UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MELROSE CREDIT UNION, PROGRESSIVE CREDIT UNION, LOMTO FEDERAL CREDIT UNION, TAXI MEDALLION OWNER DRIVER ASSOCIATION, INC., KL MOTORS, INC., SAFINI TRANSPORT, INC., WHITE & BLUE GROUP CORP., FIMA SERVICE CO., INC., CARL GINSBURG, and JOSEPH ITZCHAKY,

15-CV-9042 (AT)

Plaintiffs

-against-

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

Defendants.

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DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007
(212) 356-2199

June 24, 2016

MICHELLE GOLDBERG-CAHN,
KAREN SELVIN,
Of Counsel.

SAMANTHA SCHONFELD,
On the Memorandum.

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Defendants submit this reply memorandum of law in further support of their motion to dismiss the Amended Complaint pursuant to FRCP 12(b)(1) and 12(b)(6). As detailed herein, the girth of Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss, dated June 6, 2016 (Pls. Opp. Memo"), does not obfuscate the fact that plaintiffs' claims lack any and all merit and should be dismissed.

POINT I

PLAINTIFFS FAIL TO MEET THRESHOLD REQUIREMENTS.

A. Plaintiffs Lack Standing

1. Credit Union Plaintiffs

As previously detailed in defendants' initial motion to dismiss papers, the Credit Union Plaintiffs have failed to establish that they are within the zone of interest of the regulations they challenge or that they have suffered an injury-in-fact that is redressable in this proceeding. Notably, in their opposition, plaintiffs do not contend that they are for-hire transportation providers in the City of New York or that they are subject to regulation and oversight by TLC. Instead, they simply assert, in a conclusory fashion, that they have "adequately alleged that they are within the zone of interest of the challenged regulations," and that they have suffered an injury from the "impairment of their security interest in the medallions, an increasing number of loan deficiencies, troubled debt restructurings, foreclosure, and inevitable balance sheet losses." See Pls. Opp. Memo, at 60-61. In other words, the Credit Union Plaintiffs are asserting that they have standing to bring the instant lawsuit based on their own business failings and lack of due diligence when providing medallion loans. Yet, in their 116 page opposition memorandum plaintiffs fail to identify a single case where a financial lender's poor business decisions provide it with standing to overturn regulations that are solely applicable to its borrower.

It is well-settled that to establish standing, a party must assert its own legal rights and interests, not those of a third party. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1091 (2d Cir. 1995). The Credit Union Plaintiffs are not subject to the regulations that they challenge, and the mere allegation of an "economic interest" in the challenged regulations does not suffice. To find otherwise would open the floodgates to not just financial lenders, but to all other individuals and corporate entities that may have an "economic interest" in the taxi industry, such as the companies who provide the credit card machines in taxis or the local shop that paints taxis the iconic yellow color. Such a result, though, is precluded by the Article III standing test. Therefore, the Credit Union Plaintiffs should be dismissed from this case.

2. TMODA and LOMTO

Plaintiffs attempt to establish standing for the two organizational plaintiffs, TMODA and LOMTO, by repeating once again the generic claim that each of these organizations is "expending resources advocating on behalf of its members." Pls. Opp. Memo, at 4; see also id. at 62. Yet, at no point in the Amended Complaint, or for that matter, in the affidavits submitted by the heads of these two organizations in support of their preliminary injunction motion, do either of these two organizations detail what exact resources have been expended and on what activities. See Am. Cmplt, ¶¶ 72, 76; Gill Aff., ¶ 4: Kay Aff., ¶ 13.

While the organizational plaintiffs in this case attempt to equate themselves with the New York Taxi Workers Alliance ("NYTWA"), an organizational plaintiff that was found to have standing in the case of Nnebe v. Daus, 644 F.3d 147 (2d Cir. 2011), they are not analogous. See Plaintiffs' Opp. Memo, at 63. In Nnebe, the Second Circuit highlighted the fact that

NYTWA provided evidence establishing that it "expended resources to assist its members who face summary suspensions by providing initial counseling, explaining the suspension rules to drivers, and assisting the drivers in obtaining attorneys. NYTWA also makes an effort to really explain the urgency [of the situation] to the criminal defense lawyer so that the lawyer understands that the driver will be unable to work until the charges are resolved." 644 F.3d at 157 (internal quotation marks omitted). Accordingly, in Nnebe, the Second Circuit found that NYTWA had a "perceptible opportunity cost" since resources could have been spent on other activities. Id. Here, TMODA and LOMTO have provided no such evidence, nor have they even alleged in the Amended Complaint that they have suffered a perceptible impairment to their activities. Therefore, the abstract claim of "expending resources" does not suffice to establish organizational standing and TMODA and LOMTO should be dismissed from this case. Compare id. at 156-57 ("The evidence supplied by NYTWA, while 'scant,' is not abstract.").

3. Remaining Plaintiffs

In arguing that the remaining individual and corporate plaintiffs have standing to pursue the instant lawsuit, plaintiffs focus solely on the Accessibility Rule (codified at 35 RCNY § 58-50) that was promulgated in 2014. See Pls. Opp. Memo, at 64-65. By doing so, plaintiffs appear to acknowledge that they cannot establish an injury-in-fact that is directly attributable to the other challenged regulations. As for the Accessibility Rule, plaintiffs continue to repeat rote, conclusory claims that accessible taxis are less desirable and medallions have been rendered "worthless." Id. Yet, such conclusory claims do not suffice to evade dismissal. Moreover, plaintiffs utterly disregard the fact that the Taxi Improvement Fund ("TIF") has been established that will not only recompense medallion owners for operating a wheelchair accessible vehicle, it will pay taxi drivers a monetary incentive to operate an accessible vehicle. See 35 RCNY § 58-

50(j). Thus, the market landscape is changing. It is inconceivable that half of all taxis will be taken out of service simply because they are accessible. And, common sense dictates that when every other taxi is accessible, drivers will have no choice but to willingly seek out opportunities to drive an accessible vehicle. Thus, plaintiffs' alleged injury is entirely speculative and is insufficient for the purposes of Article III standing.

