SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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GLYKA TRANS LLC; MICDEE LLC; CITY BOYS CORP.; MAMADY SANOU; MOHAMMOD KAYUM; YELLOW CAB SLSJET MANAGEMENT CORP.; and WINNERS GARAGE, INC.,

Petitioners,

v.

THE CITY OF NEW YORK; THE NEW YORK CITY TAXI AND LIMOUSINE COMMMISSION; and MEERA JOSHI, in her capacity as Chair of the New York City Taxi and Limousine Commission,

Respondents.

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Index No. 100578/2015

MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION

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PRELIMINARY STATEMENT

This case is about the arbitrary, discriminatory, and otherwise unlawful decision by the New York City Taxi & Limousine Commission (the "TLC") to allow non-medallion black cars, especially Uber cars, to pick up passengers via smartphone "e-hails."

The TLC's regulations expressly equate an e-hail with a conventional street hail. But the TLC nonetheless permits Uber cars and other non-medallion cars to be e-hailed, effectively eviscerating the hail exclusivity to which yellow medallion taxis have been entitled under state and local law for decades. The TLC's decision to allow companies like Uber to pick up e-hails – even though Uber is not required to shoulder the enormous financial burden of purchasing medallions and is not bound by the fare limitations and other significant restrictions that apply to yellow taxis in consideration for their hail exclusivity – enables Uber to compete unfairly with yellow taxis, dramatically altering the economics of the industry and robbing medallion owners of the basic entitlement the City sold them in exchange for hundreds of millions of dollars.

State and local law have long made clear that yellow medallion taxis (and in the outer boroughs, green cars) have the exclusive right to pick up passengers through hails, and that black cars may pick up passengers only through pre-arrangement. In exchange for the hail exclusivity that state and local law bestow upon yellow taxis, yellow taxi drivers must purchase or lease medallions (which cost owners hundreds of thousands of dollars to purchase, and which cost drivers thousands of dollars per month to lease), and they may not charge more than regulated meter rates. Black car drivers need not purchase or lease medallions, and they may charge passengers whatever the free market bears. But black cars may not pick up passengers through hails. If a passenger wants a black car, he or she must pre-arrange to be picked up at some point in the future.

An e-hail is a hail, not a pre-arrangement, for two basic reasons. First, e-hail apps enable passengers to hail vehicles immediately, not at some point in the future. A passenger cannot use Uber's app to pre-arrange to be picked up and taken to the airport on Thursday at noon. Uber's app only enables a passenger to request to be picked up immediately, just like a street hail. Second, Uber's app connects passengers and drivers directly and automatically, without a dispatcher, just like a street hail. Because e-hail apps hail cars immediately, not in the future, and because they do not use a dispatcher, e-hails are hails, not pre-arrangements.

The TLC recently confirmed that it agrees with this common-sense notion by promulgating rules that define and regulate the e-hailing of yellow taxis and green livery cars. Yellow taxis and green cars both are allowed to pick up street hails, but green cars are prohibited from picking up street hails in Manhattan south of East 96th Street or West 110th Street or at the airports. The new TLC rules sensibly define a "Hail" to include *both* street hails *and* e-hails, and they confirm that green cars may not accept either street hails or e-hails in the prohibited exclusionary zones. 35 RCNY § 51-03 (defining "Hail" to include any "request, either through verbal (audio) action such as calling out, yelling or whistling, and/or a visible physical action such as raising one's hand or arm, or though an electronic method such as an E-Hail App") (emphasis added); *id*. § 54-11(f). But although the TLC correctly recognizes that an e-hail is a hail, and although it correctly recognizes that it would violate yellow taxis' hail exclusivity in the exclusionary zones to allow green cars to pick up e-hails there, the TLC's rules nonetheless allow non-medallion black cars to pick up e-hails everywhere. That makes no sense and is fundamentally unfair.

Moreover, even if an e-hail were a pre-arrangement rather than a hail – though it is not – Uber's business model still would be unlawful for at least three reasons. First, Uber's e-hail app

calculates the distance of a trip through a crude and imprecise GPS system that does not meet the specification or inspection requirements for meters that apply to yellow taxis. Second, Uber connects passengers and drivers through a computer system that is independent of the six licensed base stations through which it operates in New York City. Uber therefore violates the TLC rules that require New York City black cars to be dispatched by their base station from the physical location of the base station. Third, Uber violates the TLC rules that require that all black cars must be owned either by a franchisee or by a member of a cooperative that operates the base station. Uber's drivers are neither franchisees nor cooperative members.

Nor did the TLC engage in the required environmental review under the State Environmental Quality Review Act ("SEQRA") and City Environmental Quality Review procedure ("CEQR") prior to exempting black cars from its e-hail rules, allowing over 14,000 Uber cars (more than the total number of yellow medallion taxis) to cruise the streets for e-hails with no analysis whatsoever of the impact of this massive and unprecedented increase in the number of hail vehicles on traffic, pollution, and other aspects of the City's environment.

The TLC's failure to apply its e-hail rules to black cars, and its inexplicable decision to turn a blind eye to Uber's failure to comply with the base station rules and to state and local environmental laws, effects an unconstitutional taking of medallion owners' property without just compensation. Throughout the years, the City has generated hundreds of millions of dollars in revenue by auctioning taxi medallions that entitle their owners to hail exclusivity. Medallions are a transferrable commodity that until recently were worth over $1 million each – and which lenders routinely accepted as collateral for large and otherwise unsecured loans – precisely because the hail exclusivity that the City created and sold is so valuable. By allowing non-medallion black car companies to pick up e-hails, the City has severely compromised the

investment-backed expectations of the medallion taxi industry, including both the owners who invested in medallions and the lenders who provided financing relying upon the reasonable expectation that the City would not change rules that have become part of the fabric of New York City in the middle of the game.

The TLC's arbitrary scheme also hurts both the Metropolitan Transportation Authority and the effort to accommodate people with disabilities because black car companies like Uber are exempt from the obligation to pay either the MTA tax or the accessibility surcharges that apply to yellow taxi fares. The TLC's new requirement that half of all yellow taxis must become accessible by 2020 does not apply to black cars.

The consequences of the TLC's decision to allow non-medallion black car companies like Uber to compete on a radically uneven playing field, and to flout the basic rules that apply to everyone else, are difficult to overstate. During the last two years, e-hail apps have become prevalent, and soon they will be ubiquitous. Under the TLC's arbitrary and discriminatory scheme, driving for Uber is more attractive than driving a yellow taxi. Driving for Uber is cheaper because Uber drivers need not shoulder the financial burden of purchasing or leasing a medallion. And unlike yellow taxi drivers, Uber drivers are not limited to accepting the regulated, metered-fare rates. Uber drivers benefit from the "surge" pricing that Uber charges when demand for its vehicles increases. Not surprisingly, cab drivers are flocking from yellow taxis to Uber black cars, the medallion taxi industry is suffering from a historic driver shortage, and the value of medallions is plummeting. Unless the TLC complies with state and local law and applies its rules to companies like Uber, yellow medallion taxis will soon become extinct.

