

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
DANIEL GOLDSTEIN, JERRY CAMPBELL, as the putative :  
administrator of the estate of OLIVER ST. CLAIR STEWART :  
and in his individual capacity, THE GELIN GROUP, LLC, :  
CHADDERTON'S BAR AND GRILL INC., d/b/a :  
FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, :  
JACKIE GONZALEZ, YESENIA GONZALEZ, HUDA :  
MUFLEH-ODEH, JAN AKHTAR , DAVID SHEETS, :  
JOSEPH PASTORE, PETER WILLIAMS, PETER :  
WILLIAMS ENTERPRISES, INC., HENRY WEINSTEIN, :  
535 CARLETON AVE. CORP. and PACIFIC CARLTON :  
DEVELOPMENT CORP., :  
:

06 CV 5827 (NGG) (RML)

Plaintiffs,

.v.

GEORGE E. PATAKI, CHARLES A. GARGANO, NEW :  
YORK STATE URBAN DEVELOPMENT CORPORATION :  
d/b/a EMPIRE STATE DEVELOPMENT CORPORATION, :  
BRUCE C. RATNER, JAMES P. STUCKEY, FOREST CITY :  
ENTERPRISES, INC., FOREST CITY RATNER :  
COMPANY, RATNER GROUP, INC., BR FCRC, LLC, BR :  
LAND, LLC, FCR LAND, LLC, BROOKLYN ARENA, LLC, :  
ATLANTIC YARDS DEVELOPMENT COMPANY, LLC, :  
MICHAEL BLOOMBERG, DANIEL DOCTOROFF, :  
ANDREW M. ALPER, JOSHUA SIREFMAN, CITY OF :  
NEW YORK and NEW YORK CITY ECONOMIC :  
DEVELOPMENT CORPORATION, :  
:

Defendants.

-----x  
**FOREST CITY RATNER DEFENDANTS' REPLY MEMORANDUM OF LAW  
IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT**

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**FOREST CITY RATNER DEFENDANTS' REPLY MEMORANDUM OF LAW  
IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT**

**Preliminary Statement**

Plaintiffs' opposing memorandum is engagingly written, but that is true of many works of fiction. It is based primarily upon made-up legal theories that do not exist in reality – e.g., that the Forest City Ratner defendants' alleged role in initiating the Atlantic Yards project somehow deprives ESDC's determination of the judicial deference to which it otherwise would be entitled – and on the reiteration of conclusory allegations that are belied by the specific facts alleged in the complaint and shown by the documents that are properly before this Court.<sup>1</sup> By its incantation of conclusory rhetoric and its exposition of novel but unsupportable legal theories, the opposing memorandum actually serves to expose as entirely unsustainable the three ostensible constitutional claims that plaintiffs seek to pursue in this Court under 42 U.S.C. § 1983. Each of plaintiffs' claims under the public use, equal protection and due process clauses is completely without merit and should be dismissed.

This reply memorandum only addresses the merits of plaintiffs' claims, but the Forest City Ratner defendants also join in the arguments made by ESDC in its reply memorandum. In addition, the Forest City Ratner defendants ask that their motion to dismiss be deemed a motion to dismiss the amended complaint, which was served simultaneously with plaintiffs' opposing memorandum. The amended complaint (Braun Reply Decl. Ex. A) is identical to the original complaint, except insofar as it (1) adds six plaintiffs, (2) eliminates the

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<sup>1</sup> Plaintiffs do not dispute – and thus concede – the propriety of the Court's reliance on the documents that have been submitted on this motion by the Forest City Ratner defendants and ESDC, all of which either were referred to in the complaint or are matters of public record of which the Court may take judicial notice. Unless otherwise indicated, the abbreviations and references in this reply memorandum are the same as those in the Forest City Ratner defendants' prior memorandum. In addition to this reply memorandum, the Forest City Ratner defendants also submit the reply declaration of Jeffrey L. Braun, with exhibits.

claim against former Governor Pataki in his official capacity, (3) recites the adoption by ESDC's Board of Directors on December 8, 2006, of ESDC's Determination and Findings approving the Atlantic Yards project, and (4) adds a purported claim, against ESDC only, for judicial review under EDPL § 207.<sup>2</sup>

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<sup>2</sup> Five of the six new plaintiffs already are engaged in litigation with FCRC in connection with its efforts to acquire properties in the Atlantic Yards project footprint. First, plaintiff Henry Weinstein, through two corporations, plaintiffs 535 Carleton Ave. Corp. and Pacific Carlton Development Corp., is the fee owner of two adjoining parcels in the project's footprint (Am. Compl. ¶¶ 11-12), each of which is encumbered with a long-term ground lease. There are two lawsuits pending in the Supreme Court, Kings County, arising primarily from the efforts of the ground lessees to effectuate an assignment of their leases to an FCRC affiliate. 752 Pacific LLC, et al. v. Pacific Carlton Development Corp., et al., Index No. 32819/03, and Pacific Carlton Development Corp., et al. v. 752 Pacific LLC, et al., Index No. 29400/06. Second, plaintiff Peter Williams, through his corporation, plaintiff Peter Williams Enterprises Inc., is the owner of a one-story building at 38 Sixth Avenue (Am. Compl. ¶ 10). On October 4, 2006, his corporation and his son commenced a lawsuit, now pending in the U.S. District Court for the Southern District of New York, against FCRC and various affiliates and individuals, alleging that the defendants caused the son to be falsely arrested for the removal of a video security camera, and did so to intimidate Williams into selling his property to FCRC at a reduced price. Peter Williams Enterprises Inc., et al. v. Seagoing Development Co. LLC, et al., No. 06 Civ. 11521 (SAS) (HP). Finally, plaintiff Joseph Pastore is a tenant of the building at 473 Dean Street, which is owned by an FCRC affiliate (Am. Compl. ¶ 20). Nine other tenants of that building are parties to both an action in the Supreme Court, New York County, commenced on December 7, 2006 (Anderson, et al. v. N.Y.S. Urban Development Corp., Index No. 118212/06), and a proceeding under EDPL § 207 commenced in the Appellate Division, Second Department, on January 10, 2007 (Anderson, et al. v. N.Y.S. Urban Development Corp., Index No. 2007/00372), both of which challenge ESDC's use of eminent domain for the Atlantic Yards project. Citations in this reply memorandum to "Am. Compl." refer to plaintiffs' amended complaint in this action.

