

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of SYSCO METRO
NY, LLC, and PARKING SURVIVAL EXPERTS
d/b/a parkingticket.com, on their own behalf and on behalf
of all others similarly situated,

~~Plaintiffs~~-Petitioners,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules and for Other Legal and
Equitable Relief,

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NYS SUPREME COURT - CIVIL
- against -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF FINANCE COMMERCIAL
ADJUDICATIONS UNIT a/k/a ADJUDICATION DIVISION,
and JACQUES JIHA, Individually and as New York City
Commissioner of Finance,

~~Defendants~~-Respondents

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TO THE ABOVE NAMED DEFENDANTS-RESPONDENTS:

PLEASE TAKE NOTICE that upon the annexed Verified Petition dated September 2, 2015, upon the exhibits annexed thereto, and upon all other papers and proceedings heretofore had herein, ~~Plaintiff~~-Petitioner SYSCO METRO NY, LLC, on its own behalf and on behalf of all others similarly situated ("the class"), will make application to this Court at the Courthouse located at 60 Centre Street, New York, NY 10007, Submission Part, Room 130, on the eighth day of October 2015, at 9:30 a.m. on that day, or as soon thereafter as counsel may be heard,

FOR A JUDGMENT pursuant to Sections 3001, 6301, 6311 and 7803 of the Civil Practice Law and Rules, the common law of the State of New York, and this Court's inherent

Index No. 101637/15

**NOTICE OF
PETITION
(~~HYBRID ACTION~~)
(CLASS ACTION)**

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CITY OF N.Y. LAW DEPT.
OFFICE OF CORP. COUNSEL
COMMUNICATIONS UNIT

power, granting the following relief:

1. Vacating and annulling the final determinations made by ~~defendants~~-respondents as to the parking summonses issued to SYSCO METRO NY, LLC and listed in Exhibits A and D to this petition and such other and further summonses containing like issues that may become final on administrative appeal in the future, on the ground that such determination is arbitrary, capricious and contrary to law;
2. Directing ~~defendants~~-respondents to remit all fines paid by SYSCO METRO NY, LLC, in connection with the above referenced summonses and any summonses containing like issues that may become final on administrative appeal in the future;
3. Declaring that ~~defendants~~-respondents' policies of (a) of upholding tickets for alleged trailer lift-gate violations which are issued to tractors with separate license plates, and/or (b) deeming "DELV," "TRUCK" or any notation other than "Tractor" and "Trailer" to be an accurate body type for tickets issued to tractors or trailers, respectively, is violative of Section 238 of the Vehicle and Traffic Law;
4. Permanently enjoining ~~defendants~~-respondents from adjudicating guilt as to any parking summons on which a lift-gate violation is issued to a tractor, and/or any parking summons on which tractors and trailers are described by any body type other than "tractor" or "trailer" respectively, and requiring them to dismiss all such summonses that now or henceforward are before them for adjudication;
5. Preliminarily enjoining ~~defendants~~-respondents from adjudicating guilt as to any parking summons on which a lift-gate violation is issued to a tractor, and/or any parking summons on which tractors and trailers are described by any body type other than "tractor" or "trailer" respectively, pending the resolution of this action;

6. Vacating and annulling any and all determinations previously made by respondents in which adjudications of guilt were predicated upon lift-gate violations issued to tractors, and/or determinations previously made by respondents in which adjudications of guilt were predicated upon parking summonses on which tractors and trailers are described by any body type other than "tractor" or "trailer" respectively and requiring respondents to remit any and all fines paid thereon by any member of the class specified herein; and

7. Granting such other and further relief as may seem just and proper.

PLEASE TAKE FURTHER NOTICE that respondent's answer and supporting papers, if any, shall be served and filed at least five (5) days before the return date of this Petition and that, pursuant to Section 7804(e) of the Civil Practice Law and Rules, respondent shall file with the Clerk of the Court a certified transcript of the record of the proceedings to be considered herein; and

PLEASE TAKE FURTHER NOTICE that petitioner designates New York County as the place of hearing pursuant to CPLR § 506(b), on the ground that the determination complained of occurred within that County; and

PLEASE TAKE FURTHER NOTICE that the within is a ~~"hybrid action"~~ in which declaratory relief, injunctive relief and damages separate and apart from the Article 78 claims are demanded, see Heimbach v. Mills, 54 A.D.2d 982 (2d Dept. 1976), and that the Verified Petition herein also constitutes a complaint as to the causes of action for declaratory relief, injunctive relief and/or damages, and that such causes of action shall be litigated and adjudicated pursuant to the procedures applicable to such claims.

