

Plaintiffs-Appellants (“Plaintiffs”) appeal the Memorandum and Order of District Judge Nicholas G. Garaufis. It is reported at *Goldstein, v. Pataki*, 488 F.Supp.2d 254 (E.D.N.Y. 2007). The Report and Recommendation of Magistrate Judge Robert M. Levy, which the District Judge adopted in part, is reported at *Goldstein v. Pataki*, No. 06 CV 5827, 2007 WL 1695573 (E.D.N.Y. Feb. 23, 2007).

PRELIMINARY STATMENT

While much controversy, legal and otherwise, has sprung from the Supreme Court’s decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), there is nothing controversial about this case. For, as *Kelo* instructs, defendants are “no doubt . . . forbidden from taking [plaintiffs’] land for the *purpose* of conferring a private benefit on a *particular* private party.” 545 U.S. 477 (citation omitted) (emphasis supplied). This is a bedrock Fifth Amendment principle. All nine Justices in *Kelo* agreed on this point. No court has ever held otherwise – until now. By dismissing this action for failure to state a claim based on a complaint that presented substantial detailed facts that support the conclusion that the takings challenged here would serve an unconstitutional purpose, the district court effectively nullified the Public Use Clause. This was error.

JURISDICTIONAL STATEMENT

Subject matter jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1367(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. This is an appeal from the Final Judgment, dated June 8, 2007, and the Memorandum and Order, dated June 6, 2007, (“Opinion”) adopting in part and rejecting in part the Report and Recommendation, dated February 23, 2007 (“R&R”). A timely notice of appeal was filed on June 13, 2007. A motion to expedite this appeal made by all parties was granted by order of this Court dated July 17, 2007.

STATEMENT OF FACTS

A. The Parties

Plaintiffs-Appellants (“Plaintiffs”) are fifteen property owners or renters whose homes and businesses were long ago selected for acquisition by defendant Bruce Ratner. Because defendant Ratner, his agents and the many companies he owns or controls that are also defendants in this case (referred to collectively as “Ratner” or “FCRC”), does not technically have the power to seize the property of private citizens, Plaintiffs’ homes and businesses will be seized in the first instance by defendant New York State Urban Development Corporation

d/b/a Empire State Development Corporation (“ESDC”) and then turned over to Ratner. Defendant ESDC is a corporate, quasi-governmental agency of the State that was at all pertinent times wholly controlled by defendant former Governor George Pataki.

B. The Complaint

Plaintiffs respectfully refer the Court to the Amended Complaint (“Complaint”) (A-58.1-58.45) for a full description of the factual bases for their claims, but offer the following condensed version for purposes of this brief.

Long before any public announcement, defendants Pataki and Mayor Bloomberg agreed, at Ratner’s behest, to grant him the exclusive right to build the single largest multi-use real estate development in the history of the City of New York in the heart of central Brooklyn (the “Project”).¹ (Compl. ¶ 2, at A-58.2.)

This deal was struck: (1) without creating a comprehensive development plan or so much as considering a single alternative to Ratner’s plan

¹ The Atlantic Yards Arena and Redevelopment Project is a publicly subsidized, mixed-use redevelopment project with a sports arena that would cover 22 acres of land in and around the Metropolitan Transportation Authority’s Vanderbilt Yards, including city streets, two city properties and 68 other privately owned parcels totaling 123 tax lots. It includes 16 high-rise apartment and office towers – ranging from approximately 18 to 60 stories – and contains approximately 8.8 million square feet of residential, office and commercial space; and a 180-room hotel. (Compl. ¶ 2, n.1 at A-58.2.)

for development of the area, including his selection of Plaintiffs' properties for seizure; (2) without a true competitive bidding process for the purchase of Vanderbilt Yards owned by the Metropolitan Transportation Authority ("MTA"); (3) with no bidding process at all for the remainder of the site, including Plaintiffs' properties; (4) without local legislative review and approval by the City Council; and (5) without a process to allow for meaningful community input.

