SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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ZEHN-NY LLC; ZWEI-NY LLC; ABATAR LLC; UNTER LLC; UBER TECHNOLOGIES INC,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

-and-

SAMASSA TIDIANE, MOUHAMADOU ALIYU, AMARA SANOGO and TABISH SYED

Intervenor-Defendants
----------x

Index No. 151730/2019
(J. Frank)

CITY DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

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July 18, 2019

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Defendant, the City of New York, submits this reply memorandum of law in further support of its motion to dismiss the amended complaint and in response to arguments raised by plaintiffs in their Memorandum of Law in Opposition to Defendant and Intervenor-Defendants' Motions to Dismiss, dated June 20, 2019 ("Pls. Opp. Mem.").

ARGUMENT

POINT I

LL 147'S DELEGATION TO TLC IS LAWFUL AND APPROPRIATE.

Plaintiffs contend that Admin. Code § 19-550(b)(2) (added by LL 147 § (3)) granting TLC the authority to regulate the number of FHV licenses issued on an ongoing basis impermissibly delegates legislative authority to TLC. Relying heavily on the principles of Boreali v. Axelrod, 71 N.Y.2d 1 (1987) and New York Statewide Coalition of Hispanic Chambers of Commerce v. NYC Dep't of Health & Mental Hygiene, 23 N.Y.3d 681 (2014), plaintiffs make four arguments in support of this claim. Pls. Opp. Mem. at 10-16. Each argument relates back to the broad notion that the City Council impermissibly delegated legislative authority to TLC and as such, all action taken by TLC pursuant to LL 147 is an improper exercise of policymaking, not regulatory authority. Plaintiffs are wrong. Plaintiffs' analysis misses the essential point of Boreali and Statewide Coalition – which have no application here as the agency is merely implementing a specific delegation of authority, while furthering the core objectives of the broader statutory mandate. Most of the cases plaintiffs rely on consist of challenges to agency action as contrary to the authority provided to the agency by the legislature – not, as here, a challenge to the legislative authority itself. Here, the City Council reached consensus on its policy approach to the issuance of FHV licenses and passed legislation that delegated authority to TLC to regulate the number of FHV licenses it issued in a

circumscribed, deliberate, and lawful manner. It did so in two ways: first, it required TLC along with DOT to conduct a study that examine eight specified topics relating to the effects of for-hire transportation; and second, it instructed TLC to regulate the number of FHV licenses issued based on the extent to which such regulation will address "traffic congestion, shared rides, traffic safety, vehicle emission, for-hire vehicle ridership, the income drivers derive from providing transportation services to passengers and the availability of for-hire vehicle services in different geographic areas of the city." Admin. Code § 19-550(a), (c). Given these very specific directions to TLC, there is no basis for plaintiffs' assertion that the Council's delegation to the TLC was unconstrained or that the Council somehow ceded its policy-making duty to TLC.

As an initial matter, plaintiffs' reliance on LeadingAge, Inc. v. Shah, 32 N.Y.3d 249 (2018), in support of their argument that the legislature cannot delegate its functions to administrative agencies is misplaced. Pls. Opp. Mem. at 10. At issue in Leading Age was whether a state agency exceeded its State-delegated authority, not the delegation itself. Specifically, the LeadingAge petitioners challenged regulations enacted by the N.Y. State Department of Health in response to an Executive Order that limited compensation for executives and administrative expenditures by certain health care providers receiving state funds. As here, in LeadingAge the State Legislature delegated authority to the NYS Department of Health to limit the amount of state funds used for administrative expenditures and set a maximum executive compensation rate. Although the Court of Appeals in LeadingAge ultimately concluded that the NYS Department of Health exceeded the authority provided by the State Legislature with respect to one of three challenged regulations, the Court took no issue with the legislative delegation itself. 32 N.Y.3d at 269-71. Here, as in LeadingAge, the City Council made the primary legislative determination that the number of FHV licenses issued by TLC

needed to be temporarily limited while the issues were studied (Admin. Code § 19-550(a)), and delegated to TLC the authority to regulate the number of licenses issued to the extent TLC determined that such regulation addressed, among other factors identified in Admin. Code § 19-550(c), traffic congestion, traffic safety, and the availability of FHV services in different geographic areas of the City. Plaintiffs do not allege, however, that TLC has exceeded authority delegated to the agency in under § 19-550(b). Rather, plaintiffs allege that the delegation itself was improper. As such, Leading Age is inapposite.

Prior to addressing each of plaintiffs' individual arguments, it is important to note the City Council process that preceded enactment of LL 147 as it is highly relevant to an evaluation of plaintiffs' arguments. At the time of LL 147's enactment, the City Council determined it was necessary to limit – on a temporary basis – the issuance of FHV licenses pending the completion of a study to be conducted by City agencies. Simultaneously, the City Council directed TLC – the agency with the requisite technical expertise – to craft a longer term solution to address identified issues relating to the high volume FHV industry. Based upon the robust record before it, the City Council decided that the issues of traffic congestion, safety, and driver income needed to be immediately addressed. The City Council Comm. on FHVs Report made clear in its conclusions that "[t]he app-based FHV sector is growing unsustainably and is now at crisis level." Goldberg-Cahn Affirm. Ex. C, at 9. The legislation thus reflected the Council's policies: in the immediate term, to cease issuance of new FHV licenses; and in the longer term, to direct TLC and DOT to more closely examine the effect of transportation for hire in specified areas, and to authorize TLC to establish utilization standards for the operation of FHVs dispatched and regulate the number of FHV licenses issued.

Plaintiffs first argue that the law constitutes an impermissible delegation as LL 147 "contain[s] no standard constraining the TLC's capping authority." Id. at 11. However, as set forth in more detail in Defendant's Memorandum of Law in Support of Motion to Dismiss, dated May 16, 2019 ("Defs Mem."), the City Council has provided standards and guidance to TLC in developing utilization standards and regulating issuance of new FHV licenses by enumerating in LL 147 eight specific factors TLC must study that serve as the basis for any standards it adopts. Admin. Code § 19-550(b) (LL 147, § 3) makes clear that TLC was only authorized to establish utilization standards and regulate issuance of FHV licenses "[b]ased on the results of the study conducted pursuant to subdivision a of this section," – meaning, TLC may only take action that conforms to the results of the study examining the eight factors enumerated in § 19-550(a). Plaintiffs cite to City of Utica v. Water Pollution Control Bd., 5 N.Y.2d 164 (1959) in support of their argument (Pls. Opp. Mem. at 12), however, Utica actually supports the City's actions here. In Utica, the legislature created the Water Pollution Board and directed it to develop a comprehensive program to abate and control water pollution and empowered the Board to classify the waters in the State. 5 N.Y.2d at 166. The standard set forth by the legislature only required the agency to act "in accordance with considerations of best usage in the interest of the public." Id. at 168. In upholding this broad delegation, the Utica court emphasized that a legislative delegation is proper as long as the legislature sets forth "an intelligible principle, specifying standards or guides in as detailed a fashion as is reasonably possible in light of the complexities of the particular areas to be regulated."[1] Id. at 169. In upholding the broad delegation in Utica, the Court pointed to factors that the law specified (i.e., physical nature of the