Dated: New York, NY
September 2, 2015



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New York, NY 10038

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of SYSCO METRO
NY, LLC, and PARKING SURVIVAL EXPERTS
d/b/a parkingticket.com, on their own behalf and on behalf
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~~Plaintiffs~~-Petitioners,

Index No. 101637/15

VERIFIED
PETITION
~~(HYBRID ACTION)~~
(CLASS ACTION)

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules and for Other Legal and
Equitable Relief,

– against –

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF FINANCE COMMERCIAL
ADJUDICATIONS UNIT a/k/a ADJUDICATION DIVISION,
and JACQUES JIHA, Individually and as New York City
Commissioner of Finance,

~~Defendants~~-Respondents
-----X

~~Plaintiff~~-Petitioner SYSCO METRO NY, LLC, on its own behalf and on behalf of all
others similarly situated, complaining of ~~defendants~~-respondents THE CITY OF NEW YORK,
THE NEW YORK CITY DEPARTMENT OF FINANCE COMMERCIAL ADJUDICATIONS
UNIT a/k/a ADJUDICATION DIVISION, and JACQUES JIHA, Individually and as New York
City Commissioner of Finance, hereby alleges upon information and belief as follows:

NATURE OF THE ACTION

1. This is a ~~hybrid~~ class action for Article 78 relief, declaratory judgment, injunctive
relief and remission of fines unlawfully imposed. ~~Plaintiffs~~-Petitioners challenge two past and

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ongoing policies of ~~defendant~~-respondents. The first policy involves upholding tickets for alleged trailer lift-gate violations that are issued to tractors that by their physical nature have no lift gates and in place of a cargo area, has a trailer bed. The tractors to which these tickets are issued have with different license plate numbers than the trailers to which the lift gates may actually be affixed, and the body type on the ticket is not described as a trailer where a lift-gate may be affixed, but instead is described as a tractor, or a truck, and/or "DELV." The second policy involves upholding tickets in which the body type description of tractors is listed as "DELV," "TRUCK" or anything else besides "tractor." ~~Plaintiffs~~-Petitioners seek annulment of the adjudications of guilt made by defendants-respondents as to 367 parking summonses in the first of the above-stated categories and an additional 1,019 summonses in the second category, as well as such summonses containing like issues as may become final on administrative adjudication in the future, and seeks declaratory relief, injunctive relief and remission of fines on behalf of all those who have in the past, or will in the future, receive such summonses.

PARTIES, JURISDICTION AND VENUE

2. ~~Plaintiff~~-Petitioner SYSCO METRO NY, LLC ("Sysco") is a foreign limited liability company licensed to conduct business in the State of New York, existing under and by virtue of the laws of the State of Delaware, with its principal place of business in Jersey City, New Jersey.

3. ~~Plaintiff~~-Petitioner PARKING SURVIVAL EXPERTS d/b/a parkingticket.com is, and was at all times relevant to this lawsuit, a domestic corporation existing under and by virtue of the laws of the State of New York, with its principal place of business in Paramus, New Jersey, and is a registered ticket broker with the New York City Department of Finance and empowered by ~~Plaintiff~~-Petitioner Sysco to defend parking summonses on its behalf.

4. ~~Defendant~~-Respondent CITY OF NEW YORK is a municipal corporation existing under and by virtue of the laws of the State of New York with the powers and duties conferred thereby.

5. ~~Defendant~~-Respondent NEW YORK CITY DEPARTMENT OF FINANCE COMMERCIAL ADJUDICATIONS UNIT a/k/a ADJUDICATION DIVISION (“the Unit”) is an agency of defendant City of New York, and is empowered by law to adjudicate parking summonses issued within the City of New York.

6. ~~Defendant~~-Respondent JACQUES JIHA is a natural person who is, and was at all times pertinent to this action, Commissioner of the New York City Department of Finance, and is sued in his individual and official capacities.

7. Venue is properly laid in the County of New York because the determinations complained of were made within that County.

THE CLASS

8. The Class consists of all persons and/or entities who (a) own, operate, manage and/or control any vehicle that is, was or will be operated within the City of New York; and (b) have received, or will receive in the future, one or more parking summonses in which (i) a lift gate violation is ascribed to a tractor that has no lift gate and that has license plates different from the trailer to which the lift gate may actually be affixed, and in which the body type on the ticket is not described as a trailer (“Lift Gate Summonses”); and (b) tickets, other than for lift gate violations, in which the body type of a tractor is described as anything other than “tractor” (“Body Type Summonses”) and/or (ii) an alleged

9. It is estimated that tens of thousands, if not hundreds of thousands, of Lift Gate Summonses and Body Type Summonses have been issued to thousands of separate persons

and/or entities within the Class.

10. Due to the large number of Lift Gate Summonses and Body Type Summonses issued to members of the Class, it would be impracticable and inefficient to challenge them via separate actions or in small groups.

11. The Body Type Summonses and Lift Gate Summonses issued to Sysco, which are challenged in this action, are typical of those issued to members of the Class.

12. All members of the Class have the same complete legal defense to the Body Type Summonses and Lift Gate Summonses that Sysco does, namely, incorrect description of the vehicle body type, and (with respect to the Lift Gate Summonses) the license plate number, pursuant to Section 238 of the Vehicle and Traffic Law.

