IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIBOLO WASTE, INC., C-6 DISPOSAL, SYSTEMS, INC., AMERICAN DISPOSAL COMPANY, ANACONDA DISPOSAL, LLC, APACHE DISPOSAL, INC., ABSOLUTE WASTE, GRANDE DISPOSAL COMPANY, FELIX MALDONADO TRUCKING, INC., PRO STAR ROLL OFF DUMPSTERS, OTIS SPENCER d/b/a RIVER CITY DISPOSAL RIVER CITY WASTE, INC., SOUTH TEXAS REFUSE, INC., TEXAS WASTE SYSTEMS, INC., BRENDA MALDONALDO TRUCKING, TIGER SANITATION, INC., DRC MATERIALS and CLARK CONTRACTING SERVICES, INC.,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. SA-06-CA-801-FB
CITY OF SAN ANTONIO,	§	
Defendant.	§	

JUDGMENT

On this date came on to be considered the Judgment to be entered in the above-styled and numbered cause.

Consistent with the Order Concerning Pending Motions filed in this cause on this same date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Defendant City of San Antonio's Motion for Summary Judgment (docket #34) is GRANTED, Plaintiffs' Memorandum in Support of Motion for Summary Judgment (docket #44) is DENIED, and this case is DISMISSED. Motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 29 day of September, 2008.

FRED BIERY
UNITED STATES DISTRICT JUDGE

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CIBOLO WASTE, INC., C-6 DISPOSAL, SYSTEMS, INC., AMERICAN DISPOSAL COMPANY, ANACONDA DISPOSAL, LLC, APACHE DISPOSAL, INC., ABSOLUTE WASTE, GRANDE DISPOSAL COMPANY, FELIX MALDONADO TRUCKING, INC., PRO STAR ROLL OFF DUMPSTERS, OTIS SPENCER d/b/a RIVER CITY DISPOSAL RIVER CITY WASTE, INC., SOUTH TEXAS REFUSE, INC., TEXAS WASTE SYSTEMS, INC., BRENDA MALDONALDO TRUCKING, TIGER SANITATION, INC., DRC MATERIALS and CLARK CONTRACTING SERVICES, INC.,	§	
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ORDER CONCERNING PENDING MOTIONS

Justice Robert Jackson wrote, "The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish." United States v. Ballard, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting).

* * * * * *

Though not about the First Amendment, this case does raise constitutional issues concerning the Commerce Clause and is literally about rubbish generated by over a million Homo Sapiens in this region and how to manage the garbage.

Before the Court are: (1) Defendant City of San Antonio's Motion for Summary Judgment (docket #34); (2) Stipulation to Enlarge Time to File Dispositive Motions (docket #35); (3) Plaintiffs'

Memorandum in Support of Motion for Summary Judgment (docket #44); (4) Defendant City of San Antonio's Objections to and Motion to Strike Plaintiffs' Summary Judgment Evidence (docket #47); (5) Defendant City of San Antonio's Response to Plaintiff's Motion for Summary Judgment (docket #48); (6) Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment and Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment (docket #52); (7) Plaintiffs' Response to Defendant's Objection to and Motion to Exclude Plaintiffs' Summary Judgment Evidence (docket #53); and (8) Defendant City of San Antonio's Reply to Plaintiffs' Response to Defendant's Motion for Summary Judgment (docket #56). In the Stipulation to Enlarge Time to File Dispositive Motions, the parties advised the Court they agreed to extend until November 5, 2007, the deadline for filing dispositive motions. The Court finds the motion has merit and should be granted.

Accordingly, IT IS HEREBY ORDERED that the Stipulation to Enlarge Time to File Dispositive Motions (docket #35) is GRANTED such that the dispositive motions deadline in this case is November 5, 2007.

Defendant City of San Antonio objects to and has filed a motion to strike plaintiffs' summary judgment evidence. Specifically, defendant states the plaintiffs do not identify with any specificity, in their motion for summary judgment, the portions of the hearing or deposition testimony on which they rely. In response, plaintiffs explain the specific references to the testimony are made in their statement of uncontroverted facts, and they have attached excerpts to their motion for summary judgment for the Court's and defendant's review. Therefore, because specific references have been included, IT IS HEREBY ORDERED that Defendant City of San Antonio's Objections to and Motion to Strike Plaintiffs' Summary Judgment Evidence (docket #47) is DENIED.

Both parties have filed motions for summary judgment. Because cross motions for summary judgment have been filed, each party's motion must be considered separately, and each movant must present evidence to support its respective motion. Ghoman v. New Hampshire Ins. Co., 159 F. Supp. 2d 928, 931 (N.D. Tex. 2001); Dutmer v. City of San Antonio, 937 F. Supp. 587, 589-90 (W.D. Tex. 1996). A motion for summary judgment should be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). A dispute concerning a material fact is considered "genuine" if the evidence "is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). It is not the Court's function to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. The Court must determine if there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. Of course, in ruling on a motion for summary judgment, all inferences drawn from the factual record are viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

If the party moving for summary judgment carries its burden of producing evidence which tends to show there is "no genuine issue of material fact, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish the existence of a genuine issue of material fact for trial." Eason v. Thaler, 73 F.3d 1322, 1325 (5th Cir. 1996). The nonmoving party may not rely upon mere conclusory allegations to defeat a motion because allegations of that type are not competent summary judgment evidence and are insufficient to defeat a proper motion. Id. In fact,

if the "nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation," a motion for summary judgment may be granted even in cases "where elusive concepts such as motive or intent are at issue." Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994).

The party opposing the motion also may not rest on the allegations contained in the pleadings but "must set forth and support by summary judgment evidence specific facts showing the existence of a genuine issue for trial." Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998). In meeting this requirement, the party must "identify specific evidence in the record" and "articulate the precise manner in which that evidence supports his or her claim." Id. Rule 56 of the Federal Rules of Civil Procedure does not impose upon this Court the "duty to sift through the record in search of evidence to support a party's opposition to summary judgment." Id. (quoting Skotak v. Tenneco Resins, Inc., 953 F.2d 909. 915-16 & n.7 (5th Cir.), cert. denied, 506 U.S. 832 (1992)). A summary judgment will only be precluded by disputed facts which are material, i.e. "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Factual disputes which are irrelevant or unnecessary to the issue will not preclude summary judgment. Id.