The area where Plaintiffs' properties are located (the "Takings Area") "rests smack in the middle of some of the most valuable real estate in Brooklyn." (*Id.* ¶ 59, at A-58.19.) Following "the Project's announcement in 2003, Ratner, using the threat of eminent domain, has aggressively purchased property in the Takings Area, cleared out buildings, and left them empty." (*Id.* ¶ 60, at A-58.16.) Moreover, in his "fervor to purchase as much property as possible within the Takings Area, Ratner has repeatedly warned reluctant property owners that they only have two choices; sell or wait until their properties are taken by eminent domain." (*Id.* ¶ 61, at A-58.16.)

Defendants' decision to take Plaintiffs' properties serves only one purpose: it allows Ratner to build a Project of unprecedented size, and thus reap a profit that Defendants, tellingly, have attempted to conceal at every turn. This is not merely favoritism of a particular developer in the classic sense, although it is

that. Here, the “favored” developer is driving and dictating the process, with government officials at all levels obediently falling into line. (*Id.* ¶ 3, at A-58.2 - 58.3.)

The imminent seizure of Plaintiffs’ properties in the Takings Area selected by Ratner has been accomplished through a wholesale abdication of governmental responsibility by: (a) defendant Bloomberg, his agents and the entities he controls (collectively “City Defendants”); and (b) defendant Pataki, his agents and the entities he controlled, including defendant ESDC and its former CEO, defendant Charles Gargano (collectively “State Defendants”).

That abdication has allowed Ratner to co-opt the power of eminent domain; and to wield it in service of his understandable desire to expand the Project to truly mammoth proportions, thus increasing the profit to himself, his companies and his shareholders, by many multiples of what would ordinarily be attainable without such extraordinary power. (*Id.* ¶ 62, at A-58.16.)

MTA’s Vanderbilt Yards could easily be developed without involving the Takings Area. A large mixed-use residential and commercial complex could be built without taking a single piece of private property by eminent domain. (*Id.* ¶ 63, at A-58.16.)

The seizure of Plaintiffs' properties is not necessary to promote economic development in the area. (*Id.* ¶ 64, at A-58.16 - 58.17).

Ordinarily, the New York City Council and the City's fifty-nine Community Boards provide a forum for the voices of the citizens of the City to be heard whenever major land use questions arise like those presented by the Project. As a result of early agreement between Ratner, Pataki and Bloomberg, however, any meaningful opportunity to be heard through normal processes was extinguished by executive fiat, at both the state and local levels. (*Id.* ¶¶ 65-69, at A-58.17.)

The agreement to develop the Project and take Plaintiffs' properties included express provisions bestowing atypical benefits upon FCRC. Under one written agreement, FCRC will receive a raft of special discretionary goodies not available as-of-right to real estate developers, including \$200 million in capital contributions from the City and State,² low-cost financing for the arena, extra property tax savings, a low-cost lease, and the guaranteed transfer of private property through eminent domain. Under a second agreement, FCRC is granted the unfettered right to develop other properties near the Project footprint including

² In the spring of 2007, this number ballooned to \$305 million when the City more than doubled its capital contribution.

areas outside the Project, without interference by the City. (*Id.* ¶¶ 70-72, at A-58.17 - 58.18.)

Like much of the evidence to this very day, one of the agreements detailing these special benefits was hidden from public scrutiny. Indeed, it was only produced by threat of legal compulsion under the Freedom of Information Law. (*Id.* ¶ 71, at A-58.18.)

Pursuant to the pre-Project announcement agreement between Pataki, Bloomberg and Ratner, FCRC was gifted the rights to build over the MTA's Vanderbilt Rail Yard. This was expressly confirmed, on more than one occasion, by MTA spokespersons in discussions with news reporters. (*Id.* ¶ 73, at A-58.18.) Apparently embarrassed by the disclosure that a back-room deal had already been struck to convey the MTA's property to FCRC, the MTA retracted its statements. (*Id.* ¶ 74, at A-58.18 - 58.19.)

