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

OMAHA LLC and VULCAN CARS LLC,	:	
Petitioners,	:	Index No. _____
v.	:	Motion Seq. No. _____
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.	:	

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' ARTICLE 78 PETITION AND APPLICATION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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Petitioners Omaha LLC and Vulcan Cars LLC ("Petitioners") respectfully submit this memorandum of law in support of their Article 78 Petition filed contemporaneously herewith ("Petition") and motion to enjoin Respondents New York City Taxi and Limousine Commission and TLC Chair Meera Joshi (collectively, the "TLC" or "Respondents") from enforcing the rule passed by the TLC on December 4, 2018 and codified under Rule § 59B-24.

PRELIMINARY STATEMENT

Petitioners are for-hire vehicle ("FHV") bases that support Juno, a ride-hailing company that operates exclusively in New York City. The TLC recently promulgated a deeply flawed new rule to establish a minimum pay standard for drivers of only four ride-hail companies in New York: Uber, Lyft, Juno and Via (the "Utilization-Based Rule" or the "Rule").[1] Although the TLC's goal of ensuring that ride-hail drivers are paid fairly is one that Juno fully supports — and, indeed, is the very principle upon which Juno has modeled its business[2] — the complicated mechanism by which the TLC seeks to do so is inherently flawed and fundamentally unfair; severely and disproportionately hurts smaller, socially-conscious companies like Juno; and will destroy competition in the New York City ride-hail market, all to the detriment of the FHV industry, drivers and consumers alike. As TLC Commissioner Nora Marino decried in opposing

[1] Notice of Promulgation, 145 City Rec. 6645 (N.Y.C. Taxi & Limousine Comm'n Dec. 11, 2018). The Notice is attached as Exhibit I to the Declaration of Alexander C. Drylewski, exhibits to which are cited herein as "Ex. __." The Rule was published in The City Record, Official Journal of The City of New York, on December 11, 2018, and is currently scheduled to go into effect on February 1, 2019. (Petition ¶ 57.)

[2] From its inception, Juno has attempted to set itself apart from other ride-hail companies through its emphasis on, and commitment to, the fair and ethical treatment of its drivers. Data obtained by the TLC demonstrates that Juno historically has paid its drivers more per trip — and thus taken lower commissions per trip — than its largest ride-hail competitors in New York City. *See* James A. Parrott & Michael Reich, *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment* at 22, 74 (July 2018) (referred to herein as the "Parrott Report"), Ex. K; *see also* Affidavit of Ronen Ben David ("Ben David Aff.") ¶¶ 4-5.

the Rule, "[t]here's just too many unanswered questions and unknown variables in my opinion to have this rule as drafted."[3] Dr. Ray Mundy, an expert with over 40 years of experience in the field of transportation, has studied the Rule and concluded that it not only "was hastily drawn" and "relies on faulty data," but it "will have negative and potentially disastrous consequences for the ride-hailing industry and for the drivers the Rule seeks to protect."[4] And Steven Tenn, Ph.D., a competition expert and former economist at the Federal Trade Commission, has opined that the Rule will have severe anticompetitive effects in the New York City ride-hail market, which will harm not only companies but also consumers, who will have fewer options when choosing a ride-hail company, and drivers as well, who will lose valuable money-making options and opportunities.[5]

Left with no choice, Petitioners bring this motion to enjoin implementation of the TLC's sweeping Rule because it is arbitrary and capricious and the result of the TLC's *ultra vires* action. An injunction is necessary to prevent irreparable injury to the Petitioners and Juno, which will suffer not only non-compensable financial consequences from the Rule but also incalculable damage to its reputation and relationships with customers and drivers. The TLC's new Rule will force Juno to impose new restrictions on its drivers and cut back on the services it provides them.

Although the TLC's goal of ensuring fair driver pay — which is at the heart of Juno's business — is a worthy one, the TLC's hastily-passed Rule should not be allowed to stand. Juno fully supports a rule establishing fair pay for its hard-working drivers, but the TLC's Utilization-

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[3] NYC Taxi & Limousine Comm'n, Comm'n Meeting, YouTube (Dec. 4, 2018), https://www.youtube.com/watch?v=psjXqHKpelg&feature=youtu.be.

[4] Expert Affidavit of Dr. Ray Mundy (the "Mundy Aff.") ¶¶ 29, 40.

[5] Expert Affidavit of Steven Tenn, Ph. D. (the "Tenn Aff.") ¶¶ 34-42.

Based Rule will not only disproportionately harm smaller ride-hail companies like Juno, it will also destroy competition in the New York City market to the detriment of consumers and the very drivers the Rule claims to protect.

FACTUAL BACKGROUND

The factual bases for the relief Petitioners seek are set forth in their Petition. (*See* Petition ¶¶ 26-57.) Petitioners respectfully refer the Court to, and incorporate by reference herein, the entirety of the Petition and all facts and arguments asserted therein.

