Appellate Division Docket No.: 2017-12988
Queens County Clerk's Index No. 701402/17

New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

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-Cross-Respondents,

-against-

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

Defendants-Respondents-Cross-Appellants.

MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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COURT OF APPEALS
OF THE STATE OF NEW YORK

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,

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Appellate Division, Second Department Docket No. 2017-12988

NOTICE OF MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK PURSUANT TO CPLR 5602[a][1][i] AND RULE 500.22 OF THE RULES OF PRACTICE OF THE COURT OF APPEALS

PLEASE TAKE NOTICE that Plaintiffs-Appellants DANIELLE EVE TAXI LLC, EAC TAXI LLC, DEC TAXI LLC, EC TAXI LLC, CHIPS AHOY TAXI LLC, ECDC TAXI LLC, and DYRE TAXI LLC will move this Court, pursuant to CPLR § 5602[a][1][i] and Rule 500.22 of the Rules of Practice of the Court of Appeals, upon the record of the prior appeal in this case to the Appellate Division, Second Department, and upon the papers submitted herewith, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on June 21, 2021 at 9:30 a.m., for an order granting permission to appeal to this Court from a Decision and Order of the Appellate Division, Second Department, entered on December 30, 2020.

Dated: New York, New York
June 4, 2021

Respectfully submitted,

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RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants-Respondents Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC, and Dyre Taxi LLC are privately held New York limited liability companies with no parents, subsidiaries or affiliates.

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PRELIMINARY STATEMENT

Plaintiffs[1] purchased taxi medallions in one of three auctions organized by Defendants, the City of New York ("City") and its Taxi & Limousine Commission ("TLC"), at a time when the TLC was touting investments in taxi medallions as "better than the stock market." Plaintiffs later learned that, before the auctions, the TLC had published false information, overstating the prices at which medallions were then trading. Shortly after the auctions ended, the TLC destroyed the market for medallions by permitting the number of so-called black cars to multiply by more than five-fold and to let them compete essentially directly with medallion taxis. Medallion prices crashed. Sales became rare, and prices obtained in those few sales that did occur went from $1.2 million in the fall of 2013 to less than $800,000 by the end of 2015, and to less than $200,000 by mid-2017.

Plaintiffs have sued for breach of contract, alleging that by flooding the streets with black cars immediately after the auctions, Defendants violated the duty of good faith and fair dealing implied in every contract. Plaintiffs also have alleged that by making false pre-auction statements concerning medallion values and by failing to disclose the ruinous policies and practices they would pursue after the auction, Defendants violated Section 349 of the General Business Law ("GBL"),

[1] "Plaintiffs" refers to the moving parties on the present motion. This includes all the plaintiffs named in the original action except Daler Singh, who was dismissed from the action by Supreme Court after he filed for bankruptcy. *See* NYSCEF Doc. No. 48.

which broadly prohibits all "deceptive acts and practices." The Appellate Division dismissed those claims, holding that a boilerplate disclaimer in the TLC's bid form barred the good faith and fair dealing claim and that the GBL § 349 claim was barred by General Municipal Law ("GML") § 50-e, which requires plaintiffs in certain cases against municipal defendants to serve a notice of claim within 90 days after the claim arises.

Both holdings raise important issues worthy of this Court's review. This Court should grant leave to appeal to determine whether a party can effectively disclaim the duty of good faith and fair dealing, and if so, whether a boilerplate disclaimer of warranties is sufficient to do so. This Court also should review the Appellate Division's holding that claims under GBL § 349 are subject to the notice of claim requirements of GML § 50-e, a holding contrary this Court's decision in *Margerum v City of Buffalo*, 24 NY3d 721 [2015].

This case is also important to the taxi industry as a whole. As explained below (pp. 14-15), this case is one of several, including one in which a class has been certified, arising out of the 2013-14 medallion auctions. The other cases will raise issues similar to this one – all the more reason why this Court should resolve these issues now.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on January 30, 2017. NYSCEF Doc. No. 1.

Plaintiffs filed their Amended Complaint on March 27, 2017. NYSCEF Doc. No. 9. Defendants moved to dismiss on May 17, 2017. NYSCEF Doc. No. 11. The Supreme Court (Kerrigan, J.) denied the motion in part and granted the motion in part on September 28, 2017. NYSCEF Doc. No. 68. A true and correct copy is attached hereto as Exhibit A. The Supreme Court denied reargument on February 20, 2018. NYSCEF Doc. No. 167. A true and correct copy is attached hereto as Exhibit B. Plaintiffs filed a notice of appeal on October 30, 2017 and Defendants filed a notice of cross-appeal on November 9, 2017. NYSCEF Doc. Nos. 78 and 79. By Decision and Order dated December 30, 2020, the Appellate Division, Second Department affirmed the Supreme Court's decision as to Plaintiffs' appeal and reversed as to Defendants' appeal, thus dismissing all remaining causes of action.

TIMELINESS

Plaintiffs were served with notice of entry of the Appellate Division Decision and Order on December 31, 2020. A true and correct copy is attached hereto as Exhibit C. *See Singh v City of New York,* 189 AD3d 1697 [2d Dept 2020]. Plaintiffs moved in the Appellate Division for leave to appeal to the Court of Appeals on January 29, 2021. The Appellate Division denied that motion by an Order dated May 5, 2021, which was served with notice of entry on May 6, 2021. A true and correct copy is attached hereto as Exhibit D. This motion, made on June

4, 2021, is therefore timely.

JURISDICTION

This action originated in the Supreme Court, Queens County. The Appellate Division's Order finally determines the action, as it dismissed all remaining causes of action. This Court has jurisdiction of this motion under CPLR 5602 [a][1][i].

QUESTIONS PRESENTED FOR REVIEW

1. Whether a contracting party may effectively disclaim the implied duty of good faith and fair dealing, and if so, whether a boilerplate disclaimer of warranties "as to present or future value" is sufficient to accomplish this.

2. Whether a claim brought by auction buyers pursuant to GBL § 349 against a municipality is governed by the ninety (90) day notice of claim provisions of Municipal Law § 50-e.

The questions raised here were preserved below. NYSCEF Doc. No. 34 at 17-20, 27-31.

THE FACTS

We summarize here the facts relevant to the issues that are the subject of this motion for leave to appeal. These facts are alleged in the Amended Complaint (R-52-78), and must be taken as true for purposes of this motion.

The Taxi Industry at the Time of the Auctions

In late 2013 and early 2014, the City conducted a series of three auctions (the "Auctions") through which it offered for sale 400 taxi medallions for a total of approximately $360 million. The prices paid in the Auctions were predicated on the state of the taxi industry as it then existed and had long been regulated. But the industry was about to undergo a massive change as a result of defendants' unprecedented and unannounced conduct. Defendants gave the buyers at the Auctions, including plaintiffs, no clue of what was about to happen. Instead, they knowingly misled them.

Since 1937, the right to operate a yellow taxi in the City of New York has required a medallion, a form of license issued by the City. R-58, ¶ 39. The number of medallions is fixed by law and may be changed only by City or State legislation. *See* R-58, ¶ 40; *see also Greater New York Taxi Ass'n v State of NY*, 21 NY3d 289, 297 [2013] (discussing requirement for legislation to permit the issuance of new medallions).

In addition to the hard cap on medallions, City ordinances and TLC rules adopted over the years govern not just medallion taxis, but other categories of for-hire vehicles ("FHVs"), including black cars and livery cabs. As of late 2013, these statutes and rules limited the ability of non-medallion FHVs to encroach on the market served by medallion taxis. *See* R-56-57; *see also* R-298-332.

First and foremost, only yellow taxis could accept street hails. Livery cabs and black cars could accept fares only "by pre-arrangement" through licensed bases. *See* R-58, ¶ 37; R-61, ¶¶ 63-64. Beginning in 2013, a new category of FHV, green taxis, was permitted to accept pre-arranged fares and to accept street hails, but only outside of the so-called "exclusionary zone," which includes most of Manhattan and the City's airports. R-57, ¶29. Black car owners were required by law to have a franchise from or ownership interest in the base that coordinated their fares by pre-arrangement. R-61, ¶ 63; NYC Code § 19-502[u]. These requirements limited competition between the yellow cabs and black cars, protecting the value of medallions. R-61, ¶67.

Thus, prior to the Auctions, the entire basis for a yellow taxi medallion's value had always been that: (i) medallions conferred the exclusive right to offer point-to-point transportation to passengers ready to travel; (ii) legislation capped the number of taxis in operation; and (iii) other for-hire vehicles were limited by law in their operation and in the parts of the market they could serve.

As of January 2014, according to the TLC's 2014 Taxicab Factbook, there were 13,437 yellow taxi medallions authorized and in operation. R-56, ¶ 25; *see also* R-212-29. At that time, there were also "about 10,000" licensed black cars in operation. These black cars served the corporate market and had to be dispatched from one of 80 base stations in operation at that time. R-61, ¶ 68; R-217.

The 2012 HAIL Act,[2] which authorized the Auctions, 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. Thus, at the time of the Auctions, City law segmented the FHV market and supported the investment-backed expectations of medallion buyers.

The TLC'S Deceptive Pre-Auction Statements

In the months leading up to the Auctions, the TLC published average-price reports that routinely overstated the true transfer values. R-63-64, ¶¶ 79-80. Apart from reporting exaggerated prices, the TLC also misrepresented the price trend. R-64, ¶¶ 82-83. The TLC published charts in promotional pamphlets showing constantly rising medallion prices, when in fact medallion prices had begun to decline by late 2013. *See* R-237-97; R-64, ¶ 82. The TLC also reported average prices for many months in which there were, in fact, no transfers for value from which an average could be computed. *Id.*; *see also* R-243-47. This misinformation made the medallions appear to be much more valuable than they really were, and investment in them much less risky. Around the same time, to promote the Auctions, the TLC issued a pamphlet that declared in large, bold type that an

[2] The 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).

investment in a medallion is "**BETTER THAN THE STOCK MARKET**." R-235 (bold in original); R-63, ¶ 76. Adding to this deception, the TLC failed to announce its intention to take the actions described below (pp. 8-11) after the Auctions ended, which effectively obliterated the limits on black car operations, blasting the bedrock that historically supported medallion values.

The Auctions

Plaintiffs are single-purpose entities created to own medallions purchased in the November 2013 auction, paying the City between $1,059,000 and $1,259,000 per medallion.[3]

Like all Auction buyers, plaintiffs signed a so-called "Official Bid Form," which contained a certification that the buyers "have not relied on any statements or representations of the City of New York" in determining the amount of their bids. R-96. The bid form also says that the signatory:

> 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 … and … acknowledge[s] that no warranties are made, express or implied, by the City of New York, as to any

[3] The Auctions were for wheelchair accessible corporate medallions and for wheelchair accessible independent medallions. Corporate medallions are sold to investors in two-medallion minifleets. Independent medallions are sold to and were traditionally required to be operated by TLC-licensed taxi drivers. R-59-60, ¶¶47-49. Plaintiffs in this case purchased corporate medallions, but there are other cases, discussed below, brought by other auction purchasers, including one in which a class action on behalf of all purchasers has been certified, that will be directly affected by the outcome of this case.

matter other than the warranty of clear title.

Id. Nothing in the bid form or any other document relating to the Auctions mentions the duty of good faith and fair dealing. Certainly, nothing in those documents purports to disclaim the covenant of good faith and fair dealing.

