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

APL-2021-00166

State of New York
Court of Appeals

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

Plaintiffs-Appellants,

-against-

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

Defendants-Respondents.

REPLY BRIEF FOR THE PLAINTIFFS-APPELLANTS

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INTRODUCTION

The essence of Plaintiffs'[1] contract claim is that Defendants destroyed the value of Plaintiffs' bargain, and thus violated the implied covenant of good faith and fair dealing. Defendants did so by permitting a vast increase in the number of black cars in violation of statutory and regulatory requirements and by permitting these cars to compete essentially directly with medallion taxis, thus undermining the medallion taxi's exclusive right to accept street hails. The result was a loss of fares to yellow taxis and an unprecedented crash in the price of medallions, including those that Defendants had just sold to Plaintiffs. Defendants do not dispute that they licensed black cars in defiance of licensing laws. The rules that made their licensing practices illegal are not even discussed in Defendants' brief. Nor do defendants dispute the devastating effect of the surge in black cars on medallion values.

Instead, Defendants say that they cannot be sued for what they did, because the implied covenant of good faith and fair dealing does not "allow a party to override a contract's clear and unequivocal terms." Respondents' Brief ("Resp. Br.") 1. That abstract legal principle may be correct. But it has no application to this case because there are no "clear and unequivocal terms" – or any terms at all – in the Bid Documents that allowed the City to license black cars on a massive scale

[1] This reply brief uses the same abbreviated terms as Plaintiffs' opening brief.

in disregard of the City statutes and TLC rules.

Defendants rely on four general, boilerplate provisions in the Bid Documents. These provisions state that the City made no representation about the present or future value of medallions; that it made no representations about the present or future application of law; that it made no warranty other than that of clear title; and that the TLC's rules and other applicable law could change from time to time. They say nothing about the future *enforcement* of regulations and "other applicable law," much less reserve the City's right to abandon enforcement of the legal requirements that should have prevented the flood of black cars.

The City utterly misses the mark. Saying "I make no representation about the future value of your bargain" is not the same as saying "I reserve my right to destroy the value of your bargain." If these two statements were equivalent, the implied covenant of good faith and fair dealing would be worth nothing. It would be easily negated by routine and innocuous contractual provisions.

Apparently recognizing that the plain language of the Bid Documents did not authorize their conduct, Defendants try to reframe this case not as a contract dispute, but as an attempt by Plaintiffs to hold Defendants liable for failing to "thwart" the supposedly inevitable result of technological innovation. This attempt fails because this case is not about Defendants' failure to stop innovation. It is about their lawless (and unpredictable) action licensing Uber's non-conforming

"black car" bases and vehicles. The "innovation" they have in mind is the use of a mobile phone app to allow riders to hail black cars. But Defendants could have allowed these apps without ignoring the laws and rules that define which cars could be licensed.

No facts support Defendants' apparent assumption that Plaintiffs' claim is based on a policy decision by the TLC as to how the City's for-hire vehicle industry should be regulated. The laws and rules were (and are) clear and were unchanged. They did not allow the TLC to license black cars that are not owned by either franchisees or members of a cooperative. Defendants never argue otherwise; they do not even address the terms of the applicable laws and rules, and do not pretend they followed them. There is no way to paint that abdication as a normal exercise of regulatory authority.

The Court should reject the City's effort to eviscerate the implied covenant, and to disguise its bad faith conduct as permissible or routine regulatory activity.

The Court should also reject Defendants' argument that Plaintiffs' GBL § 349 claims are time-barred by the 90-day notice of claim statute, GML § 50-e. That argument implicitly assumes that claims under GBL § 349 are not statutory claims or are inferior to other statutory claims (such as the Human Rights Law), and therefore are subject to the 90-day notice of claim period despite this Court's contrary holding in *Margerum v City of Buffalo*, 24 NY3d 721 [2015].

Defendants understandably decline to assert or defend their implicit assumption. It finds no support in precedent or common sense. *Margerum* establishes the principle that statutory claims are not tort claims for purposes of GML § 50-e. Defendants offer no plausible basis for distinguishing that case.

The order appealed from should be reversed.