B. *Res Judicata* Bars Plaintiffs' Claims

Plaintiffs do not dispute that the Credit Union Plaintiffs previously filed an Article 78 proceeding in state court that contained many of the same allegations raised herein. Nor, for that matter, do plaintiffs dispute that the merits of the Article 78 petition were considered by the state court judge when he dismissed that proceeding. Instead, plaintiffs rest their opposition to the application of *res judicata* in this case on the argument that the Credit Union Plaintiffs "specifically excluded" constitutional claims from their Article 78 petition, and thus, they should be allowed to proceed with said claims herein.[1] See Pls. Opp. Memo, at 4. In advancing such an argument, though, plaintiffs disregard the fact that the Second Circuit has stated unequivocally that "[o]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Ferris v. Cuevas, 118 F.3d 122, 126 (2d Cir. 1997) (quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981)) (emphasis supplied). The Second Circuit has confirmed that a final judgment on the merits, such as that in the Credit Union Plaintiffs' Article 78 proceeding, "precludes the parties or their privies from relitigating issues that were or could

[1] Plaintiffs make no mention of their newly asserted state law fraud claim (Amended Complaint, Third Cause of Action) which is strictly a question of state law and should have been heard in that forum.

have been raised in that action.'" St. Pierre v. Dyer, 208 F.3d 394, 399 (2d Cir. 2000) (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981))(emphasis supplied).

At no point do plaintiffs cite to any case law which stands for the proposition that an express reservation of a right to proceed with additional claims in another forum precludes the application of *res judicata*. Further, plaintiffs do not allege, nor could they, that their constitutional claims could not have been raised alongside their Article 78 claims in what is commonly termed a "hybrid" proceeding in state court. See, e.g., Ford v. New York State Racing & Wagering Bd., 24 N.Y.3d 488 (2014); Alfonso v. Fernandez, 195 A.D.2d 46 (2d Dep't 1993). The bottom line is that all of plaintiffs' claims emanate from their upset with how TLC regulates, or in some cases, does not regulate, FHVs using electronic app technology such as Uber and Lyft, and the supposed impact that it is having on the medallion taxi industry. As such, all of plaintiffs' claims emanate from the same transaction or series of transactions and the doctrine of *res judicata* applies.

Finally, it must be noted that while done begrudgingly, plaintiffs appear to concede that *res judicata* may apply to the Credit Union Plaintiffs. See Pls. Opp. Memo, at 68 ("at most any such application would be relevant solely to the Credit Union Plaintiffs"). However, they proceed to argue that the doctrine should not be applied to the remaining plaintiffs because the Credit Union Plaintiffs did not have "authority" in the state court proceeding to represent the interests of the others. Id. at 69. Yet, express authority is not required for a finding of privity. In New York, courts have "eschew[ed] strict reliance on formal representative relationships in favor of a more flexible consideration of whether all the facts and circumstances of the party and nonparty's actual relationship, their mutuality of interests and the manner in which the nonparty's interests were represented in the prior litigation establishes a

functional representation such that the nonparty may be thought to have had a vicarious day in court." Slocum on behalf of Nathan "A" v. Joseph "B", 183 A.D.2d 102, 104 (3d Dep't 1992). Here, it is apparent that the Credit Union Plaintiffs have led the charge in state court and are now leading the charge in federal court against TLC's regulation of black car companies that utilize electronic dispatch apps, such as Uber. In both venues, the plaintiffs/petitioners have been ably represented by the same attorney, Todd A. Higgins, Esq., which the Second Circuit has noted factors significantly into a privity finding. See Pharr v. Evergreen Garden, Inc., 123 Fed. Appx. 420, 424 (2d Cir. 2005). All of the plaintiffs' interests are clearly aligned with the Credit Union Plaintiffs. Accordingly, defendants submit that a finding of privity is warranted and the doctrine of *res judicata* should be applied to all plaintiffs in this case.

C. Claims are Barred by Doctrine of Laches

While acknowledging that a motion to dismiss may be granted based on laches, plaintiffs offer no credible opposition as to why this equitable doctrine should not be applied in the instant case. See Pls. Opp. Memo, at 70. Initially, it must be noted that plaintiffs limit their laches arguments to the use of electronic apps by black car companies, such as Uber, and the Accessibility Rule. See id. at 69-72. As plaintiffs' lawsuit challenges numerous other regulations applicable to medallion taxis, such as the metered fare, partitions, and the iconic yellow taxi color, plaintiffs' silence as to these other longstanding regulations (many of which have been in existence for decades) must be viewed as a concession that laches precludes such a challenge at this late date.

As for electronic app usage by the black car industry, plaintiffs contend that the genesis for the instant lawsuit is the 2015 promulgation of so-called "E-Hail Rules" applicable to medallion taxis. See id. at 71. Yet, no injury occurred to plaintiff medallion owners with the adoption of those "E-Hail Rules." The "E-Hail Rules" allowed medallion taxis to prearrange

rides with customers utilizing electronic apps in the same manner as the Ubers of the world. This was a benefit to medallion taxis, not an injury. Instead, to the extent any injury was inflicted on the medallion industry due to the use of electronic dispatch by the black-car industry, it occurred in 2011 when TLC first authorized such use in black cars. See Black Car Assistance Corp. v. City of New York, 2013 N.Y. Misc. LEXIS 1692, *15 (April 23, 2013), aff'd, 2013 N.Y. App. Div. LEXIS 6919 (1st Dep't Oct. 29, 2013).[2] Plaintiffs fail to adequately explain why they waited almost five years to file the instant lawsuit. Instead, they amorphously argue that it was only in the past year that Uber grew big enough, and "critical mass" was achieved, that an injury was inflicted. See Pls. Opp. Memo, at 71. Yet, such a moving target injury claim, in which the plaintiffs do not even identify what is the magic number of Uber or Lyft cars on the road that now caused their injury, cannot be credited. It has always been well-understood that unlike medallion taxis, the number of black cars on the City's street has never been limited by law. See City Charter § 2303(b), providing authorization of additional medallions "upon the enactment of a local law providing therefor;" Chap. 9 of the Laws of N.Y. 2012, § 8. Moreover, to the extent that plaintiffs contend that the use of electronic apps by black car companies improperly infringes on medallion taxis' street hail exclusivity, that "injury" was inflicted the first time a black car utilized an app, not when plaintiffs subjectively determined Uber cars had hit a "critical mass" on the City's streets.

[2] Defendants note that TLC started allowing e-hail usage by medallion taxis in late 2012 when it authorized a pilot program. The pilot program was in effect for two years prior to the adoption of the E-Hail Taxi rules in 2015. Thus, if this Court were to conclude that authorizing taxis to accept rides by E-Hail somehow constitutes an injury to plaintiffs, that injury was inflicted in December 2012, when the E-Hail Taxi pilot was adopted. See Black Car Assistance, 2013 N.Y. Misc. LEXIS 1692, *3 (after the litigation, all stays were lifted and the pilot commenced mid-2013).

