UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DANIEL GOLDSTEIN, et al.,	:	
Plaintiffs,	:	CV 06 5827 (NGG) (RML)
v.	:	ECF Case
GEORGE E. PATAKI, et al.,	:	
Defendants.	:	

MEMORANDUM OF LAW OF ESDC DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

Douglas M. Kraus (DK 7497)
Preeta D. Bansal (PB 9452)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Attorneys for Defendants Empire State Development Corporation and Charles A. Gargano

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LAW REVIEW

This memorandum is submitted on behalf of defendants Charles A. Gargano and the New York State Urban Development Corporation d/b/a Empire State Development Corporation (collectively, the "ESDC Defendants") in support of their motion, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(f), to dismiss the amended complaint.

PRELIMINARY STATEMENT

By this action, plaintiffs ask the Court to disregard well-settled jurisdictional and procedural limitations, ignore the applicable standard of constitutional review, and cast aside the comprehensive legislative scheme that New York State has adopted for the exercise of eminent domain and judicial review thereof. What they seek, ultimately, is the judicial defeat of a public development project that has garnered the support of a wide range of elected officials, among them the Mayor of the City of New York and the past and current Governors of New York.

In truth, plaintiffs' invocation of the Public Use Clause as a basis for asking this Court to embroil itself in ongoing state eminent domain proceedings is extraordinary. The Supreme Court and lower federal courts consistently have held that the exercise of eminent domain, as well as the public use determinations made in support thereof, are matters of quintessentially local concern.[1] Challenges to such determinations—even federal constitutional

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[1] See Memorandum of Law of ESDC Defendants in Support of their Motion to Dismiss the Complaint, filed December 15, 2006 ("ESDC Mem."), at 11-12, 19, 28 (citing Louisiana Power & Light Co. v City of Thibodaux, 360 U.S. 25, 28-29 (1959); Grode v. Mut. Fire, Marine & Inland Ins. Co., 8 F.3d 953, 956 (3d Cir. 1993); Ahrensfeld v. Stephens, 528 F.2d 193, 198 (7th Cir. 1975); Forest Hills Util. Co. v. City of Heath, 539 F.2d 592, 595 (6th Cir. 1976); Frempong-Atuahene v. Redev. Auth., No. 98-0285, 1999 WL 167726, at *4 (E.D. Pa. Mar. 25, 1999), aff'd, 211 F.3d 1261 (3d Cir. 2000); Broadway 41st St. Realty Corp. v. New York State Urban Dev. Corp., 733 F. Supp. 735, 742 (S.D.N.Y. 1990); Eddystone Equip. & Rental Corp. v. Redev. Auth., No. Civ. 87-8246, 1988 WL 52082, at *1 (E.D. Pa. May 17), aff'd, 862 F.2d 307 (3d Cir. 1988)); see also, e.g., Creel v. City of Atlanta, 399 F.2d 777, 779 (5th Cir. 1968) ("municipal 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) ("[I]n spite of the outraged feelings of many people who have interests in this area, we have *(cont'd)*

challenges—therefore ordinarily belong in state court, subject to ultimate Supreme Court review. Federal district court scrutiny in the first instance is severely limited and, when exercised, highly deferential. Indeed, in the thirty years since New York's Eminent Domain Procedure Law (the "EDPL") was enacted in 1977, federal district courts sitting in New York have, in decisions published in the Federal Supplement or available through online sources, considered just nineteen suits challenging a condemnor's proposed exercise of eminent domain pursuant to New York law[2]—only five of which included a claim under the Public Use Clause of the Fifth Amendment. Of those five cases, not one proceeded to trial. One was dismissed for lack of ripeness (Port Chester Yacht Club, Inc., 614 F. Supp. at 323); two were disposed of on, inter alia, abstention grounds (Didden, 322 F. Supp. 2d at 388; Broadway 41st St. Realty Corp., 733 F. Supp. at 744); one was dismissed on the basis of res judicata (Waldo's, Inc., 1989 WL 153727, at *5); and one was dismissed for failure to state a claim before discovery could even commence

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in mind that questions arising from the taking of property by condemnation for state purposes . . . are ordinarily matters for determination by the state courts.").

[2] The nineteen cases are: Webster v. Nat'l Fuel Gas Supply Corp., No. 02-CV-00395C(F), 2006 WL 2711673 (W.D.N.Y. Sept. 21, 2006); Buffalo S. R.R. Inc. v. Vill. of Croton-on-Hudson, 434 F. Supp. 2d 241 (S.D.N.Y. 2006); Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250 (W.D.N.Y. 2005) (and related decisions); Tioronda, LLC. v. New York, 386 F. Supp. 2d 342 (S.D.N.Y. 2005); Ciszewski v. New York, No. 05-CV-00167, 2007 U.S. Dist. LEXIS 2087 (N.D.N.Y. Jan. 10, 2007) (and related decision); Mateo v. Phillips, 361 F. Supp. 2d 328 (S.D.N.Y. 2005) (and related decision); Woodfield Equities, L.L.C. v. Inc. Vill. of Patchogue, 357 F. Supp. 2d 622 (E.D.N.Y.), aff'd, 156 F. App'x 389 (2d Cir. 2005); Didden v. Vill. of Port Chester, 322 F. Supp. 2d 385 (S.D.N.Y. 2004) (and related decision), aff'd, 173 F. App'x 931 (2d Cir. 2006), cert. denied, -- S. Ct. --, No. 06-652, 2007 WL 91474 (Jan. 16, 2007); Atl. States Legal Found. v. Onondaga County Dep't of Drainage & Sanitation, 233 F. Supp. 2d 335 (N.D.N.Y. 2001), aff'd, 464 F.3d 297 (2d Cir. 2006); Minnich v. Gargano, No. 00 CIV. 7481, 2001 WL 1111513 (S.D.N.Y. Sept. 20, 2001) (and related decisions), vacated by Brody v. Vill. of Port Chester, 345 F.3d 103 (2d Cir. 2003); Broadway 41st St. Realty Corp., 733 F. Supp. 735; Waldo's, Inc. v. Vill. of Johnson City, No. 89-CV-897, 1989 WL 153727 (N.D.N.Y. Dec. 15, 1989); Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988) (affirming unpublished decision in which Judge Sand permitted removal of a state proceeding challenging a condemnation); Stand Together Against Neighborhood Decay, Inc. v. Bd. of Estimate, 690 F. Supp. 1192 (E.D.N.Y. 1988); Port Chester Yacht Club, Inc. v. Iasillo, 614 F. Supp. 318 (S.D.N.Y. 1985); Forty-Second St. Co. v. Koch, 613 F. Supp. 1416 (S.D.N.Y. 1985); G. & A. Books, Inc. v. Stern, 604 F. Supp. 898 (S.D.N.Y.), aff'd, 770 F.2d 288 (2d Cir. 1985); Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 605 F. Supp. 612 (S.D.N.Y.), aff'd, 771 F.2d 44 (2d Cir. 1985); Action for Rational Transit v. W. Side Highway Project, 517 F. Supp. 1342 (S.D.N.Y. 1981) (and related decisions).

(Rosenthal, 605 F. Supp. at 619). By contrast, during that same thirty-year period, the various departments of the Appellate Division of the New York Supreme Court have, in reported decisions alone, adjudicated well over 100 proceedings brought pursuant to EDPL § 207—with many of those proceedings involving the consolidated petitions of multiple allegedly aggrieved parties.

As these starkly contrasting numbers illustrate, federal district court review of local public use determinations is the clear exception, not the rule. That is not mere happenstance; the ripeness and abstention hurdles in this case and in most other suits raising challenges to the exercise of eminent domain are substantial—not, as plaintiffs contend, "artificial" (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, filed January 5, 2006 ("Opp."), at 2). Nor are the ESDC Defendants' arguments in respect thereof "patently meritless" or aimed at "squelch[ing] public participation in the debate over the [Atlantic Yards] Project." (Id.) To the contrary, the procedural doctrines that the ESDC Defendants invoke are designed precisely to avoid what plaintiffs urge: a premature interference with state procedures, coupled with a premature review of state public use determinations. And plaintiffs' improper assertion in their federal complaint of a new "cause of action" under EDPL § 207 (see Argument Point I, infra) only underscores the need for the Court to stay its hand.

