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.

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AFFIDAVIT IN OPPOSITION TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION AND IN OPPOSITION TO THE PETITION

Index No. 650574/2019

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

WILLIAM M. HEINZEN, being duly sworn, deposes and says:

1. I am the Deputy Commissioner for Policy and External Affairs of the New York City Taxi and Limousine Commission ("TLC"). I have been employed by TLC since September 2016, previously serving as Special Advisor for Strategic Affairs. As the Deputy Commissioner, I am responsible for supervising staff members within the policy department, which includes data and technology, external affairs, intergovernmental affairs, and the driver education program. Additionally, I report directly to the Commissioner/Chair and advise her on agency policy, analyze proposed legislation that could impact the agency, and review comment on potential agency rulemaking. I submit this affidavit in support of respondents' Verified Answers, in opposition to petitioners' motions for a preliminary injunction, and to place certain facts and documents on the record of this proceeding.

2. I make this affidavit based upon my personal knowledge, my review of records maintained by TLC and the City of New York, communications with TLC staff, and upon statements made by employees, officers and agents of the City of New York.

The Transportation For Hire Industry

3. Broadly speaking, TLC regulates three distinct transportation for hire sectors: (1) yellow medallion taxis; (2) street hail liveries ("SHLs" or "green taxis"); and (3) for-hire vehicles ("FHVs"), which includes black cars, liveries, and luxury limousines.

4. Yellow medallion taxis are permitted to accept trips by street hail anywhere in New York City. New York City Administrative Code ("Admin. Code") § 19-504(a). Yellow medallion taxis can also accept trips that are pre-arranged through, for example, an electronic app, or a central dispatcher. See 35 RCNY 58-38(g); 35 RCNY 58-16(b).

5. SHLs are permitted by state law to accept trips by street hail outside of the central Manhattan business district and the airports.[1] Ch. 602, 2011 N.Y. Sess. Laws 1558 (McKinney), as amended by Act of Feb. 17, 2012, ch. 9, 2012 N.Y. Sess. Laws 23 (McKinney) ("HAIL Act"). SHLs are also permitted to accept trips by prearrangement through a TLC-licensed FHV base anywhere in the City, except in the central Manhattan business district. Id.

6. FHVs are authorized to accept pre-arranged trips anywhere in the City, provided that it is pre-arranged through a TLC-licensed FHV base. See Admin. Code § 19-506(b); 35 RCNY § 59A-25(a).

7. In order to accept dispatches, each FHV must be affiliated with a base that is licensed by TLC. See 35 RCNY § 59A-04(h). An FHV gains its classification by affiliating

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[1] The Manhattan district where SHLs/green taxis cannot operate consists of Manhattan south of East 96th St. and West 110th St. See Chapter 9 of the Laws of 2012 (N.Y.), § 4(c) (defining "Hail exclusionary zone").

with a specific class of FHV base. For example, an FHV affiliated with a livery base becomes a livery vehicle, an FHV affiliated with a black car base becomes a black car, and an FHV affiliated with a luxury limousine base becomes a luxury limousine.[2] See 35 RCNY § 59A-03.

8. For any trip in a yellow taxi, passengers pay a metered rate of fare set by TLC. See 35 RCNY § 58-26(a).

9. TLC does not currently regulate FHV passenger fares, and so for any trip in an FHV, passengers pay a fare set by the dispatching base (as long as it is within the rate schedule submitted to TLC by the FHV base). See 35 RCNY §§ 59B-21(a); 59B-23(a).[3]

10. In an SHL/green taxi, passengers pay the same metered rate of fare for street hail trips as in yellow taxis or a fare set by the dispatching base for any prearranged trip.

11. The number of yellow medallion taxis is capped by law at 13,587 and the number of SHLs/green taxis is capped by law at 18,000.

12. There had traditionally been no limit on the number of vehicles that TLC can license as an FHV. In August 2018, however, the New York City Council adopted a law that prohibits TLC from issuing new FHV licenses for 12 months, with certain exceptions, such as licenses for wheelchair accessible vehicles ("WAVs"). See Local Law 147 of 2018. In accordance with the local law, during the 12-month pause on issuing FHV vehicle licenses, the City is to study various aspects of the for-hire vehicle industry and determine whether to establish vehicle utilization standards or regulate the number of FHV licenses. See id.

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[2] Generally, black car and a luxury limousine bases must accept more than 90% of passenger payment on a basis other than cash and their affiliated vehicles can set up to 20 passengers, see 35 RCNY § 59A-03(c) and (m), while a livery base has no restrictions on cash payment but its affiliated vehicles can only seat fewer than six passengers, see 35 RCNY § 59A-03(k).

[3] FHV trips are subject to various surcharges and fees. See, e.g., Article 6-F of the New York State Executive Fund (surcharge for injury compensation fund) and Article 29-C of the New York State Tax Law (fee on passenger trips in a congestion zone).

App-based FHV Companies

13. Juno, Lyft, Uber, and Via (the "Large FHV Companies") operate in New York City through TLC-licensed FHV bases, typically, black car bases, but also livery bases, and dispatch trips through a smartphone application or app that connects drivers and passengers.

