To be argued by: **Mark C. Rifkin**
Time Requested for Argument: 30 Minutes

APL-2021-00166

State of New York
Court of Appeals

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,

Plaintiffs-Appellants,

-against-

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

Defendants-Respondents.

OPENING BRIEF FOR THE PLAINTIFFS-APPELLANTS

LAW OFFICES OF DANIEL L. ACKMAN
165 Broadway, 23rd Floor
New York, New York 10006
(917) 282-8178

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Avenue
New York, New York 10016
(212) 545-4600

FRIEDMAN KAPLAN SEILER & ADELMAN LLP
7 Times Square
New York, New York 10036
(212) 833-1125

Attorneys for Plaintiffs-Appellants

Appellate Division Docket No.: 2017-12988
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PRELIMINARY STATEMENT

In late 2013 and early 2014, Defendants-Respondents ("Defendants"), the City of New York ("City") and its Taxi and Limousine Commission ("TLC"), promoted and held three public auctions for the sale of 400 yellow taxi medallions (the "Auctions"). The City set "upset" (minimum bid) prices for the Auctions that signaled to the markets that the medallions were worth, at the very least, the minimum bid prices—$650,000 for independent medallions and $850,000 for corporate medallions. As it happened, the winning bids averaged slightly more than $1 million per medallion, a total of $409 million.

Plaintiffs-Appellants ("Plaintiffs") were among the winning bidders. But the "winners" at these Auctions actually were losers, thanks to the City's bad faith, unfair, and deceptive conduct both before the Auctions and soon afterward. In the months prior to the Auctions, the TLC talked up the price of the medallions. It repeatedly made false and misleading statements about average medallion sale prices, and touted an investment in medallions as "better than the stock market." But just after the Auctions, in violation of existing licensing standards, the City and the TLC permitted an unprecedented surge in the number of so-called "black cars," most affiliated with Uber Technologies, Inc. ("Uber") and Lyft, Inc. ("Lyft"). Thus, the black car fleet grew from about 10,000 in 2014 to nearly 39,000 in 2015

and to more than 100,000 by 2018. The TLC also permitted these black cars to accept e-hails, putting them in direct competition with medallion taxis.

The market for medallions promptly crashed. By October 2021, medallions were selling for about $90,000 on average, less than a tenth of what Plaintiffs paid at the Auctions. This was not "better than the stock market." Indeed, the crash in taxi medallion prices was more dramatic than any stock market crash in memory.

Plaintiffs sued the City and the TLC in March 2017 for breach of the duty of good faith and fair dealing and for violation of Section 349 of the General Business Law ("GBL") among other claims. The Appellate Division dismissed these claims, holding that: (1) the City effectively nullified the duty of good faith and fair dealing by a boilerplate disclaimer in the Auction bid form saying that the City made no "representations or warranties" as to anything other than clear title to the medallions; and (2) the GBL § 349 claim was time-barred by provisions of General Municipal Law ("GML") § 50-e.

Both of the Appellate Division's holdings were wrong. A boilerplate disclaimer of representations and warranties cannot and does not disclaim or negate the implied covenant of good faith and fair dealing, which is implicit in every contract, and GML § 50-e applies only to traditional common-law tort claims, not to violations of remedial statutes, such as the GBL, enacted for the protection of the public.

This Court should reverse the Appellate Division's decision.

QUESTIONS PRESENTED

1. Is a boilerplate disclaimer of representations and warranties sufficient to permit a seller, in violation of the implied covenant of good faith and fair dealing, to destroy most of the value of the transaction to the buyer?

The Appellate Division answered yes.

2. Is a claim against a municipality brought under GBL § 349 governed by the ninety-day notice of claim provisions of Municipal Law § 50-e?

The Appellate Division answered yes.

STATEMENT OF JURISDICTION

On October 12, 2021, this Court granted Plaintiffs' motion for leave to appeal to the Court of Appeals from the Appellate Division's order. This Court has jurisdiction under CPLR 5602 (a) (1) (i). The questions presented were argued and decided in Supreme Court and therefore are preserved for this Court's review. R-33; R-37.[1]

STATEMENT OF THE CASE

This statement of facts is taken from the well-pled allegations of the Amended Complaint ("Complaint"),[2] from documents cited in the motion papers

[1] Citations to "R__" are to the Record on Appeal.

[2] "¶ __" refers to paragraphs of the Complaint, which can be found at R-52-78.

below, and from statements in the public record that both pre- and post-date the filing of the motion papers below and are subject to judicial notice.

I. FACTUAL BACKGROUND

A. The City's For-Hire Vehicle Industry at the Time of the Auctions

At the time of the Auctions—and for decades before—all for-hire vehicles in the City of New York, whether yellow cabs, black cars, or livery cabs, operated under specific statutes and regulations. ¶ 19. For decades, the right to operate a yellow taxi and to accept street hails in the City of New York required a license, also known as a medallion, issued by the City. R-58, ¶ 39. The medallion system began in 1937 with the passage of the Haas Act. N.Y.C., N.Y., ORDINANCES, in Proceedings of the Board of Aldermen and Municipal Assembly of the City of New York from January 4, to June 29, 1937, vol. 1545 (Mar. 1, 1937). *See* R-56, ¶¶ 23-24. Since then, the number of medallions has been fixed by law and could be changed only by an act of the City or State legislature. *See* R-58, ¶ 40; *see also Greater New York Taxi Ass'n v State of NY*, 21 NY3d 289, 297 [2013] (discussing requirement of legislation to issue new medallions). Starting in 1971, the TLC has been charged with licensing and regulating medallion taxis and the entire for-hire vehicle industry. ¶¶ 19-29. The TLC enacts rules (R-298-332) which are, of course, cabined by and subject to statutes enacted by the City Council. These statutes are codified in Title 19, Chapter 5 of the NYC Administrative Code.

In addition to capping the number of yellow cabs, the City and the TLC have also long regulated other sectors of the industry, including black cars, livery cabs, and luxury limousines, collectively known as for-hire vehicles, or FHVs. Like yellow taxis, all FHVs must be licensed, with the right to a license determined by City statutes and TLC rules. ¶¶ 51-69.

Statutes and rules also limited entry into the FHV market by licensing standards. According to the TLC's 2014 Taxicab Factbook (the "Factbook"), published in January 2014, at the time of the Auctions, there were 13,437 yellow taxi medallions authorized and in operation. R-56, ¶ 25; *see also* R-212-29. There were also "about 10,000" licensed black cars. R-61-62, ¶ 68; R-217. As the 2014 Factbook also noted, black cars had to be dispatched from one of 80 bases licensed and in operation at that time. R-61, ¶ 68; R-217.

The City ordinances and rules also restricted which parts of the market each class of FHV could serve. R-56, ¶ 27. Livery cabs, sometimes referred to as "community cars" or "car services," traditionally catered to the outer boroughs. *Id*. Before Uber and Lyft appeared, the black car industry catered primarily to the corporate community. R-57, ¶ 28. In 2012, state legislation authorized a new form of taxi, known as street hail liveries or "green cabs," which were permitted to accept street hails outside a so-called exclusionary zone, comprised of most of Manhattan and City airports. R-57, ¶ 30. While there was no specific cap on the

number of livery cabs or black cars, the licensing standards effectively limited the size of each fleet. *Id*.

In addition to limiting the size of each fleet, the City also limited competition between fleets. *Id*. Only yellow taxis could accept street hails from passengers ready to travel, giving them a crucial competitive advantage. ¶ 20. Livery cabs and black cars could accept fares only by pre-arrangement through licensed bases. R-60, ¶ 58.[3] While the statutes and regulations could (and did) change from time to time, the basic structure of the taxi market remained unchanged and supported the investment-backed expectations of medallion owners. R-55, ¶ 20. Indeed, the 2012 HAIL Act[4] 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. R-57, ¶ 31.

Beyond the requirement that black cars could only accept fares that were prearranged through bases, black car operators also were required to have a franchise relationship with or ownership interest in the base that dispatched their fares. R-61, ¶ 63. Thus, NYC Admin. Code § 19-502 (u) provided, and still

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[3] Green cabs, like traditional liveries, may accept pre-arranged trips. They also may accept street hails only outside of the so-called "exclusionary zone," which consists of most of Manhattan and the City's two airports. R-57, ¶¶ 30-31.

[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).

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*." (Emphasis added). A black car base is a for-hire base that: (a) 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*. *Id.* Thus, for a black car to be properly licensed, it must be affiliated with a licensed base and its owner must be either a cooperative owner or franchisee of that base. A base, meanwhile, could only be licensed if it were owned by franchisees or members of a cooperative that operated the bases.

While black car operators are not required to purchase medallions, as a practical matter, the size of the black car fleet was constrained by the base ownership rules and was relatively stable. R-61, ¶ 67. Thus, in mid-2013, there were only 9,163 black cars licensed by the TLC. *See*, *e.g.*, R-663, ¶ 60; R-680, ¶ 60. As noted, at the beginning of 2014, there were about 10,000. *See* R-217.

After the Auctions ended, however, the size of the black car fleet exploded, with disastrous effects on Plaintiffs. *See* R-62, ¶ 69; R-66, ¶¶ 95-99. This unprecedented surge only occurred because the TLC systematically disregarded its licensing ordinances and rules. *See, e.g.*, R-66-69, ¶¶ 96-122. The TLC licensed bases affiliated with Uber and Lyft even though they were (and are) not owned by

franchisees of the bases or members of a cooperative. Instead, the bases were and are owned and operated by large venture capital-backed corporations based in California with operations around the world. *See* R-53, ¶ 5; R-70-71, ¶ 134 n 2.

B. E-hail Taxis at the Time of the Auctions

Uber and Lyft were virtually absent from the New York City market at the time of the Auctions in 2013 and 2014. The 2014 TLC Factbook, which surveyed the yellow taxi and FHV industry, did not mention electronic hailing ("e-hailing"). R-62; ¶ 74; *see also* R-213-29. Nor did it mention Uber, Lyft, or any other company operating e-hail taxis. Defendants nevertheless asserted below that Uber was well known at the time of the Auctions. But the only evidence they presented was a statement published over a year *after* the Auctions, relating not to black car base licensing, but to licensing of "dispatch service providers," which may "partner with bases," but which are not themselves bases. *See* R-167-203.

Auction bidders had no way to know, and no reason to expect, that Uber and Lyft would soon be permitted to flood the market with tens of thousands of vehicles denominated as "black cars" despite never complying with black car licensing requirements.

C. The Market for Medallions

Once issued, medallions could be and were traded in a secondary market. Over the years preceding the Auctions, medallion prices tended to rise. According

to the 2014 TLC Factbook, this appreciation was due primarily to the "[c]losed entry with a fixed supply" of medallions and the fact that only medallion taxis had the right to accept street hails. R-58, ¶ 41; R-101. In other words, medallions were valuable because the law afforded yellow taxis the exclusive right to offer point-to-point transportation to passengers ready to travel and because legislation capped the number of yellow taxis in operation. *See* R-58, ¶ 41.

From time to time, the City took advantage of the demand for medallions. When authorized by legislation, it sold newly issued medallions at auction. *See, e.g.*, R-56, ¶ 25. In 2004, for example, the City auctioned 591 new medallions for a total of approximately $198 million.[5] In 2006, it auctioned another 308 medallions for approximately $142 million.[6] In 2007 and 2008, the City sold another 152 medallions for a total of $73 million.[7] All told, between 2004 and 2008, the City

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[5] *See* TLC Press Releases, available at https://www1.nyc.gov/assets/tlc/downloads/pdf/press_releases/press_04_04.pdf; https://www1.nyc.gov/assets/tlc/downloads/pdf/press_releases/press_04_05.pdf; https://www1.nyc.gov/assets/tlc/downloads/pdf/press_releases/press_04_07.pdf (last accessed on Dec. 12, 2021).

[6] *See* TLC Press Releases, available at https://www1.nyc.gov/assets/tlc/downloads/pdf/press_06_22_2006.pdf (last accessed on Dec. 12, 2021).

