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

----------X Index:

In re the application of:
NEW YORK PUBLIC INTEREST RESEARCH
GROUP STRAPHANGERS CAMPAIGN, Inc.,

Petitioner,

- against -

METROPOLITAN TRANSPORTATION
AUTHORITY a.k.a. MTA, NEW YORK TRANSIT
AUTHORITY, Peter S. Kalikow, as Commissioner
of the Metropolitan Transportation Authority and
Lawrence G. Reuter, as President of MTA New
York City Transit Authority,

Respondents.

----------X

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Preliminary Statement

Petitioner NEW YORK PUBLIC INTEREST RESEARCH GROUP STRAPHANGERS CAMPAIGN, Inc. ("Straphangers"), respectfully submits this Memorandum of Law in support of its Petition for a Judgment pursuant to CPLR §3001, CPLR §7801 and State Finance Law, §123-b, seeking a declaratory judgment that:

(a) the Metropolitan Transportation Authority ("MTA") Notice of Hearing ("Deficit Notice") and the financial plan approved by the MTA Board on December 18, 2002 ("the December Plan") were deceptive, misleading and defective on its face, did not provide the public with the requisite notice of the accurate state of the financial affairs of the Respondents, was violative of due process and failed to meet the notice requirements of the Public Authorities Law;

(b). the MTA has violated Public Authorities Law §1269 which requires that a five year plan

be issued on at least an annual basis;

(c) the MTA has violated the Public Authorities Law §1269 by issuing a two-year fiscal plan which is unauthorized by the Legislature and statute;

(d). the MTA intentionally misled the public as to the operating surplus for fiscal year 2002 and 2003 by and through the December Plan and Deficit Notice;

(e). the December Plan and Deficit Notice and the shifting of funds off budget to fabricate budget deficit is a violation of the State Finance Law as it constitutes a mis-allocation of public funds; and,

that the Court:

(i). issue an order, restraining and enjoining Respondents their agents and attorneys from enacting a fare increase and from partially or fully closing any token booth in the New York City Subway System until further order of this Court;
(ii). order an outside accounting of Respondents' financial affairs for five years;
(iii). order the Respondents to reissue an accurate Notice of Hearing in compliance with the Public Authorities Law should they desire to enact a fare hike or close token booths;
(iv). order the Respondents to conduct public hearings on the reissued Notice;
(v). award Petitioners attorney's fees and costs; and
(vi) such other, different and further relief as is deemed just, equitable and proper.

Petitioners respectfully submit the following affidavits in support:

(i) the Affidavit of Alan G. Hevesi, New York State Comptroller, sworn to on April 29, 2003 ("Hevesi Aff.")[with the audit conducted by Comptroller Hevesi, entitled *An Examination of the Finances of the Metropolitan Transportation Authority* ("Hevesi Audit"), dated April 2003 (attached as Exh. "K", thereto)];

(ii) the Affidavit of Gary Rose, the Director of Financial Audits in the Office of the Comptroller of the City of New York, sworn to on April 29, 2003 ("Rose Affidavit")[with the audit conducted by the City Comptroller on the Financial Practices of the Transit Authority, dated April 23, 2003 ("Thompson Audit"; attached as Exhibit "A", thereto);

(iii) the Affidavit of Gene Russianoff, staff attorney for the Straphangers since 1981, sworn to on April 29, 2003 ("Russianoff Aff."); and

(iv) the Affidavit of Alexander Wood, Executive Director of the Disabilities Network of New

York City, sworn to on April 29, 2003 ("Wood Aff.").

Statement of Facts and Summary of Argument

The pertinent facts of this matter have been set forth more fully in the accompanying Verified Petition, and the accompanying affidavits, and the Court is respectfully referred thereto.

In sum, on November 22, 2002 at a public board meeting, the MTA announced it would end 2002 with a budget surplus of $24.6 million and that it faced a budget gap of $235.9 million for 2003. On December 18, 2002, the MTA Board approved the December Plan. The December Plan reiterated the assertion of a $235.9 million gap for 2003, included $1.8 billion of MTA internal actions that reduced the combined budget gaps for 2003 and 2004 to $951 million, and called for a subway, bus, and commuter railroad fare increase of up to 33% beginning in 2003. (Verified Petition, para. 19; Hevesi Aff., para. 1)(see also copy of December Plan, annexed hereto as Exhibit "B").