Argument

**PLAINTIFFS' OPPOSING MEMORANDUM CONFIRMS THAT  
THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO  
STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED**

**A. PLAINTIFFS' CLAIM THAT THE USE OF EMINENT DOMAIN IN  
FURTHERANCE OF THE ATLANTIC YARDS PROJECT VIOLATES THE  
PUBLIC USE CLAUSE IS UNTENABLE AND SHOULD BE DISMISSED**

To the extent that plaintiffs' opposing memorandum discusses the merits of their claims at all, it primarily addresses plaintiffs' contention that the Atlantic Yards project fails to satisfy the Fifth Amendment's public use clause (see Pl. Mem. at 31-44).<sup>3</sup> Plaintiffs' discussion of this issue is a desperate effort to avoid dismissal. This effort is doomed by the salient facts that plaintiffs cannot dispute, and that they therefore completely ignore in their opposing memorandum.

Nowhere in their papers do plaintiffs ever dispute the fact that the Atlantic Yards project contains the following essential components that have long been recognized as public uses:

(1) a new arena that will be the home of Brooklyn's first major league sports franchise in 50 years, and that also will be available for amateur athletic events, job fairs, civic events, graduation ceremonies, concerts, circuses and other community-related functions;

(2) 6,860 housing units, including at least 2,250 units of affordable housing, which (as the Forest City Ratner defendants have shown and plaintiffs have not

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<sup>3</sup> Citations in this reply memorandum to "Pl. Mem." refer to "Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion [sic] to Dismiss."

disputed) is consistent with longstanding policies of New York State and New York City to encourage private investment in the creation of below-market-rate housing;

(3) transit improvements costing in excess of \$200 million, including a new state-of-the-art Vanderbilt Yards facility for the MTA and the LIRR, extensive subway improvements and the environmental remediation of the MTA's property;

(4) at least seven acres of publicly accessible open space (the General Project Plan that actually was approved by ESDC's Board of Directors on December 8, 2006, requires the creation of eight acres of public open space (see Kraus Decl. Ex. D, at 4))<sup>4</sup>; and

(5) the elimination of blight, including the construction of a \$120 million platform over Vanderbilt Yards to cover this huge trench and allow the site's redevelopment and integration into the surrounding communities.<sup>5</sup>

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<sup>4</sup> Citations in this reply memorandum to "Kraus Decl." refer to the declaration of Douglas M. Kraus, submitted by ESDC in support of its initial motion to dismiss.

<sup>5</sup> Plaintiffs reiterate the complaint's conclusory allegation that the so-called "Takings Area" in which they own or occupy property was not blighted before FCRC affiliates began to acquire properties there (Pl. Mem. at 7-9), but their amended complaint repeats the allegations that approximately half of the project footprint is within ATURA and has been repeatedly designated by the City as blighted for forty years, most recently in 2004 (Am. Compl. ¶¶ 55, 57). When acting to eliminate blight, "[p]roperty of course may be taken for ... redevelopment which, standing by itself, is innocuous and unoffending," and "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis – lot by lot, building by building." Berman v. Parker, 348 U.S. 26, 35, 75 S.Ct. 98, 104 (1954). Furthermore, plaintiffs have not responded to the documents showing that (1) five of the buildings within their "Takings Area" were so decrepit, structurally unsound and dangerous when acquired by FCRC affiliates that ESDC allowed their demolition on an emergency basis prior to completion of its environmental review of the project, and (2) the courts sustained that determination and allowed the demolitions to proceed. Develop Don't Destroy Brooklyn v. Empire State Development Corp., 31 A.D.3d 144, 816 N.Y.S.2d 424 (1st Dep't 2006), lv. to app. denied, Mo. No. 1131 (Jan. 16, 2007). One of the plaintiffs that was added to this action by the amended complaint, Pacific Carlton Development Corp., was a petitioner-plaintiff in that litigation (see Braun Decl. Exh. I), and two of the other new plaintiffs – the corporate fee owner of an adjoining parcel and the individual

In addition, the final General Project Plan for this project, as approved by ESDC's Board of Directors on December 8, 2006 (Kraus Decl. Ex. D, at 12), also gives the City's Department of Education an option to acquire or lease space in one of the project's buildings for use as a school.

These conceded uses indisputably satisfy the requirements of the public use clause.<sup>6</sup> Furthermore, the Supreme Court has admonished that a court must "not substitute its judgment for a legislature's judgment as to what constitutes a public use, 'unless the use be palpably without reasonable foundation,'" Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329 (1984), quoting United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 680, 16 S.Ct. 427, 429 (1896), and also has emphasized that "our cases make clear that empirical debates over the wisdom of takings ... are not to be carried out in the federal courts." Midkiff, 467 U.S. at 243, 104 S.Ct. at 2330.<sup>7</sup>

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who owns both corporations (see Am. Compl. ¶¶ 11-12) – are in privity with that plaintiff. Therefore, all three of these new plaintiffs are collaterally estopped from disputing the condition of these five buildings within the so-called "Takings Area" as of the acquisition of the properties by FCRC affiliates. A revised map showing the locations of all of the plaintiffs' properties within the so-called "Takings Area" is Exhibit B to the Braun reply declaration.