On the merits, plaintiffs ask this Court to proceed where others have declined to go. They employ two distinct strategies: First, they recite conclusory, self-serving, hyperbolic, and—we respectfully submit—gravely irresponsible allegations impugning the motives of respected elected officials, and then assert that these inflammatory allegations are "facts" that must be deemed true for purposes of a motion to dismiss. (See, e.g., Opp. at 2 ("[D]efendants chose to condemn plaintiffs' property not because of any supposed 'public benefits,' but rather

for the singleminded purpose of further enriching Bruce Ratner." (emphasis added)); id. at 3 ("Defendants Governor Pataki and Mayor Bloomberg, at defendant Ratner's behest, agreed to grant Ratner the exclusive right to build . . . ." (emphasis added)); id. ("[T]he 'favored' developer is in fact driving and dictating the process, with government officials at all levels obediently falling into line."). Second, they ask the Court to adopt a novel test of public use according to which, as they put it, "[m]otives [m]atter" (Opp. at 32), and the nature of the purposes served by a project is determined by the degree and timing of private initiative and involvement in that project. Indeed, they go so far as to suggest that a particular sequence of events must precede the public use determination: "deference is warranted," they insist, "only where the legislature first concludes that developing a given area will benefit the public, then identifies the specific properties to be seized to advance that predetermined purpose, and then engages in a fair and open bidding process with prospective developers to select the beneficiaries of the seizures." (Id. at 1 (their emphases).)

Both of these strategies should fail. It is well settled that bare, conclusory allegations will not rescue a claim that otherwise fails under Fed. R. Civ. P. 12(b)(6). As for plaintiffs' novel approach to the public use inquiry, it would, if actually undertaken, be unprecedented in its intrusiveness and at odds with settled case law. As the Supreme Court in Berman v. Parker explained over a half century ago, "[t]he role of the judiciary in determining whether [the power of eminent domain] is being exercised for a public purpose is an extremely narrow one," and public use determinations made by legislatures "and [their] authorized agencies" are "well-nigh conclusive." 348 U.S. 26, 32-33 (1954). See also Kelo v. City of New London, 125 S. Ct. 2655, 2665 (2005) ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad

latitude in determining what public needs justify the use of the takings power."); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (holding that taking satisfied public use requirement so long as it was "rationally related to a conceivable public purpose"); Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985).[3] Plaintiffs' insistence that the nature of the purpose served by a project must turn on the motives of the public officials who support it runs directly contrary to the relevant case law, which has always set forth an objective—not a subjective—standard of review. And plaintiffs' sequencing proposal, if adopted, would undermine the legislative scheme that the New York legislature crafted to govern ESDC's exercise of its powers of eminent domain—a scheme that depends heavily on a partnership between the private and public sectors as well as private initiative. Changes of that nature should properly be effected by the legislative and electoral processes, not by the courts.

Plaintiffs evidently are unhappy about ESDC's public use findings and the procedures by which those findings were made. But federal court is not the proper venue for airing their grievances; there is nothing constitutionally deficient about the UDC Act, ESDC's actions pursuant to that Act, or the EDPL. The amended complaint should be dismissed.

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[3] As Justice Stevens, who authored the Kelo decision for the Court, noted in recent remarks:

> The relevant constitutional text [of the Takings Clause] provides that private property shall not "be taken for public use, without just compensation." As Justice O'Connor explained in [Lingle v. Chevron U.S.A., Inc., 545 U.S. 528, 536-37 (2005)], that text does not prohibit any taking of private property, but instead merely places a condition on the exercise of the takings power. Thus, . . . a purely literal reading of the Takings Clause would limit its coverage to a guarantee of just compensation.
>
> We have nevertheless assumed that the reference to "public use" does describe an implicit limit on the power to condemn private property, but over the years we have frequently and consistently read those words broadly to refer to a "public purpose."

John Paul Stevens, Learning on the Job, 74 Fordham L. Rev. 1561, 1566-67 (2006) (footnotes omitted).

In support of the instant motion, the ESDC Defendants respectfully adopt and reassert in full the arguments made in their memorandum of law supporting dismissal of the original complaint. In accordance with the Court's instructions during its telephonic conference with the parties on Monday, January 8, 2007, the arguments herein are limited to (1) a reply to plaintiffs' opposition memorandum, which resisted dismissal of the first three counts of the amended complaint (also asserted in the original complaint), and (2) new argument pertaining to dismissal of the fourth cause of action in the amended complaint (not asserted in the original complaint).

ARGUMENT

I. THE COURT SHOULD DISMISS THE FOURTH CAUSE OF ACTION.

Plaintiffs initiated this action as a preemptive suit—an effort to avoid abstention rules by racing to the federal courthouse before anyone could file a petition for review of ESDC's Determination and Findings in state court (indeed, before ESDC could even issue its Determination and Findings). As the ESDC Defendants argued in their opening memorandum, that strategy was misguided; it not only resulted in a premature action but also rested on a misunderstanding of the abstention doctrines.

Now plaintiffs have essayed another tack. In a move transparently calculated to circumvent the EDPL process, plaintiffs have appended to their federal complaint a state-law "claim" that no one, to the ESDC Defendants' knowledge, has ever tried to litigate in federal court. Indeed, as discussed below, courts in this circuit have been virtually unanimous in their refusal to exercise supplemental jurisdiction over a very similar class of "claim": those asserted under New York Civil Practice Law and Rules Article 78 ("Article 78"). In view of this unanimity, one cannot but suspect that plaintiffs' motives in adding the fourth cause of action are

purely tactical; they know the Court must dismiss the count, but filed it in federal court a few days shy of the state limitations period in a bid for two bites at the apple. Their strategy, it would seem, is to avoid triggering Younger abstention (a tactic that in any event fails, see Point III, infra) and at once seek to preserve the option of returning to state court—notwithstanding the strict 30-day statute of limitations normally applicable to section 207 petitions, see EDPL § 207(A)—should their complaint here be dismissed. Although the ESDC Defendants expect to vigorously contest the point, plaintiffs no doubt plan to argue before the Appellate Division (upon dismissal of their federal complaint) that their time to file an EDPL § 207 proceeding in state court has been tolled by 28 U.S.C. § 1367(d), which provides that "[t]he period of limitations for any claim asserted under subsection (a) [supplemental jurisdiction]. . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."[4]

At the very least, plaintiffs should not be permitted to proceed with their fourth cause of action in this Court. The law is resolutely against them on this point, and the practical import of a decision countenancing the addition of the EDPL § 207 "claim" should be evident: If that "claim" survives this motion, there will in future be no reason for any other person aggrieved by a proposed condemnation to file a petition in state court. Why do so if there is even the slightest possibility that a federal court will permit more than an on-the-record review of the Determination and Findings, and perhaps even order discovery? The three-decades-long role that the Appellate Division of the New York Supreme Court has played in reviewing exercises of

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[4] Plaintiffs may even be under the impression that they can, pursuant to CPLR § 205, get as much as a six-month extension of their time to file a section 207 petition in the Appellate Division. That impression would be mistaken. Section 205 does not operate to extend the time for filing a claim brought pursuant to a statute that, like EDPL § 207, "both 'creates a cause of action and attaches a time limit to its commencement.'" Yonkers Contracting Co. v. Port Auth. Trans-Hudson Corp., 93 N.Y.2d 375, 379, 712 N.E.2d 678, 681, 690 N.Y.S.2d 512, 515 (1999) (citation omitted).

eminent domain will have come to an abrupt end; the federal courts will be flooded with state EDPL proceedings (not limited to EDPL Article 2 proceedings); and New York State's carefully calibrated legislative scheme governing exercises of eminent domain power will have been completely undermined.

