UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

REPUBLIC WASTE SERVICES OF TEXAS, LTD. *Plaintiff*,	§	
	§	CIVIL ACTION NO.:
	§	6:14-CV-00067-C
v.	§	**JURY TRIAL DEMANDED**
TEXAS DISPOSAL SYSTEMS, INC. *Defendant.*	§	

REPUBLIC'S UNOPPOSED MOTION FOR LEAVE TO SUBMIT REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT (CORRECTED)

Plaintiff Republic Waste Services of Texas, Ltd. ("Republic") hereby moves for leave[1] of this Court to submit a reply to Defendant's arguments in opposition to summary judgment and shows the Court as follows:

Republic moved for summary judgment on its claim for declaratory judgment and partial summary judgment as to liability on its tortious interference with contract claim because there exist no disputed issues of material fact on those issues and because the controlling legal issue is already before the Court on Defendant's motion to dismiss. In its summary judgment response, Defendant contests no facts but raises three additional legal arguments that Republic should

[1] The Motion is submitted to correct the typographical error in counsel's certificate of conference.

have the opportunity to address. Republic's initial brief did not address those arguments because they are misplaced here. They do not justify denying Republic's motion. Pursuant to this Court's standing order on motion practice, in the interests of justice and to aid this Court's resolution of Republic's motion, Republic respectfully seeks leave of Court to respond to Defendant's arguments by submitting the reply brief attached hereto as Exhibit A in support of summary judgment. The motion for leave is unopposed.

WHEREFORE Plaintiff Republic Waste Services of Texas, Ltd. requests that it be granted leave to submit the reply brief attached hereto as Exhibit A.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: */s/ Edwin Buffmire*

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CERTIFICATE OF CONFERENCE

Counsel for Republic Waste Services of Texas, Ltd. conferred with counsel for Texas Disposal Systems, Inc. regarding the Motion for Leave. Counsel for Texas Disposal Systems, Inc. does not oppose the requested relief.

By: */s/ Edwin Buffmire*
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CERTIFICATE OF SERVICE

This is to certify that on this 21st day of January, 2015, this document was served electronically via the Court's ECF system upon the persons on the service list below:

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EXHIBIT A

UNITED STATES DISTRICT COURT
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TEXAS DISPOSAL SYSTEMS, INC. *Defendant.*	§	

REPUBLIC'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Republic Waste Services of Texas, Ltd. ("Republic") hereby submits its Reply in support of its motion for partial summary judgment and would show the court as follows:

1. INTRODUCTION

Defendant identifies no disputed factual issue in responding to Republic's motion for summary judgment. Instead, its Response raises only legal arguments. None withstand scrutiny. Republic moved for summary judgment on its declaratory judgment claim and partial summary judgment (as to liability) on its tortious interference with contract claim. Review of Defendant's Response confirms these two propositions: (1) Republic's claims present no disputed issue of material fact; and (2) a single legal issue controls both Defendant's motion to dismiss and

Republic's motion for summary judgment. Because that legal issue should be determined in Republic's favor—that is, because the City's grant of an exclusive waste services contract to Republic is lawful and enforceable, including in relation to temporary construction waste—this Court should both deny the motion to dismiss and, given the absence of factual issues, grant Republic's requested summary judgment.

2. ARGUMENT

Defendant asserts four legal arguments, three new, that Republic's motion should be denied. All fail. Defendant first asserts that Republic's contract is unenforceable, citing again Texas Health & Safety Code § 364.034(h) and the argument it made under that subsection in its motion to dismiss. As Republic showed in response to that motion, the subsection does not have the disruptive meaning that Defendant ascribes to it and does not negate the City's recognized authority under Chapter 363 and its police power to grant the exclusivity provision in question. Republic's contract with the City is not contrary to the public policy of the state, it is expressly authorized by state law and common across Texas. For the reasons stated in Republic's response to the motion to dismiss and its brief in support of this summary judgment, which will not be repeated here, its contract with the City is enforceable.

