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

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In re the application of:
NEW YORK PUBLIC INTEREST RESEARCH GROUP STRAPHANGERS CAMPAIGN, Inc., GENE RUSSIANOFF, DAVID A. PATERSON, EDITH PRENTRISS, KATHERINE ROBERTS, KEITH CAUSIN, KEVIN MCRAE, FARAH STEIDE, and ALEXANDER WOOD,

Petitioners,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY a.k.a. MTA, MTA NEW YORK CITY TRANSIT AUTHORITY, et al.

Respondents.

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PETITIONERS' SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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INTRODUCTION

Petitioners respectfully submit that they have met their burden of establishing the elements required for the declaratory and injunctive relief requested in the amended Verified Petition.As set forth in Petitioners' initial Memorandum of Law, Petition, and the affidavits and attachments submitted to the Court, Respondents had a duty to provide honest disclosure of their finances, and to hold public hearings after publishing clear and accurate notices, before they were permitted to raise transit fares or close token booths. The April 2003 reports by New York State Comptroller Alan G. Hevesi and New York City Comptroller William C. Thompson, Jr, see Rose Exhibit A, Hevesi Exhibit B, clearly establish that Respondents failed to comply with their legal obligations. Both Comptrollers found that the December 2002 financial plan provided by Respondents to the MTA board, the public, and their elected representatives concealed large budget surpluses available at the end of both 2002 and 2003, and made it appear that those revenues would not be available until 2004.

The MTA Board approved the December Plan, which purported to set forth the MTA's finances for 2003 and 2004, on December 18, 2002. At the same meeting, the MTA Board proposed fare increases, booth closings and other changes that can only be carried out after notice and public hearings. Notices for public hearings were sent out that asserted a $2.8 billion deficit ("The Deficit Notice") and that referred the public to the December Plan for further information. The December Plan showed the MTA would end 2002 with a $24.6 million surplus, and have a deficit of $235.9 million in 2003.

As set forth in detail in Comptroller Hevesi's report, The December Plan concealed a series of secret transactions that the Comptroller only uncovered after subpoenaing records and deposing numerous MTA officials:

> "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.

The comptroller concluded that:

> "The failure to disclose the availability of these resources to the public foreclosed any consideration of fare options other than those proffered by the MTA, which made the public hearing process a sham. Moreover, the MTA's Director of Budgets and Financial Management testified that while he informed the Executive Director of the transactions, he did not recall advising the Chairman or other members of the board. Whether the Chairman and other board members knew of these transactions is a question only they can answer". See Hevesi Audit, Page 2.

The Respondents have clearly failed to provide accurate financial information to the public and their elected representatives. In fact, it appears that the MTA Board itself was unaware of the secret transactions that hid over $500 million in assets when it voted to increase transit fares. The Deficit Notice that cited a $2.8 billion budget gap and referred the public to The December Plan was defective, and the public hearings held pursuant to the Deficit Notice – in Comptroller Hevesi's own words – "a sham".

Petitioners seek an order from The Court directing Respondents to issue a new, accurate set of financial statements, and to provide clear and accurate notices of hearings at which the public and their elected representatives can testify as to whether any of the changes proposed at the December 18, 2002 MTA Board meeting should be carried out.

I. PETITIONERS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIM THAT THE MTA VIOLATED ITS DUTY TO PROVIDE ACCURATE DISCLOSURE, PROPER NOTICE AND MEANINGFUL PUBLIC HEARINGS PRIOR TO ANY FARE INCREASE OR TOKEN BOOTH CLOSING.

A. Petitioners are challenging The MTA's process, not its discretionary powers.

Petitioners do not challenge respondent's assertions as to their legal obligations to provide accurate disclosure of financial information, to provide public notices "written in a clear and coherent manner" and to conduct public hearings prior to increasing transit fares or closing token booths. N.Y. Public Authorities Law §§ 1263(9), 1266-3 and 1269(d) (hereafter "PAL"). Instead, respondents argue at great length on the issue of justiciability. In their Memorandum of Law in Opposition to Request for Interim Injunctive Relief ("Resp. Memo of Law") they assert that: "The fare increase is non-justiciable. Whether and when a fare increase should be implemented has been committed to the discretion of the Authorities under [the PAL] . . . These are issues about which Courts routinely decline to entertain jurisdiction for sound policy reasons based upon the separation of powers doctrine and non-justiciability of what are, essentially, political questions." Id.

