APL-2021-00166

To be argued by:
JESSE A. TOWNSEND
*30 minutes requested*

# Court of Appeals
# State of New York

DALER SINGH, DBA GILZIAN ENTERPRISE LLC, DANIELLE EVE TAXI LLC, EAC TAXI LLC, DEC TAXI LLC, EC TAXI LLC, CHIP AHOY TAXI LLC, ECDC TAXI LLC, and DYER TAXI, LLC, individually and on behalf of all others similarly situated,

*Plaintiffs-Appellants*,

*against*

THE CITY OF NEW YORK and
THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

*Defendants-Respondents*.

## BRIEF FOR RESPONDENTS

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March 10, 2022

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## PRELIMINARY STATEMENT

In 2013, Richard Chipman, a taxi magnate, purchased 14 corporate taxi medallions from the New York City Taxi and Limousine Commission, allowing him to operate taxi fleets in New York City through special purpose entities. Four years later, Chipman brought this suit through those entities (collectively, "Chipman"), chiefly complaining that the Commission failed to block the growth of Uber, a smartphone-based company that had begun operating in the City well before his purchase. The Appellate Division, Second Department, unanimously held that all of Chipman's claims should be dismissed.

This Court should affirm. Chipman's contract claims do not present the abstract issue about the implied covenant of good faith and fair dealing discussed in his brief. Instead, these claims fail on the case-specific ground that his theory of breach is foreclosed by the express contractual language that he freely agreed to. The implied covenant does not stretch nearly so far as to allow a party to override a contract's clear and unequivocal terms.

Chipman's theory of breach, at its core, is that the Commission had an implied obligation to intervene as a regulator to thwart Uber's growth-based business strategy, to preserve or enhance the value of his medallions. But the contractual documents repeatedly stressed that the Commission was making no promises about the value of medallions or how the Commission would regulate the industry in the future. No one could have reasonably believed that the Commission silently promised to regulate the industry for Chipman's private benefit, especially when the Commission was duty-bound to regulate in the public interest.

On the tort side of the case, Chipman has conceded that his common-law claims for fraud and negligent misrepresentation fail because he did not serve a timely notice of claim. But he nonetheless argues that his claim under General Business Law § 349—alleging the same injuries and same deceptive conduct—is somehow exempt from the notice-of-claim requirement. The issue turns on whether Chipman's GBL § 349 claim is "founded upon tort," and it clearly is, just as he concedes his kindred common-law claims are. And Chipman offers no reason to think that prompt notice requirements are

important for common-law fraud claims, but not statutory claims covering the same injuries and conduct.

Timeliness aside, Chipman has failed to state a viable claim under § 349 for two separate reasons. On the one hand, auctioning taxi medallions to a small group of industry insiders for millions of dollars is not the kind of modest consumer-oriented transaction targeted by the Legislature. On the other hand, Chipman has not plausibly alleged that the Commission made materially deceptive statements, where the Commission disclosed the data behind medallion price reports and was clear that past performance should not be taken as a prediction as to future value. With the benefit of hindsight, it is understandable that Chipman regrets his investment, but his regret is not basis for a claim, either in contract or tort.

## QUESTIONS PRESENTED

1. Did the Appellate Division correctly dismiss Chipman's contract claims based on an alleged breach of the implied covenant of good faith and fair dealing, because no reasonable contracting party would have thought that the Commission impliedly promised to regulate the taxi industry to maintain the value of medallions when the express contractual language said otherwise?

2. Did the Appellate Division correctly affirm the dismissal of Chipman's claim under GBL § 349, where (a) he failed to serve a timely notice of claim, and one was required because the claim sounds in tort, just like his kindred and concededly time-barred common-law claims, and (b) in any event, he failed to state necessary elements of such a claim, as Supreme Court held?

## STATEMENT OF THE CASE

### A. The Commission's regulation of yellow taxis and black cars in New York City

The Taxi and Limousine Commission regulates, supervises, and licenses various types of for-hire vehicles in New York City. N.Y.C. Charter § 2303. The Commission is charged with establishing "an overall public transportation policy" that promotes "public

comfort and convenience," *id.* § 2300, and to pursue "innovation and experimentation" regarding "modes of service and manner of operation," *id.* § 2303(b)(9).

This case principally concerns two categories of regulated vehicles for hire: medallion taxis and black cars. A medallion is a license issued by the Commission that permits the holder to operate a taxi. *See* 35 RCNY § 51-03. Taxis—and, more specifically, yellow taxis—are the only vehicles permitted "to accept hails from passengers in the street" throughout the entirety of New York City. N.Y.C. Admin. Code § 19-504(a)(1).

Unlike taxis, black cars cannot accept street hails. Instead, black cars operate with some form of prearrangement. *See* N.Y.C. Admin. Code § 19-516(a). In fact, the black-car industry first arose when large numbers of taxis began arranging rides for businesses by radio calls, which led to a shortage of taxis for street hails (R371). As a result, the Commission banned radio calls in taxis but permitted black cars to use them (*id.*).

The number of taxi licenses available in the City has long been capped by law. *See* N.Y.C. Charter § 2303(b)(4). The cap remained

unchanged for much of the 20th century, though in recent decades the Legislature and City Council have occasionally raised it (R56). *See Greater N.Y. Taxi Ass'n v. State*, 21 N.Y.3d 289, 297-99 (2013). By contrast, no law placed a cap on the number of black-car licenses until 2018, several years after Chipman bought the taxi medallions at issue in this litigation. L.L. 147/2018; 35 RCNY § 59A-06(a)(1).

In 2011 and 2012, before Chipman bought his taxi medallions, the taxi and for-hire vehicle industry experienced a significant change when the Legislature passed the HAIL Act, establishing "HAIL" licenses. *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 297-98. This law allowed the initial issuance of 6,000 green taxi licenses, which permit their bearers to accept street hails outside of Manhattan's central business district and the two airports in the City. *Id.* 303-04. While the yellow taxi industry attempted to block this change, this Court rejected their challenge. *Id.* at 308. The same legislation also authorized additional yellow taxi medallions for wheelchair accessible taxis, increasing the overall taxi stock. *Id.* at 299.

Around the same time, and still before Chipman bought his taxi medallions, the industry began experiencing another major

change. With the advent of modern technology, new companies, most prominently Uber Technologies, Inc. ("Uber") and Lyft, Inc. ("Lyft") began allowing passengers around the world, including in New York City, to prearrange black car rides through smartphone applications. *See, e.g.*, *Matter of Glyka Trans, LLC v. City of N.Y.*, 161 A.D.3d 735, 735 (2d Dep't 2018) (noting the "rapid growth of for-hire vehicle services provided by companies such as Uber").[1]

In 2011, two years before Chipman bought the taxi medallions at issue, Uber "debut[ed]" in the City, "initiating rapid growth" in the number of black cars (R371).[2] As noted above, there was no law capping the number of black cars at the time. The Commission's regulatory response to Uber and other companies focused elsewhere. To start, the Commission ensured that these new market entrants were regulated, determining that the use of smartphone apps to arrange rides fit within the regulatory structure as a prearrangement, like a radio call. *Progressive Credit Union v. City of*

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[1] *See also* Bee Shapiro, *Mom's Van Is Called Uber*, N.Y. Times, (Sept. 25, 2013), https://perma.cc/EZ23-KDMN; Ian Lovett, *Where Car Is King, Smartphones May Cut Traffic*, N.Y. Times, (July 12, 2013), https://perma.cc/SAF5-EFLY.

[2] *See also* Jenna Wortham, *With a Start-Up Company, a Ride Is Just a Tap of an App Away*, N.Y. Times, (May 3, 2011), https://perma.cc/F5HK-ZQFK.

