35 F.4th 1097
United States Court of Appeals, Eighth Circuit.

PAUL'S INDUSTRIAL GARAGE, INC., a Wisconsin corporation; Flom Disposal, Inc., a Minnesota corporation, Plaintiffs-Appellants
Countryside Disposal, LLC, a Minnesota corporation, Plaintiff
v.
GOODHUE COUNTY, a Minnesota county; Goodhue County Board of Commissioners, in their official capacities; City of Red Wing, a Minnesota municipality, Defendants-Appellees
Minnesota Pollution Control Agency, Amicus on Behalf of Appellee(s)

No. 21-2614
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Submitted: March 15, 2022
|
Filed: May 27, 2022

Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

Erick G. Kaardal, Mohrman & Kaardal, Minneapolis, MN, for Plaintiffs-Appellants.

Riley A. Conlin, Andrew J. Pieper, Bradley R. Prowant, Stoel & Rives, Minneapolis, MN, Stephen Francis O'Keefe, Goodhue County Attorney's Office, Red Wing, MN, for Defendants-Appellees Goodhue County, Goodhue County Board of Commissioners.

John M. Baker, Aaron P. Knoll, Katherine M. Swenson, Greene & Espel, Minneapolis, MN, for Defendant-Appellee City of Red Wing.

Philip S. Pulitzer, Attorney General's Office, Saint Paul, MN, for Amicus on Behalf of Appellee(s).

Before GRASZ, STRAS, and KOBES, Circuit Judges.

Opinion

KOBES, Circuit Judge.

Proverbially, "one man's trash is another man's treasure." For Paul's Industrial Garage (PIG), a Wisconsin-based trash hauler, that idiom applies literally. PIG made around $200,000 per year collecting trash in Goodhue County, Minnesota. That ended when the County passed an ordinance requiring all garbage to be deposited at a state-owned plant in Red Wing, Minnesota (the City Plant). The garbage is then processed into refuse-derived fuel and sold to Northern States Power Company (Xcel) to be burned for electricity.

PIG and other garbage haulers and processors sued the County and Red Wing, arguing that the Ordinance violated the Commerce Clause by benefitting an in-state company (Xcel) at the expense of out-of-state haulers and processors. The district court[1] granted summary judgment to the defendants. Because PIG's

[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

claim doesn't implicate the Commerce Clause, we affirm.

I.

Before passing the disputed Ordinance, the County used private haulers and waste processing facilities, including PIG, to dispose of its garbage. PIG profited in two ways from this arrangement: (1) by charging customers to remove their waste, and (2) by charging other trash haulers a "tipping fee" to use PIG's landfill in Hager City, Wisconsin. "Tipping fees are disposal charges levied against collectors who drop off waste at a processing facility. They are called 'tipping' fees because garbage trucks literally tip their back end to dump out the carried waste." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 336 n.1, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007). Between the tipping and collection fees, PIG made roughly $200,000 per year from the County, accounting for about 30% of its revenue.

In 2017 the County enacted the Ordinance, which requires haulers collecting garbage in Goodhue County to deposit it at the government-owned City Plant. The City Plant would then convert that garbage into refuse-derived fuel and sell it to Xcel.[2] PIG and

[2] "Sell" might be a misnomer because the County pays Xcel more to burn the fuel than Xcel pays to receive it. The County pays Xcel $21 per ton of refuse-derived fuel that it accepts and combusts, and Xcel pays the County $2 per ton of refuse-derived fuel delivered. So, in essence, the County pays Xcel a $19 per ton "tipping fee" to dispose of its waste.

other garbage haulers and processors sued, arguing that the Ordinance violates the dormant Commerce Clause in two ways. First, they argued that requiring all garbage to go to the City Plant to be converted into refuse-derived fuel unfairly discriminates against out-of-state competitors. They also claimed that even if the County is free to require all garbage to go to a *state-owned* plant, the County violated the dormant Commerce Clause by exclusively selling a byproduct of that garbage to a private, in-state company.

The district court granted summary judgment to the defendants. It reasoned that because PIG doesn't have the ability to turn refuse-derived fuel into electricity, it isn't similarly situated to Xcel and therefore can't bring a claim under the dormant Commerce Clause. The court also noted that even if PIG had the ability to convert refuse-derived fuel into energy, it would still lose under the Supreme Court's precedent in *United Haulers*, 550 U.S. at 334, 127 S.Ct. 1786 ("Disposing of trash has been a traditional government activity for years, and laws that favor the government in such areas—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause."). PIG appealed.

II.

We review the grant of summary judgment *de novo*, drawing all reasonable inferences in favor of PIG. *Richardson v. Omaha Sch. Dist.*, 957 F.3d 869,

876 (8th Cir. 2020). Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)).

The Commerce Clause of the Constitution grants Congress the power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. "The dormant Commerce Clause is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce." *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003). "This negative aspect of the Commerce Clause prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1180 (8th Cir. 2021) (quoting *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, ___ U.S. ___, 139 S.Ct. 2449, 2459, 204 L.Ed.2d 801 (2019)). "Under the dormant Commerce Clause, a law is discriminatory if it benefits in-state economic interests while also inordinately burdening out-of-state economic interests." *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1026 (8th Cir. 2020).

But the Commerce Clause was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (citation omitted). Accordingly, the dormant Commerce

Clause doesn't prohibit differential treatment of companies that perform *different services*, because "any notion of discrimination assumes a comparison of substantially similar entities." *Id.* at 298, 117 S.Ct. 811. "Thus, in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference. . . ." *Id.* at 300, 117 S.Ct. 811. State and local governments are therefore free to treat vacation homes differently from primary residences, *Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 453 (9th Cir. 2019), humane societies differently from for-profit breeders, *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 497-98 (7th Cir. 2017), and brick and mortar liquor stores differently from their online counterparts, *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 36-37 (1st Cir. 2007), to name a few examples.

That is the fatal flaw in PIG's dormant Commerce Clause claim. PIG and the other appellants do not allege that they are able to convert garbage into refuse-derived fuel, nor do they allege that they have the ability to burn refuse-derived fuel to create electricity. The defendants therefore are not competitors with either the City Plant or Xcel, and their claims must fail.