Bent on papering over its candid disclosure of the existing deal, the MTA later executed a "letter agreement" with FCRC designed to make it appear as if a final agreement on the sale of the MTA's property to FCRC had not yet been reached – although, in fact, such an arrangement had long been secured. (*Id.*)

Thereafter, intent on creating the appearance of an open bidding process (even though the outcome was predetermined), the MTA released a

request for proposals (“RFP”) for purchase of the development rights to the rail yards. The sham RFP was profoundly biased in favor of FCRC. Whereas FCRC had been working on its (pre-approved) proposal for purchase of the railyards with the MTA and other State officials for more than two years, the RFP gave everyone else forty-two days to generate proposals. Among other things, the RFP required proposers to submit a twenty-year profit and loss statement (pro forma). (*Id.* ¶¶ 74-76, at A-58.18 - 58.19.).

FCRC submitted a formal bid to develop over the railyards, offering to pay the MTA \$50 million – \$164.5 million less than the appraised value of \$214.5 million. Notably, FCRC failed to submit a profit and loss projection as the RFP required. (*Id.* ¶ 77, at A-58.19.)

Extell Development Company, a large and highly reputable real estate developer, submitted a bid for \$150 million. Extell’s proposal was much smaller in scale than FCRC’s, and did not require the taking of any private property by eminent domain. Extell submitted the required twenty-year profit and loss statement and in its bid proposed to go through City’s Uniform Land Use Review Process (“ULURP”) and a vote by the City Council. (*Id.* ¶ 78, at A-58.19.)

Consistent with its prior understanding with FCRC, and notwithstanding the overall superiority of the Extell bid, the MTA Board, which at

the time was controlled by defendant Pataki, granted FCRC the exclusive right to negotiate the terms of sale agreement with the MTA over the course of forty-five days. (*Id.* ¶ 78, at A-58.19.)

A bit more than a month later, the MTA and FCRC formally announced that FCRC would pay \$100 million for the rights to the site, still well below the appraised value and below the Extell bid. When the lone dissenting MTA Board member, Mitch Pally, asked for an explanation, MTA Board Chair Peter Kalikow replied, “I’m not going to be beholden by that appraisal, it’s just some guy’s idea of what those yards are worth.” (*Id.* ¶ 80, at A-58.20.)

Prior to the vote, defendant Doctoroff submitted a letter to the MTA Board declaring that the City would only commit its financial resources to the FCRC Project, and not the Extell bid. (*Id.* ¶ 81, at A-58.20.)

In violation of the terms of the RFP, FCRC never provided the MTA with its projected profits from the Project. When pressed by a reporter to reveal FCRC’s anticipated profits, defendant Stuckey claimed that profit numbers would emerge only after the Project was completed. He did not explain how the MTA could responsibly ignore FCRC’s failure to comply with an express requirement of the RFP, as government contracting rules ordinarily mandate rejection of non-

compliant bids. Stuckey defended FCRC's right to make money remarking: "It is, after all, America." (*Id.* ¶ 82, at A-58.20.).

Rather than acknowledging the true purpose for the taking of Plaintiffs' properties, over time, Defendants have proffered a number of alleged public benefit justifications. All "are either wildly exaggerated or simply false. At best, the public benefits that the Project offers are incidental; at worst, they are non-existent." (*Id.* ¶ 89, at A-58.21 - 58.22.)

Defendants now claim that the taking of Plaintiffs' properties is necessary to eliminate blight. "This is a classic post-hoc justification – a pretext with no basis in fact." (*Id.* ¶ 98, at A-58.24.) When the Project was publicly unveiled in the fall of 2003, the elimination of blight was never raised as a justification for the taking of private property, or for the development of the Project in general. This was not an oversight born of early enthusiasm over the Project. Neither of the two 2005 agreements between the City, the State and FCRC so much as reference 'blight' as a basis for government action or otherwise." (*Id.* ¶ 99, at A-58.24.)

