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

MCQ'S ENTERPRISES, INC., t/d/b/a YELLOW CAB CO., Plaintiff,	:	**CIVIL ACTION**
v.	:	**NO. 07-0067**
PHILADELPHIA PARKING AUTHORITY, et al., Defendants.	:	

M E M O R A N D U M

STENGEL, J. **January 11, 2007**

This suit arises out of the City of Philadelphia's plan to implement a city-wide cab dispatch system in order to improve cab service to residents and visitors. McQ's Enterprises, Inc. t/d/b/a/ Yellow Cab Company ("Plaintiff") filed a complaint against the Philadelphia Parking Authority ("PPA") and Chairman of the PPA Joseph Ashdale and officers Vincent Fenerty, Jr., Executive Director, and James Ney, Director, Taxicab and Limousine Division, (collectively "Defendants") on January 5, 2007 alleging violations of the Lanham Act, unconstitutional regulatory takings under the Fifth Amendment, and supplemental state law claims.

On January 8, 2007, Plaintiff filed a motion for a temporary restraining order ("T.R.O.") and preliminary injunction to stop Defendants from requiring Plaintiff to comply with this plan as of January 9, 2007. The Court held a hearing on the T.R.O. on January 8, 2007; both Plaintiff and Defendants presented arguments. The motion is

denied because Plaintiff is not likely to prevail on the merits, except for possibly the regulatory takings claim, or suffer irreparable harm. Moreover, the public interest weighs in favor of implementing the City's plan pursuant to the mandate of the Commonwealth's legislature.

I. Background

There are approximately 1600 licensed medallion cab operators in the City of Philadelphia. Yellow Cab is one of the oldest taxi dispatchers in Philadelphia, operating since the 1930's. It is also one of the largest.[1] Plaintiff asserts it is one of the most recognizable operators. It claims a proprietary interest in the "Yellow Cab" mark, the distinctive yellow color and design of its cabs, and exclusive use of the phone number (215) 333-3333. An administrative court has recognized that Plaintiff owns a common law trademark in the "Yellow Cab" mark and the yellow color of its cabs. Pl's Mot. T.R.O. Ex. C. Its fleet is comprised of independently owned and operated cab that are licensed to use the Yellow Cab mark, distinctive color and phone number. The licensed cabs also use the Yellow Cab's unique dispatch system.

Plaintiff claims to have "the most expensive, largest and most sophisticated dispatch system of any taxicab company in Philadelphia" that enables Plaintiff to handle over one million calls each year. Compl. ¶¶ 3, 36. Plaintiff invested close to $500,000 in creating its centralized dispatch system. This dispatch system has earned Plaintiff a

[1] At the T.R.O. hearing, Defendants claimed that Plaintiff is the eighth largest dispatcher in the city, with approximately 94 cabs. Plaintiff responded that it receives the most phone calls of all cab companies.

competitive advantage over other cab companies because it enables Yellow Cab to dispatch cabs more efficiently and quickly than its competitors. This dispatch system has 50 telephone lines and six operators and at least two dispatchers each shift to handle incoming calls. Each licensed Yellow Cab uses Plaintiff's dispatch system and is equipped with a global positioning system ("GPS") tracking device. When customers call Yellow Cab, dispatchers use the GPS system to locate the closest Yellow Cab to dispatch to the customer. Plaintiff contends that its established customer base calls the Yellow Cab number because they "recognized and associate that number with Yellow Cab and the quality services that they have come to expect when Yellow Cab's number is called." Compl. ¶ 38.

On July 16, 2004, the state legislature appropriated money to the Philadelphia Parking Authority for a hospitality initiative to make cab service within Philadelphia more consumer friendly. To implement this program, PPA created a coordinated dispatch system for all 1600 medallion taxicabs operating in the city. On August 4, 2006, the Philadelphia Parking Authority ordered taxicab operators to comply with the coordinated dispatch system. Pl's Mot. T.R.O. Ex. A. Under this system, each of these cabs will be required to install a GPS system from a PPA selected vendor by January 9, 2007. All other dispatch systems will have to be removed before installing the PPA system. According to Defendants, this new system has many attractive new features, aside from the GPS function. The new system includes a panic button, credit card payment options,

a visual dispatch screen to eliminate the noise of an audio dispatch system, and a visual navigation system. The new system will help the City identify and address under served neighborhoods.

