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

JOHN PADBERG, CLIFFORD PAOLILLO, and
RASHID AHMED, individually and on behalf of
all others similarly situated,

Plaintiffs,

-Against-

DIANE MCGRATH-MCKECHNIE, RUDOLPH W. GIULIANI, JOSEPH MCKAY, MATTHEW DAUS, HARRY RUBINSTEIN, ELLIOT SANDER, HARVEY GIANNOULIS, MARVIN GREENBERG, RAMONA WHALEY, AND THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION,

Defendants.

00 Civ. 3355 (RJD)

X---X

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO CERTIFY THE CLASS

Preliminary Statement

In their 30-page brief in opposition to class certification, defendants omit many salient facts, but one stands out: They agreed to a settlement of this action that explicitly recognized the presence of a class. Though they reneged on that settlement, they nevertheless moved to enforce it. That settlement would have required the payment of millions of dollars in damages to more than 500 class members. Defendants' opposition would deprive these class members of their rightful recovery.

This being the case, how can anyone claim with a straight face that class certification is not appropriate? How can any lawyer claim that the class representatives

or class counsel is inadequate? How can any lawyer who has moved for stay after stay and extension after extension seriously claim plaintiffs' motion comes too late?[1]

The class representatives have stood fast through four-plus years of litigation, enduring the many delays, the endless obfuscation and stalling of the defendants. They have already obtained summary judgment on the most significant issue (measured by damages) in this action. For that claim alone, the plaintiff class would be entitled to damages in excess of $4 million, plus punitive damages.

Who are these class representatives? John Padberg was a taxi driver for 26 years until he was summarily suspended and had his license illegally revoked. Clifford Paolillo is a taxi driver of 34 years, who owns and operates his own cab.[2] He represents the rest of the taxi drivers, who suffer—to this day—from the *in terrorem* effect of Operation Refusal. Asked at his deposition why he was serving as a named plaintiff, Mr. Paolillo was eloquent:

> Q. Sir, why are you claiming that—what are you seeking in this lawsuit?
>
> A. What am I seeking?
>
> Q. Yes.
>
> A. I'm seeking justice for the taxi drivers and the livery drivers of New York City; that the city was totally out of control, off line, illegal in what they were doing. [I am seeking the end] if I could [to] a lot of their illegal practices, to make them think twice before they make, you know, nowhere rulings, you know, violating people's civil liberties.[3]

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[1] The timing of this motion is explained in plaintiffs' Memorandum of Law In Support of their Motion to Amend, pp. 1-3. Briefly stated, plaintiffs moved for class certification immediately following this Court's 2002 summary judgment ruling and the resolution of the appeal this Court certified.

[2] Deposition of Clifford Paolillo pp 12-15. Depositions will hereafter be cited hereafter by name and page number; they are being filed as exhibits to the Declaration of Daniel Ackman, dated Dec. 13, 2004.

[3] Paolillo 34-35.

As for class counsel, this Court knows the diligence with which he has pursued this action. It knows that the Court had already found defendants guilty of a grievous constitutional wrong that requires compensation. It has already rejected the now warmed-over defense claims of ethical violations.

Unfortunately, the same cannot be said for the defendants who level the charges. Their conduct has been a story of foot-dragging and pettifogging. They have sought (and received) more than a dozen stays of discovery. In the last three months alone, they have (1) denied the existence of a critical videotape, they later admitted possessing; (2) been late repeatedly in complying with document requests; (3) sought protective orders as to two key witnesses; (3) threatened a motion to compel acceptance of a 18-month old Rule 68 Offer, only to withdraw it; (4) sought an extension of time to respond to this motion, though they had agreed on a schedule; (5) claimed plaintiffs' counsel should be disqualified as a "fact witness"; (6) admitted they withheld a critical City Hall memo, which required the re-opening of the deposition of the lead defendants; and (7) sought an extension of time to respond to notices to admit.

Perhaps worst of all: plaintiffs have for years demanded the public statements made by the lead defendants in advance of Operation Refusal. The defendants never produced them (even after they admitted possession) and were specifically ordered to do so in October 2004. Finally, the plaintiffs obtained independently a copy of the videotape of the press conference. On that videotape, Ms. McGrath-McKechnie admits what they have forever denied: that the maximum penalty for a service refusal was (and is) a $350

fine.[4] Mr. Giuliani, meanwhile, takes credit for ordering the summary suspension policy that this Court has already found unconstitutional.[5]

Now defendants claim the *plaintiffs* have been dilatory. That's *chutzpah*.