Respondents, however, are attacking a straw man. Petitioners do not, nor have they ever disputed the discretionary powers granted the MTA pursuant to the PAL. Petitioners are addressing the issue of ***how*** a fare increase must be implemented. The MTA discretion does not eliminate obligations for honest disclosure and proper notice that comports with legislative intent, due process and the "fundamental fairness" owed to the public. See Glen v. Rockefeller, 61 Misc.2d 942, 949, 307 N.Y.S.2d 46 aff'd 34 A.D.2d 930, 313 N.Y.S.2d 938 (1st Dept. 1970). Petitioners contend that

the MTA's false and misleading December Plan, its defective notices, and its sham hearings defeated the clear legislative purpose of fair hearings after full public notice.

In sum, this is not a proceeding challenging the discretion of the MTA to raise fares and carry out other changes in its operations. This is a challenge to the deceptive, misleading, and unlawful process by which respondents sought to raise fares and implement those changes.

B. Legislative History Evidences a Clear Intent to Provide Accurate Notice, Meaningful Public Debate and to Resort to Fare Increases Only If Necessary and Upon the Consideration of an Informed Public.

Since the creation of the MTA by legislative act in 1965 (PAL, Title 11), the New York State Legislature has explicitly required that any fares or toll increase shall be changed "only" upon approval by resolution of the authority and "**only** after a public hearing." PAL § 1266-3 [emphasis added].[1] Despite numerous amendments to Title 11, this public right has not only remained, but other sections and amendments have been added signifying a clear legislative intent to **increase** public participation and awareness as to any fare or toll increases, and to provide a fair hearing prior to any increase. Such amendments are consistent with the Legislature's historical intent and expressed reservation of avoiding fare increases unless necessary. See PAL, L.1990, c. 367, § 1.

For example, PAL § 1263, entitled "Metropolitan transportation authority", paragraphs 1 through 8, details the primary powers granted to the MTA. This section, which was part of the initial enabling act in 1965, begins "There is hereby created the 'metropolitan transportation authority'. The The authority shall be a body corporate and politic constituting a public benefit corporation." §1263(1). Thereafter, paragraphs 1-8 followed setting forth the authority's powers including

[1] PAL § 1307(3), which pertains to the Capital Dist. Trans. Auth. ("CDTA"), also mandates a public hearing prior to any fare increase.

compensation, voting, the establishment of committees, appointments and the removal of members. At various times after 1965 these powers were further elaborated upon by amendment. However, in 1991, the Legislature added the following amendment to this section on the MTA's powers and authorities, as the final paragraph numbered "9":

> "Whenever the authority causes notices of hearings on proposed changes in services or fares to be posted pursuant to this section or any statute, regulation, or authority policy, or where it voluntarily posts such notices, such notices shall: (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."

PAL § 1263(9). This paragraph clearly requires public notice that is "clear and coherent" and that "fairly and accurately conveys the basic nature of such change." It is clear that both the importance of public hearings and adequate notice of the same regarding any change to services, such as an increase in fares, was central to the Legislative intent to ensure the MTA upheld its duty to be accountable to the public.

This intent is also evident from the Legislature's addition, in 1975, of PAL § 2800, and particularly 2804 (entitled "Financial disclosure by public authorities or commissions prior to toll or fare increase"). Section 2800, *et seq.*, was enacted essentially "for the purpose of furnishing the state with systematic information regarding the status and the activities of public authorities". More relevant to Petitioners' action is the Legislature's enactment of Section 2804. This addition

admittedly does not apply to the MTA's authority to raise subway and bus fares, but it does apply to "any future increase in fees, tolls or other charges for the use of any such highway, bridge or tunnel facilities". PAL § 2804(1). Most importantly, the Legislature was clear to declare its intent in drafting such a law pertaining to toll or fare increases:

> "The legislature finds that public authorities and commissions having jurisdiction over highway, bridge, and tunnel facilities have in certain instances increased user fees, tolls and fares **without adequately informing the public of the need or justification for such increases.** Such facilities are constructed, financed and maintained primarily by tolls, fees and fares paid directly by users. They are a vital part of the state's transportation system and excessive user charges could have an adverse effect on the economy of the state and welfare of its citizens.
>
> It is therefore in the public interest that prior to a toll or fare increase such agencies be required to make a **full public disclosure of the financial status and the need for additional revenues.** Such a procedure could also **indicate the soundness of the internal planning process of public authorities** and also **help gain public acceptance for a necessary toll or fare increase**.
>
> Such a procedure would not limit or alter the rights vested in an authority or commission to establish and collect tolls or other user fees. It would not in any way impair the rights and remedies of bondholders nor limit or impair the power of an authority or commission to accomplish its stated purpose."
>
> [emphasis added]. Laws 1975, ch 723, § 1.[2]