REPLY TO DEFENDANTS' STATEMENT OF FACTS

Defendants try to evade the central facts of the case: The City sold 360 taxi medallions at the Auctions, reaping more than $360 million. Most Auction buyers – like Mr. Singh, who was driven into personal bankruptcy by Defendants' conduct – were relatively unsophisticated individuals, not "taxi magnates." *Cf.* Resp. Br. at 1. Promptly after the Auctions ended, and in disregard for the rules that govern black car licenses, Defendants destroyed the value of those medallions by unlawfully licensing 100,000 non-conforming Uber and Lyft vehicles as black cars – compared to just 10,000 black cars in total before the Auctions. The massive increase in the black car fleet inflicted ruinous injury on the Auction buyers.

Plaintiffs' claim is not that Defendants failed to "thwart" Uber's explosive growth. *Cf.* Resp. Br. at 2. It is that they affirmatively enabled it by failing to enforce the applicable licensing rules and laws. If, after the Auctions, Defendants had simply left the street hail market as it was, the injury Plaintiffs complain of would not have occurred. Defendants' unprecedented transformation of the

industry by their sudden decision to ignore their own licensing rules – *not* ordinary market forces – destroyed the value of the medallions the City had just sold.

Defendants' brief is peppered with misleading assertions, unsupported by the record or by historical facts. Contrary to their brief, the massive and unprecedented growth of Uber and Lyft was a post-Auction event which resulted directly from Defendants' actions and that Plaintiffs had no way of foreseeing.

A. Uber Had Not Arrived in Force and the Black Car Fleet Had Not Surged by the Time of the Auctions

Defendants say that Uber "debut[ed]" in the City and "initiat[ed] rapid growth" in the number of black cars in 2011. Resp. Br. 7. They quote a caption from a chart published after the Auctions to support that assertion, but the chart itself does not support it, nor does any data in the report in which the chart appears. R-371, R-368-80. Defendants' assertion is belied by the TLC's own statements, including the 2014 TLC Factbook – issued by the TLC in January 2014 around the time of the Auctions (*see* R-62-63 at ¶ 74) – which *does not mention Uber, Lyft or e-hailing at all*. R-213-29.

Defendants also say that "the [TLC] granted an Uber-affiliated entity a license to operate a for-hire vehicle base in the City" in 2011. Resp. Br. 8 (citing R-165-66). The statement is misleading at best. At the cited page of the Record is a license not for a black car base, but for a *luxury limousine base* (as shown by the "LX" category designation on the upper left corner of the document). Uber and the

black car fleet began their explosive growth *after* the Auctions, not before them. As the 2014 TLC Factbook stated, at the beginning of 2014, the entire black car fleet numbered only "about 10,000" cars. R-61-62 at ¶ 68; R-217.

No bidder knew or could have known at the time of the Auctions that the TLC would unleash such turmoil on the market. No rational bidder who did know would have met the City's "upset" price, let alone bid more than $1 million for a taxi medallion.[2] Indeed, as Defendants concede, the New York City Mayor reacted to the post-Auction "turmoil" in the market by proposing legislation – albeit unsuccessfully – that would have capped the number of black cars. Resp. Br. 15; *see also* R-69 at ¶ 122.

B. The TLC Licensed Uber and Lyft E-hail Taxis Unlawfully and Caused the Crash

Defendants claim that the massive increase in e-hail taxis after 2014 was merely a product of "innovation and experimentation," which, Defendants insinuate, they were required to permit and powerless to stop. Resp. Br. 5. No one disputes that Uber and Lyft were innovators, but three undeniable facts remain. *First*, no one, including affiliates of Uber and Lyft, may operate a black car base or a black car in the City of New York without a license (no matter what technology

[2] For the November 2013 and March 2014 Auctions, the minimum upset price for Accessible Minifleet Medallions was $850,000 per medallion, or $1,700,000 per lot. R-80. For the February 2014 Auction, the minimum upset price for Accessible Independent Medallions was $650,000 per medallion. R-85.

they use). *Second*, only the TLC may grant that license. And *third*, the license may only be granted if the applicant meets the lawful conditions of licensure.