A. Supplemental Jurisdiction

Notwithstanding EDPL § 207's explicit instruction that the jurisdiction of the Appellate Division over claims seeking review of condemnors' determination and findings "shall be exclusive," plaintiffs invoke that very section to assert in this Court what are, in effect, three distinct "claims": (1) that ESDC's Determination and Findings "do not conform, and result from a proceeding that did not conform, with the United States Constitution" (Am. Compl. ¶ 176); (2) that the Atlantic Yards Project does not serve a "public use, benefit or purpose," EDPL § 207(C)(4) (see Am. Compl. ¶ 177); and (3) that ESDC's Determination and Findings were not "made in accordance with the procedures set forth in this article," EDPL § 207(C)(3) (see Am. Compl. ¶ 178). The first of these is entirely duplicative of the first through third causes of action in the amended complaint and should, therefore, be stricken as redundant pursuant to Fed. R. Civ. P. 12(f). The latter two claims, which are creatures of state law, must be dismissed for lack of subject-matter jurisdiction or, alternatively, pursuant to 28 U.S.C. § 1367(c).

Plaintiffs assert that this Court can adjudicate their fourth cause of action under 28 U.S.C. § 1367(a), which gives federal courts supplemental jurisdiction over state-law claims that are "so related to" claims falling within the courts' "original jurisdiction" that "they form part of the same case or controversy." (See Plaintiffs' Letter to the Court, dated January 5, 2007, at 1.) But in the closely analogous situation in which plaintiffs have tried to append "claims" under Article 78 to their federal complaints, New York district courts have been "essentially

unanimous" in their refusal to countenance those efforts. Morningside Supermarket Corp. v. New York State Dep't of Health, 432 F. Supp. 2d 334, 347 (S.D.N.Y. 2006) (Cote, J.); see Blatch v. Hernandez, 360 F. Supp. 2d 595, 637 (S.D.N.Y. 2005) (Swain, J.); Bd. of Managers of Soho Int'l Arts Condo. v. City of N.Y., No. 01 Civ. 1226, 2004 WL 1982520, at *28 (S.D.N.Y. Sept. 8, 2004) (Batts, J.); Gill v. City of N.Y., No. 00 Civ. 8332, 2003 WL 22253229, at *1 (S.D.N.Y. Sept. 30, 2003) (Fox, M.J.); Cartagena v. City of N.Y., 257 F. Supp. 2d 708, 709-11 (S.D.N.Y. 2003) (Chin, J.) ("Cartagena I"); Adler v. Pataki, 204 F. Supp. 2d 384, 396 (N.D.N.Y. 2002) (Scullin, C.J.); Reyna v. State Univ. of N.Y. Coll. at New Paltz, No. 00-CV-733, 2001 WL 282953, *3-*4 (N.D.N.Y. Mar. 20, 2001) (Hurd, J.); Verbeek v. Teller, 114 F. Supp. 2d 139, 142-43 (E.D.N.Y. 2000) (Wexler, J.); Birmingham v. Ogden, 70 F. Supp. 2d 353, 372-73 (S.D.N.Y. 1999) (McMahon, J.); Camacho v. Brandon, 56 F. Supp. 2d 370, 380 (S.D.N.Y. 1999) (Connor, J.); Lucchese v. Carboni, 22 F. Supp. 2d 256, 258 (S.D.N.Y. 1998) (Parker, J.).[5]

The courts in Cartagena I, Blatch, and Gill all held that they lacked even the theoretical power to retain supplemental jurisdiction over such claims. See Cartagena I, 257 F. Supp. 2d at 710; Blatch, 360 F. Supp. 2d at 637; Gill, 2003 WL 22253229, at *1. As Judge Chin explained in Cartagena I, Article 78 contains an exclusivity provision requiring that any suit thereunder be brought in "the supreme court in the [relevant] county," or, in very limited circumstances, the Appellate Division. CPLR § 7804(b); see 257 F. Supp. 2d at 710. Moreover, "[t]he Article 78 proceeding is a 'novel and special creation of state law.'" Id. As such, a

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[5] Cf. Cartagena v. City of N.Y., 345 F. Supp. 2d 414, 426 (S.D.N.Y. 2004) (Chin, J.) ("Cartagena II") (agreeing, in light of the parties' explicit stipulation and the "unusual circumstances of [the] case," to adjudicate Article 78 claim notwithstanding earlier ruling to the contrary and without questioning soundness of reasoning underlying that ruling); Yonkers Racing Corp., 858 F.2d at 864 (affirming district court's decision to permit removal under the All Writs Act of Article 78 challenge in "exceptional case").

federal court "do[es] not have the power to exercise supplemental jurisdiction" to hear Article 78 challenges. Id.

The courts in all the other decisions cited assumed the existence of jurisdiction under 28 U.S.C. § 1367(a) but declined to exercise it pursuant to subsection (c) of the statute, which provides that "district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a)" in a number of situations—including where, "in exceptional circumstances, there are . . . compelling reasons for declining jurisdiction." § 1367(c)(4). In Morningside Supermarket Corp., for example, Judge Cote acknowledged that "[i]t is doubtful . . . that claims under Article 78 are even amenable to a federal district court's supplemental jurisdiction," but then held that jurisdiction was in any event inappropriate under 28 U.S.C. § 1367(c)(4). 432 F. Supp. 2d at 346. As Judge Cote explained,

> [t]he very nature of an Article 78 proceeding presents . . . compelling reasons [for declining jurisdiction under subsection (c)(4)]. "An Article 78 proceeding is a novel and special creation of state law, and differs markedly from the typical civil action brought in [federal district court] in a number of ways." It is a "purely state procedural remedy," "designed to accommodate to the state court system." Because accepting supplemental jurisdiction over such claims requires a federal court to "usurp the statutory authority bestowed upon the New York state courts," "federal courts are loath to exercise jurisdiction over Article 78 claims."

Id. (citations omitted; first alteration added; second alteration in original). See also Gregory v. Shelby County, Tenn., 220 F.3d 433, 446 (6th Cir. 2000) (holding that exclusivity provision in state statute was an "exceptional circumstance" under 28 U.S.C. § 1367(c)(4) for declining jurisdiction).[6]

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[6] A state statute purporting to preclude federal supplemental jurisdiction might, in some circumstances, be constitutionally suspect. See, e.g., TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460 n.3 (2d Cir. 1982) ("We agree with the District Court that there would be substantial doubt as to the constitutionality of a state law purporting to preclude federal court diversity or pendent jurisdiction over a state-created claim."). But the ESDC Defendants have found no case involving a state exclusivity provision in which the court applied that general principle to exercise supplemental jurisdiction over a state-created claim that, like an Article 78 "claim" *(cont'd)*

Whether one adopts Judge Chin's view that federal courts lack supplemental jurisdiction under 28 U.S.C. § 1367(a) or Judge Cote's reasoning that supplemental jurisdiction should be declined under subsection (c), the rationale supporting federal courts' dismissal of Article 78 "claims" applies a fortiori to the state-law claims plaintiffs here seek to assert. Although subject to some different procedural requirements, proceedings under EDPL § 207 and those under Article 78 are both "special proceedings" under New York law. See, e.g., Gray v. Town of Oppenheim, 289 A.D.2d 743, 744-45, 734 N.Y.S.2d 343, 345 (3d Dep't 2001); see also EDPL § 207(B) (Appellate Division's judgment under EDPL § 207(B) "shall be final subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding"). Both are "novel and special creation[s] of state law" designed to provide a "fast and cheap way to implement a right that is as plenary as an action, culminating in a judgment, but is brought on with the ease, speed and inexpensiveness of a mere motion." Lucchese, 22 F. Supp. 2d at 258 (quotation marks omitted); EDPL § 207(B) (providing that all section 207 proceedings "shall be heard and determined . . . as expeditiously as possible and with lawful preference over other matters"); id. § 207(A) ("The [section 207] proceeding shall be heard on the record without requirement of reproduction."). Reflecting this strong state policy, EDPL § 207, like Article 78, contains an exclusivity provision—the language of which is even more explicit than that of Article 78. Compare id. § 207(B) ("The jurisdiction of the appellate division . . . shall be exclusive[.]") with CPLR § 7804(b) ("A proceeding under this article shall be brought in the supreme court in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides."); see also EDPL § 208 ("Except as expressly

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(or a state-law "claim" pursuant to EDPL § 207), was a creature of the very statute containing the exclusivity provision. In any event, for the reasons explained in the text, the result is the same whether one views this as a jurisdictional inquiry per se or one involving the declining of supplemental jurisdiction under 28 U.S.C. § 1367(c).

set forth in section [207] . . . no 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."). Indeed, EDPL § 207 goes so far as to require that all proceedings brought thereunder relating to "any single public project shall be consolidated with that first filed." Id. § 207(A).