ARGUMENT

I. THE TLC'S UTILIZATION-BASED RULE SHOULD BE ANNULLED

A. The Rule Is Arbitrary and Capricious

An Article 78 proceeding raises for review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CLPR 7803(3). An agency's action is arbitrary and capricious where it lacks a "sound basis in reason" or "rational basis" in the record. *Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty.*, 34 N.Y.2d 222, 231 (1974) (quoting *Colton v. Berman*, 21 N.Y.2d 322, 329 (1967)). "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *N.Y.State Ass'n of Cty. v. Axelrod*, 78 N.Y.2d 158, 166 (1991). In particular, when an agency fails to properly take into account the evidence presented or reaches a conclusion contradicted by that evidence, the determination should be reversed as arbitrary and capricious. *See Trump on the Ocean, LLC v. Cortez-Vasquez*, 76 A.D.3d 1080, 1084 (2d Dep't 2010). Moreover, an action may be "declared null and void upon a compelling showing that the calculations from which it is derived are unreasonable." *Axelrod*, 78 N.Y.2d at 166; *see also St. James Nursing Home v. DeBuono*, 12 A.D.3d 921, 923-24 (3d Dep't 2004)

(reimbursement rates invalid because "respondents' regression analysis produced a statistically invalid and, thus, unreasonable formulation").

1. The Rule Unfairly Imposes Different Minimum Pay Mandates on Competing Companies and Ignores the Realities of the Industry

First, the use of "utilization rate" as a basis to calculate driver pay unfairly and arbitrarily imposes different minimum pay standards on competing ride-hail companies. (*See* Petition ¶¶ 61-74.) Under the Rule, companies with a lower company-specific "utilization rate" (as calculated by the TLC) must pay drivers *more* than companies with higher utilization rates. This will require Juno to incur *higher* driver pay costs than its competitors for providing the *exact same service*:

FHV Company	TLC-Calculated "Utilization Rate"	Per-Mile Rate	Per-Mile Rate (WAVs)	Per-Minute Rate
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**

Such a result is wholly unsupported by the record. (*Id.*); *see Metro. Taxicab Bd. of Trade v. TLC*, 18 N.Y.3d 329, 333 (2011); *Jewish Mem'l Hosp. v. Whalen*, 47 N.Y.2d 331, 343 (1979); *McCann v. N.Y.C. Emps. Ret. Sys.*, 60 Misc. 3d 1224(A) at *3 (Sup. Ct. Kings Cty. 2018). Indeed, the Rule utterly fails to address any of the reasons for Juno's (or any company's) "utilization rate," none of which were analyzed by the TLC. (Petition ¶¶ 65-68.) Chief among these is the fact that FHV drivers, as independent contractors, have the flexibility to control their own *acceptance rates* — which typically are far less than 100% of available rides and determined by factors completely outside the control of the ride-hail company offering trips. (*Id.*; Mundy Aff. ¶ 44 ("Ride-hail drivers [] typically have their apps on while running personal

errands, such as dropping kids off for school, shopping, meal breaks, appointments, etc." and may use their vehicles for other money making ventures as well); Ben David Aff. ¶ 12.)

This failure has serious implications for Juno, which does not put any limitations on its drivers to accept a minimum percentage of dispatched rides while logged into the app, (Ben David Aff. ¶ 14), even while other ride-hail companies may require that drivers accept a certain number of rides or risk being penalized.[6] Thus, Juno is effectively punished for providing its drivers with flexibility and for its drivers' decisions as independent contractors. (Mundy Aff. ¶¶ 42, 51-55; Ben David Aff. ¶¶ 12-13.) This is a fundamentally arbitrary and capricious process. *See Mantione v. Lavine*, 42 A.D.2d 834, 835 (1973).[7]

Rather than grapple with these important issues, the Utilization-Based Rule is premised on a single, flawed study that is the "first of its kind" and provides no support for using utilization in such a manner. (Petition ¶¶ 9, 63; Mundy Aff. ¶¶ 41-72.) In fact, while virtually all of Juno's drivers also drive for other FHV bases or ride-hail companies such as Uber or Lyft, the report upon which the TLC bases its Rule did not consider how utilization is affected by the widespread practice of driver *multi-platform use*, analyzing utilization figures solely for "*drivers working for only one company*." (Parrott Report at 37); *see St. James Nursing Home*, 12 A.D.3d

[6] *See, e.g.*, Terms of Service, Community Guidelines (effective Oct. 17, 2017) ("High acceptance rates are a critical part of reliable, high-quality service, but not accepting trip requests does not lead to permanent loss of your account. . . . If you consistently decline trip requests, we will assume you do not want to accept more trips and you may be logged out of the app."), https://www.uber.com/legal/community-guidelines/us-en (last visited Jan. 28, 2019).