[7] *See* TLC Press Releases, available at https://www1.nyc.gov/assets/tlc/downloads/pdf/press_release_11_01_07.pdf; https://www1.nyc.gov/assets/tlc/downloads/pdf/press_release_03_27_08.pdf (last accessed on Dec. 12, 2021).

sold approximately 1,000 new medallions for a total of $414 million. All of these auctions were open to the public.

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

For many years, and during the months prior to the Auctions, the TLC published monthly average sale prices for both individual (or independent) and corporate taxi medallions. R-63, ¶ 78. A corporate medallion could be owned by investors; independent medallions had to be owned by licensed taxi drivers, who, at the time, were obligated to operate them as well.[8] *See* R-59-60, ¶¶ 48-49. The TLC has a unique ability to report medallion prices because by law it must approve every sale and participate in every closing. *Id.* Thus, the TLC knows *every* actual medallion sale price. *See* TLC Rules 58-43 through 58-45.[9] Complete medallion sale and pricing data was (and is) available *only* from the TLC. R-63, ¶ 78.

In the months leading up to the Auctions, however, the TLC routinely overstated the average price of medallions. R-63-64, ¶ 79. For example, in November 2013, the TLC reported average individual medallion prices of $1,050,000. R-64, ¶ 80. In truth, the average was $900,000, approximately 14.3% lower than what the TLC stated. *Id*. In January 2014, the TLC reported the average

[8] The TLC would later amend its rules to eliminate the distinction between the two types of medallion.

[9] The relevant TLC rules cited herein are in the record at R-307-17. TLC rules are also available on the TLC website at http://www.nyc.gov/html/tlc/html/rules/rules.shtml.

sale price for an individual medallion as $1.05 million. *Id*.; *see also* R-255. The true average was $977,000. *See* R-64, ¶ 80.

For corporate medallions, the TLC reported that the average sale price was $1.32 million in May 2013 and that it remained at that level until November 2013. R-64, ¶ 83. In truth, however, there were no corporate medallion transfers for value between June 2013 and October 2013—and thus no average prices to report. *Id.* *See also* R-243-47. In November 2013, there was just one corporate medallion transfer, and that was for $1.2 million, nearly 10% *below* the reported average. *See* R-64, ¶ 83.

Apart from reporting false average sale prices, the TLC also misrepresented medallion price trends. R-64, ¶ 82. Charts in the Factbook and in promotional materials showed prices constantly rising. *See* R-227; R-234-36. In fact, while independent medallion prices had increased in early 2013, those prices *declined* during the second half of the year, from $1.015 million in July to $982,000 in February 2014. R-64, ¶ 82; *see also* R-237-97.

In short, the TLC reports and statements to the public overstated average medallion prices and misstated price trends leading up to the Auctions. R-64, ¶ 84. Contrary to what the agency reported, individual medallion prices had already begun to fall. For corporate medallions, there were hardly any sales at all. *Id.*

E. The TLC's Promotion of the Auctions

Apart from its false price reports, the TLC made additional statements about medallions as investments prior to the Auctions. The TLC issued a pamphlet before the Auctions that proclaimed, in large bold print, that an investment in a medallion was "**BETTER THAN THE STOCK MARKET**." R-63, ¶ 76; R-235 (emphasis in original). Beneath that headline, the TLC pamphlet showed a graph of purported medallion prices constantly rising from January 2001 to 2014 (present). *Id.* The graph depicted a steep rise during 2013. *Id.* Longer term, it showed the price of an independent medallion increasing from $200,000 to more than $1 million in early 2014. *Id.*

In January 2014, the agency published its Factbook about the taxi and FHV industry. R-62-63, ¶ 74; R-212-29. Among other things, the Factbook stated: "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 and 265% for mini-fleet medallions." R-62-63, ¶ 74; R-227. It added: "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.*

Neither the Factbook nor the pamphlet disclosed that, as discussed above, medallion prices had peaked and had already started to decline.

The TLC's pre-Auction statements touting medallions as prime investments were widely reported and echoed in the financial press. R-63, ¶ 77. In November 2013, on the eve of the first auction, *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* R-334. The *Journal* article quoted the TLC's then-Chairman, David Yassky, as saying, "Taxicab ownership is highly profitable and that's why investors are willing to pay these prices." R-335. The City and the TLC never informed bidders that the average prices and price trends it published were exaggerated and inaccurate. Nor did they disclose that they would undermine medallion values by flooding the City streets with tens of thousands of new "black cars," and would permit them to accept e-hails from passengers ready to travel at a moment's notice, thus blasting the bedrock that had long supported the medallion values. The City and TLC also set minimum (or upset) bids of $650,000 for individual medallions and $850,000 for corporate medallions prior to the Auctions. R-80; R-85.

F. The Auctions and the Bid Form

The 2013 and 2014 Auctions were authorized by the 2012 HAIL Act, which permitted the issuance of up to 2,000 new medallions. The TLC held three auctions

in November 2013, February 2014, and March 2014. R-62, ¶¶ 70-73; R-65-66, ¶¶ 88-94. The Auctions were for a total of 400 wheelchair-accessible medallions, some of which were corporate and others independent. R-65, ¶¶ 88, 90, 92.

Plaintiffs submitted winning bids, not knowing what the TLC was about to do. One of the original plaintiffs, Daler Singh, a taxi driver, submitted a winning bid of $821,251 for an independent medallion in the February 2014 Auction. R-54, ¶ 13.[10] Richard Chipman, an experienced medallion owner, submitted winning bids for 14 corporate medallions in the November 2013 Auction. His winning bids ranged from $2,118,000 to $2,518,000, meaning he paid from $1,059,000 to $1,259,000 per medallion. R-55, ¶ 16; R-65, ¶¶ 88-89. Mr. Chipman then formed Plaintiffs, 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 14 medallions. R-54-55, ¶ 15.

Like all auction buyers, Plaintiffs were required to sign an "Official Bid Form," which contained the following boilerplate certification:

> I CERTIFY THAT I HAVE NOT RELIED ON ANY STATEMENTS OR REPRESENTATIONS FROM THE CITY OF NEW YORK IN DETERMINING THE AMOUNT OF MY BID. I FURTHER CERTIFY THAT I HAVE NOT COLLUDED, CONSULTED, COMMUNICATED, OR AGREED IN ANY WAY WITH ANY

[10] Mr. Singh was dismissed from the action after he filed for bankruptcy. *See* NYSCEF # 408. His bankruptcy trustee has since commenced a separate action alleging nearly identical claims. *Bankrupt Estate of Daler Singh*, *DBA Gilzian Enterprise LLC, by Robert J. Musso, Esq. Trustee v The City Of New York et al,* Index No. 716032/2019 [NY Sup Ct, Queens County].

> OTHER BIDDER OR PROSPECTIVE BIDDER FOR THE PURPOSE OF RESTRICTING COMPETITION OR INDUCING ANY OTHER PROSPECTIVE BIDDER TO SUBMIT OR NOT SUBMIT A BID.

R-134 (capitalization in original). The Bid Form added that each bidder:

> understand[s] and agree[s] that the City of New York has not made any representations or warranties as to the present or future value of a taxicab medallion, the operation of a taxicab as permitted thereby, or as to the present or future application or provisions of the rules of the NYC Taxi & Limousine Commission or applicable law, other than a warranty of clear title to such medallion to successful, qualifying bidders therefore [sic] and I acknowledge that no warranties are made, express or implied, by the City of New York, as to any matter other than the warranty of clear title.

Id.

The Bid Form did not mention or even allude to the duty of good faith and fair dealing, much less purport to waive or disclaim it. And nothing in the Bid Form, or in any other Auction document, mentioned or disclosed any subsequent action the City or the TLC might take to destroy the value of the medallions it was in the process of selling. Specifically, the TLC never disclosed that it would permit the market to be flooded by tens of thousands of Uber and Lyft vehicles, or that it would license black cars and bases even if they did *not* qualify for licensure.

G. The TLC's Post-Auction Conduct

The year following the Auctions saw a dramatic and unprecedented change in the composition of the New York City FHV industry, specifically a massive increase in the number of black cars, most affiliated with Uber and Lyft. R-66, ¶ 95. The increase was directly attributable to the TLC's actions and inaction. And it

destroyed the benefit of Plaintiffs' bargain. *See* R-66, ¶ 96.

First, the TLC issued black car base licenses without regard to whether the cars were owned by franchisees or cooperative owners of their bases. The agency also issued licenses to Uber-affiliated bases, even though they also did not qualify for licensure. *Id.* Once the TLC stopped enforcing the licensing laws, the number of black cars could increase without meaningful restriction. R-66, ¶ 97. Uber- and Lyft-affiliated bases could add new vehicles *ad infinitum*. They proceeded to do just that. *Id. Second*, the TLC permitted the black cars affiliated with those bases to accept street hails at a moment's notice, putting them in direct competition with medallion taxis. R-66; ¶ 96.

All told, the number of black cars increased to 38,791 by April 2015.[11] This unprecedented surge continued to the point where, when Plaintiffs commenced this action in January 2017, there were more than 60,000 black cars operating on City streets. R-66, ¶ 98.[12] By 2017, the number of licensed FHVs (mostly black cars, but including liveries, and luxury limousines) had grown to approximately 83,000.[13] By 2018, there were more than 107,000 licensed FHVs, the vast majority

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[11] TLC 2016 Factbook at 2, available at https://www1.nyc.gov/assets/tlc/downloads/pdf/2016_tlc_factbook.pdf (last accessed on Dec. 12, 2021).

[12] Due to a clerical error, the Complaint puts this number at 90,000 black cars.

[13] 2018 TLC Factbook at 1, available at https://www1.nyc.gov/assets/tlc/downloads/pdf/2018_tlc_factbook.pdf (last accessed on Dec. 12, 2021).

of which were Uber and Lyft vehicles.[14]

In short, when the TLC auctioned the medallions in late 2013 and early 2014, the size of the black car fleet was stable and limited by longstanding car and base-licensing requirements. *See* R-61-62, ¶¶ 68-69. The number of black cars also was substantially lower than the number of yellow taxis. Within a year, however, the black car fleet had grown to *triple* the size of the yellow taxi fleet. Two years after that, it was more than *eight times* as large. Nearly all of this increase was due to the explosive growth of Uber in New York City, which, when this action was commenced, had roughly 46,000 black cars affiliated with its bases. R-69; ¶¶ 120-21. Few, if any, Uber vehicle owners were franchisees or owned a cooperative share of their bases. *Id*.

Compounding the problem, e-hail apps enabled these vehicles to pick up passengers ready to travel immediately, not at some point in the future. An Uber passenger could not arrange a trip hours beforehand. They could not, for example, book a car to be taken to the airport tomorrow morning. Rather, as Uber itself then stated, trips were "always booked on-demand by making a request through the app; there's no need to set a reservation in advance." R-70, ¶132.

H. The Resulting Destruction of Medallion Values

As black cars encroached, medallion values dropped, first slowly and then

[14] *Id.*

precipitously. 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. R-271; *see also* R-72, ¶ 145. In April 2015, there were no medallion transfers for value of any kind. *Id*. In May 2015, 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. *See* R-274; *see also* R-72, ¶ 145.

In the three months before the Complaint was filed, the TLC reported six individual medallion sales for value. R-292-94; *see also* R-72-73, ¶ 146. Of these, three were foreclosures and two were estate sales. *Id.* The only non-estate/non-foreclosure sale was in December 2016 and it was for only $387,717.60, less than half the Auction price, and well below the minimum bid levels. *See* R-292; *see also* R-72-73, ¶ 146. More recently, in October 2021, 30 medallions were sold for value (not including foreclosures). The average price was $90,261.[15] All told, medallions values have dropped by *more than 91 percent* since the Auctions. This was in dramatic contrast to the steady rise in the medallion market, as reported in the 2014 Factbook, for the previous decade. Indeed, as the Factbook noted, medallion prices had grown "exponentially" since World War II. R-112.

[15]All medallion transfer prices are reported on the TLC website. *See* https://www1.nyc.gov/site/tlc/businesses/medallion-transfers.page (last accessed on Dec. 12, 2021).