In 1976, the New York State Legislature enacted Open Meetings Law [N.Y. Public Officers Law; NY CLS Pub O] which was designed to ensure that public business is conducted in an observable manner, and that "[e]very meeting of a public body shall be open to the general public [except for executive sessions]". (Public Officers Law § 103 [a]); In the Matter of Smith v. City

[2] In 1990, the New York Court of Appeals held that subsections (2) and (3) of this section, which require the state comptroller to review reports submitted by an authority, to utilize his resources to analyze the report and to recommend whether the proposed increase in fees, tolls or charges should take effect, impermissibly interfered with the exercise of the comptroller's discretionary power under the state constitution to supervise the financial accounts of public authorities, and was therefore invalid. New York Public Interest Research Group, Inc. v. New York State Thruway Authority, 77 N.Y.2d 86, 564 N.Y.S.2d 708 (1990). This, however, does not detract from the clear legislative intent in drafting the law.

University of New York, 92 N.Y.2d 707; 685 N.Y.S.2d 910 (Ct. App., 1999).[3] Within the statute, the Legislature clarified its intent:

> "§ 100. legislative declaration
> It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it."

In light of the Legislature's history of fostering open debate by an informed public prior to any toll or fare increase, it is clear that respondents' attempts to diminish such obligations are contrary to the intent of the legislature.

C. Petitioners Have Established That Respondents Violated Their Duty to Provide Honest Financial Disclosure and a Fair and Accurate Notice, Thereby Defeating the Purpose of the Statutorily Mandated Notice and Hearing.

Respondents contend that petitioners cite to no cases where a court has blocked an MTA decision to raise fares. (Memo of Law, pg. 5). No comparable case exists because there have never been revelations such as those in the Comptrollers' reports regarding the MTA's failure to provide honest notices and to conduct meaningful hearings.

Nevertheless, the applicable case law reveals that the failure of a public authority, such as the MTA or Transit Authority, to "exercise [ ] judgment in accordance with statutory standards", is in fact justiciable. (see, e.g., Sheldon v. New York City Transit Authority, 39 A.D.2d 950; 332

[3] "Public body" includes a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body. (Public Officers Law § 102[2])

N.Y.S.2d 992 (2nd Dept., 1972). In Sheldon, a class action was brought by commuters to declare certain transit fare increases on a specific line invalid; plaintiffs alleged, *inter alia*, that fare increases on the Rockaway line were promulgated at an arbitrary ratio of twice those promulgated for the transit system as a whole and that these increases bore no relation to the statutory objective of maintaining the Transit Authority's operations on a self-sustaining basis (embodied in section 1205 of the Public Authorities Law). The Appellate Division, in a unanimous decision stated:

> ". . . in our judgment, in alleging arbitrariness and a disregard of statutory standards in the quasi-judicial act of promulgating fare increases, plaintiffs state a cause of action against defendant for a declaratory judgment to examine such claims (Matter of Lakeland Water Dist. v. Onondaga County Water Auth., 24 N.Y.2d 400; Levine v. Long Is.R.R. Co., 38 A.D.2d 936). While it is true that the courts may not substitute their judgment for that of a public authority in promulgating fares, the latter is, at a minimum, required to show that there was an exercise of judgment in accordance with statutory standards, when it is alleged, prima facie, that there was none."

Respondents also cite to cases such as Stein v. MTA, 110 Misc.2d 1027, 443 N.Y.S.2d 340 (Sup. Ct. Nassau Cty., 1981), for the proposition that courts routinely decline to hear cases based upon fare increases. In fact, it is clear that courts have never, as a rule, completely removed themselves from adjudicating such cases. For example, in Stein, the Court stated that:

> "By such decisions the courts are not interjecting themselves into executive, legislative or administrative decision making. Rather they are merely insuring that officials and administrative bodies abide by the procedural safeguards which have been developed to protect the citizenry." Id., at 342.