[7] Again demonstrating that it does not fully understand the industry it is attempting to regulate, the TLC also fails to account for the bonuses and promotions that ride-hail companies offer drivers to encourage them to use certain ride-hail apps. This oversight is particularly troubling because ride-hail companies pay these amounts directly out-of-pocket, yet they are given no credit in the TLC's Rule for such payments. All of these deficiencies in the Rule underscore that the TLC does not fully understand the ride-hail industry and has ignored the realities of the very market it is regulating.

at 923-24 (reimbursement rates invalid because "respondents' regression analysis produced a statistically invalid and, thus, unreasonable formulation"); *Dorfman v. City of Salamanca Bd. of Pub. Utils.*, 138 A.D.3d 1424, 1425 (4th Dep't 2016).[8] As Dr. Mundy explains:

> [T]he authors of the [Parrott/Reich] Report provide no examples of how utilization rates have been applied in other similar or even dissimilar industries either here or elsewhere. In other words, the whole concept of using utilization rates (and company-specific utilization rates at that) as a basis for determining base hourly wage rates in an industry that uses independent contractors is purely speculative and experimental.

(Mundy Aff. ¶ 55.)

Although the TLC attempted to fix the flaws in the Rule on December 21, 2018 — weeks *after* it had already been passed — this only made the problem worse. (Petition ¶¶ 10, 55.) Now, when a driver is logged into more than one company's app, the TLC intends to split that drivers' reported "idle time" evenly among those companies. This methodology disproportionately harms smaller companies like Juno that recruit drivers who already drive for larger ride-hail companies like Uber and Lyft. (*Id.*; Ben David Aff. ¶ 13.) Indeed, while Juno has sought to increase overall driver utilization in the New York market by recruiting existing drivers from other companies (and thus not adding new drivers to the pool), the TLC's Rule arbitrarily punishes Juno by assigning it a lower utilization rate while simultaneously rewarding incumbent ride-hail companies by reducing the effect of their drivers' idle time (and thus lowering the amount they must pay their drivers). (Petition ¶¶ 70-72; *see* Tenn Aff. ¶¶ 27-33.) Thus, as

[8] The authors of the Parrott Report appear to have generated many of their assumptions about FHV drivers from a study to which *only 3.75%* of ride-hail drivers responded. (*See* Parrott Report at 23 n.20, Ex. K.) Further, there is nothing in the Parrott Report that breaks down driver profiles by company, nor does it account in any way for differences in driver populations or business models among those companies. "The result is a sweeping Rule that is based entirely on incomplete, anecdotal evidence that simply does not account for or reflect the realities of the ride-hailing industry in New York City." (Mundy Aff.¶¶ 57-58.)

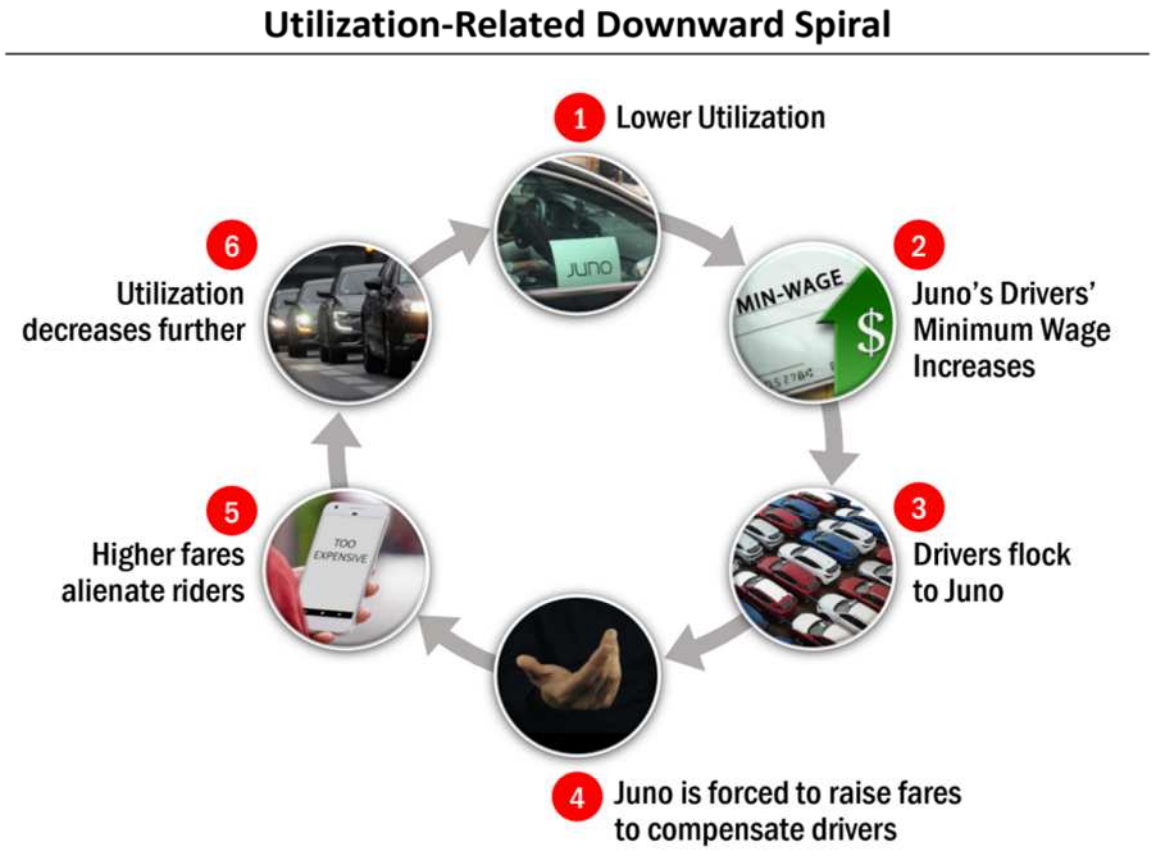
Steven Tenn, Ph.D. has observed, even where Juno is responsible for an overall reduction in driver idle time — and thus an increase in total "utilization" — Juno is punished under the Rule while its competitors are rewarded. (*See* Tenn ¶¶ 27-33.) Such a result is both irrational and unfair. *See Dorfman*, 138 A.D.3d at 1425; *Mantione*, 42 A.D.2d at 835.