The TLC's Post-Auction Conduct
Causing the Destruction of Medallion Values

When the TLC held its Auctions, the black car fleet was substantially smaller than the medallion taxi fleet and, according to the TLC's 2014 Taxicab Factbook, numbered "about 10,000" vehicles. R-217. The months following the Auctions, however, saw unprecedented upheaval in the New York City taxi industry, highlighted by the massive growth in the number of black cars affiliated with Uber and Lyft. Thus, the number of black cars increased to nearly 25,000 in 2015. R-663, ¶ 60. By the time the Amended Complaint was filed, there were 60,000 black cars in operation. R-66, ¶98.[4] By August 2018, there were 100,000 FHV's operating in New York City, more than 80,000 of which were affiliated with Uber and Lyft.[5] At the same time, the TLC permitted black cars to accept "e-hails" (electronic requests for immediate pickup), blurring the lines between the

[4] The Amended Complaint says the number is 90,000 due to a typographical error.

[5] Jeffrey C. Mays, *3 Years Ago, Uber Beat Back a Cap on Vehicles. What's Changed? A Lot,* NY Times, Aug. 9, 2018, available at https://www.nytimes.com/2018/08/09/nyregion/uber-cap-nyc-decision-strategy.html?smid=em-share (last visited June 2, 2021).

two types of taxis and allowing these e-hail taxis to be "in direct competition" with medallion taxis for the same passengers. R-375.

The explosive growth of the black car fleet was only possible because the TLC disregarded longstanding licensing rules for black cars affiliated with Uber, Lyft, and similar companies. The TLC licensed bases affiliated with Uber even though the owners of affiliated vehicles were neither franchisees nor owners of the bases. R-66, ¶¶ 96-97. And, it interpreted the pre-arrangement requirement to permit the use of electronic apps that connected black cars with passengers without any dispatch by any base. R-69-70, ¶¶ 125-133.

The surge in the black car fleet overwhelmed the taxi market as the City itself admitted. In a report by the New York City Mayor's Office in January 2016 entitled "For-Hire Vehicle Transportation Study" (the "Mayoral Report"), the City admitted plaintiffs' essential allegations. *See* R-368-80. The Mayoral Report says:

> [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.

R-375. The Mayoral Report also says:

> The rise of e-dispatch services have [sic] blurred the traditional line between medallion cabs, which can offer street-hail service, and non-

> taxi for-hire vehicles that offer pre-arranged service. With the quick arrival of a car at the tap of a button, the distinctions that yielded differential regulatory treatment across black and yellow cars are less relevant, and the City must adapt its traditional frameworks to support the new entrants that do not squarely fit into traditional categories.

R-369.

The increases in Uber's business led to a corresponding decline in yellow taxi revenue. The Mayoral Report says, "Increases in e-dispatch trips are largely substituting for yellow taxi trips in the [Manhattan central business district]." R-373. The result was that corporate medallions that had sold for $1.2 million in the fall of 2013 in the secondary market sold for less than $800,000 by the end of 2015, and the market for individual medallions virtually vanished. In the three full months before the Amended Complaint was filed in March 2017, the TLC reported just six individual medallion sales, of which three were foreclosure sales and two were estate sales. The only non-estate/non-foreclosure sale was in December 2016, for $387,718. Prices continued to fall quickly in the following months. By May 2017, the five arms-length medallion sales were for an average price of $255,000.00. *See* https://www1.nyc.gov/site/tlc/businesses/medallion-transfers.page.

The TLC allowed this to happen without any announced change in the law, and without any announced policy change. It simply ignored legal standards when it came to granting licenses bases and cars affiliated with Uber and Lyft. Thus, this

is not a case where a free market turned against buyers who came to regret their purchase. Rather, it is a case where the seller was also the market regulator and wielded its power in a way that upended the market and caused it to crash and burn.

Proceedings in Supreme Court

Plaintiffs' Amended Complaint alleges, as relevant to this motion: (1) a violation of Section 349 of the GBL, consisting of the TLC's false pre-auction statements about medallion values and price trends and by its failure to announce the ruinous policies and practices it would pursue after the Auctions; and (2) a violation of the contractual duty of good faith and fair dealing, implicit in every contract, arising from the TLC's destruction of the values of the medallions it sold, robbing plaintiffs of the benefit of their bargain. *See* R-74-75. The City and the TLC moved to dismiss the complaint pursuant to CPLR 3211[a]. R-41-42.

In an order dated September 21, 2017, Supreme Court, Queens County (Kerrigan, J.) dismissed the GBL § 349 cause of action as barred by plaintiffs' failure to comply with the notice of claim provisions of GML § 50-e, which requires that a notice of claim be filed within 90 days after a claim arises. R-16.[6]

[6] Supreme Court also stated two alternative grounds for dismissing the claim under GBL § 349, which the Appellate Division did not reach. Supreme Court said that a municipality is not a "person, firm, corporation or association" that can be sued under the GBL provision and that this case "does not involve a consumer-oriented transaction." R-17, R-19. Both those propositions are highly debatable and raise issues of statewide importance. However, because the Appellate

However, the court sustained the claim for breach of the duty of good faith and fair dealing, saying that the case "should proceed to discovery, and the city defendants may, if they are so advised, bring a motion for summary judgment based upon a better record." R-20. Both sides appealed.

While the appeal was pending, discovery proceeded on plaintiffs' good faith and fair dealing claim, and defendants moved, as Justice Kerrigan had suggested, for summary judgment on a full factual record. Justice Kerrigan denied the motion, concluding that "the terms of the Official Bid Forms do not disclaim the reasonable expectations of plaintiffs to ensure the financial stability of medallion taxicabs in accordance with the policies underpinning the TLC Rules . . ." NYSCEF Doc. No. 621 at 8-9 (emphasis added). A true and correct copy is attached hereto as Exhibit E. Justice Kerrigan added:

> Until the invention of the app-based taxi model, the revenue that medallions could expect to produce was reasonably predictable and stable, based upon their finite number and the number of black cars and other for-hire vehicles tangentially competing with them. There is no question that this changed with the introduction of competition from a new technology-based class of taxi services, introduced by Uber and thereafter expanding to other app-based companies emulating Uber's model.

Justice Kerrigan continued:

> Although Ubers and other app based taxis are not, strictly speaking, street hails as medallion taxis are, the ease of summoning one quickly

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Division did not decide them, plaintiffs do not present them here as reasons for granting leave to appeal.

> at any time with merely the swipe of an icon on a cell phone to a street corner or any location makes these taxis different from 'black car' limousines that must be ordered by calling the company's dispatch office and requesting a pick-up at a specific address, often with a significant wait time, and makes arranging a taxi pick-up as easy and spontaneous, often more so, than standing at the curb and attempting to hail with arm waving and whistles an on-duty and unoccupied medallion cab, often while vying for the same cab with others.

Id. at 9.

While this case was pending in the Appellate Division, two other Supreme Court Justices reached conclusions similar to Justice Kerrigan. 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, and held them insufficient to bar a claim for breach of the implied covenant. 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 to protect medallions owners from unfair competition from the app-based "e-hail" vehicle service companies.

Akal Taxi, NYSCEF Doc. No. 460, at 9 (Oct. 1, 2020). A true and correct copy is attached hereto as Exhibit F. In *Akal Taxi,* the Court also certified a plaintiff class consisting of purchasers of medallions at all the Auctions and approved the form and manner of class notice. *Akal Taxi,* NYSCEF Doc. Nos. 233 and 383. The class certification order and notice order are the subject of an appeal before the Appellate Division, Second Department. Appellate Division Docket No. 2020-04084.

Similarly, in *Melrose Credit Union v Nadelman*, 2020 WL 5989279 [Sup Ct, Queens County, Aug. 6, 2020, Index No. 711618/2017], another case in which medallion buyers at the Auctions sued the City and the TLC for breach of the covenant of good faith and fair dealing, Justice Risi denied a motion to dismiss that was based on the same official bid forms Defendants rely on here. A true and correct copy is attached hereto as Exhibit G. 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. . .. 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 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. Here, on a motion to dismiss the terms of the bid forms as a whole do not resolve all factual issues.

Exhibit G at 3; *Melrose Credit Union*, 2020 WL 5989279, *7 (citations omitted).

The Appellate Division Decision

The Appellate Division affirmed Justice Kerrigan's dismissal of plaintiffs' GBL § 349 claim in this case, holding it "was subject to the requirements of General Municipal Law § 50-e, as a cause of action sounding in fraud." Exhibit C at 2-3; *Singh*, 189 AD3d at 1699. It reversed the denial of Defendants' motion to dismiss plaintiffs' good faith and fair dealing claim. As a result, all causes of action have now been dismissed.

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 in order to guarantee the value of their medallions, since this would be inconsistent with the terms of the official bid form.

Exhibit C at 3; *Singh*, 189 AD3d at 1700.

The Appellate Division failed to note that plaintiffs never expected or alleged that defendants "guarantee[d] the value of their medallions" – only that they would refrain from destroying that value. The Appellate Division held, in effect, that a disclaimer of "warranties or representations as to future value" gives a

seller the unqualified right to turn around and destroy the value of the very item it has just sold.

ARGUMENT

Leave to appeal is appropriate where "the issues are novel or of public importance, present a conflict with prior decisions of [the Court of Appeals], or involve a conflict among the departments of the Appellate Division." 22 NYCRR 500.22[b][4]; *see also People v Hawkins*, 11 NY3d 484, 493 [2008] (Court of Appeals' role is "to authoritatively declare and settle the law uniformly throughout the state is best accomplished when the Court determines legal issues of statewide significance") (citations and internal quotations omitted). This case gives this Court an opportunity to answer two questions: *first*, whether the duty of good faith and fair dealing can be disclaimed and if so, what language is sufficient to make a disclaimer effective; and, *second*, whether actions under GBL § 349 are subject to the notice-of-claim limitations of GML § 50-e. Both questions are of statewide importance, potentially relevant to a vast number of New York contracts and disputes. The significance of this case to a large number of medallion buyers, plaintiffs and class members in the related cases described above, furnishes an added reason to grant leave to appeal.

I. THE COURT SHOULD GRANT LEAVE TO DECIDE WHETHER THE DUTY OF GOOD FAITH AND FAIR DEALING CAN BE DISCLAIMED, AND IF SO, WHAT LANGUAGE IS SUFFICIENT

A. New York Should Align Itself with the State Courts that Have Held the Duty Cannot Be Disclaimed

It has been clear for more than a century under New York law 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). The duty "precludes each party from engaging in conduct that will deprive the other party of the benefits of their agreement." *Leberman v. John Blair & Co.*, 880 F2d 1555, 1560 [2d Cir 1989] (applying New York law; internal quotation marks omitted).

This Court first articulated the principle in Judge Cardozo's opinion in *Wood v Duff-Gordon*, 222 NY 88, 91 [1917]. *Wood* remains a classic example of what the implied covenant requires and forbids. In *Wood*, the parties agreed that the

plaintiff would have the exclusive right to place the defendant's endorsements on others' fashion designs and to sell or license the defendant's designs, and that the defendant would receive half of all the profits. The defendant argued there was no enforceable obligation because the contract did not require the plaintiff to do anything. This Court rejected the argument, holding:

> It is true that [the plaintiff] does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. . .. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed. If that is so, there is a contract.

Id. at 90-91 (internal citations omitted).

Put differently, 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. When a contract is otherwise silent on the issue, 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; *See also Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995] (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).

There can be little doubt that Plaintiffs here properly alleged a breach of the implied covenant of good faith and fair dealing. Having sold medallions to Plaintiffs for millions of dollars, Defendants, market regulators, proceeded to

exercise their regulatory power in such a way as to subject the medallion buyers to ruinous competition. This is a paradigmatic example of frustrating a counterparty's justified expectations, thereby destroying that party's right to receive the fruits of the contract. If read to permit what Defendants have done, these contracts placed "one party . . . at the mercy of the other" - exactly what the implied covenant of good faith and fair dealing prohibits.