III.

The judgment of the district court is affirmed.[3]

STRAS, Circuit Judge, concurring.

History confirms what common sense already suggests: the Commerce Clause allows Congress "to regulate Commerce . . . among the several States," but it does not prohibit states from doing so too. *See* U.S. Const. Art. I, § 8, cl. 3. A grant of power to one body does not withdraw it from another, *License Cases*, 46 U.S. (5 How.) 504, 583, 12 L.Ed. 256 (1847), absent an express "negative clause[]," Federalist No. 32, at 201 (Hamilton) (Clinton Rossiter ed., 1961); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 610-617, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (Thomas, J., dissenting) (rejecting the "exclusivity" and "preemption-by-silence" rationales for a "negative Commerce Clause"). Today, all the court does is follow precedent, so I concur.

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[3] Because PIG isn't a relevant comparator to Xcel or the City Plant, we do not consider whether *United Haulers* or *C & A Carbone* applies to the County's conduct. *Compare United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 550 U.S. 330, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (upholding law that required haulers to bring garbage to a state-created public benefit corporation), *with C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394-95, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (holding unconstitutional a city ordinance requiring all garbage to be processed at a private waste transfer and treatment plant).

UNITED STATES DISTRICT COURT
District of Minnesota

Paul's Industrial Garage, Inc., Countryside Disposal, LLC, Flom Disposal, Inc.,

Plaintiffs,

v.

Goodhue County, Goodhue County Board of Commissioners, the, Red Wing, City of, the,

Defendants,

and

State of Minnesota, by its Minnesota Pollution Control Agency,

Amicus.

JUDGMENT IN A CIVIL CASE

Case Number: 20-cv-2192 DSD/KMM

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Red Wing's motion for summary judgment [ECF No. 20] is granted;

2. Goodhue's motion for summary judgment [ECF No. 22] is granted;

3. Plaintiffs' motion for summary judgment [ECF No. 27] is denied; and

4. The case is dismissed with prejudice.

Date: 7/14/2021 KATE M. FOGARTY, CLERK

2021 WL 2936693
Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

PAUL'S INDUSTRIAL GARAGE, INC., a Wisconsin corporation; Countryside Disposal LLC, a Minnesota corporation; and Flom Disposal, Inc., a Minnesota corporation, Plaintiffs,

v.

GOODHUE COUNTY, a Minnesota county; the Goodhue County Board of Commissioners, Minnesota, in their official capacities, and the City of Red Wing, a Minnesota municipality, Defendants.

Civil No. 20-2192(DSD/KMM)

Signed 07/13/2021

Attorneys and Law Firms

Erick G. Kaardal, Esq. and Mohrman, Kaardal & Erickson, P.A., 150 South Fifth Street, Suite 3100, Minneapolis, MN 55402, counsel for plaintiffs.

Andrew J. Pieper, Esq. and Stoel Rives, LLP, 33 South Sixth Street, Suite 4200, Minneapolis, MN 55402, counsel for defendants Goodhue County and Goodhue County Board of Commissioners.

John M. Baker, Esq. and Greene Espel, PLLP, 222 South Nineth Street, Suite 2200, Minneapolis, MN 55402, counsel for defendant City of Red Wing.

ORDER

David S. Doty, United States District Judge

This matter is before the court upon the motions for summary judgment by defendant the City of Red Wing; defendants Goodhue County and the Goodhue County Board of Commissioners; and plaintiffs St. Paul Industrial Garage (PIG), Countryside Disposal, LLC, and Flom Disposal, Inc. Based on a review of the file, record, and proceedings herein, and for the following reasons, the court grants defendants' motions and denies plaintiffs' motion.

BACKGROUND

This constitutional action arises from a newly enacted ordinance requiring waste haulers to bring mixed municipal solid waste (MMSW) collected in Goodhue County to a facility in Red Wing, Minnesota. Plaintiffs allege that the ordinance discriminates against out-of-state businesses in violation of the dormant Commerce Clause.

PIG is a Wisconsin company that hauls MMSW from customers in Goodhue County, Minnesota to its transfer station in Hager City, Wisconsin. Deml Decl. ¶¶ 2, 4. In 2019, PIG earned approximately $288,000 in sales from commercial and residential customers in Goodhue County. Id. ¶ 7. PIG also accepts MMSW at its Wisconsin transfer station from other haulers, including Countryside and Flom, who collect MMSW in Goodhue County. Id. ¶¶ 15-16; Flom Decl. ¶¶ 4, 11;

Erickson Decl. ¶¶ 4, 6. After MMSW is delivered to the transfer station, PIG puts it into containers and transports it to a landfill in La Crosse, Wisconsin. Deml Decl. ¶ 5.

On August 18, 2020, the Goodhue County Board of Commissioners adopted the Goodhue County Solid Waste Designation Ordinance (Ordinance). The Ordinance requires all waste haulers doing business in Goodhue County to deliver MMSW collected within the county to the Red Wing Solid Waste Campus, which is operated by the City of Red Wing.[1] Kaardal Decl. Ex. 1, at 3; id. §§ 3-4; Jones Decl. Ex. 9, at 1. The Ordinance is designed to reduce the volume of MMSW in landfills and to provide an alternative fuel source to generate electricity.[2] Isakson Decl. Ex. D, at 5-6. Specifically, Goodhue County wants to reduce the percentage of MMSW that ends up in landfills and to increase the percentage of waste that becomes energy.[3] Kaardal Decl. Ex. 2, at 96.

In addition, the Ordinance is designed to redirect liabilities relating to the Bench Street Landfill, located in Red Wing, to the State through the Closed Landfill

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[1] The Ordinance went into effect on October 19, 2020. Kaardal Decl. Ex. 1, at 3.

[2] Plaintiffs do not contend that the Ordinance was enacted with discriminatory intent and do not dispute that the Ordinance serves a legitimate government purpose. As a result, the court will not detail the lengthy and deliberative municipal and regulatory processes that preceded the Ordinance. See Isakson Decl. Exs. A-Q.

[3] The Minnesota Pollution Control Agency approved the Ordinance. Isakson Decl. Ex. Q, at 16.