2. The Rule Was Established Without Consideration or Analysis of Its Adverse and Anticompetitive Effects

The Utilization-Based Rule is also arbitrary and capricious because it was passed "without first considering whether its benefits justify its societal costs," specifically the significant anticompetitive effects it will have on the New York City ride-hail market. (Petition ¶¶ 75-78); *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 697 (2014). The ultimate consequence of the Rule will be to destroy competition in the FHV market, to the detriment of riders and drivers alike. (*See* Tenn Aff. ¶¶ 34-42.)

Indeed, the Rule will have a disproportionate impact on Juno, which already pays its drivers more but has a lower "utilization rate" calculated by the TLC. (Petition ¶¶ 2, 55.) As the minimum pay for companies like Juno increases under the Rule, more drivers will seek to drive for them, thus lowering their rider-to-driver ratios and further driving down their utilization rates. In turn, the companies will be forced to increase fares, causing riders to patronize other companies that can afford to offer lower fares. This, of course, will only further drive down these companies' utilization rates, which will drive up their minimum pay mandate, and so forth.

The end result is an inevitable downward spiral:



(Petition ¶ 11.) The Rule thus creates a "winner take all" scenario in the New York market that will harm not only smaller ride-hail companies but also consumers, who will have fewer options when choosing a ride-hail app, and drivers, who will lose valuable money-making opportunities. (*Id.* ¶¶ 11-12.) The Parrott Report even acknowledges that "the larger companies — with more economies of scale — set fares that are above, and pay drivers at rates below, the level that would obtain under conditions of greater competition." (Parrott Report at 44, Ex. K.) Yet the Rule would only exacerbate this undesirable scenario.

Acknowledging these flaws, the TLC belatedly attempted to temporarily alleviate them by adopting an "Initial Utilization Rate." This provisional mandate, which is not even fully explained in the Rule itself, cannot and will not solve the problem. (Petition ¶¶ 52, 62; Ben

David Aff. ¶ 16.) Indeed, the "Initial Utilization Rate" will consist of "the aggregate Utilization Rate of all Bases [] as calculated by the Commission," but the Rule provides no details as to how this "aggregate" rate will be calculated, and in any event, it will only apply for the first twelve months following the Rule's effective date. Moreover, the Rule allows companies to opt out and use their own utilization rates even during the initial twelve-month period. (*Id.*) Thus, this eleventh-hour attempt to "fix" the Rule raises more problems than it solves.

3. The Timing of the Rule Underscores Its Arbitrariness

The timing of the Rule further underscores its arbitrary and capricious nature. (Petition ¶¶ 79-83.) If there were any doubt that the TLC does not fully understand the "utilization rate" metric upon which its entire Utilization-Based Rule is premised, the TLC and the New York City Department of Transportation are currently conducting a study on utilization to be completed at least six months *after* the Utilization-Based Rule goes into effect. *See* N.Y.C. Admin. Code § 19-550; *see also Williamsburg Charter High Sch. v. N.Y.C. Dep't of Educ.*, 36 Misc. 3d 810, 831 (Sup. Ct. Kings Cty. 2012) (overturning agency decision that "was not based on a complete and accurate picture of the facts" as arbitrary and capricious); *Metro. Taxicab Bd. of Trade*, 18 N.Y.3d at 332; *Thomas v. Blum*, 88 A.D.2d 601, 602 (2d Dep't 1982).

In apparent recognition of this problem, the TLC amended the Rule to provide that it "will review," among other things, "the impact on Utilization Rates of Drivers making themselves available to accept dispatches from multiple Bases." Rule § 59B-24(d); (Petition ¶ 52). This cannot save the Rule, however, which was passed *before* any such review is done.

The TLC's failure to adequately analyze utilization and its impact is particularly egregious in light of the fact that the City Council of New York City ("City Council") has recognized the key role that utilization plays in the industry. Indeed, N.Y.C. Local Law No. 150

contemplates that a utilization standard should be taken into account in developing the minimum pay formula. (*See* N.Y.C. Local Law No. 150 ("In establishing such method [for determining the minimum payment], the commission shall, at a minimum, consider . . . any applicable vehicle utilization standard."), Ex. E.) Despite the City Council's mandate to consider utilization standards in passing the Rule, the TLC failed to do so and indeed *cannot* do so because the study of such standards will not be complete for at least six more months.

