UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
X---X

AHMAD EL BOUTARY,

Plaintiff,

18-cv-3996 (ARR) (JO)

-Against-

ORAL ARGUMENT REQUESTED

THE CITY OF NEW YORK, MEERA JOSHI, ALLAN FROMBERG, MOHAMMED AKINLOLU, AND MARK WHEELER,

Defendants.

X---X

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

Daniel L. Ackman
222 Broadway, 19th Floor
New York, NY 10038
Tel: (917) 282-8178
E-mail: dan@danackmanlaw.com

September 18, 2018

Attorney for Plaintiff

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PRELIMINARY STATEMENT

Ahmad El Boutary is a for-hire vehicle driver licensed by the NYC Taxi and Limousine Commission (TLC). On June 12, 2018, the TLC suspended his license without prior notice or a hearing of any kind. The TLC acted based on media reports that he had refused service to two passengers because of their sexual preference and on a phone called with the allegedly aggrieved passengers, but without contacting Mr. El Boutary to learn his version of events. After a hearing that included testimony by the passengers and by Mr. El Boutary, Administrative Law Judge Joycelyn McGeachy-Kuls rejected the factual and legal predicate for the suspension and recommended it be lifted. The TLC Chair accepted this recommendation, but not until Mr. El Boutary's license had been suspended for 35 days.

This suspension was unconstitutional because (a) it was ordered without process of any kind and indeed without any evidence-based or plausible accusation that Mr. El Boutary's licensure presented any threat to public health or safety; and (b) because New York law provides no fair warning that the TLC may suspend a driver's license based on a single alleged service refusal. The suspension was also in plain violation of New York City local law. Based on undisputed facts and the well-established law, the Court should grant plaintiff partial summary judgment as to liability for his constitutional claims.

FACTUAL AND LEGAL BACKGROUND

Mr. El Boutary,[1] 36, has been licensed by the TLC as a for-hire vehicle (FHV) driver for roughly four years. During that time, has completed more than 5000 trips, the majority arranged by Uber Technologies. As a black car driver, he purchased and is responsible for the maintenance of his own vehicle. He relies on his income as a FHV driver to support himself and

[1] TLC records and legal documents misspell plaintiff's last name as "El Boutari."

his two children, ages 7 and 5. An American citizen, he has never been arrested, has never been found guilty of violating any TLC rule and has never been accused of any violent act. He had never been charged with assaulting, threatening, harassing or harming any passenger or with attempting to do so. His Uber rating is 4.7 out of five stars. OATH Report & Recommendation, PX 2 at 5, citing Transcript (Tr.), PX 3, at 149.[2]

The Incident

On June 9, 2018, at about 5 P.M., Mr. El Boutary accepted an electronic hail through Uber by Emma Ms. Pichl, who was travelling along with her girlfriend Alex Iovine from Pig Beach, a restaurant/bar in Union Street in Brooklyn to another bar, the Grafton, in the East Village section of Manhattan. The two women later testified that they had with friends at the bar for three hours and that they had each had two alcoholic mixed drinks. Tr. 45-46, 74, 91, 92. After driving from Brooklyn and over the Manhattan Bridge, Mr. El Boutary stopped, parked his car and asked his passengers to get out. Tr. 39.

The actions that led to this request are in dispute. While that dispute is not material to plaintiff's claim, Judge McGeachy-Kuls ultimately resolved it in Mr. El Boutary's favor. According to Ms. Pichl and Ms. Iovine claim Mr. El Boutary stopped abruptly after seeing the women exchange a single kiss, a peck on the lips. Tr. 38-39, 59. Mr. El Boutary testified that the women were drunk, that they were kissing repeatedly and aggressively and that they refused to stop when he asked them to do so. Tr. 151-55.

It is undisputed that after they exited the car, the passengers refused to close the door, requiring the driver to get out or the car himself. Once outside the car, Ms. Pichl prevented Mr. El Boutary from leaving by standing in the doorframe of his car. Meanwhile, Ms. Iovine filmed

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[2] Plaintiff's Exhibits (PX) are to the Declaration of Daniel L. Ackman, sworn to on September 18, 2018.

their conversation with her iPhone even though Mr. El Boutary asked her not to do so. Tr. 157-158; R&R 11.