Program (CLP). The CLP allows counties to transfer landfill responsibility and liability to the State if the county requires all MMSW collected within its boundaries to be processed at a resource recovery center (RRC) within the county. Isakson Decl. ¶ 6. The Red Wing Solid Waste Campus is the only RRC in Goodhue County. Id. The Ordinance's designation requirement allows Goodhue County to pursue its longstanding public policy goal of participating in the CLP, thereby avoiding substantial cleanup costs and environmental liability.

To meet these purposes, Red Wing will make refuse-derived fuel (RDF) from the MMSW and will then deliver the RDF to the Xcel Energy powerplant in Red Wing,[4] where Xcel will use it to generate energy.[5] Jones Decl. Ex. 8; ECF No. 33-1; Jones Decl. Ex. 2, at 2; id. Ex. 3, at 1-3. The Ordinance itself does not require Red Wing to deliver RDF to Xcel or any other RRC.

Waste haulers were previously permitted to dispose of MMSW at any "state approved facility," including PIG's transfer station. See Kaardal Decl. Ex. 2 § 1.6. Now, haulers, including plaintiffs, are prohibited from delivering MMSW collected in Goodhue County

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[4] Red Wing may also distribute the RDF to RRCs other than Xcel, specifically facilities located in Barron County, Wisconsin and Olmstead County, Minnesota. ECF No. 1-2, at 4.

[5] The relationship between Red Wing and Xcel is governed by the RDF supply agreement, entered into in 2018. See Jones Decl. Ex. 8.

to any facility other than the Red Wing Solid Waste Campus. Kaardal Decl. Ex. 1 § 4.

Plaintiffs would still prefer, however, to transfer MMSW collected in Goodhue County to PIG's Wisconsin transfer station. Flom Decl. ¶ 11; Erickson Decl. ¶ 12. This is primarily due to the Ordinance's comparatively high tipping fee. Deml Decl. ¶¶ 15-16; Flom Decl. ¶ 9; Erickson Decl. ¶ 10. Under the Ordinance, haulers must pay a $118 per ton tipping fee for MMSW delivered to the Red Wing Solid Waste Campus. Deml Decl. ¶ 10. In contrast, PIG charges between $65 and $67 per ton as a tipping fee at its transfer station. Id. ¶ 15; Flom Decl. ¶ 6; Erickson Decl. ¶ 7. Plaintiffs contend that the Ordinance's tipping fee will unduly increase their business expenses and will require them to charge customers more for their services. Deml Decl. ¶¶ 13-14; Flom Decl. ¶¶ 10, 13-14; Erickson Decl. ¶¶ 10-11. PIG also estimates that it will lose a significant amount of business due to the loss in tipping fees for Goodhue County MMSW that can no longer be delivered to its transfer station. Deml Decl. ¶¶ 19, 22-24.

Plaintiffs allege that the Ordinance impermissibly favors Xcel, a privately owned public utility, by implementing the plan requiring the RDF to be delivered to Xcel's powerplant. According to plaintiffs, the Ordinance effectively makes Xcel a competitor of other waste haulers. Plaintiffs acknowledge, however, that they are not in the business of turning waste into RDF or turning RDF into electricity.

Under the RDF supply agreement between Red Wing and Xcel, Red Wing pays Xcel a maintenance fee of $21 per ton of RDF delivered to the Xcel electric generating plant. Jones Decl. Ex. 8 § 6.2. Xcel pays Red Wing $2 per ton of RDF delivered to the Xcel facility. Id. § 6.1. Although Red Wing pays Xcel more than it receives, Red Wing pays less for MMSW disposal through this process than it would pay to dispose of MMSW in a landfill. See Kaardal Decl. Ex. 1, at 148.

The Ordinance imposes civil and criminal liability for non-compliance. Kaardal Decl. Ex. 1 § 15. There is no dispute that the MMSW plaintiffs pick up from Goodhue County customers must be delivered to the Red Wing Solid Waste Campus.

On October 19, 2020, plaintiffs commenced this action alleging that the Ordinance violates the dormant Commerce Clause. Plaintiffs seek a declaration that the Ordinance is unconstitutional, an injunction enjoining defendants from enforcing the Ordinance, and an award of attorney's fees and expenses. All parties now move summary judgment.

DISCUSSION

I. Standard of Review

The court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material only when its resolution affects the outcome

of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. See id. at 252.

The court views all evidence and inferences in a light most favorable to the nonmoving party. See id. at 255. The nonmoving party must set forth specific facts sufficient to raise a genuine issue for trial; that is, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); see Anderson, 477 U.S. at 249B50; Celotex v. Catrett, 477 U.S. 317, 324 (1986). Moreover, if a plaintiff cannot support each essential element of its claim, the court must grant summary judgment, because a complete failure of proof regarding an essential element necessarily renders all other facts immaterial. Celotex, 477 U.S. at 322-23.

II. Dormant Commerce Clause

The Commerce Clause of the Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ." U.S. Const. art. I, § 8, cl. 3. Although the language provides an affirmative grant of power to Congress, the clause is also recognized as "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." Indep. Charities of Am. v. State of Minn., 82 F.3d 791, 798 (8th Cir. 1996) (citing So.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87

(1984)). The "negative" or "dormant" aspect of the clause denies "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Or. Waste Sys., Inc. v. Dept. of Env't Quality of Or., 511 U.S. 93, 98 (1994). In essence, the dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988).

A. Not Similarly Situated

To determine whether constitutional scrutiny is warranted, the court must first consider whether plaintiffs are similarly situated to Xcel—the entity they claim to be in competition with. See Gen. Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997) ("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities."); LSP Transmission Holdings, LLC v. Lange, 329 F. Supp. 3d 695, 705 (D. Minn. 2018) (holding that the "threshold issue" in dormant Commerce Clause analysis is whether the law at issue applies to similarly situated entities); Nat'l Solid Waste Mgmt. Ass'n v. Williams, 877 F. Supp. 1367, 1374 (D. Minn. 1995) ("[T]he Commerce Clause is intended to promote equality between similar in-state and out-of-state interests which compete in the same market."). "This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden

were removed." Tracy, 519 U.S. at 299. In other words, "if a statute distinguishes between 'different entities' serving 'different markets,' there would be no discrimination." Lange, 329 F. Supp. 3d at 705-06.

