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

HASSAN EL-NAHAL, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

DAVID YASSKY, MATTHEW DAUS, MICHAEL BLOOMBERG, and THE CITY OF NEW YORK,

Defendants.

13-cv-3690 (KBF)

ECF CASE

X----------X

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

In *United States v. Jones*, 565 U.S. __, 132 S. Ct. 945 (2012), the United States Supreme Court held "that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search,'" thus triggering the requirement that the state obtain a warrant based on probable cause. *Id*. at 949. The New York Court of Appeals reached the same conclusion three years earlier as a matter of state constitutional law in *People v. Weaver*, 12 N.Y.3d 433 (N.Y. 2009). In this action, plaintiff Hassan El-Nahal, alleges (and the allegation is not disputed) that the New York City Taxi and Limousine Commission (TLC) mandated the installation of a GPS device in his taxicab, that the TLC used that device to track his movements over the course of months and years, and that it used the data collected as its sole evidence to prosecute him for the violation of TLC rules.

"[T]he general rule [is] that an official nonconsensual search is unconstitutional if not authorized by a valid warrant." *Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001). Here, the TLC had no warrant and no probable cause or even reason to suspect Mr. El-Nahal, who had been a taxi driver for nearly 20 years with an excellent record, of any wrongdoing. Thus this tracking violated the Fourth Amendment of the United States Constitution as well as article I, § 12 of the New York State Constitution.

The prosecution of Mr. El-Nahal, while ultimately dismissed by the TLC's own tribunal, (albeit only after three successful appeals) resulted in a temporary license revocation and a loss of income that continued well after his license was reinstated. The temporary loss of Mr. El-Nahal's livelihood and his reasonable fear of its permanent loss also caused him tremendous pain and mental anguish. Other GPS-based prosecutions did in fact result in hundreds (if not thousands) of similarly situated taxi drivers having their licenses permanently revoked.

In their motion papers defendants treat *Jones* and *Weaver* as afterthoughts. They rely instead on two earlier district court decisions, *Buliga v. New York City Taxi and Limousine Commission*, 2007 WL 4547738 (S.D.N.Y. 2007), *aff'd by unpublished summary order*, 324 Fed. Appx. 82 (2d Cir. 2009), and *Alexandre v. New York City Taxi and Limousine Comm'n*, 2007 WL 2826952 (S.D.N.Y. 2007), that rested on legal conclusions that have been rejected by the Supreme Court (as to the Fourth Amendment) and the Court of Appeals (as to the New York Constitution). Based on the high court precedents, absent a warrant or some recognized exception to the warrant requirement, the TLC's use of GPS tracking to collect evidence and prosecute taxi drivers was and is plainly unconstitutional. Thus, plaintiff is entitled to judgment as to liability on Counts I & II of the Complaint.

STATEMENT OF FACTS

While defendants' papers note their obligation to deem the facts alleged to be true for the purposes of their motion to dismiss, they systemically ignore many of the pertinent facts that are pleaded in the Complaint. PX 1.[1] Not only does the Complaint properly allege these facts, defendants have admitted them:

1. The TLC Imposes Mandatory GPS Tracking Technology

Starting in 2007, the TLC mandated that all NYC medallion taxis be equipped with its so-called Taxi Technology System or TTS. The TTS system includes a GPS tracking device that uses a Global Positioning System or GPS. According to Garmin Ltd., a leading manufacturer of GPS devices, GPS "is a satellite-based navigation system made up of a network of 24 satellites placed into orbit by the U.S. Department of Defense.… GPS works in any weather conditions, anywhere in the world, 24 hours a day." Garmin website at http://www8.garmin.com/aboutGPS/.

[1] Plaintiff's Exhibits (PX __) are attached to the Declaration of Daniel L. Ackman being filed herewith.

The New York Court of Appeals characterizes GPS as a "sophisticated and powerful technology that is easily and cheaply deployed and has virtually unlimited and remarkably precise tracking capability." *People v. Weaver*, 12 N.Y. 3d at 441.

No statute authorizes or suggests that the TLC mandate installation of GPS tracking devices in taxicabs. The TLC, however, imposed the obligation on its own by its Rule 1-11G. This rule provides: "The owner of any taxicab required to be equipped with a taxicab technology system shall contract to procure such equipment on or before August 1, 2007." The technology must include "hardware and software that provides … (iii) trip data collection and transmission required by section 3-06 of this title, and (iv) data transmission with the passenger information monitor required by section 3-07 of this title." TLC Rule 3-06 requires that each taxicab be capable of transmitting to the commission "at pre-determined intervals established by the Chairperson … the location of trip initiation; the time of trip initiation; the number of passengers; the location of trip termination; the time of trip termination; the metered fare for the trip; and the distance of the trip." The pertinent rules in effect at the time, which have since been re-numbered, are collected at PX 2; *see also* Mullings Aff. ¶ 6, PX 3.

Thus the TLC requires that all taxis and taxi drivers continuously transmit their locations at all times to the TLC or its agents by use of GPS. The installation and use of this technology is mandatory regardless of the consent of the taxicab owner or the taxi driver. While taxis must have this technology installed, nothing in the TLC's rules permits (or even suggests) that the TLC may use GPS tracking to prosecute individual taxi drivers such as Mr. El-Nahal either criminally or administratively. Of course, no state statute or city ordinance that allows this practice either.

2. The TLC Assures the Federal Court, the Public, and Taxi Drivers that it Would not Use GPS Tracking as a Prosecutorial Tool

In 2007, before the taxi technology rules took effect, a group of drivers (not including Mr. El-Nahal) and the New York Taxi Workers Alliance filed *Alexandre*, a federal lawsuit in which they made a facial challenge to the rules and sought to enjoin their taking effect. The plaintiffs in that action advanced federal privacy claims among several others. In briefs submitted in the *Alexandre* litigation, the TLC and the City of New York argued that GPS tracking was not a search. It also sought to assure the court that GPS and related technology would be used only for limited purposes. "The potential benefits of centralized data can include complex analysis of taxicab activity in the five boroughs for policy purposes, as well as the additional benefit of aiding in the recovery of lost property," the TLC said. PX 4, p. 4.