Finally, with regard to the Accessibility Rule, it was promulgated in April 2014. See 35 RCNY § 58-50. Accordingly, plaintiffs were well aware since 2014 that 35 RCNY § 58-50 impacted them. Plaintiffs were also clearly aware that a $.30 passenger surcharge was imposed and collected since January 1, 2015 for the TIF,[3] and that millions of dollars had already been collected from the riding public when they filed their tardy lawsuit in November 2015 (Docket No. 1). See 35 RCNY §§ 58-21(c)(5)(xii); 58-26(a)(1)(i). As of January 1, 2016, medallion owners and drivers are eligible to apply to TIF for money to compensate them for their operation of an accessible vehicle. Plaintiffs are incorrect when they contend that "TLC has still not finalized the details concerning TLC's supposed reimbursement to medallion owners from the Taxicab Improvement Fund for the costs associated with converting and operating an accessible vehicle." See Pls. Opp. Memo, at 71. By rule, medallion owners who are required to hack up an unrestricted medallion as an accessible taxi under 35 RCNY § 58-50, as well as owners of restricted accessible medallions every other vehicle cycle, will receive: (1) $14,000 for the purchase of a wheelchair accessible taxi (which represents the maximum price difference between a non-accessible and wheelchair accessible taxi); and (2) $4,000 per year for the four years that the wheelchair accessible taxi remains in service to cover additional costs associated with operating an accessible vehicle, for a total of $30,000. See 35 RCNY § 58-50(j).

Monies to fund the TIF have been collected from passengers for more than a year and a half (see 35 RCNY §§ 58-21(c)(5)(xii); 58-26(a)(1)(i)) and are now actively being dispensed to owners and drivers. See http://www.nyc.gov/html/tlc/downloads/pdf/tif_driver_payroll_calendar.pdf;http://www.nyc.gov/html/tlc/html/industry/taxi_improvemen

[3] Of the $0.30 surcharge, 25 cents per ride is dedicated to an owner fund and 5 cents per ride is dedicated to a driver fund. In accordance with 35 RCNY § 58-50(h), beginning April 2017, TLC is required to annually analyze the TIF and the surcharge to determine whether it adequately covers costs and should be increased or decreased.

t_fund.shtml (last accessed June 23, 2016). At this point, hundreds of medallion owners have hacked up accessible vehicles in compliance with 35 RCNY § 58-50 and hundreds of drivers have signed up to receive incentive payments for operating an accessible vehicle. Simply put, plaintiffs waited too long to file their lawsuit, and thus, their claims must be dismissed based on the doctrine of laches.

POINT II

PLAINTIFFS' EQUAL PROTECTION CLAIMS FAIL AS A MATTER OF LAW.

Plaintiffs assert that Defendants have violated the Equal Protection Clause by applying the "TLC's Disparate Medallion Taxicab Rules, including the Accessible Conversion Rules, to participants in the New York City medallion taxicab industry, while not applying those same rules and regulations to similarly situated FHV companies." See Pls. Opp. Memo, at 72. In making these claims, plaintiffs contend that both the FHV and medallion taxicab industries operate under the same business models and are therefore similarly situated for purposes of the Equal Protection Clause. Plaintiffs further allege that defendants have not proffered any rational justification for their enforcement of the so-called "Disparate Medallion Taxicab Rules" against medallion taxicabs, but not FHVs. Plaintiffs' claims fail as a matter of law.

A. Medallion Taxicab Owners Are Not Similarly Situated to FHV Operators As a Matter of Law.

Plaintiffs claim that many of the differences asserted by defendants that exist between the medallion taxicab and FHV industries "implicate factual inquiries beyond the scope of the pleading challenge." Pls. Opp. Memo, at 75. However, under no plausible set of facts are FHV operators and medallion taxicab drivers similarly situated for purposes of an Equal Protection challenge. Even if a question were to exist, it is a purely legal question that can be decided solely by this Court at the motion to dismiss stage. Indeed, in its decision denying

plaintiffs' motion for a preliminary injunction on their Equal Protection claim, this Court already recognized that the regulatory differences between FHVs and medallion taxicabs are paramount, holding that "[t]axis and FHVs in New York City operate under different business models," that taxis retain "hail exclusivity" throughout the City, and that plaintiffs have not shown an "extremely high degree of similarity between taxis and FHVs required for an equal protection claim." See Jan. 26, 2016 Decision, Tr. at 9–10 (Docket No. 43).

As set forth by defendants in their moving papers, the services provided by medallion owners and FHV operators are markedly different. By law, medallion taxicabs are the only motor vehicles authorized to accept random and spontaneous street hails throughout New York City (although Street Hail Liveries may accept street hails in Brooklyn, Bronx, Queens, Staten Island, and Northern Manhattan as defined by statute). See Admin. Code § 19-502(1). In contrast, FHVs are prohibited by law from accepting street hails and can only pick up passengers on the basis of prearrangement. See Admin. Code §§ 19-502(g); 19-507(a)(4). To that end, the exclusive right of medallion taxicabs to accept random and spontaneous street hails throughout the entire City has justified the differential treatment between them and FHVs – not just by this Court, but in other jurisdictions as well. For example, in Gebresalassie v. District of Columbia, 2016 U.S. Dist. LEXIS 35093 (D.D.C. Mar. 18, 2016), the district court granted defendant's motion to dismiss similar equal protection claims to those raised here on the grounds that "taxicabs are the only vehicles-for-hire available for street hail. Neither private vehicles-for-hire, nor any of the other categories of public vehicles-for-hire, are available for street hail," and "that fact is sufficient to justify many of the distinctions in the legislation enacted by the District of Columbia." Id. at *16. Thus, as a matter of law, medallion taxis and FHVs are different and there are rational bases to justify the different regulatory treatment of the two sectors.

In a weak attempt to turn defendants' assertion on its head, plaintiffs argue that a medallion taxicab that provides a "rate of fare" to passengers is tantamount to an FHV base that provides a "binding fare quote" to prospective customers. Pls. Memo in Opp., at 76. This argument is wholly without merit. While plaintiffs apparently hoped that this would suggest a similarity between medallion taxicabs and FHVs, it actually highlights a material difference between the two industries. The binding fare quote provided by operators of FHVs and their bases provides prospective customers with the total cost of a ride and based on that quote, a customer may decide whether or not to utilize the service. In contrast, what is known to a customer in a medallion taxicab is the rate of fare (i.e., how the rate of fare will be determined), as it is uniform across all medallion taxis. For example, the initial charge of a taxicab ride is $2.50 plus the 30 cent Taxicab Improvement Surcharge, 50 cents per 1/5 mile or 50 cents per 60 seconds in slow traffic or when the vehicle is stopped. See 35 RCNY § 58-26(a)(1); see also http://www.nyc.gov/html/tlc/html/passenger/taxicab_rate.shtml (last visited June 22, 2016). While customers may use this information to roughly estimate the total cost of their trip — which can be subject to change due to traffic conditions, time of day, route utilized by the driver or requested by passenger, or weather — they are not provided with the total cost of the trip before entering the vehicle. Moreover, plaintiffs mistakenly assert that medallion taxicabs and FHVs "charge customers in the same manner—'through smartphones using credit card payments.'" See Pls. Opp. Memo., at 74. However, while FHV bases utilizing electronic app technology charge customers almost entirely through smartphone apps using credit cards (Admin. Code § 19-502(u); 35 RCNY 59A-03(c)(3)), medallion taxicabs regularly accept both cash and credit card as forms of payment. See, e.g., 35 RCNY §§ 54-17(e); 58-26(h). Thus, plaintiffs are simply incorrect that taxis and FHVs routinely use the same payment

methodology – taxis are still required to accept payment by cash for those passengers who wish to pay that way, something that is not required of FHVs.