<sup>6</sup> These uses' compliance with the public use clause was shown at length in the Forest City Ratner defendants' prior memorandum (see pp. 10-18). Plaintiffs have not responded to this showing.

<sup>7</sup> In Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655 (2005), Justice O'Connor, the author of Midkiff, dissented. However, the dissenters reiterated the Court's "reject[ion] as unworkable [of] the idea of courts' "deciding on what is and is not a governmental function ... and invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.'" 125 S.Ct. at 2674 (O'Connor, J., dissenting), quoting Midkiff, 467 U.S. at 240-41, 104 S.Ct. at 2329 (quoting United States ex rel. TVA v. Welch, 327 U.S. 546, 552, 66 S.Ct. 715, 718 (1946)). Similarly, Justice O'Connor's dissent in Kelo also reiterated the Court's recognition in Midkiff and Berman, 348 U.S. at 33-34, 75 S.Ct. at 103, of its "inability to evaluate whether in a given case, eminent domain is a necessary means by which to pursue the legislature's ends." 125 S.Ct. at 2674.

Therefore, “where the exercise of eminent domain is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.” Midkiff, 467 U.S. at 241, 104 S.Ct at 2229-30. This deferential standard of review has been applied by both federal and state appellate courts to condemnations by ESDC. See Rosenthal & Rosenthal Inc. v. N.Y.S. Urban Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985), cert. denied, 475 U.S. 1018, 106 S.Ct. 1204 (1986); West 41st Street Realty LLC v. N.Y.S. Urban Dev. Corp., 298 A.D.2d 1, 6, 744 N.Y.S.2d 121, 125 (1st Dep’t), app. dsmsd., 98 N.Y.2d 727, 749 N.Y.S.2d 476 (2002), cert. denied, 537 U.S. 1191, 123 S.Ct. 1271 (2003).<sup>8</sup>

In view of this “extremely narrow” role of the courts in reviewing public use determinations, Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102 (1954), quoted and followed in Brody v. Village of Port Chester, 434 F.3d 121, 128 (2d Cir. 2005), the indisputable public uses that are substantial components of the Atlantic Yards project should end any judicial inquiry and compel dismissal of plaintiffs’ public use claim. Simply put, the uses that are inherent in this project are indisputably public ones, and that fact is determinative of plaintiffs’ claim.

To avoid the fatal impact of these controlling principles, plaintiffs cobble together novel legal theories that are not recognized by case law and, in fact, do not exist. Each of these bogus theories is discussed separately below.

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<sup>8</sup> In West 41st Street Realty, the petitioners sought to appeal from the Appellate Division’s order to the New York Court of Appeals as a matter of right under CPLR 5601 on the ground that the Appellate Division’s order “directly involved the construction of the constitution ... of the United States” (§ 5601(b)(1)). The Court of Appeals conducted a sua sponte review of its subject-matter jurisdiction in accordance with its normal practice (see 22 NYCRR § 500.10), determined that the appeal did not raise a substantial constitutional issue, and therefore dismissed the appeal. 98 N.Y.2d 727, 749 N.Y.S.2d 476 (2002).

1. **There Is No Merit to Plaintiffs' Contention That the Role of the Private Developer in This Case Stands on Their Head the Legal Principles Requiring Deferential Judicial Review of the Project's Public Uses and Purposes**

The core of plaintiffs' position is the contention that, because they allege that it was the private developer who initially proposed the Atlantic Yards project and identified the bulk of the properties that ESDC would condemn, the rules and presumptions that normally apply to public use cases are stood on their head, and the deference that courts ordinarily give to the judgments of other branches of the government should be disregarded. This never has been, is not and cannot be the law.

Were it to be the law, it would penalize private developers who approached condemnors with sound proposals. Furthermore, it would be especially inappropriate in the present case, because large-scale public-private development in New York City is inherently complicated and difficult, the Atlantic Yards project is an extremely complex one, and FCRC has a strong record of success in the implementation of sophisticated large-scale public-private projects in Brooklyn (MetroTech Center and Atlantic Terminal) and elsewhere, including development of the new headquarters building for The New York Times Company in Manhattan (see West 41st Street Realty LLC, 298 A.D.2d at 3, 744 N.Y.S.2d at 123).<sup>9</sup>

Furthermore, plaintiffs have cited no case that follows their mythical rule. They generally invoke Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655 (2005), particularly Justice Kennedy's concurrence (see Pl. Mem. at 33-35), but neither the majority opinion nor the concurrence expresses the rule that plaintiffs proffer. Unlike the present case, blight removal concededly was not a purpose of the condemnations in Kelo. See 125 S.Ct. at 2664 ("Those who

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<sup>9</sup> The UDC Act obligates ESDC to provide "maximum opportunity for participation by private enterprise" in any land use project. N.Y. Unconsol. Laws § 6260(c)(3).

govern the City were not confronted with the need to remove blight”). Instead, “economic development” was the sole public purpose justifying the exercise of eminent domain. *Id.* at 2665. The case attracted widespread attention due to the concern of many observers – including the Court’s dissenters – that economic development is too susceptible to abuse by condemnors who simply could expropriate one private party’s property to convey it to another private party with no genuine public purpose. See *Kelo*, 125 S.Ct. at 2761 (O’Connor, J., dissenting) (“Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded”).