Further, the Parrott Report explains that many of the issues that the TLC is seeking to address through the Rule may be potentially solved more simply by caps on the number of cars and drivers each company is allowed. (Petition ¶ 82; s*ee* Parrott Report at 11 ("[T]he simplest policy to increase driver pay would limit the inflow of new app-based drivers and/or vehicles . . . ."), Ex. K.) The TLC has in no way accounted for the recently-enacted freeze on new FHV licenses, including how it will impact driver utilization and pay. *See* Local Law No. 147, § 1.a (2018). The TLC thus proceeded blindly in promulgating the Rule even though it lacked admittedly relevant information and ignored major regulatory developments. In this regard, the Rule also fails to comport with the City Charter's mandate that the drafting process of a rule should include "analysis sufficient to minimize compliance costs for the discrete regulated community or communities, to the extent one exists, consistent with achieving the stated purpose of the rule." N.Y.C. Charter § 1043(d)(1). Because the TLC lacked sufficient information about utilization and driver behavior, it could not possibly have satisfied this analysis. *See St. James Nursing Home,* 12 A.D.3d at 923; *Jewish Mem'l Hosp.*, 47 N.Y.2d at 343.

4. The Rule Will Disincentivize Ride-Hail Operations in Historically Underserved Areas

By linking driver pay to "utilization rate," this Rule will also lead to another unintended consequence that the TLC either failed to consider or ignored: the negative effect of the Rule on

historically underserved areas. (Petition ¶¶ 84-87; Mundy Aff. ¶ 77; Tenn Aff. ¶¶ 36-39.) By placing an emphasis on high utilization, the Rule encourages ride-hail companies to focus on areas of high demand. The result is to disincentivize companies and drivers from operating in lower demand areas, to the detriment of consumers and small businesses in already underserved parts of New York City. (Petition ¶¶ 84-87.)[9] Further, an influx of drivers to Manhattan and other high-demand areas in such a scenario could exacerbate the congestion in high-traffic areas, including the notoriously crowded Central Business District. (*Id.*) By ignoring or failing to analyze all of these important consequences, the TLC failed to give reasonable consideration to the economic and social impact the Rule will have on the industry and ride-hail companies, drivers and riders.

5. The TLC's Rule Applies Arbitrarily and Capriciously

The Utilization-Based Rule also arbitrarily applies, without any differentiation, to four "high-volume" ride-hail companies that dispatch 10,000 or more trips daily. (Petition ¶¶ 88-90.) The Rule does not take into account that, within the small group of four "high-volume" companies meeting this threshold, there is an extremely wide range of trips dispatched per day. (*Id.*); *see Metro. Taxicab Bd. of Trade*, 18 N.Y.3d at 333; *see also Kelly v. Kaladjian*, 155 Misc. 2d 652, 655 (Sup. Ct. N.Y. Cty. 1992) (bright-line test for benefit was arbitrary and irrational because it lacked "any evidentiary foundation" and the record contained no study, analysis or report used to arrive at the established guideline).

[9] Indeed, data from the 2018 TLC Factbook demonstrate that, from 2016 through June 2018, medallion taxis accounted for a mere 0.1% of pickups in the Bronx, 1.1% of pickups in Queens, and 1.5% of pickups in Brooklyn. In contrast, app companies like Uber, Lyft and Juno accounted for 6.9% of pickups in the Bronx, 11.6% of pickups in Queens, and 25% of pickups in Brooklyn. N.Y.C. Taxi & Limousine Comm'n, 2018 Factbook 5, http://www.nyc.gov/html/tlc/downloads/pdf/2018_tlc_factbook.pdf (last visited Jan. 28, 2019).

Indeed, Juno dispatches only approximately 35,000 trips daily — far fewer than its larger competitors. (Petition ¶ 89 & n.61.) There are no facts in the record, however, justifying the 10,000 daily trip threshold for equally subjecting companies to the Utilization-Based Rule — at a minimum, the TLC must provide some reasoned basis for doing so (which it has not). *See Metro. Taxicab Bd. of Trade*, 18 N.Y.3d at 333. The fundamental unfairness of the Rule is compounded by the fact that the TLC is essentially forcing a "minimum wage" (and thus a mandated employment-based model) on four companies in a single industry in New York City. (Petition ¶ 90.) Although drivers for ride-hail companies are independent contractors (*id.* ¶ 90 & n.62; Mundy Aff. ¶ 15), the Rule forces four companies to compensate drivers not only for the work they perform (*i.e.*, the trips they complete) but also for the time they spend idle, without accounting for time the drivers spend idle *because they have turned down trips*. This arbitrarily-imposed regime lacks any rational basis.

B. The TLC Acted *Ultra Vires* by Passing The Rule

In addition to being arbitrary and capricious, the Rule should be annulled on the separate and independent ground that the TLC acted *ultra vires* in enacting it. (Petition ¶¶ 91-95.) It is well settled that although "an agency can adopt regulations that go beyond the text of that legislation," it may only do so "provided [the regulations] are not inconsistent with the statutory language or its underlying purposes." *Gen. Elec. Capital Corp. v. N.Y. State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004). The TLC has violated two separate mandates of Local Law No. 150, the legislation enabling it to pass the Rule.