14. Uber received its first FHV base license from TLC in December 2011, followed by Via in June 2014, Lyft in July 2014, and Juno in April 2016.

15. Uber and Lyft generally have the same business model, providing a mix of individual and shared trips throughout the boroughs, whereas Via operates principally by providing shared rides at a flat fare to passengers. Juno operates similarly to Lyft and Uber but does not offer shared rides.

16. Under TLC rules, a FHV must affiliate with one FHV base, but may receive dispatches from FHV bases with which it is not affiliated. See 35 RCNY §§ 59A-04 and 59A—11(e). Uber has the largest number of affiliated vehicles. Lyft and Juno have less affiliated vehicles than Uber but dispatch a large number of unaffiliated vehicles.

Company	**Affiliated Vehicles (Feb 2019)**	**Dispatched vehicles 2018, quarterly**			
		Q1	*Q2*	*Q3*	*Q4*
Juno	294	25,663	25,568	25,397	24,572
Lyft	2,419	44,374	45,652	50,661	50,277
Uber	85,084	76,562	79,887	84,276	87,149
Via	1,901	7,778	8,256	8,959	8,827

17. The Large FHV Companies have expanded for-hire service to the outer boroughs. According to a report by the New York City Council FHV Committee, in 2017, 46%

of app-based FHV trips do not either start or end in the Manhattan core.[4] A copy of a New York City Council FHV Committee report is annexed hereto as Exhibit "A."

18. Uber and Lyft have been known to employ behavioral economics and social science to get drivers to work where and when they want. A copy of an April 2, 2017 article in the *New York Times*, titled "How Uber Uses Psychological Tricks to Push Its Drivers' Buttons," is annexed hereto as Exhibit "C" (https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html (last accessed February 25, 2019)).[5]

19. Since Uber first entered the New York City market in 2011, the sector has seen exponential growth, both in terms of the total number of TLC-licensed drivers and the number of FHV vehicles. The total number of FHV vehicles remained steady for years at around 40,000, but now reaches nearly 120,000. Similarly, the number of TLC-licensed drivers had remained steady at around 100,000. As of January 2019, there are nearly 205,000 TLC-licensed drivers.[6] TLC graphs on industry growth are annexed hereto as Exhibit "E."

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[4] The Large FHV Companies have claimed that various policies will negatively impact outer borough service, including a cap on the number of FHVs and a requirement that FHV bases provide greater wheelchair accessible service. A copy of an August 6, 2018 article in the *Wall Street Journal*, titled "New York's Ride-Hailing Battleground Moves to the Outer Boroughs," is annexed hereto as Exhibit "B."

[5] The companies have also employed other strategies to gain a competitive edge. A copy of an April 23, 2017 article in the N.Y. Times, titled "Uber's C.E.O. Plays With Fire," is annexed hereto as Exhibit "D" (https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html (last accessed February 25, 2019) (e.g., dispatching employees to order and cancel a competitor's ride "en emasse")).

[6] Local Law 51 of 2016 amended Section 19-505(a) of the New York City Administrative Code ("Ad. Code") to require that TLC create one driver's license that authorizes the holders to operate both FHVs and taxis. TLC rules implementing the universal driver's license took effect on September 15, 2016. See 35 RCNY Chapter 80. Prior its adoption, TLC issued separate licenses for drivers of taxis and FHVs.

20. As the industry grew, however, so did the number of complaints from drivers regarding work hours and pay. In July 2015, for example, after finding that Uber deducted from his revenue not only a 20% commission, but also an additional 12% in taxes and fees paid to the Black Car Fund, a fund established by New York State law to provide workers' compensation benefits to black car drivers, an FHV driver said of Uber, "There's a lot of promising but not delivering." A copy of a July 22, 2015 article in the *New York Daily News*, titled "Wall St. in Road Race to Rip Off Drivers," is annexed hereto as Exhibit "F."

21. In early 2016, when passenger fares were tied directly to driver payments, Uber and Lyft reduced their fare prices, generating a strong negative response from drivers as the result of lower per-trip take home pay. One FHV driver "who said he drove for Uber six days a week, eight hours a day, predicted the fare cuts would force him to work 10 to 14 hours a day to make his rent and car payments." A copy of a February 1, 2016 article in the *New York Times*, titled "Uber Drivers in New York City Protest Fare Cuts," is annexed hereto as Exhibit "G" (https://www.nytimes.com/2016/02/02/nyregion/uber-drivers-in-new-york-city-protest-fare-cuts.html (last accessed February 25, 2019)). Another FHV driver stated, "Uber treats its drivers however it wants. But we're the ones who do everything except provide the technology." A copy of a February 21, 2016 article in the *New York Times*, titled "Uber Drivers Up Against The App," annexed hereto as Exhibit "H" (https://www.nytimes.com/2016/02/21/nyregion/uber-drivers-up-against-the-app.html (last accessed February 25, 2019)).[7]

[7] The article noted that Uber drivers "are independent contractors who buy their own cars, pay for gas and maintenance, and provide their own insurance. Although they get no benefits, they remit to Uber 20 to 25 percent of what they make as a fee to use the service." The article further noted that Uber "reserves the right to 'deactivate' its drivers, sometimes for little more than a subpar rider rating." See Ex. H.