Plaintiffs' First Amended Original Complaint

As set forth in Plaintiffs' First Amended Original Complaint[1] (docket #25), the plaintiffs are commercial waste haulers who use the landfills/transfer stations owned and operated by Texas

[1] Plaintiffs filed suit in state court on July 31, 2006. The defendant was served on September 1, 2006, and filed its Notice of Removal on September 19, 2006. A hearing on plaintiffs' motion for preliminary injunction was held on December 4, 2006, and a Memorandum and Recommendation was filed on December 19, 2006, concluding plaintiffs' motion should be denied. No objections to that recommendation were filed, and the recommendation was accepted by this Court on January 26, 2007. Plaintiffs filed their First Amended Original Complaint on February 7, 2007. On March 26, 2008, the defendant filed an Advisory to the Court (docket #57) indicating the parties had agreed to meet and discuss possible alternatives to the current permit system. Due to a possibility the parties could resolve the matter, the Court was asked to hold the cross motions for summary judgment in abeyance until after the meeting. The parties were to notify the Court as to whether a resolution could be reached. On July 2, 2008, a second advisory (docket #58) was filed stating the parties were unable to reach an agreement and asking the Court to proceed with a ruling on the previously filed motions for summary judgment.

Disposal Systems, BFI and Waste Management located in the city limits of defendant City of San Antonio. Plaintiffs collect solid waste in the surrounding communities and municipalities as well as in San Antonio. Ordinances were enacted by the defendant to:

> regulate and impose fees on the operations of Plaintiffs and those persons similarly situated, who utilize the private landfills in the City of San Antonio. The Defendant alleges the location of the landfills in the City of San Antonio causes wear on the infrastructure and regulatory resources. The Defendant alleges the fees are necessary to address and abate nuisance conditions, answer public and private service complaints, mediate between industry members and intervene between industry and the citizenry.
>
> These ordinances require the Plaintiffs to obtain a permit to operate in the City of San Antonio. The Defendant charges an annual fee for each permit in an amount of $2,250 annually.
>
> Prior to June 29, 2006 City Code, Chapter 14, Sec. 14-22(e)(16) *Commercial/industrial haulers* states:
>
> > "Any commercial and/or industrial hauler collecting, transporting or disposing of solid wastes, regardless of characterization, within the corporate limits of the City of San Antonio shall be required to permit each vehicle used for transporting or hauling solid waste materials upon public streets, public alleys or highways within the corporate limits of the City of San Antonio."
>
> Persons who are subject to such ordinance were not cited for its violations. The Defendant was issuing citations at the landfills. This was not subjecting all persons "collecting, transporting or disposing" of solid waste to be monitored. Additionally permit fees charged to waste haulers have not been collected in the past.
>
> Effective June 29, 2006, City Code, Chapter 14, Sec. 14-22(m)(1) states:
>
> > *Permit* means the formal consent provided by the city to a person which entitles the person to collect, offer to collect, or dispose of waste, within the corporate limits of the city, which consent is evidenced by display of a permit decal.
>
> The Defendant is issuing citations to all users of the landfills who do not have permits. The Defendant is not attempting to issue citations for all persons "collecting" waste in the City of San Antonio. There are landfills located outside of the jurisdiction of the Defendant who receive waste that is collected within the corporate limits of the

> Defendant. These persons although collecting waste in the city limits of Defendant are not being fined for non-compliance with the ordinance.

First Amended Complaint, docket #25 at page 3-4 (Paragraph numbers omitted, emphasis in original). In count one of their complaint, plaintiffs allege the unconstitutionality of the previous ordinance because defendant has failed to enforce the ordinance in accordance with the Equal Protection Clauses of both the United States and Texas Constitutions. Plaintiffs also allege the current ordinance violates the Equal Protection clauses, the Commerce Clause, and is unconstitutional because it is a tax and not a permit or fee.

Motions for Summary Judgment

In its motion for summary judgment, defendant City of San Antonio (hereinafter "The City") provides this additional background information:

> The City of San Antonio, by and through its Solid Waste Management Department, oversees the collection and deposit of solid waste within the City's corporate limits. The City maintains a fleet of vehicles that provide this service to residents and to commercial business under contract. Businesses may also contract with private haulers for this service. There are three waste depositories located within the City limits. Two are owned by private entities and the third is a privatized City facility. These sites are used not just for the deposit of waste accrued in the city limits but may also receive solid waste from outlying areas.
>
> The City of San Antonio experiences costs associated with the regulation of the collection and deposit of solid waste in the city limits. These costs include but are not limited to impact on infrastructure (ie. [sic] road maintenance), environmental clean up, code enforcement, police and fire services, staffing expenses and overhead. The annual cost to the City is approximately $3 million. Since the early 1990's, the City of San Antonio has regulated the impact of the waste hauler industry on the City through a permit process.
>
> * * * * *
>
> Since 2003, the permit fee per vehicle has been set at $2250 for vehicles weighing more than 7,000 pounds. In 2006, the City explored other options of regulating the waste hauler industry and sought input from members of the industry as to the most effective means of assessing monies to offset the impact of the industry on the City.

> Methods explored including a per ton fee and charging a franchise fee. The industry is not opposed to the City recouping expenses, they object to the method chosen by the City. However, at the end of the review, the City determined that the permit process was the most effective for the City. On June 29, 2006, the City Code was amended to exclude the word "transporting" from the list of activities that would require a permit.
>
> Due to limitation of resources and real world applications, the City's only method of enforcing the permit requirement to date is through the use of random permit checks at the three waste dump sites located with the City limit. The City randomly assigns Code Enforcement officers to the dump sites to check permits. Trucks unable to produce a permit are cited for violation of the City code and face fines of up to $2,000.00.

Defendant City of San Antonio's Motion for Summary Judgment, docket #34 at pages 2-3 (citations to Exhibits omitted). Defendant believes summary judgment should be granted in its favor because there is no evidence of selective enforcement of the ordinance to support an Equal Protection Claim, there is no evidence of any impact on interstate commerce to support a Commerce Clause violation, and there is no evidence the permit fee is an illegal occupation tax. Plaintiffs maintain in their motion for summary judgment the ordinance serves as an illegal occupation tax because the primary purpose of the fee is to raise revenue and as such violates the Equal Protection Clause. The fee is also a violation of the Commerce Clause because it is not fairly apportioned, it discriminates against interstate commerce, and is not fairly related to the services provided.

