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, COMMON CAUSE, INC., RACHEL LEON, TRI-STATE TRANSPORTATION CAMPAIGN, INC., JONATHAN ORCUTT, LOCAL 100 OF THE TRANSIT WORKERS UNION a/k/a TWU LOCAL 100, ROGER TOUSSAINT, et al., on their own behalf and on behalf of all straphangers and taxpayers in the City and State of New York similarly aggrieved,

Petitioners,

Index:

MEMORANDUM OF LAW

For an order pursuant to Article 78 of the C.P.L.R.,

- against -

NEW YORK METROPOLITAN TRANSPORTATION AUTHORITY, PETER S. KALIKOW in his capacity of Chair/Commissioner of the Metropolitan Transportation Authority,

Respondents.

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PRELIMINARY STATEMENT

The process established by Respondent Metropolitan Transportation Authority (the "MTA") for the sale or lease of the development rights to the John D. Caemmerer West Side Yards (the "Rail Yards") violated the Authority's statutory and common law duties to secure the most beneficial terms possible for the sale of this valuable asset.

The MTA's selection process, which began with the publication of a Request for

Proposals ("RFP") on February 22, 2005, and culminated in the proposed selection of a bid from Jets Development, LLC, (the "Jets"), for a small fraction of the appraised value of the Rail Yards was also arbitrary and capricious, and a violation of the Authority's duty to treat all bidders fairly. Petitioners respectfully request that the Court: (1) allow Petitioners to intervene in Madison Square Garden ("MSG") v. New York Metropolitan Transportation Authority ("MTA") et al., Index No. 104644/05; (2) order the MTA to reject all bids obtained through its flawed and unlawful RFP process; and (3) require the MTA to issue a new RFP for the Rail Yards, providing sufficient time and information to enable all potentially interested parties to submit bids for this extremely valuable asset.

As set forth in detail in the April 15, 2005 affidavit of Gene Russianoff ("Russianoff Affidavit"), the MTA's RFP process coincided with the Authority's effort to lobby the New York State government for an unprecedented infusion of capital and operating funds. This effort concluded on March 31, 2005 when the New York State Legislature passed a budget authorizing over $15.4 billion for the "core" programs required to maintain the MTA's existing operations over the next five years.

In order to meet the MTA's needs, the Legislature was forced to raise taxes, including the sales tax and the mortgage recording tax in the MTA region. In all, the Legislature was forced to raise taxes and fees that will cost New Yorkers over $315 million every year in order to close the MTA's budget gap[1]. Ironically, on the same day the Legislature passed the 2005-2006 New York State budget—raising taxes and diverting funds from other critical programs to fund the MTA—the MTA Board voted to accept the Jets' bid for the Rail Yards, leaving over $700 million "on

1 See Russianoff Affidavit, paragraphs 13-14.

the table."

STATEMENT OF FACTS

The MTA has been trying to transfer the Rail Yards to the Jets for a small fraction of the site's appraised value since early 2004. On March 25, 2004, the MTA and the Jets entered into a Memorandum of Understanding ("MOU") to develop a stadium over the Rail Yards. The MOU failed to provide a value for the property.

After a great deal of public pressure and media attention, the MTA agreed to commission an appraisal of the Rail Yards. Two separate appraisals produced in late 2004 set the value of the Rail Yards at approximately $1 billion. The MTA's own appraisal value the Rail Yards at $923,400,000[2]. A second appraisal, commissioned by Madison Square Garden, LP ("MSG") valued the Rail Yards at $1 billion[3].

Even after the release of these appraisals, the MTA continued to negotiate to sell the Rail Yards to the Jets for a fraction of their value. In January 2005, the Jets made a formal offer of $100 million for the property. The MTA made a counter offer of $300 million[4].

The MTA's effort to sell the Rail Yards through a closed, single-bidder process was disrupted on February 4, 2005 when MSG made an unsolicited offer to purchase the Rail Yards for $600 million. Finally on February 22, 2005, the MTA succumbed to public and media pressure and issued a formal RFP for the sale or lease of the Rail Yards.

The MTA's RFP process for the sale of the Rail Yards was unique in the history of the

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2 The MTA was evidently unhappy with the conclusion of its own appraisers. It kept the results of this work secret until it was subpoenaed by a Committee of the New York State Assembly. (Cite to petition)
3 Petition at ¶¶ 35, 36.
4 Petition at ¶ 37.

