IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELMRICH TRANSPORTATION SYSTEMS, INC., et al.	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA	:	NO. 02-2233

MEMORANDUM

Dalzell, J. October 8, 2004

This case is the local exemplar of a national phenomenon. In the mid-1990s, Congress enacted a new law preempting certain local "motor carrier" regulations. Since then, towing companies across the country, from California to Missouri to New York, have challenged municipal towing ordinances as preempted by the federal law. Here, plaintiffs contend that the federal statute preempts two of the City of Philadelphia's ordinances that regulate towing companies. The City has moved for summary judgment.[1]

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[1] Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52; Tabas v. Tabas, 47 F.3d 1280, 1287 (3d Cir. 1995) (en banc).

Factual Background

The City requires any person "engag[ing] in any business within the City of Philadelphia" to obtain a business privilege license. Phila. Code § 19-2602(1), available at http://municipalcodes.lexisnexis.com/codes/philadelphia/_DATA/TITLE19/CHAPTER_19_2600_BUSINESS_PRIVI/19_2602_Licenses_.html (the "general licensing ordinance"). Thus, any towing company that intends to conduct operations within Philadelphia must obtain a business privilege license. The City's Department of Licenses and Inspections issues both permanent business privilege licenses and temporary business privilege licenses, at costs of $250.00 each and $100.00 each, respectively. Phila. Code § 19-2602(2).

In addition to the general licensing ordinance, towing companies are also subject to a "towing ordinance." See Phila Code § 9-605, available at http://municipalcodes.lexisnexis.com/codes/philadelphia/_DATA/TITLE09/CHAPTER_9_600_SERVICE_BUSINESS/9_605_Towing_.html. Although the towing ordinance is quite detailed, this case involves only five of its features. First, the towing ordinance requires towing companies to acquire, maintain (at a $50.00 annual cost) and carry a towing license from the Department of Licenses and Inspections. See § 9-605(3)(a); § 9-605(3)(c)(.5); § 9-605(3)(c)[sic](.1)[2] (collectively, the

[2] Within subsection (3) of the official codification of § 9-605, there are two part (c)'s, apparently due to a drafting error. When we cite to "§ 9-605(3)(c)," we refer to the part (continued...)

"licensing requirements"). Second, towing companies may not charge more than certain prescribed amounts for their services, must file fee schedules setting out their charges, and must carry a certified copy of their fee schedules. See § 9-605(3)(c)(.1); § 9-605(3)(c)[sic](.5); § 9-605(3)(c)[sic](.6); § 9-605(6) (collectively, the "charge provisions"). In addition, the towing ordinance's "lettering requirement" specifies the form and content of information that must appear on the door of every towing vehicle. See § 9-605(3)(c)[sic](.2). The fourth relevant feature of the towing ordinance, the "towing agreement provisions," specifies that towing companies cannot remove a disabled vehicle unless the vehicle's owner signs a standard-form towing agreement (or unless "towing is being performed pursuant to an emergency service"). See § 9-605(5). Finally, the towing ordinance authorizes revocation of any towing license if the licensee fails to comply with the ordinance's substantive terms and permits impoundment of any unlicensed tow truck. See § 9-605(3)(c)[sic](.3); § 9-605(14) (collectively, the "enforcement provisions").

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[2](...continued)
beginning with the language "No license shall be issued unless the applicant . . . ." On the other hand, references to "§ 9-605(3)(c)[sic]" are meant to direct the reader to the part beginning "Every person licensed to engage in the business of towing vehicles shall, as a condition to the retention of his license . . . ."

Helmrich Transportation Systems, Inc. ("Helmrich"),[3] a New Jersey towing company, initiated this action against the City seeking a declaratory judgment that recently enacted 49 U.S.C. § 14501(c) preempts the general licensing ordinance and parts of the towing ordinance[4] and requesting that we enjoin the City from enforcing the allegedly preempted ordinances.[5] The City has

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[3] Two Pennsylvania towing companies (West End Towing "N" Storage, Inc. and Tow Squad Incorporated) and two trade associations (Pennsylvania Towing Association, Inc. and Alliance of Automotive Service Providers of Pennsylvania, Inc.) joined Helmrich as plaintiffs in this action, but they have since conceded that they lack standing. See Pls.' Sur-reply at 2. In view of this concession, we shall dismiss their claims without prejudice.