Equal Protection Claims

In their complaint, plaintiffs allege the ordinances are invalid under the Equal Protection Clauses of both the Texas and United States Constitutions. Concerning the prior ordinance, plaintiffs believe it is vague and incapable of enforcement in that the ordinance attempts to regulate all persons "transporting" waste in the City of San Antonio; the ordinance has been selectively enforced only as to some violators; the City's vehicles are exempt, and the ordinance did not provide effective

registration of the vehicles subject to the permit fee. The current ordinance also violates the Equal Protection Clauses because the City's vehicles remain exempt; it is impossible to enforce the ordinance for collection of solid waste in the City if the waste is disposed of outside of the City, and a reduced fee is charged to vehicles owned and operated by other municipalities when there is no reasonable basis to discriminate between municipalities that have private contracts for the collection of waste and those municipalities that collect their own waste. Defendant categorizes these complaints as a selective enforcement or prosecution claim under the Equal Protection Clause. As such, plaintiffs must prove the City's actions were "motivated by improper considerations such as race, religion or the desire to prevent the exercise of a constitutional right." Bryan v. City of Madison, 213 F.3d 267, 277 (5th Cir. 2000) ("to successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right"; Bryan's selective enforcement claim was found without merit because he never alleged "any improper motive" nor did he "explain[] why the mayor and aldermen's motive to block his plan were improper"). The City maintains there is no evidence of improper motives. What the evidence shows is the primary enforcement of the ordinance occurs at waste reception sites because of limited resources; the City is seeking only to recoup about one-third of its overhead costs from the industry[2]; the City considered reduced fees for other municipalities but there is evidence it has occurred, and the challenge to the previous ordinance is moot because the City did not enforce the permit requirement until July of 2006, a month after the ordinance was amended. As a result, defendant maintains summary judgment on the Equal Protection claim should be granted. The Court agrees.

[2] Defendant states it would be "nothing more than a bureaucratic transfer of funds from one City ledger column to another" if the City required its own vehicles to have permits.

From a review of plaintiffs' response to defendant's motion for summary judgment and plaintiffs' own motion for summary judgment, plaintiffs do not take issue with defendant's arguments or evidence or present evidence to the contrary. As defendant notes in its reply to plaintiffs' response, plaintiff failed to "even address [the Equal Protection Claim] in their response, apparently abandoning their claim." Docket #56 at page 2. Based on the evidence presented by the defendant, the Court finds the motion for summary judgment as to plaintiffs' Equal Protection Claims has merit and will be granted.

Commerce Clause Claims

Plaintiffs assert the current ordinance violates the Commerce Clause of the United States Constitution because it is not "fairly apportioned, discriminates against interstate commerce and is not fairly related to the services provided by the Defendant." First Amended Complaint, docket #25 at page 7. In support of their motion for summary judgment, plaintiffs contend the ordinance is not fairly apportioned because it is not internally consistent. To be internally consistent, plaintiffs argue, "a tax must be structured so that if every [city] were to impose an identical tax, [no] multiple taxation would result." Plaintiffs' Motion for Summary Judgment, docket #44 at page 4 quoting Goldberg v. Sweet, 488 U.S. 252, 261 (1989). Based on Goldberg, plaintiffs state the internal consistency analysis is hypothetical and the question becomes whether a scenario can be created to show such inconsistency. Goldberg, 488 U.S. at 261 (the Court explained the internal consistency test as follows: "The internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute.") Plaintiffs rely on the testimony[3] at

[3] Plaintiffs chose to indicate the record references in support of their motion for summary judgment in their statement of uncontroverted facts attached to their motion instead of in the body of their motion. As previously noted defendant objected to this method and plaintiffs' asserted their references were there. The Court, therefore, denied defendant's motion. In ruling on plaintiffs' motion, the Court has endeavored to match the cited references to the plaintiffs' arguments contained in their motion for summary judgment. However, it is not the Court's fault if it

the preliminary injunction hearing from Rose Ryan, the City's interim environmental services director, to support their internal inconsistency claim as follows:

> Q: . . . If I'm a solid waste hauler, and let's say that I am a native of Louisiana, and I'm driving through the State of Texas because I'm taking my solid waste to New Mexico because I just got an amazing price break, and I'm stopped in the City of San Antonio, and you sought the assistance of the San Antonio Police Department to enforce this ordinance, how is that police officer going to know where I collected my waste?
>
> A: They may ask them about it and see their out-of-state license. I'm not sure, but . . .
>
> Q: Just because you have an out-of-state license doesn't mean you don't didn't collect it
>
> A: Right.
>
> Q: – in San Antonio.
>
> A: Well, what our code says is that if you collect or dispose within the City of San Antonio. So, if you're not disposing in the City of San Antonio, that's a piece of it.
>
> Q: And how does he know that he's not disposing in the City of San Antonio?
>
> A: Well, that's why we monitor here at the landfill, because they're disposing in the City of San Antonio.
>
> Q: So, but there's really no way to tell, in that fact scenario, is what you're saying, unless you follow him to the landfill; correct?
>
> A: They may have some other means, but I'm not aware of it.
>
> Q: Okay. Now, same scenario. I'm coming from Louisiana with my trash, I'm heading to New Mexico, I break down in San Antonio, and I have to dispose of my trash, for whatever reason. Am I going to be charged or assessed a fine by code compliance for noncompliance with the ordinance?
>
> A: It depends. If we're out there monitoring that day, then you would.
>
> Q: Would you agree with me that that person would be in violation of the ordinance?
>
> A: Yes. They would need to collect or dispose in the City of San Antonio. If we were out there monitoring that day, yes, they would be.

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has not matched and/or reviewed the correct record reference with the plaintiffs' specific argument.

Q: Regardless where that trash was collected, if they dispose in San Antonio, a Louisiana company, an Arkansas company, a New Mexico company, if they dispose in San Antonio one time, they have to be within that ordinance and pay the permit fee?

A: That's correct.

Ryan Deposition at pages 51-53 attached to Plaintiffs' Memorandum in Support of Motion for Summary Judgment, docket #44. In addition, plaintiffs' rely on this line of questioning:

Q: Let me throw out an example to you. If I have my one-ton pickup truck, and I'm hauling waste, construction demolition waste, from the building site at my house to a landfill, do I need a permit?

A: Yes, you do. If you are in the activity of transporting - collecting and transporting - excuse me - collecting and disposing of waste, then you would need a permit.

Q: All right. No matter if I went one time or 365 times, would my permit fee be the same?

A: Yes, it would.

Q: And, so, it's not based upon amount of use, it's based upon actual use at all; correct?

A: That's correct.

Q: And, so, if I'm a company, and I have an over - 7,000-pound truck, and I go once a year, my cost is $2,250; correct?

A: Yes, it is. However, if you're going to spend that kind of money on a truck, I doubt you'd be using it one time per year; otherwise, it wouldn't be a wise investment.