22. Lyft is reportedly planning to make an initial public offering and is expected to be valued between $20 billion and $25 billion. A copy of a February 20, 2019 article in the *New York Times*, titled "Lyft Sets Crucial Date in Race to I.P.O.," is annexed hereto as Exhibit "I" (https://www.nytimes.com/2019/02/20/business/dealbook/lyft-uber-ipo.html (last accessed February 25, 2019)).

April 2017 Driver Income Hearing

23. In a Notice of Public Hearing, published in the City Record on March 6, 2017, TLC announced that it would hold a public meeting on April 6, 2017 that included a hearing on the economics of operating taxis and FHVs in New York City, pursuant to the TLC's authority under the New York City Charter, including section 2304(c). TLC announced that it was soliciting testimony about the effects of this growth, if any, on income and expenses in the taxi and FHV sectors, including relating to factors affecting TLC licensed drivers' income and expenses, bonuses and service incentives, fuel costs, insurance, fare commissions, tolls, taxes and vehicle financing. A copy of the Notice of Public Hearing is annexed hereto as Exhibit "J."

24. On April 6, 2017, TLC held the noticed hearing on industry economics. A true and correct copy of relevant pages of the Transcript from the Public Hearing are annexed hereto as Exhibit "K." A complete copy of the transcript can be found on TLC's website at https://www1.nyc.gov/assets/tlc/downloads/pdf/transcript_04_06_2017.pdf (last accessed February 25, 2019).

25. During the hearing, Sarah Leberstein, an advisor at the New York City Department of Consumer Affairs, Office of Labor Policy and Standards, testified:

> Low-income and income fluctuations may be an especially acute problem among for-hire drivers. Only 23 percent of Uber drivers reported that they see working for Uber as a stable source of income. And a recent survey

> found that the average hourly pay before expenses was only about $15.50 for Uber and $17.50 for Lyft drivers.
>
> But calculating net expenses and net income is an ongoing problem, and many app-based drivers are reporting that take-home pay falls far below living wage.
>
> A main reason that income is so low is because drivers are treated as independent contractors, exempt from workplace laws, including wage laws that require employers to cover certain business expenses.

See Ex. K. at 24: 3-21.

26. Ryan Price, Executive Director of the Independent Drivers Guild ("IDG"), an affiliate of the International Association of Machinists and Aerospace Workers that represents drivers affiliated with the Large FHV Companies, recommended that TLC require from the Large FHV Companies "mandatory minute and mile pay compared to a fare." He continued:

> Essentially, what we imagine here is this pay that's regulated, when it be [sic] touchable, the sales tax and the Commission and the black car fund wouldn't be allowed to be taken out of this pay. So it's something that we can rely on every trip. We know if we go a certain distance, if we have a long enough ride, that we pay a certain amount.

Id. at 41: 5-16.

27. Stephen Savader, a TLC-licensed driver, stated:

> I should be able to make a decent income, pay my taxes and make a living. I don't know why I can't any more. It's really tough. Because of the -- all the drivers in the industry, hundreds of thousands of drivers that are coming on board, Uber wants your grandma, your grandpa to drive, your friend to drive. They don't care. They just want to put more drivers on the street.

Id. at 119: 11-21.

28. In addition to testimony provided at the hearing, TLC received written comments. Copies of the relevant written comments are annexed hereto as Exhibit "L."

TLC Hires Economists to Study FHV Driver Pay

29. Following the April 2017 hearing, TLC issued a Solicitation for Proposals ("the Solicitation") for a rigorous study of driver income the in FHV industry and to make recommendations as to a proper pay standard for FHV drivers. A true and correct copy of the Solicitation is annexed hereto as Exhibit "M."

30. The Solicitation stated that TLC is considering a policy that would provide minimum earnings for FHV drivers and requests a study of the major impacts of the policy under consideration, such as its effects on drivers, consumers, businesses, and the local economy. Id.

31. In October 2017, TLC hired James Parrott, Economic and Fiscal Policy Director of the Center for New York City Affairs at the New School, and 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.

IDG Report and Petition for Rulemaking

32. In November 2017, IDG issued a report titled "Progress Toward A Fair For-Hire Vehicle Industry." The report calls for calls for a minimum pay scale for app-based for-hire drivers in New York City, as well as for other economic protections. A true and correct copy of the report is annexed hereto as Exhibit "N."