[1] The Utica Court goes on to note that it is not reasonable for the legislature to be more specific or detailed in directing an administrative agency with respect to a complex subject. Id. at 171. ("[h]aving in mind the breadth of the problem of water pollution control, its technical and intricate character, the Legislature could hardly have been more specific in prescribing essential guidelines.").

waterway, character of the area abutting the waterway, and how the waterway had been used). Id. Similarly, here, the Council established parameters to guide TLC's exercise of its delegated authority. The factors identified in Admin Code § 19-550(a) establish the issues that the Council wanted the agency to consider regarding the establishment of vehicle utilization standards and the regulation of the issuance of FHV licenses. However, significantly, the recitation of those factors was not the only guidance the Council provided. In Admin. Code § 19-550(c), the Council prescribed the standard that govern the actions of TLC – varying the vehicle utilization standards or the number of FHV licenses issued. TLC could regulate the number of FHV licenses issued only to the extent such regulation addressed one or more of a series of factors. In the absence of a basis to believe that any proposed limitation on the number of FHV licenses issued would promote one or more of these factors, no authority was delegated to TLC to limit the number of licenses issued. A comparison of the unspecific guidelines established by the legislature in Utica with the nature of the study that Council required TLC to conduct (Admin. Code § 19-550(a)) and the standards set forth in Admin. Code § 19-550(c), underscores the propriety of the City Council's delegation of authority in LL 147.

The other cases plaintiffs rely on in support of this argument are similarly inapposite. For instance, in Levine v. Whalen, 39 N.Y.2d 510 (1976), the Court of Appeals upheld a vague and indefinite legislative prescription. There, the Court concluded that a state statute delegating authority to the N.Y. State Department of Health to develop and administer the State's policy with respect to hospitals "to provide for the protection and promotion of the health of the inhabitants of the state," was sufficient to guide the agency's implementation of the statute. 39 N.Y.2d at 516. The eight specific areas Admin. Code §19-550(a) required TLC to assess and the standards established in Admin. Code § 19-550(c) to guide TLC's decision to vary the number of

FHV licenses issued, provide far greater specificity than the broad standard upheld in Levine. Plaintiffs' reliance on Marshall v. Village of Wappingers Falls, 279 N.Y.S.2d 654 (2d Dep't 1967), fares no better. In Marshall, the court found that a zoning ordinance authorizing an administrative agency "to issue a special permit for any use for which this ordinance requires the obtaining of such permits from the Board of Appeals" was an invalid delegation of authority as it contained no standard or rule governing agency action. 279 N.Y.S.2d at 654. Unlike the delegation in Marshall, any regulation of the number of FHV licenses must be "based on" the results of the study and periodic review mandated by § 19-550(b)(2), and the extent to which such regulation promoted one or more of the factors specified in § 19-550(c). Plaintiffs offer no support for their conclusory statement that LL 147 provides less of a standard than the non-existent standard in Marshall.[2]

Plaintiffs make much of the fact that the study that the City Council required included a ninth factor that authorized TLC and DOT to examine other topics the two agencies deemed appropriate (Admin. Code § 19-550(a)(ix)), arguing that "it eroded the statutory standard intended to constrain agency action." Pls. Opp. Mem. at 11, 13. However, explicit in many delegations of power, including several cited by plaintiffs (see, e.g., Utica, 5 N.Y.2d at 164), the legislature authorizes agencies to consider a variety of factors in making decisions. Indeed, given that TLC possesses expertise under its broad delegation of authority to regulate all aspects

[2] Plaintiffs' reliance on 164th Bronx Parking, LLC v. City of New York, 20 Misc.3d 796 (N.Y. Sup. Ct., Bronx County 2008), is similarly misplaced. Pls. Opp. Mem, at 10. Although the trial court in 164th Bronx Parking struck down the legislative delegation in that case, it did so after concluding that the statute limiting the grant of licenses to parking garage operators to persons of "good character" was unconstitutionally vague insofar as it "confer[red] unrestrained power on agency officials to consider conduct reflective of poor character based merely on their own personal, subjective sensibilities or notions of good versus mediocre character or the idiosyncrasies of the official or the applicant." 20 Misc.3d at 803. Here, however, the City Council set forth specific factors pertaining to the effects of for hire transport on traffic congestion and safety, air pollution, FHV driver earnings, and the availability of FHV services for persons living in all parts of the City. Thus, there is no basis for plaintiffs' bald assertion that the delegation in Admin. Code § 19-550 is akin to the subjective delegation in 164th Bronx Parking.

of transportation for hire in NYC under the City Charter (and DOT with its expertise in transportation in the City), it was logical for the City Council to allow the agencies to examine "such other topics [they] .... deem appropriate" in the event new issues arose in connection with the study that warrant further review and examination. Thus, the last enumerated factor simply authorizes TLC and DOT to exercise their expertise. Moreover, the ninth factor is clearly constrained by the specificity of the first eight factors and was not intended to allow TLC and DOT to select any random topic of their choosing while ignoring the specifically enumerated factors.[3] In LL 147, the City Council merely made explicit the consideration of unenumerated factors that courts have long allowed and indeed thought necessary to avoid the "delinquent" exercise of delegated power. For example, in a recent challenge to the prohibition on polystyrene (Styrofoam), the Court rejected petitioners' claim that the Sanitation Commissioner considered an additional factor not explicitly set forth in the law, concluding that "it would be delinquent of the Commissioner not to consider the EPS recycling issues after the subsidy ends." Restaurant Action Alliance v. City of N.Y., N.Y. Sup. Ct., N.Y. Co. Index No. 100734/2015, at 8 (emphasis added)(Goldberg-Cahn Reply Affirm. Ex. A), aff'd, 165 A.D.3d 515 (1st Dep't 2018).

Plaintiffs next contend that the delegation to TLC was unlawful because the City Council did not conduct its own study prior to enactment. Pls. Opp. Mem. at 11-12. However, there is no requirement that a legislative body conduct a study prior to enacting any remedial legislation that includes a delegation of authority.[4] Nor do plaintiffs identify any such requirement. Rather,

[3] In any event, as the results of the study are now published, it is clear that no such other topics were reviewed. See https://www1.nyc.gov/assets/tlc/downloads/pdf/fhv_congestion_study_report.pdf (last accessed July 12, 2019).