First, Local Law No. 150 explicitly states that the TLC's rule "shall not prevent payments to for-hire vehicle drivers from being calculated on an hourly or weekly basis, or by any other method." (Petition ¶ 92.) The Rule inexplicably violates this mandate, as it allows for

calculation of minimum pay based purely on the utilization-driven formula, which does not even take into account weekly calculations, let alone allow the minimum pay to be calculated on that basis. For this reason alone, the TLC acted *ultra vires* in enacting the Rule and it should be annulled. *See McNulty v. N.Y. State Tax Comm'n*, 70 N.Y.2d 788, 791 (1987); *Riccelli Enters., Inc. v. N.Y. State Dep't of Envtl. Conservation*, 30 Misc. 3d 573, 578-79 (Sup. Ct. Onondaga Cty. 2010).

Further, Local Law No. 150 provides that the TLC's rule had to establish minimum driver payments "for a trip." (Petition ¶¶ 93-95.) The legislation made clear that a "trip" is "a transportation service that involves picking up a passenger at a location, and taking and depositing such passenger at a different location requested by such passenger" — *i.e.*, a fare not including idle time. N.Y.C. Local Law No. 150, § 1 (2018), Ex. E. If there were any question that this was the City Council's intended meaning, subsection (b) erases it. That subsection provides that the TLC's method must compensate drivers for "a trip *dispatched*." *Id.* (emphasis added). While a driver is waiting to pick up a fare, no trip has been dispatched. That happens only once a passenger requests a ride and the FHV connects the rider with the driver via the app.

Despite all this, the Rule compensates drivers not just based on "trips" but also based on *idle time*. As the TLC itself has explained: "The companies with lower utilization rates would be required to pay higher driver compensation per trip *to offset the time their drivers are waiting for a dispatch*."[10] Similarly, the Parrott Report admits: "The pay formula is thus constructed to compensate drivers for work-related time and expense *when a passenger is not in the vehicle*."[11] That is not what the City Council authorized the TLC to do, and consequently, the Rule is the

[10] Proposed Rule, 145 City Rec. 4702 (Aug. 28, 2018)) (emphasis added), Ex. F.

[11] Parrott Report at 35 (emphasis added), Ex. K.

result of *ultra vires* action and should be annulled. *See McNulty*, 70 N.Y.2d at 791 ("[I]t is elementary that '[a]dministrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute'"); *see also Riccelli*, 30 Misc. 3d at 578-79.

II. THE COURT SHOULD GRANT A PRELIMINARY INJUNCTION

Petitioners are entitled to a preliminary injunction because they can demonstrate the three requisite elements: (1) a likelihood of success on the merits, (2) irreparable injury absent relief, and (3) a balancing of equities in its favor. *See Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005) (citing *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988)); *Rakosi v. Sidney Rubell Co.*, 155 A.D.3d 564, 564 (1st Dep't 2017). The decision to grant or deny a preliminary injunction is "committed to the sound discretion of the lower courts." *Nobu Next Door*, 4 N.Y.3d at 840; *see also Rakosi*, 155 A.D.3d at 564; *Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 147 A.D.3d 1104, 1106 (2d Dep't 2017). The purpose of such relief is to maintain the status quo pending resolution of the action. *N.Y. Auto. Ins. Plan v. N.Y. Sch. Ins. Reciprocal*, 241 A.D.2d 313, 314 (1st Dep't 1997); *Pamela Equities Corp. v. 270 Park Ave. Cafe Corp.*, 62 A.D.3d 620, 621 (1st Dep't 2009); *Vanderbilt Brookland*, 147 A.D.3d at 1106. "[A] court may compensate for weaknesses in one of the foregoing elements by stressing the strength of another." *Campbell Apt., Ltd. v. Metr. Trans. Auth.*, 53 Misc. 3d 282, 301 (Sup. Ct. N.Y. Cty. 2016).

A. Petitioners Are Likely to Succeed on the Merits

To determine whether a movant is likely to succeed on the merits, a court must determine "whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action." *1234 Broadway LLC v. W. Side SRO Law Project*, 86 A.D.3d 18, 23 (1st Dep't 2011) (citing *Doe*, 73 N.Y.2d at 750-51). Although the movant must "establish a clear right to that relief under the law and the undisputed facts upon the moving papers," it need not

"tender conclusive proof beyond any factual dispute establishing ultimate success." *Id.* (citation omitted); *see Sau Thi Ma v. Xuan T Lien*, 198 A.D.2d 186, 187 (1st Dep't 1993) ("[E]ven when facts are in dispute, the nisi prius court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be conclusive.'"); *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 172-73 (2d Dep't 1986) ("As to the likelihood of success on the merits, a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings . . . .").

Here, for all the reasons discussed herein, in the Petition, and in the affidavits of Dr. Ray Mundy, Steven Tenn, Ph.D. and Ronen Ben David, Petitioners are likely to succeed on the merits because the TLC acted both arbitrarily and capriciously and *ultra vires* in passing the Utilization-Based Rule. *See 1234 Broadway LLC*, 86 A.D.3d at 23.