[4] With respect to the towing ordinance, Helmrich now challenges only the licensing requirements, charge provisions, lettering requirement, towing agreement provisions, and enforcement provisions. The complaint also includes challenges to § 9-605(3)(c)(.2) through § 9-605(3)(c)(.4) and § 9-605(3)(c)[sic](.4), but Helmrich has conceded that federal law does not preempt these portions of the towing ordinance. See Pls.' Br. Opp'n Summ. J. at 6 n.3.

While Helmrich does continue to claim that the enforcement provisions are preempted, we understand it to suggest only that we should enjoin the City from exercising the authority that the enforcement provisions confer to enforce the other parts of the towing ordinance because those other parts are preempted. If we ultimately conclude that the other parts are not in fact preempted, Helmrich would offer no basis on which we might enjoin the City from exercising its enforcement authority. In other words, the alleged preemption of the enforcement provisions is not an independent claim of preemption, but a derivative claim wholly dependent upon whether the towing ordinance's other parts are preempted. Thus, we shall concentrate on Helmrich's other preemption claims and not discuss the enforcement provisions further.

[5] Helmrich's complaint included two counts, which we consider in reverse order. Count Two, based on 42 U.S.C. § 1983, alleges that the City violated Helmrich's Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures. Because Helmrich has conceded that we should enter summary judgment against it on this count, see Pls.' Surreply at 1, we shall do so without further comment.

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filed a motion for summary judgment, and that motion is now before us.

Legal Analysis

The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. From this language, courts have identified three general situations when a federal law will displace, or preempt, a state law:

> (1) "express preemption," which arises when there is an explicit statutory command that state law be displaced; (2) "field preemption," which arises when federal law so thoroughly occupies a legislative field as to make reasonable the inference the Congress left no room for the States to supplement it; and (3) "conflict preemption," which arises when a state law makes it impossible to comply with both state and federal law or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

St. Thomas--St. John Hotel & Tourism Assoc., Inc. v. Gov't of U.S. Virgin Islands, 218 F.3d 232, 238 (3d Cir. 2000) (quotations and citations omitted). By neglecting to raise the possibility of field preemption or conflict preemption here, the parties implicitly concede that the City's ordinances remain enforceable,

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[5](...continued)
As we stated in the text, Count One alleges that 49 U.S.C. § 14501(c) preempts the City's general licensing ordinance and parts of the towing ordinance. In addition to the declaratory and injunctive relief that we mentioned above, Count One also demands damages, interest, attorneys' fees, and costs. See Compl. at 13-14. Because Helmrich has not submitted evidence of, or argument for, these other forms of relief, we consider here only Helmrich's eligibility for declaratory and injunctive relief and leave the other issues for determination at trial.

unless federal law explicitly preempts them. Whether a federal statute expressly preempts a state law is a "question, at bottom, . . . of statutory intent." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383, 112 S. Ct. 2031, 2036 (1992).

In this case, Helmrich maintains that 49 U.S.C. § 14501(c)(1) explicitly preempts the challenged portions of the general licensing and towing ordinances because it prohibits states and municipalities from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."[6] Even if the ordinances fall within the generally preemptive language of § 14501(c)(1), however, the City correctly points out that federal law still would not preempt them if a statutory exception applies.

The City argues that two[7] statutory exceptions save its ordinances from preemption, regardless of whether they "relate[] to a price, route, or service." First, it claims that the ordinances fall within the "safety exception" because they were adopted pursuant to "the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A) (2004). Alternatively, the "nonconsensual rate exception" saves from preemption ordinances "relating to the price of for-hire

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[6] There is no dispute that Helmrich is a "motor carrier." See 49 U.S.C. § 13102(12) (2004).