Because the state-law claims asserted under the fourth cause of action are functionally indistinguishable from the Article 78 state-law claims that courts in this circuit have refused to adjudicate under their supplemental powers, they should be dismissed with prejudice. Cf. Town of Haverstraw v. Barreras, 361 F. Supp. 2d 317, 319 (S.D.N.Y. 2005) (stating that because "challenges to condemnations under the EDPL are within the exclusive jurisdiction of the New York state courts," an EDPL Article 4 proceeding "cannot be litigated in [federal] court"). Dismissal is all the more warranted here because, as of January 10, 2007, there is pending in state court an EDPL § 207 proceeding relating to the very project at issue in this litigation. (See EDPL § 207 Petition of Eliselle Anderson, et al. ("Anderson Petition") (Ex. A).[7]) Under state law, plaintiffs' section 207 "claim"—had it been filed in the Appellate Division—would have had to have been consolidated with the section 207 petition already pending before the state court. See EDPL § 207(A).

B. Other Grounds For Dismissal

Should the Court, notwithstanding the overwhelming weight of authority, decide that it has and will choose to exercise supplemental jurisdiction over the fourth cause of action, the ESDC Defendants respectfully urge that it dismiss the claims contained therein on the same

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[7] References herein to "Ex. __" are to the exhibits annexed to the accompanying Declaration of Douglas M. Kraus.

grounds supporting dismissal of the first through third causes of action: The claims are unripe under Article III of the federal Constitution; abstention is warranted (see Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28-30 (1959) (abstaining from adjudication of purely state-law eminent domain questions)); and plaintiffs have failed to state a claim. Only the latter ground warrants some amplification as applied to the fourth cause of action.

As discussed above, the first claim asserted under the fourth cause of action—the federal constitutional challenge—should be stricken pursuant to Fed. R. Civ. P. 12(f). In any event, it fails for all the reasons stated in the ESDC Defendants' opening memorandum. The second claim—viz., that the Atlantic Yards Project does not serve a "public use, benefit or purpose" (Am. Compl. ¶ 177)—fails on the merits for the same reason that the first cause of action so fails: The Project patently does serve a public purpose. Finally, plaintiffs' claim that ESDC's Determination and Findings were not "made in accordance with the procedures set forth in this article," EDPL § 207(C)(3), because they were not issued within 90 days of the August 23, 2006 public hearing held pursuant to EDPL § 204 (see Am. Compl. ¶ 178), cannot survive a challenge under Fed. R. Civ. P. 12(b)(6). Because the public record indisputably was held open until September 29, 2006, and ESDC's Determination and Findings were published on December 11 and 12, 2006, the procedural requirements of the EDPL were satisfied here. See Wechsler v. New York State Dep't of Envtl. Conservation, 153 A.D.2d 300, 302, 550 N.Y.S.2d 749, 751 (3d Dep't), aff'd, 76 N.Y.2d 923, 927, 564 N.E.2d 660, 662, 563 N.Y.S.2d 50, 52 (1990).

II. PLAINTIFFS' CLAIMS ARE NOT RIPE.[8]

Whether or not the Court dismisses the fourth cause of action, the ESDC Defendants' argument that the entire complaint (now the amended complaint) must be dismissed for lack of ripeness stands unaffected. This is exactly the sort of case in which a federal court must stay its hand. As the ESDC Defendants explained in their opening memorandum, the actual condemnation of plaintiffs' properties may be frustrated by any number of intervening occurrences. The scope and nature of the Project and the Takings Area may well change as a result of state-court environmental proceedings, state-court EDPL proceedings, altered financial circumstances, or the mere passage of time. Many steps have yet to occur before proceedings are initiated to obtain title to any particular property pursuant to Article 4 of the EDPL.

The picture plaintiffs try to paint here is one of inevitability; their overarching position is that the "contours of [this] dispute are fixed and immutable," and that all obstacles to condemnation have already been cleared. (Opp. at 15 & n.3.) But even a passing consideration of historical experience belies that characterization. To offer just a few examples:

- The Westside Highway project, which was the subject of extensive environmental litigation (see, e.g., Action for Rational Transit, 517 F. Supp. 1342), was stalled entirely after only some properties had been acquired by eminent domain.
- Before the events of September 11, 2001, ESDC had issued its determination and findings in support of condemning certain properties in downtown Manhattan in furtherance of a project to expand the premises of the New York Stock Exchange. That project was abandoned before any EDPL Article 4 proceeding was filed.

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[8] To clarify any confusion (see Opp. at 13-14 n.2), the ESDC Defendants confirm that they are, in fact, seeking dismissal of all of plaintiffs' claims on ripeness grounds.

In their opening memorandum, the ESDC Defendants mistakenly stated that "[t]he ripeness inquiry must precede the inquiry into whether abstention is appropriate, because ripeness is jurisdictional." (ESDC Mem. at 12 n.11.) While it is true that ripeness is jurisdictional and abstention technically is not, the Second Circuit has held that federal courts may, under Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999), "proceed to decide a case under Younger without addressing" Article III limitations on jurisdiction. Spargo v. New York State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003). Accordingly, the Court here may decide to abstain without first resolving the ripeness question.

- After the Dormitory Authority (an entity that, like ESDC, has the power of eminent domain) issued its determination and findings in support of a project to expand the campus of Medgar Evers College, it decided not to acquire a spice factory that had been listed among the properties to be condemned. No EDPL Article 4 proceeding was, therefore, ever commenced with respect to that property.

These are just a very few of the redevelopment projects that have fallen through or changed materially for one reason or another after the condemning authority had issued its determination and findings. They illustrate that the ripeness concerns raised here are neither theoretical nor, as plaintiffs suggest, far-fetched.[9]

On a closer level, plaintiffs' response to the ESDC Defendants' ripeness arguments consists principally of disingenuous and unfounded accusations. Elevating hyperbole above law, plaintiffs assert that the ESDC Defendants "defy controlling precedent," "ignore the fact" of their own Determination and Findings, "pretend that the EDPL scheme . . . doesn't exist," and misread Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), by "conflat[ing]" its two separate prongs. (Id. at 14.) The second and fourth of these accusations warrant little discussion: The ESDC Defendants acknowledged the issuance of their Determination and Findings no fewer than four times in their opening memorandum (see ESDC Mem. at 1, 8, 9, 15-16), and carefully explained that, notwithstanding the existence of precedent supporting the proposition that Williamson County's

[9] It might strike the Court as unusual that the claims asserted here would not become ripe under Article III until the time under state law for bringing public use challenges had passed, in which case the state court's resolution of the public issue would, presumably, have collateral estoppel effect in any later federal proceeding. In fact, however, the collateral estoppel effect of a state-court judgment on federal takings claims is commonplace. See San Remo Hotel, L.P. v. City & County of San Francisco, 545 U.S. 323, 347 (2005). At the point at which a regulatory takings claim under the Just Compensation Clause becomes ripe, for example, there necessarily (not just—as here—incidentally) will have been a state-court judgment resolving the very claim at issue. The federal court is bound to follow that decision so long as the prerequisites for claim or issue preclusion (for example, adequacy of opportunity to litigate federal claims) are satisfied. See id. at 346-47.

exhaustion requirement applies to challenges under the Public Use Clause, they were not seeking to have that prong applied here (id. at 13 n.12).

As for plaintiffs' more serious assertion that the ESDC Defendants have flouted precedent, the charge is misdirected; plaintiffs, not defendants, lack authority for their position. In support of their argument that plaintiffs' claims are unripe, the ESDC Defendants cited a series of cases addressing the ripeness question in the posture in which it is presented here—i.e., where a Public Use Clause challenge is asserted before commencement of proceedings to take title. (See ESDC Mem. at 16-19.) All but one of those cases support the ESDC Defendants' ripeness argument. (Cf. id. at 16-17 n.16 (discussing Rosenthal, 605 F. Supp. 612.) Rather than grapple with those decisions, which together form the bulk of the admittedly somewhat limited federal jurisprudence on the issue presented, plaintiffs brush most of them aside with the bare declaration that they lack persuasive value. (See Opp. at 21.) Though plaintiffs devote some discussion to the Port Chester Yacht Club case (see id. at 19-20), their only response thereto consists—yet again—of a stubborn refusal to acknowledge that Judge Leisure in fact dismissed the entire complaint therein, not just the procedural due process claim, as premature. See Port Chester Yacht Club, Inc., 614 F. Supp. at 323 (dismissing all civil rights claims); see also id. at 320 & n.3 (describing plaintiff's public use challenge).