In addition to requiring all cabs to have a universal dispatch systems, cab dispatch procedures will change as of January 30, 2007. Under the new system, when a customer calls Yellow Cab, the dispatcher must check the location of the nearest cab. If the Yellow Cab closest to the customer is more than a certain number of minutes away,[2] the Yellow Cab dispatcher will have access to the location of all competitors' cabs in the City. If a competitor's cab is closer to the customer than the Yellow Cab, the Yellow Cab dispatcher must ask the customer if she would prefer to use the competitor's services. If the customer so desires, the Yellow Cab dispatcher is required to use Yellow Cab's resources to take the order for the competitor and use the coordinated system to arrange the dispatch. Plaintiff asserts that since it is the most recognizable cab company fielding the largest number of consumer calls, the new PPA system will require it to "work for its competitors." Yellow Cab does benefit in obtaining referrals from other companies.

II. Standard for a Temporary Restraining Order

The federal rules permit a court to issue a temporary restraining order ("T.R.O.") if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the

[2] PPA has not determined what this number will be, although Plaintiff estimates it will be 15 or 20 minutes.

adverse party or that party's attorney can be heard in opposition." FED. R. CIV. P. 65(b).

As a form of injunctive relief, a T.R.O. is an extraordinary remedy that is only available when the movant does not have an adequate remedy at law and will suffer irreparable injury. Morales v. TWA, 504 U.S. 374, 381 (1992). In accessing whether a the Court should issue a T.R.O., the Third Circuit directs that a district court should consider the following factors: "(1) the likelihood that the plaintiff will prevail on the merits at the final hearing; (2) the extent to which the plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. The injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." New Jersey Hosp. Ass'n v. Waldman, 73 F.3d 509, 512 (3d Cir. 1995)

III. Discussion

A. Likelihood of Success on the Merits

Plaintiff's motion for a T.R.O. is based on four claims: (1) Defendants' actions constitute an unconstitutional regulatory taking under both the federal and state

constitution;[3] (2) Lanham Act; (3) state[4] trade secret law; (4) state tortious interference with economic advantage law.

(1) Regulatory Taking Claim

The Takings Clause of the Fifth Amendment to the United States Constitution, which is applicable to state and local governments under the Fourteenth Amendment, prohibits the taking of private property for public use without just compensation. Ash v. Redevelopment Auth., 143 Fed. Appx. 439, 441 (3d Cir. 2005). The Takings Clause does not prohibit the taking of private property, however, but only places a condition on the government's exercise of this power: the requirement of compensation if the government's action results in a taking. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005). It is now well established that government regulation of property can amount to a taking requiring just compensation. Id. at 537.

In Lingle, the Supreme Court clarified its regulatory takings jurisprudence by describing three categories. Id. at 538. There are two categories of *per se* takings where

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[3] The standard for a regulatory taking is the same under the Fifth Amendment and the Pennsylvania Constitution Article 1, Section 10. People United to Save Homes v. Dep't of Envtl. Prot., 789 A.2d 319, 326 (Pa. Commw. Ct. 2001). Therefore, the Court will analyze this aspect of Plaintiff's claim under the federal standard.

[4] Defendants argue that Plaintiff's state law claims are barred by the doctrine of sovereign immunity. The Pennsylvania General Assembly has provided sovereign immunity to Commonwealth officials and employees acting within the scope of their duties. 1 Pa. Cons. Stat. Ann. § 2310. There are nine statutory exceptions, which are not applicable to this case. See 42 Pa. Cons. Stat. Ann. § 8522. Local agencies enjoy sovereign immunity under 42 Pa. Cons. Stat. Ann. § 8541. Suits to restrain state officers from enforcing provisions of a statute claimed to be unconstitutional are not barred by this doctrine. Fawber v. Cohen, 532 A.2d 429, 434 (Pa. 1987). Since Plaintiff claims that this regulation is an unconstitutional taking under the Pennsylvania Constitution and seeks injunctive relief, its state law claims may not be barred by this doctrine.

the government must provide compensation. The first category is a physical taking "where [the] government requires an owner to suffer a permanent physical invasion of her property–however minor...". Id. The Court cites Loretta v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) as an example of this form of a taking. In Loretta, the Court found that a state law requiring landlords to permit cable companies to install a cable facilities in their apartment buildings effected a taking. The second category of *per se* taking is exemplified by Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). This total regulatory taking occurs when a regulation completely deprives an owner of "all economically beneficial use of her property." Id. Lucas involved a challenge to a state law that prohibited a landowner from developing any permanent structures on two beach front lots he had purchased.

