

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

In the Matter of
VELMANETTE MONTGOMERY, JAMES F.
BRENNAN, JOAN L. MILLMAN, LETITIA
JAMES, NEW YORK PUBLIC INTEREST
RESEARCH GROUP STRAPHANGERS
CAMPAIGN, AND DEVELOP DON'T
DESTROY (BROOKLYN), INC.,

Petitioners,

v.

METROPOLITAN TRANSPORTATION
AUTHORITY and FOREST CITY RATNER
COMPANIES LLC,

Respondents.

Index No. 09/114304

**VERIFIED ANSWER OF RESPONDENT
METROPOLITAN TRANSPORTATION AUTHORITY**

Respondent Metropolitan Transportation Authority ("MTA"), by its attorneys, Paul, Weiss, Rifkind, Wharton & Garrison LLP, hereby answers the Petition herein as follows:

1. The allegations contained in paragraph 1 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against the MTA to which a response is required, they are denied.

2. MTA denies the allegations in paragraph 2 of the Petition, except admits that its Board adopted a resolution on June 24, 2009, regarding the sale of the Vanderbilt Yards; admits that it obtained an appraisal of the Vanderbilt Yards in 2005; and respectfully refers the Court to the resolution and the appraisal for their contents.

3. The allegations contained in paragraph 3 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

4. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Petition.

5. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Petition.

6. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Petition.

7. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Petition.

8. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Petition.

9. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Petition.

10. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the Petition.

11. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the Petition, except the allegation that Petitioner Develop Don't Destroy (Brooklyn), Inc. ("DDDB") was denied an opportunity to bid against Forest City Ratner Companies, Inc. ("FCRC") for the Vanderbilt Yards, which is denied.

12. MTA admits the allegations contained in paragraph 12 of the Petition.

13. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the Petition.

14. MTA admits the allegations contained in paragraph 14 of the Petition.

15. MTA admits the allegations contained in paragraph 15, except denies the allegation that Vanderbilt Yard is located in Prospect Heights.

16. MTA admits that Vanderbilt Yard is in the proximity of neighborhoods known as Prospect Heights, Fort Greene, Clinton Hill, and Boerum Hill and Park Slope, and otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Petition.

17. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the Petition.

18. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Petition.

19. MTA admits the allegations contained in paragraph 19 of the Petition.

20. MTA admits the allegations contained in paragraph 20 of the Petition.

21. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the Petition.

22. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Petition.

23. MTA denies the allegations contained in paragraph 23 of the Petition.

24. MTA denies the allegations contained in paragraph 24 of the Petition, except admits that FCRC, the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") and New York City entered into a Memorandum of Understanding ("MOU") dated February 18, 2005, and respectfully refers the Court to the MOU for its contents.

25. MTA denies the allegations contained in paragraph 25 of the Petition, except admits that it issued a request for proposals

("RFP") on May 24, 2005, to assess the interest of other parties in developing Vanderbilt Yard, and respectfully refers the Court to the RFP for its contents.

26. MTA admits the allegations contained in paragraph 26 of the Petition.

27. MTA denies the allegations contained in paragraph 27 of the Petition, except admits that it obtained an independent appraisal of the Vanderbilt Yard as of July 21, 2005, and respectfully refers the Court to the appraisal for its contents.

28. MTA denies the allegations contained in paragraph 28 of the Petition, except that it lacks knowledge or information sufficient to form a belief as to the truth of the allegation that FCRC "had been working on the Project since at least 2003", admits that FCRC submitted a proposal in response to the RFP, and respectfully refers the Court to FCRC's proposal for its contents.

29. MTA denies the allegations contained in paragraph 29 of the Petition, except admits that Extell submitted a proposal in response to the RFP, and respectfully refers the Court to the Extell Development Company's ("Extell") proposal for its contents.

30. MTA denies the allegations contained in paragraph 30 of the Petition and respectfully refers the Court to Extell's proposal for its contents.

31. MTA denies the allegations contained in paragraph 31 of the Petition and respectfully refers the Court to FCRC's proposal and Extell's proposal for their contents.

32. MTA denies the allegations contained in paragraph 32 of the Petition, except admits that it determined to negotiate first with FCRC, while keeping Extell's proposal open, and that FCRC increased the cash component of its proposal to \$100 million.

33. MTA admits the allegations contained in paragraph 33 of the Petition.

34. MTA denies the allegations contained in paragraph 34 of the Petition, except admits that its Board adopted a resolution on September 14, 2005, concerning FCRC's proposal, and respectfully refers the Court to the resolution for its contents.

35. MTA admits the allegations contained in paragraph 35 of the Petition.

36. MTA denies the allegations contained in paragraph 36 of the Petition, except admits it has not yet entered into a final contract for the disposition of Vanderbilt Yard to FCRC.

37. The allegations contained in paragraph 37 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

38. The allegations contained in paragraph 38 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

39. The allegations contained in paragraph 39 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

40. The allegations contained in paragraph 40 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

41. The allegations contained in paragraph 41 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

42. The allegations contained in paragraph 42 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

43. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43 of the Petition.

44. MTA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of the Petition.

45. MTA denies the allegations contained in paragraph 45 of the Petition, except admits that ESDC issued a Modified General Project Plan dated June 23, 2009, and respectfully refers the Court to the Modified General Project Plan for its contents.

46. MTA denies the allegations contained in paragraph 46 of the Petition and respectfully refers the Court to the Modified General Project Plan for its contents.

47. MTA denies the allegations contained in paragraph 47 of the Petition.

48. MTA denies the allegations contained in paragraph 48 of the Petition, except admits that MTA and FCRC agreed upon the terms of a transaction, as reflected in the Staff Summary prepared for the MTA Board Meeting of June 24, 2009, and respectfully refers the Court to the June 22, 2009 Staff Summary for its contents.

49. MTA denies the allegations contained in paragraph 49 of the Petition and respectfully refers the Court to the June 22, 2009 Staff Summary for its contents.