33. The report asserts that the FHV Companies are in a "race to the bottom," as they "continue to increase their profits largely by lowering driver pay and increasing their cut of fares." The report continued:

> As workers watch their income drop, they have to work longer hours to make the same amount of money and find themselves trapped in an industry with increasing expenses.…
>
> Uber only took a 20 percent fee [in 2013], then Sales Tax and Black Car Fund was deducted from the remainder. That means a trip going five miles

> in thirty minutes would have paid the worker about $20.25, and would cost the passenger $28.50.
>
> Today, that same trip pays the worker $14.68, but it would be difficult to predict what the passenger would be charged. It's not just workers that the app-based FHV companies are exploiting: it's passengers too.
>
> Passenger fare is no longer bound to actual mileage or minutes traveled. Uber, Lyft and Juno all use upfront pricing and most recently, Uber launched discriminatory pricing. Under discriminatory pricing, the company will charge the passenger whatever it thinks that passenger is willing to pay, which can be based on any number of factors the app knows about its riders (from neighborhood to scarcity of vehicles to the type of phone they have or even the amount of remaining battery life on their phone).

See id. at 5.

34. In March 2018, IDG officially petitioned the TLC in March 2018 to adopt rules establishing, among other things, minimum pay requirements for FHV drivers. The petition states that IDG garnered thousands of driver signatures in favor of the pay proposal. A copy of the petition is annexed hereto as Exhibit "O."

TLC-Commissioned Study on FHV Driver Pay

35. In July 2018, Dr. Parrot and Dr. Reich released their report, titled "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment" (the "FHV Driver Pay Report" or "Report").[8] A true and correct copy of the FHV Driver Pay Report is annexed hereto as Exhibit "P."

[8] During Dr. Parrott and Dr. Reich's research into the questions presented by the TLC, TLC provided data and answered questions about the industry, but did not direct the outcome of their research.

36. The Report proposes a pay standard by which FHV drivers would be paid the equivalent of $17.22 an hour after expenses, the independent contractor equivalent of a $15 hourly wage, based on a per-trip payment method established by TLC.[9] See Ex. P at 1.

i. The Issue

37. The FHV Driver Pay Report set forth several key findings about the FHV driver population, including:

- Ninety percent of New York City's app-based drivers are immigrants, and only one out of every six has a four-year college degree.
- Driving is the only job for two-thirds of the drivers.
- Eighty percent of drivers acquired their vehicle to enter the industry and would risk losing their investment if they switched to working in another industry.
- Half of the drivers support children and provide the bulk of their family's income.
- Forty percent of drivers have incomes so low they qualify for Medicaid and another 16 percent have no health insurance; 18 percent qualify for federal supplemental nutrition assistance (nearly twice the rate for New York City workers overall).

Id. at 4-5.

38. Based on data from the Large FHV Companies, Dr. Parrott and Dr. Reich found that gross median earnings for FHV drivers declined almost $3.00 per hour from $25.78 in September 2016 to $22.90 in October 2017, a decrease of 11.17%. Id. at 24.

[9] This amount equals the state minimum wage in New York City of $15.90, $15 plus 90 cents for paid time off. See Ex. P at 34. An additional $1.32 accounts for the employer share of payroll tax, which is required of independent contractors. Id.

39. Based on a modeling of expenses associated with driving for the FHV Companies and working time, Dr. Parrott and Dr. Reich found that 85% of FHV drivers are earning less than $17.22 per hour after expenses. Id. at 30.

40. Dr. Parrott and Dr. Reich detailed several reasons for the low driver pay. Specifically, FHV Companies rely on their drivers being classified as independent contractors, id. at 46, which translates to "most of the industry's capital and labor costs" being borne by the drivers, resulting in high expenses for drivers. id. at 47. FHV drivers are responsible for purchasing, leasing, or operating their vehicles. See generally id. at 24-27. Additionally, FHV companies require that a "persistent excess capacity" of drivers and vehicles are available "at any point in time and place," so that they can "compete for passengers by keeping waiting times low, even beyond the value of the saved time for riders," Id. at 46. As most FHV companies do not compensate drivers for this idle time, this practice contributes to "low driver pay per hour." Id. at 7 and 46. They also noted that the "variability in hours of existing drivers and the recruitment of new drivers allow companies to play a dominant role in determining driver pay." Id. at 10.

ii. The Proposal

41. To allow drivers to earn $17.22 per hour after expenses, the FHV Driver Pay Report sets out a basic pay formula that includes a per minute rate, which compensates a driver's time, and a per mile rate, which compensates a driver's expenses. The minute rate of $0.287 per minute was arrived at by dividing $17.22 by 60 minutes. Id. at 34. The mile rate of $.580 per mile was arrived at after "comprehensive accounting of all vehicle-related expenses," including one-time upfront costs, recurring costs, and operating costs.[10] See generally id. at 24-

[10] As discussed below, following the October 2018 public hearing on the proposed rule, TLC revised the expense estimates and set a higher per mile rate in the final rule. See ¶ 67.