STATEMENT OF FACTS

A. Yellow Taxi Hail Exclusivity and the Onerous Restrictions that Accompany It

There are two basic categories of vehicles that are available for hire in New York City: (i) yellow medallion taxis and (ii) non-medallion for-hire vehicles.

Yellow medallion taxis generally have the exclusive right to pick up hails in New York City. *See* N.Y.C. Admin. Code § 19-502(l) (defining a "taxi" as a "motor vehicle carrying passengers for hire in the city . . . and permitted to accept hails from passengers in the street"). Yellow taxis may pick up hails anywhere. Green cars (also known as "street-hail livery" vehicles, which were created in 2011 in order to service demand for street hails in the outer boroughs, and which are not required to have medallions) are prohibited from picking up hails in Manhattan south of East 96th Street or West 110th Street or at the airports but may pick up hails outside these excluded zones. N.Y. Tax L. § 1280(o); 35 RCNY § 82-13; *id.* § 51-03.

The 2012 state law creating the green outer borough hail cars confirms that "it shall remain the exclusive right of existing and future [yellow medallion] taxicabs licensed by the TLC as a [yellow medallion] taxicab to pick up passengers via street hail" in the excluded zones. Chapter 602, Laws of New York 2012, § 11 (amending Ch. 602 of Laws of New York 2011).

There are several subcategories of for-hire vehicles, including black cars, livery vehicles, and luxury limousines. *See* 35 RCNY §§ 59A-03(b), (j), (l); N.Y.C. Admin. Code § 19-502. This case focuses on black cars because nearly all of the cars that Uber operates in New York City are black cars; Uber operates no livery vehicles and relatively few luxury limousines. Black cars are strictly prohibited from picking up hails anywhere in New York City, whether in the green car excluded zones or not. Black cars (like all for-hire vehicles, including livery vehicles and luxury limousines) may pick up passengers only by pre-arrangement. *See* Chapter

602, Laws of New York 2012, § 11 (amending Ch. 602 of Laws of New York 2011) ("No driver of any for-hire vehicle shall accept a passenger within the city of New York by means other than a pre-arrangement with a base station . . . ."); 35 RCNY § 55-19(a) (black car drivers "must not solicit or pick up Passengers other than by prearrangement through a licensed Base").

In exchange for the hail exclusivity to which yellow taxis are entitled under state and local law and the TLC's rules, yellow taxis are subject to numerous burdensome restrictions that do not apply to black cars. Most importantly, a yellow taxi must have a medallion – the metal plate issued by the TLC that must be affixed to the hood of a taxi and display its license number. Medallions are a transferrable commodity that until recently were worth over $1 million each precisely because the hail exclusivity that accompanies them is so valuable. Because medallions are so expensive, most of them are financed, and the debt service – often thousands of dollars per month – typically is among the most significant expenses of a medallion owner.[1]

In addition to the medallion requirement, taxis are subject to numerous other restrictions that do not apply to not apply to black cars. For example:

- Yellow taxi drivers may charge passengers only the rates set by the TLC (*Id.* § 58-26).
- Medallion owners may lease yellow taxis to drivers only within the lease caps set by the TLC (*Id.* § 58-21).
- Yellow taxis must be one of the few vehicle models that are approved by the TLC (*Id.* §§ 67-04 to 67-06).
- Yellow taxis must be hacked up to comply with TLC requirements for a variety of features, including paint, finish, lighting, upholstery, seats, windows, air conditioner, and roof lights (*Id.* §§ 67-06 to 67-17).

[1] Daily shift vehicles lease for between $105.00 and $129.00 per 12-hour shift, which includes both the vehicle and the lease. 35 RCNY § 58-21(c). For those drivers who lease so-called "driver-owned vehicles," medallions lease for between $952.00 and $1,114.00 per week. *Id.*

- Yellow taxis must be equipped with taximeters, partitions, in-vehicle camera systems, credential holders, and "T-PEP" taxicab technology systems, all of which must comply with TLC specifications (*Id.* §§ 67-09 to 67-15).

- Yellow taxis must be retired from service after specified lengths of time as short as three years (*Id.* § 67-18).

- Yellow taxi drivers must have a Taxicab Driver's License, which, among other prerequisites, requires completion of the 80-hour Authorized Taxicab Training course (*Id.* § 54-04).

- Yellow taxi drivers must collect and make available to the TLC through the T-PEP system detailed trip records, including locations, times, number of passengers, and method of payment (*Id.* § 58-22).

- Yellow taxi drivers must pay a Taxi Accessibility Fee as set by the TLC (*Id.* § 58-16(f)).

- Yellow taxi drivers must collect and provide to the TLC a Taxi Taxicab Improvement Surcharge of thirty cents per trip to subsidize taxicab accessibility (*Id.* § 58-16(g)).

- Yellow taxi drivers must collect an MTA Tax of fifty cents per trip, which is provided to the Metropolitan Transportation Authority to fund its operations (*Id.* §§ 58-03(x), 58-26(a)(3)).

- Recently promulgated regulations require that half of all yellow taxis must be accessible to people with disabilities beginning in 2016 (*Id.* § 58-50).

In stark contrast, black cars are not subject to any of the above restrictions that apply to yellow taxis. For example:

- Black cars may charge rates higher than those set by the TLC for yellow taxis and need only file a rate schedule with the TLC (*Id.* § 59B-23).

- Black cars are not subject to lease caps.

- Black cars need not be a vehicle model that the TLC has approved.

- Black cars need not be "hacked up," as they are not required to be equipped with taximeters, partitions, or technology systems (*Id.* §§ 59A-31 to 33).

- Black cars are not subject to mandatory retirement until they are a minimum of five years old, and many are not subject to mandatory retirement at all (*Id.* § 59A-28(d)).

- Black car drivers need only a For-Hire Driver's License, which does not require completion of the 80-hour Authorized Taxicab Training course (*Id.* § 55-04).

- Black cars are not required to collect MTA taxes, Taxi Accessibility Fees, or Taxicab Improvement Surcharges.[2]

- Black cars need not be accessible to persons with disabilities.

There thus is a clearly delineated trade-off. The hail exclusivity to which yellow taxis are entitled is economically valuable. But the significant economic benefit of hail exclusivity comes with the significant cost of purchasing or leasing a medallion and the many other onerous restrictions that apply to yellow taxis but not to black cars. The extent to which operating a yellow taxi is preferable to operating a black car is reflected in the market price of a medallion.