Authority. It required bidders to assemble a complex proposal to build a platform over the Rail Yards, design a construction plan for the site, assess environmental, zoning and other regulatory issues and secure financing in 27 days. Petitioners believe that the MTA has never imposed such a short deadline in any RFP process for the sale of a significant asset.[5]

The RFP failed to provide critical information regarding the environmental liabilities it required bidders to assume. It also failed to explain a variety of construction requirements relating to rail operations on the site[6].

The flaws in the MTA's RFP process were confirmed when it received only three proposals. One bid was rejected because it was dependent on contingencies completely out of the control of the parties.[7] The only remaining bids were those of the two companies that had proposals under development before the RFP was announced—the Jets and MSG. In short, the MTA's RFP process was so confusing and truncated as to prevent every other developer in the world from bidding on the most valuable development site in Manhattan.

On March 21, 2005 the MTA accepted the Jets proposal—worth a present value of only $210 million – for the billion-dollar Rail Yards site.

ARGUMENT

I. PETITIONERS SHOULD BE PERMITTED TO INTERVENE

Pursuant to CPLR §§ 1012 and 1013, Petitioners request to be allowed to intervene in the matter of MSG v. MTA et al., Index No. 104644/05, because the representation of Petitioners'

5 Petition at ¶40.
6 Petition at ¶ 42.
7 Petition at ¶ 44.

interests by the parties is or may be inadequate, because the Petitioners may be bound by the judgment, and because the instant Petition and the other action have common questions of law and fact. *See, e.g.,* Village of Spring Valley v. Village of Spring Valley Housing Authority, 33 A.D.2d 1037, 308 N.Y.S.2d 736 (2nd Dep't 1970) (NAACP and individual low-income residents were entitled to intervene in proceeding by village to dissolve local agency that had been established to provide public housing for low-income residents); Teleprompter Manhattan Catv Corp. v. State Board of Equalization and Assessment, 34 A.D.2d 1033, 311 N.Y.S.2d 46 (3rd Dep't 1970).

Like MSG, Petitioners seek to prevent the MTA from selling the Rail Yards in violation of its statutory and common law obligations to obtain the terms most beneficial to the public in any disposition of public property. However, Petitioners also oppose the MTA's acceptance of MSG's bid and respectfully submit that both the Jets and MSG's bids are deficient. Petitioners respectfully submit that all of the bids submitted in response to the MTA's February 22, 2005, RFP must be rejected, as the MTA's procedure to solicit these bids was both substantively and procedurally defective. Petitioners also bring an action pursuant to State Finance Law § 123 on their own behalf and on behalf of all taxpayers in the State of New York similarly aggrieved, and believe that none of the parties in MSG v. MTA et al. adequately represents the interests of the taxpayers who will be injured if the MTA is allowed to sell the Rail Yards for a small fraction of its appraised value.

II. RESPONDENTS HAVE VIOLATED THEIR FIDUCIARY DUTY TO SECURE THE MOST BENEFICIAL TERMS POSSIBLE FOR THE SALE OF THE RAIL YARDS

The essential rules for boards exercising control over public property in New York were set forth in Ross v. Wilson, 308 N.Y. 605 (1955). In Ross, the Court of Appeals required a school board to accept the higher of two bids for the sale of a former school site. The Court's decision was based on a detailed analysis of the process and duties of public agencies in any sale of property:

> Public officials are, it has been said, "temporary trustees" of public property...and "It is mandatory upon trustees, with discretionary power of sale, to dispose of trust property upon the most beneficial terms which it is possible for them to secure" .... In Berner v. Equitable Office Bldg. Corp., (175 F. 2d 218, 221) the United States Court of Appeals said in an opinion by Judge Learned Hand: "It is the duty of every fiduciary to get the best price he can upon the sale of any part of the trust property". This exists regardless of the method of sale.

Id.

Since the Court of Appeals decision in Ross, New York courts have consistently required that public authorities, including the MTA, seek to secure the most beneficial terms possible in the sale of any public asset, and that they proceed through a process that is fair towards all bidders.

In Orelli v. Ambro, 41 N.Y.2d 952 (1977), the Court of Appeals approved of the procedure for a public auction of land by the town of Huntington, stating: "The public interest required the board to secure the most beneficial terms for the sale of the town's property in order to lessen the possibility of extravagance, fraud or favoritism." Id. at 953.