27. These expenses were converted to a per mile basis by dividing the expenses by 35,000 annual miles,[11] which resulted in an expense figure of 58 cents per mile.[12] Id. at 26

42. The proposed formula divides both the per-minute and per-mile rates by a 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 serves to "compensate drivers for work-related time and expense when a passenger is not in the vehicle," id. at 35, "because drivers are working even when they do not have a passenger in the car," id. at 34. With respect to the time factor, the UR adjusts for the portion of the driver's working time that a passenger is not in the vehicle. Id. at 35. With respect to the expense factor, the UR adjusts for "the expenses associated with pickup, cruising, and other non-passenger vehicle uses during the work shift." Id. The report calls for the application of company-specific URs so that each company is "incentivized to raise its company-wide utilization rate from one quarter to the next, that is, by increasing the average number of trips per hour." Id. A higher UR "lowers the company's costs for the expense and time components" and also benefits drivers by providing them "more rides in any given hour, thereby earning more on an hourly basis, even though their pay for each trip might be lower." Id. In this way, "the policy aligns the interests of the driver with that of the companies and both sides benefit." Id.

iii. The Projected Impact

43. Dr. Parrott and Dr. Reich analyzed the likely responses of the drivers, companies, and passengers to the pay standard. See generally id. at 53-62. They simulated

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[11] The approximate mean annual distance traveled between periodic TLC vehicle inspections. See Ex. P at 26.

[12] The proposal recommends higher rates for WAVs to compensate drivers for the additional time and expense of operating such vehicles. See Ex. P at 35-6.

alternative scenarios to assess the effects of possible fare increases, improved driver utilization, increases in labor supply, among other things, and predicted that the "pay increase likely can be readily absorbed through a combination of utilization increases, commission reductions, and modest fare increases." Id. They concluded that "all forecasts are inevitably uncertain" and note that the predicted behavioral responses of the drivers, passengers, and companies will not conform precisely to their expectations. Id. at 61. They also recommended that TLC conduct "ongoing and careful monitoring of the effects of the policy." Id. at 62.

44. Following publication of the Report, TLC conducted meetings with stakeholders, including the Large FHV Companies and drivers, to develop a rule that codifies minimum pay standards for FHV drivers that are in line with the report recommendations.

City Council Adopts Package of Bills Relating to FHV Industry

45. In August 2018, the New York City Council adopted, and Mayor Bill de Blasio signed into law, a package of bills relating to the FHV industry, including Local Law 147 of 2018, the law that places a one-year pause on the issuance of FHV licenses. See ¶ 12, supra.

46. The FHV package also includes Local Law 149 of 2018, which establishes licensing and operational requirements for "high-volume for-hire services" that dispatch more than 10,000 or more trips per day. [13] A true and correct copy of Local Law 149 of 2018 is annexed hereto as Exhibit "Q."

47. Finally, directly related to the instant Petitions, 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:

[13] The Large FHV Companies all currently meet the definition of a "high-volume for-hire service." See Admin. Code § 19-502(gg).

> 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.

A true and correct copy of Local Law 150 of 2018 is annexed hereto as Exhibit "R" (codified at Admin. Code 19-549(b)).

<u>TLC's Proposed Rule on FHV Driver Pay</u>

48. TLC published notice of a proposed rule establishing minimum pay standards for FHV drivers in the *City Record* on August 28, 2018. A true and correct copy of the relevant pages of the August 28, 2018 *City Record* publication and a readable copy of the text are collectively annexed hereto as Exhibit "S."

49. As set forth in the Statement of Basis and Purpose of the proposed FHV Driver Pay Rules:

> As the number of Taxi & Limousine Commission (TLC) FHV drivers has grown by more than 80 thousand since 2014, drivers are working longer hours for fewer trips and less pay, while bearing a significant share of the expenses for providing for hire service. Over 80,000 drivers now drive for the four largest FHV companies in New York City, which operate through the apps Uber, Lyft, Gett/Juno, and Via (collectively the "Largest FHV Companies"). These four companies account for over 75% of FHV trips. Despite economic success of these companies, reflected in the massive growth in the number of trips in recent years from roughly 42 million trips in 2015 to nearly 159 million trips in 2017, the majority of drivers have not seen an increase in income.
>
> … FHV driver median earnings declined by almost $3.00 per hour from $25.78 in September of 2016 to $22.90 in October of 2017, a decrease of

> 11.17%. Eighty-five percent of these drivers are earning less than the equivalent of the $15.00 minimum wage (which was determined to be $17.22 to account for the fact that Largest FHV Companies treat these drivers as independent contractors and therefore, unlike employees, drivers are responsible for additional payroll taxes and do not receive paid time off).

50. The Statement of Basis and Purpose detailed the pay formula established by the proposed rule for drivers of wheelchair accessible FHVs (i.e., "WAVs" or "wheelchair accessible vehicles") and FHVs that are not wheelchair accessible (i.e., "Non-WAVs"):

$$Non-WAV\ Per\ Trip\ Driver\ Pay = \left(\frac{\$0.580\ x\ Trip\ Miles}{Company\ Utilization\ Rate}\right) + \left(\frac{\$0.287\ x\ Trip\ Minutes}{Company\ Utilization\ Rate}\right) + Shared\ Ride\ Bonus$$

$$WAV\ Per\ Trip\ Driver\ Pay = \left(\frac{\$0.803\ x\ Trip\ Miles}{Company\ Utilization\ Rate}\right) + \left(\frac{\$0.287\ x\ Trip\ Minutes}{Company\ Utilization\ Rate}\right) + Shared\ Ride\ Bonus$$

See Ex. S.