To remedy the purported deficit, the MTA issued the Deficit Notice, which was entitled "Notice of Public Hearings on Proposed MTA Fare Increases, Fare Policy Changes, Subway Station Booth Closings and Toll Increases". The contents of the Deficit Notice were widely disseminated in the print and television media and over the internet. The Deficit Notice in its introduction and overview stated:

"In November 2002, the MTA published its two-year Financial Plan for 2003 and

> 2004 in which it projected a combined gross deficit of $2.8 billion. Numerous internal actions have been identified, including administrative reductions and cost-saving measures such as the closing of some token booths and the elimination of the token, as a means to reduce this deficit to an estimated $1 billion. This remaining deficit is proposed to be addressed by one of three options described below, which include combinations of fare and toll increases, service reductions, and/or increased governmental assistance. Public comments are being solicited on these proposals through a series of hearings throughout the region as noted below."

(emphasis added). The "two year Financial Plan" referred to the Deficit Notice is the December Plan cited above. In the Deficit Notice, the MTA proposed three options as the only viable means of closing the alleged $1 billion deficit. The Deficit Notice also predicated the need for various closure of token booths on the need to reduce the purported overall deficit.

Pursuant to the Deficit Notice, and the December Plan to which it refers, public hearings were held throughout the five boroughs of New York City. As a result of the public hearings held pursuant to the Deficit Notice, on March 6, 2003, the Board of Directors of the MTA voted to approve a fare hike from $1.50 to $2.00 for riders of New York City Transit buses and subways. The fare hike approved by the MTA Board is the **largest single monetary increase in the City's subway and bus history**. (See Hevesi Audit, pg. 37).

After the Deficit Notice was issued and after the conclusion of the hearings held pursuant to the Deficit Notice, the MTA revised the December Plan and financial forecasts for the agency. On March 27, 2003, the Board of Directors of the MTA voted to approve a revised financial plan (hereinafter the "March Plan"). Unlike the December Plan, the March Plan shifted resources from 2004 to 2003, and projected a surplus of $59.8 million by the end of 2004.

Based upon grim forecasts of the MTA and an impending fare increase, the New York State Comptroller commenced an audit of the finances of the MTA and its subsidiaries in January 2003 ("Hevesi Audit")(Exhibit K). In addition, the New York City Comptroller commenced an audit of the finances of Transit in January 2003 ("Thompson Audit")[1](Exhibit Rose A"). Both audits disputed the legitimacy of the $2.8 billion deficit as claimed in the Deficit Notice and December Plan upon which it was based. Both audits were critical of cooperation with the State and City Comptrollers to prepare the audit.

On April 23, 2003, New York State Comptroller Alan Hevesi released an audit of the financial affairs of the MTA. In the Hevesi Audit, the Comptroller "found that the MTA had two versions of its December Plan: the one it showed the public and the one it kept to itself." See Hevesi Audit, Page 1 (Hevesi Aff., Exh. "K"). The examination of the internal records and testimony of the MTA officials revealed that the MTA essentially had two versions of its December 2002 Financial Plan, the one it showed the public (Hevesi Aff., Exhibit "B") and the one that it did not show the public (the super spreadsheet, Hevesi Aff., Exhibit "J"). A review of the non-public super spreadsheet revealed previously undisclosed material transactions that moved resources off budget and from one year to another, that had the effect of grossly reducing the projected size of the 2002 surplus from $537.1 million to $24.6 million.

[1] This audit was performed in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, § 93, of the New York City Charter, and pursuant to Chapter 43-A, Article 5, § 1208 of the New York State Public Authorities Law.

In the Hevesi Audit, the Comptroller stated that, "A review of the internal version of the December Plan revealed previously undisclosed transactions that moved resources off budget and from one year to another". See Hevesi Audit, Page 1 (Exh. "K"). The Hevesi Audit concluded in part:

> "These secret transactions had the effect of grossly reducing the projected size of the 2002 surplus by shifting resources to 2003 and 2004. If not for these transactions, the 2002 surplus would have totaled $537.1 million, $512.5 million more than acknowledged by the MTA. Of the undisclosed surplus, $248.3 million was transferred to 2003 and $264.2 million was transferred to 2004."

See Hevesi Audit, Page 1 (Exh. "K"). The Hevesi Audit also concluded in part:

> "Our examination also revealed the existence of hidden reserves in 2004, which inflated the budget gap by $118.2 million. These reserves were funded with some of the resources that were shifted from 2002 to 2004...The resources that were shifted to 2004, combined with other undisclosed resources, would have been sufficient to avoid a fare hike in 2003. Use of these resources in 2003, however, would have widened the 2004 budget gap by an equal amount. While it would have been imprudent to use all of the surplus resources in 2003, there was far more flexibility in the size and timing of the fare hike than was acknowledged by the MTA".

See Hevesi Audit, Page 1 (Exh. "K").