The issue which this Court should consider here is whether the covenant was effectively disclaimed. As central to New York contract law as the duty of good faith and fair dealing is, it is much less clear whether and how the duty of good faith and fair dealing may be disclaimed. This Court has never addressed this important issue.

Courts in other states are divided. Some states have held that a disclaimer of the covenant is not possible. For example, the United States Supreme Court held in *Northwest, Inc. v. Ginsberg*, "under Minnesota law, which is controlling here, the implied covenant must be regarded as a state-imposed obligation. . .. [U]nder Minnesota law parties *cannot* contract out of the covenant."572 US 273, 286–287 [2014] (emphasis added). The Supreme Court explained that "a State's 'unwillingness to allow people to disclaim the obligation of good faith . . . shows that the obligation cannot be implied, but is law imposed." *Id*. (citing 3A A. Corbin, *Corbin on Contracts* § 654A, p. 88 (L. Cunningham & A. Jacobsen eds.

Supp. 1994)).

In interpreting Minnesota law, the Supreme Court cited cases from other states that also prohibit a waiver of the covenant of good faith, including a federal court decision applying New York law, *Chase Manhattan Bank, N.A. v Keystone Distributors, Inc.*, 873 F Supp 808, 815 [SD NY 1994]. *Northwest*, 572 US at 286 n2.[7] But it also noted that decisions from three other states "permit a party to contract out of the duties imposed by the implied covenant."[8] This Court should grant leave to make clear where New York stands on this important issue.

B. Assuming the Covenant of Good Faith Can Be Disclaimed, This Court Should Decide Whether a General Disclaimer of Warranties as to Value is Sufficient to Do So

The Appellate Division held the duty of good faith and fair dealing to be effectively disclaimed by a boilerplate clause in the bid form which said only that the City has "not made any representations or warranties as to the present or future

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[7] The Supreme Court also cited *Hunter v Wilshire Credit Corp.*, 927 So 2d 810, 813, n5 [Ala 2005]; *Smith v Anchorage School Dist.*, 240 P3d 834, 844 [Alaska 2010]; *Wells Fargo Bank v Arizona Laborers, Teamsters & Cement Masons Local No. 395*, 201 Ariz 474, 491, 38 P3d 12, 29 [2002]; *Habetz v Condon*, 224 Conn 231, 238, 618 A2d 501, 505 [1992]; *Dunlap v State Farm Fire & Cas. Co*, 878 A2d 434, 442 [Del 2005]; *Hill v MedlanticHealth Care Group*, 933 A2d 314, 333 [DC 2007]; *Magruder Quarry & Co., LLC v Briscoe*, 83 SW3d 647, 652 [Mo Ct App 2002] ("When terms are present that directly nullify the implied covenants of good faith and reasonable efforts, ... the contract is void for lack of mutuality"); *Gillette v Hladky Constr.*, Inc., 2008 WY 134, ¶ 31, 196 P.3d 184, 196 [2008].

[8] *Northwest*, 572 US at 286 n2 (citing *Steiner v Thexton*, 48 Cal 4th 411, 419–420, 106 Cal Rptr 3d 252, 226 P3d 359, 365 [2010]*; Shawver v Huckleberry Estates*, LLC, 140 Idaho 354, 362, 93 P3d 685, 693 [2004]; *Farm Credit Servs. of Am. v Dougan*, 2005 SD 94, ¶ 10, 704 NW2d 24, 28 [2005]).

value of a taxicab medallion . . . or as to the present or future application or provisions of the rules of the NYC Taxi & Limousine Commission or applicable law." The Appellate Division's holding threatens to undermine severely the implied covenant. Under the Appellate Division's holding, a party who simply acknowledges there was "no warranty as to value" is helpless against anything its counter-party thereafter may do to impair or destroy the value of the bargain.

As a matter of simple English and common sense, the acknowledgement should not be read to negate the implied covenant. To say that a seller has made no "warranties or representations as to … value" of the item it sold is not the same as saying that the seller is free to do whatever it likes to destroy that value. Fairly read, the acknowledgement means only that the City was not protecting medallion buyers against the vicissitudes of the taxi medallion market - not that it would be free, as a market regulator, to refuse to enforce City statutes and its own rules and thereby cause a market crash.

The Appellate Division cited no Court of Appeals or other Appellate Division decision holding that the covenant of good faith and fair dealing could be disclaimed. Certainly, no appellate decision in this State has ever held that a disclaimer might be accomplished by the kind of boilerplate acknowledgements included in the official bid form. Indeed, the Appellate Division's decision conflicts with the First Department's in *Roli-Blue, Inc. v 69/70th Street Assocs.*,

119 AD2d 173 [1st Dept 1986], and with the Second Department's own earlier decision in *Legend Autorama, Ltd v Audi of Am., Inc.*, 100 AD3d 714 [2d Dept 2012].

In *Roli-Blue*, 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 there leased premises to be used as a restaurant. The tenant then made expensive alterations to convert the space, but was later 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." *Id*. at 176. Despite that disclaimer, the First Department reversed the trial court's order dismissing the good faith and fair dealing claim because the defendant's conduct caused the denial of the 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).

Similarly, in this case, the City denied making any representation or warranty as to value. But nothing in the bid form or any other writing remotely

suggested it could or would *by its own subsequent affirmative action* destroy the value of the medallions it had just sold. Neither the bid forms nor any of the other sale documents mention, much less purport to disclaim, the covenant of good faith and fair dealing.

Likewise, in *Legend Autorama*, 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 in this one, the Second Department nevertheless rejected the disclaimer defense, finding the covenant still required Audi to exercise its express discretion to add new dealerships in good faith. 100 AD3d at 716-17. The Second Department 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).

Under these cases, if the duty of good faith and fair may be disclaimed at all, a disclaimer requires far more than a mere recitation that the City made "no warranty as to value." The bid forms at issue here contained no such explicit disclaimer of the covenant. This Court should review this case to decide what

language (if any) can effectively disclaim the duty of good faith and fair dealing that is so deeply engrained in New York contract law.

II. THE COURT SHOULD GRANT LEAVE TO CONSIDER WHETHER GML § 50-e APPLIES TO A GBL § 349 CLAIM

The Appellate Division held that plaintiffs' GBL § 349 claim "was subject to the requirements of General Municipal Law § 50-e, as a cause of action sounding in fraud." Exhibit C at 2-3. On this point, it cited only C*larke-St. John v City of New York*, 164 AD3d 743, 744 [2d Dept 2018]). *Clarke-St. John*, however, concerns a claim for common law fraud, not a statutory claim under GBL § 349. The Appellate Division decision also conflicts with two more apposite cases from this Court: *Margerum,* 24 NY3d 721, and *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201 [2001] ("*Gaidon II*"). The conflict with controlling precedent merits review by this Court.

In *Margerum*, this Court held that the 90-day GML § 50-e notice of claim requirement is inapplicable to a claim brought under the Human Rights Law. The 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. General Municipal Law § 50-e (1) (a) requires service of a notice of claim within 90 days after the claim arises "[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation." General Municipal Law § 50-i (1) precludes commencement of an action against a city "for personal injury, wrongful death or damage to real or personal property

> alleged to have been sustained by reason of the negligence or wrongful act of such city," unless a notice of claim has been served in compliance with section 50-e. … Human rights claims are not tort actions under section 50-e and are not personal injury, wrongful death, or damage to personal property claims under section 50-i. Nor do we perceive any reason to encumber the filing of discrimination claims. Accordingly, we conclude that there is no notice of claim requirement here.

24 NY3d at 730.

Margerum thus holds that statutory "human rights claims" are "not tort actions under [GML§] 50-e." There is no valid basis for distinguishing GBL § 349 claims from human rights claims. Though they address different wrongs, both laws are remedial statutes designed to protect vulnerable victims from injustice and exploitation; both should be construed broadly to effectuate their remedial purposes. As this Court put it in *Margerum*, there is no "reason to encumber" the filing of either kind of claim with a notice of claim requirement. While the remedies available under both the Human Rights Law and GBL § 349 could be called "tort" remedies in a broad sense, neither is a traditional common-law tort, and under the reasoning of *Margerum*, Section 349 claims, like statutory Human Rights Law claims, should be held not subject to GML § 50-e.

Gaidon II supports the same conclusion. This Court held in *Gaidon II* that because a GBL § 349 claim is not a common law fraud claim, it is not subject to the statute of limitations in CPLR 213[8], which is applicable to fraud claims, but instead to CPLR 214[2], which is applicable to claims based on "a liability, penalty

or forfeiture created or imposed by statute." This Court distinguished a statutory GBL § 349 claim from a common law fraud claims: "While General Business Law § 349 may cover conduct 'akin' to common-law fraud, it encompasses a far greater range of claims that were never legally cognizable before its enactment." 96 NY2d at 209. Thus, with respect to a limitations defense, *Gaidon II* holds that a GBL § 349 case is not to be treated in the same way as an action for common law fraud.

The Appellate Division held that plaintiffs' GBL § 349 claim is subject to the 90-day notice of claim requirement of GML § 50-e without citing either *Margerum* or *Gaidon II* and without considering the policies that underlie those decisions. The Appellate Division's holding puts an unwarranted burden on plaintiffs victimized by the sorts of deceptive practices that Section 349 was enacted to combat. This Court should grant leave to consider whether the Appellate Division's holding was correct.

CONCLUSION

For the reasons given above, Plaintiffs' motion for leave to appeal should be granted.

Dated: New York, New York
June 4, 2021

Respectfully submitted,

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------x

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

Plaintiffs,

-against-

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

Defendants.

----------x

Index No. 701402/17

Hon. Kevin J. Kerrigan

NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order signed by the Honorable Kevin J. Kerrigan, dated September 21, 2017, duly entered and filed in the Office of the Clerk of the County of Queens on September 28, 2017.

Dated: New York, New York
September 29, 2017

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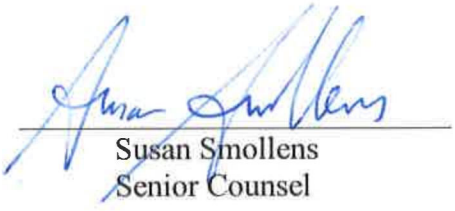
By: 
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Hon. Kevin J. Kerrigan IA Part 10
Justice

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,

- against -

The City of New York and The New York City Taxi and Limousine Commission,

Defendants.

Index Number: 701402/2017

Motion Date: July 11, 2017

Motion Cal. Number: 57

Motion Seq. No.: 1

The following papers numbered 1 to 5 read on this motion by defendant City of New York and defendant New York City Taxi and Limousine Commission for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint against them

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	
Memoranda of Law	3-5

Upon the foregoing papers it is ordered that: Those branches of the motion which are for an order dismissing the first, second, and fourth causes of action and that part of the fifth cause of action which is based on fraud, on the ground of a failure to comply with the notice of claim provisions of New York City Administrative Code §7-201 and General Municipal Law §50-e are granted. Those branches of the motion which are for an order dismissing the

first cause of action on other grounds are also granted. The remaining branches of the motion are denied.

I. Introduction

Plaintiff Danielle Eve Taxi LLC, plaintiff EAC Taxi LLC, plaintiff DEC Taxi LLC, plaintiff EC Taxi LLC, plaintiff Chips Ahoy Taxi LLC, plaintiff ECDC Taxi LLC, and plaintiff Dyre Taxi LLC successfully bid for New York City corporate wheelchair accessible taxi medallions at a public auction held on November 13, 2013. In February, 2014, plaintiff Daler Singh d/b/a Gilzian Enterprise LLC successfully bid for an independent wheelchair accessible taxi medallion at a public auction. Before the auctions, defendant City of New York and defendant New York City Taxi and Limousine Commission (TLC) (collectively the city defendants) made public statements and issued promotional materials concerning medallions, medallion prices, and price trends. In the months prior to auctions held over several years, TLC published reports on the average sale price of both individual and corporate medallions. The plaintiffs allege that the reports issued by TLC contained false, inaccurate, and misleading statements. TLC allegedly exaggerated the price of medallions in public reports while concealing the true prices and made false statements concerning the directional trend in medallion prices.

