

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 Steward and in his individual capacity, GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL, INC., d/b/a Freddy's Bar and Backroom, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ, HUDA MUFLEH-ODEH, JAN AKHTAR, DAVID SHEETS, JOSEPH PASTORE, 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, d/b/a 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 FOREST CITY RATNER APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, defendants-appellees Bruce C. Ratner, James P. Stuckey, Forest City Enterprises, Inc., Forest City Ratner Companies, LLC, f/k/a Forest City Ratner Companies (named in this action as “Forest City Ratner Company”), Ratner Group, Inc., BR FCRC, LLC, BR Land, LLC, FCR Land, LLC, Brooklyn Arena, LLC and Atlantic Yards Development Company, LLC (collectively, the “Forest City Ratner appellees”) hereby state as follows:

1. Forest City Enterprises, Inc. (“Enterprises”) is a publicly held corporation.
2. Enterprises is the owner, directly or indirectly, of 100% of the beneficial ownership interests of Forest City Ratner Companies, LLC and FCR Land LLC.
3. Brooklyn Arena, LLC is 100% owned by Net Sports and Entertainment, LLC.
4. Enterprises is the owner, directly or indirectly, of more than 10% but less than 100% of the beneficial ownership interests of Atlantic Yards Development Company, LLC and Net Sports and Entertainment, LLC. The remaining beneficial ownership interests in those entities are owned, directly or indirectly, by various individuals, trusts and limited liability companies.

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PRELIMINARY STATEMENT

The Forest City Ratner appellees respectfully submit this brief in opposition to the appeal by plaintiffs-appellants (“plaintiffs”) from the June 6, 2007 memorandum and order and June 8, 2007 judgment of the United States District Court for the Eastern District of New York (Hon. Nicholas G. Garaufis, D.J.), which dismissed plaintiffs’ federal claims on the merits and with prejudice, and their purported state-law claim without prejudice.¹

Affiliates of appellee Forest City Ratner Companies, LLC (“FCRC”) are building the Atlantic Yards Land Use Improvement and Civic Project with the authorization of appellee New York State Urban Development Corporation, d/b/a Empire State Development Corporation (“ESDC”), a public benefit corporation and political subdivision of the State of New York. The project is intended to transform a largely blighted 22-acre tract near downtown Brooklyn, and includes the exercise by ESDC of its powers of eminent domain to acquire parts of the project site. The project was approved by ESDC after an extensive public review process required by state law.

This lawsuit is one of several that have been brought by project opponents, but it is the only one in federal court, and the only one raising issues of

¹ The “Forest City Ratner appellees” are defendants-appellees Bruce C. Ratner, James P. Stuckey, Forest City Enterprises, Inc., Forest City Ratner Companies, LLC (named as “Forest City Ratner Company”), Ratner Group, Inc., BR FCRC, LLC, BR Land, LLC, FCR Land, LLC, Brooklyn Arena, LLC and Atlantic Yards Development Company, LLC.

federal law. All defendants moved to dismiss the initial complaint under Rule 12(b), Fed. R. Civ. P., on various grounds. Plaintiffs responded by serving an amended complaint (the “Amended Complaint”) (A 58.1-58.43).² The parties agreed to treat the pending motions as addressed to the new pleading. The Magistrate Judge issued a report recommending that the District Court abstain from the case under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098 (1943), and did not reach the merits. Timely objections were filed. The District Judge declined to abstain and, instead, dismissed the Amended Complaint’s federal claims for failure to state a claim for which relief can be granted. *Goldstein v. Pataki*, 488 F.Supp.2d 254 (E.D.N.Y. 2007).

SUMMARY OF ARGUMENT

The District Court’s decision was manifestly correct and should be affirmed, because none of the Amended Complaint’s three claims for relief under federal law was viable:

1. Plaintiffs’ claim under the Public Use Clause of the Fifth Amendment was not viable, because the project’s purposes include well-established public uses, including the elimination of blight and the construction of an arena, almost 7,000 units of housing (including 2,250 units of affordable

² References in this brief to “A __” are to the Joint Appendix, to “SA __” are to the Special Appendix, and to “Pl. Br.” are to the Brief for Plaintiffs-Appellants.

housing), major mass-transit improvements, and eight acres of publicly accessible open space.

2. Plaintiffs' claim under the Equal Protection Clause of the Fourteenth Amendment was not viable, because there was no allegation that plaintiffs are being treated differently from similarly situated persons, and any distinction between plaintiffs and other persons has a rational basis.

3. Plaintiffs' claim under the Due Process Clause of the Fourteenth Amendment was foreclosed by this Court's decision in *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005), which held that the state-law procedures followed here exceed the requirements of due process.

Plaintiffs' arguments on this appeal are without merit. Furthermore, many of plaintiffs' assertions are new, not having been raised in the District Court, and therefore are improper on this appeal. There is no basis for disturbing the District Court's decision.³

³ To the extent that ESDC argues in favor of abstention as an alternative basis for supporting the affirmance of the dismissal of the Amended Complaint if this Court were to find merit in plaintiffs' arguments on appeal, the Forest City Ratner appellees join in ESDC's argument.

STATEMENT OF THE CASE

The facts set forth below are taken from the Amended Complaint (A 58.1-58.43) and from documents referred to in that pleading.⁴

A. The Atlantic Yards Project

The footprint of the Atlantic Yards project encompasses “22 acres of land” in central Brooklyn, “comprised of the Metropolitan Transportation Authority’s 8.5-acre active rail yard and bus depot, city streets, two city properties and sixty-eight privately owned parcels totaling 123 tax lots” (A 58.13 [¶ 46]), including ninety vacant tax lots (A 58.25 [¶ 105]). The project site is bounded generally by Dean Street and Atlantic, Fourth and Vanderbilt Avenues (A 58.13 [¶ 48]). About half of the site is within the “Atlantic Terminal Urban Renewal Area,” or “ATURA,” which, since 1968, New York City has repeatedly designated as blighted, most recently in 2004 (A 58.15 [¶¶ 55-57]).

The project is intended to eliminate blight and rejuvenate the project area. It will include the construction of a \$120 million platform over Vanderbilt Yards – an active rail and bus storage and maintenance facility of the Metropolitan Transportation Authority (the “MTA”) and its Long Island Railroad (the “LIRR”)

⁴ On a Rule 12(b)(6) motion, a court may consider documents incorporated in the complaint by reference, or integral to the complaint and relied upon in it. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (a court may consider “documents either in plaintiffs’ possession or of which plaintiffs had knowledge and relied on in bringing suit”). Therefore, where a complaint “relies heavily upon” it, the document itself may be considered. *International Audiotext Network, Inc. v. American Tel. and Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995). See also, e.g., *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007).

– to close this enormous open trench that divides the project area from the surrounding communities (A 106, 115, 158, 160, 595, 597). The project also will include a sports arena accommodating up to 20,500 persons, office buildings, a hotel, 6,680 housing units (2,250 of which will be below market rate) (A 58.2 [¶ 2 n. 1]), mass transit improvements (including a new state-of-the-art Vanderbilt Yards facility for the MTA and the LIRR, extensive subway improvements and the environmental cleanup of the MTA’s property) (A 111, 115, 168, 176, 177, 638-41), and publicly accessible open space (A 110, 175). The arena will be the new home of the National Basketball Association franchise now known as the New Jersey Nets (A 58.14 [¶ 52]).

B. The Approval Process

The project was announced in December 2003 (A 58.17 [¶ 68]). In February 2005, ESDC, the City and FCRC entered into two memoranda of understanding by which it was agreed, among other things, that, subject to the approval of ESDC’s Board of Directors, ESDC would be the “lead agency” under the State Environmental Quality Review Act (“SEQRA”), Environmental Conservation Law § 8-0101, *et seq.*, for purposes of examining the proposed project’s environmental impacts, and that ESDC would exercise its power under State law to override New York City zoning (*see* A 58.17 [¶ 70]).

ESDC was established by the New York State Legislature pursuant to the Urban Development Corporation Act (the “UDC Act”), Unconsolidated Laws § 6251, *et seq.*, to be the State’s principal agency for economic development and rejuvenation. The UDC Act specifically empowers ESDC to override local laws and condemn property. Unconsol. Laws §§ 6255(7), 6263, 6266(3). The Act also directs ESDC to “encourag[e] maximum participation by the private sector of the economy” in ESDC projects. Unconsol. Laws § 6252.