Defendants argue that Xcel and PIG are distinct businesses that do not compete for customers or provide the same services. Defendants specifically note that plaintiffs are waste haulers that collect MMSW from residential and commercial customers and transport that MMSW to PIG's transfer station. Once at the transfer station, the MMSW is collected and sent to a landfill for disposal. Xcel, on the other hand, is a multi-state electric utility that generates electricity from a various resources, among them RDF. Xcel does not: (1) collect or haul MMSW; (2) accept MMSW; (3) own or operate a waste transfer station; or (4) dispose of MMSW at a landfill. Indeed, Xcel does not handle MMSW at all.

Plaintiffs do not dispute any of the distinctions noted by defendants, but nevertheless argue that Xcel directly competes with PIG (in particular) because they both ultimately "dispose" of waste—Xcel by generating electricity from RDF derived from MMSW and PIG by putting MMSW in a landfill. The court is not persuaded by plaintiffs' overly broad approach to the issue.

MMSW and RDF are different products governed by different regulatory schemes. See Minn. Stat. § 115A.03, subdiv. 21(a) ("'Mixed municipal solid waste' means garbage, refuse, and other solid waste

from residential, commercial, industrial, and community activities that the generator of the waste aggregates for collection."); Minn. Stat. § 115A.03, subdiv 25d ("'Refuse-derived fuel' means a product resulting from the processing of mixed municipal solid waste in a manner that reduces the quantity of noncombustible material present in the waste, reduces the size of waste components through shredding or other mechanical means, and produces a fuel suitable for combustion in existing or new solid fuel-fired boilers."); see also Wis. Admin. Code NR § 502.07 (regulating waste transfer facilities), and Minn. R. 7011.1201, et seq. (establishing that the Minnesota Pollution Control Agency regulates RDF).

The fact that RDF is derived from MMSW does nothing to establish that plaintiffs compete with Xcel. Indeed, as defendants aptly argue, "comparing MMSW and RDF is like comparing corn to corn syrup and saying that farmers who harvest corn and food processors who manufacture and sell corn syrup compete against each other." ECF No. 56, at 7. Just as farmers do not compete with food processors, waste haulers do not compete with energy producers.[6]

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[6] The fact that Red Wing pays Xcel a fee to take the RDF does not change the court's analysis. That arrangement is between Red Wing and Xcel and, in any event, results in Red Wing paying less for MMSW disposal than it would to dispose of it in a landfill. Further, Red Wing may distribute the RDF to other RRCs in Wisconsin and Minnesota, which undercuts plaintiffs' argument that the Ordinance is designed to favor Xcel over plaintiffs.

Because plaintiffs are not similarly situated to Xcel, the dormant commerce clause is not implicated.[7] See Regan v. City of Hammond, Ind., 934 F.3d 700, 704 (7th Cir. 2019) (quoting Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 95 (2d Cir. 2009)) ("[L]aws that draw distinctions between entities that are not competitors do not 'discriminate' for purposes of the dormant commerce clause."). Defendants therefore are entitled to summary judgment.

B. United Haulers Applies

Even if plaintiffs were similarly situated to Xcel, defendants would still be entitled to summary judgment because the Ordinance falls within the bounds of United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007). In United Haulers, the United States Supreme Court upheld a New York law requiring haulers to bring waste to "facilities owned and operated by a state-created public benefit corporation." Id. at 334. The Court reasoned that "[d]isposing of trash has been a traditional government activity for years, and laws that favor the government in such areas—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause." Id. at 334. Here, similarly, the Ordinance does not

[7] A more apt comparison would be among plaintiffs and the Red Wing Solid Waste Campus, which is where MMSW must be delivered under the Ordinance.

discriminate against private businesses. Rather, the Ordinance mandates that MMSW collected in Goodhue County be brought to the Red Wing Solid Waste Campus, a governmental facility, for processing. Under United Haulers, then, the Ordinance does not run afoul of the Commerce Clause.

Plaintiffs argue that United Haulers is inapposite and that the court should look instead to C&A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994). The court disagrees. In Carbone, which preceded United Haulers, the Court held that an ordinance forcing haulers to deliver waste to a particular private facility discriminated against interstate commerce in violation of the dormant Commerce Clause. Id. at 387. In United Haulers, the Court readily distinguished Carbone: "The . . . salient difference [between the two cases] is that the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. We find this difference constitutionally significant." 550 U.S. at 334. Again, here, the Ordinance does not favor a private business over other private businesses; it instead mandates delivery of MMSW to a government facility. As such, Carbone does not govern this dispute.

CONCLUSION

Accordingly, based on the above, **IT IS HEREBY ORDERED** that:

1. Red Wing's motion for summary judgment [ECF No. 20] is granted;

2. Goodhue's motion for summary judgment [ECF No. 22] is granted;

3. Plaintiffs' motion for summary judgment [ECF No. 27] is denied; and

4. The case is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

2006 WL 3804243
Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

PAUL'S INDUSTRIAL GARAGE, LLC, and Gibson Sanitation, LLC, Plaintiffs,
v.
CITY OF RED WING, et al., Defendants.

No. Civ. 06-4770 RHK/JSM.
|
Dec. 22, 2006.

Attorneys and Law Firms

Lee U. McGrath, Nick Dranias, Institute for Justice, Minnesota Chapter, Minneapolis, MN, for Plaintiffs.

John M. Baker, Pamela L. VanderWiel, John W. Ursu, Greene Espel, P.L.L.P., Minneapolis, MN, for Defendants.

MEMORANDUM OPINION AND ORDER

RICHARD H. KYLE, United States District Judge.

INTRODUCTION

The Plaintiffs in this action, Paul's Industrial Garage, LLC ("PIG") and Gibson Sanitation, LLC ("Gibson"), are garbage haulers. They commenced this action on December 6, 2006, against the City of Red Wing, Minnesota and two of its officials—Dennis Tebbe, the City's Director of Public Works, and Richard

Moskwa, the City's Deputy Director of Public Works—seeking to enjoin the application of a recently enacted City ordinance against them.[1] That ordinance will preclude Plaintiffs from collecting commercial waste in the City after the ordinance becomes effective on January 1, 2007. Plaintiffs now move for a preliminary injunction, arguing that the ordinance violates the Commerce Clause of the United States Constitution. The Court received memoranda of law from all parties and held a hearing on the Motion on December 21, 2006. For the reasons set forth below, the Court will grant the Motion.