In summing up the failure of the MTA to comply with its constitutional and statutory obligations, the Hevesi Audit stated:

> "If all of these undisclosed resources had been applied to 2003, the MTA could have avoided a fare hike in that year (see Table 6). The use of these resources in 2003, however, would have widened the 2004 budget gap by an equal amount. While it would have been imprudent to use all the resources in 2003, there was far more flexibility in the size and timing of the fare hike than was acknowledged by the MTA. MetroCard and E-ZPass enable an endless combination of fare and toll increases and discounts. The MTA itself offered seven possible fare proposals and ultimately delayed the implementation of the fare hike from March to May 2003.
>
> **The MTA's failure to disclose the available resources to the public and its elected officials foreclosed options other than those proffered by the MTA and stifled public debate over a fare hike.** Given the size of the 2004 budget gap, it

> may have made sense to raise fares in 2003 to build up a surplus to help balance the 2004 budget, but the actions of the MTA give the appearance that it was unwilling to candidly present its case to the public and its elected officials. Failure to disclose the availability of these resources calls into question whether the MTA Board was fully informed when it voted to raise fares. **It also means that the public hearings were, in effect, a sham because the public and its elected officials did not have the information necessary to make informed comments about the December Plan."**

[emphasis added]. See Hevesi Audit, pg. 22 (Exh. "K").

ARGUMENT
POINT I

PETITIONERS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF BASED UPON RESPONDENTS' DELIBERATE FAILURE TO COMPLY WITH NEW YORK STATE PUBLIC AUTHORITIES LAW

A. Petitioners Are Entitled to Declaratory and Injunctive Relief.

Petitioners herein seek a declaratory judgment as to the legal relations of the parties pursuant to C.P.L.R. §3001 and the New York State Finance Law, §123-b. C.P.L.R. §3001 states in pertinent part:

> "The Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

Petitioners also seek injunctive relief, as set forth above. In order to obtain a preliminary injunction, the moving party must establish "(1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position." Walter Karl, Inc. v. Wood, 137 A.D.2d 22, 27 (2nd Dept. 1988). The fact that both the city and state Comptrollers have already investigated the facts

underlying this Article 78 proceeding and reached conclusions squarely supporting petitioner's claim establishes that a likelihood of success on the merits exists. Irreparable harm exists because once transit riders are made to pay an unlawfully increased higher fare, no workable mechanism exists or could be created to reimburse people who were overcharged. Finally, the balancing of equities clearly tips in favor of granting a preliminary injunction. If a preliminary injunction is not granted, millions of transit riders will be adversely affected. If, on the other hand, the fare increase is preliminary enjoined, no lasting or significant harm will result. As set forth above, the MTA's own documents show a surplus for fiscal year 2003 which could cover the small loss suffered by a brief stay of the proposed fare increase and booth closings. Petitioner has met its burden for obtaining a preliminary injunction.

Petitioner also asserts that the MTA's determination was arbitrary, lacked a rational basis, and is inconsistent with lawful procedure, and as such, is reviewable under an Article 78 Proceeding. The underlying basis for the arbitrary and capricious standard is rationality. See CPLR 7801, at C7801:2. An action is arbitrary if it is without sound basis in reason and is generally taken without regard to the facts. See Pell v. Board of Ed. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y. 2d 222, at 231, 356 N.Y.S. 2d 833, at 839, 313 N.E. 2d 321, at 325. Similarly, "arbitrary and capricious" action by an administrative agency means willful and unreasonable action without consideration or in disregard of facts, or without determining principle. Elwood Investors Co. v. Behme, 79 Misc. 2d 910, 361 N.Y.S. 2d 488 (1974). Judicial review of an administrative determination is limited to considering whether it is (i) supported by substantial evidence; (ii) within the jurisdiction of the administrative body; (iii)

consistent with lawful procedure; (iv) not arbitrary; and, (v) a reasonable exercise of discretion. Matter of Pell v. Board of Education, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974); Huggins v. City of New York, 484 N.Y.S.2d 748 (Sup. 1984).

In the alternative, Petitioners also bring this action pursuant to New York State Finance Law, Article 7-A. ("Citizen-taxpayer Actions")("Action for declaratory and equitable relief"), §123-b states in pertinent part:

> "Notwithstanding any inconsistent provision of law, any person who is a citizen taxpayer, whether or not such person is or may be affected or specially aggrieved by the activity herein referred to, may maintain an action for equitable or declaratory relief, or both, against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property..."

