SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
X----------X

DALER SINGH, DBA GILZIAN ENTERPRISE LLC, DANIELLE EVE TAXI LLC, EAC TAXI LLC, DEC TAXI LLC, EC TAXI LLC, CHIPS AHOY TAXI LLC, ECDC TAXI LLC and DYRE TAXI LLC individually and on behalf of all others similarly situated,

Index No. 701402/17

Plaintiffs,

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Defendants.

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**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## PRELIMINARY STATEMENT

This is a commercial action commenced by plaintiffs who purchased New York City taxi medallions at auction from defendants the City of New York (the "City") and its Taxi and Limousine Commission (the "TLC") (together, "Defendants"). Plaintiffs allege, individually and on behalf of all others similarly situated, that in the months leading up to the auctions the TLC published, distributed and circulated systemically deceptive information that exaggerated medallion prices, misrepresented medallion price trends and omitted material information. Plaintiffs further allege that, following the auctions, the TLC acted in a concerted manner in a way that destroyed the value of the very medallions it had just sold. In short, the City and the TLC breached their duties to the Plaintiffs both coming and going.

One of the plaintiffs is Daler Singh ("Singh"), a taxi driver who purchased an independent (or individual) wheelchair-accessible medallion. The others are single-purpose entities, controlled by Richard Chipman (the "Chipman Entities"), which collectively purchased 14 corporate wheelchair-accessible medallions.[1] The detailed 180-paragraph amended complaint (the "Complaint") asserts five causes of action: First, Defendants violated § 349 of the General Business Law by engaging in deceptive acts and practices in the conduct of a business in New York State. Second, Defendants fraudulently induced Plaintiffs to purchase medallions through materially false statements and omissions. Third, Defendants breached their contracts with Plaintiffs, specifically by violating the implied covenant of good faith and fair dealing through engaging in practices that inevitably destroyed the value of the medallions they had just sold. Fourth, the Complaint alleges that Defendants engaged in negligent misrepresentation by systemically failing to provide Plaintiffs and the other auction buyers with complete and accurate

[1] Together, Singh and the Chipman Entities are referred to herein as "Plaintiffs."

information before the auctions. In sum, without Defendants' false statements and material omissions, it is likely that Plaintiffs would not have bid at the auctions or they would have bid far less. Finally, Plaintiffs allege that they are entitled to rescission of their sales contracts. The Complaint alleges that the medallions, purchased by Plaintiffs for prices ranging from $821,251 to $1.259 million, are practically unsaleable, so Plaintiffs have suffered substantial damages.

Defendants' essentially blanket defenses to all charges are that they disclaimed responsibility for their intentionally false statements and omissions and that they owe no duty of good faith or fair dealing to Plaintiffs or the proposed class. On some causes of action, Defendants assert that Plaintiffs failed to serve notices of claim, even though they in fact did so on December 16, 2016 and February 9, 2017 before filing the Complaint on March 27, 2017. Defendants also assert that they were not engaged in "business," even though they have a long history of selling medallions and even though they offered for sale 400 medallions at the 2013/2014 auctions, which netted the City a total of approximately $400 million. For the reasons articulated below, each of the defenses are without merit and often reckless. Defendants' motion must be denied it its entirety.

## STATEMENT OF FACTS

As is well known, facts pleaded in a complaint must be taken as true on a motion to dismiss. *See, e.g.*, *Leon v Martinez*, 84 NY2d 83, 87 [1994]. While Defendants' motion papers pay lip service to this principle, they include a contentious "statement of facts" that does not relate the facts as alleged but as they would prefer them to be alleged. Defendants' brief in support of their motion goes on to repeatedly mischaracterize the Complaint and its allegations. To cite just two examples, though more are discussed below, Defendants try to cast doubt on the well-plead (and well-known) facts that medallion prices began to crash almost immediately after

the auctions and that the cause of that crash was a massive influx of e-hail taxis. Given Defendants' unfortunately dishonest presentation, it is important to state the facts as actually alleged in some detail.

### 1. The For-Hire Vehicle Industry, its Regulation, and the History of TLC Medallion Auctions

For decades, the right to operate a yellow or medallion taxi in the City of New York required a taxi license, also known as a medallion, issued by the TLC.[2] ¶ 39. The medallion system began in 1937 with the passage of the Haas Act. *See* ¶¶ 23-24. Since then, the number of medallions has always been fixed by law and could only be changed through an act of the City or State legislature. *See* ¶ 40; *see also Greater New York Taxi Ass'n v State of NY*, 21 NY3d 289, 297 [2013] (discussing requirement for legislation permitting the issuance of new medallions).

In addition to its hard cap on the number of medallions, the City has long regulated the taxi and for-hire vehicle industry, which includes both medallion (or yellow) taxis and for-hire vehicles ("FHVs") of other kinds. At one time, it did so through the Police Department's "Hack Bureau." ¶ 23. Since 1971, the City has acted through its Taxi and Limousine Commission. Over the years, the City has developed a large body of statutes, codified in Title 19, Chapter 5 of the NYC Administrative Code, as well as TLC rules that govern not just yellow taxis, but other FHVs, including black cars and livery cabs. These Codes and Rules limited entry into the for-hire vehicle market and defined which parts of the market each segment of the industry could serve. Livery cabs, sometimes referred to as "community cars" or "car services," traditionally catered to the outer boroughs. ¶ 27. The black car industry catered in large part to the corporate community. ¶ 28. Both are known as for-hire vehicles and, like yellow taxis, must be licensed

[2] Citations to "¶ __" refer to paragraphs in the Complaint.

by and are regulated by the City and the TLC. ¶¶ 19-20, 26. In 2012, state legislation authorized a new form of taxi known as the street hail livery or green cab. ¶ 19. As of January 2014, according to the TLC's *2014 Taxicab Factbook* (the "*TLC Factbook*"), there were 13,437 yellow taxi medallions authorized and in operation. ¶ 25; *see also* Ex. 1.[3] Up to 6,000 green taxi licenses had been "issued." *Id*. at 1. There were also "about 10,000" licensed black cars which had to be dispatched from one of 80 base stations in operation at that time. ¶ 68.

After they were issued, medallions could be bought and sold in the secondary market. Owing to what the *TLC Factbook* calls the "[c]losed entry with a fixed supply" of medallions, and because medallion taxis had the exclusive right to accept street hails, medallions became valuable and their price did tend to rise. *See, e.g.*, ¶ 41. The City itself took advantage of this market from time to time as, when authorized by legislation, it sold newly-issued medallions at auction. In 2004, for example, the City and the TLC auctioned 591 new medallions for a total of approximately $198 million. In 2006, they auctioned another 308 medallions, netting about $142 million. They sold 63 more medallions in 2007 for just over $19 million. In 2008, they sold 89 for a just over $54 million. These auctions were open to the public at large. *See* Ex. 2. All together, they netted Defendants just over $414 million between 2004 and 2008.

The 2013/2014 auctions were authorized by the 2012 HAIL Act.[4] That Act both allowed for street hail liveries and authorized the issuance of a total of 2,000 additional yellow taxi medallions. The auctions in which Plaintiffs participated occurred in November 2013, February 2014, and March 2014. These three auctions were for a total of 400 wheelchair-accessible

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[3] Citations to "Ex. __" refer to exhibits annexed to the Affirmation of Daniel L. Ackman in Opposition to Defendants' Motion to Dismiss (the "Ackman Aff.").

[4] Hail Accessible Inter-borough License Act, ch. 602, 2011 N.Y. Sess. Laws 1558 (McKinney), as amended by Act of Feb. 17, 2012, ch. 9, 2012 N.Y. Sess. Laws 23 (McKinney).

medallions, some corporate (meaning they could be held by investors), others independent (meaning they had to be owned by licensed taxi drivers). ¶¶ 88, 90, 92.

**2. For-Hire Vehicle Regulation at the Time of the Auctions**

At the time of the auctions, and for decades before, all taxis (whether yellow cabs, black cars, or livery cabs) operated under specific statutes and regulations. ¶ 19. While each class of taxi operated under different legal rules, each type of fleet was limited in size directly or indirectly by various statutes and regulations. *Id*. The law also limited competition between the various fleets. *Id*.

The entire basis for a taxi medallion's value has always been that (i) the law afforded yellow taxis the exclusive right to offer point-to-point transportation to passengers ready to travel and (ii) legislation capped the number of yellow taxis in operation. *See* ¶ 41. While the statutes and rules could (and did) change from time to time, the basic legal structure—at least until very recently—supported the investment-backed expectations of medallion owners. ¶ 20. Fundamentally, only yellow taxis could accept street hails. *Id*. Livery cabs and black cars, on the other hand, could accept fares only by pre-arrangement through licensed bases. ¶ 58. Green taxis, like traditional liveries, are permitted to accept pre-arranged trips and can accept street hails ***only*** outside of the so-called "exclusionary zone," which consists of most of Manhattan and the City's airports. ¶¶ 30-31. Indeed, the 2012 HAIL Act expressly confirmed 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 exclusionary zone. ¶ 31.

