

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

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VERIFIED ANSWER

OMAHA LLC and VULCAN CARS LLC

Index No. 650574/2019

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.

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Respondents, the New York City Taxi & Limousine Commission (“TLC”), and Meera Joshi, in her official capacity as Chair, Commissioner, and Chief Executive Officer of the New York City Taxi and Limousine Commission, by their attorney, ZACHARY W. CARTER, Corporation Counsel of the City of New York, for their answer to the petition, respectfully allege the following upon information and belief:

1. Deny the allegations set forth in paragraph “1” of the petition, except admit that petitioners are challenging rule adopted by TLC on December 4, 2018 that establishes minimum payments standards for drivers dispatched by a high-volume for-hire service (hereinafter, the “Large FHV Company”),¹ codified at Title 35 of the Rules of the City of New York (“RCNY”), § 59B-24 (the “FHV Driver Pay Rule” or “Rule”).

2. Deny the allegations set forth in paragraph “2” of the petition, except admit that Petitioners are for-hire vehicle (“FHV”) bases licensed by TLC, and deny knowledge

¹ The Large FHV Companies currently are Juno, Lyft, Uber, and Via.

or information sufficient to form a belief as to the truth of the allegations concerning what Juno pays its FHV drivers.

3. Deny the allegations set forth in paragraph “3” of the petition, and respectfully refer the Court to the Transcript of the December 4, 2018 TLC Commission Meeting for a complete and accurate statement of the proceeding, a copy of which is annexed to the Affidavit of William M. Heinzen (“Heinzen Aff.”) as Exhibit V.

4. Deny the allegations set forth in paragraph “4” of the petition.

5. Deny the allegations set forth in paragraph “5” of the petition, except admit that after an extensive rule-making process TLC adopted the FHV Driver Pay Rule on December 4, 2018, that the rule sets forth a formula under which the Large FHV Companies are to minimally compensate their drivers for their work with the companies, and that the formula incorporates a utilization standard.

6. Deny the allegations set forth in paragraph “6” of the petition, except admit that the pay formula of the FHV Driver Pay Rule adjusts to a utilization rate specific to each Large FHV Company one year after the effective date of the FHV Driver Pay Rule.

7. Deny the allegations set forth in paragraph “7” of the petition, except admit that the “per-mile” rate of the FHV Driver Pay Rule compensates drivers for the expenses of driving for the high-volume for-hire service.

8. Deny the allegations set forth in paragraph “8” of the petition.

9. Deny the allegations set forth in paragraph “9” of the petition, except admit the FHV Driver Pay Rule was informed in part by a July 2018 report by Dr. James A. Parrott and Dr. Reich, entitled “An Earnings Standard for New York City’s App-based Drivers: Economic Analysis and Policy Assessment” (the “FHV Driver Pay Report”), annexed to the

Heinzen Aff. as Exhibit P, and respectfully refer the Court thereto for its full content and true meaning.

10. Deny the allegations set forth in paragraph “10” of the petition, and respectfully refer the Court to the TLC industry notice to the Large FHV Companies, dated December 21, 2018, annexed to the Heinzen Aff. as Exhibit X, for its full content and true meaning.

11. Deny the allegations set forth in paragraph “11” of the petition.

12. Deny the allegations set forth in paragraph “12” of the petition.

13. Deny the allegations set forth in paragraph “13” of the petition.

14. Deny the allegations set forth in paragraph “14” of the petition, except admit that the City is studying the utilization in accordance with New York City Administrative Code (“Admin. Code”) § 19-550.

15. Deny the allegations set forth in paragraph “15” of the petition, and respectfully refer the Court to the FHV Driver Pay Report, annexed to the Heinzen Aff. as Exhibit P, for its full content and true meaning.

16. Deny the allegations set forth in paragraph “16” of the petition.

17. Deny the allegations set forth in paragraph “17” of the petition, except admit that, in accordance with Admin. Code § 19-549, the FHV Driver Pay Rule applies to Large FHV Companies that dispatch 10,000 or more trips per day, which includes Juno.

18. Deny the allegations set forth in paragraph “18” of the petition, except admit that the FHV Driver Pay Rule seeks to minimally compensate drivers for the total time, both trip time and non-trip time, they are working for the Large FHV Companies.

19. Deny the allegations set forth in paragraph “19” of the petition, and respectfully refer the Court to Local Law 150 of 2018 (“LL 150”), codified as Admin. Code § 19-549(b) and annexed to the Heinzen Aff. as Exhibit R, for its full content and true meaning.