[7] Section 14501 includes more than the two exceptions that we discuss, but the City does not suggest that any of the other exceptions apply to its ordinances.

motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." 49 U.S.C. § 14501(c)(2)(C) (2004).

Thus, determining whether the general licensing and towing ordinances have been preempted by § 14501(c) requires a two-step process. We must first consider whether § 14501(c)(1) applies to the ordinances.[8] If not, then § 14501(c) does not preempt them, and we must enter summary judgment in favor of the City. On the other hand, if the ordinances do relate to "price, route, or service of any motor carrier . . . with respect to the transportation of property," then we must consider whether the safety exception and nonconsensual rate exception apply.[9] If

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[8] Both Helmrich and the City agree that, because of the presumption against preemption, Helmrich bears the burden of proving that § 14501(c)(1) preempts the general licensing and towing ordinances. See generally New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654, 115 S. Ct. 1671, 1676 (1995) ("[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law."); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."); see also Pls.' Br. Opp'n Summ. J. at 4 ("Plaintiffs concede that they must make a prima facie showing of federal preemption . . . .").

[9] Helmrich and the City hotly dispute which party bears the burden of proving that these exceptions to § 14501(c)(1)'s preemption rule apply to the general licensing and towing ordinances.

Although it recognizes the general presumption against preemption, see supra note 8, Helmrich argues that, after it carries its burden of proving that § 14501(c)(1) applies, the presumption against preemption evaporates and a new burden

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either exception applies, then § 14501(c) does not preempt the ordinances, and the City is entitled to summary judgment. We may deny the City's motion for summary judgment only if (i) the ordinances relate to a "price, route, or service of any motor carrier . . . with respect to the transportation of property" and (ii) neither exception applies.

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[9](...continued)
materializes. According to Helmrich, this new burden requires the City to prove that the § 14501(c)(2) exceptions apply to the ordinances, thereby saving them from preemption. See Defs.' Br. Opp'n Summ. J. at 4-5. In support of this argument, Helmrich relies on cases holding that, when a statute prohibits certain conduct and one party claims that its conduct falls within an exception to the prohibition, the party claiming the benefit of the exception bears the burden of proving the exception's applicability. See, e.g., United States v. First City Nat'l Bank, 386 U.S. 361, 366, 87 S. Ct. 1088, 1092 (1967). Our Court of Appeals has used similar reasoning in the preemption context, see New Jersey Payphone Ass'n v. Town of West New York, 299 F.3d 235, 240 (3d Cir. 2002) ("[O]nce the party seeking preemption sustains its burden of showing that a local municipality has [enacted an ordinance that would fall within the federal statute's general preemption language], the burden of proving that the regulation comes within the safe harbor [i.e., the exception to preemption] falls on the defendant municipality."), so we hold that the City bears the burden of proving that the § 14501(c)(2) exceptions apply here.

Perhaps unsurprisingly, the City attempts to avoid this burden allocation by citing to a long line of "facial challenge" cases. See Def.'s Br. Supp. Summ. J. at 11-12. These cases all focus on whether particular legislation is so fundamentally inconsistent with the Constitution that there are no circumstances under which the legislation could be constitutionally applied. See, e.g., Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191 (2003) (analyzing whether Richmond's trespass policy violated the First Amendment); United States v. Salerno, 481 U.S. 739, 107 S. Ct. 2095 (1987) (considering Fifth and Eighth Amendment challenge to Bail Reform Act of 1984); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118 (1984) (weighing First Amendment challenge to a Los Angeles signage ordinance). Unlike the plaintiffs in the "facial challenge" cases, Helmrich does not argue that the ordinances are unconstitutional; it maintains only that a federal statute preempts them. In short, the City's constitutional precedents do not help us identify the proper allocation of the burden of proving whether the § 14501(c)(2) exceptions apply.