In their opposition, plaintiffs also contend that "because medallion taxicabs and FHVs provide the same on-demand transportation service, they are competing for the same customers," and "[t]his fact is even admitted by Defendant City of New York in the New York Transportation Study ("Study"), which states that FHVs and medallion taxicabs 'are now in direct competition for the same passengers.'" Pls. Opp. Memo, at. 74. Contrary to plaintiffs' repetitive assertions, the Study does not contain any so-called key admissions by the City or any defendant that contradict defendants' position that medallion taxicabs are not similarly situated in any way to FHVs. While the Study did conclude that different for-hire transportation industry segments are competing for the same customer base (all transportation users in the City), this is by no means an "admission" that these different segments provide the same services. This Court can take judicial notice of the fact that there are numerous transportation services in the City, such as City buses, subways, taxis, ferries, pedicabs, bicycle lanes, and commuter vans, to name a few, and simply because they are all modes of transportation to users in the City, they are not providing the same service. Indeed, there is simply nothing stated in the Study to suggest that FHVs are usurping the taxi industry's exclusive right to accept street hails throughout the City. Thus, plaintiffs' contention that the Study contains key admissions from defendants that buttresses their claims as a matter of law, simply fails.

All in all, in establishing differential treatment from others similarly situated in a "class-of-one" claim, plaintiffs must show an "extremely high degree of similarity between themselves and the persons to whom they compare themselves." Ruston v. Town Bd. for Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010) (quoting Clubside, Inc.v. Valentin, 468 F.3d 144,

159 (2d Cir. 2006)). "Conclusory allegations alone are not sufficient to establish a plausible equal protection claim." Marom v. City of New York, 2016 U.S. Dist. LEXIS 28466, at *42 (S.D.N.Y. Mar. 7, 2016). As plaintiffs have made only conclusory statements that medallion taxicabs and FHVs using electronic app technology "serve the same customers, create the same value for those customers, transact sales in the same manner, deliver the same services, and use the same strategies to generate revenue in the on-demand transportation service business" (Pls. Opp. Memo, at 75–76), and the clear language of the applicable law contradicts these conclusory claims, they have failed to plausibly allege a "high degree of similarity" between themselves and FHV operators. As such, plaintiffs' Equal Protection claim must be dismissed.

B. Regulatory Distinctions Between Medallion Taxis and FHVs are Presumptively Valid and Rational.

Even if medallion taxicab owners, including some of the plaintiffs, were found to be similarly situated to FHV owners (which defendants do not concede), plaintiffs' Equal Protection argument fails based on the "general rule…that legislation is presumed to be valid and will be sustained if the classification [it draws] is rationally related to a legitimate [government] interest." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). "Even at the motion to dismiss stage, a plaintiff alleging an equal protection violation must plead facts that establish that there is not 'any reasonable conceivable state of facts that could provide a rational basis for the classification.'" Gebresalassie, 2016 U.S. Dist. LEXIS 35093, at *15.

Plaintiffs argue, among other things, that there is no rational basis for: (1) "subjecting taxicabs to metered fare limitations, while permitting similarly situated FHVs to vary their rates as they see fit based on market demand;" (2) "limiting medallion taxicab owners and businesses to specific lease caps set by the TLC, while permitting similarly situated FHVs to fluctuate their lease rates as they see fit based on market demand;" and (3) "requiring taxicabs to

pay a Taxi Accessibility Fee, a surcharge of thirty cents per trip to subsidize taxicab accessibility, and a tax of fifty cents per trip to fund MTA operations, while at the same time not requiring similarly situated FHVs to pay any such fees or taxes."[4] Pls. Opp. Memo, at 77–78. Although plaintiffs make these blind and conclusory assertions, they utterly fail to "negate every conceivable basis which might support [TLC's rules]," regardless of whether those reasons "actually motivated [the City]." Spavone v. NYS Dep't of Corr. Svcs., 719 F.3d 127, 136 (2d Cir. 2013).

As defendants have previously noted, the differences in the regulations applicable to medallion taxicabs and FHVs are rationally related to legitimate government interests. As medallion taxicabs are the only vehicles authorized to accept random and spontaneous street hails throughout the City, it is entirely rational that more regulations be placed upon them in order to promote overall conformity and passenger safety. See Joe Sanfelippo Cabs, Inc. v. City of Milwaukee, 46 F. Supp.3d 888, 893 (E.D. Wisc. 2014) (noting that the metered fares required in taxis were rational to protect passengers street hailing a taxi in a way that was not an issue with pre-negotiated price agreements between passengers and transportation network providers); Gebresalassie, 2016 U.S. Dist. LEXIS 35093, at *31 (finding "[h]aving the uniform red-and-grey appearance scheme self-evidently facilitates customers identifying taxicabs on the street in order to hail them."). Indeed, some of the differences upon which plaintiffs complain here have been for years touted by medallion taxi owners, such as the requirement that all medallion taxis be painted the iconic taxicab yellow and that all taxis utilize the metered rate of fare for all rides.

[4] We note that plaintiffs continue to habitually misrepresent that the thirty cent surcharge is paid by taxicab owners and drivers themselves. It is not. It is paid by taxicab passengers. See 35 RCNY §§ 58-26(i); 58-50.

Furthermore, the fact that FHVs and medallion taxicabs are not similarly situated and operate on two entirely different business models, with vastly different regulatory requirements, supports a finding that the differing rules and regulations that govern each are rational. In denying plaintiffs' motion for a preliminary injunction, this Court has already correctly concluded that "[t]aken as a whole, the differing rules and regulations that the TLC applies to taxis and FHVs are rationally related to the differences in their business models. These differences allow the TLC to achieve the legitimate government objectives of increasing the accessibility, availability, and diversity of cost-effective transportation in the City." Docket No. 43, Tr. at 12. This Court drove the point home even further in denying plaintiffs' motion for reconsideration. There, this Court held that "even if Plaintiffs' evidence demonstrates that distinctions between medallion taxicabs and for-hire vehicles 'have become less marked in recent years' that evidence 'do[es] not render the reasons advanced by Defendants for the TLC's rules and regulations governing taxis and FHVs irrational or arbitrary' within the meaning of the Equal Protection Clause." See Order Denying Pls. Motion for Reconsideration, Docket No. 57.