But the paucity of plaintiffs' response is most apparent upon examination of the supposedly "controlling precedent from the Supreme Court and the Court of Appeals for the Second Circuit" that they cite in opposition to the ESDC Defendants' authorities. (Opp. at 14.) In not one of the Supreme Court or Second Circuit cases upon which plaintiffs rely—indeed, in none of their district court cases either—did the court hold that a Public Use Clause challenge to a condemnation proceeding was ripe for adjudication prior to the filing of a state-court

proceeding seeking transfer of title.[10] Because ripeness was not raised or addressed in either Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), or Berman v. Parker, 348 U.S. 26 (1954), those cases furnish no support for plaintiffs' position.[11] It is axiomatic that when a question—even a jurisdictional question—has been passed on sub silentio in a prior decision, that silent resolution is devoid of precedential effect. See Hagans v. Lavine, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); Garay v. Slattery, 23 F.3d 744, 746 n.2 (2d Cir. 1994). For the same reason, Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), and 99 Cents Only Stores v. Lancaster Development Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), appeal dismissed, 60 F. App'x 123, 125 (9th Cir. 2003) (dismissing case as moot and suggesting that the district court vacate its decision), which

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[10] Plaintiffs cite Aaron v. Target Corp., 269 F. Supp. 2d 1162 (E.D. Mo. 2003), rev'd on other grounds, 357 F.3d 768, 776 (8th Cir. 2004), as if it helped their cause. (See Opp. at 19.) But as the very quote they use from the decision makes clear, the condemnor in that case, unlike the one here, had "initiated suit" to "take the Properties." Id. at 1176 (emphasis added). Indeed, the district court in Aaron explained that the plaintiffs' claims there were ripe precisely "because the pending state court condemnation action constitute[d] a manifest and palpable threat" of an unconstitutional taking. Id. (emphasis added).

[11] Nor is Midkiff, at least, even factually similar to this case. As the Eleventh Circuit has explained (in a case distinguishing Midkiff and holding that a Public Use Clause challenge to a proposed condemnation was not ripe where the condemnor "ha[d] not brought condemnation proceedings against any property of the appellants"), Midkiff involved plaintiffs who had already been forced into compelled arbitration, and the prospect that such plaintiffs "would be forced to surrender their property was an inevitability." Wendy's Int'l, Inc. v. City of Birmingham, 868 F.2d 433, 435, 436 n.7 (11th Cir. 1989). Here, by contrast, and in Wendy's itself, the "suit necessarily is based upon the possibility of an occurrence which may never come to pass." Id. at 436. Moreover, as plaintiffs acknowledge (see Opp. at 24), the State in Midkiff had, by the time the district court therein ruled on defendants' summary judgment motion, filed a condemnation proceeding in state court. See Midkiff, 467 U.S. at 238.

plaintiffs cite on page 18 of their opposition memorandum, are of no avail; in neither case was ripeness discussed or resolved.[12]

Although ripeness was raised before the district court in plaintiffs' other purportedly "controlling precedent," Rosenthal, 771 F.2d 44, the defendants there (including ESDC), having just won an enormously valuable dismissal on the merits before discovery in the district court, declined to press the ripeness issue on appeal and thereby defer consideration of the merits. The Second Circuit proceeded to affirm dismissal of the complaint on the merits without acknowledging or resolving the jurisdictional difficulty. See id. at 46. Plaintiffs grossly misstate the ESDC Defendants' explanation for why the Second Circuit in Rosenthal proceeded in such a fashion. (See Opp. at 17 n.5.) The explanation is not that the court silently concluded that it lacked jurisdiction, and then proceeded willy-nilly to the merits—an approach that plaintiffs must know would not qualify as an application of the hypothetical jurisdiction doctrine. Cf. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-94 (1998) (explaining that hypothetical jurisdiction involves "'assuming' jurisdiction for the purpose of deciding the merits" in circumstances where "(1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied") (emphasis added). Rather, it would appear that the court in Rosenthal, following the very approach that the Supreme Court later held improper (cf. id.), resolved the case on the merits on the assumption that it had jurisdiction, and without inquiring into the ripeness question. In any event, the court's silent assumption of jurisdiction, like that of the Midkiff and Berman Courts, carries no precedential force whatsoever.

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[12] Plaintiffs fail to mention that, several months before the court in Cottonwood ruled on the preliminary injunction request in that case, the condemnor had "filed an action in state court to condemn the land." 218 F. Supp. 2d at 1215.

Turning next to plaintiffs' accusation that the ESDC Defendants are "pretend[ing]" that the EDPL § 207 procedure (which permits adjudication of plaintiffs' claims at this juncture in state court) does not exist (Opp. at 14), little need be said beyond what plaintiffs themselves have acknowledged. It need hardly be emphasized that federal courts are not bound by state statutes dictating the point at which state courts should intervene in pending eminent domain proceedings. But even if New York courts had held that constitutional challenges brought under EDPL § 207 were, as a class, ripe for adjudication, the authority would be of little to no relevance here. Any such case applying a state-law ripeness standard would be entirely beside the point, because state courts, unlike federal courts, are not constrained by Article III of the U.S. Constitution—even when they adjudicate federal causes of action. (See Opp. at 21-22 (acknowledging as much).)[13] And any such case applying federal standards would be, at most, an outlier in this jurisprudential field.

III. ABSTENTION IS REQUIRED.

The Court should also stay its hand for another reason: Resolution of the issues raised here is best left to the ongoing state proceedings. Eminent domain is a peculiarly local

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[13] See also Asarco Inc. v. Kadish, 490 U.S. 605, 620 (1989) ("state courts are not bound by Article III and yet have it within both their power and their proper role to render binding judgments on issues of federal law"); New York State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1, 8 n.2 (1988) ("[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The States are thus left free . . . to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution.") (citation omitted); Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 971 (1984) (Stevens, J., concurring) ("Nothing in Art. III of the Federal Constitution prevents the Maryland Court of Appeals from rendering an advisory opinion concerning the constitutionality of Maryland legislation if it considers it appropriate to do so.") (footnote omitted).

Relatedly, plaintiffs' protestations that the addition of their fourth cause of action somehow changes the ripeness analysis (see Opp. at 22 ("Now that plaintiffs have filed their state law claims pursuant to EDPL § 207 as supplemental claims in this action . . . , defendants' position [on ripeness] has morphed from strange to nonsensical.")) are truly baffling. For the reasons explained in the text, any Article III objection to the Court's adjudication of plaintiffs' federal challenges applies with equal force to its adjudication of any state-law challenge. It is true that state courts are not bound by Article III, even when they decide federal claims. But federal courts are bound by Article III, even when they decide state-law claims.

concern over which state-court adjudication is the norm. (See note 1, supra.) Although—indeed, precisely because—"'there is the possibility of a federal question in every taking by eminent domain under state authority,' . . . district courts should be aware of the role of abstention in avoiding prematurely and unnecessarily deciding federal constitutional questions." Muskegon Theatres, Inc. v. City of Muskegon, 507 F.2d 199, 205 (6th Cir. 1974) (citation and footnote omitted). That admonition applies with full force here. The Court must abstain in deference both to the overall EDPL process and, more specifically, to a proceeding that was filed pursuant to EDPL § 207 in state court just last week. Alternatively, the Burford doctrine applies here.