Q: Certainly, it wouldn't be a wise investment, if that's what I had. It wouldn't be the same investment or proportionate cost to me as it would be to somebody who utilizes the situation maybe twice a day; correct?

A: Most haulers use their trucks about three times a day.

Q: We're talking about the ordinance. If I'm using it two or three times a day, and I'm delivering solid waste, the cost per trip, or the cost per truck, is less to me than it would be if I'm an independent hauler that goes once a month?

A: I couldn't answer that. You'd have to ask a private hauler about their rate structure and their operations.

Q: Okay. And when this permit fee was determined to be the appropriate amount, the $2,250, was the usage of the landfill taken into consideration, in other words, how many times I use the landfill?

A: No, it was not.

Ryan Deposition at pages 13-14 attached to Plaintiffs' Memorandum in Support of Motion for Summary Judgment, docket #44. In further support of their claim the ordinance is not internally consistent, plaintiffs rely on a Supreme Court case finding Pennsylvania marker and axle fees in violation of the Commerce Clause. American Trucking Ass'ns., Inc. v. Scheiner, 483 U.S. 266 (1987).

In Scheiner, a trucking association and corporations "engaged in interstate motor carrier business brought class action suits challenging constitutionality of Pennsylvania axle tax and marker fee."[4] Id. The broadly stated constitutional question presented to the Court was "whether Pennsylvania's flat taxes result in a blanket discrimination against interstate commerce." Id. at 281. However the Court found the precise issue more subtle: "do the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause?" Id. at 282. The Court explained:

> The way in which a tax levied on participants in interstate commerce is measured and assessed bears directly on whether it implicates central Commerce Clause values. The method of assessing the marker and axle taxes in this case on Pennsylvania-based vehicles and on other vehicles establishes that the State is not treating the two types of vehicles with an even hand. There are important and obvious differences of a constitutional magnitude between the State's registrations fees and fuel taxes, on the one hand, and its flat taxes, on the other.

Id. at 282. A state's vehicle registration fee was mentioned as a tax which easily satisfies the internal consistency test because it is assessed in every jurisdiction and causes "no impermissible interference with free trade because very State respects the registration of every other State." Id. at 282-83. The Court found Pennsylvania's fuel consumption taxes as an example of charges that more than one

[4] There is no evidence before the Court plaintiffs engage in interstate commerce. In fact, plaintiffs state in their amended complaint they are "commercial waste haulers who utilize the landfills/transfer stations owned and operated by Texas Disposal Systems, BFI and Waste Management within the city limits of the Defendant. Plaintiffs collect solid waste in the City of San Antonio as well as surrounding communities and municipalities."

jurisdiction may apply to participants in interstate commerce yet not in violation of the Commerce Clause. These taxes were found "not to hinder the maintenance of a free trade area among States. The fuel consumption taxes are directly apportioned to the milage traveled in Pennsylvania; they are therefore simply payments for traveling a certain distance that happens to be within Pennsylvania." Id. at 283. In contrast, the Court found the "unapportioned flat taxes" to "penalize some travel within the free trade area." Id. at 284. The Court wrote:

> Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that "if applied by every jurisdiction, there would be no impermissible interference with free trade." If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Id. (Citation omitted). The Court further noted:

> Although the actual imposition of flat taxes by other jurisdictions is not necessary to sustain the Commerce Clause challenge to Pennsylvania's flat taxes under the "internal consistency" test, the adoption of these flat taxes by other jurisdictions even before the Pennsylvania suits were resolved surely suggests that acquiescence in these flat taxes would occasion manifold threats to the national free trade area. Since 1980 when Pennsylvania authorized the $25 marker fee, six other States have also adopted flat taxes and seven States have adopted retaliatory levies that are assessed on motor carrier vehicles that are based in Pennsylvania or another flat-tax State. Such taxes can obviously divide and disrupt the market for interstate transportation services. In practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory. Under our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause. Nor is the axle tax saved because some out-of-state carriers which accrue high mileage in Pennsylvania pay the axle tax at a lower per-mile rate than some Pennsylvania-based carriers, it makes no difference that the axle tax, on its face, does not exact a lower per-mile charge from Pennsylvania-based carriers than from out-of state carriers. Like the exemption from wholesaling tax for goods manufactured in Washington that we struck down in Tyler Pipe Industries, Inc., the axle tax has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than "among the several States."

Id. at 285-87 (Citations omitted). Pennsylvania tried, without success, to defend its flat tax as: "a reasonable charge for the privilege of using its roads when considered alongside the high price that Pennsylvania-based trucks pay in registration fees"; "no different from the flat user fees [the] Court has recently upheld"; and a "privilege of doing business within a State." Id. at 287. In concluding the taxes were unconstitutional under the Commerce Clause, the Court stated:

> The administrative machinery of revenue collection for highway use is now obviously capable of taking into account at least the gross variations in cost per unit of highway usage between Pennsylvania-based and out-of-state carriers that are presented by these facts. Pennsylvania, as noted, uses mileage figures to apportion motor carriers' registration fees among IRP jurisdictions, to collect fuel taxes from trucks that travel less than 90% of their miles in Pennsylvania, and to calculate axle tax rebates. Pennsylvania also apportions the corporate income tax it imposes on interstate carriers by the carrier's total miles traveled in the State. While flat taxes may be perfectly valid when administrative difficulties make collection of more finely calibrated user charges impracticable, we conclude that this justification is unavailable in the case of Pennsylvania's unapportioned marker fee and axle tax.

Id. at 297. Based on this holding, plaintiffs argue if this same fee were charged by other cities, they would be subject to paying multiple times for the privilege of doing business in San Antonio and other cities. As an example, plaintiffs assert that if a surrounding city required a permit to collect solid waste in their city, and that solid waste was added to the waste of another city who also required a permit to collect solid waste in their community, and the waste was ultimately disposed of in the defendant's jurisdiction for which this permit fee is imposed, there would be multiple, unapportioned fees being imposed for the privilege of doing business. Because the ordinance is simply a charge for doing business, it "cannot stand constitutional muster."

Relying on Scheiner, plaintiffs further assert the ordinance discriminates against interstate commerce. The fee or flat tax defendant charges here is the same whether the transporter is interstate or intrastate and whether the transporter makes one entry into San Antonio a year or multiple entries

each day. Plaintiffs argue the fee charged is not fairly related to the services provided or benefits received. Plaintiffs also point to other jurisdictions that have considered flat, annual, motor vehicle taxes since the holding in Scheiner and have found them unconstitutional burdens on the Commerce Clause. One such case is Shannon v. State, 129 S.W.3d 670 (Tex. App.–Houston [1st Dist.] 2004, pet. ref'd).