Beyond the requirement that they only accept fares that were prearranged through bases, black cars were required to have an ownership interest in their base. NYC Code § 19-502[u] provides that a black car is a "for-hire vehicle dispatched from a central facility *whose owner holds a franchise from the corporation or other business entity which operates such central*

*facility, or who is a member of a cooperative that operates such central facility*." *See* ¶ 63 (citing the Code) (emphasis added). A black car base, meanwhile, is a for-hire base that: (a) that dispatches vehicles on a pre-arranged basis and (b) whose affiliated vehicles are owned by franchisees of the base or are members of a cooperative that operates the base. ¶ 64. Thus, for a black car to be properly licensed, it must be affiliated with a licensed base and must be a cooperative owner or franchisee of the base through which it obtains its fares. Black car bases also can only be licensed if 90% of their fares are non-cash. ¶ 65.

While black car operators were not required to purchase medallions, the size of the black car fleet was practically restrained by these ownership rules. ¶ 67. Thus, in mid-2013, the TLC's publications state, there were only 9,163 black cars licensed by the TLC. At the beginning of 2014, there were about 10,000. *See* Ex. 1. Only later did the size of the black car fleet explode, with disastrous effects on Plaintiffs. *See* ¶¶ 68-69. As discussed below, this volcanic growth was only possible because the TLC disregarded and tacitly waived licensing rules; at least it did so for black cars affiliated with Uber Technologies, Inc. ("Uber") and similar companies such as Lyft, Inc. ("Lyft"). It also licensed bases affiliated with Uber even though the bases were surely not owned by the affiliated black car owners. *See* ¶¶ 95-99.

**3. E-hail Taxis at the Time of the Auctions**

Defendants' motion to dismiss asserts that "Uber's presence in New York City was well-known" at the time of the auctions." Def. Br. at 26.[5] But that is simply not the case and is belied by the TLC's admissions. The *TLC Factbook*, which the TLC published at the beginning of 2014, does not mention e-hailing. It does not mention Uber (or any other company operating

[5] Citations to "Def. Br. at __" refer to pages in Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint.

e-hail taxis). The sole support for Defendants' claim in their memorandum is a "see" cite to "Goldberg-Cahn Affirm., Exhibit 'N.'" Exhibit N is a statement concerning a TLC proposal that was "published on April 24, 2015," over a year ***after*** the auctions, and that was discussed at a public hearing on May 28, 2015. Moreover, the proposal itself has nothing to do with black car base licensing, but relates to licensing of "dispatch service providers," which may "partner with bases," but which are not themselves bases.

Defendants also cite *Black Car Assistance Corp. v The City of New York*, No. 100327/13, 2013 NY Misc. LEXIS 1692 [Sup Ct NY Co., April 23, 2013], *aff'd*, 110 AD3d 618 [1st Dept 2013]. But reliance on this decision is duplicitous at best. Even if this trial court decision were well known at the time, which is highly unlikely, it concerned whether *yellow taxis* could use e-hail technology pursuant to a pilot program. The decision did not mention Uber, Lyft or any other e-hail taxi service, nor did it mention the TLC's policies (which had not yet been announced) regarding e-hail taxis.[6] The pilot program at issue in *Black Car Assistance* allowed yellow taxis to accept so-called "e-hails." But neither the pilot program nor the decision states or suggests that a black car base could be licensed or that black cars could be licensed absent compliance with longstanding legal requirements. Even if a bidder had somehow stumbled across the decision, there is no possible way that he or she could have discerned that Uber, Lyft, or any other e-hail taxi company would, in short-order, be permitted to introduce tens of thousands of vehicles that were *granted* black car licenses but were *not* required to comply with black car licensing standards into the market.

[6] The court held in substance that yellow taxis were not necessarily barred from accepting e-hails as part of a pilot program even if an e-hail was deemed to be a pre-arrangement. The decision says nothing about black cars accepting fares without true pre-arrangement. It says nothing about licensing black car bases that are not owned by franchisees or cooperators. It does not hint at the massive growth in the size of the black car fleet premised entirely on e-hailing, as that massive growth had not yet happened. Nor does it mention the TLC's *de facto* practices regarding Uber and the e-hail taxi fleet.

### 4. TLC's False and Misleading Pre-Auction Price Reports

For many years, and during the months prior to the auctions, the TLC regularly published the average sale price for both individual and corporate taxi medallions. ¶ 78. The TLC was uniquely qualified to report medallion prices because by law it had to approve every sale and participate in every closing. *Id*. Thus, the TLC knew *exactly* every actual sale price. *See id*.; *see also* TLC Rules 58-43 through 58-45.[7] Moreover, complete pricing and sales data was available *only* from the TLC.

In the months leading up to the auctions, however, in its public statements, the TLC routinely overstated the average price of a medallion. ¶ 79. For example, in November 2013, the TLC reported average individual medallion prices of $1,050,000. In truth, the actual average was only $900,000, approximately 14.3% lower than the TLC's claimed price. ¶ 80. In January 2014, the TLC reported the average sale price for an individual medallion to be $1.05 million. The true average was actually $977,000, or $73,000 less. *Id*.

Apart from reporting false prices, the TLC misrepresented the trend in medallion prices. Its charts depicted prices rising ever upward. *See* Ex. 1 at 12; Ex. 3. The reality was that, while independent medallion prices did increase in early 2013, the second half of the year witnessed a steep decline from $1.015 million in July to $982,000 by February 2014. *See* Ex. 4; ¶ 82.

For corporate medallions, the TLC reported that the average transfer price was $1.32 million in May 2013 and that it remained at that level until November 2013. ¶ 83. In fact, according to the TLC's current reporting, *there were no corporate medallion transfers* for value between June 2013 and October 2013. *Id*. In November 2013, there was just one transfer, and

[7] For the Court's convenience, the relevant TLC rules cited herein and in the accompanying memorandum of law are annexed hereto as Ex. 5. The TLC rules are also available on the TLC website at http://www.nyc.gov/html/tlc/html/rules/rules.shtml.

that was at $1.2 million, or $120,000 less than the reported average. *Id*.

In short, the TLC reports and statements to the public indicated dramatically increasing prices in the years leading up to the 2013/2014 auctions. ¶ 84. In fact, individual medallion prices had already begun to fall. *Id*. Indeed, for corporate medallions, there were no sales at all on which an average could be calculated. *Id*. Thus, the TLC falsified price points, misrepresented known_trends and pulled numbers from whole cloth in fabricated pre-auction "price" reports. Importantly, the TLC reports were the only publicly-available central repository for prices of medallion transactions.

**5. Wheelchair-Accessible Medallions**

The 2013/2014 auctions were for wheelchair-accessible medallions, meaning that the owner would have to attach them to a wheelchair accessible-vehicle. While there is no direct apples-to-apples comparison between a wheelchair-accessible medallion and an unrestricted medallion, their price trends do tend to move in tandem.[8] ¶ 87. Wheelchair-accessible medallions, however, have typically been sold for less than unrestricted medallions. *Id*.

**6. The TLC's Statements and Promotion of the Auctions**

Apart from its false price reports, the TLC made additional statements about medallion price trends. In January 2014, the agency published the *TLC Factbook*. This document purported to state facts about the taxi industry and the TLC. ¶ 74; Ex. 1. The *TLC Factbook* states: "The average annual price of independent medallions increased 260% between 2004 and 2012 while the average annual price of mini-fleet medallions increased 321% over the same time period. When accounting for inflation, prices still increased 214% for independent medallions

[8] As the name implies, a wheelchair-accessible medallion must be attached to a wheelchair-accessible vehicle ("WAV"). An unrestricted medallion can be attached to any vehicle authorized for use as a taxicab.

and 265% for mini-fleet medallions." *Id*. It adds: "The annualized return on investment (ROI) for a medallion over this time would be about 19.5%. In comparison, over the same time, the ROI for a similar investment in the S&P 500 would yield a 3.9% annual return." *Id*.

The TLC also issued before the auctions a pamphlet that affirmatively stated, in large bold type, that an investment in a medallion is "**BETTER THAN THE STOCK MARKET**." ¶ 76; Ex. 3 (emphasis in original). Underneath this headline, the pamphlet shows a graph of purported medallion prices from January 2001 to 2014 (present). *Id*. As with the *TLC Factbook*, the graph depicts a steep rise during 2013. *Id*. Longer term, it shows the price of an independent medallion increasing from $200,000 to more than $1 million in early 2014. *Id*.

These statements touting medallions as investments, like similar statements made by the TLC over the years, have been widely reported in the financial press. ¶77. To cite just one example, in November 2013, on the eve of the first of the recent auctions, *The Wall Street Journal*, citing TLC data, reported that the value of a NYC taxi medallion "Outpace[d] Gold and the Dow Jones Industrial Average." *Id*.; *see also* Ex. 6. The article quoted then TLC chairman David Yassky as saying, "Taxi cab ownership is highly profitable and that's why investors are willing to pay these prices." *Id*. These statements omitted that the prices published by the TLC were exaggerated and inaccurate. Defendants also omitted and failed to inform bidders that its actions and inactions, as explained below, would undermine medallion values through their destruction of hail exclusivity and licensing of tens of thousands of additional black cars. Thus, the TLC blasted the bedrock that had supported the value of the medallions it sold.