Plaintiff Singh formed Gilzian Enterprise LLC for the purpose of owning the taxi medallion, which cost the company $821,215. Richard Chipman organized Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC, and Dyre Taxi LLC (the Chipman companies) for the purpose of owning two yellow taxi medallions each (a company with two medallions is called a minifleet). The purchase price for the mini-fleets ranged from $2,118,000 to $2,518,000 and totaled $16,426, 000..

After the plaintiffs made their purchases, the value of their medallions allegedly fell, and the plaintiffs attribute their losses not only to alleged fraud committed by the TLC, but also to the TLC's failure to restrict the activity of companies like Uber Technologies, Inc. The plaintiffs allege that a medallion gives them the exclusive right to pick up passengers via "street hail" in certain areas of the city and that Uber infringes on this right by picking up passengers who arrange for transportation through the use of an application on their smart phones.

The relevant regulatory background and distinctions concerning yellow cabs, black cars (which Uber vehicles supposedly are), and other types of vehicles for hire are given in three decisions issued by the Honorable Allan Weiss, a Justice of the New York State Supreme Court, County of Queens, in three cases : (1) *Glyca Trans LLC v. City of New York,* Index No. 8962/15 (September 8, 2015), (2) *XYZ Two Way Radio Service, Inc. v. The*

City of New York, Index No. 5693/15 (September 8, 2015), and (3) *Melrose Credit Union v. The City of New York*, Index No. 6443/15 (September 8, 22015).

The cases decided by Justice Weiss were largely Article 78 in nature, the petitioners, who were parties with interests in medallions, essentially seeking to compel TLC to enforce laws and regulations protecting the exclusive rights of medallion holders. (Justice Weiss granted the respondents' CPLR 3211 dismissal motions.) The instant action, which purports to be a class action, is very different from those decided by Judge Weiss, but it is very similar in structure to another case previously decided by this court.

On September 30, 2015, plaintiff Jaspreet Singh, plaintiff CGS Taxi LLC, plaintiff D&P Baidwan, LLC, plaintiff C&R Bhogal, LLC, and plaintiff PEG Taxi, NYC, LLC who had also successfully bid for New York City taxi medallions at public auction and who had thereafter experienced a fall in their value allegedly due to Uber and other technological transportation companies, began an action in the New York State Supreme Court, County of Queens which was very similar to the case at bar (*CGS Taxi LLC v. The City of New York,* Index No. 713014/15). The case was assigned to this part. The law firm of Wolf Haldenstein Adler Freeman & Herz LLP represented the plaintiffs in *CGS Taxi*, and the same law firm represents the plaintiffs in the instant action.

On March 16, 2016, the defendants in *CGS Taxi* submitted a motion for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the complaint against them. Pursuant to a decision and order dated April 18, 2016 (one paper), this court converted the motion into one for summary judgment pursuant to CPLR 3211(c). (*CGS Taxi LLC v. The City of New York* , 2016 WL 2939774,) The case proceeded to discovery, On March 8, 2017, defendant City of New York and defendant TLC submitted a motion for summary judgment dismissing the complaint against them and the plaintiffs submitted a cross motion for, inter alia, partial summary judgment and an order certifying this action as a class action. Pursuant to a decision and order dated May 2, 2017 (one paper) and entered May 9, 2017, this court granted the motion by the city defendants for summary judgment and denied the cross motion by the plaintiffs. (*CGS Taxi LLC v. The City of New York* , 2017 WL 2734862.) The court found that the plaintiffs had not complied with notice of claim requirements. On June 2, 2017, the plaintiffs in *CGS Taxi* filed a notice of appeal.

II. The Complaint

The first cause of action is for violation of General Business Law §349 which prohibits "deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service." The second cause of action is for fraud. The third cause of action is for breach of the implied covenant of good faith and fair dealing. The fourth cause

of action is for negligent misrepresentation. The fifth cause of action is for rescission of the auction sale transactions.

The court notes that the complaint in this case differs from the complaint filed in *CGS Taxi* which contained a sixth cause of action labeled "violation of licensing statutes and regulations" and which apparently sought damages and/or rescission and a seventh cause of action labeled "failure to enforce codes and rules pertaining to black car operations,"also apparently for damages and/or rescission. The plaintiffs in *CGS Taxi* demanded consequential damages, punitive damages, rescission of the auction sale transactions, costs and attorney's fees, as the plaintiffs in this case do, but the complaints in both cases are without a demand for Article 78 relief.

II. CPLR 3211(a)(7)

A. Notice of Claim

The failure to comply with statutory notice of claim requirements can result in the dismissal of the complaint pursuant to CPLR 3211(a)(7). (*See, e.g.*, *Mosheyev v. New York City Dept. of Educ.*, 144 AD3d 645; *Bertolotti v. Town of Islip*, 140 AD3d 907.)

The complaint in the instant action alleges the following: " 14. Mr. Singh filed a notice of claim with the New York City Comptroller on December 16, 2016. Apart from acknowledging receipt of the notice, neither the Comptroller nor any other City official has responded to that notice. ***17. The Chipman affiliated plaintiffs filed a joint notice of claim with the New York City Comptroller on February 9, 2017. Neither the Comptroller nor any other City official has offered to adjust those claims or otherwise responded to that notice."

The city defendants argue that causes of action for tort or in the nature of tort must be dismissed because the plaintiffs did not file timely notices of claim.

The Chipman companies successfully bid for New York City corporate wheelchair accessible taxi medallions at a public auction held on November 13, 2013. The Chipman companies filed a notice of claim with the New York City Comptroller on on February 9, 2017. In February, 2014, plaintiff Daler Singh d/b/a Gilzian Enterprise LLC successfully bid for an independent wheelchair accessible taxi medallion at a public auction. Plaintiff Singh filed a notice of claim with the New York City Comptroller on December 16, 2016.

General Municipal Law §50-e, "Notice of claim," provides in relevant part: "1. When service required; time for service; upon whom service required.(a) In 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, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises ****." (Emphasis added.) (*See, Williams ex rel. Fowler v Nassau County Medical Center* , t6 NY3d 531; *Boring v. Town of Babylon*, 147 AD3d 892.)

New York City Administrative Code §7-201, "Actions against the city," provides in relevant part: " a. In every action or special proceeding prosecuted or maintained against the city, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims, upon which such action or special proceeding is founded, were presented to the comptroller for adjustment, and that the comptroller has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment ***." (*See, Raven Elevator Corp. v. City of N.Y.*, 291 AD2d 355; *Katzman v. City of N.Y.*, 183 Misc2d 501,[AT 1st].)

New York City Administrative Code §7-201 imposes a duty to not only make the required allegation, but also, at least implicitly, to serve a notice of claim upon the comptroller. In *Raven Elevator Corp. v. City of New York* (*supra*, 356), The Appellate Division, First Department stated: "With regard to those claims relating to projects for which Raven was the general contractor, Raven's communication to the City, identifying only the amount claimed, was so wanting in detail as to fail to constitute a notice of claim within the meaning of New York City Administrative Code §7-201(a), and since such notice is a condition of maintaining an action against the City, the subject claims were properly dismissed ***."

There is, of course, an interplay between Section 7-201 and section 50-e. (*See, e.g.,Silicato v. Skanska USA Civil Ne. Inc.*, 112 AD3d 464.) New York City Administrative Code §7-201 and General Municipal Law §50-e together required the plaintiffs to serve timely notices of claim before asserting their causes of action for tort or for wrongful conduct in the nature of tort. (*See, CGS Taxi LLC v. The City of New York* , 2017 WL 2734862.) Read together, the plaintiffs were required to (1) serve a notice of claim within ninety days after their claims arose and (2) allege in their complaint that thirty days passed after they presented their notice of claim to the comptroller without action on his part. The plaintiffs complied with only the second requirement, which is insufficient. The court notes that General Municipal Law §50-i, " Presentation of tort claims; commencement of actions," though not applicable to the case at bar (*see, CGS Taxi LLC v. The City of New York* , *supra*.), similarly imposes two requirements upon a plaintiff: "(a) a notice of claim [must] have been made and served upon the city ***in compliance with section fifty-e of this article" and (2) there must be an "allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice ***, and that adjustment or payment thereof has been neglected or refused ***." (*See, Fernandez v. City of N.Y.*, 148 AD3d 995.)

The plaintiffs' second cause of action asserting fraud and fourth cause of action asserting negligent misrepresentation are in tort and must be dismissed for failure to comply with New York City Administrative Code §7-201 and General Municipal Law §50-e. (*See, Serkil L.L.C. v. City of Troy*, 259 AD2d 920.) The plaintiff's first cause of action for violation of General Business Law §349, which prohibits "deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service, " must also be dismissed for failure to comply with New York City Administrative Code §7-201 and General Municipal Law §50-e. General Municipal Law §50-e applies to a cause of action "sounding in tort."(*See, Brunache v. MV Transp., Inc.*, 151 AD3d 1011; *Inc. Vill. of Westbury v. IACO Realty, Inc.*, 131 AD3d 1060, 1061 The violation of a statute resulting in injury can give rise to a tort action, (*see, Lauer v. City of New York*, 95 NY2d 95), and a cause of action for the alleged failure to properly discharge a statutory duty can be deemed a cause of action sounding in tort for which the service of a notice of claim is a prerequisite to a lawsuit. (*See, e.g., Mutuel Ticket Agents, Local 23293 v. Roosevelt Raceway Assocs.*, 172 AD2d 595.) Considering the purposes of GBL §349 and the statute's similarity with the traditional tort of fraud, a violation of the statute should be categorized as a tort for the purposes of New York City Administrative Code §7-201 and General Municipal Law §50-e.

That part of the fifth cause of action which is for rescission of the auction sale of the medallions because of fraud in the inducement (*see, Shomron v. Griffin*, 70 AD3d 406) must also be dismissed because of the failure to timely file a notice of claim. The court notes that the plaintiffs have taken the position that they are seeking rescission based on two causes of action: (1) a cause of action for breach of contract and (2) a cause of action for fraudulent inducement. " Here, though the remedy of rescission would be justified by either breach of contract or fraudulent inducement, Plaintiffs have alleged both causes of action." (Memorandum of Law, pp 36-37.) (*See, Shugrue v. Stahl*, 117 AD3d 527, 528 ["fraudulent inducement claim was not duplicative of their claim for breach of contract']).

B. The First Cause of Action (General Business Law §349)

The first cause of action alleges a violation of General Business Law § 349, "Deceptive acts and practices unlawful," which provides in relevant part: "(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." (*See, Meachum v Outdoor World Corp.*, 235 AD2d 462.) General Business Law § 349 contemplates actionable conduct that does not necessarily rise to the level of fraud (*see, Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 343; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319). "Intent to defraud and justifiable reliance by the plaintiff are not elements of the statutory claim ***." (*Small v. Lorillard Tobacco Co., Inc.*,94 NY2d 43, 55; see,(*Stutman v Chemical Bank*, 95 NY2d 24.) "The statute was intended to empower consumers; to even the playing field

in their disputes with better funded and superiorly situated fraudulent businesses. It was not intended to supplant an action to recover damages for breach of contract between parties to an arm's length contract." (*Teller v. Bill Hayes, Ltd.*, 213 AD2d 141, 148.)