In Square Parking Systems, Inc. v. Metropolitan Transportation Authority, 92 A.D.2d 782, 459 N.Y.S.2d 774 (1st Dep't 1983), this rule was applied to the MTA under circumstances with particular relevance to the Petition herein. The plaintiff in Square Parking was a bidder for the sublease of an MTA garage. After the initial submission of bids, another bidder offered to purchase the MTA's leasehold on the garage for $2 million. The Court held that "[t]he offer to purchase the MTA leasehold prior to the award of any lease required the MTA board to reconsider and reappraise the entire situation for, as a public body it was required to obtain the terms most beneficial to the public." Id. at 784-784; *see also*, Etkin v. Capital District Regional Off-Track Betting Corp., 9 A.D.3d 674, 780 N.Y.S.2d 220 (2004) (board of directors of public benefit corporation abdicated its fiduciary responsibilities by permitting extravagant expenses by management); Davis v. Board of Education 125 AD 2d 534.[8]

In the past, the MTA has acknowledged that, when selling real property, its primary mission is to obtain the best financial return available. In the sale of the former New York Coliseum site at Columbus Circle, in 1985, for example, the MTA chose to award the deal to the second highest bidder, but only after the City of New York, which stood to gain higher tax

8 New York's case law on the fiduciary duty of public authorities is also supported by the parallel rules for private corporations. *See, e.g.,* Kavanaugh v. Kavanaugh Knitting Company, 226 N.Y. 185, 193 (1919) (corporate directors "are bound by all those rules of conscientious fairness, morality and honesty in purpose, which the law imposes for those who are under the fiduciary obligations and responsibilities" of trustees); S.H. and Helen R. Scheuer Family Foundation v. 61 Associates, 179 A.D.2d 65, 70, 582 N.Y.S.2d 662, 664-65 (1st Dep't 1992); Amfesco Industries, Inc. v. Greenblatt, 172 A.D.2d 261, 265, 568 N.Y.S.2d 593, 597 (1st Dep't 1991) (corporate fiduciaries have a duty to safeguard the corporation's assets and not to waste them); Bayer v. Beran, 49 N.Y.S.2d 2 (Sup. Ct., N.Y. Cty. 1944).

revenues from the second highest bidder's proposed project, agreed to pay the difference between second bidder's price and the high bidder's price. In other words, the MTA refused to accept the second-highest bid unless the City, which preferred the second-highest bid, made up the shortfall. *See*, Wo & Jo Realty Corp. v. City of New York, 140 Misc.2d 154, 530 N.Y.S.2d 479 (Sup. Ct., N.Y. Cty. 1988).

In the present case, the MTA is under a fiduciary obligation to the people of the State of New York to obtain the maximum possible benefit for the sale of the Rail Yards. If the mayor of New York City or any other government actor wishes to support a specific bid for MTA property, they should be required to do so through an open bidding process that allows the Authority to fulfill its fiduciary obligations.

III. THE MTA HAS ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER BY CONDUCTING AN RFP PROCESS THAT DID NOT TREAT ALL BIDDERS FAIRLY AND BY ACTING WITH FAVORITISM, IMPROVIDENCE AND EXTRAVAGANCE IN AWARDING THE RAIL YARD TO THE JETS

Government agencies and officials act arbitrarily and capriciously when they act – as Respondents have acted – without a "rational basis supported in fact." Remmers v. DeBuono, 241 A.D.2d 587, 588, 660 N.Y.S.2d 159, 161 (3rd Dep't 1997).

It is well established that when a government actor deviates from either its stated policy or past practice without providing a valid reason and cogent explanation for its departure, it acts in an impermissibly arbitrary and capricious manner. Matter of Martin, 70 N.Y.2d 679, 681, 518 N.Y.S.2d 789 (1987); Matter of Lafayette Storage & Moving Corp., 77 N.Y.2d 823, 566 N.Y.S.2d 198 (1991); Uniform Firefighters of Cohoes v. Cuevas, 276 A.D.2d 184, 187, 714 N.Y.S.2d 802, 804 (3rd Dep't 2000), *leave to appeal denied*, 96 N.Y.2d 711, 727 N.Y.S.2d 697

(2001); Sisters of Charity Hospital of Buffalo v. Axelrod, 98 A.D.2d 979, 470 N.Y.S.2d 215, 217 (4th Dep't 1983). Consistent with these principles, it has been held that government decision-makers must base their decisions on "articulated standards" and guidelines and must adhere to the prescribed standards and guidelines in a manner free of favoritism, partiality, or arbitrariness. R.M. Investors Corp. v. Maggi, 104 Misc.2d 41, 52-53, 427 N.Y.S.2d 919, 927-28 (Rockland Cty Ct., 1980), *aff'd*, 120 Misc.2d 327, 467 N.Y.S.2d 295 (App. Term, 2nd Dep't 1983).

It is clear that whenever the MTA solicits bids for the purchase or sale of property, it must proceed through a process fair for all bidders. "The MTA does not have to bid at all on public contracts. Once the MTA does solicit bids, it is required to act fairly towards all bidders." Tri-State Aggregates Corp. v. MTA, 108 A.D.2d 645, 646 (1st Dep't 1985).