Outside of these two relatively narrow categories of *per se* takings, regulatory takings are governed by the factors-based approach of Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). These factors include: "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action -- for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good -- may be relevant in discerning whether a taking has occurred." Id. at 538-39 citing Penn

Central, 438 U.S. at 124.

Plaintiff contends that requiring it to install the City's coordinated dispatch system in its cabs without compensating Plaintiff "for the economic injury and loss that will result from the taking of Yellow Cab's customers and intellectual property" constitutes an unconstitutional taking. Pl's Mot. T.R.O. p. 13. Defendants' actions could constitute a *per se* taking under Loretto's physical taking theory because the City is requiring a physical invasion of private property (the Yellow Cabs) to install the coordinated dispatch system. This may not be a total regulatory taking under Lucas because Plaintiff's dispatch system may have some resale value and Plaintiff has already realized some of the value of its investment in the system, which it has used for the last several years. In contrast, the Plaintiff in Lucas did not develop his land prior to the regulation and the land had no resale value since the state law prohibited any development on the land. Plaintiff may also be able to prove a regulatory taking under Penn Central's test upon further evidence of the economic impact of this new regulation and based on the physical invasion requiring cab companies to install the coordinated dispatch system.

With the abbreviated evidentiary record in front of the Court, it appears Yellow Cab may have a colorable regulatory takings claim. This is far from clear. This possibility alone is not a sufficient basis to grant Plaintiff's request for an injunction. Takings Clause jurisprudence establishes that while the government must compensate private owners for regulatory takings, the regulation is valid as long as it is for the public

good. Lingle, 544 U.S. at 536. Defendants' plan is for the public good, since it is pursuant to a state legislative act to promote hospitality and tourism in Philadelphia. See Kelo v. City of New London, 545 U.S. 469 (2005) ("...promoting economic development is a traditional and long accepted function of government.")

(2) Lanham Act Claim

At the T.R.O. hearing, Defendants argued that Plaintiff cannot seek the protection of the Lanham Act. Defendants contend that Plaintiff is barred by College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999), where the Court held that an arm of the state could not be sued under the Lanham Act because of sovereign immunity. However, this specific holding does not override the general principle that sovereign immunity does not prevent "federal courts from enjoining state officers who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." Morales v. TWA, 504 U.S. 374, 381 (1992).

Defendants also argue that this suit is improper under the Lanham Act because Defendants are not Plaintiff's competitors. The Third Circuit has held that parties who are not direct competitors may have standing to sue under the Act if they have a reasonable interest, which is evaluated according to the following factors: "(1) The nature of the plaintiff's alleged injury: Is the injury of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws?; (2) The directness or

indirectness of the asserted injury; (3) The proximity or remoteness of the party to the alleged injurious conduct; (4) The speculativeness of the damages claim; (5) The risk of duplicative damages or complexity in apportioning damages." Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 231-233 (3d Cir. 1998) (citations omitted). Under this reasonable interest test, Plaintiff may be able to sue Defendants under the Lanham Act even though they are not direct competitors.

Even though Plaintiff may have standing to sue, it is unlikely that Plaintiff will ultimately prevail on its claim. The essential element in sustaining a claim under the Lanham Act is that the alleged infringement creates a likelihood of consumer confusion as to the source of the goods. Parker v. Google, Inc., 422 F. Supp. 2d 492, 502 (E.D. Pa. 2006). To prove trademark infringement, Plaintiff must demonstrate three elements: (1) it owns the mark; (2) the mark is valid and legally protectable; (3) defendant's use of the mark to identify goods or services causes a likelihood of confusion. Checkpoint Sys., Inc. v. Check Point Software Techs., Inc., 269 F.3d 270, 279 (3d Cir. 2001). Plaintiff's trademark is not registered, but unregistered marks are also protected under the act. Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 210 (2000) (noting that "the general principles qualifying a mark for registration under § 2 of the Lanham Act are for the most part applicable in determining whether an unregistered mark is entitled to protection...").

