

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

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JOBS TO MOVE AMERICA, :
Plaintiff/Petitioner, :
-against- : Index No. 161989/2023
METROPOLITAN TRANSPORTATION : AFFIDAVIT OF
AUTHORITY, NEW YORK CITY TRANSIT, : KEN TAKEDA
Defendant/Respondent. :
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STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

Ken Takeda, being duly sworn upon oath, deposes and says:

1. I have been employed in various roles by Kawasaki Rail Car, Inc. ("KRC") or its affiliates since 1999. I am currently employed by KRC as Manager of Contracts/Marketing, with responsibility for (among other things) KRC's contract with New York City Transit Authority ("NYCT") for the R211 railcar project (the "R211 Contract").

2. Since September 2020, I have also served as KRC's designated "USEP Administrator" for purposes of the R211 Contract. As the USEP Administrator, I personally collect information for and assemble the USEP-related materials that KRC submits to NYCT under the R211 Contract.

3. I am submitting this Affidavit to explain to the Court why certain documents that Jobs to Move America ("JMA") is seeking through its FOIL request dated February 23, 2023 (the "2023 FOIL Request") should not be disclosed publicly and why KRC has an interest in ensuring that those documents remain protected, non-public documents.

4. I am familiar with the matters set forth in this Affidavit. Where I refer to facts and matters that are not within my personal experience, they are true to the best of my knowledge and belief.

5. KRC is a “carbuilder,” designing, manufacturing and servicing rolling stock for the North American market—primarily passenger rail cars and related equipment. As a commercial enterprise, KRC sells its products and services largely to public agencies that operate transit and commuter rail systems in the U.S. and Canada, including NYCT and its sister agencies of the Metropolitan Transportation Authority (“MTA”).

6. Although KRC was formed as a New York corporation in 1989, its business was started by affiliates in 1979. KRC is not a publicly traded company, and accordingly has no public financial disclosure requirements as such.

7. The U.S. passenger rail carbuilding industry in which KRC conducts its business is highly competitive. For KRC, success depends upon winning bid contests and then, as prime contractor, efficiently managing and completing technically and logistically complicated, large-scale, multi-year design-and-build projects. Although such contracts typically feature price tags in the hundreds of millions (if not billions) of dollars, they also require substantial investments by the prime contractor (and subcontractors), entail substantial levels of financial risk, and are relatively few and far between.

8. As of 2024, there are close to a dozen carbuilders in the U.S. passenger rail carbuilding industry, including KRC, competing for business in a market that comprises only approximately 25,000 railcars in total. By comparison, the passenger rail carbuilding market in Japan alone comprises more than 60,000 railcars and the European passenger rail carbuilding market comprises more than 150,000 railcars.

9. KRC relies on its network of subcontractors and suppliers, consisting of both affiliates and non-affiliates, both in the U.S. and abroad, to fulfill its carbuilding contracts with customers, including the R211 Contract.

10. KRC's supply chain is global in scale and represents the cumulative product of decades of give-and-take and relationship-building in the rolling stock industry, resulting in pricing and other terms that benefit not only KRC but ultimately its customers as well. Cost and pricing information disclosed by supply chain members to KRC, as well as other terms and conditions of our transactions and other detailed information reflecting KRC's relationships with supply chain members, is therefore highly competition-sensitive.

11. The confidentiality of commercial information is a serious concern even as between KRC and members of its own supply chain, many of which are our competitors or members of a competitors' supply chain. In many cases, KRC's subcontractors for major subsystems were KRC's competitors for the entire project or for other similar projects, and will be KRC's competitors for future projects. For example, Alstom is perennially one of KRC's major competitors for railcar projects; however, Alstom is KRC's subcontractor for R211's propulsion system and signaling system. In other cases, KRC is a subcontractor to another market player. For example, KRC supplies railcar trucks to Wabtec, which was awarded the prime contract for NYCT's R255 project. Like Alstom, however, Wabtec has also been a subcontractor to KRC in numerous other projects over the years (including R211).

12. Railcars are not off-the-rack products. On the contrary, each project requires a unique design and also involves fabrication of custom-designed tools, equipment and numerous parts that cannot be purchased off-the-shelf. High-quality railcars and their major components cannot be designed and manufactured without very skilled labor.