Likewise, in Glen v. Rockefeller, the Court reiterated the public's right to "fundamental fairness" when dealing with governmental agencies:

> ". . . 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.

Courts will not only hear cases where statutory standards have been violated, but where, as stated above, notice of a public 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). In Reizek, the Appellate Division stated that:

> "The object of the notice is to fairly appraise the average interested citizen who may read it of the general purpose of the hearing. It is not judged merely by a quantitative test such as was applied by the Special Term, but rather it is a question of whether the notice was misleading or deceptive."

Id., at 504.

In Vizzi v. Town of Islip, 71 Misc. 2d 483; 336 N.Y.S.2d 520 (Sup. Ct., Nassau Cty., 1972), the Court questioned a public notice as to a zoning change, stating:

> "The published notice here was notably ambiguous . . . The town's notice was so unclear that it was even expressed incorrectly by its own staff . . . Where inadequate public notice is given, any subsequent actions taken based upon that notice are likewise invalid."

Id., at 485-486. In Orbach v. New York State Urban Development Corp., 110 Misc. 2d 720; 442 N.Y.S.2d 900 (Sup.Ct., NY Cty, 1981), upon a petition brought pursuant to CPLR 7803, the Court directed the respondent Urban Development Corporation (UDC) to hold another public hearing, despite the costly delay in moving forward with a multi-million dollar project, holding that "petitioners' statutory procedural rights to a full, fair public hearing . . . were denied", and that the UDC had improperly exercised its power and failed to conduct the meeting "in a manner consistent with the fundamental purpose for holding a public hearing." Id. at 725.

In Orbach, petitioner landowners sought to compel the UDC to comply with the public

hearing requirements of the New York State Urban Development Corporation Act ("UDCA"). The UDC had undertaken a major multi-million dollar project aimed at revitalizing and redeveloping the Times Square area. In furtherance of same, approximately 30 public meetings were held with various community groups.[4]

In February 1981, the UDC then issued a document called the "Discussion Document", which was "ostensibly intended to inform the public and elicit input". Id., at 902. However, according to the Court, "[u]pon reading the Discussion Document . . . contrary to the claims of UDC, **one is forced to conclude virtually all aspects of the project have been decided and that attempts to effect changes would be futile**." Id.(emphasis added).[5] After the defective notice, a final public hearing was held by UDC low-level staff members.

As a result, landowners in the Times Square area who had attended that final hearing petitioned the court contending that the UDC's final public hearing "failed to comply with the spirit and the letter" of the public meeting requirements of the UDCA, and that the final hearing was "insufficient as a matter of law". Petitioners claimed that they were denied the opportunity to be heard, and they sought to compel another public hearing. Respondents argued that any delay in construction would cause irreparable harm and that holding a new public meeting would delay the project more than two months.

The court agreed with the petitioners, stating that the "UDC in this instance gave petitioners and the public an opportunity to speak but sent no one to listen. In a literal sense, petitioners were

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[4] Respondents herein have pointed out that there were also numerous hearings prior to the fare increase.

[5] As set forth by petitioners herein, the MTA's actions also instilled a "chilling effect" on the public, which also perceived any objection to a fare hike as futile.

not heard." Id., at 723. The Court analyzed the UDCA and found it to be silent on the issue, but still held for the petitioners stating that:

> "[It] is the quality of the hearing and not its discretionary or mandatory nature which is determinative of whether or not a hearing was held by direction of law". (Matter of Consolidated Edison Co. of N. Y. v Kretchmer, 68 Misc 2d 545, 548.). Furthermore, a fair and open hearing is essential to the legal validity of administrative agency and maintenance of public confidence therein. (Morgan v. United States, 304 U.S. 1; see, also, Forest Hills Residents Assn. v. New York City Housing Auth., 69 Misc 2d 42.)." Id. at 723.

The Court concluded its analysis by holding that "upon balancing the equities, including the enormous benefit to be derived from [the] subject project, this court concludes **the procedural rights of petitioners cannot be overlooked.**" Id., at 725 (emphasis added). Despite the apparent delay to respondents' in moving forward with a multi-million dollar project, the Court directed the respondent UDC to promptly hold another public hearing "as quickly as possible in full compliance with . . . the UDCA." Id.