20. Deny the allegations set forth in paragraph “20” of the petition.

21. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “21” of the petition, except admit Petitioners obtained their TLC base licenses to operate in New York City (the “City”) in 2016.

22. Deny the allegations set forth in paragraph “22” of the petition, except admit that TLC is an agency of the City of New York authorized to operate pursuant to Chapter 65 of the New York City Charter (“City Charter”) and respectfully refer the Court to the Charter and relevant provisions of title 19, chapter 5 of the New York City Administrative Code (“Admin. Code”) for a complete description of the jurisdiction and powers of TLC, and that TLC’s executive staff and operations are located at 33 Beaver Street, New York, N.Y. 10004.

23. Deny the allegations set forth in paragraph “23” of the petition; except admit that respondent Meera Joshi is the Chair, Commissioner, and Chief Executive Officer of TLC and served in that role at the time the FHV Driver Pay Rule was promulgated, and that Commissioner Joshi’s principal place of business is located at 33 Beaver Street, New York, N.Y. 10004.

24. Deny the allegations set forth in paragraph “24” of the petition, except admit that this Court has subject matter jurisdiction over this proceeding and that petitioners purport to proceed as set forth therein.

25. Deny the allegations set forth in paragraph “25” of the petition, except admit that venue properly lies in New York Supreme Court, New York County.

26. Deny that the allegations set forth in paragraph “26” of the petition completely and accurately describe FHV industry.

27. Deny that the allegations set forth in paragraph “27” of the petition completely and accurately describe FHV industry.

28. Deny that the allegations set forth in paragraph “28” of the petition completely and accurately describe FHV industry.

29. Deny that the allegations set forth in paragraph “29” of the petition completely and accurately describe FHV industry.

30. Deny the allegations set forth in paragraph “30” of the petition, except admit that Petitioners are regulated by TLC.

31. Deny the allegations set forth in paragraph “31” of the petition, except admit that Uber began operating in the City in 2011.

32. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “32” of the petition, except admit Juno began operating in the City in 2016.

33. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “33” of the petition.

34. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “34” of the petition.

35. Deny the allegations set forth in paragraph “35” of the petition, except admit that Large FHV Companies and other FHV bases challenged TLC’s rule to establish meaningful wheelchair accessible service and that the parties to the litigation settled the matter.

36. Deny the allegations set forth in paragraph “36” of the petition, except admit that TLC held a public hearing on industry economics on April 6, 2017, that economist Dr. James Parrott testified at the public hearing, that TLC hired Dr. James Parrott and Dr. Michael Reich to study FHV driver day and propose a pay standard, and that Dr. Parrott and Dr. Reich issued the FHV Driver Pay Report in July 2018. Deny the allegations set forth in footnote “17” to paragraph “36” of the petition, and respectfully refer the Court to the FHV Driver Pay Report, annexed to the Heinzen Aff. as Exhibit P, for its full content and true meaning.

37. Deny that the allegations set forth in paragraph “37” of the petition, except admit that Introduction No. 890 of 2018 was introduced in the New York City Council in early 2018 and respectfully refer the Court to the New York City Council Committee Report, annexed to the Heinzen Aff. as Exhibit A, for its full content and true meaning.

38. Deny the allegations set forth in paragraph “38” of the petition, except admit that FHV Committee of the New York City Council held a hearing on April 30, 2018 on proposed legislation, including Introduction 890, and respectfully refer the Court to Introduction 890 for its full content and true meaning.

39. Deny the allegations set forth in paragraph “39” of the petition, except admit that, on August 8, 2018, Mayor Bill de Blasio signed Introduction 890-B into law as LL 150, and respectfully refer the Court to LL 150, annexed to the Heinzen Aff. as Exhibit R, for its full content and true meaning.

40. Deny the allegations set forth in paragraph “40” of the petition, and respectfully refer the Court to the August 28, 2018 Notice of Public Hearing and Opportunity to Comment on the proposed FHV Driver Pay Rule (the “proposed rule”), annexed to the Heinzen Aff. as Exhibit S, for its full content and true meaning.

41. Deny the allegations set forth in paragraph “41” of the petition, except admit that TLC increased the per-mile rates for the FHV Driver Pay Rule and that the Rule sets a higher minimum standard for drivers of wheelchair accessible vehicles (“WAVs”) and respectfully refer the Court to the FHV Driver Pay Rule for its full content and true meaning.

42. Deny the allegations set forth in paragraph “42” of the petition, except admit that the FHV Driver Pay Rule establishes data reporting requirements for the Large FHV Companies and respectfully refer the Court to the FHV Driver Pay Rule for its full content and true meaning.