B. Petitioners Will Suffer Irreparable Harm Absent a Preliminary Injunction

Petitioners will also suffer irreparable injury absent a preliminary injunction. *See Garden City Co. v. Erickson*, 251 A.D.2d 262, 262 (1st Dep't 1998). New York City is the only market in which Juno operates (Petition ¶ 66), and if the Rule goes into effect, Juno will suffer significant economic harm on account of its compliance with the mandates of the Utilization-Based Rule — which Juno estimates to be upwards of $2.5 million per month. (*See* Ben David Aff. ¶ 18.) Even if the Rule is later vacated and annulled, this harm may not be compensable through recovery from the TLC.[12] It is well established that a movant suffers irreparable harm where it has no recourse for its injury. *See, e.g.*, *Metro. Taxicab Bd. of Trade v. City of N.Y.*,

[12] The TLC is an agency that, in certain circumstances, is immune from civil liability for its rulemaking function. *See Valdez v. City of New York*, 18 N.Y.3d 69, 75-76 (2011); *see also Metro. Taxicab Bd. of Trade v. N. Y C. Taxi & Limousine Comm'n*, 115 A.D.3d 521, 525 (1st Dep't 2014) (TLC immune from liability because its "determination in this case, however unjustified it may have been, was an exercise of discretion").

2008 WL 4866021, at *5-7 (S.D.N.Y. Oct. 31, 2008) (finding irreparable harm based on unrecoverable costs to be incurred for compliance with regulation); *see also Metro. Taxicab Bd. of Trade v. N. Y C. Taxi & Limousine Comm'n*, 38 Misc. 3d 936, 941 (Sup. Ct. N.Y. Cty. 2013) (citing *Gross v. Perales*, 72 N.Y.2d 231 (1988)), *aff'd*, 115 A.D.3d 521 (1st Dep't 2014); *Sirius Satellite Radio, Inc. v. Chinatown Apartments, Inc.*, 303 A.D.2d 261, 261 (1st Dep't 2003).

Just as significantly, if the Rule goes into effect, Juno will face the dilemma of attempting to increase its utilization rate by fundamentally changing its business and limiting its number of drivers — capping its own potential for growth and harming drivers in the process — or suffer severe competitive consequences. (*See* Ben David Aff.¶¶ 14, 19-20); *Metso Minerals, Inc. v. Powerscreen Int'l. Distr. Ltd.*, 788 F. Supp. 2d 71, 74-75 (E.D.N.Y. 2011) (irreparable harm can be shown where party would "lose market share and change its business strategy to survive") (internal quotation omitted). Indeed, while Juno has spent years attempting to build its relationships with drivers by offering drivers the flexibility and freedom to accept or decline rides in their discretion, the Rule will force Juno to have to impose new restrictions and rules on its drivers. (Ben David Aff. ¶ 14.) The Rule will thus damage Juno's relationships with its drivers and its goodwill in the driver community. (*Id.*) This constitutes irreparable harm under controlling New York law. *See Bell & Co., P.C. v. Rosen,* 114 A.D.3d 411, 411 (1st Dep't 2014) ("[l]oss of business" employer would suffer if former employee were "permitted to continue soliciting and representing its clients" was irreparable harm); *Willis of New York, Inc. v. DeFelice*, 299 A.D.2d 240, 242 (1st Dep't 2002); *CanWest Glob. Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 872 (Sup. Ct. N.Y. Cty. 2005) (collecting cases); *see also Town New Dev. Sales and Marketing, LLC v. Reuveni*, 2017 WL 1836433, at *3 (Sup. Ct. N.Y. Cty.

May 5, 2017); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (finding "irreparable harm through loss of reputation, good will, and business opportunities").[13]

C. The Balance of the Equities Weighs in Favor of an Injunction

Finally, the balance of equities weighs in favor of granting Petitioners' requested relief. This factor "simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." *Sau Thi Ma*, 198 A.D.2d at 186-87. Thus, when "the plaintiff would suffer irreparable injury absent the relief sought" and the defendant would sustain "no great harm" if the requested interim relief were granted, the equities favor granting the motion for preliminary injunction. *Id.* at 187.

As set forth above, Petitioners face substantial irreparable harm if the Rule goes into effect. *See also Airbnb, Inc. v. City of New York*, 18 Civ. 07712 (PAE), 2019 WL 91990, at *24