As Plaintiffs' opening brief showed, under City statutes and the TLC's own rules, a black car may only be licensed if it is affiliated with a licensed base *and* is either a cooperative owner or franchisee of its base. R-61 at ¶¶ 62-64; Opening Brief for the Plaintiffs-Appellants ("Appls. Br.") 6-7. Defendants' brief never asserts that Uber and Lyft complied with these rules and never denies that the TLC issued licenses to them nonetheless. Defendants simply ignore – and thus tacitly admit – these facts.

C. The Auctions Were Open to All and Attracted Hundreds of Bidders

Defendants note that 12 individuals acquired all 200 corporate medallions in the Auctions. They fail to mention, however, that in addition to the 100 winning bids (each bid for two medallions) in the Auction of corporate medallions, there were another 236 unsuccessful bids from 78 other bidders. R-119-24. Nor do they mention that a second Auction for 32 corporate medallions in February 2014 attracted 64 bids from 42 bidders.[3] Defendants also omit that there was a separate Auction for 168 individual medallions, which was also open to the public, and attracted bids from 297 individuals. R-126-32.

[3] https://www1.nyc.gov/assets/tlc/downloads/pdf/accessible_minifleet_auction_20140325.pdf.

Together, the three Auctions attracted 429 bidders. All these facts, including the results for each of the Auctions, are in the public record and are posted on the TLC's own website.[4]

ARGUMENT

I. DEFENDANTS FAIL TO JUSTIFY THE APPELLATE DIVISION'S DECISION DISMISSING PLAINTIFFS' CAUSE OF ACTION FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

A. Plaintiffs Complain That Defendants *Destroyed* the Value of Their Medallions, Not That They Failed to Guarantee It

The Appellate Division found that "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*." *Singh v City of New York,* 189 AD3d 1697, 1700 [2d Dept 2020] (emphasis added). Defendants embrace this mistaken characterization of Plaintiffs' case. In truth, Plaintiffs never complained that Defendants failed to issue a guaranty. Rather, they complain that Defendants *destroyed* the value of the medallions after the Auctions ended.

There is a world of difference between a seller doing nothing to protect a buyer from economic harm and acting affirmatively in a way that destroys the value of what the seller has sold. The duty of good faith and fair dealing may not compel a contract party to guarantee the value of a counter-party's bargain. But it

[4] https://www1.nyc.gov/site/tlc/businesses/medallion-auction.page

undeniably *prohibits* that party from acting in a way that destroys the value of that bargain. This is the main reason the implied covenant exists, as this Court has recognized many times since its seminal decision in *Wood v Duff-Gordo*n, 222 NY 88, 91 [1917] (Cardozo, J.). *See*, *e.g.*, *Moran v Erk*, 11 NY3d 452, 456 [2008] ("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") (internal quotation marks omitted); *Dalton v Educ. Testing Serv*., 87 NY2d 384, 389 [1995] (same) (quoting *Kirke La Shelle Co. v Paul Armstrong Co*., 263 NY 79, 87 [1933]).

Defendants have built their argument on the Appellate Division's mischaracterization of Plaintiffs' claim. If accepted by this Court, the argument will make it easy for every drafter of a form contract to render the covenant of good faith and fair dealing a nullity.

B. Defendants Rely Upon "Provisions" in the Bid Documents That Are Not Relevant and Do Not Support Their Argument

Defendants argue that four provisions in the Bid Documents authorized them to do what they did. Resp. Br. 28. Those provisions authorized nothing of the kind. None of them gave the TLC a green light to ignore its own rules or applicable laws when it granted licenses to Uber and Lyft or to do so without changing the licensure rules.

The four provisions Defendants rely on are as follows:

> I understand and agree that the City of New York has not made any representations or warranties [1] as to the present or future value of a taxicab medallion … or [2] 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 [3] I acknowledge that no warranties are made, express or implied, by the City of New York, as to any matter other than the warranty of clear title. [4] 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.

R-135.[5] There is not a word in the quoted language or anywhere else in the Bid Documents that reasonably informed bidders that the TLC purported to reserve the right to issue as many black car licenses as it wanted to, whether they conform to applicable law or not.

The first, third, and fourth provisions Defendants cite are plainly irrelevant. No one is claiming that Defendants represented or warranted anything about the value of medallions, or that they made any warranty other than one of clear title, or that the law might not change "from time to time." (In fact, there was no change of significance in the law during the post-Auction period.)