43. Deny the allegations set forth in paragraph “43” of the petition, except admit that TLC held a public hearing on the proposed rule on October 3, 2018.

44. Deny allegations set forth in paragraph “44” of the petition, except admit that New York City Council Member Brad Lander was the prime sponsor of LL150 and respectfully refer the Court to the Transcript of the October 3, 2018 TLC Commission Meeting, annexed to the Heinzen Aff. as Exhibit T, for a complete and accurate statement of Council Member Lander’s testimony.

45. Deny the allegations set forth in paragraph “45” of the petition, and respectfully refer the Court to the written testimony of NYC Council Member Brad Lander, annexed to the Heinzen Aff. as part of Exhibit U, for its full content and true meaning.

46. Deny the allegations set forth in paragraph “46” of the petition, and respectfully refer the Court to the written testimony of NYC Council Member Brad Lander, annexed to the Heinzen Aff. as part of Exhibit U, for its full content and true meaning.

47. Deny the allegations set forth in paragraph “47” of the petition, except admit Joseph Okpaku testified on behalf of Lyft at the October 3, 2018 TLC Commission

Meeting on the proposed rule and respectfully refer the Court to the Transcript of the October 3, 2018 TLC Commission Meeting, annexed to the Heinzen Aff. as Exhibit T, for a complete and accurate statement of Mr. Okpaku's testimony.

48. Deny the allegations set forth in paragraph "48" of the petition, and respectfully refer the Court to Lyft's written comments on the proposed rule, annexed to the Heinzen Aff. as part of Exhibit U, for its full content and true meaning.

49. Deny the allegations set forth in paragraph "49" of the petition, except admit Andrei Greenwalt testified on behalf of Via at the October 3, 2018 TLC Commission Meeting on the proposed rule and respectfully refer the Court to the Transcript of the October 3, 2018 TLC Commission Meeting, annexed to the Heinzen Aff. as Exhibit T, for a complete and accurate statement of Mr. Greenwalt's testimony.

50. Deny the allegations set forth in paragraph "50" of the petition, and respectfully refer the Court to Dave MetroBuggy's written comments on the proposed rule, annexed to the Heinzen Aff. as part of Exhibit U, for its full content and true meaning.

51. Deny the allegations set forth in paragraph "51" of the petition, except admit that TLC published a Notice of Promulgation of the FHV Driver Pay Rule on November 30, 2018 in anticipation of a vote by the TLC Commissioners on the Rule at the December 4, 2018 Commission Meeting and that the notice reflected changes made to the proposed rule.

52. Deny the allegations set forth in paragraph "52" of the petition, and respectfully refer the Court to the FHV Driver Pay Rule, annexed to the Heinzen Aff. as Exhibit P, for its full content and true meaning.

53. Deny the allegations set forth in paragraph "53" of the petition, except admit that TLC Commissioners approved the FHV Driver Pay Rule on December 4, 2018 by 7-1

vote and respectfully refer the Court to the Transcript of the December 4, 2018 TLC Commission Meeting, annexed to the Heinzen Aff. as Exhibit V, for a complete and accurate statement of Commissioner Marino's remarks.

54. Deny the allegations set forth in paragraph "54" of the petition, except admit that the FHV Driver Pay Rule was published in the *City Record* on December 11, 2018 and pursuant to the New York City Administrative Procedure Act, a rule takes effect 30 days after publication date in the *City Record*.

55. Deny the allegations set forth in paragraph "55" of the petition, except admit that, on December 21, 2018, TLC informed the Large FHV Companies of the utilization rates in effect from February 2019 through June 2019 and respectfully refer the Court to the December 21, 2018 notice, annexed to the Heinzen Aff. as Exhibit X, for its full content and true meaning.

56. Deny the allegations set forth in paragraph "56" of the petition, and respectfully refer the Court to TLC's December 21, 2018 notice on utilization rates, annexed to the Heinzen Aff. as Exhibit X, for its full content and true meaning.

57. Deny the allegations set forth in paragraph "57" of the petition, and respectfully refer the Court to TLC's December 21, 2018 notice on utilization rates, annexed to the Heinzen Aff. as Exhibit X, for its full content and true meaning.

58. Neither admit nor deny the allegations set forth in paragraph "58" of the petition as it consists of legal argument to which no response is required; however to the extent that this Court requires a response, deny the allegations set forth in said paragraph, and respectfully refer the Court to CPLR § 7803 and to the cited cases for their full content and true meaning.