The table below summarizes how medallion values plummeted as the number of black cars surged:

DATE	LICENSED BLACK CARS	AVG. MEDALLION PRICES[16]
2014	10,000[17]	$1,200,000
2015	38,791[18]	$875,000
2016	67,484[19]	$475,000
2017	82,794[20]	$181,670
2018	107,435[21]	$139,333

It has been widely reported, and is alleged in the Complaint, that this precipitous decline was caused by the massive influx of Uber and Lyft- affiliated vehicles. *See*, *e.g.*, R-337-66 (collecting articles correlating the dramatic increase in the number of Uber and Lyft vehicles with the drastic decline in medallion values). The City's own economist has admitted as much, as discussed further below.

This unprecedented drop in prices is not hard to explain. If drivers can work the same streets and serve the same passengers without spending a million dollars for a medallion, why would they purchase one? Indeed, why would drivers even

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[16] Prices are for corporate medallions as of June of the relevant year. If there were no transactions in June, the price is for the next month in which there was a non-foreclosure transfer. *See* https://www1.nyc.gov/site/tlc/businesses/medallion-transfers.page (last accessed on Dec. 12, 2021).

[17] TLC 2014 Factbook, R-217.

[18] TLC 2016 Factbook at 1.

[19] TLC 2018 Factbook (includes all FHVs) at 1.

[20] *Id.*

[21] *Id.*

lease a medallion? The answer, increasingly, is that they would not.

I. Defendants' Admissions About the Crash

The City and the TLC 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"). R-367-80. The Mayoral Study admits:

> [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.... *Yellow cabs have seen their passenger volume decline*.

Id. at R-375 (emphasis added). The Mayoral Study also admits that increases in Uber's business have led directly to a corresponding decline in yellow taxi fares: "Increases in e-dispatch trips are largely substituting for yellow taxi trips . . ." *Id*. at R-373.

The City's own economists also have admitted the impact of the City's practices. A "Taxi Market Economic Study," prepared by the City's 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…." R-386. The OMB study adds

that "the recent decline [in medallion taxi trip volume] appears to coincide with the rapid growth in eFHV-affiliated cars." R-390. In deposition testimony, the principal author of that study agreed that the only factor that changed materially between the time of the Auctions in 2013 and 2014 and his deposition in September 2016 was the explosive growth in the volume of e-hail taxis operating in the City. *See* R-494-95; R-515-18; R-526; R-602-12.[22]

Beyond the statements by the OMB, the City has 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 admitted the reason for the postponement: the influx of Uber and Lyft undermined the medallion market to the point where additional auctions are not feasible. *See* R-685-93. Thus, the City has attempted no further auctions since 2014.

In sum, the TLC's actions caused a substantial decline in fares earned by yellow cabs. R-71, ¶ 139. They also caused a sharp decline in the pool of available taxi drivers, making medallion taxis harder to lease, and thus undercutting the sole source of revenue for corporate medallion owners. *See* R-71-72, ¶ 140. With Uber, Lyft, and other app-based taxi companies encroaching on the fares that had been

[22] This testimony was taken in connection with another action commenced on behalf of other Auction purchasers. *See CGS Taxi LLC v City of New York*, [Sup Ct, Queens County, Index No. 713014/2015]. That action was dismissed on a ground not applicable to this case.

the exclusive province of yellow taxis, the value of medallions has declined even more dramatically. In short, the unprecedented explosion in the black car fleet caused the medallion market's unprecedented crash.

II. PROCEDURAL HISTORY

In December 2016, and February 2017, Plaintiffs served notices of claim on the New York City Comptroller pursuant to New York City Admin. Code § 7-201. R-650-84; *see also* R-54, ¶ 14; R-55, ¶ 17. After more than 30 days elapsed with no response, Plaintiffs commenced this action on January 30, 2017. Plaintiffs filed the current Complaint on March 27, 2017. *See* R-1, R-52-78.

On May 2, 2017, Defendants moved to dismiss. R-41-42. On September 21, 2017, Supreme Court (Kerrigan, J.) denied the motion in part and granted it in part. R-28-38. Supreme Court dismissed Plaintiffs' GBL § 349 claim, their fraudulent inducement claim, their negligent misrepresentation claim, and that part of their rescission claim based on fraud, all for failure to comply with the notice of claim provisions of GML § 50-e. Supreme Court sustained Plaintiffs' breach of contract claim (based on the violation of the duty of good faith and fair dealing) and that part of their rescission claim based on breach of contract. *Id.* Plaintiffs appealed and Defendants cross-appealed. R-3-4; R-21-22.

The Appellate Division affirmed Justice Kerrigan's dismissal of plaintiffs' GBL § 349 cause of action, holding it "was subject to the requirements of General

Municipal Law § 50-e, as a cause of action sounding in fraud." *Singh v City of New York,* 189 AD3d 1697, 1699 [2d Dept 2020]. It reversed the denial of Defendants' motion to dismiss Plaintiffs' contract claim based upon the covenant of good faith and fair dealing. As to the good faith and fair dealing claim, the Appellate Division said:

> [T]he official bid form used by the plaintiffs included an acknowledgment that the City had 'not made any representations or warranties as to the present or future value of a taxicab medallion, the operation of a taxicab as permitted thereby, or as to the present or future application or provisions of the rules of the NYC Taxi & Limousine Commission or applicable law, other than a warranty of clear title to such medallion.' Based upon this language, no reasonable person in the position of the plaintiffs would believe that the defendants would act or refrain from acting in any manner to guarantee the value of their medallions, since this would be inconsistent with the terms of the official bid form.

Id. at 1700.

On October 12, 2021, this Court granted leave to appeal.

A. Related Cases

While this case was pending in the Appellate Division, two other Supreme Court Justices reached conclusions similar to Justice Kerrigan's. In *Akal Taxi NYC LLC v City of New York*, [Sup Ct, Queens County, Index No. 708602/2017], Justice Esposito addressed the same auction sale documents as those at issue here and held them insufficient to bar a claim for breach of the implied covenant of good faith and fair dealing. After noting that "[d]efendants, as both the sellers and

market regulators, had extraordinary power over the value of the taxi medallions they had sold," Justice Esposito explained:

> Defendants have failed to establish prima facie that at the time of the purchase of the medallions by the class members, defendants were unaware Uber, Lyft and other app-based "e-hail" vehicle services were planning to expand their operations significantly. Defendants also have failed to show prima facie that at such time, defendant TLC intended to refrain from limiting the numbers of such Uber, Lyft and other app-based "e-hail taxis," and was unaware the resulting competition would adversely affect the then current and projected revenue figures and market value of the medallions owned by the class members. In addition, defendants have failed to establish prima facie that the plummeting value of the subject medallions since the auction sales was not the result of a breach of an implied covenant by the TLC . . .

Akal Taxi NYC LLC v City of New York, Sup Ct, Queens County, Sept. 25, 2020, (NYSCEF #460), Esposito, J., Index No. 708602/2017, slip op at 9-10 (*see* document attached hereto).[23]

Similarly, in *Melrose Credit Union v Nadelman*, Sup Ct, Queens County, Aug. 6, 2020, (NYSCEF #318), Risi, J., Index No. 711618/2017 (*see* document attached hereto), another case in which Auction buyers sued the City and the TLC for breach of the covenant of good faith and fair dealing, Justice Risi denied a

[23] In *Akal Taxi*, Supreme Court also certified a class consisting of all purchasers of medallions in the Auctions and approved the form and manner of class notice. *Akal Taxi NYC LLC v City of New York,* Sup Ct, Queens County, Oct. 25, 2019 (NYSCEF # 231) and May 14, 2020 (NYSCEF # 382), Esposito, J., Index No. 708602/2017 (*see* documents attached hereto). The class certification order and notice order are the subject of a fully briefed appeal before the Second Department. In addition, the Supreme Court's denial of summary judgment to both Plaintiffs and Defendants in *Akal Taxi* is the subject of a pending appeal before the Second Department.

motion to dismiss that was based on the same official Bid Forms that Defendants rely on in this case. *Id.* at 5. Justice Risi explained:

> A covenant of good faith and fair dealing is implicit in all contracts. The implied covenant is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract even if the express terms of the contract do not explicitly prohibit that conduct…. Here, on a motion to dismiss the terms of the bid forms as a whole do not resolve all factual issues.

Id. at 4 (citations omitted).

ARGUMENT

I. STANDARD OF REVIEW

On a motion to dismiss pursuant to CPLR 3211, the Court's task is to determine whether a plaintiff's pleading states a cause of action. The motion must be denied if from the four corners of the pleading, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]. The reviewing court must liberally construe the complaint. *See*, *e.g.*, *Leon v Martinez*, 84 NY2d 83, 87 [1994]; CPLR 3026. It must also accept as true the facts alleged in the complaint and in any submissions in opposition to the dismissal motion. *See Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001] (collecting cases); *Wieder v Skala*, 80 NY2d 628, 631 [1992]. The court must accord plaintiffs the benefit of every possible favorable inference. *See Sokoloff*, 96 NY2d at 414. Whether the

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]. Moreover, dismissal under CPLR 3211 (a) (1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law." *Leon*, 84 NY2d at 87-88; *see generally* Siegel, N.Y. Prac § 259, at 503 [6th ed].

II. THE APPELLATE DIVISION ERRED IN DISMISSING PLAINTIFFS' CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

A. The Covenant of Good Faith and Fair Dealing is Implied in Every Contract

For more than a century, New York courts have held that every contract includes an implied duty of good faith and fair dealing. This duty (or "covenant," as it is often called) requires that the parties be faithful to the agreed-upon purpose of the contract and act consistently with their counterparty's justified expectations. *Rowe v Great Atl. & Pac. Tea Co*., 46 NY2d 62, 68-69 [1978]; Restatement (Second) of Contracts § 205.

"The implied covenant of good faith and fair dealing . . . 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." *Moran v Erk*, 11 NY3d 452, 456 [2008] (internal quotation marks omitted). *See also Dalton*

v Educ. Testing Serv., 87 NY2d 384, 389 [1995] (same) (quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]).

Bad faith "may include evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." *Stevens v Publicis, S.A.*, 50 AD3d 253, 256 [1st Dept 2008] (quoting Restatement [Second] of Contracts § 205, Comment d) (internal quotations omitted).

This Court first articulated the principle in Judge Cardozo's opinion in *Wood v Duff-Gordon*, 222 NY 88, 91 [1917]. As Judge Cardozo explained, when one party to a contract has discretionary power, New York law refuses to "suppose that one party was to be placed at the mercy of the other." *Wood*, 222 NY at 91. Thus, New York law deems a contract to include promises that a reasonable person would be justified in believing critical to the agreement. *Wood*, 222 NY at 90-91. Even where a contract contemplates the exercise of discretion, the covenant of good faith and fair dealing includes a promise not to act arbitrarily or irrationally in exercising that discretion. *Dalton*, 87 NY2d at 389.

The covenant "'encompass[es] any promises which a reasonable person in the position of the promisee would be justified in understanding were included,'" as long as they "'are not inconsistent with the terms of the contract.'" *Twinkle Play*

Corp. v Alimar Props., Ltd., 186 AD3d 1447, 1448 [2d Dept 2020] (quoting *Turkat v Lalezarian Developers, Inc*., 52 AD3d 595, 596 [2d Dept 2008]; citing *511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d 144, 153 [2002]). Where "a covenant of good faith is necessary to enable one party to receive the benefits promised for performance, it is implied by the law as necessary to effectuate the intent of the parties." *Wakefield v N. Telecom, Inc*., 769 F2d 109, 112 [2d Cir 1985] (applying New York law); *see also Arbeeny v Kennedy Exec. Search, Inc.,* 71 AD3d 177, 184 [1st Dept 2010] (citing *Wakefield*).

A claim for breach of the covenant of good faith and fair dealing may lie "[e]ven if a party is not in breach of its express contractual obligations." *Elmhurst Dairy, Inc. v Bartlett Dairy, Inc.*, 97 AD3d 781, 784 [2d Dept 2012]. Thus, in *Elmhurst Dairy*, the Second Department found that the defendant had not breached any written terms of an exclusive sales agreement but nevertheless permitted a claim for the breach of the duty of good faith and fair dealing. The Court sustained the claim, stating "[T]he plaintiff has alleged that the new delivery arrangement deprives it of the fruit, or benefit, of the exclusivity provision of the Elmhurst/Bartlett contract, and that Bartlett may have acted in bad faith to circumvent its exclusivity obligations under the Elmhurst/Bartlett contract." *Id.* at 784, citing *Moran*, 11 NY3d at 456 and *Dalton,* 87 NY2d at 389.