A. Abstention In Favor Of The Ongoing, Unitary Administrative And Judicial Proceedings Under The EDPL Is Required.

As explained in the ESDC Defendants' opening memorandum, the Court should abstain in deference to the overall EDPL process that was ongoing at the time this lawsuit was filed and continues today. Plaintiffs' reliance on Midkiff for the proposition that the administrative portion of the EDPL proceedings is not the sort of proceeding to which Younger deference is due is, as the ESDC Defendants have already explained, seriously misplaced. (See ESDC Mem. at 24 & n.19.) As plaintiffs themselves acknowledge, the State in Midkiff had a right, "[s]eparate and apart from [the administrative] proceedings," to bring a condemnation suit against landowners. (Opp. at 24.) The independent nature of the administrative proceedings was spelled out in the challenged statute, which expressly provided that such hearings would "'not constitute any part of any action in condemnation or eminent domain.'" Midkiff, 467 U.S. at 238 (quoting Haw. Rev. Stat. § 516-51(b) (1976)). Here, by contrast, the administrative portion of the EDPL is an essential prerequisite to the judicial proceedings under both section 207 and Article 4 of the EDPL; without notice, public hearings, or determinations and findings, there generally can be no judicial proceeding. The administrative proceedings, in other words, form

part of a "unitary process" in face of which a federal court ought to abstain. New Orleans Pub. Serv., Inc. v. Council of New Orleans ("NOPSI"), 491 U.S. 350, 369 (1989). (See also ESDC Mem. at 24-25.)[14]

Relatedly, plaintiffs mischaracterize NOPSI when they say that it rejected an argument "identical" to the one the ESDC Defendants make here. (Opp. at 25.) At the risk of repeating points made in their opening brief (but entirely ignored by plaintiffs), the ESDC Defendants submit that NOPSI simply does not govern this case. (See ESDC Mem. at 23-24, 21 n.18, 25 n.20.) When the Court in NOPSI said that abstention was inappropriate in face of proceedings that were not "judicial in nature," it was referencing legislative proceedings that were not part of a "unitary process" which, by design, incorporated both agency action and judicial review. See NOPSI, 491 U.S. at 370-71. The EDPL process is not "legislative" in the sense NOPSI used the word; as the NOPSI Court explained, a "legislative" process involves the "'making of a rule for the future,'" id. at 371, while a "judicial" one applies "'laws supposed already to exist'" to "'present or past facts.'" Id. As between these two options, the administrative process under EDPL Article 2 clearly qualifies as "judicial"—particularly when viewed, as it must be, as part of a unitary procedure inclusive of judicial review. Moreover, contrary to plaintiffs' assertion, the fact that "EDPL hearings permit no discovery, no ability to subpoena records, no ability to examine witnesses under oath and . . . no cross-examination"

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[14] Plaintiffs suggest that Aaron, 357 F.3d at 776, supports their position here because that case, in their view, held that "state condemnation proceedings [were] 'commenced' when state court proceedings [were] filed, not upon selection of property for eminent domain or publication of blight findings." (Opp. at 24.) This is misleading. The court in Aaron held that a "state action . . . filed" in state court triggered Younger abstention even though the federal action was filed first, because proceedings of substance on the merits had yet to occur in the federal court at the time of the state-court filing. Aaron, 357 F.3d at 775-76. That finding was sufficient to resolve the Younger question. But the court did not stop there; it further observed that (1) "[t]he condemnation proceeding against appellees' property had been initiated" by passage of an ordinance authorizing the condemnation, Aaron, 357 F.3d at 775 (emphasis added); and, accordingly, (2) "[a]t the time [the federal suit was filed] the eminent domain proceedings had been ongoing for more than five months," id. at 776 (emphasis added).

(Opp. at 26) cannot be dispositive of the question; those same limitations also apply in the indubitably "judicial" proceeding brought pursuant to EDPL § 207. (Cf. ESDC Mem. at 23-24 (citing, inter alia, Spargo v. New York State Comm'n on Judicial Conduct, 351 F.3d 65, 79-80 (2d Cir. 2003) (holding that abstention was appropriate even though "primary mission" of administrative proceeding was "fact-finding")).)

B. Abstention In Favor Of The EDPL § 207 Proceeding Pending In State Court Is Required.

Alternatively, the Court must abstain in deference to the EDPL § 207 proceeding filed in the Appellate Division last week. On December 18, 2006, a set of individuals and organizations (the "Anderson Plaintiffs") purporting to be aggrieved by ESDC's Determination and Findings served a demand, pursuant to EDPL § 207, upon ESDC to produce the administrative record for the Atlantic Yards Project in preparation for litigation in the Appellate Division of "the need and location of" such Project. (See Anderson Petition (Ex. A), Exhibit 1.) On January 10, 2007, the Anderson Plaintiffs filed proof of service of that demand, along with a petition, in the Appellate Division for the Second Department. (See id. (Ex. A).) Among the allegations contained in the petition is that ESDC is condemning property for the purpose of building not a public project, but a private road. (See id. (Ex. A) ¶¶ 11-14.) ESDC, in compliance with the section 207 demand, is preparing to file the very voluminous administrative record with the state court.

Although the first-named plaintiff in the Anderson suit (Eliselle Anderson) has joined with the first-named plaintiff in the instant case (Daniel Goldstein) in prior litigation against ESDC about this very Project (see Petition filed in Develop Don't Destroy Brooklyn v.

Empire State Dev. Corp. (Ex. B)),[15] the pair have evidently determined that two suits would be better than one this time. Whatever the strategy, the expected state-court EDPL § 207 proceeding (see ESDC Mem. at 10, 21) has materialized, and abstention is required.

Plaintiffs' objection that "[t]hird [p]arties [d]o [n]ot [c]ount" (Opp. at 29)—viz., that a suit filed by someone other than the plaintiff in the federal case is insufficient to trigger Younger—is flatly contradicted by the Second Circuit's holding in Spargo, 351 F.3d 65. Efforts to distinguish that case on the ground that any state-court section 207 plaintiffs would be "entirely unrelated" to plaintiffs herein (Opp. at 30) rest—as it turns out—on both a factual inaccuracy (given Ms. Anderson and Mr. Goldstein's prior litigation history with respect to this very project) and a legal one; as Spargo makes clear, the third party with the pending state-court suit need not be these "plaintiffs' subsidiaries, employees, or related entities." (Opp. at 30.)

Nor is it by any means a requirement that the Anderson Plaintiffs' rights somehow "derive" from those of these plaintiffs, or that the harm these plaintiffs allege (the taking of their properties) is identical to the harm alleged in the state proceeding. See Hindu Temple Soc'y of N. Am. v. Sup. Ct. of N.Y., 335 F. Supp. 2d 369, 375-76 (E.D.N.Y. 2004) (Dearie, J.) (rejecting both arguments), aff'd sub nom. Hindu Temple Soc'y of N. Am. v. Sup. Ct. of N.J., 142 F. App'x 492 (2d Cir. 2005). What matters, rather, is whether the two sets of plaintiffs' interests, even if "slightly" divergent, are substantially "intertwined." Id.; see, e.g., Hicks v. Miranda, 422 U.S. 332, 348-50 (1975) (abstaining from federal suit brought by plaintiffs whose interests were "intertwined" with those of defendants in pending state criminal prosecution). That test is met here; both sets of plaintiffs allege that their properties are being illegally condemned in furtherance of the Project, both challenge ESDC's Determination and

[15] Plaintiffs' counsel in that case, Mr. Baker, is also counsel to plaintiffs here. (See id. (Ex. B) at 26.)

Findings, and both seek a determination that the Project is not for a public use. Indeed, had plaintiffs here filed their EDPL § 207 "claim" in the appropriate court—the Appellate Division—their suit would automatically have been consolidated with that of the Anderson Plaintiffs. See EDPL § 207(A). Where, as here, the issues raised by the plaintiffs in the federal proceeding cannot be resolved without also "resolving issues at the heart of the current state proceeding," Younger abstention is appropriate. Hindu Temple Soc'y, 335 F. Supp. 2d at 376.[16]

Finally, Gilbertson v. Albright, 381 F.3d 965 (9th Cir. 2004) (en banc), does not help plaintiffs, and certainly does not require, as a prerequisite to Younger abstention, that the plaintiffs in the federal proceeding ask the court to "enjoin [a] state court judge." (Cf. Opp. at 28.) To the contrary, Gilbertson *overturned* a long-standing Ninth Circuit rule that the federal proceeding had to have the potential to "direct[ly] interfer[e]" with state proceedings before Younger could apply. See 381 F.3d at 977-78. Instead, the court held, an affirmative answer to the three-part inquiry identified in Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982)—viz., whether there are (1) ongoing state proceedings that (2) implicate important state interests and (3) provide the plaintiff with an adequate opportunity to litigate federal claims—fully "answers the question of whether Younger applies to noncriminal proceedings." Gilbertson, 381 F.3d at 978. If further clarification were needed, the court explained that it was no longer adhering to a rule that "the prospect that the federal court decision may influence the state court outcome through claim or issue preclusion" is insufficient to trigger Younger. Gilbertson, 381 F.3d at 976. To the contrary, it said, "[p]reclusion rules may be relevant to determining the practical effect of a federal court's relief." Id. at 978.