After the Supreme Court's opinion in *Kelo*, however, Defendants commissioned a "Blight Study" of the area to be performed by a company called AKRF. FCRC paid for the study. AKRF is the antithesis of an independent

consultant. Each and every time AKRF has been retained to study a project in conjunction with an environmental review in New York City, it has drawn conclusions that favored the proposed project. (*Id.* ¶¶ 100-01, at A-58.24.)

The conditions that the AKRF Blight Study found to be “blighted” in fact are a direct result of the Project itself and the attendant non-enforcement and neglect by the City of New York, the New York City Department of Transportation, the MTA and FCRC, as well as property warehousing by FCRC. (*Id.* ¶ 102, at A-58.24.)

FCRC will profit enormously from the Project. The magnitude of that profit cannot be determined with certainty at this time, however, because FCRC has refused to disclose this data publicly. FCRC’s profit is conservatively estimated at one billion dollars (\$1,000,000,000). FCRC’s profit will certainly be greater than the public return, if any. The financial risks associated with the Project will be borne by the public, not FCRC. (*Id.* ¶¶ 121-25, at A-58.28.)

In addition to the hostile seizure of Plaintiffs’ properties, Defendants will also execute a number of so-called “friendly” takings. The friendly takings consist of Defendants acquiring, without objection, title to FCRC’s own properties, presumably after paying “just compensation” as required by the Fifth Amendment. This will then allow for the eviction of tenants, like the plaintiff

residing at 479 Dean Street, who are otherwise protected from eviction without cause by State rent laws. Thus, in one fell swoop, the friendly taking will allow FCRC (i) to avoid the rent laws and their “onerous” relocation requirements, (ii) to evict all tenants without any cause or justification, and (iii) to line its pockets with additional funds from the public fisc. (*Id.* ¶¶ 126-130, at A-58.28 - A-58.29.)

By taking Plaintiffs’ property and giving it to FCRC, Defendants intend to benefit FCRC. FCRC is the primary beneficiary of the taking of Plaintiffs’ properties. The public does not benefit from the taking of Plaintiffs’ properties. Alternatively, insofar as the public derives any benefit from the taking of Plaintiffs’ properties, it is secondary and incidental to the benefit that inures to FCRC. Defendants’ desire to confer a private benefit to FCRC was a substantial, motivating factor in Defendants’ decision to seize Plaintiffs’ property and transfer it to FCRC.

As set forth above, and throughout the Complaint, among other indicia that the taking of Plaintiffs’ properties is for the primary purpose of benefitting FCRC, without limitation, are:

- (A) the Project was wholly conceived by FCRC;

- (B) absent FCRC's persistence in pursuing the Project, there would be no development at the site that would require the condemnation of plaintiff's property;
- (C) not a single alternative plan (much less multiple plans) was considered before the determination to proceed with the Project;
- (D) not a single alternative private developer (much less multiple developers) was considered before the determination to proceed with FCRC;
- (E) the beneficiary of the land transfer by eminent domain was known long before the determination to proceed;
- (F) there was no meaningful community or local input before (or even after) the decision to proceed;
- (G) the Project is not the product of a carefully considered development plan;
- (H) the environmental impact of the Project was not studied before the determination to proceed;
- (I) the social ramifications of the Project were not considered before the determination to proceed;

- (J) there was no independent consultant or team of consultants who evaluated the Project before the determination to proceed;
- (K) there was no finding that the Project was consistent with the overall development goals of the City and State before the determination to proceed;
- (L) there was no finding that the area to be condemned was blighted before the determination to proceed;
- (M) New York City is not struggling to rebound from an economic depression;
- (N) Brooklyn is not struggling to rebound from an economic depression;
- (O) the substantial public financing and incentives provided for the program were not put in place *before* the developer was known;
- (P) the economic benefits, if any, to be realized from the Project are *de minimus*; and
- (Q) many of the procedural protections in place to prevent development without local and community input and approval were bypassed.

(*Id.* ¶¶ 138-39, at A-58.30 - 58.31.)

