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

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OMAHA LLC and VULCAN CARS LLC

Petitioners,

- against -

NEW YORK CITY TAXI AND LIMOUSINE COMMISSION and MEERA JOSHI, in her official capacity as Chair, Commissioner, and Chief Executive Officer of the New York City Taxi and Limousine Commission

Respondents.

Index No. 650574/2019

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RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE VERIFIED PETITION AND TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

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February 26, 2019

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PRELIMINARY STATEMENT

Petitioners, two for-hire vehicle ("FHV") bases licensed by the New York City Taxi & Limousine Commission ("TLC") and owned by the transportation company, Juno USA LP ("Juno"), commenced this Article 78 proceeding by Order to Show Cause seeking a preliminary injunction, along with an order vacating and annulling the rules codified at Title 35 of the Rules of the City of New York ("RCNY"), §§ 59B-24, requiring that FHV drivers be paid a minimum pay constituting a livable wage ("FHV Driver Pay Rule" or "Rule"). Of note, the challenged rule was promulgated by TLC and published in the City Record on December 11, 2018, taking effect thirty days thereafter (i.e., January 11, 2019). Although the FHV Minimum Driver Pay Rule was in effect pursuant to law, TLC chose not to enforce the rule until February 1, 2019. Despite being aware of the Rule for months now, petitioners chose to do nothing until the eleventh hour and commenced the instant proceeding after the rules were in effect.

In any event, the FHV Driver Pay Rule indisputably serves a strong government interest to ensure a living wage for FHV drivers and to facilitate better driver utilization and decrease traffic congestion. Pursuant to TLC's broad delegation of powers to regulate all aspects of the transportation industry in New York City and to effectuate an overall public transportation policy, TLC adopted the carefully crafted Rule, to provide income protection and financial stability to FHV drivers, reverse the trend of a decrease in FHV driver earnings, provide income transparency in the financial relationships among FHV drivers, vehicle owners and bases, and to optimize the utilization of the drivers in a exponentially increasingly crowded industry.

Indeed before promulgating the FHV Driver Pay Rule, TLC commissioned Dr. James Parrott, Economic and Fiscal Policy Director of the Center for New York City Affairs at the New School, and Dr. Michael Reich, Professor of Economics and Chair of the Center on

Wage and Employment Dynamics at the University of California, Berkley, to evaluate a pay standard for FHV drivers, which resulted in a report. "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment" (the "FHV Driver Pay Report" or "Report"). The FHV Driver Pay Report provided insight into and assessment of the current state of FHV industry economics and projections on the potential impact of a driver pay standard. While the Report provided part of the basis of TLC's evaluation in promulgating the Rule, petitioners' exhaustive attempts to discredit the Report miss the mark. Indeed, the Report was only one part of TLC's evaluation of the FHV industry and TLC's own evaluation and expertise, as well as the hours of public testimony, written comments, and stakeholder meetings, cannot be discounted. The FHV Driver Pay Rule is reasonable and rational in its entirety.

Finally, petitioners' request for a preliminary injunction while this matter is pending is entirely inappropriate. The Rule was enacted in December 2018. Petitioners chose not to proceed to Court in an expeditious manner; instead, they waited until the eleventh hour before filing the instant lawsuit. Therefore, any claim of "emergency" is specious on its face. In any event, for all of the reasons set forth above, petitioners are not likely to succeed on the merits of their claims because the Rule is reasonable and rational, and well within TLC's extremely broad grant of authority to regulate the transportation for hire system in New York City. Further, petitioners cannot satisfy the irreparable harm prong of the preliminary injunction standard since their alleged harm is solely economic in nature and speculative. Finally, as any injunction would disrupt the significant public policy goals of the Rule, and would prevent tens of thousands of FHV drivers from earning a fair and equitable livable wage (which they could never recover), and would help decrease congestion, the balance of the equities tips decidedly in favor of respondents and mandates that no preliminary injunctive relief should be issued.

STATEMENT OF FACTS

Respondents respectfully refer the Court to the Affidavit of TLC Deputy Commissioner for Policy and External Affairs William M. Heinzen, sworn to on February 26, 2019 ("Heinzen Aff."), respondents' Verified Answer, and the exhibits annexed thereto, for the facts relevant herein.

ARGUMENT

POINT I

PETITIONERS' CLAIMS ARE BARRED BY LACHES.

The petition should be denied and dismissed under the equitable doctrine of laches. Laches bars petitioners that engage in a delay in vindicating their rights from bringing an action or proceeding if that delay causes prejudice to the adverse party. See Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 816 (2003), cert. denied, 540 U.S. 1017 (2003); Matter of Schulz v. State of N.Y., 81 N.Y.2d 336, 348 (1993). Here, petitioners' delay not only prejudices respondents, but it clearly prejudices FHV drivers who have been anxiously awaiting the implementation of the Rule to support themselves and their families.

When assessing a laches defense pleaded as an affirmative defense (such as here),[1] a court should consider the effect of the delay both on the adverse parties and on other individuals. See, e.g., Matter of Cantrell v. Hayduk, 45 N.Y.2d 925, 927 (1978) (two-month delay in filing election ballot challenge injured voters, justifying dismissal of Article 78 petition); Matter of Adler v. Office of Ct. Admin. of Unified Ct. Sys. of State of N.Y., 9 Misc. 3d 1109(A) (Sup. Ct. N.Y. Co. 2005), aff'd, 35 A.D.3d 260 (1st Dep't 2006) (Article 78 petition filed within

[1] Matter of Clair v City of New York, 144 A.D.3d 98 (1st Dep't 2016)

four months dismissed since delay in challenging OCA's reclassification was not only prejudicial to OCA, but would also unseat over 150 court officers promoted). Particularly when the action challenges substantial government initiatives, the "destabilizing and prejudicial effects from delay may be decisive factors." Schulz, 81 N.Y.2d at 347-48 (challenge to law extending state credit and long-term debt barred by laches when action was filed eleven months after the law was passed and the state had already issued bonds pursuant to the law's authority).[2]

Petitioners here have unreasonably delayed bringing their lawsuit, resulting in prejudice not only to respondents, but to the FHV drivers who are barely eking out a living, and to other FHV bases who are implementing the FHV Driver Pay Rule. The Rule was passed in early December 2018 and published in the City Record on December 11, 2018 and became effective 30 days later (January 11, 2019). Petitioners herein waited almost two months from the vote approving the final version of the rule before commencing of the instant Article 78 proceeding, on January 30, 2019, seeking to strike down the rule (and moving for a preliminary injunction enjoining its implementation), after the rules effective date, but on the eve of TLC indicating it would commence enforcement..