In Conduit and Foundation Corp. v. MTA, 66 N.Y. 2d 144, the Court of Appeals stated that the MTA had broad discretion in assessing bids, but noted that such discretion could not be exercised in an "arbitrary and capricious" manner. The Court held that the authority's award of a bid should be set aside "upon a showing of actual impropriety or unfair dealing—i.e. favoritism, improvidence, extravagance, fraud and corruption." Conduit and Foundation at 344. *See also* Jered Contracting v. NYC Transit Authority, 22 N.Y.2d 187, 292 N.Y.S.2d 98, N.Y. 1968. ("The provisions of the statutes and ordinances of this state requiring competitive bidding in the letting of public contracts evince a strong public policy of fostering honest competition in order to obtain the best work or supplies at the lowest possible price. In addition, the obvious purpose of such statutes is to guard against favoritism, improvidence, extravagance, fraud and corruption.") Jered at 193.

It is also well-settled that a failure to provide a reasonable timeframe for submissions to potential bidders defeats the primary purpose of conducting a competitive contracting process – *i.e.,* the encouragement of maximum competition, so as to obtain the best possible deal for the public – and it renders the decision based on that process arbitrary and capricious. McArdle v. Board of Estimate of the City of Mt. Vernon, 74 Misc.2d 1014, 347 N.Y.S.2d 349 (Sup. Ct., Westchester County 1973), *aff'd*, 45 A.D.2d 822, 357 N.Y.S.2d 1009 (2nd Dep't 1974); *see also, generally,* Wo & Jo Realty Corp. v. City of New York, 157 A.D.2d 205, 212, 555 N.Y.S.2d 271, 274 (1st Dep't 1990) ("the RFP method . . . affords the government the flexibility . . . to achieve the greatest economic benefit in dealing with prospective contractors, developers and franchisees"); *See also*, Tri-State Aggregates Corp. v. MTA, 108 A.D.2d 645, 646.

Finally, any process impermissibly favoring one bidder over another must be set aside. In McArdle, the City of Mt. Vernon solicited bids for a computer services project, requiring responses within ten days of the request for bids. The winning bidder had a decided advantage over other potential bidders because of its familiarity with the city's needs and requirements. After finding that the process was fundamentally unfair and impermissibly favored one bidder, the Court vacated the award and ordered the city to re-bid the contract:

> where the specifications for the contract were drawn by one of the bidders, where they are tailor made for a particular purpose by one of the bidders, it would seem clear that the only means of protecting the public interest and the fairness of the contract would be . . . the applications . . . of the standards of reasonableness and fairness evolved by the courts. . . . A minimum requirement in the public interest should be that the detailed specifications thus drawn, and the background factual information necessary to make an intelligent bid, should be placed in the hands of all bidders, and not just one, and that adequate time be allowed for the formulation of the bids.

74 Misc.2d at 1018-19, 347 N.Y.S.2d at 353-54.

The process by which the MTA offered to sell the Rail Yards was similarly flawed. By the time the RFP was issued, the Jets had been working closely with the MTA, the City of New York, and the Empire State Development Corporation – for years – on plans to develop the site. It was impossible for any new bidders to comply with the requirements of the RFP provided by the MTA. This is confirmed by the lack of participation in the purportedly "competitive" bidding process by anyone other than MSG and the Jets.

As noted above, New York Courts have consistently overturned decisions by public agencies and authorities which were tainted by favoritism, improvidence, or extravagance. See Conduit and Foundation Corp., 66 N.Y.2d 144 (1985); Jered Contracting Corp., 22 N.Y.2d 187 (1986); McArdle, 74 Misc. 2d 1014, 447 N.Y.S.2d 349 (1979). Here, the Court must reject the MTA's confused, truncated process, which was clearly designed to favor the Jets. The Court should also reject the disgraceful result of that process – the sale of a billion-dollar state asset for $210 million. If this is not a case of favoritism, improvidence, and extravagance by a public authority, it is difficult to imagine how New York's law prohibiting such conduct can ever be violated.