The first issue arising under GBL §349 pertains to whether the statute has any application against municipal defendants since it forbids "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state ***." It has been held that " section 349 authorizes a claim for deceptive business practices only against a 'person, firm, corporation or association' and does not apply to a state administrative agency performing governmental functions, such as DOCS here (General Business Law § 349[b])." (*Walton v. New York State Dep't of Corr. Servs.*, 25 AD3d 999, 1002, aff'd as modified, 8 NY3d 186.) The plaintiffs argue that the municipal defendants were engaged in a commercial function when they sold the medallions, thereby generating substantial revenues for the city, and that there is no case that suggests that a municipality that engages in commerce is not bound by the same commercial law that applies to other buyers and sellers. The plaintiffs rely on the "the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' " (*United States v. Winstar Corp.*, 518 US 839, 895, quoting *Lynch v. United States*, 292 US, 571, 579.)

But "[t]he regulation of an occupation by means of licensing is a valid exercise of the police power ***." (2 NY Jur2d, "Administrative Law," §69; *see, e.g.,Melron Amusement Corp. v. Town of Mamaroneck in Westchester Cty.*, 104 AD2d 858, 859 ["For these reasons, we find that Local Law No. 2/1981 constitutes a proper exercise of the town board's police power as it is rationally related to the protection and preservation of the public welfare and safety. "].) "Municipalities may regulate and control traffic. There is a strong public interest in regulating taxicabs, which include preventing congestion on the streets, insuring traffic safety, providing its citizens with safe and reasonably priced service, preventing unsafe driving, and insuring that competent people are servicing its citizens." (*G & C Transp., Inc. v. McGrane*, 32 Misc3d 872, 877, aff'd, 97 AD3d 817.)

The court does not find it necessary to determine whether the municipal defendants were engaged in ordinary commercial activity, or in the exercise of the police power, or engaged in a hybrid function when they auctioned off the medallions. Instead, the court finds, as did the Appellate Division, Third Department in *Walton v. New York State Dep't of Corr. Servs.* (*supra* 1002), that GBL §349 applies only against a "person, firm, corporation or association"; the statute does not expressly or by implication apply to municipal defendants. Further support for an interpretation of GBL §349 which excludes municipal defendants from the scope of the statute may be found in GBL §349(h) which provides for an award of treble damages. "Among the remedies available to private plaintiffs are compensatory damages, limited punitive damages and attorneys' fees (General Business Law § 349[h])." (*Karlin v. IVF Am., Inc.*, 93 NY2d 282, 291.) Punitive damages are not

recoverable against municipal defendants. (*Corvetti v. Town of Lake Pleasant*, 146 AD3d 1118; *Dorian v. City of New York*, 129 AD3d 445,446 [" punitive damages are not recoverable against a state or its political subdivisions, which includes a municipality"].)

"A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act ***." (*Stutman v. Chem. Bank*, 95 NY2d 24, 29; *Valentine v. Quincy Mut. Fire Ins. Co.*, 123 AD3d 1011, 1015; *Zurakov v. Register.Com, Inc.*, 304 AD2d 176.) While the statute is broad in scope, "[s]ection 349 does not grant a private remedy for every improper or illegal business practice, but only for conduct that tends to deceive consumers ***." (*Schlessinger v. Valspar Corp.*, 21 NY3d 166, 172.) The statute is directed at practices which affect the public at large, and it has no application where there is merely a private contractual dispute between parties. (*See, Yellow Book Sales and Distribution Co., Inc. v. Hillside Van Lines, Inc.*, 98 AD3d 663; *Canario v. Gunn*, 300 AD2d 332.) The plaintiff must allege that the the claimed violations have "a broad impact on consumers at large." (*Plaza PH2001 LLC v. Plaza Residential Owner LP*, 98 AD3d 89, 104,)

Proof of a prima facie case under General Business Law § 349 requires "a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof * * *." (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25.) "[A] claim for deceptive business practices under General Business Law § 349 or for false advertising under General Business Law § 350 requires proof of a causal connection between some injury to plaintiffs and some misrepresentation made by defendants * * *." (*Small v Lorillard Tobacco Co.*, 252 AD2d 1, 15, affd 94 NY2d 43.) The test for deceptive acts and practices is an objective one, i.e., whether the defendant made representations or omissions which were "likely to mislead a reasonable consumer acting reasonably under the circumstances." (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra,* 26.)

"Courts evaluating whether a conduct is 'consumer-oriented' have generally focused on several factors, namely, "(i) the amounts at stake, (ii) the nature of the contracts at issue, and (iii) the sophistication of the parties ***." (*4 K & D Corp. v. Concierge Auctions, LLC*, 2 Fsupp 3d 525, 548.) "To determine whether deceptive practices are consumer oriented, courts examine whether the transaction is more like '[t]he typical violation contemplated by the statute,' which 'involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising,' than 'large, private, single-shot contractual transactions,' which involve 'complex arrangements, knowledgeable and experienced parties and large sums of money' ***." (*904 Tower Apartment LLC v. Mark Hotel LLC*, 853 Fsupp2d 2d 386, 399, quoting *Teller v. Bill Hayes, Ltd.*, 213 AD2d 141, 146–48.) Cases where plaintiffs have

recovered pursuant to GBL § 349 usually, if not uniformly, "involve transactions where the amount in controversy is small." (*Teller v. Bill Hayes, Ltd.*, 213 AD2d 141, 146.) " Courts in New York have held repeatedly that a single shot transaction involving complex arrangements, knowledgeable and experienced parties and large sums of money is not a consumer-oriented transaction for purposes of GBL claims ***." (*4 K & D Corp. v. Concierge Auctions, LLC*, *supra*, 548 [internal quotation marks and citations omitted].)

The case at bar does not involve a consumer-oriented transaction. (*See*, *Gray v. Seaboard Sec., Inc.*, 14 AD3d 852 [investors in securities].) This is not a case where the amounts in controversy are small, and the sale of the medallions was a complex process, starting with the solicitation of bids for the auction. Taxi medallions, like securities, are not purchased in the traditional manner that consumer goods are purchased, and taxi medallions, like securities, are not purchased as goods to be consumed or used. (*See, Gray v. Seaboard Sec., Inc.*, *supra*.) The plaintiffs are investors who had access to large amounts of capital to put at risk, and they were, or should have been, sophisticated enough to risk the large sums of money paid for the medallions. Plaintiff Singh paid $821,215 for his medallion. Richard Chipman paid a total of $16,426, 000 for his medallions. These individuals are obviously not the small consumers intended to be protected by GBL§349, but rather investors with substantial personal assets or access to substantial financing. The sale of medallions often involves financing by banks and credit unions, who should be knowledgeable about the risks undertaken, if taxi drivers purchasing medallions are not. Moreover, the acts of the city defendants did not have a broad impact on the public at large, but merely upon a relative handful of entities interested in investing in taxi medallions. (See, *Brooks v. Key Tr. Co. Nat. Ass'n*, 26 AD3d 628 [investment advice and management of investment accounts].)

The plaintiffs did not state a claim under GBL §349.

C. The Other Causes of Action

A party moving for judgment dismissing one or more causes of action asserted against him pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence must show that the documentary evidence submitted is " such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702; *see, Galvan v. 9519 Third Avenue Restaurant Corp, supra; Fontanetta v. Doe*, 73 AD3d 78; *Vanderminden v.Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v.Webster Town Center Partnership*, 221 AD2d 248.

"Where, as here, evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one ***." (*Hallwood v. Incorporated Village of Old*

Westbury, 130 AD3d 571, 572; *Agai v. Liberty Mut. Agency Corp.*, 118 AD3d 830; *Fishberger v. Voss*, 51 AD3d 627.) However, " unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate ***." (*Hallwood v. Incorporated Village of Old Westbury, supra,* 572; *Agai v. Liberty Mut. Agency Corp., supra; Fishberger v. Voss*, supra.) Consideration of evidentiary materials will almost never warrant dismissal of a cause of action pursuant to CPLR 3211(a)(7) unless they conclusively establish that the plaintiff has no cause of action. (*Hendrickson v. Philbor Motors, Inc.*, 102 AD3d 251.)

In regard to the plaintiffs' second cause of action, which is for fraudulent inducement, fourth cause of action, which is for negligent misrepresentation, and that part of the fifth cause of action which is for rescission because of fraud, the court has dismissed them on notice of claim grounds, but the city defendants did not on this mere CPLR 3211(a) (1)and (7) motion otherwise eliminate factual issues arising under these causes of action.

In regard to the third cause of action, which is in contract for breach of the implied covenant of good faith and fair dealing, and that part of the fifth cause of action which is for rescission for material breach of contract, the court again finds that the city defendants did not on this mere CPLR 3211(a) (1)and (7) motion otherwise eliminate factual issues arising under these causes of action. This case should proceed to discovery, and the city defendants may, if they are so advised, bring a motion for summary judgment based upon a better record. (*See, CGS Taxi LLC v. The City of New York, supra.)*

Dated: September 21, 2017

Kevin J. Kerrigan, J.S.C.

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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,

-against-

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

Defendants.

Index No. 701402/2017

Hon. Kevin J. Kerrigan, J.S.C.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that attached is a true and correct copy of the Order dated February 20, 2018 and duly filed and entered by the office of the Queens County Clerk on February 23, 2018 (NYSCEF Doc. No. 166).

Dated: New York, New York
February 23, 2018

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/797946

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J. Kerrigan IA Part 10
Justice

Daler Singh, DBA Gilzian Enterprise LLC, Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC and Dyre Taxi LLC individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

The City of New York and The New York City Taxi and Limousine Commission,

Defendants.

Index Number: 701402/17

Motion Date: December 5, 2017

Motion Cal. Number: 159

Motion Seq. No.: 3

The following papers numbered 1 to 4 read on this motion by defendant City of New York and defendant New York City Taxi and Limousine Commission(TLC) for reargument.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Notice of Cross Motion - Affidavits - Exhibits	
Answering Affidavits - Exhibits	
Reply Affidavits	
Memoranda of Law	2-4

Upon the foregoing papers it is ordered that leave to reargue is denied. The City and TLC have failed to demonstrate that this Court misapprehended any question of law or fact so as to merit reargument.

Plaintiff Danielle Eve Taxi LLC, plaintiff EAC Taxi LLC, plaintiff DEC Taxi LLC, plaintiff EC Taxi LLC, plaintiff Chips Ahoy Taxi LLC, plaintiff ECDC Taxi LLC, and plaintiff Dyre Taxi LLC successfully bid for New York City corporate wheelchair accessible taxi medallions at a public auction held on November 13, 2013. In February, 2014, plaintiff Daler Singh d/b/a Gilzian Enterprise LLC successfully bid for an independent wheelchair accessible taxi medallion at a public auction. Before the auctions, defendant City of New York and defendant New York City Taxi and Limousine Commission (TLC) (collectively the city defendants) made public statements and issued promotional materials concerning medallions, medallion prices, and price trends. In the months prior to auctions held over several years, TLC published reports on the average sale price of both individual and corporate medallions. The plaintiffs allege that the reports issued by TLC contained false, inaccurate, and misleading statements. TLC allegedly exaggerated the price of medallions in public reports while concealing the true prices and made false statements concerning the directional trend in medallion prices.

Plaintiff Singh formed Gilzian Enterprise LLC for the purpose of owning the taxi medallion, which cost the company $821,215. Richard Chipman organized Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC, and Dyre Taxi LLC (the Chipman companies) for the purpose of owning two yellow taxi medallions each (a company with two medallions is called a minifleet). The purchase price for the mini-fleets ranged from $2,118,000 to $2,518,000 and totaled $16,426, 000..