ARGUMENT

The Class Representatives Are Well Informed Champions of a Common Cause; Both Have an Intense Interest in the Outcome of this Case

1. Commonality and Typicality:

From the very beginning, plaintiffs have always claimed there are two classes represented in this action. The first consists of more than 500 New York City taxi drivers who, because of Operation Refusal, had their licenses suspended or revoked. The second consists of other taxi drivers who were threatened by the same policy as well as by the TLC's system of judging. (Complaint ¶¶ 19, 46-48). Both classes are seeking compensatory and punitive damages, as well as injunctive relief that would bar defendants from perpetuation of their illegal and unconstitutional policies. Any "blurring" or confusion is solely in the mind of the defendants (or their lawyers). The first class (or sub-class) is bound by common questions concerning the legality of the suspensions and the revocations. All the drivers caught by the Operation Refusal "sting" suffered the same suspension. In every case, the TLC then sought to revoke.[6] Indeed, defendants admit that the "subclass of taxi drivers whose licenses were suspended or

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[4] PX 21 p. 8.

[5] PX 21, pp. 2-3, 7.

[6] Chairman Daus testified (at 127):

> Q. You would seek license revocation in every case, whether it was a bias refusal or destination refusal or hotel hack line refusal?
>
> A. That was the initial policy that started in November 1999.

revoked" is proper. (Def. Brief p. 6)[7] That some drivers found their licenses forever revoked and others suffered the lesser injustice of a suspension is relevant to damages, not class certification.

All taxi drivers are bound by the question of whether they can expect a fair hearing in the TLC courts. That the TLC has discontinued its summary suspension policy is irrelevant. There are still damages claims that involve common questions, as do all claims of TLC judicial bias. The TLC, moreover, has never wavered from its revocation policy.[8] Accordingly, plaintiffs have met the requirements of Rule 23(a).

2. <u>Fair and Adequate Representatives</u>:

Defendants claim that Mr. Padberg and Mr. Paolillo are poor representatives because of their "minimal knowledge." In fact, they have represented the class extremely well. They have lost or risked their livelihoods, and their reputations, making their individual stakes in this action substantial. As usual, defendants simply ignore—and even affirmatively misstate—the record. Their entire brief amounts to a series of obscure citations,[9] surrounded by factual misrepresentations.

<u>Jack Padberg</u>:

Mr. Padberg is an excellent representative; indeed, it's hard to imagine a better one. He testified that he communicated with counsel 20 or 25 times.[10] He has reviewed

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[7] They later claim to draw some kind of inference from the entirely irrelevant fact that Mr. Padberg did not appeal to the full commission—though he did appeal to Chairwoman McGrath-McKechnie. Here's what they omit: no one at the TLC ever told him such an appeal was possible. Padberg 153.

[8] Defendants claim they have stopped the summary suspension policy. (Def. Brief in Opposition to Class Certification p. 6) But again they omit the rest of the story: Chairman Daus insists that the TLC has the right to revoke a taxi driver's license for a first refusal offense and would do so. Daus 130.

[9] Nearly every case they cite involves claims under the Fair Debt Collection Practices Act (FDCPA). The key feature of those claims is that the maximum allowable damages under the statute were $1000. By their nature, no individual plaintiff has much knowledge or much of a stake.

[10] Padberg 118-119.

the complaint, and did so when the case was filed, and has sworn out affidavits.[11] Though he was not familiar with the legal term, "class representative," he offered a solid definition of the concept.[12] He spoke eloquently about his reasons for serving, noting his hope "that if this is resolved in my favor, that something like this would never happen to somebody else again just trying to do their job."[13] He did not know the names of the former TLC commissioners, but he surely knew about Chairman Daus and former Chairwoman McGrath-McKechnie, and of course Mayor Giuliani, who are the principal defendants.[14]

More important, defendants *do not dispute* that Mr. Padberg has "personal knowledge of the factual circumstances" relating to this case. He discussed them in detail under oath (even if defense counsel didn't care to ask) including the facts relating to his revocation and the events of his hearing.[15] This knowledge is relevant; his ability to define legal terms is not. His alleged "problems of credibility" relate to matters wholly apart from this action. There is no question his testimony here was truthful and forthcoming. He appeared at two mediation sessions and at several hearings.[16] These facts—the important facts that defendants omit— prove he is more than "adequate." He is first rate.

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[11] Defendant's statement that "he did not see any legal papers filed by his attorney" can only be deliberate lie. (Def. Brief p. 12). In fact, he testified he read the complaint around the time it was filed and that he kept a copy at home. Padberg 117. He testified he saw the hand-written settlement document as he was present when it was drafted. Padberg 133-134. He has testified by affidavit, too. Padberg 86-19.