A. General Licensing Ordinance and Licensing Requirements

The general licensing ordinance requires "[e]very person desiring to engage in . . . any business within the City of Philadelphia [to] procure a business privilege license from the Department of Licenses and Inspections." Phila. Code § 19-2602(1). Similarly, the towing ordinance directs that "[n]o person shall engage in the business of towing vehicles unless that person has obtained a license from the Department of Licenses and Inspections." Phila. Code § 9-605(3)(a). To comply with these ordinances, towing companies must pay a one-time $250.00 fee for a permanent business privilege license and an annual $50.00 fee for a towing license. See § 19-2602(2)(a), § 9-605(c)(.5). They must also carry copies of their towing licenses in each of their tow trucks. § 9-605(c)[sic](.1).

Helmrich argues that these provisions "relate" to its routes and services because they "restrict the routes and services that [its] towing-motor carrier business provides." See Pls.' Br. Opp'n Summ. J. at 7-8; see also King Aff. at 4 ("The requirement of a city towing license imposes an obvious geographical restriction on the routes and services provided by my towing-motor carrier business."). Although the general licensing ordinance and the towing ordinance's licensing requirements forbid Helmrich from operating in Philadelphia without the appropriate licenses, and thus do "restrict" its routes and services to some extent, it does not follow that the

ordinances "relate" to routes and services within the meaning of § 14501(c)(1).

The Ninth Circuit has recently and persuasively explained that the phrase "related to" in § 14501(c)(1) should be "interpreted quite broadly." Indep. Towers of Wash. v. Washington, 350 F.3d 925, 930 (9th Cir. 2003). Thus, "[a] state or local regulation is related to the price, route, or service of a motor carrier if the regulation has more than an indirect, remote, or tenuous effect on the motor carrier's prices, routes, or services." Tocher v. City of Santa Ana, 219 F.3d 1040, 1047 (9th Cir. 2000), overruled in part on other grounds by City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 122 S. Ct. 2226 (2002).

The towing ordinance's licensing requirements mandate only that all towing companies pay an annual $50.00 fee, regardless of the prices they charge, routes on which they operate, and services they provide. Obtaining a business privilege license affects towing companies even more minimally because it requires but a single payment. While it is true that towing companies may not serve Philadelphia customers unless properly licensed, the practical impediments to acquiring the necessary licenses are so low that any effect on the towing companies' prices, routes, or services can only be called "indirect, remote, or tenuous." Thus, we hold that § 14501(c)(1) does not preempt the general licensing ordinance or the towing ordinance's licensing requirements because they do not relate to a price, route, or service of a motor carrier. See also Galactic

Towing, Inc. v. City of Miami Beach, 341 F.3d 1249, 1252 (11th Cir. 2003) (affirming district court's conclusion that licensing ordinance was not preempted because safety exception applied).

B. Lettering Requirement

To retain its towing license, a towing company must:

> [L]egibly inscribe in letters not less than one and one-half inches high on the door of every towing vehicle identification consisting of commercially painted name or business logo, address and telephone number of licensee, towing license number, the tow truck classification and, in letters not less than one inch high, a statement that a complete certified fee schedule is available from the driver.

Phila. Code § 9-605(3)(c)[sic](.2). Although Helmrich generally claims that federal law preempts this language, it does not explain how the lettering requirement relates to prices, routes, or services in any way. The general presumption against preemption renders this deficiency fatal to Helmrich's claim that the lettering requirement is preempted. See supra note 8. Having failed to articulate any reason or offer any evidence to rebut the presumption against preemption, Helmrich cannot establish that § 14501(c)(1) preempts the lettering requirement.

C. Towing Agreement Provisions

The City's towing ordinance contains many detailed provisions related to towing agreements, the written authorization that owners give to tow their vehicles. The most important part of this regulatory scheme directs that:

> No person shall remove or tow a disabled vehicle from or to a place within the limits of the City of Philadelphia unless a towing agreement, in triplicate, has been signed by the owner of a disabled vehicle or his authorized representative, the operator of the towing vehicle, and a police officer if one is present except that when towing is being performed pursuant to an emergency service the signature of the owner of the disabled vehicle is not required.