In May 2005, the MTA issued a request for proposals for the purchase of the development rights attributable to its Vanderbilt Yards site (A 58.19 [¶ 75]). FCRC and one other developer, Extell Development Company (“Extell”), submitted formal bids (A 58.19 [¶¶ 77-78]). FCRC initially offered \$50 million for the development rights (A 58.19 [¶ 77]). On July 27, 2005, the MTA’s Board of Directors approved a 45-day period of exclusivity to negotiate the terms of an agreement with FCRC (A 58.20 [¶ 79]). On September 14, 2005, the MTA and FCRC announced that FCRC would pay \$100 million to develop Vanderbilt Yards (A 58.20 [¶ 80]).⁵

⁵ The Amended Complaint alleged that FCRC’s bid to the MTA was inferior to Extell’s competing bid because Extell offered the MTA \$150 million while FCRC only offered \$50 million (A 58.19 [¶¶ 77, 78]). A comparison of the actual bids (A 594-779 [FCRC], A 780-863 [Extell]) exposes this contention as specious. While Extell offered \$150 million in cash as compared to FCRC’s initial offer of \$50 million in cash, Extell offered the MTA only cash, while FCRC also offered to (1) build a new Vanderbilt Yards facility for the MTA, (2) conduct environmental remediation and clean-up of the MTA’s property, (3) compensate MTA for increased operating costs, (4) construct additional mass transit improvements relating to the

On July 24, 2006, ESDC issued a notice of public hearing under New York's Eminent Domain Procedure Law (the "EDPL") and SEQRA (A 58.20-58.21 [¶ 83]). EDPL Article 2 requires that, "prior to acquisition," a condemnor "shall conduct a public hearing ... at a location proximate to the property which may be acquired," for the purpose of "inform[ing] the public" and "review[ing] the public use to be served by a proposed public project and the impact on the environment" EDPL § 201. Notice of the hearing must be published, and also mailed to each property owner. EDPL § 202. "At the hearing the condemnor shall outline the purpose, proposed location or alternate locations of the public project and any other information it considers pertinent," after which any persons in attendance "shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project." EDPL § 203.

On August 23, 2006, ESDC held its public hearing (A 58.21 [¶ 84]). It was followed by a community forum in September 2006, at which the public was given further opportunities to speak (A 58.21 [¶ 85]).

nearby subway station, and (5) provide the MTA with a share of sales tax revenues to be generated by the project (*see* A 638). FCRC's bid thus reasonably could be valued at \$329.4 million dollars *before* the cash component was increased from \$50 million to \$100 million.

On December 8, 2006, ESDC's Board of Directors approved the project, adopted a General Project Plan and made its determination and findings as required under the EDPL, SEQRA and the UDC Act (*see* A 58.21 [¶ 87]).⁶

C. This Action

This action was commenced in the District Court on October 26, 2006, prior to ESDC's approval of the project. Plaintiffs are owners and tenants of real property within the project site. Defendants are (1) then-Governor Pataki, (2) ESDC and its Chairman, (3) the Forest City Ratner appellees, and (4) the City of New York, its Mayor, Deputy Mayor and Economic Development Corporation (the "EDC"), and two EDC officials.

The initial complaint (A 22-58) alleged that, "[i]n the next few days, ESDC will announce that FCRC has passed every aspect of the review process," and "[t]he condemnation and seizure of plaintiffs' properties will follow quickly thereafter" (A 41 [¶¶ 83, 84]). The complaint asserted three claims for relief under 42 U.S.C. § 1983 for alleged violations of the Constitution, *i.e.*, that the project violated the Fifth Amendment's Public Use Clause, the Fourteenth Amendment's Equal Protection Clause, and plaintiffs' rights to procedural due process.

⁶ The EDPL provides for expedited judicial review, by a proceeding commenced in the Appellate Division, of a determination to condemn real property. *See* EDPL § 207. ESDC does not acquire ownership of any properties until it has commenced a further proceeding in the State Supreme Court, obtained an order authorizing it to file an acquisition map, and actually filed the map with the county clerk. EDPL § 402(b)(5). This proceeding may be commenced "up to three years after conclusion of" judicial review of the determination to condemn. EDPL § 401(A).

On December 15, 2006, all defendants moved to dismiss under Rule 12(b) (*see* A 96.1-96.3, 997-98, 999-1001, 1001.1-1001.2). On January 5, 2007, plaintiffs served the Amended Complaint (A 58.1-58.43), which repeated the initial complaint's federal claims and added a fourth claim, against ESDC only, for judicial review under EDPL § 207 of ESDC's determination. By stipulation, the motions to dismiss were treated as addressing the new pleading (A 9 [1/9/07]), and ESDC filed a separate motion to dismiss the claim under EDPL § 207 (A 9 [#69]).⁷ Magistrate Judge Robert M. Levy heard oral argument on the motions to dismiss on February 7, 2007.

On February 23, 2007, the Magistrate Judge issued a report (SA 1-42) recommending that the Court abstain from the case under the *Burford* doctrine. He also recommended that the Court not abstain under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), and not dismiss for lack of ripeness. He did not address the merits.

On March 9, 2007, all parties submitted timely objections to the report. Responses and replies thereafter were submitted. The District Judge heard oral argument on March 30, 2007.

⁷ The parties also agreed that a separate action, *Piller, et ano. v. Pataki, et al.*, No. 07-CV-152, would be consolidated with *Goldstein, et al. v. Pataki, et al.*, No. 06-CV-5827, and that the decision in *Goldstein* would apply to *Piller* (A 1361-64).

On June 6, 2007, Judge Garaufis rendered his decision (SA 43-108). He declined to abstain under *Burford*, and agreed with the Magistrate Judge that *Younger* abstention was inappropriate, and that the case was ripe for review. Turning to the merits, he dismissed the Amended Complaint's federal claims for failure to state a claim for which relief can be granted, and dismissed plaintiffs' state-law claim without prejudice.

Judgment was entered on June 8, 2007 (SA 109-10). The notice of appeal followed (A 1433-35). This Court thereafter granted a joint motion for expedited consideration.

ARGUMENT

STANDARD OF REVIEW

We agree with plaintiffs (*see* Pl. Br. at 26) that the District Court's decision is a ruling of law that is reviewed *de novo*.

I.

THERE WAS NO MERIT TO THE AMENDED COMPLAINT'S CLAIM THAT THE USE OF EMINENT DOMAIN IN FURTHERANCE OF THE ATLANTIC YARDS PROJECT VIOLATES THE PUBLIC USE CLAUSE

The Amended Complaint's first cause of action challenged the use of eminent domain as violative of the Fifth Amendment's Public Use Clause. However, (a) the District Court properly concluded that plaintiffs could not overcome the deferential standard of review applicable to public use challenges,

(b) controlling precedent establishes that the uses served by this project are genuine public uses, and (c) plaintiffs' contentions as to the supposed inadequacy of the public uses are without merit.

A. The District Court Properly Analyzed the Controlling Public Use Principles

In considering a challenge under the Public Use Clause, the courts' "role 'is an extremely narrow one.'" *Brody v. Village of Port Chester*, 434 F.3d 121, 127-28 (2d Cir. 2005), quoting *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102 (1954). A court must "not substitute its judgment for a legislature's judgment as to what constitutes a public use, 'unless the use be *palpably without reasonable foundation.*'" *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329 (1984) (emphasis added), quoting *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680, 16 S.Ct. 427, 429 (1896). *See also Berman*, 348 U.S. at 32, 75 S.Ct. at 102 ("when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive," and "[t]his principle admits of no exception merely because the power of eminent domain is involved").

Based on *Berman*, *Midkiff* and the Supreme Court's most recent public use decision, *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005), the District Court recognized that a taking

fails the public use requirement if and only if the uses offered to justify it are “palpably without reasonable foundation,” *Midkiff* at 241, such as if (1) the “sole purpose” of the taking is to transfer property to a private party, *Kelo* at 477, *Midkiff* at 245, or (2) the asserted purpose of the taking is a “mere pretext” for an actual purpose to bestow a private benefit, *Kelo* at 478.

(SA 98.) The District Court correctly determined that the Atlantic Yards project fits neither category, because it is undisputed that the project furthers numerous substantial public purposes.

Reviewing the Amended Complaint’s factual allegations, the Court concluded that plaintiffs’ objection to ESDC’s exercise of eminent domain “concerns only the measure of a public benefit – as opposed to its existence” (SA 99). Thus, “although plaintiffs allege that the net gain in tax revenues will be lower than Defendants have predicted, they do not allege that there will no net gain,” and “although Plaintiffs’ allege that Defendants’ claims about job creation are overstated, they do not suggest that the Project will fail to create jobs” (SA 99). Furthermore, while plaintiffs asserted that the portion of the project area that they called the “Takings Area” was not blighted, they did “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” (SA 99-100).⁸ Regarding housing, although

⁸ The Amended Complaint divided the project’s footprint into two components: (1) the properties owned by the MTA or situated within ATURA; and (2) what the Amended Complaint entitled the “Takings Area” (A 58.15 [¶ 55]), consisting of two city blocks (Blocks 1127 and 1129) and part of a third (Block 1128). A diagram showing these areas and plaintiffs’ properties is in the record (*see* A 960).

plaintiffs alleged that the project “might result in fewer units of affordable housing than Defendants predict” and that “the affordable units ... will not remotely offset the impact of the luxury housing’ that the Project will provide,” plaintiffs did “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” (SA 100). Finally, plaintiffs did not allege that the project’s “non-quantifiable public benefits,” including the new arena, the attraction of a major league sports franchise to Brooklyn, and the other new uses planned for Vanderbilt Yards “will fail to benefit the public by their very effectuation, and not merely by their power to generate revenue” (SA 101).

The Court held that the issue of “[w]hether the Project will in fact achieve” its objectives “is not a matter that this court may consider” (SA 100 n. 12). This conclusion was compelled by *Midkiff*, where the Supreme Court cautioned that, “[w]hen the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings ... are not to be carried out in the federal courts.” 467 U.S. at 242-43, 104 S.Ct. at 2330. The Supreme Court specifically reaffirmed this principle in *Kelo*. 545 U.S. at 488, 125 S.Ct. at 2667. Therefore, the District Court was correct in concluding that plaintiffs’ allegations, “if proven, would not permit a reasonable juror to conclude that the ‘sole purpose’ of the Project is to confer a private benefit” (SA 106).

B. The Uses That Support This Project Are Public Uses

The District Court's conclusion also was compelled by the courts' long recognition of the project's purposes as proper public uses.

1. **Elimination of blight.** In *Berman v. Parker*, the Supreme Court not only unanimously recognized blight elimination as a public purpose justifying eminent domain, but it sustained the inclusion of non-blighted sites in the condemnation, so that a whole neighborhood can be redeveloped and the likelihood of blight's recurrence can be minimized. 348 U.S. at 35, 75 S.Ct. at 104 ("Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending," because "it is the need of the area as a whole which Congress and its agencies are evaluating"). See also, e.g., *Rosenthal & Rosenthal, Inc. v. N.Y.S. Urban Development Corp.*, 771 F.2d 44, 46 (2d Cir. 1985) (even though the plaintiffs' building was not blighted, its condemnation "to make way for the redevelopment of [a] blighted area is a classic example of a taking for a public use or purpose within the law of eminent domain").

Faced with this authority, plaintiffs claimed that the portion of the project's footprint in which their properties are situated, which they called the "Takings Area," never was blighted until FCRC affiliates began to acquire properties there (see A 58.24-58.25 [¶¶ 99-106]). Plaintiffs did not dispute that the MTA's Vanderbilt Yards is a huge open trench that creates an ugly barrier

separating properties on one side of the Yards (which are part of ATURA) from the so-called “Takings Area” on the other side of the Yards. Nor did plaintiffs dispute that ATURA repeatedly has been designated by the City as blighted for forty years, and that, despite redevelopment elsewhere in ATURA, the portion of ATURA within the project footprint remains blighted. It is the two and a fraction blocks of the project’s footprint outside ATURA that, according to plaintiffs, were not really blighted. These allegations do not suffice to avoid dismissal.

First, the courts will not entertain disputes about the boundary line that is drawn by a condemnor that is acting to eliminate blight. *Berman*, 348 U.S. at 35, 75 S.Ct. at 104 (the condemnor’s determination of “the need of the area as a whole” controls, because “community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis,” and “[i]f owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly”). *See also Rosenthal & Rosenthal*, 771 F.2d at 46. Therefore, plaintiffs are seeking “to substitute the landowner’s standard of the public need” for ESDC’s standard, which is proscribed by *Berman*. 348 U.S. at 35, 75 S.Ct. at 104.

Second, the blight study that ESDC commissioned (*see* A 213-593) comprehensively documented the condition of the properties in the project’s

footprint on a parcel-by-parcel basis, and compiled exhaustive evidence to support ESDC's determination that there was significant blight within the so-called "Takings Area" prior to the acquisition of properties by FCRC affiliates.⁹

Third, plaintiffs' claim that the so-called "Takings Area" was not blighted before FCRC affiliates acquired properties there is belied by the outcome of a prior litigation. An applicant for approvals that are subject to SEQRA is precluded from changing the affected property while the application is pending (*see* 6 NYCRR § 617.3(a)), subject to an emergency exception (§ 617.5(c)(33)). Here, as FCRC affiliates acquired properties, their structural engineer determined that several buildings within the purportedly non-blighted "Takings Area" were so structurally unsound that they posed a danger of imminent collapse and thus threatened public safety. ESDC concurred and issued an emergency declaration

⁹ The blight study is specifically referred to in the Amended Complaint (*see* A 78-79 [¶¶ 85-88]) and therefore properly may be considered (*see* n. 4, *supra*). For example, the blight study reported that in the small portion of Block 1128 that is within the project's footprint, the mid-block area was "overgrown with weeds, enclosed by a chain-link fence, and occupied by several parked cars, many of which appear to be abandoned" (A 243). On Block 1129, two lots were vacant (A 406), and a third had broken-down cars and auto parts and was littered with debris (A 409-11). The warehouse on another lot had windows that "have been sealed with cinder blocks or glass block," while "scaffolding covers the majority of the building's ground-floor ... , contributing to the abandoned appearance of the building," which also displayed graffiti, large cracks in the façade and an interior that was in poor condition (A 243, 420-30). The three buildings on another lot were so "severely dilapidated" that FCRC's structural engineer recommended their prompt demolition (A 244, 444-54). Another lot was "in a state of extreme disrepair," being "overgrown with weeds and littered with trash and surrounded by a chain link fence ... topped with barbed wire," while "[g]raffiti covers many of the surfaces on the lot, including the facades of the five-story warehouse, two dilapidated structures adjacent to the main building, and the wall of the building on [the] adjacent lot," with "[a]ll of the windows on the warehouse building having been permanently sealed" (A 244, 466-73).

authorizing immediate demolition. Project opponents (including several plaintiffs in this action) sued to challenge ESDC's emergency declaration and enjoin the demolition (*see* A 866-92). The State Supreme Court sustained ESDC's emergency declaration (*see* A 894-938). The Appellate Division unanimously affirmed. *Develop Don't Destroy Brooklyn v. Empire State Development Corp.*, 31 A.D.3d 144, 816 N.Y.S.2d 424 (1st Dep't 2006), *lv. to app. denied*, 8 N.Y.3d 802, 830 N.Y.S.2d 698 (2007). This determination conclusively demonstrates that there indeed was significant blight within the "Takings Area" before FCRC affiliates acquired properties there.¹⁰

2. The arena. The new arena, designed by celebrated architect Frank Gehry, is a centerpiece of the project, and will enable the New Jersey Nets basketball team to relocate to Brooklyn. The Nets will be the first major league sports franchise in Brooklyn since the Dodgers left fifty years ago. The Nets' presence is intended to both symbolize and stimulate Brooklyn's continuing resurgence.

¹⁰ In addition to these conditions, the blight study found that the diverse ownership of the numerous parcels contributed to blight by preventing site assemblage for comprehensive redevelopment (*see* A 218]). Diversity of ownership has been recognized as a factor that can indicate blight. *See Rosenthal & Rosenthal, Inc. v. N.Y.S. Urban Development Corp.*, 605 F.Supp. 612, 618 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985). The blight study also found evidence that the incidence of crime was higher in the project area than in surrounding areas (A 483-88).

The use of eminent domain to create stadiums and other sports arenas is so well-established that it was acknowledged as a proper public use by the dissenters in *Kelo*. Justice O'Connor's dissent thus stated that "the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use – such as with ... a stadium." 545 U.S. at 498, 125 S.Ct. at 2673. *See also Southeast Land Development Associates, L.P. v. District of Columbia*, No. Civ. A 05-1413 RWR, 2005 WL 3211458 (D.D.C. Nov. 1, 2005) (taking property for construction of a baseball stadium does not violate the Public Use Clause); *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960 (5th Cir. 1995) (a baseball stadium parking lot is a public use); *cf. Ludtke v. Kuhn*, 461 F.Supp. 86 (S.D.N.Y. 1978) (observing that New York City had acquired title to Yankee Stadium and surrounding land by eminent domain).

3. Affordable housing. It is equally well established that the use of eminent domain for housing purposes complies with the Public Use Clause. *See, e.g., Midkiff*, 467 U.S. at 243, 104 S.Ct. at 2330 (condemnation to address anomalies in a state's residential property market satisfied the Public Use Clause); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527 (1989) (condemnations to create low-income housing served a public purpose).

Here, the Amended Complaint acknowledged that the project will include 2,250 units of affordable housing, but sought to impugn the project by asserting that little of this housing will serve low-income families (*see* A 58.25-58.26 [¶¶ 107-15]). The District Court rejected these allegations as irrelevant, holding that, while the issue of whether the new housing is “sufficiently affordable may be an important political question,” the “Constitution does not enshrine Plaintiffs’ value judgment that a taking lacks a public purpose if it results in ‘luxury’ as opposed to ‘affordable’ housing, and the constitutionality of this taking does not depend on the relative numbers of the planned housing units priced at, above, or below market rate” (SA 100-101).

Even if the District Court erred in dismissing plaintiffs’ assertions as irrelevant (and it did not err), the project’s affordable housing scheme is completely consistent with a wide array of New York State and City policies that create incentives for the construction by private developers of below-market-rate (*i.e.*, “affordable”) housing for middle-income households.¹¹ Here are just a few examples:

¹¹ Contemporary usage generally differentiates between “low-income,” “moderate-income” and “middle-income.” The definitions are based on Areawide Median Income (“AMI”) as determined annually by the United States Department of Housing and Urban Development (“HUD”), which is the standard reference. For 2006, the New York AMI as set by HUD is \$70,900. *See* http://www.huduser.org/Datasets/IL/IL06/ny_fy2006.pdf (A 990). “Low income” is defined as less than 80% of AMI (*see* 42 U.S.C. § 1437a(b)(2)). The New York City Housing Development Corporation defines “middle-income” as earning a maximum income equal to 175% of AMI (*see* A 982).

1. New York State created the Mitchell-Lama program in 1955 (Article 2 of the Private Housing Finance Law), providing for government-assisted financing and local real estate tax abatements to encourage private investment in new housing for middle-income households. *See Columbus Park Corp. v. Dep't of Housing Preservation and Development*, 80 N.Y.2d 19, 23, 586 N.Y.S.2d 554, 555 (1992) (“The Mitchell-Lama Law ... is a government program for encouraging the private development of low and middle income housing”).

2. The Bloomberg Administration has published a white paper entitled *The New Housing Marketplace: Creating Housing for the Next Generation 2004-2013*, which sets forth the City’s housing agenda and states that one of “[t]he key goals of our plan” is to “[c]reate 92,000 units of affordable housing for 280,000 New Yorkers, including an ambitious middle-class housing program for the 21st Century” (A 964) – a goal that is repeated in a 25-year master plan entitled “PLAN NYC,” published by the City on December 12, 2006, and available on-line (*see* <http://www.nyc.gov/html/hpd/downloads/pdf/10yearHMPlan>). Pursuant to this initiative, Mayor Bloomberg and the Port Authority recently agreed to the transfer of 24 acres of land to the City for new middle-income housing in Long Island City. This project will contain approximately 5,000 residential units for families earning up to \$145,000 annually (*see* A 983-85).

3. The City’s Zoning Resolution contains inclusionary housing incentives under which owners may construct larger residential buildings than otherwise would be allowable if they include units for lower-income residents or, in some cases, build them at other locations. *See* Zoning Resolution §§ 23-90 through 23-953. The City’s recent rezonings of Hudson Yards (the underutilized portion of Manhattan between Midtown and the Hudson River) and West Chelsea include provisions pursuant to which such bonuses are available for the development of housing for “lower income,” “moderate income” and “middle income” households, with a “middle income household” being defined as one “having an income equal to or less than” 175% of “the income limits ... for New York City residents established by [HUD] for lower income families receiving housing assistance payments” Zoning Resolution §§ 93-231, 98-261. As HUD’s New York region Areawide Median Income for 2006

is \$70,900 (*see* n. 11, *supra*), housing for a family with an annual income of \$124,075 satisfies these statutory requirements.

These programs all show that New York State and City have actively pursued, for decades, various initiatives to address the shortage of housing that is affordable to middle-class and working-class families. In *Midkiff*, the Supreme Court upheld as consistent with the Public Use Clause Hawaii's use of eminent domain to address anomalies in its residential housing market arising from the concentration of fee ownership in a few families. *A fortiori*, New York may use eminent domain to address anomalies in its own local housing market.

4. Mass transit improvements. Takings of private property for mass transit and other public transportation purposes plainly satisfy the Public Use Clause. *See, e.g., Kelo*, 545 U.S. at 498, 125 S.Ct. at 2673 (O'Connor, J., dissenting) ("a railroad" is a public use even if owned by "private parties"); *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422-23, 112 S.Ct. 1394, 1404 (1992) (condemnation to facilitate intercity rail passenger service furthers a public use); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 706, 43 S.Ct. 689, 692 (1923) ("a taking of property for a highway as a taking for public use has been universally recognized, from time immemorial").

5. Public open space. Although the District Court did not expressly rely on the project's creation of several acres of open space as evidence that the project will serve a public purpose, condemnation to create parks and other

public open space clearly serves a public use. *Shoemaker v. United States*, 147 U.S. 282, 297, 13 S.Ct. 361, 390 (1893) (“land taken in a city for public parks and squares, by authority of law, where advantageous to the public for recreation, health, or business, is taken for a public use”).

C. Plaintiffs’ Assertions as to the Supposed Inadequacy of the Public Uses Are Without Merit

The various contentions advanced by plaintiffs to attack the District Court’s decision are completely without merit.

1. Plaintiffs’ “Supplemental Allegations” Are Both Improper and Irrelevant

In their brief, plaintiffs offer several “supplemental allegations” that never were presented to the District Court (*see* Pl. Br. at 15-21), but that, if “[g]iven the opportunity,” they “would include ... in a supplemental complaint, pursuant to Fed. R. Civ. P. 15(d)” (Pl. Br. at 15). However, Rule 15(d) does not empower this Court to grant plaintiffs leave to supplement the Amended Complaint, nor does it allow supplemental pleadings when the matter no longer is pending in the District Court. *See, e.g., Walker v. Felmont Oil Corp.*, 262 F.2d 163, 165 (6th Cir. 1958) (denying a request to file a supplemental complaint asserting issues not considered by the District Court, because Rule 15(d) does not apply to Courts of Appeals); *Brill v. General Industrial Enterprises, Inc.*, 234 F.2d 465, 470 (3d Cir. 1956) (same).

It is well-settled, moreover, that “a federal appellate court does not consider an issue not passed upon below.” *In re Ishihara Chemical Co. Ltd.*, 251 F.3d 120, 127 (2d Cir. 2001), quoting *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877 (1976) (declining to consider “facts and issues” not raised in the District Court). *See also Diesel v. Town of Lewisboro*, 232 F.3d 92, 108 (2d Cir. 2000) (observing that arguments not raised before the District Court have been waived).

Here, moreover, plaintiffs’ “supplemental allegations” are based largely on information that appears to have been publicly available prior to the District Court’s decision. Plaintiffs never sought to raise these issues before the District Court and never requested permission to file a Second Amended Complaint. Similarly, plaintiffs never moved in the District Court pursuant to Rule 60(b), Fed. R. Civ. P., for relief from the judgment on the basis of newly discovered evidence. Plaintiffs’ failure to present their “supplemental allegations” to the District Court bars their presentation on appeal.

Furthermore, even if the Court were to consider these supplemental allegations, the allegations would not alter the fact that the project has numerous public purposes, and that plaintiffs’ contentions, as the District Court recognized, concern “only the measure of a public benefit – as opposed to its existence”

(SA 99) – and thus are barred by Supreme Court precedent such as *Midkiff* and *Kelo*.¹²

2. The Project’s Purposes Are Not a “Mere Pretext” for an Actual Purpose to Bestow a Private Benefit

The core of plaintiffs’ claim is that the purposes justifying the Atlantic Yards project are “mere pretexts,” and that the project’s “actual purpose” is to bestow a private benefit on FCRC (A 58.2-58.3, 58.21-58.28 [¶¶ 89-125], 58.29-58.33 [¶¶ 131-140]). In considering this claim, the District Court looked to Justice Kennedy’s concurrence in *Kelo* (SA 102):

A court applying a rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying a rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

¹² Every supplemental allegation is, moreover, either irrelevant or untrue – or both. The MTA’s Hudson Yards RFP is entirely irrelevant to the Vanderbilt Yards RFP, and the MTA, which issued both RFPs, is not even a defendant in this action. Plaintiffs’ unattributed assertion that the City’s financial contribution to the project has increased from \$100 to \$205 million, as well as their assertion that financial calculations for one site were omitted from one report to ESDC, might affect the project’s finances if true, but would not alter the fact that the project includes numerous public uses. The decision in *752 Pacific Carlton LLC v. Pacific Carlton Development Corp.*, 14 Misc.3d 1237(A) (Table), No. 32819/03, 2007 WL 656309 (Sup. Ct. Kings Co. Mar. 1, 2007), concerned a private contractual dispute between fee owners that oppose the project and long-term ground lessees that attempted to assign their leaseholds to an FCRC affiliate; neither FCRC nor its affiliate was a party to the lawsuit or was found to have engaged in misconduct. Finally, the report entitled *Delivering the Promise of New York State: A Strategy for Economic Growth and Development*, which was prepared for ESDC by a consultant, is quoted in a misleading and out-of-context manner, because the quoted language specifically refers to two ESDC subsidiaries that have nothing to do with the Atlantic Yards project.

545 U.S. at 491, 125 S.Ct. at 2669. Justice Kennedy continued that “[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit,” although the review should proceed “with the presumption that the government’s actions were reasonable and intended to serve a public purpose.”

545 U.S. at 491, 125 S.Ct. at 2669.

Using Justice Kennedy’s opinion as guidance, the District Court held that “[p]laintiffs have not set forth facts supporting a plausible claim of an unconstitutional taking,” and that plaintiffs could not satisfy the “mere pretext” test by simply alleging that “the purported purposes of the Project are dubious” (SA 102). Instead, the District Court held, *Kelo* required plaintiffs to allege that the “actual purpose” of the project was to bestow a private benefit on FCRC (SA 103), and to allege facts that rendered the assertion plausible (*see* SA 104-05).

In *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955 (2007), the Supreme Court held that, to state a claim in conformity with Rule 8(a)(2), Fed. R. Civ. P., a plaintiff must allege “plausible grounds” to support the claim, and must put forth more than “labels and conclusions” but, rather, factual allegations that are “enough to raise a right to relief above the speculative level.” *Id.* at 1964-65. *Bell Atlantic* is consistent with this Court’s prior rulings under Rule 12(b)(6). This Court has emphasized repeatedly that a plaintiff must allege

facts that are sufficient to allow a reasonable inference of a right to relief. *See, e.g., E & L Consulting, Ltd. v. Doman Industries Ltd.*, 472 F.3d 23, 28 (2d Cir. 2006) (“Conclusory statements are not a substitute for minimally sufficient factual allegations”); *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 201 (2d Cir. 2006) (“a complaint consisting only of naked assertions, and setting forth no facts upon which a court could find a violation ... , fails to state a claim”); *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006) (“Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice”); *Mason v. American Tobacco Co.*, 346 F.3d 36, 39 (2d Cir. 2003) (“Deductions or opinions couched as factual allegations” are not given a “presumption of truthfulness”). Similarly, this Court will not credit “unwarranted deductions of fact drawn by” the plaintiff. *Scalisi v. Fund Asset Management, L.P.*, 380 F.3d 133, 137 (2d Cir. 2004). *See also Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 174-75 (2d Cir. 2005) (same).

This Court interprets *Bell Atlantic* as requiring plaintiffs to meet a “plausibility standard,” which “obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.” *Iqbal v. Hasty*, 490 F.3d 143, 153 (2d Cir. 2007). *Bell Atlantic* applies to all civil cases. *See Iqbal* (prisoner’s civil rights case); *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, ___ F.3d ___, No. 05-5132-cv, 2007 WL

1989336 (2d Cir. July 11, 2007) (securities fraud case); *Roth v. Jennings*, 489 F.3d 499 (2d Cir. 2007) (shareholder disgorgement case).

Here, plaintiffs concede that “the district court determined – correctly – that the ‘plausibility’ gloss on the motion to dismiss standard announced in *Bell Atlantic v. Twombly* ... was not confined strictly to the antitrust conspiracy claims” (Pl. Br. at 23), but plaintiffs immediately take this concession back by asserting that the District Court erred in “borrow[ing] a concept from *Bell Atlantic* unique to Sherman Act § 1 claims” (Pl. Br. at 23).

Plaintiffs do not challenge the District Court’s statement that the “sole or primary fact alleged by plaintiffs in [*Bell Atlantic*] was parallel conduct,” and that the Court in *Bell Atlantic* considered parallel conduct, without more, to be “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market” (Pl. Br. at 23-24). Plaintiffs argue, however, that the District Court “leaped” to a “remarkable conclusion” when it observed that, as in *Bell Atlantic*, “the facts alleged by Plaintiffs in the present case – the taking of property from some private parties and the resulting benefit to other private parties – *are as consistent with lawful behavior as with unlawful behavior*” (Pl. Br. at 24) (emphasis in original). According to plaintiffs, the District Court “dismissed a well pleaded complaint alleging facts that give rise to a powerful inference of

Defendants’ unconstitutional purpose or intent, because it is also *possible* that Defendants’ conduct was lawful” (Pl. Br. at 24) (emphasis in original).

Plaintiffs’ contentions miss the point, because the District Court was correct in concluding that a taking of property that benefits private parties is “as consistent with lawful behavior as with unlawful behavior” (SA 105). The Supreme Court has explicitly held that “[t]here is no doubt that the Constitution permits property to be transferred from one private party to another if the transfer serves a public use.” *Berman*, 348 U.S. at 33-34, 75 S.Ct. at 102-03. Therefore, as the District Court recognized (SA 103-104), this case *is* analogous to an antitrust case in which an allegation of parallel conduct is “consistent with conspiracy, but just as much in line with a wide swath of” lawful behavior. *Bell Atlantic*, 127 S.Ct. at 1964. In both the antitrust context and the eminent domain context, it is necessary to allege facts sufficient to give a claim of unlawful conduct plausibility. Given the authentic public purposes served by the Atlantic Yards project, the District Court was correct in concluding that the Amended Complaint did not allege “plausible grounds to infer ... an actual purpose to bestow a private benefit” (SA 105-106).

The supposedly “well pleaded” factual allegations that, according to plaintiffs, “give rise to a powerful inference of [an] unconstitutional purpose or intent” (Pl. Br. at 24) really amount to conclusory assertions that “defendants

intend[ed] to benefit FCRC,” and that their “desire to confer a private benefit to FCRC was a substantial, motivating factor, in defendants’ decision to seize plaintiffs’ property and transfer it to FCRC” (*see* SA 103, quoting the Amended Complaint (A 58.29-58.30 [¶¶ 133, 137])). As the District Court recognized, “[p]laintiffs do not allege any facts suggesting that any Defendant had any reason to bestow a private benefit on any private party” (SA 103). 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 are ‘mere pretexts’ within the meaning of *Kelo*” (SA 103).

Contrary to plaintiffs’ assertion, moreover (*see* Pl. Br. 34), the District Court’s analysis does not represent a heightened pleading standard. Instead, it follows this Court’s repeated insistence that, on a motion to dismiss, conclusory allegations are not entitled to the presumption of truth that applies to allegations of fact. *See also, e.g., Iqbal*, 490 F.3d at 153. Here, the emptiness of plaintiffs’ assertions was exposed at the hearing before the District Court when plaintiffs’ counsel responded to a question by Judge Garaufis as to the basis of plaintiffs’ claim that Mayor Bloomberg’s role in the approval of this project was improper:

Mayor Bloomberg’s background is, he’s a businessman. What happened here is, a businessman approached another businessman and said, Hey, I have a great deal. Let’s do a deal together. And he said, I love it. Let’s do the deal. He completely jettisoned his responsibilities as a public official

(Mar. 30, 2007 transcript, at 100.) This assertion is paranoid fantasy, not a well pleaded fact that “nudges [plaintiffs’] claims across the line from conceivable to plausible ...” *Bell Atlantic*, 127 S.Ct. at 1974.¹³

3. Plaintiffs’ Conclusory Statements About Defendants’ Allegedly Improper Motives Are Irrelevant

Plaintiffs assert that, “[i]n this action, Defendants’ motive or intent is *the* issue,” and that it is a “quintessential question of fact” that “cannot be resolved as a matter of law at the pleading stage” (Pl. Br. at 41) (emphasis in original). This proposition is entirely fallacious.

Plaintiffs derive their proposition that “motive or intent” is controlling from references in *Kelo* to the “purpose” of the condemnation and to what was “intended,” the trial court’s references in *Kelo* to the “primary motivation” of the development plan, and Justice Kennedy’s references to “favoritism” (Pl. Br. at 37-40). However, the Atlantic Yards project will provide myriad public benefits that are conceded by plaintiffs and have long been recognized as satisfying the Public Use Clause. Therefore, conclusory allegations of improper “motive” or “favoritism” do not raise material factual questions.

¹³ Plaintiffs assert that “the district court made little to no mention of Plaintiffs’ critical factual allegations” (Pl. Br. at 35-37). The District Court’s failure to mention particular allegations only reflects their irrelevance to a public use claim where the project manifestly is imbued with significant public purposes.

The references in *Kelo* to “intent” and the use of similar terms are akin to references to “legislative intent,” which is different from the subjective intent of an individual actor. It would repudiate *Kelo* itself, as well as *Midkiff* and other authorities, to decide that plaintiffs’ conclusory claims require a *de novo* judicial inquiry into the subjective motives of decision makers in the political branches of government, or into the strengths and weaknesses of the policy considerations that motivated their decisions, or the likely efficacy of their determinations in achieving public purposes. Recognizing that decisions to condemn property “are by their nature political accommodations of competing concerns,” this Court has specifically rejected “examination of the thought processes of those exercising the legislative prerogative” to condemn as “a judicial invasion into an area exclusively reserved for the legislature.” *Brody v. Village of Port Chester*, 434 F.3d at 136. Similarly, the District Court made it clear during oral argument that it understood the inappropriateness of inquiry into subjective motives:

Do you think it would be appropriate for there to be discovery as to the reasons why members of the Board of Estimate rea[ched] the agreement that they made at 3:30 in the morning one morning, frustrat[ed] over whether they are also going to, you know, approve some park project in the Bronx in order to come to that conclusion, which is the way, would you agree, that the Board of Estimate operated ... ?

Aren’t you asking for more of the ESDC than was ever required in the Board of Estimate or most other legislative bodies about land use?

(Mar. 30, 2007 transcript, at 111.)¹⁴

Comparable allegations also have been rejected in prior cases in this Circuit. In *Rosenthal & Rosenthal, Inc. v. N.Y.S. Urban Development Corp.*, 605 F.Supp. 612 (S.D.N.Y.), *aff'd*, 771 F.2d 44 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018, 106 S.Ct. 1204 (1986), the plaintiffs claimed that the Times Square redevelopment project had been enlarged to include their properties for the “sole purpose” of increasing the profits to be derived by a private developer who allegedly had been selected because of his relationship with Mayor Koch. 605 F.Supp. at 616. The District Court rejected this argument, because the complaint itself showed that the project would serve broad public purposes:

It is clear, then, that a substantial, legitimate public purpose underlies the Project, and that a large scale redevelopment plan such as is described in the complaint is rationally related to serving that purpose.

¹⁴ Justice Kennedy’s summary of the trial court’s decision in *Kelo*, quoted by plaintiffs at length (Pl. Br. at 39-40), does not support plaintiffs’ claim that there should be a factual inquiry into defendants’ “motives” or “intentions.” *Kelo* came to the Supreme Court on certiorari to the Connecticut Supreme Court, having been initiated in the Connecticut state court system. Connecticut law does not establish procedures comparable to New York’s EDPL, which requires a condemnor to hold a public hearing and make a record that then can be reviewed by the courts. In Connecticut, unlike New York, a condemnor may make a determination to condemn without holding a hearing or making a record. Therefore, a condemnee who wishes to challenge the condemnor’s determination must commence an action in the Connecticut Superior Court and move for an injunction, and the record supporting the condemnation is assembled in the trial court, not in proceedings before the condemnor. *See, e.g., Berne v. Town of Stratford*, 23 Conn. App. 554, 556-57, 583 A.2d 136, 137-38 (App. Ct. 1990). Plaintiffs’ citation to *Johnson v. Ganim*, 342 F.3d 105, 117 (2d Cir. 2003), for the proposition that, when “a factual issue exists on the issue of motive or intent, a defendant’s motion for summary judgment ... must fail” (Pl. Br. at 41), is completely inapposite, because that case had nothing to do with eminent domain or legislative purposes. Instead, it involved the alleged termination of an employee in retaliation for his exercise of free speech.

Plaintiffs would have us avoid this conclusion by permitting them to prove that the “true motivation” behind the project is private profit. Such an argument flies in the face of reality, even as portrayed in plaintiffs’ own pleading. It is not enough that the Project planners were partially motivated by the desire to make money for private developers. Such mixed motivations seem politically inevitable and perhaps are necessary to the success of this kind of project. To constitute a purely private taking and thus fit within the narrow exception of *Midkiff*, plaintiffs must demonstrate that no public purpose exists for the Project. This they cannot do.

Id. at 617-18. This Court affirmed. 771 F.2d 44 (1985). Similarly, in *Didden v. Village of Port Chester*, 304 F.Supp.2d 548 (S.D.N.Y. 2004), *aff’d*, 173 Fed. Appx. 931 (2d Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 1127 (2007), the plaintiffs challenged the condemnation of their property as motivated by the pursuit of “private interests ... rather than the interests of the public.” 304 F.Supp.2d at 557. The District Court sustained the condemnation, holding that the plaintiffs’ claims were time-barred but that, alternatively, even if they were timely, the project’s public purpose was established, and even “bad faith” could not “have transformed that public purpose into a private purpose.” *Id.* at 559. This Court affirmed, rendering its decision *after* the Supreme Court’s decision in *Kelo*. *See* 173 Fed. Appx. at 933.

4. The Role of the Private Developer in This Case Does Not Justify a Departure From the Legal Principles Requiring Deferential Judicial Review of the Project’s Public Uses and Purposes

According to plaintiffs, “the evidence that most convincingly exposes Defendants’ true intent or purpose in condemning [the] properties is a comparison

of the sequence and nature of events preceding the takings in this action as compared to the reported decisions that have sustained takings” and “those instances where courts have enjoined takings on public use grounds” (Pl. Br. at 44).

Plaintiffs theorize that a taking raises a public use claim if it effectuates a project that was conceived of in the first instance by a private developer, regardless of whether the project provides a public benefit.¹⁵ They argue that the alleged conception of the Atlantic Yards project by FCRC turns the rules and presumptions that normally apply to public use cases on their head, and that the courts should disregard the deference ordinarily due to the judgments of other branches of government.

This never has been and cannot be the law. Were it the law, it would penalize private developers who approached condemnors with sound proposals. Furthermore, it would be especially inappropriate here, because large-scale public-

¹⁵ Plaintiffs suggest that their conclusory allegations regarding the initial conception of the project were sufficient to withstand the motions to dismiss because the facts alleged were circumstantial evidence of improper motive (*see* Pl. Br. at 42-43). However, the conceded public uses to be served by the project render plaintiffs’ arguments about motive irrelevant. The cases cited by plaintiffs are inapposite, because in those cases subjective intent was an element of each plaintiff’s claim. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003) (employment discrimination); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555 (1977) (racial discrimination); *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127 (1955) (willful tax evasion); *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988) (employment discrimination); *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987) (public school segregation); *Mallette v. Scully*, 752 F.2d 26 (2d Cir. 1984) (manslaughter).

private development in New York City is inherently complicated and difficult, and FCRC has a record of success in the implementation of sophisticated large-scale public-private projects in Brooklyn (MetroTech Center and Atlantic Terminal) and elsewhere, including the new headquarters building for The New York Times Company in Manhattan (*see West 41st Street Realty LLC v. N.Y.S. Urban Development Corp.*, 298 A.D.2d 1, 3, 744 N.Y.S.2d 121, 123 (1st Dep't), *app. dsmsd.*, 98 N.Y.2d 727, 749 N.Y.S.2d 476 (2002), *cert. denied*, 537 U.S. 1191, 123 S.Ct. 1271 (2003)).

The District Court captured the fallacy of plaintiffs' theory during oral argument:

If an area has been designated a blighted area, ... or I drive by there every business day for six years and I say, This is an area that is undeveloped, considering what's all around it ... , and I am an entrepreneur, I'm in real estate, all around me, in the entire City of New York, they are building high-rise condos and apartments and office buildings, and [here] is an area that is close to transportation, that is served by numerous arterial highways and large boulevards and it's near the center city and there's just nothing there except ... an open pit with railroad tracks, and I say, Wow, this is a great place to put a major development, and I think I can do it, which will serve several purposes – one is, I'll profit from it, I'll provide a use that is needed by the community ... and it's already been determined that this is an area that is ripe for development because it's ... in large measure fallow in terms of its highest and best use, it's been recognized by the government on repeated occasions that it is such and is designated as such, and I take that to the agency which is sponsoring or developing plans for such blighted areas, among others, and that's the process that brings us to a determination that there ought to be a redevelopment of that area, and then the agency ... puts out a notice, an RFP or whatever, I respond to it because it was my idea in the first place and I

have the best plan, and I get selected and here I am, why doesn't that comport – why isn't that a lawful type of result? What's the problem with that?

(Mar. 30, 2007 transcript, at 92-93.) Plaintiffs' response was that the project violates the Public Use Clause because the project site was "chosen by Ratner," who "approached ... the Mayor," after which "a decision was made [to] bypass all city review procedures [and] zoning codes" (*id.* at 95). This response simply restates plaintiffs' unsupported and non-existent rule. It ignores the fact that the MTA requested and obtained bids for the right to build over the Vanderbilt Yards, and also ignores the UDC Act, which obligates ESDC to "encourag[e] maximum participation by the private sector" in any project, Unconsol. Laws § 6252 (*see also* § 6260(c)(3)), and authorizes ESDC to override "the requirements of local laws, ordinances, codes, charters or regulations" whenever "in the discretion of the corporation such compliance is not feasible or practicable." Unconsol. Laws § 6266(3).

To support their mythical rule that the project's public uses are pretextual because the project was conceived of by a private developer, plaintiffs invoke *Kelo*, particularly Justice Kennedy's concurrence (*see* Pl. Br. at 33-35). However, neither the majority opinion in *Kelo* nor the concurrence expresses the rule that plaintiffs proffer. Furthermore, unlike the present case, blight removal concededly was not a purpose of the condemnations in *Kelo*. *See* 545 U.S. at 483,

125 S.Ct. at 2664 (“Those who govern the City were not confronted with the need to remove blight”). Instead, “economic development” was the *sole* public purpose justifying eminent domain (545 U.S. at 484, 125 S.Ct. at 2665), which is precisely what has made *Kelo* such a high-profile and controversial decision. Critics of the decision, including the Court’s dissenters, fear that, where it is the sole justification for condemnation, economic development is too susceptible to abuse by condemnors who would expropriate an owner’s property to convey it to another private party with no genuine public purpose – *i.e.*, that economic development lends itself too readily to a “pretextual” public purpose and thus to condemnation abuse. *See* 545 U.S. at 494, 125 S.Ct. at 2761 (O’Connor, J., dissenting) (“Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded”).

Even in *Kelo*, however, the Court’s majority (which included Justice Kennedy) sustained the takings as proper under the Public Use Clause, and explicitly rejected “a heightened form of review” in economic development cases. 545 U.S. at 488, 125 S.Ct. at 2668. In his concurrence, Justice Kennedy relied on three considerations to sustain the condemnations (545 U.S. at 493, 125 S.Ct. at 2670), and the application of those considerations to the present case is irreconcilable with plaintiffs’ public use claim:

1. In *Kelo*, the “taking occurred in the context of a comprehensive development plan,” and “the economic benefits of the project [could not] be characterized as *de minimis*.” Here, too, ESDC’s exercise of eminent domain is part of a comprehensive development plan that is expected to engender substantial public benefits.

2. In *Kelo*, the condemnor “complied with elaborate procedural requirements that facilitate review of the record and inquiry into [its] purposes.” Similarly, here ESDC complied with the procedural requirements of the EDPL, SEQRA and the UDC Act and, in the process, generated an extensive record containing numerous documents that are matters of public record, including documents that were submitted to the District Court by ESDC (*e.g.*, ESDC’s final Determination and Findings [A 1204-1227] and General Project Plan [A 1039-1203]) and a Final Environmental Impact Statement.

3. Finally, in *Kelo*, “[t]he identity of most of the private beneficiaries were unknown at the time the city formulated its plans.” Here, of course, the project’s sponsor is alleged by plaintiffs to have been determined from the outset. The Amended Complaint acknowledges, however, that the MTA issued a request for bids for the right to build over its property, and a competing bid was received (A 58.19 [¶¶ 75-78]). Furthermore, unlike the project in *Kelo*, the Atlantic Yards project is not only about economic development, but includes

numerous other public uses. In addition, the project does not entail simply the transfer of properties from their current private owners to other private parties. Instead, (a) major portions of the project will remain under public ownership by ESDC or the MTA and the LIRR (*see* A 1047, 1077), (b) the City’s Department of Education has an option on space within one of the buildings for use as a school (*see* A 1050), and (c) the project’s open space will be owned by a not-for-profit entity (*see* A 1068).¹⁶

The cases cited by plaintiffs to support their proffered rule (Pl. Br. at 46-49) do not articulate any such rule. Instead, they show that courts have set aside condemnations as violative of the Public Use Clause only where the factual showings were dramatically different from plaintiffs’ allegations here.

For example, *Aaron v. Target Corp.*, 269 F.Supp.2d 1162 (E.D. Mo. 2003), *rev’d*, 357 F.3d 768 (8th Cir. 2004), arose from a private landlord-tenant dispute. It was alleged that a major retailer, Target, had approached the municipality and persuaded it to exercise eminent domain only after the failure of its effort to negotiate a lease extension with the plaintiffs, who were its landlord. The District Court issued a preliminary injunction, holding that the condemnation “would seem to be not for a ‘public use’ as the Fifth Amendment requires, but

¹⁶ Furthermore, some of the residential buildings will contain condominium units (A 1047), while the other buildings will be occupied primarily by residential or commercial tenants. No one knows the identities of the ultimate owners of the condominium units or the tenants of the residential and commercial rental space.

rather for the private use of Target.” 269 F.Supp.2d at 1175. Even on those facts, however, the Court of Appeals reversed, holding that the District Court should have abstained from interfering with the ongoing condemnation process, and that the plaintiffs’ allegations that the condemnation resulted “from the defendants’ conspiring to take plaintiffs’ property for a private use” failed to justify the District Court’s intervention. 357 F.3d at 778-79.

Similarly, in *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001), *app. dsmsd.*, 60 Fed. Appx. 123 (9th Cir. 2003), the District Court issued a preliminary injunction after the municipality acted to condemn a retailer’s lease for a shopping center store to accommodate the demands of the adjoining anchor tenant, Costco, which allegedly had threatened to close its facility and relocate to another community if it could not expand into the neighboring space. In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D. Cal. 2002), a mega-church had acquired 18 acres of vacant land for construction of a new facility, after which the municipality adopted several stratagems to thwart the church, finally adopting a “resolution of necessity” as the predicate for condemning the land for redevelopment as a Costco store. On these facts, the District Court issued a

preliminary injunction, holding that the church had “shown at least a fair question on the merits of its takings claim on public use grounds.” 218 F.Supp.2d at 1230.¹⁷

The foregoing cases thus all involved condemnations that would effectuate a “one-to-one transfer” of property from one private party to another (*Kelo*, 545 U.S. at 487, 125 S.Ct. at 2667), where it reasonably could be inferred that eminent domain had been employed for the exclusive purpose of supporting the interests of a private party. These cases are a far cry from the present case, where numerous substantial public uses are inherent in the project.

Plaintiffs’ final case, *MHC Financing Ltd. Partnership v. City of San Rafael*, No. C 00-3785, 2006 WL 3507937 (N.D.Cal. Dec. 5, 2006), is also inapplicable. It involved a rent control ordinance applicable to mobile home parks, which was challenged as violative of the Public Use Clause. Citing *Kelo*, the District Court denied the city’s motion for summary judgment, because there was no evidence that the ordinance was part of a “carefully considered development plan,” or that the ordinance did more than confer “a private benefit on the incumbent tenants.” *Id.* at *14. However, the case had nothing to do with the exercise of eminent domain or the transfer of real estate or other tangible property

¹⁷ The District Court’s discussion of the public use issue in *Cottonwood Christian Center* was cursory, and the primary basis for the decision was the church’s claims under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc, and the First Amendment’s Free Exercise Clause. *See* 218 F.Supp.2d at 1219-29.

from one owner to another. The court’s reliance on *Kelo* was purely a matter of analogy.

Here, the undisputed benefits of the project to the public at large are numerous. The fact that a private developer also will benefit does not render the condemnations unconstitutional. *See Kelo*, 545 U.S. at 485, 125 S.Ct. at 2666 (“the government’s pursuit of a public purpose will often benefit individual private parties”); *Berman*, 348 U.S. at 33-34, 75 S.Ct. at 103 (“The public end may be as well or better served through an agency of private enterprise than through a department of government,” and “[w]e cannot say that public ownership is the sole method of promoting the public purpose of community redevelopment projects”).

II.

THE AMENDED COMPLAINT DID NOT PLEAD A VIABLE CLAIM THAT THE PROJECT’S APPROVAL DENIED PLAINTIFFS EQUAL PROTECTION

The District Court was correct in deciding that the Amended Complaint does not allege a viable equal protection claim. The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254 (1985). The Amended Complaint contains no allegation that plaintiffs have been treated differently from similarly situated persons (*see* A 58.33-58.35 [¶¶ 149-161]). This deficiency in and of itself

warranted dismissal of plaintiffs' claim. *See Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) ("it is axiomatic that a plaintiff must allege that similarly situated persons have been treated differently").

Furthermore, legislation is presumed to be valid and will be upheld as long as the classification created by the legislation is rationally related to a legitimate state interest. *See City of Cleburne*, 473 U.S. at 439, 105 S.Ct. at 3254. A distinction that is not based on a suspect classification such as race does not offend the Equal Protection Clause if it has some "reasonable basis," even if "in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161 (1970), quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340 (1911). Here, as the District Court recognized, the condemnation of plaintiffs' properties is "rationally related to a legitimate governmental purpose" (SA 107).

Plaintiffs argue that defendants violated their equal protection rights when "they selected Ratner as the sole beneficiary of the taking of plaintiffs' properties" (Pl. Br. at 51). This claim does not assert a denial of equal protection, because plaintiffs do not claim that they are similarly situated to "Ratner." Plaintiffs rely exclusively on cases that hold that "vindictive governmental action violates the Equal Protection Clause" (Pl. Br. at 53-54). However, nothing in the Amended Complaint supports an inference that, in approving the project,

defendants were motivated by malice or vindictiveness towards plaintiffs. Instead, the Amended Complaint asserts that defendants “have targeted plaintiffs for adverse treatment for no rational purpose,” but “for the purpose of conferring a benefit [on] FCRC” (A 58.33 [¶ 151]). As the District Court held, however, the takings serve a rational purpose, *i.e.*, well-established public purposes that satisfy the Public Use Clause. Therefore, plaintiffs’ allegations cannot state an equal protection claim.

In this Court, in tacit recognition of the Amended Complaint’s deficiencies, plaintiffs assert that defendants violated plaintiffs’ rights “by selecting Plaintiffs’ properties ... instead of the properties of others that are similarly situated [but] more contiguous and thus more geographically desirable than Plaintiffs’ properties” (Pl. Br. at 51). The Amended Complaint contained no such allegation, and plaintiffs’ papers below contained no such allegation. Plaintiffs may not raise this theory on appeal. Their equal protection claim simply is not viable.¹⁸

¹⁸ Plaintiffs alluded to something like their new theory once in the District Court, *i.e.*, at oral argument before Magistrate Judge Levy. When questioned by the Court as to the nature of plaintiffs’ equal protection claim, counsel replied, without any elaboration, that “we are being singled out for adverse treatment than others similarly situated, namely the other people who are right next door to us” (Feb. 7, 2007 transcript, at 51). In response, counsel for the Forest City Ratner appellees stated that this contention “is not in the pleading, and it was never addressed or raised in the brief. It was suggested for the first time today. It is without merit because, in fact, if you look at the one block [*i.e.*, Block 1128] that [is] bifurcated [into] the part being condemned and the part not being condemned, the fact is that the properties not being condemned include a church that is in active use and a number of townhouses that are on the national register of

III.

THE AMENDED COMPLAINT DID NOT PLEAD A VIABLE CLAIM THAT THE APPROVAL OF THE ATLANTIC YARDS PROJECT VIOLATED PLAINTIFFS' DUE PROCESS RIGHTS

The Amended Complaint alleged that defendants violated plaintiffs' rights to due process by:

(1) circumventing local and community review and local zoning regulations; (2) failing to provide sufficient time to meaningfully respond between the release of the Draft Environmental Impact Statement and the hearing on August 23, 2006; (3) failing to provide a hearing that allowed plaintiffs to meaningfully state their objections; and (4) at all times providing an empty, meaningless, process, with a pre-determined outcome.

(A 58.35 [¶ 164].) The District Court correctly held that this claim is foreclosed by this Court's decision in *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005).

There, this Court held that the procedures established by New York's EDPL – precisely the procedures that ESDC followed here – satisfy the requirements of due process. In so doing, this Court held that a condemnee “has

historic places.” (*Id.* at 65.) Had plaintiffs raised this theory in their pleading, defendants would have submitted documents from the public record that show that the portion of Block 1128 not being condemned is not blighted, but contains numerous properties determined to be historic resources by New York State or the New York City Landmarks Preservation Commission, including a church and several rowhouses in officially designated historic districts. Plaintiffs also refer in their brief to the Newwalk condominium on Block 1128 (Pl. Br. at 51), which was not included in the project. Public documents show that this building is a recently converted condominium, and that condemnation of this property alone would have displaced 168 households. There thus was a reasonable basis for excluding these properties from the project.

no constitutional right to participate in the [condemnor's] initial decision to exercise its power of eminent domain,” and that the degree of “public participation” that is provided for in the EDPL goes “well beyond that which is required by the Due Process Clause.” *Id.* at 133, 134 n. 11. Therefore, plaintiffs’ due process claim was untenable under *Brody*.

On appeal, plaintiffs have recharacterized their claim, abandoning the allegations of the Amended Complaint except for the conclusory assertion that defendants “at all times provid[ed] an empty, meaningless process with a predetermined outcome” (Pl. Br. at 55). Based on this reformulation, plaintiffs disingenuously argue that “[t]he district court misconstrued the nature of” their claim (*id.* at 55).

Plaintiffs’ recharacterized due process claim is not tenable, because plaintiffs have not asserted any factual allegations that support a plausible inference that the outcome was predetermined. Plaintiffs rely on two cases, both of which involved inmate disciplinary hearings, for the proposition that “[a] hearing in which the result is arbitrarily and adversely predetermined violates” due process (Pl. Br. at 55). However, neither case is apposite, because the plaintiffs in both cases had identified specific defects in their respective hearings from which a court

could reasonably infer that the outcome of the hearings had been predetermined.¹⁹ Here, at most, plaintiffs have asserted that Governor Pataki and Mayor Bloomberg expressed support for the project prior to ESDC's decision, and that ESDC ultimately approved the project. These allegations do not warrant the conclusion that ESDC's decision to approve the project was preordained.

The project is a large-scale redevelopment of a 22-acre site, and ESDC has devoted substantial time and resources to its review of the project, including a statutorily-required public hearing, a community forum and numerous other public meetings, and it has conducted an elaborate environmental review. In the process, ESDC has created a massive record, containing 26,000 pages. Prudence dictates that ESDC not embark on such a huge expenditure of time and resources unless the project had the support of high governmental officials. However, the inference that plaintiffs seek to draw – that, because of these senior officials' support, the outcome was predetermined – is unreasonable and cannot be accepted.

There is no factual allegation of any act of interference in the process by the Governor, the Mayor or anyone acting on their behalf, nor is there any

¹⁹ In *Francis v. Coughlin*, 891 F.2d 43 (2d Cir. 1989), the inmate alleged that the hearing officer had “suppressed evidence, distorted testimony, and never informed [the inmate] of testimony against him.” *Id.* at 46. In *Ponte v. Real*, 471 U.S. 491 (1985), the prison disciplinary board had refused to allow the inmate to call witnesses in his defense and had not provided any explanation for this refusal.

factual allegation of any other wrongful act. There is no factual allegation of any specific defect in the review process. Therefore, there is no viable claim of a corrupt process. *See, e.g., Ciambriello v. County of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002) (“complaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed,” and “diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct”) (quoting *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993)); *Jaouad v. City of New York*, 39 F.Supp.2d 383, 388-89 (S.D.N.Y. 1999) (dismissing plaintiffs’ claim that Parking Violations Bureau judges were biased due to their relationship to the City’s Department of Finance, because the plaintiffs “failed to allege sufficient facts to show that the PVB’s connection with the DOF results in biased enforcement,” and “[a]ny broad-based allegations of bias on the part of government officials requires a certain level of specificity and substantiation that must be articulated in the complaint”); *cf. Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994) (affirming the dismissal of a claim that a disciplinary board had exhibited racial bias as “conclusory,” while sustaining as viable a claim for gender discrimination where the plaintiff identified specific defects in the hearing and a causal connection between the alleged bias and a flawed outcome).

Plaintiffs have failed to “amplify” their due process claim “with some factual allegations” that “render the claim *plausible*.” *Iqbal*, 490 F.3d at 158 (emphasis in original). Therefore, the claim was properly dismissed.

ANTI-VIRUS CERTIFICATION

Case Name: Goldstein v. Pataki

Docket Number: 07-2537-cv

I, Samantha Collins, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/31/2007) and found to be VIRUS FREE.

/s/ Samantha Collins

Samantha Collins

Record Press, Inc.

Dated: August 31, 2007