Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; and RASIER, LLC, Plaintiffs, vs. THE CITY OF SEATTLE; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES; and FRED PODESTA, in his official capacity as Director, Finance and Administrative Services, City of Seattle, Defendants.	No. 17-cv-00370-RSL DEFENDANTS' OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL **NOTED ON CALENDAR: August 18, 2017**

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

After devoting substantial time and deliberation to the issues presented in this case, including reviewing more than one hundred pages of briefing and holding two lengthy oral arguments, this Court properly concluded that Seattle Ordinance 124968 ("the Ordinance") is a valid exercise of the City of Seattle's delegated authority "to ensure safe and reliable for-hire and taxicab transportation services within the City of Seattle," and that the challenges to the Ordinance asserted by Plaintiffs the United States Chamber of Commerce and Rasier, LLC fail as a matter of law. Dkt. #66, at 8, 28. Plaintiffs nonetheless asks this Court to enjoin implementation of the Ordinance while Plaintiffs' appeal of this Court's decision is pending before the Ninth Circuit. This Court should deny Plaintiffs' request, which is premised on their prospects for success in reversing this Court's dismissal ruling, and which could delay implementation of the Ordinance, and thus the realization of the safety and reliability benefits that the Seattle City Council sought to achieve in enacting the Ordinance, for many months if not years.

A. Plaintiffs are not likely to succeed on appeal.

The propriety of an injunction pending appeal turns, in the first instance, on the moving party's likelihood of success on appeal, as Plaintiffs acknowledge. Dkt. #67, at 2. In other words, Plaintiffs' motion depends upon whether the Ninth Circuit is likely to reverse this Court's decision granting the City's motion to dismiss. Plaintiffs implicitly admit, as they must, that the Court's decision precludes the Court from concluding that they are likely to succeed on appeal. Dkt. #67, at 3; *see, e.g.*, *Doe v. Reed*, No. C09–5456BHS, 2011 WL 5403218 (W.D. Wash. Nov. 8, 2011) (denying injunction pending appeal because decision granting defendants' motion for summary judgment established that plaintiffs were not likely to succeed on the merits). In their motion, Plaintiffs ignore the legal determinations this Court made in that dismissal decision—which are the only determinations that the Ninth Circuit will review on appeal—and instead premise their request entirely on this Court's April 4 decision granting preliminary injunctive relief. *See* Dkt. #67, at 2 (arguing that "[n]othing has changed" since this Court issued the preliminary injunction). Plaintiffs argue that this Court's prior identification of "serious questions" with respect to Plaintiffs' federal antitrust preemption claim applies with equal force to their motion for an

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

injunction pending appeal. *Id.* at 3. But as the Supreme Court has explained, in determining whether to grant an injunction pending appeal under Rule 62(c), this Court asks "whether the stay applicant has made a *strong showing* that he is likely to succeed on the merits." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (emphasis added). Notably, the sole case Plaintiffs cite in support of their view that an injunction pending appeal may issue on the basis of "serious questions" did *not* grant injunctive relief on that basis, but instead concluded that the appealing party was likely to succeed on appeal. *Se. Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1100 (9th Cir. 2006). Nor do Plaintiffs cite any decision approving the grant of a stay pending appeal on the basis of serious questions.

Even assuming an injunction pending appeal may be granted solely on the basis of "serious questions," this Court's April 4 order does not support Plaintiffs' new request for injunctive relief. In that order, the Court concluded that "serious questions" were sufficient to justify preliminary injunctive relief because the federal antitrust questions presented by Plaintiffs deserved "careful, rigorous judicial attention" from the Court, rather than "a fast-tracked rush to judgment." Dkt. #49, at 18; *see also id.* (granting relief in order to provide time for "careful judicial consideration" of federal antitrust claim). As the Ninth Circuit has explained, the "serious questions" standard applies only to merits questions "which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc). At this point, the Court has taken the time necessary to consider Plaintiffs' federal antitrust claims (as well as all of the other claims presented in Plaintiffs' complaint), and definitively concluded that the antitrust claims lack merit because the Ordinance is a valid exercise of the City's delegated authority to regulate the local for-hire and taxicab transportation industry that falls within the "state action" exemption to federal antitrust law. Dkt. #66, at 6-16. There is no further need for an injunction in order to preserve the Court's ability to resolve those questions or to execute its judgment.