B. The Complaint Properly Alleges a Breach of the Covenant

If any case establishes a violation of the covenant of good faith and fair dealing, it is this case. Having touted the value of the medallions, having promoted the Auctions, having declared an investment in medallions as better than the stock market, having set minimum bid prices, and having sold medallions for millions of dollars, the Defendants then ruinously upset the market.

The duty of good faith and fair dealing is especially critical in this case because the City and the TLC are market regulators as well as sellers. Defendants' dual role gave them exceptional power—a power they abused as soon as the Auctions ended. This is a paradigmatic example of one party frustrating a counterparty's justified expectations. If the generic language of the Bid Form is read to permit what Defendants have done, it placed medallion buyers entirely at the mercy of the City and the TLC. This is exactly what the implied covenant of good faith and fair dealing is meant to prohibit.

While potential bidders knew about the existence of black cars, they also knew that licensing ordinances and regulations had kept their number stable for decades. And they also knew that statutes and rules required that black cars could accept fares only by prearrangement and that black car owners were required to be franchisees or have an ownership interest in their bases. Once the City and its TLC suddenly stopped enforcing the rules—without warning and without any formal

change in the law—they allowed tens of thousands of improperly licensed e-hail taxis to operate in direct competition with medallion taxis. These actions and the related inaction undermined and ultimately destroyed the value of the medallions that the Defendants had just sold to the public.

Defendants acted surreptitiously. Neither the City nor the TLC announced in advance that the TLC would license black cars whose owners were neither members of a cooperative nor franchisees. And neither the City nor the TLC formally changed statutes or regulations under which black cars were supposed to be licensed before permitting Uber- and Lyft-affiliated vehicles to flood the market.[24] This was the antithesis of good faith and the opposite of fair dealing.

C. The Duty of Good Faith and Fair Dealing May Not be Waived or Disclaimed

While the duty of good faith and fair dealing is central to New York law, this Court has not addressed whether the duty may be disclaimed or waived. The Court should make clear that it may not be.

So far as Plaintiffs are aware, there is no New York appellate decision prior to this case upholding a disclaimer of the duty of good faith and fair dealing. Indeed, such a disclaimer is inherently problematic. It implies that the disclaiming party may act in bad faith or unfairly with impunity. Thus, many courts have held

[24] To be clear, Plaintiffs do not demand that the Defendants take any regulatory action. Plaintiffs only seek damages or rescission on behalf of the Auction purchasers.

that the covenant cannot be waived or disclaimed.

In *Northwest, Inc. v. Ginsberg*, the United States Supreme Court held that under Minnesota law, "the implied covenant must be regarded as a state-imposed obligation" and that "parties *cannot* contract out of the covenant." 572 US 273, 286–287 [2014] (emphasis added). The Supreme Court explained that a state court's unwillingness to allow the duty of good faith to be disclaimed is derived from the fact that the obligation is not derived from a writing or conduct, but rather is "law imposed." *Id.* (citing 3A A. Corbin*, Corbin on Contracts* § 654A, p. 88 (L. Cunningham & A. Jacobsen eds. Supp. 1994)); *see also Alta Vista Properties, LLC v Mauer Vision Center*, *PC*, 855 NW2d 722, 730 [Iowa 2014] ("implied duty of good faith and fair dealing . . . inheres in all contracts and cannot be disclaimed"); *Pierce v Int'l Ins. Co. of Illinois*, 671 A2d 1361, 1366 [Del 1996] ("duty of good faith and fair dealing attaches to every contract, and this duty cannot be disclaimed").

In *Northwest*, relying upon a federal court decision applying New York law, the Supreme Court identified New York as one of the states that "preclude a party from waiving the obligations of good faith and fair dealing." 572 US at 287 n 2 (citing *Chase Manhattan Bank, N.A. v Keystone Distributors, Inc.*, 873 F Supp 808, 815 [SD NY 1994]). *See also Shin v Am. Airlines Grp., Inc.*, 2017 WL 3316129, *9 [ED NY, Aug. 3, 2017, No. 17-CV-2234-ARR-JO] ("New York law

does not allow parties to contract out of the implied covenant for good faith and fair dealing") (citing *Northwest*, 572 US at 287 n 2).

The rule described by the Supreme Court in *Northwest*, forbidding a waiver or disclaimer of the covenant of good faith and fair dealing, is consistent with this Court's approach to disclaimers generally. The Court made clear in *Gaidon v Guardian Life Ins. Co. of Am*., 94 NY2d 330 [1999] ("*Gaidon I*"), that not every purported disclaimer is effective as to every claim. *Gaidon I* involved claims of fraudulent inducement and deceptive business practices concerning the sale of so-called "vanishing premium" insurance policies. 94 NY2d at 341. The insurer's agents used deceptive illustrations that allegedly represented to each plaintiff that he or she would have to pay annual premiums out-of-pocket for only the first eight years of the policy. But the policies themselves contained several integration or merger clauses stating that only the actual policy provisions controlled.

While this Court in *Gaidon I* held that disclaimers barred a common law fraud claim, it sustained a statutory claim for deceptive business practices despite those same disclaimers. This Court reasoned that although the insurers "did not guarantee that interest [and dividend] rates would remain constant, they failed to reveal that the illustrated vanishing dates were wholly unrealistic." 94 NY2d at 350. Similarly, in this case, while the City did not guarantee the value of the

medallions, it did not disclose that the TLC and the City might take actions certain to cause a massive decline in their value.

Similarly, a recent Appellate Division decision holds that a court must enforce the duty of good faith and fair dealing despite purported disclaimers. In *Aozora Bank, Ltd. v J.P. Morgan Sec. LLC*, 144 AD3d 440, 440-41 [1st Dept 2016], the defendants argued that disclaimers in an offering document put buyers of collateralized debt obligations on notice that "defendants had already colluded with the collateral manager to accept into the CDO toxic assets from Bear Stearns's own balance sheet." *Id*. at 440. The First Department disagreed and held that the disclaimers were inadequate to defeat the plaintiff's claim for breach of the duty of good faith and fair dealing, especially where "many of the CDO's assets were purchased *after* plaintiff's investment." *See id*. at 441 (emphasis added).

Other Appellate Division cases have reached similar conclusions. In *Roli-Blue, Inc. v 69/70th Street Assocs.,* 119 AD2d 173 [1st Dept 1986], the First Department refused to give effect to a purported disclaimer that expressly denied liability for the condition giving rise to the claim. The plaintiff in that case leased premises to be used as a restaurant. The plaintiff then made expensive alterations to convert the space for that purpose but was denied a certificate of occupancy for the restaurant. The lease contained an express disclaimer of any warranty that the premises "may be used for the purposes mentioned in this Lease." 119 AD2d at

176. Despite that language, the First Department reversed the trial court's order dismissing the good faith and fair dealing claim. The court held the dismissal improper because the defendant's subsequent conduct had caused the denial of a certificate of occupancy. *Id*. The court concluded:

> While the clause does contain a disclaimer of any warranty that the demised premises may be used for the purposes mentioned in the lease, it is doubtful that, in the absence of a clear indication to the contrary, it was ever intended to apply to a situation where the landlord, by his own subsequent affirmative action, renders illegal the contemplated use of the demised premises.

Id. (emphasis added). *See also M/A-COM Security Corp. v Galesi*, 904 F2d 134, 136 [2d Cir 1990] ("where a party's acts subsequent to performance on the contract so directly destroy the value of the contract for another party that the acts may be presumed to be contrary to the intention of the parties, the implied covenant of good faith may be implicated.") (*citing Roli-Blue, Inc. v 69/70th Street Assocs.*).

This reasoning applies to Plaintiffs' claims here: Defendants' post-agreement action and inaction permitted Uber and Lyft to flood the market with tens of thousands of e-hailing "black cars" and destroyed the value of the medallions. As in those other cases, the Bid Form did not waive or disclaim the covenant of good faith and fair dealing as to those subsequent acts.

Likewise, in *Legend Autorama, Ltd v Audi of Am., Inc.*, 100 AD3d 714 [2d Dept 2012], the plaintiff, an automobile dealer, sued Audi alleging that the automaker breached the covenant of good faith and fair dealing by permitting

another dealership to open within 13 miles of the plaintiff's showrooms. Audi cited a contract term that expressly permitted it to add newly franchised dealers, even within existing dealers' territories, at its discretion. Even though the argument for a disclaimer was stronger in that case than here, the Second Department rejected the defense, finding the covenant still required Audi to exercise its discretion to add new dealerships in good faith. 100 AD3d at 716-17. It thus held that "even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement." 100 AD3d at 716 (citation and quotation omitted).

This Court should reverse the Appellate Division's contrary decision and hold that the covenant of good faith and fair dealing, imposed by law in every contract, cannot be disclaimed.

D. The Boilerplate Disclaimer of Warranties in the Bid Form Did Not Override the Covenant of Good Faith and Fair Dealing

To say that the duty of good faith and fair dealing cannot be disclaimed is not, of course, to say that the express terms of the contract are irrelevant in considering what conduct may breach that duty. It is well established that the duty of good faith and fair dealing does not override an express contractual term. *Dalton,* 87 NY2d at 389. But this rule is inapplicable here, for there is no express term in the Bid Form that permits the City to do what it did.

The Bid Form language that Defendants and the Appellate Division relied on

as justifying dismissal of Plaintiffs' good faith and fair dealing claim is not, by any stretch, an express authorization for the City to flood the market with dubiously licensed black cars. The disclaimer, R-134, is pure boilerplate. In it, the bidder says:

> I understand and agree that the City of New York has not made any representations or warranties as to the present or future value of a taxicab medallion, the operation of a taxicab as permitted thereby, or as to the present or future application or provisions of the rules of the NYC Taxi & Limousine Commission or applicable law, other than a warranty of clear title to such medallion to successful, qualifying bidders therefore [sic] and I acknowledge that no warranties are made, express or implied, by the City of New York, as to any matter other than the warranty of clear title.

This language is limited on its face to a disclaimer of "representations and warranties" other than a warranty of clear title. It says that the City does not warrant the value of a medallion, which is reasonable, not that the City is then free to destroy that value, which would be wholly unreasonable. It disclaims any warranty as to "the present or future application" of applicable law, but does not say or imply that the City is free to permit a massive influx of black cars, or to ignore the law while doing so, in a way that has a ruinous effect on the medallion market. To read the Bid Form in a way that would give the City such a far-reaching, extreme power would be irrational.

The Appellate Division's opinion in this case says that "no reasonable person in the position of the plaintiffs would believe that the defendants would act

or refrain from acting in any manner to guarantee the value of their medallions." *Singh,* 189 AD3d at 1700 (emphasis added). That statement misses the point. Plaintiffs are not saying that Defendants "guaranteed" anything—only that they impliedly promised, as every contracting party does, to refrain from bad faith conduct and unfair dealing that would undermine the parties' bargain. Under the Appellate Division's reading, a contracting party who merely acknowledges there is "no warranty as to value" is helpless against *anything* its counterparty later does to render the deal valueless.

If the City had wanted to protect its right to act as it did in this case, perhaps it could have done so. It could have written a Bid Form that said: "The City reserves the right to issue black car licenses at its sole discretion, without limit as to number, and without regard for the provisions of the New York City Administrative Code governing such issuance." If that language were in the Bid Form, this would be a different case. But in that event, this case would probably never have existed, because no buyer would have bid any significant sum for medallions at the Auctions. That language would have been a red flag, a clear deterrent. That may be why no such language, or anything remotely similar, appears in the Bid Form.

Fairly read, the acknowledgement in the Bid Form means only that Defendants were not guaranteeing medallion buyers against the vicissitudes of the

market. It did not mean that Defendants could, as market regulators, refuse to enforce City legislation and ignore their own rules meant to protect the exclusivity afforded to medallion owners and thereby cause a market crash.