Cases cited by petitioners mirror this duty and the public's right to accurate notice. (see, e.g.,Gernatt v. Town of Sardinia, 87 N.Y.2d 668, 642 N.Y.S.2d 164)(notice so misleading that "interested parties ... [forego] attendance at the public hearing" 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)(notice "framed to give a false concept ...");(41 Kew Gardens Rd Assoc v. Tyburski, 124 A.D.2d 553, 507 N.Y.S.2d 698 mot for lv den 68 N.Y.2d 612, 510 N.Y.S.2d 1027)(notice misleading so as to thwart the underlying purpose of the notice requirement).

Respondents argue that Garlen is distinguishable from this matter as the Court held that the notice at issue provided "sufficient clues" so that citizens could ascertain the nature of the proposed change in the law. Id., 17 A.D.2d at 279. However, the Court based that ruling on the fact that

any interested citizen could access the documents underlying the proposed statutory change by simply visiting the County Clerk where the documents were available. Id. at 279. Based upon "sufficient clues" in the notice and the availability of the underlying documents, the notice was upheld. Unlike Garlen, interested citizens in this matter were referred to the MTA 's December Plan, upon which the Deficit Notice was based. As set forth above, the December Plan falsely portrays asserts that the MTA faced deficits for 2002 and 2003 when large surplus' existed. An interested citizen had no access to accurate, truthful information upon which to make an intelligent decision on the need to testify regarding the fare hike. Therefore, unlike Garlen, the Deficit Notice herein did not meet the MTA's statutory obligation to provide the public with accurate information pertaining to the need for a fare increase. As the underlying documents show, the December Plan inaccurately portrays a surplus for 2002 of $24.6 million 2003 when in fact a surplus of $527.1 million existed. The December Plan also showed a deficit of $235.9 million in 2003 when in fact a surplus of $83.1 million existed. See Hevesi Audit, Page 2.

Accurate notice and meaningful debate are fundamental principles in the private as well as the public sector. The notice and public hearing requirements of the Public Authorities Law is analogous to similar provisions of federal securities law which protect shareholders from misleading and materially false statements in proxy statements. See Securities Exchange Act of 1934, §14(a), Rule 14a-9 of the federal proxy rules. It is well settled that "irreparable injury results from the use of false and misleading proxies when the free exercise of shareholders' voting rights will be frustrated". Krauth, et al. v. Executive Telecard, Ltd., 890 F.Supp. 269, 287 (S.D.N.Y. 1995). Proxy statements must be accurate and avoid materially misleading statements. "If the deficiencies with the proxy statement... meet the standard of materiality below, then the threat of irreparable

harm will follow". Id. In Krauth, the United States Supreme Court defined materiality as: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote". Id., citing TSC Industries v Northway, 426 U.S. 438, 449, 48 L.Ed.2d 757, 96 S.Ct. 2126 (1976). Shareholders in private sector corporations pay for the privilege of their status as shareholders, and as such, they are protected by notice provisions in the Securities Exchange Act. Similarly, riders and customers of the respondents pay fares and tolls for the privilege of use of the respondents facilities, and they are afforded input into the fare structure through the PAL notice and public hearing provisions.

The respondents failed to disclose to the public that funds had been transferred into off-budget accounts prior to the release of the "December Plan" which purported to justify the deficit in fiscal years 2003/2004. See Hevesi Audit, pgs. 1-3, 7, 8. 15, 16, 21-23, 35-37. Furthermore, the Deficit Notice failed to inform the public of an actual budget surplus of more than $500 million for fiscal year 2003. See Hevesi Audit, pg. 22, 37. The existence of a substantial surplus in fiscal year 2003 was intentionally omitted from the Deficit Notice. As the affidavits filed in this matter indicate, had the public been aware of these facts which were first disclosed in the Comptrollers' audits, it would have changed the substance of the testimony at public hearings, the efforts to organize to oppose the proposed fare hike, and, in the case of petitioner David Paterson, advocacy by an elected official in his oversight capacity. See Affidavits of Russianoff, Wood and Paterson.

It is respectfully submitted that the covering up of a $500 million budget surplus in 2003 is materially misleading and as the annexed affidavits confirm, detrimentally affected public participation in the hearing process required under the PAL.

II. A PRELIMINARY INJUNCTION IS REQUIRED TO AVOID IRREPARABLE HARM TO PETITIONERS

a. The inability to recreate a hearing that should have taken place constitutes irreparable harm.