Nowhere in its briefs or affidavits did the TLC ever mention or suggest it would or that it might use the GPS data to track or investigate particular drivers or gain evidence for prosecutions. Ultimately, the district court (Judge Berman) rejected the drivers' claims, holding that GPS tracking was not a search for purposes of the Fourth Amendment. *Alexandre*, 2007 WL 2826952 at *9. In his ruling, Judge Berman emphasized that the new technology "will obviate the need for written records and will ... enable the TLC to respond to the thousands of consumer [lost property] requests." *Id*. at *2. The court concluded that drivers had no expectation of privacy and thus could not state a Fourth Amendment Claim. As to the drivers' state claims, he concluded that New York courts would recognize "no greater privacy interest" to "a vehicle traveling upon a public roadway under the New York State Constitution, than that which is afforded under the United States Constitution." *Id*. at *10. In another case brought by a single driver *pro se*, Judge Cote reached the same conclusion. *Buliga*, 2007 WL 4547738 at *2-3. These holdings and the analyses by two district courts in 2007 proved to contrary to what the Supreme

Court would decide in *Jones* and a bad guess as to what the New York Court of Appeals would decide in *Weaver*. The drivers' challenges having been rejected, the technology rules took effect.

In line with its assurances in federal court, before the technology mandate took effect, the TLC issued a "Statement of Basis and Purpose," which stated the reasons for its technology and GPS mandate. In this statement, the TLC noted that the technology could "assist in the recovery of lost property"; that it would allow for "centralized data" to permit the "complex analysis of taxicab activity in the five boroughs for policy purposes; that it would "enable passengers to follow their route on a map"; and that it would "provide a valuable resource for statistical purposes." PX 5.

The TLC made no mention in this statement (or elsewhere) of using GPS data to investigate or prosecute taxi drivers. The TLC never intimated it would or might track drivers for investigatory purposes of any kind. Indeed it further disavowed that intention in statements on its website. Responding to "Driver Frequently Asked Questions," the TLC assured that its new technology would not be used to track or to prosecute individual drivers, and was largely for customer service and the driver's convenience:

> Is the TLC going to use this technology to track drivers?
>
> No, the TLC will only use this technology to provide those customer service improvements described here. Even more importantly for drivers, the TLC is replacing the current hand-written trip sheets with automatic electronic trip sheets which are limited to collecting pick-up, drop-off, and fare information, all of which are already required. This technology will also provide TLC with credit card tip information.
>
> Will my trip/fare information be transmitted to the Internal Revenue Service (IRS)?
>
> No, your fare information will not be automatically sent to the IRS. There will be no changes to the current system, in which the IRS must send a subpoena to the TLC requesting trip sheet information.
>
> Will the systems be used to issue speeding tickets or other similar

> infractions?
>
> No, there are no plans to issue tickets for speeding or other similar infractions using the systems. PX 5A.

Thus, in a series of statements to a federal court, to the public at large, and to taxi drivers in particular, the TLC averred that its technology mandate was not designed for or geared toward using GPS to track, follow, or prosecute individual taxi drivers. Since then, as detailed below, the TLC has used the devices for just that purpose, resulting in the revocation of licenses and substantial fines despite the complete absence of evidence from anything other than GPS tracking and related mandatory taxi technology.

3. Using GPS Tracking, the TLC Reports an '$8.3 Million' Scam; Prosecutions Planned

On March 12, 2010, the TLC issued and e-mail press release under the subject heading "Taxi Scammers" in which it claimed to have "discovered" that "35,558 [taxi] drivers" had "illegally overcharged at least one passenger" over a 26-month period by manually switching the taxi meter from Rate Code 1 (the default setting used for trips inside NYC) to Rate Code 4)the rate that applies to out-of-city trips). The release specified that the overcharges had occurred on precisely "1,872,078 trips" and that the "total" overcharge was "$8,330,155, or an average of $4.45 per trip." PX 6. In this initial announcement, and many times since then, the TLC admitted that it had made this discovery by "using GPS technology installed in taxicabs."

Even as it was offering these extravagant—and ultimately unsupportable —accusations of widespread abuse, the TLC was constrained to note that while the overcharges were on "over 1.8 million trips … there were 361 million taxi trips during" the 26-month period in question so "the illegal fare was only charged in 0.5% of all trips" (that is, one trip out of 200). The press statement quoted Mayor Bloomberg's radio address of the same day, where he said, "[Y]ou know, some of these people could face serious charges." *Id*.

The media picked up the story eagerly and without question. The New York Post headline shouted: "Taxi drivers scammed passengers to the tune of $8M by rigging meters." The Daily News ran its story under the headline, "36,000 city cabbies overcharged passengers by $8.3M in widespread meter scam." The New York Times announced: "New York Cabs Gouged Riders Out of Millions." Defendant Mathew Daus, the soon-to-be-departing Commissioner, told the Times, "We have not seen anything quite this pervasive. It's very disturbing." To the Post, Daus opined, "I think these people are criminals." PX 7.

The scandal, however, had at best been vastly overstated. Soon after its announcement, the TLC backtracked. Just 10 days after its initial release, the TLC admitted that the account it had aggressively marketed was wildly inaccurate. "[A] fairly significant number" of the incidents resulted in no additional charges, suggesting they might have been simple mistakes, Chairman Daus told the Times. PX 8. The agency's press release of May 14, 2010 offered a revised version of the story. It now stated: "21,819 taxicab drivers overcharged passengers a total of 286,000 times … for a total estimated overcharge of almost $1.1 million"—not "$8,330,155." Even assuming the re-stated 286,000 figure is accurate, it means that Rate 4 was used to overcharge passengers on less than one trip out of a thousand. PX 9. This same press release announced: "The TLC referred the issue to the New York City Department of Investigation, which is investigating the matter with the Manhattan District Attorney's Office, with an eye toward potential criminal charges for the most egregious offenders." *Id*. Several months later, the district attorney indeed announced criminal charges, thanking the TLC for its ability to do so. PX 10.

4. The TLC Admits it Used GPS Tracking to Investigate and Prosecute El-Nahal even as it Lacked Reason to Suspect him or Any Individual Driver of Any Rate 4 Overcharge Violation

Beyond its statement in its initial press release, the TLC has admitted several times that it gathered the evidence needed to prosecute "Rate 4" violations using GPS. The TLC conducted this electronic dragnet even though it had no reason to suspect (let alone probable cause) that any individual had committed a "Rate 4" violation.