Indeed, because even the "serious questions" standard requires the Court to conclude that

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

the moving party has "a fair chance of success," *Marcos*, 862 F.2d at 1362 (quotation omitted), this Court's conclusion that Plaintiffs' claims all fail as a matter of law precludes granting injunctive relief under either the "likelihood of success" standard *or* the "serious questions" standard. Tellingly, Plaintiffs do not cite a single case in which a court granted injunctive relief on the basis of "serious" merits questions *after* finding that the moving party was unlikely to succeed on the merits, let alone after finding that the party's claims should be dismissed under Rule 12(b)(6). As the en banc Ninth Circuit made clear in *Marcos*, the "serious questions" standard applies where the circumstances make analyzing the moving party's likelihood of success difficult or impossible—not where the moving party simply cannot establish a likelihood of success. For this reason alone, Plaintiffs' motion for an injunction pending appeal should be denied.

B. The equities and public interest strongly weigh against enjoining the Ordinance for several years while Plaintiffs' appeal is pending.

Because Plaintiffs are unlikely to succeed on appeal, this Court need not consider the other elements required for an injunction pending appeal (a likelihood of irreparable injury and a showing that both the balance of the equities and the public interest favor injunctive relief). In any event, Plaintiffs also cannot satisfy those requirements.

Plaintiffs' motion assumes that the equities and public interest are the same here as they were when the Chamber sought a preliminary injunction six months ago. (Indeed, Plaintiffs do not offer any new evidence whatsoever regarding the harms they or their members will purportedly face in the absence of an injunction.) But Plaintiffs' preliminary injunction motion sought to delay implementation of the Ordinance by only a few months until this Court could consider Plaintiffs' claims on their merits. Granting an injunction pending appeal, by contrast, would extend that delay many months or years into the future. In the Ninth Circuit, civil appeals are generally set for oral argument 12 to 20 months after the filing of a notice of appeal, and decisions generally issue 3 to 12 months after oral arguments.[1] Accordingly, even if the Ninth Circuit were to affirm this Court's

[1] *See* United States Court of Appeals Office of the Clerk, "Frequently Asked Questions," http://www.ca9.uscourts.gov/content/faq.php.

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

dismissal of Plaintiffs' case, the Ordinance likely would not take effect until 2019, or perhaps even 2020, if it were enjoined pending appeal.[2]

The prospect of this substantial, multi-year delay in the Ordinance's implementation drastically changes the Court's analysis of the relevant equities and the public interest. It is well-settled "that a state suffers irreparable injury *whenever* an enactment of its people or their representatives is enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (emphasis added); *see also Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.") (quotation omitted).[3] That injury will be particularly severe if implementation of the Ordinance is delayed for several years.

Moreover, as this Court has noted, the City Council adopted the Ordinance to "ensure safe and reliable for-hire and taxicab transportation services within the City of Seattle," and "made a number of specific findings related to how allowing for-hire drivers to have more control over their schedules and working conditions would improve the safety, reliability, stability, and economic benefits of the local transportation network." Dkt. #66, at 8. If the Ordinance is enjoined pending appeal, the public's interest in realizing those safety and reliability benefits will go unserved for several years. *See Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) ("The public interest may be declared in the form of a statute.").

The harms to the City and to the public interest posed by a years-long delay in implementation of the Ordinance (which this Court has deemed entirely lawful) must be weighed

---

[2] While the City appreciates Plaintiffs' willingness to "cooperate with the City in seeking expedition of their appeal," Dkt. #67, at 3 n.1, the decision whether to grant an expedited appeal is solely within the discretion of the Court of Appeals and it is far from certain that the Ninth Circuit will grant any such request, whether opposed or not. *See* 9th Cir. R. 27-12 (identifying limited circumstances in which cause to expedite exists). Moreover, even expedited preliminary injunction appeals often take a year or more to resolve. *See, e.g.*, *M.R. v. Dreyfus*, 767 F.Supp.2d 1149 (W.D. Wash. 2011), *rev'd*, 697 F.3d 706 (9th Cir. 2012) (amended Ninth Circuit opinion reversing district court's denial of preliminary injunctive relief issued more than 15 months after district court's decision).

[3] In its injunction ruling, the Court noted that public has an interest "in the enforcement of the laws Congress has passed." Dkt. #49, at 17. In light of the Court's recent ruling, this interest no longer applies.