BACKGROUND

The City owns an incinerator—the Red Wing Waste-to-Energy Facility (the "Incinerator")—that combusts solid waste. (Moskwa Aff. ¶¶ 2-3.) The Incinerator charges a "tipping fee" for the disposal of waste of approximately $56 per ton.[2] (Gibson Aff. ¶ 6; Larson Aff. ¶ 8.) Other waste disposal locations in the vicinity, including several in Wisconsin, charge lower tipping fees than the Incinerator. (Gibson Aff. ¶ 6; Larson Aff. ¶ 18.) As a result, the Incinerator does not process a sufficient amount of waste on a yearly basis to cover its operating expenses, because many waste haulers

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[1] Hereafter, the Court collectively refers to Tebbe, Moskwa, and the City of Red Wing as "the City."

[2] The phrase "tipping fee" is derived from the fact that dump trucks hauling garbage must raise and "tip" their back-ends in order to dump their loads. *SSC Corp. v. Town of Smithtown*, 66 F .3d 502, 505 n. 5 (2d Cir.1995).

choose to deliver garbage (including garbage collected in the City) to less-expensive waste-disposal facilities, including those across the Minnesota border. The Incinerator incurred operating losses of over $200,000 each year from 2003 through 2005. (Daggs Aff. Ex. B.2.)

During late 2004 and early 2005, the City proposed implementing the "organized collection" of commercial waste—in other words, the City would collect all commercial waste generated within its borders. (Moskwa Aff. ¶ 10.)[3] Under its organized-collection plan, the City would require that all commercial waste generated in the City be brought to the Incinerator for disposal. (*Id.* Ex. D.) The City recited 13 purported goals that would be accomplished by its organized-collection plan, including among other things protecting the health, safety, and welfare of the community; ensuring the reliable and adequate collection of commercial waste; and ensuring that the Incinerator had a sufficient supply of waste to "eliminate or reduce the City taxpayer financial liability from the City's general fund to support the incinerator in its operation." (*Id.*)

Pursuant to Minnesota law, the City held public hearings in 2005 and 2006 concerning its plan to implement the organized collection of commercial waste. (*Id.* ¶¶ 12-14.) Not surprisingly, the City's then-licensed commercial-waste haulers objected to the organized-collection plan, because it meant that they

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[3] Generally speaking, "commercial waste" is waste generated by commercial establishments (not including construction debris) rather than by households. (Moskwa Aff. Ex. G § 10.01, subd. 2.)

would be forced to give up business in the City. (*Id.* ¶ 15.) In response to these objections, the City proposed entering into contracts with each of the haulers. The City prepared a form contract—a "Solid Waste Delivery Agreement"—and sent that form contract to each of the City's then-licensed commercial-waste haulers. (*Id.* ¶ 16 & Ex. E.)

The Solid Waste Delivery Agreement mandates that the haulers bring all commercial waste collected in the City to the Incinerator and that the haulers pay the City the appropriate tipping fees for that waste. (*Id.* Ex. E §§ 2.1, 2.5.) The City has no obligation to pay anything to the haulers under the Agreement; the only consideration flowing to the haulers is their right to collect garbage in the City for a period of ten years.[4] (*Id.* Ex. E § 6.1.) The Agreement also contains a clause purporting to waive any challenge the haulers might assert to the constitutionality thereof or any related City ordinance, such as the City's proposed organized-collection ordinance. (*Id.* Ex. E § 3.6.)

The City informed the haulers that if all of them signed the Solid Waste Delivery Agreement by August 15, 2006, it would not implement organized collection. (*Id.* ¶ 17 & Ex. F.) If all haulers did not sign the Agreement by the deadline, however, the City would go forward with its plan to implement organized collection,

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[4] At oral argument, the City's counsel stated that each Solid Waste Delivery Agreement had a 20-year term rather than a 10-year term. The form Agreement submitted with the City's Motion papers, however, indicates that the Agreement is for a 10-year term. (Moskwa Aff. Ex. E § 6.1.)

but would exempt from organized collection any hauler that had signed a Solid Waste Delivery Agreement with the City. (*Id.* ¶ 17 & Ex. F.) In other words, each hauler was faced with two choices: the hauler could either (a) sign the Solid Waste Delivery Agreement, which would permit it to continue collecting commercial waste in the City but would require it to deliver all such commercial waste to the Incinerator (a less-profitable proposition than what had previously existed), or (b) refuse to sign the Solid Waste Delivery Agreement and thereby be completely precluded from collecting commercial waste in the City.

PIG and Gibson were City-licensed commercial-waste haulers at the time the City proposed the organized collection of commercial waste. They refused to sign the Solid Waste Delivery Agreement because they wanted to continue transporting commercial waste to less-expensive disposal facilities in Wisconsin, rather than to the Incinerator. Accordingly, not all haulers signed Solid Waste Delivery Agreements and, as a result, the City carried through on its "threat" and enacted its organized-collection ordinance—City of Red Wing Municipal Code Section 10.02 (the "Ordinance").

Under the terms of the Ordinance, as of January 1, 2007, only waste haulers possessing a license issued by the City may collect commercial waste within City limits. (Moskwa Aff. Ex. G, § 10.02, subd. 8.) Furthermore, only haulers under contract with the City may be issued a license. (*Id.* subd. 7.) Because PIG and Gibson would not sign the Solid Waste Delivery Agreement, they cannot obtain a license and, accordingly,

they will be precluded from collecting commercial waste in the City as of January 1, 2007.

Plaintiffs now seek a preliminary injunction enjoining the City from enforcing the Ordinance against them. They argue that the City's actions in passing the Ordinance and "coercing" haulers to sign the Solid Waste Delivery Agreement violate the Commerce Clause.

ANALYSIS

I. Ripeness

The City first argues that Plaintiffs' claim is not yet ripe because Plaintiffs have not applied for licenses to collect commercial waste in the City and if they were to do so, they might be granted such licenses. (Def. Mem. at 11-12.) The Court disagrees.