Plaintiffs assert the effect on interstate commerce in this case is best illustrated by the Shannon case which closely parallels the facts currently before the Court. In Shannon, the City of Houston passed "a series of ordinances to regulate the transportation and treatment of certain non-hazardous wastes." Id. at 672. The ordinances made it unlawful to transport waste originating within the City of Houston unless the driver and the vehicle had a permit. A $50 permit fee for the transporter was imposed along with a $400 fee for each vehicle requiring a decal. Id. The City's permit and registration fees were challenged as being unconstitutional under the Commerce Clause. Relying on the decision in Scheiner, the appellant argued the permit and licensing fees were flat taxes and as such were an undue burden on interstate commerce. The court found the fee structure found unconstitutional in Scheiner very similar to those imposed by the City of Houston. In making this determination the court explained:

> First, the City's flat tax charges the interstate transporter the same fee that it charges an intrastate transporter. Although this is a facially non-discriminatory tax, the out-of-state transporter who makes just one entry a year into Houston to load waste must pay the same fee as a local hauler who loads waste in Houston on a daily basis.
>
> Second, although it is true that only transporters of waste originating in Houston are subject to the tax, if each state, or in this case, each municipality, were to charge transporters an annual flat fee for the privilege of loading waste in its city, transporters would be encouraged to conduct only local transport of waste, rather than attempt to pay multiple registration fees necessary to conduct their business on an interstate basis.
>
> Since Scheiner, many jurisdiction that have considered flat, annual, motor vehicle taxes, similar to those in this case, have struck them down as unconstitutional

> burdens on interstate commerce. See Trailer Marine Transp. Corp. v. Rivera Vazques, 977 F.2d 1, 10 (1st Cir. 1992) (invalidating flat $35 trailer fee with optional reduction for transient trailers because "the cost of paying for trailer accidents in Puerto Rico is borne disproportionately by out-of-state transient trailers"); Gov't Suppliers Consol. Servs., Inc. v. Bayh, 975 F.2d 1267, 1281 (7th Cir. 1992) (invalidating flat registration and licensing fee for solid waste transporters and noting that "[f]or the truck that hauls garbage only occasionally, the per-haul cost of the registration fee will be many times the cost to a hauler of in-state waste."); Black Beauty Trucking, Inc. v. Ind. Dept. of State Revenue, 527 N.E. 2d 1163, 1165 (Ind. Tax. Ct. 1988) (holding flat supplemental highway user fee invalid because tax was unapportioned and "not related to the extent of the taxpayer's contact with the state."); Am. Trucking Assns. v. Sec'y of State, 595 A.2d 1014, 1017 (Me. 1991) (citing Scheiner and invalidating annual $25-per-truck hazardous material transportation license); Am. Trucking Assns., Inc. v. Sec'y of Admin., 415 Mass. 337, 613 N.E. 2d 95, 100 (1993) (invalidating flat registrations and licensing fees for motor carriers and noting that "local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks.").
>
> We agree with the authorities above and conclude that the $50 permit fee and the $400 registration-decal fee are unconstitutional because they are not fairly apportioned, as required by Scheiner.

Id. at 673.

Despite the foregoing assertions, defendant contends this case is governed by the more recent Supreme Court decision in United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority, 127 S. Ct. 1786 (2007). At issue there was the constitutionality of a "flow control" ordinance[5] similar to one that had previously been struck down by the Court under the Commerce Clause. Id. at 1790. The Court noted the "salient difference" was "the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation." Id. A difference with constitutional significance. The Court explained:

> 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. Applying the Commerce Clause test reserved for

[5] A flow control ordinance is one that "requires trash haulers to deliver solid waste to a particular waste processing facility." United Haulers, 127 S. Ct. at 1790.

> regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer Counties.

Id.

The ordinance at issue on United Haulers was enacted in response to a solid waste crisis. Initially, the Oneida-Herkimer Solid Waste Management Authority, a public benefit corporation, was created and in 1989, it and the counties "entered into a Solid Waste Management Agreement, under which the Authority agreed to manage all solid waste within the counties." Id. at 1791. To cover the operating and maintenance costs for the facilities operated by the Authority, tipping fees/disposal charges were assessed. These fees were significantly more than those charged in the open market. As a consequence, some citizens could opt to have their waste hauled to facilities with lower tipping/disposal fees. To avoid this consequence, the "flow control" ordinances were enacted to require "all solid waste generated within the Counties be delivered to the Authority's processing sites." Id. In order for private haulers to collect waste in the counties, they were required to obtain a permit from the Authority. As a result, United Haulers Association along with six haulers who operated in the counties filed suit alleging the flow control law violated "the Commerce Clause by discriminating against interstate commerce." Id. at 1792.

In reaching its conclusion, the Court set forth the parameters of Commerce Clause as follows:

> The Commerce Clause provides that "Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States." Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause an implicit restraint on state authority, even in the absence of a conflicting federal statute.
>
> To determine whether a law violates this so-called "dormant" aspect of the Commerce Clause, we first ask whether it discriminates on its face against interstate commerce. In this context, "'discrimination' simply means differential treatment of

> in-state and out-of-state economic interests that benefits the former and burdens the latter." Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually *per se* rule of invalidity," which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.

Id. at 1792-93 (Citations omitted).

What the Court found distinguished this case from its previous holding in C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994), in which a flow control ordinance was found unconstitutional, was the current ordinance benefitted a "clearly public facility." Id. at 1795. In explaining the flow control ordinances were not in violation of the dormant Commerce Clause, the Court opined:

> Compelling reasons justify treating these laws differently from laws favoring particular private businesses over their competitors. "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." But States and municipalities are not private businesses-far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens. These important responsibilities set state and local government apart from a typical private business.
>
> Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism. As our local processing cases demonstrate, when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of "simple economic protectionism." Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism. Here the flow control ordinances enable the Counties to pursue particular policies with respect to the handling and treatment of waste generated in the Counties, while allocating the costs of those policies on citizens and businesses according to the volume of waste they generate.
>
> The contrary approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts with state and local government. The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition. In this case, the citizens of Oneida and Herkimer Counties have chosen the government to provide waste management services, with a limited role for the private sector in arranging for transport of waste from the curb to the public