[4] The Court in Huggins v. New York, 126 Misc.2d 908 (Sup. Ct., N.Y. County 1984), rejected an argument that a detailed study was necessary prior to the legislature delegating authority to an administrative agency. There, the Court concluded that "[p]etitioners' complaint that the Council's investigation of the relationship between food vendors, congestion and public safety was insufficiently rigorous is equally unavailing. The fact that there may exist more scientific methods than those employed upon which legislative decisions are based does not, by itself, render those judgments" invalid. 126 Misc.2d at 911.

plaintiffs cite to decades old cases where a legislative body happened to have conducted its own study prior to a legislative enactment. For instance, nearly a century ago in Rudack v. Valentine, 163 Misc. 326, 327 (N.Y. Sup. Ct., N.Y. County 1937), a legislative body pre-dating the City Council undertook its own study prior to enacting legislation delegating regulatory authority over taxis to the Hack Bureau. (Pls. Opp. Mem. at 12). Nothing in Rudack, however, states - or even suggests - that the current City Council or legislative bodies are required to thoroughly examine every facet of any complex or economic problem before authorizing an administrative agency to implement regulations addressing such problems. In fact, plaintiffs ignore the numerous legislative enactments requiring administrative agencies to marshal their resources and expertise to address urgent and complicated problems facing the City. For example, when the City Council enacted the polystyrene ban (i.e., Styrofoam), the Council explicitly delegated power to the Department of Sanitation to study whether such product was recyclable based upon several broad factors set forth in the legislation and to implement regulations based on the results of said study. Admin. Code § 16-329(b)-(c). In upholding an Article 78 challenge to the agency's determination, the court concluded that the agency's "[d]etermination was a painstakingly studied decision," which occurred after the City Council's delegation to act. Restaurant Action Alliance v. City (Goldberg-Cahn Reply Affirm. Ex. A.), at 10; aff'd 165 A.D.3d at 515. Similarly, the local law creating the Street Vendor Review Panel, comprised of the heads of several city agencies, explicitly delegated authority to City agencies to promulgate rules pertaining to general and food vending businesses "after making a determination that such vending business would constitute a serious and immediate threat to the health, safety and well-being of the public" based on those agencies' determinations relating to congestion issues on various streets. Admin. Code § 20-465.1(a). In those statutes, like the one challenged here, the

City Council delegated authority to several agencies but conditioned such delegation on studies that had not yet taken place. Delegating regulatory authority and conditioning such on prospective study by an agency evidences recognition by the legislature that the regulated subject matter is one requiring specific agency expertise.

Plaintiffs' third argument attempts to characterize the eight enumerated factors specified by the City Council for consideration in the study as impermissibly social or value based. However, the enumerated factors are precisely the type of costs and benefits that agencies permissibly balance in the course of everyday regulatory decision-making processes. Despite plaintiffs' heavy reliance on Statewide Coalition, the Court of Appeals made clear in that case that "the promulgation of regulations necessarily involves an analysis of societal costs and benefits." Statewide Coalition, 23 N.Y.3d at 697. The Court concluded:

> Indeed, cost-benefit analysis is the essence of reasonable regulation; if an agency adopted a particular rule without first considering whether its benefits justify its societal costs, it would be acting irrationally. We stated as much in Boreali, noting that "many regulatory decisions involve weighing economic and social concerns against the specific values that the regulatory agency is mandated to promote" (Boreali, 71 NY2d at 12). Therefore, Boreali should not be interpreted to prohibit an agency from attempting to balance costs and benefits.

Id. at 697-98. Similarly, in upholding the Taxi of Tomorrow rules, the Court of Appeals in Greater N.Y. Taxi Ass'n v. TLC, 25 N.Y.3d 600 (2015) made clear that it was permissible for TLC to "balance[] the costs and benefits to all interested parties – passengers, owners, drivers and the general public" and determined that the rules did not constitute an unwarranted intrusion into "economic and social concerns … outside of [TLC's] proper sphere of authority." 25 N.Y.3d at 610-11. Thus, plaintiffs incorrectly argue that any cost-benefit weighing is an impermissible delegation; it is only problematic when agencies weigh economic and societal concerns outside the clear scope of their delegated authority.

Here, plaintiffs cannot show that the authority delegated to TLC is anything more than a permissible cost-benefit analysis. Contrary to plaintiffs' arguments, TLC is not being tasked with making difficult and complex choices among social and political policy goals. Through the study of the topics specified in Admin. Code § 19-550(a), TLC is simply directed to balance the costs and benefits to all interested parties – here, FHV companies using apps, FHV and taxi drivers, passengers, and the general public – much like the law challenged in GNYTA. In addition to balancing the costs and benefits mandated by the study, the City Council directed TLC to regulate the number of FHV licenses issued only to the extent TLC had a basis to think that such action would address one or more of the factors identified in Admin. Code § 19-550(c). As such, the legislation required TLC to assess a range of issues relating to for-hire vehicle transportation and delegated to TLC the determination of the best way to balance concerns about traffic congestion, safety, driver income, and availability of services throughout the City in order to have access to the best transportation for-hire in the City. Importantly, the Council did not leave this determination to TLC without imposing parameters on TLC's discretion; § 19-550(c) prescribed the Council's goals. The balancing of the costs and benefits of the factors enumerated in § 19-550(a) and the assessment of the extent to which limiting the issuance of FHV licenses would address one or more of the objectives identified in § 19-550(c) to manage the ever-increasing congestion and safety issues surrounding transportation for hire in New York City, starkly contrasts with the political compromises or controversial value judgments over matters of personal autonomy at play in Boreali and Statewide Coalition. See NYC C.L.A.S.H. v. N.Y. State Office of Parks, Rec. & Historic Preserv., 27 N.Y.3d 174, 176 (2016)(holding smoking prohibition in parks did not reflect a political compromise and noting that the "exercise of an

individual right is not limitless."). Here, there is simply no risk that the delegation made to TLC could interfere with personal autonomy and rights.

Finally, plaintiffs contend that the delegation in LL 147 to regulate the number of FHV licenses is contrary to the City Council's historical practice of establishing limits on the number of medallion taxis, arguably in support of the third Boreali factor. Pls. Opp. Mem. at 14. However, that the legislature has not undertaken such action in the past has no bearing on what the legislature may do today. There was nothing prohibiting prior legislatures from delegating to TLC the ability to regulate the number of taxi medallions or FHV licenses that may be issued. Likewise, there is nothing prohibiting the City Council from now deciding that given the increasing complexity of the already-regulated FHV industry, paired with the expertise of TLC in all aspects of the FHV industry, legislation authorizing TLC to regulate the number of FHV licenses issued is appropriate. To do so would bind today's City Council to the will of prior Councils.

POINT II

THE CITY HAS AUTHORITY UNDER GML § 181 AND OTHER PROVISIONS OF LAW TO LIMIT THE NUMBER OF FHVs

Plaintiffs argue a rigid and distorted construction of GML § 181. However, plaintiffs ignore that there are several provisions of New York State law which, in addition to GML § 181, establish the City's authority to enact comprehensive regulation of all types of vehicles operated for hire, including limiting their number. These are as follows:

> (1) Municipal Home Rule Law ("MHRL") § 10(1)(a)(12), in relevant part, provides cities, towns and villages authority over "the government, protection, order, conduct, safety, health and well-being of persons or property therein", including specifically "the power to adopt local laws providing for the regulation or licensing of occupations or businesses[.]"

> (2) General City Law ("GCL") § 20(32) preserves "the power or duty imposed on the police department or other analogous agency to regulate hacks, taxicabs and taxi drivers pursuant to the provisions of any city charter, local law or ordinance[.]"
>
> (3) Vehicle and Traffic Law ("VTL") § 1642(a)(3) grants the City of New York authority over "[t]he prohibition or regulation of the use of any highway by particular vehicles or classes or types thereof[.]"

