SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of the Application of the New York State Urban Development Corporation d/b/a Empire State Development Corporation to acquire title in fee simple absolute to certain real property, required for the

Index No. 32741/09

ATLANTIC YARDS LAND USE IMPROVEMENT AND CIVIC PROJECT- PHASE 1

NOTICE OF MOTION

BLOCK 1118, LOTS 1,5, 6, 21-25 AND 27;
BLOCK 1119, LOTS 1 and 64; BLOCK 1120, LOT 35;
BLOCK 1121, LOTS 42 and 47; BLOCK 1127, LOTS 1, 10-13, 18-22, 27, 29, 30, 33, 35, 43, 45-48, 50, 51 and 54-56; BLOCK 1129, LOTS 1, 3-6, 13, 21, 25, 39, 43-46, 49, 50, 54, 62, 76 and 81; Pacific Street between Carlton and Vanderbilt Avenues; Pacific Street between Flatbush and Sixth Avenues; Fifth Avenue between Atlantic and Flatbush Avenues including traffic island at Fifth Avenue and Pacific Street (FEE),

as said property is shown on the current Tax Map of the Borough of Brooklyn, City and State of New York

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PLEASE TAKE NOTICE that, upon the annexed affirmation of Matthew D. Brinckerhoff, Esq., dated January 28, 2010, the accompanying exhibits, the Verified Answer, Defenses, Affirmative Defenses, Objections in Point of Law and Counterclaims, and all the pleadings and/or other documents filed in this action, Respondents Peter Williams Enterprises, Inc., 535 Carlton Ave. Realty Corp., Pacific Carlton Development Corp., Daniel Goldstein, and Chadderton's Bar and Grill, Inc., d/b/a Freddy's Bar and Backroom, will move before the Supreme Court of the State of New York, County of Kings, before the Honorable Abraham G. Gerges, IAS Part 74, located in courtroom 17.17 at 320 Jay Street, Brooklyn, New York, on the 29th day of January, 2010, at 9:30 in the forenoon, or as soon thereafter as counsel may be heard, pursuant to CPLR 406, 408, 2201, 3211 and 3212, for an order:

1. Dismissing the Petition with prejudice, pursuant to CPLR 3211 or 3212, on the ground that Petitioner's EDPL § 204 Determination and Findings, dated Dec. 8, 2006 (attached in incomplete form as Ex. C to the Petition) ("2006 D&F"), can no longer serve as the predicate for the seizure of Respondents' homes and businesses because:

    (A) the Modified General Project Plan ("2006 MGPP"), dated Dec. 8, 2006, upon which the 2006 D&F was based, was nullified and superceded by a new Modified General Project Plan, dated Sep. 17, 2009 ("2009 MGPP"), thus vitiating the 2006 D&F;

    (B) the 2006 D&F and the now superceded 2006 MGPP provided for the acquisition of *all* properties simultaneously, but the new 2009 MGPP provides for the acquisition of properties in two stages; and

    (C) it is undisputed that the factual underpinnings of the determination of public use, benefit and purpose set forth in the 2006 D&F have materially changed during the more than three years that have passed; or, alternatively

2. Dismissing the Petition without prejudice based on procedural defects, failure to state a claim and lack of subject matter jurisdiction, pursuant to CPLR 3211 or 3212, because the Petition does not comply with the strict requirements contained in EDPL Article 4 and CPLR Article 4, and is thus defective, on multiple grounds, including without limitation:

(A) the Petition does not comply with EDPL § 402(b)(3)(a), which mandates that the Petition contain a statement alleging "compliance with the requirements of article two of this law," because the article two predicate, *i.e.*, the 2006 D&F, has been nullified, superceded and/or materially undermined as set forth above;

(B) the Petition is premature or unripe because Respondents' EDPL § 207 challenge to the 2006 D&F has not been finally determined – Respondents' filed a timely Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal to the Court of Appeals (attached as Ex. B to Respondents' Verified Answer), which was served on Petitioner before this action was commenced and has not been adjudicated;

(C) the Petition does not state "the public use, benefit or purpose for which the property is required," as mandated by EDPL § 402(b)(3)(d), indeed the words public use, benefit or purpose are nowhere to be found in the Petition, even in conclusory form;

(D) the Petition does not comply with EDPL § 402(b)(3)(a) and EDPL § 402(b)(3)(d), because the 2006 D&F attached as Ex. C to the Petition is incomplete, and because Petitioner intentionally omitted the list of properties contained in the 2006 D&F in order to

conceal the fact that the 2006 D&F was premised upon a single acquisition, which was recently changed to a staged acquisition without any amendment to the 2006 D&F;

(E) the Petition allegedly served upon Respondents is incomplete and inconsistent with the Petition filed in this Court, and differs from one Respondent to the next, because it does not contain true and complete copies of the proposed acquisition maps;

(F) the Petition seeks relief that is inconsistent with the relief sought in the Notice of Petition, paragraph 6 of the relief sought by the Notice of Petition seeks an order "directing that each condemnee shall have a period of one hundred twenty (120) days . . . to file a written claim for damages," whereas Paragraph e) of the Wherefore Clause in the Petition seeks an order "directing that each condemnee shall have a period of ninety (90) days . . . to file a written claim for damages"; and

(G) a condition precedent to the relief requested in the Petition has not been met, the 2009 MGPP provides that Petitioner's "acquisition of all such properties [by condemnation] will not occur until such time as [Petitioner] receives commitments, guaranties and other evidence satisfactory to [Petitioner] that [Ratner] will (i) promptly commence construction of the Arena, and all of the infrastructure necessary for the Arena (together with

the Arena, the "Initial Development"), (ii) complete such construction within agreed-upon time periods and (iii) commence and complete construction of the Upgraded Yard in accordance with and subject to the schedule agreed to with the MTA (and acceptable to [Petitioner])," 2009 MGPP at 23, however, Ratner needs an additional $324.8 million to complete the arena for his professional basketball team and cannot provide any "assurance that the funds will be raised"; or alternatively,

3. Staying this action, pursuant to CPLR 2201, until such time as Petitioner demonstrates that it has corrected the numerous deficiencies outlined above, including without limitation, demonstrating that the adjudication of Respondents' current EDPL § 207 proceeding or any subsequent proceeding to challenge any subsequent amended or modified EDPL § 204 Determination and Findings, is final;

4. Granting leave for Respondents to conduct pretrial disclosure, pursuant to CPLR 408, including without limitation, discovery concerning the revelations just this week that firmly establish that Petitioner has consistently misrepresented the timing of the Project;