Once the controlling legal issue has been determined (as it must be to decide the motion to dismiss), none of the other arguments offered by Defendant provides any basis for deferring or denying summary judgment. Defendant's Response now

asserts for the first time that Republic cannot maintain a civil lawsuit to enforce its rights under the contract. Defendant appears to direct this standing argument only toward Republic's tortious interference claim, though it would necessarily apply to both claims—if it withstood scrutiny. *See* Response at 6 (arguing only that "Republic's allegations against Texas Disposal do not actually amount to a complaint of interference" without discussing declaratory judgment). Ample precedent rejects Defendant's contention. Defendant's two additional arguments, at 3 and 5, apply only to Republic's tortious interference claim. They have no effect on Republic's request for summary judgment on its declaratory claim, and they lack merit even as to Republic's tortious interference claim.

2.1. Republic has standing to bring these claims.

Texas law is well settled that a party to an exclusive contract with a municipality, or franchise, has the right to maintain a suit to enforce and enjoin interference with that contract. *See Lindsley v. Dallas Consol. St. Ry. Co.*, 200 S.W. 207, 208 (Tex. Civ. App.—Dallas 1917, no writ) ("the holder of a valid franchise . . . has also an important interest therein; undoubtedly such an interest entitles him to defend any invasion of his lawful franchise rights by the city or another"). Defendant would have this Court hold that a party in possession of a valid franchise cannot seek judicial recourse, even when someone openly harms its interests

without a license.[1] More than a century of Texas law says otherwise. *See Tugwell v. Eagle Pass Ferry Co.*, 9 S.W. 120 (Tex. 1888).

Texas cities have long held, and often exercised, the authority to decide that certain important services are best provided to their citizens by a single, regulated provider. In that context, franchisees, licensees, and utility companies have long been entitled to bring actions against would-be competitors to enjoin unlawful conduct. For example, electric companies were entitled to enjoin a competitor from encroaching on subdivisions to which they had the exclusive right to provide electricity services. *See Public Utils. Board v. Cent. Power & Light Co.*, 587 S.W.2d 782, 784 (Tex. App.—Corpus Christi 1979, writ ref'd n.r.e.). A taxi company was entitled to bring an action against a competitor who failed to comply with city ordinance. *Moore v. Cox*, 215 S.W.2d 666, 667 (Tex. Civ. App.—Fort Worth 1948, no writ). The *Moore* defendant argued, like TDS, that plaintiff's remedy could only be sought through the penal provisions of city ordinance. *Id.* The Fort Worth Court of Appeals rejected that argument and stated, "[o]ur courts have many times determined [that] proposition[] against [defendant]." *Id.* The Texas Supreme Court has confirmed that the holder of an exclusive contract or franchise is "entitled to

[1] The scant authority cited in Defendant's Response lacks relevance to the issues presented by Republic's motion for summary judgment. Defendant points to several inapposite cases involving the delegation of police powers to private entities, but those cases do not even stand for Defendant's proposition. *See* Response at 7. For example, *Crosbyton v. Texas-New Mexico Utilities Co.*, relied on by Defendant for the proposition that Republic's contract is somehow unconstitutional and void, *affirmed* the validity of a city's exclusive twenty-year contract entitling plaintiff to furnish all power to the city for its water pumps and streetlights. 157 S.W.2d 418, 420 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.). More importantly, Republic does not seek penal remedies under city ordinance, but merely seeks protection of its contractual rights.

defend any invasion, whether by a public body or an individual." *Brazosport Sav. and Loan Ass'n v. Am. Sav. and Loan Ass'n*, 342 S.W.2d 747, 750 (Tex. 1961).