51. On October 3, 2018, TLC held a public hearing on the proposed rule. A true and correct copy of the transcript from that public hearing is annexed hereto as Exhibit "T."

52. Terri Gerstein, a fellow at the Harvard Law School Labor and Work Life Center Program, spoke about the independent contractor classification of FHV drivers:

> I think it's useful for you to understand what it means and how it is disadvantageous for working people to be treated as an independent contractor as opposed to an employee. Independent contractors aren't covered by wage and hour laws, so they don't get overtime. It's not just minimum wage. In terms of taxes, they have to pay both the employer and employee portion of FICA.
>
> So, when an employee, in context, only has to pay seven-plus-percent of the employee portion, they're not covered by all the core labor protections, like the National Labor Relations Act, which gives workers the right to organize; like OSHA, which regiments workplace safety and health.

> They are not covered by unemployment insurance. Although, there is a case in the New York State that is working its way through the appellate division involving Uber drivers, who the Department of Labor has found to be employees. And it uncovered, in terms of the new developing laws, like paid sick and paid family leave, and they're not protected against retaliation, if they complain about violations. . . .
>
> [I]t is important to recognize that the proposal is setting a wage standard, basically placing on these companies a small fraction of the responsibilities that every other employer has. . .
>
> [W]ithout this kind of wage standard, it's really a race to the bottom.

Id. at 154-6.

53. Zubin Soleimany of NYTWA posited that the FHV Companies are able to absorb the minimum pay rates, stating:

> [W]hen we looked at fares done under up-front pricing, once Uber started hiding the passenger price from the drivers and from the customer, we found that Uber's rates for UberX trips, randomly selected, increased by twenty-four percent over their last publicly advertised rate . . .
>
> So, they jacked up prices twenty-four percent but froze drivers at the static rates they paid before. So, with that increase, we know that there is room for our proposal to increase that rate of FHV driver pay equivalent to the taxi and green cab rate of pay. . .

Id. at 109:18 – 110:8.

54. Andrei Greenwalt of Via maintained that its company was meeting various policy goals of the proposed rule:

> The TLC's report . . . demonstrated that drivers on the Via platform receive average net hourly earnings of $21.73. That is much higher than our competitors, and it is well above this proposal's goal of $17.22 an hour after expenses.
>
> We have done this all while achieving the highest utilization and efficiency in the industry. Roughly ninety-five percent of our trips are pooled, and we've done it while providing drivers the option of hourly predictable guaranteed earnings.

Id. at 78:21 – 79:10.

55. Speakers mentioned the high commission rates of the Large FHV Companies. Aziz Bah, an FHV driver and IDG member, stated:

> The app company pricing is complicated. They can take anywhere from thirty-five all the way to sixty-five percent or seventy percent. You name it. . . .
>
> [Uber] charge[s] the customer a price upfront, then the driver is paid base rate . . . time and distance. But now, they can charge maybe the longest route, depending on where the rider is going, and the driver takes the shortest route. The driver is going to be left holding the bag because he's going to be receiving way less. And on our receipt, we can totally see how much the riders pay, at least that's what they show us. We're not sure if that's exactly what it is. But then, sometimes when you compare, they're taking about fifty percent.

Id. at 265:13 – 267:8; see also id. at 163: 13-20.

56. Speakers also commented on how the Large FHV Companies benefit economically from shared rides. Michele Dottin, an FHV driver, engaged in the following exchange with Commissioner Joshi about pooled rides:

> MS. DOTTIN: A pooled ride is almost seventy percent cheaper [in terms of what driver is paid] than a regular "X" ride. . . .
>
> Because what they do is, here is the first thirteen miles, the first person that got in the car, they are charging them the thirteen miles. They charge the second passenger a regular fare, based on the pool depending on what time of day. Right? But the driver is paid on the difference in mileage, not how long their butt has been sitting in the seat. But the difference is three miles, even though they might have been in the car eight miles. . . .
>
> MS. JOSHI: So, the second passenger then, you're only paid on three miles?
>
> MS. DOTTIN: Right.
>
> MS. JOSHI: Not the seven?
>
> MS. DOTTIN: Correct. Not the entire mileage that they're sitting in the car. What [the FHV company] said is, "Oh, you can't double dip." Well, why can you?

Id. at 191-93; see also id. at 270-71.

57. Speakers stated that the estimated vehicle expenses in the report were underestimated. For example, Bhairavi Desai, New York Taxi Workers Alliance, stated:

> We think the idea that driver incomes will go up by fourteen percent is absolutely false because the expenses are underestimated as much as $10,000 per year, per driver. To give you an example, a driver whose weekly expenses would be $390 a week -- and that's if you're lucky in vehicle expenses and insurance. Your expenses are $7,800 more per year than what's been calculated in this report. You're not going to be making fifteen per hour, you're going to likely be making eleven per hour.

Id. at 71:11 – 72:1; see also id. at 209-210.