All of these provisions speak of local "regulation" either generally of businesses, types of vehicles, or specifically of "hacks" and "taxicabs." In contrast to GML § 181, there is no separate mention of limiting the number of regulated entities. However, New York City (and other cities as well) have long relied on MHRL § 10(1) to limit the number of licenses issued in a particular trade or occupation or the number of businesses that can operate in a particular area. In Short Stop Indust. Catering Corp. v. City of New York, 127 Misc.2d 363 (Sup. Ct., N.Y. Co. 1985), the Court upheld a law (LL 17 of 1983) that capped the number of licenses issued by the City to food vending vehicles, concluding that the enactment was authorized under MHRL § 10(1) and had a rational basis in the need to mitigate traffic congestion. In Huggins v. City of New York, 126 Misc.2d 908 (Sup. Ct., N.Y. Co. 1984), the Court upheld, on the same basis, another portion of the same local law which prohibited food vending on designated streets at specified times. See also Big Apple Food Vendors' Ass'n v. City of New York, 228 A.D.2d 282 (1st Dep't), app. dismissed, 88 N.Y.2d 1064 (1996), app. denied, 89 N.Y.2d 807 (1997) (upholding limit on number of licenses issued to single licensee for vending food from sidewalk cart or vehicle). These decisions make clear that MHRL § 10(1)(a)(12) restates and codifies the long-standing police power of local jurisdictions. The same is true of GCL § 20(32) and VTL § 1642(a)(3). It is also true of the original text of GML § 181(1), authorizing cities, towns and villages to "adopt ordinances regulating the registration and licensing of taxicabs and may limit the number of taxicabs to be licensed." In the case of New York City, this local police power

had been exercised for many years to regulate and limit the number of vehicles providing transportation for hire, an exercise validated in Rudack v. Valentine, 163 Misc. at 326.[5]

GML § 181, like the above-cited provisions of State law, relates to the authority of New York City and other local jurisdictions to regulate particular trades and occupations, and is thus in pari materia with them. Plaintiffs essentially allege that GML § 181 implicitly repeals the general local regulatory authority established in the above-cited provisions, which includes the authority to limit the number of individuals engaged in a trade or occupation, with regard to limiting the number of livery vehicles. However, it is accepted that statutes in pari materia "should, if possible, be given uniformity of application and construction, and applied harmoniously and consistently." Stated differently, "[t]he rule requiring all acts in pari materia to be construed together, and the rule disapproving implied repeals, constitute but different expressions of the same rule." McKinney's Statutes § 221, at 378-379.

GML § 181 is easily reconciled with the above-cited provisions, in particular with MHRL § 10(1)(a)(12), in considering the true necessity for amending GML § 181(1) to authorize the regulation and/or limitation by counties of vehicles providing for-hire transportation. MHRL § 10(1)(a)(12) authorizes counties, as well as cities, towns and villages, "to adopt local laws providing for the regulation of occupations or businesses[.]" However, with respect to counties alone, this subparagraph further provides:

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[5] Plaintiffs incorrectly assert that "[t]he State of New York adopted the provisions of the [N.Y. City ordinance regulating and limiting the number of taxicabs] as part of a recodification and amendment of the New York City Administrative Code in 1937." Pls. Opp. Mem. at 27, n.19 The Court of Appeals has stated, with regard to the 1985 recodification of the Administrative Code, that "the recodified Administrative Code cannot be equated with the enactment of a State statute." Elliot v. City of New York, 95 N.Y.2d 730, 735 (2001)(citing the 1985 Code section providing that "[r]ecodification by the Legislature 'shall not be construed as validating, ratifying or conforming any provision' of the pre-existing Administrative Code to State law."). Since the "pre-existing Administrative Code" referred to by the Court was the 1937 codification, the Court's conclusion necessarily applies to that codification as well. It follows that the City's regulation and limitation of vehicles providing transportation for hire remained (and remains) a provision of local law emanating from the City's police power, a power recognized and restated by both GML § 181 and MHRL §10(1)(a)(12).

> **Except in** a case where and to the extent that a county is **specifically** authorized to regulate or license an occupation or business, the exercise of such power by a county shall not relate to the area thereof in any city, village or area of any town outside the village or villages therein during such time as such city, village or town is regulating or licensing the occupation or business in question.

MHRL § 10(1)(a)(12)(b). Thus, the amendments to GML § 181(1) that specifically authorized various counties near New York City to regulate and/or limit vehicles providing transportation for hire were necessary to ensure uniform county-wide regulation of the industry, unimpaired by separate local requirements enacted by jurisdictions within those counties. This was necessary because of the growing number of trips made by vehicles operating for hire between and among New York City and nearby counties and the consequent need for interjurisdictional reciprocity, that is, the mutual recognition of licenses issued by the City and those counties to vehicles operating for hire and their drivers. See VTL § 498 ("Interjurisdictional pre-arranged for-hire vehicle operation").

As its title indicates, VTL § 498 governs interjurisdictional reciprocity in the operation of "pre-arranged for-hire vehicles," a category of vehicles that explicitly includes liveries and black cars. VTL § 498(1)(c). New York City is specified as a "licensing jurisdiction" entitled to participate in the system of interjurisdictional reciprocity, together with the nearby counties authorized to regulate this category of vehicles by GML § 181. See VTL § 498(1)(b). The system requires that these "licensing jurisdictions" meet uniform standards in the regulation of such vehicles and their drivers. VTL § 498(3), (4), (6). Thus the Legislature, in enacting that provision as well as the various county-related amendments to GML § 181(1), was not seeking to limit the authority granted to New York City by the original text of GML § 181. By the same token, the Legislature did not need to make any changes in the section's original text, since New York City's power to regulate and limit the occupation of providing transportation for hire (and

indeed, the practice of all trades and occupations) had long been recognized and was codified in provisions of State law, including GML § 181.

Plaintiffs allege that the Legislature, in enacting the various amendments to GML § 181 relating to "limousines" and/or "livery vehicles" in the counties near New York City, intended to restrict the City to limiting only the number of "taxicabs," as that term is currently understood in New York City. Although plaintiffs focus only on the part of GML § 181 that relates to limiting the number of "taxicabs," the relevant provision of GML § 181(1) authorizes the City to license, regulate and limit their number. The system of interjurisdictional reciprocity, which includes New York City and was elaborated by the county-related amendments to GML § 181, necessarily assumes that the City has plenary regulatory authority over FHVs, including the power of licensing and registration. Thus, it is impossible to attribute to the Legislature, in enacting the county-wide amendments to GML § 181, the intent to exclude the City from all authority over any type of vehicle operated for hire with the exception of "taxicabs," as that term is currently understood in the City. Plaintiffs cannot have it both ways – they cannot argue that the county-related amendments to § 181 changed the meaning of "taxicab" to prevent the City from limiting the number of FHVs, but not from otherwise licensing and registering them (GML § 181(2)). It can of course be pointed out that other provisions of law, including MHRL § 10(1)(a)(12) and the City's traditional police power, authorize the City to regulate all trades and occupations, including the provision of transportation for hire. However, as noted above, courts view these provisions as including authority to limit the number of those engaged in a trade or occupation. It would indeed be a strained reading of GML § 181 to contend that the Legislature intended to set up a conflict between that section and other provisions of law, including MHRL § 10(1)(a)(12), with regard to one thing – limiting the number of those engaged in a trade or

occupation – but not another – otherwise regulating the same trade or occupation, including through licensing and registration. Far less constrained is the conclusion that the county-related amendments to GML § 181(1) had no effect on any part of the City's regulatory authority over vehicles providing transportation for hire.