In Stein v. Metropolitan Transportation Authority et al., 110 Misc.2d 1027; 443 N.Y.S.2d 340 (Sup.Ct. 1981), where Petitioners sought a declaratory judgment invalidating certain fare increases adopted by the MTA and its subsidiaries, the court stated that "[t]he old rule relied on reluctantly in Glen v. Rockefeller [ ] which precluded all citizen-action suits absent special and peculiar injury has been abrogated by the enactment of article 7-A of the State Finance Law which authorizes citizen taxpayers to challenge alleged wrongful expenditures of State funds whether or not they are specially aggrieved.", *citing* State Finance Law, § 123-b, subd 1.[2]

---

[2] In Stein, the court continued stating that "courts have increasingly recognized that, 'If the requirement of standing is given a narrow construction when there is involved constitutional or important statutory rights or misfeasance or nonfeasance of public officials, then there is, in effect, no practical remedy for anyone with an interest in enforcing the right -- and the right becomes but a mockery.'" *citing* 3 Weinstein-Korn-Miller, NY Civ Prac, par 3001.04.). Stein, *supra*, at 342.

Petitioners and all similarly situated have and will continue to be damaged by the actions of the Respondents in violation of Public Authorities Law and New York State Finance Law until such time as this Court grants the relief sought herein.

POINT II

THE MTA DELIBERATELY FAILED TO COMPLY WITH ITS STATUTORY OBLIGATIONS

The New York State Public Authorities Law, N.Y. Pub. A (McKinney's 2004), governs financial operation of the MTA, Transit and its affiliated subsidiaries. In enacting Public Authorities Law, the legislature of New York State stated in pertinent part:

> "The urgent and immediate need for the stabilization, strengthening and improvement of commuter services for the transportation of person in the metropolitan area can be met by the creation of a public authority to serve as the state's instrument for the carrying out of programs designed to continue and improve commuter services."

(emphasis added). See Id., §1260(6). To facilitate the statutory purpose of the Public Authorities Law, the Legislature empowered the MTA to engage in certain fiscal activities. These activities were codified in Public Authorities Law §1266, et seq. As relevant herein, the legislature authorized the MTA to engage in the following activities:

> "The authority establish, levy and collect or cause to be established, levied and collected and, in the case of a joint service arrangement, join with others in the establishment, levy and collection of such fares, tolls, rentals, rates, charges and other fees as it may deem necessary, convenient or desirable for the use and operation of any transportation facility and related services operated by the authority or by a subsidiary corporation".

Id., §1266-3. The Public Authorities Law statutorily mandates a process for establishing fares and fees. The statute states in pertinent part:

> "Any such fares, tolls, rentals, rates, charges or other fees for the transportation of passengers shall be established and changed only if approved by resolution of the authority adopted by not less than a majority vote of the whole number of members of the authority then in office, with the chairman having one additional vote in the event of a tie vote, and only after a public hearing".

Id. The Legislature further authorized the MTA as follows:

> "Such fare, tolls, rentals, rates, charges and other fees shall be established as may in the judgment of the authority be **necessary to maintain the combined operations of the authority and its subsidiary corporations on a self-sustaining basis**. The said operations shall be deemed to be on a self-sustaining basis as required by this title, when the authority is able to pay or cause to be paid from revenue and any other funds or property actually available to the authority and its subsidiary corporations (a) as the same shall become due, the principal of and interest on the bonds and notes and other obligations of the authority and of such subsidiary corporations, together with the maintenance of proper reserves therefor, (b) the cost and expense of keeping the properties and assets of the authority and its subsidiary corporations in good condition and repair, and (c) the capital and operating expenses of the authority and its subsidiary corporations".

(emphasis added) Id. Aside from the procedural safeguard of a public hearing process, the Public Authorities Law mandates sound financial accounting practices and access to same by the public at large. Public Authorities Law §1269(d) requires the MTA to submit a five year plan on at least an annual basis to the Governor. As relevant herein, §1269(d) requires:

> "1. Submi[ssion] to the Governor [of] a strategic operation plan for the five year period commencing January first of the following year...The plan may be amended as required but shall be updated at least annually". The plan shall include, but need not be limited to, the following:
>
> a. Long-range goals and objectives for the operation of services and facilities;
> b. Planned service and performance standards for each year of the period covered by the plan....
> c. Level and structure of fares projected for each year of the period covered by the plan;
> d. Estimated operating and capital resources anticipated to be available from internal sources as well as from federal, state, regional and local sources;
> e. Estimated operating and capital costs to satisfy planned standards of performance and service.

f. Strategies to improve productivity; control cost growth...;
g. Specific allegation of operating and capital resources by mode and operation, including funds, personnel, and equipment;
h. Configuration by mode, operation and route of the services to be provided and the facilities to be operated, identifying major planned changes in service and routes; and the MTA.
i. Identification of the operating and capital costs as compared to the revenues anticipated from system users for the metropolitan transportation authority and its subsidiaries and the New York City Transit Authority and its subsidiaries.
j. An analysis of the relationship between specific planned capital elements contained in approved capital program plans and the achievement of planned service and performance standards.

2. Each annual update of the plan shall include a status report summarizing the extent to which planned service and performance standards developed for the previous year were achieved, the causes of any failure to achieve projected standards of service, and corrective measures the authority intends to take to avoid non-achievement o projected standards in the upcoming year.

