

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

_____ x

SUSAN CLAIR, TANTA EXPRESS LLC,
EASY ED TRANSIT INC., TOVE CAB CORP.,
ZIP TRANSIT INC., and TRY TRANSIT INC.,
on behalf of themselves and all others similarly situated,

Index No.

Petitioners,

v.

THE CITY OF NEW YORK; THE NEW YORK
CITY TAXI AND LIMOUSINE COMMISSION;
and MEERA JOSHI, in her capacity as Chair of the
New York City Taxi and Limousine Commission,

Respondents.

_____ x

**MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION AND
PETITIONERS' MOTION FOR A TRO AND PRELIMINARY INJUNCTION**

CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

A. The City Council Enacts the Hybrid Vehicle Requirement..... 2

B. The TLC Voluntarily Agrees to Require Half of All Taxis to Become
Accessible 4

C. The TLC Enacts the Accessibility Rules 5

D. The TLC Has Not Approved an Accessible Hybrid 7

ARGUMENT 7

I. PETITIONERS ARE LIKELY TO SUCCEED ON THEIR CLAIMS..... 7

II. PETITIONERS ARE THREATENED WITH IRREPARABLE HARM..... 8

III. THE BALANCE OF THE EQUITIES WEIGHS IN
PETITIONERS’ FAVOR 10

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

Committee for Taxi Safety, Inc. v. City of New York, 40 Misc. 3d 930
(Sup. Ct. N.Y. County May 15, 2013)8

Metro. Taxicab Bd. of Trade v. City of New York, 2008 WL 4866021
(S.D.N.Y. Oct. 31, 2008)9, 10

Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839 (2005)7

Noel v. New York City Taxi and Limousine Comm’n, 837 F. Supp. 2d 268 (2011)4

Noel v. New York City Taxi and Limousine Comm’n, 687 F.3d 63 (2d Cir. 2012)4, 5

Statutes and Regulations

49 C.F.R. § 37.29(b)4

CPLR § 4061

CPLR § 63011

CPLR § 63111

CPLR § 78061

N.Y.C. Admin. Code § 19-533 *passim*

35 R.C.N.Y. § 51-036

35 R.C.N.Y. § 58-036

35 R.C.N.Y. § 58-169

35 R.C.N.Y. § 58-50 *et seq.*1, 9

35 R.C.N.Y. § 67-186

Other Authorities

New York City Taxi and Limousine Commission, “Taxicab Vehicles In Use:
Only Approved Vehicles to Hacked-Up”, *available at*
http://www.nyc.gov/html/tlc/html/industry/taxicab_vehicles_in_use.shtml7

Petitioners, by and through their attorneys, Cuti Hecker Wang LLP, respectfully submit this memorandum of law in support of their motion for a TRO and preliminary injunction pursuant to CPLR §§ 406, 6301, and 6311 and in support of their Petition.

PRELIMINARY STATEMENT

This class action challenges the decision by the New York City Taxi & Limousine Commission (the “TLC”) to ignore the mandate of N.Y.C. Admin. Code § 19-533, which, in furtherance of the City Council’s avowed policies of improving the City’s air quality and conserving fuel, requires that all taxi medallion owners must be afforded the option of operating a hybrid electric vehicle.

In 2014, the TLC promulgated new rules (the “Accessibility Rules”¹) requiring that 50% of all taxis become accessible to people with mobility disabilities by 2020. The Accessibility Rules contemplate a four-year phase-in of the new 50% requirement beginning in January 2016. Starting next month, half of all vehicles reaching their mandatory retirement dates, including those of the Petitioners and the class of medallion owners they represent, must be replaced with accessible vehicles. Notwithstanding the plain language of § 19-533, the TLC has not approved an accessible hybrid electrical vehicle. The TLC nevertheless is requiring medallion owners to proceed with the conversion process, even though no hybrid electric vehicle option is being provided in blatant violation of § 19-533.

