07-2537-cv

United States Court of Appeals

for the

Second Circuit

DANIEL GOLDSTEIN, JERRY CAMPBELL, as the Putative Administrator of the Estate of OLIVER ST. CLAIR STEWART and in his Individual Capacity, GELIN GROUP, LLC., CHADDERTON'S BAR AND GRILL, INC., doing business as Freddy's Bar and Backroom, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ, HUDA MUFLEH-ODEH, JAN AKHTAR, DAVID SHEETS, PETER WILLIAMS ENTERPRISES, INC., 535 CARLTON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., AARON PILLER and ROCKWELL PROPERTY MANAGEMENT, LLC.,

Plaintiffs-Appellants,

– v. –

GOVERNOR GEORGE E. PATAKI, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, doing business as Empire State Development Corporation, BRUCE C. RATNER, JAMES P. STUCKEY, FOREST CITY ENTERPRISES, INC., FOREST CITY RATNER COMPANY, RATNER GROUP, INC., BR FCRC, LLC., BR LAND, LLC, FCR LAND, LLC., BROOKLYN ARENA, LLC, ATLANTIC YARDS DEVELOPMENT COMPANY, LLC, MICHAEL BLOOMBERG, DANIEL DOCTOROFF, ANDREW M. ALPER, JOSHUA SIREFMAN, CITY OF NEW YORK and NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE ESDC DEFENDANTS-APPELLEES

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PRELIMINARY STATEMENT

Invoking the Public Use Clause, Plaintiffs-Appellants ("Plaintiffs") make the far-fetched, conclusory claim that a host of state and local public officials, none of whom has any evident or even alleged motive to curry favor with the private defendants named in this action, abdicated their public responsibilities by conspiring to foist upon New York a redevelopment project that, though undeniably supported by numerous public purposes, is a mere "pretext" for their desires to confer private benefits. Even if allegations of nefarious motive alone *could* state a viable Public Use Clause claim, the allegations here, resting as they do on pure, implausible speculation, cannot survive a motion to dismiss. The district court properly so concluded.

Stripped of its conclusory accusations, the pleading in this consolidated action boils down to a series of complaints about the procedures New York's eminent-domain-empowered agencies use to exercise their powers—procedures this Court has already concluded pass constitutional muster—and the bidding and contracting processes used in connection with the redevelopment project at issue. The Public Use Clause, however, is concerned not with Plaintiffs' proffered model of good government, but rather with whether a taking of private property serves a conceivable public purpose. Because the proposed taking here plainly does so, the district court's decision should be affirmed.

Alternatively, if Plaintiffs are right that the Public Use Clause entails a subjective inquiry into the hearts and minds of public officials, the district court should have abstained from adjudicating their claims.

STATEMENT OF FACTS AND OF THE CASE[1]

ESDC and the Eminent Domain Process

A. ESDC's Mission

Defendant-Appellee New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC"),[2] a creature of the New York State Urban Development Corporation Act of 1968 (the "UDC Act"), is a public corporation to which the New York Legislature has delegated the sovereign power of eminent domain. Among the "legislative findings and purposes"

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[1] All facts set forth below appear either in Plaintiffs' pleadings or in documents incorporated by reference or relied upon therein. *See, e.g.*, *Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130 (2d Cir. 2001) (materials incorporated by reference into the complaint may be considered on a motion to dismiss). Plaintiffs' efforts to smuggle "supplemental allegations" into their suit by way of their appeal brief (*see* Brief for Plaintiffs-Appellants ("Pl. Br.") at 15-21) is improper, and the Court should disregard the "facts" asserted therein. All of those "facts" (except for the ones pertaining to the Hudson Railyards RFP), moreover, were available to Plaintiffs *before* the District Court dismissed their claims in June. Plaintiffs therefore had—and squandered—the amendment "opportunity" (*id.* at 15) they now seek. *See, e.g.*, *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 328 (6th Cir. 2006).

[2] The undersigned counsel represent both ESDC and Charles A. Gargano, former CEO of ESDC. These two defendants are referred to herein as the "ESDC Defendants."

underlying ESDC's creation is that "there exist in many municipalities within this state residential, nonresidential, commercial, industrial or vacant areas, and combinations thereof, which are slum or blighted, or which are becoming slum or blighted areas because of substandard, insantitary, deteriorated or deteriorating conditions." N.Y. Unconsol. Laws § 6252.

To remedy these and other problems, ESDC is directed to "encourag[e] *maximum* participation by the private sector of the economy," *id.* (emphasis added), "in part by promoting large-scale real estate projects that create and retain jobs and/or reinvigorate distressed areas." *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 31 A.D.3d 144, 146, 816 N.Y.S.2d 424, 427 (1st Dep't 2006). ESDC "is not limited to projects in which it is the prime mover." *E. Thirteenth St. Cmty. Ass'n v. N.Y. State Hous. Fin. Agency*, 218 A.D.2d 512, 512-13, 630 N.Y.S.2d 517, 518 (1st Dep't 1995); *see In re Waybro Corp. v. Bd. of Estimate*, 67 N.Y.2d 349, 356-57, 493 N.E.2d 931, 935 (1986); *Wein v. Beame*, 43 N.Y.2d 326, 331-32, 372 N.E.2d 300, 302-03 (1977).

ESDC may use eminent domain to acquire property "necessary or convenient" to carrying out its mission, N.Y. Unconsol. Law § 6263, but can proceed with a "land use development project" like the one at issue here only with an explicit finding that "the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or

insanitary area and tends to impair or arrest the sound growth and development of the municipality," *id.* § 6260(c).

B. Procedure for Exercise of Eminent Domain

To exercise its power of eminent domain in furtherance of a given project, ESDC must comply with New York's Eminent Domain Procedure Law ("EDPL"), a legislative scheme adopted in 1977 to govern, centralize, and lend uniformity to all eminent domain proceedings by state "condemnors." *See* EDPL § 101. Article 2 of the EDPL "sets forth the procedures for determining the need for and location of public projects prior to the condemnation of private property." (SPA-47.[3]) The first step a prospective condemnor must take is to notice and convene a public hearing concerning the "proposed public project." EDPL § 201; *see id.* § 203. A record of the hearing is maintained, and those in attendance have a right to be heard and to have their views entered into the record either in writing or orally. EDPL § 201.

Next, the condemnor must make and publish a "determination and findings" specifying, among other things, "the public use, benefit or purpose to be served by the proposed public project." EDPL § 204(A), (B)(1). The deadline for such publication is 90 days from the close of the public hearing. *Id.* § 204(A).

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[3] "SPA" refers to the Special Appendix filed herein. "JA" refers to the parties' Joint Appendix.

Any "aggrieved person" has thirty days after publication of the determination and findings to challenge them in a petition before the appropriate Department of the Appellate Division of the Supreme Court of the State of New York, which has "exclusive" jurisdiction. *Id.* § 207(B); *see also* § 208 ("[N]o court of this state shall have jurisdiction to hear and determine any matter, case or controversy concerning any matter which was or could have been determined in a proceeding under this article."). The EDPL directs that the Appellate Division "shall either confirm or reject the condemnor's determination and findings." *Id.* § 207(C). In reaching its disposition, the court considers whether

> (1) the proceeding was in conformity with the federal and state constitutions,
>
> (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,
>
> (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and
>
> (4) a public use, benefit or purpose will be served by the proposed acquisition.

Id. The review under EDPL § 207 is conducted entirely on the administrative record developed in the EDPL-mandated public hearing and thereafter; no discovery is permitted. *See id.* § 207(A). This Court has held that the section 207 proceeding furnishes all the process that is due in litigating a takings claim under the Public Use Clause of the United States Constitution. *See Brody v. Vill. of Port*

Chester, 434 F.3d 121, 134 (2d Cir. 2005). Indeed, state-court review of public use under section 207 is robust, *see, e.g.*, *49 WB, LLC v. Vill. of Haverstraw*, 839 N.Y.S.2d 127 (2d Dep't 2007), and state courts may, if they choose, impose more restrictive "interpretations as to what qualifies as a 'public use'" than do federal courts, *id.* at 129.

The last stage of the eminent domain process, governed by Article 4 of the EDPL, is the proceeding to acquire title to the individual properties designated for taking. The prospective condemnor has up to three years to initiate such a proceeding after a "final order or judgment" has been rendered in the EDPL § 207 proceeding (if one has been filed). EDPL § 401(A)(3). Once notified of the Article 4 proceeding, condemnees-to-be may appear and answer. *See id.* § 402(B)(4). If the court determines that the procedural requirements of the EDPL have been fully complied with, it issues an order granting the petition. *See id.* § 402(B)(5). The "acquisition of the property" becomes "complete" when the condemnor files the court's order, along with the acquisition map, with the county clerk or register. *Id.*

C. The Atlantic Yards Project

ESDC is the sponsor and lead agency for a plan to develop the Atlantic Terminal Area of Brooklyn (the "Atlantic Yards Project" or "Project"), a land use development project which was first announced in December 2003. (JA-

58.17.) Plaintiffs assert, and Defendants are bound to assume for purposes of this appeal, that Defendant-Appellee Forest City Ratner Companies ("FCRC") first conceived of the Project. (JA-58.14 ¶¶ 51-53.)