[12] Padberg 119.

[13] Padberg 126.

[14] Padberg 116.

[15] Padberg 147-159; *see Greenspan v. Brassler*, 78 F.R.D. 130 (S.D.N.Y. 1978).

[16] Padberg 158-159.

Even if he were not, Libardo Uribe, Ioannis Sklavounakis, and Joseph Gerard are all experienced taxi drivers ready and able to represent the class. So long as one representative can fairly and adequately represent the class (and Mr. Padberg certainly can) Rule 23(a) is satisfied. 5 *Moore's Federal Practice* § 23.25[f] at 23-144; 7A *Federal Practice & Procedure: Civil* § 1765 at 277-278 & n. 34; *see also In re Crazy Eddie Sec. Litig.,* 135 F.R.D. 39, 41 (E.D.N.Y.1991).

Perhaps Mr. Padberg forgot the name of the judge. Perhaps that's unfortunate, but it has no conceivable relevance to this motion. It's much more important to heed what the judge—whatever his name is—rules. As the Supreme Court stated in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966), a Rule 23(b) case where the named plaintiff "did not understand the complaint at all," the Federal Rules were not designed to install "procedural booby traps. . . . If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to adjudication on the merits."

Cliff Paolillo:

Mr. Paolillo, of course, has been somewhat less involved.[17] No one has ever claimed his license was suspended. He represents the other drivers, any one of whom could have had his license and his taxi snatched without a hearing and later revoked. He, too, knew the complaint, and he spoke movingly about what this case is really all about. In addition to the comments quoted above, he testified: "I mean, I could have been easily

[17] Defendants state he failed to respond to interrogatories and document demands "until ordered to do so by Magistrate Gold." Defendants' brief p. 15. One would think that given defendants' record in discovery matters, they would be careful making such a charge—even if it were true. In fact, as defendants know, it's false. Judge Gold ruled that defendants' document demands as to Mr. Paolillo were irrelevant, so he was not required to respond. Nor is there any reason at all that Mr. Padberg and Mr. Paolillo would be required to talk to each other.

pulled over and said I refused and lost my license like other drivers were. My point of being here, okay, is to let the city know, here's a person, okay, who's legal, who's been legal, whose doing the right thing but yet their policies, their rulings, their decisions puts me in harm's way, my family in jeopardy. And that's what I'm seeking here; just you know, as a voice to let the city know you can't do this."[18]

He, like Jack Padberg, is a magnificent champion.[19]

3. **Alleged Mootness: The Rule 68 Claim:**

In a final desperate attempt to avoid the merits, defendants claim that Mr. Padberg's claim is moot because a year-and-a-half ago he refused a so-called Rule 68 settlement offer.[20] Defendants have tried this argument before. On Sept. 30, defense counsel wrote a letter to this Court in which she sought a conference so she could move "to compel plaintiffs' acceptance of defendants' Rule 68 Offer of Judgment." Plaintiffs argued in a letter in response that such a motion would be frivolous and the defendants dropped the idea. They do not explain what caused them to revive it. Still, their argument, then as now, depends on a mischaracterization of the law, the ignoring of

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[18] Paolillo 43-45.

[19] The arguments about the inadequacy of counsel essentially re-hash the arguments about the class representatives. There are, however, several additional factual misstatements that bear correction:

First, the December 2003 settlement (or non-settlement) "fell apart" because the defendants failed to comply with their obligations and tried to change the deal—as this Court has ruled. In so ruling the Court made clear that plaintiffs' counsel had done nothing unethical, as he was willing to submit the attorneys' fee issue to arbitration. Defendants refused. Counsel, as an officer of the court, submits he did tell Mr. Padberg about the Rule 68 offer, even though it was specious and a non-starter as it failed to begin to compensate the class. As the offer came just before real class-based negations were to begin, which Mr. Padberg attended, it was a non-event and it is no wonder it slipped Mr. Padberg's mind. After all, for more than a year, the defendants forgot about it, too. That counsel is also a journalist is, most likely, helpful to the class, but basically irrelevant. He has been an attorney in numerous class actions, albeit for the defense. The charge that counsel improperly "solicited" the clients is simply false. Though defense counsel asked some confusing questions, Mr. Padberg clearly stated that his former lawyer and garage owner, Mr. Wissak, contacted plaintiffs' counsel. Mr. Wissak made the introduction and "prearranged" the first lawyer-client contact that led to this lawsuit. Padberg 157-158; Ackman Decl. ¶ 12.