Tellingly, the Accessibility Rules expressly acknowledge that § 19-533 prohibits the TLC from requiring medallion owners to convert to accessible vehicles if no accessible hybrids are available. The rules provide that they go into effect on (i) “the date on which there is available

¹ The Accessibility Rules are set forth in Title 35, Section 58-50 *et seq.* of the Rules of the City of New York (“RCNY”), and are attached as Exhibit 1 to the Affirmation of Daniel Mullkoff, Dec. 28, 2015 (“Mullkoff Aff.”).

an Accessible Taxicab Model that meets . . . the requirements of § 19-533” or (ii) January 1, 2016, whichever is earlier. During the April 2014 hearings in which the TLC considered the proposed rules, Respondent Joshi, the TLC’s Chair, expressly acknowledged that the Accessibility Rules would violate § 19-533 if they were to go into effect without an approved accessible hybrid vehicle being available, taking the position that any such concern was, as of April 2014, merely “hypothetical” because the TLC still had, at that time, more than a year and a half to approve an accessible hybrid vehicle. But January 1, 2016 is now upon us, and no accessible hybrid has been approved. The issue therefore is no longer “hypothetical.” The Accessibility Rules cannot go into effect without violating § 19-533.

Petitioners do not oppose the TLC’s efforts to afford people with mobility disabilities greater access to taxi service. But such efforts cannot come at the expense of the City Council’s considered commitment to clean air and fuel conservation. The TLC plainly has no authority to ignore such an important and unambiguous statutory requirement and must be enjoined from doing so.

STATEMENT OF FACTS

A. The City Council Enacts the Hybrid Vehicle Requirement

In 2005, the City Council enacted a law mandating that the TLC make hybrid electric vehicles available to all current and future medallion owners:

The commission shall approve one or more hybrid electric vehicle models for use as a taxicab within ninety days after the enactment of this law. The approved vehicle model or models shall be eligible for immediate use by all current and future medallion owners. For the purposes of this chapter, a hybrid electric vehicle shall be defined as a commercially available mass production vehicle originally equipped by the manufacturer with a combustion engine system together with an electric propulsion system that operates in an integrated manner.

N.Y.C. Admin. Code § 19-533.

The legislative history of § 19-533 confirms that the City Council concluded that this statutory requirement was critical to further its goals of improving the City's air quality and conserving fuel. The City Council promulgated legislative findings declaring that:

The Council of the City of New York hereby finds that the use of alternative fuel vehicles is important to the City's goal of improving air quality and conserving fuel.

...

The burning of fossil fuels is a major source of greenhouse gases that contribute to the growing problem of global warming. Furthermore, fuel prices continue to escalate while our reliance on fossil fuels has also increased our dependence on foreign sources of oil. Therefore, it is important to encourage the use and development of alternative fuel vehicles, including hybrid electric vehicles, to increase fuel efficiency, reduce air pollution and lower dependence on foreign oil.

Mullkoff Aff., Ex. 2.

The City Council expressly tied its goals of improving the City's air quality and conserving fuel to the importance of making hybrid electric vehicles available to taxi medallion owners:

The use of alternative fuel vehicles is especially appropriate with taxicabs, many of which operate 24 hours per day, spewing an enormous amount of emissions into the air.

Id. Indeed, the City Council expressly recognized that the TLC's stringent vehicle specifications were unreasonably preventing medallion owners from using hybrids, to the detriment of air quality and fuel efficiency:

The [TLC] has promulgated rules mandating specifications for taxicabs. These specifications, while important to passenger comfort, have prevented many promising alternative fuel vehicles, which do not meet specifications by minimal amounts, from being used as taxicabs. To further the City's policy of improving air quality and conserving fuel, this Council is enacting this law to designate certain alternative fuel vehicles to be used as taxicabs.

Id.

For these reasons, § 19-533 is not discretionary. It is mandatory. The statute requires that the TLC “shall” make at least one hybrid model available “for immediate use by all current and future medallion owners.” There are no exceptions.

B. The TLC Voluntarily Agrees to Require Half of All Taxis to Become Accessible

In 2011, a group of plaintiffs sued the TLC in federal court alleging that the lack of accessible taxis violated the Americans with Disabilities Act (the “ADA”). *See Noel et al. v. New York City Taxi and Limousine Comm’n et al.*, No. 11 Civ. 237 (GBD) (S.D.N.Y.). The federal plaintiffs could not sue taxi owners/operators directly because federal law expressly exempts providers of taxi service from operating accessible vehicles. *See* 49 C.F.R. § 37.29(b) (“Providers of taxi service are not required to purchase or lease accessible automobiles.”). The federal plaintiffs therefore sued the City without naming any owners/operators, claiming that the City discriminated against mobility-impaired passengers by licensing an insufficient number of accessible taxis. Various taxi industry groups sought to intervene in the federal lawsuit, but the district court denied all such intervention motions.