13. The questions of law and fact common to the Class predominate over any questions affecting only individual members.

14. Sysco will fairly and adequately protect the interests of the Class.

15. A class action is superior to the other methods available for the fair and efficient adjudication of the controversy.

16. Because this action challenges an ongoing and continuing government policy, class action relief is appropriate. See Allen v. Blum, 58 N.Y.2d 954 (1983).

RELEVANT FACTS

17. The allegations in paragraphs 1 through 16 of the Petition and ~~Complaint~~ are repeated and realleged as if fully set forth herein.

18. ~~Plaintiff~~ Petitioner Sysco owns and operates a fleet of vehicles that make deliveries in the City of New York and elsewhere.

19. Some of the vehicles owned and operated by Sysco within the City of New York

are tractors and others are trailers and yet others are trucks. The tractors contain cabs, engines and trailer hookups, and the trailers are configured to be attached to the tractors via the hookups and via several brightly colored wires that attach the two vehicles for braking and signaling. Tractors are issued their own unique license plate number and trailers are issued their own license plate number which, respectively are affixed to the vehicle as required by law.

20. Because the tractors can be, and are, driven separately from the trailers, and because any of a number of trailers might be hooked up to a given tractor on a given day, the tractors have different license plate numbers from the trailers. Indeed, a tractor may even be registered in a different state from the trailer to which it is attached on any given day.

21. Tractors and trailers additionally have separate, readily observable exhaust systems (tractors often have vertical exhaust which trucks do not), axles and tires, and have different sets of wheels in different sizes.

22. The above-stated features that distinguish tractors from trailers are readily observable upon even a cursory inspection.

23. Because the tractors do not carry cargo, they do not have any lift gates; instead, only the trailers can have (although they do not necessarily have) lift gates. Each tractor has a trailer bed where a truck does not. This element, the trailer bed, is easily distinguishable on a tractor versus a truck as ~~The rear parts of the tractors are equipped with trailer beds.~~ “Trucks” “DELVS” and “Trailers” do not have trailer beds.

A. The Lift Gate Summonses.

24. Annexed as Exhibit A is a list of 367 Lift Gate Summonses issued by respondents to Sysco.

25. Each of the summonses listed on Exhibit A was issued to a tractor.

26. Each of the summonses listed on Exhibit A alleged a lift gate violation.
27. On each of the summonses listed on Exhibit A, the license plate number and state of a tractor which has no lift gate, rather than the license plate number and state of the trailer to which the lift gate may actually be affixed, is listed.
28. On each of the summonses listed on Exhibit A, the body type of the vehicle is not described as “trailer.” Some describe the body type as “tractor,” which is a correct description of the vehicle associated with the license plate on the face of the summons, but which is *not* a correct description of the trailer to which the lift gate is affixed. Others incorrectly describe the body type as “truck,” “DELV” or some other notation.
29. Sysco has retained Parking Survival Experts d/b/a parkingticket.com (“PSE”), a registered ticket broker, to represent it with respect to parking summonses in New York City, and PSE has in fact represented it with respect to these summonses.
30. PSE appeared at the Commercial Adjudications Unit (“the Unit”) on behalf of Sysco to contest each of the summonses listed on Exhibit A.
31. Annexed as Exhibits B-1 and B-2 are the administrative records of two sample summonses which are typical of the Lift Gate Violations. These show that PSE submitted proof to the Unit as to each summons, including (a) photographs showing that the vehicle was a tractor and that readily observable features showed that the tractor was a separate and distinct vehicle; (b) photographs showing that the tractor did not have a lift gate; (c) registration documents for the tractor; and (d) official notices of violation (tickets) issued by Traffic Enforcement Agents (ticket agents) and police officers within 30 days before and after the subject summons, issued to the same vehicle in which the body type was correctly described.
32. Evidence of the same type was presented as to each of the other summonses listed

on Exhibit A. The administrative record for each such summons is submitted herewith on a DVD which is annexed as Exhibit C.

33. PSE argued, before an administrative law judge employed by the Unit, that each and every one of the summonses listed on Exhibit A should be dismissed because the body type and plate number were described incorrectly.

34. The administrative law judges rejected this argument, adjudicated Sysco guilty on each of the summonses, and imposed fines.

35. PSE administratively appealed the summonses to the Appeals Board of the Unit, again contending that they must be dismissed because the body type and plate number were described incorrectly.

36. The administrative law judges hearing the appeal rejected this argument and affirmed the adjudications of guilt.

37. No further administrative remedies are available to Sysco with respect to the subject summonses listed on Exhibit A.

38. A substantial number of other Lift Gate Summonses, similar in all respects to those listed in Exhibit A and to which Sysco has a like defense, are currently in the administrative adjudication pipeline, and it is expected that further Lift Gate Summonses will be issued in the future. ~~Plaintiff~~ Petitioner reserves the right to add such summonses to this petition as they become ripe for review.