50. MTA denies the allegations contained in paragraph 50 of the Petition and respectfully refers the Court to the June 22, 2009 Staff Summary for its contents.

51. MTA denies the allegations contained in paragraph 51 of the Petition and respectfully refers the Court to the June 22, 2009 Staff Summary for its contents.

52. MTA denies the allegations contained in paragraph 52 of the Petition and respectfully refers the Court to the June 22, 2009 Staff Summary for its contents.

53. MTA denies the allegations contained in paragraph 53 of the Petition, except admits that its Finance Department issued a Staff Summary dated June 22, 2009, and respectfully refers the Court to the June 22, 2009 Staff Summary for its contents.

54. MTA admits the allegations contained in paragraph 54 of the Petition.

55. MTA denies the allegations contained in paragraph 55 of the Petition, except admits that the quoted statement was made, and states that there was no request for any explanation as to "why MTA did not solicit a new proposal from Extell," and there was no reason to believe that Extell would have any interest in submitting a new proposal.

56. MTA denies the allegations contained in paragraph 56 of the Petition, except admits that the quoted statement was made, and states that there was no request for any explanation as to "why MTA had not obtained an independent appraisal to determine the Vanderbilt Yard's market value in 2009."

57. MTA admits the allegations contained in paragraph 57 of the Petition.

58. MTA denies the allegations contained in paragraph 58 of the Petition, except that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations concerning the identities of persons who attended the open meeting on June 24, 2009, admits that its Board adopted a resolution on June 24, 2009, concerning the sale of the Vanderbilt Yard, and respectfully refers the Court to the June 24, 2009 Resolution for its contents.

59. MTA denies the allegations contained in paragraph 59 of the Petition, except admits that it has complied with the Public Authorities Accountability Act of 2005 under PAL § 2897(6)(c)(v), among other provisions, and has so stated.

60. MTA denies the allegations contained in paragraph 60 of the Petition.

61. MTA denies the allegations contained in paragraph 61 of the Petition and respectfully refers the Court to the MTA Board's June 24, 2009 Resolution for its contents.

62. The allegations contained in paragraph 62 of the Complaint constitute legal arguments or conclusions to which no

response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

63. MTA denies the allegations contained in paragraph 63 of the Petition, except admits that the Brooklyn real estate market markedly deteriorated from 2005 to at least June 2009, and otherwise respectfully refers the Court to the June 22, 2009 Staff Summary for its contents.

64. MTA denies the allegations contained in paragraph 64 of the Petition and respectfully refers the Court to the Staff Summary for its contents.

65. MTA denies the allegations contained in paragraph 65 of the Petition and respectfully refers the Court to the MTA Board's June 24, 2009 Resolution for its contents.

66. MTA denies the allegations contained in paragraph 66 of the Petition.

67. The allegations contained in paragraph 67 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

68. MTA denies the allegations contained in paragraph 68 of the Petition, except admits that it did not solicit a new proposal from Extell after receiving Extell's inadequate proposal in 2005, and Extell has not requested any opportunity to submit a new proposal.

69. MTA declines to respond to the allegations of paragraph 69, which concern privileged legal advice obtained by MTA.

70. MTA denies the allegations contained in paragraph 70 of the Petition, except admits that MTA did not "provide any formal opportunity" for FCRC or anyone else "to submit a proposal for developing the Vanderbilt Yard" at the June 24, 2009 Board meeting, and states that receipt of such proposals was not on the agenda for the meeting, and no one, including Petitioners and their representatives, requested prior to the meeting that any such item be included on the agenda.

71. MTA denies the allegations contained in paragraph 71 of the Petition.

72. MTA denies the allegations contained in paragraph 72 of the Petition.

73. MTA denies the allegations contained in paragraph 73 of the Petition.

74. MTA denies the allegations contained in paragraph 74 of the Petition, except admits that it followed its usual rules governing the time allotted to public speakers at its June 24, 2009 Board meeting.

75. In response to paragraph 75 of the Petition, MTA repeats and realleges its responses to paragraphs 1-74 of the petition.

76. The allegations contained in paragraph 76 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

77. The allegations contained in paragraph 77 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

78. The allegations contained in paragraph 78 of the Petition constitute legal arguments or conclusions to which no response is required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

79. The allegations contained in paragraph 79 of the Petition constitute legal arguments or conclusions to which no response is

required. To the extent that any allegations are made against MTA to which a response is required, they are denied.

80. MTA denies the allegations contained in paragraph 80 of the Petition.

81. MTA denies the allegations contained in paragraph 81 of the Petition.

82. MTA denies the allegations contained in paragraph 82 of the Petition.

83. MTA denies the allegations contained in paragraph 83 of the Petition, except admits that it did not consider the purported proposal of DDDDB, which was introduced for the first time at its Board meeting of June 24, 2009, was not submitted in a timely fashion and did not constitute a *bona fide* offer.

84. MTA denies the allegations contained in paragraph 84 of the Petition.

85. MTA denies the allegations contained in paragraph 85 of the Petition.

Objections in Point of Law

1. None of the Petitioners has suffered or will suffer any direct injury as a result of the MTA action challenged in the Petition.

2. Denial of standing to Petitioners will not erect any impenetrable barrier shielding MTA from judicial oversight.
3. All Petitioners lack standing to prosecute this proceeding.

Affirmative Statement of the Case

4. This proceeding is only the latest in a long line of misguided attempts to use litigation to derail the Atlantic Yards development project – a project that will bring a professional sports team back to Brooklyn for the first time in more than 50 years, add thousands of units of low- and mid-income housing, reinvigorate the commercial life of downtown Brooklyn and generate thousands of jobs, while at the same time upgrading LIRR's 100-year-old Vanderbilt Yard into a modern facility and providing MTA with \$100 million on top of these valuable benefits.