Even in that situation, the Court’s majority sustained the takings as proper under the public use clause and explicitly rejected the application of “a heightened form of review” to economic development cases. 125 S.Ct. at 2668. In his concurrence, Justice Kennedy relied on three considerations to sustain the condemnations (125 S.Ct. at 2670), and the application of those considerations to the present case is irreconcilable with plaintiffs’ claim under the public use clause:

1. In *Kelo*, the “taking occurred in the context of a comprehensive development plan,” and “the economic benefits of the project [could not] be characterized as de minimus.” Here, too, ESDC’s exercise of eminent domain is part of a comprehensive development plan that is expected to engender substantial public benefits – not just the tax revenues and jobs that economic development should generate, but the elimination of blight, the creation of the arena, housing, public open space and possibly a school, and extensive transit improvements and environmental remediation.

2. In *Kelo*, the condemnor “complied with elaborate procedural requirements that facilitate review of the record and inquiry into [its] purposes.” Similarly, here ESDC

complied with the elaborate procedural requirements of the EDPL, SEQRA and the UDC Act and, in the process, generated an extensive record containing numerous documents that are matters of public record, including documents that have been submitted to this Court by ESDC (e.g., ESDC's final Determination and Findings of December 8, 2006, and the General Project Plan) and a Final Environmental Impact Statement.<sup>10</sup>

3. Finally, in Kelo, “[t]he identity of most of the private beneficiaries were unknown at the time the city formulated its plans.” Here, of course, the project’s sponsor is alleged by plaintiffs to have been determined from the outset. Nevertheless, unlike the project in Kelo, the Atlantic Yards project is not premised solely on economic development, and it does not entail simply the transfer of property from its current private owners to other private parties. Instead, the project includes numerous traditional public uses, and as the General Project Plan makes clear, (a) major portions of the project will remain under public ownership by ESDC or the MTA and LIRR (Kraus Decl. Ex. D at 9, 39), (b) the City’s Department of Education has an option to own or lease space within one of the buildings for use as a school (id. at 12), and (c) the

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<sup>10</sup> There is no claim in this action that ESDC failed to comply with any of these procedural requirements, except that the amended complaint’s claim under EDPL § 207 asserts that “ESDC violated section 204(a) of the EDPL by failing to make its determinations and findings within 90 days of the stated close of the public hearing on Aug [sic] 23, 2006” (¶ 178). However, New York’s state courts have determined that the 90-day period established by EDPL § 204(A) does not begin to run until the close of the period for the submission of written comments to the prospective condemnor. Wechsler v. N.Y.S. Dep’t of Environmental Conservation, 153 A.D.2d 300, 303, 550 N.Y.S.2d 749, 751 (3d Dep’t), aff’d, 76 N.Y.2d 923, 563 N.Y.S.2d 50 (1990). Here, although the public hearing “was held ... on August 23, 2006” (Am. Comp. ¶ 84), “[t]he final deadline for public comments on the Project was September 29, 2006” (id. at ¶ 86). The issuance by ESDC on December 8, 2006, of its “formal Determination and Findings in connection with the Project” (id. ¶ 87) was within 90 days of the deadline for public comments, and therefore was timely.

publicly accessible open space will be owned by a conservancy or other not-for-profit entity (id. at 30).<sup>11</sup>

Finally, the cases cited by plaintiffs to support their proffered rule (Pl. Mem. at 38-39) do not articulate any such rule. Instead, they show that courts have set aside exercises of eminent domain as violative of the public use clause only on the basis of factual showings that are dramatically different from the allegations in the present case.<sup>12</sup>

For example, Aaron v. Target Corp., 269 F.Supp.2d 1162 (E.D. Mo. 2003), rev'd, 357 F.3d 768 (8th Cir. 2004), arose from a private landlord-tenant dispute. It was alleged that a major retailer, Target, had approached the municipality and persuaded it to exercise eminent domain only after the failure of its effort to renegotiate and extend its ground lease with the plaintiffs, who were its landlord. The District Court issued a preliminary injunction against condemnation proceedings, holding that the condemnation “would seem to be not for a ‘public use’ as the Fifth Amendment requires, but rather for the private use of Target.” 269 F.Supp.2d at 1175. Even on those facts, however, the Court of Appeals for the Eighth Circuit reversed, holding that the District Court should have abstained from interfering with the ongoing condemnation process, and that the plaintiffs’ allegations that the condemnation “did not result from a legitimate legislative or municipal finding of blight, but rather from the defendants’

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<sup>11</sup> Furthermore, some of the residential buildings will contain condominium units (Kraus Decl. Ex. D at 9), while the other buildings will be occupied primarily by residential or commercial tenants. No one knows the identities of the ultimate owners of the condominium units. Nor does anyone know the identities of the ultimate tenants of the residential and commercial rental space. Therefore, the identity of the private parties who will occupy the project were unknown when the condemnor formulated its plans.

<sup>12</sup> As the discussion below shows, all three of plaintiffs’ cases involved the issuance of a preliminary injunction rather than a final determination that there had been a violation of the public use clause.

conspiring to take plaintiffs' property for a private use," failed to "demonstrate 'bad faith' or 'extraordinary circumstances'" sufficient to justify the District Court's intervention. 357 F.3d at 778-79.