B. The City Generates Hundreds of Millions of Dollars In Revenue By Auctioning Medallions With the Promise of Hail Exclusivity

The City has received hundreds of millions of dollars in revenue from selling taxi medallions in recent years. The City auctioned taxi medallions for the first time in 1996 and 1997, realizing approximately $85 million in revenue from the sale of 400 medallions. Affirmation of Daniel Mullkoff, March 31, 2015 ("Mullkoff Aff."), Ex. 1. Between 2006 and 2014, the City auctioned approximately 1,450 more medallions, generating an additional approximately $824 million in revenue. *See* Mullkoff Aff., ¶ 38. On top of that nearly $1 billion in revenue, the City reaps a five percent transfer tax on sales of medallions between private individuals. N.Y.C. Admin. Code §§ 11-1401 *et seq*. The City created this lucrative market and generated these very substantial revenues by selling the promise of hail exclusivity to those who purchased and/or repurchased medallions.

[2] Thus, every fare that a black car e-hail diverts from a yellow taxi reduces the MTA's revenue by fifty cents and the accessibility fund by thirty cents.

C. The Rise of Uber's Illegal E-Hailing Service

Against this regulatory backdrop, companies like Uber recently began offering services that enable passengers to hail vehicles electronically by using a smartphone application. Smartphone e-hails have the potential to create significant efficiencies by connecting passengers to drivers directly and immediately.

The TLC was quick to recognize this potential. In late 2012, it created a pilot program through which yellow taxis and green cars were permitted to accept e-hails through smartphone apps subject to certain rules. Mullkoff Aff., Ex. 2. The TLC concluded that the pilot program was a success and, in January 2015, approved permanent e-hail rules that permit yellow taxis and green cars to pick up e-hails through TLC-regulated smartphone apps. *Id.*, Ex. 3.

Uber's service does the same thing but with black cars rather than taxis. Uber's users provide their credit card information in advance when they first download and install the app. When a user is ready to travel, the Uber app displays a map showing the user the precise locations of available cars and provides the approximate travel time of the closest available car to the user's location. If the user e-hails a car, the e-hail is immediately and automatically transmitted to the available cars in the vicinity. There is no dispatcher, and there is no time lag between the user's push of the button and the drivers' receipt of the e-hail. Uber's app does not enable a passenger to pre-arrange to be picked up at some point in the future. An Uber user is able to hail a car only for immediate pickup. *Id.*, Ex. 4 (Uber website stating that "Uber is always booked on-demand by making a request through the app" and that "[w]e automatically connect you with the closest driver to get you picked up as quickly as possible").

An e-hail is a hail, not a pre-arrangement. With an e-hail, as with a conventional street hail, a passenger looking for a cab signals to drivers who are in the area – whether through the

wave of a hand or by pushing a button on a smartphone screen – that he or she wishes to be picked up immediately. In both situations, the passenger interacts directly with the driver, not with a dispatcher. In neither situation is the passenger pre-arranging to be picked up at some point in the future. Indeed, the primary reason why Uber is so attractive to passengers is that the wait time is *de minimis*. Uber boasts that the median wait time for its vehicles is just 2 minutes and 25 seconds in Manhattan and 3 minutes and 8 seconds in the other boroughs. *Id.*, Ex. 5.

Nearly all of Uber's drivers drive black cars.[3] None of Uber's black cars is subject to the medallion requirement, the fare and lease caps, or the numerous other onerous restrictions that apply to yellow taxis and green cars. Indeed, Uber's black cars are free to charge passengers whatever they want. During peak demand times, Uber subjects passengers to "surge" pricing, charging them a multiple of its standard rates. *See id.*, Ex. 10. And Uber is not required to pay either the MTA tax or the accessibility surcharge – each of which increases yellow taxi fares.

When Uber first entered the New York City market, it took the strained position that it was not subject to the TLC's jurisdiction and was not required to comply with any of the TLC's base station or other licensing requirements, asserting that it supposedly was a mere technology company that provided no actual transportation services. *See id.*, Ex. 11. Uber eventually relented – accepting that its cars, drivers, and passengers do not travel in a virtual world but rather in a physical world of real streets, populated by real vehicles and real people – and associated its service with six licensed base stations through which its cars operate. *See id.*, Exs.

[3] Uber's "UberT" service, which permits e-hailing of medallion taxis, is a very small part of its New York City business and is not at issue here. Uber operates a small number of luxury limousines and no livery vehicles. *See* Mullkoff Aff., Exs. 6, 7 (noting that Weiter LLC, Hinter LLC, Schmecken LLC, Danach-NY LLC, and Unter LLC are black car bases owned by Uber); Exs. 8, 9 (noting that Grun LLC is a luxury limousine base owned by Uber).

6, 8. But even if e-hails were pre-arrangements rather than hails, Uber's service still violates the TLC's black car base station rules in several ways.

First, Uber connects passengers and drivers through a computer system that is independent of the licensed black car base stations through which it operates in New York City. Uber therefore violates the rules that require New York City black cars to be dispatched "through" and "*from*" the "physical location" of their base station. 35 RCNY § 55-03(h) (providing, for all for-hire vehicles, that a black car's base station "is the Commission-licensed business for dispatching For-Hire Vehicles and the physical location from which For-Hire Vehicles are dispatched"); *id.* § 59A-03(e) (same); *id*. § 59B-03(f) (same); *id*. § 59A-03(c) (a black car base station must be the "central dispatch facility"; *id*. § 59B-03(c) (same); *id*. § 55-19(a) (black car pre-arrangements must be made "through a licensed Base"); *id*. § 59A-11(e)(3) (emphasizing with *italics* that a black car must be "dispatched *from* its affiliated Base") (emphasis in original); *id*. § 59B-15(a) (a black car base station "must maintain a principal place of business in a commercially zoned area, from which affiliated Vehicles and Drivers can be dispatched"); *id*. § 59B-15(d) ("no For-Hire Vehicle can be dispatched from any location other than the location specified in the Base License").

Second, Uber violates the TLC's rules requiring that all black cars must be owned either by a franchisee or by a member of a cooperative that operates the base station. *Id*. §§ 55-03(d)(2), 59A-03(c)(2), 59B-03(c)(2), 59B-08(b). Uber's drivers are neither franchisees nor cooperative members.