5. The present Petition does not address the merits of the Atlantic Yards Project but is instead focused on MTA's alleged failure to comply with the procedural requirements of the PAAA in connection with its June 24, 2009 Resolution authorizing the Chairman and Executive Director of MTA to enter into certain transactions, including the disposition of certain property rights of MTA, in connection with the Atlantic Yards Land Use Improvement

and Civic Project (the "Atlantic Yards Project" or "the Project"), a major transit-oriented, mixed-use, mixed-income development project in downtown Brooklyn. See Certified Record ("Cert. Rec."), Ex. 23.

6. The Atlantic Yards Project, as outlined in the General Project Plan ("GPP") adopted by the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") pursuant to the Urban Development Corporation Act, involves the construction of a sports arena, residential buildings (including rental housing units for low, moderate, and middle income New Yorkers), commercial buildings and publicly accessible open space, all in close proximity to mass transportation facilities of MTA. It also requires the construction by the developer of important improvements to MTA transportation facilities, including a major upgrading of LIRR's Vanderbilt Rail Yard, a rail yard (currently uncovered) over which part of the Atlantic Yards Project is to be built, and construction of a new subway entrance at the intersection of Atlantic and Flatbush Avenues for access to NYCT's Atlantic Avenue/Pacific Street subway station complex. Williams Aff. ¶ 3 & Ex. A.

7. The Vanderbilt Yard is located southeast of the intersection of Atlantic Avenue and Flatbush Avenue in downtown Brooklyn and occupies most of three city blocks: Block 1119, Lot 7; Block 1120, Lot 1; and Block 1121, Lot 1. The Vanderbilt Yard supports LIRR operations into and out of Atlantic Terminal over LIRR's Atlantic Branch. The Vanderbilt Yard is a critically important train storage and support facility and must remain operational throughout the construction of the new upgraded yard ("Upgraded Yard"), as well as during the construction of the support structures that are necessary for development over the Vanderbilt Yard.

Williams Aff. ¶ 4 Ex. B.

8. The June 24, 2009 Board Resolution (see Cert. Rec., Ex. 23) was the culmination of a publicly advertised competitive Request for Proposals that MTA issued four years earlier, in May 2005 (see Cert. Rec., Ex. 3), concerning the proposed disposition of property rights for development over the Vanderbilt Yard consistent with LIRR's need to continue to operate a critical transportation facility at the site and the economic development, planning, and civic interests of the City and State in the surrounding area. Williams Aff. ¶ 5.

A. History of the Atlantic Yards Project

9. In February 2005, MTA received a request from FCRC for comments on a MOU dated February 18, 2005, among FCRC, ESDC, the City of New York, and New York City Economic Development Corporation ("NYCEDC"). The MOU set forth understandings and agreements concerning the properties involved in a proposed development project in the vicinity of LIRR's Vanderbilt Yard in Brooklyn. See Cert. Rec., Ex. 1; Williams Aff. ¶ 6.

10. The MOU contemplated that FCRC would build a major sports arena intended to host the New Jersey Nets basketball team, bringing back a professional sports franchise to Brooklyn after a 50-year absence. The arena would be surrounded by a mixed-use development of multifamily housing, including a substantial number of affordable housing units, as well as public open space, commercial office space, and retail space. See Cert. Rec., Ex. 1 at pg. 1. Additionally, the MOU contemplated the sale or lease of certain MTA-owned properties to FCRC or ESDC, relocation of the Vanderbilt Yard and construction by FCRC of a new LIRR rail yard. See *id.* at pg. 2. Finally, the MOU provided that the City and ESDC would

"commit capital funding to the Project, subject to appropriation, of \$100 million each." See *id.* at pg. 4; Williams Aff.; ¶ 7.

11. MTA, which had been apprised of discussions between FCRC and ESDC due to the potential involvement of MTA property in the project, responded to FCRC's request by letter dated February 24, 2005, expressing a commitment to cooperate with FCRC as it developed its plans to implement the project, subject to certain conditions. See Cert. Rec., Ex. 2. Among other things, the MTA response stated that:

Nothing in this letter shall obligate MTA to sell or lease MTA Properties to FCRC, EDC or ESDC or preclude MTA from determining, in its sole discretion, to use a competitive process, including, without limitation, competitive bidding, for determining the fair market value of MTA Properties and/or to assist the MTA Board in determining to whom to sell or lease MTA Properties.

Id. at pg. 1; Williams Aff. ¶ 8.

12. On May 24, 2005, consistent with the statement in its February 25, 2005 letter, MTA issued a "Request for Proposals for the sale or lease of all or some of the air space and related real property interests in one or more of the three parcels known as Vanderbilt Yard." ("RFP"). See Cert. Rec., Ex. 3. While the RFP did not specify for what use the land should be developed, it stated that

an important factor was “[c]onsistency with the Long Island Rail Road’s need to continually operate critical transportation services within the Vanderbilt Yard and related support facilities.” *Id.* at pg. 3. The RFP also expressed MTA’s interest in proposals that would meet MTA’s needs while promoting the “economic development, planning, and civic needs and desires of the City and State” and taking into consideration “the interests of the surrounding community.” *Id.*; Williams Aff. ¶ 9.

13. As of July 6, 2005, the stated deadline for responsive proposals, MTA received two proposals, one from FCRC and one from Extell. As outlined in a July 27, 2005 Staff Summary by MTA’s Real Estate Department (see Cert. Rec., Ex. 7), FCRC’s proposal embodied the project discussed in the February 18, 2005 MOU with ESDC, NYCEDC and New York City. It proposed development of a mixed-use community over the Vanderbilt Yard and adjacent properties, consisting of approximately 6,000 units of housing (including 2,250 affordable residential rental units), 1,200,000 square feet of commercial space, 180,000 square feet of retail space, an arena for the Nets basketball team, as well as parks, open space,

and parking spaces. FCRC further proposed to relocate and expand the existing Vanderbilt Yard. *See id.* at pg. 1; Williams Aff. ¶ 10.

