

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

MARCHA ROBYN WALLEN, et al.,	)	
	)	
Plaintiffs,	)	Cause No.: 4:15-cv-1432-HEA
	)	
vs.	)	
	)	
ST. LOUIS METROPOLITAN TAXICAB	)	
COMMISSION, et al.	)	
	)	
Defendants.	)	

**DEFENDANT MTC AND DEFENDANT COMMISSIONERS’
MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS
OR, IN THE ALTERNATIVE,
MOTION FOR A JUDGMENT ON THE PLEADINGS**

COME NOW Defendants Metropolitan Taxicab Commission of Metropolitan St. Louis (known herein as “Defendant MTC”), and the following individually named Commissioners Eyasu Asfaw, Louis P. Hamilton, Dave McNutt, and Basil Rudawsky (known jointly herein as “Defendant Commissioners”) (Defendant MTC and Defendant Commissioners will be referred to jointly, when possible, as “these Defendants”), by and through counsel, and for their Memorandum of Law in Support of their Motion to Dismiss or, in the alternative, Motion for a Judgment on the Pleadings, state to this Court as follows:

1. Plaintiffs’ Complaint Fails To State A Claim Upon Which Relief Can Be Granted

Plaintiffs filed suit against these Defendants alleging violations of the Sherman Act claiming that Defendant MTC, by and through Defendant Commissioners, is engaged in anti-competitive conduct stifling competition in the vehicle for hire and taxicab industry (“Plaintiffs’ Complaint”). The Sherman Act provides that “[e]very contract, combination in the form of trust

or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. Section 1.

Defendant MTC is a Regional Taxicab District duly organized and existing under the statutory authority granted to it in RSMo. Section 67.1800 through RSMo. Section 67.1822, and Defendant Commissioners are members of Defendant MTC.

Plaintiffs allege that these Defendants are in violation of the Sherman Act for engaging in anticompetitive conduct, as summarized below:

- a. Requiring Uber drivers to receive MTC licenses and vehicle permits;
- b. Limiting the number of available permits;
- c. Enacting regulations that require Plaintiffs to comply with new and existing taxicab regulations that “do not work with” Uber’s business model;
- d. Enacting regulations that require companies like Uber to obtain certificates of convenience;
- e. “Conspiring” to restrict Uber’s entry into the market outside of St. Louis;
- f. Enjoining Lyft, Uber’s competitor, from operating in Defendant MTC’s district;
- g. Secret rule drafting; and
- h. Failing to hold a meeting in August of 2015. *See Plaintiffs’ Complaint* ¶ 113.

Pages 1 through 35 of Plaintiffs’ Complaint contain mere argument, self-serving explanations of Plaintiff Uber’s business model, and irrelevant statements of fact that are alleged for no purpose other than to sensationalize this litigation. Furthermore, pages 1 through 35 of Plaintiffs’ Complaint contain references to irrelevant news articles and editorial statements that serve no legal purpose. In fact, Plaintiffs’ legal claim is not asserted until page 36 of the Complaint.

Plaintiffs’ Complaint acknowledges that states are generally immune from liability for claims filed under the Sherman Act, and cite to only two (2) cases in an effort to strip these Defendants of such immunity. These Defendants have moved this Court to dismiss Plaintiffs’ Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative to grant

them a judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c) because the Plaintiffs' interpretation of the State of Missouri's enabling statutes and Federal case law is in error. Plaintiffs' Complaint fails to state a claim upon which relief can be granted because these Defendants are entitled to Parker Immunity and not subject to liability under the Sherman Act, as discussed in more detail below.

2. Authority Provided To Defendant MTC By The State

Within RSMo. Section 67.1802, the Missouri State Legislature established a "Regional Taxicab District" authorized to undergo certain duties and exercise certain powers in St. Louis City and St. Louis County. The powers expressly granted to Defendant MTC are set out in RSMo. Section 67.1804, which states:

For the regional taxicab district, there is hereby established a "Regional Taxicab Commission", which shall be a body politic and corporate vested with all the powers expressly granted to it herein and created for the public purposes of recognizing taxicab service as a public transportation system, improving the quality of the system, and exercising primary authority over the provision of licensing, control and regulations of taxicab services within the district. Id.

Furthermore, RSMo. Section 67.1808(8) provides that Defendant MTC is empowered to:

Adopt a taxicab code to license and regulate taxicab companies and individual taxicabs within the district consistent with existing ordinances, and to provide for the enforcement of such code for the purpose of improving the quality of taxicab service within the district. Id.

RSMo. Section 67.1809.1 further provides that the State of Missouri established Defendant MTC for purpose of:

...[L]icense, supervise, and regulate any person who engages in the business of transporting passengers in commerce, wholly within the regional taxicab district established in section 67.1802, in any motor vehicle designed or used to transport not more than eight passengers, including the driver. Id.