*N.Y.*, 889 F.3d 40, 46 (2d Cir. 2018). As announced in industry-wide notices, the Commission accordingly allowed black cars to use smartphone apps to arrange rides, so long as they did so through a licensed black car "base" (as existing rules for black cars required). Commission, Industry Notice 11-15, *Attention: For-Hire Vehicle drivers receiving dispatches via smartphone apps* (July 1, 2011), https://perma.cc/V44J-JQLS. The Commission underscored that black-car bases working with a smartphone app were required to follow all of the Commission's black-car rules, such as a prohibition on using the term "taxi" in advertising. Commission, Industry Notice 11-16, *Attention: FHV bases using smartphone apps for dispatch and developers of smartphone apps for dispatch* (July 18, 2011), https://perma.cc/62AK-ZQAR.

Later in 2011, the Commission granted an Uber-affiliated entity a license to operate a for-hire vehicle base in the City (R165-66). The Commission authorized additional Uber-affiliated bases in 2012 and 2013 (R67-68). Both federal and New York courts have rejected lawsuits brought by the taxi industry faulting the Commission for allowing companies like Uber to accept smartphone-

arranged rides.[3] Courts around the country have also rejected similar lawsuits brought against municipalities over the reduced value of taxi licenses.[4]

In 2013, recognizing that the taxi industry was also interested in using new technology, the Commission authorized taxis to use smartphone apps to arrange rides, first in a pilot program and later in approved rules (R57-58). Commission, *Notice of Promulgation of Rules* (Jan. 29, 2015), https://perma.cc/N84X-YST6. This step allowed taxis to use new technologies to reach customers who prefer an app-based service.

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[3] *See, e.g.*, *Progressive Credit Union v. City of N.Y.*, 889 F.3d 40, 44-45 (2d Cir. 2018) (rejecting claims by taxi trade associations and financiers that the Commission's supervision of black car companies allegedly impaired their property rights or their entitlement to procedural due process or equal protection); *Matter of Melrose Credit Union v. City of N.Y.*, 161 A.D.3d 742, 745-47 (2d Dep't 2018) (rejecting effort by medallion financier to halt the expansion of black cars because it failed to establish direct harm or standing to sue); *Glyka Trans.*, 161 A.D.3d at 738-41 (holding that the Commission rationally concluded that the smartphone-arranged ride was a black-car prearrangement and different from a taxi street hail).

[4] *See, e.g.*, *Newark Cab Ass'n v. City of Newark*, 901 F.3d 146, 160-62 (3d Cir. 2018); *Ill. Transp. Trade Ass'n v. City of Chicago*, 839 F.3d 594, 596-99 (7th Cir. 2016); *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee*, 839 F.3d 613, 616 (7th Cir. 2016); *Boston Taxi Owners Ass'n v. City of Boston*, 180 F. Supp. 3d 108, 116-121 (D. Mass. 2016).

### B. Chipman's 2013 medallion purchases and the contractual provisions he agreed to

All of this is prelude to the commercial transactions at issue in this litigation. The turmoil occasioned by Uber's entry in the New York City market and the Commission's regulatory response would not have been news to Chipman—an experienced businessman who specializes in the financing, management, and brokerage of medallions—when he purchased 14 corporate medallions through limited liability companies at an industry auction held in November 2013 (R54-55, 80-81; *see* Opening Br. for Pls.-Appellants ("App. Br.") 14).[5]

At the time of this auction, the Commission published reports of the prices paid for medallion transfers on its website (R204-06, 238-47). When calculating the average prices, the Commission noted that it excluded certain sales if it believed them not to be arms-length (R205-07). It also expressly warned that it made no

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[5] *See* Westway Medallion Sales, *Meet Our Team: Richard Chipman* (June 8, 2021), https://perma.cc/M7H9-PEA9 ("Richard is one of the most experienced and well-respected members of the industry."). The original plaintiff, Daler Singh, was dismissed from this case for lack of standing while the appeal was pending, and did not join the motion for leave to appeal (Br. in Supp. of Mot. for Permission to Appeal 1 n.1; *see also* May 14, 2020 Order 1-2, NYSCEF No. 621).

representations or warranties about the data; that the data could be misleading due to the exclusion of transactions that were not arms-length; and that the data "should not be relied upon" as an indication of future medallion prices or for the suitability of medallions for investment or business purposes (*id.*). In its published graphs showing trends in historical medallion prices, the Commission noted that "PAST PERFORMANCE IS NOT A GUARANTEE OF FUTURE RESULTS" (R236). And the Commission's 2014 Factbook explained that medallion prices fluctuate based on taxi fares, demand, operational costs, anticipated investment returns, and other factors (R112).

The bid guide for the 2013 industry auction was detailed (R87-90). For each bid, bidders were required to complete a bid form, submit a certified check or money order for $10,000 as a deposit, and include a letter of commitment, issued by a government-licensed lender, for no less than 80% of the bid amount (R88). Each bid covered two paired corporate medallions (R80).

Chipman submitted 10 bids that ranged from $1.818 million to $2.518 million for the paired medallions (R119-21, 135-40). Seven

of his bids won (R119-20), totaling over $16 million for 14 corporate medallions (R55). Just 12 individuals—Chipman and 11 others—acquired all 200 corporate medallions (R119-24).

On each bid form, which he personally signed, Chipman certified that he "ha[d] not relied on any statements or representations from the City of New York in determining the amount of [his] bid" (R135). Chipman agreed that the City did not make any representations or warranties about "the present or future value of a taxicab medallion" or "the present or future application or provisions of the rules of the … Commission or applicable law" (*id.*). Chipman also agreed that "no warranties [were] made, express or implied, [by the City on] any matter other than the warranty of clear title" (*id.*). And he acknowledged that the medallions were conveyed "subject to" the Commission's regulations and other applicable law, "as may be amended from time to time" (*id.*).

After seven of his bids prevailed, Chipman submitted signed and notarized affidavits of "non-reliance," in which he reaffirmed that he had not relied on any statements, representations, actions, or determinations by the Commission, including any concerning

"the value of taxicab medallions" (R145). He also reaffirmed that the licenses were subject to state and local laws and regulations that could be "amended from time to time" (*id.*).

Chipman also signed bills of sale, formally conveying the medallions to him (R158). The bills of sale once again provided that (1) the Commission made no warranties, express or implied, on anything other than clear title; (2) the Commission made no representations about the present or future value of the licenses; and (3) the licenses were subject to all applicable state and local laws and regulations, which were subject to change (*id.*)

### C. Uber's and its competitors' growth strategies and the City's response

As Chipman alleges in his complaint, in the years after he obtained his additional taxi licenses, Uber grew tremendously in New York City, as it did all over the country and, indeed, globally. By 2015, Uber had more than 20,000 affiliated cars in the City (R68). In 2017, it had more than 46,000 affiliated cars, more than triple the number of taxis in the City (R69). This rapid increase reflected Uber's global growth-at-any-cost business strategy. Backed by

venture capital, Uber deliberately sought massive growth at a loss, in the hopes that capturing market share over incumbent interests in multiple continents would lead to profitability down the road.[6] Uber's competitors, such as Lyft, also began competing in New York City. These companies' business strategies and their impact on taxis did not go unnoticed in the City.[7]

In 2014, Lyft entered the New York City market. When the company failed to adhere to applicable rules and regulations, the City took action, bringing a lawsuit against Lyft seeking to bar the company from entering the market without obtaining licenses for its drivers and its bases. *See* Compl., *City of N.Y. v. Lyft, Inc.*, N.Y. Cnty. Index No. 451477/2014, NYSCEF No. 2. The action was resolved with Lyft agreeing not to launch any service in the City without complying with the Commission's rules and regulations. *See* So-Ordered Stip., *Lyft*, N.Y. Cnty. Index No. 451477/2014, NYSCEF No. 26.

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[6] Richard Waters, Shannon Bond, *Uber Faces a Long Road to Profitability—If It Gets There at All*, L.A. Times, (May 13, 2019), https://perma.cc/868W-W9MB.

[7] *See, e.g.*, Emma G. Fitzsimmons, *City Hall and Uber Clash in Struggle Over New York Streets*, N.Y. Times, (July 16, 2015), https://perma.cc/M3DW-VM2K.