5. Directing that a trial will be held, pursuant to CPLR 410, in order for the Court to resolve any material factual disputes concerning the various issues raised by this motion and in Respondents' Verified Answer, Defenses, Affirmative Defenses and Counterclaims; and

6. For such other and further relief as this Court deems appropriate.

Dated: January 28, 2010
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By: _____
Matthew D. Brinckerhoff

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Attorneys for Respondents Peter Williams Enterprises, Inc., 535 Carlton Ave. Realty Corp., Pacific Carlton Development Corp., Daniel Goldstein, and Chadderton's Bar and Grill, Inc., d/b/a Freddy's Bar and Backroom

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Attorneys for Petitioner

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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as said property is shown on the current Tax Map of the Borough of Brooklyn, City and State of New York

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Index No. 32741/09

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT AND/OR TO STAY THIS ACTION AND/OR FOR DISCOVERY AND TRIAL

MATTHEW D. BRINCKERHOFF, an attorney admitted to practice law in the State of New York, affirms the following under penalty of perjury:

1. I am a member of Emery Celli Brinckerhoff & Abady LLP, counsel for Respondents Peter Williams Enterprises, Inc., 535 Carlton Ave. Realty Corp., Pacific Carlton Development Corp., Daniel Goldstein, and Chadderton's Bar and Grill, Inc., d/b/a Freddy's Bar and Backroom.

2. I submit this affirmation in support of Respondents' motion, pursuant to CPLR 406, 408, 2201, 3211 and 3212, for an order:

A. Dismissing the Petition with prejudice, pursuant to CPLR 3211 or 3212, on the ground that Petitioner's EDPL § 204 Determination and Findings, dated Dec. 8,

2006 (attached in incomplete form as Ex. C to the Petition) ("2006 D&F"), can no longer serve as the predicate for the seizure of Respondents' homes and businesses because:

(i) the Modified General Project Plan ("2006 MGPP"), dated Dec. 8, 2006, upon which the 2006 D&F was based, was nullified and superceded by a new Modified General Project Plan, dated Sep. 17, 2009 ("2009 MGPP"), thus vitiating the 2006 D&F;

(ii) the 2006 D&F and the now superceded 2006 MGPP provided for the acquisition of *all* properties simultaneously, but the new 2009 MGPP provides for the acquisition of properties in two stages; and

(iii) it is undisputed that the factual underpinnings of the determination of public use, benefit and purpose set forth in the 2006 D&F have materially changed during the more than three years that have passed; or, alternatively

B. Dismissing the Petition without prejudice based on procedural defects, failure to state a claim and lack of subject matter jurisdiction, pursuant to CPLR 3211 or 3212, because the Petition does not comply with the strict requirements contained in EDPL Article 4 and CPLR Article 4, and is thus defective, on multiple grounds, including without limitation:

(i) the Petition does not comply with EDPL § 402(b)(3)(a), which mandates that the Petition contain a statement alleging "compliance with the requirements of article two of this law," because the article two

predicate, *i.e.*, the 2006 D&F, has been nullified, superceded and/or materially undermined as set forth above;

(ii) the Petition is premature or unripe because Respondents' EDPL § 207 challenge to the 2006 D&F has not been finally determined – Respondents' filed a timely Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal to the Court of Appeals (attached as Ex. B to Respondents' Verified Answer), which was served on Petitioner before this action was commenced and has not been adjudicated;

(iii) the Petition does not state "the public use, benefit or purpose for which the property is required," as mandated by EDPL § 402(b)(3)(d), indeed the words public use, benefit or purpose are nowhere to be found in the Petition, even in conclusory form;

(iv) the Petition does not comply with EDPL § 402(b)(3)(a) and EDPL § 402(b)(3)(d), because the 2006 D&F attached as Ex. C to the Petition is incomplete, and because Petitioner intentionally omitted the list of properties contained in the 2006 D&F in order to conceal the fact that the 2006 D&F was premised upon a single acquisition, which was recently changed to a staged acquisition without any amendment to the 2006 D&F;

(v) the Petition allegedly served upon Respondents is incomplete and inconsistent with the Petition filed in this Court, and differs from one

Respondent to the next, because it does not contain true and complete copies of the proposed acquisition maps;

(vi) the Petition seeks relief that is inconsistent with the relief sought in the Notice of Petition, paragraph 6 of the relief sought by the Notice of Petition seeks an order "directing that each condemnee shall have a period of one hundred twenty (120) days . . . to file a written claim for damages," whereas Paragraph e) of the Wherefore Clause in the Petition seeks an order "directing that each condemnee shall have a period of ninety (90) days . . . to file a written claim for damages"; and

(vii) a condition precedent to the relief requested in the Petition has not been met, the 2009 MGPP provides that Petitioner's "acquisition of all such properties [by condemnation] will not occur until such time as [Petitioner] receives commitments, guaranties and other evidence satisfactory to [Petitioner] that [Ratner] will (i) promptly commence construction of the Arena, and all of the infrastructure necessary for the Arena (together with the Arena, the "Initial Development"), (ii) complete such construction within agreed-upon time periods and (iii) commence and complete construction of the Upgraded Yard in accordance with and subject to the schedule agreed to with the MTA (and acceptable to [Petitioner])," 2009 MGPP at 23, however, Ratner needs an additional $324.8 million to complete the arena for his professional basketball team

and cannot provide any "assurance that the funds will be raised"; or alternatively,

C. Staying this action, pursuant to CPLR 2201, until such time as Petitioner demonstrates that it has corrected the numerous deficiencies outlined above, including without limitation, demonstrating that the adjudication of Respondents' current EDPL § 207 proceeding or any subsequent proceeding to challenge any subsequent amended or modified EDPL § 204 Determination and Findings, is final;

D. Granting leave for Respondents to conduct pretrial disclosure, pursuant to CPLR 408, including without limitation, discovery concerning the revelations just this week that firmly establish that Petitioner has consistently misrepresented the timing of the Project; and

E. Directing that a trial will be held, pursuant to CPLR 410, in order for the Court to resolve any material factual disputes concerning the various issues raised by this motion and in Respondents' Verified Answer, Defenses, Affirmative Defenses and Counterclaims.

Background

3. On or about December 8, 2006, Petitioner, the New York State Urban Development Corporation ("UDC") issued its "Determination and Findings by the New York State Urban Development Corporation d/b/a Empire State Development Corporation Pursuant to EDPL Section 204 with Respect to the Atlantic Yards Land Use Improvement and Civic Project" ("2006 D&F") (an incomplete copy of which is attached as Ex. C to the Petition). The missing

property list is readily available from Petitioner's own website, *see* http://www.empire.state.ny.us/pdf/AtlanticYards/Determination%20and%20Findings.pdf.