The flaw in the City's argument is that plaintiffs generally need not engage in "exercise[s] in futility" in order to establish ripeness. *S.D. Mining Ass'n v. Lawrence County*, 155 F.3d 1005, 1008-09 (8th Cir.1998). Here, the Ordinance expressly states that the City may only issue licenses to those applicants who are under contract with the City. (Moskwa Aff. Ex. E § 10.02, subd. 8.) Moreover, the City has mandated that all contract haulers agree to bring such waste to the Incinerator, a condition to which Plaintiffs have made clear they will not agree. Accordingly, there do not appear to be any terms under which the City would enter into contracts agreeable to Plaintiffs; as a result, Plaintiffs

are precluded from obtaining licenses under the Ordinance's express terms. Therefore, there is no need for Plaintiffs to have applied for licenses, because such applications would be futile.

II. Injunctive relief

The Court next turns to the merits of Plaintiffs' Motion. In analyzing a request for a preliminary injunction, the Court must look to the four factors set forth by the Eighth Circuit in *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109 (8th Cir.1981). Those factors are: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to the other litigants; and (4) the public interest. *Id.* at 114. When applying the *Dataphase* factors, the Court must "flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene." *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 601 (8th Cir.1999). The party seeking injunctive relief bears the "complete burden" of proving all of the *Dataphase* factors. *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir.1987).

A. Likelihood of success

The Court begins its analysis with Plaintiffs' likelihood of success, which is frequently considered the most important of the *Dataphase* factors. *See S & M*

Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir.1992). Plaintiffs claim that the City used the "threat" of enacting the Ordinance as a "hammer" to coerce haulers to execute the Solid Waste Delivery Agreement, which mandates the delivery of locally-collected commercial waste to the Incinerator. These actions, according to Plaintiffs, violate the Commerce Clause because they amount to "the exercise of local regulatory power for the purpose of isolating the local waste [-]collection market from the National market in waste processing and disposal." (Pl. Mem. at 18.)[5] The City raises several arguments in response, but none is persuasive.

1. The Commerce Clause's "market-participant exception"

The City first argues that the Court need not engage in a Commerce-Clause analysis at all because it is a "market participant" rather than a "market regulator." It is well-established that where "a state or local government is a market participant in a business, it may pursue its own economic interests free from the constraints imposed by the Commerce Clause within

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[5] Under the Commerce Clause, the Plaintiffs may challenge both the Ordinance and the Solid Waste Delivery Agreements that the City sought to have Plaintiffs sign, because those Agreements arose out of and were "ancillary to" the Ordinance. *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 187 (1st Cir.1999); *see also SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 514-18 (2d Cir.1995) (performing Commerce-Clause analysis of waste flow-control statute as well as contracts entered into as part of that statutory scheme).

the market in which it is a participant." *Red River Serv. Corp. v. City of Minot, N.D.*, 146 F.3d 583, 586-87 (8th Cir.1998). This so-called "market-participant exception" recognizes that the Commerce Clause was not intended to prevent state and local governments from operating in a proprietary capacity in the free market, just as private market participants do. *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1111 (8th Cir.1996). Here, the City argues that it participates in the market for the collection and disposal of garbage and that, as a market participant, it is free to contract with whomever it chooses, on whatever terms it desires, and that such contracts are beyond the reach of the Commerce Clause. (Def. Mem. at 19-25.) The Court disagrees.

In order to avail itself of the market-participant exception, the City must show that it is "actually participating in a narrowly defined market *as a proprietor rather than simply regulating the actions of other private market participants." Chance Mgmt.*, 97 F.3d at 1111 (emphasis added). To act as a "proprietor" in the garbage-collection and garbage-disposal markets, the City must "buy[] or sell[] goods as any private economic actor might." *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir.1995) (citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-39 (1980)). In other words, the City must expend City funds to procure garbage services in an open marketplace. *See*, *e.g.*, *Nat'l Solid Waste Mgmt. Assoc. v. Williams*, 146 F.3d 595, 599-600 (8th Cir.1998) (local government is proprietor in garbage services market when "it undertakes to buy waste services on the open market"); *SSC Corp. v. Town*

of Smithtown, 66 F.3d 502, 515 (2d Cir.1995) ("Insofar as the city expended only its own funds in entering into [waste disposal] contracts for public projects, it [is] a market participant. . . . ") (alteration in original) (citation omitted); *see also White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 214-15 (1983) (city of Boston was market participant when it used its own funds to contract for construction of city buildings and required contractors to hire specified number of Boston residents).

Here, the City did not act as a proprietor by "purchasing" the services of its newly licensed commercial-waste haulers, with City funds, on the open market. In fact, under the terms of the Solid Waste Delivery Agreements between the City and the haulers, the City will pay *nothing at all* for the haulers' services, despite the haulers agreeing to use a less-profitable method to dispose of the City's commercial waste: the City Incinerator. Moreover, the Solid Waste Delivery Agreements contain a clause pursuant to which the haulers agreed to waive any constitutional challenges to the Agreements or to the Ordinance. It is highly unlikely that a private company, in an open marketplace, would be able to entice others to enter into contracts with such severely one-sided and unfavorable terms.[6]

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[6] At oral argument, the City argued that it could be a "proprietor" in the garbage-services market (and hence avail itself of the market-participant exception) even if it does not buy or sell such services, as long as it "participates" in some fashion in the marketplace. Yet regardless of whether the City "participates" in the garbage-services market without actually buying or selling

Rather, it appears that the City used its regulatory powers—in particular, its threat to enact organized collection and thereby stifle the haulers' ability to collect garbage in the City, lest they be subject to criminal sanctions—to coerce the haulers to sign Solid Waste Delivery Agreements. Because those regulatory powers are not enjoyed by others in the garbage-services market, the Court concludes that the City cannot have been acting simply as a "market participant" when it "forced" the haulers to enter into the Solid Waste Delivery Agreements. *See SSC Corp.*, 66 F.3d at 512 (city actions "constitute 'market participation' only if a private party could have engaged in the same actions"; "No private company in the open market could force others to buy its services under pain of criminal penalties."); *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 48 F.3d 701, 717 (3rd Cir.1995) ("market participation does not . . . confer upon [a city] the right to use its regulatory power to control the actions of others in the market"); *Zenith/Kremer Waste Sys., Inc. v. W. Lake Superior Sanitary Dist.*, Civ. No. 5-95-228, 1996 WL 612465, at *8 n. 11 (D.Minn. July 2, 1996) (Report and Recommendation of Erickson, M.J.) (no basis to conclude public entity was market participant where it "require[d] all participants in the market to purchase the government service—even when a

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such services, "local governments do not enjoy *carte blanche* to regulate a market simply because they also participate in that market." *USA Recycling*, 66 F.3d at 1282. That is precisely what has occurred here.

better price can be obtained on the open market") (citing *Atl. Coast*, 48 F.3d at 717).