[2] There is no minimum period of time that must pass before laches may be applied. In fact, even a timely Article 78 petition — filed less than four months after the administrative determination — may be dismissed under laches when the petitioners' filing delay causes harm. See, e.g., Cantrell, 45 N.Y.2d at 927; Save the Pine Bush, Inc. v. N.Y. State Dept. of Envt'l Conserv., 289 A.D.2d 636 (3d Dep't 2001), lv. denied, 91 N.Y.2d 611 (2002) (petitioners barred by laches because they waited until the State spent over $8,300,000 on an expansion project prior to filing of Article 78 proceeding challenging the legality of the project); Rumack v. McNamara, 195 Misc. 84, 87 (Sup. Ct., Special Term, N.Y. Co. 1949) (petitioners waited to file their Article 78 challenge until over 1,000 candidates took the allegedly improper examination, several of whom were then appointed to the position based on the examination results).

Petitioners could have challenged the lawfulness of the Rule when it was promulgated in early December 2018, or shortly thereafter. By choosing to challenge the FHV Driver Pay Rule at the eleventh hour, rather than at an earlier point, petitioners have prejudiced respondents, FHV drivers and other FHV bases,, the riding public, and even the general public as to the rule's impact on traffic congestion. Respondents have now been forced to defend the legality of this complex and important rule on short notice. This in and of itself may be grounds for dismissal. In Cantrell, the Court of Appeals, 45 N.Y.2d at 927, found:

> Rather than acting with due diligence, [the petitioners] allowed more than two months to elapse before commencing this proceeding. The delay imposed a well nigh impossible burden upon respondents, since they were forced to attempt to formulate a defense to a variety of complex challenges within a matter of days. To condone the attempted resolution of these issues in such an unnecessarily precipitous manner would be to do a great disservice to the residents of Westchester County whose interests are most deeply implicated in this proceeding. In light of all this, we conclude that this proceeding is barred by laches.

Petitioners could have challenged the Rule when it was finalized in early December 2018, and their delay threatens to harm TLC, FHV drivers and the public. Petitioners have no excuse for waiting to commence this lawsuit and filing their papers at the last practical moment. Accordingly, petitioners' claims must be dismissed under the doctrine of laches.

POINT II

THE FHV DRIVER PAY RULE IS REASONABLE AND RATIONAL.

Administrative agencies enjoy broad discretionary power when making determinations on matters they are empowered to decide. CPLR § 7803 provides for very limited judicial review of administrative actions and states, in pertinent part: "The only questions that may be raised in a proceeding under this article are … (3) whether a determination … was

arbitrary and capricious or an abuse of discretion." The arbitrary and capricious standard is not a demanding one. It requires only that the administrative agency determination be reasonable and supported by the record taken as a whole. Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). A court "may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated." Purdy v. Kreisberg, 47 N.Y.2d 354, 358 (1979). If the record supports the acts of the administrative agency, then its determination is conclusive. Cohen v. State of New York, 2 A.D.3d 522, 525 (2d Dep't 2003).

Moreover, agencies are presumed to have developed an expertise and judgment that requires the courts to accept the agency judgment if not unreasonable. Lynbrook v. N.Y. State Pub. Employment Relations Bd., 48 N.Y.2d 398, 404 (1979). Moreover, a "presumption of regularity attends to the action of the [agency], and it is incumbent upon the petitioner to overcome that presumption and establish the action to have been without reasonable foundation." Kayfield Constr. Corp. v. Morris, 15 A.D.2d 373, 379 (1st Dep't 1962); see also National Rest. Assn. v. N.Y.C. Dep't of Health and Mental Hygiene, 148 A.D.3d 169, 179 (1st Dep't 2017) ("Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context…. The challenger must establish that a regulation is so lacking in reason for its promulgation that it is essentially arbitrary.").[3]

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[3] In short, an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference . . ." Black Car Assistance Corp. v City of N.Y., 2013 N.Y. Misc. LEXIS 1692, *13, aff'd, 110 A.D.3d 618 (1st Dep't 2013) (Sup. Ct. N.Y. Co. April 23, 2013) (citing Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 A.D.3d 425, 429 (1st Dep't 2007), aff'd 11 N.Y.3d 859, 901 (2008). See also Greater N.Y. Taxi Assn. v N.Y.C. TLC., 25 N.Y.3d 600, 609 (2005) (noting that "the City Council granted the TLC extremely broad authority to enact rules"); Statharos v. N.Y.C. Taxi &

A. The FHV Driver Pay Rule is Entirely Rational

The record considered by TLC - including an expert report, hours of testimony at multiple public hearings, written comments, and meetings with industry stakeholders, including Juno, Lyft, Uber, and Via (the "Large FHV Companies") - establishes that TLC's adoption of the FHV Driver Pay Rule had a rational basis, and was not unreasonable, arbitrary or capricious.

In recent years, the FHV sector has seen exponential growth in the number of TLC-licensed vehicles and drivers, fueled principally by the Large FHV Companies. See Ex. E. This growth has benefited consumers, who have obtained convenient service in all corners of the City, as well as the companies, themselves. Lyft, for example, is reportedly valued between $20 and $25 billion. See Ex E. Underlying this growth, however, are the drivers, who are not only making the hundreds of thousands of trips per day to support the companies' financial gains but also bearing "most of the industry's capital and labor costs" of doing so. See Ex. P at 47. Yet, even with this industry growth, these drivers have seen their pay decrease in recent years, often to less than a living wage. Id. at 38. This treatment of drivers has been characterized by some as a "race to the bottom." See Heinzen Aff. ¶¶ 33, 53.

In light of the complaints and concerns about low driver pay, and pursuant to its Charter mandate to set standards and conditions of FHV service and to establish a broad public transportation policy, see City Charter § 2303, TLC engaged in a years-long process to develop a reasonable and rational policy that seeks to *minimally* compensate drivers for the time and expense of operating FHVs. In April 2017, TLC held a six-hour public hearing on industry economics and heard from economists, drivers, and industry groups. See Ex. J. Following the

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Limousine Commn., 198 F.3d 317, 324 (2d Cir. 1999) (stating that "TLC has been given broad authority to promulgate rules dealing with every aspect of the industry").

hearing, TLC retained economists to undertake a study of FHV driver income that included analysis of data obtained directly from the Large FHV Companies, for the purpose of proposing a minimum pay standard for FHV drivers.

The FHV Driver Pay Report, issued in July 2018, found that a majority of drivers are working full time, that driver pay is decreasing, and that drivers bear enormous expenses to operate FHVs. See Ex. P. Additionally, the Report noted that the industry model – in which a "persistent excess capacity" of drivers allow companies to compete with each other for passengers by providing short wait times, albeit "even beyond the value to the passengers" – contributes to long work hours and low pay. Id. at 46. To address these issues, the Report proposed a formula that includes a per-mile rate to compensate drivers for their expenses and a per-minute to compensate them for their time. Id. at 34. The rates are divided by a "utilization rate" ("UR") that serves to "compensate drivers for [the currently uncompensated] work-related time and expense when a passenger is not in the vehicle. Id. at 35. The company-specific UR seeks to "align[] the interests of the driver with that of the companies" by incentivizing higher URs that would lower a company's per-mile and per-minute rates and increase driver's average hourly earnings. Id. Based on a series of simulations, the Report concluded that the "pay increase likely can be readily absorbed through a combination of utilization increases, commission reductions, and modest fare increases." Id. at 53-62.

Taking the proposed pay formula as a reasonable approach to a complex issue in a complex industry, TLC worked to translate the proposal into a rule. Simultaneously, the New York City Council affirmed the findings in the Report and endorsed the concept of the proposed pay formula. Local Law 150 of 2018, codified at Admin. Code § 19-549, permits TLC to adopt a minimum pay standard for drivers of the Large FHV Companies based on the factors reflected

in the Report's proposal. See Ex. R. Moreover, the City Council report for the local law summarizes the Report's findings and cites the proposed pay formula. See Ex. A.

Following adoption of the local law, TLC published the proposed rule and received significant feedback from the public through written comments, meetings, and a public hearing. See Exs. T and U. TLC incorporated many comments into the final rule and reasonably rejected others. See Heinzen Aff. ¶¶ 67-72. Significantly, based on comments from the Large FHV Companies about the utilization rates, TLC refined the company-specific utilization rate based on data from the Large FHV Companies. Id. It further established an initial industry-wide utilization rate for the first year and regular reviews thereafter so that timely adjustments can made where appropriate. Id. Finally, to address overlapping multiple platform use, TLC will split the time drivers spend idling on multiple apps evenly between each company. Id.

Some Large FHV Companies raised concerns about a pay standard based on per-trip calculation, as opposed to a per-week calculation. Lyft, for example, noted that a per-week calculation is better for them "economically" because it could pay drivers at its preferred per-trip rate then "top up" as needed at the end of its preferred pay period. See Ex. U (Nov. 14, 2018 email of Lyft representative David Yassky and attachment). Yet, the administrative record reflects concerns that such an approach would turn the minimum pay standard into a pay ceiling, as opposed to a pay floor. TLC Chair Meera Joshi stated her concern with "a per-week [calculation] is that you will then have incentives that are used to help you reach the minimum, rather than when you're judged on a per-trip you have to pay incentives on top of the minimum." See Ex. T at 104-5. Council Member Brad Lander, the prime sponsor of LL 150 of 2018, added that the pay requirement "should not be an average that allows subminimum pay at some times to offset incentives at others." See Ex. U (Lander Testimony and comments of 32BJ SEIU). With

this mind, and consistent with local law, TLC rejected the per-week calculation proposed by the Large FHV Companies. The final rule, however, permits hourly calculations, as TLC reasonably considered it the functional equivalent of a per-trip calculation. See Heinzen Aff. at fn. 18.

B. Petitioners' Belated Attempts to Submit So-Called "Expert Affidavits" To Undermine the Rationality of the Rule Should Not Be Considered, and In Any Event, The Affidavits are Ill-Informed and Do Not Support Their Claims.

(i) The Analyses of the Juno Experts Should Not Be Considered.

Petitioners claim that the FHV Driver Pay Rule is "hopelessly unsubstantiated." See Petition at ¶ 3. Petitioners are incorrect, but now seek to fill this alleged void with so-called "expert" affidavits purportedly in support of their claims, see "Expert Affidavit of Dr. Ray Mundy" (the "Mundy Affidavit") and "Expert Affidavit of Steven Tenn, Ph.D." (the "Tenn Affidavit"). Petitioners had ample opportunity to submit "expert" analyses to TLC during the almost four months that elapsed between publication of the proposed rule and the date of adoption and did not do so.[4] Because the "expert" analyses are outside the administrative record, they should not be considered by the Court.[5] See Metropolitan Taxicab Bd. of Trade v. TLC, 18 N.Y.3d 329, 333 (2011) (noting TLC cannot be faulted for adopting rule without some showing

[4] Additionally, Petitioners neither testified at the public hearings nor submitted any written comments on the FHV Driver Pay Rule.

[5] Similarly, petitioners' belated request for an evidentiary hearing to "resolve any material factual disputes" should not be considered. Juno Petition, "Wherefore Clause," ¶ C. However, such is not provided for in an Article 78 proceeding. CPLR § 7804(h) provides for a trial in an Article 78 proceeding "forthwith" if a triable issue of fact exists. The existence of a triable issue of fact is rare in an Article 78 proceeding, as the nature of an Article 78 proceeding necessarily raises the legal issues such as whether an already existing record supports the determination under review, whether the body or officer is required to perform a certain act, or whether a judicial or quasi-judicial officer is acting or threatening to act without or in excess of jurisdiction. See CPLR § 7803, et seq. Here, because the record is sufficiently developed for the Court to evaluate the rationality of the Rule, petitioners' request for a trial should be denied.

from the regulated entities that it was justified, provided that the regulated entities had a chance to comment). In any event, their analyses are ill-considered and uninformed.

(i) Petitioners' Claim about the Utilization Rate Component of the FHV Drive Pay Rule is Meritless.

Petitioners, citing range of perceived flaws, argue that the company-specific UR component of the FHV Driver Pay Rule "ignores the realities of the industry." See Petition ¶¶ 61-74. Specifically, Petitioners claim that company-specific URs are "unfair" because companies will be paying different rates for the same trip. Id. ¶¶ 62-3. Petitioners, however, minimize the drivers in this analysis, by focusing solely on trip time and not a driver's non-trip time on a company's platform. After all, the drivers are still expending time and accruing expenses while on that company's platform. See Ex. P at 34 (noting that "drivers are working even when they do not have a passenger in the car"). Company-specific URs ensure that the compensation drivers receive for trips from a specific company adequately compensate them for the time they spend waiting for dispatches from *that* specific company. Abandoning company-specific URs would mean that drivers that receive the bulk of their trips from a company with a low UR would be compensated *less* for those trips, simply because *other* companies' drivers have less down time. Thus, at bottom, the UR component seeks to fairly and reasonably compensate drivers for the entire time they are working on a specific company's platform.

Petitioners argue that URs are based on various factors "outside its control." See Mundy Aff. ¶ 54. Petitioners indicate that a company's UR is negatively impacted by drivers engaging in a range of activities throughout the day, like "running personal errands, such as dropping kids off for school, shopping, meal breaks, appointments, etc." See id. ¶ 44 Yet, it is absurd to think that FHV drivers, a large majority of whom are professional, full-time drivers, would undertake the significant expense of operating FHVs only to go about their day ignoring

dispatches.[6] In any case, if this were the case, Petitioners offer no reason to conclude that the Large FHV Companies would not all be equally effected by the phenomenon. Moreover, Petitioners provide direct evidence that it does exercise control over URs. See Affidavit of Ronen Ben David at 4, fn. 1 (noting that Juno's technology places drivers offline at airports because they cannot accept any trips at that time). Petitioners' business decision to not employ additional tools to improve its UR, such as, logging off drivers who do not accept trips, offers no basis to annul minimum pay standards for drivers. See Petition ¶ 66.

Petitioners further claim that they are being treated unfairly because their business model of exclusively recruiting drivers affiliated with other Large FHV Companies is uniquely designed to increase an industry-wide UR. See id. ¶ 72. TLC data indicates, however, that their business model is not truly unique, as Lyft also has a relatively small number of affiliated drivers and dispatches a significant number of Uber-affiliated drivers. See Heinzen Aff. ¶ ??. Again, as noted above, Petitioners' business decisions offer no basis to deny drivers fair pay.

Petitioners erroneously claim that the Rule encourages more trips in high-demand, high-congestion areas and less trips in "historically underserved areas." See generally Petition ¶ 84-87. However, it is unreasonable to think that the Large FHV Companies, as rational profit maximizing entities, would all forgo continuing to service the Bronx or Queens, where they have seen tremendous growth, to have their nearly 100,000 drivers compete for a finite number of trips in the Manhattan core where a congestion surcharge on FHV service is imposed (N.Y.S.

[6] Mundy mistakenly believes that New York City operates like any other jurisdiction around the country. See Mundy Aff. ¶ 23. While app drivers in many jurisdictions are unlicensed for-hire drivers and thus could conceivably gain regular clients outside an app, New York City requires that app-affiliated for-hire drivers be licensed by the TLC and that their trips be prearranged through a licensed FHV base. See Admin. Code §§ 19-505; 19-516.

Tax Law Article 29-C) and reasonable transportation alternatives are available.[7] Id. at ¶ 17. Also, the implication that it is the drivers, themselves, who would be directing their efforts toward high-congestion areas rings hollow, as the Large FHV Companies are known to employ sophisticated tools to dispatch drivers where and when they want. Id. at ¶ 18.

With respect to the claim that smaller companies will suffer under a company-specific UR, Petitioners conveniently ignore the fact that Via has significantly less affiliated vehicles than Uber and Lyft, yet retains a higher UR.[8] See Heinzen Aff. ¶ 68. Petitioners are essentially claiming that *they* can only be successful with a large pool of drivers who are cruising the streets without a passenger while also bearing their own labor and capital costs. Yet, the company-specific UR component of the rule reasonably "aligns the interests of the driver with that of the companies and both sides benefit," not just the companies. Id.

Petitioners tack on a range of additional baseless claims in an attempt to undermine the rule, including claims that the Rule is "experimental" and that conclusions in the Report were based on a small data set. See Petition ¶ 79, fn. 17. Petitioners cite no case law to support the claim that a brand new policy is arbitrary because it is a brand new policy. The applicable case law, however, focuses on whether the rule was arbitrary, which this Rule clearly is not. Further, while it is true that the Report analyzed a driver survey that had a low response

[7] To the extent Petitioners claim that the Report is unreasonable because it did not consider the impact of the surcharge on trips in the Manhattan core, the claim is without merit. As the Report correctly notes, however, the surcharge is "independent" of the minimum pay standard. Indeed, while the surcharge may reduce congestion in the Manhattan core, it does not follow that the Large FHV Companies would thereby increase pay and improve utilization rates.

[8] Setting fares in the FHV market is arguably a sophisticated endeavor. Although Petitioners assert that larger companies will gain a price advantage over the smaller ones under the rule, it is notable that since the rule took effect, the largest company is charging a high passenger fare, as compared to smaller competitors. See Ex. AA.

rate, Petitioners ignore the fact that the Rule was informed by hundreds of thousands of data points on trip time, vehicles expenses, passenger fares, driver payments, lease rates, commission rates, and log on/off data. With respect to the driver survey, Petitioners offer no support to show any problems with the survey. See Nash Metalware Co. v. Council of N.Y., 14 Misc. 3d 1211(A), 1211A (Sup. Ct. N.Y. Co. 2006) ("While a small sample size or a biased selection of realtors might result in inaccurate data, the [] Petitioners offer no showing that there was any problem of sample size or bias, and the record shows no such problem.").

Finally, Petitioners' reliance on N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 23 N.Y.3d 681 (2014) as a basis for annulling the Rule is inapt. In that case, the agency engaged in an analysis of societal costs of a policy without any legislative guidelines on the broad policy goals. Id. at 697-8. Here, however, the City Council not only set the broad policy goals under which TLC acted, by requiring that TLC adopt a minimum pay standard for FHV drivers, but also clearly endorsed the specific pay formula adopted by TLC, including the company-specific UR component. See Ex. A.

Notwithstanding Petitioners' meritless claims, as discussed above, the final rule reflects feedback from the Large FHV Companies about URs. It reasonably splits a driver's overlapping idle time on multiple platforms evenly among the companies. It also provides that TLC will regularly review URs and make adjustments where appropriate, so that companies can benefit from improved URs under the formula. Finally, it provides the Large FHV Companies one year to operate under an industry-wide UR of 58%, so that those companies that fall below the UR can work to improve it before the company-specific URs take effect. Petitioners, which have the lowest UR at 53%, gain the most by this feature.

C. The FHV Driver Pay Rule Must Be Upheld.

The record before TLC establishes a reasonable basis to adopt the FHV Driver Pay Rule. The Rule was carefully crafted after years of studying the issue and reasonably based on broad judgmental considerations, as a means of providing income protection and financial stability to FHV drivers, to reverse the trend of decrease in earnings of FHV drivers, to provide income transparency in the financial relationships among FHV drivers, vehicle owners and bases and to optimize the utilization of drivers in a exponentially increasingly crowded industry. See Jamaica Recyling Corp. v. City of N.Y., 38 A.D.3d 398, 399 (1st Dep't 2007) (citing Consolation Nursing Home v. N.Y. State Dep't of Health, 85 N.Y.2d 326, 332 (1995) (stating that in enacting rules, an agency head "is not confined to factual data along but also may apply broader judgmental considerations based upon the expertise and experience of the agency [she] heads"). Moreover, because the record demonstrates that all aspects of the Rule were informed by experts, hours of public testimony, written comments, stakeholder meetings, and TLC's knowledge of the industry, this matter is clearly distinguishable from Ahmed v. City of N.Y., 129 A.D.3d 435 (1st Dep't 2015) (invalidating taxi surcharge to create $10 million health care fund for drivers because there was no methodology to support the total projected amount of money that TLC determined was needed or how it was expected to be spent) and Metro. Taxicab Bd. of Trade v N.Y.C. TLC, 18 N.Y.3d 329, 333 (2011) (invalidating TLC rule that prohibited taxi owners from collecting a sales tax from its drivers because TLC did not present "any justification with support in the record" for changing the longstanding practice).

While Petitioners take issue with the specifics of the final rule, it is not irrational for TLC to choose one well-considered path to accomplish minimum pay standards for drivers over another. See, e.g., Singh v. Joshi, 152 F. Supp.3d 112, 127 (E.D.N.Y. 2016) ("No doubt

TLC could have effectuated its goal of increased accessibility in the yellow cab fleet in many ways. It could have required half of medallion owners to convert, but not on a rotating basis, permanently exempting the other 50%. Or it could have simply required that each and every vehicle in the fleet become wheelchair-accessible."). Accordingly, the FHV Driver Pay Rule is rational and reasonable and must be upheld.

POINT III

THE DRIVER PAY RULE COMPORTS WITH LOCAL LAW

The remaining perceived flaws with the FHV Driver Pay Rule that Petitioners identify are in fact fully supported by and consistent with local law.[9] Petitioners argue that the rule is unreasonable because it only applies to FHV companies that dispatch 10,000 or more trips per day. See Petition ¶ 88. Yet, Admin. Code § 19-549(a) provides that TLC "shall by rule establish a method for determining the minimum payment that must be made to a for-hire vehicle driver for a trip dispatched by a *high-volume for-hire service* to such driver." (emphasis added). Admin. Code § 19-502(gg) defines "high-volume for-hire service" as an FHV company that "dispatches, or facilitates the dispatching of, 10,000 or more trips in the city in one day."

Petitioners further argue that the UR component of the Rule is unreasonable because the Rule was adopted before the City completed a study required by Admin. Code § 19-550. See Petition ¶ 55. Pursuant to Admin. Code § 19-550, the City is to study a range of topics, including traffic congestion, traffic safety, vehicle utilization standards, driver income and work hours, access to for-hire service throughout the City. Following the study, Admin. Code § 19-

[9] To the extent that petitioners assert that the Pay Rule is arbitrary and capricious because they believe it is *ultra vires*, the argument why the rule is not *ultra vires* is addressed herein.

550(b) provides that the City (1) may establish vehicle utilization standards for the Large FHV Companies and (2) review the number of FHV vehicle licenses on a periodic basis to determine if any regulation on the number of FHV vehicle licenses is necessary. Additionally, Admin Code § 19-549(d) further provides that"[f]ollowing completion of the study required by section 19-550," TLC must determine whether to set minimum passenger fares. Thus, the required study serves to inform possible TLC regulation of vehicle utilization standards, FHV vehicle licenses, and passenger fares – not driver pay standards, which is all the Rule sets.

Petitioners argue that the local law only permits TLC to require minimum compensation for "trips," not total work time on a company's platform. See Petition ¶ 93. Yet, Admin. Code § 19-549(a) explicitly states that TLC can consider a "vehicle utilization standard" in establishing the pay formula. See Admin. Code § 19-549(a); see also Admin. Code § 19-502(hh) (defining "vehicle utilization standard"). Moreover, in a City Council Committee Report on the legislation that ultimately became Admin. Code § 19-549(a), the City Council cited the specific formula that TLC adopted (albeit with minor adjustments to the specific rates), thus indicating the formula was consistent with the law. See Ex. A.

Finally, Petitioners erroneously assert that the rule is in conflict with Local Law 150 by preventing payments to drivers from being calculated on a weekly basis. See Petition at ¶¶ 91-95. The Local Law, which is codified as Admin. Code § 19-549(b), states in relevant part:

> The commission shall by rule establish a method for determining the minimum payment that must be made to a for-hire vehicle driver for a trip dispatched by a high-volume for-hire service to such driver. In establishing such method, the commission shall, at a minimum, consider the duration and distance of the trip, the expenses of operation to the driver, any applicable vehicle utilization standard, rates of fare and the adequacy of for-hire vehicle driver income considered in relation to for-hire vehicle driver expenses. Such rule promulgated by the commission shall

> not prevent payments to for-hire vehicle drivers from being calculated on an hourly or weekly basis, or by any other method, **provided that the actual payments made to such drivers are no less than the minimum payments determined in accordance with the method established by the commission**.

Specifically, petitioners argue that the FHV Driver Pay Rule is ultra vires because "it allows for calculation of minimum pay based purely on the utilization-driven formula, which does not even take into account hourly or weekly calculations." Juno Petition at ¶ 92.. However, Petitioners' flawed reading completely ignores i) that the FHV Driver Pay Rule contains an Hourly Payments option [35 R.C.N.Y. 59B-24(a)(5)]; and more importantly ii) the last clause of Admin Code § 19-549(b), which states: "**provided that the actual payments made to such drivers are no less than the minimum payments determined in accordance with the method established by the commission.**" Petitioners ignore this phrase presumably because it is impossible to reconcile this phrase with Petitioners' position that the method established by TLC, which permits calculation based upon a per trip basis or an hourly basis, but not a weekly basis, is ultra vires. See 35 RCNY § 59B-24.

Based upon basic statutory interpretation principles, Local Law 150 must be read in its entirety, with all clauses given their plain meaning. New York Courts have held that:

> In matters of statutory interpretation, our primary consideration is to discern and give effect to the Legislature's intention. As we have repeatedly stated, the text of a provision is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning. Additionally, we should inquire into the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history. Finally, it is well settled that a statute must be construed as a whole and that its various sections must be considered with reference to one another.

Matter of Albany Law School v. New York State Off. Of Mental Retardation & Dev. Disabilities, 19 N.Y.3d 106, 120 (2012) (internal quotation marks and citations omitted). As such, clearly a proper reading of Local Law 150 is that it permits FHV bases to pay drivers weekly, if they so choose, **provided that the actual payments made to such drivers are no less than the minimum payments determined in accordance with** the FHV Driver Pay Rule on a per trip or per hour basis. However, as petitioners construe Local Law 150, it allows FHV bases to calculate payments to FHV drivers weekly with the actual weekly payments being likely less than what the drivers would have been paid pursuant to the FHV Driver Pay Rule on a per trip or per hour basis.[10] This is simply not a correct reading of the Local Law at issue.

POINT IV

PETITIONERS' REQUEST FOR A PRELIMINARY INJUNCTION MUST BE DENIED.

A preliminary injunction is an extraordinary and drastic remedy that should not be routinely granted, and the party seeking such relief bears a heavy burden of proof. See Rosa Hair Stylists, Inc. v. Jaber Food Corp., 218 A.D.2d 793, 794 (2d Dep't 1995); MacIntyre v. Metropolitan Life Ins. Co., 221 A.D.2d 602 (2d Dep't 1995); Chester Civic Improvement Ass'n, Inc. v. N.Y.C. Transit Authority, 122 A.D.2d 715, 717 (1st Dep't 1986). "It is well established that the drastic remedy of a preliminary injunction is not to be granted unless a clear right to the

[10] By requiring a per-trip pay standard, the FHV Driver Pay Rule is consistent with the requirement that TLC set a standard for minimum payments that "must be made" to an FHV driver for "a" dispatched trip. See Admin. Code § 19-549(b). Further, the per-trip pay standard gives due consideration to the fact that drivers are incurring consistent operational expenses for each trip that should be adequately reflected in the driver's income for such trip. Consistent with the local law, however, the Rule does not prohibit Petitioners from actually remitting payment to the drivers at the end of a trip, shift, or week.

relief demanded is established under the undisputed facts upon the moving papers, and that the burden of showing such an undisputed right is on the person seeking such relief." Brandt v. Bartlett, 52 A.D.2d 272, 275 (3d Dep't 1976). See also East 13th St. Homesteaders' Coalition v. Lower East Side Coalition Housing Dev., 230 A.D.2d 622, 623 (1st Dep't 1996).