Republic seeks a declaration of its rights under a contract. The Declaratory Judgment Act, 28 U.S.C. § 2201, empowers this Court to declare Republic's rights under a contract. Republic also seeks remedy for the interference and consequent damages caused to Republic's interests under the 2014 Contract by Defendant's intentional actions. Republic is entitled to seek that redress in court. *See Moore*, 215 S.W.2d at 667 (seeking injunction and lost business damages resulting from defendant's unlawful conduct). This resolves the only challenge to summary judgment on Republic's declaratory judgment claim. The Court should grant it.

2.2. Defendant's remaining two arguments apply only to Republic's tortious interference claim and likewise do not prevent summary judgment.

Defendant makes two other arguments for denying summary judgment only as to Republic's tortious interference claim. Defendant argues that, even if the Court holds that the 2014 Contract is enforceable and denies Defendant's motion to dismiss, the Court should nonetheless deny summary judgment on tortious interference because: (1) TDS should have the opportunity to assert the affirmative defense of justification on the grounds that its mistaken interpretation of state law immunizes it from liability; and (2) Republic does not have contracts with the San Angelo construction waste customers that Defendant services. It bears emphasis that neither argument addresses or even touches on Republic's request for declaratory judgment. Once the § 364.034(h) issue and the standing issue have been

determined in Republic's favor, Republic will be entitled to a summary judgment declaring that its contract is enforceable and prohibits the provision of temporary construction waste services to San Angelo customers by TDS. Defendant's Response does not contend otherwise. Further, neither of these two additional arguments provides grounds to deny Republic's motion for partial summary judgment on its tortious interference claim.

2.2.1. *Justification requires a colorable right, which is a legal question that Defendant cannot raise.*

The court need not wait to award Republic summary judgment on liability for tortious interference, as Defendant suggests. A justification defense would be futile—Defendant can assert no colorable legal right. Whether a defendant has asserted a colorable legal right is a question of law for the Court. *See Settlement Capital Corp. v. BHG Structured Settlements, Inc.*, 319 F. Supp. 2d 729, 733 (N.D. Tex. 2004); *Texas Beef & Cattle Co. v. Green*, 921 S.W.2d 203, 211 (Tex. 1996). Defendant's supposition that it has the right to ignore city ordinance and the plain terms of Republic's contract cannot supply the basis for a justification defense.

That Defendant claims a right does not make it colorable. A right is only "colorable" if it is "an appearance of right which would lead others without inquiry to suppose the existence of the right claimed." *Bennett v. Computer Assocs. Int'l, Inc.*, 932 S.W.2d 197, 202 (Tex. App.—Amarillo 1996, no writ) (internal quotation marks omitted); *see also Strategic Capital Corp. v. New Strong Group, Ltd.*, Civil Action No. 4:08-CV1651, 2012 WL 6202182, at *9 (S.D. Tex. Dec. 12, 2012). Defendant relies only on its mistaken legal conclusion that "Texas law does not

allow municipalities to adopt exclusive agreements for [construction waste] collection." Response at 6. But that assertion only relates to the extent of the City's authority to grant exclusivity when it franchises construction waste collection; it provides no colorable affirmative right for Defendant to provide any type of waste collection services within the City of San Angelo without some form of franchise or authorization from the City. Only the City can give Defendant that right. It hasn't. As a matter of law, then, Defendant's § 364.034(h) argument cannot support a defense of justification because it cannot supply the license, permission, contract, franchise, or other affirmative "colorable right" required by any person in order to haul waste within the City of San Angelo. Defendant's argument that, in the very limited context of temporary construction waste, state law requires a city to grant hauling franchises on a non-exclusive basis, provides no basis for TDS to exercise "self-help" and, with no authorization from the City in any form, conduct a business that it recognizes is in direct violation of the City's policy determination embodied in the Republic contract. Thus, Defendant has no colorable right as a matter of law, and any affirmative defense of justification would be futile. So Defendant's liability for tortious interference with Republic's contract is subject to summary judgment.