13. Railcar manufacturers, employers in certain other industries, and even customers compete to attract the skilled labor necessary to complete KRC's projects. Disclosure of confidential information contained in KRC's USEP reports would aid other employers in efficiently offering competitive terms both to potential KRC recruits and to existing KRC workers. The resulting inability to obtain and retain sufficiently skilled labor in sufficient numbers would directly impact KRC's ability to deliver its products on-time, on-budget, and with the level of quality expected of KRC, resulting in a loss of reputation in the market, poor performance scores by customers (which are considered in bidding contests), and negative financial consequences that affect pricing strategies and corporate investment decisions along with the bottom line.

14. Within this market context, KRC has a critical commercial interest in maintaining the confidentiality of information that would disclose (or aid in deducing) its cost structure, profitability, and capacity to participate in new bidding contests. KRC also has an interest in maintaining the confidentiality of information that, if made public, could make KRC less competitive by increasing, for instance, its labor costs. Likewise, disclosure of information regarding the number and staffing of work stations can reveal manufacturing/assembly processes that give KRC a competitive advantage in the market.

15. KRC has been fortunate to have been able to maintain a cooperative, respectful and mutually beneficial relationship with its workforce, which has not felt a need to unionize in more than 40 years. KRC views its historically good relationship with labor as an important factor contributing to its competitiveness in the market, and believes that public disclosure of the confidential information in KRC's R211 USEP reports may unnecessarily agitate KRC's workforce, which would only make KRC less competitive in the carbuilding industry.

16. On February 16, 2018, NYCT awarded the R211 Contract to KRC. It is the first KRC contract with NYCT (or any other customer) with USEP requirements. As such, historically KRC has never submitted information of the type and in the level of detail required by the R211 Contract in connection with any previous project, and does not now do so in connection with any other current project.

17. Article 405 of the R211 Contract sets certain caps for KRC's fully-loaded labor rates for various work roles for individual calendar years through 2026. However, Article 405 does not set forth either actual utilization of the designated roles, actual costs, or breakdowns of costs as among constituent cost categories for each role (e.g., hourly rates, fringe benefits, payroll taxes, insurance, overhead and profit).

18. Article 1026 of the R211 Contract requires KRC to submit USEP reports to NYCT semi-annually for the first four years of the project (i.e., through 2022) and then annually for the remainder of the project. As of the date of the 2023 FOIL Request, KRC had submitted eight semi-annual reports ("Reports") and no annual reports. There has been no occasion requiring submission of quarterly report.

19. The USEP reporting requirement calls for submission of information on a level of detail far beyond the generalized outline of maximums set forth in Article 405. KRC collects this information both internally and from its affiliated and non-affiliated subcontractors and suppliers.

20. Much of the reported information is proprietary and confidential commercial information regarding staffing, production, man-hours, payroll, overhead, benefits, insurance, taxes, and other costs of KRC and members of its supply chain, from which market intelligence regarding profitability, pricing strategies, manufacturing processes, capacity to undertake new projects, industry relationships, and other aspects of the inner workings of the reporting entity's

business may be gleaned. If disclosed publicly, such information would cause substantial injury to the competitive position of KRC or its reporting subcontractor.

21. The information that KRC provided in its Reports is secret and not generally available even within KRC, much less to the public, which KRC would not have shared outside of corporate management channels but for the USEP requirements (and, in some cases, other reporting requirements) of the R211 Contract. KRC submitted its Reports with the understanding that the information would be kept confidential and used only to assess compliance with contractual benchmarks to meet the stated policy goals of the USEP program for appropriate allocation of public funds.

22. KRC takes reasonable measures to maintain the confidentiality of such information—both as a general matter and in submitting the Reports. Within KRC, such information is compartmentalized and accessible only by a limited number of executives, managers and accounting and HR personnel with an actual need-to-know. To the extent they exist, generally-accessible copies of documents containing such information are available only in redacted form. KRC's information technology (IT) policies and practices require restricted storage of and access to confidential HR and commercial information, and KRC's Employee Manual requires employees to keep company records, documents and mail confidential, and prohibits the use of KRC's proprietary or confidential information and trade secrets except as necessary on the job.

23. The Reports have not been disclosed to others and have not otherwise been made public. In fact, even in meeting its R211 USEP program requirements, KRC submits such information only to specific NYCT personnel, with a written warning to limit internal distribution.

Furthermore, in providing additional information for purposes of audit, KRC submits information only to MTA Audit Services and only pursuant to a non-disclosure agreement.

24. Due to the commercially sensitive and confidential nature of their own USEP-required information, certain of KRC's subcontractors that often compete with KRC for business have refused to provide such information to or through KRC, insisting on bypassing KRC and disclosing their USEP information directly to MTA Audit Services subject to non-disclosure agreements. If KRC were the subcontractor to such entities, KRC would do the same.