Defendants' claims of public benefit are a pretext to justify a private taking. Indicia that Defendants' claims of public benefit are a pretext include, without limitation: (1) the Project will not actually create more jobs; (2) the Project will not generate a net economic benefit for the community or the City or any gain will be *de minimus*; (3) the Project will not materially increase available affordable housing; and (4) the area slated for condemnation is not blighted. (*Id.* ¶ 140, at A-58.31-58.32)

C. Supplemental Allegations

Even without the benefit of basic civil discovery, additional evidence of Defendants' improper purpose has come to light since Plaintiffs' Amended Complaint was filed on January 5, 2007. Given the opportunity, Plaintiffs would include these allegations, among others, in a supplemental complaint, pursuant to Fed. R. Civ. P. 15(d). The district court dismissed Plaintiffs' constitutional claims with prejudice and without leave to replead.

1. MTA's "Genuine" RFP For Hudson Railyards

On July 13, 2007, the MTA released two RFPs soliciting proposals from developers interested in purchasing its Hudson Rail Yards. Because the recent Hudson RFP shares many of the same characteristics of the Vanderbilt RFP,

it serves as a useful comparator for analyzing the legitimacy of the Vanderbilt RFP.

The City and the MTA have charted a new course for the Hudson Rail Yards in the years that have passed since their foiled attempt to transfer the property to the owners of the New York Jets via a sham RFP like the one Defendants' employed in this case. This time, *before* any transfer of the property is up for consideration, the MTA and the City, including the City Council and local community boards, have engaged in an extensive planning process culminating in a comprehensive development plan for the area. The plan does not contemplate acquiring property by eminent domain. Moreover, the plan was selected *before* any developer was selected or even solicited.

Now, with the plan in place, the MTA and the City have begun the process of selecting one or more private developers to realize their vision. The RFP has all the earmarks of true competitive selection process designed to protect the public fisc by maximizing the amount of money received by the MTA in exchange for its valuable property.

The Vanderbilt RFP was only forty-two pages long. It provided little guidance to developers interested in the property. It did not present a

comprehensive or detailed vision for the future of the site. Responses were due no later than forty-two days after its release.

By contrast, the Hudson RFP is 1,369 pages long. It is extremely comprehensive and detailed. It requires, proposers to submit a breadth and depth of financial information that dwarfs that required of all responders (except Ratner) in the Vanderbilt RFP. It contains hundreds of pages of design guidelines, thus ensuring that the pre-determined needs of the public will be met. It even contains an extensive model design and proposal compiled by an outside consultant to provide even more guidance to developers. Finally, there is a ninety-two day window from RFP publication to the deadline for submitting responses.

The difference between the two RFPs could hardly be more stark. That difference adds another powerful fact that compellingly supports an inference that the Vanderbilt RFP was a crude and ineffective *post hoc* pretext for State and City Defendants' decision to gift the Vanderbilt Yards to Ratner.

2. City Commitment To Ratner Doubles From \$100 To \$205 Million

After the Amended Complaint was filed in this action, a reporter discovered that the City inserted an additional \$105 million payment into the City budget earmarked for further defraying Project costs that would otherwise be borne by Ratner. At a press conference, defendant Bloomberg acknowledged that

the number might well go higher. This means that the Independent Budget Office (IBO) analysis of the financial impact of the proposed arena on the City must be revised downward from the possibility of a total of \$1 million per year for over 30 years, to a \$70 million loss (without accounting for the time value of money).

When asked about this by a reporter recently, IBO Deputy Director George Sweeting said the new numbers came as a little surprise to him. “Because the size of the city contribution has grown, the gain from the arena is certainly less than \$30 million and it could be a loss,” said Sweeting, adding that the organization had no plans to do the math again. Sweeting remarked that the IBO’s first analysis “wasn’t exactly a ringing endorsement.”

3. Judicial Finding of Ratner’s Misconduct and Misrepresentations to ESDC

In *752 Pacific LLC v. Pacific Carlton Development Corp.*, No. 32819-03, 14 Misc. 3d 1227(A) (Table), 2007 WL 656309 (printed in full) (Sup. Ct. Kings Co., Mar. 1, 2007), New York State Supreme Court Justice Ira B. Harkavy granted summary judgment to defendant Pacific Carlton Development Corp. and 535 Carlton Ave. Realty Corp. (both also plaintiffs in this action) (collectively “Carlton”) in a dispute over control of two properties owned by Carlton in the Takings Area.