1. The Project Site

The proposed site for the Atlantic Yards Project "has suffered from physical deterioration and relative economic inactivity for at least four decades. Dominated by an approximately 9-acre open rail yard and otherwise generally characterized by dilapidated, vacant, and underutilized properties, the site creates a clear visual and physical barrier between the neighborhoods north and south of Atlantic Avenue" in downtown Brooklyn. (JA-222 (Atlantic Yards Arena and Redevelopment Project Blight Study (the "Blight Study"), at B-1).) At the heart of the Project site lie portions of the "Atlantic Terminal Urban Renewal Area" or "ATURA"—an area that, as Plaintiffs concede, the City first designated as blighted in 1968. (JA-58.15 ¶¶ 55, 58.) All prior plans to remediate this blighted site have proven fruitless. As late as April 2004, the City reconfirmed, for the tenth consecutive time, the ATURA's blight designation and accompanying renewal plan. (*Id.* ¶ 57.)

Plaintiffs admit that the ATURA is blighted and has been so designated for decades. Moreover, while they grudgingly allege that "[n]early half" of the site falls within the ATURA (JA-58.15 ¶ 55), the Blight Study shows

that number to be approximately 63%. (JA-215.) The district court accepted the 63% figure (SPA-46), and Plaintiffs offer no facts to controvert it. Plaintiffs have defined the entire non-ATURA section of the Project site as the "Takings Area." (JA-58.15 ¶ 55.)

The Blight Study ESDC commissioned in early 2006, before making the findings it needed to proceed under the UDC Act, confirmed that the blight extended beyond the ATURA into most of the Takings Area. (*See* JA-213-593.) Specifically, the Study concluded that one or more blight characteristics were present on most lots within the Takings Area. (JA-310-482.) Buildings on five of those lots—ones that FCRC had acquired through private purchase—had deteriorated to such an extent that they posed a threat to public safety and had to be demolished immediately. (JA-502-543.)[4] *See Develop Don't Destroy Brooklyn*, 31 A.D.3d at 148-49, 816 N.Y.S.2d at 428-29 (describing litigation concerning demolition). More generally, the Blight Study showed that "the non-rail yard portion of the project site is characterized by unsanitary and substandard conditions

[4] It is clear that these buildings' major structural deterioration was not, as Plaintiffs conclusorily assert, "the result of the [Atlantic Yards] Project itself" (JA-58.16 ¶ 60). The Blight Study documents severe and long-standing damage to roofs, floors, and walls, as well as water and rot damage to the timber floorings and floor joists. (JA-502-543.) These buildings were, at the time the Study was conducted, "permanently exposed to the elements." (JA-502, 510, 515, 519, 522, 530.)

including vacant and underutilized buildings, vacant lots, irregularly shaped lots, building facades that are in ill-repair (e.g., crumbling brickwork, graffiti, flaking paint), and structures suffering from serious physical deterioration." (JA-216.)

2. The Nature of the Project

Although Plaintiffs assert that the blight in the Takings Area is not as extensive as ESDC determined it was (*see* JA-58.24-58.25), they do not dispute that the Atlantic Yards Project will in fact remediate admitted blight in the ATURA and the Takings Area.

The Project would serve a host of other public purposes as well. As presently conceived, the Project plan is for a 22-acre mixed-use development consisting of a sports arena to house the professional basketball team now known as the New Jersey Nets, thousands of new housing units (a large portion of which qualifies as affordable), extensive improvements to mass transit facilities, new office space, eight acres of publicly accessible open space, and new retail space. (JA-58.13-58.14, 58.25, 1043-44, 1204-05.)

3. ESDC's Role in the Project

On February 18, 2005, ESDC, along with the City of New York and the New York City Economic Development Corporation, joined FCRC in signing two memoranda of understanding concerning the Project. (JA-1005-1016, 1028-

1034.) The stated purpose of the first memorandum was to "set forth certain understandings and agreements among" the signatories

> with respect to the design, development, construction and operation of (a) an arena for use by a professional basketball team currently known as the New Jersey Nets and for other sports and arena events . . . and (b) a mixed-use development consisting of multifamily housing; commercial office space; and retail space . . . .

(JA-1005.) The second memorandum was to similar effect. (JA-1028-29.) Neither memorandum purported to describe the impetus behind, or the purposes of, the proposed Project.

On September 16, 2005, ESDC announced that the Project might have a "significant effect" on the environment and would therefore necessitate preparation of an environmental impact statement. (JA-1036.) On July 18, 2006, after receiving and reviewing the Blight Study it had commissioned, ESDC issued a formal declaration that the Atlantic Yards Project qualified as both a "land use development project" and a "civic project" under the UDC Act. (JA-58.13 ¶ 47.)

On August 23, 2006, and in accordance with the directives of EDPL Article 2, ESDC held a duly noticed public hearing to discuss the Project. Additional community forums not mandated by the EDPL were held on September 12 and 18, 2006. (*See* JA-1206.)

After reviewing comments and testimony received at the public hearing and community forums, as well as the written comments submitted and the

Final Environmental Impact Statement for the Project (a corrected and amended version of which had been published on November 27, 2006), ESDC made its Final Determination and Findings. (*See* JA-1204-1227.) Those were published on December 11 and 12, 2006.

In its Determination and Findings, ESDC announced that it had resolved to exercise its power of eminent domain in connection with the Atlantic Yards Project. Chief among the public purposes it found the Project would serve was the elimination of blighted conditions within the Project site—both in the ATURA and in the Takings Area. (JA-1204, 1207.) Other public benefits and uses identified included:

- "a publicly owned state-of-the-art arena to accommodate the return of a major-league sports franchise to Brooklyn [and] a valuable athletic facility for the City's colleges and local academic institutions";
- "2,250 affordable housing units and between 3,075 and 4,180 market-rate housing units";
- "8 acres of publicly accessible open space that links together the surrounding neighborhoods";
- improved public transport;
- "environmental remediation of the Project Site"; and
- a host of "economic benefits," including the creation "4,538 new jobs in the City" and the generation of hundreds of millions of new tax dollars for the City and State.

(JA-1208-09.)

On December 21, 2006, the New York State Public Authorities Control Board (comprised of the Governor, the Speaker of the State Assembly, and the Majority Leader of the State Senate) issued its resolution approving the Atlantic Yards Project. (JA-1310-18.)

This Action

On October 26, 2006, less than a month after closure of the EDPL record and over six weeks *before* ESDC published its Determination and Findings, the first of these consolidated cases—*Goldstein v. Pataki*, 06 CV 5827 (NGG)(RML)—was filed in the United States District Court for the Eastern District of New York (Garaufis, J.) by individuals and entities who own or rent real estate in the Takings Area. (JA-22-58.) Short-circuiting the EDPL process, the Goldstein Plaintiffs filed a federal complaint in which they asserted, pursuant to 42 U.S.C. § 1983, that ESDC and the other public Defendants were threatening to violate their constitutional rights under the Public Use Clause of the Fifth Amendment, the Equal Protection Clause, and the Due Process Clause. (JA-49-56.)

The Goldstein Plaintiffs' theory was—and remains—that a host of public officials, including ESDC employees, Mayor Bloomberg, and former Governor Pataki, engaged in a "wholesale abdication of governmental responsibility" (Pl. Br. at 5) by banding together to support the Atlantic Yards Project for the *sole purpose* of conferring a benefit on the Project's corporate

sponsor, FCRC, and its CEO, Bruce Ratner. Kicking off their Complaint with bald accusations of "misuse of government[] power" and "betrayal of public trust," the Goldstein Plaintiffs asserted that all of the public Defendants acted at all relevant times "in service of the interests of a private developer," and, oblivious to their public responsibilities, "obediently [fell] into line" with all of FCRC's plans for the Project. (JA-23-24.) Tellingly, however, the "facts" identified to support this conspiracy theory consisted, in essence, of complaints about the process and sequence by which the Project was proposed and developed—a process and sequence that comported fully with the procedures enacted by the New York Legislature directing ESDC to cooperate with—indeed, ""encourag[e] maximum participation by"—private entities. N.Y. Unconsol. Law § 6252. (*See* JA 33-48.) Not a single allegation in the entire Complaint purported to offer any "facts" demonstrating that the public Defendants had or could have had any reason to abdicate their professional and public responsibilities in order to collude for the sole purpose of enriching Bruce Ratner.

Plaintiffs' Discovery Motion

A few days after the Goldstein Plaintiffs filed their Complaint, a reporter asked their counsel how suit could have been filed "before eminent domain has been used by the state." (JA-1228.) Counsel responded, "*[W]e need to get discovery*, where we get to question people under oath and get documents

that will support what we already know . . . ." (JA-1228-29 (emphasis added).) True to their cause, and within two weeks of filing their suit, the Goldstein Plaintiffs asked the district court to schedule a conference to discuss their proposed motion for expedited discovery. (*See* JA-4-5.)