Similarly, in 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F.Supp.2d 1123 (C.D. Cal. 2001), app. dsmsd., 60 Fed. Appx. 123 (9th Cir. 2003), the District Court issued a preliminary injunction after the municipality acted to condemn a retailer's lease for a shopping center store to accommodate the demands of the adjoining anchor tenant, Costco, which allegedly had threatened to close its facility and relocate to a nearby community if it could not expand into the neighboring space. In Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203 (C.D. Cal. 2002), a mega-church had acquired 18 acres of vacant land for construction of a new facility, after which the municipality adopted a moratorium on discretionary zoning approvals, extended the moratorium several times, offered to purchase the church's property, and then adopted a "resolution of necessity" as the predicate for condemning the land for redevelopment as a Costco store. On these facts, the District Court issued a preliminary injunction, holding that the church had "shown at least a fair question on the merits of its takings claim on public use grounds." 218 F.Supp.2d at 1230.<sup>13</sup>

Plaintiffs' cases thus all involved circumstances in which condemnation would transfer property from one private party to another, and in which it reasonably could be inferred that eminent domain had been employed for the exclusive purpose of supporting the interests of

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<sup>13</sup> The District Court's discussion of the public use issue in Cottonwood Christian Center was cursory, and the primary basis for the injunction appears to have been the church's claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, and the First Amendment's free exercise clause. See 218 F.Supp.2d at 1219-29.

a private party. These cases are a far cry from the present case, where numerous substantial and indisputably public uses are inherent in the project.

**2. There Is No Merit to Plaintiffs' Contention That Their Conclusory Allegations Are Sufficient to Open a Factual Inquiry into Defendants' "Motives" or "Intentions"**

Plaintiffs' second theory for avoiding dismissal of their public use claim is the assertion that Kelo supports an inquiry into "defendants' motives in making the decision to take plaintiffs' properties and businesses," which "is a quintessential question of fact" that "cannot be resolved on a motion to dismiss" (Pl. Mem. at 31) (emphasis in original). Plaintiffs derive this proposition from references in the majority opinion in Kelo and Justice Kennedy's concurrence to the "purpose" of the condemnation there at issue, as well as the opinions' references to what was "intended," the trial court's references to the "primary motivation" of the development plan in Kelo, and Justice Kennedy's references to favoritism (Pl. Mem. at 33-34).

However, nothing in Kelo supports the proposition that a complaint's conclusory allegations of favoritism are sufficient to raise factual issues, and require denial of a motion to dismiss, where, as here, the specific facts alleged in the complaint and demonstrated by documents that are properly before the Court show that eminent domain is being used in furtherance of a project that manifestly is imbued with significant public purposes. It would be a repudiation of Kelo itself, as well as of Midkiff and other controlling appellate authority, to conclude that plaintiffs' conclusory claims are sufficient open up a de novo judicial inquiry into the subjective motives of government decision makers, or into the strengths and weaknesses of

the various considerations that entered into their decisions, or into the likely efficacy of their determination in achieving its public purposes.<sup>14</sup>

Allegations comparable to the conclusory ones on which plaintiffs rely have been specifically rejected, moreover, in at least two prior cases in this Circuit. In Rosenthal & Rosenthal Inc. v. N.Y.S. Urban Development Corp., 605 F.Supp. 612 (S.D.N.Y. 1984), aff'd, 771 F.2d 44 (2d Cir. 1985), cert. denied, 475 U.S 1018, 106 S.Ct. 1204 (1986), the plaintiffs claimed that the Times Square renewal project had been enlarged to include their properties for the “sole purpose” of increasing the profits to be derived by a private developer who allegedly had been selected because of his relationship with Mayor Koch. 605 F.Supp. at 616. The court rejected this argument because the complaint itself showed that the project would serve broad public purposes:

It is clear, then, that a substantial, legitimate public purpose underlies the Project, and that a large scale redevelopment plan such as is described in the complaint is rationally related to serving that purpose. Plaintiffs would have us avoid this conclusion by permitting them to prove that the “true

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<sup>14</sup> Plaintiffs’ lengthy quotation from Justice Kennedy’s summary of the trial court’s decision in Kelo (Pl. Mem. at 34-35) does not support plaintiffs’ claim that this Court should allow a factual inquiry into defendants’ “motives” or “intentions.” Kelo came to the Supreme Court on certiorari to the Connecticut Supreme Court, having been initiated in the Connecticut state court system, not in a federal district court. Connecticut law does not establish procedures comparable to New York’s EDPL, which requires a condemnor to hold a public hearing and make a record that then can be reviewed by the courts. In Connecticut, unlike New York, a condemnor may make a determination to condemn without holding a hearing or making a record. Therefore, a condemnee who wishes to challenge the condemnor’s determination must commence an action in the Connecticut Superior Court and move for an injunction, and the record supporting the condemnation is assembled in the trial court, not in proceedings before the condemnor. See, e.g., Berne v. Town of Stratford, 23 Conn. App. 554, 556-57, 583 A.2d 136, 137 (App. Ct. 1990). Plaintiffs’ citation to Johnson v. Ganim, 342 F.3d 105, 117 (2d Cir. 2003), for the proposition that, when “a factual issue exists on the issue of motive or intent, a defendant’s motion for summary judgment ... must fail” (Pl. Mem. at 35), is completely inapposite. The case had nothing to do with eminent domain or the purposes of legislative or quasi-legislative action and, instead, involved the alleged termination of a government employee as retaliation for his exercise of free speech.

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

Id. at 617-18. Similarly, in Didden v. Village of Port Chester, 304 F.Supp.2d 548 (S.D.N.Y. 2004), aff’d, 173 Fed. Appx. 931 (2d Cir. 2006), cert. denied, No. 06-652 (Jan. 16, 2007), the plaintiffs sued a condemnor and a private developer to challenge the condemnation of the plaintiffs’ property as motivated by the pursuit of the defendants’ “own private interests ... rather than the interests of the public.” 304 F.Supp.2d at 557. The plaintiffs sought to bolster their claim by characterizing a proposal that they had received from the private defendants as a bribe, but the court sustained the condemnation, holding that the plaintiffs’ claims were time-barred and that, even if they were timely, the project’s public purpose had been established, and “[t]he alleged ‘bribe’ ... , even if it was a “bad faith” offer, could not in any way have transformed that public purpose into a private purpose.” Id. at 559.