While Plaintiff may be able to prove the first and second elements of a Lanham Act claim through their exclusive and continuous use of the Yellow Cab name, color and

phone number, Plaintiff is unlikely to prevail on the third element of the Lanham Act claim: likelihood of consumer confusion. In the Third Circuit, this element of a trademark infringement claim is judged by the Lapp factors, which include:

> 1) the degree of similarity between the owner's mark and the alleged infringing mark; (2) the strength of the owner's mark; (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase; (4) the length of time the defendant has used the mark without evidence of actual confusion arising; (5) the intent of the defendant in adopting the mark; (6) the evidence of actual confusion; (7) whether the goods, though not competing, are marketed through the same channels of trade and advertised through the same media; ((8) the extent to which the targets of the parties' sales efforts are the same; (9) the relationship of the goods in the minds of consumers because of the similarity of function; (10) other facts suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant's market, or that he is likely to expand into that market." Interpace Corp. v. Lapp, Inc., 721 F.2d 460, 463 (3d Cir. 1983).

Plaintiff argues that a lengthy discussion of the Lapp factors is not necessary because unlike the "typical trademark infringement case," Defendants are not using a similar trademark in relation to similar goods but redirecting Yellow Cab's customers to its competitors without its consent even though the customer had specifically requested Yellow Cab's service by dialing its trademarked phone number. Pl's Mot. T.R.O. p. 15.

The Court agrees with the Plaintiff that this is not a typical trademark infringement case; Plaintiff's Lanham Act claim is unlikely to succeed. Defendant PPA is not a competing taxicab dispatcher. PPA is an administrative agency charged by the state legislature with the goal of improving cab service in Philadelphia. Plaintiff cites no legal authority for the proposition that offering an alternative service to Plaintiff's customers

violates Plaintiff's trademark in the Yellow Cab name, color, or phone number. Defendants, through their hospitality initiative, are trying to improve customer service by offering customers an alternative if their prefered cab company is not available. Under this program, dispatchers tell customers that they have a choice: to wait for service from the cab company they initially called or be serviced by an alternative cab that is closer to their location. It then becomes the choice of the consumer whether to wait for service from Yellow Cab or whether to ask for quicker service from an alternative vendor.

Plaintiff's Lanham Act claim is unlikely to succeed because Plaintiff may not have standing to sue Defendants, who are not competitors, and Plaintiff cannot show a likelihood of consumer confusion.

(3) State Law Trade Secret Claim

Plaintiff also brings a trade secret claim. A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Den-Tal-Ez, Inc. v. Siemens Capital Corp., 566 A.2d 1214, 1228 (Pa. Super. Ct. 1989). To obtain relief for misappropriation of a trade secret, a plaintiff must show the following elements: "(1) that there was a trade secret; (2) that it was of value to employer [owner] and important in the conduct of his business; (3) that by reason of discovery of ownership the employer had the right to the use and enjoyment of the secret; and (4) that the secret was communicated to the employee while he was in a position of trust and confidence

under such circumstances as to make it inequitable and unjust for him to disclose it to others, or to make use of it himself, to the prejudice of his employer." A.M. Skier Agency, Inc. v. Gold, 747 A.2d 936, 940 (Pa. Super. Ct. 2000).

Plaintiff asserts that its customer list constitutes a trade secret because Pennsylvania courts routinely consider customer lists to be trade secrets. A closer look at Pennsylvania caselaw shows that not all customer data is entitled to protection. Instead, courts focus on the value of the customer list, asking whether the list represents a permanent and exclusive relationship between customers and the company. A.M. Skier Agency, 747 A.2d at 940.