This is another way of concluding that GML § 181 must be interpreted in pari materia with MHRL § 10(1)(a)(12) and the other provisions of law cited above. It is also another way of concluding that the county-related amendments to GML § 181 do not operate an implied repeal of any part of the City's regulatory authority over vehicles providing transportation for hire. The conclusion here is consistent with the fact that no part of GML § 181 was ever intended to alter the powers of New York City – whether to expand or limit them. The section as originally enacted merely restates the police power of cities, towns and villages with regard to vehicles providing transportation for hire, as accepted by the courts in common law. See Rudak, 163 Misc. 326.[6] Although plaintiffs would like the Court to believe that the Legislature intended, through the county-related amendments to GML § 181, to take away powers from the City confirmed by the statute's original enactment, and recognized by such sources as MHRL § 10(1)(a)(12), GCL § 20(32) and VTL § 1642(a)(3), courts emphasize that legislative bodies do not make significant changes through "subtle device[s]," and should not be presumed to "hide elephants in mouseholes." Hall v. Hall, 138 S. Ct. 1118, 1129 (2019); see also Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001) ("Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"); MacNeill v. Berryhill, 869 F.3d 109, 115 (2d Cir. 2017)("[plaintiff's] contention amounts to an argument that the

[6] Indeed, the sponsor of the original enactment explicitly stated that it did not affect the powers of New York City. See Letter of Senator Thomas C. Desmond, Chair of the Comm. on the Affairs of Cities, to Daniel Gutman, Counsel to the Governor, March 27, 1956, in Laws of 1956, chapter 209, bill jacket. Goldberg-Cahn Reply Affirm., Ex. C.

amendment of a subparagraph of a statutory provision dealing with paternity determinations served to revise the entirety of New York's intestacy scheme...But legislative bodies generally do not 'hide elephants in mouseholes'")(citing Cruz v. TD Bank, N.A., 22 N.Y.3d 61, 72 (2013)). Finally, this comports with the long-standing recognition by courts of the City's plenary regulatory authority over all types of vehicles providing transportation for hire, including FHVs. See Livery Round Table, Inc. v. NYC FHV & Limousine Com'n. [*sic*], 2018 U.S. Dist. LEXIS 65524, 20 (S.D.N.Y. 2018)(stating TLC has a "long-standing and previously unchallenged practice of regulating for-hire transportation" and "has been issuing similar rules and regulations [with regard to FHVs] for nearly fifty years without any question as to its authority to do so"); Vugo, Inc. v. City of New York, 2019 U.S. App. LEXIS 20958, *5 (2d Cir. July 16, 2019); (reiterating TLC's longstanding authority to regulate FHVs and taxis); GNYTA v. TLC, 25 N.Y.3d at 600 (acknowledging TLC's regulatory authority over taxicabs and other vehicles providing transportation for hire in New York City).

While plaintiffs marshal a series of Latin phrases in support of their allegation that the Court should not look beyond the literal language of GML § 181, plaintiffs ignore the fundamental precept that the primary consideration in construing a statute is to "ascertain and give effect to the intention of the Legislature." McKinney's Statutes § 92(a). Although "legislative intent must first be sought in the language of the statute under consideration," it is also true that "the purpose and applicability of a statute should be based on a consideration of its legislative history, and it has been held that legislative history is not to be ignored, even if words be clear." Jacobs v. Marine Midland Bank, N.A., 124 Misc.2d 162, 164 (Sup. Ct., Orange Co. 1984)(citing McKinney's Statutes § 124) (emphasis added). See also Riley v. County of Broome, 95 N.Y.2d 455, 463 (2000) ("it is appropriate to examine the legislative history even though the

language of [the statute under consideration] is clear"); New York State Bankers Ass'n v. Albright, 38 N.Y.2 430, 437 (1975) ("[w]hen aid to the construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'").

An important factor in discerning legislative intent is "[t]he conditions under which [an] act was adopted[.]" McKinney's Statutes § 124 at 255. As shown herein, the amendments to GML § 181 authorizing counties to regulate and/or limit vehicles providing transportation for hire were part of the creation and elaboration of the system of interjurisdictional reciprocity, a construct that included (and includes) New York City. The Legislature therefore could not have intended in those amendments to limit the City's authority over FHVs, and there is no indication of such an intent. Moreover, as set forth in Defs. Mem. at 11-14, taxicabs, when GML § 181 was first enacted, were commonly understood to encompass all types of vehicles providing transportation for hire, including vehicles operating by prearrangement, the essential feature of modern FHVs.

The only item of legislative history on which plaintiffs rely is S3538-B, a bill passed by the Legislature in 2016 which would have amended GML § 181 to clarify that cities, towns and villages have authority to register and license "limousines, liveries and transportation network company vehicles" in addition to taxicabs. The Introducer's memorandum in support of that bill identifies the evil intended to be addressed by the bill as: "Cities are now having issues with livery vehicles acting as unregulated taxis which don't have to meet the same licensing and safety standards as taxis." Defs' Mem. at 15. The bill was thus intended to address a relatively new phenomenon, not defined in the legislation or further described in the legislative history, but clearly encompassing FHVs using apps to provide service such as Uber. The bill would have

made clear that cities, towns and villages have authority to register and license vehicles constituting this new phenomenon, without reference to limiting their number. Notably, informed observers, such as the N.Y. State Division of the Budget, did not believe the bill was necessary because it was "more than plausible to assume that livery and transportation network company vehicles [were] already subsumed and included within the phrase 'taxicabs and limousines.'" Div. of the Budget, Bill Memo Re: No. S3538-B, Nov. 17, 2016 (Goldberg-Cahn Reply Affirm., Ex. B). Ultimately, the bill was vetoed by the Governor and never became law.

The following year, the Legislature passed, and the Governor signed, a new bill that addressed the problem identified by the sponsor of S3538-B in an entirely different way. That bill, enacted as part AAA of chapter 59 of the Laws of 2017, established a new Article 44-B of the VTL (§ 1691 et seq.) creating a statewide regulatory system for transportation network companies and their vehicles. Unlike S3538-B, this new system completely ousts local jurisdictions from authority to regulate these entities and vehicles, with the exception of New York City. VTL § 1691(1) exempts from the definition of a state-regulated "transportation network company vehicle" the main types of City-licensed vehicles providing transportation for hire, including "a black car,...as defined in section 19-502 of the administrative code of the city of New York" and "a for-hire vehicle, as defined in section 19-502 of the administrative code of the city of New York." These were the categories under which, at the time of enactment, vehicles operating for Uber and similar services were licensed by New York City. With the enactment of VTL Art. 44-B, the Legislature renounced the framework set forth in S3538-B to address the regulatory challenge posed by the app-based FHV services. In its place is a system acknowledging the City's general regulatory authority over what elsewhere in the State are

transportation network companies (and vehicles). The City continues to exercise this authority pursuant to GML § 181, as it applies – and has always applied – since its original enactment.

POINT III

PLAINTIFFS ARE INCORRECT THAT LL 147 IS PREEMPTED BY STATE LAW.