> facilities. The citizens could have left the entire matter for the private sector, in which case any regulation they undertook could not discriminate against interstate commerce. But it was also open to them to vest responsibility for the matter with their government, and to adopt flow control ordinances to support the government effort. It is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services. "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values.
>
> We should be particularly hesitant to interfere with the Counties' efforts under the guise of the Commerce Clause because "[w]aste disposal is both typically and traditionally a local government function." Congress itself has recognized local government's vital role in waste management, making clear that "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." We may or may not agree with that approach, but nothing in the Commerce Clause vests the responsibility for that policy judgment with the Federal Judiciary.
>
> Finally, it bears mentioning that the most palpable harm imposed by the ordinances-more expensive trash removal-is likely to fall upon the very people who voted for the laws. Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when "the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." Here, the citizens and businesses of the Counties bear the costs of the ordinances. There is no reason to step in and hand local businesses a victory they could not obtain through the political process.
>
> We hold that the Counties' flow control ordinances, which treat in-state private business interest exactly the same as out-of-state ones, do not "discriminate against interstate commerce" for purposes of the dormant Commerce Clause.

Id. at 1796-97 (Citations omitted). The Court continued by finding the test forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), should be used in analyzing the ordinances. This test is "reserved for laws 'directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.'" Id. at 1797. Under the Pike test, a nondiscriminatory statute is upheld "'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Id. (quoting Pike, 397 U.S. at 142). The Court found the ordinance gave the counties a "convenient and

effective way to finance their integrated package of waste-disposal services." Id. at 1798. The Court did note revenue generation is "'not a local interest that can justify *discrimination* against interstate commerce,'" but thought it to be "a cognizable benefit for purposes of the Pike test." The Court added the following explanation:

> At the same time, the ordinances are more than financing tools. They increase recycling in at least two ways, conferring significant health and environmental benefits upon the citizens of the Counties. First, they create enhanced incentives for recycling and proper disposal of other kinds of waste. Solid waste disposal is expensive in Oneida-Herkimer, but the Counties accept recyclables and many forms of hazardous waste for free, effectively encouraging their citizens to sort their own trash. Second, by requiring all waste to be deposited at Authority facilities, the Counties have markedly increased their ability to enforce recycling laws. If the haulers could take waste to any disposal site, achieving an equal level of enforcement would be much more costly, if not impossible. For these reasons, any arguable burden the ordinances impose on interstate commerce does not exceed their public benefits.
>
> The Counties' ordinances are exercise of the police power in an effort to address waste disposal, a typical and traditional concern of local government. The haulers nevertheless ask us to hold that laws favoring public entities while treating all private businesses the same are subject to an almost *per se* rule of invalidity, because of asserted discrimination. In the alternative, they maintain that the Counties' laws cannot survive the more permissive Pike test, because of asserted burdens on commerce. There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.

Id. (Citation omitted).

Based on United Haulers and the Pike test referenced therein, the defendant contends there is no facial discrimination in the ordinance before this Court because no distinction is made with respect to out-of-state versus in-state haulers. Plaintiffs have provided no evidence of any impact on interstate commerce other than their speculation and no evidence the burden imposed on interstate commerce in relation to the putative local benefits is excessive.

Defendant also points out the plaintiffs have ignored and failed to address the applicability of United Haulers in their response to defendant's motion for summary judgment. Defendant argues the claim the fee is not fairly apportioned fails because the haulers in San Antonio are not being asked to obtain permits based solely on their sheer presence in San Antonio, but in connection with the actual collection and disposal of solid waste with the city limits of San Antonio. No multiple taxation occurs even if another state or municipality requires permits for the same activity within its boundaries because such costs would be associated with the business performed in that area and not the impact on The City. Defendant finds the plaintiffs' hypothetical concerning the one-time disposal in the City of San Antonio beyond the "realm of hypothetical into that of fantastic," and the hypothetical of the broken down truck "unpersuasive" as a local hauler would likely have to be used because the truck is in fact "broken down." Moreover, the City argues the hypothetical concerning collecting waste in two surrounding areas with permit fees and then disposing of the waste in San Antonio thereby incurring a third fee as highlighting a critical flaw in plaintiffs' entire case. Defendant asserts "Plaintiffs' real issue here is not interstate in nature, but rather inter-municipal. This is not a matter addressed in the United States Constitution, and the Commerce Clause should not be read so broadly. Although extreme hypotheticals can be created in almost every situation to link any fee or tax to interstate commerce, such stretches of the imagination should not be entertained."

Defendant also finds the Scheiner and Shannon cases distinguishable. In Scheiner the flat axle fee was assessed regardless of whether the trucking company was conducting business in the state and the court considered evidence that out-of state businesses were facing discrimination. No evidence of discrimination as to any out-of-state haulers has been brought forth in this case. The decision in Shannon is also distinguishable because the Court did not address whether the fee at issue was a license fee rather than a flat tax and therefore cannot be determinative of this case.

Based on United Haulers and the arguments and authorities presented by the defendant, the Court finds, as a matter of law, the ordinance does not interfere with interstate commerce. As a result, there is no violation of the Commerce Clause.

Illegal Occupation Tax or Permitted Regulatory Fee

Plaintiffs contend the ordinance which requires all solid waste haulers who collect or dispose of solid waste within The City must affix a permit, at a cost of $2,250 per vehicle[6], is an illegal occupation tax and as such violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. While recognizing that fees imposed against persons in a particular industry are not occupation taxes when those fees are in an amount reasonably necessary to fund the regulation of that industry, plaintiffs contend the fees collected from these permits "are greatly in excess of the amount necessary to implement the ordinance." Plaintiffs' Memorandum in Support of Motion for Summary Judgment, docket #44 at page 3. Plaintiffs appear to rely solely on the testimony of Rose Ryan, from the preliminary injunction hearing and her deposition, to support this assertion:

Q: How much money is anticipated to be raised by this permit fee?

A: Approximately $1.2 million.

* * * *

Q: Let's look at the top of that document where it talks about 14 Fiscal Year 2006 revenue fee adjustments. Under the revenue item, there is a waste hauler permit with an asterisk beside it. Do you see that?

A: Yes, I do.

Q: And there is an increase, a revenue fee adjustment increase, in thousands. Can you tell the Court what that number is?

A: I see a waste hauler permit fee for 759,000.

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[6] The record reflects the vehicle permit cost is $2,250 per vehicle 7,000 pounds or more gross vehicular weight, and $150 per vehicle 6,999 pounds or less gross vehicular weight.

Q: Okay.

A: But it isn't an increase. I don't – We have not increased the fees since 2003, I believe.