Uber's drivers also rate their passengers, and a passenger's rating is visible to a driver before the driver accepts the passenger's e-hail. Mullkoff Aff., Exs. 12, 13; Verified Petition ¶¶

83, 119. This rating system invites drivers to violate 35 RCNY § 55-20, which prohibits black car drivers from refusing to pick up passengers except under narrowly prescribed circumstances.[4]

In the short period since it entered the New York City market, Uber has expanded rapidly. Although Uber has strenuously resisted disclosing its data to the TLC as the TLC's regulations require of all black car companies, 35 RCNY § 59B-19(a), the three months of trip data that Uber recently (and belatedly) disclosed demonstrate that its number of rides per day rose by a third – from 25,681 to 34,271 – in just 90 days. Mullkoff Aff., Ex. 15. (According to that same data, the smartphone hailing app Lyft provided an average of 3,866 rides per day in September 2014, which was just its second full month operating in New York City. *Id.*) Uber CEO Travis Kalanick asserted in January 2015 that the number of Uber rides in New York City is quadrupling each year. *Id.*, Ex. 16. Uber reported in January 2015 that there were approximately 16,000 drivers in New York City actively accepting hails through the Uber app, *id.*, Ex. 17 at 15, and Uber plans to add 10,000 additional drivers in 2015. *Id.*, Ex. 18. There are now approximately 14,088 for-hire vehicles affiliated with Uber bases in the city – more than the 13,587 taxi medallions in circulation. *Id.*, Ex. 19.

Since Uber began operating in New York City, it has repeatedly violated the TLC's regulations. For example, when Uber first entered the New York City market, it took the strained position that it was not subject to the TLC's jurisdiction and did not need to operate through licensed drivers or through licensed base stations. *See id.*, Ex. 11. After it reluctantly

[4] Uber's User Terms and Conditions emphasize that Uber is "a technology platform" that "does not provide transportation" services "or function as a transportation carrier." Mullkoff Aff., Ex. 14. "Uber has no responsibility or liability" to passengers "relating to any transportation" provided by its black car drivers. *Id*. Uber's passengers are required to acknowledge and agree that they "may be exposed to situations involving" black car drivers "that are potentially unsafe, offensive, harmful to minors, or otherwise objectionable," and that passengers use Uber's e-hail app at their "own risk and judgment." *Id*. Uber "shall not have any liability arising from or in any way related to" any injuries that a passenger may sustain. *Id*.

agreed to operate through licensed drivers and licensed base stations, Uber then refused to release its trip data to the TLC, complying only after the TLC suspended five of Uber's six New York City bases and Uber's appeal of that decision was rejected. *Id.*, Ex. 20. A TLC spokesperson stated that Uber was denied a license for an additional base in New York City because "they are unfit to hold an additional license based on [a] history of non-compliance with respect to other base licenses they hold." *Id.*, Ex. 21.[5]

D. The City Arbitrarily Exempts Black Cars From Its Regulation of E-Hails

In 2013, the TLC began a pilot program through which yellow taxis and green cars were permitted, on a temporary and experimental basis, to use e-hail apps to pick up passengers. On or about January 29, 2015, the TLC declared the pilot program a success and promulgated a set of rules that govern e-hails on a permanent basis. Mullkoff Aff., Ex. 3.

The new rules sensibly provide that an e-hail is a hail. TLC Rule 51-03 defines an "E-Hail" as "a Hail made through an E-Hail application." 35 RCNY § 51-03. A "Hail" is in turn defined as any "request, either through verbal (audio) action such as calling out, yelling or whistling, and/or a visible physical action such as raising one's hand or arm, *or though an electronic method such as an E-Hail App*" (emphasis added). Thus, the new rules treat a

[5] Uber's non-compliance with the TLC's regulatory scheme is consistent with allegations that the company has disregarded government regulation in numerous other cities in which it operates. *See, e.g.*, Mullkoff Aff., Ex. 22 ("Uber has a reputation for ignoring government regulations, choosing instead to deal with legal issues after its services have become established in an area. In the past it's received cease-and-desist letters from Boston, LA and Pittsburgh, among others."), Ex. 23 (describing lawsuits brought against Uber by cities of Los Angeles, San Francisco, and Portland). A Wall Street Journal article quoted Uber CEO Travis Kalanick describing Uber's dismissive attitude toward a cease-and-desist letter served on the company by the San Francisco Municipal Transportation Agency: "The thing is, a cease and desist is something that says, 'Hey, I think you should stop,' and we're saying, 'We don't think we should.' The only way to deal with that is to be taken to court, and we never went to court." *Id.*, Ex. 24.

conventional hail and an e-hail the same way. Whether one hails a cab by waving, yelling, whistling, or pressing a button on a smartphone screen is immaterial.

Further demonstrating its agreement that an e-hail is a hail, the TLC issued a rule confirming that green cars, which are not permitted to accept street hails south of East 96th Street or West 110th Street in Manhattan or at the airports, likewise may not accept e-hails in those excluded zones. *See* 35 RCNY § 54-11(f) (confirming that green cars may "accept passengers by hail from the street *or by E-Hail App* only in the Hail Zone") (emphasis added).

Without any explanation, however, the TLC arbitrarily defined "Hail" to exclude all non-medallion black cars. The definition of "Hail" includes e-hails, but *only* those e-hails requesting on-demand "Taxicab or Street Hail Livery service at the metered rate of fare" ("Taxicab" being a defined term meaning yellow taxi, and "Street Hail Livery" service being a defined term meaning green car). For some unknown reason – the TLC did not explain its reasoning – the TLC chose to exempt all black cars from its rules subjecting e-hails to all of the restrictions that apply to conventional hails.

The TLC likewise engaged in no environmental impact review before exempting black cars from its e-hail rules, notwithstanding the massive increase in the number of for-hire vehicles cruising the City's streets for hails.

E. The Economic Harm to Medallion Owners

Uber's explosive growth and brazen encroachment upon the hail exclusivity that belongs to medallion owners have caused Petitioners to suffer very significant economic harm, both to the value of their medallions and to their incomes.

The average price of a medallion rose steadily for decades until the spring of 2013, when it reached a peak of $1,320,000 for corporate medallions and $1,045,000 for individual

medallions. Mullkoff Aff., Ex. 25. The average price of a medallion has dropped at least 25% since then, and it continues to fall. *Id.*, Ex. 26.