The remaining provision in the Bid Documents – the most specific provision that Defendants rely upon – comes nowhere near to saying what Defendants wish it

[5] Some of the quoted language is repeated, with no significant variation, at R-145 and R-158.

said. It merely acknowledges that the City made no representation or warranty as to the "application or provisions" of any TLC rule or law. It conspicuously omitted the word "enforcement." For obvious reasons, the TLC did not, and never would, say or imply that it would disregard the laws and rules it is responsible for enforcing. After all, by defining who may operate for-hire vehicles and what kind of service those vehicles may offer, City statutes and laws give value to the right to operate them. If, for example, the TLC had suddenly announced – with no change in the law – that it was increasing the number of taxi medallions ten-fold, no one would say that "market forces" were at work.

City rules and laws, described in Plaintiffs' opening brief, provide that a black car license may be issued only to operators who have an ownership interest in, or a franchise relationship with, the base by which their cars are dispatched. Defendants nowhere claim that those legal requirements did not exist or that they did not apply to Uber and Lyft. And Defendants nowhere argue that they complied with the rules and applicable laws when they licensed the Uber and Lyft black car bases and 100,000 affiliated black cars after the Auctions ended.[6] Thus, unlike *Matter of Glyka Trans, LLC v. City of N.Y.*, 161 AD3d 735 [2d Dept 2018], relied

[6] The 2018 TLC Factbook, published in September 2018, states that there were 107,435 licensed FHV's (which includes black cars, liveries, and luxury limousines) by June 2018, increased from 67,484 in 2016 and 82,794 in 2017.
https://www1.nyc.gov/assets/tlc/downloads/pdf/2018_tlc_factbook.pdf

on by Defendants throughout their brief, Plaintiffs do not demand a change in any law or rule or even any interpretation of them. The problem is that Defendants *ignored* the rules and applicable laws governing the black car licenses. Incredibly, their brief does not discuss these provisions of "applicable law" at all.

The statement in the Bid Documents that Defendants made no warranty as to the application or provisions of any rules or applicable laws did not inform bidders that Defendants would no longer adhere to the rules and laws after the Auctions ended. The statement in *Gaidon v Guardian Life Ins. Co. of Am*., that "future dividends may be higher or lower than those illustrated," did not convey the meaning that the illustrations "were wholly unrealistic" is directly parallel. 94 NY2d 330, 350 [1999] ("*Gaidon I*"). *See* Appls. Br. 32-33.

Moran v Erk and *Murphy v Am. Home Prods. Corp.*, 58 NY2d 293 [1983], which Defendants cite, are not inconsistent with that conclusion. In *Moran*, the Court held that the covenant of good faith and fair dealing did not invalidate a standard attorney approval contingency in a real estate contract. 11 NY3d at 457. In *Murphy*, the Court held that the covenant did not take away an employer's "unfettered right" to fire an at-will employee at any time. 58 NY2d at 304. Those decisions do not support Defendants' argument that the TLC could, by disregarding its own rules governing the licensing of black car bases and black cars, destroy the value of the medallions that it sold Plaintiffs at the Auctions.

In short, no term in the Bid Documents is inconsistent with Plaintiffs' good faith and fair dealing claim.

C. Plaintiffs' Good Faith and Fair Dealing Claim Does Not Deprive Defendants of the Power to Regulate

Defendants argue that enforcing the implied covenant in this case would encroach on their authority to regulate. There is no basis for that argument because Defendants do not even try to show that their post-Auction issuance of tens of thousands of additional black car licenses was a lawful exercise of regulatory power. This case is not, as Defendants assert, about whether the TLC agreed to bind or limit its "regulatory authority." Resp. Br. 34. It is about whether the TLC's disastrous actions *contrary* to its duty as a regulator breached the covenant of good faith and fair dealing it owed to the Auction purchasers.