Finally, plaintiffs cite to Boston Taxi Owners Ass'n v. City of Boston, 2016 U.S. Dist. LEXIS 43496 (D. Mass. Mar. 31, 2016) for the proposition that no rational basis exists for the differential treatment between FHVs and medallion taxicabs. Pls. Opp. Memo, at 80. Plaintiffs note that the Court in Boston Taxi held that "the [City of Boston's] disparate treatment of taxicab operators and TNCs [transportation network companies] is not rationally related to a legitimate government objective because neither of the City's two policy goals is rationally related to any distinction between taxi operators and TNCs." Id. What plaintiffs fail to acknowledge or disclose is that the regulatory scheme in Boston regarding companies using electronic app technology, such as Uber and Lyft, is drastically different from the regulatory

scheme in New York City regarding FHVs. Currently, there are no regulations governing the transportation network companies in Boston, whereas FHVs in New York City (both operators of FHVs and vehicles themselves) are subject to their own detailed set of rules and regulations set forth in City enacted statutes and rules promulgated by TLC. Such FHV regulations include, but are not limited to, the requirement that persons seeking to operate FHVs must obtain a TLC driver's license (35 RCNY § 55-11(a)(1)), that applicants for a FHV driver's license participate in a training course and pass an exam on course content in order to obtain a license (35 RCNY § 55-04(j)), that FHV drivers must pass a TLC background check and be of good moral character (35 RCNY § 55-04(h)), that all FHVs must be affiliated with and dispatched from a TLC-licensed base (35 RCNY § 55-11(a)(1)), that most FHV vehicles pass a safety inspection at least three times per year with one inspection of every six taking place at a TLC facility (Admin. Code § 19-504(f); 35 RCNY § 59B-26(a)), that FHVs cannot be painted yellow (Admin. Code § 19-515(a); 35 RCNY § 59A-29(d)), and that FHVs that are licensed as liveries, black cars, or luxury limousines cannot accept street hails (Admin Code § 19-516(a). This is in stark contrast to Boston where transportation network companies providing ride service, such as Uber and Lyft, are currently subject to no regulatory oversight. As such, plaintiffs' effort to analogize these companies operating in Boston to the status of FHVs in New York City is completely misplaced.

For all of these reasons, along with those set forth in defendants' initial memorandum of law, plaintiffs' Equal Protection claims should be dismissed as a matter of law.

POINT III

PLAINTIFFS' TAKINGS CLAIMS ARE NOT RIPE FOR JUDICIAL REVIEW AND FAIL AS A MATTER OF LAW.

A. Plaintiffs Have Not Sought Just Compensation in State Court, and Thus, Their Takings Claims Are Not Ripe.

Plaintiffs have not sought just compensation in state court prior to the filing of this federal action alleging an unconstitutional taking of their property. Their attempt to oppose defendants' ripeness claim (under FRCP 12(b)(1)) by arguing that the Credit Union Plaintiffs' prior Article 78 proceeding somehow constituted an application seeking just compensation in state court, while at the same time arguing damages are limited in Article 78 proceedings, strains credulity. Pls. Opp. Memo., at 84-89.

Plaintiffs assert that their Amended Complaint properly alleges that they sought just compensation in state court – a precondition to the filing of an unconstitutional taking claim in federal court under the well-established doctrine set forth in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-90 (1985) – by referencing the filing of an Article 78 proceeding in state court by the Credit Union Plaintiffs. Pls. Opp. Memo, at 86-88. Yet, in their next breath, plaintiffs argue that an Article 78 proceeding is not an appropriate proceeding to avail plaintiffs of just compensation because Article 78 proceedings explicitly prohibit awards of damages, unless damages are incidental to the relief sought therein (CPLR § 7806). Id. The inherent contradiction in the plaintiffs' arguments is striking. Indeed, it is unclear how plaintiffs can baldly plead that they sought just compensation in state court (Am. Cmplt ¶ 174), without actually having done so, and then explicitly acknowledge that the Article 78 proceeding filed by the Credit Union Plaintiffs did not authorize an award of damages ("[t]he Credit Union Plaintiffs and numerous other non-parties to this action filed multiple Article 78

actions against defendants... - a remedy that does not even reliably provide the sort of just compensation which Plaintiffs are even seeking." Pls. Opp. Memo, at 85).[5]

In an attempt to salvage their pleading and jurisdictional deficiencies, plaintiffs argue that in New York, parties "seeking relief or just compensation from any municipal decision must bring an action pursuant to Article 78 of the [CPLR]." Pls. Opp. Memo, at 86. Plaintiffs are wrong, and indeed, by making such a statement, they exhibit a basic misunderstanding of the nature of a just compensation claim and how such a claim may be raised in state court. A just compensation claim is not evaluated under the rubric of CPLR Article 78. Instead, a just compensation claim typically alleges a violation of Article 1, Section 7 of the New York State Constitution (i.e., takings section) which provides in subsection (a) that "[p]rivate property shall not be taken for public use without just compensation." Of note, plaintiffs themselves have asserted such a state constitutional claim in their Sixth Cause of Action in the Amended Complaint. See Am. Cmplt, Sixth Cause of Action. Since a just compensation claim is based on a constitutional violation, it may be raised in a plenary action. See, e.g., 520 East 81st Street Assoc. v. State of New York, 99 N.Y.2d 43 (2002); Kim v. City of New York, 90 N.Y.2d 1 (1997); Mekler v. City of New York, 20 MiSc.3d 1128(A) (Sup. Ct., Kings Co. 2008); Gangemi v. City of New York, 13 Misc. 3d 1112 (N.Y. Sup. Ct., Kings. Co. 2006); Dawson v. Higgins, 154 Misc. 2d 811 (N.Y. Sup. Ct., N.Y. Co. 1992).

While just compensation/taking claims (along with all other constitutional claims) can certainly be raised alongside Article 78 claims in what is often termed a "hybrid" proceeding

[5] Interestingly, all of the plaintiffs attempt to bootstrap themselves to the Credit Union Plaintiffs' Article 78 proceeding to avoid dismissal of their taking claims on ripeness grounds, but when defending against the defendants' *res judicata* argument, they claim there was no privity between the Credit Union Plaintiffs and the other plaintiffs. Such contradictions are rife throughout plaintiffs' 116 page opposition memorandum.

in state court (as the Glyka Trans LLC petitioners did in their Article 78 proceeding heard before Justice Weiss which was marked "related" to the Melrose Credit Union Article 78, not "consolidated"), that does not mean that the just compensation claim is heard and decided in accordance with Article 78 standards. Instead, it is heard and decided as any constitutional claim would be and is most often related to a request for a declaratory judgment and related relief. Accordingly, plaintiffs' indication that just compensation claims may only be raised via an Article 78 proceeding in state court where petitioners are limited to "incidental damages," is false and should be disregarded. The fact that the Credit Union Plaintiffs did not raise their takings claims in connection with their Article 78 proceeding and failed to commence another state court proceeding seeking just compensation further underscores the fact that plaintiffs' takings claims are not ripe for judicial review.