3. The Metropolitan Transportation Authority shall take into consideration any petitions from local elected officials for improved services, including how these service improvements relate to the service and performance standards described above, and shall consult with appropriate elected officials in its preparation and periodic updates to the operation plan".

As set forth in the Verified Petition, and as detailed in both the Hevesi Audit and the Thompson Audit, it is clear that the MTA, despite its paramount duty to the public, deliberately failed to comply with its constitutional and statutory obligations. Such failure led to a pattern of deception by the MTA to justify a fare hike by misleading the public in its assertions the MTA ended 2002 with a surplus of only $24.6 million and that a deficit existed in fiscal year 2003 (see Argument II, below).

The MTA also evidenced a continuing pattern of concealing resources. According to the Hevesi Audit:

"When viewing the responses of MTA budget officials both before and during this

> examination, it is hard to reach any other conclusion than that they have cultivated an insular budget system and organizational culture that is distinguished by its failure to provide clearly defined and understandable budgetary information. The decisions that MTA budget officials have been making about the financial plan presentation, when it will produce statutorily mandated financial plans, and the denials of legitimate requests for public information, all exemplify a disturbing culture of secrecy."

See Hevesi Audit, Pages 3, 4 (Exh. "K"). The Thompson Audit came to a similar conclusion:

> "The Transit Authority did not provide the public with complete, clear, and accurate information about its current and future financial position. The Transit Authority overstated its operating expenses on its financial statements for 2001 and on its draft financial statements for 2002, and its Fiscal Year 2003 Operating Budget Proposal lacked essential information...Overall, the errors in the Transit Authority's financial statements combined with the shortcomings of the Operating Budget **make it impossible for all concerned parties to assess the financial position of the Transit Authority and make an informed judgment about the necessity for a fare increase**."

(emphasis added) See Thompson Audit, pg. 2 (Exh. "Rose A"). Most importantly, the MTA failed in its obligation to provide an adequate public hearing (as mandated by §1266-3), as set forth in the Hevesi Audit. Initial revisions to the MTA's finances were made only ***after*** the MTA Board voted to increase the transit fare.

According to the Thompson Audit, "[w]e cannot determine whether those revisions, and possibly others yet to be revealed, will prove the necessity of a fare hike that affects more than seven million passengers a day". See Thompson Audit, Page 3 (Exh. "Rose A").

POINT III

THE COMPTROLLERS' AUDITS EXPOSED AN INTENTIONAL

PATTERN OF DECEPTION BY THE MTA TO JUSTIFY A FARE HIKE BY MISLEADING THE PUBLIC THAT A DEFICIT EXISTED IN FISCAL YEAR 2003; THE MTA'S ACTIONS SERVED TO VOID ANY PROPER NOTICE OR PROPER HEARING NECESSARY TO EFFECT A LEGITIMATE FARE INCREASE

Based upon the deliberate acts and omissions of the MTA, as described above, which included the production of important financial revisions ***after*** the MTA Board had voted for the fare increase, it is not surprising that the public was mislead and the New York State Comptroller has characterized the MTA's process as "sham" hearings.

A. The MTA's Failure to Disclose its Diversion of Funds, and Failure to Disclose its True Financial Condition Served to Mislead the Public, Misinform the Public and By Operation of Law Effectively Voids Both the Public Notice of Hearing and the Hearings Themselves.

As stated above, Public Authorities Law § 1266(3) provides, inter alia, that the MTA may establish and change fares, tolls, rentals, rates, charges and other fees for the transportation of passengers only if approved by resolution of the MTA Board and "**only after a public hearing**". Concurrently, Section 1263 (9) of the Public Authorities Law provides that whenever the MTA does cause notices of hearings on proposed changes in services or fares to be posted pursuant to statute, regulation or MTA policy, or where the MTA voluntarily posts such notices, the notice must adhere to the requirements set forth; the notice must:

> "a) be written in a clear and coherent manner using words with common and every day meaning; (b) be captioned in large point type bold lettering with a title that fairly and accurately conveys the basic nature of such change or changes; (c) where such change involves a proposed change in levels of fare, include in its title the range of amounts of fare changes under consideration; d) contain, to the extent practicable, a concise description of the specific nature of the change or changes, including but not limited to a concise description of those changes that affect the largest number

> of passengers; (e) where such change involves a change in the nature of a route, contain, to the extent practicable, a clear graphic illustration of such change or changes; and (f) where such change involves a partial or complete station closing, such notice shall be posted at the affected station with a clear graphic illustration depicting the nature of any closing for such station."