14. In exchange for certain land and air rights to MTA property, FCRC offered to pay MTA \$50 million in cash, to relocate and upgrade the Vanderbilt Yard (at an estimated expense of \$182 million), to provide a \$20 million Letter of Credit to collateralize full environmental indemnification, and to construct access to the New York City Transit Authority's Atlantic Avenue/Pacific Street subway station complex to the northwest of the project site at an estimated expense of \$29 million. The FCRC proposal also noted that the State and City had agreed to \$200 million in subsidies for site preparation and public infrastructure improvements around the proposed arena. *See id.* at pg. 2; Williams Aff. ¶ 11.

15. Extell's proposal was more modest, as it intended to develop only the Vanderbilt Yard rather than using the Yard as part of a larger project. Extell planned to develop a mixed-use community consisting of 1,940 units of housing (including 573 low and moderate income apartments and 1,367 market rate condominium units), 116,000 square feet of retail space, 75,000 square feet for school and/or community facility use, 1,000 parking spaces, and 167,137

square feet of parks and open space. Extell offered to pay \$150 million for the property and stated that it would "in all likelihood receive up to \$150 million in subsidy from the City and State under similar terms offered FCRC in order to reconfigure Vanderbilt Yard and construct a platform" but did not indicate that it had begun to negotiate with the City and State as FCRC had. *See id.* at pgs. 1-2. Extell offered no indemnification for environmental risks which had been specifically requested in the RFP, and did not offer to pay for MTA's expenses in relocating the Vanderbilt Yard. *See id.* at pg. 2; Williams Aff. ¶ 12.

16. In order to facilitate its consideration of the two proposals, MTA commissioned an appraisal of the property. This appraisal, dated July 21, 2005, valued the property at \$271,184,250 (or \$75/square foot) were the property developable "as is." Because the property would be developable only after a developer incurred the costs of track relocation and platform construction, the appraiser deducted the sum of \$56,684,600, which was the estimated cost used in the appraisal for moving the Yard and constructing a platform, producing a net estimate of \$214,500,000 (rounded from \$214,499,650). *See Cert. Rec., Ex. 6; Williams Aff. ¶ 14.*

17. On July 27, 2005, the MTA's Board met and considered the property appraisal and the two proposals. See Cert. Rec., Ex. 8. The Board resolved to begin negotiating with FCRC, without rejecting Extell's proposal. See Cert. Rec., Ex. 9. Indeed, MTA planned to use Extell's still-open offer as leverage in negotiating with FCRC:

Chairman Kalikow commented on his experience in negotiating with tenants and said that Ratner is aware that Extell wants an opportunity to win, and if Ratner does not bring to the table an adequate bid amount, than [sic] the Board will move forward with the process.

Cert. Rec., Ext. 8 at pg. 5. During the ensuing negotiations FCRC increased the cash component of its initial offer from \$50 million to \$100 million, as reflected in a Staff Summary by MTA's Real Estate Department dated September 8, 2005. See Cert. Rec., Ex. 10; Williams Aff. ¶ 14.

18. The MTA Board considered the renegotiated FCRC proposal at a meeting on September 14, 2005. See Cert. Rec., Ex. 11. At the meeting, a number of public speakers, including representatives of business groups, unions and community groups, expressed support for the FCRC proposal, while others expressed opposition. See *id.* at pg. 2. Members of the MTA Board stated that they found FCRC's offer more advantageous to MTA than Extell's,

noting that the FCRC proposal offered both greater economic value and more security. FCRC's new cash proposal together with the reimbursements and proposed construction, they noted, exceeded the property's appraised value. In addition, the indemnification for environmental risks and reimbursement for ongoing costs associated with the Yard, as well as fiscal support from the ESDC and the NYCEDC, reduced the risk that MTA would have otherwise assumed in moving forward with the Project. See *id.* at pgs. 2-3. One Board member also noted that Extell's proposal was "based on faulty assumptions that the subsidies would be available to pay for the construction of the Yard and the platform despite providing fewer benefits." *Id.* at pg. 3. Accordingly, the Board adopted a Resolution stating that "[n]o further action shall be taken with respect to the Extell proposal and negotiations shall be continued with FCRC with respect to the FCRC proposal in an effort to consummate a transaction satisfactory to MTA." *Id.* at pg. 7; Williams Aff. ¶ 15.

19. The parties then began an assessment of the environmental impact of the proposed development, which took some time to complete. On November 27, 2006, as reported in a December 7, 2006 Staff Summary by the MTA Real Estate

Department, the Board of the ESDC accepted a corrected and amended Final Environmental Impact Statement. See *Cert. Rec.*, Ex. 15. On December 13, 2006, the MTA Board adopted a resolution approving detailed SEQRA findings and authorizing the Chairman and Executive Director to proceed with the aspects of the Project that involved MTA. See *Cert. Rec.*, Ex. 20; *Williams Aff.* ¶ 16.

20. In furtherance of the proposed transaction that was authorized by the September 2005 and December 2006 Board resolutions, FCRC proceeded to advance the project design documents relating to the proposed Upgraded Yard and subway entrance improvement, and MTA and FCRC entered into negotiations over the detailed terms of the documents they would need to execute to consummate the contemplated transactions, including the agreement concerning the disposition of MTA's property rights. FCRC also completed design documents for the construction of a temporary yard on Blocks 1120 and 1121 that would be needed for LIRR's later staged use. The temporary yard, upon completion, would enable relocation of existing tracks of Vanderbilt Yard situated on Block 1119 (the parcel needed for construction of the proposed

arena) and the eventual construction of the Upgraded Yard on Blocks 1120 and 1121; Williams Aff. ¶ 17.

21. In February of 2007, MTA, LIRR, and FCRC entered into a temporary yard license agreement to permit FCRC to commence with the construction of a temporary yard on Blocks 1120 and 1121, and FCRC began work on the temporary yard. The temporary license agreement further required that FCRC reimburse LIRR for its additional costs of operating during such construction activities. Williams Aff. ¶ 18 & Ex. C.

22. Since that date, construction work by FCRC on the temporary yard has been ongoing, although it ceased for more than five months beginning in December 2008. FCRC has stated that the reason for this delay was the pendency of litigation relating to the Project but that the temporary yard is now scheduled to be completed within weeks. Williams Aff. ¶ 19.