Although it is well-settled that takings claims that are not ripe must be dismissed, plaintiffs make the unorthodox request to this Court in a footnote that it should stay decision on defendants' motion to dismiss their unripe takings claims pending resolution of further Article 78 proceedings in state court. Pls. Opp. Memo. at 89, n.23. First, such a request should be denied because unripe takings claims must be dismissed pursuant to the Williamson doctrine. Dreher v. Doherty, 531 Fed. Appx. 82, 84 (2d Cir. 2013); Santini v. Connecticut Hazardous Waste Mgmt. Serv., 342 F.3d 118, 126 (2d Cir. 2003); Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 380 (2d Cir. 1995). Second, as explained above, an Article 78 proceeding in and of itself is not the appropriate vehicle for seeking just compensation in state court (unless coupled with a constitutional claim in a hybrid proceeding). For all of the reasons set forth above, plaintiffs' takings claims are not ripe for review, are jurisdictionally barred, and must be dismissed under the well-settled Williamson doctrine.

B. Plaintiffs' Takings Claims Must Be Dismissed As a Matter of Law.

As argued in defendants' motion, even if this Court were to find plaintiffs' takings claims ripe, plaintiffs have not plead a viable takings claim, and thus, they must be dismissed. Interestingly, it appears that plaintiffs are confused as to what exactly they are claiming has been the subject of a "taking." In their opposition papers, plaintiffs vacillate between alleging that the property interest implicated is the actual medallion, versus supposed regulatory rights of the medallion owners. See, e.g., Pls. Opp. Memo, at 90-91. While plaintiffs may have a property interest in their medallions, they clearly do not retain a property interest in the regulations governing the use of those medallions.

Owners of medallions have the privilege of using the public streets in New York City for hire and accepting street hails from prospective passengers. In determining whether the Fifth Amendment protects this intangible interest, federal courts consider: (1) whether express statutory language prevents "the formation of a protectable property interest;" and if the answer is no, then, (2) whether the owner of the alleged property possesses the right to transfer and the right to exclude. See Peanut Quota Holders Ass'n v. United States, 421 F.3d 1323, 1330-31 (Fed. Cir. 2005). Although medallions are transferrable (35 RCNY § 58-43, et seq.), it is clear that medallion owners do not enjoy the right to exclude others, which is "perhaps the most fundamental of all property interests." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005). "So long as the government retains the discretion to determine the total number of licenses issued, the number of market entrants is indeterminate. Such a license is by its very nature not exclusive." Peanut Quota, 421 F.3d at 1334. For as long as the taxicab medallion system has existed in New York City, the government (through the City Council and New York State Legislature) has retained discretion to issue additional medallions. See, e.g., City Charter § 2303(b)(4); Chapter 9 of the Laws of New York (2012). Medallion owners cannot "exclude

later licensees from entering the market, increasing competition, and thereby diminishing the value of [their] license[s]." Peanut Quota, 421 F.3d at 1334. See also Minneapolis Taxi Owners Coalition, Inc. v. City of Minneapolis, 572 F.3d 502, 508-09 (8th Cir. 2009)("The taxicab licensees, with no equivalent guaranteed minimum, cannot be said to share this concreteness of value. Even before the ordinance amendment, the taxicab licenses were similar to the fishing licenses in Peanut Quota Holders in that '[e]ach additional license dilute[d] the value of the previously issued licenses' because the limited resource was subject to increased competition with each additional license.").

As defendants previously argued, the regulatory scheme governing medallions was never understood to provide an unalterable monopoly where plaintiff medallion owners could operate free from all competition. See Rogers Truck Line v. U.S., 14 Cl. Ct. 108, 114 (Cl. Ct. 1987); Jackson Sawmill Co. v. United States, 428 F. Supp. 555 (1977), aff'd, 580 F. 2d 302 (1978), cert. denied, 439 U.S. 1070 (1979). Contrary to plaintiffs' desires, "a medallion owner has no right to exclude others from the market." Boston Taxi Owner's Ass'n v. City of Boston, 2016 U.S. Dist. LEXIS 43496, at *13. And, despite plaintiffs' lengthy rhetoric, the fact that defendants have not taken action to exclude others from competing with medallion owners does not make their takings claims viable.

In any event, plaintiffs have conceded that they cannot maintain a Takings Claim as to the diminution of value of their medallions because, as defendants have previously argued, they have no protected property interest in the value of their medallions. See Pls. Opp. Memo, at 94, n.28 (plaintiffs "have never alleged – and their Amended Complaint does not state – that there is a protected property interest in the market value of medallions."). Therefore, it appears that plaintiffs' takings claim is strictly about whether their medallions retain a use. Yet,

plaintiffs cannot seriously allege that medallion owners are not able to utilize their medallion to operate transportation for hire on the City's streets, accepting rides via street hails. While plaintiffs may argue that black cars using electronic app technology, coupled with TLC's authorization for such, have increased competition and reduced their total ride share and compensation, plaintiffs do not allege, nor could they, that defendants have prevented plaintiffs from using their property precisely as they always have. See Penn Central v. City of New York, 438 U.S. 104, 136 (1978). Defendants have not "interfere[d] in any way with the present uses" of medallions and taxis. Id. at 136. Plaintiffs (at least medallion owner plaintiffs) continue to be free to operate their medallions for the purposes of accepting street hails for rides on the City's streets. Similarly, TLC has enacted E-Hail rules for medallion taxis to explicitly authorize taxis to prearrange rides through a smartphone app, just as black cars do. See 35 RCNY § 51-03. There has been no taking – physical or regulatory of plaintiffs' medallions – defendants have merely incorporated new technology into TLC's existing regulatory structure.