Likewise, a fare increase can be struck down for a failure to conduct required public hearings prior to imposing the increase. (See, e.g., County of Rensselaer v. Capital District Transportation Authority, 42 A.D.2d 445, 349 N.Y.S2d 20 [1973](relying upon Public Authorities Law, Section 1307(3), which is similar to section 1266[3]).

It is clear that if the language in a notice of hearing is "so deceptive that reasonable persons were duped into not appearing" (see, e.g., Reizek Inc. v. Exxon, 42 A.D.2d 500, 349 N.Y.S.2d 14), or so misleading that "interested parties ... [forego] attendance at the public hearing" (Gernatt v. Town of Sardinia, 87 N.Y.2d 668, 642 N.Y.S.2d 164) or "framed to give a false concept ..." (Garlen v. City of Glens Falls, 17 A.D.2d 277, 234 N.Y.S.2d 564 affd 12 N.Y.2d 1025, 239 N.Y.S.2d 349), so as to thwart the underlying purpose of the notice requirement (see, e.g., 41 Kew Gardens Rd Assoc v. Tyburski, 124 A.D..2d 553, 507 N.Y.S2d 698 mot for lv den 68 N.Y.2d 612, 510 N.Y.S.2d 1027), the governmental action taken after the public hearing may be successfully challenged.

In Glen v. Rockefeller, 61 Misc.2d 942, 307 N.Y.S.2d 46 aff'd 34 A.D.2d 930, 313 N.Y.S.2d 938 (1st Dep't 1970), while a petition to challenge a fare increase (under the Transit Authority statute which parallels Section 1266[3]), was dismissed on standing grounds, the court clearly stated that:

> "[h]ad such right been available to petitioners in the first instance whereby they could have tested, in a public forum, (1) the accuracy of the amount claimed by the

> Transit Authority as an operating deficit, (2) the accounting and fiscal methods employed by this agency to arrive at its determination regarding its annual financial condition and (3) the reasonableness of the fare increase petitioners now claim to be arbitrary and illegal, perhaps recourse to the courts would have been unnecessary and wholly avoided."

Id. at 949. Further, the Court reiterated the public's right to "fundamental fairness" when dealing with governmental agencies:

> "However, the right to a public hearing and to public scrutiny of the administrative decisions of elected or appointed representatives of the community cannot cavalierly be dismissed as an ethereal goal or an impalpable principle of law, abstractly appealing only to an inquisitive segment of the public. On the contrary, it goes to the heart of the fundamental fairness which is required of all governmental agencies, officers and employees when dealing with the citizens of the State or their affairs."

Id. at 949.

As stated by the State Comptroller's Report, the MTA's public hearings "were, in effect, a sham because the public and its elected officials did not have the information necessary to make informed comments about the December Plan." (Hevesi Audit, pg. 22; Exh. "K"). Likewise, as stated by the City Comptroller's Report, "[o]verall, we concluded that the TA's financial documents issued prior to and after the March 6, 2003 meeting of the MTA Board were not adequate to provide the basis for sound policymaking. Our analysis revealed that financial statements and budget documents were incomplete, misleading, and obfuscating." (Rose Aff., para. 8; Thompson Audit, Exh. "Rose A"). It appears that what information was available, was false and misleading. This was confirmed when the MTA revised its financial projections revisions to more accurately reflect its financial state of affairs ***after*** the MTA Board had voted for the fare increase and ***after*** the public hearing process had concluded. The MTA's own revisions demonstrate that contrary to the Deficit

Notice and December Plan, there was no deficit at the end of 2002, and there was a surplus projected for 2003. At the very least, the MTA's failure to disclose its true financial condition at the end of 2002 precluded a full and fair debate regarding the timeliness of its need for a fare increase. The MTA's maneuvers to divert funds into future years and its failure to disclose these actions to the public and those entities having oversight responsibility with respect to it served to mislead and deter the public from effective participation in the hearing process.

The clear revelations of deceptive conduct cited by the State and City Comptrollers, are supported by both the Affidavit of Gene Russianoff, staff attorney for the NYPIRG Straphangers Campaign, and the Affidavit of Alexander Wood, Executive Director of the Disabilities Network of New York City.

As stated by Mr. Wood, a member of Disabled in Action and other disabilities groups who was active in a past effort to keep token booths open:

> "At these meetings, we discussed the difficulty of getting the public to show up in the face of such a significant MTA budget gap and other competing budget concerns in the state and city. We agreed that the amount of money needed to bridge the gap seemed insurmountable and that some kind of fare hike seemed inevitable. We discussed the importance of the hearings and spoke of the need to get riders out even though the prospects for defeating a fare hike or convincing the MTA not to shut most token booths seemed grim.
>
> ....
>
> I attended the first New York City hearing in Manhattan on February 5, 2003. I chose not to testify in part because I had decided that [ ] the fare hike battle in particular was a very difficult one to win given the MTA's budget deficit of $2.8 billion dollars. This was reinforced by newspaper articles and other reports that emphasized the size of the MTA's deficit. While I was more optimistic about the token booth closings, I did not see being able to save all 177 targeted booths open, also because of the MTA's budget problems.