Plaintiffs rely upon five aspects of Art. 29-C that purportedly demonstrate the legislature's intent to preempt the field of congestion reduction measures and FHV license issuance. See Pls. Opp. Mem. at 28-30. First, plaintiffs claim that the "State has treated congestion in New York City as a matter of state concern and adopted a comprehensive, interconnected, balanced, and phased strategy for addressing it." Id. at 28. This claim is predicated on an overbroad interpretation of Art. 29-C. As set forth in Defs. Mem., Art. 29-C is significantly narrower in application than plaintiffs contend. Simply, Art. 29-C imposes a congestion zone surcharge on all taxis and FHVs and allocates the revenue raised by the surcharge to a variety of funds designated for public transportation improvements. Art. 29-C in no way parallels the extraordinarily far reaching legislative schemes found to have preempted local regulation in a particular field. See, e.g. Robin v. Hempstead, 30 N.Y.2d 347 (1972); Consol. Edison Co. v. Town of Red Hook, 468 N.Y.S.2d 596 (1983); see also Defs. Mem. at 18-20. In an effort to salvage their claim, plaintiffs' again conflate the broad sweep of the Fix NYC Advisory Panel Report's ("Fix NYC Report") recommendations with what was actually enacted by the legislature as part of a tax law. In any event, even if the Fix NYC Report had been wholesale adopted by the legislature, the Fix NYC Report clearly does not contemplate exclusive State control over congestion reduction measures in New York City. Id. at 21-22.

Second, plaintiffs maintain that Art. 29-C was "enacted against the backdrop of a legislative understanding that local governments did not have authority to cap FHVs." For the

reasons set forth in Point II, *supra*, and in Defs Mem. at 10-16, plaintiffs are incorrect. Indeed, at the time Art. 29-C was enacted, the legislature was fully aware of TLC's regulatory authority over FHVs as well as TLC's ability to regulate the number and timing of issuance of new FHV licenses. See, e.g. Livery Round Table, Inc., 2018 U.S. Dist. LEXIS 65524 at 20; GNYTA, 25 N.Y.3d at 600. When the City's plenary regulatory authority, including the ability to cap, over all types of vehicles providing transportation for hire is considered, the absence of any preemptive intent to occupy the field of FHV licensing becomes clear. On this point, N.Y. Jancyn Mfg. Corp. v. County of Suffolk, 71 N.Y.2d 91 (1987) is instructive. In Jancyn, the Court emphasized the fact that the enactment of the state scheme postdated the enactment of the challenged local law. Jancyn, 71 N.Y.2d at 99-100. Given this chronology, the Court determined that the absence of any express statement of preemption or statements of policy by the legislature was significant as the legislature was aware that local laws and ordinances regulating in the relevant field existed at the time the State scheme was passed.[7] Id. The Jancyn chronology, and the Court's conclusion that it demonstrated an absence of any preemptive intent on the part of the legislature, parallels the circumstances herein. The plenary regulatory authority exercised by TLC over FHVs existed long before Art. 29-C was passed. As such, it is highly significant that the legislature did not expressly indicate, through a superseder clause or statement of policy, that

[7] The significance of the Jancyn chronology is further reinforced through evaluation of the cases wherein field preemption was found to preempt local regulatory authority. Specifically, in cases where field preemption was found, the promulgation of the local law or ordinance occurred after, and often in response to, the state legislative scheme. See e.g. Robin, 30 N.Y.2d 347; Consol. Edison Co., 468 N.Y.S.2d 596; Ba Mar v. County of Rockland, 164 A.D.2d 605, 612 (2d Dep't 1991). Conversely, in circumstances where local laws or ordinances are already in place at the time the state scheme is passed, the legislature clearly indicates its intent to preempt the field through express statements of preemption or declarations of policy. Dougal v. County of Suffolk, 102 A.D.2d 531, 533-534 (2d Dep't 1984)("At the time of the enactment of article 39 of the General Business Law, which forms the core of the regulatory scheme, the State Legislature was well aware of the existence of local ordinances on the subject and, in declaring 'it the policy of the state to prohibit the sale of drug paraphernalia' (L 1980, ch 811, § 1), evinced an intent to make that article the sole remedy..."). No such clear indication of intent exists here.

it intended to preempt any aspect of a field in which TLC's authority has long been unquestioned.

Plaintiff's third, fourth, and fifth points relating to field preemption similarly miss the mark. See Pls. Opp Mem. at 29-31. Plaintiffs essentially argue that because FHVs are a component of the State surcharge pricing tax scheme, the legislature impliedly preempted any regulation by TLC that could conceivably touch on congestion reduction measures. Id. This argument demonstrates a fundamental misunderstanding of field preemption. A local law or ordinance is preempted under the doctrine of field preemption when, in the absence of express statements of preemption, the legislature has enacted a comprehensive and detailed regulatory scheme in a particular field. See Con. Edison, 468 N.Y.S.2d at 599. A comprehensive scheme is found to exist when the state statute established extensive and direct controls at the local level. Dougal, 102 A.D.2d at 533. Here, no such comprehensive scheme is established by Art. 29-C.

Plaintiffs try to avoid the lack of any comprehensive regulatory scheme in the field of FHV regulation, by classifying the relevant field as congestion reduction and pointing to the role of FHVs in the state scheme as evidence of the State's intent to preempt TLC's ability to regulate the number and timing of issuance of FHV licenses. See Pls. Opp. Mem. at 28. In so doing, plaintiffs ignore the field they actually argue is preempted – regulation of FHV license issuance. Instead, plaintiffs claim that the State's passage of the congestion zone surcharge evinces the legislature's intent to preempt not just the field of congestion reduction, but any regulation that purports to regulate FHVs if it impacts congestion in any way whatsoever. Plaintiffs do not –and indeed cannot –cite to any support for this distortion of the field preemption doctrine. Even if the legislature intended to preempt the field of congestion reduction measures, the revenue raising surcharges, paired with various other measures to improve public transportation in Art.

29-C, does not reasonably lead to the conclusion that the State also intended to deprive TLC of its longstanding authority over all aspects of FHV regulation.

Finally, plaintiffs' halfhearted attempt at demonstrating a direct conflict between LL 147 and Art. 29-C, fails. In maintaining that LL 147 directly conflicts with Art. 29-C, plaintiffs singularly argue that capping FHV license issuance conflicts with the State's reliance on taxis and FHVs to raise revenue. However, for the reasons stated in Defendant's Memo of Law and herein, there is no established correlation between the number of trips performed in the congestion zone and the number of FHV licenses issued by TLC. This is largely due to a surplus of FHVs in the central business district, which has resulted in a massive spike of FHV idling and cruising in the central business district and does not further the revenue raising goals of Art. 29-C as the surcharge only applies to trips performed.[8] Faced with this reality, plaintiffs speculate that "the permanent local power to cap is the power to harm trip numbers over the longer term." See Pls. Opp. Mem. at 33. Aside from the fact that this statement is wholly unsupported, it conflates the authority for TLC to cap with the permanency of any limitation TLC may implement now or in the future. It also fails to account for TLC's ability to adjust or eliminate implemented measures under LL 147 after weighing the factors set forth therein if appropriate.

POINT IV

PLAINTIFFS' ARGUMENT THAT LL 147 IS BARRED BY GBL § 340 FAILS.