Petitioners allege that by issuance of the Deficit Notice, and its direction of the public to the false and misleading December Plan, the public participation and discourse intended by the PAL. As stated by Comptroller Hevesi, the public hearings were a "sham". See Hevesi Audit 22. In Teachers Association of the Japanese Educational Institute of New York, Inc. v. Japanese Educational Institute of New York and Nippon Club, Inc., 724 F. Supp. 188 (S.D.N.Y. 1989), the Court held that "a meeting already held, like a plant already moved, presents an arbitrator with a deed already done. The inability to recreate the discussion that would or should have been constitutes the irreparable harm". Id. at 193.

Although the holding of Teachers Association involved a dispute in an arbitration setting, the underlying dispute subject to the arbitration involved rescheduling of hearings in a manner that would facilitate a healthy dialogue irrespective of outcome. Id. The respondents in Teachers Association, similar to the respondents herein need not adopt recommendations advanced by the attendees at their meetings. In this matter, the MTA need not adopt the recommendations of the public or elected officials elicited through the public hearing process. The Court stated it was not the ultimate outcome that was important, "but rather on what is said at the meetings, how it is said, who hears what is said, how it was heard and what further speech or action is kindled by this discourse." Id. Similarly, the Court in Orbach, supra, upon balancing of the equities concluded that the harm to the petitioners due to the defective hearing outweighs the irreparable harm alleged by the respondents as to lengthy delays in a multi-million dollar construction project.

The affidavits herein clearly herein establish that the dialogue which should have, and could

have, taken place pursuant to the PAL, did not based upon the conduct of the respondents as described in the Hevesi Audit.

As petitioner Paterson states in ¶4 of his affidavit:

> "The notice provided by respondents with respect to the hearings that were held in connection with their decision to raise subway, bus and train fares, and close token booths, failed to inform me of the true nature of the respondents' financial condition, thus preventing me from being able to exercise my constitutional responsibilities properly either at the hearings or in the Senate. Had I known then what I have since learned from the reports issued last week by the New York State Senate and New York City Comptrollers, I would have intervened more forcefully, asked more questions, acted to mobilize more people and organizations, to convince the respondents to either avoid, reduce or delay the fare hike and avoid, reduce or delay the token booth closings."

Further, petitioner Paterson states in ¶6 of his affidavit:

> "Because of the material misrepresentations of the respondents, I was led to believe that the danger of imminent financial crisis at the MTA and its affiliated transit authorities was much greater than it actually was. This prevented me from presenting more persuasive arguments against the fare hikes and token booth closings than I was able to make and prevented me from effectively exercising my duties as a Senator to provide meaningful oversight over public agencies."

That the hearing process failed to accomplish its goal of meaningful public discourse and exchange is best summed up by the New York State Comptroller Hevesi when he states in his audit: "The hearings were a sham."

As the due process, free speech rights and their constitutional rights of the petitioners and the public have been irreversibly altered and abridged based upon the conduct of the respondents, it is respectfully submitted that irreparable harm has been demonstrated.

b. Petitioner David A. Paterson's Constitutional Rights Have Been, And Are Continuing To Be, Denied, Making A Preliminary Injunction An Appropriate Remedy.

Case law makes clear that the deprivation of a constitutional right is irreparable harm, as a matter of law. Thus, "'[w]hen an alleged deprivation of a constitutional right is involved, most

courts hold that no further showing of irreparable injury is necessary.'" Mitchell v. Cuomo, 748 F.2d 804, 806 (2nd Cir. 1984) (citations omitted). *Accord*, Brewer v. West Irondequoit Central School District, 212 F.3d 738, 744-45 (2nd Cir. 2000); Jolly v. Coughlin, 76 F.3d 468, 482 (2nd Cir. 1996); Statharos v. New York City Taxi and Limousine Commission, 198 F.3d 317, 322 (2nd Cir. 1999); Lily Pond Lane Corp. V. Technicolor, Inc., 98 Misc.2d 853, 854, 414 N.Y.S.2d 596, 597 (Sup. Ct., N.Y. Cty. 1979).

Petitioner David A. Paterson is an elected member of the New York State Senate, possessing broad rights and responsibilities under Article 3 of the New York State Constitution, including the power and responsibility to exercise oversight over public authorities (including the respondents) and to participate in the negotiation and authorizing of the state budget. (Paterson aff., ¶¶ 1, 3.) As the Senate Minority Leader explains in his affidavit, the "notice provided by respondents with respect to the hearings that were held in connection with their decision to raise subway, bus and train fares, and close token booths, failed to inform [him] of the true nature of the respondents' financial condition, thus preventing [him] from being able to exercise [his] constitutional responsibilities properly either at the hearings or in the Senate." (Paterson aff., ¶ 4.)