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[16] The fact that the exact claims raised in the EDPL § 207 proceeding differ from those presented here is not dispositive; the question, as the Court explained in Midkiff, is whether plaintiffs' federal claims "have been or could be presented" in the state proceeding. 467 U.S. at 237 (emphasis added).

Because a judgment in this Court on plaintiffs' federal—and, a fortiori, state-law—claims "may influence" the outcome in the pending EDPL § 207 proceeding (for example, through a determination that the Atlantic Yards Project serves no public purpose—a determination that would have res judicata effect on ESDC in the Appellate Division proceeding), the test set forth in Gilbertson and, indeed, generally adhered to, is amply satisfied.

C. Abstention Under Burford Is Required.

Even if no ongoing state proceeding were pending, the Court would still have to abstain under Burford v. Sun Oil Co., 319 U.S. 315 (1943). Plaintiffs do not dispute that the instant case is, in all respects relevant to the Burford analysis, indistinguishable from Coles v. City of Philadelphia, 145 F. Supp. 2d 646, 652-53 (E.D. Pa. 2001), aff'd, 38 F. App'x 829 (3d Cir. 2002). Instead, they rely on a decision that was subsequently vacated, albeit not on abstention grounds. (See Opp. at 30-31 (discussing Minnich v. Gargano, No. 00 Civ. 7481, 2001 WL 46989 (S.D.N.Y. Jan. 18, 2001), vacated on other grounds, 261 F.3d 288 (2d Cir. 2001)).) The ESDC Defendants respectfully submit that Judge Baer's analysis in Minnich is not persuasive.

As even the Minnich court recognized, the factors identified in that case and in Second Circuit precedent as pertinent to the Burford inquiry are not criteria, failure to satisfy any one of which results in retention of jurisdiction (cf. Opp. at 30 (describing factors as "a three-prong test")), but are instead factors to weigh in the balance in deciding whether "the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" NOPSI, 491 U.S. at 361 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)); see Hachamovitch v. DeBuono, 159 F.3d 687, 697 (2d Cir. 1998). Moreover, at

least two of those factors plainly weigh in favor of abstention here: (1) the state regulatory scheme (the EDPL) is (as Judge Baer acknowledged) "highly specific" and relatively complex, even if it is not particularly difficult to comprehend; and (2) (again, as Judge Baer acknowledged) the "eminent domain power is traditionally an area of state concern." Minnich, 2001 WL 46989, at *5.

The Minnich court's discounting of these factors simply does not accord with Burford or the Second Circuit precedent interpreting Burford. Cf. Grode v. Mut. Fire, Marine & Inland Ins. Co., 8 F.3d 953, 956 (3d Cir. 1993) ("Burford abstention is usually applied to state regulatory matters such as . . . applying state eminent domain procedures."). Moreover, plaintiffs' insistence that Burford abstention is unwarranted absent difficult questions of state law (see Opp. at 31) rests on a misreading of Burford itself. As the Second Circuit has emphasized, Burford supports two distinct grounds for abstention, only one of which requires that the court be presented with difficult state-law questions. See Hachamovich, 159 F.3d at 697. The other ground requires simply that the "'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" Id. That test is met here.

IV. PLAINTIFFS FAIL TO STATE A CLAIM UNDER FEDERAL LAW.

Ripeness and abstention aside, plaintiffs have failed to state a claim, and nothing in their opposition papers should persuade the Court otherwise. That opposition, in fact, is premised largely on a recitation of the conclusory allegations contained in their (now amended) complaint. It is of course axiomatic that such allegations cannot alone stave off dismissal; the Court, in resolving a motion to dismiss under Rule 12(b)(6), need deem true only well-pleaded factual allegations—not excited and groundless rhetoric impugning the motives of virtually

every public servant to have come in contact with a challenged project. At the very least, the Court is not bound to credit the inflammatory allegations that public officials, the Mayor and the former Governor included, acted without regard to the public interest and were motivated solely by a desire to enrich a private developer.[17]

The most striking defect in plaintiffs' response, however, lies not in what is said but in what is not said. Markedly absent from plaintiffs' discussion is any mention of the acknowledged and uncontested fact that at least half of the Project site here has been designated by the City as blighted for nearly forty years. (See ESDC Mem. at 5-6, 30 (discussing ATURA designation and blight removal plan); see also Am. Compl. ¶ 55 (acknowledging ATURA designation).) This omission is at once astonishing and understandable; were plaintiffs to acknowledge the ATURA designation, they would have to concede that the Project, broadly considered, serves a public purpose. But by pushing the ATURA out of the picture, they make it look like they are attacking more than just the scope of the Project. Also striking is the failure to even cite—much less discuss—the Second Circuit's decision in Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005). These two omissions, once factored into the analysis, drive home the conclusion already compelled by the facts and the law: Plaintiffs have failed to state any constitutional claim upon which relief may be granted.

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[17] See, e.g., Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002) ("'Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'") (alteration removed; quoting Gebhart v. Allspect, Inc., 96 F. Supp. 2d 331, 333 (S.D.N.Y. 2000)); Ivey v. Kawasaki Rail Car, Inc., No. CV-05-2207, 2005 WL 3133765, at *2 (E.D.N.Y. Nov. 23, 2005) (on motion to dismiss, "'mere conclusions of law or unwarranted deductions' need not be accepted") (quoting First Nationwide Bank v. Helt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994)); Hickey v. O'Bannon, 287 F.3d 656, 658 (7th Cir. 2002) ("we are not obliged to accept as true legal conclusions or unsupported conclusions of fact"); Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 184 (3d Cir. 2000) (court "'need not accept as true unsupported conclusions and unwarranted inferences'" and should approach plaintiff's allegations in a "'realistic, rather than a slavish, manner'") (quoting City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998)).

A. The Public Use Requirement Is Satisfied Here.

Plaintiffs have offered no constitutionally cognizable reason for rejecting the public use determination supporting the Atlantic Yards Project. As the ESDC Defendants explained at length in their opening memorandum, plaintiffs' proffered reading of Kelo presumes a silent overruling not just of the Second Circuit's decision in Rosenthal, 771 F.2d 44, but also of the Supreme Court's own prior precedents. (See ESDC Mem. at 30-37.) Such an interpretation does not withstand scrutiny. At most, Kelo suggests that certain procedural facts not otherwise relevant to the analysis might be helpful in determining whether, in cases where the sole justification offered for a condemnation is economic development, the project at issue will in fact serve a public purpose. Far from "mak[ing] no sense" (Opp. at 40), that holding, if it can even be characterized as such, represents a limited modification of the Berman/Midkiff rule of objective deference to account for the fact that "economic development" does not necessarily, and by its very nature, serve a public purpose.

But where, as here, several inherently public purposes support the project, Kelo's arguable modification of the test is beside the point. In other words, plaintiffs' allegations that the Atlantic Yards Project was conceived of, continues to be driven by, and was motivated by a desire to benefit a private developer are simply irrelevant; those facts, even if true, would not change the purposes served by the Project—all of which, unlike economic development alone, are by their very nature public. (See ESDC Mem. at 29 (citing cases acknowledging public nature of the several purposes ESDC has identifed).) See Green St. Ass'n v. Daley, 373 F.2d 1, 6 (7th Cir. 1967) ("Given a public purpose or use, the motives that underlie the exercise of [the] power [or eminent domain] may not be questioned.").

That Berman and Midkiff continue to control the analysis outside the limited context identified in Kelo—i.e., that plaintiffs here are not entitled to a "detailed examination of

the thought processes of those exercising the legislative prerogative" of eminent domain—is made clear by the Second Circuit's post-Kelo decision in Brody. 434 F.3d at 136. Plaintiffs, not surprisingly, have no answer to Brody. They do not so much as cite it.