The district court initially granted the plaintiffs a temporary injunction, *Noel v. New York City Taxi and Limousine Comm’n*, 837 F. Supp. 2d 268 (2011), but the Second Circuit reversed, 687 F.3d 63 (2d Cir. 2012). In vacating the injunction, the Second Circuit held that “the TLC does not violate the ADA by licensing and regulating a private taxi industry that fails to afford meaningful access to passengers with disabilities.” *Id.* at 72-74. The Second Circuit emphasized that the federal plaintiffs’ claims were inconsistent with taxi operators’ express exemption under the ADA: “[S]ince the taxi industry itself is exempt, there is no underlying violation of the ADA for the TLC to redress by regulation. The district court, which has held that the TLC must

increase the number of handicap-accessible taxis, has thus run counter to the policy choice of the political branches, which exempted the taxi industry from the ADA.” *Id.* at 73.

Despite the Second Circuit’s ruling that the ADA does not require the TLC to mandate accessible taxis, and despite having argued vehemently (and successfully) that providing accessible taxi service is not legally required, the City nevertheless entered into a settlement agreement with the *Noel* plaintiffs, which the District Court approved on September 16, 2014 (the “Settlement Agreement”). *Mullkoff Aff.*, Ex. 3.

The Settlement Agreement acknowledges that the parties entered into it “voluntarily” and that the City did not admit any violation of the ADA or any other federal, state, or local law or regulation. *Id.* ¶ 2.1. Under the Settlement Agreement, the TLC agreed to promulgate rules mandating that at least 50% of taxis be wheelchair accessible by January 1, 2020. *Id.* ¶ 5.1.1.

The Settlement Agreement acknowledged that the Accessibility Rules could not take effect without violating § 19-533 unless the TLC first approved an accessible hybrid electric vehicle. It provided that “the period for converting 50% of all Taxicab Vehicles to accessible vehicles” would begin on “the earlier of either: (1) the date on which there is a commercially available vehicle that also meets the requirements of New York City Administrative Code § 19-533, and which can also be converted to accommodate the transportation of persons who use wheelchairs in accordance with the ADA; or (2) January 1, 2016.” *Id.* ¶ 3.16. By agreeing to this language, the TLC effectively committed to approving an accessible hybrid electric vehicle no later than January 1, 2016.

C. The TLC Enacts the Accessibility Rules

The TLC passed the Accessibility Rules on April 30, 2014. The rules require owners of unrestricted taxi medallions to begin using accessible vehicles as their vehicles are retired from

service beginning on the “Accessible Conversion Start Date.” *See* 35 R.C.N.Y. § 58-03(a); *see also id.* § 67-18 (specifying retirement schedules for vehicles).

With respect to minifleet medallions (medallions that are not individually owned and that must be owned in groups of at least two, *see* 35 R.C.N.Y. § 51-03), the Accessibility Rules provide that owners of a minifleet must use accessible vehicles for all new vehicles placed into service until at least 50 percent of the minifleet’s vehicles are accessible (that is, one out of two new vehicles if they own two medallions, two out of three if they own three, etc.).

With respect to individual medallions (medallions for which the owner may only own one medallion, *see* 35 R.C.N.Y. § 51-03), the Accessibility Rules provide that the TLC will conduct a bi-annual lottery to select which 50% of those medallions must be converted to accessible vehicles.

The Accessibility Rules provide that the “Accessible Conversion Start Date” – after which medallion owners must begin converting to accessible vehicles – will be “the earlier of (1) the date on which there is available an Accessible Taxicab Model that meets the specifications of Section 67-05.2 of these Rules and the requirements of §19-533 of the Administrative Code, as certified by the Chairperson, or (2) January 1, 2016.” Thus, just like the Settlement Agreement, the Accessibility Rules acknowledge that § 19-533 requires the TLC to approve an accessible hybrid electric vehicle before January 1, 2016.