59. Neither admit nor deny the allegations set forth in paragraph “59” of the petition as it consists of legal argument to which no response is required; however to the extent that this Court requires a response, deny the allegations set forth in said paragraph, and respectfully refer the Court to the cited cases for their full content and true meaning.

60. Deny the allegations set forth in paragraph “60” of the petition and in the accompanying footnote “43.”

61. Deny the allegations set forth in paragraph “61” of the petition.

62. Deny the allegations set forth in paragraph “62” of the petition, except admit that the FHV bases subject to the FHV Driver Pay Rule will be subject to a company-specific utilization rate following an “Initial Utilization Rate” period unless TLC determines otherwise, and respectfully refer the Court to the FHV Driver Pay Rule for its full content and true meaning.

63. Deny the allegations set forth in paragraph “63” of the petition.

64. Deny the allegations set forth in paragraph “64” of the petition, except admit that the FHV Driver Pay Rule provides for review of the utilization rates at least once a year and respectfully refer the Court to the FHV Driver Pay Rule, annexed to the Heinzen Aff. as Exhibit W, for its full content and true meaning.

65. Deny the allegations set forth in paragraph “65” of the petition.

66. Deny the allegations set forth in paragraph “66” of the petition.

67. Deny the allegations set forth in paragraph “67” of the petition, and respectfully refer the Court to the Transcript of the October 3, 2018 TLC Commission Meeting, annexed to the Heinzen Aff. as Exhibit T, for its full content and true meaning.

68. Deny the allegations set forth in paragraph “68” of the petition.

69. Deny the allegations set forth in paragraph “69” of the petition, and respectfully refer the Court to the FHV Driver Pay Report, annexed to the Heinzen Aff. as Exhibit P, for its full content and true meaning.²

70. Deny the allegations set forth in paragraph “70” of the petition.

71. Deny the allegations set forth in paragraph “71” of the petition.

72. Deny the allegations set forth in paragraph “72” of the petition.

73. Deny the allegations set forth in paragraph “73” of the petition.

74. Deny the allegations set forth in paragraph “74” of the petition.

75. Deny the allegations set forth in paragraph “75” of the petition.

76. Deny the allegations set forth in paragraph “76” of the petition.

77. Deny the allegations set forth in paragraph “77” of the petition, and respectfully refer the Court to the FHV Driver Pay Report, annexed to the Heinzen Aff. as Exhibit P, for its full content and true meaning.

78. Deny the allegations set forth in paragraph “78” of the petition.

79. Deny the allegations set forth in paragraph “79” of the petition.

80. Deny the allegations set forth in paragraph “80” of the petition.

81. Deny the allegations set forth in paragraph “81” of the petition.

82. Deny the allegations set forth in paragraph “82” of the petition.

83. Deny the allegations set forth in paragraph “83” of the petition.

84. Deny the allegations set forth in paragraph “84” of the petition.

² Petitioners are inconsistent regarding what percentage of ride-hail drivers responded to TLC’s survey. Here they allege 3.75%, whereas earlier in their answer they state 5.5%. See Petition at footnote “17.”

85. Deny that the allegations set forth in paragraph “85” of the petition, and respectfully refer the Court to the 2018 TLC Factbook, a copy of which is publically available online at https://www1.nyc.gov/assets/tlc/downloads/pdf/2018_tlc_factbook.pdf, for its full content and true meaning.

86. Deny the allegations set forth in paragraph “86” of the petition.

87. Deny the allegations set forth in paragraph “87” of the petition.

88. Deny the allegations set forth in paragraph “88” of the petition, aver that 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), and that 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” and respectfully and respectfully refer the Court those sections for their full content and true meaning.

89. Deny the allegations set forth in paragraph “89” of the petition, except admit that the Juno has been dispatching less New York City-based trips per day than Uber and Lyft since it received its first base license in 2016.

90. Deny the allegations set forth in paragraph “90” of the petition.

91. Deny the allegations set forth in paragraph “91” of the petition.

92. Deny the allegations set forth in paragraph “92” of the petition, and respectfully refer the Court to LL 150, codified as Admin. Code § 19-549 and annexed to the Heizen Aff. as Exhibit R, for its full content and true meaning.

93. Deny the allegations set forth in paragraph “93” of the petition, and respectfully refer the Court to LL 150, codified as Admin. Code § 19-549 and annexed to the Heinzen Aff. as Exhibit R, for its full content and true meaning.

94. Deny the allegations set forth in paragraph “94” of the petition, and respectfully refer the Court to the FHV Driver Pay Report, annexed to the Heinzen Aff. as Exhibit P, for its full content and true meaning.