In 2015, the Commission issued "e-dispatch" regulations that imposed uniform service standards for the benefit of passengers, including those that choose to use Uber or similar companies (R168-202). Changes were necessary, the Commission explained, to protect bases, drivers, and passengers, because although the current rules already required companies like Uber to obtain a base license or have a contract with an existing base, those bases often had no knowledge or control over the companies, which made it difficult for the Commission to hold them accountable (R169). And, the Commission explained, the rise of new technologies used to dispatch vehicles and to connect passengers necessitated these changes to encourage innovation (R168).

Recognizing the issues with the number of black cars on the streets, the same year, then-Mayor de Blasio sought legislation capping black car growth, only to see the effort fail (R69). In 2018, however, a renewed legislative effort succeeded. New York thus became the first major city in the United States to impose a vehicle cap on

companies like Uber.[8] The groundbreaking 2018 law placed a one-year moratorium on new licenses and granted the Commission authority to cap licenses going forward. *See* L.L. 147/2018, §§ 19(a), 3. The Commission has since exercised that authority, and a cap on black car licenses remains in place today. *See* 35 RCNY § 59A-06(a)(1). Uber and its affiliates unsuccessfully sued to challenge both the local law and the accompanying rule adopted by the Commission. *See Zehn-NY LLC v. City of N.Y.*, N.Y. Cnty. Index No. 151730/2019, 2019 N.Y. Misc. LEXIS 5875, at *1-*8 (Sup. Ct. Oct. 28, 2019).[9]

In 2021, with individual taxi medallion owners and taxi drivers increasingly in debt,[10] the City committed $65 million toward

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[8] Emma G. Fitzsimmons, *Uber Hit With Cap as New York City Takes Lead in Crackdown*, N.Y. Times, (Aug, 8, 2018), https://perma.cc/BZ4S-FUHJ.

[9] The City and Commission have taken other steps to regulate Uber and Lyft, which those companies have challenged in court. *See, e.g.*, *Matter of Tri-City, LLC v. N.Y.C. Taxi & Limousine Comm'n*, 189 A.D.3d 652, 652-53 (1st Dep't 2020); *Zehn-NY LLC v. N.Y.C. Taxi & Limousine Comm'n*, N.Y. Cnty. Index No. 159195/2019, 2019 N.Y. Misc. LEXIS 6789, at *1 & *7-8 (Sup. Ct. Dec. 23, 2019); *Tri-City, LLC v. N.Y.C. Taxi & Limousine Comm'n*, N.Y. Cnty. Index No. 159947/2019, 2019 N.Y. Misc. LEXIS 6774, at *1 & *3-*6 (Sup. Ct. Dec. 23, 2019).

[10] *See, e.g.*, Emma G. Fitzsimmons, *A Taxi Driver Took his Own Life. His Family Blames Uber's Influence*, N.Y. Times, (May 1, 2018), https://perma.cc/R57G-BECG.

financial relief for small-scale taxi medallion owners. Commission, *Notice of Promulgation of Rules* (Oct. 6, 2021), https://perma.cc/CJ9N-DER7. The Medallion Relief Program assists owners of five or fewer taxi medallions in renegotiating loan terms with their lenders; if the medallion owner's lender agrees to certain terms, the Commission provides a $20,000 down payment, and medallion owners may apply for up to $9,000 in additional support payments toward the first six months of the renegotiated loan. *Id.* The program extends not only to medallion owners who directly acquired licenses at Commission-run auctions, but also to the numerous individuals who acquired medallions in secondary sales through brokers like Chipman. *See id.*

Nearly 200 medallion owners secured more than $20 million in debt forgiveness through this program the first month it was operational. *See* Office of the Mayor, *Taxi Medallion Relief Program Surpasses $20 Million in Debt Forgiveness* (Oct. 30, 2021), https://perma.cc/Y6VK-QVCD.

Later in 2021, after a public campaign by taxi drivers and medallion owners, the City built upon this foundation by announcing

an additional City-funded loan guaranty. *See* Office of the Mayor, *Mayor, Senator Schumer, NY Taxi Workers Alliance, and Marblegate Asset Management Announce Agreement to Supplement Medallion Relief Program with City Backstop* (Nov. 3, 2021), https://perma.cc/DGU9-G7FF.[11] Under the announced program, if a medallion owner's lender writes down a principal loan balance to $200,000 and agrees to certain loan terms, the City will provide both $30,000 toward the loan principal and a City-funded guaranty on the restructured loan. *See* Commission, *Notice of Public Hearing and Opportunity to Comment on Proposed Rules* (Dec. 20, 2021), https://perma.cc/ER9Q-27EQ.

### D. Chipman's suit and the Appellate Division's unanimous decision dismissing his complaint

In 2017, the seven plaintiffs—limited liability companies owned by Chipman—sued the City and the Commission, asserting (1) claims alleging deceptive conduct—for fraudulent inducement, negligent misrepresentation, and deceptive acts against consumers

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[11] *See* Brian M. Rosenthal, *N.Y.C. Cabbies Win Millions More in Aid After Hunger Strike*, N.Y. Times, (Nov. 3, 2021), https://perma.cc/5NNK-EHWM.

under General Business Law (GBL) § 349; and (2) contract claims—for breach of the implied covenant of good faith and fair dealing and rescission (R52-78).

Supreme Court, Queens County, dismissed all three claims alleging fraudulent or deceptive conduct because Chipman had failed to comply with notice-of-claim requirements under state and local law (R14-16). The court also held that the GBL § 349 claim failed because it did not apply to municipalities and because Chipman had not alleged a viable claim in any case (R16-19). Supreme Court declined to dismiss the contract claims (R19-20).

While conceding that the claims for fraudulent inducement and negligent misrepresentation claims were properly dismissed, Chipman appealed the dismissal of the GBL § 349 claim for deceptive practices, while the Commission cross-appealed the decision allowing the contract claims to proceed (R3-4, 21-22).

The Appellate Division, Second Department, unanimously held that the entire complaint should be dismissed (Supplemental Record on Appeal ("SR") 4-5). On the GBL § 349 claim, the court found that the claim sounded "in fraud," and therefore, "in tort"

within the meaning of General Municipal Law (GML) § 50-e, requiring service of a timely notice of claim (SR5). Because Chipman had failed to do so, the claim failed at the outset (SR6), without any need to consider alternative grounds for dismissing the claim.

On the contract claims (SR6-7), the court held that in light of the clear and express language in the contract documents, "no reasonable person" in Chipman's shoes would have believed that the Commission would "act or refrain from acting in any manner in order to guarantee the value of [his] medallions," because such promises would be "inconsistent" with the contracts' terms (SR6). After all, the court noted, Chipman had agreed that the Commission made no representations or warranties about the present or future value of the medallions, or the present or future nature of the Commission's regulations (*id.*).

While the appeal was pending in the Appellate Division, both parties moved for summary judgment on the contract claims that Supreme Court had not dismissed. Supreme Court dismissed the claims of one plaintiff, Daler Singh, for lack of standing, and otherwise denied both motions (*see* May 14, 2020 Orders, NYSCEF Nos.

621 & 622). Both parties noticed appeals (*see* June 23, 2020 & July 6, 2020 Notices of Appeal, NYSCEF Nos. 625 & 626).

After the Appellate Division issued its decision related to the motion-to-dismiss stage of the proceedings, Chipman failed to perfect his appeal of the denial of his motion for summary judgment. *See Singh v. City of N.Y.*, 2d Dep't App. Div. No. 2020-05000. The court granted the Commission's motion for leave to withdraw its appeal of Supreme Court's denial of its motion for summary judgment, as its earlier decision dismissing all claims made any further appeal academic. June 30, 2021 Order, *Singh v. City of N.Y.*, 2d Dep't App. Div. No. 2020-05318.