The court ruled in favor of Carlton and terminated its leases with Shaya Boymelgreen, because Boymelgreen violated the plain terms of the lease when he secretly assigned his leasehold interest to an FCRC “affiliate” without Carlton’s knowledge or consent as was plainly mandated by the agreements. As it happens, Mr. Boymelgreen owns or controls a substantial condominium project immediately adjacent to Vanderbilt Railyards that Ratner has never targeted for seizure even though Boymelgreen’s property is unquestionably more contiguous with the proposed arena footprint than Carlton’s properties, and thus its seizure would promote a more compact and efficient Project site. *See* Matthew Schuerman, *Ratner Rules: Brooklyn Nets Plan Spares Developer Shaya Boymelgreen’s Project*, Vill. Voice, Apr. 5, 2004, available at <http://www.villagevoice.com/news/0414,schuerman,52432,5.html>.

The court’s decision reveals that FCRC knowingly entered into an unenforceable option agreement for Boymelgreen’s leasehold in 2005, followed by an equally unenforceable assignment of that leasehold in 2006. FCRC was motivated to engage in this improper conduct for two reasons. First, FCRC used the option to claim to ESDC and the public that it controlled Carlton’s properties when it did not, thus allowing FCRC to minimize the number and breadth of properties slated for seizure by eminent domain. Second, insofar as FCRC and

Boymelgreen might have managed to get away with the illegal assignment scheme, the court's summary judgment determination reveals that FCRC intended to use its status as a long-term lessee to attempt to demolish the buildings.

4. Ratner Provided Materially Incomplete Financial Information To ESDC

In response to a freedom of information lawsuit filed by New York State Assemblyman James Brennan of Brooklyn, the ESDC has now acknowledged that it “never saw a business plan from developer Forest City Ratner.” Eliot Brown, *State Never Saw Business Plan For Atlantic Yards Project*, NY Sun, Mar. 28, 2007, available at <http://www.nysun.com/article/51354>. Instead, ESDC “relied” on the limited profit projections contained in a KPMG report prepared for Ratner. The KPMG report is flawed and incomplete. The most recent evidence of this is an analysis published in the last week that revealed that KPMG “forgot” to include Site 5 in its report. With Site 5, which consists of a luxury condominium tower representing more than 5% of the total square footage of the entire Project, mysteriously missing from the KPMG analysis, the reliability of the only financial projections provided to ESDC as evidence that Ratner's profits would not be too obscene as compared to any perceived public benefit, has, like so many of Defendants' conclusory claims, been substantially undermined.

5. Critical ESDC Report

On July 19, 2007, a consultant hired by ESDC issued a scathing evaluation of the agency. Nat Kearney, *Delivering on the Promise of New York State*, July 2007, available at <http://www.atkearney.com/res/shared/pdf/NewYorkReport-2007FINAL.pdf>. Among other things, the sixty page report confirms Plaintiffs' general allegations and fears concerning ESDC. The report recommends that ESDC should "reject its legacy of regional patronage, a pattern of funding one-off solutions, and a perceived preference for practicing the economics of political convenience." The report also criticizes ESDC's "practice of favoring political over economic criteria in making major project decisions."

C. The Report and Recommendation

In his Report and Recommendation dated February 23, 2007, ("R&R") Magistrate Judge Robert M. Levy, recommended denying Defendants' motions to dismiss this case as unripe or to abstain pursuant to the doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). The R&R also, however, recommended granting Defendants' motion to abstain under the doctrine established in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Having recommended abstention, the Magistrate Judge did not address the "difficult and serious

questions regarding the exercise of eminent domain under emerging Supreme Court jurisprudence” raised by Plaintiffs’ Complaint.

D. The Memorandum and Order

In a sixty-six page Memorandum & Order, dated June 6, 2007 (“Opinion”), the district court considered, *de novo*, Defendants’ motions to dismiss.