In short, the Appellate Division got this case wrong by misreading the Bid Form. By contrast, three Supreme Court Justices—Justice Kerrigan in this case and Justices Esposito and Risi in cases based on the same document—got it right. (*See supra* pp. 22, 24-25.) As Justice Esposito pointed out in *Akal Taxi*, while buyers at the Auctions took a market risk, that does not eliminate the issue "as to whether purchasers could have reasonably believed defendants would act, if necessary, to prevent unfair competition by Uber and its progeny." *Akal Taxi,* Sept. 25, 2020 (NYSCEF #460) slip op at 9. Justice Esposito was also correct in observing that "Defendants, as both the sellers and market regulators, had extraordinary power over the value of the taxi medallions they had sold," making this a strong case for application of the implied covenant of good faith and fair dealing. *Id.*

The Appellate Division order, insofar as it dismisses the good faith and fair dealing claim, should be reversed and Justice Kerrigan's order should be reinstated as to that claim.

III. THE APPELLATE DIVISION ERRED IN HOLDING THAT A GBL § 349 CLAIM IS GOVERNED BY GML § 50-e

Plaintiffs' first cause of action was brought under GBL § 349, which makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade or

commerce." GBL § 349 (a). Plaintiffs served notices of claim on the New York City Comptroller pursuant to NYC Admin. Code § 7-201, which requires such notice 30 days before the action is commenced. R-55, ¶ 17. However, the Appellate Division held this claim to be barred by GML § 50-e, which requires a notice of claim to be served within 90 days after the claim arises in a "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." GML § 50-e (1) (a).

The Appellate Division erred in holding that a suit for violation of GBL § 349, a statute creating a new remedy not available at common law, is a "case founded upon tort" within the meaning of GML § 50-e.

The controlling authority on this issue is *Margerum v City of Buffalo*, 24 NY3d 721 [2015], a decision of this Court that the Appellate Division overlooked. In *Margerum,* an action brought under the Human Rights Law, this Court held that GML § 50-e did not apply to that statutory claim. This Court said:

> [W]e reject the City's argument for dismissal on the basis of plaintiffs' failure to file a notice of claim prior to commencement of this action. [GML] § 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.' …. *Human rights claims are not tort actions under section 50-e* …. Accordingly, we conclude that there is no notice of claim requirement here.

24 NY3d at 730 (emphasis added) (quoting GML § 50-e (1) (a)).

Margerum's holding that statutory human rights claims "are not tort actions under [GML§] 50-e" is equally applicable to the GBL. For purposes of the notice of claim requirement, there is no principled basis on which to distinguish a GBL § 349 claim from a Human Rights Law claim. Like a claim under the Human Rights Law, a GBL § 349 claim is not a common law tort. Both claims are statutory, brought under remedial legislation. Both statutes should be construed broadly to effectuate their purposes. Thus neither type of claim should be subject to GML § 50-e. In the words of *Margerum*, there is no "reason to encumber" the filing of either type of action with a notice of claim requirement with a very short limitations period.

Gaidon v Guardian Life Ins. Co. of Am., 96 NY2d 201, 209-10 [2001] ("*Gaidon II*"), supports the same conclusion. In that case, this Court held that because a GBL § 349 claim is *not* a common law fraud claim, it is not subject to the statute of limitations for fraud claims in CPLR 213 (8). Rather, a GBL § 349 claim is subject to the statute of limitations in CPLR 214 (2), applicable to statutory claims. The *Gaidon II* Court explained: "While [§ 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." *Gaidon II*, 96 NY2d at 209.

Thus *Gaidon II* declined to treat GBL § 349 claims as fraud claims for time-bar purposes. But in holding the time bar of GML § 50-e applicable to the § 349 claim in this case, the Appellate Division cited only a common-law fraud case, *Clarke-St. John v City of New York*, 164 AD3d 743, 744 [2d Dept 2018]. The Appellate Division ignored both *Margerum* and *Gaidon II.* Moreover, apart from the Appellate Division's decision in this case, *no court* has held that a GBL § 349 claim is subject to GML § 50-e.

This Court should reverse the Appellate Division's holding on this issue and hold that the GBL § 349 claim is timely.

CONCLUSION

After exaggerating medallion values, promoting the Auctions and touting the investment, Defendants took actions that upended the industry, caused a crash and left the Plaintiffs with assets whose value had plummeted by 90 percent. Defendants' conduct was deceptive, in bad faith and extremely harmful. This conduct should not be excused. For these reasons, the Court should reverse the decision of the Appellate Division and hold that (1) the boilerplate provisions in the Bid Form did not waive or disclaim the covenant of good faith and fair dealing, and (2) Plaintiff's GBL § 349 claim is timely.

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Respectfully submitted,

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

By: 
Robert S. Smith
7 Times Square
New York, New York 10036
Telephone: (212) 833-1125
Facsimile: (212) 373-7925
rsmith@fklaw.com

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
Mark C. Rifkin
Benjamin Y. Kaufman
270 Madison Ave., 9th Floor
New York, NY 10016
Telephone: (212) 545-4600
Facsimile: (212) 686-0114
rifkin@whafh.com
kaufman@whafh.com

LAW OFFICE OF DANIEL L. ACKMAN
Daniel L. Ackman
165 Broadway, 23rd Floor
New York, New York 10006
Telephone: (917) 282-8178
Facsimile: (888) 290-3481
d.ackman@comcast.net

Attorneys for Plaintiffs-Appellants

812028

PRINTING SPECIFICATIONS STATEMENT

Pursuant to Rule 1250.8(j)

I hereby certify pursuant to 22 NYCRR § 1250.8(j) that the foregoing was prepared in Microsoft Word 2013.

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ADDENDUM:

Unpublished Cases

Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH J. ESPOSITO, J.S.C. IA PART 6

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AKAL TAXI NYC LLC, C&R BHOGAL LLC, PEG TAXI NYC LLC, GGS TAXI LLC, JASPREET SINGH, and D&P BAIDWAN LLC, individually and on behalf of all others similarly situated,

Index No: 708602/2017

Motion Date: October 7, 2019

Plaintiffs,

Seq. No. 4

-against-

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

Defendants.

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The following papers read on this motion by plaintiffs, for an order pursuant to CPLR Article 9 certifying plaintiffs' proposed class and appointing lead plaintiffs and lead counsel, and for other such relief as this court may deem just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Plaintiff's Memorandum of Law in Support	5
Affirmation in Opposition	6-8
Defendant's Memorandum of Law in Opposition	9
Affirmation in Further Support	10-12
Plaintiff's Reply Memorandum of Law	13

Upon the foregoing papers and for the reasons stated herein, it is ORDERED that the motion is granted.

In late 2013 and early 2014 Balbir Janjua, Dalvir Bhogal, Satnam Singh, Jaspreet Singh and Ravinder Multani, all licensed taxi drivers were among the winning bidders in

three auctions organized and promoted by defendants, The City of New York and its Taxi and Limousine Commission (TLC). Four of the individual bidders thereafter later filed for bankruptcy due to the market crash in the value of medallions. However, plaintiffs herein, Akal Taxi, coordinated by Mr. Janjua and C & R Bhogla, coordinated by Mr. Bhogal, still own their medallions and now seek an order of this court certifying them as class representatives.

Plaintiffs allege in their amended complaint, *inter alia*, that prior to the subject auctions defendants herein published misleading and inflated and false medallion price reports depicting an unbroken elevation in the value of medallions when in fact prices were on the decline. Plaintiffs further allege that defendants failed to disclose that the TLC would soon refrain from enforcing longstanding regulations and ordinances which protected the advantages yellow Taxi drivers had previously enjoyed. In sum, plaintiffs allege that the TLC orchestrated the collapse in the price of the medallions, resulting in enormous losses for plaintiff taxi drivers. Plaintiffs maintain that defendants' conduct constitutes violations of General Business Law Section 349 and a clear violation of the implicit duty of good faith and fair dealing in contract law.

It is well settled that CPLR Section 901[a] permits a class action if: "(1) the class is so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class predominate over any questions affecting individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class is superior to other available methods for the fair and efficient adjudication of the controversy" (*see Friar v Vanguard Holding Corp.* 78 AD2d 83 [2nd Dept 1980]).

After considering all of the arguments and reviewing all of the relevant case law submitted before this court, the court finds that plaintiffs have clearly established the aforementioned elements necessary for this court to authorize a class action.

In accordance with the foregoing, it is ORDERED that this action is hereby certified as a class action, pursuant to CPLR Article 9 and it is further ORDERED that plaintiffs' counsel are hereby appointed as representatives of the proposed class and Wolf Haldenstein and Ackman are appointed as class counsel.

The foregoing constitutes the decision and order of this court.

Dated: October 25th 2019

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JOSEPH J. ESPOSITO, J.S.C.

FILED
NOV 14 2019
COUNTY CLERK
QUEENS COUNTY

2

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH J. ESPOSITO, J.S.C. IA Part 6
Justice

----------X

AKAL TAXI NYC LLC, C&R BHOGAL LLC, PEG TAXI NYC LLC, GGS TAXI LLC, JASPREET SINGH, and D&P BAIDWAN LLC, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

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

Defendants.

----------X

Index No.: 708602/2017

Motion Date: 02/03/2020

Motion Seq. No.: 7

The following papers read on this motion by plaintiffs, Akal Taxi NYC LLC, C&R Bhogal LLC, Peg Taxi NYC LLC, GGS Taxi LLC, Jaspreet Singh, and D&P Baidwan LLC, individually and on behalf of all others similar situated (hereinafter as "plaintiffs"), move this Court for an order: (1) approving plaintiffs' proposed form and manner of notice of the pendency of this lawsuit, submitted as Exhibits 2 and 3 to the contemporaneously filed Affirmation of Benjamin Y. Kaufman, pursuant to CPLR Section 904; (2) ordering defendants to bear the expenses of the notification pursuant to CPLR Section 904(d); and (3) granting plaintiffs such other and further relief as this Court deems just and proper.

Papers Numbered

Notice of Motion – Affidavits – Exhibits..... 1-3
Affirmation in Opposition – Affidavits – Exhibits 4-6
Reply Affirmation 8-9

Upon the foregoing papers, it is ordered that plaintiffs' first branch of the motion is granted and the second branch of the motion is denied.

On June 21, 2017, pursuant to CPLR Section 205, plaintiffs filed a Summons and Complaint commencing this action and an amended complaint was filed on July 25, 2017. Plaintiffs then moved for class certification submitted on October 7, 2019. By order dated October 25, 2019, and entered on November 14, 2019, the Court granted class certification.

Defendants' Objections to the Notice

Plaintiffs argue that the court summarized the allegations, reviewed the requirements of CPLR Article 9 and held that "after considering all of the arguments and reviewing all of the relevant case law submitted before this court, the court finds that plaintiffs have clearly established the aforementioned elements necessary for this court to authorize a class action." Plaintiffs, in an effort to ensure the ease of administration of any class-wide relief, proposed a minor change to the proposed class definition in their reply brief and sought to represent "all purchasers of taxi medallions from defendants at auctions in 2013 and 2014, or their successor or assigns." Plaintiffs state that this clarification ensures that only those individuals or entities who personally own the medallion are included in this action.

Defendants argue that a class must be properly defined before such notice can be given in order to ensure that it is sent to the correct individuals who may be members of the class, and so that the notice may "contain a description of the class so that an individual may determine whether he is actually a member" (*Vickers v Home Fed. Sav. & Loan Ass'n of East Rochester*, 56 AD2d 62 [4th Dept 1977]). Defendants state that plaintiffs' new class definition highlights the difficulties in determining membership in that class and should be rejected. They further argue that to the extent that the court continues to believe class certification is appropriate, the class should be defined as all taxi medallion owners who, like class representatives, purchased their medallion from defendants after bidding at the February 2014 TLC auction of independent taxi medallions and still own their medallion. Defendants allege that it is not even clear what "successors or assigns" plaintiffs seek to include in their new class definition. Defendants argue that they did not enter into contracts with the unknown entities or sell taxi medallions to them, and there is no basis for these successors or assigns to assert the cause of action in this case or be included in the class (*Klein v Rober's Am. Gourmet Food, Inc*., 28 AD3d 63, 71 [2d Dept 2006]). Moreover, defendants state that such bankruptcy trustees, who are fiduciaries to the creditors of bankrupt medallion owners, have different interests and are not similarly situated to class representatives.