After the plaintiffs made their purchases, the value of their medallions allegedly fell, and the plaintiffs attribute their losses not only to alleged fraud committed by the TLC, but also to the TLC's failure to restrict the activity of companies like Uber Technologies, Inc. The plaintiffs allege that a medallion gives them the exclusive right to pick up passengers via "street hail" in certain areas of the city and that Uber infringes on this right by picking up passengers who arrange for transportation through the use of an application on their smart phones.

The plaintiff's third cause of action is for breach of the contractually implied covenant of good faith and fair dealing.The plaintiff's fifth cause of action is for rescission of the auction sales transactions. The defendants submitted a motion to dismiss the complaint on July 11, 2017.Pursuant to a decision and order dated September 21, 2017 (one paper), this court, inter alia, denied the motion as it pertained to the third cause of action and granted only that part of the fifth cause of action which was based on fraud. The remaining causes of action were dismissed.(*See, Singh v. The City of New York*, 2017 WL 4791469.)

The defendants now seek to reargue their prior motion for the purpose of obtaining the dismissal of the third cause of action and the dismissal of the fifth cause of action in its entirety.

The first issue presented is whether the complaint's failure to expressly allege the absence of a complete and adequate remedy at law for the purported breach of contract bars a claim for rescission. It is true that "[t]he equitable remedy of rescission is only to be invoked where the plaintiff has no adequate remedy at law and where the parties can be substantially restored to their status quo ante positions ***." (*Habberstad Volkswagen, Inc. v. GC Volkswagen, Inc.*, 127 AD3d 1019, 1020.) However, the defendants' reliance on *Loreley Fin. (Jersey) No. 28, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*(117 AD3d 463), which dismissed a cause of action for rescission because of a failure to allege an absence of an adequate remedy at law, is misplaced. The *Loreley* decision cites *Rudman v. Cowles Commc'ns, Inc.* (30 NY2d 1, 13–14) which states: " the equitable remedy is to be invoked only when there is lacking complete and adequate remedy at law and where the Status quo may be substantially restored (6 N.Y.Jur., Cancellation of Instruments, ss 2—4). Here, damages appear adequate and it is impracticable to restore the Status quo, the assimilation of plaintiffs' company being complete ." In the case at bar, however, it appears at this stage that restoration of the status quo is feasible, and it also appears that damages, such as loss of income arising from a contractual breach, will be difficult, if not impossible, to prove. The the court determines that the complaint in the case at bar need not expressly allege the absence of a complete and adequate remedy at law.

The second issue presented is whether the plaintiffs may seek both rescission and damages for breach of contract. They may. A party "may seek rescission and damages in the same action (CPLR 3002[e])." (*Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 AD3d 278, 279 [apparently involving breach of contract rather than fraud].) " CPLR 3002(e) permits the court to make the plaintiff completely whole, not by allowing 'inconsistent' items of relief, but by realistically recognizing that they are not inconsistent at all. Plaintiff wants to be rid of the transaction, restored to status quo, and also recompensed for everything else lost along the way. " (Connors, Commentaries, McKinney's Cons. Laws of NY, Book 7B, C3002:24.) Although the defendants argue that CPLR 3002(e) applies only to a cause of action for fraud, there appears to be no reason why a party asserting a cause of action for breach of contract should be denied the opportunity to obtain, in the words of the statute, "complete relief."

The third issue presented is whether the fifth cause of action should be dismissed because "the plaintiffs failed to allege the specific terms of the purported contract which were breached and upon which liability is predicated." (Defendants' memorandum of law, p4.) It is true that "[i]n order to adequately plead a cause of action for breach of

contract*** the complaint must allege the provisions of the contract that were allegedly breached ***." (*Woodhill Elec. v. Jeffrey Beamish, Inc.*, 73 AD3d 1421, 1422; *see,Sutton* v. *Hafner Valuation Grp., Inc.*, 115 AD3d 1039.) A complaint may be dismissed where a plaintiff does not allege "the breach of any particular contractual provision ***." (*Kraus v. Visa Int'l Serv. Ass'n,* 304 AD2d 408; s *see,Sutton* v. *Hafner Valuation Grp., Inc*, *supra.*) However, in the case at bar, the plaintiffs are not seeking rescission for the breach of any one express term of the contract, but for the violation of the implied covenant of good faith and fair dealing. How the defendants allegedly violated the implied covenant should be evident from the plaintiffs' twenty-seven page amended complaint containing 180 separately numbered paragraphs.

Accordingly, the motion is denied.

Dated: February 20, 2018

Kevin J. Kerrigan, J.S.C.

FILED
FEB 23 2018
COUNTY CLERK
QUEENS COUNTY

EXHIBIT C

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the Second Judicial Department on December 30, 2020.

Dated: January 4, 2021

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Corporation Counsel
of the City of New York
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By: Diana Lawless
DIANA LAWLESS
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Attorneys for Plaintiffs-Appellants-Respondents

Appellate Division Docket No. 2017-12988

New York Supreme Court
Appellate Division: Second Department

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-Respondents,

against

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

Defendants-Respondents-Appellants.

APPELLATE DIVISION
ORDER AND NOTICE OF ENTRY

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
100 Church Street
New York, New York 10007

Date and timely service of a copy of the within Order and of Notice of Entry is hereby admitted.

New York, N.Y._____, 2021
_____, Esq.
Attorney for _____

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D65357
T/htr

_____AD3d_____ Argued - September 17, 2020

ALAN D. SCHEINKMAN, P.J.
HECTOR D. LASALLE
VALERIE BRATHWAITE NELSON
ANGELA G. IANNACCI, JJ.

2017-12988 DECISION & ORDER

Daler Singh, etc., et al., appellants-respondents,
v City of New York, et al., respondents-appellants.

(Index No. 701402/17)

Wolf Haldenstein Adler Freeman & Herz, LLP, New York, NY (Benjamin Y. Kaufman, Gregory M. Nespole, Correy A. Kamin, and Law Offices of Daniel L. Ackman of counsel), for appellants-respondents.

Zachary W. Carter, Corporation Counsel, New York, NY (Richard Dearing and Eric Lee of counsel), for respondents-appellants.

In a purported class action, inter alia, to recover damages for violations of General Business Law § 349 and breach of the implied covenant of good faith and fair dealing, and/or to rescind certain contracts, the plaintiffs appeal, and the defendants cross-appeal, from an order of the Supreme Court, Queens County (Kevin J. Kerrigan, J.), dated September 21, 2017. The order, insofar as appealed from, granted that branch of the defendants' motion which was pursuant to CPLR 3211(a) to dismiss the first cause of action on the grounds that the plaintiffs failed to comply with the requirements of General Municipal Law § 50-e and failed to state a cause of action. The order, insofar as cross-appealed from, denied those branches of the defendants' motion which were pursuant to CPLR 3211(a) to dismiss the third cause of action and so much of the fifth cause of action as sought rescission of the subject contracts based upon breach of the implied covenant of good faith and fair dealing.

ORDERED that the order is affirmed insofar as appealed from; and it is further,

ORDERED that the order is reversed insofar as cross-appealed from, and those branches of the defendants' motion which were pursuant to CPLR 3211(a) to dismiss the third cause

of action and so much of the fifth cause of action as sought rescission of the subject contracts based upon breach of the implied covenant of good faith and fair dealing are granted; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

The plaintiffs in this putative class action seek to recover monetary damages, and/or to rescind their contracts to purchase New York City taxi cab medallions, due to the alleged actions of the defendants, the City of New York and the New York City Taxi and Limousine Commission (hereinafter the TLC), which purportedly caused a dramatic loss in value of the medallions after the medallions had been purchased at auction. The plaintiffs allege, inter alia, that prior to holding three taxi cab medallion auctions in late 2013 and early 2014, the TLC "intentionally overstated the value of taxi medallions and concealed the fact that the value of those medallions had already begun to decline due to factors known to the TLC but not disclosed to [the] plaintiffs," and that after the auctions, the TLC "through its actions and inaction, significantly undermined the value of the medallions it had just sold to [the] plaintiffs." The TLC's alleged wrongful action and inaction after the auctions included permitting affiliates of Uber Technologies, Inc. (hereinafter Uber), to acquire licenses to operate black car services despite the affiliates' failure to satisfy the black car licensing requirements, and permitting affiliates of Uber to "accept street hails in direct and illegal competition with medallion taxis."

The defendants moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, and the plaintiffs opposed the motion. In an order dated September 21, 2017, the Supreme Court, inter alia, granted that branch of the defendants' motion which was to dismiss the first cause of action, which sought to recover damages for violations of General Business Law § 349. The plaintiffs appeal from this portion of the order. The court denied those branches of the defendants' motion which were to dismiss the third cause of action, which sought to recover damages for breach of the implied covenant of good faith and fair dealing, and so much of the fifth cause of action as sought rescission of the contracts based upon breach of the implied covenant of good faith and fair dealing, on the ground that the plaintiffs failed to state a cause of action. The defendants appeal from these portions of the order.

Administrative Code of the City of New York § 7-201 and General Municipal Law § 50-e together require a plaintiff, in order to bring an action sounding in tort against the City of New York, to serve a notice of claim within ninety days after the date the claim arises (*see Bovich v East Meadow Pub. Lib.*, 16 AD3d 11, 16; *Raven El. Corp. v City of New York*, 291 AD2d 355, 356). Failure to comply with a statutory notice of claim requirement is a ground for dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action (*see Mosheyev v New York City Dept. of Educ.*, 144 AD3d 645, 646; *Bertolotti v Town of Islip*, 140 AD3d 907, 908-909).

General Business Law § 349(a) prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (*see North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 11). We agree with the Supreme Court's determination that the plaintiffs' first cause of action, which sought to recover damages for violations of General Business Law § 349, was a claim sounding in tort, and therefore was subject to the requirements of General Municipal Law § 50-e, as a cause of action sounding in fraud (*see Clarke-*

St. John v City of New York, 164 AD3d 743, 744). Accordingly, we agree with the court's determination granting that branch of the defendants' motion which was to dismiss the first cause of action due to the plaintiffs' failure to serve a notice of claim within 90 days after the claim arose (*see Mosheyev v New York City Dept. of Educ.*, 144 AD3d at 646; *Bertolotti v Town of Islip*, 140 AD3d at 908-909).

We disagree, however, with the Supreme Court's determination to deny those branches of the defendants' motion which were to dismiss the third cause of action, which sought to recover damages for breach of the implied covenant of good faith and fair dealing, and so much of the fifth cause of action as sought rescission of the contracts based upon breach of the implied covenant of good faith and fair dealing, on the ground that the plaintiffs failed to state a cause of action. On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the pleading is afforded a liberal construction, the facts as alleged are accepted as true, and the plaintiffs are accorded the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88). A motion pursuant to CPLR 3211(a)(7) based upon evidentiary materials should not be granted "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [internal quotation marks omitted]; *see Sokol v Leader*, 74 AD3d 1180, 1182). "As a general rule, rescission of a contract is permitted 'for such breach as substantially defeats its purpose'" (*RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654, quoting *Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284). "The implied covenant of good faith and fair dealing is breached when a party acts in a manner that would deprive the other party of the right to receive the benefits of their agreement" (*1357 Tarrytown Rd. Auto, LLC v Granite Props., LLC*, 142 AD3d 976, 977). "Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [internal quotation marks omitted]). "This 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'" (*id.* at 389, quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87). "The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship'" (*Dalton v Educational Testing Serv.*, 87 NY2d at 389, quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304).