95. Deny the allegations set forth in paragraph “95” of the petition.

96. In response to the allegations set forth in paragraph “96” of the petition, respondents repeat and re-allege their responses to paragraphs “1” through “95” of the petition as if fully set forth herein.

97. Deny the allegations set forth in paragraphs “97” through “107” of the petition.

98. In response to the allegations set forth in paragraph “108” of the petition, respondents repeat and re-allege their responses to paragraphs “1” through “107” of the petition as if fully set forth herein.

99. Neither admit nor deny the allegations set forth in paragraph “108” of the petition as it consists of legal argument to which no response is required; however to the extent that this Court requires a response, deny the allegations set forth in said paragraph.

100. Deny the allegations set forth in paragraphs “110” through “113” of the petition, and respectfully refer the Court to LL 150, codified as Admin. Code § 19-549 and annexed to the Heinzen Aff. as Exhibit R, for its full content and true meaning.

101. In response to the allegations set forth in paragraph “114” of the petition, respondents repeat and re-allege their responses to paragraphs “1” through “113” of the petition as if fully set forth herein.

102. Deny the allegations set forth in paragraphs “115” through “117” of the petition.

103. Deny the allegations set forth in paragraph “118” of the petition, except admit that respondents are not aware that petitioners herein have sought the relief requested herein.

104. Deny the allegations set forth in paragraph “119” of the petition, except admit petitioners purport to proceed as set forth therein.

STATUTORY FRAMEWORK

The Taxi and Limousine Commission of the City of New York (“TLC”)

105. Pursuant to Chapter 65 of the New York City Charter (“City Charter”), TLC was established to continue, further develop, and improve taxi and limousine service in the City of New York. City Charter § 2300. City Charter Section 2300 further provides, “[i]t shall be the further purpose of the commission . . . to adopt and establish an overall public transportation policy governing [vehicles] as it relates to the overall public transportation network of the city”

106. The jurisdiction, powers and duties of the TLC are set forth in City Charter § 2303. The City Charter authorizes TLC to adopt regulations pertaining to driver and public safety. Indeed, City Charter § 2303 provides, in pertinent part, as follows:

a. The jurisdiction, powers and duties of the commission shall include the regulation and supervision of the business and industry of transportation of persons by licensed vehicles for hire in the city, pursuant to the provisions of this Chapter.

b. Such regulation and supervision shall extend to:

* * *

2. The regulation and supervision of standards and conditions of service.

* * *

6. Requirements of standards of safety and design, comfort, and convenience . . . in the operation of vehicles

* * *

9. The development and effectuation of a broad public policy of transportation affected by this chapter as it relates to forms of public transportation in the city, including innovation and experimentation in relation to type and design of equipment, modes of service and manner of operation, which for limited purposes and limited periods of time may depart from the requirements otherwise established for licensed vehicles pursuant to this chapter.

* * *

11. The formulation, promulgation and effectuation of rules and regulations reasonably designed to carry out the purposes, terms and provisions of this chapter.

107. City Charter § 2303(b)(11) statement that TLC’s authority extends to “[t]he formulation, promulgation and effectuation of rules and regulations reasonably designed to carry out the purposes, terms and provisions of this chapter,” draws from Administrative Code § 19-503(a) direction to TLC to “promulgate such rules and regulations as are necessary to exercise the authority conferred upon it by the [City Charter] and to implement the provisions of this chapter.”

108. To this end, TLC is empowered to regulate the standards of vehicles and levels of service of FHV’s, including requiring that FHV drivers be paid a minimum pay constituting a livable wage, as part of TLC’s jurisdiction to develop “a broad public policy of transportation....” City Charter § 2303(b)(9).

109. Indeed, pursuant to this broad empowerment, TLC was authorized to promulgate the FHV Driver Pay Rule even absent a local law directly speaking to the issue. Nevertheless, Local Law 150 of 2018 requires TLC to, among other things, set minimum payments for for-hire vehicle drivers for trips dispatched by high volume for-hire services. It provides 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.

Local Law 150 of 2018 codified as Admin. Code § 19-549(b).

110. In furtherance of its authority under the City Charter and pursuant to Local Law 150 of 2018, TLC promulgated the FHV Driver Pay Rule (35 RCNY § 59B-24) requiring that FHV drivers be paid a minimum pay constituting a livable wage. FHV Driver Pay Rule was promulgated in accordance with the requirements of the City Administrative Procedure Act (“CAPA”), which is set forth in Chapter 45 of the City Charter.