The TLC later admitted that its initial suspicions were raised by the conduct of a single taxi driver named Wasim Khalid Cheema. Unlike Mr. El-Nahal and other drivers who were prosecuted based on electronic records alone, Cheema had been charged by at least one passenger, possibly two, of overcharging them. He also had been found guilty of overcharging passengers before. The TLC subsequently alleged that Cheema persistently (rather than intermittently) engaged Rate 4, that is, on nearly every trip for a period of months. They alleged further that Cheema had accumulated an outsized income by overcharging passengers by a total exceeding $40,000 in a six-month period. PX 11. Serge Royter, a TLC computer systems manager, who would file the charges against Mr. El-Nahal, signed an affirmation in 2010 in which he swore, "The Rate Code 4 overcharges came to my attention after [the Cheema decision] was rendered by [the] Office of Administrative Trials and Hearings." PX 12.

After that, Royter was "asked by [his] supervisors to see if any other taxicab drivers had also overcharged passengers by illegally using the Rate Code 4 fare." He "then accessed the raw trip record data from the three [taxi technology] vendors and began setting up parameters to extrapolate the trips where Rate 4 was illegally used." PX 12. In another sworn affidavit, Pansy Mullings, the former TLC director of enforcement, admitted the TLC discovered the alleged violations by "[u]sing electronic trip data that had been collected via GPS devices and transmitted to TLC." Ms. Mullings added: "[The] TLC used information concerning passenger

pick-up and drop-off locations and times for trips where Rate Code 4 was activated by the driver." PX 2. This review of the GPS tracking data was not for statistical or policy purposes—Mr. Royter admitted he had no familiarity with the taxi technology system being used for policy purposes. PX 13 at 251. It was an evidence-gathering operation.

To this day, with possibly one or two exceptions, the TLC has not produced any claim by any actual passenger that he or she was overcharged.[2] In sworn testimony, Ms. Mullings admitted that there were few complaints by actual passengers—this despite the hundreds of thousands, if not millions, of purported overcharges.[3] Rather in virtually every case, its allegations are based on its use of GPS technology only. And it is also despite the fact that, overall, the TLC receives roughly twenty thousand complaints from passengers and civilians annually. PX 14 at 25. Ms. Mullings admitted as well that the TLC's prosecution of individual drivers would have been a practical impossibility without GPS tracking. PX 14 at 63-64.

Ultimately, the TLC announced its intention to file administrative charges and to revoke the licenses of at least 633 taxi drivers, and possibly more than 2300. Some of these drivers had gained, by the TLC's accounting, less than $50 from the alleged overcharges. The agency would later offered settlements to drivers based on a schedule of penalties. PX 15.

[2] In sworn testimony, Ms. Mullings stated that before the Rate 4 scandal was publicized, "a couple" of passengers had come forward alleging Rate 4 overcharges. PX 14 at 34. Mr. Royter testified he had heard of "several" passengers coming forward. PX 13 at 228.

[3] The paucity of passenger complaints powerfully suggests that the scope of the problem remains overstated. When Rate 4 is engaged, it is evident to anyone looking at the meter, which would rise in 80-cent increments (rather than the ordinary 40-cent increments). Also, the use of Rate 4 appeared on most of the receipts that would be available to passengers. Finally, anyone who takes taxis on the same route on a regular basis would be able to notice that the fare charged was more than normal. PX 14 at 68-70. If even one out of a thousand of the supposed victims had complained, the TLC would have a thick file containing hundreds of passenger complaints. But there is no such file.

5. The TLC Charges El-Nahal, along with Many Others, and Offers an Immediate Settlement

On or around January 3, 2012, a TLC prosecutor sent Mr. El-Nahal a "directive to appear" at a conference "in reference to allegations" that he had "deliberately and intentionally" overcharged passengers on ten separate occasions between November 20, 2009 and February 2, 2010. PX 16. Though the letter omitted this context, Mr. El-Nahal had at that time been a licensed taxi driver for 20 years with no significant violations on his record and had received a commendation from the TLC chairman for volunteering his services by offering free rides in the wake of the September 11 attacks. PX 17. As a full-time taxi driver, Mr. El-Nahal would complete more than 9,000 trips per year, meaning that he allegedly employed the Rate 4 button to overcharge passengers during this three-month period on roughly one trip in 200 or once every five or six days. El-Nahal Aff., PX 18. The initial settlement letter did not state the amount of the alleged overcharges, but the sum-total of the six overcharges later alleged was less than twelve dollars.

The directive advised Mr. El-Nahal that he could settle the charges by paying $1,000 (based on $100 per occurrence).[4] If he chose "not to accept," the letter advised that the "TLC will proceed with a revocation hearing at the New York City Office of Administrative Trials and Hearings ('OATH'), in which TLC will seek to revoke your license and impose a substantial fine." The letter added: "OATH has already decided many similar rate 4 overcharge cases which have resulted in license revocation and substantial fines." It cited TLC v. Ajoku, Index No. 408/11, and TLC v. Gueye, Index No. 354/11. PX 16.

[4] Under the NYC Administrative Code, the penalty for three overcharges of a passenger within 18 months is license revocation.

In fact, at that time, there had been less than a handful of contested Rate 4 overcharge cases decided by OATH. Ajoku, a driver appearing *pro se,* had contested the charges. But in the Gueye ruling, and nearly all the others "decided" at OATH, followed default hearings, that is, where the charges were uncontested because the driver did not appear. Other letters to drivers cited the Cheema case, and claimed similar evidence. *See* PX 19. These letters omitted the fact that in the Cheema case, the TLC found in its investigation that the driver had engaged Rate 4 on nearly every trip, that his income far exceeded that of other drivers, and that passengers had filed complaints against him. PX 18. In fact, as noted, with few exceptions, the TLC had no evidence of a deliberate overcharge and no actual passengers claiming to have been overcharged.

Mr. El-Nahal appeared for the settlement conference without counsel. There, the TLC prosecutor advised him that there had been a "careful investigation" so that they knew that he was guilty of the charges. If he insisted on a hearing, the prosecutor advised him that he would certainly be found guilty and that his license would be revoked. The TLC said it would allow him to settle the case by paying $900. El-Nahal Aff., PX 17.

6. El-Nahal Found Guilty and his License Revoked, but the Rulings are Thrice Reversed

Mr. El-Nahal refused the offer and appeared for a hearing (again without counsel) on May 7, 2012. The hearing, however, was not at OATH but at the TLC's own tribunal (the TLC having changed its jurisdiction rule in the interim). The TLC offered electronic trip records and a generic affidavit by Serge Royter, a TLC computer systems manager, which did not mention Mr. El-Nahal and made no claim regarding intent. Mr. El-Nahal was found guilty; the ALJ imposed fines totaling $550 and revoked his license. PX 19.