58. Commissioner Joshi engaged in the following exchange with Lyft's Joseph Okpaku about the proposed per-trip compliance, as compared to per-week compliance:

> MS. JOSHI: What I think is important for people to understand is the difference between a per-trip and per-week compliance. My concern with a per-week 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.
>
> And incentives are meant to encourage drivers to be in a certain area, do things that are advantageous for your company, so why shouldn't they be paid on top of what the minimum is, rather than also be included in the minimum?
>
> MR. OKPAKU: No one said that that can't happen under our proposal. But, again, I want to reiterate that the concerns --
>
> MS. JOSHI: But there's nothing to prevent it from happening when you do it on a weekly basis.

Id. at 104-5.

59. One driver noted both the promise of, and the investment required for, driving for the FHV Companies:

> So, I decided, "Okay. I see the advertisement," you know, "You're making $6,000 a month." I was, like, "Okay. I will put in my information,

> take a $35,000 auto car." And little did I know that after a month, I'm not getting $6,000. I'm getting $500 a week. . . .
>
> [I]'m sinking in debt in $18,000, $20,000. Some of us are even thinking about bankruptcy. . . .
>
> I had everything good, but -- until they advertised. This is a false hope they gave to me.

Id. at 273.

60. Several drivers complained about the process by which the FHV Companies remove drivers from their app:

> A lot of these drivers, not only Uber, all the app-based companies, they get deactivated left and right for no reason and have never been able to get any kind of fair hearing. The smallest mistake, those guys get deactivated. They go to Uber or Lyft or Juno or whatever company it is, no one listens to them.

Id. at 260-61; see also id. at 197-98.

61. In addition to testimony provided at the public hearing, TLC received written comments on the proposed rule. Copies of the submitted written comments are collectively annexed hereto as Exhibit "U."

62. New York City Council Member Brad Lander, the prime sponsor of Local Law 150 of 2018, submitted written comments, which stated in relevant part:

> Driver pay at peak demand periods should not be used an offset to allow companies to pay subminimum pay when demand is low. The minimum pay requirement should be a floor for all trips, on top of which incentives can be added; it should not be an average that allows subminimum pay at some times to offset incentives at others. . . .
>
> However, some app-based companies, particularly Via, compensate drivers on an hourly basis, which I believe meets the standard of fair and dependable compensation and fulfills the spirit of Intro 890-B, so long as drivers are making at least the equivalent of a living wage. The Parrott and Reich report showed that during the study period, Via paid a net hourly median of $20.99 and a mean of $21.73, well above other industry players and the $17.22 goal. Via combines its hourly payment approach with an

> emphasis on shared rides, resulting in a model which is good for both driver pay predictability and for reducing solo rides (thus hopefully contributing to a reduction in congestion).

See Ex. U.

63. Following the October hearing, TLC continued to meet with stakeholders regarding the proposed rule, including the FHV Companies and driver groups.

TLC's Final Rule on FHV Driver Pay

64. On December 4, 2018, TLC held a public hearing where, among other things, the FHV Driver Pay Rules were discussed and voted upon. A true and correct copy of the Transcript from the December 4, 2018 Public Hearing is annexed hereto as Exhibit "V."

65. At that public meeting, TLC voted to approve the promulgation of the Final FHV Driver Pay Rules. A true and correct copy of the Notice of Promulgation of Final Rule published in the *City Record* on December 11, 2018 and a readable copy of the text are collectively annexed hereto as Exhibit "W."[14]

66. The final rule reflects changes that were made to the proposed rule in response to the public testimony, written comments, and comments of the many stakeholders that TLC met with during the pendency of the rulemaking process. For example, as a result of a broader review of driver expenses undertaken by TLC in response to comments that the report underestimates expenses, the final rule adjusts the mile rates from $0.580 to $0.631 for non-WAV trips and from $0.803 to $0.818 for WAV trips. These adjustments increase driver pay to

[14] Pursuant to the New York City Administrative Procedure Act, a final rule takes effect 30 days from the date of publication in the *City Record*. See City Charter § 1043(f). As discussed below, TLC delayed the effective date of the FHV Driver Pay Rule until February 1, 2019.

compensate for higher expenses than were initially projected in the FHV Driver Pay Report.[15] Accordingly, the pay formula is as follows:

$$Non - WAV\ Per\ Trip\ Driver\ Pay = \left(\frac{\$0.631\ x\ Trip\ Miles}{Company\ Utilization\ Rate}\right) + \left(\frac{\$0.287\ x\ Trip\ Minutes}{Company\ Utilization\ Rate}\right) + Shared\ Ride\ Bonus$$

$$WAV\ Per\ Trip\ Driver\ Pay = \left(\frac{\$0.818\ x\ Trip\ Miles}{Company\ Utilization\ Rate}\right) + \left(\frac{\$0.287\ x\ Trip\ Minutes}{Company\ Utilization\ Rate}\right) + Shared\ Ride\ Bonus$$

See Ex. W.