4. The 2006 D&F was premised upon the "Atlantic Yards Land Use Improvement and Civic Project Modified General Project Plan" dated and approved the same day, December 8, 2006 (the "2006 MGPP") (attached as Ex. A).[1]

5. The 2006 D&F averred that the "principal public use, benefit and purpose of the Project" was "to eliminate the blighted conditions on the Project Site and the blighting influence of the below-grade rail yard." Petition Ex. C at 4.

6. The 2006 D&F alleged that the Project, as reflected in the 2006 MGPP, would also provide other "public uses, benefits and purposes," including, *inter alia*, 2,250 units of affordable housing and a "a state-of-the-art rail storage, cleaning and inspection facility for the LIRR that would enable it to better accommodate simultaneously its new fleet of multiple-unit series electric propulsion cars operated by LIRR which are compliant with the American [sic] with Disabilities Act." *Id.* at 5.

7. The 2006 D&F claimed that the Project would provide certain economic benefits, including, among other things, "net tax revenues in excess of the public contribution to the Project." *Id.* at 6.

8. The 2006 D&F did not provide for the condemnation of Respondents' properties in stages. All properties were to be acquired at the same time.

[1] Available at http://www.empire.state.ny.us/AtlanticYards/General_Project_Plan.asp.

9. All, or nearly all, of the "findings" of public use, benefit or purpose contained in the 2006 D&F were based upon the facts presented in the 2006 MGPP. Indeed, they were both adopted on the same day by the UDC.

10. On January 5, 2007, Respondents timely challenged the 2006 D&F pursuant to EDPL § 207 in an amended complaint filed in federal district court. *See Goldstein v. Pataki*, 2007 WL 575830 (Jan. 5, 2007 E.D.N.Y.).

11. On June 6, 2007, the district court dismissed Petitioner's EDPL § 207 claim "without prejudice to its being re-filed in state court," *Goldstein v. Pataki*, 488 F.Supp.2d 254, 291 (E.D.N.Y. 2007).

12. On February 1, 2008, the Court of Appeals for the Second Circuit affirmed "the judgment of the district court dismissing . . . the state claim without prejudice." *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008).

13. On June 23, 2008, the Supreme Court of the United States denied certiorari. *Goldstein v. Pataki,* 128 S. Ct. 2964 (June 23, 2008) ("Justice Alito would grant the petition for a writ of certiorari").

14. On August 1, 2008, Respondents re-filed their EDPL § 207 claim in the Appellate Division, Second Department.

15. In opposing Respondents' EDPL § 207 claim before the Appellate Division, Petitioner argued that the court was legally precluded from considering the factual allegations concerning events that occurred *after* the 2006 Determination and Findings because none "of these materials formed any part of the administrative record before the ESDC when it rendered its [2006 Determination and Findings], and they should not be considered by the

Court." Brief of Respondent, *Goldstein v. N.Y. State Urban Dev. Corp.*, at 3, n.1 (Dec. 19, 2008).

16. On May 12, 2009, the Appellate Division, Second Department, denied the Petition. *Goldstein v. N.Y. State Urban Dev. Corp.*, 59 A.D.3d 312 (2d Dep't 2009).

17. Thereafter, in the Court of Appeals, Respondents asked the Court to consider the materially significant events that transpired after the 2006 Determination and Findings, particularly Petitioner's adoption of the 2009 Modified General Project Plan on September 17, 2009, and information known to Petitioner prior to its adoption, which fatally undermine the public use finding contained in the old and stale 2006 Determination and Findings. *See* Brief for Petitioners-Appellants, 2009 WL 3810843 at 21-33 (Jul. 31, 2009); Reply Brief for Petitioners-Appellants, 2009 WL 3810849 at 77-79 (Sep. 25, 2009).

18. Petitioner argued strenuously – devoting six full pages of its brief to the topic – that the Court of Appeals should not consider anything that transpired after December 8, 2006, the date Petitioner UDC adopted its 2006 Determination and Findings, including the adoption of the 2009 Modified General Project Plan which superceded the 2006 Modified General Project Plan, upon which the 2006 Determination and Findings was premised. *See* Brief for Respondent-Respondent, 2009 WL 3810844, at 36-41 (Sep. 8, 2009).

19. On November 24, 2009, the Court of Appeals affirmed the denial of Respondents' EDPL § 207 claim. *Goldstein v. N.Y. State Urban Dev. Corp.*, No. 178, 2009 WL 4030939 (Nov. 24, 2009), *motion to reargue or hold motion in abeyance pending.* While that ruling is not final, the Court of Appeals made it clear that it had rejected Respondents' plea to consider the many respects in which the public use findings had been materially undermined

during the nearly three years that had passed since Petitioner issued its 2006 Determination and Findings. It explained that it was reviewing only "the record upon which the [UDC] determination was based and by which we are bound." *Id.* at 2.

Material Changes to the Project

A. Modified General Project Plan

20. In June 2009, after the Second Department ruling, and believing that all litigation hurdles to the Project had been cleared, Petitioner revealed, for the first time, its long-standing intention to materially modify the 2006 MGPP, the plan on which the 2006 D&F was premised.

21. Among other things, Petitioner released a proposed Modified General Project Plan ("2009 MGPP") (attached as Ex. B),[2] and a 63 page "Technical Memorandum" (attached as Ex. C),[3] detailing some, but not all, of the material changes sought and obtained by the Project developer, Bruce Ratner, and various entities, he owns or controls (hereafter "Ratner"), and contained in the proposed 2009 MGPP.

22. On September 17, 2009, four members of the UDC's obscure, unelected, eight-member Board met, and three of them (with one recusal/abstention) voted to adopt the 2009 MGPP.[4]

23. Among other things, the three board members knew, or should have known, the following at the time they adopted the 2009 MGPP:

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[2] Available at: www.empire.state.ny.us/pdf/AtlanticYards /MODGPP2009.pdf.

[3] Available at www.empire.state.ny.us/pdf/AtlanticYards/Technical_Memo_text.pdf.

[4] Webcast of meeting available at www.empire.state.ny.us/webcasts/default.asp.