Phila. Code § 9-605(5)(a). Other towing agreement provisions require towing companies to use standard towing agreements prepared by the Department of Licenses and Inspections, incorporate the company's bill into the towing agreement, provide a copy of the towing agreement to a police officer at the scene of an accident, and retain copies of towing agreements for four years. See § 9-605(5)(b)-(g). All of these provisions directly regulate at least one aspect of the way in which towing companies relate with their clients. Thus, the towing agreement provisions relate to service and are preempted by § 14501(c)(1), unless saved by either the safety exception or the nonconsensual rate exception.

As we noted above, the safety exception permits municipalities to exercise their "safety regulatory authority," 49 U.S.C. § 14501(c)(2)(A) (2004), even if their safety ordinances relate to a motor carrier's price, route, or service.

The Supreme Court explained that the safety exception's "clear purpose . . . is to ensure that [Congress's] preemption of States' economic authority over motor carriers of property . . . 'not restrict' the preexisting and traditional state police power over safety." City of Columbus v. Ours Garage & Wrecker Serv., 536 U.S. 424, 439, 122 S. Ct. 2226, 2236 (2002). To that end, the Court noted that "[l]ocal regulation of prices, routes, or services of tow trucks that is not genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)'s preemption rule." Ours Garage, 536 U.S. at 442, 122 S. Ct. at 2237. Here, the City has failed to offer any explanation of how the towing agreement provisions genuinely respond to safety concerns. Without such an explanation, the City has not yet carried its burden of proving that the safety exception applies to the towing agreement provisions. See supra note 9. Moreover, we hold that the nonconsensual rate exception does not apply to the towing agreement provisions because they do not relate "to the price of for-hire motor vehicle transportation by a tow truck." 49 U.S.C. § 14501(c)(2)(C) (2004).

To summarize, we have held that the towing agreement provisions fall within § 14501(c)(1)'s general rule of preemption. Although the nonconsensual rate exception does not save the towing agreement provisions from preemption, it is possible that the City could carry its burden of proving that the safety exception does apply. On this record, however, the City has not demonstrated that the safety exception applies, so it is

not entitled to summary judgment on Helmrich's claim that § 14501(c) preempts the towing agreement provisions.

D. Charge Provisions

Helmrich's final challenge to the towing ordinance focuses on the charge provisions. The most basic charge provision caps the fees that towing companies may charge for "towing a disabled vehicle," "storage," and "minor repair." See Phila. Code § 9-605(6); § 9-605(3)(c)[sic](.6) (collectively, the "fee cap"). The City requires towing companies to file with the Department of Licenses and Inspections complete schedules of the fees they charge for their services and to carry a certified copy of their fee schedule in each tow truck. § 9-605(3)(c)(.1); § 9-605(3)(c)[sic](.5) (collectively, the "fee schedule requirements").

The fee schedule requirements have at most only an "indirect, remote, or tenuous effect" on towing companies' prices, routes, and services, see Tocher, 219 F.3d at 1047, so they do not "relate" to prices, routes, and services and are therefore not preempted.

The fee cap is more complex because it regulates the prices that towing companies may charge for both towing and non-towing services, such as storage and repairs. As we explained above, § 14501(c)(1) preempts local ordinances if they are "related to a price . . . of any motor carrier . . . with respect to the transportation of property," and the caps on prices for non-towing services have little to do with "the transportation of property." See also 49 U.S.C. § 13102(19) (2004) (defining

"transportation"). Thus, § 14501(c)(1) does not apply to the fee cap on non-towing services, and the fee cap on these services is not preempted.

On the other hand, because the portions of the fee cap setting maximum prices for towing directly affect the prices that a towing company can charge for the "transportation of property," § 14501(c)(1) preempts them, unless one of § 14501(c)(2)'s exceptions save them from preemption. The City has not explained, and we cannot imagine, how the fee cap on towing charges could be "genuinely responsive to safety concerns," Ours Garage, 536 U.S. at 442, 122 S. Ct. at 2237, so we hold that, as a matter of law, the safety exception does not apply to them.