Meanwhile, the Appellate Division denied Chipman's motion for reargument or leave to appeal its decision dismissing all claims. *Singh v. City of N.Y.*, 2021 N.Y. Slip Op. 65665(U) (2d Dep't May 5, 2021). This Court then granted leave to appeal (SR3).

## ARGUMENT

## POINT I

### CHIPMAN'S CONTRACT CLAIMS FAIL BECAUSE HE CANNOT WIELD THE IMPLIED COVENANT TO OVERWRITE EXPRESS CONTRACTUAL TERMS

Chipman asks this Court to opine on a non-issue. This case is not about whether a party can disclaim the implied covenant of good faith and fair dealing (*contra* App. Br. 30-35).[12] There's no relevance to Chipman's extended discussion of how the U.S. Supreme Court—in a case addressing federal preemption—has described States' handling of that issue. *See Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 285-87 (2014). The issue is not in this case.

Nor did the Commission argue, or the Appellate Division hold, that a disclaimer of any representation about value defeats the implied covenant of good faith and fair dealing (*contra* App. Br. 35-38). That issue, too, is not presented here.

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[12] Chipman does not address the Commission's argument that his rescission claim fails on an independent ground (*see* App. Div. Br. for Resp'ts-Appellants 56-59; App. Div. Reply Br. for Resp'ts-Appellants 10-11). Rescission is not available when monetary damages are, *Rudman v. Cowles Commc'ns, Inc.*, 30 N.Y.2d 1, 13-14 (1972), and any reduction in the value of Chipman's medallions can be measured and compensated by damages (R77).

Instead, the dispositive issue is whether Chipman's particular theory of breach is sustainable on this record. That turns on a bedrock principle this Court has reaffirmed time and again: the duty of good faith and fair dealing cannot be used to inject an implied promise into a contract that is "inconsistent" with its express terms. *See, e.g.*, *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983). Chipman's contract claims fail because he tries to use the implied covenant exactly how it may not be used.

After reviewing the contractual provisions in this case, the Appellate Division concluded that the specific terms of the contractual documents were incompatible with any implied promise on the part of the Commission to throttle Uber's growth using its regulatory authority, as Chipman claims. Chipman fails to explain how his sweeping application of the implied covenant is consistent with the contractual language, legal doctrine, or regulatory history at issue here.

### A. Chipman's theory that the Commission silently promised to regulate Uber for his personal benefit is foreclosed by the express contractual terms that he freely agreed to.

Chipman's effort to reimagine the case as raising a broad theoretical issue of contract law is a diversion. The Appellate Division correctly resolved the case-specific question at the heart of his contract claims, based on the particular contractual terms.

To understand why the Appellate Division correctly resolved the contract claims on the facts of this case, it is helpful to explain the theory of breach that Chipman tries to advance here. From the start, Chipman has conceded that the Commission never breached any express term of their contracts. Instead, his contract claims rely entirely on the implied covenant of good faith and fair dealing. And he seeks to use that doctrine to read a highly unlikely promise into the parties' agreements: he contends that the Commission made an unstated promise to regulate the taxi and black-car industry in a manner that would stifle the growth of Uber and other competitors for Chipman's personal benefit (R66-73).

Indeed, Chipman argues that this unstated and anti-competitive promise to block Uber's growth was at the heart of the deal—

even though Chipman never identifies what authority the Commission had to do so (App. Br. 35-38). And he has maintained that position while acknowledging, in his own complaint and through documentary evidence he submitted, two key facts known when he bought his taxi medallions. On the one hand, Uber had started operating in the City well before the November 2013 auction through for-hire vehicle bases (R67-68, 165-66, 371), and its activities were widely publicized; indeed, the New York Times alone dedicated multiple articles to the subject prior to the auction.[13] It could hardly have been a secret to industry insiders like Chipman that Uber's entry into the market threatened to be transformative. On the other hand, while the number of taxi licenses had long been capped by statute, there was no similar legislative cap on black cars at the time (*see, e.g.*, R58-62).

Throughout this case, Chipman has cast about for a viable theory of the Commission's supposed breach. Chipman has at times

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[13] Bee Shapiro, *Mom's Van Is Called Uber*, N.Y. Times, (Sept. 25, 2013), https://perma.cc/EZ23-KDMN; Jenna Wortham, *With a Start-Up Company, a Ride Is Just a Tap of an App Away*, N.Y. Times, (May 3, 2011), https://perma.cc/F5HK-ZQFK.

complained about the Commission's determination that e-hailing is a form of prearrangement rather than a street hail, over which taxis have a monopoly (App. Br. 17, R70-71). But the Commission made that determination more than two years before Chipman bought his taxi medallions. *See* Commission, Industry Notice 11-15, *Attention: For-Hire Vehicle drivers receiving dispatches via smartphone apps* (July 1, 2011), https://perma.cc/V44J-JQLS. And federal and state courts have consistently found that the Commission's determination was rational. *Progressive Credit Union*, 889 F.3d at 50-51; *Glyka Trans*, 161 A.D.3d at 739-741.

At other times, Chipman has pivoted to complaining that the Commission has "flood[ed]" the streets of the City with Uber-affiliated black cars (App. Br. 13, 36). Indeed, that was the centerpiece of his final submission in the court below (*see* App. Div. Mot. for Reargument and Renewal or Leave to Appeal 15-19). But the Commission is a regulator, not a for-hire vehicle operator. If anyone "flooded" the market, it was Uber, Lyft, and other companies that made their own business decisions over a period of years. Chipman's real complaint is with them, and the consumers who have

given them business. And Chipman never argues that the Commission had the authority to simply cap the number of black cars; as noted, there was no legislation authorizing the Commission to establish a cap until 2018 despite earlier efforts to enact such a law.

At still other points, Chipman suggests the issue is one of being unable to foresee Uber's growth (App. Br. 7-8). But the question is not whether he, or anyone else, is blameworthy for failing to predict Uber's popularity. The question instead is whether the implied covenant of good faith includes an unspoken promise by the Commission to insure him against Uber and other market threats. Chipman cannot show that it does.

Nominally, Chipman's contractual claim attacks how the Commission licensed Uber-affiliated black car bases (R75). The Appellate Division concluded correctly that Chipman had no viable claim rooted in the implied covenant of good faith and fair dealing to challenge the Commission's licensing actions.

The Appellate Division's decision was directly grounded in the language of the agreements that Chipman signed. The documents are short—one or two pages each—and unambiguous. Rather than

featuring "boilerplate" disclaimers, as Chipman claims (*contra* App. Br. 35-36), the documents include multiple provisions that go directly to Chipman's claim that his medallions have declined in value because of the Commission's regulatory actions. First, Chipman agreed that the Commission had made no representations about the "present or future *application or provisions*" of the Commission's regulations or other applicable law (R135 (emphasis added)). Second, he repeatedly acknowledged that the Commission's rules and other applicable law could change from time to time (R135, 145, 158). Third, Chipman repeatedly confirmed that the Commission made no representations about the present or future value of the medallions (R135, 145, 158). And finally, he acknowledged that the Commission also made no warranty of any kind other than that of clear title (R158).

In light of those express terms, no reasonable person in Chipman's shoes would have justifiably believed that the Commission had promised to intervene to thwart the business strategy of Uber and other competitors in order to maintain the value of Chipman's licenses (SR6). *See Moran v. Erk*, 11 N.Y.3d 452, 457 (2008) (no

reasonable person would have believed alleged implicit promise was made, as it was inconsistent with contract's "plain language"). To imply a binding promise—that the Commission pledged to regulate in a particular way to maintain a favorable market for Chipman—is flatly "inconsistent with other terms of the contractual relationship." *Murphy*, 58 N.Y.2d at 304. Simply put, the covenant of good faith cannot be used to imply the existence of provisions that contradict, or are inconsistent with, the explicit provisions. *See id.* at 304-05.