[13] Courts have not hesitated to grant injunctive relief under similar circumstances. *See, e.g.*, *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D. 3d 430, 432 (1st Dep't 2016) (irreparable harm where restaurant "will be closed, its 19 employees will lose their jobs, and plaintiff will lose its substantial investment in improvements"); *Destiny USA Holdings, LLC v. Citigroup Glob. Mkts. Realty Corp.,* 69 A.D.3d 212, 222 (4th Dep't 2009) (irreparable harm where failure to fund construction project would cause "enormous potential for harm to [plaintiff's] reputation and the reputation of the entire [project]"); *Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D.3d 856, 859 (3d Dep't 2003) ("Loss of goodwill associated with a business, which is difficult to quantify, can constitute irreparable injury even if monetary damages, as well as injunctive relief, are requested."); *Willis*, 299 A.D.2d at 242 (irreparable harm where plaintiff would "likely sustain a loss of business impossible, or very difficult, to quantify"); *Second on Second Cafe, Inc. v. Hing Sing Trading, Inc.*, 66 A.D.3d 255, 272-74 (1st Dep't 2009); *Quinones v. Bd. of Managers of Regalwalk Condo. I,* 242 A.D.2d 52, 57 (2d Dep't 1998); *Suffolk Cty. Elec. Contr. Assn., Inc. v. Town Bd. of the Town of Iship*, 2013 WL 6924814, at *6 (Sup. Ct. Suffolk Cty. Dec, 19, 2013) (irreparable harm where local law would prevent members of a trade organization from working on commercial projects unless they participate in an apprenticeship because the requirement would result in a substantial loss of business and good will); *Jacob H. Rottkamp & Son, Inc. v. Wulforst Farms, LLC*, 17 Misc. 3d 382, 388-89 (Sup. Ct. Suffolk Cty. 2007) (irreparable harm where plaintiff's inability to fulfill its supply agreements with its customers would result in severe harm to the plaintiff's reputation as a "reliable supplier of excellent quality Long Island sweet corn"); *see also Wilf v. Halpern*, 194 A.D.2d 508, 508 (1st Dep't 1993); *Mr. Natural, Inc. v. Unadulterated Food Prods., Inc.*, 152 A.D.2d 729, 730 (2d Dep't 1989).

(S.D.N.Y. Jan. 3, 2019) (balance of harms tipped in plaintiffs' favor where, among other things, plaintiffs faced "significant compliance costs" and "at least some risk of alienating plaintiffs' users."). On the other hand, Petitioners stand ready and willing to litigate this action as expeditiously as possible, and there is little harm to the TLC from maintaining the *status quo* for a brief period of time while the Petition is adjudicated. To the contrary, the TLC has extended the effective date of the Rule from January 10 to February 1 and continually made changes and clarifications to the Rule as drafted. (Petition ¶ 55 & n.38.) While this action is litigated, the TLC may take that time to analyze whether alternative minimum pay rules would be more effective and avoid the myriad problems created by the Utilization-Based Rule. (*See* Mundy Aff. ¶ 84 (opining that TLC should "give more thought to the fact that the path it is embarking upon is one no other transportation regulatory agency has ever taken – that it will necessarily have to develop minimum pay rules for all other FHVs under its jurisdiction and maintain immense data details on hours worked, payments made, etc.").) And, in any event, the TLC has other tools available to it — like its recently-enacted moratorium on licenses (Petition ¶ 15) — to attempt to achieve its stated goals while the status quo is maintained. *See Airbnb*, 2019 WL 91990, at *24 (enjoining City ordinance where, among other things, the City's regulator had "other tools" to advance City's interests).

Moreover, as explained herein and in the Petition, the current Rule threatens not only Petitioners but also the entire ride-hail industry in New York City. The Rule will have the unintended consequence of severely harming competition and forcing smaller companies like Juno to change their business models (which are designed to actually increase driver utilization, *see* Petition ¶¶ 70-72), limit their growth, or face significant — if not insurmountable —

competitive disadvantages. (*See* Tenn Aff. ¶¶ 9, 17-42.) As a result, consumers and drivers will ultimately have fewer options for ride-hail services.

Further, in light of the "winner take all" scenario that the Utilization-Based Rule creates, the Rule will incentivize drivers and ride-hail companies to focus on higher-demand areas, compounding the already significant congestion problems in New York City and causing potentially disastrous effects for traditionally lower-demand areas. (Petition ¶¶ 84-87.) In this way, the Rule threatens to undo one of the largest benefits of ride-hail companies — *i.e.*, providing access in underserved neighborhoods. (*Id.* ¶ 85.) Such a result is fundamentally at odds with the TLC's stated purpose of ensuring that all New Yorkers have access to safe and affordable transportation.

III. THE COURT SHOULD GRANT A TEMPORARY RESTRAINING ORDER

Finally, CPLR 6301 provides that a "temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." CPLR 6301. The aim of a temporary restraining order is "to furnish the plaintiff with a stop-gap measure upon a showing that immediate and irreparable injury, loss or damage is likely unless the defendant is restrained in advance of the return date of the motion for a preliminary injunction." 13 Jack B. Weinstein et al., *New York Civil Practice*: CPLR 6301.01 (2d ed. 2014). For the reasons described above, Petitioners face immediate irreparable harm if the Court does not enter a temporary restraining order pending the hearing on the preliminary injunction.

CONCLUSION

Petitioners respectfully request that the Court grant (i) their motion for a preliminary injunction and a temporary restraining order enjoining Respondents from enforcing the Utilization-Based Rule until the Court rules on the Petition; and (ii) the relief requested in the Petition.

Dated: New York, New York
January 29, 2019

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/s/ George A. Zimmerman