Senator Paterson was prevented from exercising the rights and duties granted to him by the New York State Constitution by respondents' false and misleading notices and statements concerning their decision to raise subway, bus and commuter rail fares. Respondents' failure to provide notice enabling the Senator, as well as other members of the Legislature, with enough information to adequately perform his job, while at the same time purporting to provide accurate disclosure of their finances, prevented him from exercising his constitutional rights in a meaningful or effective way. See Paterson Affidavit. This deprivation of petitioner Paterson's constitutional

rights is, under applicable legal principles, irreparable harm. A preliminary injunction directing respondents to roll-b ack the fare

and toll increases should therefore be issued.

c. The Individual Petitioners Whose Lives Are Being Directly Impacted In Ways That Cannot Be Measured In Monetary Terms Are Suffering Irreparable Harm.

In her affidavit, Katharine Roberts states that she lives on about $900 per month in Social Security payments. Of that amount, about $400 goes to rent. That leaves about $500 per month for all other expenses, including medical expenses, transportation, food, and utilities. Ms. Roberts travels by public transportation at least five days per week to attend meetings of advocacy groups she's active with, including groups who advocate on behalf of the mentally ill and senior citizens (Roberts aff., ¶¶ 2, 6.). In addition, she suffers from heart disease and requires regular medical care, which she uses public transportation to access. (Roberts aff., ¶¶ 1, 7.). Due to her extremely limited budget, which leaves her with no discretionary income whatsoever after paying for the bare necessities of life (and often doesn't even provide her with enough to cover the necessities), the fare increase will require her to cut back on her involvement with advocacy and volunteer activities, and/or force her to walk to doctors' appointments that she would normally use public transportation to get to, thus jeopardizing her health. (Roberts aff., ¶¶ 6 - 7.).

Petitioner Edith Prentriss is disabled and confined to a wheelchair. She lives on a combination of federal disability payments and private charity. (Prentriss aff., ¶¶ 2 - 3.). Ms. Prentriss depends on public transit to enable her to participate in volunteer activities, attend parks, museums and cultural centers, and visit relatives. (Prentriss aff., ¶¶ 1, 4.). Because of her very limited budget, the fare hike will require her to forego family visits that she's accustomed to making, curtail visits to public parks and museums, reduce the level of her volunteer work, and rely on her

wheelchair to travel longer distances than before. (Prentriss aff., ¶¶, 4 - 6.).

Both of these women will be forced to reduce the level of interaction with the outside world that they currently enjoy. Instead of visiting relatives, or participating in volunteer or advocacy work, they will be forced to stay home, by themselves, because their limited incomes will not allow them to pay the new, higher transit fares while maintaining the same level of daily activity they were able to sustain under the prior, lower fares. This forced elimination of social activity is an injury that cannot be measured, nor adequately compensated for, in dollars and therefore constitutes irreparable harm. The future impact of future potential fare increases and how those increases could impact on the lifestyle of Ms. Prentriss or Ms. Roberts are irrelevant to the issue herein. The issue presented in this matter is the current impact of the fare increase on their lives.

Under applicable case law, injunctive relief is appropriate where "injuries are irreparable in the sense that measuring their value in terms of dollars and cents is nearly an impossible task," Ross-Simons of Warwich, Inc. v. Baccarat, Inc., 66 F.Supp.2d 317, 327 (D. R.I. 1999), or, in other words, where "'the nature of the plaintiff's loss would make damages difficult to calculate.'" *Id.* (quoting Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992)); *see also*, Jackson v. National Football League, 802 F.Supp. 226, 231 (D. Minn. 1992) (harm is irreparable if its value is unquantifiable). Where an after-the-fact monetary award would not be adequate compensation, Tom Doherty Associates, Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 37 (2nd Cir. 1995), or where the nature of the harm is such that "compensation in money cannot atone for it," John T. v. Delaware County Intermediate Unit, 2000 WL 558582, *7 (E.D. Pa. 2000), or where "damages are clearly difficult to assess and measure," Register.Com v. Verio, Inc., 126 F.Supp.2d 238, 248 (S.D.N.Y. 2000), the harm is irreparable and a preliminary injunction to protect the plaintiffs or petitioners is

appropriate.