B. The Revised Transaction

23. As noted above, as FCRC's work on the temporary yard continued, the Atlantic Yards Project was delayed by multiple lawsuits commenced against FCRC and ESDC. During the pendency of these lawsuits, dramatic changes occurred in the larger economy and

in the real estate market in New York City and nationally, particularly after the financial markets collapsed in the fall of 2008. In addition, because of increases in the construction costs, the cost of the improved Vanderbilt Yard had grown dramatically. Williams Aff. ¶ 20. Indeed, Petitioners themselves acknowledge the existence of a “worsening financial and economic climate and real estate market,” even as early as 2006 (Petition ¶ 43), and an “economic downturn” by 2009, as a result of which “financial and credit markets ha[d] tightened considerably and the Brooklyn real estate market ha[d] markedly deteriorated” (*id.* ¶ 63). In addition, because of increases in the construction costs, the cost of the improved Vanderbilt Yard had grown dramatically. Williams Aff. ¶ 20.

24. In part due to these developments, beginning in 2008, LIRR participated in a value engineering exercise with FCRC to assess the most efficient way to meet LIRR’s needs for an upgraded yard. In addition, FCRC approached MTA and requested a modification of certain of the terms of the planned transaction as originally outlined in 2005, which was still being negotiated. The parties engaged in extensive negotiations, which culminated in the

revised proposed transaction terms outlined in a Staff Summary, dated June 22, 2009. See Cert. Rec., Ex. 22; Williams Aff. ¶ 20.

25. The revised proposed transaction carried forward the three central features of the original proposed transaction: (a) payment of \$100 million for the Vanderbilt Yard property rights; (b) construction at FCRC's expense of the Upgraded Yard at Blocks 1120 and 1121, following the completion of the temporary yard; and (c) construction at FCRC's expense of a new subway station entrance at the intersection of Atlantic and Flatbush Avenues, providing access to NYCT's Atlantic Avenue/Pacific Street subway station complex. See Cert. Rec., Ex. 22, at pgs. 1-5 of attachment; Williams Aff. ¶ 21.

26. While the revised transaction continues to provide for payment of \$100 million for the Vanderbilt Yard property rights, under the revised transaction a substantial portion of the \$100 million cash component of FCRC's proposal will be paid out over time. First, FCRC will make at closing an initial cash payment of \$20 million in exchange for the portion of the MTA parcel (located on Block 1119) on which the new arena is to be built. Thereafter, FCRC will pay MTA an amount equal to \$80 million net present value (discounted at

a rate of 6.5% per annum), consisting of four scheduled annual payments of \$2 million each, and 15 scheduled annual payments thereafter, each in the amount of \$11,033,357, to purchase air rights in six adjacent development parcels over the remaining portions of the Vanderbilt Yard (Blocks 1120 and 1121), where the Upgraded Yard will be built. See Cert. Rec., Ex. 22, at pgs. 1-5 of attachment; Williams Aff. ¶ 22.

27. FCRC will not be permitted to acquire any of the six development parcels until it has substantially completed construction of the Upgraded Yard. Once the Upgraded Yard is completed, FCRC, after payment in full of the price of a development parcel, may purchase a development parcel (with portions of the annual payments it has already made credited against the purchase price). See Cert. Rec., Ex. 22, at pgs. 1-5 of attachment; Williams Aff. ¶ 23.

28. Thus, the Petition is highly misleading in alleging that the transaction is structured "so that FCR could, in effect, stop making payments to MTA, keep the portion of the Vanderbilt Yard on which the arena would be built, and abandon the project." Petition ¶ 51. Those allegations ignore the fact that MTA would retain all of the rights to the remaining property if FCRC were to not to pay for them,

in addition to receiving all the benefits of the improved rail yard. See Dellaverson Aff. ¶¶ 26-27.

29. The revised transaction also continues to provide for the construction, at FCRC's expense, of the Upgraded Yard for LIRR. As a result of the value engineering exercise that LIRR engaged in with FCRC in 2008 and 2009, the capacity of the Upgraded Yard will be 56 cars, with seven eight-car tracks and an eight-car drill track. Although FCRC's original design called for nine tracks and a capacity of 76 cars, the new design fully meets LIRR's future needs in view of a planned change in the use of the Upgraded Yard for reasons unrelated to this project. Specifically, once LIRR service into Grand Central Terminal begins, upon completion of LIRR's East Side Access project, LIRR will discontinue regularly scheduled service into Atlantic Terminal. Instead, LIRR will operate a shuttle service between Atlantic Terminal and Jamaica Station. Although LIRR will actually be running more frequent service once the switch to shuttle service is implemented, the Upgraded Yard will need to accommodate fewer and shorter trains. See Cert. Rec., Ex. 22, at pgs. 1-5 of attachment; Williams Aff. ¶ 24.

30. The improvements to the Vanderbilt Yard to be constructed by FCRC under the revised transaction are valued at over \$150 million and continue to include an in-ground manifold system for toilet servicing, new lighting, security, a new electrical substation, employee facilities, and the addition of a western entrance to the yard, allowing for greater yard functionality. See Cert. Rec., Ex. 22, at pg. 3. In addition, FCRC remains responsible for remediation of any environmental matters in connection with the improvements. See *id.* at pg. 3 of attachment. These upgrades will not only create a more modern yard to replace the current, 100-year-old yard; it will also provide a yard that looks to the future of the LIRR and the upcoming East Side Access service plan. Moreover, FCRC is required to secure its obligations to construct the improvements to the Vanderbilt Yard both by furnishing a letter of credit in an amount of \$86 million and by providing at or before the commencement of construction of the Upgraded Yard, a guaranty from its parent company, Forest City Enterprises, covering its obligation to complete the yard improvements. See *id.* at pg. 1 of attachment; Williams Aff. ¶ 25.