**7. The Auction Sales to Plaintiffs of Wheelchair-Accessible Medallions**

Plaintiffs purchased medallions at the 2013 and 2014 auctions, not knowing what the TLC was about to do. Mr. Singh, a taxi driver, submitted a winning bid of $821,251 for an independent, wheelchair-accessible medallion at the February 26, 2014 auction. ¶ 13. He later

formed Gilzian Enterprise LLC ("Gilzian"), for the sole purpose of owning the medallion. *Id*. Gilzian closed the sale for yellow taxi medallion number 4W75 on or around May 27, 2014. *Id*.

Richard Chipman, an experienced medallion owner, submitted winning bids at the November 14, 2103 auction ranging from $2,118,000 to $2,518,000 for seven "minfleets" (which are comprised of two medallions each, meaning he paid from $1,059,000 to $1,259,000 per medallion). ¶¶ 16, 88-89. He formed Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC and Dyre Taxi LLC, all single-purpose entities, for the sole purpose of owning the seven minifleets (a total of 14 medallions). ¶ 15.

**8. The TLC's Post-Auction Actions**

The year following the auctions saw a dramatic and unprecedented change in the makeup of the New York City taxi industry, especially a massive increase in the number of black cars. ¶ 95. This increase was directly attributable to the TLC's actions and its deliberate inaction. And it began to destroy the benefit of Plaintiffs' bargain. *See* ¶ 96. First, the TLC issued black car base licenses to Uber-affiliated bases, even though these affiliates plainly did not qualify for such licenses. *Id*. Second, it suddenly permitted the black cars affiliated with those bases to accept street hails in direct competition with medallion taxis. *Id*. Absent enforcement of the black car and black car base licensing laws, the number of black cars could increase without meaningful restriction. ¶ 97. Uber-affiliated bases could add new vehicles *ad infinitum*; and they proceeded to do just that. *Id*.

All told, the number of black cars increased from about 10,000 at the beginning of 2014 to nearly 25,000 in 2015. ¶¶ 68, 119. This exponential growth continued to the point where as

of the filing of the Complaint, there were over 60,000 black cars on the City streets. ¶ 98.[9] Now, less than three months after the Complaint was filed, there are more than 72,000 active black cars operating in the City.[10] Thus, when the TLC sold the medallions at the 2013 and 2014 auctions, the black car fleet was substantially smaller than the medallion taxi fleet. The size of that fleet was stable and limited by car and base licensing requirements. *See* ¶¶ 68-69. Within a year, the black car fleet was double the size of the yellow taxi fleet. *See* ¶ 119. Today, it is *almost five times* the size. Nearly all of this increase is attributable to the growth of Uber-affiliated bases, which, at the time the complaint was filed, boasted roughly 46,000 affiliated black cars with few, if any, owning a cooperative share of their bases. ¶ 120.

**9. The Resulting Destruction of Medallion Values**

The first page of Defendants' motion to dismiss contains the oddly phrased statement: "it is reported that medallion prices may have declined for a myriad of reasons." Def. Br. at 1. If Defendants are suggesting that medallion prices may not have actually declined, that is brazenly false. The TLC's own records evince a steep and sudden drop. Ex. 4. By March 2015, the TLC reported just two transfers of individual medallions for $800,000 each and four corporate medallion sales for $925,000 each. *Id*.; *see also* ¶ 145. None of these medallions were wheelchair accessible. *Id*. In April 2015, there were no medallion transfers for value of any kind. *Id*. In May, there was one individual medallion transfer for $700,000 and no corporate transfers. *Id*. In June 2015, the TLC reported only three medallion transfers, all of which were foreclosures. *Id*.

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[9] Due to a clerical error, the Complaint states that there were approximately 90,000 black cars operating in New York City at the time the Complaint was filed.

[10] These numbers are from TLC lists of licensees available on the TLC website at http://www.nyc.gov/html/tlc/html/industry/current_licensees.shtml

More recently, in the three full months before the Complaint was filed, the TLC reported six individual medallion sales for value. ¶ 146. Of these, three were foreclosure sales and two were estate sales. *Id*. The only non-estate/non-foreclosure sale was in December and it was for only $387,717.60. *Id*.

If Defendants' motion papers are meant to insinuate that the cause of the dramatic decline is unknown, their statements are doubly false. The cause is well known and has been widely reported. ¶ 77; *see, e.g.*, Barro, "Under Pressure From Uber, Taxi Medallion Prices Are Plummeting," The New York Times, Nov. 27, 2014; Hickman, "How Uber Is Actually Killing the Value of a New York City Taxi Medallion," TheStreet.com, May 26, 2015; Mosendz and Nasiripour "Taxi Medallion Prices Are Plummeting, Endangering Loans," Bloomberg, Jan. 30, 2017, collected at Ex. 7.[11] It has also been admitted by the City's own economist, as discussed further below. In any event, it is pleaded in the Complaint and must be accepted as true for purposes of a motion to dismiss.

Right after the auctions, the TLC permitted tens of thousands of Uber and other e-hail taxis to enter the for-hire vehicle market and to compete directly with yellow cabs—all without paying for a medallion or being subjected to the rigorous requirements with which medallion taxis must comply. At the same time, the TLC permitted black cars to accept e-hails, thus blurring the lines between the two types of taxis, which, the mayoral study published by the City admits, were "now in direct competition for the same passengers." Ex. 8. If a driver can work the same streets and serve the same passengers without spending $800,000 or more for a

[11] *See also*, Barro, "New York City Taxi Medallion Prices Keep Falling, Now Down About 25 Percent," The New York Times, Jan. 7, 2015; Fischer-Baum & Bialik, "Uber Is Taking Millions Of Manhattan Rides Away From Taxis," FiveThirtyEight.com, Oct. 3, 2015; Holodny, "Uber and Lyft are demolishing New York City taxi drivers," Business Insider, Oct. 12, 2016.

medallion, why would he purchase a medallion? The answer is, increasingly, that he would not.

### 10. Defendants' Admissions Regarding Taxi Regulation and the Cause of the Medallion Crash

Defendants have conceded many of these facts. In January of 2016, the New York City Mayor's Office published a formal report entitled "For-Hire Vehicle Transportation Study" (the "Mayoral Study"). *See id*. The study states:

> [O]nce-distinct regulatory categories [in the taxi market] are now blurring, and causing more direct competition for drivers and passengers… Through the use of apps that let customers 'e-hail' and summon 'e-dispatches' yellow and green cabs, black cars, and livery cars are now in direct competition for the same passengers.… The market segmentation that once existed has substantially eroded… With the advent of app-based dispatching, Uber's share of the [FHV] market has risen sharply.... [y]ellow cabs have seen their passenger volume decline.

*Id*. at 7. The Mayoral Study adds that increases in Uber's business have led to a directly corresponding decline in yellow taxi fares, stating: "Increases in e-dispatch trips are largely substituting for yellow taxi trips in the [Manhattan central business district]." *Id*. at 5. The Study adds that the traditional regulatory distinctions between medallion taxis and black cars have been eroded:

> The rise of e-dispatch services have blurred the traditional line between medallion cabs, which can offer street-hail service, and non-taxi for-hire vehicles that offer pre-arranged service. With the quick arrival of a car at the tap of a button, the distinctions that yielded differential regulatory treatment across black and yellow cars are less relevant, and the City must adapt its traditional frameworks to support the new entrants that do not squarely fit into traditional categories.

*Id*. at 1.

This unprecedented explosion in the black car fleet, with black cars now permitted to compete directly with yellow taxis, caused the value of Plaintiffs' medallions to crash and burn. The TLC allowed this without any announced change in the law or any public announcement of its intent before the auctions. It did so, rather, by quietly ignoring the law when it came to

granting licenses to Uber and its similarly venture capital-backed e-hail competitors like Lyft.

The TLC's action and inaction have caused a substantial decline in per-shift fares earned by yellow cabs. ¶ 139. It has caused the loss of available drivers to whom medallion owners may lease their taxis. ¶ 140. With Uber and other app-based taxi companies encroaching on the fares that had been the exclusive province of yellow taxis, the expected future value of medallions has declined by even more than the current drop in revenues. It has also caused the loss of available financing. As a result, the secondary market for taxicab medallions, which the TLC portrayed as robust and rising before the auctions, is all but frozen. ¶¶ 143, 147. There are few sales because there are no buyers. *See id*.

Defendants have also admitted the reason for the sharp drop in medallion values. A "Taxi Market Economic Study" by the NYC Office of Management and Budget ("OMB") states: "The statistical analysis suggests that an additional 1,000 cars affiliated with eFHV is associated with a reduction of daily fares per medallion of approximately $4-5…." *See* Ex. 9. It adds, "[T]he recent decline [in medallion taxi trip volume] appears to coincide with the rapid growth in eFHV-affiliated cars." *Id*. The principal author of that study, OMB economist Francesco Brindisi, in sworn testimony, identified several factors in the valuation of a taxi medallion. *See* Ex. 10. But Brindisi conceded that the only factor that has demonstrably changed between the time of the 2013/2014 auctions and his testimony in September 2016 was the volume of e-hail taxis operating in the City, which has, of course, exploded. *See id*. at 32-33, 53-56, 64, 148. Brindisi could not identify any more important factor. *See id*. at 147-50.

Beyond the statements by the OMB and its economist, the City has itself acknowledged the collapse by postponing indefinitely the issuance and auctions of the additional medallions authorized by the HAIL Act. In separate reports, both the City and New York State

Comptrollers admit that the presence of Uber, Lyft and other new services have impacted the value of medallions to the point where additional actions are not feasible. Ex. 12. Even if these allegations had not been admitted, they are certainly well-plead.

The few sales that have occurred in recent years demonstrate that the value of medallions has fallen precipitously. *See, e.g.*, ¶ 146. In the first three months of 2017, the TLC reported just three individual medallion sales for value. Ex. 4. Of the three sales, one was a foreclosure sale and one was an estate sale. *Id*. None of these sales were for wheelchair-accessible medallions. *Id*. The only non-estate/non-foreclosure sale was in March, and it was for $241,000, less than one-third of the average sale price for wheelchair accessible medallions at the 2014 auction. *Id*.

## STANDARD OF REVIEW

On a motion to dismiss pursuant to CPLR 3211, the pleadings are "afforded a liberal construction" and this Court must "accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87-88 (internal citations omitted); *Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010] ("If there is a discernible claim, that is where the inquiry must end; the difficulty of its proof is not the present concern.").

In evaluating a motion to dismiss under CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action . . . and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon,* 84 NY2d at 88 (the standard is "whether the proponent of the pleading has a cause of action," not whether he has proven his case). By either standard, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus

in determining a motion to dismiss." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].

A dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted by a moving party utterly refutes the complainant's factual allegations, thereby "*conclusively* establish[ing] a defense to the asserted claims as a matter of law." *Leon*, 84 NY2d at 88 (internal citations omitted) (emphasis added); *see also Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]. Documentary evidence that forms the basis of the defense must be such that it resolves all factual issues and irrefutably disposes of the plaintiff's claim as a matter of law. *Berger v Temple Beth-El of Great Neck,* 303 AD2d 346, 347 [2d Dept 2003].

Not only have Defendants failed to make the required showing, but the undisputed facts and documentary evidence support Plaintiffs' claims. In light of these principles, and affording Plaintiffs the benefit of every favorable inference, Defendants' motion to dismiss should be denied.

## ARGUMENT

### I. PLAINTIFFS COMPLIED WITH APPLICABLE NOTICE OF CLAIM REQUIREMENTS

#### A. Plaintiffs Served Notices of Claim in Compliance with Applicable Law

As alleged in the Complaint, the named Plaintiffs served notices of claim on December 16, 2016 and February 9, 2017. *See* Ex. 11; ¶¶ 14, 17. **Defendants do not contest that these notices are sufficient for Plaintiffs' contract, GBL § 349 and rescission claims**. Def. Br. at 8. But they assert a notice of claim defense as to plaintiffs' fraudulent inducement and negligent misrepresentation claims. These defenses fail even as to these two claims because neither is "for personal injury, wrongful death or damage to real or personal property." Beyond that, neither (with the arguable exception fraudulent inducement) is "founded upon tort." Nevertheless, the

argument that Plaintiffs' failed to comply with Section 50 of the General Municipal Law plainly fails in light of the Court of Appeals' recent decision in *Margerum v City of Buffalo*, 24 NY3d 721 [2015], and is also foreclosed by Justice Kerrigan's recent decision in *CGS Taxi LLC et al. v The City of New York et al.*. *See* Ex. 14.

In *Margerum*, the Court of Appeals summarized the law and the scope of GML § 50-e and GML § 50-i. In doing so, it plainly rejected the City of Buffalo's attempt to extend those notice of claim statutes beyond their plain language to cover non-tort actions like those at issue here. The Court wrote:

> General Municipal Law § 50–e (1)(a) requires service of a notice of claim within 90 days after the claim arises "[i]n any case *founded upon tort where a notice of claim is required by law* as a condition precedent to the commencement of an action or special proceeding against a public corporation.

24 NY3d at 730 (emphasis added). In other words, this provision, including its 90-day limitations period, only applies in cases "founded upon tort" and *also* "where a notice of claim is required." *Margerum* continues:

> General Municipal Law § 50–i(1) precludes commencement of an action against a city 'for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city,' unless a notice of claim has been served in compliance with section 50–e.

*Id*. By its plain language, this provision applies only to cases involving "personal injury, wrongful death or damage to real or personal property." In *Margerum*, the Court of Appeals rejected the argument that a notice of claim was a condition precedent to a statutory Human Rights Law claim because such claims "are not personal injury, wrongful death, or damage to personal property claims under section 50–i." *Id*. Thus, as Justice Kerrigan similarly concluded, for § 50 to apply, the case must not only sound in tort, it must also be for personal injury, wrongful death or damage to property. Ex. 14 at 8 (citing *Margerum*, 24 NY3d at 730).

Taken together, GML § 50-i and -e have no bearing on statutory actions, such as the one in *Margerum*, or on commercial actions like this one. This was Justice Kerrigan's conclusion in *CGS Taxi* when he wrote: "In the case at bar [*CGS Taxi*], the plaintiffs were not required to file a notice of claim pursuant to General Municipal Law §§50-e and 50-i read together." *Id*. Rather, Justice Kerrigan concluded that the *CGS Taxi* plaintiffs were required to file notices of claim under New York City Administrative Code §7-201, which, he held, applied to all actions against the City of New York. *Id*. This was the basis for the ruling dismissing the *CGS Taxi* complaint. But since Plaintiffs have filed notices of claim that, as Defendants concede, comply with § 7-201, the *CGS Taxi* decision squarely defeats Defendants' notice-of-claim arguments in this case.

### B. This Action is Not a Personal Injury Action and is Not Founded on Tort so it is Not Encompassed by General Municipal Law § 50

Plaintiffs' GBL § 349 cause of action is a statutory claim like the one at issue in *Margerum*. It does not sound in tort and is certainly not a personal injury claim. Not surprisingly, the Court of Appeals has held that a GBL § 349 cause of action is *not* a common law fraud claim so it is *not* subject to the fraud statute of limitations. *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]. Instead, the limitations period for statutory claims applies. *See id*. In *Gaidon*, the Court of Appeals concluded:

> While General Business Law § 349 may cover conduct 'akin' to common-law fraud, it encompasses a far greater range of claims that were never legally cognizable before its enactment…. For these reasons, we hold that the three-year period of limitations for statutory causes of action under CPLR 214 (2) applies to … General Business Law § 349 claims.

*Id*. at 209. Given this holding, any suggestion that GML § 50-i or § 50-e, which only apply to torts and personal injury cases, also apply to GBL § 349 is untenable.

Plaintiffs' breach of contract cause of action is, by definition, not a tort claim. Not

surprisingly, many courts have not applied or held that the notice of claim provisions of GML § 50 do not apply to contract claims. *See, e.g.*, *Hoydal v City of New York*, 154 AD2d 345, 346 [2d Dept 1989]; *Creative Waste Management, Inc. v Capitol Environ. Servs., Inc*., 429 F Supp 2d 582, 606 [SDNY 2006]; *Guinyard v City of New York*, 800 F Supp 1083, 1090 [EDNY 1992]. Thus, Defendants concede that GML § 50 does not apply. *See* Def. Br. at 9.

Plaintiffs' rescission cause of action seeks equitable relief that may be ordered for various wrongs, including breach of contract where the breach substantially defeats the purpose of the contract. *Babylon Assocs. v County of Suffolk*, 101 AD2d 207, 215 [2d Dept 1984]; *Mina Inv. Holdings Ltd. v Lefkowitz*, 16 F Supp 2d 355, 362 [SDNY 1998], on reconsideration in part, 184 FRD 245 [SDNY 1999]. A cause of action for rescission is neither a tort claim nor a personal injury claim; accordingly, the GML notice of claim provisions do not apply, as Defendants concede. *See* Def. Br. at 9.

Defendants assert that GML § 50 requirements do apply to Plaintiffs' negligent misrepresentation and fraudulent inducement causes of action. But they do not cite a single case where a court so held. Under *Margerum*, Defendants' argument fails because, even if these causes of action sound in tort, they are not claims for personal injury, wrongful death or the like, as the two-pronged test requires. A cause of action for fraudulent inducement is particularly ill-suited to the notice of claim requirement, having "been described as a 'particular species of fraud [that] combines both contract and tort law concepts and is at the juncture point of contract and tort law.'" *Langenberg v Sofair*, No. 03 Civ. 8339 (KMK)(FM), 2006 US Dist LEXIS 88157, at *4–5 [SDNY Dec. 7, 2006] (internal citation omitted).

Moreover, the Court of Appeals has noted that the purpose of a notice of claim is "to permit timely investigation and opportunity for early resolution." *Margerum*, 24 NY3d at 728.

Here, there is no physical body or location to investigate, and it is clear from the Comptroller's silence that the City will not be offering an early resolution. Thus, considering both the language of the most recent Court of Appeals decision on point and the purpose of the notice of claim provisions, dismissal of any of Plaintiffs' claims pursuant to GML § 50 would be improper.

## II. PLAINTIFFS' FIRST CAUSE OF ACTION CLEARLY STATES A CLAIM FOR VIOLATION OF GENERAL BUSINESS LAW § 349

Section 349 of the New York General Business Law ("GBL") makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce." GBL §349(a). In order to state a claim under GBL §349, a private plaintiff must allege that: (1) the challenged act or practice was consumer-oriented; (2) the challenged act or practice was misleading in a material respect; and (3) plaintiff was injured as a result of the deceptive act or practice. *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]. A plaintiff pursuing such a claim need not establish defendant's intent to defraud or mislead. Nor must the plaintiff prove justifiable reliance. *See Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]; *Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012] ("Justifiable reliance by the plaintiff is not an element of the [GBL §349] statutory claim."); *Stutman*, 95 NY2d at 29 ("as [the Court of Appeals] ha[s] repeatedly stated, reliance is not an element of a section 349 claim."). Defendants, as sellers of assets to the public at large, are not entitled to deceive buyers or misrepresent the product they are offering for sale. Defendants are indisputably engaged in the trade of selling taxi medallions. Not only did they sell 400 medallions at the recent auctions, they sold over 1,000 medallions between 2004 and 2008. These auctions were all open to the public.

Defendants do not deny that they engaged in the types of deceptive acts and practices prohibited by GBL §349. Instead, they purport to be engaged in activity that is not consumer-

oriented so as to fall within the ambit of the law. GBL §349, however, has been held to apply to an extremely wide range of commercial conduct. *See Karlin v IVF Am., Inc.*, 93 NY2d 282, 290 [1999] (collecting cases in which GBL §349 was held to apply to an editing business, a wedding singer, a clothing retailer, an automobile dealer, and a magazine subscription seller). The objectionable activity need not be targeted at every consumer in the state; nor does the violator need to be engaged in a traditional business. *See id*. Finally, Defendants' regulatory function does not insulate them from liability for their deceptive acts and practices *as sellers* and they cite no authority that holds otherwise.

### A. Defendants' Practices, Marketing Hundreds of Medallions to the Public, Are Consumer-Oriented

The threshold requirement that the wrongful conduct be consumer-oriented serves merely to ensure that GBL §349 is not used to regulate private contract disputes that are unique to the parties. *See Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 145 [2d Dept 1995]. For a dispute to be "private" under this law, it must concern transactions that are not consumer-oriented "in the sense that they potentially affect similarly situated consumers." *Id*. at 148 (citing *Oswego Laborers'*, 85 NY2d at 26-27). So long as an offer or transaction was "not unique to [the parties to the case]," "private in nature or a 'single-shot transaction,'" the statute applies. *Oswego Laborers'*, 85 NY2d at 26-27 (internal citations omitted).

Here, Defendants do not dispute that they sold hundreds of medallions through public auctions. They question, rather, whether Plaintiffs are the types of people meant to be protected by the statute, merely because Plaintiffs' purchases were not "modest" consumer transactions and because Plaintiffs were part of what Defendants characterize as a narrow group of purchasers. Def. Br. at 10. Yet the auctions were open to all, and attracted hundreds of potential medallion purchasers who were similarly misled by Defendants' misstatements and omissions.

"GBL 349 is not limited to unsophisticated parties and to suits for just 'modest' amounts, but expressly entitles 'any' victim of a deceptive business practice to recover its 'actual damages,' regardless of the amount of those damages… GBL 349 applies to virtually all economic activity…" *Phoenix Life Ins. Co. v Irwin Levinson Ins. Trust II*, No. 600985/08, 2009 NY Misc LEXIS 4093, at *12 [Sup Ct NY Co, Feb 19, 2009]. The amount of the transaction is just one of several factors a court must consider in determining whether conduct is "consumer-oriented." *See Fleisher v Phoenix Life Ins. Co.*, 858 F Supp 2d 290, 304 [SDNY 2012] (no one factor alone is dispositive).

### B. That Defendants are Government Entities does not Entitle them to Violate Business Standards when they Engage in Business

Defendants also argue that the auction of taxicab medallions, because it is regulated, "can hardly be characterized as a consumer-based 'business' within the context of GBL §349." Def. Br. at 10. This argument is conclusory and incorrect. Courts in New York have consistently found regulated industries to fall within the ambit of the consumer fraud statute. *See, e.g.*, *B.S.L. One Owners Corp. v Key Int'l Mfg.*, 225 AD2d 643, 644 [1996] (sale of cooperative interests in realty was sufficiently consumer-oriented for plaintiff to maintain a GBL § 349 claim); *Riordan v Nationwide Mut. Fire Ins. Co.,* 977 F2d 47, 51-53 [2d Cir 1992] (GBL § 349 applies to sale of insurance policies and contains no exceptions for regulated industries).

Moreover, Defendants' unsupported arguments notwithstanding, the fact that Plaintiffs also have a contractual dispute with Defendants does not preclude Plaintiffs from alleging a violation of GBL § 349. In the context of a consumer's contract with an insurance provider, for example, the First Department explained:

> The term unfair or deceptive practices [in GBL § 349] has been defined as representations or omissions likely to mislead a reasonable consumer acting reasonably under the circumstances. The allegation that the insurer makes a practice of inordinately delaying and then denying a claim without reference

> to its viability, may be said to fall within the parameters of that definition. Certainly, it goes beyond a private contract dispute as to policy coverage.

*Acquista v N.Y. Life Ins. Co.*, 285 AD2d 73, 82 [1st Dept 2001] (internal quotations and citations omitted). Similarly, Plaintiffs' allegations regarding Defendants' practice of misrepresenting the financial health of the market and failing to disclose drastic changes in the market's structure go well beyond a private contract dispute.

This case is entirely distinguishable from *New York Univ. v Cont'l Ins. Co.*, 87 NY2d 308, 321 (1995), cited by Defendants. That action involved complex insurance coverage and proof of loss, in which each side was knowledgeable and received expert representation and advice. The dispute was unique to the parties to the case. Here, Defendants disseminated identical information to the public at large. Furthermore, because the City completely controls the market for medallions (particularly new medallions sold at auction), the parties occupied entirely disparate bargaining positions, making this precisely the type of deceptive practice meant to be addressed by GBL § 349.

Finally, Defendants' regulatory function does not insulate them from liability for their deceptive acts and practices *as sellers*. They cite no authority that holds otherwise. Even if Defendants also have a regulatory relationship with Plaintiffs, nothing in the law insulates them from a GBL §349 claim where they acted commercially. Defendants cannot deny that the City held public auctions to sell hundreds of medallions to the public. They likewise cite no case – because there is no case – that suggests that a municipality that engages in commerce is not bound by the same commercial law that applies to other buyers and sellers.

Indeed, the U.S. Supreme Court rejected this implicit argument nearly a century ago, even as advanced by the United States. In a case involving a forged check drawn on the U.S. Treasury, a unanimous Court, per Justice Holmes, rejected the assertion that a special rule

applied because the government was a party. "The United States does business on business terms," the Court concluded. *United States v Nat'l Exch. Bank of Baltimore, Md.*, 270 US 527, 534-35 [1926]. This rule has been adopted—and never seriously questioned—many times by the Supreme Court since. *See, e.g.*, *Franconia Assocs. v United States*, 536 US 129, 141 [2002]; *United States v Winstar Corp*., 518 US 839, 895-96 [1996]; *Clearfield Trust Co. v United States*, 318 US 363, 369 [1943]. At least one New York court has also followed this logical rule. *See Maryland Casualty Co. v Central Trust Co.*, 265 AD 416, 420-21 [4th Dept 1943].

Nor does the City deserve special treatment because the TLC sold the medallions at a public auction that was authorized by state and local law. Just because a statute authorized the sale, does not mean ordinary commercial law does not govern. As the Supreme Court stated in *Winstar*, the "general principle" is that "'when the [the government] enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" 518 US at 895 (quoting *Lynch v United States*, 292 US 571, 579 [1934]); *see also Corporation Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v Pemex-Exploracion y Prod.*, 962 F Supp 2d 642, 659 [SDNY 2013] (quoting the "basic principle of justice" articulated by the United States Supreme Court in *Winstar*). The *Winstar* Court specifically rejected the argument that the passing of a "regulatory statute" allowed the government to avoid contractual liability. *See id*; *see also Hoydal*, 154 AD2d at 346 (applying ordinary contract law to the City's auction of land). Accordingly, the City is bound by the same commercial principles governing other parties that do business on a wide scale in this state.

### C. Plaintiffs, Holding Now Unsaleable Medallions, Suffered Injury As a Result of Defendants' Deceptive Acts and Omissions

Plaintiffs are under no obligation to sell or attempt to sell their medallions in order to assert or establish injury or to state a claim for relief. This is especially true where Plaintiffs

have alleged that the secondary market for medallions "is all but frozen" and have sought rescission. ¶¶ 143, 176-80. Indeed, transfers have become exceedingly rare, due to a shortage of buyers and the absence of financing. ¶ 147. Moreover, because of the debt service obligations typically incurred by medallion buyers, the ability to lease a medallion is critical to a medallion owner's business model. ¶ 46. Both individual and corporate owners of medallions have suffered from the dearth of drivers willing to lease their medallions. ¶ 133. While the extent of this harm may be difficult to calculate with precision at this stage of the proceedings, the harm surely exists and is sufficient to allege injury-in-fact. *See Ossining Union Free School Dist. v Anderson*, 73 NY2d 417, 424 [1989] ("recovery may be had for pecuniary loss"); *accord Clinton v New York*, 524 US 417, 432 [1998] ("economic injury [is sufficient] to establish standing").

Plaintiffs have alleged, and it cannot be seriously questioned, that medallion values have plummeted. The existence of such harm, which has been detailed in the press, is anything but speculative. *See* Ex. 7. The OMB study, its author's sworn testimony, and reports by the NYC and State Comptroller leave no doubt about the cause of these losses. *See* Ex. 9, 10, 12. Plaintiffs further allege that Defendants sold the medallions pursuant to false and misleading marketing materials, as well as without disclosing information about their impending regulatory neglect and malfeasance to potential buyers. ¶¶ 4, 5, 7, 95-127, 162-64.

Defendants' lengthy exposition regarding alternative theories for the admitted decline in the value of Plaintiffs' medallions raises, at best, factual issues not properly resolved on a motion to dismiss. Even if there were some uncertainty about what caused the medallion price crash, it would be improper to dismiss Plaintiffs' claims as a matter of law on a motion addressed to the pleadings. Rather, the parties should proceed to discovery that would allow a jury to make a

decision based upon a complete record.[12]

## III. THE COMPLAINT ALLEGES THAT DEFENDANTS DESTROYED THE VALUE OF MEDALLIONS THEY HAD JUST SOLD, WHICH VIOLATES THE DUTY OF FAIR DEALING AND IS A BREACH OF CONTRACT

### A. The TLC's Acceptance of Auction Bids Created Enforceable Contracts

Defendants continue to assert that Plaintiffs have failed to allege the existence of a contract between the parties. This argument is frivolous as the Complaint asserts the existence a contract clearly and repeatedly. ¶¶ 93, 94, 154, 166. Moreover, as any first year law student knows, a contract is formed by an offer (the auction bids), an acceptance (the announcement of winning bids), consideration (payment to the City) and a mutual intention to be bound by the terms of an agreement. *Express Industries and Terminal Corp. v New York State Dept of Transp.*, 93 NY2d 584, 589 [1999]. Defendants' solicitation of bids was a request for offers. *S.S.I. Investors, Ltd. v Korea Tungsten Mining Co.*, 80 AD2d 155, 160 [1st Dept 1981].

A leading treatise summarizes how an auction process creates a binding contract: "The acceptance of a bid at auction is commonly signified by the fall of the hammer or by the auctioneer's announcement 'Sold.' All that is necessary is that the auctioneer shall express his intention to accept the bid, in any mode that is clear to the bidder or that he has reason to know and understand. After such an acceptance, the sale is consummated." 1 J. Perillo, Corbin on Contracts 4.14 [1993]. This is especially so after consideration passed between the parties. *See Weiner v McGraw-Hill*, 57 NY2d 458, 464 [1982]. Here, the bids were offers. *See id*. ("[T]he

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[12] Although Plaintiffs do not request such relief or deem it appropriate, should the Court determine to convert this motion pursuant to CPLR 3211(c), Plaintiffs request that the Court schedule a Preliminary Conference so that discovery can be had to make a complete record. *See Nonnon v City of New York*, 9 NY3d 825, 827 [2007] (court must give notice to parties so they can make appropriate record); *Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988] (party opposing summary judgment after conversion of motion pursuant to CPLR 3211(c) must not be deprived of the opportunity to make an appropriate record).

submission of a bid coupled with a tender of a deposit, generally precede the formation of a contract."); *see also* Black's Law Dictionary 183 [9th Ed 2009] (bid is an "offer to pay a specified price for something that may or may not be for sale"). Once Defendants accepted those bids, contracts were formed. *S.S.I. Investors*, 80 AD2d at 158-59, 161. The bills of sale delivered by Defendants to Plaintiffs memorialize the contract terms. ¶ 93.

### B. Plaintiffs Allege Actions by the TLC which Destroyed the Benefit of the Medallion Buyers' Bargain

For at least a century, New York Law has held that every contract includes an implied duty of good faith and fair dealing, whereby the parties must be faithful to the agreed-upon purpose of the contract and act consistently with the other party's justified expectations. *Rowe v Great Atl. & Pac. Tea Co*., 46 NY2d 62, 68 [1978]; *Chase Manhattan Bank v Keystone Distributors, Inc.*, 873 F Supp 808, 815 [SDNY 1994]; Restatement (Second) of Contracts § 205. As Judge Cardozo famously stated, "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed." *Wood v Duff-Gordon*, 222 NY 88, 91 [1917] (internal quotation omitted). A later Court of Appeals decision adds: "'[T]he undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'" *Rowe*, 46 NY2d at 69 (quoting 5 Williston, Contracts (rev. ed., 1937), § 1293, p. 3682). Put slightly differently, New York law refuses to "suppose that one party was to be placed at the mercy of the other." *Wood,* 222 NY at 91.

Judge Cardozo's statements in *Wood* aptly describes the case at bar. Defendants sold taxi medallions to Plaintiffs. They did not specifically promise to enforce the laws and rules that give

medallions value. But their failure to reasonably enforce those laws defeated entire purpose of the transactions. The whole arrangement was, as Judge Cardozo wrote, "instinct with an obligation, imperfectly expressed" that the TLC would not act to destroy the value of the medallions it had just sold. *See* ¶¶ 20, 25, 37, 58-59, 62-69, 99. Defendants' entire argument assumes that, contrary to New York law, they can refuse to enforce legal standards that support the value of medallions and that Plaintiffs are simply at Defendants' mercy.

New York deems a contract to include promises that a reasonable person in the position of the promisee would be justified in believing critical to the agreement. *Wood*, 222 NY at 90-91; *511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d 144, 153 [2002] (citing *Rowe*, 46 NY2d at 69 and quoting 5 Williston, Contracts §1293 at 3682). This principle "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" *Dalton v Educ. Testing Serv*., 87 NY2d 384, 389 [1995] (quoting *Kirke La Shelle Co. v Armstrong Co*., 263 NY 79, 87 [1933]). Where one contract party destroys the benefit of the bargain, it violates the implied covenant of good faith and fair dealing. *See Roli-Blue, Inc. v 69/70th Street Assocs*., 119 AD2d 173 [1st Dept 1986]; Restatement (Second) of Contracts, §205. This is the very conduct Plaintiffs alleged in the Complaint. In sum, Defendants were obligated to act in a manner that affirmed the expectations of the parties to the medallion sales contracts. Instead, they systemically destroyed those expectations and caused unprecedented losses.

### C. The Implied Covenant May Be Violated by Otherwise Lawful Conduct and Cannot be Disclaimed

The Restatement explains that a party's action may be otherwise lawful, but still breach the duty: "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified." Restatement § 205, comment D. "Bad

faith may be overt or may consist of inaction, and fair dealing may require more than honesty." *Id*. As the Court of Appeals stated in *Dalton*, "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." 87 NY2d at 389.

Many courts have held that the duty of good faith and fair dealing may not be disclaimed. *Northwest, Inc. v Ginsberg*, 134 S Ct 1422, 1432 [2014] (citing Minnesota law); *Alta Vista Properties, LLC v Mauer Vision Center, PC*, 855 NW2d 722, 730 [Iowa Supreme Court 2014]; *Pierce v Int'l Ins. Co. of Illinois*, 671 A2d 1361, 1366 [Del. Supreme Court 1996] ("duty of good faith and fair dealing attaches to every contract, and this duty cannot be disclaimed"). Put another way, "'[t]he obligation [is not] implied, but is law imposed.'" *Northwest*, 134 S Ct at 1432 (quoting 3A. Corbin, Corbin on Contracts § 654A, p. 88 (L. Cunningham & A. Jacobsen eds. Supp. 1994)).

When Plaintiffs purchased their medallions, they reasonably expected that Defendants would enforce existing laws and norms that gave medallions their value. The primary benefit of owning a New York City taxi medallion—the main reason medallions were prized assets—was that the law granted hail exclusivity to yellow taxis and limited their number. Rather than support the value of the medallions they had sold, all for at least $800,000, the TLC did just the opposite. While everyone knew about the existence of black cars, they also knew the licensing rules and practices that kept stable the number of black cars. They also knew that hails without prearrangement were the exclusive province of yellow cabs.