FHV Driver Pay Rule

111. The FHV Driver Pay Rule provides, as follows:

(a) A Base that, on average, dispatches ten thousand or more trips per day, or a Base that is part of a group of Bases operating under the same public-facing trade, business or operating name that collectively dispatches more than ten thousand trips per day, must pay Drivers, at a minimum, the following amounts for each trip dispatched by the Base:

(1) *Per Mile Rate.* Beginning January 1, 2019, for each mile a Driver transports a Passenger in the City on a trip dispatched by the Base, the Base must pay the Driver no less than \$0.631 per mile for a trip dispatched to a Vehicle that is not an Accessible Vehicle and \$0.818 for a trip dispatched to an Accessible Vehicle, divided by the Base's Utilization Rate, and for trips that begin in the City but end outside of the City, the Base must pay the Driver no less than \$1.262 per mile for a trip dispatched to a vehicle that is not an Accessible Vehicle and no less than \$1.636 per mile for a trip dispatched to an Accessible Vehicle for each mile a Driver transports a Passenger outside of the City;

* * *

(2) *Per Minute Rate.* Beginning January 1, 2019, for each minute a Driver transports a Passenger in the City on a trip dispatched by the Base, the Base must pay the Driver no less than \$0.287 per minute, divided by the Base's Utilization Rate, and for each minute a Driver transports a Passenger outside of the City on a trip dispatched by the Base that began in the City and ended outside of the City, the Base must pay the Driver no less than \$0.574 per minute, and
112.

(3) *Shared Ride Bonus.* For each separate pick up on a trip where a Passenger shares the Vehicle for part or all of the trip with a Passenger from a separately dispatched call, the Base must pay the Driver the Shared Ride Bonus, in addition to the per mile and per minute rates.
113.

(4) *Consumer Price Index Adjustments.* Beginning January 1, 2020, and continuing each calendar year thereafter, the dollar amounts in the per mile rates and per minute rates contained in this subdivision will be adjusted using the 12-month Percentage Change in the Consumer Price Index for Urban Wage Earners and Clerical Workers for the NY-NJ-PA metro area. The Consumer Price Index adjusted per mile and per minute rates will be posted on the Commission's website.
114.

(5) *Hourly Payments.* If a Base subject to this section pays drivers on an hourly basis, the payment the Driver receives for each hour the Driver accepts dispatches from the Base must be at least the sum of the Per Mile Rate for all miles the Driver transported Passengers during the hour, the Per Minute Rate for all minutes the Driver spent transporting Passengers during the hour, and the Shared Ride Bonus for each applicable pick up performed during the hour.

35 RCNY § 59B- 24(a)	Fine: \$500 per instance of under payment. In addition to the penalty payable to the Commission, the Hearing Officer must order the Base to pay restitution to the Driver, equal to the amount not paid to the Driver in violation of this rule.	Appearance Required
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(b) *Utilization Rate.* The Commission will assess, and post on its website, the Utilization Rate for each Base subject to this section every six months. A group of Bases operating under the same public-facing trade, business, or operating name will be assessed one Utilization Rate, applicable to each individual Base in the group, calculated using the collective Driver availability and passenger trip times for all Bases in the group.

115.

(1) *Initial Utilization Rate.* For the twelve (12) months following the effective date of 35 RCNY § 59B-24, the Utilization Rate for all Bases subject to Subdivision (a) of this section will be the aggregate Utilization Rate of all Bases subject to Subdivision (a), as calculated by the Commission. A Base subject to Subdivision (a) may petition the Commission to calculate a Utilization Rate specific to the Base prior to the expiration of the twelve month Initial Utilization Rate period, but in no event will a Base subject to Subdivision (a) of this section have a Utilization Rate lower than the aggregate Utilization Rate of all Bases subject to Subdivision (a) for the twelve (12) months following the effective date of 35 RCNY § 59B-24.

(c) *Daily Average Trip Volumes.* The daily average trip volume for each Base and each group of Bases operating under the same public-facing trade, business or operating name will be assessed every six months. Bases that average over ten thousand trips per day over the most recent assessment period, and Bases that are parts of a group of Bases operating under the same public-facing trade, business or operating name that collectively average over ten thousand trips per day over the most recent assessment period, will be subject to the requirements of Subdivision (a) of this section until such time as the next assessment occurs.

(d) *Evaluation by the Commission.* 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.

RELEVANT FACTS

116. For the facts relevant to the instant Article 78 petition, respondents respectfully refer the Court to the Heinzen Aff. and the exhibits annexed thereto, for a complete recitation of the facts and administrative record relevant to the instant proceeding.