And the Missouri legislature expressly provides Defendant MTC with implementation authority in RSMo. Section 67.1810.1, which states:

To implement internally the powers which it has been granted, the commission shall:

- (1) Elect its own vice chair, secretary, and such other officers as it deems necessary, make such rules as are necessary and consistent with the commission's powers;
- (2) Provide for the expenditure of funds necessary for the proper administration of the commission's assigned duties;
- (3) Convene monthly meetings of the entire commission or more often if deemed necessary by the commission members;
- (4) Make decisions by affirmative vote of the majority of the commission; provided that each of the commissioners, including the chairperson, shall be entitled to one vote on each matter presented for vote and provided further that at least two city appointees and two county appointees, excluding the chairperson, must be included in each majority vote of the commission...Id.

RSMo. Section 67.1812 clearly authorizes Defendant MTC to enact a “taxicab code,” and RSMo. Section 67.1818 requires the taxicab code to contain administrative procedures and safeguards.

RSMo. Section 67.1806 contains State requirements pertaining to the composition and appointment of Defendant MTC’s members, as follows:

The regional taxicab commission shall consist of a chairperson plus eight members, four of whom shall be appointed by the chief executive of the city with approval of the board of aldermen, and four of whom shall be appointed by the chief executive of the county with approval of the governing body of the county.

Of the eight members first appointed, one city appointee and one county appointee shall be appointed to a four-year term, two city appointees and two county appointees shall be appointed to a three-year term, and one city appointee and one county appointee shall be appointed to a one-year term. Members appointed after the expiration of these initial terms shall serve a four-year term.

The chief executive officer of the city and the chief executive officer of the county shall alternately appoint a chairperson who shall serve a term of three years. The respective chief executive who appoints the members of the commission shall appoint members to fill unexpired terms resulting from any

vacancy of a person appointed by that chief executive. All members and the chairperson must reside within the district while serving as a member. All members shall serve without compensation. Nothing shall prohibit a representative of the taxicab industry from being chairperson.

In making the eight appointments set forth in subsection 1 of this section, the chief executive officer of the city and the chief executive officer of the county shall collectively select four representatives of the taxicab industry...Id.

3. Defendant MTC Is A Political Subdivision Of The State Of Missouri With A Majority of Non-Industry Commissioners

Due to the above-cited statutes, it is clear that Defendant MTC is:

- a. A governmental entity organized and existing pursuant to statute;
- b. Acting under state authority;
- c. With the express authority to enact a taxicab code;
- d. With "... authority over the provision of licensing, control and regulations of taxicab services within the district;"
- e. To consist of an appointed nine (9) member Commission;
- f. Of which only four (4) Commission members are active in the taxicab industry; and
- g. Of which all Commission members, including the Defendant Commissioners, are appointed by the Chief Executive Officers of St. Louis City and St. Louis County.

However, at present, Defendant MTC has one (1) vacancy on the Commission so there are only eight (8) Commissioners, three (3) of whom are in the taxicab industry. However, regardless of whether this vacancy exists or is filled, the four (4) Commissioners who are active in the taxicab industry do not control the actions of the Defendant MTC.

4. Parker Immunity Applies

Plaintiffs' Complaint cites to two (2) United States Supreme Court cases in an attempt to strip these Defendants from immunity, stating:

The United States Supreme Court recently confirmed that where, as here, a state has not expressly authorized a body to engage in anti-competitive behavior, or where active market participants control a nominally public body like the MTC and no independent governmental agency or official actively supervises its conduct, that body's conduct is not immune from anti-trust liability. See *Plaintiffs' Complaint* ¶ 9.

The first case cited in Plaintiffs' Complaint to support their argument that these Defendants lack immunity is F.T.C. v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1005 (2013), wherein the United States Supreme Court outlined the parameters of "Parker Immunity" (also referred to as the "state action doctrine"), as follows:

This Court recognized in Parker v. Brown, 317 U.S. 341, 350–352, that the **federal antitrust laws do not prevent States from imposing market restraints as an act of government**...Under the state-action doctrine, immunity from federal antitrust law may extend to non-state actors carrying out the State's regulatory program. But given the antitrust laws' values of free enterprise and economic competition, state-action immunity is disfavored, and is recognized only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to the State's own regulatory scheme.

Immunity will attach only to activities of sub-state governmental entities that are undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. A state legislature need not expressly state that intent, but the anticompetitive effect must have been the **foreseeable result of what the State authorized.** (*internal citations omitted*) (*emphasis added*) Id.

In Phoebe Putney, the Supreme Court held that actions taken by a state organized hospital authority failed to meet the test for "Parker Immunity" because the State of Georgia only granted the authority leasing and acquisition powers, but did not expressly authorize the hospital authority to limit competition by consolidating hospital ownership. Id.