The cases on which Defendants rely, *United States v Winstar Corp.*, 518 US 839 [1996], and *Merrion v Jicarilla Apache Tribe*, 455 US 130 [1982], stand in stark contrast to this case because they involved government action that was unquestionably permissible in the absence of contractual limits. In *Winstar,* the plaintiffs claimed that by enacting and implementing the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), the United States violated promises it had previously made. There was no question that the federal government's enactment of FIRREA, unlike the TLC's issuance of black car licenses inconsistent with licensing standards, was a valid act. It was in that wholly

different context that the majority in *Winstar* relied upon two prior holdings, including *Merrion*, that "sovereign power … will remain intact unless surrendered in unmistakable terms." *Winstar*, 518 US at 872 (citing *Merrion*, 455 US at 148; other citation omitted).[7]

The government lost in *Winstar* because "'when the [the government] enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" 518 US at 895 (plurality opinion of Souter, J.)) (quoting *Lynch v United States,* 292 US 571, 579 [1934]). Under "normal principles of contract interpretation," a private party may overcome any "reverse presumption" to which the government may be entitled. 518 US at 920-21 (Scalia, J., concurring). The implied covenant of good faith and fair dealing is one of the "normal principles of contract interpretation" long recognized under New York law, and it prohibits the City from acting as it did after the Auctions. For this reason also, *Winstar* supports Plaintiffs' position.

In *Merrion*, the Supreme Court held that the Apache Indian Tribe's authority to impose a severance tax on oil and gas from its reservation land had not been "surrendered in unmistakable terms" by oil and gas leases the tribe had entered into with private parties. In that case, as in *Winstar*, there was no question that the

[7] Nevertheless, even in *Winstar*, the government lost the case. This case is much stronger for the private litigant than *Winstar*, and *a fortiori* the governmental parties cannot prevail here.

governmental body had authority in the absence of a contract to do what it did. This case presents the exact opposite situation. Here, the TLC had no authority to issue the non-conforming black car licenses, so the rule of *Merrion* has no application.

Winstar and *Merrion* thus give no aid to Defendants' argument that the covenant of good faith and fair dealing improperly encroaches on their authority to regulate. Nor are Defendants helped by their citation to cases in which their exercises of regulatory authority over black cars and the taxi industry has been upheld. Resp. Br. 9 n 3, 32-33. These cases have nothing to do with the unlawful conduct at issue in this case: the issuance of licenses to *non-compliant* black car owners and bases. *See Progressive Credit Union v City of N.Y.*, 889 F3d 40, 44-45 [2d Cir 2018] (claim of disparate treatment in regulating activities, not licensing, of FHVs and medallion taxis); *Matter of Melrose Credit Union v City of N.Y.,* 161 AD3d 742, 745-47 [2d Dept 2018] (alleged non-enforcement of rules governing e-hails; decided on standing grounds); *Matter of Glyka*, 161 AD3d at 738-41 (mandamus to compel enforcement of e-hail rules denied).

While the City Charter requires the TLC to consider "innovation and experimentation" in its supervision of the for-hire vehicle industry, it also requires the TLC to establish "qualifying standards required for . . . licensees," including licenses for "owners or operators of vehicles." NY City Charter § 2303(b)(5).

Regardless of how innovative an applicant may be, the City Charter nowhere empowers the TLC to ignore its own qualifying standards in issuing licenses.[8]

The TLC's own rules also require it to "[e]stablish and enforce standards to *ensure all Licensees are and remain financially stable*." TLC Rule 52-04(a)(4) (emphasis added). Defendants ignore that rule and indeed have done the opposite. The TLC's licensure rules for black cars and bases had the practical effect of limiting the number of bases and black cars for decades prior to the Auctions. Those rules were a standard that ensured the financial stability of other black cars and yellow cabs alike. That was the "heavily regulated environment" to which Defendants refer (*see* Resp. Br. 32-33) in effect when Plaintiffs bought 360 medallions in the Auctions.

However, Plaintiffs were *not* given the right to operate medallion taxis in a heavily regulated environment. To the contrary, the "heavily regulated environment" was turned upside down when the TLC granted licenses to Uber and Lyft even though they failed to meet the strict licensing requirements for black cars and bases. The right to operate in a "heavily regulated environment" is meaningless when some competitors are permitted to operate without complying

[8] Defendants concede that the TLC must ensure that "new market entrants" were properly regulated (Resp. Br. 7, 41), but they ignore the well-pled fact that *non-conforming* "black car" base licenses were given to Uber and Lyft, allowing them to operate more than 100,000 *non-conforming* "black cars," with the ensuing catastrophic consequences for the medallion buyers.

with the same regulations. That is the position Defendants put Plaintiffs in when they licensed the non-conforming Uber "black car" bases right after the Auctions ended. When the TLC ignored the black car licensing standards, it not only failed to ensure that the Auction buyers would remain financially stable, it ensured that they would not.

Unlike the plaintiffs in *Matter of Glyka*, Plaintiffs here do *not* challenge any rulemaking by the TLC, nor do they seek to compel the TLC to regulate the taxi industry in any particular way. Rather, Plaintiffs claim that by failing to adhere to the TLC's *existing* rules, and by licensing non-conforming Uber and Lyft "black car" bases, Defendants breached the covenant of good faith and fair dealing owed to the Auction purchasers.

In sum, Defendants cannot invoke their "regulatory authority" to defeat Plaintiffs' good faith and fair dealing claim.

II. PLAINTIFFS' GBL § 349 CLAIM WAS INCORRECTLY DISMISSED

A. Defendants Fail to Explain Why This Court Should Not Follow *Margerum* and *Gaidon II*

In addressing Plaintiffs' GBL § 349 claim, Defendants fail to distinguish *Margerum* in which this Court held that statutory human rights claims "are not tort actions under [GML§] 50-e." 24 NY3d at 730. *Margerum* is both binding precedent and irreconcilable with their position. Defendants offer no principled

argument why Plaintiffs' statutory claim is not a tort claim, just as the statutory claim in *Margerum* was not a tort claim, for GML purposes.

Defendants' cursory discussion of this binding precedent suggests that the case was decided as it was only because the City of Buffalo did not brief it adequately. Resp. Br. 49. But *Margerum* is fully consistent with prior decisions of this Court that statutory claims, including GBL § 349 claims, are subject to the three-year statute of limitations set by CPLR 214(2). For example, in *Gaidon v. Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 208 [2001] ("*Gaidon II*"), the Court applied the three-year statute of limitations to a GBL§ 349 claim because the statutory claim reached acts beyond the common law and liability would not exist but for the statute. Likewise, in *People v Credit Suisse Sec. (USA) LLC*, the Court applied CPLR 214(2) to a Martin Act claim because it "imposes numerous obligations – or 'liabilities' – that did not exist at common law." 31 NY3d 622, 628-629, 632 [2018]. There is no relevant difference between the statutes of limitations at issue in *Gaidon II* and *Credit Suisse* and a statute limiting the time in which a notice of claim must be filed.[9]

Defendants do not offer any persuasive distinction of *Gaidon II*. They say, absurdly, that *Gaidon II* supports their position because the Court observed there

[9] Plaintiffs do not dispute whether they were required to submit a notice of claim. They did so pursuant to NYC Admin. Code § 7-201(a). *See* R-55 at ¶ 17; R-650-84 (notice of claim).

that GBL § 349 claims resemble common law fraud claims. Resp. Br. 48-49. Defendants overlook the critical factor that after noting the resemblance, the *Gaidon II* Court held that GBL § 349 claims and fraud claims are subject to *different* statutes of limitation. 96 NY2d at 208.

In an attempt to overcome *Margerum* and *Gaidon II*, Defendants make a strained argument that GBL § 349 claims should be subject to different time-bar rules depending on which time-bar is in question. They argue that the statutory violation is a tort for notice-of-claim purposes, but not a tort for statute of limitations purposes. Resp. Br. 48-49. Defendants cite no authority that justifies the inconsistent treatment of GBL § 349. Instead, they rely on irrelevant or unpersuasive Appellate Division decisions, most of them decided *before Margerum*, to argue that GML § 50-e applies to any claim, statutory or otherwise, that can be likened to a common law tort claim.

Defendants' reasoning is unsound. The cases on which they rely all involve personal injury claims, which are inherently "founded upon tort." *See* GML § 50-e(a) (notice of claim required for claims "founded upon tort"). A GBL § 349 claim is *not* inherently founded upon tort. Like the Human Rights Law claim in *Margerum*, it is purely and uniquely statutory, putting it outside the scope of GML § 50-e. *See also Credit Suisse*, 31 NY3d at 628-629, 632 (applying CPLR 214(2) to a Martin Act claim because it "imposes numerous obligations … that did not exist

at common law").