The 62-second video records the passengers demanding an explanation from Mr. El Boutary. It shows the passengers cursing at the driver and yelling at him, while the driver neither cursed nor yelled. The passengers demand to know why he refused to continue the trip, to which he said that he asked them to stop kissing, but they refused. Tr. 155. Specifically, Mr. El Boutary says, "I said the first time, don't do that. You did, you did it again." Tr. 77. He called the passenger's conduct "illegal," by which he meant that it was in violation of Uber's Community Guidelines. Tr. 77-78, 150. These Community Guidelines, in fact, do forbid "touch[ing] or flirt[ing] with other people in the car and do bar "sexual conduct with drivers or fellow riders, no matter what." The guidelines also state, "[I]f you need to make a phone call, keep your voice down to avoid disturbing your driver or other riders." PX 4 at 3, 9.

Ms. Pichl and Ms. Iovine responded by saying that "Nothing is illegal. We're not—it's not illegal to kiss in New York." Tr. 79. The parties argued about whether kissing is allowed in an Uber and whether the passenger's kissing was disrespectful. Tr. 78-79. Throughout the conversation, Mr. El Boutary was trying to close his car door and end the confrontation. While at one point he extended his hand in an attempt to block his being filmed without his consent, Tr. 169, he never touched either passenger. Tr. 47, 52. Ms. Pichl and Ms. Iovine discussed "calling the cops," but say they cannot do so. They told Mr. El Boutary that they will contact Uber instead and "get [him] fired." Tr. 79-80. At no point during the video does he grab anyone, touch anyone's cell phone, curse or yell at either passenger. Nor does he mention the sexual orientation of either passenger. R&R 8.

Post-Incident Reports

Later that night, at 9:49 PM, Mr. El Boutary reported the incident to Uber via the Uber App. He said: "Hello i had 2 girls in my car and they Awere extremely disrespctful. they were drunk and kissing each other and i asked to please stop. They ignored me and they spit in my car and slapped a door really hard." PX 5; R&R 7-8.

The following day, Ms. Iovine posted the video on her Facebook page. Tr. 84. Several of her friends re-posted the video on Twitter. Tr. 85. By June 11, the incident had been reported by the New York Daily News and the New York Post, both of which re-posted the passenger's video on their own websites. PX 6.

The Post reported, "The city's TLC said Monday that no complaint with the agency had been filed in connection to the incident, but that it has launched an investigation." The News wrote that the passengers had made a complaint to Uber, whose spokesperson said it was investigating and would take appropriate action. The Daily News also quoted TLC public relations chief Allan Fromberg as saying, "We've reached out to the victim, and will be starting the investigation today." Various news accounts quoted Mr. Fromberg as saying that "a driver "is most definitely not allowed to do such a thing. There is a list of circumstances that are grounds for refusing service to a passenger, and what happened is most definitely not among them." Mr. Fromberg also said, "This blatantly discriminatory behavior described by the complainant is repugnant, and will not be tolerated in the City of New York." PX 6.

The TLC Investigation and Charges

The TLC "investigation," did not review the evidence as much as embellish it. It was conducted by Mark Wheeler and another TLC lawyer solely over the telephone. Tr. 13. It did not include talking to or attempting to talk to Mr. El Boutary. It also did not include reviewing his

statement to Uber, made the night of the incident. It did not lead to any written record of witness statements.

On the afternoon of June 11, a 311 report was filed seemingly in the name of Ms. Iovine. In fact, the 311 report was not initiated by Ms. Iovine or by Ms. Pichl, but by TLC lawyers. Tr. 104-105, R&R 5. The 311 "complaint details" state in full: "driver abruptly pulled over and kicked passenger and her girlfriend out of the car. He yelled at them for being disrespectful and inappropriate because of pecked [sic] on the lips." PX 7. It says nothing about grabbing, cursing, harassment or threats—all false allegations would later appear in TLC charging documents.

The TLC served a "Directive and Notice of Summary Suspension" on Mr. El Boutary by mail the next day. PX 8. That complaint was based on any press reports, which is how the incident came to the TLC's attention. Tr. 7, 12. It alleged that Mr. El Boutary "refuse[d] to provide service to a passenger on the basis of her sexual orientation." It also indicated that the suspension was "pursuant to TLC Rule 68-15(a)(1)" and "based upon the Chairperson's determination that emergency action is necessary to insure public health or safety." In fact, there is no evidence (or even a claim) that the chairperson made any such determination. Instead, Wheeler admitted, "In terms of the suspension policy and the choice to proceed as a revocation matter, that was, I guess, Mohammed Akinlolu, my boss," though Wheeler also allowed that Akinlolu may have been told how to handle the case. Tr. 16.