Both Rosenthal and Didden were decided by the District Court prior to Kelo, but a Second Circuit panel affirmed Didden after the Supreme Court’s decision in Kelo. See 173 Fed. Appx. at 933.<sup>15</sup>

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<sup>15</sup> Plaintiffs deride as “frivolous” (Pl. Mem. at 11) the Forest City Ratner defendants’ citation of Rosenthal & Rosenthal Inc., 605 F.Supp. at 618, in their prior memorandum (at 23-24) to support the principle that plaintiffs “assertions of favoritism really amount to a claim of corruption by government officers and fraud on the public,” so that they “should be subjected to the heightened pleading standard for fraud set forth in Fed. R. Civ. P. 9(b) ....” According to plaintiffs, “[t]he Supreme Court has expressly disavowed any such rule on at least two occasions” (Pl. Mem. at 11), while “the Second Circuit has expressly held that any pre-2002 case law purporting to suggest that there can be a heightened pleading standard in section 1983 cases was overruled ... and is no longer good law” (id. at 12). Plaintiffs’ allegations of favoritism are insufficient to avoid dismissal of this action regardless of whether they are evaluated under Rule

**3. There Is No Merit to Plaintiffs' Contention That the Legislative Delegation of the Power of Eminent Domain to ESDC Is "Uncabined" and Therefore Inconsistent with the Broad Judicial Deference Normally Extended to Eminent Domain Determinations**

Plaintiffs' final theory for avoiding dismissal of their public use claim is the assertion that "the deference to legislative wisdom evidenced in Berman and Midkiff ... does not apply where, as here, the Legislature has not defined what constitutes a legitimate 'public use,'

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9(b) or Rule 12(b). However, plaintiffs' discussion of the applicability of Rule 9(b) to cases brought under § 1983 is patently incorrect. In plaintiffs' principal decision, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S.Ct. 1160 (1993), there was no allegation of fraud, and the Court merely rejected Court of Appeals authority that had established, by decisional law, a heightened pleading requirement for claims against municipalities under § 1983. Similarly, in Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S.Ct. 92 (2002), the Court rejected the application of a heightened pleading requirement to employment discrimination claims brought under Title VII. Neither Leatherman nor Swierkiewicz considered complaints that accused a defendant of fraud. The only Second Circuit decision cited by plaintiffs, Phelps v. Kapnolas, 308 F.3d 180 (2d Cir. 2002), is equally inapposite. Phelps was a prisoner's rights case in which the Court of Appeals rejected a District Court's ruling that required the prisoner to satisfy a heightened pleading requirement with respect to a claim that prison officials had acted with "deliberate indifference" in temporarily placing him on a restricted diet. 308 F.3d 186-87. Similarly, none of plaintiffs' other cases (see Pl. Mem. at 13) considered allegations of fraud. On the other hand, subsequent to Leatherman and Swierkiewicz at least one District Court has applied the heightened pleading standard of Rule 9(b) to a claim of fraud asserted in an action under § 1983. Barry Aviation, Inc. v. Land O'Lakes Municipal Airport Comm'n, 219 F.R.D. 457, 461 (W.D. Wis. 2003), rev'd on other grounds, 377 F.3d 682 (7th Cir. 2004). Here, plaintiffs' claims of favoritism, and of a review process that supposedly was a "sham" process with a predetermined outcome (see Am. Compl. ¶¶ 2-4, 62, 64, 73-82, 83-85, 89, 133-140), amount to claims of a fraud on the public, much as did the claims in Rosenthal, and plaintiffs even allege that "[t]his is a case ... , ultimately, about a betrayal of public trust" (Am. Compl. ¶ 2). Numerous decisions have recognized that a pleading that does not actually use words like "fraud" or "misrepresentation" still may sound in fraud and be subject to the heightened pleading standard of Rule 9(b). See, e.g., In re Daou Systems, Inc. Securities Litigation, 411 F.3d 1006, 1027 (9th Cir. 2005); Hayduk v. Lanna, 775 F.2d 441, 443 (1st Cir. 1985); Dealers Supply Co. v. Cheil Industries, Inc., 348 F.Supp.2d 579, 590 (M.D.N.C. 2004); Hernandez v. Ciba-Geigy Corp. USA, 200 F.R.D. 285, 291 (S.D. Tex. 2001); D.A. Collins Const. Co. v. ICOS/NCCA, a Joint Venture, No. 91-CV-933, 1994 WL 328626, \*7 (N.D.N.Y. June 28, 1994); Toner v. Allstate Ins. Co., 821 F.Supp. 276, 283 (D. Del. 1993) (cited with approval in Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1477 (2d Cir. 1995), decided under the False Claims Act).

and where the task of deciding whether the ‘public use’ requirement has been satisfied has been left entirely to the unbridled discretion of an unelected administrative agency” (Pl. Mem. at 40) (emphasis in original). There is no merit to this contention, because it mischaracterizes the legislative delegation of eminent domain power to ESDC, and because it is not supported by the cases that plaintiffs cite.

To buttress their assertion that ESDC’s authority to exercise eminent domain supposedly is “unbridled” or “uncabined,” plaintiffs cite only the provisions of the EDPL (see Pl. Mem. at 42-43). By doing so, plaintiffs ask this Court to look in the wrong place. The EDPL establishes uniform state-wide procedures for the exercise of eminent domain by those agencies and bodies that have the power to exercise it, but does not constitute a delegation of legislative authority to ESDC or any other state or local agency.