Even if Defendants claim "discretion" to ignore the black car licensing laws—itself a dubious proposition—their actions were still arbitrary and in violation of the implied duty. *See, e.g.*, *SI Communs., Inc. v Nielsen Media Research*, 181 F Supp 2d 404, 410 [SDNY 2002]

("[T]he covenant of good faith requires that a party vested with contractual discretion exercise that discretion reasonably, not arbitrarily or capriciously, or in a manner inconsistent with the reasonable expectations of both parties.") (internal citation omitted). Indeed, the "covenant of good faith and fair dealing governs all exercises of contractual discretion except when the parties expressly permit certain acts that would otherwise violate an implied covenant." *United States Bank Nat'l Ass'n v PHL Variable Life Ins. Co.*, 112 F Supp 3d 122, 129 [SDNY 2015]. Certainly, Defendants did not—and never would have—offered a contract that expressly permitted them to more than triple the size of black car fleet and allow those cars to accept e-hails throughout the five boroughs. Had they done so, no one would have purchased their medallions, certainly not at prices they did.

Defendants chose not to enforce rules and practices that limited the number of black cars operating on City streets and that restricted the manner of their operation. Instead, without notice, within eighteen months of the auctions, Defendants had allowed more than 20,000 Uber taxis to operate in a way that was new and unexpected. These actions undermined and ultimately destroyed the value of the very medallions Defendants had just sold to unwitting Plaintiffs.[13]

## IV. DEFENDANTS' ADMITTEDLY FALSE PRE-AUCTION STATEMENTS AND OMISSIONS FRAUDULENTLY INDUCED PLAINTIFFS TO BID

Defendants knew precisely every medallion sale price in the months leading up to the auctions. Nevertheless, inducing Plaintiffs to bid at the auctions, the TLC routinely misstated the average sale prices, misrepresented price trends and omitted material information about medallions sales. ¶¶ 71-73, 75-81. Perhaps more importantly, Defendants also omitted material

[13] To be clear, Plaintiffs do not contend that TLC Rules and associated regulations created a contract between the parties. It was the sale of the medallions at auction that created the contracts between the parties. The TLC Rules merely provide the framework under which the medallions are sold and operated. Defendants breached the contracts by improperly exercising their discretion in not enforcing statutes and rules in a way that undermined the market for and value of the medallions.

facts about their intentions to ignore longstanding rules and practices in their regulation of the taxi and for-hire vehicle industry. Both these alleged material omissions and Defendants' material misstatements are sufficient to support a cause of action for fraudulent inducement. *See Securities Investor Protection Corp. v BDO Seidman, LLP,* 95 NY2d 702, 710 [2001] (citing *Gaidon v Guardian Life Ins. Co.*, 94 NY2d 330, 348 [1999]. But for these false statements and material omissions, plaintiffs would not have bid at the auctions, or would have bid far less.

### A. Both Misrepresentations and Omissions Can Support a Claim for Fraudulent Inducement

Defendants completely misstate Plaintiffs' cause of action for fraudulent inducement, selectively cherry-picking portions of Plaintiffs' allegations in order to incorrectly suggest that Plaintiffs have only alleged that Defendants "made knowing misrepresentations of material facts." Def. Br. at 18. Defendants ignore, however, that, in addition to misrepresentations, Plaintiffs allege that Defendants also ***omitted*** material information. *See, e.g.*, ¶¶ 95-99, 128-43. *See New York Univ.*, 87 NY2d at 318 ("There are situations where a material omission can induce detrimental reliance as effectively as a false statement."). The TLC failed to disclose to the market that it did not plan to require Uber-affiliated bases to comply with base licensing rules, thus allowing Uber to add new vehicles *ad infinitum*. ¶ 97. Defendants also omitted to state that they would allow e-hail taxis to accept street hails in direct competition with medallion taxis. ¶ 96.

Following the guidance of the United States Supreme Court, New York courts have found that "[i]n cases involving omissions, especially where open market transactions are involved, reliance is generally presumed to flow from a finding of materiality." *Brandon v Chefetz*, 106 AD2d 162, 167 [1st Dept 1985]. In cases like this one, "'involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is

necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important…'" *Id*. (quoting *Affiliated Ute Citizens v United States*, 406 US 128, 153-54 [1972]). Aside from Defendants' material misrepresentations, their omissions of material fact caused a fraud on the market. Particularly because Defendants have complete control over the market and are the ***only*** source of information about the market, it is undeniable that all information available to the market came from Defendants. Not only does this crucial fact make a demonstration of reliance unnecessary but, contrary to Defendants' contention, it makes the disclaimers to which Defendants cling entirely meaningless.

### B. Boilerplate Disclaimer Language Does not Defeat a Fraudulent Inducement Claim Based on Defendants' Knowingly False Statements and Material Omissions

Defendants may not escape liability by hiding behind boilerplate disclaimers. "The law is abundantly clear in this state that a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge." *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]; *see also Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]; *Steinhardt Group, Inc. v Citicorp*, 272 AD2d 255, 257 [1st Dept 2000] ("a purchaser may not be precluded from claiming reliance on misrepresentations of facts peculiarly within the seller's knowledge, notwithstanding the execution of a specific disclaimer"); *Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mkts. Inc.*, 119 AD3d 136 [1st Dept 2014] (defendants' disclaimers did not track the misrepresentations and omissions alleged by plaintiffs and thus did not negate plaintiffs' claim of justifiable reliance).

Neither an "as is" clause nor a "no reliance" clause in a sales contract defeats a fraudulent

inducement claim based on statements and omissions by the seller that urged the purchaser to buy where then-present facts and omissions were peculiarly within the seller's knowledge. *TIAA Global Investments, LLC v One Astoria Square*, LLC, 127 AD3d 75 [1st Dept 2015]. As the First Department held in *Stambovsky v Ackley*, "[w]here a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care … nondisclosure constitutes a basis for rescission as a matter of equity." 169 AD2d 254, 259 [1st Dept 1991]. The *Stambovsky* court explained: "Any other outcome places upon the buyer not merely the obligation to exercise care in his purchase but rather to be omniscient with respect to any fact which may affect the bargain. No practical purpose is served by imposing such a burden upon a purchaser." *Id*.

*Basis Yield* is directly on point. In that case, the First Department determined that the investment bank defendant had knowledge from non-public sources about the mortgage-backed securities it sold, that this knowledge vitiated the effect of its disclaimers, and that the disclaimers were not sufficiently specific to invalidate a claim of reliance. 115 AD3d at 137-39. Here, Defendants alone possessed non-public knowledge of the City's for-hire vehicle market, and about medallion sale-price history. Thus, their boilerplate disclaimers are no defense.[14]

[14] Moreover, the purported "documentary evidence" presented by Defendants is anything but conclusive. It raises rather than resolves factual issues. For instance, Defendants contend that their boilerplate disclaimers undermine Plaintiffs' claims that they relied upon Defendants' representations when evaluating whether to bid on medallions. But under New York law, it is clear that documents should be considered on a motion to dismiss only where the contents are "essentially undeniable" and not in dispute. *See Fonanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010].

## V. DEFENDANTS' DISSEMINATION OF KNOWINGLY FALSE INFORMATION SUPPORTS A CAUSE OF ACTION FOR NEGLIGENT MISREPRESENTATION

From the outset, Defendants conflate negligent misrepresentation and fraudulent inducement, lumping them together in an attempt to argue that purported documentary evidence "refutes plaintiff[s'] claims of deliberate misrepresentation and justifiable reliance…." Def. Br. at 17. Unlike fraudulent inducement, negligent misrepresentation requires neither a knowing misrepresentation nor intent. A claim for negligent misrepresentation merely requires the plaintiff to demonstrate: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information provided by defendant was incorrect or that it omitted material information; and (3) that plaintiff reasonably relied on the information or omission. *See Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] (reciting elements of claim for negligent misrepresentation); *Abbot v Herzfedl & Rubin, P.C.*, 202 AD2d 351, [1st Dept 1994] (denying motion to dismiss where complaint stated sufficient facts to support allegations of negligent misrepresentation based on omissions). Plaintiffs have adequately alleged all three elements.

Defendants do not bother to deny that they misrepresented the historical sales figures and price trends for taxi medallions. Their only asserted defense is the nonsensical notion that auction buyers cannot show privity with the auction sellers. Plaintiffs purchased their medallions directly from the Defendants at auction. Plaintiffs thus meet the first element of negligent misrepresentation because there is privity of contract between Plaintiffs and Defendants.

Even if, assuming *arguendo*, the contract between the parties were not enough to demonstrate privity, a "privity-like" relationship may be established where a defendant possesses "unique or specialized expertise, or [has] a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Kimmell v*

*Schaefer*, 89 NY2d 257, 263 [1996]. Given their exclusive control of the market for newly issued medallions as well as their comprehensive oversight over the secondary market, Defendants had a duty to impart correct information to Plaintiffs regarding both the sale prices of medallions and Defendants' plans to permit practically unlimited growth of the e-hail taxi fleet. As discussed above, because of Defendants' exclusive access to complete information and their regulatory powers, any purported disclaimer issued in connection with Plaintiffs' medallion purchases was not binding. Judge Pollock said it well: "The doctrine of bespeaks caution provides no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away." *In Re Prudential Sec. Inc. Ltd. Partner. Lit.*, 930 F Supp 68, 72 [SDNY 1996]. Defendants alone possessed material knowledge and information but withheld it, thus precluding their reliance on a disclaimer. *See Securities Investor Protection Corp.*, 95 NY2d 710 ("There are situations in which a material omission can induce detrimental reliance as effectively as a false statement.").