The court previously summarized the allegations, reviewed the requirements of CPLR Article 9 and held that "after considering all of the arguments and reviewing all of the relevant case law submitted before this court, the court finds that plaintiffs have clearly established the aforementioned elements necessary for this court to authorize a class action." This court finds the class certification appropriate, and allows the addition of "successors or assigns."

The Notice Should be Approved Under CPLR Section 904

Pursuant to CPLR Section 904(b), in all class actions seeking damages, reasonable notice of the commencement of the action must be given to members of the class in such manner as the Court directs. The form and content of the notice is subject to court approval, and in determining the method by which notice is to be given, the court is to consider: (1) the cost of giving notice by each method considered; (ii) the resources of the parties; and (3) the stake of each represented member of the class, including the likelihood represented members may wish to exclude themselves from the class or appear individually (CPLR Section 904(c)).

The court approves the form and content of the notice. The notice, pursuant to CPLR Section 904, "sets forth the information necessary to make an informed and intelligent decision whether to participate as members of the class," including apprising class members of the issues between the parties, the effects of staying in the class and the right to exclude themselves from the class *(Michels v Phoenix Home Life Mut. Ins. Co.*, 1997 NY Misc. LEXIS 171 [1997]).

The Method and Costs of Notice

Plaintiffs wish to engage with a professional class action administration service, JND Legal Administration Company, to design and implement the mailing and publication of the long-form and short-form notices for the modest fee of $5,000 in addition to the actual cost of printing and mailing the Notice and for publishing the Summary notice which amounts to approximately $8, 900. Plaintiffs further seeks an Order directing defendants to provide them with a list of the last known names, email addresses, and residential addresses of each Auction buyer and their known successors and assigns so that plaintiffs may comply with their duty to send the notice to them. Plaintiff states that this information was requested by the defendants' counsel, who have failed to provide it and they must not be compelled by the court.

Defendants argue that the addresses of those who purchased taxi medallions after bidding at auction are available in TLC's records, and defendants have no objection to providing this information to plaintiffs for purposes of class notice once such notice approve by the Court. However, the defendants argue that plaintiffs do not provide an explanation why the cost should be $7 per notice, when the cost of first-class postage is only $0.55., which, multiplied by 200 should equal to $110. Defendants further state that they see no justification in engaging with a professional class action administration service. And finally, defendants maintain that because "successors and assigns" such as bankruptcy trustees, should not be included in a class of independent medallion owners there should be no need for publishing notice in a legal publication. The further argue that publication notice in NYC Taxi News website and TLC Magazine is unnecessary where as here, individual notices can be sent directly to auction buyers. Defendants further rely on CPLR Section 904(d) in arguing that the plaintiffs shall bear the expense of notification.

Pursuant to CPLR Section 904(d), "unless the court orders otherwise, the plaintiff shall bear the expense of notification," and that there is no basis to depart from the default rule. Plaintiffs' rely on *Pludeman,* in arguing that the defendant should bear the expense of the notification considering the merits of the action, the defenses thereto, and the resources of the respective parties (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 424-425 [1st Dept 2010]). The court finds that the plaintiffs are responsible for the expense of the notification. Pursuant to an Order signed on March 10, 2020, plaintiffs' summary judgment motion was denied and therefore, plaintiffs' claims are not highly meritorious. Furthermore, in *Pludeman*, the defendants were a large corporation, whereas defendants in the instant case is a municipality that is responsible for public services for its population of over 8 million residents and while the City may have more resources than plaintiffs, it also has significantly greater expenses.

Accordingly, it is ORDERED that plaintiffs' notice is approved for form and content, however, the plaintiffs shall bear the expense of notification.

The foregoing constitutes the decision and order of this court.

Dated: May 12, 2020

JOSEPH J. ESPOSITO, J.S.C.

FILED
5/14/2020
1:44 PM
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI
A. J. S. C.

IA PART 3

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MELROSE CREDIT UNION,

Plaintiff,

-against-

GENNADY NADELMAN, YURY TRESKUNOV, GENOLG TRANSIT INC., TAKI GOOD TAXI LLC, IDLE TAXIT CAB, LLC, DERBY TRANSPORT, LLC, APACHE ARROW CAB, LLC, RUNDLE MEN TAXI, LLC, GEYR TAX, INC., EMISSION GOOD TAXI, LLC, CATERPILLAR CAB, LLC, CAT TAXI AB, LLC, GOLD DUST CAB, LLC, BIG RIVER TAXI, LLC, DOG TAXI CAB LLC, CIT TAXI CAB, LLC, BROAD OAK CAB, LLC, TAXI FOR ALL, LLC, and BLACK FOREST TAXI, LLC,

Defendants.

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GENNADY NADELMAN, YURY TRESKUNOV, EMISSION GOOD TAXI, LLC, CATERPILLAR CAB, LLC, CAT TAXI CAB, LLC, GOLD DUST CAB, LLC, BIG RIVER TAXI, LLC, DOG TAXI CAB, LLC, CITY TAXI CAB, LLC, BROAD OAK CAB, LLC, TAXI FOR ALL, LLC and BLACK FOREST TAXI, LLC,

Third-Party Plaintiffs,

-against-

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

Third-Party Defendants.

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Index Number: 711618/2017

Motion Sequence #4

DECISION/ ORDER

The following numbered papers read on this motion by third-party defendants pursuant to CPLR §3211(a)(1), (3) and (7) to dismiss the third-party complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 276-294
Answering Affidavits - Exhibits	EF 297-307
Reply Affidavits	EF 311

Upon the foregoing, papers it is ordered that this motion is determined as follows:

This is an action brought by plaintiff Melrose Credit Union based on the defendants' alleged defaults on taxi medallion loans. The third-party plaintiffs are twelve of the nineteen defendants. The third-party plaintiffs commenced this third-party action on July 20, 2018. The third-party plaintiffs were the successful bidders for wheelchair accessible vehicle (WAV) taxi medallions in November 2013. The November 2013 auction offered 200 corporate WAV taxi medallions which were sold in lots of two. The highest winning bid was $2,518,000 or $1,259,000 per WAV medallion and the lowest winning bid was $2,050,000 or $1,025,000 per WAV medallion. The twenty WAV medallions at issue here were purchased by the third-party plaintiffs for $22,500,000 with financing provided by Melrose through ten separate loans.

The third-party plaintiffs allege that, before the auction, third-party defendants made public statements and issued promotional materials. The third-party plaintiffs allege that the third-party defendants made statements concerning the high demand and low supply of the medallion and that the medallions were a risk-free long-term investment. They allege that these statements artificially inflated the price of the medallions. They further assert that thereafter the third-party defendants undercut the value of these medallions by entering into a class-action settlement that promised to exponentially increase the number of wheelchair accessible taxicabs on the road without the need for a wheelchair accessible medallion. They further assert that after their purchase the value of the medallions fell because the third-party defendants failed to regulate Uber and Lyft and other ride share companies and allowed these companies to saturate the New York City street hail market under far looser standards than those imposed on yellow (medallion) taxicabs. The third-party plaintiffs allege the medallion gives them an exclusive right to pick-up passengers via the street hail in certain areas of New York City, which is infringed upon by ride share companies picking up passengers who arrange transportation through the use of an application on their smart phone.

The amended third-party complaint pleads causes of action under GBL §349, negligent misrepresentation, recession, fraudulent conveyance, breach of the implied covenant of good faith and fair dealing and unjust enrichment. The third-party defendants have moved to dismiss the third-party complaint.

The third-party defendants first argue that the complaint should be dismissed as it is barred by the statute of limitations because the complaint as a whole sounds in the nature of an Article 78 proceeding. The third-party defendants argue that because the claims are based on Article 78 it should be subject to a four-month statute of limitations. This argument is without merit. The

complaint does not seek to challenge the rules and regulations of the third-party defendants but rather are seeking rescission and money damages in the alternative. Thus, the complaint is not subject to a four-month statute of limitations.

The third-party defendants next argue that dismissal is warranted due to the third-party plaintiffs' failure to serve a notice of claim. The failure to comply with the statutory notice of claim requirements can result in dismissal of the complaint pursuant to CPLR §3211(a)(7). Under General Municipal Law §50(e), the filing of a notice of claim within ninety (90) days after the accrual of the claim is a condition precedent to actions sounding in tort seeking money damages against the City of New York (*Davidson v Bronx Municipal Hosp.*, 64 NY2d 59 [1984]; *City of N.Y. v Kraus*, 110 AD3d 755 [2d Dept 2013]; *Stone v Town of Clarkstown*, 82 AD3d 746 [2d Dept 2011]; *Maxwell v City of New York*, 29 AD3d 540 [2d Dept 2006]). The third-party plaintiffs argue that the entire action is based upon a breach of contract and therefore is not subject to the notice of claim requirement of 50(e). Here, there is one cause of action based in tort. The second cause of action for negligent misrepresentation is based in tort and is not contractual in nature and must be dismissed. The claim under GBL §349 is subject to a three year statute of limitations under CPLR §214(2) (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777 [2012]). However, the complaint alleges multiple acts from which the statutory period could run, therefore it would be premature to dismiss this cause of action based on the statute of limitations at this stage.

The third-party defendants next move to dismiss each cause of action under CPLR §3211(a)(1) and §3211(a)(7). On a motion to dismiss for failure to state a cause of action under CPLR §3211(a)(7), a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Baker v Town of Wallkill*, 84 AD3d 1134 [2011]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2004]). A motion to dismiss merely addresses the adequacy of the pleading and does not reach the substantive merits of plaintiff's cause of action (*see Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050 [2d Dept 2016]; *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]). Whether the pleading will later survive a summary judgment motion, or plaintiff will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss (*see Tooma v Grossbarth*, 121 AD3d 1093 [2d Dept 2014]). To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR §3013; *see Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901 [2d Dept 2014]). In order to be successful on a motion to dismiss pursuant to CPLR §3211(a)(1), the documentary evidence that forms the basis of the defense must resolve all factual issues and completely dispose of the claim (*see Held v Kaufman*, 91 NY2d 425 [1998]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]).

The first cause of action is under General Business Law §349 which prohibits "deceptive acts or practices in the conduct of any business, trade or commerce." Pursuant to GBL §349(h) "any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice" and "to recover his actual damages" caused by the unlawful act or practice. The first issue arising under GBL §349 pertains to whether the statute can be applied against municipal defendants since it forbids "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any services in this state."

Third-Party Plaintiffs argue that the City is bound by the same commercial principles governing all other parties that do business on a wide scale in this State. The court finds that GBL §349 authorizes a claim for deceptive business practices only against a person, firm, corporation or association and does not apply to municipal defendants (*see Walton v N.Y. State Dept. of Corr. Servs.*, 25 AD3d 999 [3d Dept 2006]). Therefore, this cause of action must be dismissed.

The fourth and fifth causes of action for fraudulent conveyance are brought under the Debtor Creditor Law. These causes of action must be dismissed. In order to set aside an alleged fraudulent conveyance, one must be a creditor of the transferor or represent their interests (*see Paragon v Paragon*, 164 AD3d 1460 [2d Dept 2018]). Here, the claims must be dismissed as the third-party plaintiffs have not sufficiently alleged that the are creditors and, thus, they lack standing to assert such a claim. The third-party plaintiffs' attempt to rely on *Carney v Horion Invs. Ltd.* (107 F. Supp. 3d [D. Conn. 2015]) is misplaced. That case allowed an entity in receivership to become its own creditor. The facts of that case are inapposite and not applicable to the instant matter.

The sixth cause of action for breach of the implied covenant of good faith and fair dealing is not dismissed. A covenant of good faith and fair dealing is implicit in all contracts (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract even if the express terms of the contract do not explicitly prohibit that conduct (*see 25 Bay Terrace Assoc., L.P. v Public Serv. Mut. Ins. Co.*, 144 AD3d 665 [2d Dept 2015]). The third-party defendants argue that the express terms of the contract documents including in the bid forms preclude this cause of action. The bid forms contain terms stating that the medallions were bought without any representation or warranties as to the value of the medallions or to the present or future operations of the TLC rules and applicable law. The third-party defendants focus on only certain terms in the bid forms to support their argument. The court, however, must determine whether the implied covenant of good faith and fair dealing is implicit in the agreement viewed as a whole rather than portions of it (*see Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]). Here, on a motion to dismiss the terms of the bid forms as a whole do not resolve all factual issues and warrant dismissal of the cause of action.