....

After the Manhattan hearing, I did not work on the fare hike or token booth issues because the result seemed inevitable and, given other budget news, I made a judgment that I should chose my battles and focus on those that were winnable."

Wood Aff., paras. 6, 8, 10. However, according to Mr. Wood, "[a]fter reading the audits of Comptrollers Hevesi and Mc Call, I feel that I and other members of the public were misled by the claims of the MTA that the budget deficit was $2.8 billion dollars." Wood Aff., para. 11.

This situation was mirrored by Mr. Russianoff, who also has considerable experience in the public transportation forum:

"The enormous deficit projections were a major impediment to our organizing efforts. I recall joking over and over again with riders, officials and reporters that if you go in to a subway station and see a notice saying the MTA has a $2.8 billion deficit, your first reaction is, 'Thank God the MTA is not asking for a $3 fare.'

While more than 350 people testified at the five hearings and at a March 6th MTA board meeting, I believe that significantly more riders and officials would have spoken had the MTA reported that they were in fact running an $82 million surplus in 2003. In addition, because of the large size of the deficit, many of those testifying chose to focus less on the fare and more on the MTA's plan to close 177 subway station booths, which the MTA projected would save approximately $25 million over two years.

... ...

Based on nearly 25 years of organizing transit riders, I know many riders and officials who spoke at the hearings - including myself - who would have given significantly different testimony if the MTA had not misled them about the agencies finances."

Russianoff Aff., paras. 7-8, 10.

As alleged by the Petitioners herein, "Upon information and belief, the December Plan was manipulated to reflect a $2.8 billion dollar surplus in a year with a surplus for the purpose of misleading the public to justify a pre-determined fare increase [para. 57] . . . the Deficit Notice was specifically designed to mislead the public into accepting a fare hike [para. 56] . . . [and] the

Respondents chose to include the purported $2.8 billion dollar surplus in the Deficit Notice even though not required by statute to set the tone for public debate on the amount of an unnecessary increase at the public hearings to follow." [para. 59].

B. The MTA's Inaccurate and Misleading Notices and Failure to Disclose the Available Resources to the Public and its Elected Officials Foreclosed Options Other than Those Proffered by the MTA and Stifled Public Debate over a Fare Hike.

The Deficit Notice of the MTA and the December Plan to which it referred to were intentionally misleading as to the severity of the deficit faced by the MTA. The MTA's notice, as posted on its website, stated as follows:

> "In November 2002, the MTA published its two-year Financial Plan For 2003 and 2004 in which it projected a combined gross deficit of $2.8 billion. Numerous internal actions have been identified, including administrative reductions and cost-saving measures such as the closing of some token booths and the elimination of the token, as a means to reduce the deficit to an estimated $1 billion."

In the Deficit Notice, the MTA proposed three options as the **only** viable means of closing the $1 billion deficit. The Deficit Notice also predicated the need for various closure of token booths on the need to reduce the purported overall deficit.

Notwithstanding the MTA's deliberate failure to comply with numerous constitutional and statutory obligations, as described above and as supported by the State and NYC audits, which included, among other things, intentionally shifting surplus revenue to the MTA's corporate account to inflate the purported deficit in their financial reports, intentionally allocating money for purposes beyond the statutory definition of "self sustaining" in the Public Authorities Law, the inflation of the purported deficit to $2.8 billion dollars to justify a fare hike, misleading the public and its elected

officials with its December Plan presentation, and intentionally obstructing the audits of both Comptrollers in an effort to suppress discovery of their deceptive accounting practices, as also alleged by the Petitioners herein:

> " . . . the Deficit Notice was specifically designed to numb the public into accepting a fare hike [para. 56] . . . [and] the Respondents chose to include the purported $2.8 billion dollar surplus in the Deficit Notice even though not required by statute to set the tone for public debate on the amount of an unnecessary increase at the public hearings to follow [para. 59] . . . [and] public participation in the public hearing process was chilled and otherwise diminished by the purported massive deficit faced by the MTA." [para. 60].

Petitioners also allege herein that the Deficit Notice was intended to justify a fare increase in a year when the operating budget of the MTA was in surplus. As such, the Deficit Notice was an improper if not effective means in accomplishing the goal of setting the agenda for a fare increase in fiscal year 2003.