(1) a memorandum, dated September 17, 2009, from Dennis Mullen ("Mullen Memo") (attached as Ex. D),[5] the then-designated, but not confirmed, Chairman of the UDC Board, requesting that the Board adopt the 2009 MGPP, and provide authorization to (a) "Amend Funding Agreements," (b) "Enter into Leases," (c) "Convey Real Property," (d) "Enter into other Project Documents," and (e) "Take Related Actions," including without limitation the approval of the amendment of UDC's funding agreement with Ratner so as to accelerate the State's last cash payment of $25 million (for a total of $100 million) to the Ratner for purposes (such as soft costs and demolition) previously disallowed in earlier funding agreements signed in 2007;

(2) the September 10, 2009, Report of the New York City Independent Budget Office entitled "The Proposed Arena at Atlantic Yards: An Analysis of City Fiscal Gains and Losses" (attached as Ex. E),[6] which concluded that,

> (a) the Project/Arena will *cost* the City a minimum of $39.5 million (a figure that balloons to $220 million when opportunity costs are considered),
>
> (b) the State will gain $25 million in new tax revenues (only $9 million when opportunity costs are considered),
>
> (c) the MTA will gain $6 million (but will lose $16 million when opportunity costs are considered), and
>
> (d) Ratner, the private developer, will receive $726 million in government subsidies and benefits for the arena alone;

(3) that the deal between Ranter and the MTA had been materially altered (i) to provide for an the initial cash payment of only $20 million (instead of $100 million), (ii) to restructure and extend the full acquisition of the balance of the MTA property beyond 2030, (iii) to allow Ratner to abandon the planned further acquisition at any time, in its sole discretion, with virtually no penalty, (iv) to

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[5] September 17, 2009 Memorandum from Dennis Mullen to Directors of the Board, available at http://www.scribd.com/doc/19857899/Ay-Mgpp-Board-Memo62309 ("Mullen Memo").

[6] Available at: http://www.ibo.nyc.ny.us/iboreports/AtlanticYards 091009.pdf.

extend the payments for the acquisition of the MTA air rights on Blocks 1120 and 1121 to the year 2030, and (v) to reduce the size of the replacement yard from nine tracks with a 76 car capacity to seven tracks with a 56 car capacity, *see, e.g.,* MTA Staff Summary (attached as Ex. F);[7]

(4) that the City had or would agree to amend its funding agreement with Ratner to accelerate its scheduled payment to Ratner of $15 million (for a total of $205 million plus unquantifiable past and future payments for "extraordinary infrastructure costs");

(5) that the Technical Memorandum issued by the UDC in June 2009 anticipated that the Project (under the residential plan) would total 7,961,000 square feet, yet the Project had since been reduced to include only 5,145,000 square feet, a reduction of approximately 35%; and

(6) that although the 2009 MGPP anticipates the *possibility* that as many as 2,250 affordable housing units will be built over the next 30 years, the development agreement between UDC and Ratner provided that every unit of affordable housing would be *contingent* upon "governmental authorities making available to [Ratner] affordable housing subsidies."

24. The 2009 MGPP (attached as Ex. B) provides that Petitioner's "acquisition of all such properties [by condemnation] will not occur until such time as [Petitioner] receives commitments, guaranties and other evidence satisfactory to [Petitioner] that [Ratner] will (i) promptly commence construction of the Arena, and all of the infrastructure necessary for the Arena (together with the Arena, the "Initial Development"), (ii) complete such construction within agreed-upon time periods and (iii) commence and complete construction of the Upgraded Yard in accordance with and subject to the schedule agreed to with the MTA (and acceptable to [Petitioner])." 2009 MGPP at 23.

[7] Available at http://www.mta.info/mta/pdf/ay_summary.pdf.

25. Notwithstanding Petitioner's public commitment, as set forth in the new 2009 MGPP, that it will not seek to acquire Respondents' homes and businesses until it receives satisfactory evidence that the professional basketball arena and downgraded rail yard will actually be completed (but not the alleged affordable housing, publicly accessible private space or anything else but acres of parking lots), it commenced this action (dated December 15, 2009) on December 23, 2009, at almost precisely the same time that aspects of the arena tax exempt bond offering were revealed as follows:

> As one of the Vacant Possession Release Conditions, and as required under the Arena Lease Agreement, ArenaCo will be obligated to pay or cause to be paid the Additional Rent Amount (presently anticipated to be $324.8 million, which amount may ultimately be reduced to reflect prior expenditures made for the Arena Project and included in the budget for the Arena Project on and after November 1, 2009) to the Issuer (for deposit with the PILOT Bond Trustee). . . . At the time of the issuance of the Series 2009 PILOT Bonds, ArenaCo will not have funds sufficient to pay the Additional Rent Amount, but ArenaCo expects to raise sufficient funds prior to the Arena Project Effective Date . . . Although ArenaCo expects that the necessary funds will be timely raised, there can be no assurance that the funds will be raised or that the amount of such funds will be sufficient to make the full payment of the Completion Cost. In the event that the Issuer has not received the Additional Rent Amount from ArenaCo for deposit with the PILOT Bond Trustee at or prior to the Outside Commencement Date, or if such receipt does not occur within five (5) Business Days of Vacant Possession having been achieved, proceeds of the Series 2009 PILOT Bonds will not be applied to the construction of the Arena, and the Issuer will be required to redeem the Series 2009 PILOT Bonds at 101%.

See Bond Offering Statement (available at http://www.scribd.com/doc/24623475/Official-Statement-Posted-12-21-2009-8-8-MB).

26. As is made clear from the Bond Offering Statement, Ratner needs an additional $324.8 million and cannot provide any "assurance that the funds will be raised," and if he fails, the Project will unquestionably be scotched, yet Petitioner claims to have received

satisfactory evidence that Ratner will complete the arena for his basketball team and the new downgraded rail yard, such that it has decided to proceed with seeking an order from this Court seeking to vest title.

B. Vanderbilt Rail Yards and the MTA Deal

27. As explained above, at the time of the UDC Board meeting on September 17, 2009, members of the voting troika of UDC Board members knew or should have known that the MTA Deal had been radically restructured.

28. Indeed, the alleged benefit to the public engendered by the 2005 deal between the MTA and Ratner, which had always been dubious, had been utterly gutted by the new deal in 2009.

29. Under the terms of the new deal, Ratner is only required to pay $20 Million for the rights to the MTA's property on Block 1119 required for the construction of Phase I.

30. Ratner is not required to make any additional payments to the MTA until June 2012 at which time it must make an additional payment of $2 Million.

