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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK**

In re:

Metro Fuel Oil Corp., *et al.*

Debtors.

Case Nos. 12-46913 (ESS)
12-46914 (ESS)
12-46916 (ESS)
12-46917 (ESS)
12-46918 (ESS)
12-46919 (ESS)
12-46920 (ESS)
12-46921 (ESS)
12-46922 (ESS)

Jointly Administered

**LIMITED OBJECTION OF MTA TO AMENDED NOTICE
TO COUNTERPARTIES TO POTENTIALLY ASSUMED
EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

MTA Metro-North Commuter Railroad (“Metro North”) and MTA New York City Transit Authority (“Transit”, and collectively with Metro North, the “MTA”) by and through their undersigned counsel, hereby file this limited objection (the “Limited Objection”) to Debtors’ Amended Notice to Counterparties to Potentially Assumed Executory Contracts and Unexpired Leases (the “Cure Notice”). In support of its Limited Objection, the MTA respectfully states as follows:

LIMITED OBJECTION

1. The MTA objects to the Cure Notice to the extent that it runs afoul of New York State statutory authority and MTA inter-agency guidelines, which restrict all MTA agencies from doing business with companies that are unable to meet these legal standards.

A. The MTA Is Required To Comply With New York State Statutory Mandates Regarding Vendor Responsibility

2. The New York State Public Authorities Law dictates the manner in which procurement of contracts for the MTA shall be performed. Section 1209 governs the procurement of contracts for public work issued by Transit, with section 1265-a being the analog provision for Metro North.¹ Both sections of this statute make clear that any public works bidder with which the MTA contracts must be “responsible,” meaning that, among other things, the contract awardee must possess the legal authority to do business in New York, a satisfactory record of integrity, appropriate financial, organizational and operational capacity and controls, and an acceptable overall performance. See Office of the New York State Comptroller, Vendor

¹ Transit and Metro-North are both New York State public authorities created pursuant to the New York State Public Authorities Law, and are subject to New York State rules and regulations. See, e.g., NY CLS St. Fin. §139-j(a) and 139-k(a) (defining governmental entity to include any public authority existing pursuant to the Public Authorities Law).

Responsibility Information For State Agencies (Dec. 10, 2012),
http://www.osc.state.ny.us/vendrep/info_vresp_vrreview.htm#1.

3. This responsibility requirement is further articulated in New York State Finance Law (the “Finance Law”) section 139-j, which mandates that a governmental entity make a determination of responsibility with respect to a proposed contract awardee prior to issuing a procurement award. Sections 163(9)(f) and 139-k of the Finance Law detail the specific policies and procedures needed for a responsibility finding, which include, inter alia, the completion of a vendor responsibility questionnaire by the proposed awardee and a certification as to the accuracy of the information provided.

4. In addition to these codified state mandates, the MTA has adopted its own set of vendor responsibility requirements, as memorialized in its All Agency Procurement Guidelines (the “Agency Guidelines”). A true and accurate copy of the Agency Guidelines is attached hereto as Exhibit A. The Agency Guidelines, which were last updated in March 2012, supplement the state mandates by establishing additional rules and requirements governing the qualification of bidders for public contracts involving MTA agencies.

5. The MTA contracts referenced in Exhibit A to the Cure Notice (collectively, the “Contracts”) are both government purchase contracts relating to the purchase and delivery of heating oil. See Cure Notice, Ex. A, Rowid 23 and 31. As such, these publicly bid government contracts are subject to the vendor responsibility provisions of both the aforementioned New York State statutory authority and MTA Agency Guidelines. Id.²

2 The Contracts allow for the provision of fuel to four MTA agencies -- Transit, Metro-North, Staten Island Rapid Transit Operating Authority and the Triborough Bridge and Tunnel Authority. The Contracts are publicly available and copies can be provided to the Court upon request.

6. To this end, the Contracts contain certain vendor representations that ensure compliance with the statutory and agency responsibility mandates. For example, the Transit Contract incorporates a lengthy responsibility questionnaire and a separate document confirming the vendor's compliance with section 139 of the Finance Law. Both of these documents contain carefully crafted, detailed questions that, when reviewed as a whole, provide enough information for the MTA to properly evaluate the responsibility of the bidder in the furtherance of protecting the public till and ensuring that MTA contractors possess the necessary and appropriate credentials for such work. Further, both documents require notarization or certification by the vendor. True and accurate copies of a sample thirty (30) page Transit Responsibility Questionnaire and a four (4) page Transit Finance Law Compliance form are collectively annexed hereto and made a part hereof as Exhibit B.

7. Because these requirements are rigorous and can only be met after a detailed evaluation prior to bid, the Contracts naturally contain non-assignability provisions, restricting assignments to only those entities that are authorized and approved by the MTA.

B. Applicable New York State Law Precludes The Contracts From Automatic Assumption And Assignment With Respect To A Proposed Sale Of Debtors' Assets

8. 11 U.S.C. § 365(c)(1) prohibits the assumption or assignment of executory contracts in situations where applicable non-bankruptcy law would prohibit such action. The stated purpose of this statute is to protect non-debtor parties, such as the MTA, whose rights may be prejudiced by having their contract assigned to an unknown third party. See In re Grove Rich Realty Corp., 200 B.R. 502, 507 (Bankr. EDNY 1996) (“[Section 365(c)(1)] allows for enforcement of federal, state and local laws which prohibit assignment in bankruptcy where non-debtor third parties would be adversely affected. This is particularly true when the proposed assignee has no track record of performance, and there is no assurance of full compliance with

the contract. . . .”); In re Nitec Paper Corp., 43 B.R. 492, 499 (Bankr. SDNY 1984) (“The provisions of the bankruptcy code clearly envision respect for [state law’s] fundamental procedures. * * * Although many companies have attempted to use the bankruptcy law to circumvent important state and federal policies, this court cannot allow it to happen.”).

9. The contract assumption procedures proposed by the Debtors in their Cure Notice fail to account for compliance with the State mandated vendor responsibility requirements, nor so much as even reference these mandates. Indeed, the procedures that Debtors ask this Court to bless contain little detail regarding the type of information that will be reviewed prior to any proposed assignment, other than that the review will include the purchaser’s financials and non-descript “other information.”

10. Simply put, if adopted by this Court, the procedures propounded by the Debtors would provide a back door for a non-responsible vendor to skirt the New York State statutory requirements and bind MTA agencies to an otherwise unenforceable contractual obligation.

11. Based upon the foregoing, the MTA respectfully requests that any order this Court issues with respect to the Cure Notice recognize and adhere to the legal mandates of the relevant New York State statutory authority as well as the applicable provisions of the Agency Guidelines regarding responsible vendors, and prohibits the assumption and assignment of the Contracts by any purchaser who cannot meet these requirements.

Dated: December 10, 2012
Brooklyn, New York

MTA

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