During the same period, yellow taxis have faced steadily declining passenger numbers and revenues. According to data maintained by the TLC, the average number of yellow taxi trips per day decreased by approximately 8% between 2012 and 2014, and by approximately 5.3% just between 2013 and 2014. *Id.*, Ex. 27. The Petitioners in this case have been hit hard. The amount medallion owners can charge lessees and leasing agents, the average number of trips per shift, and drivers' incomes are all down sharply. Verified Petition, ¶¶ 13-41; Mullkoff Aff., Ex. 28 (yellow taxi fares dropped by approximately $80 million from 2013 to 2014). Lenders are beginning to foreclose on medallion owners who no longer can service the loans they took out to buy the medallions from the City. *See, e.g.*, *id.*, Ex. 29 (showing that Citibank is now foreclosing on at least 90 medallions owned by one individual). Petitioners also face an acute shortage of drivers because thousands of yellow taxi drivers have left, opting instead to drive for Uber. Verified Petition, ¶¶ 29, 34-36, 39-41; Mullkoff Aff., Ex. 30.[6]

ARGUMENT

I. THE TLC'S DECISION TO ALLOW BLACK CARS TO ACCEPT E-HAILS IS ARBITRARY AND CAPRICIOUS, AN ERROR OF LAW, AND A FAILURE TO PERFORM A MANDATORY DUTY

The Court of Appeals has long made clear that administrative agencies such as the TLC are duty-bound to achieve "consistent results" with respect to similarly situated parties. *Matter of Charles A. Field Delivery Serv., Inc*., 66 N.Y.2d 516, 519 (1985). The "underlying precept is

[6] Numerous Uber drivers have alleged that Uber has lured drivers to the company by making false representations about average earnings and other employment conditions. *See, e.g.*, *id.*, Ex. 31 (describing disparity between Uber's representations about median driver income and actual incomes); Ex. 32 (describing multiple class-action lawsuits brought by drivers against Uber).

that in administrative, as in judicial, proceedings justice demands that cases with like antecedents should breed like consequences." *Id*. (quotation omitted); *see also Buffalo Civic Auto Ramps, Inc. v. Serio*, 21 A.D.3d 722, 725 (1st Dep't 2005) ("Where two cases are so similar as to require the same treatment, to treat them differently would be evidence that the determination should be considered arbitrary and capricious."); *Frank Lomangino & Sons, Inc. v. City of New York*, 980 F. Supp. 676, 681 (E.D.N.Y. 1997) ("One of the principles that the New York Court of Appeals has enunciated within the folds of Article 78 is a robust form of equal protection, namely that administrative agencies must treat similarly situated applicants consistently."); *Hamptons, LLC v. Zoning Bd. of Appeals of Inc. Vill. of E. Hampton*, 98 A.D.3d 738, 739 (2d Dep't 2012) ("A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the determination.") (citations omitted).

There is no rational explanation for the TLC's decision to bestow a wholesale exemption upon black cars from its rules otherwise providing that e-hails are treated the same way as conventional hails. The availability of e-hailing apps does not change the basic nature of the taxi business. E-hailing apps are convenient mechanisms for vehicle dispatch and fare payment, nothing more. Companies like Uber cannot be permitted to use e-hail apps as a basis for ignoring the clear rules that establish what the various categories of vehicles are permitted to do and which are supposed to apply neutrally to all of the industry's players.

The TLC understands that an e-hail is a hail, not a pre-arrangement. A pre-arrangement is a request for service at some point in the *future*. Although reasonable people might disagree about exactly how far into the future a passenger must be booking a trip for it to constitute a pre-

arrangement as opposed to a hail, surely an electronic request for *immediate* pickup – made directly and automatically by a passenger to a driver without a dispatcher – is not a pre-arrangement. Because this conclusion is inescapable, the TLC confirmed through its new rules that an e-hail generally must be treated the same way as a conventional hail, regardless of whether it is made by "calling out, yelling or whistling," by "raising one's hand or arm," or "though an electronic method such as an E-Hail App." 35 RCNY § 51-03.

The TLC's rules governing black car base stations further confirm that an e-hail is not a pre-arrangement. Black car drivers must be affiliated with a licensed black car base station. 35 RCNY § 59A-11(e). The rules require that, for all pre-arranged black car trips, the car must be dispatched "through" and "*from*" the "physical location" of its base station. 35 RCNY § 55-03(h) (providing, for all for-hire vehicles, that a black car's base station "is the Commission-licensed business for dispatching For-Hire Vehicles and the physical location from which For-Hire Vehicles are dispatched"); *id.* § 59A-03(e) (same); *id*. § 59B-03(f) (same); *id*. § 59A-03(c) (providing that a black car base station must be the "central dispatch facility"; *id*. § 59B-03(c)(same); *id*. § 55-19(a) (providing that black car pre-arrangements must be made "through a licensed Base); *id*. § 59B-15(a) (providing that a black car base station "must maintain a principal place of business in a commercially zoned area, from which affiliated Vehicles and Drivers can be dispatched"); *id*. § 59B-15(d) (providing that "no For-Hire Vehicle can be dispatched from any location other than the location specified in the Base License"). Lest there be any doubt about whether these regulations mean what their plain language says, the TLC italicized the word "*from*" in requiring that black cars be "dispatched *from* its affiliated Base" in § 59A-11(e)(3).

By contrast, Uber's e-hail app connects the passenger and driver directly and automatically. *See* Mullkoff Aff., Ex. 4. The base station plays no role in the e-hail process. Because an e-hail is not dispatched through the base station, and because it is not dispatched from the physical location of the base station, an e-hail is not a pre-arrangement.

Not only do the TLC's pre-existing base station rules confirm that an e-hail is not a pre-arrangement, and not only did the TLC recognize in its new rules that an e-hail is a hail, but the TLC expressly confirmed that, because an e-hail is a hail, green cars cannot accept e-hails in the excluded zones in which they are prohibited from accepting conventional hails. 35 RCNY § 54-11(f) (confirming that green cars may "accept passengers by hail from the street or by E-Hail App only in the Hail Zone"). The TLC plainly understands that it would untenably undermine the hail exclusivity to which yellow taxis are entitled in the excluded zones if green cars were permitted to pick up e-hails where they are prohibited from picking up conventional hails. The same logic applies to e-hails of black cars.

Yet the TLC inexplicably chose not to protect yellow taxi hail exclusivity from black car e-hailing. That makes no sense. If an e-hail is a hail – which it plainly is, as the TLC's own rules reflect – then there is no rational reason to allow black cars, which are not allowed to pick up hails anywhere, to pick up e-hails everywhere. Nor has the TLC offered any reason for the gaping exemption to the new e-hailing rules that it bestowed upon the black car industry. Without comment or explanation, the TLC arbitrarily defined "Hail" to exclude all non-medallion black cars. The definition of "Hail" includes e-hails, but *only* those e-hails requesting "Taxicab or Street Hail Livery service at the metered rate of fare" ("Taxicab" being a defined term meaning yellow taxi, and "Street Hail Livery" service being a defined term meaning green car). That makes as much sense as defining "speeding" to include the act of exceeding the

applicable speed limit in yellow taxis but not black cars. It falls well short of the reasoned decision-making that the law demands of administrative agencies.