## VI. PLAINTIFFS HAVE STATED A CLAIM FOR RESCISSION BASED ON THE ALLEGED BREACH OF CONTRACT AND THE ALLEGED FRAUDULENT INDUCEMENT

Defendants incorrectly claim, citing no authority, that rescission is "only available to parties who have been injured as the result of a contract breach." Def. Br. at 16. This contention completely ignores the paradigmatic circumstances under which parties most often seek rescission—where the defendant deliberately concealed vital information that, if plaintiff had known about it at the time of the contract, he or she would never have entered into the agreement in the first place. "Rescission will almost certainly be available when the claimant seeks to escape from an agreement that was induced by the other party's fraud or wrongdoing." Restatement of the Law (3d), Restitution and Unjust Enrichment, § 54

To justify the equitable remedy of rescission, a contract party must only allege "fraud in the inducement of the contract; failure of consideration; an inability to perform the contract after it is made; ***or*** a breach in the contract which substantially defeats the purpose thereof." *Babylon Assocs.*, 101 AD2d 215 (internal citation omitted) (emphasis added). The standard is disjunctive; only one of those elements need be alleged. Here, though the remedy of rescission would be justified by either breach of contract or fraudulent inducement, Plaintiffs have alleged both causes of action.

"To maintain an action based on fraudulent representations, whether it be for the rescission of a contract or…in tort for damages, it is sufficient to show that the defendant knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged." *Channel Master Corp. v Aluminium Ltd. Sales, Inc.*, 4 NY2d 403, 406-07 [1958] (internal citations omitted). *See also Mich. Nat'l Bank-Oakland*, 89 NY2d 94, 107 [1996] (because the insurer failed to disclose its insolvency to the reinsurers, reinsurance contracts were properly rescinded for fraud in the inducement). Plaintiffs' Complaint more than adequately alleges that Defendants sold the medallions at auction knowing full well that they were preparing to allow the unfettered expansion of the e-hail taxi fleet, in part by permitting e-hail taxis to operate in direct violation of the TLC's rules, thereby frustrating the purpose of the contract. *See, e.g.*, ¶¶121, 123-37. It is settled law that, if a promise is made with the undisclosed intention of not performing it, this "constitutes a misrepresentation of 'a material existing fact' upon which an action for rescission may be predicated." *Sabo v Delman*, 3 NY2d 155, 160 [1957] (internal citations omitted); s*ee also Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]. There is "no doubt that a misrepresented intention to perform a contract may constitute actionable fraud, and a statement of present

intention is deemed a statement of material existing fact." *Neckles Bldrs., Inc. v Turner*, 117 AD3d 923, 925 [2d Dept 2014] (internal citations and quotations omitted). Plaintiffs, therefore, have stated a claim for rescission.

Even if Defendants' material misrepresentations and omissions are ultimately found to be merely negligent, the same result will lie. For more than a century, New York law has "afford[ed] remedies for the consequences of innocent misrepresentation. A contract induced thereby may, in many cases, be avoided, and the equitable powers of courts are frequently imposed for the rescission of contracts or transactions based upon mistake or innocent misrepresentation…." *Canadian Agency, Ltd. v Assets Realization Co.*, 165 AD 96, 103 [1st Dept 1914] (internal quotations and citations omitted). As *Canadian Agency* adds, "[i]n equity, the right to relief is derived from the suppression or misrepresentation of a material fact, though there be no intent to defraud… It is inequitable and unconscientious for a party to insist on holding the benefit of a contract which he has obtained through misrepresentations, however innocently made." *Id*.

Rescission of a contract is also permitted "for such a breach as substantially defeats its purpose." *RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654 [2d Dept 2005] (quoting *Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]). Where there is a breach of contract that is so substantial and fundamental as to defeat the objective of the parties in making the contract, rescission of a contract will be permitted in the interest of providing an equitable remedy. *See id*; *see also Willoughby Rehabilitation & Health Care Ctr., LLC v Webster*, No. 2013-06324, 2015 NY App Div LEXIS 9114, at *6 [2d Dept Dec. 9, 2015] (rescission is permitted for a breach of contract that is so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract). The primary function

of rescission is to substantially restore the *status quo* between the parties. *See Sokolow v Lacher*, 299 AD2d 64, 71 [1st Dept 2002]; *Cusack v American Defense Sys., Inc.*, 86 AD3d 586, 588 [2d Dept 2011] ("The effect of rescission is to declare the contract void from its inception and to put or restore the parties to status quo."). Here, Plaintiffs and Defendants entered into valid and binding agreements for the purchase and sale of taxi medallions. Plaintiffs paid mightily for their medallions, which were to provide them, *inter alia*, with hail exclusivity (except as to green taxis outside the exclusionary zone). Defendants breached their contracts with Plaintiffs in a way that substantially defeated the purpose of the agreements. Plaintiffs are free to seek from the court any and all remedies available to parties injured as a result of this contractual breach. Plaintiffs, therefore, may properly seek rescission.[15]

## VII. WHILE THE COMPLAINT PLAUSIBLY ALLEGES VIOLATIONS OF LOCAL LAW, NONE OF PLAINTIFFS' CLAIMS SOUND IN ARTICLE 78 AND NONE SEEK ARTICLE 78-TYPE RELIEF

Defendants devote many pages of their brief to their arguments that Plaintiffs' "Article 78" claims should be dismissed because Plaintiffs lack "standing" to bring such claims or because they are time-barred. In fact, none of the Complaint's asserted causes of action sound in Article 78, so there are no such claims to dismiss. Indeed, as Justice Kerrigan noted in his April 27, 2016 decision in *CGS Taxi*, Plaintiffs' claims are "very different" from Article 78 claims. *See* Ex. 13 at 2. Moreover, Plaintiffs are not seeking relief pertinent to Article 78, such as

[15] Defendants also argue that, based upon statements of non-reliance contained in the contracts, Plaintiffs' claim for rescission is barred by the doctrine of unclean hands. This is yet another instance of the pot calling the kettle black. "The doctrine of unclean hands is only available where plaintiff is guilty of immoral or unconscionable conduct…and the party seeking to invoke the doctrine is injured by such conduct." *Frymer v Bell*, 99 AD2d 91, 96 [1st Dept 1984] (internal citation omitted). Not only would it be nonsensical to cast Plaintiffs' signature of these statements of non-reliance as "immoral" or "unconscionable," but also it is absurd to suggest that **Defendants** were injured by Plaintiffs' actions. The injury flows solely in the other direction. Defendants made hundreds of millions of dollars from their transactions with Plaintiffs and the class. It is the Defendants alone who have acted immorally and in an unconscionable manner.

mandamus. They are seeking damages or rescission of their contracts. Because the instant case is a commercial action, the limitations period for Article 78 does not apply.[16]

That said, the Complaint does allege, as detailed above, that the TLC violated and continues to violate licensing standards expressed in the NYC Code and in TLC rules. *See, e.g.*, ¶¶ 97, 123, 126-27, 130, 160. In their lengthy brief, Defendants do not deny that the TLC has failed to enforce these rules in licensing Uber-affiliated bases and Uber taxis affiliated with these bases. They do not deny that none of the Uber-affiliated bases are owned by franchisees of the base. They do not deny that few, if any, of the vehicles associated with the Uber-affiliated bases are members of a cooperative that operates the base. They likewise do not deny that these improperly-licensed Uber taxis routinely accept so-called e-hails, which are made by passengers immediately ready to travel, not by true pre-arrangement via a black car base.

The Complaint makes these allegations in detail, but not because it asserts any Article 78 claims. It makes them because the TLC failed to disclose its practices before it sold the medallions and because those practices, when put into effect, destroyed the benefit of the medallion buyers' bargains. For that reason, the TLC's actions as a regulator, even if not unlawful, *resulted in* a violation of the GBL § 349, in fraudulent inducement, in negligent misrepresentation and in a breach of contract.

## CONCLUSION

When Defendants sold taxi medallions, they were required to comply with commercial norms. Instead, they misrepresented medallion prices, medallion price trends and the way the

[16] Justice Kerrigan repeated this conclusion in his May 9, 2017 decision dismissing the *CGS Taxi* complaint based on the plaintiffs' failure to file notices of claim. Not only did Justice Kerrigan plainly state in that ruling that *CGS Taxi* is not an Article 78 action, his ruling was necessarily based on that conclusion because it dismissed the complaint for plaintiffs' failure to file a notice of claim. Because an Article 78 action does not require a notice of claim, any Article 78 claim in *CGS Taxi* would not have been dismissed on that ground. *See* Ex. 14.

taxi industry would be regulated and structured after the auctions, thus defeating Plaintiffs' expectations as buyers and denying them the benefit of their bargain. Plaintiffs' allegations are more than sufficient to state claims for violations of the General Business Law, for breach of the covenant of good faith and fair dealing, for fraudulent inducement, and for negligent misrepresentation. For all of the foregoing reasons, Defendants' motion to dismiss should be denied.

Dated: June 6, 2017

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