In an effort to salvage their cause of action under GBL § 340, plaintiffs cherry-pick choice phrases from the Second Circuit Court of Appeals ruling in Hertz Corp. v. City of New

[8] Plaintiffs curiously reference Complaint ¶ 35 in response to defendant's point that there is no relationship between FHV license numbers and trips performed in the congestion zone. However, Complaint, ¶ 35 only discusses increased trips outside of the congestion zone where Art-29C's surcharge does not apply. Indeed, the chart included as part of Complaint ¶ 35 actually reinforces defendant's claim that trip numbers in the congestion zone have remained constant despite the exponential growth in the number of TLC issued FHV licenses thereby demonstrating the absence of a conflict.

York, 1 F.3d 121 (2d Cir. 1993). In so doing, plaintiffs completely ignore the framework set forth therein for assessing Sherman Act and GBL § 340 challenges to state and municipal enactments.[9] See Pls. Opp. Mem. at 35-38. Crucial to the evaluation of a Sherman Act challenge to a governmental enactment is an assessment of the "role played by the governmental body in implementing the legislation," not, as plaintiff's attempt to argue, the effect the government enactment may have on trade within a particular industry. Hertz, 1 F.3d at 126. If the governmental enactment constitutes a pure regulatory scheme that is merely imposed upon private actors in a specific industry, it is outside the purview of the Sherman Act and GBL § 340. Id. Conversely, where the government issues a dictate that is then performed "not by the state" but by private actors absent continuing government oversight, it is subject to challenge under the Sherman Act and GBL § 340 irrespective of the requirement of plausibly alleging a contract, combination, or conspiracy as an element of the claim. Id.

In Hertz, the Second Circuit applied the Sherman Act framework set forth in Fisher v. City of Berkeley, 475 U.S. 260 (1986). In Fisher, the Supreme Court considered a Sherman Act challenge brought by a number of landlords to a rent stabilization ordinance enacted by the City of Berkley. See Fisher, 475 U.S. at 262. Under the ordinance, private landlords were only permitted to raise rents "pursuant to an annual general adjustment of rent ceilings by a Rent Stabilization Board of appointed commissioners or after he is successful in petitioning the board for an individual adjustment." Id. In defending the ordinance, the City of Berkley argued that the ordinance constituted purely unilateral conduct outside the purview of the Sherman Act. Id at 267. In opposition, the Fisher plaintiffs maintained that the ordinance was a hybrid restraint on trade, which exists in the absence of pure regulatory regime as it requires private actors'

[9] GBL § 340 is modeled on the Sherman Anti-Trust Act and is generally construed in light of federal precedent. See Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 335 (1988).

participation in order to enforce or implement. Thus, it was not insulated from challenge under the Sherman Act irrespective of the fact that it was enacted by the municipality. Id.

In evaluating the parties' claims, the Fisher Court reiterated the well-settled principal that "[n]ot all restraints imposed upon private actors by governmental units necessarily constitute unilateral action outside the purview of § 1." Id at 267-268. Significantly, where private actors are granted "a degree of regulatory power, the regulatory scheme may be attacked under § 1." Id. (internal citations omitted). Turning to the ordinance at issue, the Fisher Court determined that the City of Berkley's enactment constituted purely unilateral governmental action outside the scope of the Sherman Act. In reaching this determination, the Court emphasized the fact that the ordinance "places complete control over maximum rent levels" and the rent ceilings they mandate "exclusively in the hands of the Rent Stabilization Board." Id. at 269. Thus, it was clear that the ordinance was unilaterally imposed on landlords in the City of Berkley as the private landlords did not possess any degree of regulatory power. Id. The Court also distinguished the Berkley ordinance from hybrid restraints found to be actionable under the Sherman Act in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) and California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc. 445 U.S. 97 (1980). Significantly, in those cases where government enactments were deemed hybrid restraints, the state had no direct control over enforcement of the ordinance. Rather, the state imposed a requirement where private actors had sole responsibility for implementation absent continuing governmental oversight. Id. at 268.[10]

[10] In Schwegmann, a Louisiana statute "authorized a distributor to enforce agreements fixing minimum retail prices not only against parties to such contracts, but also against retailers who sold the distributor's products without having agreed to the price restrictions." Fisher, 475 U.S. at 268. In finding that this constituted a hybrid restraint, the Fisher Court emphasized the fact that even though the retailer was legally required to adhere to the levels it was responsible for setting, the involvement of suppliers in setting those prices made it "impossible to characterize the regulation as unilateral action by the State of Louisiana." Fisher, 475 U.S. at 268. Similarly, in Midcal, California required that wine producers, wholesalers, and rectifiers file fair trade contracts or price schedules with the State or otherwise post a resale price schedule for that producer's products. Midcal, 445 U.S. at 99. State-licensed wine merchants were then prohibited from selling wine to a retailer at prices other than those set by the producers,

In Hertz, the Second Circuit invoked the Fisher framework to evaluate a City enacted local law passed in response to Hertz's imposition of rental vehicle surcharges for customers who resided in Bronx, Kings, New York, or Queens County and rented a car from a Hertz outlet in the New York metropolitan area, New Jersey, Southern Connecticut, or Eastern Pennsylvania. Hertz, 1 F.3d at 123-124. The local law, which was enacted in response to concerns of over the disparate impact such surcharges would have on minority communities, prohibited surcharges based on the residence of a prospective customer who was otherwise qualified to rent a Hertz vehicle rendering Hertz's proposed surcharges unlawful. Id. at 124. The Second Circuit determined that the local law was not unilateral conduct and therefore subject to challenge under the Sherman Act as: (1) the local law could not be classified as a pure regulatory scheme as it simply directed "all rental-car companies doing business in New York City to remove one factor from their competitive-pricing structures" without providing for continued regulation or review of rental pricing structures; and (2) "the law lack[ed] an independent quasi-judicial board that in [Fisher] could adjust rates and provide relief in individual circumstances." As such, the local law called for private anticompetitive efforts in order to enforce its terms. Hertz, 1 F.3d at 127.

Here, contrary to plaintiffs' assertions, Hertz reinforces the unilateral nature of LL 147. Specifically, LL 147 provides for ongoing regulation of FHV license issuance by TLC and does not require any private conduct whatsoever in its implementation. Rather, the City has unilaterally imposed a pure regulatory scheme that is controlled and implemented entirely by a government entity. That plaintiffs are subject to, but in no way responsible for implementing, LL

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wholesalers, and rectifiers. Id. In finding that the California price-fixing scheme was actionable under the Sherman Act, the Court determined that "California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act" as "[t]he wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." Id. at 103. Indeed, the "State [had] no direct control over wine prices, and it [did] not review the reasonableness of the prices set by wine dealers." Id. at 100.

147 does not render LL 147 actionable under the Sherman Act or under GBL § 340. Indeed, as in Fisher, LL 147 simply operates to limit unfettered availability of FHV licenses or to establish vehicle utilization standards if consideration of the factors set forth in LL 147 renders such action appropriate. Fisher 475 U.S. at 269 ("Berkeley's landlords have simply been deprived of the power freely to raise their rents. That is why they are here. And that is why their role in the stabilization program does not alter the restraint's unilateral nature."). Accordingly, because LL 147 is a unilaterally enacted regulatory scheme that in no way calls for private participation, defendant is entitled to dismissal of plaintiff's sixth cause of action under GBL § 340.