Indeed, adopting Chipman's reimagining of the implied covenant of good faith and fair dealing in light of the express terms of the contracts here would inject dramatic unpredictability in contractual relations. This Court has noted that "[c]larity and predictability are particularly important in the interpretation of contracts." *Moran*, 11 N.Y.3d at 457. But the boundless implied covenant that Chipman proposes is contrary to these interests, and would undermine, rather than "preserve[,] New York's status as a commercial center." *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 20 N.Y.3d 310, 315-16 (2012). His argument would not only

prevent parties from deliberately cabining their contractual obligations through express terms, but also "extend" the implied covenant of good faith "so far as to undermine a party's general right to act on its own interests in a way that may incidentally lessen the other party's anticipated fruits from the contract." *M/A-COM Sec. Corp. v. Galesi*, 904 F.2d 134, 136 (2d Cir. 1990) (quotation marks omitted).

Chipman relies on this Court's century-old decision in *Wood v. Duff-Gordon*, 222 N.Y. 88, 90-91 (1917) (*see* App. Br. 27), but he misapplies it. Unlike the exclusivity contract at issue there, the contracts here weren't silent in a way that required implying a term to govern either party's conduct. Just the opposite. Again, across the contractual documents, the Commission stated that it was making no promises about future regulation or the future value of the medallions. To imply a binding promise that the Commission would regulate Uber to maintain the value of Chipman's medallions would be "inconsistent with other terms of the contractual relationship," *Murphy*, 58 N.Y.2d at 304, which made clear that no promises were being made about the regulatory future (SR6).

Contrary to Chipman's assertion (App. Br. 33-35), the ruling here does not conflict with the non-binding Appellate Division decisions on which he almost exclusively relies. In *Roli-Blue, Inc. v. 69/70th Street Associates*, 119 A.D.2d 173, 174-78 (1st Dep't 1986), a commercial tenant was allowed to plead a claim similar to an implied covenant claim where its landlord's own affirmative actions rendered the tenant's intended use of the leased premises illegal, and there was no express contractual provision that was inconsistent with such an implied term. In *Aozora Bank, Ltd. v. J.P. Morgan Securities LLC*, 144 A.D.3d 440, 440-41 (1st Dep't 2016), an implied covenant claim was allowed to proceed in conjunction with a fraud claim where the plaintiff had alleged that the defendants had actively colluded with a collateral management to place toxic assets in a collateralized debt obligation.

*Legend Autorama, Ltd. v. Audi of America, Inc.*, 100 A.D.3d 714, 716-17 (2d Dep't 2012), is even further afield, because the court there held that an implied covenant claim could proceed where the contract included an express obligation on the defendant franchisor to actively assist the plaintiff in all aspects of the business.

Likewise, in *Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc.*, 97 A.D.3d 781, 784 (2d Dep't 2012), an implied covenant claim was allowed to proceed where a plaintiff had alleged that a defendant deliberately changed its business to circumvent an exclusivity provision in the parties' contract.

Even assuming these cases were correctly decided, this case presents sharply different circumstances. The parties didn't reach any understanding that the Commission would intervene to regulate Chipman's competitors to aid his business. To the contrary, the contract repeatedly stated that the Commission was making no promises about the content or application of its rules or other laws, and repeatedly advised Chipman that his purchase was being made subject to applicable laws, which could be amended (but, of course, might not be).

Even setting these clear and unequivocal terms to one side, Chipman's claim falters on another ground: the Commission has not deprived him of "the fruits of [his] contract." *Dalton*, 87 N.Y.2d at 389 (quotation marks omitted). Chipman's purchase of medallions bestowed the right to operate a taxi accepting street hails in a

heavily regulated environment. N.Y.C. Admin. Code § 19-504(a)(1). The Commission has honored that right. *Glyka Trans*, 161 A.D.3d at 741 (holding that "the [Commission's] decision to allow companies such as Uber to pick up passengers via smartphone application does not interfere with a taxicab's use of its medallion or exclusive right to pick up passengers via street hail"). The fundamental purpose of the medallion sale has not been frustrated, even without taking into account the express terms disclaiming any representations about the future value of medallions or the future regulatory environment.

The Appellate Division reached the correct conclusion: because the Commission made clear that it was making no promises about regulatory policies, it cannot be deemed to have implicitly promised to intervene to thwart market threats from competitors like Uber, especially when neither local nor state law at the time capped the number of cars those competitors could have (SR6-7). By their terms, the City's taxi licenses did "not include a right to be free from competition." *Glyka Trans*, 161 A.D.3d at 741 (quotation

marks omitted). Chipman could not have justifiably believed that the Commission had silently granted him that very right.

### B. The background to the parties' contract confirms that Chipman's theory of breach is inconsistent with reasonable expectations.

In addition to the contractual provisions themselves, the regulatory backdrop also undercuts the notion that the Commission ever promised permanence in the taxi and black-car industry. After all, the Commission is charged with pursuing "innovation and experimentation" in the industry, N.Y.C. Charter § 2303(b)(9), and it must "further develop" for-hire transportation services, 35 RCNY § 52-01—not to protect individual incumbent interests, but to advance the public good, N.Y.C. Admin. Code § 19-501.

Consistent with this regulatory framework, nothing in the contractual language here suggests that the Commission intended to take the highly unusual step of binding its own regulatory authority. As the Supreme Court has explained, contractual limits on governmental authority to tax or regulate will be found only if expressed in "unmistakable terms." *Merrion v. Jicarilla Apache Tribe*,

455 U.S. 130, 148 (1982); *accord City of St. Louis v. United Rys. Co.*, 210 U.S. 266, 280 (1908).

Five justices of the Court reaffirmed that doctrine in *United States v. Winstar Corporation*. *See* 518 U.S. 839, 920-22 (1996) (Scalia, J., concurring in judgment); *id.* at 924-31 (Rehnquist, C.J., dissenting). As the controlling opinion explained, when "the contracting party is the government, [] it is simply *not* reasonable to presume an intent" to bind the government's ability to use its regulatory or legislative authority in a way that incidentally impacts performance of a contract; instead, a plaintiff must overcome the opposite presumption. *Id.* at 920-21 (Scalia, J., concurring in judgment). And the plurality opinion in *Winstar* found that the federal government could be held liable in that case only based on express contractual provisions that promised the government's counterparties specific regulatory treatment, *see id.* at 863-67 (Souter, J., plurality), which is a far cry from what Chipman has here.

Chipman's claim is four steps away from viable. First, he has no clear contractual language that is sufficient to overcome the presumption that the parties did not intend to bind the Commission's

regulatory authority. Second, he has no contractual language at all, whether clear or not, as his claim by its terms posits breach of an implied covenant. Third, the language that *is* present in the contract defeats his claim. And fourth, that express language is clear—indeed unmistakable—in doing so.

As noted, the transaction documents stated that the Commission made no representations about the "present or future application or provisions" of its regulations or about the "present or future value" of the medallions, and advised that the Commission's regulations and other laws are subject to change (R135, 145, 158). To read a contract with these provisions as nonetheless including an implied covenant to regulate the for-hire vehicle industry to benefit Chipman would turn doctrine on its head.

Chipman's reading makes especially little sense in the taxi and for-hire vehicle industry. The "heavy and longstanding regulation of this area," *Nat'l R.R. Passenger Corp. v. Atchison, T. & S.F.R. Co.*, 470 U.S. 451, 469 (1985), belies any suggestion that the Commission silently intended to contract away its regulatory powers. As Chipman himself acknowledges, the City has been

regulating taxis since the Great Depression (R56), and the Commission's transportation policies have continually evolved—particularly in periods like this one, when the for-hire-vehicle industry has had to adapt to new participants and technologies (R371). Because of "the pervasiveness of [] prior regulation in this area," Chipman had "no legitimate expectation" that the industry would be frozen in amber. *Atchison*, 470 U.S. at 469.