31. Finally, the revised transaction continues to contain the requirement — as before — that FCRC, at its expense, construct a new subway station entrance at the intersection of Flatbush and Atlantic Avenues to provide access to the NYCT's subway station complex to the northwest of the project site. The construction of the new subway station entrance, which must be in conformance with specifications approved by NYCT, is anticipated to cost in excess of \$50 million, and the obligation to complete this transit improvement is guaranteed by FCRC's parent. In addition, FCRC will pay a fee of \$200,000 per year to have the subway station complex at Atlantic Avenue include the name "Barclays Center." See Cert. Rec., Ex. 22, at pg. 3; Williams Aff. ¶ 26.

32. The revised proposal is consistent with the modified GPP for the Atlantic Yard Project, which ESDC adopted on June 23, 2009, and affirmed on September 17, 2009, and which allows for the acquisition of the necessary property by eminent domain in two phases rather than in one acquisition as previously planned. The Atlantic Yards Project, in its current form, will involve between 5,325 and 6,430 units of new housing, including 2,250 units of affordable housing. Additionally, it will develop class A commercial office space.

At the center of this development will be the Barclays Center, an arena that will be the new home of the Nets basketball team. The arena will also host amateur athletic events, circuses, graduations, and other civic and community sponsored and entertainment events. All of this residential, commercial, retail, and arena development is situated in close proximity to one of the major transportation hubs of MTA, making this a significant transit-oriented economic development project. See Williams Aff. Ex A.

33. The Atlantic Yards Project is expected to greatly benefit the Brooklyn community. ESDC has estimated that it will generate over 10,000 new, direct job years and over 20,000 total job years, resulting in over \$1 billion in total personal income. ESDC and the City have estimated that the Project will generate over \$40 million in City tax revenues and over \$85 million in State tax revenues. See Williams Aff. Ex. A, at pg. 33.

C. The MTA Board's Approval of the Revised Proposal.

34. On May 27, 2009, MTA staff briefed the MTA Board on the revised proposal at an executive session of the Board. In addition, on May 29, 2009, Helena Williams, the President of LIRR and, at the time, interim Executive Director and Chief Executive Officer of MTA,

attended a public hearing on the Atlantic Yards Project in Brooklyn, convened by members of the Assembly and the Senate of the State of New York. At this hearing, Ms. Williams addressed MTA's anticipated role in the Atlantic Yards Project and certain of the anticipated benefits of the Atlantic Yards Project for MTA and for the City and State of New York, as outlined above. In addition, she noted FCRC's statement that it had set — and met — ambitious goals for minority- and woman-owned business participation in the Atlantic Yards Project, with 44.2 percent of contracts awarded to M/WBE firms and approximately 40 percent of those contracts going to Brooklyn-based firms. Williams Aff. ¶¶ 1, 29.

35. At its regular meeting on June 24, 2009, the full MTA Board considered the proposed revised transaction and vote to authorize MTA to proceed with the transaction. As at prior meetings concerning the Project, including the Board's Finance Committee meeting held on June 22, 2009, a number of public speakers supported the Project, and a number opposed it. Among those opposing the Project at the June 24, 2009 Board meeting was a representative of Develop Don't Destroy (Brooklyn), Inc. ("DDDB"), who for the first time introduced a so-called alternative Unity Plan to

MTA, four years after the deadline for submissions in response to MTA's RFP – although Petitioners claim that they began work on the Unity Plan in 2004, before the RFP was even issued (Petition ¶¶ 22). Nor had DDDDB sought to submit to MTA a proposal for development of the Vanderbilt Yard at any point in the ensuing four years, including at the meeting of the MTA Finance Committee held two days before the Board meeting (on June 22, 2009), at which a DDDDB representative had appeared. Hemmerdinger Aff. ¶ 6.

36. Given these circumstances, it is obvious that DDDDB's submission of this "offer" for the first time on June 24, 2009, at the very Board meeting at which MTA was to vote on authorization of a revision to a development proposal of FCRC that had been under consideration since July 2005, was a political stunt rather than a *bona fide* responsive offer from a responsible Proposer. Hemmerdinger Aff. ¶ 7.

37. The RFP, which required an application fee of \$25,000, contained a number of detailed requirements for proposals, as well as criteria for selection, including quantity and certainty of financial return to the MTA; financial viability of the proposal; overall economic development benefit of the proposal; experience of the Proposer in

the development, management, marketing and design of projects of a scale, complexity, and quality similar to that required by the RFP, and ability to implement its proposal; proposed timeframe for commencement and completion of the proposal; the Proposer's financial qualifications (including its proven ability to obtain financing for projects of similar size, experience with institutional lenders, and evidence of the willingness of such lenders to finance the proposed development); the amount of equity or personal risk the Proposer intends to assume; quality of the development program; the Proposer's previous record of performance in business dealings with any municipal, state or federal agencies, including the MTA; ability of the Proposer and MTA to agree on the terms of the disposition contract; and the Proposer's commitment to ensure MTA/LIRR operating requirements with minimal impact to railroad operations. See Cert. Rec., Ex. 3; Hemmerdinger Aff. ¶ 8.

38. Beyond the obvious facial defects of the Unity Plan, including the fact that it had not been submitted in a timely fashion in response to the RFP and had not been accompanied by the required \$25,000 application fee, it had numerous other patent shortcomings. Among these were that the Unity Plan did not contain any reasonable

explanation of how the sponsor would actually obtain the purchase money that DDDDB claimed would be paid to MTA, nor how the proposed project would be either financed or built. Nor did it identify who would be responsible for the construction of the project or contain any indication that anyone involved in the plan could qualify as a responsible bidder under any applicable legal requirements. The Unity Plan failed to demonstrate the Proposer's financial qualifications in any reasonable way, cited no proven ability to obtain financing for projects of similar size or experience with institutional lenders, and evidenced no willingness of such lenders, or relevant City and State governmental entities, to assist in financing the proposed development. Hemmerdinger Aff. ¶ 9.

39. After the conclusion of the public remarks portion of the meeting, the Board considered the matters before it, with the benefit of a Staff Summary, an attachment thereto entitled "Major Atlantic Yard Transaction Points" and the proposed Resolution concerning the Project. See Cert. Rec., Ex. 22. These materials addressed, among other things, the evolution of the negotiations of the in-progress Project and the benefits it is expected to generate. The Board of Directors approved the Resolution, authorizing the

Chairman or Executive Director to negotiate and execute the necessary contracts to implement the Project and take the necessary actions to satisfy applicable legal or regulatory requirements in connection with the Project. See Cert. Rec., Ex. 24. The Board's authorization was made contingent upon ESDC's concluding its process for affirming the modified GPP in accordance with the UDC Act. See *id* at pg. 6; Hemmerdinger Aff. ¶ 10.

40. In adopting the resolution, the Board considered the amount of the cash payment and the payment terms, which had been modified from the FCRC proposal that MTA had originally accepted in response to its 2005 RFP. Whereas the original proposal had provided for an up-front cash payment of \$100 million, the proposal before the Board in 2009 provided for a payment of \$20 million upon closing (for Block 1119, the arena parcel), followed by payments totaling \$80 million in present value, discounted at 6.5 percent, *i.e.*, four annual payments of \$2 million and 15 annual payments of \$11,033,357 (for the MTA air rights over Blocks 1120 and 1121). See Cert. Rec., Ex. 22 at pg. 6. The Board also considered the unlikelihood of receiving a better offer, given the severe deterioration

in the economy generally and the real estate market in particular since 2005. Hemmerdinger Aff. ¶ 11.

41. The Board also took into consideration the “tremendous up front investment by the buyer to actually build the platform” over the Vanderbilt Yard, which must be made before the developer can build the revenue generating portions of the proposal. See Hemmerdinger Aff. ¶ 12 & Ex. A. As one Board member noted, “[t]o get all of the elements lined up so that you can get a transaction of this kind to move forward is extraordinarily difficult and time consuming.” Hemmerdinger Ex. A at pg. 4.

42. The Board further considered the value MTA was receiving from the elements of FCRC’s proposal that supplemented the proposed cash payments, including FCRC’s obligation to construct a new permanent improved Vanderbilt Yard over Blocks 1120 and 1121 (at an estimated cost of nearly \$150 million) and the requirement that FCRC construct a new subway entrance at Atlantic Avenue and Flatbush (anticipated to cost tens of millions of dollars). Taking into account these additional elements, including the modifications to the improved Vanderbilt Yard as compared with the original 2005 proposal, the Board found that “the proposed terms

offered by the Developer [are] advantageous to the MTA, price and other factors having been considered." See Cert. Rec., Ex. 24 at pg. 5. In that connection, the Board also considered the new payment terms in light of the ongoing difficulties in both the credit and real estate markets, and the Resolution explicitly recognizes that the "economic circumstances have affected the capacity of developers, including FCRC, to secure financing for large real estate development projects." *Id.* at pg. 3. Even the Board members who voted against the resolution acknowledged that "the economy has changed a lot in the four years since this plan was initially approved, and there may be some risk in pushing the developer back to the table." Hemmerdinger Ex. A at pg. 2.

43. The Board also discussed whether a new appraisal was warranted under the circumstances, in addition to the appraisal that MTA had obtained in connection with the 2005 RFP, and concluded that it was not. Hemmerdinger Aff. ¶ 14. As one Board member observed, "[t]he reality is, it is only worth what somebody is willing to provide." Hemmerdinger Aff. Ex. A at pg. 3. Chairman Hemmerdinger also pointed out that "the real estate market is a whole lot weaker now than it was in 2005." *Id.* at pg. 8.

44. Moreover, it was clear that a second appraisal would yield a value far below the 2005 appraised value, even apart from the decline in the real estate market. As noted above, the 2005 appraisal valued the property at \$271,184,250 (or \$75/square foot) were the property developable "as is" and then deducted the sum of \$56,684,600 as a rough proxy for the cost of relocating a portion of the rail yard and constructing a platform over the rest of the rail yard. This deduction produced a net estimated value for Vanderbilt Yard of \$214,500,000. See *supra* ¶ 16.

45. In fact, as detailed in the Affidavit of Gary Dellaverson, MTA's CFO, both of the RFP respondents anticipated expenses in excess of \$100 million for the platform construction work. Dellaverson Aff. ¶ 8. Moreover, since that time MTA has learned that the costs associated with relocating the portion of the rail yard that is on Block 1119 (where the arena is to be built), and of constructing a platform over the remainder of the relocated rail yard (*i.e.*, over Blocks 1120 and 1121), will be well in excess of the sum of \$56,684,600 that was employed in the July 2005 appraisal. In connection with constructing just the temporary yard on Blocks 1120 and 1121, which is intended to enable development of Block 1119

and adjacent properties as an arena, FCRC has already incurred costs that exceed the sum of \$56.684 million, and it is not yet finished. Dellaverson Aff. ¶ 11.

46. Thus, the figure of \$56.684 million that was employed in the July 2005 appraisal as an estimate of the cost of *both* relocation of the rail tracks and platform construction over the relocated rail yard does not even cover the reported cost of achieving the first of these steps — the relocation of the rail tracks — let alone the more formidable undertaking of constructing a platform over the relocated rail yard. Just the “hard” costs of constructing the required platform could easily exceed \$199 million. Dellaverson Aff. ¶¶ 13-15.

47. This sum, for platform construction “hard costs” only and based upon a figure lower than the lowest contractor cost estimate, is more than three times the \$56.684 million estimate that was employed in the July 2005 appraisal as an estimate of the cost of *both* (a) relocation of the rail tracks and (b) constructing a platform over the relocated rail yard. *See id.*

48. Considering the realistic construction costs to make the Vanderbilt Yard developable, as well as the decline in the real estate market, if MTA were to have conducted a second appraisal in 2009, it

would have seriously jeopardized MTA's efforts to maximize its financial interests in connection with the disposition of Vanderbilt Yard property rights. In addition to seeing such appraisal adjusted significantly downward to take into account a weakened real estate market, a downward net property value adjustment would also have been anticipated in connection with the calculation of the costs associated with track relocation and platform construction, based upon the information noted above. Such downward adjustments in the appraisal could only have weakened MTA's position in its efforts to maximize its financial return. Dellaverson Aff. ¶ 18.