A party seeking a preliminary injunction must establish each of the following: (1) the likelihood of its ultimate success on the merits; (2) that it will suffer irreparable injury if the preliminary injunction is not granted; and (3) that, on balance, the equities favor granting the preliminary injunction. See State of N.Y. v. Fine, 72 N.Y.2d 967, 968-69 (1988); W.T. Grant Company v. Srogi, 52 N.Y.2d 496, 517 (1981); Schneider Leasing Plus, Inc. v. Stallone, 172 A.D.2d 739 (2d Dep't), app. dism'd, 78 N.Y.2d 1043 (1991); Application of J.O.M. Corp. v. Dep't of Health, 173 A.D.2d 153, 154 (1st Dep't 1991). As detailed herein, petitioners have not established entitlement to the extraordinary relief that they request and thus, their request for a preliminary injunction must be denied.[11]

A. Petitioners Have Not Established Likelihood of Success on the Merits.

Petitioners cannot establish that they have a likelihood of success on the merits when, as detailed more fully above, the FHV Driver Pay Rule is reasonable and rational. See Point II, supra. Moreover, laches dictates that petitioners' late-filed claims be dismissed. See Point I, supra. Based on these grounds for denial of the petition, petitioners cannot establish a likelihood of success on the merits.

[11] The preliminary injunction request here mirrors the relief demanded in the petition. To the extent that it does, "absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment." Board of Mgrs. of Wharfside Condominium v. Nehrich, 73 A.D.3d 822, 824 (2d Dep't 2010) (quoting SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d 727, 728 (2005)).

B. Petitioners Have Not Established Irreparable Harm.

In order to prevail on an application for a preliminary injunction, the moving party must demonstrate a danger of irreparable injury if an injunction were not issued. See Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862 (1990). It is well settled that irreparable harm "must be shown by the moving party to be imminent, not remote or speculative." Golden v. Steam Heat, 216 A.D.2d 440, 442 (2d Dep't 1995); see also Willow Media, LLC v. City of N.Y., 78 A.D.3d 596, 596 (1st Dep't 2010); Buffalo v Mangan, 49 A.D.2d 697, 697 (4th Dep't 1975).

In support of the instant applications for a preliminary injunction, petitioners advance three theories of irreparable harm: (1) the substantial cost of compliance with the Rule; (2) the cost of compliance with the Rule are unrecoverable or recoupable; (3) compliance with the Rule will allegedly result in loss of customers, business and goodwill. See Petitioners' Memorandum of Law ("Juno Mem.") at 15-17. Each of these theories is speculative and remote.

i. Petitioners' Claims of Substantial and Unrecoverable Costs are Speculative and Therefore do Not Constitute Irreparable Harm.

Petitioners maintain that the alleged substantial costs of compliance with the FHV Driver Pay Rule constitutes irreparable harm. The costs petitioners present, however, are highly speculative and do not warrant enjoining implementation. Moreover, economic injury alone, which may be compensable by money damages, does not constitute irreparable harm. See Wall Street Garage Parking Corp. v. New York Stock Exchange, Inc., 10 A.D.3d 223, 228 (1st Dep't 2004); Di Fabio v. Omnipoint Communications, Inc., 66 A.D.3d 635, 636-37 (2d Dep't 2009);

330 East 72nd Street Condo. v. Colmenares, 2014 N.Y. Slip Op. 31301(U), 2014 N.Y. Misc. LEXIS 2291, **5-6 (Sup. Ct., N.Y. County May 19, 2014).[12]

A preliminary injunction "should be awarded sparingly, and only where the party seeking it has met its burden of proving both the clear right to the ultimate relief sought, and the urgent necessity of preventing irreparable harm." Buffalo v. Mangan, 49 A.D.2d at 697 (emphasis added); see also Board of Educ. of Union Free School Dist. No. 3 v. National Educ. Ass'n of U.S., 63 Misc. 2d 338, 341 (Sup Ct, Suffolk County 1970) ("an injunction should issue only where the peril to the plaintiff is very substantial and imminent").

Petitioners' claim of imminent harm fails to account for the flexibility built into the FHV Driver Pay Rule, which provides for a one-year Initial Utilization Rate period where all bases would start out with the same utilization rate. Pursuant to Rule 59B-24(b)(1):

> For the twelve (12) months following the effective date of 35 RCNY § 59B-24, the Utilization Rate for all Bases…will be the aggregate Utilization Rate of all Bases subject to Subdivision (a), as calculated by the Commission. For the twelve (12) months following the effective date of 35 RCNY § 59B-24, the Utilization Rate for all Bases…will be the aggregate Utilization Rate of all Bases subject to Subdivision (a), as calculated by the Commission.

[12] Relying on Metropolitan Taxicab Bd. of Trade v. TLC, 115 A.D.3d 121 (1st Dep't 2014), and Metropolitan Taxicab Bd. of Trade v. City of N.Y., 2008 U.S. Dist. LEXIS 94021 (S.D.N.Y. Oct. 31, 2008), petitioners argue that they are entitled to a finding of irreparable harm because damages are not available in the instant proceeding and because TLC is immune from civil liability that results from its rule making function. See Juno Mem. at 15-17. While it is true that damages are not available in the instant proceeding, the absence of available damages herein does not foreclose all other methods of recovery. In any event, even if petitioners are correct in asserting that they have no recourse in the absence of a preliminary injunction, the highly speculative nature of petitioners' claims of irreparable harm based on compliance costs precludes issuance of an injunction.

The FHV Driver Pay Rule also provides for evaluation by the Commission no less than annually. Pursuant to Rule 59B-24(d):

> No less than annually, the Commission will review Driver, Vehicle Owner, and Base expenses, Driver earnings, the impact on Utilization Rates of Drivers making themselves available to accept dispatches from multiple Bases, service levels, and any other information it deems relevant to determine if adjustments need to be made to the rates set forth in Subdivision (a) of this section.

The flexibility built into the FHV Driver Pay Rule of the Initial Utilization Rate period and of the periodic review establishes the speculative nature of Petitioners' claimed irreparable injury. Moreover, Petitioners' claim that the Initial Utilization Rate does not solve the FHV Driver Pay Rule is unavailing. Juno Petition at ¶ 73. Juno itself is benefitting from the increase of the aggregate Initial Utilization Rate based upon other the contributions to the aggregate Utilization Rate of the other Large FHV companies. See Heinzen Aff. at ¶ 69.