Q: Well, this is – this is a document generated by the City. And I'm just trying to determine, does the City anticipate that, in this year's budget, they were going to receive an additional $759,000 based upon this permit fee?

A: Those would be for permits collected.

Q: Okay. And since it's an adjustment and an increase, am I to assume that that fee had not been collected in the past?

A: There were some that were in – delinquent in paying their fee, and we were in the process of collecting those monies. And, so, this is an estimal [sic] that we have for our budget.

* * * *

Q: Okay. You don't dispatch any of the private?

A: No, we do not. That's a cost that is – we absorb, and it's part of what we use to offset and pay for the department, you know, the activities.

Q: And you don't know how much that costs per year?

A: I don't have that at the top of my head, but we can - -

Q: In other words, we went into this budget process, and we had a number that we're looking for to balance the budget, and you don't recall what this element of cost is?

A: There's a variety of things associated with it, and, as I stated before, it's about $3 million. We ask the haulers to pay about 1.2, and The City absorbs the rest through their ratepayers.

Q: Okay. But, again, what I'm going back to, Ms. Ryan, is you've created this permit fee, and you've got a budget, and that budget says, we're going to raise $1.2 million. You don't do that in a vacuum; you do that based upon, it's going to cost us this much for this element, that much for this element, another amount for another element. And you're here to testify –

A: That's correct. And what I'm saying is, it's (the rest of the answer was not provided by the plaintiffs).

* * * *

Q: Okay. My understanding of the money that's generated by the permit fees is that that money is put into the general fund of the ESD, Environmental Services Division?

A: We're not part of the general fund. What it is is we're an enterprise fund.

Q: Yes, ma'am.

A: So those monies would be part of our enterprise fund monies, not the general fund.

Q: Okay. And so those monies would basically cover the general budget of the ESD, is a better –

A: Right.

Q: No general fund, but budget of the ESD?

A: Correct.

Q: All right. And the total budget of the ESD when you and I spoke in December was somewhere in the nature of $3 million?

A: Those were for a variety of shared expenses.

Q: Shared expenses.

A: The three million – well, there are a lot of things that we do in conjunction with the city.

Q: Mm-hmm.

A: A portion of 311, a portion of our attorney's fees, a portion of our code enforcement.

Q: Yes, ma'am.

A: Those kinds of things.

Q: And –

A: And that alone was about $3 million.

Q: Okay. And that's what you contribute to the City of San Antonio –

A: Those are shared expenses.

Q: – for the shared costs, yes, ma'am.

A: Yes, on shared expenses, yes.

* * * *

Q: All right. And I think you told me already that there's 300 trucks that are out there that are subject to the – to the ordinance, and then the City has 250?

A: That's correct.

Q: Okay. If we add those two together and multiply that by $2,250, that approaches $1.2 million?

A: No. I believe what we were looking at was the 1.2 would be coming from approximately the 300 vehicles that are out there. The City's costs are approximately $3 million for that, so the City pays some portion through our rate, and then the other portion we book to our haulers to share in that (rest of answer not provided by plaintiffs).

* * * *

A: . . . a franchise fee, truck permit fee or container fee. And if you look at the amounts of money that's collected, Houston collects $5 million a year, Piano [sic] collects $5 million a year, Dallas collects $1.7 million a year, and, you know. So our. What we collect for what we do is not unreasonable, and that is with these other cities.

Q: Not asking if it's unreasonable. But the purpose of this fee is to generate revenue; correct?

A: Yes, it is. It's to help offset our costs of these activities.

Q: Nonetheless, the purpose of this fee is to generate revenue?

A: That's correct.

Plaintiffs contend the evidence shows the fee is used to raise general revenue for other items than the implementation of "the fee and its enforcement." Plaintiffs believe the test of "whether the fee raises more revenue than reasonably needed for its regulation" requires an inquiry into the expenditures which can only be for the regulation of the fee itself and not for all services provided. Therefore, plaintiffs assert items such as the printing of permits, the application process, the inspection of the vehicles to determine if they have the permits attached or properly affixed, and the prosecution of people in violation of the ordinance are proper costs in the regulation of the industry. However, costs for settling

disputes between consumers and waste haulers, picking up trash that escaped the trucks of the plaintiffs, cleaning up vacant lots and 311 call centers are not related to the implementation or regulation of the permit and such items are not to be included in determining whether the permit is a fee or a tax. Defendant contends plaintiffs' interpretation is too narrow. Both cite Texas Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454 (Tex. 1997), to support their respective contentions on tax versus fee.

In Texas Boll Weevil, the court was asked to decide, as this Court has been asked to decide, whether the assessments at issue were regulatory fees or occupation taxes. Texas Boll Weevil, 952 S.W.2d at 461. In deciding the assessments were fees, the court discussed the differences and the test to be used in making a fee versus tax determination:

> Fees that are imposed against persons in an industry, when only in an amount reasonably necessary to fund the State's regulation of that industry, are not occupation taxes. Thus, if the assessments are merely regulatory fees, as the Foundation contends, they are not prohibited . . . .
>
> We have articulated a "primary purpose" test for determining whether an assessment is an occupation tax or a regulatory fee:
>
> > The principal of distinction generally recognized is that when, from a consideration of the statute as a whole, the primary purpose of the fees provided therein is the raising of revenue, then such fees are in fact occupation taxes, and this regardless of the name by which they are designated. On the other hand, if its primary purpose appears to be that of regulation, then the fees levied are license fees and not taxes.
>
> Because money is fungible, this determination is not controlled by whether the assessments go into a special fund or into the State's general revenue.
>
> Of course, almost all fees or assessments are intended to raise revenue. The critical issue is whether the assessment is intended to raise revenue *in excess* of that reasonably needed for regulation. For example in Producer's Association, the court held that an inspection fee imposed against milk producers was a regulatory fee, not an occupation tax. The undisputed evidence reflected that the annual cost of inspecting diaries was $38,000, while the inspection fee generated only about $30,000 annually. On

> the other hand, the court in City of Houston v. Harris County Outdoor Advertising Ass'n, 879 S.W.2d 322 (Tex. App.–Houston [14th Dist.] 1994, writ denied), cert. denied, 516 U.S. 822, 116 S. Ct. 85, 133 L. Ed. 2d 42 (1995), held that permit fees levied against billboard owners constituted an occupation tax. The evidence in the form of a detailed accounting study, reflected that the fee generated revenues equaling four to ten times the cost of regulation, and thus were intended primarily to raise revenues.

Id. at 461-62.