Nevertheless, without any prior notice or hearing, the TLC suspended Mr. El Boutary's license, citing TLC Rule 68-15(a)(1).[3] That rule provides:

> The Chairperson can summarily suspend a License if the Chairperson believes that continued licensure would constitute a direct and substantial threat to public

[3] The pertinent TLC Rules and NYC Admin. Code provisions are collected at PX 10.

> health or safety, pending revocation proceedings. Such direct and substantial threats to public health or safety would include but are not limited to:
>
> (i) Any act, as prohibited by these Rules, of driving a TLC licensed vehicle while Impaired by intoxicating liquor (regardless of its alcoholic content), or Drugs;
>
> (ii) Any act, as prohibited by these Rules, of bribery, fraud, material misrepresentation, theft, threat against a person, harassment, abuse, or use of physical force.
>
> (iii) Any act, as prohibited by these Rules, involving the possession of a Weapon in a vehicle licensed under these Rules.

The TLC sent Mr. El Boutary a second letter dated June 13, which included a "Petition," to the NYC Office of Administrative Trials and Hearings (OATH). The Petition, dated June 12, alleged violations of TLC Rule 80-12(d), (e) and (f) and TLC Rule 80-20(a)(1). PX 9. TLC Rule 80-12(d), (e) and (f) pertain to threats, harassment, abuse and the use of physical force again of passengers. There is no evidence or even any allegation to support any such charge. TLC Rule 80-20(a)(1) pertains to a driver's refusal to transport passengers, but it contains exceptions, including one that permits refusal of passengers who are "disorderly or intoxicated." TLC Rule 80-20(b)(9). The Petition also alleged that the driver "refused to continue to provide service to a passenger on the basis of that passenger's sexual orientation," that he "grabbed the passenger's arm," and that he "cursed at the passenger" and "yelled at the passenger."

TLC Rule 80-12(d), (e) and (f) allow for a driver's suspension after a hearing, but not before, and do not provide for license revocation. TLC Rule 80-20(a)(1) also does not provide for license revocation (or for suspension) on the first (or even the second) offense. None of these allegations, even if proven, are a predicate for the suspension of Mr. El Boutary's license. Thus while the TLC brought "revocation proceedings" to support its summary suspension, it could state no legitimate grounds for revocation.

The OATH Hearing

On June 21, a hearing was held at OATH. At that hearing, the TLC called the Ms. Pichl and Ms. Iovine as witnesses. They both testified that Mr. El Boutary did not hit, grab, assault, harass either of them. At the hearing, the TLC did not claim or provide any evidence that the TLC chair had made any finding concerning Mr. El Boutary. Rather, the decision to suspend was made by Mohammed Akinlolu, Wheeler's supervisor. Tr. 16. Neither Joshi nor Fromberg testified as the TLC would not produce them without a subpoena.

The TLC also introduced as evidence the Facebook video posted by Ms. Iovine. The video does not show Mr. El Boutary grabbing either passenger's arm. It contains cursing and yelling by the passengers, but not by Mr. El Boutary. Tr. 77, 79; R&R 3. The video does not show Mr. El Boutary uttering any homophobic slur or in any way indicating that he was acting based on the passenger's sexual orientation. The video also shows that Mr. El Boutary wanted to end the argument, but that Ms. Pichl kept opening and closing the car door because she "didn't want [Mr. El Boutary] driving off yet." Tr. 56. The passengers confirmed that he did not utter any such slurs at any time. Tr. 61, 96.

The video does not show what had happened inside the car. The passengers testified that they exchange only a peck on the lips. Mr. El Boutary testified that the women were drunk, that they played a video on their phone at high volume, that they engaged in passionate kissing, and that they refused to stop doing so when he asked. Tr. 150-52. Indeed, on the video, Mr. El Boutary says that he asked them to stop, but they continued. It also does not show the passengers claiming, as they later would, there was just one peck; it shows them saying they were allowed to "kiss in an Uber." Tr. 78. The OATH ALJ later credited Mr. El Boutary's version of the event. R&R 10.

Contrary to the factual allegations in the petition, the passengers testified that they had made no pre-suspension allegation that Mr. El Boutary had engaged in bribery, fraud, material misrepresentation, theft, threat against a person, harassment, abuse, or use of physical force. Tr. 52, 62-64, 115. He did not grab either passenger's arm or curse at them. Tr. 108, 115. And there is no evidence that either passenger made any such claim to the TLC.