Here, the plaintiffs concede that the 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 in order to guarantee the value of their medallions, since this would be inconsistent with the terms of the official bid form. Accordingly, since the evidence submitted by the defendants demonstrated that the plaintiffs' allegations regarding breach of the implied covenant of good faith and fair dealing were not facts at all, the Supreme Court should have granted those branches of the defendants' motion which were to dismiss the third cause of action and

so much of the fifth cause of action which sought rescission of the contracts based upon breach of the implied covenant of good faith and fair dealing.

In light of our determinations, we need not address the parties' remaining contentions.

SCHEINKMAN, P.J., LASALLE, BRATHWAITE NELSON and IANNACCI, JJ., concur.

ENTER: Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

EXHIBIT D

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the Second Judicial Department on May 5, 2021.

Dated: May 6, 2021

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
100 Church Street
New York, New York 10007

By: _____
ERIC LEE
Assistant Corporation Counsel
212-356-4053

To:

LAW OFFICE OF DANIEL L. ACKMAN
77 Water Street, 8th Floor
New York, NY 10005

WOLF HALDENSTEIN ADLER FREEMAN & HERZ, LLP
270 Madison Avenue, 10th Floor
New York, NY 10016

Attorneys for Plaintiffs-Appellants-Respondents

Appellate Division Docket No. 2017-12988

New York Supreme Court
Appellate Division: Second Department

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-Respondents,

against

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

Defendants-Respondents-Appellants.

APPELLATE DIVISION
ORDER AND NOTICE OF ENTRY

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
100 Church Street
New York, New York 10007

Date and timely service of a copy of the within Order and of Notice of Entry is hereby admitted.

New York, N.Y._____, 2021
_____, Esq.
Attorney for _____

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M276961
MB/

ROBERT J. MILLER, J.P.
HECTOR D. LASALLE
VALERIE BRATHWAITE NELSON
ANGELA G. IANNACCI, JJ.

2017-12988 DECISION & ORDER ON MOTION

Daler Singh, etc., et al., appellants-respondents,
v City of New York, et al., respondents-appellants.

(Index No. 701402/2017)

Appeal and cross appeal from an order of the Supreme Court, Queens County, dated September 21, 2017, which was determined by decision and order of this Court dated December 30, 2020. Motion by the appellants-respondents for leave to reargue the appeal and cross appeal, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

MILLER, J.P., LASALLE, BRATHWAITE NELSON and IANNACCI, JJ., concur.

ENTER: Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

May 5, 2021

SINGH v CITY OF NEW YORK

EXHIBIT E

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J. Kerrigan Part 10
Justice

----------x
Daler Singh DBA Gilzian Enterprise LLC, Danielle Eve Taxi LLC, EAC Taxi LLC, DEC Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC and Dyre Taxi LLC, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

The City of New York and The New York City Taxi and Limousine Commission,

Defendants.
----------x

Index No. 701402/ 2017

Motion Date December 16, 2019

Motion Sequence No. 16

The following EF papers numbered 465 to 619 read on this motion by defendants for summary judgment.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	465-510
Answering Affidavits - Exhibits.....	513-566
Reply Affidavits.....	611-619

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

That branch of the motion for summary judgment dismissing the complaint as it pertains to plaintiff Singh is granted. The remaining branches of the motion for summary judgment dismissing the causes of action for breach of the implied covenant of good faith and fair dealing and for recission with respect to the remaining plaintiffs is denied.

Defendants' motion for summary judgment seeks dismissal of

Singh's causes of action against them upon the grounds of lack of standing and lack of capacity to sue and dismissal of the remaining causes of action of co-plaintiffs for breach of the implied covenant of good faith and fair dealing and for recission (*see Singh v The City of New York*, 2017 NY Slip Op 32215 [U]).

New York law provides that a motion for summary judgment shall be granted if "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]). The moving papers "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit" (*id.*)

In addition, in deciding a summary judgment motion, the court's role is to determine whether any triable issues exist, not the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court must view the evidence in the light most favorable to the nonmoving party and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. (see *Santelises v Town of Huntington*, 124 AD3d 863 [2d Dept 2015]). Summary judgment is a drastic remedy that should be granted only if there are no triable issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012].)

Defendants support their motion, inter alia, with an attorney's affirmation and excerpts of defendants' deposition transcripts.

This action commenced with the filing of a summons and complaint on January 30, 2017 by Daler Singh, dba Gilzian Enterprise LLC on behalf of himself and a putative class based on Daler Singh's purchase of an independent wheelchair accessible taxi medallion at a public auction held by the City of New York and the Taxi and Limousine Commission (TLC) (collectively the defendants) on February 26, 2014. Daler Singh formed Gilzian Enterprise LLC for the purpose of owning the taxi medallion, which cost the company $821,215. The complaint contained causes of action for violation of General Business Law § 349, fraudulent inducement, breach of the contractually implied covenant of good faith and fair dealing, negligent misrepresentation, and rescission.

The complaint was amended on March 27, 2017 to add seven 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. Richard Chipman organized Danielle Eve Taxi LLC, EAC Taxi LLC, DEC

Taxi LLC, EC Taxi LLC, Chips Ahoy Taxi LLC, ECDC Taxi LLC, and Dyre Taxi LLC (the Chipman companies) for the purpose of owning two yellow taxi medallions each (a company with two medallions is called a mini-fleet). Jointly, these plaintiffs purchased 14 corporate wheelchair accessible, taxi medallions at a public auction held on November 13, 2013. The purchase price for the mini-fleets ranged from $2,118,000 to $2,518,000 and totaled $16,426,000. The bids were accepted on November 14, 2013 and notice of acceptance was posted on the TLC's website on November 15, 2013.

Before the auctions, the defendants made public statements and issued promotional materials concerning medallions, medallion prices, and price trends. In the months prior to the auctions, TLC published reports on the average sale price of both individual and corporate medallions. The plaintiffs allege that the reports issued by the TLC contained false, inaccurate, and misleading statements. The TLC allegedly exaggerated the price of medallions in public reports while concealing the true prices and made false statements concerning the directional trend in medallion prices.

According to the Rules of the TLC, the auctions are held by sealed written bids, which are submitted by hand delivery at the time and place designated by the TLC. (35 RCNY § 65-06.) A notice of the sealed bid sale is publicized at least 30 days prior to the deadline for bidding. (35 RCNY § 65-05[a].) The Chairperson of the TLC sets the upset minimum price for the bids. (35 RCNY § 65-05[b][1].) In this case, one Notice of Medallion Sale (Industry Notice #13-38), dated October 11, 2013, indicated that "[t]he minimum upset price for Accessible Minifleet Medallions is $850,000 per medallion, or $1,700,000 per lot." Any bid less than the minimum upset price would be rejected as non-responsive. (35 RCNY § 65-05[b][4].) The form of the bid is created by the TLC and once the bid is made, it cannot be withdrawn. (35 RCNY § 65-06[a][1], [e].)

According to the January 2014 Factbook, the market sets the price for the medallion, which is based on the following factors: "taxi fares and tips, demand for taxi service, availability and cost of taxicab medallion financing, market for the medallion, anticipated return on the investment to acquire a medallion as compared to other investments, [and] cost of operating a taxi." In the 2014 Factbook, TLC reported that "200 mini-fleet wheelchair-restricted medallions [were] auctioned off at an average price of $2.27 Million (mini-fleet medallions [were] sold in pairs, making the average price $1.13 Million per medallion)."

After the plaintiffs made their purchases, the value of their medallions allegedly fell and plaintiffs attribute their losses not only to the public reports and statement issued by the TLC, but also

to the TLC's failure to restrict the activity of companies like Uber Technologies, Inc. (Uber), which are considered black cars. The plaintiffs allege that a medallion gives them the exclusive right to pick up passengers via "street hail" in certain areas of the city and that Uber infringes on this right by picking up passengers who arrange for transportation through the use of an application on their smart phones. Plaintiffs also allege that the TLC allowed Uber to suddenly and dramatically increase the number of black cars in service flooding the market of passengers taxi medallion owners serve especially in Manhattan and at the New York airports. As a result, plaintiffs allege a substantial decline in revenue caused by a decrease in per-shift fares earned and a loss of drivers willing to lease their medallions. This decline in revenue, plaintiffs' allege, caused the inability to pay monthly installments on the mortgages secured by the medallions and caused the value of the medallions to fall.

Defendants argue that rather than promising to safeguard the value of the medallions, the Official Bid Forms, Affidavits of Non-Reliance and Taxicab License Bills of Sale contained language explicitly disclaiming any such responsibility. Defendants refer to the Official Bid Forms that state "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 Taxi & Limousine Commission or applicable law." As a result, defendants argue that plaintiffs cannot now claim there was a breach of an implied covenant that directly contradicts the plain language of the contract. Defendants further argue that "[i]n purchasing the medallions, plaintiffs undertook the risk of changes in the industry that could impact the value of the medallions they purchased."

Moreover, defendants argue that the express terms of the contract preclude any obligation on their part to protect plaintiffs from competition arising from Uber and other app-based for-hire vehicle companies. The companies obtained their licenses after completing the TLC's application, which include the required affirmation of compliance with TLC rules and regulations. Defendants claim that at the time of the auctions in November 2013, Uber was operating as a black car for two years. In fact, the defendants refer to the Industry Notices issued in 2011, which states that "while the use of these [smart phone applications] by for-hire vehicles and for-hire vehicle bases is permitted, this use must be in compliance with TLC regulations." In addition, the defendants argue that while the number of black cars grew thereafter, plaintiffs had no reason to believe that defendants undertook an implied contractual obligation to prevent this growth as there was no cap on the number

of black car licenses the TLC could issue. Defendants further argue that there is no legal basis for the notion that there was an implied obligation on defendants to enact such legislation, such as Local Law 147 of 2018, which paused the issuance of new for-hire vehicle licenses.

With respect to the branch of the motion for dismissal of the complaint as it pertains to plaintiff Singh, this Court, in its order issued on February 4, 2019 granting the City's motion to amend its answer to assert the affirmative defenses of lack of standing and lack of capacity to sue stated, " 'The law is clear that the trustee of the estate of a bankrupt is vested with title to all of the bankrupt's property, including rights and choses in action. The trustee in bankruptcy, with the approval of the bankruptcy court, may elect to abandon assets of the bankrupt. Following abandonment, title revests in the bankrupt * * * However, this doctrine has no application to unscheduled assets of which the trustee was ignorant and had no opportunity to make an election.' (*Weiss v. Goldfeder*, 201 AD2d 644, 645 [2d Dept1994] [internal quotation marks and citations omitted].) '[A] debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on his or her own behalf***' (*George Strokes Elec. & Plumbing Inc. v. Dye*, 240 AD2d 919, 920, [3d Dept (1997]; *123 Cutting Co. v. Topcove Assocs., Inc.*, 2 AD3d 606, [2nd Dept 2003])." This Court accordingly granted the City's motion to amend its answer based upon the facially meritorious nature of the defenses sought to be added and the failure of Singh, in opposition, to establish that these defenses lacked merit as a matter of law. Likewise, in opposition to the instant motion for dismissal based upon those newly-added defenses, Singh has again failed to offer any cognizable opposition. Indeed, the bankruptcy trustee appropriately commenced a separate action entitled *Bankruptcy Estate of Daler Singh, d/b/a Gilzian Enter. LLC v City of New York* (Index No. 716032/2019). Accordingly, the action by Singh must be dismissed in its entirety.

With respect to the remaining defendants' cause of action for breach of the implied covenant of good faith and fair dealing and their attendant equitable cause of action for recission, the terms "good faith" and "fair" are ideals that are ingratiated in our culture as guiding principles and have been taught from childhood. They are firmly rooted in the manner in which business is conducted in our society. Good faith, for example, "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." (*see* Restatement [Second] of Contracts § 205 [1981]).