Defendant asserts the summary judgment establishes the City of San Antonio through its Solid Waste Management Department expends approximately $3,000,000 annually on expenses related to waste disposal issues within its city limits. This amount includes costs associated with clean up, road maintenance, police and fire protection and overhead costs. With only 300 vehicles subject to the $2,250 permit fee, only one-third of the costs will be recouped through the permit fees. Plaintiffs bear the burden to show the permit fee is an occupation tax and not a fee, and have not and cannot meet this burden. In support of its motion, defendant relies not only on the trial and deposition testimony of Ms. Ryan, but have also provided the Court with her affidavit. In that affidavit, Ms. Ryan avers as follows:

> The City of San Antonio experiences costs associated with the regulation of the collection and deposit of solid waste in the city limits. These costs included but are not limited to impact on infrastructure (ie. [sic] road maintenance), environmental clean up, code enforcement, police and fire services, staffing expenses and overhead. The annual cost to the City for solid waste management for some of these functions is approximately $3 million. With a $2,250 per vehicle permit fee for vehicles weighing in excess of 7,000 pounds, and with a potential base of 400 non-City owned waste haulers vehicles collecting or depositing within the City limits, the City would recoup approximately $900,000. Or less than one-third of its associated costs if all trucks were properly permitted.
>
> Since the early 1990's, the City of San Antonio has regulated the impact of the waste hauler industry on the City through a permit process. Since 2003, the permit fee per vehicle has been set at $2250. In 2006, the City explored other options of regulating the waste hauler industry and sought input from members of the industry as to the most effective means of assessing monies to offset the impact of the industry on the City. The Department also surveyed other cities across the country to determine how they recouped expenses associated with solid waste management. The cities surveyed used various means, including a container fee (permitting of individual waste receptacles), a vehicle

> permit fee and franchise fee (payment of a percent of income derived from waste services in the city limits). Some cities used a combination of these fees. We also explored charging a per ton fee for every ton of waste placed in a site located within the city limits. At the end of the review, the City determined that the permit process was the most effective for the City.

Defendant also points out the plaintiffs have not taken issue with the right of The City to recoup its costs but rather with the method of recoupment - a vehicle permit and not a franchise fee.[7] Defendant contends the fees produced are reasonable and therefore the ordinance provides for a fee and not an occupation tax.

The Texas Supreme Court discussed reasonableness of a license fee in Fort Worth v. Gulf Refining Co., 125 Tex. 512, 83 S.W.2d 610 (1935). Stating the sum being collected must not be excessive or "more than reasonably necessary to cover the costs of granting the license and exercising proper police regulation, or as stated another way, the sum levied should bear some reasonable relationship to the legitimate object of the licensing ordinance," the court quoted the rule as stated in McQuillin on Municipal Corporations as follows:

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[7] When questioned, one of the plaintiffs acknowledged he objection was to the methodology being used by The City not the money being raised:

> Q: Now, is your objection to this ordinance the methodology, or the fact that money needs to be raised?
>
> A: My only objective [sic] is the methodology. The way that it's applied, we have no way of administering it to our customers. I have trucks that are spares that may run once a year. That's going to cost me $2,250. I have trucks that go into the landfill three times a day, as Rose Ryan so, you know, eloquently put her business acumen on. How do you – That's going to be 50,000-plus dollars. How do you – How do you literally quantify that a customers , with any sort of accuracy? There is no way of doing it.
>
> When I discussed it with Rose and with Danny, the answer is always the same: Raise your rates, raise your rates. Well, when you compete against Waste Management and BFI, and the rest of these gentlemen out here, it's not that easy to raise your rates. But if we had it in the form of a franchise fee, then it's something that can be passed on. It's a city-imposed fee, which this is. It's a permit fee; it's from the city. Well, a franchise fee is the same thing; it's from the city. But at least it's there, it's quantifiable, it's hard, and the customer has to pay it, versus me begging for a price increase and him telling me no.

> "Where the exaction is imposed under the power to regulate or in the exercise of the police power, as distinguished from the power to tax for revenue, as heretofore explained, the general rule obtains that the sum levied cannot be excessive nor more than reasonably necessary to cover the costs of granting the license and of exercising proper police regulation. The nature of the business sought to be controlled and the necessity and character of police regulations are the dominating elements in determining the reasonableness of the sum to be imposed. What would be fair and reasonable in one kind of business might well be considered unfair and unreasonable in another kind. This difference is fully recognized by the judicial decisions, and has been made the the [sic] basis for close distinctions.
>
> 'The judicial view is that much should be left to the discretion of the municipal authorities. Where under undoubted charter power, the tax is imposed for revenue alone, or for police regulation and revenue, the amount thereof is usually a matter for determination by the legislative branch of the municipal government. Ordinarily the courts will decline to interfere on the ground that the amount is oppressive or unreasonably large. They incline to defer to the judgment and discretion of the corporate authorities, and frequently presume that the amount demanded is reasonably, particularly in the absence of evidence to the contrary.'

Id. at 618-19. Here the plaintiffs claim, without authority, that only costs such as printing of the permits, the application process, the inspection of the vehicles to determine compliance and the prosecution of persons in violation of the ordinance can be considered. However, as explained by the Texas Supreme Court, the fee is reasonable if it covers the cost of granting the license, for example, the cost of printing the permits and the application process, as well as the costs of exercising proper police regulation. Proper police regulation covers expenses that bear a reasonable relationship to the object of the licensing ordinance, here the collecting and disposing of waste inside the city limits of the defendant and the costs associated therewith.

As the undisputed testimony of Ms. Ryan reveals, the Solid Waste Management Department expends over $3,000,000 annually for some of the functions associated with the cost of regulating the collection and deposit of solid waste in the city limits and the fees generated by the ordinance ranges between $900,000 and $1.2 million dollars. Based on the arguments and authorities presented, the Court

does not find, as plaintiffs argue, that these fees are greatly in excess of the amount reasonably necessary to regulate the waste collecting and hauling industry in The City, and there has been no evidence submitted to show the purpose or intent of the permit fee is to merely raise revenue. Therefore, the Court finds the vehicle permit ordinance is a regulatory fee and not an occupation tax.

Accordingly, IT IS HEREBY ORDERED that Defendant City of San Antonio's Motion for Summary Judgment (docket #34) is GRANTED, Plaintiffs' Memorandum in Support of Motion for Summary Judgment (docket #44) is DENIED, and this case is DISMISSED. Motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 29 day of September, 2008.

FRED BIERY
UNITED STATES DISTRICT JUDGE