On appeal by counsel (hired at Mr. El-Nahal's expense), in a ruling dated June 1, 2012 the TLC Tribunal appeals board reversed on the ground that the evidence against Mr. El-Nahal,

consisting of electronic trip sheets, was insufficient to demonstrate intent, which is a critical element of an overcharge violation. The appeals board held:

> The elements of an overcharge include among other things, what the overcharged fare was, what the correct fare was, the nature of the trip involved, and whether or not there was an intent on the part of the person charged with an overcharge to do so. Here, the ALJ failed to set forth which trips resulted in an overcharge and on what basis he decided that the respondent intentionally caused the overcharges. Moreover, the ALJ did not state which party he found credible. Under these circumstances, the ALJ's decision is reversed as it is not supported by substantial evidence. PX 20.[5]

Mr. El-Nahal's license was reinstated. But almost as quickly, the TLC re-issued one of the six charges against him, never explaining why it did not file all six as it had before. A hearing was held on July 13, 2012, at which the TLC offered the same evidence that the appeal tribunal had already found insufficient. TLC ALJ Lee found Mr. El-Nahal not guilty and concluded that the TLC's evidence was not even enough to make a prima facie case:

> I find that the Commission has not proven the respondents' intent to overcharge in this case. I find that the Commission's single piece of evidence, the trip record, is insufficient to prove that the respondent intentionally charged the passenger a Rate 4 code. Based on Mr. Royter's affirmation, I find that the Commission has not discounted or eliminated the possibility of human error or mechanical error as the Source of a Rate 4 charge.… Accordingly I find that a prima facie case has not been established and the summons is dismissed. PX 21.

Though the TLC adjudication rules allow the TLC to appeal an adverse ruling (which it often does) to the TLC Tribunal appeals board, the TLC did not appeal. *See* TLC Rule 68-15. Thus ALJ Lee's ruling became a final judgment, binding on the agency. Instead of appealing, the TLC re-filed the remaining five charges that it had filed originally, but had not re-filed. These five alleged overcharges totaled eight dollars and forty cents.

[5] In this decision, as in the decisions that followed, the Appeals Board noted that Mr. El-Nahal had raised constitutional objections to the use of GPS tracking evidence, but it declined to reach those questions. PX 20.

After an adjournment of one hearing date (at which the TLC announced it was not prepared to proceed because it needed "to conduct further investigation in light of the appeal") Mr. El-Nahal appeared for a third time. At this hearing held on September 13, the Commission offered no new evidence. There was nothing from its claimed "further investigation." The evidence was exactly the same, still limited to electronic trip records and the Royter affidavit. There was still no evidence of intent that the Appeals Board had held was required. Nevertheless, this time TLC ALJ Gould found Mr. El. Nahal guilty on all five counts and revoked his license.

Mr. El-Nahal appealed again and the appeals board reversed again. In a decision dated October 19, 2012, the appeals board wrote that the agency had still failed to offer any direct or even circumstantial evidence of intent. Nor was there any evidence that the technology system—the sole basis for the charges against Mr. El-Nahal—had been working properly:

> Here, the ALJ found that intent was inferred from the circumstance of the respondent's 'trip sheets taken together of various days.' However, the ALJ's decision fails to explain how a group of trip sheets of various unspecified days established intent on the part of the respondent to overcharge passengers without even pointing to any particular trip numbers.… The ALJ failed to explain how five alleged instances of overcharges totaling $8.40 stated on five separate trip sheets spanning 4 months for a driver who has been licensed since 1998 and who testified he averaged approximately 40 trips per day proved intent, how the alleged overcharges of $1.20, $2.00, $1.60, $2.40 and $1.20 were respectively determined, and what the correct fares should have been for each of these five trips. The ALJ also failed to make a finding regarding the type of taximeter used by the respondent in each instance of alleged overcharge, the location of the rate buttons on the particular meter, the sequence required to activate rate 4 on the particular meter, how it was/was not possible for the respondent to mistakenly hit the wrong button while operating his taxicab.… PX 22.

Following this second reversal, the TLC re-filed the same charges. At a hearing on February 19, 2013, the agency prosecutor offered the same evidence—trip sheets, Google maps and the Royter affidavit. The prosecutor made no effort to come to terms with the appeals board decisions, saying only that he was permitted to re-file the charges. He still offered no proof of

intent. Nevertheless, TLC ALJ Garrett, in five verbatim decisions, found Mr. El-Nahal guilty and ordered his license revoked. PX 23.

Mr. El-Nahal appealed for a third time, and the conviction was again reversed, this time with prejudice, for "failure to make a prima facie case." In a ruling dated March 6, 2013, the appeals board wrote:

> [T]he Royter affirmation and the Google maps and [sic] do not supply evidence of the respondent's intent to overcharge. In his affirmation, Serge Royter (Commission's Enforcement Division, administrative summonses) … generally described the TPEP system, fare rates, the different brands of taximeters and how the different rates are engaged on each brand, how he determined whether a passenger was overcharged.… This information establishes nothing beyond what the trip sheets establish, which was found insufficient, namely, that Rate 4 was engaged and Rate 4 should not have been engaged for trips within New York City.…
>
> Royter does not state that this respondent intended to overcharge, only that he did overcharge. Thus, the Royter affirmation does not prove that this respondent intended to overcharge….
>
> Thus, the Commission did not prove intent…. PX 24.

Mr. El-Nahal's license was restored, but not before he had lost considerable wages and suffered substantial emotional and physical pain. The TLC did not challenge the March 6, 2013 decision. This action ensued.

ARGUMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure a moving party is entitled to summary judgment "when after viewing all the facts in the record in a light most favorable to the non-moving party, there is no genuine issue of material fact present, 'so that the moving party is entitled to judgment as a matter of law.'" *Forsyth v. Federation Employment and Guidance Serv.*, 409 F.3d 565, 569 (2d Cir. 2005) (quoting Rule 56(c)); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party has made a properly

supported showing sufficient to suggest the absence of any genuine factual issue, to defeat the motion the opposing party must come forward with evidence that would be sufficient to support a jury verdict in its favor. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). Here, plaintiff has demonstrated facts that are admitted or which cannot be disputed. These facts concern the TLC's use of the technology, which the agency required installed, the actual use being very different from what the agency promised. These admitted facts are more than sufficient to support this motion.