POINT IV

PUBLIC AUTHORITIES LAW SECTION 1266 (3) DOES NOT AUTHORIZE THE MTA TO RAISE FARES AT THE SAME TIME THAT IT (I) USES CURRENT REVENUES TO PRE-PAY DEBT SERVICE ON ITS OBLIGATIONS, OR (II) DIVERTS SUCH REVENUES INTO OFF-BUDGET CORPORATE ACCOUNTS TO MAKE SUCH MONEYS AVAILABLE FOR FUTURE YEAR REQUIREMENTS

Public Authorities Law §1266(3) stipulates that the MTA may only raise transit fares necessary to maintain the "self sustaining" nature of the MTA. As stated above, as per §1266-3:

> "Such fares, tolls, rentals, rates, charges and other fees shall be established as may in the judgment of the authority **be necessary to maintain the combined operations of the authority and its subsidiary corporations on a self-sustaining basis**."

Generally, section 1266 (3) provides that the MTA's operations will be deemed to be on a self-

sustaining basis when the MTA is able to simultaneously make the three kinds of payments set forth in the statute, not only for itself but also for its subsidiary corporations. However, as stated in the Verified Petition and as per the Hevesi and Thompson Audits, the MTA intentionally shifted surplus revenue to the MTA's corporate account to inflate the purported deficit in their financial reports, and allocated money for purposes beyond the statutory definition of "self sustaining" in the Public Authorities Law. Such actions were intended and did in fact inflate the purported deficit to $2.8 billion dollars to justify a fare increase.

The first of the three categories of payments set forth in 1266(3) concerns principal and interest on the bonds and notes and other obligations of the authority and of such subsidiary corporations, as the same shall become due, together with the maintenance of proper reserves therefor. The statute **expressly restricts** the MTA's consideration of this category of expense to **current year debt requirements**. This express limitation in the statute makes tenable the argument that moneys applied toward a prepayment of future debt service by definition constitute surplus funds, which could alternatively have been employed in mitigation of the need for a fare increase.

The other two types of payments set forth in the statute - the cost and expense of keeping the MTA's property and assets in good condition and repair, and the capital and operating expenses of the MTA - are not expressly limited to current year requirements in the statute. However, if the MTA could pre-pay these expenses out into the future whenever it chose to do so, notwithstanding its true financial condition, it could make a case for a fare increase at any time it determined to do so, and the public would be none the wiser. The same result could ensue if the MTA were able to

divert current year revenues into off-budget accounts in order to remove them from the scrutiny that typically accompanies a fare increase. Because oversight entities and the public **rely** upon the MTA to share all relevant information concerning its financial condition so as to justify its need for a fare increase, neither would be in a position to challenge the reasonableness of any such fare increase if the MTA were not to disclose the fact that it had shifted funds otherwise available to it in the current year to uses in the future.

Thus, it is highly unlikely that recourse to the provisions of section 1266 (3) would permit the MTA to deploy current year revenues either to pre-pay future year debt service expenses or to fund "rainy day" off-budget accounts where that action would create a need for a fare increase on the grounds that the MTA would not otherwise be "self sustaining". In a situation where the MTA is facing the potential of a fare increase, such moneys should appropriately be utilized to mitigate the need for such a fare increase.

In addition, regardless of the apparent discretion granted the MTA to shift funds and divert revenues, given the long history of legislative initiatives in New York State to protect against unnecessary fare increases, it does not logically follow that the Legislature in according this authority intended, or contemplated, that the MTA could use its discretion in a manner which would work to precipitate or accelerate a fare increase. Given the ability of the MTA to utilize all three types of payment requirements to justify its determination, a diversion of current year revenues to prepayments of debt service or to off-budget accounts for use in a future year, even if otherwise fiscally sound, must be viewed critically in the context of a fare increase. Similarly, it would seem

clear that if the MTA were enjoying a huge surplus it would likewise be precluded from raising fares since a condition precedent to any fare increase under section 1266 (3) is that it be necessary for purposes of maintaining the MTA's operations on a self-sustaining basis.

Conclusion

FOR ALL OF THE REASONS SET FORTH ABOVE, AND IN THE ACCOMPANYING PETITION, PETITIONERS' REQUEST FOR RELIEF SHOULD BE GRANTED.

Dated: New York, New York
April 29, 2003

Shanahan & Associates, P.C.

Thomas D. Shanahan

545 Fifth Avenue, Suite 1205
New York, New York 10017
(212) 867-1100

Eric Schniederman
113 University Place, 7th Floor
New York, New York 10003
(212) 358-1500

Davidson & LoPresti, LLP

Anthony A. LoPresti

545 Fifth Avenue, Suite 1205
New York, New York 10017
(212) 867-1100

Daniel Brite
Kennedy, Schwartz & Cure, P.C.
113 University Place, 7th Floor
New York, New York 10013
(212) 358-1500