2. The dormant Commerce Clause analysis

Having concluded that the market—participant exception does not apply, the Court next engages in a Commerce-Clause analysis of the Ordinance and the Solid Waste Delivery Agreements.[7] The Commerce Clause grants Congress the power "to regulate commerce . . . among the several states." U.S. Const., art. I, § 8, cl. 3. It has long been held that this grant of power to Congress contains "negative implications that restrict states' power to regulate interstate commerce." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1383 (8th Cir.1997). Under this "dormant Commerce Clause" jurisprudence, state actions that regulate commerce are evaluated under a two-step inquiry.

First, the Court must determine if the challenged action "overtly discriminates against interstate commerce." *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir.2000). Such discrimination may take one of three forms, namely, (1) the action may be discriminatory on its face or, if facially neutral, may

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[7] It has long been held that "[t]he interstate movement of solid waste is 'commerce' under the Commerce Clause." *Waste Sys. Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1386 (8th Cir.1993) (citing *City of Phila. v. N.J.*, 437 U.S. 617, 622-23 (1978)).

have (2) a discriminatory purpose or (3) a discriminatory effect. *Id.* "Discrimination" in this context means "differential treatment of instate and out-of-state economic interests that benefits the former and burdens the latter." *Id.* Second, if the challenged action does not "overtly discriminate" against interstate commerce, it will nevertheless be invalidated if the burden it imposes on interstate commerce clearly exceeds the action's putative local benefits. *Id.*

Despite the City's protestations to the contrary, the inescapable conclusion here is that the Ordinance and the Solid Waste Delivery Agreements have a discriminatory purpose: they favor the City's economic interest by forcing all commercial waste to be disposed of at the Incinerator while, at the same time, they burden out-of-state interests by preventing the transportation of commercial waste across state lines for disposal. Indeed, the City admits that one of the purposes behind enacting the Ordinance was to divert sufficient waste to the Incinerator so as to "eliminate or reduce the City taxpayer financial liability from the City's general fund to support the incinerator in its operation." (Moskwa Aff. Ex. D at 2.)

To argue that there was no discriminatory motive behind the "threat" of organized collection and the Solid Waste Delivery Agreements, the City directs the Court's attention to a litany of environmental, health, and safety goals it allegedly hoped to achieve by implementing organized collection. (*Id.*) As Plaintiffs pointed out at oral argument, however, these concerns are illusory. Indeed, the City's own website indicates

that compelled delivery of waste to the Incinerator was not implemented for environmental or health purposes, but rather for the City's "fiscal health." (*See* Daggs Aff. Ex B.1 (plan for delivery of all commercial waste to the Incinerator is listed under "Fiscal Health" section of City's "2006/2007 City Council Goals," rather than "Quality of Life Issues" section).)

Moreover, the City fails to proffer any evidence that the compelled delivery of commercial waste to the Incinerator—as opposed to incinerators elsewhere in Minnesota or across state lines—was in any way necessary to achieve the City's purported environmental, health, and safety goals. For example, the City claims that its "greatest concern" behind enacting the Ordinance was the disposal of the City's commercial waste "in accordance with the state's waste management heirarchy." (*Id.* Ex. D at 5.) That heirarchy—contained in Minnesota Statutes Section 1 15A.02—expresses a preference for the incineration of garbage rather than its burial in landfills. Yet, there is no reason why the City must require the combustion of garbage in *its* Incinerator in order to achieve this goal. Indeed, the same goal would be achieved if, for example, the City's commercial waste were shipped to Wisconsin for incineration.[8]

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[8] At oral argument, the City suggested that it needs to control where and how City waste is disposed of in order to avoid liability under the "Superfund" statute, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a). But the City could avoid any such liability by requiring garbage haulers transporting City waste

The City also argues that the Ordinance is unassailable because organized-collection ordinances have been repeatedly upheld in the face of Commerce-Clause challenges. (*See* Def. Mem. at 14 ("If the City can constitutionally adopt a system of organized collection, Plaintiffs can never secure an order from this court precluding the [C]ity from putting that system into effect.").) The City is mistaken, for it ignores a critical distinction between the Ordinance in this case and the organized-collection ordinances in the cases it cites: the Ordinance here is nothing more than a guise (or, in the Plaintiffs' parlance, a "sham") intended to force garbage haulers to transport commercial waste to the Incinerator so that the City can collect more tipping fees. By contrast, valid organized-collection ordinances pursuant to which a city contracts-out its garbage collection services generally involve a competitive bidding process in which there is "no requirement that local interests be favored in the performance of the contract." *Southern Waste Sys. LLC v. City of Delray Beach, Fla.*, 420 F.3d 1288, 1291 (11th Cir.2005). Here, there was no competitive bidding process, and the Solid Waste Delivery Agreements the City attempted to foist onto Plaintiffs favor the City's own economic interests over out-of-state interests.

Simply put, in order to increase revenue for its economically untenable waste-disposal plant, the City strong-armed garbage haulers (and attempted to

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across state lines to indemnify the City—for example, by posting a high bond or by acquiring liability insurance—in the event that waste were not disposed of in accordance with CERCLA.

strong-arm the Plaintiffs) into agreeing to bring all commercial waste to the Incinerator, lest they lose the right to conduct business in the City. This is precisely the type of "economic protectionism" that the dormant Commerce Clause is intended to prevent. *Waste Sys. Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1385 (8th Cir.1993).