B. The Body Type Summonses.

39. Annexed as Exhibit D is a list of 1,019 Body Type Summonses issued by respondents to Sysco.

40. Each of the summonses listed on Exhibit D was issued to a tractor.

41. On each of the summonses listed on Exhibit D, the body type of the vehicle is not described as “tractor” but is instead described as “truck,” “DELV” or some other notation.

42. As with the Lift Gate Summonses, PSE has in represented Sysco with respect to the summonses annexed as Exhibit D, and appeared at the Unit to contest each of those summonses.

43. Annexed as Exhibits E-1 and E-2 are the administrative records of two sample summonses which are typical of the Body Type Summonses. These show that PSE submitted proof to the Unit as to each summons, including (a) photographs showing that the vehicle was a tractor and that readily observable features showed that the tractor was a separate and distinct vehicle; (b) photographs showing that the tractor did not have a lift gate; (c) registration documents for the tractor; and (d) official notices of violation (tickets) issued by Traffic Enforcement Agents (ticket agents) and police officers within 30 days before and after the subject summons, issued to the same vehicle, in which the body type was correctly described.

44. Evidence of the same type was presented as to each of the other summonses listed on Exhibit D. The administrative record for each such summons is included in the DVD, previously referred to above, which is annexed as Exhibit C.

45. In addition, annexed as Exhibit F a list of body types recognized by the New York State Department of Motor Vehicles, showing that “tractor” is a distinct body type and that “DELV,” “Truck” and other such notations are not the same as “tractor.” “DELV” and “Truck” are used exclusively for “one-piece” truck types that do not have separate tractors and trailers. Vehicles that may be given the body type “DELV” include “*closed* trucks,” coaches, curbside trucks (which refers to trucks that sell food or other items at the curb), delivery trucks, express trucks, metro trucks, package trucks, panel trucks, parcel trucks, step-in trucks (in which the cab

can be accessed via a step), street trucks (a type of pickup), and walk-in trucks.

46. PSE argued, before an administrative law judge employed by the Unit, that each and every one of the summonses listed on Exhibit D should be dismissed because the body type was described incorrectly.

47. The administrative law judges rejected this argument, adjudicated Sysco guilty on each of the summonses, and imposed fines.

48. PSE administratively appealed the summonses to the Appeals Board of the Unit, again contending that they must be dismissed because the body type was described incorrectly.

49. The administrative law judges hearing the appeal rejected this argument and affirmed the adjudications of guilt.

50. No further administrative remedies are available to Sysco with respect to the subject summonses listed on Exhibit D.

51. A substantial number of other Body Type Summonses, similar in all respects to those listed in Exhibit D and to which Sysco has a like defense, are currently in the administrative adjudication pipeline, and it is expected that further Body Type Summonses will be issued in the future. ~~Plaintiff~~ Plaintiff-Petitioner reserves the right to add such summonses to this petition as they become ripe for review.

C. Facts of General Application.

52. The Lift Gate Summonses and Body Type Summonses were adjudicated guilty by the Unit, and affirmed by the Unit's appellate panel, based on an ongoing policy and practice of defendants-respondents City, Finance and Unit.

53. In particular, the ~~defendants-~~ defendants-respondents have adopted a policy of upholding what they describe as "reasonable" body type descriptions or, as Department of Finance General

Counsel Diana Beinart stated at a recent meeting with representatives of PSE including the undersigned counsel, body type descriptions that comport with the “spirit” of the Vehicle and Traffic Law, rather than requiring strict compliance with such law.

54. Sysco and PSE have attempted to obtain review and revision of this policy via negotiation with the Unit, but the policy continues in effect and practice.

**AS AND FOR A FIRST CAUSE OF ACTION: ARBITRARY,
CAPRICIOUS AND CONTRARY TO LAW**

55. The allegations in paragraphs 1 through 54 of the Petition ~~and Complaint~~ are repeated and realleged as if fully set forth herein.

56. An administrative determination must be set aside as arbitrary and capricious under CPLR § 7803 if it is based on an incorrect legal standard. See New York Times Co. v. City of New York Comm’n on Human Rights, 41 N.Y.2d 345 (1977); see also McCambridge v. McGuire, 62 N.Y.2d 563, 568 (1984).

57. The form of parking summonses, and the adjudication thereof within the State, are governed by Section 238 of the Vehicle and Traffic Law.

58. VTL § 238(2) states in pertinent part that the notice of violation, whether or not personally served on the owner of the vehicle, shall contain *inter alia* “the **plate designation** and the plate type as shown by the registration plates of said vehicle and the expiration date; the make or model, and **body type** of said vehicle; a description of the charged violation... and the date, time and particular place of occurrence of the charged violation” (emphasis added). The presence of these elements is essential because “summonses must be written with sufficient clarity and detail so as to identify the proper offender and eliminate the possibility that another motorist operating another vehicle was at fault.” See Memorandum in Support of Senate Bill 3396-A.