25. The Reports sought by the 2023 FOIL Request should not be released to JMA, which posts information that it obtains via FOIL to its freely accessible website. In fact, JMA has already posted one of the documents it seeks in the 2023 FOIL Request (the executed R211 Contract).

26. Releasing the Reports to JMA, and thus to the public at large, would cause substantial injury to KRC by diminishing its competitive advantage in the U.S. passenger rail carbuilding industry. Among other things, the information would reveal, either directly or indirectly, the industry relationships, pricing, technology, and trade secrets (including but not limited to means and methods of design and fabrication) offered by KRC and its supply chain.

27. Such information is extremely valuable, not only because of the investments KRC and its affiliates have made to develop its business assets over 40 years in business in the U.S. passenger railcar industry, but also due to the utility of such information to third parties in expanding their knowledge and guiding their decisions in competing for business opportunities and resources (especially labor resources).

28. Armed with the information contained in the Reports, Alstom or any sophisticated and experienced market participant with its own understanding of the carbuilding business could

come to a better understanding of KRC's costs and profitability, with which they could more accurately predict and undercut KRC's project bids and potentially drive it out of the market. This, in turn, would lead to less competition and potentially higher costs for public agency customers.

29. Disclosure of information on KRC's supply chain would cause substantial injury to KRC's competitive position because, among other things, it would allow competitors to obtain information on the availability and/or pricing of parts, equipment and components, thereby enabling analysis and potential duplication of KRC's cost structures and market advantages without expending equivalent effort and resources. It would also enable competitors to take advantage of (and potentially disrupt or undermine) a supply chain that KRC has developed through substantial investments of time and resources.

30. Detailed information on the man-hours that KRC expends and/or plans to expend to execute a project must also be kept confidential since, if disclosed, it would (especially in combination with publicly reported information regarding contract performance) not only enable competitors to know with precision the man-hours actually utilized by KRC to produce its products (and therefore better estimate the effort necessary for KRC to produce similar products), but it would also offer a glimpse into the size and skill levels of KRC's human resource reserves available for additional projects.

31. Further, the hourly rates used to convert man-hours into monetary values are competition-sensitive information because, if disclosed, they would allow competitors to derive features of KRC's cost structures including (but not necessarily limited to) payroll, fringe benefit costs, cost of manufacture at different production locations, operational capacity and capital asset values. Furthermore, disclosure of payroll information would not only make KRC vulnerable to poaching of labor and stripping KRC of its investments in training at various production locations,

but also will cause interruptions in manufacturing operations, resulting in schedule delays, delay damages, and higher costs to conduct remedial/warranty work on account of inconsistent quality levels.

32. Further, disclosure of information regarding the number of KRC work stations, staffing numbers and skill levels at periodic intervals can reveal secret manufacturing/assembly processes or sequences that contribute to KRC's ability to timely deliver high-quality products, the duplication of which would erode KRC's competitive position.

33. Finally, detailed information on project schedule and forecast are closely tied to KRC's operational capacity and the market share acquisition strategy that is at the core of Kawasaki's business plans. As such, project schedule information, if disclosed, would enable competitors in this highly competitive industry to gain knowledge of KRC's business goals and strategies to develop counter-strategies.

34. KRC knows that all of the foregoing is possible and that it actually happens because KRC itself has, in the past, taken advantage of similar information of competitors which was made public through FOIL requests of third parties.

35. While KRC generally supports the policy goals of the USEP program, its reporting requirements, and even the FOIL statute, KRC humbly submits that their combined effect should not be to disadvantage the prospects of commercial enterprises such as KRC and the members of its supply chain.

FURTHER AFFIANT SAYETH NOT.

Dated: February 9, 2024



KEN TAKEDA

On the 9th day of February, 2024 before me personally appeared the above signatory, Ken Takeda, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the above affidavit, and acknowledged to me that he executed the same, and that by his signature on the affidavit, the individual executed this affidavit.

Raphael Louis Guida

NOTARY PUBLIC

RAPHAEL LOUIS GUIDA
Notary Public, State of New York
No. 01GU6060396
Qualified in Westchester County
Commission Expires *03/26/24*

General Information

Case Name	JOBS TO MOVE AMERICA vs. METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT
Court	New York Supreme Court
Date Filed	Mon Dec 11 00:00:00 EST 2023
Docket Number	161989/2023
Parties	JOBS TO MOVE AMERICA; METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT