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In the M
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TE OF NEW YORK

For Judgment

- against -

NEW YORK ME
TRANSPORTAT
ETS DEVELOPM

Index No. 104644/05

LAS Part 49

Justice Cahn

PETITIONER'S REPLY
MORANDUM OF LAW IN
ORT OF ARTICLE 78
ON AND MOTION FOR
VARY INJUNCTION

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PRELIMINARY STATEMENT

Respondents devote the bulk of their papers to citing and discussing myriad cases setting forth the rudiments of "rational basis" review of administrative action. Respondents have avoided, however, any substantial discussion of the key principle of law that governs *this* case: the rule that, once the MTA elected to dispose of property through competitive bidding, it had to act *fairly* with respect to all bidders. Indeed, the MTA grudgingly acknowledges this principle (without discussion) in but a single passage of its 58-page brief, and it then cites a controlling case—the First Department's unanimous decision in *Square Parking Sys., Inc. v. MTA*, 92 A.D.2d 782, 783-84, 459 N.Y.S.2d 774, 775-77 (1st Dep't 1983)—only in passing in a footnote.[1] *Square Parking* and similar cases make clear that the MTA, "as a public body," was "required to obtain terms most beneficial to the public" and to "act fairly with respect to all bidders."

It is self-evident that the MTA did not "obtain [the] terms most beneficial to the public": the MTA accepted the Jets' offer even though it was $200 million lower than MSG's offer. And the MTA's bidding process was anything but fair. From the moment it negotiated the MOU, the MTA acted to favor the Jets over other bidders without regard to the merits of the other bids. To achieve that predetermined outcome, the MTA structured an aberrationally expedited bid process designed to favor the Jets and discourage other bidders. It hired real estate consultants with conflicts of interest and permitted board members who had prejudged the issues to participate in the decision-making process. Although the Jets submitted a noncompliant bid

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1 MTA Br. at 41 n.44; *see also* Jets Br. at 34.

that was contingent on both a zoning override and an unprecedented, and inconceivable, future rezoning of the site, the MTA recast the requirements of the RFP to consider the Jets' proposal. Contrary to the provisions of the RFP, the MTA also permitted the Jets—but no other bidder—to restructure their bid in order to purport to buy only *part* of the development rights to the Site.

Moreover, the MTA arbitrarily altered the evaluation criteria specified in the RFP at the eleventh-hour and without notice in other ways—such as by relying on supposed "uncertainty" concerning the No. 7 subway line extension—that were transparent covers for its decision to select the Jets' inferior bid. In the end, the MTA Board awarded the property to the Jets without the benefit of any staff recommendation and without making the requisite statutory finding that its decision was "in the interest of the authority" (N.Y. Pub. Auth. Law § 1267(6))—both in contravention of its typical practice and, as to the latter, in violation of law. Indeed, it appears from published reports that, even after the MTA Board acted, the MTA and the Jets continued to implement the "sweetheart deal" that they always intended: they negotiated a term sheet that further altered this deal in ways that compromise the MTA's legal position, yet the MTA and Jets have refused to produce that term sheet to this Court.

Stripped of their rhetoric and irrelevancy, Respondents' papers offer no rational basis for the MTA's decision. The justifications offered for the MTA's decision either ignore the flawed bidding process that actually occurred, or—as in the case of the MTA's purported doubts about MSG's ability to close the deal—are simply post-hoc rationalizations that were manufactured after the bidding and raised for the first time by the MTA's lawyers here in order to defend the MTA's favoritism toward the Jets.

In the final analysis, Respondents' entire position reduces to two propositions, neither of which can shield the MTA's illegal conduct from this Court's searching review: (1) the notion that an adverse court ruling will somehow harm the City's Olympic bid; and (2) the claim that the MTA crafted its RFP so as to retain "complete discretion to select" the Jets' inferior proposal, and even to "waive compliance with" or "deviate[]from" the terms of the RFP during the competitive process itself.[2] On the basis of such arguments, Respondents ask this Court to refrain from intervening "'to prohibit a *fait accompli*.'"[3] Respondents are simply wrong, of course, to suppose that this Court's role is to act as the cheering section for the City's Olympic bid. Respondents are also wrong to contend that the MTA could, by reserving for itself "complete discretion" in the RFP, escape its legal duties. The MTA's solicitation in *Square Parking* was cast in the same broad terms, but that did not prevent the First Department from holding that this public authority, once it undertakes to seek competitive proposals for public property, must obtain the best deal and must conduct a fair process. Because the MTA did neither here, its decision must be set aside. The MTA must be ordered to halt its effort to dispose of this property to the Jets at an inadequate price, and to award this property to MSG as the highest bidder or else put it out for re-bid in a fair and proper bidding process.

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2 Jets Br. at 13, 47.

3 *Id.* at 56 (quoting *New Scotland Ave. Neighborhood Ass'n v. Planning Bd.*, 142 A.D.2d 257, 261, 535 N.Y.S.2d 645, 648 (3d Dep't 1988)).

ARGUMENT

POINT I

THE MTA WAS REQUIRED IN THE RFP PROCESS TO ACT "FAIRLY" AND OBTAIN THE "MOST BENEFICIAL" TERMS

In an attempt to obscure the relevant legal standards, the MTA engages in a rambling discussion about how "competitive bidding statutes [and cases] are inapposite" because "the MTA had no statutory duty to use a competitive bid process to dispose of real property interests in the West Side Yards." (MTA Br. at 35.) But, as the MTA is ultimately forced to concede, by opening the sale of the Rights to a competitive RFP process, the MTA was required to act "fairly" in accordance with the standards articulated by the First Department in two competitive bid cases, *Square Parking Sys., Inc. v. MTA* and *Tri-State Aggregates Corp. v. MTA*.[4] In *Square Parking*, the First Department held that, by opening the leasing of a garage to a competitive process, the MTA "was required to act *fairly* with respect to all bidders" and "required to obtain terms *most beneficial* to the public." 92 A.D.2d 782, 785, 459 N.Y.S.2d 774, 777 (1st Dep't 1983). And in *Tri-State*, the First Department confirmed that, in identifying the "most beneficial" terms, the MTA is required to act "fairly toward all bidders." 108 A.D.2d 645, 646, 485 N.Y.S.2d 754, 754 (1st Dep't 1985).

The MTA concedes that it had an "obligation" to "act rationally in evaluating the various proposals pursuant to the RFP." (MTA Br. at 37.) Under the standards articulated by the First Department in *Square Parking* and *Tri-State*, any analysis of whether the MTA acted "rationally" here necessarily requires a determination of whether the MTA acted "fairly" in the RFP process and obtained the "most beneficial" terms. (*See id.* at 41 & n.44.) Because the MTA

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[4] MTA Br. at 41 n.44; *see also* Jets Br. at 34 (conceding that *Square Parking* is the "relevant" standard in this case).

conducted a sham process designed to award the Rights to the Jets at any cost, the MTA failed to uphold its duties to act "fairly" and to obtain the "most beneficial" terms. Thus, as a matter of law, the MTA's decision to award the Rights to the Jets was arbitrary and capricious and must be annulled.

A. THE MTA VIOLATED ITS FIDUCIARY AND LEGAL DUTIES TO SECURE THE "BEST PRICE OBTAINABLE" FOR THE SITE

1. Consistent With Its Fiduciary Duty To Act "In The Interest Of The Authority," The MTA Should Have Accepted MSG's Higher Bid

The MTA does not, and cannot, dispute that (i) MSG's bid complied with the specifications set forth in the RFP, and (ii) MSG's bid exceeded the Jets' bid by at least $200 million. (*See* Chart Comparing Bids (Petitioner's Opening Memorandum of Law ("Pet. Br.") app. A).) The MTA nevertheless bypassed MSG's higher bid by, *inter alia*, citing naked political pressures in favor of the Jets' stadium that were exerted by its "two stake holders"—the Governor and the Mayor—purportedly in order to aid the general "economic development" of the area. As MTA Board member James S. Simpson put it, "we can't think of ourselves strictly as a transportation company, we are part of . . . the economic engine that drives the city of New York."[5] Respondents embrace that rationale, noting—as the Jets put it—that in disposing of its property, "the MTA must consider the interests of the people of the State of New York." (Jets Br. at 27.) Respondents are wrong. As a limited-purpose public authority, the MTA was not free to accept a lower bid in order to serve its conception (and that of its "stake holders") of what might be good for the "economic development" of the State. In so doing, the MTA plainly disregarded its statutory mandate and its fiduciary duties.

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5 Krsulic Aff. Ex. R (Certified Transcript of MTA Board Meeting, Mar. 31, 2005 ("Certified Transcript")) at 38 (Statement of MTA Board Member Simpson).

The New York Court of Appeals' decision in *Ross v. Wilson*, 308 N.Y. 605 (1955), is directly on point and refutes the Jets' claim that "there is no authority for MSG's assertion that the MTA cannot consider the broader concerns of the State." (Jets Br. at 34.) In *Ross*, a municipal board of education opted to sell a schoolhouse to a church even though the church's bid was $1,000 less than a competing bid; the board reasoned that, "if the sale were to be mandated to be made to the highest bidder, it may well be that a saloon, filling station or other enterprise undesirable . . . might be forced upon [the land]." *Id.* at 609. The board defended its decision to accept the lower bid because, *inter alia*, the applicable provisions of the Education Law did not explicitly require the board to accept the highest bid, but instead provided that the board members could sell property "at such price and upon such terms as they shall deem proper." *Id.* at 610. Though recognizing that the board's decision to sell the schoolhouse to a church was made for "commendable" reasons after a local referendum endorsed the church sale, the Court of Appeals annulled the board's decision in an opinion that could hardly be clearer:

> Sections 402 and 1804 (subd. 6) of the Education law contemplate that the electors may exercise their judgment and discretion in good faith concerning what is the best price at which a schoolhouse can be sold, but where a higher offer from a responsible bidder is already in their hands, there is not room for the exercise of discretion concerning it. The higher offer must be accepted if it is for a use that may be conducted pursuant to law. . . .
>
> Whichever procedure is prescribed by the Legislature for selling this publicly owned property, it was the duty of the board of trustees and of the district meeting to obtain the *best price obtainable* in their judgment for any lawful use of the premises. In this respect, their powers and duties are similar to those of trustees. . . . *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*. . . . 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 fiduciary obligation exists regardless of the method of sale. . . .

> Neither the district meeting nor the board of education could deliberately accept a lower offer for public property in order to favor one bidder, and thus promote objectives outside of the scope of the Education Law, however commendable such purposes may be.

Id. at 612-16 (internal quotation omitted).

Here, the MTA likewise could not "deliberately accept a lower offer" to "promote objectives outside the scope of the [Public Authorities Law]." As set forth in Section 1267(6) of the Public Authorities Law, in order to "rent, lease, or grant easements or other rights in any land or property of the authority," the MTA must first determine that "it is *in the interest of the authority*" to do so. N.Y. Pub. Auth. Law § 1267(6) (emphasis added). As former MTA Chairman Richard Ravitch has sworn: "the MTA's board members have a legal responsibility and fiduciary duty to do what is in the interest of the Authority. In this case that necessarily means *getting the highest price* obtainable for the Authority so that these funds can be used for transportation purposes." (Ravitch Aff. ¶ 3 (emphasis added).)[6]

Respondents' attempt to evade the "best price obtainable" standard on the ground that it applies only in "the education context" is baseless. (Jets Br. at 30.) Just as the Education Law requires boards of education to act "for the best interest of the school district" in connection with the sale of property, the Public Authorities Law requires the MTA to act "in the interest of the

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6 Ignoring the Court of Appeals' decision in *Ross*, the Jets assert that MSG has "recharacterize[d] Mr. Ravitch's opinions as founded upon some type of enforceable legal duty" and rip out of context a comment by Ravitch to a committee of the New York State Assembly concerning "styles of governance." (Jets Br. at 34-35.) The full text of Ravitch's testimony to the committee (attached as Exhibit A to the Supplemental Affidavit of Richard Ravitch, dated Apr. 26, 2005) makes clear that his views about the MTA's legal and fiduciary duties are not, as the Jets claim, "merely about governance style." (*Id.* at 34.) As Ravitch explained: "Regardless of any differences in governance style between myself and Mr. Kalikow, the legal and fiduciary obligations of MTA Board members remain the same: By disposing of this property without securing the highest price obtainable, the MTA Board failed to fulfill those obligations here." (Ravitch Supp. Aff. ¶7.)

Indeed, like Ravitch, Constantine Sidamon-Eristoff, who served on the MTA Board from 1974 to 1989, has also now confirmed in a sworn affidavit: "During my 15 years as an MTA Board member, I always understood my legal and fiduciary duties to be as follows: from the moment an MTA Board member is confirmed, the Authority's interests must come first. At that point the MTA Board member's job is totally fiduciary, and each Board member's fiduciary duty is owed solely to the Authority, the statutory purposes of the Authority, and the riding public it is obligated to serve." (Sidamon-Eristoff Aff. ¶4.)

authority" in connection with the sale of its property.[7] *Merritt Meridian Constr. Corp. v. Gallagher*, 96 A.D.2d 933, 934, 466 N.Y.S.2d 381, 383 (2d Dep't 1983). The scope of authority of the MTA and boards of education in the sale of property is thus virtually identical. And the MTA's *duty* in exercising such authority is clear: as explained by the Second Department in *Merritt Meridian*, after a limited-purpose public entity like the MTA "exercises its discretion as to the method of sale and the bid specifications, its duty, absent the retention of the right to reject any and all bids, is to accept the highest, responsive offer from a responsible bidder for a lawful use." *Id.*

Because the MSG bid complied with the specifications set forth in the RFP and exceeded the Jets' bid by at least $200 million, it should have been accepted as "the highest, responsive offer from a responsible bidder for a lawful use." The Jets assert that this is an "erroneous legal theory" that "conflates a competitive bid process . . . with a competitive proposal process" (Jets Br. at 29), and the MTA inexplicably mischaracterizes *Ross* and its progeny as involving "competitive bid statutes that require administrative agencies to award contracts to the lowest bidder." (MTA Br. at 33 & n.31.) Both the Jets and the MTA, however, ignore the Court of Appeals' plain recognition in *Ross* that the "best price obtainable" standard applies irrespective of "whichever procedure is prescribed by the Legislature for selling th[e] publicly owned property." 308 N.Y. at 612.

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[7] As the Public Authorities Law limits the scope of the MTA's authority in connection with the sale of property, the MTA's reliance on *Creole Enters., Inc. v. Giuliani*, 167 Misc. 2d 810, 636 N.Y.S.2d 547 (Sup. Ct. New York County 1995), *aff'd*, 653 N.Y.S.2d 576 (1st Dep't 1997), is misplaced. In *Creole*, the radio stations at issue were "run by the City [not a limited purpose public entity] pursuant to laws which vest the City with *tremendous* power and discretion." 167 Misc. 2d at 820, 636 N.Y.S.2d at 553 (emphasis added). Moreover, *Creole* did not even involve competing proposals. 167 Misc. 2d at 814-15, 636 N.Y.S.2d at 550 ("Initially, [the City] considered selling the radio stations to commercial buyers. Ultimately, however, it decided to sell the stations to the [non-profit] Foundation. . . . [T]he City planned neither to conduct competitive bidding nor to hold a public hearing [and did not.]").

There is no greater force to the Jets' contention that the First Department's decision in *Jo & Wo Realty Corp. v. City of New York*, 157 A.D.2d 205, 555 N.Y.S.2d 271 (1st Dep't), *aff'd*, 76 N.Y.2d 962, 563 N.Y.S.2d 727 (1990), somehow "controls this case." (Jets Br. at 29, 32.) In *Jo & Wo*, the First Department held only that, in selling the unused New York Coliseum for redevelopment pursuant to the State's Urban Renewal Law, the City did not have to accept the highest bid because the Urban Renewal Law "explicitly authorize[d] the sale of property to an applicant which does not necessarily offer the highest price but proposes to develop the property in accordance with the purposes of the site's urban renewal program." 157 A.D.2d at 213, 555 N.Y.S.2d at 275. The Jets do not, and cannot, identify any state statute authorizing the MTA to ignore or otherwise discount the highest bid here. *Jo & Wo* is entirely inapposite.

The Jets are ultimately forced to admit that the "relevant" First Department decision here is *Square Parking*, in which "the First Department specifically noted that since the MTA is a 'public body,' it should select the course of action 'most beneficial to the public.'" (Jets Br. at 34.) As the Court of Appeals has explained, "in the case of a public body, . . . the object to be achieved is likewise to realize *the best price* for the property." *Ross*, 308 N.Y. at 610.

By accepting the Jets' significantly lower bid, the MTA plainly failed to honor its fiduciary duties as a "public body." Its decision should be set aside on that basis alone. And, even were it permissible for the MTA to consider the political wishes of its "two stake holders"—the Governor and the Mayor—in the guise of "economic development," it was improper for the MTA here simply to take at face value the representations of State and City officials on this subject without conducting its own independent assessment of the relative economic-development benefits of each proposal. The MTA's blind acceptance of these representations was pure speculation, unsupported by any independent appraisal, and therefore

patently unlawful. *See, e.g.*, *Merritt Meridian*, 96 A.D.2d at 934, 466 N.Y.S.2d at 383 (rejecting school district's determination awarding contract to lower bidder because "[a]cceptance of such a lower bid would constitute a breach of the board's fiduciary duty and *the substitution of the judgment of said bidder for that of the board* as to what terms and conditions would yield the maximum financial benefits for the school district") (emphasis added).[8]

2. The MTA Failed To Make Express Findings That The Jets' Significantly Lower Bid Was "In The Interest Of The Authority"

As both the Court of Appeals and First Department have made clear, obtaining the best price is the most important factor in any fair decision-making process by a limited-purpose public entity such as the MTA.[9] While the MTA contends that price "is not the only factor to be considered in an evaluative process" (MTA Br. at 40), it does not, and cannot, dispute that price is the primary factor. Indeed, the cases cited by the MTA confirm that it "may not exercise its discretion arbitrarily, *e.g.*, to accept a lower bid, based on extraneous considerations," and that,

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8 The MTA never even inquired of MSG about the economic development benefits of its mixed-use, residential community proposal, even though MSG's project would create more direct tax revenue ($275 million per year by 2018), Lynn Aff. ¶ 5, and more permanent jobs (13,000) than is projected for the stadium project. *Compare* Mastro Aff. Ex. 65 (Letter from Hank Ratner, Vice Chairman of Madison Square Garden, L.P., to Roco Krsulic, Director of Real Estate, MTA, dated Mar. 21, 2005 re: Proposal by Madison Square Garden, L.P. in response to the Metropolitan Transportation Authority's Request for Proposals, dated Feb. 22, 2005) at III-10, *with* Mastro Supp. Aff. Ex. 78 (New York City Independent Budget Office, *Background Paper: The Long-Term Costs and Benefits of the New York Sports and Convention Center*, February 2005); *see also* Mastro Supp. Aff. Ex. 79 (Charles V. Bagli, *Mayor's Guess at Stadium Jobs is Highest Yet*, N.Y. Times, Apr. 10, 2005, section 1 at 33). In fact, the MTA itself recommended just such a residential development for the Site in its 1989 Master Plan, and the MTA's own appraiser recently valued the Site at nearly $1 billion on the basis that its "highest and best" use is precisely this type of residential development. Mastro Aff. Ex. 47 (*Master Plan Caemmerer West Side Yard*) at 3; *id.* Ex. 15 (Letter from MTA's Appraiser to Roco Krsulic, dated Jan. 31, 2005) ("[T]he highest and best use of the subject site is its development with a mixed-use development that is for the most part residential apartment buildings with ground-level retail use along the site's 11th Avenue frontage."). Both the well-respected Regional Plan Association and the Speaker of the City Council agree. *Id.* Ex. 31 (RPA Statement, dated Feb. 23, 2005) ("Mixed-use development on the site would both provide a higher return to the MTA and be a better neighbor to the surrounding area than a football stadium."); *id.* Ex. 41 (David M. Levitt & Josh P. Hamilton, *NYC's Miller Says Jets Stadium Bid Inferior to Cablevision Plan*, Bloomberg News, Mar. 22, 2005) (noting that City Council Speaker Gifford Miller endorsed MSG's proposed project as consistent with the carefully crafted West Side rezoning plan that the City Council recently approved only after capping and reducing the area's density). Hence, the MTA's blind acceptance of the government's exaggerated stadium projections and failure to consider the economic development benefits of MSG's proposal render the MTA's determination here arbitrary and capricious in any event.

9 *Ross*, 308 N.Y. at 612-16; *Square Parking*, 92 A.D.2d at 785, 459 N.Y.S.2d at 777.

when other factors are considered, the determination must still result "in the acceptance of the bid bringing the greatest amount of revenue into [its] coffers, *i.e.*, the sale of property on the 'most beneficial terms.'"[10]

The MTA cannot credibly dispute that the MSG proposal, which exceeded the Jets' bid by at least $200 million, was *presumptively* the "most beneficial." Under *Ross* and its progeny, in securing the "most beneficial" terms, limited-purpose public entities like the MTA are required to seek the "best price obtainable."[11] The MTA thus could not have accepted the Jets' significantly lower bid except after a formal determination that it was nonetheless "in the interest of the authority." N.Y. Pub. Auth. Law § 1267(6). Indeed, "the large amount of money involved between the high bid and the low bid makes it seem imperative not to arbitrarily ignore the [more favorable] bidder without good reason based on sufficient facts to justify such rejection, and acceptance of the [less favorable] bid." *N. Country Dev. Corp. v. Massena Hous. Auth.*, 65 Misc. 2d 105, 113, 316 N.Y.S.2d 894, 903 (Sup. Ct. St. Lawrence County 1970). Contrary to its customary practice, the MTA did not issue any findings with respect to its decision to award the Rights to the Jets (Lhota Aff. ¶ 2-3), much less the required finding that acceptance of the Jets'

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10 *New City Jewish Ctr. v. Flagg*, 111 A.D.2d 814, 815, 490 N.Y.S.2d 560, 561 (2d Dep't 1983). The MTA's reliance on *Mun. Testing Lab. v. N.Y. City Transit Auth.*, 233 A.D.2d 105, 649 N.Y.S.2d 426 (1st Dep't 1997), is misplaced. In *Municipal Testing*, the winning bid reflected the maximum financial gain because the bidder submitted a "bid almost identical to petitioner's" and had "travel related expenses" that were "lower than petitioner's." *Id.* The MTA's reliance on *Citiwide News, Inc. v. N.Y. City Transit Auth.*, 62 N.Y.2d 464, 478 N.Y.S.2d 593 (1984), fails because *Citiwide* concerned only "the question whether a license agreement . . . is subject to the competitive bidding requirements." 478 N.Y.S.2d at 594. As the MTA's own cases confirm, even "absent a competitive bidding requirement, a city or agency has a fiduciary duty to sell property in the public interest" and, in the first instance, that duty "means getting the best price." *Creole*, 167 Misc. 2d at 820, 636 N.Y.S.2d at 553; *see also Yeshiva of Spring Valley, Inc. v. Bd. of Educ.*, 132 A.D.2d 27, 31, 521 N.Y.S.2d 253, 256 (2d Dep't 1988) (annulling lease because the board "ignored the amount of money to be offered for the lease by the parties").

11 *See Ross*, 308 N.Y. at 611; *Orelli v. Ambro*, 41 N.Y.2d 952, 952, 394 N.Y.S.2d 636, 636 (1977) (approving board's decision to reject initial buyer for "another prospective buyer [who] was ready to pay a considerably higher price" because "the public interest required the board to secure the most beneficial terms for the sale of the town's property"); *Merritt Meridian*, 96 A.D.2d at 934, 466 N.Y.S.2d at 383 ("[T]he board of education is empowered to sell and convey real property when it deems it for the best interest of the school district. When selling school property, the board of education has a fiduciary duty to secure the best price.").

significantly lower bid was somehow "in the interest of the authority." N.Y. Pub. Auth. Law § 1267(6). In fact, the MTA staff specifically refrained from recommending the Jets' bid over the MSG bid. (*See* Krsulic Aff., Ex. M (MTA Staff Summary, dated Mar. 30, 2005); Lhota Aff. ¶ 2.) And the MTA's submission here, which is conspicuously devoid of any administrative record to support its award of the Rights to the Jets, fails to comply with CPLR 7804(e).[12]

In sum, the record is devoid of any contemporaneous findings by the MTA that the Jets' significantly lower bid was somehow "in the interest of the authority."[13] In the absence of such

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12 The MTA was obligated to "file with its answer a certified transcript of the record of the proceedings under consideration," and the Court "may order the [MTA] to supply any defect" in the record. CPLR 7804(e); *see also, e.g., Bellman v. McGuire*, 140 A.D.2d 262, 265, 528 N.Y.S.2d 834, 836-37 (1st Dep't 1988) ("CPLR 7804(e) . . . requires the *respondent* in an Article 78 proceeding to submit a complete record of *all evidentiary facts*." (emphasis added)); *Scheman v. Joy*, 56 A.D.2d 568, 568, 392 N.Y.S.2d 287, 288 (1st Dep't 1977) ("[P]etitioner is entitled to have his case determined on the merits and respondent is under a duty to file a certified transcript of the record of the proceedings and *the court directs respondent to supply defects in the record* . . . ." (emphasis added)).

13 Respondent MTA attempts to distract this Court from the real issue in the case—the MTA's improper decision to award the Development Rights to the Jets for inferior consideration—by complaining that the documents attached to the Affirmation of Randy M. Mastro and submitted in support of MSG's Article 78 Petition are "hearsay." The MTA, however, fails to mention that the vast majority of exhibits include part of the record in support of the Verified Petition, including (a) statements by MTA Board members before and during the March 31 meeting (which the MTA itself attaches to the Affidavit of Roco Krsulic, *see* Krsulic Aff. Ex. R (Certified Transcript of March 31, 2005 Board Meeting)); (b) documents in the public record, including the Environmental Impact Statement, the MTA staff summary, and MTA Board resolution; (c) sworn affidavits from former MTA Chairman Richard Ravitch and others; and (d) public admissions found in newspaper articles which are admissible on that basis but also offered, if not for the truth of the matters asserted there (though Petitioner believes in good faith that these admissions are true), to show that these officials have been quoted as making these statements. The MTA does not refute that the statements by its Board members were made or that MSG reproduced them accurately in a transcript derived from a television broadcast. Rather, the MTA (along with the Jets) offers affidavits and exhibits of its own that confirm what MSG has said all along: these Board members reached a predetermined decision to turn down MSG's admittedly superior offer and relied on improper considerations conceived at the last minute or even after the fact to steer the Site to the Jets.

Furthermore, the "hearsay" cases cited by the MTA are wholly inapposite and arise in the context of summary judgment rather than in the context of preliminary injunctions. CPLR 6312(a) clearly provides that "[o]n a motion for a preliminary injunction the plaintiff shall show, by affidavit and such other evidence as may be submitted, that there is a cause of action, and either that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual; or that the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." *See also Lee v. Viacom, Inc.*, No. 110080/2003, 2003 WL 22319071, at *4 (Sup. Ct. N.Y. County June 12, 2003) (granting plaintiff's motion for a preliminary injunction pursuant to CPLR 6312(a) and accepting as exhibits to an affidavit "a comprehensive database search of newspapers, magazines, and internet websites" which established plaintiff's reputation and his name recognition). While MSG believes that the ample record here establishes its right to immediate relief, it would also welcome an evidentiary hearing on any disputed issues of fact.

findings, the only conclusion that can be drawn is that the MTA violated its fiduciary and legal duties to act "fairly" and obtain the "most beneficial" terms.

B. THE MTA DID NOT ACT "FAIRLY" BY ADOPTING RULES DESIGNED TO AWARD THE DEVELOPMENT RIGHTS TO THE JETS

In an attempt to defend the MTA's predetermined decision to award them the Development Rights, the Jets go so far as to say that "the MTA had the *absolute* discretion" to adopt and change, at its whim, the rules and evaluation criteria for the RFP process. (Jets' Br. at 39 (emphasis added).) Indeed, as if fairness had no place in a competitive RFP process, the Jets assert that, by writing the RFP to retain ultimate discretion over how to sell the property, the MTA retained essentially unfettered discretion to do whatever it wanted, whenever it wanted. (*Id.*) According to the Jets, the fairness standard does not even apply to competitive "proposals" (as opposed to "bids"). (Jets Br. at 39.) This semantic hairsplitting has failed to impress the courts in the past,[14] and nothing that the Jets say adds to its persuasiveness. Indeed, as the New York Court of Appeals has made clear, public authorities must foster honest competition and prevent favoritism, improvidence, and material or substantial irregularity in the awarding of

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[14] *See O'Henry's Film Works, Inc. v. Bureau of Ferry & Gen. Aviation Operations*, 111 Misc. 2d 464, 468-49, 444 N.Y.S.2d 509, 512 (Sup. Ct. N.Y. County 1981) ("[I]n view of the request for proposals herein, we are realistically confronted by competitive bidding."); *Massena*, 65 Misc. 2d at 112, 316 N.Y.S.2d at 902 ("The argument that these were 'proposals' and not 'bids' does not impress the Court, since in fact all bids are proposals."). Tellingly, as part of the RFP process, even the MTA and its Chairman Peter Kalikow solicited "responsive bids" and repeatedly referred to "bid documents." Mastro Aff. Ex. 61 (MTA Press Release: MTA asks for Best and Final Offers for Westside Rail Yard, dated Feb. 15, 2005) ("Responsive *bids* are expected to be presented to the MTA Board for consideration at its March 31st meeting. . . . If other developers are interested in *bidding*, they too must comply with the same ground rules contained in the *bid* documents.") (emphasis added); Mastro Supp. Aff. Ex. 80 (Solicitation Letter from MTA Chairman Peter Kalikow to MSG, dated Feb. 15, 2005) ("On Tuesday, February 22, 2005, a *bidder's* package containing draft lease and easement documents and other information relative to the Site will be available . . . This package will be sent to the Jets and to MSG directly. *Bidders* will be required to post a letter of credit." (emphasis added)); *see also* Mastro Aff. Ex. 1 (Transcript, MTA Board Meeting, derived from NY1 Broadcast, Mar. 31, 2005) at 35 (Statement of MTA Executive Director Katie Lapp) ("As you know, we issued an RFP February 22nd, we received five *bids* on March 21st." (emphasis added)); *id.* at 41 (Statement of MTA Board Member Kupferman) (referring to the "Jets *bid*." (emphasis added)). Even the Jets' other lawyer, David Boies, has repeatedly referred to the proposals made here by both the Jets and MSG as "bids." Mastro Supp. Aff. Ex. 81 (Transcript, Kirtzman & Co. Broadcast on WCBS-TV, Mar. 27, 2005), at 2, 4-5, 7.

public contracts.[15] Thus, "an objectionable and invalidating element is introduced when specifications are drawn to the advantage of one manufacturer not for any reason in the public interest but, rather, to insure the award of the contract to that particular manufacturer." *Gerzof v. Sweeney*, 16 N.Y.2d 206, 211, 264 N.Y.S.2d 376, 381 (1965). Not surprisingly, the MTA itself ultimately concedes that, by opening the sale of the Rights to a competitive RFP process, the MTA was required in the RFP process to act "fairly" with respect to all competitors. (MTA Br. at 41.)

Yet the MTA repeatedly adopted *unfair* rules that were designed specifically to privilege the Jets:

- The MTA set an unusually short timetable for responses to the RFP because the Jets already had put in "four years of work" on their proposal. (Mastro Aff. Ex. 29.) The MTA set a deadline of March 21, 2005, only 27 days after the RFP was issued, for the submission of proposals. By comparison, in a recent project by the ESDC and the Moynihan Station Development Corporation, the process involved two steps, in which bidders first had **46 days** to respond to a Request for Qualifications, and then after the issuance of an RFP two months later, **85 days** to prepare their submissions.[16] Similarly, in another project organized by the Queens West Development Corporation, a Partnership of the ESDC, the NYC Economic Development Corporation and the Port Authority of New York and New Jersey, bidders first had at least **67 days** to respond to the RFP, following which one or two developers were chosen for a Final Proposal Round that would last another **60 days**.[17]

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15 *See N.Y. State Chapter, Inc., Associated Gen. Contractors of Am. v. N.Y. State Thruway Auth.* 88 N.Y.2d 56, 68, 643 N.Y.S.2d 480, 484 (1996); *Conduit & Found. Corp. v. MTA*, 66 N.Y.2d 144, 148, 495 N.Y.S.2d 340, 343 (1985).

16 Mastro Supp. Aff. Ex. 82 (Farley Post Office Request for Qualifications, July 12, 2004) at 2; *id.* Ex. 83 (Farley Post Office Request for Proposals, Oct. 28, 2004) at 1.

17 *Id.* Ex. 84 (Queens West Request for Proposals) at 3, 20. Other examples abound. For example, an RFP for Pier 57 employed a two-step process, with bidders having 18 weeks to complete a Request for Expressions of Interest (RFEI) and then 37 days to respond to an RFP issued 20 weeks after submissions of their Expressions of Interest. *Id.* Ex. 85 (Pier 57 RFEI) at 2; *id.* Ex. 86 (Pier 57 RFP) at 2.

- The MTA set an unusually short timetable for deciding on the proposals for the Rights. As set forth in the RFP, the MTA would select a proposal just 10 days after submission. By comparison, **90 days** were allotted for decision on an RFP for Pier 57 in Manhattan and **60 days** were allotted for decision in a development organized by the Queens West Development Corporation.[18]

- The MTA's requirement that bidders accept the Rights "where is/as is" was designed to aid the Jets who were four years into the approval process and had sufficient confidence in the availability of a zoning override for their proposed stadium. For example, the Jets already had been assured an override of local zoning by the ESDC.[19] The MTA's "where is/as is" requirement was particularly remarkable in light of earlier determinations by the MTA and its appraiser that zoning changes would be needed to pursue the "highest and best" use of the Rights. "Where is/as is" requirements are unusual for RFPs of this type. For example, there are no "where is/as is" requirements in RFPs issued by the ESDC for three other significant development projects in the City.[20]

- The MTA opted against a bidders' conference and bidders' interviews, both of which are customary in RFP processes,[21] because the MTA already was intimately familiar with the bidder to whom it intended to award the Rights.

- The MTA omitted any reference to excess development rights in its RFP. In contrast, the ESDC and the Moynihan Station Development Corporation make explicit reference in a recent RFP to 1 million square feet of "Excess Development Rights" and detail the terms for the use of the rights.[22]

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18 Mastro Supp. Aff. Ex. 84 (Queens West Request for Proposals) at 20; *id.* Ex. 86 (Pier 57 RFP) at 2.

19 Mastro Aff. Ex. 58 (ESDC General Project Plan) at 12.

20 Mastro Supp. Aff. Ex. 84 (Queens West Request for Proposals); *id.* Ex. 82 (Farley Post Office Request for Qualifications, July 12, 2004); *id.* Ex. 87 (42nd Street Redevelopment RFP).

21 *Id.* Ex. 84 (Queens West Request for Proposals) at 2 (Conference); *id.* Ex. 87 (42nd Street Redevelopment Request for Proposals) at 6 (Conference); *id.* Ex. 82 (Farley Post Office Request for Qualifications) at 18 (Conference), 20 (Interview); *id.* Ex. 88 (Con Edison Request for Proposals) at 2 (Interview).

22 *Id.* Ex. 83 (Farley Post Office Request for Proposals, July 12, 2004) at 1, 9-10.

- The MTA required that the successful bidder would provide blanket indemnification for environmental liabilities. The MTA concedes that "the Jets had been working with the MTA and the LIRR on a number of issues related to the Site, including environmental issues." (MTA Br. at 8.) In contrast, when MSG requested copies of materials relating to environmental liability, the MTA refused to disclose anything. (Lance Aff. ¶¶ 4-9.)

In addition to adopting rules designed to steer the Development Rights to the Jets and issuing an RFP that departed from established practice in comparable situations, the MTA also changed rules *during the RFP process* at its "sole and absolute" discretion as a further step toward ensuring the award of the Development Rights to the Jets:

- Nowhere in the RFP did the MTA state that it would consider proposals involving the disposition or the retention of Transferable Development Rights ("TDRs"). In fact, the bid specifications expressly described the MTA's "goal" as a *"[d]isposition of the air rights* over the entire Site in a manner that will maximize the economic benefit to MTA." (Mastro Aff. Ex. 27 (RFP) at II (emphasis added).)

- Nowhere in the RFP did the MTA indicate that any benefit stemming from a perceived increased likelihood that the No. 7 subway line extension would come to pass would be a criterion.[23] The No. 7 subway extension received only a passing mention in the RFP—in the description of the Site—and (as will be explained below) the MTA was simply wrong to suppose that the No. 7 subway line extension is more likely under the Jets' proposal.

- Nowhere in the RFP did the MTA mention a criterion based on the impact of a proposal on the development of the Eastern Rail Yards. Yet several MTA Board members claimed to have decided to award the Rights to the Jets in part because of the "greater value" the Jets' proposal would provide the MTA "from the development of the Eastern Rail Yards." (*Id.* Ex. 1 (Transcript) at 41.) But bidders were not afforded the opportunity to evaluate and respond to this newfound criterion because the bid specifications never disclosed that the MTA would consider it.

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[23] *See* Krsulic Aff Ex. R (Certified Transcript) at 39 (justifying the award of the Development Rights to the Jets in part to "assure the financing of the number seven train").

By changing the rules during the competition, the MTA contravened "public policy [which] dictates that all responsible bidders be afforded equal opportunity to compete." *Margrove, Inc. v. Office of Gen. Servs., Inc.*, 27 A.D.2d 321, 323, 278 N.Y.S.2d 485, 488 (3d Dep't), *aff'd* 19 N.Y.2d 901, 281 N.Y.S.2d 92 (1967). Indeed, "it is a fundament of fair play that there be no change in the rules during the competition but here, even worse than a violation of that concept, the rules were changed after the scores were posted." 27 A.D.2d at 324, 278 N.Y.S.2d at 488. Thus, as courts have recognized, "applying a standard not specified" is "arbitrary" and "manifestly unfair."[24]

C. THE MTA'S RFP PROCESS WAS NOT "FAIR" BECAUSE THE REAL ESTATE CONSULTING FIRM RETAINED BY THE MTA BOARD WAS CONFLICTED AND THE VOTING MTA BOARD MEMBERS PREJUDGED THE ISSUE

The MTA's RFP process also was arbitrary and unfair because the real estate consulting firm retained by the MTA to review the bids was conflicted and the voting members of the MTA Board prejudged their determination concerning the award of the Rights. Contrary to the Jets' contention that the conflicts and prejudgments are "based only the fact that the MTA Board members are technically appointed by the Governor" (Jets Br. at 45), they are, in fact, proved by plain admissions by MTA Board members and representatives of the real estate consulting firm.

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24 *Progressive Dietary Consultants, Inc v. Wyoming County*, 90 A.D.2d 214, 217-18, 457 N.Y.S.2d 159, 162 (4th Dep't 1982); *see also Browning-Ferris Indus. of N.Y., Inc. v. City of Lackawanna*, 204 A.D.2d 1047, 1048, 612 N.Y.S.2d 732, 733 (4th Dep't 1994) (annulling contract award because City took into consideration "an undisclosed specification"). The MTA's reliance on *Starburst Realty Corp. v. City of New York*, 498 N.Y.S.2d 673 (Sup. Ct. N.Y. County 1985), is misplaced. *Starburst* concerned the differences between "the proposal(s) actually subjected to public hearing and the final contract," not, as here, changes to the rules that applied during the competition to determine the selection of the favored bidder. *Id.* at 680. Indeed, *Starburst* actually confirms the impropriety of the MTA's actions here. When the Board of Estimate in *Starburst* opted to change the rules during the competition, it "issued a Supplemental Information Request (SIR) revising the standards set down in the 1980 RFP" so as to give all bidders an equal chance to compete. *Id.* at 676. Here, in stark contrast, the MTA told no one but the Jets that it was changing the rules of the RFP process so that only the Jets could succeed.

For example, the MTA does not, and cannot, dispute that Barry Gosin, the CEO of Newmark & Co., the real estate consulting firm retained by the MTA purportedly to review the bids and then advise the Board in a fair, even-handed and neutral manner, has publicly expressed his support for the stadium as a "positive" development and, together with Newmark Chairman Jeffrey Gural, has given at least $100,000 to NYC 2012.[25] In response to the public outcry over Newmark's conflicts, the MTA first announced that Newmark would make no recommendations, but instead would provide only a technical analysis of the bids. (Mastro Aff. Ex. 36 (Joshua Robin, *MTA Sticks With Helpers; Agency, Realty Company Says Execs' Support of Stadium Won't Compromise Role as West Side Advisor*, Newsday, Mar. 23, 2005, at A14).) In the end, however, the MTA obtained and purported to rely on a letter from Newmark recommending the Jets' bid anyway. (Mastro Supp. Aff. Ex. 89 (March 30, 2005 Letter from James D. Kuhn, President of Newmark, to Roco Krsulic).)

Moreover, the voting members of the MTA Board acknowledged at the time that they were deferring to the wishes of their political patrons, Governor Pataki and Mayor Bloomberg. As one Board member frankly put it: "We've got two stake holders, we've got the city and the state. We've got two elected officials, we've got the mayor and we've got the governor, who were elected by the public to represent them and to do things that are best for the city and the state." (Mastro Aff. Ex. 1 (Transcript) at 38.) Indeed, the Board's voting members are predominantly composed of close political allies of the Governor and "at will" employees of the

25 *See, e.g.*, Mastro Aff. Ex. 36 (Joshua Robin, *MTA Sticks With Helpers; Agency, Realty Company Says Execs' Support of Stadium Won't Compromise Role as West Side Advisor,* Newsday, Mar. 23, 2005, at A14). When news of the Newmark conflict of interest came to light, "State officials" reportedly urged the MTA to reconsider its selection of Newmark, arguing that "the authority could be tainted by charges of favoritism in the intense bidding process." *Id.*

Mayor.[26] Several of these same members also are conflicted because their companies are large financial contributors to NYC 2012, which is lobbying for a stadium on the Site.[27] In addition, at least nine of the Board members admitted in public statements that they had already made up their minds before the March 31, 2005 vote on the competing bids. (*See* Seton Aff. Ex. 2 (Chart: Pre-Judgment of MTA Board Members) at 2.) The four members appointed by the Mayor even went so far as to issue a press release the day before the vote explaining how they would vote the next day. (Mastro Aff. Ex. 56 (Statement by New York City Representatives on the Metropolitan Transportation Authority Board John Banks III, Susan Kupferman, Mark Lebow, and Mark Page on the Disposition of the Western Rail Yards, Mar. 30, 2005).) In prejudging the issue in favor of the Jets, the voting members of the MTA violated their legal and fiduciary duties, further rendering the March 31 decision arbitrary, capricious, and unfair.[28]

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26 At least eight Board members and their spouses have donated more than $275,000 in the aggregate to Governor Pataki, and at least 11 Board members have contributed to Republican Party causes and candidates. Moreover, of Mayor Bloomberg's four appointees to the MTA Board, two are "at will" employees of his administration, one is the spouse of his Deputy Mayor, and another is employed as a lobbyist for a public utility heavily regulated by the government and therefore dependent upon its good will. Even the nominees recommended in the first instance by county executives, and then appointed from among those multiple nominations by the Governor, have strong political allegiances to the Governor. For example, Vice Chair David S. Mack has personally donated nearly $28,000 to Friends of Pataki since 2001 and more than $36,000 to Republican Party causes and candidates since 1999; and Board member Andrew M. Saul and his wife have given approximately $80,000 to Friends of Pataki since 2000, and Saul has personally contributed an additional $120,000 to Republican Party causes and candidates since 1999. Seton Aff. ¶ 3.

27 In fact, these companies collectively gave more than $1.1 million to NYC 2012, the group lobbying for this stadium as part of the City's Olympic bid. *See* Seton Aff. Ex. 3 (Charts: Olympic Bid Conflicts of Interest) (Chairman Kalikow's real estate company gave at least $50,000; Vice Chair Dunn's former employer, Morgan Stanley, for which he currently serves as an Advisory Director, gave at least $750,000; and Board member John Banks' employer, Con Edison, gave at least $300,000).

28 *See, e.g., Woodlawn Heights Taxpayers & Cmty. Ass'n v. N.Y. State Liquor Auth.*, 307 A.D.2d 826, 827, 763 N.Y.S.2d 317, 318 (1st Dep't 2003) (vacating Liquor Authority's determination because a Liquor Authority commissioner's public comments "before any vote was taken . . . clearly indicate a preconceived bias" and mandated that the commissioner should have been disqualified from participating in the determination); *1616 Second Ave. Rest. v. N.Y. State Liquor Auth.*, 75 N.Y.2d 158, 162, 551 N.Y.S.2d 461, 463 (1990) ("where . . . an administrative official has made public comments concerning a specific dispute that is to come before him in his adjudicatory capacity, he will be disqualified on the ground of prejudgment if 'a disinterested observer may conclude that [he] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'").

In short, MSG never had a fair chance. Thus, on the basis of that improper prejudgment alone, the Court should find that the MTA's decision-making process was unfair and irrational. It is no response for the MTA to rely on the statements of some Board members denying that their votes were tied to Governor Pataki's and Mayor Bloomberg's support for the Jets' proposal. (*See* MTA Br. at 50.) The entire purpose of rules prohibiting conflicts of interest is to avoid the appearance of impropriety that undermines fairness of process.[29] The MTA's decision-making process here, fraught with conflicts and prejudgments, cannot stand.

POINT II

THE MTA'S RELIANCE ON PRETEXTUAL RATIONALIZATIONS AND OBJECTIVELY FALSE AND UNSUPPORTED FACTUAL ASSUMPTIONS NECESSARILY RENDERS ITS DECISION TO SELECT THE JETS' PROPOSAL ARBITRARY AND CAPRICIOUS

In an effort to justify their votes in favor of the Jets' inferior bid and to obscure the arbitrary and capricious nature of their decision, the MTA's directors offered up a number of rationales—many of them expressed for the first time only at the March 31 meeting and others advanced for the first time only in the MTA's and the Jets' opposition briefs here—that were either improper considerations contravening their fiduciary duties or pretextual excuses belied by the facts. No amount of mudslinging or attempts by the MTA and the Jets to depict this dispute

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29 For example, in an investigative report regarding a similarly scandalous public contract award, the State Attorney General and Inspector General found that public officers should act in such a way as not to give rise to any suspicion that they are engaged in acts that violate the public trust or that give the appearance of a potential conflict between their duties and their personal activities, even if no actual violation of trust or conflict exists. It was the MTA's responsibility to scrupulously avoid the appearance of such impropriety in its decision-making process. *See* Mastro Aff. Ex. 4 (New York State Attorney General & New York State Inspector General, *A Joint Investigation Into the Contract Between the New York State Canal Corporation and Richard A. Hutchens CC, LLC* (Nov. 2004) at 72-3 ("The Code [of Ethics] . . . instructs that a public officer 'should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of its trust.'" (citing N.Y. Pub. Off. Law § 74(3)(h))); *see also* New York State Ethics Commission Advisory Opinion 02-05 (citing 1979 opinion of the Attorney General). In this regard, the Jets' reliance on *La Corte Electrical Construction & Maintenance, Inc. v. New York State Department of Social Services*, 243 A.D.2d 1029, 663 N.Y.S.2d 446 (3d Dep't 1997), is misplaced. Here, MSG's allegations are not "conclusory;" rather they are based on conflicts and prejudgments that are concrete, actual and publicly admitted by the Board members themselves.

as a battle over the benefits and drawbacks of each proposal can obscure the unmistakable conclusion that such post-hoc rationalizations for the MTA's decision require it to be annulled. The MTA's reliance on these pretexts render its decision to award the Development Rights to the Jets arbitrary and capricious and an abuse of discretion.

A. THE MTA CANNOT JUSTIFY A DETERMINATION BY RELYING ON PRETEXTUAL RATIONALIZATIONS THAT IT KNOWS OR OBJECTIVELY SHOULD KNOW ARE FALSE AND UNSUPPORTED BY THE FACTS

The excuses put forward by the MTA Board in an attempt to justify their arbitrary pre-determination make clear that the MTA's decision to award this site to the Jets was a legally indefensible determination justified only by objectively false pretextual rationalizations. An agency cannot offer up unsupported, post-hoc rationalizations to defend a determination challenged as arbitrary and capricious; to the contrary, the case law makes clear that an agency's determination will be invalidated if it is predicated on pretextual rationalizations that the agency knew or objectively should have known were false and devoid of factual support. *See, e.g., N.Y. State Chapter, Associated Gen. Contractors of Am. v. N.Y. State Thruway Auth.*, 88 N.Y.2d 56, 74-75, 643 N.Y.S.2d 480, 488-89 (1996) ("*Post hoc* rationalization for the agency's adoption of a [project labor agreement] cannot substitute for a showing that, prior to deciding in favor of a PLA, the agency considered the goals of competitive bidding").

In the environmental review context, for example, the Appellate Division in *Glen Head-Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay* invalidated a town board's grant of a re-zoning application in part because the board had relied improperly on the applicant's representation in an environmental impact statement ("EIS") that it would be able to provide sewage access for the re-zoned property. The board relied on this representation even though, prior to the board's grant of the re-zoning, facts had come to light that significantly called into

question whether the applicant would, in fact, be able to deliver on that representation. *See* 88 A.D.2d 484, 489-495, 453 N.Y.S.2d 732, 736-39 (2d Dep't 1982). Similarly, in the "Westway" case, the Second Circuit, construing analogous federal environmental review standards, struck down an agency determination because the agency relied on an FEIS that contained "false statements" concerning the role of the project site as a habitat for certain local fish species, and "statements regarding aquatic impact[s that] had not been compiled in 'objective good faith.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1030 (2d Cir. 1983).[30] The Second Circuit concluded that this false justification "became a false premise in the decisionmakers' evaluations" that tainted the agency's determination. *Id.* at 1034. And in *Munash v. Town Board*, the Appellate Division rejected a town board's negative declaration concerning the potential environmental impacts of a project, even though the board's expert consultant submitted a report indicating that there likely would not be a significant impact from the project, because the board had received additional reports from outside experts advising that the project likely would cause a significant impact, and the board's expert "did not perform an on-site study, and indicated that she would further evaluate th[e] issue upon receipt of additional . . . information." *See* 297 A.D.2d 345, 346-47, 748 N.Y.S.2d 160, 162-63 (2d Dep't 2002). Thus, in each of these cases, the court took action to annul the agency's determination because it was clear that the agency's findings simply did not have sufficient factual support to justify the agency's determination.

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30 The agency in *Sierra Club* had relied on an inadequate and factually incorrect report—a report that was not directly based on any actual testing of the project site—to support its finding that the project would not have any significant impact on the striped bass population migrating down the Hudson River. *See id.* at 1022-24. The agency continued to rely on this false report even after other government entities and third-party consultants presented the agency with information indicating that the project would, in fact, significantly impact the habitat for fish in the project area. *See id.* The court refused to recognize any obligation of deference to the agency's judgment under those circumstances.

This bedrock principle has been recognized in the context of agency contracting determinations as well. For example, the court in *Massena*, after concluding that the Massena Housing Authority had failed to follow proper competitive bidding procedure, observed that the lack of legitimate factual support for the authority's stated rationale in selecting the winning bidder likely constituted "an additional reason for sustaining the petition." 65 Misc. 2d 105, 113, 316 N.Y.S.2d 894, 902-03. In this regard, the court noted that "the explanation of the authority as to the inability of petitioner to complete the project within a reasonable time, differs from [that of] their own selected subcommittee who in their report stated, in part, 'It is the committees [sic] opinion that all proposers can meet reasonable schedules.'" *Id.* Moreover, the court noted:

> Nor would the fact the Authority had previously dealt with the respondent . . . with good results seem to be sufficient reason for ignoring all other bids. The large amount of money involved between the high bid and the low bid makes it seem imperative not to arbitrarily ignore the lowest bidder without good reason based on sufficient facts to justify such rejection, and acceptance of the highest bid.

Id.

As set forth in detail in Petitioner's Opening Brief and below, the rationales offered by the MTA Board in support of its determination, as well as the additional rationales Respondents assert for the first time in their briefs, fly in the face of the facts and amount to nothing more than pretextual justifications for the MTA's unlawful selection of the Jets' inferior bid. As the authorities set forth above make clear, the MTA's determination must be annulled.

B. THE MTA'S STATED JUSTIFICATIONS FOR ITS DECISION CONSIST ENTIRELY OF PRETEXTUAL RATIONALIZATIONS AND OBJECTIVELY FALSE AND UNSUPPORTED FACTUAL ASSUMPTIONS

1. The MTA's Manufactured Concerns About Closing a Deal with MSG

The MTA's claim that its directors "had concerns about whether MSG's proposal was likely to close," because "Petitioner's proposal provides for a closing date in 2006, well beyond

the customary 30 to 60 day period for closing on real estate transactions that are subject to an RFP," is a particularly stark example of the pretexts for its decision. (MTA Br. at 5, 13.)

As an initial matter, the MTA staff accepted MSG's proposal as a qualifying bid. (Mastro Supp. Aff. Ex. 90 (MTA Staff Summary and Resolution ("Staff Summary and Resolution") of the Board of the Metropolitan Transportation Authority, dated Mar. 30, 2005, at 3).) In contrast to its conclusion with respect to the TransGas proposal—that the Board should not pursue it because of the number of contingencies outside of the control of the MTA—the MTA staff stated that it was "await[ing] direction from the MTA Board on how to proceed" regarding MSG's proposal. (*Id.* Ex. 90 (MTA Staff Summary and Resolution) at 3).) Accordingly, the MTA cannot be heard now to say that the Board rejected MSG's proposal in part on the ground that its bid raised a threshold question about commitment. In fact, the MTA's Staff Summary directly contradicts the position that the MTA is now taking: "MSG has advised MTA that it is committed to close the acquisition of the Site immediately following its selection by MTA." (*Id.* at 2.) Nowhere in the MTA's Staff Summary is any concern about the bona fides of this commitment raised.

In fact, MSG's proposal contemplates an immediate closing date, with MSG paying real estate taxes for the 2005 calendar year. (*See* Mastro Aff. Ex. 65 at V-8.) MSG's proposal further contemplates a period of ten months for "*Pre-Construction* Negotiations" with the MTA. (*Id.* at V-4, VI-2 (emphasis added).) This timeline for "pre-construction negotiations" was set forth on two pages clearly entitled "*Development* Schedule." (*Id.*) Moreover, a letter from MSG to the MTA, dated March 29, 2005, confirmed MSG's "commitment to close the acquisition of the Site and to pay the full purchase price as set forth in the Proposal immediately following its

selection by the MTA." (*See* Mastro Supp. Aff. Ex. 91 (Letter from H. Ratner to R. Krsulic dated Mar. 29, 2005).)

Amazingly, the MTA now states that the Board perceived this letter as "inconsistent" with MSG's proposal, and that the letter thus amplified the Board's concern about MSG's intentions with respect to closing. (*See* MTA Br. at 13 n. 11). Yet tellingly, *not one* Board member mentioned at the March 31, 2005 hearing any concern about MSG's seriousness in regard to closing this deal or to doing so in a timely fashion. (*See* Mastro Aff. Ex. 1 (Transcript).)

Indeed, although the MTA *now* asserts that MSG's letter reiterating and confirming its commitment gave rise to "concerns," the MTA had no such reaction in an analogous situation, when the Jets sent the MTA a letter in an attempt to clarify a certain element of their proposal (i.e., whether it was conditioned on PACB approval). (MTA Br. at 13.) In fact, the MTA relies heavily on that letter in urging now that the Jets' proposal was unconditional. (*See* Jets' Br. at 5 ("There was nothing contingent about the Jets' proposal") (citing Letter from A. Lee of the Jets to R. Krsulic of the MTA, dated March 28, 2005).) The MTA's disparate treatment of clarifying correspondence from MSG and the Jets is of a piece with the MTA's entire approach to the bidding process—with the MTA always standing ready to place its thumb firmly on the Jets' side of the scale.[31] And, as explained below, the MTA's reliance on the "facts" asserted in that Jets' letter cannot withstand scrutiny.

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31 The skewed nature of the bidding process was underscored by the fact that the MTA objected to MSG's retention of Steven M. Polan of the law firm Manatt, Phelps & Phillips LLP on the ground that his having been MTA General Counsel 16 years ago gave rise to a conflict. *See* Mastro Supp. Aff. Ex. 92 (March 30, 2005 Letter from Catherine A. Rinaldi to Steven M. Polan); *id.* Ex. 93 (Apr. 4, 2005 Letter from Catherine Rinaldi to Steven M. Polan). This objection is completely unfounded, as Polan was not involved in any transaction or matter at the MTA that would constitute a conflict with respect to this RFP process. Mastro Supp. Aff. Ex. 94 (Mar. 31, 2005 Letter from New York State Ethics Commission to Steven M. Polan). At the same time, however, the MTA lodged no objection to the Jets' retention of Stephen Lefkowitz of Fried, Frank, Harris, Shriver & Jacobs as "lead real estate and land use attorney" (Mastro Aff. Ex. 33 (Jets' Bid) at 6.1-11), despite the fact that

[Footnote continued on next page]

2. The Contingency at the Foundation of the Jets' Bid—PACB Approval

The MTA and the Jets have littered their opposition papers with references to the "unconditional" payment of "$250 million" to the MTA that was included in their proposal.[32] Yet Respondents' papers, in fact, show that this payment—and, thus, the Jets' willingness to proceed in any respect with this Project—is anything but assured.[33] To begin with, according to the Jets, their proposal had been contingent upon PACB approval of the proposed project until just before the MTA voted on March 31, 2005.[34] Then, on March 28, 2005—just three days before the MTA voted—the Jets sent the MTA a letter stating: "This confirms that the Jets are prepared to close on a transaction . . . irrespective of whether the Public Authorities Control Board has scheduled a meeting or has actually approved the project described in the Jets' proposal." (Krsulic Aff. Ex. 65 (Letter from A. Lee to R. Krsulic dated March 28, 2005).) The MTA purports to have accepted this representation. But the story does not end there.

In fact, on Monday, April 11, 2005, the MTA and the Jets executed a term sheet with respect to the disposition of the West Side Yards. (*See* Mastro Supp. Aff. Ex. 96 (Charles V.

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Lefkowitz was the MTA's lead outside counsel in connection with the development of the West Side Yards Master Plan during the same time period of Polan's involvement, and even though the ethical rule governing Lefkowitz's involvement—DR 5-108—is more restrictive than that cited by the MTA as giving rise to Polan's conflict—DR 9-101(B). Mastro Supp. Aff. Ex. 95 (Apr. 1, 2005 Letter from Steven M. Polan to Catherine A. Rinaldi). Surely, if Polan had a conflict due to his involvement during the 1980s with the creation of the West Side Yards Master Plan, then Lefkowitz, who worked with Polan as the MTA's outside counsel at that time, would have a conflict as well. That the MTA saw fit to object to only Polan's involvement in the bidding process – and deprive MSG of his services – is further evidence of the arbitrary and capricious nature of the entire endeavor.

32 *See, e.g.*, MTA Br. at 2 ("The Jets' proposal in the aggregate is superior to the MSG proposal in a number of respects, including that . . . it unconditionally provides $250 million to the MTA."); Jets Br. at 14 ("the Jets proposed to purchase the air rights on a 'where is/as is" basis for $250 million . . . This proposal contained no contingencies.").

33 The Jets' bid also includes an impermissible condition to closing: "The Jets reserve the right to withdraw this proposal if closing does not occur by June 1, 2005." (Mastro Aff. Ex. 33 (Jets' Bid) at 1.1-2.)

34 *See* Jets' Br. at 44 ("When the Jets embarked on the NYSCC project, they always assumed that they would not have to commit to purchasing the development rights until PACB approval was secured. This was an important aspect of the deal from the Jets' perspective.")

Bagli, *Jets' Offer of Additional $40M Seems to Save the Stadium, At Least for Now*, N.Y. Times, Apr. 14, 2005, at B9).) Petitioner has requested production of this term sheet, but Respondents have refused to provide it to MSG or even to this Court.[35] The term sheet is highly relevant to this proceeding because it reportedly has altered the terms of the proposed transaction in ways that were not previously disclosed. Specifically, it has been reported that, among other things, the Jets will now pay just $50 million to the MTA in the first instance—and only upon approval of the PACB—with the remaining $200 million to be paid at one or more indeterminate dates in the future. (*See* Mastro Supp. Aff. Ex. 96 (Charles V. Bagli, *Jets' Offer of Additional $40M Seems to Save the Stadium, At Least for Now*, N.Y. Times, Apr. 14, 2005, at B9).) The MTA argues that it received a written assurance from a Jets representative, before deciding to award this property to the Jets, that the Jets could be amenable to going to contract before PACB approval, but that does not address whether the MTA has since agreed to permit this contingency to precede any contractual obligation on the Jets' part. This is important because the RFP expressly provided that "[n]o proposal that is contingent upon a change in existing zoning requirements will be considered," and "[o]ffers that are in some way contingent upon future zoning will not be deemed responsive." (Mastro Aff. Ex. 27 (RFP) at Section IV.C., V.I.) Yet that is apparently the way the MTA's deal with the Jets has ended up being structured: the Jets' entire payment obligation is contingent upon proper PACB approval of a zoning override, in violation of the RFP's express requirements.[36]

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35 Mastro Supp. Aff. Ex. 97 (Letter from R. Mastro to Justice Cahn dated Apr. 14, 2005); *id.* Ex. 98 (Letter from L. Solomon to the Court, Apr. 15, 2005).

36 The MTA also unsuccessfully attempts to explain away the differences between the cash "on the table" offered by the Jets, on the one hand, and MSG, on the other. Several MTA Board members openly conceded that MSG's bid was worth at least $200 million more than that of the Jets. For example, MTA Real Estate/Planning Committee Chair James S. Simpson observed at the March 31 meeting that MSG's proposal was qualified for consideration under this RFP and, even more importantly, that it was worth substantially more than that of the Jets: "MSG's proposal is worth at least $200 million more

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3. The Status of the No. 7 Subway Line Extension

As previously mentioned, the MTA's claim that it awarded the Development Rights to the Jets in part to "assure the financing of the number seven train" (Krsulic Aff. Ex. R (Certified Transcript) at 39), is nothing more than say-so after the fact. It was nowhere to be found in the bid specifications or in any part of the evaluation criteria for this bid process, and it lacks any objective basis in fact. The MTA and the Jets' responses to this claim consist of rote reiteration of the MTA's bald assertion that "funding for the Number 7 line subway extension is much more likely to be available if the Jets' proposal were to actually be developed, as opposed to the MSG proposal." (MTA Br. at 15; *see also* Jets' Br. at 22.) This assertion is no more credible now, in Respondent's court papers, than it was when the MTA Board first made it on March 31, 2005. Indeed, Respondents' argument in this regard is flatly contradicted by admissions on the part of the MTA and the City confirming that the financing for the No. 7 subway line extension has already been established and that the extension project will go forward, regardless of the fate of the stadium.[37]

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than the Jets' proposal" to the MTA, and "if we said, 'OK, let's look at the cash on the table, what is the best deal for us today' . . . the MSG proposal is the correct choice." *Id.* Ex. 1 (Transcript) at 36. Two other MTA Board members, Vice Chairman David S. Mack and Vice Chairman Edward B. Dunn, similarly conceded that MSG's proposal was higher. *Id.* Ex. 1 (Transcript) at 40. The MTA argues that MSG has taken Simpson's statements out of context, noting that Simpson also stated, among other things, that "since the MTA was not currently defaulting on bonds, it should take a more long-term view." (MTA Br. at 22.) This is a bit too pat. On account of the severe gaps in its operating and capital budgets, the MTA not only recently has forced its riders to bear increased fares on MetroCards but, with respect to the 2005-2006 budget, it also lobbied the Legislature to raise taxes and fees and divert funds from other programs in favor of the MTA. (Mastro Supp. Aff. Ex. 99 (Affidavit of Gene Russianoff submitted in *N.Y. Public Interest Research Group/Straphangers Campaign, Inc., et al v. N.Y. Metropolitan Transportation Authority and Peter S. Kalikow*, a related Article 78 petition filed on April 18, 2005) ¶¶ 3, 9, 19.) On March 31, 2005, in response to the MTA's pleas, the Legislature voted to raise taxes and fees and divert funds from other critical programs such as schools and healthcare. (*Id.*) The MTA now says that, in any event, "since the net proceeds from the Site will be used for capital purposes consistent with the MTA's proposed 2005-2009 $21.1 billion Capital Program, the difference in up-front cash between the Jets' proposal and the MSG proposal amounts to a very small percentage of the MTA's overall five-year capital program." (MTA Br. at 22.) But the MTA cannot have it both ways. Either it overstated its need for funds when it was lobbying the Legislature, or it is minimizing its need for cash now.

37 For example, City Planning spokeswoman Rachaele Raynoff recently confirmed that the extension of the No. 7 subway line "will continue regardless of the fate of the proposed stadium and expansion of the Javits Convention Center." Mastro Aff. Ex. 52 (Joshua Robin, *$45M to Design No. 7 Line Expansion*, N.Y. Newsday, Feb. 16, 2005, at A18). Similarly, Mayor

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Most notably—as the Court will recall—counsel for the MTA in the related environmental litigation represented to the Court in that proceeding, two weeks before the MTA's vote on the bid selection, that he "will so stipulate" that the "extension will go" forward, and that "*the city is going to pay for it*" through bonds because "the subway extension is intricately related to the zoning." (Mastro Aff. Ex. 51 (Hr'g Tr., *Hell's Kitchen Neighborhood Ass'n v. N.Y. City Dep't of City Planning*, No. 117957/04 (Sup. Ct. N.Y. County Mar. 17, 2005) at 35-36 (emphasis added).) Thus, having already represented that the No. 7 subway line extension would *not* be dependent on the construction of a stadium, the MTA cannot now be heard to argue before this same Court that the No. 7 subway line extension is somehow dependent on the stadium project.[38] Indeed, City officials, including the Mayor, repeatedly assured the public that the extension of the No. 7 subway line "will continue regardless of the fate of the proposed stadium and expansion of the Javits Convention Center."[39] In fact, just one day after the MTA's vote, Mayor Bloomberg again admitted that "the city is going to pay for the extension of the No. 7 subway line over there, so *all of that area* becomes a lot more valuable right away because people can get there. And it's the only MTA project that the city can pay for." (Mastro Aff. Ex. 54 (Transcript, WABC-AM, Gambling Show (April 1, 2005)).) Thus, it

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Bloomberg has stated that "[t]he $2 billion extension of the No. 7 subway line 'still may be possible' if the MTA awards Cablevision the site of the proposed West Side stadium." *Id.* Ex. 53 (Michael Saul, *Mike Still Likes No. 7 Extension*, N.Y. Daily News, Mar. 26, 2005, at 5).

38 *See In re Liquidation of Union Indem. Ins. Co. of N.Y.*, 89 N.Y.2d 94, 103-04, 651 N.Y.S.2d 383, 387-88 (1996) (holding that "admissions [by counsel] in a previous action" are "evidence of the fact or facts admitted" because "[i]t would be unseemly, to say the least, to permit [a party] to renege on its court-submitted evidence and, in effect, to use quasi-official assertions as both a sword and a shield"); *Bender v. N.Y. City Health & Hosps. Corp.*, 382 N.Y.S.2d 18, 20-21 (1976) ("where a governmental subdivision acts or comports itself wrongfully or negligently . . . that subdivision should be estopped from asserting a right or defense which it otherwise could have raised").

39 Mastro Aff. Ex. 52 (Joshua Robin, *$45M to Design No. 7 Line Expansion*, N.Y. Newsday, Feb. 16, 2005, at A18); *see also id.* Ex. 53 (Michael Saul, *Mike Still Likes No. 7 Extension*, N.Y. Daily News, Mar. 26, 2005, at 5).

is indefensible for the MTA now to claim that a commitment that the City already has independently made prior to the MTA's March 31, 2005 decision somehow justifies it.[40]

Actions by the City Council also make abundantly clear that the fate of the proposed No. 7 subway line extension does not in any way depend on the transfer of the Development Rights to the Jets. On January 19, 2005, the City Council approved a series of land use actions under Section 197-d of the City Charter (the Uniform Land Use Review Procedure) to rezone large portions of the Far West Side of Manhattan and create the Special District. That same day, the Council adopted a resolution describing in detail agreements between the Council and the Office of the Mayor regarding the financing for the No. 7 subway line extension ("Resolution 760").[41]

The Council's decision to approve the zoning for the Special District was based on the commitment of the City and the MTA to extend the No. 7 subway line to provide service to the Special District. Without the No. 7 subway line extension, the Council would not have approved

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40 The pretextual nature of this supposed justification for accepting the Jets' bid is further evidenced by the fact that the MTA Board members "rarely, if ever mentioned the No. 7 subway line extension in the past" in connection with the disposition of the Development Rights—that is, until March 31, when board members were struggling to come up with something (regardless of how farfetched) to justify leaving more than $200 million on the table. *See id.* Ex. 48 (Sewell Chan, *M.T.A. Links Stadium Bid to Rail Extension*, N.Y. Times, April 2, 2005, at B1) ("[O]n Thursday [March 31], the subway extension suddenly became a central reason city by authority board members for their decision to award the Jets the right to build a stadium over the West Side railyards. . . . Members of the board who had rarely, if ever, mentioned the No. 7 extension in the past described the project as top priority."). Indeed, "[w]hen an extension of the No. 7 subway line to the Far West Side became a serious possibility in 2001," the MTA was "not particularly excited about" the proposed extension of the No. 7 subway line, and "[i]ts chairman said the authority would not pay any of the cost." *Id.*

41 As City Council Member Christine Quinn explained in her affidavit submitted to this Court, "the City Council passed Resolution 760, endorsing the Administration's financing plan for the extension of the Number Seven train through a bond issue – a plan that also does not rely in any way upon construction of the NYSCC stadium or any other development over the Rail Yards. . . . Council leadership deliberately added explicit language emphasizing that the Hudson Yards infrastructure projects, including the Number Seven extension and its financing plan, were wholly independent from the NYSCC stadium plan. . . . Passage of Resolution 760 cleared away the last governmental hurdle standing in the way of the Number Seven train extension." Mastro Supp. Aff. Ex. 108 (Affidavit of Christine Quinn, *N.Y. Pub. Interest Research Group/Straphangers Campaign, Inc. v. MTA*, No. 105292/05 (Sup. Ct. N.Y. County Apr. 27, 2005) ¶ 22.

the zoning, because the mass transportation infrastructure would not be in place to support such high densities. This point was explicitly stated in several critical documents:

- Council Resolution 760: "The Council and the Administration are in agreement that the redevelopment of the Hudson Yards, as described in the definition of the Hudson Yards Redevelopment Area set forth in 93-01 of the zoning resolution, requires principal infrastructure elements in such area such as the extension of the Number 7 subway line." (Mastro Supp. Aff. Ex. 100 (N.Y. City Council Res. No. 760 (2005)).)

- The City Planning Commission Report on the Special District: "Providing subway access is critical to attracting development to this area" and "The Commission recognizes that subway service must be provided to the Hudson Yards in order to support the redevelopment." (Mastro Supp. Aff. Ex. 101 (Relevant excerpts of City Planning Commission Report on the Special District, Nov. 22, 2004) at 3, 76.)

- The Department of City Planning's Far West Midtown: A Framework for Development: "Only a subway can move the large numbers of people associated with redevelopment without placing unacceptable strains on the existing vehicular and pedestrian network. The Number 7 Subway line extension is therefore a prerequisite for redevelopment of the Far West Side." (Mastro Supp. Aff. Ex. 102 (Department of City Planning, Far West Midtown: A Framework for Development) at VII.)

- The Final Environmental Impact Statement for the Special District and the 7 Train Extension ("FEIS"), co-authored by the City Planning Commission and MTA: "The analysis also indicated that the extension of the No. 7 Subway westward and southward into the Hudson Yards area best fulfills the project's goals." (Mastro Supp. Aff. Ex. 103 (FEIS), at 2-23.) "The No. 7 Subway Extension is key to supporting and encouraging the private development associated with the rezoning" (*Id.* at 2-48.)

The FEIS assumes that the No. 7 subway line extension will be complete and in operation by 2010. (*See* Mastro Supp. Aff. Ex. 103 (FEIS), at pp. 4-47.) The FEIS makes this assumption without discussing any financial contribution related to the development of the Stadium Site or the transfer of excess development rights from that Stadium Site.

The City Planning Department and Commission did not include the Western Rail Yards in the Special District. Unlike the new development in the Special District, the Jets Stadium will not contribute to the financing of the No. 7 subway line extension—not in the form of payments in lieu of tax, not in the form of real property taxes, and not in the form of district improvement bonus payments that apply to other development in the Special District.

Mindful of the utter absence of any Jets or Stadium contribution to the cost of the No. 7 subway line extension, the City Council included language in Resolution 760 to assure that none of the funds used to pay for the infrastructure on the West Side, including the No. 7 subway line extension, would be used to pay for elements of the Stadium project west of 11th Avenue. (*See* Mastro Supp. Aff. Ex. 100 (N.Y. City Council Res. No. 760 (2005).) At the Council's request, to assure that funds would not be diverted from the No. 7 subway line extension, Deputy Mayor Daniel Doctoroff sent a letter to Speaker Gifford Miller on January 10, 2005, which stated that: "[t]he Administration agrees that no funds generated by the District Improvement Bonus will be used to pay for any improvements to the sites housing the New York Sports and Convention Center." In other words, the Stadium project, which was not subject to City Council review and approval, was separate and distinct from the Special District zoning and the No. 7 subway line extension, which were the subject of Council votes and will proceed *with or without the Jets Stadium*.[42]

In approving the Special District, the City Council took action to assure that the financing of the No. 7 subway line extension would proceed—regardless of whether there were delays in

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42 *See, e.g.*, Mastro Supp. Aff. Ex. 108 (Affidavit of Christine Quinn, *N.Y. Pub. Interest Research Group/Straphangers Campaign, Inc. v. MTA*, No. 105292/05 (Sup. Ct. N.Y. County Apr. 27, 2005) ¶ 24 ("The City Council approval of the Special District is premised on the extension of the Number Seven train, consistent with the EIS. The Jets Stadium will not contribute anything, and is not essential, to the financing of the Number Seven train extension.").

the development of the Special District, and regardless of whether the Stadium project ever went forward. The Council demanded, and the Mayor's Office agreed, to modify the financing plan for the No. 7 subway line extension to make it more cost-effective and to insulate it from uncertainties about the timetable for future development in the Special District. Council Resolution 760 corrected two major defects in the financing plan for the No. 7 subway line extension:

- Resolution 760 eliminated the need to borrow over $1 billion to pay interest on the debt for the No. 7 subway line extension, during the period between the issuance of the debt and the time when new development in the Special District would generate enough revenue to pay debt service. (*See* Mastro Supp. Aff. Ex. 100 (N.Y. City Council Res. No. 760 (2005)); Mastro Supp. Aff. Ex. 108 (Quinn Aff.) ¶ 22.)

- Resolution 760 made it possible to proceed with the extension of the No. 7 subway line, *even if development in the Special District was delayed*, by amending the financing plan to provide for Council appropriation in the budget process of funds to cover debt service on the bonds for the No. 7 subway line extension and other infrastructure. (*Id.*)

The City Council deemed such financing assurances for the No. 7 subway line extension to be a necessary precondition of development in the Special District, with the reasonable expectation that development, particularly commercial development, will not occur until some time after the No. 7 subway line extension is in service. In short, the City Council's actions leave no doubt that the MTA's purported reliance on the greater likelihood that the Jets' proposal would ensure the financing of the No. 7 subway line extension was wholly invented after the fact to justify its selection of the Jets' inferior proposal. As City Council Member Quinn confirms in her sworn affidavit: "The idea that the City would now reverse course and refuse or fail to finance the [No. 7 line] extension if the MTA failed to approve the Jets' bid is preposterous and flies in the face of recent history." (Mastro Supp. Aff. Ex. 108 (Quinn Aff.) ¶ 23.)

4. The Supposed Impact on the MTA's Eastern Rail Yards

Respondents argue that the Jets' proposal would provide the MTA with "greater value" from "the development of the Eastern Rail Yards" (Krsulic Aff. Ex. R (Certified Transcript) at 41), and that the timing of MSG's proposal would "retard" development on the Eastern Rail Yards and reduce the value of the MTA's development rights over the Eastern Rail Yards.[43] In particular, the MTA asserts: "In 2010, when, according to MSG, development rights in the Eastern Rail Yards will first be sold, under the Jets' proposal, a completed stadium would exist across the street from the Eastern Rail Yards, while under MSG's proposal, the Site will be under construction for another eight years." The MTA appears to be arguing that construction on a large scale on the Western Rail Yards would deter developers from buying the development rights over the Eastern Rail Yards. Like the specious post-hoc argument concerning the No. 7 subway line, this concern was never mentioned in the RFP's bid specifications or the evaluation criteria.

In addition, this argument misrepresents the schedule for development set forth in MSG's proposal and ignores projections relating to the Eastern Rail Yards that the City released in 2003. As the development schedule in MSG's proposal makes clear, half of the railroad tracks on the Western Rail Yards would be covered by 2009, three buildings would be completed by 2010, and all but three of the 11 buildings in the development would be finished by 2014.[44]

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43 *Id.* Ex. 56 (Statement By New York City Representatives On The Metropolitan Transportation Authority Board John Banks III, Susan Kupferman, Mark Lebow, And Mark Page On The Disposition Of The Western Rail Yards, Mar. 31, 2005) ¶ 1. The City's MTA appointees asserted that "Cablevision's proposed construction schedule would leave the rail yards as a construction site until 2018, retarding development on the Eastern Rail Yards and thereby reducing substantially the value to the MTA from the sale of 6.3 million square feet of development rights on that site." *Id.*

44 *See* Mastro Supp. Aff. Ex. 65 (Letter from Hank Ratner, Vice Chairman of Madison Square Garden, L.P., to Roco Krsulic, Director of Real Estate, MTA, dated Mar. 21, 2005 re: Proposal by Madison Square Garden, L.P. in response to the Metropolitan Transportation Authority's Request for Proposals, dated Feb. 22, 2005, for the sale or lease of real property interests above John D. Caemmerer West Side Yard) at VI-2.)

Significantly, the schedule of "Hudson Yards Projected Revenue" included in the City's December 2003 RFP for Underwriters shows that sales of development rights over the Eastern Rail Yards are not expected to begin generating revenue until 2014—in other words, *after* the construction of MSG's proposed development would already largely have been completed. (*See* Mastro Aff. Ex. 57 (Request for Proposals, Financing of Hudson Yards Project by the Hudson Yards Finance Corporation, app. 2.).)

Moreover, the City's schedule of Hudson Yards projected revenues also shows that the 5.13 million square feet of transferable development rights over the Eastern Rail Yards will be sold over the next several decades, through 2035. (*See* Mastro Aff. Ex. 103 (FEIS App. A.2: RWCDS Summary Tables); *id.* Ex. 57 (Request for Proposals, Financing of Hudson Yards Project by the Hudson Yards Finance Corporation, app. 2.).) As previously explained, the 4.4 million square feet of phantom "air rights" that the MTA purports to have retained would compete directly with the development rights over the Eastern Rail Yards. (Pet. Br. at 39-41.) In contrast, MSG's proposal would not result in *any* competition with the development rights over the Eastern Rail Yards because MSG's proposal does not contemplate the creation or sale of any TDRs. Nor would MSG's proposal compete with the uses for which the Eastern Rail Yards have just been rezoned, because MSG contemplates building predominantly residential housing, and the Eastern Rail Yards site was just rezoned to be approximately 73% to 82% commercial. (*See* Mastro Supp. Aff. 101 (City Planning Commission Report on the Special District, Nov. 22, 2004) at 17.)

Respondents' papers do not include any response to this argument. In any event, given that the City has identified a date some 30 years in the future for completing the sale of the development rights over the Eastern Rail Yards, any sale of TDRs that might somehow come to

exist over the Western Rail Yards before that time would adversely affect the value of its TDRs over the Eastern Rail Yards site. Thus, only the Jets' deal could end up potentially competing with the MTA's Eastern Rail Yards site.[45]

5. The Supposed Value of the TDRs

The MTA did not accept the Jets' bid in its original form; indeed, it purported to reject the $440 million contingent component of the Jets' proposal premised on phantom "air rights."[46] In order to save the Jets' bid, however, the MTA simply invented new terms in an attempt to provide an alternate justification for crediting hundreds of millions of dollars in additional "value" to be provided to the MTA if it accepted the Jets' bid.

Respondents argue that TDRs "have long been and continue to be valuable real estate rights in New York City" and that the TDRs "retained" by the MTA provide "valuable rights." (MTA Br. at 24.) That is not so with respect to *these* purported rights. The point is simple: the TDRs have no value because they do not exist and, now, as a legal and a factual matter, they *cannot* ever exist. They have not been created by a zoning ordinance; and in light of the ESDC's exercise of its override powers on April 12, 2005, they never will be.

Two cases the MTA cites for the proposition that TDRs have long been, and continue to be, valuable real estate rights in the City, instead, demonstrate that TDRs only have value if they

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45 Some MTA Board members also cited the Jets' "aggressive" build schedule as a factor in the Jets' favor, claiming that early completion of construction on the Site would aid future development of the MTA's Eastern Rail Yards. (Krsulic Aff. Ex. R (Certified Transcript) at 51.) As just explained, however, the Eastern Rail Yards development is not even contemplated to begin until 2014, by which time MSG's proposed development would already largely have been completed (including the entire platform), so this could not rationally have been a disqualifying factor. Mastro Aff. Ex. 57 app. 2. Moreover, if MTA officials truly were concerned about MSG's build schedule, they surely would have inquired whether MSG could expedite that schedule, as they inquired of the Jets in other respects in trying to improve the Jets' bid. Instead, MTA officials said nothing, expressed no such concern in the Staff Summary, and thereby betrayed their lack of any genuine concern in this regard.

already exist. Both *Penn Central Transportation Co. v. City of New York* and *Fisher v. Giuliani* discuss TDRs that already exist by act of law.[47] Although Petitioner does not dispute that TDRs created by the provisions of the Zoning Resolution or other local law have value, no such law provides for the phantom TDRs that the MTA supposedly "retained" over the Site.[48]

First, as a factual matter, creation of the TDRs is an impossibility because the City Council will not implement the necessary rezoning.[49] The City Council only recently completed a comprehensive rezoning of the West Side that creates the highest densities in the City.[50] There is no place to put an additional 4.4 million square feet of development (the equivalent of two Empire State Buildings) without destroying the City's land use plan for the area. Indeed, before approving the West Side rezoning, the Council capped the density and reduced the amount of

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46 *See* Krsulic Aff. Ex. R (Certified Transcript) at 32 (MTA Chairman Kalikow conceded that the Jets' "air rights" component was "never included for our consideration. So there's been talk about us considering them and adding them to the price and we have not done that.").

47 See *Penn Central*, 42 N.Y.2d 324, 327, 397 N.Y.S.2d 914, 917 (1977) (discussing "above-the-surface development rights, transferable to adjacent sites under the city landmark ordinance"), *aff'd on other grounds*, 438 U.S. 104 (1978); *Fisher*, 280 A.D.2d 13, 720 N.Y.S.2d 50 (1st Dep't 2001) (discussing TDRs appurtenant to properties within the "Manhattan Theater District" created by the City's Zoning Resolution, which "authorize[s] the transfer of development rights from designated theaters to receiving sites anywhere within the Theater Subdistrict").

48 In an apparent attempt to shore up their contention that these TDRs have value, the MTA now argues: "Indeed, in the recent rezoning of the Hudson Yards generally, the MTA's Eastern Rail Yards were rezoned to include TDRs." (MTA Br. at 24.) The Eastern Yards TDRs fall into an entirely different category, and they cannot reasonably be compared with "air rights" that the MTA "retained." The TDRs over the Eastern Rail Yards are not phantom rights; the City Council and City Planning Commission created them by means of the zoning resolution adopted on January 19, 2005.

49 Council Member Christine Quinn put it best with respect to this "ludicrous" proposition: "It is inconceivable that the City Council would ever enact such a rezoning scheme." (Mastro Supp. Aff. 108 (Quinn Aff.) ¶ 23.) *See also* Mastro Aff. Ex. 59 (Sewell Chan & Charles V. Bagli, *Jets Win Stadium Battle by 2 Touchdowns (the Vote Is 14-0)*, N.Y. Times, Apr. 1, 2005, at B1) (quoting Councilwoman Christine Quinn as saying "[t]hat money will never be seen by the Authority").

50 *Id.* Ex. 42 (David W. Dunlap, *BLOCKS; The Sky is No Longer the Limit on Far West Side Buildings*, N.Y. Times, Jan. 13, 2005, at B3). The Hudson Yards allows Floor Area Ratios (the ratio of lot area to building area) of up to 33.0. Prior to this rezoning, the highest FAR allowed in the City was 21.6.

permitted development by more than 1 million square feet for fear of excessive density.[51] Here, the Jets' proposal literally requires a comprehensive plan to be done citywide. In the absence of comprehensive planning, such rezoning would be arbitrary, capricious and illegal.[52] The massive nature of the task only reinforces the absurdity of the proposal. It is transparent "cover" for the Jets' lowball bid, of no value whatsoever, other than as a smokescreen for the MTA to hide behind in steering this Site to the Jets.[53]

Even if the Council were prepared to grant such a rezoning, it could not lawfully do so because the ESDC's exercise of its statutory override power for the stadium project preempts the Council's zoning authority over the Site. Notwithstanding the baseless and self-serving statements in the affidavit of ESDC Senior Counsel Steven Matlin (*see* Matlin Aff. ¶¶ 3-6), the ESDC's exercise of its zoning override over the Site—an authority that is completely inconsistent with the comprehensive planning principles embodied in the City's Zoning Resolution—will preempt the City Council's zoning authority and preclude further zoning to

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51 The Special Hudson Yards District allows Floor Area Ratios (the ratio of lot area to building area) of up to 33.0. Prior to this rezoning, the highest FARs allowed in the City were 21.6, except for a limited number of exceptions that technically permitted unlimited transfer from landmarks (e.g., in the Special Midtown District). However, as a practical matter, City Planning did not allow new buildings to exceed a maximum of 21.6 FAR. In the vast majority of cases, the maximum FAR under the Zoning Resolution for commercial and mixed-use buildings is 18. Under the Multiple Dwelling Law, the maximum residential FAR is fixed at 12.

52 *See* N.Y. Town Law § 263 (Zoning regulations "shall be made in accordance with a comprehensive plan and designed to" for example, "lessen congestion in the streets," "promote health and general welfare," "provide adequate light and air," "prevent the overcrowding of land," "avoid undue concentration of population," and "facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements." Municipal officials must make such regulations "with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."); *see generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-95 (1926) (setting out the policy reasons for and permissibility of comprehensive zoning plans).

53 Moreover, any "bonus" to the government attributable to additional zoning density—such as a $440 million bonus payment for TDRs, and especially any "bonus" specifically earmarked for public improvements related to the increased density proposed by the Jets' developers—would amount to a prohibited "sale" of zoning rights, which is illegal in New York. As one court explained in rebuking the MTA and the City under strikingly similar circumstances in the Columbus Circle case, "government may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items." *See Mun. Art Soc'y v. City of N.Y.*, 137 Misc. 2d 832, 838, 522 N.Y.S.2d 800, 804 (Sup. Ct. N.Y. County 1987).

create TDRs on the Site. The ESDC zoning override is a site-specific avoidance of comprehensive local planning imposed by force of State law, which "local laws otherwise in conflict may not inhibit." *Floyd v. N.Y. State Urban Dev. Corp.*, 33 N.Y.2d 1, 7, 347 N.Y.S.2d 161, 164 (1973).

The City's Zoning Resolution, adopted in 1961 and amended from time to time thereafter, is the embodiment of a comprehensive plan for the regulation of land use within its borders.[54] Every time the Zoning Resolution is amended, or a discretionary approval (such as a special use or bulk permit) under the Resolution is issued, the City Planning Commission adopts a written report explaining the basis for its action and how that action comports with the City's specific planning goals and objectives. N.Y. City Charter §§ 197-c(h), 200. In contrast, the ESDC's zoning override implements, by force of State law, a site-specific development plan in derogation of the City's comprehensive and interdependent allocation of land-use rights among property owners within its borders. *See* N.Y. Unconsol. Laws § 6266 (3). This action necessarily preempts the City's authority to regulate land use insofar as that particular site is concerned. Furthermore, because development rights are appurtenant to a "tract of land,"[55] the City simply cannot lawfully reassert zoning authority over a theoretical "residual" interest in the Site by slicing the property horizontally into separate parcels and retaining the "excess" over the space consumed by the stadium. Thus, the City simply cannot purport to assert its comprehensive plan over a site that has been developed in direct contravention of that plan.

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54 *See* N.Y. City Zoning Resolution, available at http://www.nyc.gov/html/dcp/html/zone/zonetext.html. Courts have long recognized the authority of a municipality, in the exercise of its police powers, to enact a comprehensive plan of zoning and land-use regulation. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

55 *See* N.Y. City Zoning Resolution § 12-10 (definition of Zoning Lot), available at http://www.nyc.gov/html/dcp/pdf/zone/art01c02.pdf.

Moreover, the suggestion that the ESDC could somehow exercise an additional override over both this and other, recipient sites to create transferable development "rights" defies all logic and credibility. TDRs are creatures of zoning and land-use law,[56] not of the ESDC's development powers. Clearly, the ESDC could exercise its zoning override with respect to other project sites (provided that it complied with the requirements of the UDC Act) in order to undertake development in excess or derogation of the use authorized on those sites under the Zoning Resolution. *See* N.Y. Unconsol. Laws § 6266(3). Such development, however, would have nothing to do with the transfer of any "rights" appurtenant to the stadium site; the authority for such development would come from the ESDC's override itself. Indeed, if the ESDC exercised its override with respect to a "recipient" site, *there would be no need for the ESDC to exercise a second override on the stadium site.* By overriding the "recipient" site's zoning, the ESDC could undertake any development it deemed proper for that site (so long as it acted within the scope of its legal obligations). It would be a complete legal fiction—and, indeed, an unnecessary and superfluous legal fiction—to credit the MTA for having transferred some residual development "right" to a recipient site not subject to any local zoning limitations. Thus, Mr. Matlin's statement that "nothing precludes the ESDC from later overriding the zoning at the Site, *as well as at recipient locations*, in order to create TDRs above the Site," simply defies all credibility. (Matlin Aff. ¶ 6 (emphasis added).)

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56 Under City law, transfers of development rights are allowed only in very narrow circumstances. As a general rule, unused development rights may be transferred only to adjacent lots through zoning lot mergers (*see* N.Y. City Zoning Resolution § 12-10 (definition of Zoning Lot), available at http://www.nyc.gov/html/dcp/pdf/zone/art01c02.pdf). Limited exceptions to the rule include provisions for the transfer of excess rights over landmarked sites, which may be transferred to an "adjacent site" across a street or to sites that share a chain of common ownership with the landmarked site, and excess rights over property within a handful of special zoning districts, including the recently adopted Hudson Yards Special District—a district that omits the stadium site. (See also the N. Y. City Zoning Resolution, South Street Seaport Special District, Article IX, Chapter 1, available at http://www.nyc.gov/html/dcp/pdf/zone/art09c01.pdf))

In sum, there is no legal basis or precedent for any plan to create millions of square feet of transferable "rights" over the Site through the use of an ESDC zoning override, followed by the reinstitution of local zoning regulations or an additional exercise of the ESDC's override on this and other sites. The MTA's approach to these "air rights" demonstrates the arbitrary and capricious nature of this decision. On one hand, the MTA rejected the $440 million "air rights" component of the Jets' bid, which would require future zoning action that is both lacking in the necessary City Council support and unlawful as a matter of State law; on the other hand, it purported to reserve for itself those specious "air rights" for future use and then credited the Jets' bid for "creating value" based on those phantom rights.[57] In so doing, the MTA improperly modified the Jets' bid without affording any similar opportunity to other bidders or prospective bidders,[58] and thus violated its own instructions that all bidders submit "best and final offers" for consideration on March 31 (Mastro Aff. Ex. 61 (MTA press release, *MTA Asks For Best and Final Offers For West Side Rail Yard*, Feb. 15, 2005)), as well as its stated goal in the RFP that it

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57 Of note, the MTA and the City administration have been playing a "shell game" with the development rights on this Site all along. As co-lead agencies on the West Side rezoning plan, they chose to carve this Site out of that comprehensive plan, reserving it for a stadium. The reasons for that calculated decision are obvious: they did not want the City Council to have any role in reviewing the stadium proposal. Instead, they wanted to bypass the City Council altogether by obtaining an ESDC zoning override to permit a stadium to be built on the Site, just as the City administration now intends to bypass the City Council in financing the new stadium through an illegal diversion of PILOT revenue to circumvent the City budget process. Mastro Supp. Aff. Ex. 108 (Affidavit of Christine Quinn, *N.Y. Pub. Interest Research Group/Straphangers Campaign, Inc. v. MTA*, No. 105292/05 (Sup. Ct. N.Y. County Apr. 27, 2005), ¶ 17) ("This unilateral appropriation of over a billion dollars in PILOT money would violate the Council's authority under the New York City Charter, which clearly commits the power to appropriate funds to the City Council. The Administration's plan for an illegal slush fund also runs afoul of state law, which requires PILOT revenues to be remitted to New York City's general fund and disbursed pursuant to the normal budget process, through an appropriation adopted by the Council. Speaker Miller and I recently introduced legislation, co-sponsored by 24 Council Members and the Public Advocate, confirming that the Charter requires Council authorization for the disbursement of PILOT payments."). It is therefore disingenuous for the MTA to suggest that it will now somehow be able to convince that same City Council to approve a separate rezoning of the Site to create phantom "air rights' that it can then indiscriminately sell for use elsewhere. (*Id.* ¶ 23) ("[T]he idea that the City Planning Department, the City Planning Commission and the City Council would now revisit the rezoning plan in order to add 4.4 million square feet of Transferable Development Rights to the Rail Yards, potentially throwing off the careful balance achieved through years of planning and negotiation, is ludicrous. It is inconceivable that the City Council would ever enact such a rezoning scheme.")

58 "At no time prior to the MTA Board's vote on March 31, 2005 did any representative of the MTA contact MSG to discuss any issue regarding Transferable Development Rights ('TDRs') connected with the disposition of property rights over the Rail Yards, including the potential effect of MSG's Proposal thereon." Lynn Aff. ¶ 16.

was seeking "disposition of the air rights over *the entire site* in a manner that will maximize the economic benefit to the MTA." (*Id.* Ex. 27 (RFP) at Section II (emphasis added).)[59]

6. Post-Hoc Rationalizations Manufactured Only After the March 31, 2005 Vote

In addition to the foregoing, Respondents cite several additional "reasons" in their papers for rejecting MSG's proposal. None of these so-called "reasons" was noted in the MTA's Staff Summary, nor were they noted by any Board member at the MTA Board meeting on March 31, 2005. They were created by lawyers long after the fact in order to paper over an illegitimate process.

First, Respondents say that MSG "failed a stated criteria" requiring that proposals permit future construction of a bus garage to relocate the Quill Bus Depot." (MTA Br. at 13.) But as the MTA's Staff Summary indicates, the MTA staff found MSG's bid to be a qualifying bid, and the staff was "awaiting direction . . . . on how to proceed with regard to the . . . MSG proposal."[60] Any argument that MSG failed to address a stated criterion or otherwise failed to comply with the RFP cannot be squared with the express findings of the MTA's Staff Summary.

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59 Some MTA Board members also cited the Jets' pledge of minority participation in the stadium project as a basis for favoring that proposal. (*See* Seton Aff. Ex. 1 (Reasons Cited by MTA Board Members for Voting in Favor of Jets' Bid).) MSG made similar commitments of minority participation (Lynn Aff. ¶ 8), so that could not rationally have been a distinguishing factor here. Moreover, this too was not cited among the evaluation criteria in the RFP's bid specifications.

60 *See* Krsulic Aff. Ex. M (MTA Staff Summary, dated Mar. 30, 2005) at 3. Notably, the Jets' bid provides next to no information about the Quill Bus Depot. It does not include any specifications as to the size, dimensions, capacity, or number of levels of the bus garage. In addition, a memorandum from the MTA reveals that the Jets would impose certain limitations on the garage space that the MTA deemed unacceptable: "With the understanding that the New York Jets would impose deployment restrictions on the space (such as not permitting salt/hazardous material storage), Department of Buses, Facilities Division has conducted extensive research into our commodity materials and identified pertinent 'Bulk Storage Items' for the depot's future operational needs. . . It is our position that we would be unable to operate a functional depot if the identified materials could not be stored at the site." Mastro Supp. Aff. Ex. 109 (MTA Mem. dated Nov. 29, 2004 re: "Construction Phasing for New Michael J. Quill Bus Depot—Bulk Storage Items"). Finally, the MTA's Staff Summary states that MTA had not even seen the Jets' "newest design" before they voted on March 31. *See* Krsulic Aff. Ex. M (MTA Staff Summary, dated Mar. 30, 2005) at 3. In view of the foregoing, the MTA staff's basis for "tentatively" determining that the Jets' proposed project would accommodate Quill is entirely unclear, and qualified in any event because "NYCT staff has not reviewed the Jets' newest design." (*Id.*)

The MTA now suggests for the first time that it was concerned that MSG was not a serious bidder because MSG had twice previously expressed interest in the property but had not followed through with a bid. (MTA Br. at 13-14.) But one of those instances involved a quite different project: a possible collaboration ***with the Jets*** on a stadium to house the Knicks, the Rangers and the Jets. Given that MSG was collaborating with the Jets on that project, it defies reason to suggest that the MTA can—particularly with no discussion of the point whatever—hold the failure to go forward against MSG's current bid, but not against the Jets'. The other project cited by the MTA was nearly 20 years ago and it involved, as the MTA's brief concedes, *former owners* of the Garden. (MTA Br. at 13-14). Respondents do not explain, nor is it apparent, how the conduct of former owners of the Garden could rationally be taken to reflect negatively on *Petitioner's* bid.

The MTA also asserts for the first time here that the Board "did not find the MSG development team to have the appropriate 'experience, reputation, and creditworthiness' because their core business is not real estate development, and has no experience in mixed-use development." (MTA Br. at 30.) The MTA further claims: "[w]hile MSG and its parent and affiliates have been involved in a number of ventures, it is ***not*** their business to develop residential or mixed use real estate." (*Id.* at 30-31.) Again, this belated justification, even if it were meritorious, was not raised in the MTA's Staff Summary or by any Board members at the March 31 meeting.[61] And given that the winning bidder here is in the business of *football,* and that it has not so much as disclosed the developer for the proposed stadium, this particular justification proffered by the MTA must be viewed, at best, as facetious.

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61 Tellingly, the MTA never even contacted MSG prior to its vote on March 31, 2005 to discuss *any* of these concerns. Lynn Aff. ¶¶ 13-17 (emphasis added).

Finally, Respondents say MSG's financing was not certain. (*Id.* at 30.) But once again, no question about financing was raised during the bid process, in the Staff Summary or at the Board meeting. Indeed, this is an incredible claim, given MSG's commitment, which was recognized in the Staff Summary (Krsulic Aff., Ex. M (MTA Staff Summary, dated Mar. 30, 2005) at 2), to close and pay the MTA $400 million immediately upon being selected, obviating any concern about the financing of the proceeds to be paid to the MTA. And the MTA's citation to MSG's 10-K in this context is particularly unhelpful for the MTA, as it shows Cablevision to be a multi-billion dollar company with financing capability that is more than sufficient to pay the purchase price immediately. (*See id.* Ex. K (Cablevision 10-K dated Mar. 16, 2005) at 32-33.)[62]

POINT III

THIS COURT SHOULD ANNUL THE MTA'S AWARD TO THE JETS AND DIRECT THE MTA TO AWARD THE DEVELOPMENT RIGHTS TO MSG OR, ALTERNATIVELY, RE-BID THE DEVELOPMENT RIGHTS IN A FAIR AND PROPER BIDDING PROCESS

As previously explained, the MTA conducted a sham RFP process and manufactured implausible and demonstrably false rationales for awarding the Development Rights to the Jets.

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62 In this same vein of trying to salvage a flawed process with post-hoc rationalizations, Respondents now urge this Court to ignore the law in aid of the City's Olympic bid. Those same scare tactics have not worked with State officials such as Assembly Speaker Sheldon Silver and Senate Majority Leader Joseph Bruno, both of whom ultimately have the right to decide the stadium project's fate but have said publicly that they see no need to do so until after the IOC decides in July on the site of the 2012 Summer Olympics. And those threats have not daunted other Citywide elected officials, including Public Advocate Betsy Gotbaum (who has brought her own petition challenging the MTA's decision here), City Council Speaker Gifford Miller and City Council Members Christine C. Quinn, Gale A. Brewer, Philip Reed, Bill Perkins, Eva Moskowitz, Charles Barron, David Yassky, John Liu and Letitia James (who lead a group of 10 Council Members seeking leave to appear before this Court as Amici Curiae in support of the related Petition in *N.Y. Pub. Interest Research Group/Straphangers Campaign, Inc. v. MTA*, No. 105292/05), and City Comptroller William Thompson (whose office is auditing the illegal financing scheme that the City administration has proposed to pay for this stadium project's enormous public subsidy). Moreover, it simply is not true that the City's Olympic bid depends upon immediate approval of the stadium project. Indeed, the head of the IOC site selection committee, when asked by reporters during the committee's recent New York visit whether a stadium had to be "in pla[ce] or begun at least before selection," replied only that it "can be important, but we have seen here a very, very good stadiums [sic]. We have been to Madison Square Garden, to Flushing Meadow, we have seen such great infrastructure that can be a good legacy for the City and for the sports. Of course we would like to have a stadium in place, but this can be helpful for us and for the City." Kriegel Aff., Ex. B, at 21. Indeed, other cities, including Athens and Sydney, were awarded the Summer Olympics long before they commenced construction on their Olympic stadiums.

Under CPLR 7806, this Court may annul the MTA's award to the Jets and direct the MTA to award the Development Rights to MSG or, at a minimum, re-bid the Development Rights in a fair and proper bidding process that fulfills all the MTA's legal obligations.[63]

Ignoring that this is a proceeding to *review* an agency determination under CPLR 7803(3), the MTA characterizes the relief sought by MSG as a "mandamus to compel" and asserts that "mandamus in the form of compelling the MTA to select the MSG proposal, or to conduct another selection process anew, is simply not available." (MTA Br. at 55.) Under CPLR 7806, however, a court hearing a proceeding brought "to review a determination" properly may "annul" the determination and "direct or prohibit specified action by the respondent." CPLR 7806. Thus, in *Browning-Ferris*, for example, the Appellate Division annulled a contract award and directed re-bidding. *Browning-Ferris*, 204 A.D.2d at 1048, 612 N.Y.S.2d at 733. The MTA's attempted reliance on "mandamus to compel" cases is thus entirely misplaced.[64] Accordingly, the Court should now grant this Petition and order appropriate relief annulling the MTA's decision and directing the MTA to take the necessary remedial action.[65]

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63 *See* CPLR 7806 ("If the [Article 78] proceeding was brought to review a determination, the judgment may annul or confirm the determination . . . and may direct or prohibit specified action by the respondent."); *Browning-Ferris*, 204 A.D.2d at 1048, 612 N.Y.S.2d at 733 (annulling contract award and directing re-bidding in Article 78 proceeding).

64 *See, e.g., Donaldson v. State*, 156 A.D.2d 290, 292, 548 N.Y.S.2d 676 (1st Dep't 1989); *Deane v. City of N.Y. Dep't of Bldgs.*, 177 Misc. 2d 687, 677 N.Y.S.2d 416 (Sup. Ct. N.Y. County 1998).

65 The MTA's assertion that "permanent injunctions are not a form of available relief under Article 78" (MTA Br. at 57) also is misguided. As both courts and commentators have recognized, "it is reasonably clear today that even outright injunctive relief, if appropriate, is available in an Article 78 proceeding." David D. Siegel, *New York Practice* § 570, at 942 (3d ed. 1999); *accord, e.g., Cattaraugus County Nursing Home v. Axelrod*, 484 N.Y.S.2d 366 (3d Dep't 1985) ("[W]e hold that Special Term acted properly in permanently enjoining respondent from taking any further action to recover the Medicaid reimbursement funds that were the subject of the [Article 78] proceedings below."); 14 Jack B. Weinstein et al., *New York Civil Practice: CPLR* ¶ 7806.00, at 78-188 (rev. 2d ed. 2004) ("The court has the power under CPLR 7806 to . . . order the respondent to take action in the petitioner's favor."). The case law upon which the MTA relies, *see, e.g., Daniels v. Daniels*, 3 A.D.2d 749, 760, 160 N.Y.S.2d 133 (2d Dep't 1957), is conspicuously outdated and has been expressly abrogated; indeed, in *Policemen's Benevolent Ass'n v. Board of Trustees*, for example, the Second Department expressly disavowed its earlier holding in *Daniels v. Daniels* and held that "injunctive relief such as that sought in the petition at bar is obtainable in an article 78 proceeding. . . . In view of the foregoing clear holdings by the Court of Appeals, we are not now following the seemingly contrary determinations banning injunctive relief in article 78 proceedings." 21 A.D.2d 693, 694, 250 N.Y.S.2d

[Footnote continued on next page]

CONCLUSION

Pursuant to CPLR 7803, MSG respectfully requests that this Court grant the Petition and enter an order (i) declaring that the MTA acted arbitrarily and capriciously in selecting the Jets' bid, which was non-compliant with this RFP and therefore should have been disqualified; (ii) declaring that the MTA acted arbitrarily and capriciously in rejecting MSG's admittedly superior bid in favor of the Jets' proposal, which was inferior to MSG's bid by any rational measure; (iii) declaring that the MTA acted arbitrarily and capriciously in conducting a sham bidding process that was designed and altered to ensure that the Development Rights would end up in the hands of the Jets; (iv) declaring that the MTA acted arbitrarily and capriciously in failing to supplement the FEIS to reflect the environmental impacts of a potential additional 4.4 million square feet purportedly to be retained by the MTA and created through rezoning; (v) annulling the MTA's selection of the Jets' bid; (vi) granting a preliminary injunction enjoining the MTA from entering into any agreement to transfer the Development Rights to the Jets on these terms, pending the outcome of these proceedings, and a permanent injunction from doing so in the absence of a new and proper bidding process; (vii) compelling the MTA to award

[Footnote continued from previous pages]

523, 526-27 (2d Dep't 1964) (citing *Daniels*, 3 A.D.2d 749, 160 N.Y.S.2d 133). Moreover, a judgment in an Article 78 proceeding annulling a determination and directing specified action is based on remedying a government's arbitrary, capricious and illegal actions and are remediable under CPLR 7806 on that basis alone. The harm to the party raising such a meritorious claim, or the balance of equities between that party and the government, do not alter that ultimate analysis. The government wrong requires a remedy, regardless of whether the government's action caused irreparable harm to the complaining party. In any event, though, MSG and the public will suffer an irreparable harm if the Development Rights go to the Jets for inferior consideration due to the MTA's sham RFP process. *See, e.g., O'Henry's Film Works, Inc. v. Bureau of Ferry & Gen. Aviation Operations*, 111 Misc. 2d 464, 444 N.Y.S.2d 509 (Sup. Ct. N.Y. County 1981) (recognizing that the "petitioner may be irreparably damaged" unless "the RFP were redrawn to include terms which were certain"); *Lee v. N.Y. City Dep't of Hous. Pres. & Dev.*, 162 Misc. 2d 901, 614 N.Y.S.2d 694 (Sup. Ct. N.Y. County 1994) (recognizing that petitioners would be irreparably harmed "if the City is permitted to transfer Bronx Site 11A to CHA in violation of the terms of the RFP"). And the equities clearly favor MSG and the public, which depends on this mass transit system and on the MTA to act "fairly" and obtain the terms "most beneficial" to the riding public. *Square Parking*, 92 A.D.2d at 785, 459 N.Y.S.2d at 777; *Tri-State*, 108 A.D.2d at 646, 485 N.Y.S.2d at 754. The MTA and the City should not be rewarded for their misconduct, no matter what their aspirations. *See O'Henry's Film Works*, 111 Misc. 2d at 469, 44 N.Y.S.2d at 513 ("If the RFP were redrawn to include terms which were certain and clear in intent the City would not be prejudiced. Whereas if this preliminary injunction were not granted, the petitioner may be irreparably damaged. It would appear that in the interest of justice this application should be granted.").