31. Thereafter, Ratner must make further payments of $2 Million on June 1, 2013, 2014 and 2015.

32. Commencing on June 1, 2016 the annual payments to the MTA increase to $11 Million per year and continue for 15 years until 2030.

33. The MTA agreed to a redesigned and reduced scope of the replacement yard for the LIRR and required that construction of the replacement yard commence by June 30, 2012 and be completed by September 1, 2016.

34. The new agreement with the MTA provides that it will convey the parcel necessary for the construction of the arena upon the payment of the initial $20 Million. The conveyance of the MTA air rights for parcels on Blocks 1120 and 1121 will only occur upon the payment of the subsequent amounts associated with each parcel.

35. If Ratner fails to construct the yard, it loses the rights to the air space on Blocks 1120 and 1121 and MTA can draw on the letter of credit.

36. The result of the new MTA agreement has two direct impacts on the timing of the completion of Phase II and the potential that it will be completed at all.

37. The structure of the deal assures that the final payment for the air rights over the Yards will not be made until June 2030. Until that payment is made, the rights to that parcel will not be conveyed to Ratner, thus precluding Ratner from beginning construction of the last towers.

38. The deal is also structured so that Ratner can decide to abandon the project at virtually any time and mitigate its potential financial loss and limit its up front investment.

39. Ratner can decide as early as June 1, 2012 to abandon Phase II and avoid the first additional payment of $2 Million.

40. Ratner could decide to keep its option on the air rights parcel and simply pay $2 Million per year to maintain that option and still abandon Phase II by June 1, 2016 before the annual payments significantly increase to $11 Million.

41. If Ratner decides to abandon Phase II at any of those points, it can also walk away from the obligation to complete the permanent replacement rail yard and simply

forfeit the $86 Million letter of credit that is far less than the estimated cost of $147 Million to complete the downgraded rail yard.

42. If Ratner decides not to build Phase II – failing to cover the rail yard with a platform – then the blight that supposedly dominates the project area, particularly the below grade yards on Blocks 1120 and 1121, will continue without any plan for redevelopment.

43. Even if Ratner proceeds with the Project consistent with the time frame in the MTA agreement, construction for the completion of Phase II will not commence until after 2030.

44. According to the 2006 D&F, the "primary" public benefit to be realized by the Project is the elimination of blight that allegedly exists and will likely continue due to the presence of Vanderbilt Yards.

45. The new agreement between Ratner and the MTA reduces, if not eliminates, the likelihood that Vanderbilt Yards will be redeveloped in a timely manner, if at all. Thus, instead of eliminating the alleged blight, the Project will make the alleged blighting conditions and influence of Vanderbilt Yards a permanent feature.

46. Both the 2006 MGPP and the 2006 D&F, contemplated that the Project would be completed in 2016 and that it would alleviate the existing blight and blighting influence of Vanderbilt Yards with the completion of Phase II including the construction of the platform over the Vanderbilt Yards and construction of all of the high-rise towers.

47. The vast majority of the purported benefits of the Project are derived in Phase II including the majority of the housing and the majority of the affordable housing, all of the privately owned, publicly accessible open space, the majority of the community facilities and

the majority of the economic benefits associated with construction jobs, tax revenue and permanent employment.

48. As part of its 2006 Blight Study, which supported the approval of the 2006 MGPP and the 2006 D&F, the UDC determined that underutilized lots, including lots used for surface parking lots, were evidence of blight and had a blighting influence on surrounding properties hindering their sound redevelopment.

49. Even if Ratner were to eventually complete the project, the agreement with the MTA permits the commencement of the final portions of Phase II to be postponed until 2030.

C. Affordable Housing

50. Like the 2006 D&F, the 2009 MGPP states that the Project will generate at least 2,250 units of affordable housing and that not more than 50% of the Phase II units will be completed without the completion of 50% of the Phase II affordable housing units.

51. The Mullen Memo recommending adoption of the 2009 MGPP, however, made it clear, for the first time, that the affordable housing is wholly contingent on the availability of government subsidies. Because such subsidies cannot be guaranteed, and because, in any event, utilizing finite government subsidies does absolutely nothing to increase the overall number of available affordable housing units in the City of New York, the claim of affordable housing was wholly eviscerated by the Mullen Memo.

52. Specifically, an attachment to the Mullen Memo provides that:

> no less than Two Thousand Two Hundred Fifty (2,250) affordable housing units, subject to governmental authorities making available to [Ratner] or its applicable successor or assign, after good faith review by the applicable administering agency, affordable housing subsidies consistent with then applicable

program rules and standards then generally available to developers of affordable housing units.

D. New Revelations Contained in Master Closing Documents Which Were Made Public Three Days Ago

53. *Just three days ago* – and consistent with the disturbing lack of transparency that has marked this "Public Project" from the moment it was first conceived by Ratner,[8] who then enlisted the aid of his old law school friend, then Governor George Pataki, and fellow multi-millionaire Mayor Michael Bloomberg, to wield the power of eminent domain on his behalf – Petitioner UDC made available the Master Closing documents, which were executed more than a month ago.

54. Although the documents are voluminous and complex, a quick review by Mr. Norman Oder, who has reviewed some of the voluminous materials, has put the lie to Petitioner's prior assurances that the project will by completed in 10 years or less. *See* Atlantic Yards Report, Despite Promise of Ten-Year AY Buildout, ESDC Deadlines Allow 12 Years for Phase 1, 15 Years to Start Platform, 25 Years for Full Project, Jan. 27, 2010 (attached as Ex. G).[9] The newly disclosed documents reveal that the deadlines "imposed" by Petitioner on Ratner bear

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[8] Perhaps because the project has always been the realization of Ratner's desire to forcibly acquire and develop property owned by others, and contrary to the entire EDPL upon which this special proceeding is premised, Ratner has flatly refused to provide information about the project. Indeed, when Ratner was asked by a reporter recently to share plans for the project, he demanded: "Why should people get to see plans? This isn't a public project." *See* Crain's, TENACIOUS B; Bruce Ratner must clear yet more do-or-die hurdles at Atlantic Yards, Nov. 9, 2009 (available at http://www.crainsnewyork.com/article/20091108/FREE/311089987, although the title of the article was subsequently changed (the rapper reference was removed) to "Ratner Faces Atlantic Yards Hurdles).