At the end of the hearing, OATH Administrative Law Judge Joycelyn McGeachy-Kuls indicated she would issue a decision in due course.

The OATH ALJ Report and Recommendation

On July 9, Judge McGeachy-Kuls issued a Report and Recommendation. It determined: "[The TLC's evidence was insufficient to establish that respondent's continued licensure would pose a direct and substantial threat to the health or safety of the public" and recommended, "Suspension of [Mr. El Boutary's] taxi driver license should be immediately lifted." R&R 1. The Report states, "[A]fter reviewing the testimony of the witnesses, together with the video recording, and evaluating whether the testimony comports with common sense and experience, [credits Mr. El Boutary's] testimony over the testimony of Ms. Ms. Pichl and Ms. Iovine." R&R 10.

Specifically, the Report finds:

> Respondent testified that he has completed 5,000 rides in his for hire-vehicle and has observed many passengers, including same-sex couples, kiss or show affection. It seems unlikely that respondent would notice a brief 'peck kiss' through his rearview mirror as he was driving in New York City. It seems unlikely that this 'peck kiss' alone would cause him to ask the passengers to get out of his car. It is also unlikely that respondent would give up a fare and potentially risk receiving a bad Uber rating for something as mild as a 'peck kiss.' R&R 10.

The Report further concludes, "Even if the facts had been sufficient to establish that this refusal was based on the complainants' sexual orientation, this refusal does not support a finding

that continued licensure of respondent would pose a direct and substantial threat to public health and safety." R&R 11. It notes that Mr. El Boutary's conduct is addressed in TLC rules containing service refusals and states, "The penalty for a first violation of this rule is a monetary fine of $350 if the driver pleads guilty before a hearing and a $500 fine if the driver is found guilty following a hearing. … Thus, TLC's own rules demonstrate that and improper refusal of service does not require license suspension." R&R 12. In sum, for both factual and legal reasons, the Report recommends the reinstatement of Mr. El Boutary's license.

At the time of the recommendation, however, Mr. El Boutary had already been suspended for 28 days. Under TLC Rules 68-15(c), that the ALJ's decision was a recommendation to the TLC chair, not a ruling. The chair would then have up to 60 days to make a "final determination of the Commission with respect to the Summary Suspension."

This Action and Plaintiff's Reinstatement

On July 11, after Mr. El Boutary had been denied his livelihood for 29 days without any finding or plausible claim that his licensure presents a threat to public health or safety and without any ruling that he violated any TLC rule or City law, he filed this action. The City was served on July 12; all defendants were served by July 13. On July 13, counsel for Mr. El Boutary informed Sheryl Neufeld, the chief of the NYC Law Department's Administrative Law Division, that the action had been filed and sent her a copy of the complaint. In addition, counsel informed Neufeld that he would be filing a Order to Show Cause and TRO application seeking reinstatement of plaintiff's license on July 16 or July 17 unless plaintiff's license had been reinstated before that. On July 15, counsel sent Neufeld draft motion papers in near-final form. On July 16, the TLC informed counsel that the TLC chair had accepted the ALJ's recommendation and was reinstating his license. By that time, Mr. El Boutary had been denied his livelihood for 35 days.

On July 26, plaintiff filed an amended complaint, updating the factual statement and adding a defamation claim as to defendant Fromberg.

ARGUMENT

I. STANDARD OF REVIEW

To be entitled to summary judgment, a movant must show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is appropriate where "the evidence, viewed in the light most favorable to the [opposing] party …, demonstrates that there are no genuine issues of material fact and that the judgment is warranted as a matter of law." *Delaney v. Bank of Am. Corp*., 766 F.3d 163, 167 (2d Cir. 2014) (internal quotation omitted). "Summary judgment is appropriate when there can be but one reasonable conclusion as to the verdict, *i.e*., it is quite clear what the truth is, and no rational factfinder could find in favor of the nonmovant." *Soto v. Gaudett*, 862 F.3d 148, 157 (2d Cir. 2017) (internal citations and quotation marks omitted). In determining whether an award is appropriate, the Court should consider the "pleadings, deposition testimony, answers to interrogatories and admissions on file, together with any other firsthand information including but not limited to affidavits." *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011). In this case, plaintiffs' factual statements are supported by documentary evidence, sworn hearing testimony and defendants' admissions.