I. UNDER *JONES*, GPS TRACKING IS A SEARCH THAT CANNOT BE CONDUCTED WITHOUT A WARRANT OR AN EXCEPTION TO THE WARRANT REQUIREMENT

In *U.S. v. Jones*, the Supreme Court held: "[T]he Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" 132 S. Ct. at 949. In *Jones*, police officers had attached a GPS device to a car driven by a suspected drug dealer. The government had actually applied for a warrant to allow its use of the device, but the term of the warrant had lapsed. Based in part on its GPS tracking, Jones was indicted for conspiracy to distribute cocaine, convicted and sentenced to life imprisonment. The D.C. Circuit Court of Appeals reversed the conviction because of the admission of evidence obtained by warrantless use of the GPS device which, it held, violated the Fourth Amendment. The Supreme Court affirmed.

The Court's decision was based on a traditional understanding of the Fourth Amendment tied to common law trespass: "It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information." 132 S. Ct. at 949. The case at bar is no different: The TLC mandated the placement of tracking devices in privately owned taxicabs and then (after promising it would do no such thing) used the devices to investigate and obtain information about drivers' movements over weeks, months and

years. While the Supreme Court tied its holding to the physical attachment of the device, it also stated: "It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question." *Id*. at 953-54.

Justice Scalia's opinion for the Court in *Jones* was concurred in by five justices. All nine justices, however, concurred in the result. Five justices went further and concluded that the tracking alone, even without the physical placement of a device, was a search. Justice Sotomayor, concurring, wrote:

> [T]he Government installed a [GPS] tracking device on respondent Antoine Jones' Jeep without a valid warrant and without Jones' consent, then used that device to monitor the Jeep's movements over the course of four weeks. The Government usurped Jones' property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection. 132 S. Ct. at 954 (J. Sotomayor, concurring).

Justice Sotomayor also based her concurrence on that fact that "GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" 132 S. Ct. at 953-56 (quoting *United States v. Cuevas-Perez*, 640 F. 3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)). The same is true here, as the TLC has admitted. To investigate thousands of drivers without GPS monitoring would have required the collection of hundreds of thousands if not millions of hand-written records from dozens of garages and from individual taxi owners, and then reviewing each one. PX 14 at 63-64 (Mullings).

Though based on a different analysis, Justice Alito's concurrence in *Jones* would also lead to a finding that the TLC's use of GPS tracking for months and even years violated the Fourth Amendment. Justice Alito concluded:

> [T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. 132 S. Ct. at 964.

Thus, under the Court's decision in *Jones*, and under the concurring opinions of all nine justices, the TLC's massive GPS tracking regime violated the Federal Constitution.

This tracking violated the New York Constitution as well. Even before *Jones*, the New York Court of Appeals held in *Weaver* that GPS tracking is a search for purposes of the New York Constitution. The *Weaver* court held: "Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause." 12 N.Y.3d at 447. Distinguishing earlier Supreme Court cases such as *United States v. Knotts*, 460 U.S. 276 (1983), the Court wrote:

> One need only consider what the police may learn, practically effortlessly, from planting a single device. The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possibly limited only by the need to change the transmitting unit's batteries. *Id.* at 441.

It added, "The massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy." *Id.* at 444. The Court of Appeals reaffirmed its holding in *Weaver* just three months ago in *Cunningham v. New York State Department of Labor*, where it held that the attachment of a GPS device to a state employee's car was a search "within the meaning of the State and Federal Constitutions." __ N.Y.3d __, 2013 WL 3213347 (N.Y. June 27, 2013).[6]

[6] In *Cunningham*, the Court of Appeals further held that even though the state employed a GPS device in tracking one of its own employees within the workplace, thus allowing for a "workplace exception" to

In *Weaver* (as in *Jones*), the state did not contend that it had obtained a warrant or that there was some "exception to the warrant requirement." It contended "only that no search occurred." But the Court found that contention "untenable." *Id.* at 445. This untenable position that there was no search is now the ground defendants attempt to hold.

II. DEFENDANTS' CLAIMS ABOUT EXPECTATIONS OF PRIVACY ARE BOTH FALSE AND IRRELEVANT

Defendants, relying on older cases like *Buliga* and *Knotts*, suggest that there was no search because taxi drivers did not have "an expectation of privacy." Def. Br. at 7-10. But this argument utterly ignores both the admitted facts and the law. As detailed above, the TLC issued repeated assurances that it would not use GPS tracking as a prosecutorial tool. Given the TLC's statements to a federal court, to the public in the course of rulemaking, and to taxi drivers on its website, there was every reason for taxi drivers to expect that the agency would not track individuals and then use the collected evidence as the basis for regulatory charges and license revocations. Defendants, of course, ignore these statements because acknowledging them would totally undermine their current position. But the TLC's promises cannot be wished away.

Beyond the undisputed facts, the Supreme Court in *Jones* rejected the premise of defendants' suggestion. In *Jones*, the government argued that its target "had no 'reasonable expectation of privacy'" because the vehicle it tracked had travelled "on the public roads, which were visible to all." The Court, however, concluded it "need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the [*Katz v. United States*, 389 U.S. 347 (1967)] formulation," which rested on expectations of privacy. Instead, it relied on the need, "at bottom" to "'assur[e] preservation of that degree of privacy

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the state warrant requirement, the search was unreasonable and therefore unconstitutional. 2013 WL 3213347.

against government that existed when the Fourth Amendment was adopted.'" *Jones*, 132 S.Ct. at 950 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). This concern focused on the government's trespass on Jones' vehicle, the placement of the device and using that device to conduct surveillance, which is precisely what occurred here. In any event, the *Jones* Court specifically discussed the earlier "beeper cases" on which defendants rely (*Knotts* and *United States v. Karo*, 468 U.S. 705 (1984)) and found them to be "perfectly consistent" with its holding. 132 S. Ct. at 952; *see* Def. Br. at 7, 8, 10 & 11.

If there were any doubt about the rationale for *Jones*, and the irrelevance of the "expectation" question, the Court reiterated its view just this year in *Florida v. Jardines*, where it stated: "The [Fourth] Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." 133 S.Ct. 1409, 1414 (2013) (quoting *Jones,* 132 S.Ct. 945, 950–951, n. 3 (internal quotation marks omitted).