In *Buffalo Civic Auto Ramps, Inc. v. Serio*, 21 A.D.3d 722 (1st Dep't 2005), the petitioner company challenged the reclassification by the Superintendent of Insurance of the petitioner's parking ramp cashiers as automobile drivers rather than clerical office employees. The First Department held that the Superintendent's decision was arbitrary and capricious, explaining that there was "no appreciable distinction" between the petitioner's and other similarly situated cashiers. *Id*. at 725. The Court reaffirmed that "[w]here two cases are so similar as to require the same treatment, to treat them differently would be evidence that the determination should be considered arbitrary and capricious." *Id.*

In *Callanan Indus. Inc. v. Rourke*, 187 A.D.2d 781 (3d Dep't 1992), the petitioner challenged a determination by the Planning Commission of the City of Troy requiring the submission of an environmental impact statement before its application to relocate an asphalt plant would be approved. The Third Department acknowledged that the "Planning Commission's determination was supported by substantial evidence and, viewed in isolation, was not arbitrary and capricious," but held that the decision was arbitrary and capricious nonetheless because the Planning Commission had recently approved "a site plan for a similar asphalt plant using the same process as petitioner's plant and within the same industrial zone" and had thus "reach[ed] a contrary result on essentially the same facts." *Id.* at 781-84. *See also Hamptons, LLC v. Zoning Bd. of Appeals of Inc. Vill. of E. Hampton*, 98 A.D.3d 738, 739-40 (2d Dep't 2012) (holding that Zoning Board's imposition of conditions on special use permit for restaurant was arbitrary and capricious because it had approved an application that was "substantially similar" and provided no explanation as to the discrepancy). .

There is no rational basis for prohibiting green cars from picking up e-hails where they may not pick up street hails, while giving black cars free reign to pick up e-hails even where they may not pick up street hails. The TLC's decision to exempt black cars from its decision that an e-hail is a hail is thus arbitrary and capricious and an error of law. State and local law make clear that the TLC has no discretion to allow non-medallion black cars to pick up hails with impunity. Chapter 602, Laws of New York 2012, § 11 (amending Ch. 602, Laws of New York 2011) (2012 state law creating green cars, which reaffirmed that "it shall remain the exclusive right of existing and future [yellow medallion] taxicabs licensed by the TLC as a [yellow medallion] taxicab to pick up passengers via street hail" in the excluded zones); N.Y.C. Admin. Code § 19-507(a)(4) (entitled "Mandatory penalties" and requiring that the TLC "*shall* fine any driver, or suspend or revoke the driver's license of any driver" of a non-medallion black car who picks up a passenger other than by "prearrangement"). The TLC should be directed to enforce its e-hail rules against black cars.[7]

II. THE TLC'S DECISION TO EXEMPT BLACK CAR E-HAIL METER SYSTEMS FROM ITS SPECIFICATION AND INSPECTION RULES IS ARBITRARY AND CAPRICIOUS, AN ERROR OF LAW, AND A FAILURE TO PERFORM A MANDATORY DUTY

The TLC regulates the manner in which yellow medallion taxi meters calculate fares based on distance and time. Yellow taxi meters must comply with Handbook 44 of the United States Department of Commerce National Institute of Standards and Technology, which sets forth specifications, tolerances, and other technical requirements for weighing and measuring

[7] In addition to violating these state and local statutes, and in addition to being arbitrary and capricious, the TLC's decision to allow black cars to pick up e-hails also violates the New York City Charter, which provides that "Additional taxicab licenses may be issued from time to time only upon the enactment of a local law providing therefor." NYC Charter § 2303(b)(4). By permitting black cars to accept e-hails anywhere in the city, the TLC has effectively expanded dramatically the number of medallions in circulation without legislative authorization.

devices. 35 RCNY § 58-26(a)(1)(iv). All taxi meters must be tested by authorized TLC inspectors upon installation and again on an annual basis. *Id*. § 58-39(e). The TLC imposes these stringent specification and testing and requirements because it recognizes that it is of paramount importance to ensure that passengers are being charged appropriate fares based on the actual distance travelled. Because the TLC understands that e-hail apps that are not subject to the rigorous requirements of Handbook 44 and that have not been tested may not be reliable, the TLC's new e-hail rules specifically prohibit the use of e-hail apps to compute distance traveled. Only an approved and regularly inspected taxi meter may be used to compute distance. 35 RCNY §§ 54-17(m)(2), 58-26(j)(2), 78-21(b)(2), 82-26(j)(2).

Without explanation, however, the TLC has exempted Uber's black cars from this important requirement, allowing Uber's unregulated and uninspected e-hail app – which apparently relies on rudimentary, imprecise GPS data – to compute the distance traveled for each trip. That is arbitrary and capricious. The TLC cannot credibly contend that there is any sound reason for strictly prohibiting yellow taxis from using e-hail apps to compute distance but nonetheless giving black cars free reign to do so.

III. THE TLC'S DECISION TO ALLOW UBER TO VIOLATE ITS BASE STATION DISPATCH AND FRANCHISE/COOPERATIVE REQUIREMENTS IS ARBITRARY AND CAPRICIOUS, AN ERROR OF LAW, AND A FAILURE TO PERFORM A MANDATORY DUTY

A. Base Station Dispatch Rules

Even assuming for the sake of argument that an e-hail is a pre-arrangement rather than a hail – though it is not – e-hail apps such as Uber's nonetheless violate the TLC's longstanding rules for black-car bases. As discussed in the previous section, in order for a trip to be a valid pre-arrangement such that a black car is allowed to pick up a passenger, the car must be dispatched "through" the base station and "*from*" the "physical location" of the base station. *See*

supra at 17 (citing 35 RCNY §§ 55-03(h), 59A-03(e), 59B-03(f), 59A-03(c), 59B-03(c), 55-19(a), 59A-11(e)(3) (emphasis in original), 59B-15(a), and 59B-15(d)). But Uber's e-hail app connects the passenger and driver directly and automatically. The base station plays no role in the e-hail process. Because an e-hail is not dispatched "through" the base station, and because it is not dispatched "*from*" the "physical location" of the base station, Uber's e-hails violate the TLC's longstanding rules for black-car bases.

The mandatory language in the numerous regulations cited above confirms that the TLC has no discretion to allow Uber to ignore the TLC's black car base station dispatch requirements with impunity. The TLC should be directed to enforce its base station dispatch rules against Uber.

B. Base Station Franchise/Cooperative Rules

Uber also violates the TLC's rules requiring that all black cars must be owned either by a franchisee or by a member of a cooperative that operates the base station. *Id*. §§ 55-03(d)(2), 59A-03(c)(2), 59B-03(c)(2), 59B-08(b). Uber's drivers are neither franchisees nor cooperative members.