II. THE SUSPENSION OF MR. EL BOUTARY'S LICENSE WITHOUT A HEARING WAS A PLAIN DENIAL OF DUE PROCESS

It is well established that a taxi driver's license is a form of property that cannot be denied without due process of law. *Nnebe v. Daus*, 644 F.3d 147, 158 (2d Cir.2011); accord: *Mackey v. Montrym*, 443 U.S. 1, 11 (1979) (horse trainer's license); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (driver's license); *Padberg v. McGrath-McKechnie*, 203 F.Supp.2d 261, 276

(E.D.N.Y. 2002), aff'd 60 Fed. Appx. 861 (2d. Cir.), cert. denied, 540 U.S. 967 (2003) (taxi driver's license). Whether the TLC's claims about Mr. El Boutary's conduct were true of false, whether or not they were made in good faith, the suspension of his license without notice or opportunity to be heard denied him due process of law.

A. The *Padberg* Decision is Dispositive

Judge Dearie's decision in *Padberg* is directly on point. In *Padberg*, the TLC had, acting in pursuit of mayoral initiative called "Operation Refusal," summarily suspended and then sought to revoke the licenses of taxicab drivers accused of refusing service often because of racial animus. The plaintiffs were taxicab drivers who had been disciplined under the Operation Refusal policies. One group of plaintiffs sought a preliminary injunction, which the court awarded. A second group sought and was awarded summary judgment on the merits as to the TLC's summary suspensions. 203 F.Supp.2d at 266. Judge Dearie granted the plaintiffs summary judgment, holding that the summary suspension of a taxi driver's license based on an alleged service refusal denied them due process of law.

In *Padberg* as in this case the TLC summarily suspended drivers it accused drivers of refusing service to passengers, often due to racial animus. The taxi driver plaintiffs argued that summary suspension without a prior hearing denied them due process. *Padberg*, 203 F.Supp.2d at 267. The court agreed.

First, Judge Dearie concluded, "[T]axicab drivers have a property interest in their taxicab licenses sufficient to trigger due process protection." *Id*. at 276 (citing *Mackey*, 443 U.S. at 11 and other cases). It added: "Procedural due process generally requires that an individual be given notice and an opportunity to be heard before the government may deprive him of property." 203 F.Supp.2d at 277 (citing *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)); *see also Harrell v. City of*

New York, 138 F.Supp. 3d 479, 488 (S.D.N.Y. 2015) (applying general rule to the TLC's warrantless seizure of vehicles). While Judge Dearie allowed that there are exceptions to the general rule, he noted, "When the procedures in place do not allow for the presentation of potentially exculpatory evidence, there is little doubt that due process rights are in jeopardy." 203 F.Supp.2d at 280 (citing *Bell*, 402 U.S. at 542). Ultimately, Judge Dearie held: "Given the strength of the taxi drivers' compelling interest in their licenses and the substantial risk of erroneous deprivation balanced against the important, but not immediate, need for the TLC to discipline those who refuse service, the Court finds that depriving the plaintiffs of a pre-suspension hearing violated their due process rights.

Because the *Padberg* defendants included the City and the TLC chair, and because the defendants had a full and fair opportunity to litigate the issues, the defendants here are bound by that judgment pursuant to the doctrine of collateral estoppel or issue preclusion. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288 (2d Cir. 2002). "Issue preclusion … bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor*, 553 U.S. at 892 (internal citations and quotations omitted). The doctrine precludes parties "'from contesting matters that they have had a full and fair opportunity to litigate,' thus avoiding "the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and [fostering] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id*. (quoting *Montana v. United States*, 440 U.S. 147, 153–154 (1979)); *see also United States v. Alcan Aluminum Corp*., 990 F.2d 711, 719 (2d Cir. 1993). "For purposes of issue or claim preclusion, summary judgment is considered a decision on the merits." *DeCastro v. City of New York*, 278 F.Supp.3d 753, 764 (S.D.N.Y. 2017)

(citing *Ranasinghe v. Kennell*, No. 16-CV-2170 (JMF), 2017 WL 384357, at *4 (S.D.N.Y. Jan. 25, 2017) and other cases).