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

against the limited harm faced by Plaintiffs in the absence of an injunction. Although this Court has expressed concern that the Chamber's members may face "competitive injury" if lists of qualifying drivers are disclosed to Teamsters Local 117, Dkt. #49, at 17, Plaintiffs have presented no evidence that the inadvertent or purposeful disclosure of such a list to a Chamber member's competitors—which is the only form of disclosure that could cause *competitive* injury to the Chamber's members—is likely. And the Ordinance includes several provisions designed to prevent such disclosure: Local 117 is required to keep the lists confidential, may use them only to contact drivers to solicit their support, and faces hefty fines—up to $10,000 a day—as well as a private right of action for damages and injunctive relief and the possible revocation of its status as a qualified driver representative if it violates the Ordinance. *See* SMC 6.310.735.E, 6.310.735.M.3; Dkt. #39-9 (Director's Rule FHDR-7). What is more, as this Court recognized, if these lists come into the City's possession, Plaintiffs could seek injunctive relief to prevent their disclosure to the public. *See* Dkt. #66, at 27 n.14 (discussing RCW 42.56.540).

The Court's April 4 decision also expressed concern about the impact of the Ordinance on the fundamental business model of Chamber members like Uber and Lyft, which is built around mobile application software and independent contractors. Dkt. #49, at 17. But if mandatory negotiations between a Chamber member and its drivers' exclusive driver representative do ultimately take place (which will occur only if the representative successfully procures the support of a majority of the member's qualifying drivers), the Ordinance requires negotiations only over matters such as safety and price terms. There is no inherent conflict between an agreement governing such matters and the member's continued used of an independent contractor/mobile application business model. Nor did Plaintiffs present any evidence that the parties are likely to reach such an agreement or that, if they did, the City would likely approve it.

In short, any harm to Plaintiffs that might occur in the absence of an injunction pending appeal cannot outweigh the significant harm to the City and the public that would accompany an additional multi-year delay in implementation of the Ordinance. At the very least, the balance of hardships does not tip *sharply* in favor of Plaintiffs, as it must to justify injunctive relief solely on

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200

the basis of "serious" merits questions. For these separate reasons as well, the Court should deny Plaintiffs' request.

CONCLUSION

For these reasons, this Court should deny Plaintiffs' motion for an injunction pending appeal.

DATED this 9th day of August, 2017.

PETER S. HOLMES
Seattle City Attorney

By: /s/Michael K. Ryan
WSBA #32091
Gregory C. Narver, WSBA #18127
Sara O'Connor-Kriss, WSBA #41569
Josh Johnson, WSBA #33570
Assistant City Attorneys
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Phone: (206) 684-8207 — Michael K. Ryan
Phone: (206) 684-8233 — Gregory C. Narver
Phone: (206) 615-0788 — Sara O'Connor-Kriss
Phone: (206) 386-1099 — Josh Johnson
Fax: (206) 684-8284
E-mail: michael.ryan@seattle.gov
E-mail: gregory.narver@seattle.gov
E-mail: sara.oconnor-kriss@seattle.gov
E-mail: josh.johnson@seattle.gov

Stephen P. Berzon (pro hac vice)
Stacey M. Leyton (pro hac vice)
P. Casey Pitts (pro hac vice)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Phone: (415) 421-7151
Fax: (415) 362-8064
E-mail: sberzon@altber.com
E-mail: sleyton@altber.com
E-mail: cpitts@altber.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2017, I electronically filed this DEFENDANTS' OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the below-listed:

Timothy J. O'Connell	tim.oconnell@stoel.com
Michael A. Carvin	mcarvin@jonesday.com
Jacqueline M. Holmes	jholmes@jonesday.com
Christian G. Vergonis	cvergonis@jonesday.com
Robert Stander	rstander@jonesday.com
Lily Fu Claffee	lfclaffee@uschamber.com
Steven P. Lehotsky	slehotsky@uschamber.com
Warren Postman	wpostman@uschamber.com
Kathryn Comerford Todd	ktodd@uschamber.com
Robert J. Maguire	robmaguire@dwt.com
Douglas C. Ross	douglasross@dwt.com

DATED this 9th day of August, 2017, at Seattle, Washington.

By: /s/Stacey M. Leyton
sleyton@altber.com

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
(206) 684-8200