Under governing legal principles, petitioners Roberts and Prentriss will suffer, and already are suffering, irreparable harm as a direct result of respondents' illegal fare increase. The forced abandonment of the normal day-to-day activities that make up their lives, and provide their lives with meaning, is a harm whose monetary value is incapable of measurement. Accordingly, and under controlling legal principles, a preliminary injunction reversing the illegal fare increase should be issued.

III. THE BALANCING OF THE HARDSHIPS FAVORS PETITIONERS

A balancing of the equities usually requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief. A balancing of the equities favors the movants where "the irreparable injury to be sustained by the plaintiffs is more burdensome to [them] than the harm caused to defendants through imposition of the injunction." Burmax Co. v. B&S Industries, 135 A.D.2d 599, 601, 522 N.Y.S.2d 177 quoting Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 70 A.D.2d 1021, 1022, 418 N.Y.S.2d 216. *See also* Kurtz v. Zion, 61 A.D.2d 778, 779, 402, N.Y.S.2d 402. The irreparable injury to Petitioners resulting from Respondents' conduct has been discussed supra. In the absence of an injunction, the grace period currently in effect will expire and the full force and affect of Respondents' fare increase gained through their intentionally misleading conduct in violation of petitioners constitutional right to due process and statutory right to notice and the opportunity to be heard. Respondents claim that "ordering any delay in the implementation of the transit fare increase would cause chaos and confusion, if it could even be accomplished at all, since all programming effort and physical work has already been implemented and cannot be "undone" absent extraordinary effort and physical work at great cost...."

Respondents Memo. of Law 4. However, if Respondents have not followed proper procedure regarding notice, disclosure, and public hearings, they have created their own burden. "Hardship resulting from the failure to obey the law is not a proper consideration." Conway Farmer et al. v. D'Agostino Supermarkets, Inc., 544 N.Y.S.2d 943, 1989 N.Y. Misc. (LEXIS 453).

As the conduct of respondents results from their intentional violation of the Public Authorities Law, they should be the party to bear the burden of the hardships arising from their conduct. Courts have consistently favored delegating the burden of malfeasance to the malfeasor. In People of the State of New York v. New York State Federation of Police, Inc., 188 A.D.2d 689; 590 N.Y.S.2d 573 (3rd Dept. 1992), the court stated, ""We also find that a balancing of the equities favors the plaintiff. While it is true that defendants may suffer financial hardship as a result of the injunction, the interest of the public in not being defrauded outweighs other considerations."

IV. AS THIS CASE INVOLVES AN ISSUE OF PUBLIC POLICY AND IS COMMENCED BY CITIZEN TAX PAYERS, NO BOND SHOULD BE REQUIRED BY THIS COURT

Respondents state that petitioners have not "even offered to post a bond to reimburse the public for millions of dollars in expenses incurred and revenue lost should its ultimate request for relief be denied." Res. Memo of Law, pg. 4. After a thorough review of all reported cases involving citizen taxpayers commencing actions involving important public policy, petitioners are unaware of any Court requiring petitioners to post a bond. Regardless, petitioners acknowledge that C.P.L.R. §6312 states, in pertinent part, "that prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction." See Id.,

6312. However, Petitioner points to the procedures for citizen-taxpayer actions as outlined in the

State Finance Law, which states in pertinent part: "At any stage of the action, upon motion by the defendant, or upon its own initiative, the court may order the plaintiff to give an undertaking for costs and taxable disbursements not to exceed the sum of twenty-five hundred dollars. If plaintiff shall not have given such undertaking at the expiration of sixty days from the date of service of the order upon him or her, the court may, upon motion of the defendant, dismiss the action and award costs to the defendant" (emphasis added). State Finance Law §123-d. "In cases where the statute has authorized taxpayer's suit, that is, in cases involving claimed unauthorized expenditure of state funds, parties must follow statutory procedures and, if required by the court, plaintiff must post undertaking for costs and defendant may be ordered to pay costs and expenses." Wein v. Comptroller, 1979, 47 N.Y.2d 394, 413 N.Y.S.2d 633, 386 N.E,2d 242. Hence, petitioners will post a bond for security of costs when directed to do so by the court upon proper application by the respondents.

CONCLUSION

Petitioners respectfully submit that the preliminary injunction should be granted and an immediate evidentiary hearing held.

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