[9] Atlantic Yards Report, Despite Promise of Ten-Year AY Buildout, ESDC Deadlines Allow 12 Years for Phase 1, 15 Years to Start Platform, 25 Years for Full Project (available at: http://atlanticyardsreport.blogspot.com/2010/01/despite-promise-of-ten-year-ay-buildout.html).

almost no relationship to the 2009 MGPP, much less the superceded 2006 MGPP upon which Petitioner's 2006 D&F is based, and allow instead for:

- six years to build the arena
- three or four years to start construction of the first tower
- five or six years to start construction of the second tower
- ten years to start construction of the third tower
- 12 years to build Phase 1 (which can be much smaller than officially promised)
- 15 years to start construction of the platform over the railyard
- 25 years to finish the project (which can be much smaller than officially promised)

> The damages Forest City Ratner faces in most cases – less than $10 million for an arena that's up to three years late, $5 million for each of three buildings if they're late – don't represent a lot of money, especially given that the developer just got a cash flow boost of $31 million to buy land.

Id.

ARGUMENT

I. EDPL Proceedings Require Strict Statutory Compliance

55. An EDPL proceeding is a special proceeding. It is created by statute. It allows for the summary compelled transfer of real property from one owner to another without any of the normal due process protections afforded by a plenary action. Accordingly, a party seeking such an extraordinary, truncated and expedited remedy must strictly satisfy the statutory requirements.

56. Thus, as in a summary proceeding under the RPAPL, an action seeking to vest title under Article 4 of the EDPL "must be strictly construed and . . in strict conformity with the terms of the statute." *Matter of Addition to Reed's Basket Hollow Swamp Park*, 6 Misc.3d, 2005 WL 416817, at *3 (Sup. Ct. Kings Co. 2005) (citation omitted).

57. For example, in *Reed's Basket Hollow Swamp Park*, this Court strictly construed the EDPL and denied the condemnor's motion to amend, explaining that:

> the power to condemn, or to take private property without the owner's consent, must be strictly construed and must be exercised in strict conformity with the terms of the statute conferring the right.

Id. (citing *Central Hudson Gas & Elec. v. Morgenthau*, 234 A.D. 530, 533 (3d Dep't 1932), *aff'd* 259 N.Y. 569 (1932)); *see also Schneider v. City of Rochester*, 160 N.Y. 165, 172 (1899); *Matter of Water Commissioners of Amsterdam*, 96 N.Y. 351, 357 (1884).

58. In the nearly identical context of a summary proceeding under the RPAPL, courts have uniformly explained that in a "special proceeding governed entirely by statute . . . it is well established that there must be strict compliance with the statutory requirements to give the court jurisdiction." *Clarke v. Wallace Oil Co.*, 284 A.D.2d 492, 493, 727 N.Y.S.2d 139 (2d Dep't 2001) (citations omitted). *See also MSG Pomp Corp. v. Doe*, 185 A.D.2d 798, 799-800, 586 N.Y.S.2d 965, 966 (1st Dep't 1992) (same); *Berkeley Associates Co. v. DiNolfi*, 122 A.D.2d 703, 505 N.Y.S.2d 630, 632 (1st Dep't 1986) (same); *Stribula v. Wien*, 107 Misc. 2d 114, 438 N.Y.S.2d 52, 54 (App. Term 1st Dep't 1980) (same).

59. The reasons for requiring strict compliance with the statutory commands are not difficult to understand. As explained in *Zenila Realty Corp. v. Masterandrea*, the modifications of procedural rights in special proceedings "is in derogation of the common law . .

. , [e]ach [statutory] provision . . . must be strictly construed." 123 Misc. 2d 1, 6, 472 N.Y.S.2d 980, 984 (Civ. Ct. N.Y. Co. 1984).

60. The court in *Fisch v. Chason*, a summary eviction proceeding, explained this important concept as follows:

> Historically, landowners were exclusively relegated to the cumbersome and time consuming common-law action of ejectment to remove those unlawfully on their property. In order to assist the landowner, the legislature devised a statutory scheme whereby people could be removed in an expeditious fashion. However, to protect the interests of those who were subject to summary removal, strict compliance with the provisions of the statute was demanded. . . . A petitioner's failure to comply strictly with the statute results in the forfeiture of its right to maintain the special proceeding and must culminate in the dismissal of the action.

99 Misc. 2d 1089, 418 N.Y.S.2d 495, 496 (Civ. Ct. N.Y. Co. 1979) (dismissing petition as jurisdictionally defective for various pleading defects).

61. The *Fisch* court's analysis is fully transferrable to summary proceedings under Article 4 of the EDPL. Like the common law action for ejectment, the antecedent to modern summary eviction proceedings under the RPAPL, property owner seeking to resist the government's attempt to seize their property in New York were historically allowed to challenge the taking in a plenary action where they were afforded all the due process rights available to a litigant with a breach of contract or personal injury claim.

62. In 1977, however, the legislature, in its infinite wisdom, determined that the government should not be forced to litigate over condemnation in pesky plenary actions. Accordingly, it enacted the EDPL, which, like the provisions for summary proceedings in the RPAPL, severely truncated the procedural protections available to property owners seeking to

challenge government plans to confiscate their homes or business so they can be given to a powerful and politically influential real estate developer eager to profit from building luxury condominiums and an arena for his professional basketball team.

63. Thus, courts will dismiss summary proceedings for failure to comply with a wide array of seemingly "technical" statutory requirements. *See, e.g., MSG Pomp Corp. v. Doe*, 185 A.D.2d 798, 799-800, 586 N.Y.S.2d 965, 966 (1st Dep't 1992) (failure to properly allege regulatory status mandates dismissal); *300 West Realty Co. v. Wood*, 69 Misc.2d 580, 330 N.Y.S.2d 524, 526 (Civ. Ct. N.Y. Co. 1971), *aff'd*, 69 Misc. 2d 582, 330 N.Y.S.2d 527 (App. Term 1st Dep't); *Elston v. Dubois*, N.Y.L.J., Dec. 8, 1999, p. 29, c. 1 (Civ. Ct. N.Y. Co.) (failure to accurately describe premises); *Homestead Equities, Inc. v. Washington*, 176 Misc.2d 459, 672 N.Y.S.2d 980 (Civ. Ct. N.Y. Co. 1998) (inconsistencies between petition and notice of termination); *Papacostopulos v. Morrelli*, 122 Misc.2d 938, 472 N.Y.S.2d 284 (Civ. Ct. Kings Co. 1984) (failure to describe properly the subject premises).