The third cause of action is for rescission. A rescission based upon a breach of contract must be material and willful or if not willful so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract (*see Babylon Assoc. v County of Suffolk,* 101 AD2d 207 [2d Dept 1984]). Here, the complaint sufficiently alleges a cause of action for rescission. The complaint alleges that the third-party plaintiffs' purpose for purchasing the medallions was for a solid investment due to the limited number of medallions marketed and the need for wheelchair accessible vehicles. The complaint further alleges that the actions taken by the third-party defendants destroyed the medallion market and the stream of income derived from owning a medallion, such that the medallion's value dropped and the third-party plaintiffs are no longer able to generate income from them. Thus, the cause of action for rescission should not be dismissed.

The seventh cause of action is for unjust enrichment. To recover on a cause of action for unjust enrichment, there must be a dispute as to the existence of the contract or the contract does

not cover the dispute at issue (*see Clark-Fitzpatrick v Long Island Rail Road Co.*, 70 NY2d 382 [1987]; *Hochman v LaRea*, 14 AD3d 653 [2d Dept 2005]). Here, there is no dispute as to the existence of a contract. Inasmuch as the existence of a written contract precludes recovery on a quasi-contract claim for unjust enrichment, this cause of action must be dismissed.

Accordingly, the branches of the third-party defendants' motion to dismiss the first cause of action under GBL §349, the second cause of action for negligent misrepresentation, the fourth and fifth causes of action for fraudulent conveyance under the Debtor Creditor Law and the seventh cause of action for unjust enrichment are dismissed. The branches of the third-party defendants' motion to dismiss the third cause of action for rescission and the sixth causes of action for breach of the implied covenant of good faith and fair dealing are denied and those causes of action are not dismissed.

This is the decision and order of this Court.

Date: August 3, 2020

Hon. Joseph Risi, A.J.S.C.

FILED
8/6/2020
3:30 PM
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH J. ESPOSITO, J.S.C. IA Part 6
Justice

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AKAL TAXI NYC LLC, C&R BHOGAL LLC, PEG TAXI NYC LLC, GGS TAXI LLC, JASPREET SINGH, and D&P BAIDWAN LLC, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

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

Defendants.

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Index No.: 708602/2017

Motion Date: 8/24/2020

Motion Seq. No.: 8

The following papers read on this motion by defendants pursuant to CPLR 3212 for summary judgment dismissing the amended complaint, and this cross motion by plaintiffs Akal Taxi NYC LLC, C&R Bhogal LLC, Peg Taxi NYC LLC, GGS Taxi LLC, Jaspreet Singh, and D&P Baidwan LLC, individually and on behalf of all others similar situated, to impose sanctions against defendants pursuant to 22 NYCRR 130-1.1(a).

Papers Numbered

Notice of Motion - Affidavits - Exhibits .....EF Doc. #317-#439
Notice of Cross Motion- Affidavits- Exhibits .....EF Doc. #440-441, 455-458
Answering Affidavits - Exhibits .....EF Doc. #446-#450
Reply Affidavits -Exhibits ..... EF Doc. #451

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiffs commenced this action on June 21, 2017, as a proposed class action. In lieu of answering, defendants City of New York and the New York City Taxi and Limousine Commission (TLC) moved to dismiss the complaint pursuant to CPLR 3211(a)(4) and (7) (mot. Seq. No. 1), and thereafter, plaintiffs moved (mot. Seq. No. 3) for leave to reargue the resulting order dated November 13, 2017 (EF Doc #65). By order dated December 28, 2018 (EF Doc #89), the motion by plaintiffs for leave to reargue the order dated November 13, 2017 was granted, and upon reargument it was modified to permit the

first, third and fifth causes of action to proceed on their merits.[1] The first cause of action was based upon alleged violation of the General Business Law § 349; the third cause of action was for breach of the implied covenant of good faith and fair dealing arising out of the purchase by plaintiffs, and all other purchasers of New York City taxicab medallions at auctions held by defendants City of New York and the New York City Taxi and Limousine Commission (TLC) in 2013 and 2014, and the fifth cause of action was for rescission premised upon the alleged contractual breaches. An amended complaint was filed on July 25, 2017, reasserting the first, third and fifth causes of action alleged in the original complaint, and issue was joined. Defendants assert various affirmative defenses in their answer to the amended complaint, including ones based upon lack of capacity and standing, and their allegation that a claim under General Business Law § 349 may not be maintained against a governmental entity.

Plaintiffs moved for class certification pursuant to CPLR article 9 (mot. Seq. No. 4) which was granted by order dated October 25, 2019 and entered on November 14, 2019. Prior to the filing of the note of issue on November 4, 2019, plaintiffs moved (mot. Seq. No. 5) for partial summary judgment pursuant to CPLR 3212 on the causes of action asserted in the amended complaint based upon alleged violation of General Business Law § 349 and breach of the implied covenant of good faith and fair dealing. By order dated March 10, 2020 and entered on March 16, 2020, the motion by plaintiffs for partial summary judgment (mot. Seq. No. 5) was denied. Plaintiffs moved (mot. Seq. No. 7) to approve and authorize a proposed notice of the pendency of the class action, which notice was approved for form and content (*see* order dated May 12, 2020 and entered on May 14, 2020), and indicates that plaintiffs "Akal Taxi, coordinated by Mr. Janjua, and C & R Bhogal, coordinated by Mr. Bhogal," have been certified by the court as class representatives, and the class is comprised of those "persons and entities who purchased yellow taxi medallions from defendant City of New York or defendant New York City Taxi and Limousine Commission through three public auctions conducted in 2013 and 2014, or their successors or assigns."

Defendants move for summary judgment dismissing the amended complaint. Plaintiffs oppose the motion, and cross move pursuant to 22 NYCRR 130-1.1(a) to impose sanctions against defendants. According to plaintiffs, the instant motion should have been withdrawn by defendants because it is frivolous and wastes judicial resources, and defendants should be sanctioned insofar as they refused to do so. Defendants oppose the cross motion.

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[1] The other claims sounding in tort and wrongful conduct, in the nature of tort, were dismissed based upon plaintiffs' failure to timely file notices-of-claim (*see* order dated November 13, 2017).

At the outset, the court notes that to the extent plaintiffs contend defendants' motion is "duplicative," defendants did not previously moved for summary judgment, and hence the instant motion is not duplicative or violative of the rule against successive motions for summary judgment. Furthermore, defendants did not cross move for any relief in relation to plaintiffs' prior motion for summary judgment (mot. Seq. No. 5), and contrary to plaintiffs' additional contention, defendants were under no obligation to make such a cross motion.

A motion for summary judgment may be made by any party to an action after the joinder of issue (CPLR 3212[a]). The court may set a date after which no such motion for summary judgment may be made and, where no such date is set by the court, the motion shall be made no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]). Defendants' motion for summary judgment dismissing the amended complaint, is timely, having been made on March 3, 2020.[2]

Furthermore, although plaintiffs contend the motion by defendants unduly burdens the court as a result of the COVID-19 pandemic, they themselves recognize access to the courts serves to ensure that justice is provided to all, and the rule of law remains in full effect, even during a pandemic. Even taking into account that filing of papers was suspended by Administrative Order of the Chief Administrative Judge of the New York State Courts (AO/78/20), due to the emergency circumstances caused by the COVID-19 virus outbreak, that Administrative Order did not take effect until March 22, 2020, and contained no requirement that any motion served prior to its effective date be withdrawn by the movant prior to final submission.

To the extent plaintiffs contend the branch of the motion by defendants for summary judgment dismissing the first cause of action for violation of General Business Law § 349 is moot, the order dated March 10, 2020, did not grant any relief to defendants, and no judgment was entered thereon (*see* CPLR 5011). To the extent plaintiffs also contend that defendants' motion is frivolous because the court has previously rejected the arguments of defendants relative to the viability of the causes of action for breach of the implied covenant of good faith and fair dealing, and for rescission, the denial of defendants' prior motion to

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[2] By preliminary conference order dated March 13, 2019, the court directed that any motion for summary judgment be made no later than 120 days after the filing of the note of issue, but under no circumstances beyond 120 days of the filing of the note of issue absent further order of the court. By compliance conference order dated June 17, 2019, plaintiffs were directed to file a note of issue on or before November 8, 2019.

dismiss the complaint for failure to state a cause of action does not preclude defendants' motion for summary judgment (*see Del Castillo v Bayley Seton Hosp.*, 232 AD2d 602 [2d Dept 1996]; *Pappas v Harrow Stores*, 140 AD2d 501, 503 [2d Dept 1988]; *Scott v Transkrit Corp.*, 91 AD2d 682, 683 [2d Dept 1982]). The prior motion by plaintiffs for summary judgment came before the court in a posture where the burden was upon them to establish *prima facie* entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also* CPLR 3212[b]). Since plaintiffs failed to meet their burden, summary judgment could not be granted, and defendants were under "no burden to otherwise persuade the court against summary judgment" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). Plaintiffs' contention that defendants' motion herein improperly calls for reconsideration of the May 7, 2020 order of the Hon. Kevin Kerrigan, J.S.C. in the action entitled *Singh v City of New York*, (Sup. Ct. Queens County, Index No. 701402/2017), is without merit. Although such order is by another judge of coordinate jurisdiction, it was not issued within the confines of this action (*see* CPLR 2217[a], CPLR 2221).

Thus, the court shall entertain the motion by defendants, and the cross motion by plaintiffs to impose sanctions pursuant to 22 NYCRR 130-1.1(a) is denied.

A summary judgment proponent must make a prima facie showing of an entitlement to same as a matter of law by tendering sufficient evidence to eliminate any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of their motion, defendants offer, among other things, the affirmation of their counsel, and copies of the pleadings, TLC's application forms, instructions and checklist relative to applications for "black car" or "luxury limousine" base licenses/base stations,[3] certain bid forms, bills of sale, loan agreements, and affidavits of "No-Reliance," certain for-hire vehicle (FHV) base licenses, excerpts of transcripts from depositions in other actions, various affidavits, affirmations and other court filings, TLC industry notices and "Tentative Results" for certain auctions, and various internet articles and postings.

To the extent defendants assert the amended complaint should be dismissed based upon lack of standing or lack of capacity of plaintiffs, plaintiffs' counsel previously

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[3] The Appellate Division, Second Department, included a general description of the types of vehicles that are available to passengers for hire in New York City in its decision and order dated May 2, 2018 in *Matter of Glyka Trans. LLC v City of New York*, (161 AD3d 735 [2d Dept 2018]).

represented to the court, in the memorandum of law submitted in support of plaintiffs' motion for class certification (EF Doc #95), that plaintiffs Akal Taxi NYC LLC and C&R Bhogal LLC, which sought to be certified as class representatives, still owned their own medallions. Defendants have not presented any evidence this representation was incorrect. Nor have they shown that in the meantime, plaintiffs Akal Taxi NYC LLC and C&R Bhogal LLC have transferred their ownership interest in their medallions and thus no longer have a stake in this case as individual members of the class of plaintiffs. Defendants also have not shown that plaintiffs Akal Taxi NYC LLC or C&R Bhogal LLC should be removed as class representatives to assert the claims on behalf of the class.

To the extent plaintiffs' counsel acknowledged in the same memorandum of law that "four of the individual bidders later filed for bankruptcy and no longer own the medallions they purchased," the notice of the pendency of the class action includes a notice informing putative class members, that "[i]f you declared bankruptcy or assigned your medallion to a financial institution or otherwise, you may not be a member of the Class." Defendants assert that plaintiffs GGS Taxi LLC[4] and D&P Baidwan LLC lack standing or the capacity to sue because they failed to list the claims herein as an asset when filing the voluntary Chapter 7 bankruptcy petitions dated October 27, 2017 (EF Doc. #359) and May 11, 2018 (EF Doc. #360). The copies of those Chapter 7 bankruptcy petitions presented by defendants show that those petitions were filed by individuals, who listed ownership interests in the respective limited liability companies CGS Taxi LLC[5] and D&P Baidwan LLC. Defendants have failed to show such limited liability companies are, or were, petitioners in those bankruptcy proceedings, or any other bankruptcy proceeding (*see R. Della Realty Corp. v Sunnymeade Leasing, LLC*, 65 AD3d 1324 [2d Dept 2009]).