Moreover, plaintiffs appear to concede (as they must) that if Midkiff and Berman are applicable here, the appropriate question is whether any conceivable public purpose is served by the proposed taking. While they insist that it is not enough for the ESDC Defendants to "mouth[] the words 'blight' (or 'jobs' or 'housing')" (Opp. at 40), that straw man need not detain the Court long. In fact—as the ESDC Defendants explained in their opening brief and as the complaint itself makes plain (but as plaintiffs conveniently omit to mention in their response)—it is uncontested that at least half of the Atlantic Yards Project site is in fact blighted. The City made its blight determination nearly forty years ago, and renewed it in 2004. The State and City governments have been searching for a project to remedy that blight ever since—until now, without success.

What plaintiffs are quibbling with when they accuse the ESDC Defendants of "mouthing the word[] 'blight,'" then, is not the conclusion that the Project will remediate blight (it plainly will), but the determination to include within the scope of the Project properties other than those that are incontestably blighted. But that determination, as Rosenthal and Berman hold, is not properly the subject of review by a federal court. See Berman, 348 U.S. at 35-36 ("It 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."); Rosenthal, 771 F.2d at 46.[18]

Finally, plaintiffs' attempts to pull this case outside what they deem to be the Berman paradigm—and thus the only proper circumstance in which deference is due to a condemnor's public use determination—fail on a number of fronts. (Cf. Opp. at 35-40.) First, no case has ever held that deference is dependent on factual similarity to Berman; quite to the contrary, as explained in Point IV-B, infra, deference is due unless the designated agency is acting ultra vires. Second, any success plaintiffs have in painting a contrast between Berman and this case rests on their refusal to acknowledge the long-standing ATURA designation and the attendant fact, referenced in the complaint itself, that at least half of the Project site has been blighted for almost 40 years. Third, plaintiffs' paradigm entirely excludes the facts of Rosenthal, which, to the extent they differed from those in Berman, paralleled in most respects those of this case. Finally, as explained above, the mere "fact" that the Project was conceived of and initiated by a private developer is not, under governing law, relevant to the analysis.

It bears emphasizing, in respect of the latter point, the sheer novelty of plaintiffs' suggestion that a public entity's public use determination deserves no deference if the project in question was sparked by private initiative. (Cf. Opp. at 35-40.) In fact, the involvement and initiative of private developers is a critical part of New York's eminent domain scheme; the UDC Act specifically encourages ESDC to partner with private entities, and New York courts

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[18] Justice Stevens, who authored the Kelo decision that was joined in full by a majority of the Court, has since explained that, "[t]hough much criticized, the Kelo opinion . . . rejected arguments that federal judges should review the feasibility of redevelopment plans, that they should evaluate the justification for the taking of each individual parcel rather than the entire plan, and that they should craft a constitutional distinction between blighted areas and depressed areas targeted for redevelopment." John Paul Stevens, Learning on the Job, 74 Fordham L. Rev. 1561, 1566 (2006) (emphasis added).

have repeatedly held that ESDC "is not limited to projects in which it is the prime mover." E. Thirteenth St. Cmty Ass'n v. New York 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, 493 N.E.2d 931, 502 N.Y.S.2d 707 (1986); Wein v. Beame, 43 N.Y.2d 326, 331, 372 N.E.2d 300, 401 N.Y.S.2d 458 (1977). In insisting that the Court adopt a sequencing test according to which Berman and Midkiff apply only where public initiative precedes private action, plaintiffs propose not only new law, but new law that runs contrary to the extant legislative scheme.

B. Deference To The State's And ESDC's Public Use Determination Is Required.

Plaintiffs, in their opposition to the ESDC Defendants' motion, launch another, distinct assault on the State's legislative apparatus. In an effort to side-step the substantial deference ordinarily due local public use determinations, plaintiffs attack the statutory scheme pursuant to which the state legislature has delegated its eminent domain powers to ESDC. (See Opp. at 40-44.) Citing the Seventh Circuit's decision in Daniels v. Area Plan Commission, 306 F.3d 445 (7th Cir. 2002), they argue that New York law leaves all "public use" determinations to the "unbridled discretion" of ESDC (Opp. at 40) and that, accordingly, any such determination is at best due no deference and at worst null and void. (Id. at 40-44.) This argument not only misreads Daniels, but rests on a distortion of the UDC Act.

The question raised in Daniels was whether a local planning commission's entirely unguided determination that vacating a restrictive covenant against commercial use of certain property would be in "the public interest" because "commercial uses could be more appropriate . . . for the property" was entitled to deference. 306 F.3d at 461. The statute pursuant to which this determination was made contained no attempt to define or circumscribe the definition of "public interest." Id. In fact, state law affirmatively prohibited condemnation

of property "if 'commercial development' is the sole public purpose." Id. at 462. Under these circumstances, the court refused to accord the commission's judgment the "almost complete deference" that ordinarily would be due under the Public Use Clause. Id. at 461. The court further concluded (applying no deference) that the various public purposes proffered in support of the condemnation lacked foundation in fact. Id. at 466. In rendering its decision, the court noted that while remediation of blight unquestionably was a public use, any attempt to justify the condemnation on that ground failed because the planning commission had not followed state-law procedures for designating the relevant area as blighted. See id. at 463-64.

Completely ignoring the text of the Act pursuant to which ESDC exercises its powers of the eminent domain, plaintiffs assert that this case is identical to Daniels because here, as there, state law "leav[es] condemning state agencies 'free to create a public purpose out of whole cloth' with no limiting 'findings of public purpose established by the legislature.'" (Opp. at 43 (quoting Daniels).) This assertion is reckless in its inaccuracy. In fact, the New York legislature made extensive "findings of public purpose" when it first granted powers (among them, the power of eminent domain) to ESDC in 1968. Those findings are recited at great length in the UDC Act under the heading "Statement of legislative findings and purposes," and include such determinations as 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, insanitary, deteriorated or deteriorating conditions." N.Y. Unconsol. Law § 6252.

Moreover, the UDC Act limits ESDC's powers—again, among them the power of eminent domain—by express reference to the statutorily identified public purposes. As relevant here, ESDC may not proceed with a "land use development project" unless and until it makes

explicit findings that (1) "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"; (2) "the project consists of a plan or undertaking for the clearance, replanning, reconstruction and rehabilitation of such area and for recreational and other facilities incidental or appurtenant thereto"; and (3) "the plan or undertaking affords maximum opportunity for participation by private enterprise, consistent with the sound needs of the municipality as a whole." Id. § 6260(c). A separate set of findings must be made for a "civic project." Id. § 6260(d). There is no dispute that ESDC actually made the requisite findings here.

Plaintiffs acknowledge the existence of the UDC Act in as abrupt and dismissive a fashion as they dare, characterizing it as (1) setting forth nothing more than the "general mission of the ESDC" and (2) failing sufficiently to distinguish the public-purpose limitations on ESDC's eminent domain powers from limitations on its other powers. (Opp. at 43 n.10 (their emphasis).) These objections lack merit. The legislature here has identified the public purposes it seeks to further, and has vested in ESDC the power to further those purposes through, inter alia, the exercise of eminent domain. ESDC's Determination and Findings, made pursuant to that legislative grant and the express limitations contained therein, accordingly are entitled to full legislative deference. New York State's failure to organize its statute in the manner plaintiffs prefer is of no moment.

C. Equal Protection And Due Process

Plaintiffs make little effort to defend their equal protection and due process claims against dismissal under Fed. R. Civ. P. 12(b)(6). (See Opp. at 44-7.) They have no answer to the ESDC Defendants' arguments that (1) the equal protection claims founders on the existence of a

conceivable rational basis for the proposed takings, and (2) the due process claim is foreclosed by the Second Circuit's decision in Brody. Accordingly, neither claim can survive.

CONCLUSION

For the reasons stated herein and in the ESDC Defendants' Memorandum of Law in Support of their Motion to Dismiss the Complaint, the Court should dismiss the amended complaint in its entirety.

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Respectfully submitted,

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: _____
Douglas M. Kraus (DK 7497)
Preeta D. Bansal (PB 9452)

Four Times Square
New York, NY 10036
(212) 735-3000
Attorneys for Defendants ESDC and Charles A. Gargano