ESDC’s power of eminent domain derives from the UDC Act, not the EDPL, and the UDC Act – a statute that plaintiffs ignore in their opposing memorandum – explicitly constrains ESDC’s ability to exercise that power. Under the UDC Act, ESDC may not condemn property unless it makes specific enumerated findings. See N.Y. Unconsol. Laws § 6260(h). In the present case, as plaintiffs acknowledge, the Atlantic Yards project has been approved by ESDC as both a “land use improvement project” and a “civic project” under the UDC Act (see Am. Compl. ¶ 47). In the case of a land use improvement project, ESDC “shall not be empowered to undertake the acquisition ... of a project unless” it makes 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.” N.Y. Unconsol. Laws § 6260(c). In the case of a civic project, ESDC may not condemn property unless it finds:

(1) That there exists in the area in which the project is to be located, a need for the educational, cultural, recreational, community, municipal, public service or other civic facility to be included in the project;

(2) That the project shall consist of a building or buildings or other facilities which are suitable for educational, cultural, recreational, community, municipal, public service or other civic purposes;

(3) That such project will be leased to or owned by the state or an agency or instrumentality thereof, a municipality or an agency or instrumentality thereof, a public corporation, or any entity which is carrying out a community, municipal, public service or other civic purpose, and that adequate provision has been, or will be, made for the payment of the cost of acquisition, construction, operation, maintenance and upkeep of the project;

(4) That the plans and specifications assure or will assure adequate light, air, sanitation and fire protection.

Id. at § 6260(d). See also, e.g., West 41st Street Realty LLC, 298 A.D.2d at 4, 744 N.Y.S.2d at 124 (“When considering land use improvement projects,” ESDC “is required to” make the findings set forth in § 6260).<sup>16</sup>

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<sup>16</sup> The findings required by the UDC Act have been made here at the conclusion of a long public review process that included a public hearing before ESDC as well as numerous public meetings before other agencies, including the City Planning Commission. The federal courts in this Circuit have deferred to determinations by ESDC to condemn property not only in considering challenges premised on the public use clause, see Rosenthal & Rosenthal Inc., 771 F.2d at 46, but also in considering challenges premised on the First Amendment. See G&A Books, Inc. v. Stern, 770 F.2d 288, 297 (2d Cir. 1985), cert. denied sub nom. MJM Exhibitors Inc. v. Stern, 475 U.S. 1015, 106 S.Ct. 1195 (1986); Forty-Second Street Co. v. Koch, 613 F.Supp. 1416 (S.D.N.Y. 1985).

Not only is the Legislature's delegation of the power of eminent domain to ESDC carefully circumscribed, but the cases that plaintiffs cite (Pl. Mem. at 41-42) fail to support their assertion that an "unbridled" delegation of the authority to condemn property eliminates the requirement of judicial deference. In plaintiffs' principal case, Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445 (7th Cir. 2002), the reason why the court did not extend deference to the condemnor's determination was that the condemnor had not premised its determination on grounds set forth in the Indiana statute that gave it the power of eminent domain. In the present case, by contrast, there is no claim that ESDC has acted in excess of the power granted to it by the Legislature in the UDC Act.<sup>17</sup>

Careful consideration of plaintiffs' contentions thus exposes them as devoid of merit. It is beyond question that the Atlantic Yards project contains multiple substantial public uses and serves multiple substantial public purposes, and that ESDC's exercise of eminent domain in furtherance of that project satisfies the requirements of the public use clause.

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<sup>17</sup> Plaintiffs also cite, in passing, one additional case, Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996). There, owners of low-income housing sued municipal officials to challenge their extremely rigorous enforcement of the city's housing code. They claimed, among other things, that city officials wanted to use the housing code to seize their properties so that they could redevelop the sites for a shopping center, and they asserted claims based on procedural due process, substantive due process, equal protection and the Fair Housing Act. 75 F.3d at 1315. On appeal, in reviewing the District Court's denial of the defendants' motion for summary judgment, the Ninth Circuit appears to have sua sponte recharacterized part of the plaintiffs' claim as asserting a taking for private use and without just compensation. In that context, the court stated, in what appears to have been dicta, that "the usual extreme deference that courts owe to legislative determinations of public use" would not be appropriate "[i]f" it was true that, as alleged by the plaintiffs, there was "an uncompensated taking through a raw misuse of government power," because the "only determination that could possibly have been made that a shopping center on the plaintiffs' land was a 'public use' would have been a secret determination by the defendants as executive-branch officials of the city or as individuals using the cloak of their official positions to effect their private ends." Id. at 1321. This case has no bearing on the issue of the Legislature's delegation of the power of eminent domain to ESDC, or on judicial review of ESDC's determinations. To the contrary, it recognizes that, in the absence of what amounts to corruption, such determinations are entitled to "extreme" deference.

**B. PLAINTIFFS' CLAIM THAT THEIR RIGHTS TO EQUAL PROTECTION ARE BEING VIOLATED IS COMPLETELY WITHOUT ANY MERIT AND SHOULD BE DISMISSED**

In their opening memorandum, the Forest City Ratner defendants characterized plaintiffs' equal protection claim as "murky and confusing" (Mem. at 24), and further pointed out that it failed to contain any assertion that plaintiffs are being treated differently from similarly situated persons. Although plaintiffs since have amended their complaint, they have not added any of the allegations that would be necessary to correct this deficiency and assert an equal protection claim (see Am. Compl. ¶¶ 149-61).

Instead, plaintiffs support their claim exclusively by reliance on cases that stand for the proposition that, in plaintiffs' words, "vindictive governmental action violates the Equal Protection Clause even if the government's malice is directed at a single unique entity" (Pl. Mem. at 45).