Moreover, plaintiffs' own papers concede that an alleged diminution of value of their so-called property cannot satisfy the first two prongs of the Penn Central analysis. As to the first two factors, it is well-settled that a takings claim may not rest on a "mere diminution in the value of property . . . [.]" Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 645 (1993). More importantly, it is axiomatic that an owner's reasonable investment-backed expectations in a highly regulated industry, such as the New York City medallion taxi industry, are limited – the second Penn Central factor. In the Amended Complaint and again in plaintiffs' opposition papers, plaintiffs allege that their medallions have depreciated by 40%. Pls. Opp. Memo, at 99; Am. Cmplt, ¶ 327. Indeed, the exhibit appended to plaintiffs' opposition confirms that while it may be that recent private sale amounts reported to TLC for the secondary

transfer of medallions have declined, there have in fact been recent medallion transfers for several hundred thousand dollars, including foreclosures as recent as December 2015 exceeding $700,000. See Affirm. of Todd A. Higgins, dated June 6, 2016, Ex. "5," at 36. Thus, plaintiffs by their own admission cannot establish a diminution of value sufficient for a takings claim. In any event, as already argued, speculation as to future lost profits does not form the basis of a successful takings claim – thus, plaintiffs' takings claims fail as a matter of law. Sanitation & Recycling Indus. Inc. v. City of N.Y., 928 F. Supp. 407 (1996), aff'd,197 F.3d 987 (1996).

For all of the reasons set forth above and in defendants' initial motion papers, plaintiffs' takings claims must be dismissed as a matter of law.

POINT IV

PLAINTIFFS' DUE PROCESS CLAIMS FAIL AS A MATTER OF LAW.

Nothing in plaintiffs' opposition counters defendants' argument that plaintiffs' due process claims fail as a matter of law. Pls. Opp. Memo, at 108-111. As set forth in defendants' opening memo, nothing has been taken away from the plaintiffs via the accessible vehicle requirement codified in 35 RCNY § 58-50, which appears to be the only rule challenged on due process grounds. See Pls. Opp. Memo, at 109-111. The Accessibility Rule was promulgated as part of a complete rulemaking process with a public hearing and comment period. Thus, all procedural due process requirements for notice and an opportunity to be heard were complied with prior to the adoption of the challenged accessibility rule.

First, as already explained in defendants' initial memorandum, none of plaintiffs' medallions have been "converted" from unrestricted to restricted medallions. Rather, the owners of corporate/minifleet medallions, defined as those owned in groups of two or more medallions, 35 RCNY § 51-03, Admin. Code § 19-504(i), (such as plaintiffs White & Blue and FIMA), are

required to affiliate a wheelchair accessible vehicle with every other medallion; and independent medallion owners (such as plaintiffs Ginsberg and Itzchaky) are required on an alternating basis to affiliate a wheelchair accessible vehicle with their medallion. 35 RCNY § 58-50(c). Thus, no one is "converting" their medallions. By rule, each medallion owner has an opportunity at some point to utilize a vehicle that is not wheelchair accessible.[6] In addition, medallion owners are free to transfer their obligations with other medallion owners at any time, as set forth in 35 RCNY § 58-50(e). While plaintiffs may have a property interest in their medallions, they have no protected property interest in the unfettered and unregulated use of said medallions. Simply because plaintiffs possess so-called unrestricted medallions, does not mean that TLC lacks authority to impose regulatory requirements on the use of said medallion as is clear from the multitude of regulations imposed on medallion owners as challenged by plaintiffs herein.

Second, aside from the fact that plaintiffs lack a protected property interest in the unrestricted use of their medallions, all interested parties, including all of the plaintiffs herein, were provided notice and an opportunity to be heard prior to the promulgation of the Accessibility Rule. In their opposition, plaintiffs completely mischaracterize the public rulemaking record in an untoward attempt to substantiate their due process challenge. There is nothing in the ample and robust notice and comment period, and detailed public hearing, to support plaintiffs' contention that there was no "meaningful" opportunity to be heard prior to TLC's adoption of the accessibility rule. Pls. Opp. Memo., at 110. As set forth in defendants' initial brief, TLC commenced formal rulemaking on the accessibility requirement and related passenger surcharge in March 2014. This was done in strict accord with the requirements set

[6] Plaintiffs ignore the fact that TLC has the authority to require all medallion owners to purchase wheelchair accessible vehicles regardless of whether they hold restricted or unrestricted medallions. See City Charter § 2303.

forth in the City Administrative Procedure Act ("CAPA"), codified at New York City Charter § 1043 et seq. TLC published its notice of proposed rule in the *City Record* and on TLC's website in March 2014 (http://www.nyc.gov/html/tlc/downloads/pdf/proposed_rules_wheelchair_accessibility_taxicabs.pdf [last accessed June 20, 2016]), and held a public hearing on the proposal on April 30, 2014. Numerous people testified and submitted comments both in favor of and in opposition to the rule. See http://www.nyc.gov/html/tlc/downloads/pdf/transcript_04_30_14.pdf (last accessed June 20, 2016). Thus, there was clearly a meaningful opportunity for all interested and affected parties to be heard prior to the adoption of the rule. Although plaintiffs attempt to mischaracterize the recent findings of EDNY Judge Block in Singh v. Joshi (Pls. Opp. Memo, at 110), Judge Block concluded that the record of the rulemaking "reflects extensive input from many points of view" and was a "meaningful opportunity to be heard." Singh, 2016 U.S. Dist. LEXIS 8776, at *24. The bald, unsupported claim by plaintiffs that they were not provided with notice or an opportunity to be heard on the accessibility requirement is contradicted by the public record. Public notice of the proposed rulemaking easily satisfies due process requirements. Nothing in CAPA or any other provision of law requires targeted, individualized notification to specific medallion owners, credit unions, taxi drivers, or other interested parties prior to the promulgation of a new rule.

Third, plaintiffs are simply incorrect in how they characterize the federal class action settlement in Taxis for All Campaign v. TLC (formerly known as Noel v. TLC) (hereinafter TFA), 11 Civ. 237 (SDNY)(GBD), that led to the Accessibility Rule. Pls. Opp. Memo, at 110-111. The only requirement imposed on TLC by the Memorandum of Understanding entered between the parties in TFA prior to the settlement of that action was for defendant TLC to publish a proposed rule, no later than December 31, 2013, requiring medallion

owners to purchase wheelchair accessible taxis such that 50% of the taxi fleet would be accessible by the end of 2020. See TFA Docket No. 160, Ex. 1 (MOU, at ¶¶ IV(B), (C)(1)); Ex. 2. (Implementation Agreement, at ¶ I(A)-(C)). There was nothing binding on defendants to actually promulgate the rule and the agreement was clear that in the event that the proposed rule was not adopted by TLC, the TFA litigation would resume. Id. Indeed, the public record confirms that while TLC did publish a proposed rule for accessible vehicles in December 2013, a different version of the rule was re-noticed and re-published in March 2014, and it was the March 2014 version of the rule that was ultimately adopted in April 2014. Compare http://www.nyc.gov/html/dcas/downloads/pdf/cityrecord/cityrecord-12-23-13.pdf (last accessed June 23, 2016)(proposed rule with no passenger surcharge) with 35 RCNY § 58-50(j) (including passenger surcharge to support owner and driver costs affiliated with accessible vehicles). Thus, it was within the discretion of the TLC Commissioners whether to adopt the proposed accessibility rule, and numerous interested groups participated in the public rulemaking process. In fact, the TFA settlement was not finalized until after the adoption of the April 2014 accessibility rule – the TFA settlement was preliminarily approved on June 9, 2014 and finally approved in September 2014.[7] See TFA Docket Nos. 208, 234. To say otherwise is entirely contradicted by the very public rulemaking and settlement records.