64. Indeed, courts have repeatedly rejected the suggestion that such defects may be cured by amendment, absent a showing of "prejudice." In *Capital Resources Corp. v. Doe*, 154 Misc.2d 864, 586 N.Y.S.2d 706 (Civ. Ct. Kings Co. 1992), the court dismissed the petition for incorrectly naming the tenant as "John Doe," and refused to grant the petitioner leave to amend. *Id.* at 708. The court explicitly rejected the petitioner's argument that leave to amend should be granted absent a showing of prejudice to respondent, because to do so would completely eviscerate the statutory requirements. "It is not hard to imagine the mischief that such a ruling would engender" the court explained, the focus must be "on the issue of statutory compliance." *Id.* at 709.

II. The Petition Is Defective

65. This is a special proceeding brought pursuant to EDPL Article 4 and CPLR Article 4. As set forth above, the requirements contained in EDPL Article 4 must be strictly construed and scrupulously followed in order for the statute to confer subject matter jurisdiction upon the Court, thus permitting it to summarily grant the extraordinary relief set forth in the EDPL. Because the Petition does not comport with the requirements of EDPL Article 4, it is procedurally defective, and it fails to adequately state a claim upon which relief may be granted, thus depriving the Court of subject matter jurisdiction.

A. The Petition is Premature

66. The Petition does not comply with EDPL § 401(A)(3), which allows for the commencement of proceedings under EDPL Article 4 "after . . . (3) entry of the final order or judgment on judicial review pursuant to section two hundred seven of this chapter," because no final order or judgment has been entered as Respondents filed a timely Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal (attached as Ex. B to the Answer), which was submitted on December 21, 2009, and that motion has thus far not been acted on by the Court of Appeals, which issued decisions on motions on January 12, January 14, and January 19.

67. The earliest the Court of Appeals could rule on Respondents' motion would be February 9, when the next Court session resumes. Based on this defect alone, the Petition should be dismissed.

B. The Petition Does Not State the Public Use, Benefit or Purpose for Which the Property Is Required

68. EDPL § 402(B)(3), mandates that the Petition shall set forth "(d) the public use, benefit or purpose for which the property is required." The Petition simply does not set forth this critical information. It does not even make the allegation in a conclusory or cursory fashion. Indeed, the terms "public use," "public benefit," and/or "public purpose," are nowhere found in the Petition. This requirement is fundamental. Petitioner's failure to comply with it is fatal.

69. Petitioner's failure to comply with EDPL § 402(B)(3)(d) is not inadvertent. Had Petitioner attempted to comply with EDPL § 402(B)(3)(d) by setting forth its allegations of public use, benefit or purpose as it did in its 2006 D&F, it would have been forced to materially misrepresent a host of claimed public uses, benefits or purposes that have since proven ephemeral, thus mandating dismissal of the Petition for being materially false.

70. Had Petitioner instead attempted to comply with EDPL § 402(B)(3)(d) by setting forth its allegations of public use, benefit or purpose as they existed at the time the Petition in this action was verified on December 15, 2009, it would have faced certain dismissal because any truthful allegations of public use, benefit or purpose as of that date materially undermine the 2006 D&F.

71. Apparently unhappy with either unpalatable option, Petitioner chose instead to simply ignore the express command of EDPL § 402(B)(3)(d). Based on this defect alone, the Petition should be dismissed.

C. Petitioner's Eleventh Hour Decision to Acquire Properties in Stages Mandates Dismissal

72. EDPL § 402(B)(3) mandates that the petition shall set forth "(a) a statement providing . . . the compliance with the requirements of article two of this law."

73. EDPL § 401(C), provides that whereas property sought to be "acquired for a public project," can be condemned in stages it must be proposed as a staged acquisition at the public hearing stage.

74. Petitioner violated EDPL § 402(B)(3) and/or EDPL § 401(C), because the 2006 D&F (an incomplete copy of which is attached as Ex. C to the Petition) contemplated and provided for the acquisition of *all* properties sought to be condemned in one stage, whereas that provision was changed to provide for two stages of acquisitions when Petitioner adopted the 2009 MGPP on September 17, 2009, but yet did not update, modify or amend the 2006 D&F.

75. The change in acquisition plans is described in a Technical Memorandum published by Petitioner in advance of the adoption of the 2009 MGPP as follows:

> A modification to the GPP is proposed to allow for the acquisition of property in two phases, rather than one phase as detailed in the FEIS. The first round of acquisition would occur towards the end of 2009 and would encompass the arena block including the streetbeds to be closed, Block 1129, Pacific Street between Vanderbilt and Carlton Avenues, Lots 42 and 47 on Block 1121, and, if necessary for the construction and operation of the LIRR rail yard, easements or other property interests in Lot 35 on Block 1120 and possibly a small number of additional lots included in the project site. The second round would occur towards the end of 2011 and would encompass the remainder of the project site.

Ex. C at 3-4.

76. Based on this defect alone, the Petition should be dismissed.

D. The EDPL § 204 Determination and Findings Attached As Exhibit C to the Petition is Materially Incomplete and Defective

77. Petitioner violated EDPL § 402(B)(3)(a) and/or EDPL § 402(B)(3)(d), by failing to attach a true and correct copy of the 2006 D&F, but instead intentionally omitted materially adverse information, *e.g.,* the initial list of properties targeted for acquisition in single stage. Had Petitioner attached a complete and accurate copy of the 2006 Determination and Findings, it would have immediately revealed the material change from a one stage acquisition plan to two stage acquisition plan, thus jeopardizing Petitioner's attempt to obtain a quick order from the court granting its petition, notwithstanding this material – intentionally concealed – defect.

78. Based on this defect alone, the Petition should be dismissed.

E. Petitioner's Failure to Satisfy a Condition Precedent Mandates Dismissal

79. The 2009 MGPP provides that Petitioner's "acquisition of all such properties [by condemnation] will not occur until such time as [Petitioner] receives commitments, guaranties and other evidence satisfactory to [Petitioner] that [Ratner] will (i) promptly commence construction of the Arena, and all of the infrastructure necessary for the Arena (together with the Arena, the "Initial Development"), (ii) complete such construction within agreed-upon time periods and (iii) commence and complete construction of the Upgraded Yard in accordance with and subject to the schedule agreed to with the MTA (and acceptable to [Petitioner])." Ex. B at 23.