The principle that plaintiffs invoke has no application to this case, because there is nothing in the complaint that reasonably could support an inference that, in reviewing and approving the Atlantic Yards project, defendants were motivated by malice or vindictiveness directed at plaintiffs. To the contrary, the complaint merely asserts that defendants "have targeted plaintiffs for adverse treatment for no rational purpose," but instead "for the purpose of conferring a benefit ... to FCRC" (Am. Compl. ¶ 151). If it were true that ESDC was condemning plaintiffs' property for the purpose of benefitting FCRC, it would not constitute a denial of equal protection inasmuch as the alleged purpose of the condemnation is to benefit FCRC, not to harm plaintiffs out of malice or vindictiveness. In addition, there are numerous other properties that also are being condemned. There thus is no allegation plaintiffs have been

singled out for treatment that is different from that of similarly situated persons. Therefore, plaintiffs' equal protection claim should be dismissed.

**C. PLAINTIFFS HAVE NOT ALLEGED A VIOLATION OF DUE PROCESS, AND THEIR DUE PROCESS CLAIM THEREFORE SHOULD BE DISMISSED**

Plaintiffs' due process claim is so clearly untenable in the wake of the decision in Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005), that plaintiffs devote only one half-hearted paragraph to defending it (Pl. Mem. at 46-47). According to plaintiffs, their claim is "simple" and is based on the theory that defendants have acted by, "among other things, 'at all times providing an empty, meaningless process with a pre-determined outcome'" (id. at 47, quoting Am. Compl. ¶ 164). There is no merit to this contention.

In Brody, the Second Circuit specifically held that a condemnee "has no constitutional right to participate in the [condemnor's] initial decision to exercise its power of eminent domain," and that the rights provided to potential condemnees by New York's EDPL exceed the requirements of due process. 434 F.3d at 133. Brody thus disposes of plaintiffs' due process claim.<sup>18</sup>

Furthermore, even if plaintiffs had a constitutional right to participate in ESDC's decision to exercise eminent domain, their conclusory assertions of a pre-determined outcome are belied by documents to which they refer in their own pleading. Plaintiffs premise their assertion of a pre-determined outcome primarily on two memoranda of understanding entered into in February 2005 by FCRC, ESDC, the City and the City's Economic Development Corporation (see Am. Compl. ¶¶ 70-72). These MOU's are before the Court (see Kraus Decl.

<sup>18</sup> The two cases cited by plaintiffs, Ponte v. Real, 471 U.S. 491, 105 S.Ct. 2192 (1985), and Francis v. Coughlin, 891 F.2d 43 (2d Cir. 1989), are prisoners' rights cases and have no bearing on this case in view of the Second Circuit's decision in Brody.

Exs. A, B), and they are inconsistent with plaintiffs' assertions that there was a pre-determined outcome. One of the MOU's provided for the submission to ESDC by FCRC of a revised development plan that would be "[s]ubject to the review and approval of the Public Parties" (Kraus Decl. Ex. A, at ¶¶ 2, 3), and further provided that, if there was "review and acceptance by the Public Parties" (i.e., ESDC's staff and the City's City Planning Commission), "ESDC staff" would "seek the approval of the ESDC Board of Directors to have ESDC" adopt a general project plan, exercise (in consultation with the City Planning Commission) "its power to override local zoning," and "approve acquisition and disposition of the Project site to FCRC" (id. at ¶ 5). It also provided that it was "non-binding and does not create or give rise to any legally enforceable rights or legally enforceable obligations or liabilities of any kind on the part of any party hereto" (id. ¶ 20). The second MOU contains similar disclaimers (see Kraus Decl. Ex. B, pp. 2, 4). Plaintiffs' assertion of a pre-determined outcome thus is inconsistent with the documents on which their complaint purports to premise the assertion of a pre-determined outcome.

This claim would not be viable even in the absence of the Brody decision, and should be dismissed.

**Conclusion**

For the foregoing reasons and those set forth in the Forest City Ratner defendants' prior papers as well as in ESDC's papers, plaintiffs' claims under 42 U.S.C. § 1983 should be dismissed in their entirety.<sup>19</sup>

Dated: New York, New York  
January 19, 2007

Respectfully submitted,

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<sup>19</sup> Should this Court dismiss plaintiffs' constitutional claims for failure to state a claim, it should do nothing to undermine the preclusive effect of that dismissal on any future assertion by plaintiffs of essentially the same claims in the state courts under EDPL § 207. In fact, EDPL § 207 should not even be viewed as a "cause of action" or a "claim," but rather as establishing the procedure by which objections to the exercise of eminent domain (including constitutional objections) are to be litigated in the New York state courts. Here, the substance of plaintiffs' ostensible "cause of action" against ESDC under EDPL § 207 is duplicative of their claims under § 1983 – except to the extent that the EDPL § 207 "cause of action" raises one procedural issue under state law (see n. 10, supra). If the Court concludes that the "cause of action" under EDPL § 207 is a separate claim, then the Court may dismiss it on the merits for failure to state a claim for which relief can be granted. Federal courts normally decline to exercise supplemental jurisdiction of state law claims where the federal claims are dismissed at the outset of the case. Nevertheless, relying on United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966), the courts have recognized an exception to this general rule where the determination of the federal claims decides an issue that is dispositive of a state claim. See Ivy v. Kimbrough, 115 F.3d 550, 553 (8th Cir. 1997); Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1187 (7th Cir. 1987); Ford v. Consol. Edison Co. of N.Y., Inc., No. 03 Civ. 9587, 2006 WL 538116, \*19 (S.D.N.Y. Mar. 3, 2006).