B. The Summary Suspension of a For-Hire Vehicle Driver based on a Refusal Allegation Denied Plaintiff Due Process of Law

Even if they were not collaterally estopped from challenging Judge Dearie's decision, *Padberg*, which concerns the same TLC action that is at issue here, is squarely based on established Supreme Court precedent. Judge Dearie applied the familiar balancing test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), that balances the private interest, the risk of an erroneous deprivation and the government's interest.[4] While he acknowledged that a pre-deprivation is not required in every case, he concluded that the general rule requiring such a hearing as a matter of due process governed.

As to the private interest, Judge Dearie found, a taxi driver's "interest in [his] taxicab license is profound. Suspending their licenses does far more than inconvenience drivers; it deprives them of their very livelihood." He noted, "The Supreme Court has recognized on a number of occasions that a person's means of support enjoys heightened significance as a property interest." *Padberg*, 203 F.Supp.2d at 277-78 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985); *Bell*, 402 U.S. at 539, and *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *see also Gilbert v. Homar*, 520 U.S. 924 (1997) (recognizing "severity of depriving someone of the means of his livelihood"). *Bell* is particularly notable, Judge Dearie wrote, because in that case, "[T]he Supreme Court specifically acknowledged that a driver's

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[4] Under *Mathews*, the Court must consider: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail." 424 U.S. at 335.

license, once issued, could become 'essential to the pursuit of a livelihood.' Such is undeniably the case with the plaintiff taxi drivers." *Padberg*, 203 F.Supp.2d at 278 (some citations omitted). And it is the case with Mr. El Boutary who supports his family with his earnings as a for-hire vehicle driver. Tr. 148-49.

Judge Dearie added, "The interference with this significant private interest is further exacerbated by the duration of the summary suspension." Indeed, in this case, Mr. El Boutary was suspended for 10 days before his hearing. And he remained suspended after his hearing, despite a positive recommendation, awaiting a ruling from the chair. Ultimately, his summary suspension lasted 35 days before it was lifted.

In evaluating the risk of an erroneous deprivation, the *Padberg* court noted, "[I]t is important to remember that the TLC Rules do not contemplate a *per se* prohibition against service refusals in all circumstances … [but that TLC rules contemplate multiple] situations in which a service refusal is justified." 203 F.Supp.2d at 278. Determining whether the driver committed an unlawful service refusal requires an assessment of both the driver's conduct and the passengers'. If the passenger, for example, the passenger is "disorderly or intoxicated," a driver is with his or her rights in refusing service. TLC Rule 80-20(b)(9).

Moreover, in this case, the TLC suspended Mr. El Boutary citing TLC Rule 68-15(a)(1), which is, in turn premised on the chair's belief "that continued licensure would constitute a direct and substantial threat to public health or safety." Determining what conduct constitutes "a direct and substantial threat" requires a subtle assessment of facts, evidence and the driver's record, which makes an erroneous determination quite possible. Error is more likely where, as here, the "investigation" lasts just one day, is instigated by tabloid news stories and a Facebook post, and omits even a conversation with the driver. Of course, in this case, the TLC, according to Judge

McGeachy-Kuls, the TLC misconstrued the facts and ignored its own rules, making error extremely likely.

As Judge Dearie noted, "[I]n those cases in which the Supreme Court has upheld summary suspensions without a hearing, the availability of prompt, meaningful postsuspension procedures to rectify any erroneous or questionable deprivation has been a critical component of their analysis." *Padberg*, 203 F.Supp.2d at 279. In *Mackey*, Judge Dearie noted, the statute entitled a suspended driver "to an immediate postsuspension hearing before the Registrar of Motor Vehicles." *Id*. In *Barry v. Barchi*, 443 U.S. 55, 66 (1979) "[T]he lack of any substantive postdeprivation hearing violated due process." The *Barry* Court stated, "Once suspension has been imposed, the [license holder's] interest in a speedy resolution of the controversy becomes paramount," and an "early and reliable determination" of the facts becomes a matter of constitutional imperative." 443 U.S. at 66. In this case, however, the hearing was not *held* until eight days after the summary suspension and it took 35 days to resolve. Thus, as in *Padberg*, "[T]he available postsuspension procedures provided little, if any, protection of the taxicab driver's due process rights." 203 F.Supp.2d at 279.