It is also true that the TLC also "invad[ed] privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection." 132 S.Ct. at 954 (J. Sotomayor concurring). But that finding is unnecessary to establish a search under *Jones* or *Jardines*. Both the majority and the concurring opinions in *Jones* reached their conclusions after acknowledging and discussing earlier cases using different types of tracking devices, the same cases on which defendants now rely. The *Weaver* Court also reviewed the Supreme Court's earlier tracking cases, and still held that GPS tracking was so different and so much more invasive that it was a search even if the driver being followed had been traveling on public streets. Indeed, the Supreme Court did not even specify the locations where Jones had been driving—that fact was

of no moment. Weaver, for his part, was tracked to a K-Mart parking lot. *Jones*, 132 S.Ct. at 947; *Weaver*, 12 N.Y.3d at 436.

Finally, defendants' argument that the information collected electronically by GPS tracking is "the same" as that which it might have gleaned from paper trip sheets filled out by drivers by hand is similarly false and irrelevant. Def. Br. 8. First of all, the Rate 4 button did not even exist before the implementation of the taxi technology system. PX 14 at 55-56. Second, the self-reported trip sheets did not record trip-distance. For these reasons, the TLC has admitted that the Rate 4 prosecutions would have been impossible using the old tools. *Id*. at 62. In any event, even if the TLC somehow could have reviewed hundreds of thousands of hand-drawn paper records, that is not what its prosecutors actually did. In fact, they used GPS records. In both *Weaver* and *Jones*, the Courts allowed that the police could in theory have followed the cars on public streets, albeit with some difficulty and at substantial expense. But in reality they used GPS tracking, which is so invasive as to be unconstitutional without a warrant. As the *Weaver* Court put it, GPS tracking made these prosecutions "not merely possible but entirely practicable." 12 N.Y.3d at 441; *see also Jones*, 132 S. Ct. at 964 ("Devices like the one used in the present case, however, make long-term monitoring relatively easy and cheap.") (J. Alito, concurring).

III. DEFENDANTS CANNOT ESTABLISH ANY RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT

After *Jones*, it is impossible for defendants to claim that their GPS tracking is not a search under the Federal Constitution. The Supreme Court having ruled, GPS tracking requires either a search warrant based on probable cause or some recognized exception to the warrant requirement. "Warrantless searches 'are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'" *United States v. Howard*, 489 F.3d 484, 492 (2d Cir. 2007) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443,

454-55 (1971)); *Ferguson v. City of Charleston*, 532 U.S. at 70 (the general rule is that warrants are required); *United States v. Casado*, 303 F.3d 440, 443-44 (2d Cir. 2002) ("It is well established that warrantless searches and seizures are per se unreasonable under the Fourth Amendment unless they fall within one of several recognized exceptions.").

Taxi drivers are not employees of the TLC or of the City, but are independent businessmen, unprotected by civil service rules. Taxis are privately owned and operated. Because they are independent contractors, cabdrivers cannot engage in collective bargaining. *See* G.R.G. Hodges, *Taxi! A Social History of the New York City Cabdriver* (Johns Hopkins Univ. Press 2007), pp.147-48. Their is likewise muted, as 91% of cabdrivers are first generation immigrants. B. Schaller, "NYC Taxi Fact Book," p. 2, PX 25. Taxi drivers are, however, entitled to the same constitutional protections as other citizens. The New York Court of Appeals made this oft-neglected point half a century ago in *Hecht v. Monaghan*. A cabdriver, the *Hecht* Court wrote, "is not the employee of any public body nor is he the appointee of any municipal officer."

> Rather, he is a private citizen whose livelihood is derived from the fares and gratuities he receives from the persons whom he serves as a licensed hack driver. He is not under the direct supervision of a public official in the performance of his daily routine, but is merely regulated with regard to certain aspects of his business. The rules applicable to the disciplining, suspension and discharge of civil employees should not be extended to include the suspension or revocation of licenses of those whose salaries are not paid from public funds. 307 N.Y. 461, 468–69 (N.Y. 1954); *see also Nnebe v. Daus*, 644 F.3d 147, 162 (2d Cir. 2011).

The same, of course, is true of the law applicable to searches and seizures. If the TLC wanted to track a private citizen and use the evidence gathered to prosecute him, it was required either to obtain a search warrant.

The TLC had every opportunity to apply for a warrant if it had grounds. *See Jones*, 132 S. Ct. at 964 (J. Alito, concurring) ("[W]here uncertainty exists … the police may always seek a warrant."). But the TLC never applied (and of course had no probable cause as to Mr. El-Nahal

or hundreds of drivers similarly situated). Thus no warrant was obtained. Defendants, therefore, can only justify their electronic dragnet if they can claim some exception to the warrant requirement. But no recognized exception pertains: There were no exigent circumstances; there was no consent; and the administrative search exception does not apply.

A. Taxi Drivers never Consented to the TLC's GPS Searches

For consent to be an exception to the warrant requirement, it must be informed, knowing and voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-24 (1973). Of course, the burden of proving that consent was free and voluntary is on the state and "[t]his burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *see also Anobile v. Pelligrino*, 303 F.3d 107, 124 (2d Cir. 2002) ("The official claiming that a search was consensual has the burden of demonstrating that the consent was given freely and voluntarily"). Mere acquiescence to the search being conducted, of course, is not consent. *U.S. v. Deutsch*, 987 F.2d 878, 883 (2d Cir. 1993). It certainly cannot be said that working as a taxi driver or accepting a license constitutes consent to an otherwise unconstitutional search. *Anobile,* 303 F.3d at 124. Indeed, employment cannot be deemed consent even where employees had been notified by a rulebook that they are subject to search. *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187, 202 n.23 (2d Cir.1984).

No one asked Mr. El-Nahal (or any other taxi driver) for his consent to being tracked. Indeed, as a group, taxi drivers vehemently opposed the enactment of the taxi technology rules, going so far as to file a federal lawsuit to block their taking effect. And in its support of the rules, the TLC repeatedly assured the federal court, the public, and taxi drivers that it would not use GPS technology to track individual drivers. With these facts in the record, the TLC has not even argued that the drivers consented.