Matter of Nadler v City of N.Y., 166 AD3d 618 [2d Dept 2018], for example, does not hold, despite what Defendants argue, that a Labor Law claim is subject to GML § 50-e. *Nadler* was a proceeding pursuant to General Municipal Law § 50-e(5) "for leave to serve a late notice of claim." 166 AD3d at 618. In bringing that proceeding, the plaintiff conceded the applicability of the notice of claim statute. The issue here was neither raised nor decided in that case. Two other cases Defendants cite – both decided years before *Margerum* – likewise involved permission to serve a late notice of claim and thus did not adjudicate the applicability of GML § 50-e. *See Matter of Kim v Dormitory Auth. of The State of New York*, 140 AD3d 1459, 1460 [3d Dept 2016] (plaintiff "moved pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim"); *Zahra v New York City Hous. Auth.*, 39 AD3d 351, 351 [1st Dept 2007] ("Plaintiffs … were asserting a cause of action under General Municipal Law § 205-a").

In *Melia v City of Buffalo*, 306 AD2d 935, 935-36 [4th Dept 2003], also pre-*Margerum*, the Fourth Department held, without analysis, that an injured worker's claim under his collective bargaining agreement for the difference between his regular wages and workers' compensation benefits was subject to GML § 50-e. Defendants offer no reason why this Court should follow *Melia* rather than its own more recent decision in *Margerum* and the logical implication of *Gaidon II*.

Defendants provide no cogent argument why the Court should deviate from its three prior holdings that a statutory claim should not be treated as a tort claim for statute of limitations purposes. GML § 50-e does not apply to Plaintiffs' GBL § 349 claim.

B. The Auctions Were "Consumer-Oriented"

Seeking an alternative to their GML § 50-e argument, Defendants raise an argument that the Appellate Division did not reach. They argue that Plaintiffs' GBL § 349 claim was properly dismissed because the Auctions were not "consumer-oriented." Even if properly raised, this Court's recent decision in *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d 169 [2021], which Defendants ignore, defeats their argument.

In *Himmelstein*, the plaintiffs complained that the defendant sold a book, *New York Landlord-Tenant Law* (the "Tanbook"), through false and deceptive means. *Id.* at 174. The defendant made essentially the argument Defendants make here: that GBL § 349 did not apply because "the Tanbook is oriented towards legal professionals (*i.e.*, lawyers, judges, and tenant advocates) rather than consumers." *Id*. at 178. This Court rejected that argument, concluding, "We are unpersuaded by defendant's attempt to limit the reach of GBL § 349." *Id*.

In *Himmelstein*, this Court rejected the First Department's conclusions that GBL § 349 is limited to goods and services purchased "for personal, family, or

household use," and that GBL § 349 does not apply to a business's purchase of "a widely sold service that can only be used by businesses." 37 NY3d at 176-77. As this Court explained, "[T]here is no textual support in GBL § 349 for a limitation on the definition of 'consumer' based on use. Indeed, any such narrowing of the term 'consumer' would be contrary to the legislative intent to protect the public against all forms of deceptive business practices." 37 NY3d at 177.

Himmelstein notes that the defendant advertised the Tanbook and made it available for sale to the general public. *Id.* at 178. It also noted that legal professionals "are merely a subclass of consumers and, as we recently clarified, 'consumer-oriented conduct' need not 'be directed to *all* members of the public.'" *Id*. (quoting *Plavin v Group Health Inc*., 35 NY3d 1, 13 [2020]). The Court further noted that the defendant's sales agreement was "a form contract." *Id*.[10]

Those factors are present here as well. Defendants advertised the Auctions to the general public and the Auctions were open to all in accordance with TLC rules. R-82-94; TLC Rules 10-01(a) ("Issuance shall be made through . . . a *public* auction") (emphasis added) & 10-01(e) ("*Any* person may bid") (emphasis added).