Judge Dearie found that "the third *Mathews* factor—the government's interest— [also] counsels in favor of additional protections." He reached this conclusion despite his view that "[a] service refusal on the basis of race is a deplorable and unacceptable practice" and that "[t[he TLC is right to aggressively" enforce rules barring it. "But aggressive enforcement of TLC policy, no matter how laudable or necessary, must conform to the mandates of the Constitution. As a general rule, depriving someone of a property interest prior to a hearing will be condoned only in 'extraordinary situations.'" 203 F.Supp.2d at 280 (quoting *Fuentes*, 407 U.S. at 90, and citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). "These circumstances exist not just

when there is an important government interest at stake, but also when 'very prompt action is necessary.'" *Padberg*, 203 F.Supp.2d at 280 (quoting *United States v. All Assets of Statewide Auto Part*s, 971 F.2d 896, 903 (2d Cir.1992) and citing *Fuentes*, 407 U.S. at 91). Typically, the Supreme Court has allowed deprivation prior to a hearing in cases involving pressing and immediate threats to the public health and safety. *Padberg*, 203 F.Supp.2d at 280. Here no such threat existed and none was even alleged.

Both Judge Dearie and Judge McGeachy-Kuls determined that an alleged service refusals, even if based on racial animus or homophobic bias "do not present the sort of immediate threats to health and safety that would permit summary suspension." *Id*. at 281. In sum, given the taxi drivers' compelling interest in their licenses and the substantial risk of error balanced against the important, but not immediate, need for the TLC to discipline those who refuse service, depriving the plaintiffs of a presuspension hearing denied them due process. *Padberg*, 203 F.Supp.2d at 281.

As Judge McGeachy-Kuls concluded, a later case, *Nnebe*, 644 F.3d 147, involving the suspension of TLC-licensed drivers based on a criminal arrest and pending criminal charges, was distinguishable from both *Padberg* and this case. First, the TLC has a specific rule allowing for a summary suspension based on a criminal arrest, which at least signals that a police officer found probable cause that a crime had been committed. In this case, of course, there was no arrest and there are no pending criminal charges. Second, even if there has been an arrest, the TLC is required as matter of due process to afford the suspended driver a hearing that gives the driver "a real opportunity to show that they do not pose a risk to public safety, arrests notwithstanding." *Nnebe*, 644 F.3d at 161.

In this case, the TLC was required to make its own finding that the passenger had committed conduct that violated a TLC rule and that the conduct demonstrated respondent's continued licensure would pose a direct and substantial threat to public health or safety. The TLC utterly failed to do wither before suspending Mr. El Boutary. Thus, in *Padberg*, which, like this case, contemplated summary suspensions for service refusals, even refusals alleged to involve discriminatory conduct, licenses suspensions absent notice or hearing, denied the plaintiffs due process of law. The same rule should apply here and plaintiff is entitled to summary judgment on his Due Process claim.

III. NEW YORK LAW PROVIDES NO FAIR WARNING THAT A FOR-HIRE VEHICLE DRIVER'S LICENSE MAY BE SUSPENDED BASED ON AN ALLEGED SERVICE REFUSAL

A. The Right to Fair Warning of the Law is Fundamental

An individual's right to fair warning of conduct that is forbidden or required and to the penalty that may be imposed for misconduct is "fundamental" and "essential to the protections provided by the Due Process Clause." *FCC v. Fox Television Stations, Inc*., 132 S.Ct. 2307, 2317 (2012). In *SEC v. Sloan*, a case concerning the summary suspension of trading in a security, the Supreme Court called "the power to summarily suspend …without any notice, opportunity to be heard, or findings based upon a record" an "awesome power with a potentially devastating impact" and that a "clear [legislative] mandate" was necessary to confer it. 436 U.S. 103, 112 (1978).

The Second Circuit held in *Rothenberg v. Daus*, another action against the City based on the TLC's conduct, "Even in the civil regulatory context … we cannot defer to [an agency's] interpretation of its rules if doing so would penalize an individual who has not received fair notice of a regulatory violation." 2012 WL 1970438 (2d Cir.2012) (internal quotation omitted). A few weeks later after *Rothenberg*, the Supreme Court ruled even more emphatically in *FCC v.*

Fox Television. The Court held: “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. It requires the invalidation of laws that are impermissibly vague.…” 132 S.Ct. at 2317 (internal citations, quotations and parentheticals omitted, emphasis added). Even more recently the Supreme Court applied the fair warning or void-for-vagueness doctrine to invalidate penalties in the immigration context. In *Sessions v. Dimaya*, the Court stated: “The prohibition of vagueness in criminal statutes … is an essential of due process, required by both ordinary notions of fair play and the settled rules of law.” 138 S.Ct. 1204, 1212 (2018) (April 17, 2018) (citations and internal quotations omitted). This doctrine, the Court added “guarantees that ordinary people have ‘fair notice’ of the conduct a statute proscribes.” *Id*. (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). Finally, “[T]he doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.” The *Sessions v. Dimaya* court relied on *Johnson v. United States*, 135 S.Ct. 2551 (2015). In *Johnson*, the Court added that fair warning “principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences.” Id. at 2557.