2.2.2. *Defendant's conduct interferes with Republic's rights and obligations under the 2014 Contract, so no further contract is needed.*

Defendant also argues, at 3, that Republic cannot prove interference because Republic has yet produced evidence of Republic's contracts with customers. Again, Defendant's argument misses the mark.

The requisite element of a tortious interference with contract claim is that the defendant willfully and intentionally interfered with plaintiff's contract. *See Fluorine on Call, Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 864 (5th Cir. 2004). Tort liability may be imposed on a defendant who intentionally and improperly interferes with the plaintiff's rights under a contract, if the interference causes the plaintiff to lose a right under the contract or makes the rights more costly or less valuable. *See* RESTATEMENT (SECOND) OF TORTS § 766 (1979); *see also Exxon Corp. v. Miesch*, 180 S.W.3d 299, 339 (Tex. App.—Corpus Christi-Edinburg 2005, *rev'd on other grounds*) (describing Texas law as "protecting all intentional invasions of contractual relations," including "intentional acts of a person to serve to frustrate the purpose of another's contract with a third party"). Defendant's interference with Republic's 2014 Contract is straightforward: Under the 2014 Contract, Republic has the right and obligation to provide waste collection services to all commercial customers within the City of San Angelo, including construction waste customers. *See* Appendix to Republic's Brief in Support of Summary Judgment at 8, Ex. A ¶ 8. By providing construction waste services within the City of San Angelo, Defendant purposefully interferes with Republic's rights and impairs Republic's obligations under the 2014 Contract. Defendant's conduct robs Republic's rights under the 2014 Contract of some of their value. That contract and Defendant's unlawful conduct establish the requisite elements of Republic's claim for tortious interference with contract. *See Raymond v. Yarrington*, 73 S.W. 800, 803 (Tex. 1903) ("where a party

has entered into a contract with another to do or not to do a particular act or acts, he has as clear a right to its performance as he has to his property").

There is no requirement that Republic establish other contracts. Texas courts "have long recognized a cause of action for tortious interference with contractual rights. . . . Tortious interference is a generic tort. Indeed it is the quintessential tort: the intentional taking of that which belongs to another." *Cole v. Hall*, 864 S.W.2d 563, 571 (Tex. App.—Dallas 1993, writ dism'd w.o.j.). Defendant is intentionally taking the business that Republic is entitled to under the 2014 Contract. Republic need not establish other contracts with customers to whom it has the exclusive right to provide waste collection services. *See Amendariz v. Mora*, 553 S.W.2d 400, 403 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.) (affirming verdict on tortious interference of contract claim brought by the holder of an exclusive concession lease against a competitor for infringing on that exclusive contract); *see also In re Burzynski*, 989 F.2d 733, 738–39 (5th Cir. 1993) (holding that the plaintiff doctor had adequately pleaded a tortious interference claim against insurer relating non-payment of insurance proceeds to patients that doctor was entitled to receive).

3. CONCLUSION

The single legal issue common to both Republic's motion for partial summary judgment and Defendant's motion to dismiss should be resolved in Republic's favor because its contract is enforceable. Consistent with Defendant's admission in its letter to Republic, MSJ App'x at 76, that this dispute is "ripe for the courts to settle," once the Court resolves that controlling legal issue, Republic's claims will be

ripe for summary judgment on all issues except the amount of Defendant's liability arising from its tortious interference. In order to avoid multiplying injury to Republic, and to give force to the City's determination that its citizens' interests are best served by a comprehensive solid waste management services contract with a single provider, summary judgment should be granted as requested.

WHEREFORE Plaintiff Republic Waste Services of Texas, Ltd. requests that it be granted partial summary judgment holding that the contract between Republic and the City of San Angelo is enforceable as to the rights granted Republic regarding construction and demolition waste, that Defendant is liable for tortious interference with Republic's rights under its contract with the City of San Angelo, and providing for further proceedings to determine the appropriate remedies under Republic's tortious interference claim.

Respectfully submitted,

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