80. Notwithstanding Petitioner's public commitment, as set forth in the new 2009 MGPP, that it will not seek to acquire Respondents' homes and businesses until it receives

satisfactory evidence that the professional basketball arena and downgraded rail yard will actually be completed (but not the alleged affordable housing, publicly accessible private space or anything else but acres of parking lots), it commenced this action (dated December 15, 2009) on December 23, 2009, at almost precisely the same time that aspects of the arena tax exempt bond offering were revealed as follows:

> As one of the Vacant Possession Release Conditions, and as required under the Arena Lease Agreement, ArenaCo will be obligated to pay or cause to be paid the Additional Rent Amount (presently anticipated to be $324.8 million, which amount may ultimately be reduced to reflect prior expenditures made for the Arena Project and included in the budget for the Arena Project on and after November 1, 2009) to the Issuer (for deposit with the PILOT Bond Trustee). . . . At the time of the issuance of the Series 2009 PILOT Bonds, ArenaCo will not have funds sufficient to pay the Additional Rent Amount, but ArenaCo expects to raise sufficient funds prior to the Arena Project Effective Date . . . Although ArenaCo expects that the necessary funds will be timely raised, there can be no assurance that the funds will be raised or that the amount of such funds will be sufficient to make the full payment of the Completion Cost. In the event that the Issuer has not received the Additional Rent Amount from ArenaCo for deposit with the PILOT Bond Trustee at or prior to the Outside Commencement Date, or if such receipt does not occur within five (5) Business Days of Vacant Possession having been achieved, proceeds of the Series 2009 PILOT Bonds will not be applied to the construction of the Arena, and the Issuer will be required to redeem the Series 2009 PILOT Bonds at 101%.

See Bond Offering Statement (available at http://www.scribd.com/doc/24623475/Official-Statement-Posted-12-21-2009-8-8-MB).

81. As is made clear from the Bond Offering Statement, Ratner needs an additional $324.8 million and cannot provide any "assurance that the funds will be raised," and if he fails, the Project will unquestionably be scotched, yet Petitioner claims to have received satisfactory evidence that Ratner will complete the arena for his basketball team and the new

downgraded rail yard, such that it has decided to proceed with seeking an order from this Court seeking to vest title.

82. Because a condition precedent to the relief Petitioner seeks has not been met, the Petition should be dismissed and Petitioner should be prohibited from seeking to confiscate Respondents' homes and businesses until it provides compelling evidence that the basketball arena, downgraded rail yard and acres of parking lots will actually be built as is required by the 2009 MGPP.

83. Based on this defect alone, the Petition should be dismissed.

F. The Petition and the Notice of Petition Seek Inconsistent Forms of Relief

84. The Petition does not comply with EDPL Article 4 because it seeks relief that is inconsistent with the relief sought in the Notice of Petition. Paragraph 6 of the relief sought by the Notice of Petition seeks an order "directing that each condemnee shall have a period of one hundred twenty (120) days . . . to file a written claim for damages." Paragraph e) of the Wherefore Clause in the Petition seeks an order "directing that each condemnee shall have a period of ninety (90) days . . . to file a written claim for damages."

85. Based on this defect alone, the Petition should be dismissed.

G. The Petition Does Not Designate Condemnees as Respondents in violation of CPLR 401

86. CPLR 401 requires that the "party commencing a special proceeding shall be styled the petitioner and any adverse party the respondent." Here, Petitioner violated CPLR 401 because, while it accurately describes itself as the petitioner, it does not designate the proposed condemnees as adverse party respondents.

87. Based on this defect alone, the Petition should be dismissed.

H. The Copy of the Petition Purportedly Served upon Respondents Is Not the Same as the Petition Filed in Court

88. A complete and accurate copy of the Petition was not served upon Respondents. The Petition that was served upon Respondents is not complete, indeed it materially differs from the Petition in the Court file as the version that was served, or attempted to be served, does not contain a complete and accurate set of acquisition maps, attached as Ex. A to the Petition. While EDPL § 402(B)(2) allows for notice which contains only those portions of the acquisition map affecting the owners property, it does not absolve Petitioner of its responsibility to serve true, accurate and complete copies of the Petition upon all Respondent/Condemnees. The Petition must therefore be dismissed for lack of personal jurisdiction.

89. Based on this defect alone, the Petition should be dismissed.

III. This Action Should Be Stayed

90. As set forth above, Respondents' EDPL § 207 proceeding remains pending before the Court of Appeals. Respondents filed a timely Motion to Reargue Appeal and/or Hold Motion in Abeyance Pending Hearing and Determination of Related Appeal (attached as Ex. B to the Answer), which was submitted on December 21, 2009, and that motion has thus far not been acted on by the Court of Appeals, which issued decisions on motions on January 12, January 14, and January 19.

91. The earliest the Court of Appeals could rule on Respondents' motion would be February 9, when the next Court session resumes.

92. CPLR 2201 provides that "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."

93. Here, Petitioner seeks the drastic remedy of vesting or transfer of title even though the Court of Appeals is still considering Respondents' motion to reargue based on the extraordinary circumstance presented by the UDC's appeal to the Court of Appeals of a materially indistinguishable action where it was found to have used a blight designation as a pretext for the seizure of private property for transfer to a private university.

94. A stay is also warranted because there are two actions pending in Supreme Court, New York County, which challenge Petitioner UDC's newly amended 2009 MGPP, including a motion for a preliminary injunction. The court in those consolidated actions has indicated that it will either rule on the merits or on the preliminary injunction by the end of February because the UDC and Ratner have indicated that there is no further demolition work scheduled until March.

95. It would be both unwise and unfair to grant the relief sought by the Petition while Respondents motion to reargue before the Court of Appeals, or the other actions challenging the project as a whole, remain pending.

96. Accordingly, Respondents respectfully request that the Court issue an order staying this action pending the resolution of the actions set forth above.

IV. The Court Should Grant Leave to Conduct Discovery and Conduct a Trial

97. As set forth above, *only three days ago*, Petitioner made many volumes of documents available for review that are directly related to its consistent claim that the Project will be completed in ten years. Indeed, the first review of those documents appears to indicate

that Petitioner has cynically and materially misrepresented the actual timing of the Project to the public at large and a number of courts.

98. Given this development, and Petitioner's steadfast resistance to allowing a court to consider the many changes to the Project over the course of more than three years – changes that have utterly eviscerated any legitimate claim that the Project will serve anything other than Ratner's singular desire to increase his and his shareholder's wealth – while turning a large swath of Brooklyn into a wasteland for decades, if not longer, this Court should grant Respondent's leave to conduct discovery, pursuant to CPLR 408.

* * *

WHEREFORE, based on the foregoing, Respondents' motion seeking dismissal of the Petition, or alternatively a stay of this proceeding, and/or leave to conduct discovery and a trial, should be granted.

Dated: January 28, 2010
New York, New York

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Matthew D. Brinckerhoff, Esq.