Moreover, when a state agency gathers evidence for the specific purpose of incriminating individuals, "they have a special obligation to make sure" that those individuals "are fully informed about their constitutional rights, as standards of knowing waiver require." *Ferguson*, 532 U.S. at 85. "Phrased somewhat differently, critical to the question of [voluntary consent to a search is] the antecedent question of whether" the target "understood that the request was not being made" for general regulatory analysis "but rather by agents of law enforcement for purposes of crime detection." *Ferguson v. City of Charleston*, 308 F.3d 380, 397 (4th Cir. 2002). While voluntariness is a question of fact, *Schneckloth*, 412 U.S. at 227, there is no evidence here that consent was in fact voluntarily given. In this case, the TLC never informed drivers that it would use its GPS device to obtain evidence for criminal and quasi-criminal prosecutions. It said the opposite and detailed the various non-investigatory functions of the taxi technology system. *Cf. Stoner v. California*, 376 U.S. 483, 489-90 (1964) (that a hotel guest may have given implied consent for entry by maids or janitors did not extend to entry by police officers to search for evidence of crime). In fact, the TLC admits it used GPS to collect evidence and to prosecute individuals. It organized information in databases created especially for that purpose. It then created "individual overcharge reports." Royter Aff. ¶¶ 10-13, PX 12. It was all designed and executed as part of an evidence-gathering project that taxi drivers did not know about and about which they were never asked.

B. Knowledge is not Consent

Some searches are conducted inherently in secret, such as a wiretap. Others, such as a search coincident with an arrest, are likely to be conducted openly. But nothing in the Supreme Court's Fourth Amendment jurisprudence turns on this distinction. A search is a search regardless of whether it is hidden or open. A search is a search even if the target suspects he is being bugged or knows he is being watched.

While the point is self-evident, it is also illustrated by the Supreme Court's decisions. In the landmark case *Mapp v. Ohio*, the police arrived at a residence and were met by "Mapp and her daughter … [who] refused to admit them without a search warrant." 367 U.S. 643, 644 (1961). The police searched the house anyway. This search was unconstitutional, even though Mapp knew full well it was occurring. In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the creation of roadblocks to search cars for illegal drugs was a search even though the motorists knew they were being stopped and searched. In *Arizona v. Gant*, 556 U.S. 332 (2009), police searched a car while its owner was under arrest at the scene and able to see the search underway. That the search was done in plain sight of the car's owner (or driver) was immaterial. Similarly, *People v. Scott*, 79 N.Y.2d 474 (N.Y. 1992), involved an administrative search where the police announced their presence to the business owner and explored the yard out front. Though there was nothing surreptitious about it, the search was still in violation of the state constitution. In any search involving urine testing, the target would certainly be aware. *E.g.*, *Chandler v. Miller*, 520 U.S. 305 (1997). There are many other examples that need not be rehearsed here of searches that were open and notorious, but unconstitutional nevertheless. But there are no cases holding that a search was unconstitutional simply because it was surreptitious (and would have been lawful otherwise).

In this case, some taxi drivers may have known that there was GPS device in their cabs. (This question would be a factual issue unresolvable on a motion to dismiss as the GPS device is embedded in the TTS, cannot be used for navigation, and the map it generates is visible only in the back seat, not to the driver. Goldstein Aff. ¶ 17, PX 26.) But it is undisputed that all cabdrivers had also been told that the GPS capacity would be used for policy-making, for data

collection and the like—*not* to track individuals. None were informed of or could have known that the TLC would use the GPS as an evidence-gathering tool.

C. The TLC cannot establish the 'Administrative Search' Exception to the Warrant Requirement

Defendants claim the use of GPS tracking data "in an administrative proceeding" is not a search." Def. Br. 7. They cite no authority for this proposition, which makes no sense because whether a search was conducted depends not at all where the fruits of that search are used—whether in a criminal trial, in a quasi-criminal administrative proceeding as here, or not at all.[7] To the extent the context of the TLC's dragnet is relevant, it can only be to claim the so-called administrative search exception to the warrant requirement. But based on the undisputed facts of this case, defendants cannot properly invoke the "administrative search" exception under either federal law or New York law because the TLC cannot establish a substantial need for its search or that the search was permitted by statute or even by regulation.

The administrative search doctrine can provide an exception to the warrant requirement where a search is conducted pursuant in a closely regulated industry pursuant to statutory authority. Under the Supreme Court's decision in *New York v. Burger*, 482 U.S. 691 (1987), the state must satisfy three criteria in order to invoke the exception.[8] But in this case, the TLC cannot satisfy any.

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[7] Both the Supreme Court and the Second Circuit have termed license disbarment proceedings "quasi-criminal." *In Re Ruffalo*, 390 U.S. 544, 551 (1968); *Erdman v. Stevens*, 458 F.2d 1205, 1210 (2d Cir. 1972).

[8] *New York v. Burger* was decided on appeal from the New York Court of Appeals. On appeal, the U.S. Supreme Court reversed, finding that the New York court had enacted too strict a test. Later, in *Scott*, the Court of Appeals revisited the issue and held that, as a matter of New York constitutional law, the stricter test it had announced earlier was proper and would govern. 79 N.Y.2d at 496-97. Thus under, New York law, the TLC fails even more emphatically to pass the administrative search exception test.

First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. *Burger*, 482 U.S. at 702. Here, there is no such interest. While overcharging is unlawful—and the state certainly has some interest in enforcing its laws— there was no evidence that overcharging was a pervasive problem. Even after the TLC announced the "massive scam," even after it publicly urged passengers to come forward with their complaints, few passengers have done so. This fact certainly casts some doubt on the scope of the problem. But even if there were as many overcharges as the TLC announced in the media, the agency admits that they occurred less than one trip out of a thousand (286 thousand out of 361 *million*). PX 9. The TLC says it can (or already has) elimated the Rate 4 overcharge problem. Indeed, even as it announced its discovery of the "taxi scammers," it also announced that the problem had been solved by the "implement[ion of] a system whereby a highly visible alert would appear on the passenger screen advising the passenger that Rate Code 4 has been activated and should only be used in Nassau or Westchester Counties." Additional solutions such as "geo fencing" were also in the works. *Id*. A problem that is rare, unnoticed by its putative victims, and which is readily solved cannot be said to create a substantial interest.[9] *Cf*. *Scott*, 79

[9] *Burger*, by contrast, involved warrantless inspections of vehicle dismantling businesses (a/k/a chop shops) believed to be involved in automobile theft. These searches followed detailed legislative findings demonstrating the scope and intractability of the problem. In its decision in *Burger*, the Supreme Court cited a statement by the New York governor that explained the substantial need for the search regime:

> Motor vehicle theft in New York State has been rapidly increasing. It has become a multimillion dollar industry which has resulted in an intolerable economic burden on the citizens of New York. In 1976, over 130,000 automobiles were reported stolen in New York, resulting in losses in excess of $225 million. Because of the high rate of motor vehicle theft, the premiums for comprehensive motor vehicle insurance in New York are significantly above the national average. In addition, stolen automobiles are often used in the commission of other crimes and there is a high incidence of accidents resulting in property damage and bodily injury involving stolen automobiles. 482 U.S. at 708.