To the extent defendants assert plaintiff PEG Taxi LLC lacks standing or the capacity to sue because it failed to list the claims herein as an asset when filing a bankruptcy petition, defendants submit a copy of a certification dated June 13, 2019 (EF Doc #362) of Andrea Dobin, the former trustee in the Chapter 7 bankruptcy case, *In re Multani* (US Bankruptcy Court, DNJ, Case No. 18-18004 [MBK]), of Ravinder Multani, as debtor. The certification appears to have been prepared for submission in support of a motion by Dobin in the bankruptcy court to reopen the debtor's case so to allow Dobin to administer the "re-filed" litigation brought by Multani and PEG Taxi, LLC as plaintiffs, for the benefit of the debtor's estate and its creditors. In the certification, Dobin states that "[Multani] listed PEG Taxi,

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[4] *see infra n* 5.

[5] It appears that the name "GGS Taxi LLC" in the caption may be incorrect, and that the limited liability company's actual name is CGS Taxi LLC.

LLC as an asset on his schedules and indicated that *he and PEG* were parties to "litigation" wherein it was contended the City of New York defrauded the parties that engaged in a 2013 auction of medallions" (emphasis supplied). Dobin did not specify, in the certification, the caption/index number of the litigation. Dobin indicates that because Multani informed her the litigation was dismissed, she filed a Chapter 7 trustee's report of "no distribution," but did not specifically abandon the litigation as an asset, and that in December 18, 2018, the bankruptcy court entered a final decree and closed the debtor's bankruptcy case. According to Dobin, she subsequently learned from "counsel representing the [p]laintiffs," that the litigation had been refiled upon certain notice requirements being completed. In the certification, Dobin asserts that because the litigation had been commenced pre-petition, it is the property of the debtor's bankruptcy estate.

Defendants have failed to show, by this certification, or any other evidence, that plaintiff PEG Taxi LLC was a petitioner in the bankruptcy proceeding for Ravinder Multani, as debtor, or any other bankruptcy proceeding (*see R. Della Realty Corp. v Sunnymeade Leasing, LLC*, 65 AD3d 1324 [2d Dept 2009]).

To the extent defendants assert plaintiff Jaspreet Singh lacks standing or the capacity to sue because he also failed to list the claims herein as an asset when filing for Chapter 7 bankruptcy, defendants submit Singh's voluntary petition dated November 2, 2015 wherein he listed his taxi medallion as an asset on "Schedule B- Personal Property," but scheduled no claims related to it, including as contingent or unliquidated claims. Although this action was commenced after November 2, 2015, the bankruptcy code defines "property of the estate" to include "all legal and equitable interests of the debtor in property as of the commencement of the case" (11 USC § 541[a][1]). Causes of action which accrue prior to the close of the bankruptcy proceedings, and which were neither abandoned nor administered in the case, nor the subject of a court order, remain property of the bankruptcy estate and the plaintiff loses the capacity to sue on his own behalf with respect thereto (*see Martinez v Desai*, 273 AD2d 447, 447-448 [2d Dept 2000]). Plaintiff Jaspreet Singh bases his claims in this action on his purchase of his medallion at an auction in 2014, and defendants' alleged breaches of the implied covenant of good faith and fair dealing in relation to the sale and thereafter, and thus, his claims accrued prior to the close of the bankruptcy proceedings. In opposition, plaintiff Jaspreet Singh makes no claim, and offers no proof, that the causes of action asserted herein were abandoned by the trustee in his bankruptcy case, or are the subject of a court order. Under such circumstances, plaintiff Jaspreet Singh lacks standing to sue defendants in his individual capacity, and must be removed as a member of the class. That branch of the motion by defendants for summary judgment dismissing the first, third and fifth causes of action asserted against them by plaintiff Jaspreet Singh in the amended complaint is therefore granted.

That branch of the motion by defendants for summary judgment dismissing the first cause of action asserted against them by plaintiffs Akal Taxi NYC LLC, C&R Bhogal LLC, PEG Taxi NYC LLC, GGS Taxi LLC and D&P Baidwan, LLC, in the amended complaint based upon alleged violation of General Business Law § 349, is granted. "Pursuant to the doctrine of [the] law of the case, judicial determinations made during the course of ... litigation before final judgment is entered may have preclusive effect provided that the parties had a full and fair opportunity to litigate the initial determination" (*Sterngass v Town Bd. of Town of Clarkstown*, 43 AD3d 1037, 1037 [2d Dept 2007]; *accord Ruffino v Green*, 72 AD3d 785, 786 [2d Dept 2010]). By order dated March 10, 2020, the court determined that plaintiffs were not entitled to summary judgment in their favor on their cause of action based upon violation of General Business Law § 349. In reaching this decision, the court concluded that section 349 of the General Business Law authorizes a claim for deceptive business practices only against a "person, firm, corporation or association," but is inapplicable to a state administrative agency performing governmental functions, and therefore does not apply to municipal defendants (General Business Law § 349[b]). The court also determined that this action does not involve a consumer-oriented transaction insofar as taxi medallions are not purchased in the traditional manner that consumer goods are purchased, and like securities, are not purchased as goods to be consumed or used.[6] These determinations constitute law of the case on the issue of the nonviability of the first cause of action asserted against defendants in the amended complaint (*see Ruffino v Green*, 72 AD3d 785). The doctrine of law of the case precludes reconsideration of the issue, and hence, the first cause of action asserted by plaintiffs Akal Taxi NYC LLC, C&R Bhogal LLC, PEG Taxi NYC LLC, GGS Taxi LLC and D&P Baidwan, LLC in the amended complaint fails as a matter of law.

With respect to the third cause of action asserted by plaintiffs Akal Taxi NYC LLC, C&R Bhogal LLC, PEG Taxi NYC LLC, GGS Taxi LLC and D&P Baidwan, LLC against defendants in the amended complaint, based upon breach of the implied contractual duty of good faith and fair dealing, and the attendant fifth equitable cause of action for rescission, the general rule with respect to auctions is that a seller's acceptance of an auction bid forms a binding contract, unless the bid is contingent on future conduct (*see Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439 [2016]). Although an auction can be conditional, meaning property can be withdrawn after the close of bidding, it will not be deemed conditional absent explicit terms (*see id* at 449). The official bid forms used to conduct the public auctions of the independent accessible taxi medallions from defendants in 2013 and

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[6] The court additionally found plaintiffs failed to show that defendants engaged in any act or practice which was deceptive or misleading.

2014 (*see* EF Doc. #349, #350), are not conditional within such meaning, and thus constitute binding contracts.

Implicit in every contract is a covenant of good faith and fair dealing, which encompasses any promise that a reasonable promisee would understand to be included (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). The covenant 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 Educational Testing Serv.*, 87 NY2d at 389, quoting *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 NY 79, 87 [1933]). "While the duties of good faith and fair dealing do not imply obligations 'inconsistent with other terms of the contractual relationship' (*Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]), they do encompass 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included' (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978], quoting 5 Williston, Contracts § 1293, at 3682 [rev ed 1937])" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

Defendants do not claim that the medallion purchase contracts disclaimed an implied duty of good faith and fair dealing (*see* Defendants' Reply Memorandum of Law, pp 2, 7 [EF Doc. #458]). Rather, defendants argue the terms of the medallion purchase contracts are contrary to the obligations plaintiffs Akal Taxi NYC LLC, C&R Bhogal LLC, PEG Taxi NYC LLC, GGS Taxi LLC and D&P Baidwan, LLC seek to imply, because the contracts expressly state that defendants made no "representations or warranties as to the present or future value of a taxicab medallion ... or as to the present or future application of the [TLC] rules or applicable law" (EF Doc. #349, #350). Defendants assert that beyond the promise that a purchaser would receive a taxicab medallion with clear title, the contract made no other promises to the purchaser. Defendants further assert neither plaintiff limited liability companies, nor any reasonable purchaser, could have justifiably believed the medallion purchase contracts imposed an implied obligation on defendants to ensure that a certain level of value of the medallions would remain after the sale, or to protect the purchasers from growing competition from Uber and other smartphone app-based FHV companies.

By signing the official bid forms, the bidders acknowledged familiarity with the rules of the TLC and agreed to comply therewith, which rules include the legislative findings that "the business of transporting passengers for hire by motor vehicle in the city of New York is affected with a public interest, is a vital and integral part of the transportation system of the city, and must therefore be supervised, regulated and controlled by the city" (Administrative Code of City of NY § 19-501). As explained by Justice Kerrigan in his decision and order dated May 7 2020 in *Singh* (Index No. 701402/2017), the City adopted an ordinance in 1937 known as the "Haas Act" in response to the flooding of the taxicab

market at that time, with the number of taxicabs exceeding the supply of taxicabs needed to meet the level of service demanded by the public, and the attendant problems of undue and needless traffic congestion, long hours and inadequate income for taxicab drivers, and unfair competition. The Haas Act established the medallions system, whereby small plates are attached to the hood of a taxi, certifying it for passenger pick-up, and limited the number of medallion licences, and therefore taxicabs. Since then, the City of New York has controlled and regulated the taxicab industry, including yellow cabs, black cars and other types of "for-hire" vehicles.[7]

As Justice Kerrigan also explained in his decision and order, the rules of the TLC, provide that the TLC "will issue licenses and adopt and enforce rules regulating the [medallions taxicab and for-hire vehicle] business and industry" (35 RCNY 52-02]), and has a duty, when regulating, to "[f]ormulate and adopt rules reasonably designed to carry out the purposes of the Commission," "[e]stablish and enforce standards to ensure all Licensees are and remain financially stable," "[d]evelop and implement a broad public policy of transportation as it pertains to the forms of public transportation regulated by the Commission," and "[e]ncourage and provide procedures to encourage innovation and experimentation relating to type and design of equipment, modes of service and manner of operation" (35 RCNY 52-04[a][1], [3], [7] and [8]).

The terms of the official bid forms did not make any express promise as to the level of revenues which could be obtained by a purchaser of a medallion, but clearly, the purchase of a medallion was intended as an income-producing investment, albeit subject to a certain degree of market risk. However, contrary to the arguments of defendants, the terms of the official bid forms do not eliminate the question of fact as to whether purchasers could have reasonably believed defendants would act, if necessary, to prevent *unfair* competition by Uber and its progeny, whether by restricting the expansion of operations of those companies, limiting the number of Uber vehicles and other app-based for-hire vehicles entering into the market, or enforcing standards and conditions of service relative to those companies to the same degree as enforced against taxi medallions owners. Defendants, as both the sellers and market regulators, had extraordinary power over the value of the taxi medallions they had sold.

Defendants have failed to establish prima facie that at the time of the purchase of the medallions by the class members, defendants were unaware Uber, Lyft and other app-based "e-hail" vehicle services were planning to expand their operations significantly. Defendants also have failed to show prima facie that at such time, defendant TLC intended to refrain

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[7] see n 3.

from limiting the numbers of such Uber, Lyft and other app-based "e-hail taxis," and was unaware the resulting competition would adversely affect the then current and projected revenue figures and market value of the medallions owned by the class members. In addition, defendants have failed to establish prima facie that the plummeting value of the subject medallions since the auction sales was not the result of a breach of an implied covenant by the TLC to protect medallions owners from unfair competition from the app-based "e-hail" vehicle service companies.

Under such circumstances, the branch of the motion by defendants for summary judgment dismissing the third and fifth causes of action asserted against it by plaintiffs Akal Taxi NYC LLC, C&R Bhogal LLC, PEG Taxi NYC LLC, GGS Taxi LLC and D&P Baidwan, LLC in the amended complaint is denied.

Dated: September 25, 2020

JOSEPH J. ESPOSITO, J.S.C.

FILED

10/1/2020
11:34 AM

COUNTY CLERK
QUEENS COUNTY