67. Additionally, the final rule differs from the proposed rule in numerous additional ways. The final rule: (1) adds out of town rates - $1.262/mile for non-WAV trips, $1.636/mile for WAV trips, and $0.574/minute for all trips – for miles and minutes driven with a passenger outside of New York City; (2) requires bases to put the amount a passenger paid for a trip on all receipts to drivers; (3) allows for hourly payments, as long as the hourly payment was at least the sum of the Per Mile and Per Minute rates a driver drove during the hour;[16] (4) adds an Initial Utilization Rate period where all bases would start out with the same UR;[17] and (5) adds a requirement that TLC analyze the pay rules at least annually to determine if adjustments need to be made to the pay rates. See id.

[15] The adjusted vehicle expenses are reflected in the supplemental report issued by Dr. Parrot and Dr. Reich. See ¶ 74, infra.

[16] TLC considered the hourly payment standard to be the functional equivalent of a per-trip payment standard. Due to constraints of time and geography, a driver cannot subsidize a low-pay trip with a high-pay trip within the course of an hour, which means a driver would have to be paid for each trip or part of a trip made within the hour at or above the minimum standard.

[17] In response to feedback from the Large FHV Companies, TLC incorporated the initial utilization rate so that companies have an opportunity to improve their utilization rate before they are subject to the company-specific rate.

<u>Implementation of FHV Driver Pay Rules</u>

68. On December 21, 2018, TLC Deputy General Counsel Ryan Wanttaja sent an email notifying the FHV Companies of the following utilization rates ("URs") that will be in effect from February 2019 through June 2019:

		Utilization Rate	Per-Mile Rate	Per-Mile Rate (WAVs)	Per-Minute Rate
Industry-wide		58%	$1.088	$1.410	$0.495
Company specific	Via	69%	$0.914	$1.186	$0.416
	Uber	58%	$1.088	$1.410	$0.495
	Lyft	56%	$1.127	$1.461	$0.513
	Juno	53%	$1.191	$1.543	$0.542

A true and correct copy of the December 21, 2018 email is annexed hereto as Exhibit "X."

69. In the December 21, 2018 email, Mr. Wanttaja advised the Large FHV Companies that the final URs reflect concerns of the FHV Companies that the initial proposed URs in the FHV Driver Pay Report do not precisely reflect work time.[18] To address these concerns, following the October 2018 hearing, TLC obtained from the FHV Companies log-on/log-off data covering the period from February 2018 through June 2018. Based on review of this data, TLC calculated URs by identifying breaks drivers took during their work days and accounting for drivers' overlapping idle time on multiple apps. <u>See</u> <u>id.</u>

70. In the instances of overlapping idle time, Mr. Wanttaja stated that TLC split the idle time evenly between each company. For example, if a driver were logged into Company A's and Company B's app concurrently for 15 minutes, 7.5 minutes of idle time was attributed to each company. If a driver were logged into three companies' apps concurrently for

[18] The proposed URs for the FHV Companies in the report were as follows: Juno (50%); Lyft (58%); Uber (58%); and Via (70%). <u>See</u> Ex. P at 37. The FHV Driver Pay Report focused on single-app drivers and relied on trip data as a proxy for work time. <u>Id.</u> at 22.

the 15 minutes, 5 minutes of idle time was attributed to each company. Additionally, TLC calculated idle time separately from trip time so that time a driver spent logged into Company B while taking a trip with Company A would not count against Company B. See id.

71. Mr. Wanttaja stated that the final URs reflect the total trip time divided by the total combined idle time and trip time for the period from February 2018 through July 2018.[19] Mr. Wanttaja further stated that the final URs will be in effect from February 2019 through July 2019 and that TLC will recalculate URs from July through December 2018 to set rates for the second half of 2019. See id.

72. In a TLC Industry Notice, dated January 11, 2019, TLC stated that the pay rules will take effect on February 1, 2019. A true and correct copy of the January 11, 2019 Industry Notice is annexed hereto as Exhibit "Y."

73. In January 2019, Parrot and Reich published a supplemental report to the FHV Driver Pay Report, titled "The New York City App-based Driver Pay Standard: Revised Estimates for the New Pay Requirement." The supplemental report "informs the final pay standard" set by TLC and includes a revised expense analysis and, based on updated data, a revised estimate of the extent to which current driver earnings fall below the minimum pay standard. A true and correct copy of the report is annexed hereto as Exhibit "Z."

74. In late January and early February 2019, the Large FHV Companies announced that they would be updating passenger rates and increasing driver pay to comply with the FHV Driver Pay Rule. True and correct copies of various announcements from different companies and rates are collectively annexed hereto as Exhibit "AA."

[19] The final URs are based on the trip and idle time only of drivers who worked exclusively for the FHV Companies in any particular week of the five-month review period. See Ex. X.

75. As permitted by the FHV Driver Pay Rule, Via is currently using its company-specific UR of 68% in the pay formula. The remaining Large FHV Companies are currently subject to the industry-wide UR of 58%.

76. For all of the reasons set forth herein and in the accompanying Verified Answer and Memorandum of Law, I respectfully request that the Court deny petitioners' motions for a preliminary injunction, along with the petitions in their entirety.

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

NOTARY PUBLIC

JASON P. GONZALEZ
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No. 02GO6150827
Qualified in Queens County
My Commission Expires August 07, ~~2014~~ 2022