[20] The Rule 68 offer, which ignores the putative class, is dated May 12, 2003. Biberman Decl. Exh. W.

contrary authority, and a misstatement of the facts. There simply is no basis for the nonsensical idea that defendants might buy off a named plaintiff—indeed buy him off at a price of their own choosing—and thus moot a class action in which they concede they have violated the constitutional rights of more than 500 class members. Defendants also ignore the fact that Mr. Padberg and Mr. Paolillo are both seeking injunctive relief.

The Rule 68 Offer was made in May of 2003. It was not to the class, and it did not purport to settle the claims for injunctive relief. It was followed by two mediation sessions, and it was, therefore, abandoned. It is a dead letter. But even if it were not, it would not be a serious offer, and certainly would provide no argument for denying class certification.

The case on which defendants purport to rely, *Ambalu v. Rosenblatt*, 194 F.R.D. 451 (E.D.N.Y. 2000), is so far off the mark that it is impossible to believe that it could be cited in good faith. *Ambalu* involved a claim under the Fair Debt Collection Practices Act (FDCPA). The key feature of such a claim is that the maximum allowable damages under the statute were $1000. Once the defendants offered to pay the full amount, the court ruled that the case was moot. The court further held that even the class action should be dismissed. The latter ruling was specifically premised on the fact that the plaintiffs had never moved for class certification.

Defendants ignore the facts of *Ambalu* and outrageously state, "This case presents precisely the same situation." Defendants also fail to cite later-decided Eastern District and Southern District cases that clearly and specifically distinguish *Ambalu*. Finally, defendants disregard earlier Supreme Court and Circuit Court cases in clear opposition to the principle it puts forward.

In *McDowall v. Cogan*, 216 F.R.D. 46 (E.D.N.Y. 2003), also a FDCPA case, the court expressly distinguished *Ambalu* on the ground that the plaintiff had sought to certify the class. The court held: "It follows that if a defendant wishes make an offer of judgment prior to class certification … *it must do so to the class and not to the named plaintiff alone*." *Id.* at 51 (emphasis added). *Schaake v. Risk Management Alternatives, Inc.*, 202 F.R.D. 108 (S.D.N.Y. 2001), makes the same distinction, and the court noted, "[I]t has long been recognized that Rule 68 Offers of Judgment have no applicability to matters legitimately brought as class actions." (citing cases) The Supreme Court, as the *Schaake* court noted, has long recognized that a defendant cannot avoid a class action simply by offering to even a full settlement with the representative—even where a motion for class certification has been denied. *See*, *e.g.*, *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980). If the rule were otherwise, there would be no class actions.

Contrary to the current claim, the offer— $25,000— was to all the named plaintiffs, not just to Mr. Padberg. Plaintiffs rejected it on the obvious grounds that this action is a class action and any settlement would have to resolve the claims of the entire class. At the time, defendants were successfully opposing all motions for discovery as to damages and other issues in part because plaintiffs' appeals as to the constitutionality of the TLC's revocation policy were still pending.

Defendants still state that Mr. Paolillo is not seeking damages. Asked that question at his deposition, he said he *is* seeking damages. "I think I deserve some damages, too, from this, yes," he said, and he repeated himself more than once.[21] Defense counsel could not possibly have been confused. They just choose to misstate the

[21] Paolillo 66, 67.

facts. Mr. Ahmed is seeking damages, including punitive damages. His claims have not been dismissed. Even if they were, he would still be a member of the class.

The so-called offer was for $25,000, presumably to be divided three ways. But even if Mr. Padberg was to receive half or all (and there is no reason to assume he would) the offer would be inadequate and would moot nothing. Mr. Padberg was suspended for three months and his license was permanently revoked. Accordingly his personal damages easily exceed $25,000—and that is before adding punitive damages. At trial, Mr. Padberg will be asking the jury to award at least $100,000 to him alone.[22] The sum offered was, of course, much less than 1% of the damages that plaintiffs would have received in the failed settlement. Of course, that offer was made before discovery dramatically strengthened the plaintiffs' case. For that, the plaintiff class owes a debt of gratitude to Mr. Padberg.

CONCLUSION

For the reasons stated, including defendants' own recognition that a class exists, this Court should grant plaintiffs' motion to certify the plaintiff class.

Dated: New York, New York
December 14, 2004

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[22] Defendants rehearse once again their oft-argued opposition to punitive damages, as they do in their motion for summary judgment. Repetition does not help. For an explanation of the reasons why punitive damages are certainly available (which is to say a jury could award them, and even that the Court could so in this case) *see* plaintiffs' brief in support of their motion for summary judgment pp.46-49.

TO:
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Counsel For Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December __, 2004, I caused the foregoing to be served as indicated on the parties listed below.

____
Daniel L. Ackman

BY HAND TO:
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