The Instant Article 78 Proceeding

117. By Order to Show Cause, signed by the Court on January 30, 2019 and amended by the Court on February 1, 2019, and the Verified Article 78 Petition, sworn to on January 30, 2019, petitioners commenced the instant proceeding seeking, inter alia, a judgment: (1) annulling the rule enacted by TLC on December 4, 2018, codified at 35 RCNY § 59B-24 (“FHV Driver Pay Rule”); (2) requesting an evidentiary hearing to resolve any material factual disputes; (3) and ordering respondents to pay costs, fees, and disbursements. Petitioners further seek the issuance of a preliminary injunction enjoining respondents from implementing and enforcing the FHV Driver Pay Rule pending a determination by this Court on the instant Article 78 proceeding.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

118. The petition is barred by the doctrine of laches and must be dismissed.

119. 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. Here, petitioners’ delay not only prejudices respondents, but it clearly prejudices FHV drivers by preventing them from earning a fair and equitable livable wage.

120. Despite the fact that the FHV Driver Pay Rule was adopted on December 4, 2018, petitioners waited until its effective date had run, which is 30 days after its publication in the City Record on December 11, 2018, and did not commence the instant proceeding challenging the rule until January 30, 2019. Petitioners sat on their heels and did nothing to

attempt to challenge the proposed rule until two days prior to TLC scheduled commencement of enforcement – February 1, 2019.

121. Because petitioners waited too long to attempt to vindicate their rights, the proceeding must be dismissed due to laches.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

122. TLC's adoption of the FHV Driver Pay Rule was rational, reasonable, within TLC's discretion and entirely lawful. In reviewing the rationality of an agency's actions, the Court must determine whether the action had a rational basis in the record or was arbitrary and capricious. Moreover, an administrative agency's exercise of its rule-making authority is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise. As more fully set forth in respondents' accompanying Memorandum of Law, TLC's adoption of the FHV Driver Pay Rule was supported by the substantial evidence within the record, and, therefore, was a proper exercise of TLC's discretion.

123. Pursuant to its broad delegation of powers to regulate all aspects of the for-hire transportation industry in New York City and to effectuate an overall public transportation policy, see N.Y.C. Charter § 2303, TLC engaged in a years-long process to develop the carefully-crafted FHV Driver Pay Rule as a means of providing income protection and financial stability to FHV drivers, to reverse the trend of a decrease in FHV driver earnings, 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.

124. In April 2017, in light of concerns about low driver pay in the FHV sector, TLC held a six-hour public hearing on industry economics and heard from drivers, economists,

and industry groups on a range of issues, including the effect of the independent driver classification of FHV drivers on driver income. See Exhibit J to Heinzen Aff. Following the hearing, TLC retained 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 undertake a months-long study of FHV driver income that included an analysis of data obtained directly from the Large FHV Companies. In July 2018, Dr. Parrott and Dr. Reich issued their report, entitled “An Earnings Standard for New York City’s App-based Drivers: Economic Analysis and Policy Assessment.” The Report found that a majority of drivers work full time as drivers, that driver pay is decreasing, and that drivers bear enormous expenses to operate FHV’s. 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. See generally Exhibit P to Heinzen Aff.

125. To address these issues, the Report proposed a formula to minimally compensate drivers for both their time and expense of operating an FHV. The proposed formula consists of a per minute rate, which compensates a driver’s time, and a per mile rate, which compensates a driver’s expenses. The proposed formula further divides both the per-minute and per-mile rates by a company-specific utilization rate (“UR”), which calculates the percentage of time a company’s drivers spend transporting passengers while logged-on to the company’s platform. The UR component is designed to compensate drivers for currently uncompensated work-related time and expense when a passenger is not in the vehicle. A 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. See id.

126. 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. See Id.

127. 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, with the adoption of Local Law 150 of 2018, codified at Admin. Code § 19-549, the New York City Council affirmed the findings in the Report and endorsed the concept of the proposed pay formula. Specifically, Local Law 150 of 2018 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, including utilization rates.

128. Following adoption of the local law, TLC published the proposed rule setting forth the minimum pay standard, as developed in the Report, and received significant feedback from the public through written comments, meetings, and a public hearing. TLC incorporated many comments into the final rule and reasonably determined not to incorporate others. Significantly, based on comments from the Large FHV Companies about URs, TLC refined the company-specific utilization rate based on data from the Large FHV Companies. It further established an initial industry-wide utilization rate for the first year so that companies have an opportunity to improve their utilization rate before they are subject to the company-specific rate. It also established regular reviews thereafter so that timely adjustments can be made where appropriate. Finally, to address overlapping multiple platform use, TLC determined it would split the time drivers spend idling on multiple apps evenly between each company.