Notwithstanding the apparent lack of imminence, it is unlikely that petitioners will bear the ultimate cost of implementation. Unlike medallion taxis, TLC does not regulate fare amounts charged by FHVs (35 RCNY § 58-26) and FHVs may charge any rate of fare they choose so long as it is within the rate cards submitted to TLC (35 RCNY § 59B-23). As such, FHVs may charge passengers increased fares to either assist with, or cover entirely, any costs associated with compliance with the Rule. Indeed, petitioners readily admit that the cost of implementation will ultimately fall on the consumer. "[C]ompanies will inevitably be forced to increase their fares to make the higher mandated payments to their drivers." Petition, ¶ 11.

Petitioners operate "in a regime that is heavily regulated." See Progressive Credit Union v. City of N.Y., 2018 U.S. App. LEXIS 11233, *23 (2d Cir. 2018). Moreover, "TLC was created with the stated purpose of continuance, further development and improvement of taxi and

limousine service in the city of New York." Id. (internal citations omitted). Business model flexibility is "to be expected from a Rule that attempts to increase the number of WAVs available to disabled riders." Livery Round Table, Inc., 2018 U.S. Dist. LEXIS 65524, at 31. Adapting to accommodate a lawful rule that "plainly further[s] an important public interest" and does not amount to imminent irreparable harm. Id. Petitioners' blatant attempt to avoid complying with the FHV Driver Pay Rule is not a basis to warrant an injunction.

ii. Petitioners have Not Demonstrated an Imminent Risk of Loss of Customers, Business and Good Will.

Petitioners' general claim of imminent risk of loss of customers, business and good will is mostly a reiteration of its claims of irreparable economic injury and, as set forth above, economic injury alone does not constitute irreparable harm. See POINT B(i). Petitioners asserts that implementing the rule will require a fundamental change in its business and limit the number of its drivers and that the FHV Driver Pay Rule will "damage Juno's relationships with its drivers and its goodwill in the driver community." (Juno Mem. at 16) . This is in stark contrast to what TLC heard from drivers about the lack of a livable wage. Nevertheless, such a speculative risk is not irreparable harm warranting a preliminary injunction. Petitioners also point to the Company Specific Utilization Rate as irreparable harm. As stated above, the Company Specific Utilization Rate is reasonable and rational as a means of incentivizing higher utilization rates. Furthermore, during the Initial Utilization Rate period, Juno is benefiting from Via's higher Company Specific Utilization rate, which undercuts their position that they will suffer any imminent risk. See POINT B(i) above; Heinzen Aff. at ¶ 68.

C. The Balance of Equities Clearly Favors the City.

Finally, petitioners have not shown that on balance the equities lie in their favor. Petitioners "must [show] that the irreparable injury to be sustained . . . is more burdensome to

[the petitioners] than the harm caused to the [City] through imposition of the injunction." Nassau Roofing & Sheet Metal Co. v. Facilities Development Corp, 70 A.D.2d 1021, 1022 (3d Dep't 1979), app. dismissed, 48 N.Y.2d. 654 (1979). In making this determination, the Court must weigh the interests of the general public as well as the interests of the parties to the litigation. See DePina v. Educational Testing Service, 31 A.D.2d 744, 745 (2d Dep't 1969); Hill v. Boufford, 141 Misc. 2d 654, 658 (Sup. Ct., N.Y. Co. 1988). In balancing the equities, a court is required to consider the public interest. Depina v. Educ. Testing Svc., 31 A.D.2d 744, 744 (2d Dep't 1969); Greenwich Towers Associates v. McLean, Grove & Co., Inc., 17 A.D.2d 733, 733 (1st Dep't 1962); International Railway Co. v. Barone, 246 App. Div. 450 (4th Dep't 1935). In fact, it has been stated that "the court must consider and attach paramount importance to the public interest aspects of the litigation." Metropolitan Transp. Auth. v. Village of Tuckahoe, 67 Misc.2d 895, 900 (Sup. Ct. Westchester Co. 1971), aff 'd, 38 A.D.2d 570 (2d Dep't 1972).

As discussed above, petitioners have not established imminent irreparable harm based upon the Rule. Thus, they cannot maintain that the equities tip in their favor on this basis. Rather, the equities tip decidedly in favor of the implementation of the Rule, which is intended to benefit the FHV drivers with a livable wage. When the speculative, cost-based harms asserted by petitioners are weighed against the rule's goal of providing income protection and financial stability to FHV drivers, to reverse the trend of a decrease in earnings of FHV drivers, to provide income transparency in the financial relationships among FHV drivers, vehicle owners and FHV bases and to optimize the utilization of the FHV drivers in a exponentially increasingly crowded industry, it is clear that a balancing of the equities favors respondents.

POINT V

PETITIONERS ARE NOT ENTITLED TO ATTORNEY'S FEES OR LEGAL COSTS.

Petitioners are not entitled to costs, fees, and disbursements incurred in connection with this proceeding, as such items are not available against the City in an Article 78 proceeding. See Cosgrove v. Hanson, 58 A.D.2d 911 (3d Dep't 1977); see also Thomashefsky v. Supreme Court, 232 A.D.2d 572 (2d Dep't 1996). While CPLR §§ 8600 - 8605 allow for recovery of attorney's fees in certain instances in actions and proceedings against the State, no such allowance is made for actions and proceedings against municipalities. See CPLR §8602(g); Apollon v. Giuliani, 246 A.D.2d 130, 135 - 36 (1st Dep't. 1998), lv. app. denied 92 N.Y.2d 1046 (1999). TLC is neither the State, nor a State agency within the meaning in CPLR § 8602 (g). It is an agency of the City. See New York City Charter §1802. Accordingly, Petitioners are not entitled to attorney's fees or legal costs against them in this proceeding.

CONCLUSION

For the foregoing reasons, the petition should be dismissed in its entirety and the petitioners' request for a preliminary injunction should be denied, together with such other and further relief as this Court may seem just, proper and equitable.

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