A covenant of good faith and fair dealing is implicit in all contracts (*see Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). "Encompassed within the implied obligation of each promisor to exercise good faith are any promises which a reasonable person in the position of the promisee would be justified in understanding were included. This 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" (*id.* at 389 [internal quotation marks and citations omitted]). "[T]he undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Havel v Kelsey-Hayes Co.*, 83 AD2d 380, 382, quoting 11 Williston, Contracts [3d ed.], § 1295, p. 37; *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion" (*Dalton v Educational Testing Serv.*, *supra* at 389). Further, the contractually implied covenant is not without limits as it can be enforced only to the extent it is consistent with the terms of the contract (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]; *SNS Bank v Citibank*, 7 AD3d 352, 354–355 [2004]).

As stated by the Court of Appeals, "[W]ith respect to auctions, the general rule is that a seller's acceptance of an auction bid forms a binding contract, unless the bid is contingent on future conduct (*City of New York v Union News Co.*, 222 N.Y. 263, 270, 118 N.E. 635 [1918]). While 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 *Slukina v 409 Edgecombe Ave. Hous. Dev. Fund Corp.*, 2013 N.Y. Slip Op. 31966[U], *8, 2013 WL 4446914 [Sup.Ct., N.Y. County 2013])" (*Stonehill Capital Management, LLC v Bank of the West*, 28 NY3d 439, 449 [2016]).

Thus, an auction bid, such as the one at issue, constitutes a contract to which the implied covenant of good faith and fair dealing attaches. In this case, the relevant bids took place on November 13, 2013 and were accepted on November 14, 2013. While defendants refer to the language in the Affidavits of Non-Reliance and Taxicab License Bill of Sale subsequently executed by Richard Chapman on behalf of defendant companies on January 14, 2014 and February 14, 2014, respectively, the Official Bid Forms were not conditional and, thus, constituted the binding contracts. Therefore, the Court rejects defendants' argument that the express language in said Affidavits and the Bills of Sale disclaim the contractually implied covenant in the Official Bid Forms.

Inasmuch as the Official Bid Forms were drafted solely by the

defendants, basic principles of contract law require their strict interpretation against the drafters (*see* Restatement (Second) of Contracts § 206; 11 Williston on Contracts, § 32:12 [4th ed. 2009]). The Court looks to the terms of the Official Bid Forms as a whole and finds that defendants' arguments fail to eliminate triable issues of fact. Defendants' arguments focus on only certain terms in the Official Bid Forms to support their claim that there is a disclaimer of the contractually implied covenant. However, the Court is required to determine whether this implied covenant is "implicit in the agreement viewed as a whole" (*Rowe v Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 69 [1978]) and not only portions thereof. A viewing of the contract as a whole supports the conclusion that the implied covenant is not barred by its express terms (see *Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]).

Specifically, at the top of the Official Bid Forms, it states, "I ACKNOWLEDGE that I am familiar with the Rules of the NYC Taxi & Limousine Commission governing the ownership of taxi medallions and agree to comply with same at all times, including with respect to the requirements regarding the completion of this transaction if I am a successful bidder. I further ACKNOWLEDGE that I have read the rules relating to Criteria for Taxicab Ownership and am qualified to own a taxicab. *** I further acknowledge that I understand that the use and transferability of any taxicab medallion and the operation of a taxicab pursuant to the license represented by the medallion are subject to and conditioned upon compliance with the requirements of the rules of the NYC Taxi & Limousine Commission and applicable law, as may be amended from time to time."

By signing the Official Bid Forms, plaintiffs acknowledged familiarity with the Rules of the TLC and agreed to comply therewith, which included familiarity with the purpose, role, and powers and duties of the TLC. The purpose and role of the TLC in New York City dates back to 1937 when the taxicab industry was declared a vital and integral part of transportation.[1] At that time, the Board of Aldermen of the City of New York, the New York City Council's predecessor body, found the taxicab market was flooded with an excessive number of taxicabs. (*Rudack v Valentine*, 163 Misc 326, 327 [Sup Ct, NY County 1937], citing Code of Ordinances of the City of New York, Chapter 27a, § 1.) This caused "undue and needless traffic congestion; long hours and inadequate income for taxicab drivers; excessive competition because of the number of taxicabs . . . [and] unfair competition" among other things. (*Id.* at 327.) As a result, a city ordinance was adopted on March 1, 1937, and approved by the mayor on March 9, 1937, known as the "Haas Act" (Chapter 27a, Code

[1] See section 19-501 of the New York City Administrative Code.

of Ordinances). The Haas Act established the current medallion system, and limited the number of medallions. 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.[2]

To meet its stated purpose, as in the Haas Act, the Rules of the TLC provide that it "will issue licenses and adopt and enforce rules regulating the [taxicab] business and industry". (35 RCNY § 52-02.) In addition, encompassed in its specific powers and duties when regulating, the TLC has a duty to "(1) Formulate and adopt rules reasonably designed to carry out the purposes of the Commission. . . . (4) Establish and enforce standards to ensure all Licensees are and remain financially stable. . . . (7) Develop and implement a broad public policy of transportation as it pertains to the forms of public transportation regulated by the Commission. (8) Encourage 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], [8].)

Contrary to defendants' arguments, the terms of the Official Bid Forms do not disclaim the reasonable expectations of plaintiffs to ensure the financial stability of medallion taxicabs in accordance

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[2] The distinctions between yellow cabs, black cars and other for hire vehicles are given in three decisions issued by the Honorable Allan Weiss, a Justice of the New York State Supreme Court, County of Queens, in three cases: (1) *Glyca Trans LLC v. City of New York*, Index No. 8962/15 (September 8,2015), (2) *XYZ Two Way Radio Service, Inc. v. The City of New York*, Index No. 5693/15 (September 8, 2015), and (3) *Melrose Credit Union v. The City of New York*, Index No. 6443/15 (September 8, 2015).

The cases decided by Justice Weiss were largely Article 78 in nature, and the petitioners, who were parties with interests in medallions, essentially sought to compel TLC to enforce laws and regulations protecting the exclusive rights of medallion holders. Justice Weiss granted the respondents' CPLR 3211 dismissal motions. In the *Matter of Glyka Trans, LLC, et al. v City of New York et al.*, a hybrid proceeding pursuant to CPLR Article 78 and action for declaratory relief, the Appellate Division, Second Department affirmed the dismissal, holding, *inter alia*, that " TLC's alleged decision to 'allow black cars to pick up e-hails' did not, as a matter of law, constitute an unconstitutional taking of the petitioners' property." (161 AD3d 735, 740 [2d Dept 2018].) The instant action, which purports to be a class action, is very different.

with the policies underpinning the TLC Rules and, consequently, the value of the medallions that is based upon their revenue-generating ability. It is uncontroverted that the undeniably high sale prices of taxi medallions has hitherto been market-driven based upon their legislatively-created scarcity that gave them the sole right to pick up street hails. Up until the invention of the app-based taxi model, the revenue that medallions could expect to produce was reasonably predictable and stable, based upon their finite number and the number of black cars and other for-hire vehicles tangentially competing with them. There is no question that this changed with the introduction of competition from a new technology-based class of taxi services, introduced by Uber and thereafter expanding to other app-based companies emulating Uber's model. Although Ubers and other app-based taxis are not, strictly speaking, street hails as medallion taxis are, the ease of summoning one quickly at any time with merely the swipe of an icon on a cell phone to a street corner or any location makes these taxis different from "black car" limousines that must be ordered by calling the company's dispatch office and requesting a pick-up at a specific address, often with a significant wait time, and makes arranging a taxi pick-up as easy and spontaneous, often more so, than standing at the curb and attempting to hail with arm-waving and whistles an on-duty and unoccupied medallion cab, often while vying for the same cab with others.

This Court takes judicial notice that Uber and other such app-summoned taxi services, because of their ease of access, compete directly with medallion yellow taxis, arguably at a distinct advantage since they are not legislatively limited in their numbers under a medallion system and can operate without having to pay millions of dollars for the privilege of owning a medallion. Although the evidence on this record does not establish that the City misrepresented the current revenue figures for the subject medallions published to prospective bidders, and although Uber had been operating in the City of New York for approximately two years prior to the medallion auction, the evidence presented also does not resolve questions concerning whether the City knew at the time, and did not disclose, that Uber and other app-based taxi services were planning to expand their operations significantly, that the TLC was not going to limit the numbers of such taxis and that the resulting increased competition would adversely affect the current and projected revenue figures published to defendants for the purpose of inducing them to place bids for the purchase of the medallions, and, consequently, the market value of the medallions. Although the purchase of the subject medallions was clearly intended as an income producing investment subject to similar market value risks as the purchase of real estate, unlike the risk of a downturn in the real estate market that real estate investors accept as being largely unpredictable due to the vagaries of the marketplace and the economy,

over which the seller has no control and for which the seller has no responsibility, a question presented here is whether the alleged plummeting value of the subject medallions since the action sale was the result of the City's subsequent allowing of Uber and app-based services to expand their operations in the City and its failure to protect medallion owners from unfair competition by Uber and its app-based progeny. Defendants fail to eliminate triable issues of fact as to whether the City breached an implied covenant by failing to prevent unfair competition with the medallion taxicabs by limiting the number of Uber vehicles and other app-based for-hire vehicle companies into the market. That plaintiffs have not established that defendants breached the implied warranty of fair dealing does not establish an entitlement to summary judgment. "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004] [quoting Larkin Trucking Co. v Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept 1992]; see also *Gonzalez v Beacon Terminal Assocs., L.P.*, 48 AD3d 518, 519 [2d Dept 2008]; *Dalton v Educational Testing Service*, 294 AD2d 462 [2d Dept 2002]). The City has failed to meet its affirmative burden on summary judgment.

Accordingly, the remaining branches of the motion for summary judgment dismissing plaintiffs' causes of action for breach of the implied covenant of good faith and fair dealing and for recission are denied. To the extent not specifically addressed herein, defendants' remaining arguments are without merit.

Dated: May 7, 2020

Kevin J. Kerrigan, J.S.C.

FILED

5/14/2020
10:04 AM

COUNTY CLERK
QUEENS COUNTY

EXHIBIT F

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.

----------X

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

EXHIBIT G

2020 WL 5989279 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
Queens County

MELROSE CREDIT UNION, Plaintiff,
v.
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;
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,
v.
The City of New York and The New York City Taxi and Limousine Commission, Third-Party Defendants.

No. 711618/2017.
August 6, 2020.

Decision/ Order

Joseph Risi, Judge.

***1** Motion Sequence #4

Present: HONORABLE JOSEPH RISI

A. J. S. C.

IA PART 3

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.

***2** 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 § 321*1*(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.

***3** 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.

***4** 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

<<signature>>

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

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Affirmation of Service

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

Jeffrey Benjamin, an attorney at law duly licensed to practice law in the courts of the State of New York, affirms the truth of the following under penalties of perjury:

I am not a party to this action and am over the age of 18 years old. On June 4, 2021, I served one (1) true copy of the within MOTION FOR LEAVE TO APPEAL TO THE NYS COURT OF APPEAL by:

[ ] depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within New York State,

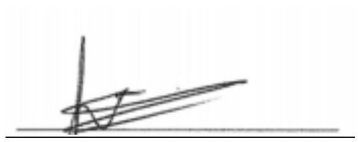
[X] via UPS NEXT DAY COURIER

[ ] via the NYSCEF e-filing system

addressed to each of the following persons at the last known address set forth after each name:

JAMES E. JOHNSON
Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007
Attn: Eric Lee, Esq.

Dated: June 4, 2021



Jeffrey Benjamin