The nonconsensual tow exception permits the City to limit "the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle," 49 U.S.C. § 14501(c)(2)(C) (2004), so the City may cap the prices of nonconsensual tows. The nonconsensual rate exception does not, however, permit the City to regulate charges for consensual towing, as the fee cap on consensual tows attempts to do. See also Independent Towers v. Washington, 350 F.3d 925, 931 (9th Cir. 2003) (concluding that regulations governing the rates charged for nonconsensual tows are not preempted); Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765, 777-78 (2d Cir. 1999) (holding that municipal regulation of consensual towing rates is preempted, but regulation of nonconsensual towing rates is not preempted).

As we have explained, § 14501(c) does not preempt the fee schedule requirements, the fee cap on non-towing services, or the fee cap on nonconsensual tows. Still, § 14501(c)(1) does preempt the fee cap insofar as it limits the rates that towing companies may charge for consensual tows. Though Helmrich has not moved for summary judgment, "district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S. Ct. 2548, 2554 (1986). Here, the City had ample notice of Helmrich's claims and came forward with reams of evidence, so we may enter summary judgment sua sponte in favor of Helmrich on the parts of Count One challenging the limits on the prices that towing companies may charge for consensual tows.

Conclusion

Section 14501(c)(1) does not preempt the general licensing ordinance, licensing requirements, lettering requirement, fee schedule requirements, or the fee cap on nonconsensual tows and non-towing services, so we shall grant the City's motion for summary judgment on the parts of Count One dealing with these provisions. We shall also enter summary judgment sua sponte in favor of Helmrich on the part of Count One challenging the fee cap on consensual tows because § 14501(c) preempts that portion of the towing ordinance. Since Helmrich is

entitled to summary judgment, we shall also enjoin the City from enforcing the cap on the price of consensual tows.

Regrettably, this is not the end of the case. We cannot grant summary judgment in the City's favor on the parts of Count One challenging the towing agreement provisions because the City so far has failed to carry its burden of demonstrating that these parts of the towing ordinance genuinely regulate safety. Still, we decline to grant summary judgment sua sponte in Helmrich's favor on this portion of Count One because the City may be able to carry its burden of proof at trial.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELMRICH TRANSPORTATION	:	CIVIL ACTION
SYSTEMS, INC., et al.	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	NO. 02-2233

ORDER

AND NOW, this 8th day of October, 2004, upon consideration of defendant's motion for summary judgment (docket entry # 40), plaintiffs' response thereto, defendant's reply, and plaintiffs' sur-reply, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. The claims of West End Towing "N" Storage, Inc., Tow Squad Incorporated, Pennsylvania Towing Association, Inc., and Alliance of Automotive Service Providers of Pennsylvania, Inc., are DISMISSED WITHOUT PREJUDICE FOR LACK OF STANDING;

2. Defendant's motion for summary judgment is GRANTED IN PART;

3. It is hereby DECLARED that 49 U.S.C. § 14501(c) preempts Sections 9-605(6) and 9-605(3)(c)[sic](.6) of the Philadelphia Code to the extent that they limit the fees for consensual tows;

4. Defendant City of Philadelphia is PERMANENTLY ENJOINED from enforcing Sections 9-605(6) and 9-

605(3)(c)[sic](.6) of the Philadelphia Code to the extent that they limit the fees for consensual tows;

5. A non-jury trial shall COMMENCE at 1:00 p.m. on October 22, 2004 in Courtroom 10B, and the parties shall make their pretrial submissions in accordance with the Court's Standing Order (attached) by noon on October 18, 2004; and

6. Pursuant to Fed. R. Civ. P. 56(d), the non-jury trial shall ADDRESS only (i) plaintiff's challenge to Section 9-605(5) of the Philadelphia Code; and (ii) the amount of damages, interest, attorneys' fees, and costs to which plaintiff may be entitled.

BY THE COURT:

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Stewart Dalzell, J.