Just as there are significant trade-offs between owning yellow medallion taxis versus non-medallion for-hire vehicles, so too are there significant trade-offs between owning black cars versus livery vehicles or other categories of non-medallion for-hire vehicles. For example, livery vehicle base stations must maintain a parking space for every two cars with which it is associated. RCNY §§ 59B-15(j)(2), 59B-05(b), 59B-21(e). Uber does not wish to operate livery vehicles through livery base stations because it does not wish to shoulder the cost of maintaining some 8,000 parking spaces for its nearly 16,000 cars. So Uber operates black cars through black car base stations, which are not subject to this parking space requirement. But Uber must not be

permitted to have its cake and eat it too. Uber cannot both operate black cars through black car base stations, thereby avoiding the parking space requirement that applies to livery vehicles, and also ignore the franchise and/or cooperative ownership requirements that apply to black car divers and black car base stations.

The TLC has repeatedly emphasized the importance of strictly enforcing the restrictions that constrain the manner in which black car and livery vehicles may operate. The TLC specifically prohibits the "cross-class dispatching" of for-hire vehicles (for example, livery bases dispatching black cars or vice versa) because "cross-class dispatching erodes the distinction between Livery service and Black Car service." Mullkoff Aff., Ex. 33. The TLC has explained:

> To reflect the fact that Livery bases serve their surrounding communities, the Administrative Code sets extensive requirements for bases that can dispatch Livery vehicles, and Black Car bases do not meet these requirements. For example, the Administrative Code requires bases that dispatch Livery vehicles to maintain off-street parking and affiliate a minimum number of vehicles. These requirements were meant to ensure that a Livery base serving a community had enough vehicles to provide the needed service and enough parking available for these vehicles as not to encumber the community's ability to find street parking of its own. Black Car bases do not meet these requirements and allowing them to dispatch Livery vehicles subverts the intent of the Administrative Code.

Id. Directly tying this concern to the increasing prevalence of e-hail technology, the TLC explained more recently that "[t]he purpose of the cross-class dispatch prohibition is to preserve important vehicle class distinctions" required by statute "*that were becoming blurred by the spread of smartphone applications*." *Id.*, Ex. 34 (emphasis supplied). The TLC thus recognizes that companies like Uber may not pick and choose which of the various black car and livery vehicle base station requirements they wish to heed and which requirements they wish to ignore.

It is notable that Uber's black car base stations are by far the largest base stations in the City. The largest base station that is not affiliated with Uber has 390 vehicles associated with it, whereas Uber's base stations have between 1,278 and 4,798 vehicles associated with them for a

total of approximately 13,408 affiliated vehicles – approximately 61% of the total black cars. Mullkoff Aff., Ex. 7. The TLC is not just unlawfully allowing Uber to violate its base station rules with impunity. It is allowing Uber to do so on an enormous and unprecedented scale.

Uber either operates black car base stations or livery vehicle base stations, and the TLC has no discretion to turn a blind eye to Uber's systemic violation of the important requirements that apply to each base station type.[8]

IV. THE TLC'S DECISION TO ALLOW BLACK CARS TO ACCEPT E-HAILS VIOLATES SEQRA AND CEQR

SEQRA's "primary purpose is to inject environmental considerations directly into governmental decision making." *Matter of City Council of City of Watervliet v. Town Board of the Town of Colonie*, 3 N.Y.3d 508, 515 (2004) (quotation omitted). In enacting SEQRA, the Legislature expressly declared that its intent was to ensure that "the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy." N.Y. Envtl. Conserv. Law ("ECL") § 8-0103(7); 6 NYCRR § 617.1.

Toward that goal, SEQRA requires that an administrative agency must prepare an environmental impact statement ("EIS") with respect to any agency action that may have "a significant effect on the environment." ECL § 8-0109(2); 6 NYCRR § 617.3. An agency action is unlawful unless the agency either complies with the EIS requirement or issues a "negative declaration" finding that the action will not have a significant effect on the environment. 6 NYCRR § 617.3(b), (c). The agency must "make an initial determination whether an

[8] Uber's drivers also rate their passengers, and a passenger's rating is visible to a driver before the driver accepts the passenger's e-hail. Mullkoff Aff., Exs. 12, 13; Verified Petition ¶¶ 83, 119. This rating system invites drivers to violate 35 RCNY § 55-20, which prohibits black car drivers from refusing to pick up passengers except under narrowly prescribed circumstances.

environmental impact statement need be prepared" for the action "[a]s early as possible." ECL § 8-0109(4); 6 NYCRR § 617.6(a)(1).

The Court of Appeals and the First Department have repeatedly recognized the importance of "literal" and "strict" compliance with SEQRA's requirements. *Watervliet*, 3 N.Y.3d at 515; *Williamsburg Around the Bridge Block Ass'n v. Giuliani*, 223 A.D.2d 64, 73 (1st Dep't 1996). "SEQRA's broad definition of 'actions'" must "be liberally construed to facilitate SEQRA's salutary purposes." *Watervliet*, 3 N.Y.3d at 518. The "threshold at which the requirement that an EIS be prepared is triggered is relatively low," for "[t]he purpose of an EIS is to act as an "environmental 'alarm bell.'" *Williamsburg*, 223 A.D.2d at 71 (citations omitted). The point is to require an administrative agency to take a "hard look" at the potential environmental consequences of its action before it acts and present a "reasoned elaboration" of the basis for its determination. *Kahn v. Pasnik*, 90 N.Y.2d 569, 574 (1997); *Williamsburg*, 223 A.D.2d at 70.[9]

The TLC has repeatedly acknowledged that the issuance of any new yellow taxi medallions triggers SEQRA's EIS requirement because adding more taxis to the streets plainly increases traffic and pollution and otherwise significantly affects the environment. *See*, *e.g.*, Mullkoff Decl., Ex. 1 at 27-28 (discussing EISs conducted in 1989 and 2004 regarding additions of new medallions); Ex. 35 (Notice of Completion of EIS in 2013 regarding addition of accessible medallions). Given that SEQRA's EIS requirement is triggered by the issuance of any new yellow taxi medallions, surely it is triggered by the TLC's decision to allow 14,000 Uber black cars to cruise the City's streets and pick up e-hails – *more than the total number of yellow taxi medallions in circulation*. *Id.*, Ex. 19. The six black car base stations that Uber has rolled

[9] CEQR's requirements are "virtually identical" to those of SEQRA. *Williamsburg*, 223 A.D.2d at 71; 43 RCNY § 6-01 *et seq*.

out already dwarf the size of the next largest base station – Uber currently operates 61% of the black cars in New York City – and Uber recently reported that it plans to add 10,000 additional black car drivers in New York City in 2015. *Id.*, Ex. 7, 18.