IV. THE MTA VIOLATED THE STATE FINANCE LAW BY SELLING THE RAIL YARDS THROUGH THE RFP OF FEBRUARY 22, 2005

Petitioners 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 1.9

The Respondents agreed to sell the Rail Yards to the Jet's long before the issuance of the RFP of February 22, 2005. Petition, ¶37. The Respondents only appraised the property after public pressure. The MTA's appraisal estimated the value of the property at $923 million. Petition, ¶35. After the appraisal was completed and only after MSG's initial proposal on February 4, 2005, disrupted plans to sole-source the property to the Jets, the MTA issued the RFP of February 22, 2005 to solicit bids from prospective developers. Petition, ¶38. For many reasons, including, but not limited to, the minimal period of time available for interested parties to prepare their bids, the failure to make available the documents necessary to properly prepare bids,

9 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.

and the 10-day period to review bids before voting, the RFP of February 22, 2005 discouraged submission of bids by interested parties and resulted in the selection of the Jets' bid, which offered only a small fraction of the value of the Rail Yard. Petition, ¶¶ 39-55. All of the bids were far below the appraised value of the property and should have been rejected by the MTA Board. Id. However, the MTA Board voted to select the Jets' bid on March 31, 2005. Petition, ¶55. The MTA Board vote to select the Jet's bid constitutes a wrongful sale of state property which deprives the State of New York and its taxpayers of funds from the sale of such a valuable State asset. As such, the Respondents have violated the New York State Finance Law and the relief sought in the Petition is properly granted.

V. THE REQUIREMENTS FOR INJUNCTIVE RELIEF HAVE BEEN MET

"[T]o be entitled to a permanent injunction, a plaintiff must demonstrate that it will be irreparably harmed absent the injunction." Ansonia Tenants' Coalition, Inc. v. Ansonia Associates, 151 Misc.2d 213, 217, 573 N.Y.S.2d 211, (Sup. Ct., N.Y. County 1991) (citing Kane v. Walsh, 295 N.Y. 198, 205-06 (1946)). Irreparable harm "has been defined as that which cannot be repaired, restored or adequately compensated in money, or where the compensation cannot be safely measured." Intern. Union of Operating Engineers, Local 463 v. City of Niagara Falls, 191 Misc.2d 375, 743 N.Y.S.2d 236 (Sup. Ct., Niagara Cty. 2002); Midway Beverage Corp. v. Grolsch Importers, Inc., 1987 WL 119908, *3 (Sup. Ct., Kings Cty.); *see also*, Sirius Satellite Radio, Inc. v. Chinatown Apartments, Inc., 303 A.D.2d 261, 756 N.Y.S.2d 557 (1st Dep't 2003); McLaughlin, Piven, Vogel, Inc. V. W.J. Nolan & Company, Inc., 114 A.D.2d 165, 174, 498 N.Y.S.2d 146, 152 (2nd Dep't 1986).

Obviously, once a real estate transaction is completed and construction of a stadium

begins, there will be no adequate means of redressing Petitioners' claim that the awarding of the Rail Yards to the Jets was unlawful. Irreparable harm will be suffered, making preemptive injunctive relief appropriate and necessary.

Because time is of the essence, a preliminary injunction enjoining the Rail Yards transaction from going forward pending the resolution of this proceeding on the merits is also warranted. Preliminary injunctive relief should be granted where the moving party demonstrates (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) the balance of equities favor the movant. J.A. Preston Corp. v. Fabrication Enterprises, Inc., 68 N.Y.2d 397, 406, 509 N.Y.S.2d 520, 534 (1986).

Likelihood of success is established where the moving party has "set forth a prima facie case" and "may be sufficiently established even where the facts are in dispute and the evidence inconclusive." Four Times Square Associates, LLC v. Cigna Investments, 306 A.D.2d 4, 5-6, 764 N.Y.S.2d 1, 2-3 (1st Dep't 2003). As explained above, Petitioners have established that the MTA's decision to sell the Rail Yards based upon a substantively and procedurally defective RFP process was unlawful and arbitrary and contrary to the Authority's fiduciary duties.

The balance of equities also favors Petitioners, since all they are seeking to do is to compel the MTA to re-bid the development project, so that the MTA – and the people of the State of New York – will obtain more money for the Rail Yards property.

CONCLUSION

For all of the reasons set forth above, and in the annexed Petition and affidavits, Petitioners respectfully request that the Court enter an order (1) declaring that the MTA violated

its fiduciary duty to obtain the best terms possible for the sale of the Rail Yards; (2) declaring that the MTA acted arbitrarily and capriciously by attempting to sell the Rail Yards through a flawed, unfair RFP process; (3) enjoining the MTA from entering into any agreement to sell the Rail Yards to the Jets based on the February 22 RFP process; (4) requiring the MTA to initiate a new RFP process consistent with its fiduciary obligation and free of any taint of favoritism, improvidence, and extravagance; and (5) granting such other relief as the court deems appropriate.

Dated: New York, New York
April 15, 2005

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