TLC Chair Joshi acknowledged this fact even more directly during the hearings in which the Accessibility Rules were considered. In response to testimony from a witness that the Accessibility Rules violated § 19-533 because the TLC had not, as of that date (April 2014), approved an accessible hybrid electric vehicle, Ms. Joshi stated that the concern about the mandate in § 19-533 was premature and merely “hypothetical” because the TLC had, as of that

date, over a year and a half to approve an accessible hybrid electric vehicle before the January 1, 2016 deadline:

I think it's sort of a hypothetical illegality. Now, there is a section of law, 19-533, that says there must be a hybrid option, and time will tell, on January 1st, 2016, what the options are and what 19-533 looks like. And at that point, we'll be able to judge the state of the rules as compared to the Ad Code requirements I think time will tell whether there's an illegality or not, but right now's it's a hypothetical.

Mullkoff Aff., Ex. 4.

D. The TLC Has Not Approved an Accessible Hybrid

There are currently ten vehicle models that the TLC has approved for use as accessible vehicles. See http://www.nyc.gov/html/tlc/html/industry/taxicab_vehicles_in_use.shtml. None of those ten vehicle models is a hybrid electric vehicle within the meaning of § 19-533. None of the three hybrid vehicle models that are currently approved by the TLC is wheelchair accessible.

ARGUMENT

“The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor.” *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005) (citing C.P.L.R. § 6301). Petitioners readily meet that standard.

I. PETITIONERS ARE LIKELY TO SUCCEED ON THEIR CLAIMS

Respondents have no credible defense to Petitioners' claims. Section 19-533 says that the TLC “shall” make at least one hybrid model available “for immediate use by all current and future medallion owners.” If the Accessibility Rules are allowed to go into effect, there will be no hybrid model available for medallion owners subject to the purported conversion requirement. That would violate both the plain language of and avowed legislative policy behind § 19-533.

This case is just like *Committee for Taxi Safety, Inc. v. City of New York*, 40 Misc. 3d 930 (Sup. Ct. N.Y. County May 15, 2013). In that case, the TLC had adopted rules mandating that all medallion taxis use a single vehicle model, the Nissan NV200, sometimes referred to as the “Taxi of Tomorrow.” Medallion owners brought suit, claiming that this requirement violated § 19-533 because the Taxi of Tomorrow is not a hybrid. Justice Moulton granted the Article 78 petition, holding that the Taxi of Tomorrow rules “violate Administrative Code § 19-533 as they do not provide for a hybrid vehicle option.” *Id.* at 937-39. Justice Moulton explained that “‘an agency cannot promulgate rules or regulations that contravene the will of the Legislature’ or the terms of the authorizing statute” and held that the Taxi of Tomorrow rules “run afoul of this . . . restriction on agency action, because they violate New York City Administrative Code § 19–533, which ‘has the force of a statute in the City of New York.’” *Id.* at 934-35 (citations omitted). As a result of that ruling, the TLC amended the Taxi of Tomorrow rules in order to comply with § 19-533. Under the revised Taxi of Tomorrow rules, medallion owners are permitted to use *either* the Nissan NV200 *or* a hybrid vehicle, which satisfies the requirements of § 19-533.

The *Committee for Taxi Safety* case cannot be distinguished from this case. Section 19-533 imposes a mandatory requirement. Neither the TLC nor this Court has any discretion to ignore it.

II. PETITIONERS ARE THREATENED WITH IRREPARABLE HARM

Petitioners and the members of the class they represent will suffer irreparable harm in at least three ways if a temporary restraining order and preliminary injunction are not issued.

First, if Respondents are not enjoined and Petitioners are compelled to purchase non-hybrid vehicles in violation of § 19-533, the environment will be harmed. In enacting § 19-533, the City Council could not have been more clear that taxi emissions are a significant contributor

to pollution in New York City and that hybrid electric taxis must be made available in order to protect public health. *See supra* at 2-3.