N.Y.2d at 517 (calling New York's auto theft problem an "economic debacle," but still finding the search used to combat the problem unconstitutional).

Second, the warrantless inspection must be "necessary to further [the] regulatory scheme." *Burger,* 482 U.S. at 702-03. The TLC can hardly argue that a warrantless search was necessary here. If it had cause to investigate plaintiffs (or even to investigate taxi drivers in general) it could have applied for a warrant. Taxi drivers would not have known, so the agency would not have lost the element of surprise. Indeed, the TLC could have avoided the problem by not even creating the Rate 4 button in the first place. For decades, taxi drivers had calculated out-of-town fares without a button, and no one ever suggested doing so was difficult. *See Anobile*, 303 F.3d at 120 (searches of racetrack employee residences unnecessary to further the regulatory scheme where the state could search vehicles, barns and persons located in the racetrack area instead). Here, the TLC could have prevented the abuse of the Rate 4 button simply by eliminating the button or by disabling it within the five boroughs.

Even more clearly, the TLC's dragnet fails the "certainty and regularity" prong of the *Burger* test. The *Burger* Court held: "[T]he statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." In other words, the statute (or regulation) must perform the warrant's two basic functions: It must advise the owner of the target premises that the search is being conducted pursuant to law within a properly defined scope; and it must limit the discretion of the inspecting officers. To perform the first function, the statute must be sufficiently comprehensive and definite so that the search target "cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." 482 U.S. at 703 (internal citations and quotations omitted).

Here, of course, no TLC regulation (and certainly no statute) advised cabdrivers they would be tracked by the GPS devices in their cabs. To the contrary, in passing its rule, the TLC assured time and again that it would *not* use GPS technology to "track" drivers or even to issue speeding tickets. But later it did much more, using the GPS monitoring to prosecute charges that are far graver, so serious in that they can lead to the revocation of a driver's license and thus his loss of livelihood. *See generally Nnebe*, 644 F.3d at 159 (taxi driver's "private interest [in his continued licensure] is enormous"); *Padberg v. McGrath-McKechnie*, 203 F. Supp. 2d 261, 277 (E.D.N.Y. 2002), aff'd 60 Fed. Appx. 861 (2d. Cir.), cert. denied, 540 U.S. 967 (2003) (cabdriver's interest in his license is not merely "sufficient to trigger due process protection," it "is profound").

As no law authorized the tracking of individuals, drivers could not have been "aware that [their movements would] be subject to periodic inspections undertaken for specific purposes." Nothing in the NYC Code or TLC rules, "limits the discretion of the inspectors" so that searches would be "carefully limited in time, place, and scope, " which *Burger* requires. 482 U.S. at 703 (internal citation and quotation omitted). Thus, nothing in the TLC rules provides "a constitutionally adequate substitute for a warrant," making the administrative search exception inapplicable.

D. Defendants Cannot Claim the 'Special Needs' Exception to the Warrant Requirement

Defendants allude briefly to the "special needs" exception to the warrant requirement. Def. Br. 12. But they ignore its basic predicate, which bars its application here. "The 'special needs' doctrine, which has been used to uphold certain suspicionless searches performed *for reasons unrelated to law enforcement*, is an exception to the general rule that a search must be

based on individualized suspicion of wrongdoing." *City of Indianapolis*, 531 U.S. at 54; *Ferguson*, 532 U.S. at 79.

Here, however, the TLC has admitted it used its GPS tracking not for general statistical purposes or to craft policy or to find lost property. The post-Cheema review of the GPS tracking data was for purposes of filing charges.[10] The prospect of "serious charges," both administrative and criminal, was announced from the outset and the matter was referred to the Department of Investigation for a joint investigation with the Manhattan District Attorney, which quickly announced arrests and criminal charges. PX 10. Because "the immediate objective of the searches was to generate evidence *for law enforcement purposes*," the special needs exception cannot apply. *Ferguson*, 532 U.S. at 83; *see also Nicholas v. Goord*, 430 F.3d 652, 662-64 (2d Cir. 2005) (evidence gathering for purposes "crime detection" activities associated with normal law-enforcement concerns does not meet the special-needs threshold.)

CONCLUSION

The TLC instituted its GPS tracking of Mr. El-Nahal and other taxi drivers based on information about a single cabdriver. Without a warrant, absent probable cause, and without even a reasonable suspicion, defendants used GPS to track the movements of thousands. Its tracking was not for the purposes it repeatedly announced, but to gather evidence in support administrative and criminal charges. As Judge Hancock, contemplating crimes far more serious than those that spurred the TLC, wrote in *Scott*:

> [T]ools such as unannounced general inspections, without judicial supervision or regulatory accountability, are always helpful in detecting and deterring crime. If these were the only criteria for determining when

[10] Had defendants limited their use of GPS tracking to the reasons they asserted to the in court in *Alexandre* or during the rulemaking process, the special needs exception might well apply. But once they began to use it as a tool to gather evidence for prosecution, they could no longer seek refuge in the exception.

> citizens' privacy rights may be curtailed there would thus be few, if any, situations in which [constitutional] protections … would operate. Indeed, the very purpose of including such protections in our Constitution was to provide a counterbalancing check on what may be done to individual citizens in the name of governmental goals. 79 N.Y.2d at 500.

The oddity and the irony here is that the TLC employed these general inspections not in response to a crime wave, but to find one. And even after the scale of the apparent crisis faded, even as the scope of the "scam" was downgraded, even if few putative victims emerged, and despite its promises, the TLC's prosecutions proceeded apace.

There is no dispute as to the facts. TLC prosecutions were based on evidence that the TLC in violation of the Fourth Amendment. This electronic dragnet was illegal in prospect under *Weaver*, as well as under *Jones*. Thus, for the reasons stated, plaintiff's motion for summary judgment as to Counts I & II of the Complaint should be granted.

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__/s/_____
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