Notwithstanding the massive expansion of the number of for-hire vehicles on the City's streets that the TLC has permitted by exempting black cars from its e-hail rules, the TLC did not engage in the "hard look" that SEQRA and CEQR require. Instead, the TLC gave no consideration whatsoever to the environmental consequences of allowing black cars to accept e-hails.[10]

V. THE TLC'S FAILURE TO APPLY ITS E-HAIL RULES TO BLACK CARS CONSTITUTES AN UNCONSTITUTIONAL TAKING OF PETITIONERS' PROPERTY

A. The TLC's Rules Constitute an Error of Law Because They Violate the Takings Clause of the Federal and State Constitutions

The TLC's decision to allow black cars to pick up e-hails also violates the Takings Clauses of the Fifth Amendment to the U.S. Constitution and Article I, § 7 of the New York Constitution, which prohibit the government from taking private property without just compensation. The Supreme Court has consistently recognized that "if regulation goes too far it will be recognized as a taking." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). The Takings Clause "applies to not only the paradigmatic physical taking . . . but also to regulatory interferences, which transpire when some significant restriction is placed upon an owner's . . . property [use] for which fairness and justice require that compensation be given."

[10] The CEQR likewise requires agencies to study the potential impact on socioeconomic conditions such as local industries. *See* Mullkoff Decl., Ex. 36 (2014 CEQR Technical Manual, Ch. 5, "Socioeconomic Conditions"). Accordingly, the TLC's 2013 EIS analyzed the potential impact of the sale of new medallions on the "Value of a Yellow Taxicab Medallion" and "Taxicab Driver Income." *Id.*, Ex. 35 at 4-7.

Maine Educ. Assn'n Benefits Trust v Cioppa, 695 F.3d 145, 152 (1st Cir. 2012) (citation omitted). Where, as here, a claim is based on a regulatory taking, courts consider a "complex of factors" first articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). These factors include "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Penn Central*, 438 U.S. at 124). This principle of fundamental fairness animates the constitutional right to just compensation when the government takes private property.

The manner in which the TLC has regulated Uber has very significantly interfered with – and soon will totally destroy – the reasonable investment-backed expectations of those to whom it sold medallions. The City cannot credibly deny that Petitioners invested in their medallions based on the reasonable expectation that the City would continue to enforce the hail exclusivity that creates the medallions' economic value. Indeed, the City quite literally created the market for yellow taxi medallions – purposefully, in order to raise revenue – by designing a system through which medallions would be auctioned off (generating revenue) and then resold again and again in an active commodity market (with the City imposing another 5% tax on every resale). The City allowed and encouraged the lending industry (including financial institutions such as Capital One, Signature Bank, Citibank, a variety of credit unions such as at Melrose Credit Union, Progressive Credit Union and League of Mutual Taxi Owners, and publicly traded companies such as Medallion Financial Group) to invest over $2 billion financing these purchases and repurchases, providing the liquidity necessary to support this market. Taxi medallions are a transferrable commodity that until recently were worth over $1 million each (about $17 billion in the aggregate) precisely because the hail exclusivity that the City created

and sold is so valuable. Taxi medallions are not mere revocable licenses that the City is free to extinguish on a whim. Medallions literally are tangible property – they are metal discs that must be affixed to the taxis' hoods – that afford their owners the basic protections that the federal and state Constitutions afford to property owners.

By allowing non-medallion black cars to pick up e-hails, the City has upset the investment-backed expectations of the entire medallion taxi industry, including both the owners who invested and the lenders who provided the financing on the reasonable belief that black cars would not be permitted to pick up hails.

The character of the City's conduct, moreover, strongly supports the conclusion that it acted unconstitutionally. The City *purposefully enriched itself*, raising nearly $1 billion for its coffers, by creating a marketplace and selling medallion owners the exclusive right to pick up hails. Having profited so handsomely from creating and hawking hail exclusivity, the City cannot eviscerate that exclusivity by permitting black cars to pick up with impunity hails that have not been pre-arranged. The character of the City's conduct is critical because the typical Takings Clause case does not involve a scenario in which the government itself has directly profited from creating the entitlement it is accused of taking without just compensation. The City's conduct violates basic notions of fair play. *See Hodel v. Irving*, 481 U.S. 704, 716 (1987) (explaining that the character of the government's action can render it unconstitutional even when the degree of economic harm itself is not enough to do so).

In *Boonstra v. City of Chicago*, 214 Ill. App. 3d 379 (1991), a taxi licensee brought a Takings Clause claim challenging the City of Chicago's change to its laws that prevented license holders from transferring their licenses to others. An Illinois appellate court held that the city

had unlawfully taken the plaintiff's property without just compensation. *Id.* at 386-87. The court explained:

> [W]hen the City of Chicago adopted the taxicab ordinance in 1963 and issued taxicab licenses which were assignable pursuant to the ordinance, it created and conferred property rights in the taxicab licenses which accrued to those persons who purchased the taxicab licenses as assignees and were approved by the City of Chicago. Thus, when the City of Chicago amended the taxicab ordinance in 1982 by summarily precluding those persons already having an assignable property interest in taxicab licenses from being able to assign their property interests, the City of Chicago's action constituted a taking of property without due process and without just compensation.

Id. at 387. The Court focused on the fact that Chicago had "plainly fostered and participated in the assignment of the taxicab licenses" and had "created for its citizens a public market place for the assignment of its taxicab licenses." *Id.* at 386. The taxi licenses were constitutionally protected because they "embraced the essence of property in that they were securely and durably owned and marketable. *Id.* at 387.

That is what we have here. Just as in *Boonstra*, the City created property rights by selling medallion owners the exclusive right to pick up hails. The City invented, facilitated, cultivated, and encouraged the marketplace. Having done so, elemental principles of fair play prohibit the government from turning around and upsetting the reasonable investment-backed expectations that it created by fundamentally changing the rules after it already has pocketed hundreds of millions of dollars. The TLC's unexplained decision to exempt black cars from its new e-hail regulations has had a severe negative impact on Petitioners. *See* Verified Petition, ¶¶ 13-41 (detailing the reduction in the value of Petitioners' medallions and their lost revenue). The Federal and State Constitutions entitle them to just compensation.

Because the TLC's actions violate the federal and state constitutions, they likewise violate Article 78 because the actions constitute an "error of law." CPLR 7803(c)(3). The Petition therefore should be granted.

B. If the Petition Is Not Granted, Petitioners Are Entitled to Discovery on Their Constitutional Claim

As shown in Section III.A above, the Court should conclude as a matter of law that the TLC's rules constitute an unconstitutional taking and therefore violate the Federal and State Constitutions as well as CPLR § 7803(c)(3). If the Court disagrees and concludes that Petitioners' Takings Clause claim turns on factual issues that cannot be resolved as a matter of law on the pleadings, then Petitioners are entitled to discovery because this is a hybrid proceeding/action in which Petitioners have asserted both an Article 78 claim and a plenary claim for declaratory relief and damages under the Federal and State Constitutions.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Petition should be granted.

Dated: March 31, 2015
New York, New York

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