If anything, a reasonable person in Chipman's position would have realized that the Commission has historically given new market entrants considerable latitude to operate. In the 1980s, the Commission created the black-car industry after a growing number of providers had adopted a new way of arranging for-hire service (R371). And in the past decade, in defiance of the incumbent interests in the industry, the Commission won not only the right to create a new category of for-hire vehicles that could accept street hails in the outer boroughs and northern Manhattan (HAIL license holders), but also the discretionary authority to issue new yellow taxi medallions. *Greater N.Y. Taxi Ass'n*, 21 N.Y.3d at 297-99.

Indeed, the heart of Chipman's grievance—that the City is "flood[ed]" with black cars (App. Br. 8, 13, 15, 30, 34, 36)—is something the Commission had limited regulatory authority to address without legislative action, as nowhere does Chipman claim that the Commission had the power to simply cap the number of black cars without legislative authorization. And as explained, while the City has now taken the step of capping the number of black cars, it did so through first-in-the-nation legislation in 2018, after years of trying (*see* R69). L.L. 147/2018, §§ 1(a), 3.

In any case, by Chipman's own account, the implied covenant limits a contracting party from acting "arbitrarily or irrationally" (App. Br. 27, citing *Dalton*, 87 N.Y.2d at 389). Chipman's industry have already tried and failed to show that the Commission acted arbitrarily or irrationally in regulating smartphone apps like Uber as black car services rather than taxis. *Progressive Credit Union*, 889 F.3d at 50-51 (holding that Commission rationally treated taxis and for-hire vehicles differently); *Glyka Trans*, 161 A.D.3d at 739-40 (holding that Commission acted rationally in deciding "that the

use of a smartphone application to request a ride from an [black car] was a form of prearrangement" rather than a "street hail").

Contrary to Chipman's assertions (App. Br. 29-30), the Commission did not "suddenly stop[] enforcing the rules" relating to black cars; on the contrary, Chipman's own complaint alleges that the Commission treated Uber-affiliated black car bases consistently before and after the auction at which Chipman bought his medallions (R67-68). And, the Commission has taken steps to enforce its rules when it concludes that those rules are being violated, like when it brought suit against Lyft to prevent the company from entering the New York City market without complying with all applicable rules and regulations. *See* Compl., *City of N.Y. v. Lyft, Inc.*, N.Y. Cnty. Index No. 451477/2014, NYSCEF No. 2.

Moreover, the Commission has changed its rules over time to be more restrictive of smartphone app-based black car services—such as by imposing additional provisions to ensure uniform service standards for all passengers, including those that choose companies like Uber (R168-202)—and more permissive to taxis—such as by allowing them to use smartphone apps to prearrange rides and thus

be able to use new technologies to reach customers (R57-58). And the City has since done the same through legislation after repeated efforts, including through its groundbreaking law placing a cap on the number of black cars to control growth. L.L. 147/2018, §§ 1(a), 3. Far from indifferent, the City was responsive to the profound challenges posed by the disruptive growth of companies like Uber and Lyft.

Likewise, Chipman has not alleged that the Commission knew anything more than the public or industry insiders did about any plan by companies such as Uber and Lyft to dramatically expand their market presence at the time Chipman bought his medallions. Nor does the complaint ever even suggest that the Commission deliberately stayed its hand with the goal of subverting the value of Chipman's medallions in bad faith. Nor does evidence of such conduct exist, as discovery in this case later confirmed (*see* Mem. of Law in Supp. of Defs.' Mot. for Summ J., NYSCEF No. 509).

None of the foregoing is to suggest that taxi medallion owners are powerless in the face of the changes to how New Yorkers move about the City. Indeed, lobbying and public pressure have

contributed to public policy changes that have both increased the Commission's regulation of the new market entrants like Uber and Lyft—in a way that the Commission had never regulated black cars before, *see* L.L. 147/2018—and a trailblazing program to assist indebted small medallion owners, though not industry insiders like Chipman, *see* Commission, *Notice of Promulgation of Rules* (Oct. 6, 2021), https://perma.cc/CJ9N-DER7. But these are policy responses, because the taxi medallion owners' complaints are quintessentially policy ones.

Investments are rarely risk-free, and the mere fact that Chipman's medallions turned out to be less valuable than he hoped hardly gives rise to a claim for breach of contract. The Court should reject Chipman's attempt to stretch the implied covenant of good faith to stifle the Commission's regulatory actions in the public interest, and thus affirm the dismissal of his contract claims.

## POINT II

## CHIPMAN'S GBL § 349 CLAIM FAILS FOR TWO INDEPENDENT REASONS

Chipman's GBL § 349 claim likewise fails, for at least two reasons.[14] First, as the Appellate Division held, his notice of claim was not served within 90 days of the claim's accrual and thus was untimely under GML § 50-e. And second, as Supreme Court held, Chipman also failed to plead a plausible claim under GBL § 349, where the Commission did not participate in consumer-oriented conduct or engage in materially deceptive acts.

### A. Chipman's GBL § 349 claim is founded in tort, just like his kindred common-law claims, and he was obliged to comply with GML § 50-e.

The Appellate Division rightly recognized that Chipman's GBL § 349 claim was untimely because he failed to serve notice of his claim within the time limit in GML § 50-e. Three undisputed facts make the conclusion essentially unavoidable. First, it is

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[14] There are other reasons too. Chipman does not address Supreme Court's holding that his GBL § 349 fails because the statute does not apply to municipalities (R17-18). But there is little value in reaching that abstract issue here, where Chipman's claim is clearly both untimely and inadequately pled. The City reserves the right to raise the issue in future proceedings, if necessary.

undisputed that Chipman had to serve a notice of claim on the City, and indeed he did so (*see* R55), but not within the period that GML § 50-e requires. GML § 50-e(a) (a party asserting a claim "founded upon tort" against a municipality must serve a notice of claim within 90 days of the claim arising).[15] Second, Chipman does not contest that his claims for fraudulent inducement and negligent misrepresentation were properly dismissed for failure to serve a timely notice of claim (R16). And third, it is unchallenged that Chipman's GBL § 349 claim rests on the same allegations that support his claims for fraudulent inducement and negligent misrepresentation (R74-77).

Chipman cannot evade the notice-of-claim requirement by applying a different label to the same allegations. Indeed, the nature of the injury—harm stemming from allegedly deceptive conduct—was alleged to be the same across these claims (R74-77). The GBL

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[15] There is no dispute that Chipman was required to serve notice of his claim on the Comptroller under New York City Administrative Code § 7-201(a). But he failed to do so with the 90-day deadline that GML § 50-e(a) requires for a claim "founded upon tort." Chipman's counsel's first action against the City on behalf of taxi medallion owners, alleging very similar claims to those alleged here, was dismissed due to failure to serve timely notices of claim under these provisions (R705-08).

§ 349 claim was exactly what it sounded like—a claim sounding in tort—and so required a timely notice of claim (SR5).

Chipman mistakenly suggests that the GBL § 349 claim cannot be a "tort" claim because it is created by statute (App. Br. 39-41). New York courts have regularly applied notice-of-claim requirements to statutory claims that are akin to common-law torts. Among such claims are personal-injury Labor Law claims, *see, e.g.*, *Matter of Nadler v. City of N.Y.*, 166 A.D.3d 618, 619 (2d Dep't 2018); *Matter of Kim v. Dormitory Auth. of State of N.Y.*, 140 A.D.3d 1459, 1460 (3d Dep't 2016), claims relating to injured or deceased firefighters under GML § 205-a, *Zahra v N.Y.C. Hous. Auth.*, 39 A.D.3d 351, 351 (1st Dep't 2007), and even a federal statutory claim for radiation injury, *Corcoran v. N.Y. Power Auth.*, 202 F.3d 530, 538-41 (2d Cir. 1999).

So long as a statutory claim akin to a common-law tort "seeks money damages for an alleged failure by the City to discharge a duty imposed upon it by law," it sounds in tort and requires a timely notice of claim. *Melia v. City of Buffalo*, 306 A.D.2d 935, 936 (4th Dep't 2003). Federal courts have approached analogous issues of

federal law similarly, holding, for example, that "claims brought pursuant to [42 U.S.C. §] 1983 sound in tort." *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *see also id.* at 727 (Scalia, J., concurring in the judgment) ("There is no doubt that the cause of action created by § 1983 is, and was always regarded as, a tort claim").