Unlike the facts of Phoebe Putney, in the present case the State of Missouri, by statute, has *expressly* authorized Defendant MTC to:

- a. “[S]tudy and take into account rate and fee structures as well as the **number of existing taxicab licenses** within the district in considering new applications for such licenses.” (*emphasis added*) RSMo. Section 67.1818;
- b. “[E]xercis[e] **primary authority over the provision of licensing**, control and regulations of taxicab services within the district...” (*emphasis added*) RSMo. Section 67.1804;
- c. “[L]icense, supervise, and regulate any person who engages in the business of transporting passengers in commerce, wholly within the regional taxicab district.” (*emphasis added*) RSMo. Section 67.1809.1; and
- d. Enact a Taxicab Code that is “...relating to taxicab issues such as **licensing, regulation, inspection, and enforcement...**” (*emphasis added*) RSMo. Section 67.1812.

The State expressly delegated to Defendant MTC the power to license, supervise, regulate, inspect, and limit the number of licenses and permits available to taxicabs, vehicles for hire, sedans, and dispatch services operating with St. Louis City or St. Louis County. And, in doing so, Defendant MTC is authorized to make and enforce the regulations and licensing procedures complained of in the Plaintiffs’ Complaint, whether anti-competitive or not.

Therefore, Defendant MTC and Defendant Commissioners are entitled to Parker Immunity to shield them from liability under the Sherman Act because any anticompetitive conduct or anticompetitive results of Defendant MTC’s regulations and procedures was expressly authorized or the foreseeable result of the authority granted to these Defendants by the State of Missouri.

The second case cited by Plaintiffs is N. Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct. 1101 (2015). That case involved a state dental board where six of the eight

(6/8) members were dentists engaged in the “active practice of dentistry” and attempted to keep non-dentists from competing in the teeth-whitening industry. The Supreme Court ultimately held that the board was not entitled to Parker Immunity for claimed violations of the Sherman Act because: 1) the State board’s enabling legislation *did not expressly* include teeth-whitening practices under the definition of dentistry; and 2) the board was *controlled* by members of the industry without any State supervision.

The Supreme Court in N. Carolina State Board of Dental Examiners stands for the following rules pertaining to Parker Immunity:

[Where] a controlling number of the Board's decision makers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State... (*emphasis added*) Id. at 1109-1117.

Antitrust laws confer immunity on the anticompetitive conduct of States acting in their sovereign capacity...but when a nonsovereign actor is **controlled by active market participants**, such as [a] board, it only enjoys Parker Immunity if 1) the challenged activity is clearly expressed state policy; and 2) the policy is actively supervised by the state. (known as the 2 part “Midcal Test” from California Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)). (*emphasis added*) Id.

[T]he Court holds today that a state board **on which a controlling number of decision makers are active market participants** in the occupation the board regulates must satisfy Midcal 's active supervision requirement in order to invoke state-action antitrust immunity. (*emphasis added*) Id. at 1113 – 1115

Within its opinion in N. Carolina State Board of Dental Examiners, the Supreme Court also explained that states can ensure Parker Immunity for governmental entities, as follows:

States, furthermore, can ensure *Parker Immunity* is available to agencies **by adopting clear policies to displace competition**; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Id. at 1115.

In the present case, it is clear that the Missouri legislature enacted statutes and adopted clear policies to displace competition in the taxicab industry, both expressly and due to

foreseeable application of Defendant MTC's enabling legislation, as being within the scope of Defendant MTC's authority. Also, pursuant to RSMo. Section 67.1806, since only four of the nine (4/9) Commissioners are members of the taxicab industry, a controlling number of Defendant MTC's decision makers *are not* active market participants and the second prong of the Midcal Test requiring state supervision, contrary to Plaintiffs' argument, does not apply to the present case.

Since the conduct of these Defendants was done in furtherance of clear Missouri state policy and Defendant MTC is not controlled by active members of the taxicab industry, Plaintiffs' conspiracy claims must also fail as a matter of law. This is because Federal Courts hold that:

[W]e reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on perceived conspiracies to restrain trade. We reiterate that, with the possible market participant exception, **any action that qualifies as state action is ipso facto ... exempt from the operation of the antitrust laws.** (*internal citations omitted*)(*emphasis added*) City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379 (1991).

Therefore, the cases cited in Plaintiffs' Complaint actually support these Defendants' claim for Parker Immunity.

5. Conclusion

For the reasons argued above and as a matter of law, Defendant MTC and Defendant Commissioners are entitled to Parker Immunity and this Court should find in favor of these Defendants and grant their Motion to Dismiss Plaintiffs' Complaint or, in the alternative, enter a judgment in favor of these Defendants on the pleadings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2015 the foregoing Memorandum of Law in Support of Motion to Dismiss , was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all attorneys of record.

/s/ Neil J. Bruntrager