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[10] *Himmelstein* follows a long line of decisions upholding the broad reach of "consumer-oriented" conduct within GBL § 349. *Karlin v IVF Am.*, 93 NY2d 282, 290 [1999] (GBL § 349 "appl[ies] to virtually all economic activity") (collecting cases). GBL § 349 seeks to secure "an honest marketplace" where "'trust,' and not deception, prevails.'" *Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 [2002] (quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). As long as the offer or transaction is "not unique to [the parties to the case]," "private in nature or a 'single-shot transaction,'" the statute applies. *Oswego Laborers*, 85 NY2d at 26-27 (internal citations omitted).

Like lawyers, medallion buyers, whether investors or drivers, are merely a subclass of consumers. And Defendants' Bid Form is a form contract. R-96-97.

Ignoring the rules governing a Rule 3211 motion to dismiss, Defendants try to litigate the facts underlying their defense in this Court. They say the Auctions were "treat[ed] as trade news" and were "advertised … in industry notices to target parties with existing ties to the industry." Resp. Br. 53. They claim the Auctions "were geared toward industry regulars" and "had no impact on consumers at large." *Id*. These factual claims ignore, of course, that anyone could buy an independent medallion and that the Auctions were open to all and were widely publicized in the general press. In any event, this Court need not find facts on this appeal.

Finally, Defendants liken the medallions to "commercial securities," which they say are "frequently 'purchased as investments' and not as consumer goods." Resp. Br. 54-55 (citing *Gray v Seaboard Sec., Inc.*, 14 AD3d 852, 853 [3d Dept 2005]). Medallions are nothing like "commercial securities." Medallions carry with them the right to operate a yellow taxi on the streets of New York and accept fare-paying customers. They are valuable because they permit a holder to profit from his or her own labor or enterprise. The purpose of securities, by contrast, is to give owners the right to profit from the efforts of others. *See SEC v W. J. Howey Co.*, 328 US 293, 301 [1946] (purchaser of security profits "solely from the efforts of

others"). The strained analogy between a purchaser of a taxi medallion and an investor in the stock market is just one more reflection of the weakness of Defendants' position.

C. Plaintiffs Allege Materially False and Misleading Statements and Omissions

Finally, again relying on an argument not reached by the Appellate Division, Defendants try to disprove Plaintiffs' allegations that Defendants repeatedly made materially false and misleading statements prior to the Auctions. But Plaintiffs' specific and detailed factual allegations must be accepted as true on this appeal from a ruling on a motion to dismiss.

Plaintiffs allege that the TLC routinely overstated the average monthly sale prices of medallions ahead of the Auctions. R-63-64 at ¶ 79. *See* Appls. Br. 10-11. (The misstatements applied both to individual and corporate medallions, though Defendants' brief ignores this fact. *See* R-63-64 at ¶¶ 79-83.) Defendants do not deny making those statements, but they deny that the statements were objectively or materially misleading, asserting that the correct numbers could have been calculated from public information. Resp. Br. 54-55. That is a flimsy argument: prospective auction buyers were entitled to take the TLC at its word and were not required to re-do its math.

Plaintiffs also allege that, prior to the Auctions, Defendants failed to disclose the TLC's plan to disregard both City statutes and its own rules in issuing tens of

thousands of new black car licenses after the Auctions. R-74 at ¶ 160. It is difficult to imagine more important information to a prospective bidder.

The issue is not whether the TLC disclosed "that it would license more black car bases." Resp. Br. 59. Nor is it whether the City Council could or would amend City statutes or whether the TLC could or would change its rules from time to time. In fact, there were no relevant amendments, just Defendants' persistent disregard for still extant law. The issue is whether the City concealed from bidders at the Auctions that 100,000 non-compliant black cars would be licensed wholesale in violation of the law. If, as the Court must assume on this motion to dismiss, that information was concealed, its materiality cannot be questioned.

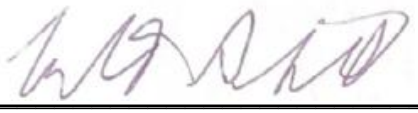
CONCLUSION

For all these reasons and for those presented in Plaintiffs' opening brief, this Court should reverse the Appellate Division's decision and reinstate Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing and for violation of GBL § 349.

Dated: New York, New York
April 13, 2022

Respectfully submitted,

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

By: 

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