This understanding accords with the usage of "tort" prevalent around the time GML § 50-e was enacted. This Court had acknowledged that statutes could create torts; for example, the Court held that the New York Fair Trade Act "made [the] tort" of unfair competition, *Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc.*, 281 N.Y. 101, 106 (1939). Similarly, while discussing the interplay of copyright and contract law, it acknowledged that a copyright holder "may count upon the infringement as a tort, and seek redress under the statute by action in the federal courts." *Condon v. Associated Hosp. Serv.*, 287 N.Y. 411, 414 (1942) (quotation marks omitted). This case law accords with the definition of a tort as a "private or civil wrong or injury [or] [a] wrong independent of contract" involving a "duty imposed by general law." *Black's Law*

*Dictionary* 1660 (4th ed. 1951). Thus, the fact that an action is based on a duty imposed by statute rather than common law does not take the action outside of the realm of tort law.

This interpretation is also consistent with legislative intent. Legislative history from the initial passage of GML § 50-e shows that the provision's sponsors and detractors understood it would apply to "any tort action" or any action "arising from tort." Ltr. of the J. Comm. of the Cnty. Officers' Ass'n, Ass'n of Towns, and Mayors' Conf., Bill Jacket, L 1945, ch 694, at 13, and N.Y.C. Bar Ass'n Comm. on State Legislation, Bill Jacket, L 1945, ch 694, at 40. Moreover, the Legislature has specifically addressed and excluded certain types of statutory claims from the ambit of GML § 50-e: "claims arising under the provisions of the workers' compensation law, the volunteer firefighters' benefit law, or the volunteer ambulance workers' benefit law." GML § 50-e(8)(a). Chipman, of course, brings none of these claims here. And indeed, while statutory claims have proliferated since the Legislature enacted GML § 50-e, the Legislature has returned to the statute repeatedly without upsetting the settled understanding of what claims the law

covers. *See, e.g.*, L. 2010, ch. 12, §§ 1, 2; L. 2012, ch. 500, § 4; L. 2012, ch. 500, § 5; L. 2013, ch. 24, § 2; L. 2019, ch. 11, § 5.

The Legislature's decision to exclude specific statutory claims from GML § 50-e's reach would make little sense if GML § 50-e already excluded statutory claims altogether. *See Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 587 (1998) (canon against superfluity). And its repeated decisions not to add to the list of excluded statutory claims, even as it has revisited the statute, is yet more evidence that the statute generally applies to statutory tort claims. *See People v. Page*, 35 N.Y.3d 199, 206-07 (2020) (*expressio unius* canon).

GBL § 349, in particular, is a statutory claim that clearly is founded upon tort. It targets alleged deceptive or misleading conduct, which is a core domain of tort law. And it resembles the long-established tort of common-law fraud. Indeed, according to its legislative history, the statute's express purpose was to fight "consumer frauds." Att'y Gen. Mem. for the Governor, Bill Jacket, L 1980, ch 346, at 20. Chipman's claims demonstrate this close relationship between the statutory and common-law torts—he alleged

GBL § 349 and fraud and negligent misrepresentation, all addressed to the same conduct and alleged injury (R74-77).

Chipman has no meaningful response on the core point that his GBL § 349 claim is founded "in tort" (SR6). Instead, he cites two wholly inapposite decisions: *Gaidon v. Guardian Life Insurance Company of America*, 96 N.Y.2d 201 (2001), and *Margerum v. City of Buffalo*, 24 N.Y.3d 721 (2015) (App. Br. 39-41).

Neither case helps him. *Gaidon* only confirms the correctness of the Appellate Division's holding. There, the Court expressly recognized that GBL § 349 claims are "akin" and "similar" to claims for common-law fraud. 96 N.Y.2d at 209 (quotation marks omitted). These observations are dispositive on the notice-of-claim question.

*Gaidon*, of course, went on to hold because GBL § 349 claims are not identical to claims for common-law fraud, the applicable limitations period is governed by CPLR 214's provision covering liabilities "created or imposed by statute." *Id.* at 210. But that holding is irrelevant here, because the notice-of-claim requirement, unlike *Gaidon*'s statute-of-limitations inquiry, does not turn on whether a claim derives from a statutory or common-law source. It

instead turns on the different question whether the claim is founded "upon tort"—which GBL § 349 claims certainly are.

In *Margerum*, this Court simply held that employment discrimination claims under the Human Rights Law—claims absent here—were not tort claims subject to GML § 50-e. 24 N.Y.3d at 730. Notably, in *Margerum* the municipality argued principally that a different provision, GML § 50-i, applied to the Human Rights Law claims because they resulted in personal injury and damage to personal property. *See* Br. for Resp'ts-Appellants 57-66, *Margerum*, 24 N.Y.3d 721 (APL-2013-00290). And it asserted that its position did not rest on whether the claim at issue was a tort or not. Reply Br. for Resp'ts-Appellants 5, *Margerum*, 24 N.Y.3d 721 (APL-2013-00290).

In any case, statutory claims for employment discrimination do not resemble any New York common-law tort. In fact, New York recognizes no tort for wrongful discharge. *See, e.g.*, *Lobosco v. N.Y. Tel. Company/NYNEX*, 96 N.Y.2d 312, 316 (2001). Statutory claims for employment discrimination thus have no antecedent in New York's common-law of torts. Indeed, claims challenging one's

discharge have been traditionally viewed as the domain of contract. *See id.* at 316 (acknowledging that an employee may have breach of contract claim for termination in violation of express written policy). By contrast, claims for deceptive practices under GBL § 349 are unquestionably akin to the long-established common-law torts of fraud and negligence, as this Court has expressly recognized. *Gaidon*, 96 N.Y.2d at 209. Nothing in *Margerum* calls that into question.

Finally, the policy behind the notice-of-claim requirement is as applicable to GBL § 349 claims as any other tort claim. The "plain purpose of statutes requiring prelitigation notice to municipalities is to guard them against imposition by requiring notice of the circumstances … upon which a claim for damages is made, so that its authorities may be in a position to investigate the facts as to time and place, and decide whether the case is one for settlement or litigation." *Rosenbaum v. City of N.Y.*, 8 N.Y.3d 1, 11 (2006) (quotation marks omitted). If a municipality does not know that a consumer believes its actions are deceptive, then it cannot either

promptly settle such claims—and rectify the underlying acts—or prepare an adequate defense against them.

Just as a common-law tort such as fraud requires early and vigorous investigation to determine whether a claim is valid and, if so, how to rectify it, so too would a GBL § 349 claim benefit from early awareness and vigorous investigation into the underlying facts. There is no sound policy reason to treat the two claims differently for the purpose of notice.

### B. Even if it were timely, Chipman fails to allege two essential elements of a GBL § 349 claim.

Untimeliness aside, Chipman's GBL § 349 claim would still fail, because he has failed to plead essential elements of such a claim, as Supreme Court held. As this Court has explained, a plaintiff asserting a GBL § 349 claim must allege, among things, that the defendant engaged in (a) consumer-oriented conduct that (b) was materially deceptive. Chipman has failed to adequately plead either element.

### 1. Corporate taxi medallions are not "consumer-oriented" products.

As a "threshold matter," a GBL § 349 claim "must be predicated on a deceptive act or practice that is consumer oriented." *Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 309 (2017) (quotation marks omitted). Several important baselines thus define the actual scope of liability. First, the challenged acts must have "a broad impact on consumers at large," *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 320 (1995), because GBL § 349 is "directed at wrongs against the consuming public." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24 (1995). Second, private contract disputes unique to the parties do not fall within the ambit of the statute. *Id.* at 25. Third, GBL § 349 is "primarily intended" for "modest" transactions, *N.Y. Univ.*, 87 N.Y.2d at 321, not "complex" agreements "in which each side was knowledgeable and received expert representation and advice," *id.*

These baselines collectively confirm that the Commission's auctions of medallions in accordance with the law did not constitute consumer-oriented conduct. When announcing the corporate medallion auction at issue, the Commission did not "reach out to the

consuming public at large." *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 294 (1999). Instead, treating the auctions as trade news, the Commission advertised them in industry notices to target parties with existing ties to the industry, like Chipman here.