49. Accordingly, the Board considered the matter and judged a new appraisal to be at best an unnecessary delay and, at worst, detrimental to MTA's bargaining position. Hemmerdinger Aff. ¶ 14. The Board considered the 2005 appraisal sufficient, and contrary to Petitioners' allegation that the resolution "did not reference any appraised or estimated value of the Yard" (Petition ¶ 65), the resolution in fact explicitly found that an appraisal had been made of the property "and is included in the record of the transaction." Cert. Rec., Ex. 24 at pg. 5

50. The Board also found that MTA's transit-oriented mission would be furthered by the disposition. See Cert. Rec., Ex. 24 at pg. 5. LIRR, and its riders, would benefit greatly from the upgraded train yard, the current yard being over 100 years old. NYCT, and its riders, would benefit from the construction of a new subway access point, which would increase pedestrian safety in accessing the subway. Both improvements would directly serve the surrounding community, as well as the fans accessing the proposed arena. In speaking in favor of the transaction, one member stated that "I am now persuaded, the rail yard that we need and the transportation improvements that we desire to serve this arena" would be provided by the modified proposal. Hemmerdinger Ex. A at pg. 4.

51. The Board determined, in addition, that the transaction would yield significant economic dividends to the residents of Brooklyn and those of the State as a whole, particularly in the creation of new jobs and new revenue streams for the City and State. The Resolution reflects the Board's finding that "the disposal of the MTA Property is intended to advance the economic development interests of the City and State of New York" and "is expected to result in the creation and retention of substantial number of job

opportunities and the creation or retention of substantial sources of revenues." Cert. Rec., Ex. 24 at pg. 5. As the Chairman concluded: "[I]n this economy, jobs and an arena in Brooklyn is a public good." Hemmerdinger Ex. A at pg. 8. Even a Board member who voted against the sale said that "the arena would be a wonderful thing for downtown Brooklyn;" while another stated that "this would be a major, major benefit to Brooklyn and to all of the people of New York." Hemmerdinger Ex. A at pgs. 1-2.

52. Furthermore, the Board considered the risk to which the project might expose the MTA. The Resolution states that proposed terms do not expose MTA to liability, and that if MTA is unable to successfully conclude the transaction with FCRC, MTA is free to negotiate with other developers or begin a new selection process. See Cert. Rec., Ex. 24 at pgs. 4-5. One Board member who spoke in favor of the resolution stated that the "transaction protects the Long Island Rail Road yards, there is a guarantee that the money would be there in order to maintain and to actually upgrade the rail yards that are there now." Hemmerdinger Ex. A at pg. 2. He further stated his opinion that the transaction posed no risk to the MTA because "if, in fact, this other part in addition to the arena doesn't actually exist, the

MTA still owns the air rights. So, there is really a no lose situation here." *Id.*

53. The Board also considered the fact that the MTA had been in negotiations with FCRC since 2005, and that FCRC was well on its way to completing the temporary train yard. The Resolution states that "FCR has constructed much of the temporary yard and plans to complete the construction of the temporary yard by the end of December, 2009." Cert. Rec., Ex. 24 at pg. 3.

54. Finally, the Board consulted extensively with its staff, the public and its counsel in authorizing the transaction. Several Board members mentioned their discussions with MTA and LIRR staff in considering the proposal, including the Chairman. See Hemmerdinger Ex. A at pgs. 4, 6, 8.

Conclusion

55. In view of the foregoing, MTA complied with PAL § 2897(3) in connection with its June 24, 2009 Board Resolution, in that the proposed sale to FCRC is for an amount not less than the fair market value of the rights to be conveyed.

56. Alternatively, if an appraisal was required, any such requirement was complied with, as MTA did obtain an independent appraisal.

57. MTA also complied with PAL 2897(6)(a) and (b) in connection with its June 24, 2009 Board Resolution because that resolution and the proposed sale to FCRC were the result of a competitive RFP process that began in 2005 and has been conducted in full compliance with those statutory provisions.

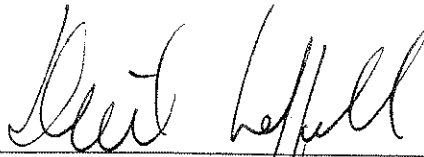
58. Finally, MTA complied with PAL § 2897(6)(c) in connection with its June 24, 2009 Board Resolution, as MTA obtained such competition as is feasible under the circumstances, the disposal of the property is intended to further the public health, safety or welfare or an economic development interest of the state or a political subdivision, and the purpose and the terms of such disposal were documented in writing and approved by resolution of the MTA Board.

WHEREFORE, Respondent MTA respectfully requests this Court dismiss the Petition with prejudice and grant MTA such other and further relief as the Court deems just and proper.

New York, New York
November 5, 2009

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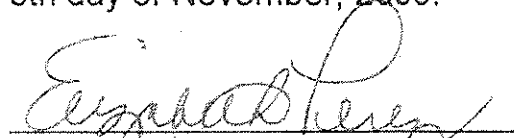
VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HELENA E. WILLIAMS, being sworn, states that she is President of the Long Island Rail Road, a subsidiary of the Metropolitan Transportation Authority, a respondent in this proceeding; that she has read the foregoing answer to the petition in this proceeding and knows its contents; that the same is true to her own knowledge, except as to those matters therein asserted upon information and belief; that as to those matters, she believes it to be true; and that the basis of her belief is familiarity with relevant documents and conversations with persons possessing first-hand knowledge.


HELENA E. WILLIAMS

Sworn to before me on this
5th day of November, 2009.


Notary Public

ELIZABETH PEREZ
Notary Public, State of New York
No. 01PE6002740
Qualified in Queens County
Commission Expires February 17, 20 10