The City points to a recent Second Circuit case—*United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir.2001)—for the proposition that state action may be held invalid under the Commerce Clause only if it favors a local *private* business rather than a local *public* facility. (Def. Mem. at 25-27.) The Eighth Circuit, however, has never adopted this view; in fact, it has implicitly rejected it on more than one occasion. *See*, *e.g.*, *U & I Sanitation*, 205 F.3d at 1067-68; *Waste Sys.*, 985 F.2d at 1385-89. Moreover, the Sixth Circuit has explicitly rejected the Second Circuit's holding in *United Haulers*. *See Nat'l Solid Waste Mgmt. Assoc. v. Daviess County, Ky.*, 434 F.3d 898 (6th Cir.2006). The Court concludes, therefore, that the public/private distinction is an insufficient basis on which to deny Plaintiffs injunctive relief.[9]

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[9] The City also notes that the Supreme Court has recently granted a petition for a writ of *certiorari* in *United Haulers* and argues that the Court should refrain from ruling on Plaintiffs' Motion until the Supreme Court issues its opinion in that case. (Def. Mem. at 27-28.) Given the irreparable harm that Plaintiffs will suffer absent injunctive relief, as discussed below, the Court declines the City's invitation to stay this case—which, in practical

Based on the record currently before it, the Court concludes that the organized-collection Ordinance and the Solid Waste Delivery Agreements ancillary to it are "overtly discriminatory" because they have a clear discriminatory purpose. Such a finding "is almost always fatal," *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 185 (1st Cir.1999), because it subjects the actions in question to "rigorous scrutiny." *U & I Sanitation*, 205 F.3d at 1067. Applying that exacting standard here, the City's actions can be upheld only if the City can demonstrate that it "has no other means to advance a legitimate local interest." *Id.* The City has not attempted to satisfy this standard, and the Court concludes that it cannot do so.

Indeed, the City's primary (if not sole) motivation for its actions—generating revenue for the Incinerator—"is not a local interest that can justify discrimination against interstate commerce ." *Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 393-94 (1994). Moreover, even if the Court were to accept at face value the alleged environmental and public safety goals cited by the City when enacting the Ordinance, those goals clearly can be accomplished in ways other than mandating the delivery of all commercial waste to the Incinerator, such as by enacting restrictions on the amount of commercial waste permitted by City businesses or by mandating that all commercial waste be

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effect, would be the same as denying Plaintiff's Motion—pending the outcome in *United Haulers*.

incinerated, *regardless* of where that incineration occurs.

For all these reasons, the Court concludes that Plaintiffs are likely to succeed on the merits of their Commerce-Clause claim.

B. Irreparable harm

Because the Court concludes that Plaintiffs are likely to succeed on the merits, it may presume that Plaintiffs will suffer irreparable harm in the absence of injunctive relief. *See*, *e.g.*, *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir.1999); *Allen v. Minnesota*, 867 F.Supp. 853, 859 (D.Minn.1994). Even without that presumption, however, the Court would find that irreparable harm would result due to Plaintiffs' impending loss of City customers and business goodwill. *See*, *e.g.*, *Medicine Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir.2003) ("Loss of . . . reputation and goodwill can constitute irreparable injury."). In fact, the evidence proffered by Plaintiffs indicates that the City has already begun calling Plaintiffs' customers and informing them that they will no longer be able to do business with Plaintiffs after January 1, 2007, inevitably damaging Plaintiffs' reputations. (Larson Aff. Exs. A.5 through A.12.)

C. Balance of equities and the public interest

The Court further concludes that the potential harm to Plaintiffs absent an injunction greatly outweighs any harm that the City might suffer if an injunction were granted. Indeed, an injunction would in no way impair commercial-waste collection in the City or the delivery of a substantial portion of that waste to the Incinerator, in light of the Solid Waste Delivery Agreements many garbage haulers have already signed. Those Agreements would in no way be affected by an injunction enjoining enforcement of the organized-collection Ordinance as against Plaintiffs. Nor has the City proffered any evidence that haulers already under contract with the City would be placed at a competitive disadvantage if an injunction were to be granted. Indeed, it is likely that many (if not most) of those haulers' customers have signed contracts that probably cannot be broken simply to receive cheaper garbage-collection services from the Plaintiffs here.

For all the foregoing reasons, the Court concludes that Plaintiffs' Motion for a Preliminary Injunction should be granted.

D. Bond

Pursuant to Federal Rule of Civil Procedure 65(c), the Court must set an appropriate bond when granting preliminary injunctive relief. Plaintiffs argue that no bond is appropriate in this "public interest" litigation (Pl. Mem. at 24-25), while the City argues that a $1

million bond would be appropriate because of "substantial losses the City stands to occur if an injunction issues" (Def. Mem. at 32-34).

The amount of the bond is entrusted to the Court's sound discretion; it should be set in an amount that will insure the non-movant against any financial loss it might sustain as a result of the injunction, in the event the non-movant ultimately prevails in the litigation. *N. States Power Corp. v. Fed. Transit Admin.*, 270 F.3d 586, 588 (8th Cir.2001). Because, as noted above, the Court perceives little (if any) harm that might befall the City by granting an injunction, the Court will require Plaintiffs to post a bond of $1,000.

CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, it is **ORDERED** that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Doc. No. 11), which the Court construes as a Motion for Preliminary Injunction, is **GRANTED** as follows:

> 1. Defendants City of Red Wing, Dennis Tebbe, and Richard Moskwa, and any person or entity acting in concert with them or on their behalf, are hereby enjoined, pending further order of this Court, from directly or indirectly enforcing all or any part of City of Red Wing Municipal Code Section Section 10.02 so as to prohibit Plaintiffs from collecting and hauling Commercial and Industrial Solid Waste (as that term is defined in Municipal

Code Section 10.01 subd. 2) that is generated in the City of Red Wing, by entities other than the City of Red Wing, to out-of-state facilities for processing, recycling and/or disposal; and

2. Plaintiffs shall post a bond of $1,000 for the payment of such costs and damages as may be incurred or suffered by the City if it is found to have been wrongfully enjoined. Upon the posting of the bond, the injunction provided for herein will become effective.