[7] Contrary to plaintiffs' statement that "the public was not allowed to participate" in the TFA settlement (Pls. Opp. Memo at 110-11), Judge Daniels specifically allowed medallion owner interests to submit objections to the proposed settlement, which they did (see TFA Docket No. 216), and there was a fairness hearing where objectors, including not only taxi interests but members of the public who were notified of such, were able to participate prior to final approval of the settlement. Id. at Docket No. 235.

For all of the foregoing reasons, plaintiffs' procedural due process claims[8] fail and must be dismissed.

POINT V

PLAINTIFFS' STATE LAW FRAUD CLAIM SHOULD BE DISMISSED.

As set forth in defendants' initial memorandum, this Court should decline to exercise supplemental jurisdiction over plaintiffs' purely state law fraud claim plead in the Third Cause of Action (Am. Cmplt, ¶¶ 328-341). Not only should the Court decline to exercise supplemental jurisdiction because the remainder of the claims should be dismissed, but plaintiffs' state law fraud claim is not inextricably intertwined with the remaining causes of action. As confirmed in plaintiffs' opposition, plaintiffs' state law fraud claim is based on TLC's alleged conduct at the 2014 taxi medallion auctions. Pls. Opp. Memo, at 112-113. However, the rest of plaintiffs' claims are based on TLC regulatory requirements, as well as TLC's interpretation of regulations pertaining to the use of electronic apps by FHVs. Specifically, plaintiffs' Equal Protection claim asserts that there is disparate regulatory treatment between medallion taxis and FHVs and that TLC should not allow black cars using electronic apps to operate in competition with taxis. Plaintiffs' takings claims are premised upon the argument that by allowing FHVs to use electronic apps, TLC has adversely impacted the value of medallions. And, plaintiffs' due process claim is targeted solely at the process utilized in adopting the accessibility requirement for taxis. None of the federal (and related state) constitutional claims are in any way connected to plaintiffs' contention that TLC engaged in an intentional tort in the

[8] It is clear from plaintiffs' opposition papers that plaintiffs are only raising a procedural due process and not a substantive due process challenge.

handling of auctioning new taxi medallions. Thus, this Court should decline to exercise supplemental jurisdiction over plaintiffs' state law fraud claim.

In any event, should this Court elect to exercise supplemental jurisdiction over plaintiffs' state law fraud claim, such claim must be dismissed based on the fact that the plaintiffs failed to comport with basic pleading requirements, including that they did not file a Notice of Claim with the Comptroller of the City of New York.[9] Plaintiffs' attempt to skirt around this prerequisite for filing an action seeking damages against the City fails. Moreover, nothing in plaintiffs' opposition supports the notion that plaintiffs were somehow excused from complying with Admin. Code § 7-201(a), a condition precedent to commencing an action for damages against the City. Even assuming, *arguendo*, that plaintiffs were excused from complying with Admin. Code § 7-201(a), plaintiffs were still obligated to file a Notice of Claim under N.Y. General Municipal Law § 50-e. See D'Antonio v. Metro. Transp. Auth, 2008 U.S. Dist. LEXIS 16726, at *21 (S.D.N.Y. Mar. 4, 2008) ("because plaintiffs failed to file a notice of claim with respect to their tort claims for fraud … the Court dismisses these claims."); United States v. Schmitt, 999 F. Supp. 317, 365 (E.D.N.Y. 1998) ("a condition precedent to pursue the tort of fraud against the City requires that the [plaintiffs] file a notice of claim…."). Thus, the notice of claim requirement cannot be waived.

Plaintiffs' allegation that they somehow complied with the notice of claim requirement by writing letters to various City officials "warning" about the so-called imminent catastrophic collapse of the medallion industry is absurd. Pls. Opp. Memo, at 115-116.

[9] It is unclear why plaintiffs devote almost three pages in their opposition arguing they met requirements of FRCP 9 (Pls. Memo in Opp. at 111-114), as defendants have raised two strong procedural bases to dismiss the state law fraud claim from this action. Defendants did not address the merits of the state law fraud claim in their motion, but do not concede that the claims are well pled or that defendants do not have valid defenses to those claims, despite plaintiffs' assertions to the contrary. Id. at 114.

Moreover, nothing in the Credit Union Plaintiffs' Article 78 proceeding put defendants on notice about the alleged state law fraud claim based on statements made by TLC prior to the February 2014 auction. See Pls. Opp. Memo, at 115. The Article 78 proceeding sought a declaration that TLC was acting unreasonably and contrary to law in allowing FHVs using electronic app technology to operate in New York City (along with mandamus to compel enforcement). Plaintiffs did not place defendants on notice of the alleged fraud committed and possibility of a federal lawsuit in the Credit Union Plaintiffs' Article 78 proceeding, since the Article 78 did not raise fraud claims, or plead any causes of actions with respect to medallion auctions. See Goldberg-Cahn Dec. in Support Motion to Dismiss, Exhibit "A." The only allusion to a future federal case in the Article 78 proceeding was a possible takings claim (in a footnote in the memorandum of law). Such "notice" to the extent that there was one, clearly does not suffice to meet plaintiffs' notice obligations under Admin. Code § 7-201(a). See Hardy v. NYC Health & Hosp. Corp., 164 F.3d 789, 793 (2d Cir. 1999). The cases plaintiffs' cite are inapposite as in those cases (Pls. Opp. Memo, at 115), defendants were provided with clear notice of the nature of the claims, and time and place of those claims. In contrast, here, plaintiffs never provided defendants any notice in their Article 78 proceeding that plaintiffs were raising state law fraud claims in connection with the 2014 medallion auction.

Accordingly, plaintiffs fail to meet the minimal pleading requirements for their purely state law fraud claim and the Third Cause of Action must be dismissed.

CONCLUSION

For all of the foregoing reasons, together with those set forth in defendants' May 2, 2016 Memorandum of Law, defendants respectfully request that this Court grant their motion to dismiss the Amended Complaint in its entirety, together with such other relief as the Court deems just and proper.

Dated: New York, New York
June 24, 2016

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007
(212) 356-2199

By: _____
MICHELLE GOLDBERG-CAHN
KAREN B. SELVIN
Assistant Corporation Counsels

MICHELLE GOLDBERG-CAHN,
KAREN B. SELVIN,
Of Counsel.
SAMANTHA SCHONFELD,
On the Memorandum.