By their nature, medallions are meant for businesses equipped at navigating a "heavily regulated" industry. *Progressive Credit Union*, 889 F.3d at 52-53. The Commission thus designed the auctions with serious entrants in mind, not the general public. Minimum bids for the paired corporate medallions—the type that Chipman bid on and won—were set at $1.7 million (R80). Bidders had to familiarize themselves with the Commission's extensive regulations, secure financing, and send a certified deposit just to participate (R87-90).

Because the auctions were geared toward industry regulars, the Commission's conduct had no impact on consumers at large, and is not an appropriate subject for a GBL § 349 claim. *See Gonzalez v. Vill. Taxi Corp.*, 155 A.D.3d 696, 701 (2d Dep't 2017) (rejecting GBL § 349 claim between taxi dispatch companies). And indeed, the conduct and outcome of the auction mirrored its design:

about four dozen bidders participated, and 12 of them submitted all 200 winning bids (R119-24).

And while GBL § 349 does not strictly bar high-dollar claims, the amount of money involved weighs against finding the statute applies here. Notably, when the Legislature created the private right of action under GBL § 349, it specifically provided for $50 in statutory damages because it believed that consumers might otherwise be deterred from vindicating their claims. L. 1980, ch. 346, § 1. This Court has thus recognized that the Legislature did not intend for the statute to reach large-dollar transactions. *N.Y. Univ.*, 87 N.Y.2d at 321. The dollar amounts at issue here only serve to confirm that the Commission's medallion auctions do not constitute consumer-oriented transactions, particularly where medallions are anything but traditional consumer goods (R19).

In a similar vein, the "vast majority of courts" that have considered the issue have found that GBL § 349 does not apply to commercial securities, *Gray v. Seaboard Sec., Inc.*, 14 A.D.3d 852, 853 (3d Dep't 2005), and Supreme Court appropriately found these cases instructive (R19). Like commercial securities, medallions are

also frequently "purchased as investments" and not as consumer goods. *Gray*, 14 A.D.3d at 853. And like securities investors who operate in a "highly regulated" arena, Chipman too had several other means available to protect his rights. *Id.* Medallion auctions, in short, are not consumer-oriented transactions and thus are not covered by GBL § 349.

### 2. The Commission's statements or omissions were not materially deceptive.

Chipman similarly fails to sufficiently allege a second element of a GBL § 349 claim: that the Commission engaged in materially deceptive acts. As this Court has explained, to avoid "a tidal wave of litigation against businesses" not intended by the Legislature, a plaintiff must establish that the defendant's representations or omissions were "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego*, 85 N.Y.2d at 26. This inquiry is an objective one, which courts can properly resolve on a motion to dismiss. *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 32 (2000).

Chipman has hinged his claim on two acts: (1) the Commission's purported misrepresentations about the value of a medallion in the past and the resale prices of medallions transferred between private parties, and (2) its purported failure to disclose that it would go on to license black-car bases in a manner that they allege is inconsistent with its previous licensing rules (R74). Neither act is materially misleading to an objective consumer.

The Commission's statements on the historical value of a medallion are not objectively or materially misleading. A party does not violate GBL § 349 by "publishing truthful information and allowing consumers to make their own assumptions about the nature of the information," even when a plaintiff may allege that its disclosure was "incomplete," "less than candid," or a product of "statistical gamesmanship." *Gomez-Jimenez v. N.Y. Law Sch.*, 103 A.D.3d 13, 17 (1st Dep't 2012). Although Chipman highlights a few of the Commission's statements—all of which generally affirm that medallions had historically increased in value—critically, he never alleges that these statements are false (R62-63). In fact, the materials that Chipman submitted in opposition to the Commission's motion

to dismiss, including independent press reporting, mirror these statements because medallions did experience unprecedented growth in the past (R334-36).

Although Chipman alleges that the Commission's data on average medallion transfer prices were purportedly overstated (R63-64), the record belies his claim. At the outset, Chipman focuses on statements about independent medallions, but he did not buy such medallions—he bought corporate paired medallions. In any case, he asserts that the Commission misstated the average resale price of independent medallions in both November 2013 and January 2014 (R64), but the Commission's complete sales reports for 203 and 2014 were publicly available, allowing computation of the average resale prices (R238-47, 254-68). Similarly, Chipman criticizes the Commission for reporting that the average resale price of an independent medallion remained at $1.05 million during the latter half of 2013 and the early part of 2014 (R64), but the Commission's complete sales reports were again available, allowing computation of an average if desired, and show that medallions fetched different prices in different months throughout that period, as many

investment products exchanged between different parties would (R245-47, 254-56). And while Chipman faults the Commission for allegedly stating—in an unmentioned document—that the average resale price of corporate medallions remained at $1.32 million during the summer and fall of 2013 (R64), the complete sales reports show that no such sales were reported during this period (R243-47).

In essence, Chipman faults the Commission for failing to predict that prices would drop in future sales that were yet to occur. But the data in question documented actual past sales, rather than purporting to project future ones. And the Commission specifically counseled against making unfounded inferences about medallions as it reported the information. The Commission noted that it excluded transactions that it believed were not handled on an arms-length basis, and that the covered transactions did not include information about the transactional terms; as a result, the Commission warned, "the data may be misleading and may not accurately convey trends in medallion prices" (R208). And it warned that it made no "representations or warranties" about the data and that the data "should not be relied upon" as an indication of future

medallion performance or for the suitability of medallions for investment or business purposes (*id.*). In light of these statements, no reasonable person—particularly an industry insider—could have found the information materially misleading.

Chipman fares no better in insisting that the Commission acted deceptively because it did not disclose that it would license more black car bases. Here, Chipman acknowledged that the City made no representations or warranties about "the present or future value of a taxicab medallion" or "the present or future application" of the Commission's regulations (R135). And he also acknowledged that the Commission made no warranties, either express or implied, on anything other than clear title (*id.*). And he acknowledged that his medallions were subject to regulations that could be amended "from time to time" (*id.*). Because the Commission uttered no "specific language" about the future of black-car regulation, it did nothing deceptive. *Andre Strishak & Assocs., P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608, 610 (2d Dep't 2002). That is doubly true where the Commission not only refrained from making any representations about its future regulatory actions, but repeatedly

and expressly reminded Chipman that it had not done so, and further cautioned that relevant laws and regulations were subject to change.

Uber had been operating in the City since 2011, and the Commission immediately allowed the company to work with black cars. *Progressive Credit Union*, 889 F.3d at 46. Additionally, in the years leading up to the auctions, interest and demand for ride sharing exploded across the country as the concept and technology became mainstream. Every bidder "acting reasonably under the circumstances"—especially an industry insider like Chipman—would have recognized that he was joining a complex regime where changes to the regulatory environment and technologically driven market pressures would affect the value of the medallions. To hold the Commission liable for investments that Chipman may now regret because the market has shifted as technology and consumer preferences change would handcuff its broad authority to craft public policy in the public interest and to encourage innovation in the face of those changes.

## CONCLUSION

The Appellate Division's order should be affirmed.

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March 10, 2022

Respectfully submitted,

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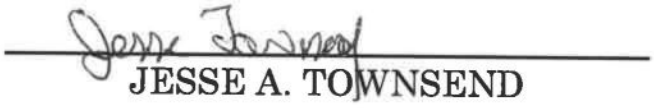
## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 11,198 words, not including the table of contents, the table of authorities, this certificate, and the cover.



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