First, in an exhaustive analysis covering more than thirty pages of its opinion, the court rejected the recommendation to abstain from hearing this case under *Burford*. (11-41) Next, the district court accepted and adopted the remaining recommendations to deny Defendants’ motion to dismiss the case as unripe and to refuse to abstain under the doctrine set forth in *Younger*.

Having rejected Defendants’ various justiciability arguments, the district court turned to Defendants’ motion to dismiss Plaintiffs’ three constitutional causes of action pursuant to Fed. R. Civ. P. 12(b)(6).

Beginning on page forty-three of the Opinion, the district court set forth its “public use analysis.” That analysis consisted of a careful fourteen page review of the three leading Supreme Court cases concerning the Public Use Clause: *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); and *Kelo*.

Starting on page fifty-six, and for the last ten pages of the Opinion, the district court evaluated whether Plaintiffs' complaint stated a claim for a violation of the Public Use, Equal Protection, and Due Process Clauses. It is these ten pages that are at issue on this appeal.

At the outset of this critical analysis, the court distilled the Supreme Court's public use jurisprudence to two questions that can determine whether "a taking fails the public use requirement": (1) whether "the sole purpose of the taking is to transfer property to a private party," or (2) whether "the asserted purpose of the taking is a mere pretext for an actual purpose to bestow a private benefit." *Id.* The district court held that Plaintiffs did not state a Public Use claim under either formula.

First, without the benefit of guidance from this Court's decisions in *Iqbal v. Hasty*, No. 05-5768, No. 05-5844, 2007 WL 1717803 (2d Cir. Jun. 14, 2007) and *Roth v. Jennings*, No. 06-0784-cv, 2007 WL 1629889 (2d Cir. Jun. 6, 2007), the district court determined – correctly – that the "plausibility" gloss on the motion to dismiss standard announced in *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1964 (2007) was not confined strictly to antitrust conspiracy claims. *Op.* at 61.

The district court did not stop there. It went on to erroneously borrow a concept from *Bell Atlantic* that is unique to Sherman Act § 1 claims. The district court explained that (1) the “sole or primary fact alleged by the plaintiffs in [*Bell Atlantic*] was parallel conduct,” and (2) the *Bell Atlantic* Court considered parallel conduct, without more, to be ambiguous behavior “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”

The district court then leaped from uncontroversial observation to remarkable conclusion. The court held that “Under [*Bell Atlantic*], Plaintiffs’ claims that the public use requirement has been violated must be dismissed” because, as in *Bell Atlantic*, “the facts alleged by Plaintiffs in the present case – the taking of property from some private parties and the resulting benefit to other private parties – *are as consistent with lawful behavior as with unlawful behavior.*”³ (emphasis supplied). Op. 63.

³ The district court repeated this critical point in a footnote distinguishing the Supreme Court’s subsequent decision in *Erickson* reversing a Rule 12(b)(6) dismissal in a constitutional case brought by a prisoner because the “plaintiff in *Erickson* alleged facts that, if true, would give rise to liability,” whereas the “plaintiffs in [*Bell Atlantic*] and the present case alleged facts that are as consistent with lawful behavior as with unlawful behavior.” (Op. 64 n.13.)

Thus, on a Rule 12(b)(6) motion, the district court dismissed a well pleaded complaint alleging facts that give rise to a powerful inference of Defendants' unconstitutional purpose or intent, because it is also *possible* that Defendants' conduct was lawful.

The district court stretched the holding of *Bell Atlantic* in a second way as well. In explaining why *Bell Atlantic* “was intended to apply beyond antitrust-conspiracy cases,” the district court honed in on the Court’s “retirement” of the “no-set of facts” rule because a focused and literal reading of the rule could result in a court declining to dismiss a “wholly conclusory statement of claim.” (62) (quoting *Bell Atl.*, 127 S. Ct. at 1968).