It is, to be sure, often said that the degree of vagueness that the Constitution permits varies in part on the nature of the enactment. Indeed the Supreme Court has “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Sessions*, 138 S.Ct. at 1212 (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 498–499 (1982)). But *Sessions* and *Johnson* were both civil matters. Sessions, 138 S.Ct. at 1213. So was *FCC v. Fox Television*, which involved

regulatory penalties. The same is true of *Rothenberg*, which involved a penalty imposed by the TLC.

B. No City Law Provides Warning a Driver May be Suspended Based on an Alleged Service Refusal

As Judge McGeachy-Kuls noted, the penalty for a taxi driver refusing service refusal, which is proscribed by TLC Rule 80-20, is a fine of $350 if the driver pleads guilty before a hearing and a $500 fine if the driver is found guilty following a hearing. TLC Rule 80-02(e) (stating mandatory penalties for the violation of certain TLC Rules).[5] The rules describe this penalty as "mandatory" because it is directed by NYC Admin. Code § 19-507, enacted by the City Council. This penalty provision draws no distinction based on the alleged reason for the refusal.

The degree of vagueness in this case is extreme. None of the rules defendants cite in either petition permit a suspension—let alone a summary suspension—for a service refusal. TLC Rule 68-15(a)(1), cited in the June 13 petition permits suspensions where "continued licensure would constitute a direct and substantial threat to public health or safety" and it specifically mentions: acts "prohibited by [TLC] Rules," such a driving a TLC licensed vehicle impaired by liquor or drugs; acts of "bribery, fraud, material misrepresentation, theft, threat against a person, harassment, abuse, or use of physical force; and acts "involving the possession of a weapon in a [TLC licensed] vehicle." Nothing in this rule would give any TLC driver reason to believe his license could suspended for a first service refusal. Moreover, TLC Rule 80-02 would leave any

[5] The same rule states that second violation "w/in 24 months" could result in a $700 fine (or $1,000 if the driver insists on a hearing "and possible suspension of License for up to 30 days if found guilty following a hearing." TLC Rule 80-02(e).

driver with a clear conviction that the penalty for a refusal is a fine and a fine only, with suspension a possibility for a *second* offense *after* a hearing.

There was no allegation (and no basis for any allegation) that Mr. El Boutary ever drove while impaired, that he ever had a weapon in his vehicle or that he engaged in bribery, fraud, threats, harassment or physical force. And there is nothing in any TLC that would give him fair warning that he might be suspended based on the conduct alleged—even if guilty as charged. This result stands even if the driver cursed or yelled, even if he acted based on his passengers' sexual orientation (which the evidence shows he did not). Defendants straining to suspend Mr. El Boutary's license based on the facts at hand (and even the facts it invented) denied him fair warning of the law and of due process of law.

IV. IN SUSPENDING MR. EL BOUTARY'S LICENSE, THE TLC VIOLATED ITS OWN RULES AND NEW YORK CITY LAW

As Judge McGeachy-Kuls stated, "[The] TLC's own rules demonstrate that an improper refusal of service does not require license suspension." R&R 12. Moreover, as detailed above, those rules do not permit license suspension for a first service refusal offense. The TLC is, of course, bound by its own rules. Moreover, the penalty for a service refusal is set by NYC ordinance, which neither the TLC nor its officers or agents are free to change or ignore. Thus it is plain that the City, via its agency the TLC, violated local law.

CONCLUSION

Because defendants suspended plaintiff without notice or hearing in direct violation of a binding federal court judgment, because it imposed this unconstitutional penalty that has no grounding in New York law or TLC rules, and because the TLC plainly violated its own rules and the NYC Admin. Code, this Court should grant plaintiff partial summary judgment as to liability on his constitutional and state law claims.

Dated: New York, New York
September 18, 2018

__/s/________________________
Daniel L. Ackman
Law Office of Daniel L. Ackman
222 Broadway, 19th Floor
New York, NY 10038
Tel: (917) 282-8178
dan@danackmanlaw.com

Attorney for Plaintiff