POINT V

PLAINTIFFS' N.Y. STATE CONSTITUTION DUE PROCESS CLAIM FAILS AS A MATTER OF LAW.

Plaintiffs' opposition to City defendant's motion to dismiss their N.Y. State Constitution due process claim fares no better than their poorly plead claim. See Pls. Opp. Mem., at 38-39. Notably, plaintiffs do not cite to a single case in support of their argument that a duly-enacted statute, such as the one challenged here, violates the due process clause of the N.Y. Constitution if premised upon an "arbitrary choice." Id. at 38. The cases plaintiffs cite in their due process point all pertain to individual determinations and not to legislative enactments. For example, plaintiffs' reliance on Town of Orangetown v. Magee, 88 N.Y.2d 41 (1986), is misplaced insofar as that case was a challenge to a town building inspector's determination to revoke a building permit in an arbitrary manner without any legal justification. 88 N.Y.2d at 52-53. There, the plaintiff had a clear vested right under state law to develop the land and the building inspector revoked the permit in an arbitrary manner. Id. at 54. Similarly, plaintiffs' reliance on Acquest Wehrle, LLC v. Town of Amherst, 11 N.Y.S.3d 771 (4th Dep't 2015), does not advance their argument as that too was premised on a town's determination against an individual landowner

that was made with no legal justification. Moreover, both cases involved the plaintiffs' clearly protected property interests, which is not applicable to plaintiffs' claims herein. Town of Orangetown, 88 N.Y.2d at 52 (plaintiffs establish they had vested rights to develop their land under law and thus demonstrated "a protectable property interest in the building permit, ... [and] more than a mere expectation or hope to retain the permit...."); Acquest Wehrle, 129 A.D.3d at 775-76 (plaintiffs established constitutionally protectable property interest in the sewer waiver request). Plaintiffs here utterly fail to allege that they have a property interest in the further issuance of new FHV vehicle licenses. Nor could they, as plaintiffs clearly only have a protected property interest in the licenses that they (or their affiliates or partner drivers) already possess and LL 147 does not affect already-issued licenses.

Notwithstanding plaintiffs' failure to allege, much less demonstrate, a clearly protectable property interest, plaintiffs nonetheless argue that their due process rights were somehow violated because LL 147 was enacted "without study." Pls. Opp. Mem. at 38. However, as set forth above, there is no support for the contention that all legislation must be enacted only after a "study" is performed. Here, the City Council had ample evidence in the legislative record to support its conclusions that FHVs "rapid growth over the past several years has led to economic and environmental concerns." Comm. Rpt, Goldberg-Cahn Affirm. Ex. C. Moreover, the Committee Report cited to several already-conducted studies in reaching its conclusions, such as Bruce Schaller's July 2018 Report, "The New Automobility: Lyft, Uber and the Future of American Cities" (July 25, 2018) (Rpt. at 22), Bruce Schaller's February 2017 Report: "Unsustainable? The Growth of App-Based Ride Services and Traffic, Travel and the Future of New York City" (Feb. 27, 2017)(Rpt. at 7), Bruce Schaller's December 2017 Report "Empty Streets, Full Streets: Fixing Manhattan's Traffic Problem (Dec. 21, 2017)(Rpt. at 19), the City of

New York Office of the Mayor's "For-Hire Vehicle Transportation Study" (Jan. 2016)(Rpt. at 19), Drs. Parrott & Reich's Report, "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment (July 2018)(Rpt. at 14-19), and numerous TLC and DOT published reports (*passim*). Certainly, the legislature had more than ample information "to make an informed decision," contrary to plaintiffs' claims.

While plaintiffs attempt to portray the Council's conclusions as "arbitrary" based on cherry-picked statements from the Office of the Mayor's January 2016 For-Hire Vehicle Transportation Study (id. at 38-39), plaintiffs conveniently ignore the myriad statements and findings in the Committee Report since that time that clearly reflect that issues with congestion, traffic, safety, accessibility, and financial concerns had been exacerbated since then. Indeed, the Committee Report explicitly cites to Bruce Schaller's statements about the limitations of the January 2016 FHV Report, noting that it "studied a time period that mostly did not reflect the explosions of app-based FHVs" as it relied on data from June 2013 through June 2015 which "mostly reflected conditions before the accelerated expansion of app-based FHVs began in spring of 2015." Rpt. at 20-21. The Committee Report clearly states that both Mr. Schaller and DOT have "documented extensively, the situation has evolved dramatically since then. In 2018, traffic slowed to roughly 5 mph in Manhattan...." Id. The Report further cites to myriad new facts to reflect changes in the City's streetscape since the Mayor's Report on For-Hire Transportation in January 2016. For example, the Report notes that "[h]igh-volume FHV trip volumes were 1.5 times higher in May 2018 compared to May 2017" and that such represents that taxis and FHVs "combined now perform 14 million more trips in a month when compared to January 2015" (Rpt. at 25); "In May 2018, almost 18.5 million trips were dispatched by high-volume FHV companies, more than six times the trip volume in May 2015" (Rpt. at 17);

"between June 2015 (the end of the period covered by the FHV Study) and the fall of 2016, e-dispatch passenger volumes tripled, to 500,000 riders per day, far outpacing the drop in yellow taxi trips, leading to large additions in overall taxi/FHV trip volumes" (Rpt. at 7-8); "'in 2015, and to a larger extent in 2016, growth in taxi and for-hire ridership outpaced growth in transit (subway and bus) ridership' and is now the leading source of growth in non-personal vehicle travel in the city." (Rpt. at 8); "Since May 2016, an average of 1,700 app-based FHVs have become active every month" (Rpt. at 10); and "As of July of 2017, Uber has surpassed the number of taxi trips per day in New York City" (Rpt. at 11). This, coupled with the numerous facts and data noted in the Report, led the City Council to conclude there are significant environmental, traffic, accessibility, and financial concerns that warrant further action to be taken with respect to the ever-growing issues of FHVs. Thus, LL 147 is clearly rational and based on sound reasoning set forth in the legislative record, and cannot be found to be "arbitrary or shocking."[11] For all of these reasons, plaintiffs' substantive due process claim fails.

CONCLUSION

For the foregoing reasons, along with those set forth in City defendant's opening memorandum of law, the Amended Complaint should be dismissed in its entirety, together with such other and further relief as this Court may seem just, proper and equitable.

[11] Plaintiffs' attempt to argue that there need be a specific "study" or "research recommending caps on for-hire vehicles" in support of their argument that the legislative enactment of the City Council is somehow arbitrary from a due process perspective is plain wrong. Pls. Opp. Mem. at 39. While plaintiffs point to some personal viewpoints expressed by Bruce Schaller as to his personal opinion on whether a limitation on the issuance of FHV licenses is the best policy choice (id.), such does not lead to the conclusion that the City Council's determination to impose such a limitation on the issuance of new licenses is irrational or without basis. In any event, as plaintiffs have pointed to the new action announced by the City as a result of the study mandated by LL 147, the new proposed policy is to have a combination of a continued limitation on the issuance of new licenses to be reviewed every 6 months after one year along with rules capping FHV cruising in the City streets to ensure a higher utilization rate (this portion of the policy was recommended by Mr. Schaller).

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