129. TLC considered various mechanisms for measuring compliance with the pay standard. 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 “economically” for Lyft 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 Exhibit U to Heinzen Aff. 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 Exhibit T to Heinzen Aff. at 104-5. Council Member Brad Lander, the prime sponsor of Local Law 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 Exhibit U to Heinzen Aff. 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. fn. 16.

130. The record before TLC establishes a reasonable basis to adopt the FHV Driver Pay Rule. The FHV Driver Pay Rule was carefully crafted after years of studying the issue and reasonably based on broad judgmental considerations. Accordingly, TLC’s promulgation of the FHV Driver Pay Rule was within its statutory authority, supported by the record, and thus rational and reasonable.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

131. The FHV Driver Pay Rule is fully supported by and consistent with local law and thus is neither unreasonable nor ultra vires.

132. Admin. Code § 19-549 permits TLC incorporate FHV Drivers' total work time on a FHV Company's platform for the purpose setting a per-trip payment standard. See Petition ¶ 93. 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 to Heinzen Aff.

133. Admin. Code § 19-549(a) permits the TLC set minimum payment standards for drivers dispatched by a "high-volume for-hire service," which is defined as an FHV company, such as Juno, that dispatches 10,000 or more trips per day. See Admin. Code § 19-502(gg) (defining "high-volume for-hire service").

134. Admin. Code § 19-550 requires the City to study a range of topics, including traffic congestion, traffic safety, vehicle utilization standards, driver income and work hours, 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. See Admin. Code § 19-549(d) and § 19-550(b). Thus, it was not unreasonable to adopt the FHV Driver Pay Rule prior to completion of the study.

135. The method of meeting the Rule's pay standard on either a per-trip or hourly basis is consistent with Admin. Code § 19-549(a). As proper reading of law 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.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

136. Petitioners are not entitled to a judgment permanently and preliminarily enjoining the FHV Driver Pay Rule. As more fully set forth in the accompanying Memorandum of Law, petitioners have failed to meet their burden of satisfying the prerequisites for preliminary injunctive relief. Specifically, petitioners are: (1) unlikely to succeed on the merits of their claim for all the reasons set forth above; (2) petitioners will not be irreparably injured if injunctive relief is not granted; and (3) the balance of equities favor respondents (and FHV drivers). As such, petitioners' request for preliminary injunctive relief should be denied.

137. As to petitioners' request for permanent injunctive relief, vacating and annulling the FHV Driver Pay Rule, petitioners are not entitled to such relief for all of the reasons set forth herein and in the accompanying Memorandum of Law.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

138. Petitioners' request for an evidentiary hearing to "resolve any material factual disputes" should not be considered. Petition, "Wherefore Clause," ¶ B. First, a "hearing" is not provided for in an Article 78 proceeding. Second, 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, as the record is sufficiently developed for the

Court to evaluate the rationality of the FHV Driver Pay Rule, petitioners' request for a trial should be denied.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

139. As to petitioners' request for an award of costs, fees and disbursements, attorneys' fees are not available to petitioners pursuant to CPLR § 8101 in this Article 78 proceeding.

WHEREFORE, respondents respectfully request that the petition be denied in its entirety, together with such other and further relief as this Court deems appropriate.

Dated: New York, New York
February 26, 2019

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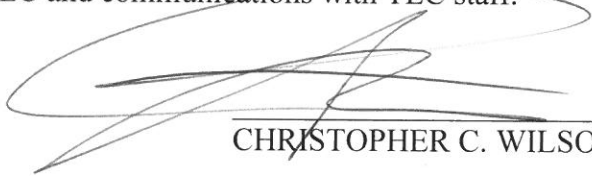
By: _____/s/
Pamela A. Koplik
Assistant Corporation Counsel

VERIFICATION

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

CHRISTOPHER C. WILSON, being duly sworn, deposes and says:

I am General Counsel of the New York City Taxi and Limousine Commission (“TLC”), the respondent in the within proceeding. In this capacity I am authorized to verify pleadings on behalf of the TLC. I have read the foregoing answer and upon information and belief, I believe the contents to be true. The source of my information and the basis for my belief are the books and records of the TLC and communications with TLC staff.


CHRISTOPHER C. WILSON

Sworn to before me this
26 day of February, 2019.



NOTARY PUBLIC

SHERRYL A. ELUTO
Notary Public, State of New York
No. 02EL5072220
Qualified in Kings County
Commission Expires March 06, 2019