Plaintiff's trade secret claim is unlikely to prevail on the merits for several reasons. First, it is unclear from the evidentiary record before the Court that Plaintiff's customer list qualifies as a trade secret. Plaintiff does not support its motion with evidence that Plaintiff uses this list to gain a competitive advantage. Given the nature of the taxicab industry, it seems unlikely that Plaintiff uses its customer list to solicit business. How would Plaintiff know which customers need to hire taxi cabs at any given point in time? The Court also doubts that the customer list has value to Plaintiff and is important in conducting its business because there is no evidence that the list represents a permanent and exclusive relationship between Plaintiff and its customers. Third, there is no evidence in the record that Plaintiff's customer list will be transmitted to its competitors. Although Plaintiff will be required to offer its customers the option of hiring a competing

taxi cab in some circumstance, Plaintiff's own dispatcher will arrange for the service. It is not likely that Plaintiff's competitors will therefore learn the customer's identity and use it to their competitive advantage by soliciting that customer in the future.

(4) State Law Tortious Interference Claim

To prevail on its claim, Plaintiff must show: "(1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct." Crivelli v. GMC, 215 F.3d 386, 394 (3d Cir. 2000). In determining whether the interference is improper, the Third Circuit sets forth the following factors to consider: "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties." Id. at 395.

Plaintiff may have a state law claim for interference with prospective contractual rights since the coordinated dispatch system will take away some of Plaintiff's customers in certain circumstances, e.g. when a Yellow Cab is too far away and the customer prefers

to hire a closer cab driver. However, some of the factors listed above weigh in Defendants' favor, as Defendants seek to improve hospitality and tourism in Philadelphia by created a centralized dispatch system to more effectively serve customers. The limited record before the Court suggests that Plaintiff could prevail on this claim.

B. Irreparable Harm to the Plaintiff

In addition to showing it is likely to prevail on the merits, Plaintiff must prove that injunctive relief is necessary to prevent irreparable harm. In the Third Circuit, irreparable injury is defined as a harm that cannot be redressed by a legal or equitable remedy following trial. M.Kelly Tillery v. Leonard & Sciolla, LLP, 437 F. Supp. 2d 312, 324 (E.D. Pa. 2006) *citing* Instant Freight Co. v. C.F. Air Freight, 882 F.2d 797, 801 (3d Cir. 1989). This injury cannot be "remote or speculative, but actual and imminent and for which monetary damages cannot adequately compensate." Id. (citation omitted).

Plaintiff bases its showing of irreparable harm on misappropriation of trade secrets and trademark infringement under the Lanham Act. Pl's Mot. T.R.O. pp. 19-20. The Court has already found that Plaintiff is unlikely to prevail on these claims. Plaintiff may be able to prevail on its regulatory takings claim; however, monetary compensation will adequately compensate Plaintiff for this injury, if the Court finds the regulation enacts a taking. Plaintiff may also prevail on its state law interference with prospective customer relationships claim. This harm too can be remedied through monetary damages. Moreover, this harm is speculative. Plaintiff's customers might not select a competitor's

cab. Additionally, any business Plaintiff loses may be compensated for by referrals from other cab companies. Plaintiff has not shown irreparable harm.

C. Irreparable Harm to the Defendants and to the Public Interest

If the Court grants Plaintiff's request for a T.R.O., it will impede Defendants' legislative mandate. The harm to the greater public interest weighs in favor of declining to grant the injunction. The legislature of the Commonwealth of Pennsylvania charged the PPA with improving taxi transportation in the City of Philadelphia in order to promote hospitality. Exempting Plaintiff from these requirements will harm the public interest, as Defendants' plan is intended to benefit the public.

IV. CONCLUSION

Since all four factors discussed above do not favor the granting of a T.R.O., Plaintiff's motion is denied. An appropriate Order follows.

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MCQ'S ENTERPRISES, INC., **t/d/b/a YELLOW CAB CO.,** **Plaintiff,**	: : : :	**CIVIL ACTION**
v.	: :	**NO. 07-0067**
PHILADELPHIA PARKING **AUTHORITY, et al.,** **Defendants.**	: : :	

O R D E R

AND NOW, this 11th day of January, 2007, upon consideration of Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction (Document No. 2) and after a hearing where both Plaintiff and Defendants presented argument, it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.