In their submissions to the court on this issue, the Goldstein Plaintiffs sought documents and testimony they believed would reveal the subjective "motives" various public officials had in supporting or facilitating the Atlantic Yards Project. (*See, e.g.*, JA-6 Docket No. 36 at 5 ("Defendants' motive or intent is not just one issue, it is *the* issue.").) To that end, they requested far-flung discovery of all "communications" concerning the Project between "individuals in each defendant group who are, or have been, involved with the Project" and "depositions of those individuals involved in key communications." (*Id.* at 2.)

The ESDC Defendants pointed out that the Goldstein Plaintiffs could not possibly demonstrate the risk of irreparable harm necessary to support a motion for expedition because, as their counsel had already admitted on the record, any taking of their properties was many, many months off. (*See* JA-6 Docket No. 37 at 2-3.) Not only had ESDC yet to even publish its Determination and Findings, but all parties understood that the acquisition proceedings pursuant to EDPL Article 4 would not even commence until any section 207 proceedings (which all parties expected would be filed) had been resolved in the Appellate Division. (*See id.* at

2.) The ESDC Defendants also argued, *inter alia*, that discovery into public officials' and other individuals' "motives" was in any event improper under the Takings Clause, and noted that they would be seeking dismissal of the action on that ground and others. (*See id.* at 5-7.)

On December 15, 2006, Magistrate Judge Levy stayed all discovery except limited inquiries concerning Defendants' data storage and retrieval procedures. (*See* JA-7.) The Goldstein Plaintiffs failed to pursue the limited "expedited" discovery permitted by this ruling, and thus the limited discovery was suspended. (JA-10-11.)

The Motions to Dismiss

Also on December 15, 2006, all Defendants moved to dismiss the Goldstein Plaintiffs' Complaint. The ESDC Defendants offered four grounds for their own motion: (1) since no title proceeding under EDPL Article 4 had yet commenced, the action was not ripe; (2) the district court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971), because (as Plaintiffs' counsel had acknowledged) a section 207 proceeding challenging the Project in state court—if not one by the Goldstein Plaintiffs themselves—was imminent; (3) the court should abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); and (4) the Goldstein Plaintiffs had failed to state a claim under any of the constitutional

provisions they had invoked. (*See* JA-7 Docket No. 52.) All other Defendants joined in the ESDC Defendants' argument and added arguments of their own.

In response to the arguments in the motions to dismiss, on January 5, 2007, the Goldstein Plaintiffs filed an Amended Complaint that was virtually identical to the original Complaint but added a fourth cause of action purporting to initiate a proceeding—in *federal district court*—under EDPL § 207. (*See* JA-58.1-58.40.) The evident purpose of this tactic was to satisfy the thirty-day period for filing an EDPL § 207 action, but to avoid filing it in state court so as not to trigger dismissal of the federal action by application of the *Younger* abstention doctrine.

At the same time, a separate but apparently coordinated action under EDPL § 207 was filed in state court. On January 10, 2007, another set of individuals and entities (the "Anderson Plaintiffs") purporting to be aggrieved by ESDC's determination and findings initiated a section 207 proceeding in the court the EDPL designates as the "exclusive" venue for such a proceeding: the state Appellate Division. (JA-1283-94.) *See* EDPL § 207(B). The first-named plaintiff in that action, Eliselle Anderson, had previously joined with the first-named plaintiff in the Goldstein action, Daniel Goldstein, in suing ESDC about the

Atlantic Yards Project. (*See* JA 866.)[5] The Anderson Plaintiffs' suit is still pending in the Appellate Division.

By stipulation of the parties, the arguments made in support of the motions to dismiss the original Complaint were treated as addressing the new pleading as well (JA-9), and Defendants filed motions to dismiss the amended pleading. The ESDC Defendants emphasized that, in the thirty years since the EDPL had been enacted, federal district courts in New York had considered just *five* Public Use Clause challenges to the exercise of eminent domain, *all* of which were dismissed before trial. (*See* JA-9 Docket No. 70 at 1-3.) By contrast, the Appellate Division of the New York State Supreme Court had fully resolved well over 100 petitions pursuant to EDPL § 207. (*Id.* at 3.) The ESDC Defendants also argued that the court should not exercise supplemental jurisdiction over the EDPL § 207 "claim" Plaintiffs purported to assert. (*See id.* at 6-13; JA-10 Docket No. 74.)

On February 7, 2007, Magistrate Judge Levy held extensive oral argument to consider Defendants' motions. (JA-10.)

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[5] On January 11, 2007, the Plaintiffs in *Piller v. Pataki*, 07 Civ. 0152 (NGG)(RML), leapt into the federal-court fray with their own Complaint, which parrots the Goldstein Plaintiffs' Amended Complaint. (*See* JA-59-94.) Pursuant to the parties' stipulation, the Piller and Goldstein actions were eventually consolidated. (JA-12, 1361-64.)

Magistrate Judge Levy's Report and Recommendation

Two weeks later, Magistrate Judge Levy issued a Report and Recommendation ("Report") suggesting to Judge Garaufis that he grant the motions to dismiss and enter judgment in Defendants' favor. (SPA-1-42.) Judge Levy concluded that Plaintiffs' claims were ripe, but that *Burford* abstention was warranted. Accordingly, he did not reach the question whether Plaintiffs had stated a claim upon which relief could be granted.

Judge Levy explained that *Burford* abstention is called for when the federal interest in retaining jurisdiction is outweighed by the State's competing concern to have particular kinds of cases adjudicated in a state forum. (SPA-34.) Here, Judge Levy reasoned, any federal interest was overcome because (1) "New York's EDPL sets forth a highly specific and comprehensive mechanism for condemnees to challenge any aspect of a condemnation in a state-created system of administrative and judicial review" (SPA-35), and (2) "it is indisputable that eminent domain is traditionally a matter of local concern and that the state has a vital interest in establishing a coherent policy with respect to it" (SPA-36). Finally, Judge Levy observed, "allowing plaintiffs to do an end-run around the EDPL and instead litigate their claims in federal court would provide incentive for forum shopping and thereby undermine New York's legislative scheme governing the exercise of eminent domain power." (SPA-39.) This was because "[n]o

prospective condemnee, given the choice, would opt for narrow, on-the-record (yet constitutionally adequate) review in the Appellate Division if all of the benefits of federal review were freely available." (SPA-39.)

Plaintiffs objected to Judge Levy's *Burford* ruling, and Defendants objected to his ripeness and *Younger* rulings. On March 30, 2007, Judge Garaufis presided over a lengthy oral argument to consider those objections. (JA-15.)

Judge Garaufis's Opinion

On June 6, 2007, Judge Garaufis issued a Memorandum and Order dismissing the consolidated action in its entirety with prejudice. (SPA-43-108.) Although he disagreed with Judge Levy's determination that abstention under *Burford* was warranted, he concluded that the case could not proceed because Plaintiffs had failed to state a claim for relief under any of the constitutional provisions they had invoked.

The principal reason Judge Garaufis gave for rejecting Judge Levy's abstention recommendation was that, unlike *Burford* itself and another key authority, *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), this case did not involve any difficult local issues. (*See* SPA-64 & n.4, 74-75, 77-78.) Critically, however, Judge Garaufis agreed with Defendants that *if* review under the federal Constitution—and the Public Use Clause in particular—actually entailed an evaluation of the *political process underlying ESDC's public*

use determination, a federal court's adjudication of the claim would be tantamount to engaging in the intensely local inquiries at issue in *Burford* and *Alabama Public Rail Commission*. (SPA-77.)

On the merits, Judge Garaufis held that Plaintiffs had failed to state a claim under the Public Use Clause. (*See* SPA-85-108.) After conducting a lengthy analysis of the three controlling Supreme Court cases—*Berman v. Parker*, 348 U.S. 26 (1954), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Kelo v. City of New London*, 545 U.S. 469 (2005)—Judge Garaufis articulated what he deemed to be the pertinent inquiry under that Clause: "[A] taking fails the public use requirement if and only if the uses offered to justify it are 'palpably without reasonable foundation,' such as if (1) the 'sole purpose' of the taking is to transfer property to a private party, or (2) the asserted purpose of the taking is a 'mere pretext' for an actual purpose to bestow a private benefit." (SPA-98 (citations omitted).) Under neither test, Judge Garaufis explained, could Plaintiffs' challenge survive Defendants' motion.

First, the district court concluded, Plaintiffs' bare accusation that "[t]he public does not benefit from the taking of Plaintiffs' properties" was unsupported by their own allegations. (SPA-99.) In truth, "although Plaintiffs allege that the net gain in tax revenues will be lower than defendants have predicted, they do not allege that there will be no net gain." (*Id.*) Likewise,

"although Plaintiffs allege that Defendants' claims about job creation are overstated, they do not suggest that the Project will fail to create jobs." (*Id.*) Next, "Plaintiffs do not dispute that the majority of the Project Area—which encompasses the Takings Area—is blighted, and in fact they seem to concede that it is." (SPA-99-100.) And, as the Supreme Court had explained in *Berman*, the actual property being taken need not itself be blighted if the Project as a whole will remediate blight. (SPA-100.) Fourth, "Plaintiffs do not allege that the Project will fail to achieve a significant net increase in housing units in the area, and it is clear that it is intended to do so." (*Id.*) Finally, "Plaintiffs also do not allege that the Project's non-quantifiable public benefits"—like the return of a major-league sports team to Brooklyn—"are false." (SPA-101.)

Because Plaintiffs plainly had not alleged that the Project would serve no public purpose, the district court found that their claim necessarily failed under the well-worn principles set forth in *Berman* and *Midkiff*. The court, however, construed the Supreme Court's decision in *Kelo* as opening up a new avenue of possible attack, permitting Plaintiffs to argue, if they could, that their property was going to be taken "'under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit.'" (SPA-92 (quoting *Kelo*, 545 U.S. at 478).)

Applying that test, the district court concluded that Plaintiffs' allegations again fell far short of the mark. Simply put, Plaintiffs had failed to "allege any facts suggesting that any Defendant had any reason to bestow a benefit on any private party. Therefore, even if Plaintiffs could prove every allegation in the Amended Complaint, a reasonable juror would not be able to conclude that the public purposes offered in support of the Project [were] 'mere pretexts' within the meaning of *Kelo*." (SPA-103.) Judge Garaufis acknowledged that the Amended Complaint included bare assertions of an "'inten[t] to benefit FCRC'" and a "'desire to confer a private benefit to FCRC,'" but explained that, particularly in view of the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which echoed the reliance Justice Kennedy, in his concurrence in *Kelo*, had placed on *plausibility* as a governing factor in alleging pretext, those conclusory allegations could not rescue the claim. (SPA-103-06.)

Finally, the district court ruled that Plaintiffs' equal protection and due process challenges—challenges "based on the same facts as the Takings Clause claim" (SPA-106)—were meritless. Because the proposed taking was "rationally related to a legitimate governmental purpose," as required under the Equal Protection Clause in circumstances not involving suspect classes, and because this Court had already held that the EDPL satisfied due process, *see Brody*

v. Vill. of Port Chester, 434 F.3d 121 (2d Cir. 2005), neither claim could survive Defendants' motions. (SPA-106-07.)[6]

Judgment was entered in Defendants' favor on June 8, 2007. (JA-1431.) Plaintiffs filed their notice of appeal five days later. (JA-1433.)

SUMMARY OF ARGUMENT

Not only was the district court correct that Plaintiffs have failed to state a claim under the Public Use Clause, but it construed the law much more generously in their favor than the applicable case law permits. Where, as here, the public benefits and purposes of the project at issue are evident on the face thereof, there is neither need nor justification for looking beyond the undeniable "public use" to seek out some nefarious "motive." The *Kelo* Court's suggestion that "pretext" might offer a fruitful avenue of constitutional attack is limited to those cases, like *Kelo* itself, in which the *sole* public purpose being proffered for a project is economic development—a purpose that is not inherently public. Even in those cases, moreover, the "pretext" inquiry is an objective one—not a roving search into the hearts of all the public officials involved in the proposed project. And even *if* public officials' dreams and desires had some relevance under the Takings Clause, the district court was right that Plaintiffs have offered no facts to

[6] Judge Garaufis also declined to exercise supplemental jurisdiction over Plaintiffs' state-law claims. (*See* SPA-108.) Plaintiffs do not challenge that determination in their brief.

support a finding that the public Defendants acted or had any motive to act in abdication of their governmental responsibilities and with the sole or even primary purpose of benefiting Bruce Ratner. (*See* Argument Part I.)

If subjective motives *are* a legitimate subject of inquiry in cases where, as here, the public purpose is inherent in the nature of the Project, then the key reason the district court gave for declining to abstain under *Burford* lacks force. Judge Garaufis refused to abstain principally because, in his view, federal courts evaluating Public Use Clause challenges need not "evaluate the political questions underlying" a proposed exercise of eminent domain. (SPA-77.) Defendants of course agree with that proposition. But if Plaintiffs are right that the Public Use Clause requires an in-depth assessment of public officials' motives, there is no escaping an examination of the "political questions," and *Burford* abstention is required, supplying an alternative ground for affirmance of the district court's dismissal of Plaintiffs' action. (*See* Argument Part II.)

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE FEDERAL CONSTITUTION

A. The Project Serves Multiple Undeniable Public Purposes

Plaintiffs' chief constitutional claim is under the Fifth Amendment's Takings Clause, which guarantees the government will not take private property for public use without just compensation. *See* U.S. Const., amend. V. As *Kelo*'s

author, Justice Stevens, has observed, "a purely literal reading of the Takings Clause would limit its coverage to a guarantee of just compensation" and permit no challenge based on whether or not the taking serves a "public use." John Paul Stevens, *Learning on the Job*, 74 Fordham L. Rev. 1561, 1566-67 (2006). The Supreme Court has, however, read the Clause to place "an implicit limit on the power to condemn private property." *Id.* at 1567.

Still, the "public use" limitation has long been construed to trigger only the most deferential judicial scrutiny. "Public use" means not a literal "use by the public" but rather a "'public purpose.'" *Kelo*, 545 U.S. at 479-80. A taking serves a "public use" when "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Because "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one," *Berman v. Parker*, 348 U.S. 26, 32 (1954), a court should not "substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be *palpably without reasonable foundation*," *Midkiff*, 467 U.S. at 241 (emphasis added; citation omitted).

Applying these bedrock principles, the proposed taking of Plaintiffs' properties plainly passes constitutional muster. In truth, this is not even a borderline case. Critical aspects of the Atlantic Yards Project are for "public use"

in the most literal sense: a new sports arena and recreational facilities will be built on the Project site, mass transit will be improved, and new public open space will be created. *See, e.g.*, *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting) (identifying as clear "public uses" "a railroad" and "a stadium"); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422-23 (1992) (taking to facilitate Amtrak's rail service did not violate the Public Use Clause); *Southeast Land Dev. Assocs., L.P. v. District of Columbia*, No. Civ. A. 05-1413, 2005 WL 3211458, at *5 (D.D.C. Nov. 1, 2005) (taking to build baseball stadium did not violate the Public Use Clause); *Pastan v. City of Melrose*, 601 F. Supp. 201, 202-03 (D. Mass. 1985) (taking for a "park" was "for a clearly public use").

And other purposes that will be served undeniably are public ones. Plaintiffs do not and cannot deny that remediation of longstanding blight and creation of affordable housing are quintessential public purposes. *See, e.g.*, *Berman*, 348 U.S. at 34; *Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985) (removal of blight is a "classic example of a taking for a public use"); *Pennell v. City of San Jose*, 485 U.S. 1, 12 (1988) (efforts to relieve housing market pressures were within State's police powers). They admit, moreover, that the majority of the Project site is in fact blighted, and that the Project will create at least some affordable housing. (*See* SPA-99-100; JA-58.15 ¶¶ 55, 57; JA-58.25 ¶¶ 104-05; *id.* ¶ 108.)

Plaintiffs' gripe, then, is not about *whether* the Project serves public purposes, but rather *to what extent* some of the stated purposes will actually be realized, and whether taking of their properties is necessary to the accomplishment of the Project's stated (and admittedly public) aims. In effect, they seek to transform the deferential "rational basis" public use inquiry into a test of exacting judicial scrutiny—one that would require narrow tailoring of a proposed taking to ensure that it is no greater than necessary to achieve important or compelling public purposes. Specifically, they complain that ESDC has overstated the projected economic benefits of the Project and the number of affordable housing units and new jobs the Project will create. (JA-58.22-58.23; JA-58.25-58.28.) They also assert that their own properties are not blighted. (JA-58.24-58.25.)

But these assertions, even if true, simply do not give rise to a cause of action under the Public Use Clause. It has been settled for over half a century that "the legislature, not the judiciary, is the main guardian of the public needs to be served" by an exercise of eminent domain and the appropriate scope of the project. *Berman*, 348 U.S. at 32. Accordingly, the Supreme Court has explained that even in those cases—*unlike* this one—where the *sole* justification for the taking at issue is economic development, a federal court should not "second-guess [a condemnor's] considered judgments about the efficacy of its development plan," or try to evaluate for itself whether the public purpose asserted will actually be

realized. *Kelo*, 545 U.S. at 488-89. Nor should it "second-guess [a condemnor's] determinations as to what lands it needs to acquire in order to effectuate the project." *Id.* at 489. The latter point is illustrated by the Supreme Court's decision in *Berman* and this Court's decision in *Rosenthal & Rosenthal*.

In *Berman*, the owner of a department store that was slated for condemnation as part of a broader redevelopment plan targeted at a blighted area of Washington, D.C. argued that the proposed condemnation violated the Public Use Clause because the department store itself was not blighted. 348 U.S. at 31. The agency's plan was to take the store and transfer it to a private developer. *Id.*

The Supreme Court rejected that argument. The legislature "and its authorized agencies" had decided that the taking was needed to improve a blighted area, and that determination was "well-nigh conclusive." *Id.* at 32-33. That the petitioner's property was not actually blighted or even contributing to a condition of blight changed the analysis not at all; the Court refused to interfere with the condemning agency's decision to "attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis." *Id.* at 34. It further explained that

> [i]t is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Id. at 35-36.[7]

This Court's decision in *Rosenthal* is much to the same effect. The plaintiffs in that case were the lessee and owner of a concededly non-blighted building located in an area that ESDC's *alter ego*, the UDC, had designated for redevelopment. *See* 771 F.2d at 45. The "primary goal" of the redevelopment project, as described by UDC, was "the elimination of the physical, social and economic blight that ha[d] afflicted the Times Square area of Manhattan." *Id.* (citing *Nat'l Res. Def. Council, Inc. v. City of N.Y.*, 672 F.2d 292, 294 (2d Cir. 1982), in turn citing UDC's final determination and findings pursuant to the EDPL). As part of the project, UDC had determined to condemn plaintiffs' property and turn it over to a pre-selected private developer (and alleged close friend and political supporter of Mayor Edward Koch) for construction of new office buildings. *See id.*; *see also Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 605 F. Supp. 612, 616 (S.D.N.Y. 1985).

Like the Supreme Court in *Berman*, this Court rejected the Public Use Clause challenge. That the *Rosenthal* plaintiffs' property was not blighted and would "be transferred to private developers" made "no difference" under the

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[7] Although the *Berman* Court used the term "legislative branch," Congress had in fact delegated its power of eminent domain to the District of Columbia Redevelopment Land Agency. *See id.* at 29. Hence the Court's admonition, elsewhere in its opinion, that federal courts defer to "congress *and its authorized agencies*." *Id.* at 33, 34 (emphasis added).

Supreme Court's precedents; "the power of eminent domain is merely the means to the end," and "'community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.'" *Id.* at 46 (quoting *Berman*, 348 U.S. at 35).

The district court in this case faithfully and properly applied these precedents when it rejected Plaintiffs' efforts to build a Public Use challenge out of complaints about the scope and projected efficacy of the Atlantic Yards Project. (*See* SPA-99.)

B. There is No Warrant for Examining Whether the Admittedly Valid Public Purposes Are "Pretextual"

Given the district court's finding that Plaintiffs have effectively conceded the Project will serve numerous public purposes (a finding Plaintiffs do not challenge on appeal[8]), there was no cause for it to further consider whether "the asserted purpose of the taking [was] a 'mere pretext' for an actual purpose to bestow a private benefit." (SPA-98 (quoting *Kelo*, 545 U.S. at 478).) Contrary to Judge Garaufis's apparent assumption and Plaintiffs' contention, it is *not* a "bedrock Fifth Amendment princip[le]" (Pl. Br. at 38) that an allegation of pretext can resuscitate a Public Use challenge that has foundered on the rocks of multiple

[8] Plaintiffs do not dispute the District Court's conclusion that they failed to allege that the Project serves no public purpose. Instead, on appeal they contend that the *primary motive* behind the Project is to enrich Bruce Ratner, and that any public benefits are therefore only *secondary* or incidental. (*See* Pl. Br. at 37-55.)

admitted public purposes. Instead, a reviewing court should entertain the possibility of pretext only—at most—if the purposes offered for the project are not *inherently* public.

Kelo represents the very first time in the context of a Public Use challenge that the Supreme Court used the "mere pretext" language Plaintiffs seize upon. The case involved a challenge to the City of New London's attempt to condemn private homes in furtherance of an economic development project "intended . . . to capitalize on the arrival of" a major pharmaceutical research facility (to be run by Pfizer Inc.) adjacent to the redevelopment area. *Kelo*, 545 U.S. at 474. The Court accepted *Kelo* for certiorari *solely* "to determine whether a city's decision to take property *for the purpose of economic development* satisfies the 'public use' requirement of the Fifth Amendment." *Id.* at 477 (emphasis added); *see* Petition for Writ of Certiorari at i, *Kelo v. New London*, 545 U.S. 469 (2005) (No. 04-108), *available at* 2004 WL 1659558 (framing question presented as: "What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of 'economic development' that will perhaps increase tax revenues and improve the local economy?").

Acknowledging the narrowness of the question presented, the *Kelo* Court emphasized a key factual distinction between the case before it and

Berman: "Those who govern the City [of New London] were not confronted with the need to remove blight in" the area designated for redevelopment. 545 U.S. at 483. It also noted plaintiffs' argument that "using eminent domain for economic development impermissibly blurs the boundary between public and private takings." *Id.* at 485.

Nonetheless, the Court explained, under the broad deferential standards enunciated in *Berman* and *Midkiff*, the City's determinations that the takings would foster economic development and that economic development served the public interest was entitled to respect, and foreclosed any challenge under the Public Use Clause. *Id.* at 483-84.

This holding has prompted the virtually universal consensus that *Kelo* confirmed—and possibly even *loosened*—the already extremely deferential judicial review of the public purposes of proposed takings. *See, e.g.*, Richard A. Epstein, *The Public Use, Public Trust & Public Benefit*, 9 Green Bag 2d 125, 125 (2006) (adverting to the "public outcry against a judicial outcome that makes a mockery of the public use limitation found in the takings clause"). Reacting to public concern about the paucity of federal constitutional protections against the taking of private property after *Kelo*, thirty-four States have enacted legislation tightening the state-law restrictions on such takings. *See* Lynn E. Blais, *Urban Revitalization in the Post*-Kelo *Era*, 34 Fordham Urban L. J. 657, 659 n.20 (2007).

At least 17 bills to such effect were introduced in the New York Legislature. *See 49 WB, LLC*, 839 N.Y.S.2d at 130 n.1. Then-Judge John Roberts, testifying at his hearing for confirmation as Chief Justice of the Supreme Court, stated that these legislative initiatives reflected a resolution by state legislatures not to "use the [e]minent domain power to the broadest extent that the Supreme Court has said [they] are authorized to do." Washington Post, *Transcript: Day Three of the Roberts Confirmation Hearings*, Sept. 14, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091402252.html.

Yet Plaintiffs read *Kelo* quite differently. Homing in on the majority opinion's passing statement that a condemnor would not "be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," 545 U.S. at 478, they curiously argue that *Kelo expanded* rather than *constricted* the degree of constitutional scrutiny under the Public Use Clause. They contend that a Public Use challenge can now proceed by merely alleging a principal motive or intent to benefit a private party—even if the public purposes of the project at issue are plain and admitted. (*See* Pl. Br. at 37-38.) Plaintiffs also rely on the concurrence authored by Justice Kennedy, who joined the majority's opinion in full, but sought to elaborate upon the circumstances in which, in his view, a "pretext" might exist. Justice Kennedy agreed that the proper

test was whether the taking was "'rationally related to a conceivable public purpose,'" 545 U.S. at 490 (quoting *Midkiff*, 467 U.S. at 241), but thought that "'[w]here the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose'" is merely incidental or pretextual. *Id.* at 491 (quoting trial court's opinion; second alteration in original).

Plaintiffs evidently believe that *Kelo*'s language about pretext and incidental benefits applies not only to cases (like *Kelo* itself) where the *sole* justification for the project and its attendant taking is economic development, but also equally to cases (like this one) where the project *admittedly* serves a number of *inherently* public purposes—including the remediation of blight, the building of a sports stadium, the creation of affordable housing, and improvements to mass transit. There is no basis for that belief.

As a preliminary matter, Justice Kennedy—the only Justice to have discussed the issue of pretext at any length—suggested that the pretext issue was peculiar to pure economic development cases. As noted, he couched his views accordingly. *See, e.g.*, *id.* ("'*[w]here the purpose [of a taking] is economic development* and that development is to be carried out by private parties or private parties will be benefited'") (emphasis added); *id.* at 493 ("[m]y agreement with the Court that a presumption of invalidity is not warranted *for economic development*

takings in general, or for the particular takings at issue in this case") (emphasis added).

More importantly, there is no justification for extending the "pretext" concept beyond the context in which it was conceived. "Pretext," as the term is used in *Kelo*, describes a concern that a purpose of *arguably* public character—a purpose that, depending on the facts, either might or might not serve the public—will not actually benefit the public at all or will be minor in contrast to the private benefit conferred. "Economic development" falls into this category. *Cf. id.* at 485 (noting plaintiffs' argument that "using eminent domain for economic development impermissibly blurs the boundary between public and private takings"). The primary beneficiary of "economic development" invariably is a private entity or individual, and any public benefits are, almost by definition, primarily fiscal (more jobs, tax revenues, etc.)—and are by no means assured in such cases. The function of a "pretext" analysis in those circumstances is to confirm that the contingent public benefits will have a reasonable prospect of realization and are not merely an excuse to facilitate the interests of private parties.

It is this very instability in the *nature* of the proffered purpose that caused Justice O'Connor to write as strong a dissent as she did in *Kelo*. Justice O'Connor drew a line between those cases in which the project at issue "*directly* achieved a public benefit," *id.* at 500—for example, cases where stadiums are to be

built and where blight is to be remediated, *see id.* at 498, 500—and cases, like *Kelo* itself, where property is "give[n] over for new, ordinary private use . . . predicted to generate some *secondary* benefit for the public." *Id.* at 501 (emphasis added).

The chief public purposes supporting the Atlantic Yards Project fall squarely into Justice O'Connor's first category—and outside the realm of concern about "pretext." It is beyond dispute that remediating blight, building affordable housing, a sports arena, and public open space all serve the public in a direct and immediate, non-contingent sense. Particularly given Plaintiffs' *admission* that the Project will in fact serve these purposes, any inquiry into whether the purposes are "pretextual" would be nonsensical.[9]

[9] The following example may serve to illustrate the point: A city takes an individual's home to make way for a public highway. All, including the owner of the home, agree that a public highway is a classic "public use" within the meaning of the Takings Clause, and that the highway will in fact serve the public. But the owner believes—indeed, has good evidence that—the public official driving the highway project is motivated not by a desire to serve the public but instead by a desire to get re-elected to his position next term, or even to please a prospective (private) donor who may be awarded the highway contract.

As Plaintiffs would have it, the federal court's inquiry in this example does not end at the concession of public purpose. Instead, the court is obliged to sniff around for an ulterior motive until it is satisfied that none exists and hearts are pure. That is not the law.

C. If a Screen for "Pretext" Is Required, the Relevant Inquiry is an Objective One

Even if courts in every Public Use case—no matter the public purposes to be served—were, as Plaintiffs insist, required to screen for "pretext," that inquiry would not entail the broad-ranging fishing expedition into subjective motivations that Plaintiffs evidently envision. Instead, the inquiry would be an objective one. Federal courts are wary enough about discerning legislative intent from the *face* of an available public record. They should be especially loath to look behind a public record to attempt to ascertain the personal motivations of individual legislators.

The Supreme Court has long used words like "intends" and "purpose" in the Public Use Clause context to denote an objective, rather than a subjective, inquiry. In *Midkiff*, for example, the case that unequivocally embraced the objective "conceivable public purpose" test for public use, the Court likewise used the words "purposes" and "intended goals." *See, e.g.*, 467 U.S. at 235, 239-42. Yet not even Plaintiffs suggest that *Midkiff* furnished an invitation to delve into the thoughts, motivations, or correspondence of state and municipal officials. As the Court of Appeals for the District of Columbia recently explained,

> the word "pretextual" is used [in *Kelo*] to characterize the public benefits that will flow from the taking, not the thought processes of legislators or other government officials . . . .

> The terms "purpose," "motive," and "intent" sometimes are used (imprecisely) as if they were interchangeable. In the present context, it is important to remember that "public purpose" is the modern mode of expressing the constitutional requirement of a "public use."

Franco v. Nat'l Capital Revitalization Corp., -- A.2d --, 2007 WL 2001652, at *10 (D.C. Jul. 12, 2007). This Court has also confirmed as much. In *Brody v. Vill. of Port Chester*, which was decided after *Kelo*, the Court explained that no "examination of the thought processes of those exercising the legislative prerogative" was warranted under the Public Use Clause. 434 F.3d at 136; *see also 49 WB, LLC*, 839 N.Y.S.2d at 137, 140-41 (applying *objective* "pretext" test, founded in rational basis standard, to reject condemnor's determination and findings because the EDPL record showed that more affordable housing would be created without condemnation than with it).

That the inquiry is an objective one is demonstrated, too, by the facts that: (1) the only case Justice Stevens's majority opinion cites in the paragraph discussing "mere pretext" is *Midkiff*, *see Kelo*, 545 U.S. at 478 (quoting *Midkiff*, 467 U.S. at 245); and (2) elsewhere in his opinion (which Justice Kennedy joined in full), Justice Stevens confirms in no uncertain terms that "intrusive scrutiny" into legislative motives is improper in evaluating Public Use Clause challenges, 545 U.S. at 483.

The cases Justice Kennedy's concurrence cites likewise undermine the case for a subjective inquiry. *See id.* at 491 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47, 450 (1985), and *Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-36 (1973)). In *Cleburne*, the Court held that application of a city ordinance requiring a special permit for operation of a facility for the mentally retarded violated the Equal Protection Clause—*not* because those who wrote the laws and applied them bore any personal ill will toward the mentally retarded, but instead because, as an objective matter, there was no "rational basis for believing" the ordinance would serve the city's "legitimate interests." 473 U.S. at 448. The only *conceivable* rationale for singling out the mentally retarded was an "irrational prejudice" against that group. *Id.* at 450.

In *Moreno*, the issue was whether an amendment to the Food Stamp Act that, as demonstrated by the face of the legislative history, "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program," 413 U.S. at 534, passed muster under the "rational basis" test. The Court held that it did not, but only after considering and rejecting a *conceivable* rationale for the amendment—*i.e.*, prevention of fraud—not actually reflected in the legislative history. *See id.* at 535-38. As the Court's discussion in *Moreno* makes clear, had there been some basis for concluding that the law was rationally related to the conceivable purpose of curtailing fraud, the law would

have been upheld. *See id.* That nefarious personal motives might have animated the legislation could not, under those circumstances, have furnished a ground for declaring the law unconstitutional.[10]

D. Even Applying Plaintiffs' Own Subjective Test for Public Use, Their Claim Fails

Disregarding these authorities, Plaintiffs premise their entire claim on the theory that Defendants' personal, subjective "motive or intent is *the* issue that must be resolved" in this case. (Pl. Br. at 41 (emphasis in original).) While Judge Garaufis, in his analysis below, evidently was willing to assume as much, he correctly held that Plaintiffs' theory fails even on its own terms. (*See* SPA-101-06.)

1. The District Court Relied on Long-Settled Pleading Principles and a "Plausibility" Standard Even Plaintiffs Agree Applies Here

It has long been the law in this circuit that "conclusory statements are not a substitute for minimally sufficient factual allegations" on a Rule 12(b)(6) motion. *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 28 (2d Cir. 2006); *see also, e.g., Ciambriello v. County of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002) ("A merely conclusory allegation that a private entity acted in concert with a

[10] Justice Kennedy's reliance on "rational basis" cases like *Cleburne* and *Moreno* stands in stark contrast to Plaintiffs' own reliance here on the "suspect class" racial discrimination cases of *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252 (1977), and *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987). (*See* Pl. Br. at 43.)

state actor does not suffice to state a § 1983 claim against the private entity."). As the Supreme Court has explained, courts simply "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

More recently, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court elaborated that "[f]actual allegations must be enough to raise a right to relief above the speculative level," and that, to satisfy the requirements of Rule 8(a) and survive a motion to dismiss pursuant to Rule 12(b)(6), those factual allegations must offer at least "plausible grounds" for inferring the existence of the element they are offered to support. 127 S. Ct. 1955, 1964-65 (2007); *see also Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) ("[A] pleader [must] amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.").

As Plaintiffs acknowledge, although *Twombly* itself was an antitrust case, the core "plausibility" standard it articulated extends beyond that context to all applications of Rules 8(a) and 12(b)(6). (*See* Pl. Br. at 23.) *See also Twombly*, 127 S. Ct. at 1966 (the plausibility standard "*reflects the threshold requirement of Rule 8(a)(2)* that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief'" (emphasis added)). The Court in *Twombly* was clear that, to the extent prior precedent had suggested that a claim could be dismissed

only if "no set of facts" could be proven to support it, that precedent was misguided. *See id.* at 1969 (the "no set of facts" standard gleaned from *Conley v. Gibson*, 355 U.S. 41 (1957), had "earned its retirement").

Applying these standards, Judge Garaufis below concluded that Plaintiffs' Public Use Clause claim would not survive Defendants' motion because

> [n]owhere in the Amended Complaint or their briefs do Plaintiffs sufficiently allege any purpose [*i.e.*, motive] to confer a private benefit. . . . *Plaintiffs do not allege any facts suggesting that any Defendant had any reason to bestow a benefit on any private party*.

(SPA-102-03 (emphasis added).) Although he noted that Plaintiffs had included in their complaint *conclusory* allegations concerning Defendants' purported desires and intents, Judge Garaufis correctly explained that these allegations did not assert facts or "'a *plausible* accusation of impermissible favoritism to private parties.'" (SPA-104 (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)) (Judge Garaufis's emphasis).) Plaintiffs did not allege, for example, any special relationship between any of the public Defendants and Bruce Ratner, or how or why the former had or would have had any reason to abdicate their professional and public responsibilities in order to benefit the latter. Even the allegations in *Rosenthal*, found insufficient in the district court as well as this Court to withstand a motion to dismiss, asserted more—*viz.*, that the private developer was a close friend and political supporter of Mayor Koch. *See Rosenthal*, 605 F. Supp. at 616.

2. Plaintiffs' Attack on the District Court's Reasoning is Misguided

Near the end of his opinion, and drawing an analogy to the antitrust conspiracy claim alleged in *Twombly*, Judge Garaufis observed that Plaintiffs' Public Use claim had to be dismissed because the only facts alleged in support thereof were "as consistent with lawful behavior as with unlawful behavior." (SPA-105.) *See Twombly*, 127 S. Ct. at 1966. In attacking Judge Garaufis for applying the "wrong standard" (Pl. Br. at 30), Plaintiffs focus disproportionately and erroneously on this statement.

As Plaintiffs properly observe, the reason the Court in *Twombly* required that an antitrust conspiracy claim founded on parallel conduct allege more than the bare fact of parallel conduct—*i.e.*, facts "not merely consistent with" an illegal antitrust agreement—was that the *agreement* is what makes the conduct unlawful in that context. *See Twombly*, 127 S. Ct. at 1966. (*See* Pl. Br. at 31.) Where Plaintiffs go wrong is in insisting that the same analysis does not translate to this case.

The crux of Plaintiffs' claim, after all, is that Defendants' *motives alone* render the proposed taking here unconstitutional. Because, as Judge Garaufis held, Plaintiffs are forced to concede that the Project will *in fact* serve a number of public purposes (however ineffectively—as they assert), they are left to argue that their claim can nonetheless succeed if, as a subjective matter, the public

officials involved intend to benefit Bruce Ratner rather than the public. Such a claim indisputably fails without the supposed subjective intent; as Plaintiffs themselves put it, "Defendants' motive or intent is *the* issue that must be resolved." (Pl. Br. at 41 (their emphasis).)

From a pleading perspective, then, a claim of private taking alleging nefarious motive is similar to a claim of parallel conduct alleging unlawful agreement. In both cases, because the claim stands or falls with a single critical element (agreement in one, motive in the other), that critical element must be supported by more than mere conclusory allegations; some facts, rising beyond the level of speculation, are needed to render the claim "plausible." Indeed, if anything, the pleading burden is higher here than in *Twombly*, because here the "*presumption* [is] that the government's actions were reasonable and intended to serve a public purpose." *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring) (emphasis added).

3. The District Court Properly Held that, Under the Applicable Pleading Standards, Plaintiffs' Claim Could Not Proceed

Finally, under the "plausibility" standard Plaintiffs acknowledge applies, their allegations quite plainly fail to state a claim. Of the bullet-pointed "facts" they highlight in their brief (*see* Pl. Br. at 35-37), the first five and the last take issue with the *sequence* according to which the Project was initiated and fleshed out—specifically, the fact that the Project was first proposed by Bruce

Ratner and FCRC, rather than by ESDC. Plaintiffs again elaborate on this theme when they insist that the "sequence and nature of events preceding the takings in this action" (*id.* at 44) distinguishes it in a constitutionally relevant sense from cases like *Kelo* and *Berman v. Parker*, 348 U.S. 26 (1954). (Pl. Br. at 44-51.)

No case, however, has ever held that a project originated by a private individual or entity fails for that reason to pass muster under the Public Use Clause, and any such holding would do violence to the UDC Act and the legislative choices it embodies. As discussed above (*see supra* p. 3), the New York Legislature has made the considered decision that ESDC should "encourage[e] maximum participation by the private sector of the economy," N.Y. Unconsol. Laws § 6252, and "is not limited to projects in which it is the prime mover." *E. Thirteenth St. Cmty. Ass'n v. N.Y. State Hous. Fin. Agency*, 218 A.D.2d 512, 512-13, 630 N.Y.S.2d 517, 518 (1st Dep't 1995). At the very least, the fact that ESDC (as alleged by Plaintiffs) acted *in perfect conformity with its long-standing statutory mandate* furnishes no basis upon which to infer an invidious motive.[11]

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[11] Plaintiffs suggest the courts' favorable dispositions toward Public Use Clause challenges in three cases outside this jurisdiction, *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 F. App'x 123 (9th Cir. 2003), *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), and *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *rev'd on abstention grounds*, 357 F.3d 768 (8th Cir. 2004), all stemmed from the sequence of events leading to the proposed takings in those cases. (*See* Pl. *(cont'd)*

All but two of Plaintiffs' remaining bullet-pointed allegations—allegations (vi) through (xiv) (*see* Pl. Br. at 35-36)—pertain exclusively to alleged irregularities in a bid that the Metropolitan Transit Authority, which *is not a defendant here*, accepted from FCRC for the rights to develop certain land it owns in the ATURA. Plaintiffs never explain how these "facts" could support an inference that the public Defendants actually named herein acted solely to enrich Bruce Ratner.

This leaves Plaintiffs with the argument that such a motive can be inferred from the "facts" that (1) "the Defendants never claimed that the Takings Area was blighted until years after the Project was officially announced and *Kelo* had been decided"; and (2) "ESDC . . . engaged in a sham 'public' review process whose outcome was predetermined long before." (Pl. Br. at 36.) The first of these "facts" is simply irrelevant, given Plaintiffs' concession that roughly 63% of the entire Project site *is in fact blighted* and *has been so for nearly forty years.* Under these circumstances, any inference that remediation of blight is a pretext is

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Br. at 46-49.) That is incorrect. In all three cases, what concerned the courts was that the takings appeared to be bare transfers of land from one private party to another (in two cases, Costco; in the third, Target Corp.)—a classic violation of the Public Use Clause manifestly not presented here. *See 99 Cents Only Stores*, 237 F. Supp. 2d at 1129 (noting absence of any blight and *admission* by condemnor that purpose of taking was not public but "to satisfy the private expansion demands of Costco"); *accord Cottonwood*, 218 F. Supp. 2d at 1229; *Aaron*, 269 F. Supp. 2d at 1172.

untenable. The second "fact," moreover, is no fact at all, but rather a conclusory assertion that ESDC's public hearing—a hearing that Plaintiffs do not deny comported fully with the dictates of the EDPL—was a "sham."

In short, no improper motive can be inferred from the "facts" Plaintiffs purport to assert here. As the district court properly held, no judge or jury reasonably could conclude that Mayor Bloomberg, former Governor Pataki, ESDC, or the other public Defendants named in this suit acted with the sole or even primary purpose of "confer[ring] a private benefit to FCRC." (JA-58.30 ¶ 137.)

E. Plaintiffs' Equal Protection and Due Process Claims Fare No Better

Plaintiffs' additional constitutional challenges are equally meritless, and the district court properly dismissed them. Plaintiffs do not dispute that their equal protection claim turns on the existence or non-existence of a rational basis for the taking, and that that claim therefore cannot succeed if the Public Use Clause claim fails. (*See* SPA-107 (holding that Plaintiffs' equal protection claim failed because "the takings at issue are rationally related to a legitimate governmental purpose").) Nor do they offer any foundation for the outlandish suggestion that ESDC or any other Defendant conspired to engage in "vindictive governmental action." (Pl. Br. at 53.)

Likewise, Plaintiffs offer no basis for distinguishing their "as applied" due process claim from the due process attack on the EDPL that this Court rejected in *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005).

II. IF PLAINTIFFS ARE CORRECT THAT THE PUBLIC USE CLAUSE INQUIRY ENTAILS A SEARCHING EXAMINATION OF INDIVIDUAL MOTIVES, *BURFORD* ABSTENTION IS WARRANTED

In rejecting Defendants' argument below that he should abstain under *Burford v. Sun Oil*, Judge Garaufis explained that abstention was unwarranted because "this court is not being asked to evaluate the political questions underlying the Project. . . . Instead, the issue before this court is whether the taking of Plaintiffs' properties is rationally related to a conceivable public use." (SPA-77.) This fact, in Judge Garaufis's view, distinguished Plaintiffs' case from *Burford* itself and from *Alabama Public Service Commission v. Southern Railway Co. ("Alabama")*, 341 U.S. 341 (1951), which involved fact-intensive inquiries into local issues of "reasonableness" and "public need." (SPA-77.) But if Plaintiffs are correct that the constitutional inquiry entails probing into the hearts and minds—not to mention the letters and emails—of state and local public officials, Judge Garaufis's rationale does not withstand scrutiny, and *Burford* abstention supplies an alternative ground for affirmance.

A federal court should abstain under *Burford* when the federal interest in having the federal rights at issue "adjudicated in federal court" is outweighed by "the State's interests in maintaining 'uniformity in the treatment of an "essentially local problem."'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1995) (quoting *New Orleans Pub. Serv., Inc. v. City Council of New Orleans ("NOPSI")*, 491 U.S. 350, 362 (1989) (in turn quoting *Alabama*, 341 U.S. at 347)). No "formulaic test," *id.* at 727, or "'mechanical checklist,'" *Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239, 1245 (2d Cir. 1992) (citation omitted), governs a court's balancing of these competing factors. Instead, the inquiry is guided by general considerations, no single one of which, standing alone, either necessitates or precludes abstention. Chief among these are (1) whether the case involves a comprehensive state regulatory scheme, complete with concentrated state-court judicial review, *see, e.g.*, *NOPSI*, 491 U.S. at 362; *Alabama*, 341 U.S. at 346; *Bethphage*, 965 F.2d at 1243, 1245; *Levy v. Lewis*, 635 F.2d 960, 962 n.1, 963-64 (2d Cir. 1980); (2) whether the subject matter of the litigation is traditionally one of state concern, *see, e.g.*, *Quackenbush*, 517 U.S. at 726-27; *Alabama*, 341 U.S. at 346; *Bethphage*, 965 F.2d at 1247; *Levy*, 635 F.2d at 963; and (3) whether federal-court adjudication of the particular questions presented will unduly disrupt the regulatory scheme at issue, *see, e.g.*, *NOPSI*, 491 U.S. at 362; *Bethphage*, 965 F.2d at 1247; *Levy*, 635 F.2d at 963-64.

Also important under *Burford*, as under all abstention doctrines, is whether the state-court review of the questions presented is adequate. *See, e.g.*, *Bethphage*, 965 F.2d at 1245-46. Finally, the need for the federal court to engage in "discretionary interpretation of state statutes," *id.* at 1243, and thus entangle itself in the "'skein of state law,'" *NOPSI*, 491 U.S. at 361 (quoting *McNeese v. Bd. of Educ. of Cmty. Sch. Dist. 187*, 373 U.S. 668, 674 (1963)), may be relevant to the analysis. (*See* SPA-34-35.) That factor, however, is by no means necessary or dispositive; there are two "strands" of *Burford* abstention, and only one of them requires the involvement of thorny state-law issues. *See NOPSI*, 491 U.S. at 361-62; *see also, e.g.*, *Bethphage*, 965 F.2d at 1247.

There can be no question that the UDC Act and the EDPL together make up a comprehensive—and adequate, *see Brody*, 434 F.3d at 134—scheme governing the exercise and adjudication of eminent domain in New York. The Act identifies specific substantive criteria that serve as prerequisites to ESDC's exercise of the eminent domain power. *See* N.Y. Unconsol. Laws § 6260. Any such exercise is reviewed through the uniform and centralized procedures of the EDPL—a process that permits affected individuals both to have their say in the wisdom of the proposed project and to challenge, among other things, the constitutionality of any taking and ESDC's authority. *See* EDPL § 207(C).

Nor can there be any doubt that the subject matter of this scheme—eminent domain—is one of traditionally local concern. *See, e.g.*, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 26, 29 (1959); *Creel v. City of Atlanta*, 399 F.2d 777, 779 (5th Cir. 1968) ("[M]unicipal eminent domain [is] ordinarily a local matter."); *Green St. Ass'n v. Daley*, 373 F.2d 1, 6 (7th Cir. 1967) ("[I]n nearly all cases the question of whether the land to be acquired will be devoted to a public purpose is more appropriate for the state court to make in the condemnation proceedings."); *Harrison-Halsted Cmty. Group, Inc. v. Hous. & Home Fin. Agency*, 310 F.2d 99, 103 (7th Cir. 1962); *Mateo v. Phillips*, 361 F. Supp. 2d 328, 330 (S.D.N.Y. 2005); *Broadway 41st St. Realty Corp. v. New York State Urban Dev. Corp.*, 733 F. Supp. 735, 742 (S.D.N.Y. 1990) ("Due to the sensitive nature of the state's power to condemn the land of its citizens, eminent domain has remained a local political issue."); *Coles v. City of Philadelphia*, 145 F. Supp. 2d 646, 651 (E.D. Pa. 2001) (holding that *Burford* abstention was warranted in face of eminent domain proceeding), *aff'd sub nom. Coles v. Street*, 38 F. App'x 829 (3d Cir. 2002). Indeed, as Judge Levy noted in his Report, Plaintiffs "all but conceded this point." (SPA-38.)

As noted, however, the district court believed *Burford* abstention was unwarranted because resolution of Plaintiffs' federal constitutional claims would not entail any entanglement in sticky local issues pertaining to "reasonableness" or

"public need." (*See* SPA-77.) The ESDC Defendants respectfully submit that, should the Court accept Plaintiffs' arguments that the role of the federal court in reviewing a Public Use claim *does* entail examination of the personal motives of state and local officials and the "political questions" (*id.*) that might have guided their decisions, *Burford* abstention would be warranted. Otherwise, federal adjudication of the issue—one centered on local needs and desires—unquestionably would disrupt unduly the coherent scheme New York has adopted to govern exercises of eminent domain.

The point is best illustrated by the Supreme Court's decision in *Alabama*—a case applying *Burford* abstention. In that case, a railroad brought suit against a state agency that, pursuant to its statutory authority, had refused the railroad permission to discontinue rail service in a given area on grounds that the service fulfilled a "public need." *See Alabama*, 341 U.S. at 343. The railroad, alleging that that decision effected an unconstitutional deprivation of property without due process of law because the "public need" did not justify the economic burden placed on the railroad, sought an injunction in federal district court. *See id.* The district court granted the requested relief, and the Supreme Court reversed on abstention grounds, chiefly because the due process claim presented, though a federal one, "depend[ed] . . . upon the predominantly local factor of public need for

the service rendered." *Id.* at 347. This "essentially local problem" was, in the Supreme Court's view, one best left to the courts of the State. *Id.* [12]

If Plaintiffs' proffered analysis in this case—one focusing on the motives and "political questions" (SPA-77) driving local and state officials—is the correct one, the same conclusion should follow here. Indeed, as the Third Circuit has explained, a constitutional challenge requiring examination of official "motivations" implicates "complex matters of state concern" and is therefore a stronger candidate for abstention than one mandating an objective review. *Chiropractic Am. v. Lavecchia*, 180 F.3d 99, 108 (3d Cir. 1999).

[12] Judge Garaufis, in certain portions of his opinion, appears to have embraced the erroneous view that *Alabama* involved "a pure question of state law." (SPA-64; *see also id.* at n.4; SPA-78.) In fact, as both the district court and Supreme Court opinions in that case make clear, whatever state-law claims were asserted therein were so insubstantial as to warrant *no discussion*. The district court, which reached the merits of the case, focused *solely* on the federal claim. *See S. Ry. Co. v. Alabama Pub. Serv. Comm'n*, 91 F. Supp. 980, 983 (M.D. Ala. 1950); *id.* at 985; *id.* at 994-95 (noting the circumstances under which Alabama law permits suspension of rail service, but granting relief *solely* under the Fourteenth Amendment). And the Supreme Court, in hinting at (without deciding) a possible resolution on the merits, cited two federal question cases and no state cases. *See Alabama*, 341 U.S. at 347 (citing *Atl. Coast Line R.R. Co. v. N.C. Corp. Comm'n*, 206 U.S. 1, 24-27 (1907), and *Chesapeake & Ohio Ry. Co. v. Pub. Serv. Comm'n of W. Va.*, 242 U.S. 603, 608 (1917)).

Burford abstention is thus warranted and provides an alternative ground for affirmance if Plaintiffs' views of the merits are adopted.[13]

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[13] There were serious ripeness questions earlier in this case, which, as noted, was filed before ESDC had published its Determination and Findings. Even after publication of determination and findings, however, federal court review of public use is premature, because there is no federal right of action to challenge a public use determination. Procedures for such review are creatures of state law and direct Plaintiffs to state court. *See, e.g.*, EDPL § 207(C)(4). The *federal* right is, instead, a right to be free from unconstitutional deprivations or property, and a claim to vindicate that right does not ripen until the property deprivation has actually occurred or the threat of deprivation "is *certainly impending*." *Volvo N. Am. Corp. v. Men's Int'l Prof. Tennis Council*, 857 F.2d 55, 63 (2d Cir. 1988) (emphasis added; quotation marks omitted). Ordinarily, as most of the courts to have addressed the issue in condemnation situations have held, a property deprivation is not "certainly impending" at least until the condemnor's commencement of title proceedings. *See, e.g., Wendy's Int'l, Inc. v. City of Birmingham*, 868 F.2d 433, 436-37 (11th Cir. 1989); *Hemperly v. Crumpton*, 708 F. Supp. 1247, 1250-51 (M.D. Ala. 1988); *Eddystone Equip. & Rental Corp. v. Redevelopment Auth.*, Civ. A. No. 87-8246, 1988 WL 52082, at *2-3 (E.D. Pa. May 17, 1988), *aff'd mem.*, 862 F.2d 307 (3d Cir. 1988); *HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667, 669-70 (E.D. Va. 1985); *Port Chester Yacht Club, Inc. v. Iasillo*, 614 F. Supp. 318, 321-22 (S.D.N.Y. 1985).

That rule makes particular sense in the context of the EDPL, which permits a condemnor to wait until up to three years after the determination and findings are published (or after the completion of any section 207 proceeding, *see* EDPL § 401(A)) to initiate a title proceeding under Article 4 of the EDPL, during which time the proposed project may be frustrated by any number of intervening occurrences. Indeed, in past years, condemnation proceedings did not ultimately commence in whole or in part after publications of the condemning agency's determinations and findings with respect to the Westside Highway project (the subject of extensive environmental litigation), expansion of the New York Stock Exchange (abandoned after the events of September 11, 2001), and expansion of the Medgar Evers College.

With respect to the Atlantic Yards Project now at this stage, however, ESDC concedes that condemnation plans are swiftly proceeding, and that initiation of

(cont'd)

CONCLUSION

For the foregoing reasons, the ESDC Defendants respectfully request that the Court affirm the judgment of the district court.

DATED: August 31, 2007

Respectfully submitted,

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title proceedings is imminent and could occur even during the pendency of this appeal.

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