59. As stated by Assemblyman Feldman, whose letter in support of the bill is attached as Exhibit G, the reason the statute was amended and required those five elements was because motorists throughout New York were being dunned for tickets that were not theirs because of relaxed standards for identifying people that permitted notices of violations to be sent even if the registration information did not match resulting in innocent residents paying fines. See Letter of Assemblyman Daniel L. Feldman, Governor Pataki's Bill Jacket, Chapter 224, 1995.

60. VTL § 238(2-a)(b) specifies that “[i]f any information which is required to be inserted on a notice of violation is omitted from the notice of violation, *misdescribed*, or illegible, the violation *shall* be dismissed upon application of the person charged with the violation.” (Emphasis added).

61. The New York Court of Appeals has held, in a series of two cases, that the provisions of VTL §§ 238(2) and 238(2-a) are mandatory, and that the Unit has no discretion to decline to dismiss a parking summons if any of the required information is misdescribed. Moreover, the courts have repeatedly and consistently rejected the use of any “substantial compliance” or “reasonableness” standard, and have instead required *strict* compliance.

62. The first of the relevant cases was Matter of Ryder Truck Rental, Inc. v. Parking Violations Bureau, 62 N.Y.2d 667, 669-70 (1984), which stated that “[t]he provisions explicitly prescribed by the Legislature in the statute are mandatory,” and that there is “no warrant or justification in the articulation of the statute for differentiation between the expiration date and the plate designation, the plate type, the make or model, or the body type of the vehicle. To hold all these elements directory only would evidently be to eviscerate the legislative enactment.”

63. Subsequently, in Matter of Wheels, Inc. v. Parking Violations Bureau, 80 N.Y.2d 1014, 1015-16 (1992), the Court of Appeals stated as follows:

In Matter of Ryder Truck we declared that five identification elements, *including plate type*, on a parking ticket were mandatory, and the omission of one element required dismissal (Matter of Ryder Truck Rental v. Parking Violations Bur., 62 N.Y.2d 667, 476 N.Y.S.2d 285, 464 N.E.2d 983). We now amplify that decision and hold that *a misdescription of any of the five mandatory identification elements also mandates dismissal*. (Emphasis added).

64. The courts in Adams v. City of Buffalo Parking Violations Bureau, 161 Misc. 2d 683, 685 (Sup. Ct., Erie Co. 1994), Crichlow v. New York City Dep't of Finance Adjudication Div., 2011 WL 1662916 (Sup. Ct., Queens Co. 2011), People v. Gabbay, 175 Misc. 2d 421, 423 (App. Term, 2d Dept. 1997) have also noted that any omission or misdescription of the “five identification elements,” including plate designation and body type, mandates dismissal.

65. Moreover, “the Court of Appeals ruling in [Wheels] does not provide for levels of misdescription *and it does not provide for an exception for small errors*.” Crichlow, 2011 WL 1662916, *3 (emphasis added). On this ground, the Crichlow court rejected the Unit’s argument that a description of a two-door sedan as a four-door sedan was close enough because it got the general body type right. See id. This constituted a clear rejection of any “reasonableness” or other approximate standard for adjudicating misdescriptions, and held that a body type misdescription cannot be overlooked simply because it is a “small error” or because it describes the correct general category of vehicle (such as a sedan).

66. In parking summons cases, “[t]he Court of Appeals has required strict compliance with the requirements of the VTL.” Dong Sic Ko v. City of New York Dep't of Finance Parking Violations Bureau, 28 Misc. 3d 603, 608 (Sup. Ct., N.Y. Co. 2010) (Schlesinger, J.).

67. Thus, unlike desk appearance tickets, traffic summonses or criminal court accusatory instruments, misdescriptions of identification elements in parking summonses, including body types and plate designations, are not amendable defects.

68. In Nestle Waters North America, Inc. v. City of New York, 121 A.D.3d 124 (1st Dept. 2014), the Appellate Division, First Department, recently reaffirmed that strict compliance with VTL § 238 is mandated. The Nestle case involved license plates that read “Apportioned” but were described on summonses as “IRP,” which the Unit upheld because Apportioned plates were designated as IRP in the New York State Department of Motor Vehicles’ internal coding. See id. at 126-27, 129.

69. The First Department described the state of the law concerning VTL § 238(2) as follows:

VTL § 238(2) provides the requirements for initiating a prosecution for parking violations. The statute sets forth five mandatory identification elements which may not be omitted from a parking summons if it is to survive a jurisdictional challenge and avoid dismissal. The mandatory five elements are 1) plate designation 2) plate type 3) expiration date of registration; 4) make or model of vehicle and 5) body type of vehicle. *The Court of Appeals has required strict compliance with the requirements of VTL § 238(2)... a misdescription of any of the five mandatory identification elements also constitutes a jurisdictional defect mandating dismissal.*

Id. at 128-29 (citations omitted) (emphasis added). Indeed, the court reiterated the words of the Court of Appeals in Ryder, supra, that “[t]he provisions explicitly prescribed by the Legislature in the statute are mandatory” and that “[t]o hold all these elements directory only would evidently be to *eviscerate* the legislative enactment.” Id. (emphasis added), quoting Ryder, 62 N.Y.2d at 669-70.

70. Stating that it was “bound by the plain language of VTL § 238(2),” the Nestle court found that the “IRP” summonses violated the law because “IRP” was not an accurate description of what was shown on the registration plates. Id. at 129. Moreover, although the court was “cognizant” that the New York DMV used “IRP” and “Apportioned” interchangeably

and that “IRP” was more convenient for parking violations officers due to it being present on their automatic coding machines while “Apportioned” was not, it held that “the statute simply does not allow for such administrative expedience, and neither this Court nor an administrative agency is permitted to effectively amend a statute to permit such shortcut.” Id. at 129-30.

71. In sum, the Nestle court held that deference was not due to the City’s administrative procedures or convenience when interpreting VTL § 238(2), and that instead, summonses must conform to the strict terms of the statute. The Nestle case clearly rejected a “convenient” or “close enough” standard.

72. Defendants-respondents have nevertheless adopted a policy of upholding the Lift Gate Summonses and Body Type Summonses on the basis of, essentially, “good enough for government work,” i.e., that approximate body type and plate descriptions and/or those that comport with the “spirit” of the VTL are acceptable.

73. This is wrong, however, because the case law of the Court of Appeals and the First Department clearly requires strict compliance, not spiritual compliance.

74. As to the Lift Gate Summonses, it is obvious that the lift gate is attached to the trailer rather than the tractor, because the tractor does not deliver cargo. Tractors do not have lift gates on the back, but instead have trailer beds. Moreover, as discussed above, the tractor and trailer are separate entities. They have different license plates (and may even be registered in different states), different exhaust systems and axles, and the tractor may be operated independently from the trailer. One tractor may be hooked up to a given trailer one day and another trailer the next. It is readily observable that the tractor and trailer are separate, and that the lift gate is exclusively part of the trailer.

75. In addition, it is common knowledge that, because tractors may be operated

independently and may be hooked up to any of a number of trailers, they have separate insurance policies known in the industry as “bobtail” policies. Tractors and trailers may even be separately owned. As such, “[a] tractor should be distinguished from a trailer” in legal terms. Mercure v. SBH Trucking, Inc., 2014 WL 4343790, *1 n.2 (Sup. Ct., Kings Co. 2014).

76. As such, the Lift Gate Summonses fail to comply with VTL § 238(2) for two separate reasons, *either* of which is sufficient by itself to require dismissal. First, they have an incorrect plate designation, in that they contain the license plate of the tractor rather than the separate license plate of the trailer to which the lift gate is attached. Second, and independently, they contain body type descriptions listing the vehicle as a tractor, or as some other description that is not “trailer.”

77. Likewise, the Body Type Summonses fail to comply with the VTL, because the DMV recognizes only “tractor,” distinct from any other body type, as the body type for tractors. Other body type descriptions such as “DELV” or “Truck” are exclusively for one-piece trucks. Moreover, no truck has two plates with distinct license plate numbers; one in the front and a second in the rear, and possibly, the license plates are from different states, as is often the case with tractors and the separate trailers to which they may be attached. A tractor may not properly be described as “Truck” or “DELV,” because it is not a complete truck or a complete delivery vehicle, and therefore, “Truck,” “DELV” or similar notations are simply not accurate descriptions of the vehicle to which the notice of violation is issued.

78. Annexed hereto as Exhibit H is the affidavit of Joe Cannon, Director of Transportation for Sysco, stating that he is highly familiar with Sysco’s vehicles and that in all instances where a trailer is connected to a tractor, the total vehicle length exceeds 35 feet. This means that, under 34 RCNY § 4-15(b)(3), they cannot be a single vehicle, because this rule

provides in pertinent part that “[t]he length of a single vehicle, inclusive of load and bumpers shall not be more than 35 feet.” If there is solely a tractor, then it is under 35 feet but is obviously not a truck or delivery vehicle because it contains only a cab and a trailer bed. Thus, as a matter of law, single-unit body type descriptions such as “Truck,” “DELV” or “REFRIG” are inaccurate descriptions of a tractor. The Body Type Summonses, in which tractors are described using the above designations, contain body type misdescriptions and do not strictly comply with VTL § 238.

79. To the extent that out-of-state vehicles, including tractors, use registration cab cards rather than stickers, this does not make it lawful to describe such tractors as “Truck” or “DELV,” because the physical body type may easily be ascertained by visual inspection separate and apart from whatever a registration sticker may say. VTL § 238(2) requires that the body type description match the vehicle itself, which any ticket agent with functioning eyes can see. See Crichlow, *supra* (declining to excuse body type misdescription of automobile registered in Virginia). Furthermore, an agent could measure the connected tractor and trailer to ascertain that they are longer than 35 feet and thus cannot be a single vehicle under the RCNY. As further discussed above, PSE submitted other tickets issued to the subject vehicles, written by other issuing agents who were able to determine the body type of the vehicle to be a tractor with no problem. If other issuing agents were able to determine the vehicles’ correct body type, then there is no reason that all issuing agents should not be required to do so, particularly when the law explicitly requires it as stated above.

80. Consequently, ~~defendants-~~respondents’ adjudication of guilt as to the Lift Gate Summonses and Body Type Summonses, and their administrative affirmance of such adjudication, were arbitrary, capricious and contrary to law, and must be annulled.

**AS AND FOR A SECOND CAUSE OF ACTION:
REMISSION OF FINES**

81. The allegations in paragraphs 1 through 80 of this Petition ~~and Complaint~~ are repeated and realleged as if fully set forth herein.

82. Because the subject Sysco summonses are arbitrary, capricious and contrary to law, the fines paid by Sysco thereon must be remitted, together with such pre-judgment interest as is allowed by law. See Adams, supra.

**AS AND FOR A THIRD CAUSE OF ACTION:
DECLARATORY JUDGMENT**

83. The allegations in paragraphs 1 through ⁸²~~79~~ of this Petition ~~and Complaint~~ are repeated and realleged as if fully set forth herein.

84. Because the conduct complained of herein springs from an ongoing and continuing governmental policy, declaratory relief on behalf of the Class is appropriate. See Allen v. Blum, 58 N.Y.2d 954 (1983).

85. A declaratory judgment would effect a final resolution as to the rights and other legal obligations as between defendants-respondents and the Class. See CPLR § 3001.

86. Because the Class includes people and/or entities who will be issued Lift Gate Summonses and/or Body Type Summonses in the future, it will be without adequate remedy if declaratory relief is not granted.

87. Accordingly, this Court should issue declaratory judgment specifying (a) that summonses alleging lift gate violations may not be issued to tractors, and must contain the license plate designation and body type description of a vehicle other than a tractor; (b) that summonses issued to tractors must describe the body type as “tractor” and may not use “DELV,” “truck” and/or other body type descriptions reserved for complete one-piece vehicles; (c) that

any adjudication of guilt, or affirmance of such adjudication, of a Lift Gate Summons or Body Type Summons is in violation of Section 238 of the Vehicle and Traffic Law; and (d) that dismissal of all Lift Gate Summonses and/or Body Type Summonses that have been issued or may be issued in the future is mandated by Section 238 of the Vehicle and Traffic Law.

**AS AND FOR A FOURTH CAUSE OF ACTION:
PERMANENT INJUNCTION**

88. The allegations in Paragraphs 1 through 87 of this Petition and ~~Complaint~~ are repeated and realleged as if fully set forth herein.

89. The Class has no adequate remedy at law absent a permanent injunction.

90. In the absence of a permanent injunction, the Lift Gate Summons and Body Type Summons issues are likely to recur.

91. Since the rights of the Class are clear, the Court should intervene to prevent further violations of such rights rather than requiring present and future members of the Class to wait until wrong is done and then challenge each unlawful act individually.

92. The Class will suffer irreparable harm absent injunctive relief.

93. Consequently, this Court should issue a permanent injunction prohibiting defendants-respondents, their employees, agents and/or servants, from (a) adjudicating guilt as to any Lift Gate Summons and/or Body Type Summons as hereinbefore described, and/or (b) affirming any adjudication of guilt that may be made as to such summons.

**AS AND FOR A FIFTH CAUSE OF ACTION:
PRELIMINARY INJUNCTION**

94. The allegations in Paragraphs 1 through 93 of this Petition and ~~Complaint~~ are repeated and realleged as if fully set forth herein.

95. In order to obtain a preliminary injunction, "the movant must establish (1) a

likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balancing of the equities in favor of granting the injunction." Winzelberg v. 1319 50th Realty Corp., 52 A.D.3d 700, 701 (2d Dept. 2008); Master Mech. Corp. v. Macaluso, 51 A.D.3d 739, 741 (2d Dept. 2008).

96. Plaintiff-Petitioner and the Class have shown a clear likelihood of succeeding on the merits by virtue of the points and authorities set forth in paragraphs 53 through 80 above.

97. In the absence of a preliminary injunction, ~~Plaintiff~~-Petitioner and the Class will suffer irreparable harm, in the form of (a) permanent loss of the right to a hearing, an administrative appeal and/or to a judicial challenge of Lift Gate Summonses and/or Body Type Summonses that are currently in the pipeline or which may be subject to defendants-respondents' adjudication in the future; (b) fines, judgments and penalties on such summonses; and/or (c) the possibility of booting and/or confiscation of their vehicles due to failure to pay unlawful summonses that are under challenge.

98. The balance of equities clearly favors granting a preliminary injunction because no prejudice will inure to ~~defendants-respondents~~ if Lift Gate Summonses and/or Body Type Summonses that are presently in the system, or that may enter the system in the future, are stayed. Specifically, if ~~defendants-respondents~~ prevail in this action, they will be able to adjudicate the summonses and obtain any amounts which may be due thereon.

99. Accordingly, this Court should issue a preliminary injunction barring defendants-respondents from (a) adjudicating guilt as to any Lift Gate Summons or Body Type Summons as hereinbefore described, (b) affirming any adjudication of guilt already issued as to any such summons, and/or (c) issuing penalties or judgments as to any such summons. while this lawsuit remains pending.

100. In addition, this Court should issue a preliminary injunction (a) staying any and all Lift Gate Summonses and/or Body Type Summonses that have hitherto been issued or that may be issued in the future; (b) enlarging the time in which members of the Class may seek adjudication of such summonses until this lawsuit is determined; and (c) enlarging the time in which members of the Class may appeal any adjudication of guilt as to such summons until this lawsuit is determined.

**AS AND FOR A SIXTH CAUSE OF ACTION: REMISSION
OF FINES PAID BY THE CLASS**

101. The allegations in paragraphs 1 through 100 of this Petition and ~~Complaint~~ are repeated and realleged as if fully set forth herein.

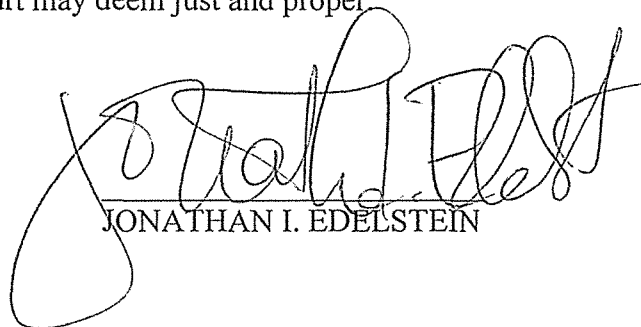
102. For the reasons specified in paragraphs 53 through 80 above, any and all adjudications of guilt and/or affirmances of such adjudications as to any Lift Gate Summons and/or Body Type Summons issued to any member of the Class, past, present or future, or at minimum any such summons that became final on administrative review on or after four (4) months prior to the date of filing of this Petition and ~~Complaint~~, are arbitrary, capricious and contrary to law, and must be annulled.

103. Accordingly, this Court should issue judgment requiring defendants-respondents to remit any and all fines paid by any member of the Class on any Lift Gate Summons and/or Body Type Summons, past, present or future, see Adams, supra, or alternatively and at minimum should issue judgment requiring defendants-respondents to remit any and all fines paid by any member of the Class on any Lift Gate Summons and/or Body Type Summons that became final on administrative review on or after four (4) months prior to the date of filing of this Petition and Complaint.

CONCLUSION

WHEREFORE, in light of the foregoing, ~~plaintiffs~~-petitioners demand judgment in their favor and against ~~defendants~~-respondents for (a) Article 78 relief as prayed for in the First and Sixth Causes of Action; (b) remission of fines as prayed for in the Second and Sixth Causes of Action; (b) declaratory judgment as prayed for in the Third Cause of Action; (c) injunctive relief as prayed for in the Fourth and Fifth Causes of Action; (d) costs, disbursements and attorneys' fees; and (f) such other and further relief as this Court may deem just and proper.

Dated: New York, NY
September 2, 2015



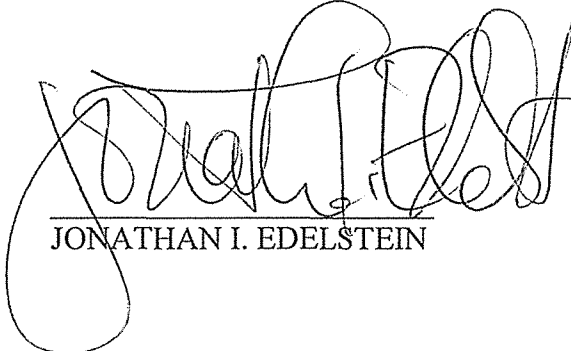
JONATHAN I. EDELSTEIN

VERIFICATION

JONATHAN I. EDELSTEIN, an attorney admitted to practice in the courts of the State of New York, affirms under penalty of perjury pursuant to CPLR § 2106 that the following is true and correct to the extent of his knowledge:

1. I am the attorney for the ~~plaintiffs~~-petitioners in the within action and as such am fully familiar with the facts and circumstances thereof.
2. I have read the contents of the within Petition ~~and Complaint~~ and the same are true to the extent of my knowledge.
3. The sources of my knowledge of the allegations of fact made herein include conversations with my client, review of the case file and review of other pertinent documents.
4. The reason I make this Verification is that the ~~plaintiff~~-petitioner is a foreign corporation and its place of business is not in the County where I have my office. See CPLR § 3020(3).

Dated: New York, NY
September 2, 2015



JONATHAN I. EDELSTEIN