Second, if Petitioners are compelled to purchase non-hybrid vehicles in violation of § 19-533, they will suffer financial harm that would be difficult if not impossible to quantify and that, if the City's argument carries the day, may not even be legally available. The Accessibility Rules provide for a "Taxicab Improvement Fund" that collects a new surcharge of 30 cents per fare and distributes 5 cents per fare to drivers and 25 cents per fare to owners of accessible vehicles to help defray some of the significant additional acquisition, operation, and maintenance costs associated with accessible vehicles. See R.C.N.Y. § 58-16(g), 58-50(h), (j). But the TLC acknowledges that this fund may not be sufficient to cover all of the costs associated with accessible vehicles, and Petitioners claim that the fund will not be nearly sufficient. Verified Petition ¶ 34; Affidavit of David Beier, Dec. 28, 2015 ("Beier Aff."), ¶ 8. Petitioners allege that if they are forced to purchase non-hybrid vehicles in violation of § 19-533, they will be entitled pursuant to CPLR § 7806 to restitution and/or damages in the amount of the difference between their actual costs associated with acquiring, operating, and maintaining an accessible vehicle and the funding that is made available to them through the Taxicab Improvement Fund. But Respondents claim that no such restitution or damages remedies are available. *Id.* ¶ 35. Petitioners expressly asked Respondents to stipulate that there is no irreparable harm because Petitioners have an adequate restitution and/or damages remedy, but Respondents refused to do so. Affirmation of Eric Hecker, Dec. 28, 2015 ("Hecker Aff."), ¶ 4 and Ex. 2. The irreparable harm requirement therefore is satisfied. *See, e.g., Metro. Taxicab Bd. of Trade v. City of New York*, 2008 WL 4866021, at *6 (S.D.N.Y. Oct. 31, 2008) (finding irreparable harm in part

because “Defendants would [not] stipulate to Plaintiffs’ right to damages if the [rules being challenged] are implemented and then struck down”).

Third, drivers who lease taxis from medallion owners strongly prefer driving hybrids to driving accessible vehicles for a variety of reasons, including especially the reduced fuel costs. Indeed, the driver preference for hybrids over accessible vehicles is so strong that there barely is any market for leasing accessible vehicles. Beier Aff. ¶¶ 5-12; Affidavit of Susan Clair, Dec. 28, 2015 (“Clair Aff.”), ¶ 4; Affidavit of Rezk Badawy, Dec. 23, 2015, ¶¶ 5-7; Affidavit of Sophia Popovic, Dec. 28, 2015, ¶ 6; Affidavit of Fred Weingarten, Dec. 28, 2015, ¶ 5. Petitioner Clair’s experience is instructive. Her medallion was selected in the June 2015 lottery, and the TLC therefore informed her that “the next taxicab vehicle hacked-up with this medallion must be an accessible taxicab.” Clair Aff. ¶ 3 and Ex. 1. Until now, Ms. Clair had been leasing her medallion to a driver through a leasing agent for \$2,400.00 per month. *Id.* ¶ 3. But the leasing agent has informed her that because the market for leasing accessible vehicles is so weak, it no longer will make this payment to her. *Id.* ¶ 4. Indeed, her medallion is in storage and it is not currently being used at all. *Id.* ¶ 5. Ms. Clair is a senior citizen who is herself mobility-impaired. She counted on the \$2,400.00 she was receiving from the leasing agent to meet her monthly expenses, which now far exceed her income. *Id.* ¶ 6. If Ms. Clair were allowed to associate her medallion with a hybrid electric vehicle as § 19-533 requires, she would be more likely to be able to lease it and generate the revenue she desperately needs to support herself. *Id.* ¶ 7.

III. THE BALANCE OF THE EQUITIES WEIGHS IN PETITIONERS’ FAVOR

The balance of the equities tips decidedly in Petitioners’ favor. Nobody disputes that expanding access to taxi service for people with mobility impairments is an important goal. But

it also is indisputable that clean air and fuel conservation are important goals as well. And whereas expanding accessibility is the policy choice of a subservient agency, affording taxi medallion owners access to hybrid electric vehicles in order to protect our environment and conserve our natural resources is the considered and avowed public policy choice of the legislature itself.

The TLC's and the City Council's goals are not mutually exclusive. There are myriad ways in which the TLC could balance concerns about accessibility and the environment by increasing accessibility without prohibiting the use of hybrids. The TLC simply has no discretion to ignore the unambiguous requirement of § 19-533, no matter how commendable its motivation may be.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the motion for a temporary restraining order and preliminary injunction and the Petition should be granted.

Dated: December 29, 2015
New York, New York

By:



Eric Hecker
Daniel Mullkoff

CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600

Attorneys for Petitioners and Class