Characterizing as “conclusory,” Plaintiffs allegations (i) that by “taking plaintiffs’ property and giving it to FCRC, defendants intend to benefit FCRC,” and (ii) that Defendants “desire to confer a private benefit to FCRC was a substantial, motivating factor, in defendants’ decision to seize plaintiffs’ property and transfer it to FCRC” – the district court held that Plaintiffs’ Public Use Claim was “not sufficient to withstand a motion to dismiss.” Op. at 61 (citing Complaint para 133, 137). As *Iqbal* confirms, this was plain error.

After disposing of Plaintiffs’ “conclusory” Public Use claim, the district court summarily dismissed Plaintiffs’ Equal Protection and Due Process

Clause claims because it perceived that the two claims were “based on the same facts as the Takings Clause claim.”

Seemingly without examining the allegations in the Complaint or addressing Plaintiffs’ arguments, the court concluded that because the takings were “rationally related to a legitimate governmental purpose” they did not offend the Equal Protection Clause.

Turning to Plaintiffs’ Due Process claim, the court appropriately adverted to the core allegation in support of Plaintiffs’ Due Process Claim – that the EDPL review process provided to Plaintiffs for the takings in this case was “empty” and “meaningless” with a “predetermined outcome.” The court proceeded to dismiss Plaintiffs’ *as applied* claim on the ground that a panel of this Court ruled in *Brody v. Port Chester*, 434 F.3d 121 (2d Cir. 2005) rejected a *facial* due process challenge to the statute.

Finally, the court dismissed Plaintiffs’ supplemental state law claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

ARGUMENT

I. STANDARD OF REVIEW

“A decision that a complaint fails to state a claim on which relief can be granted is a ruling of law, and [the Second Circuit] review[s] such a decision *de novo*.” *Roth v. Jennings*, No. 06-0784-cv, 2007 WL 1629889, at *11 (2d Cir. Jun. 6, 2007) (citations omitted).

In conducting this *de novo* review, this Court, “like the district court, must accept as true all of the factual allegations set out in plaintiff’s complaint, draw all inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally.” *Id.* (internal quotation marks and citation omitted).

Fed. R. Civ. P. 8(a)(2) “requires only a short and plain statement of the claim, . . . [s]pecific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citing *Bell Atl. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957))).

The “bottom-line principle is that ‘once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the

allegations in the complaint.” *Roth*, 2007 WL 1629889, at *11 (citing *Bell Atl.*, 127 S. Ct. at 1969). “The fundamental issue at the dismissal stage is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test.” *Phelps v. Kapnolas*, 308 F.3d 180, 184-85 (2d Cir. 2002) (internal quotation marks and citations omitted).⁴ Courts “must take care lest judicial haste in dismissing a complaint in the long run makes waste” as an “[u]ntimely dismissal may prove wasteful of the court’s limited resources rather than expeditious, for it often leads to a shuttling of the lawsuit between the district and appellate courts.” *Id.* at 185 (brackets, internal quotation marks and citations omitted).

In an exhaustive decision rendered after the Order appealed from here, a panel of this Court carefully analyzed what it described as the “[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings . . . created by the Supreme Court’s decision in *Bell Atlantic*.” *Iqbal*,

⁴ Although *Phelps* is a pre-*Bell Atlantic* decision, it was cited approvingly in *Iqbal*. *Iqbal*, 2007 WL 1717803, at *23 (“The plausibility standard requires no subsidiary facts at the pleading stage to support an allegation of Hasty’s knowledge because it is at least plausible that a warden would know of mistreatment inflicted by those under his command. Whether such knowledge can be proven must await further proceedings.”)

2007 WL 1717803, at *8; *see also id.* at *6-11 (providing detailed analysis of Supreme Court precedents). “After careful consideration of the Court’s opinion [in *Bell Atlantic*] and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened pleading, but is instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.” *Id.* at *11 (emphasis in original).

While the notably permissive standard governing a motion to dismiss unquestionably applies to cases like this, it is critically important that the standard be strictly adhered to in civil rights cases where: (1) defendants have exclusive possession and control of virtually all of the evidence concerning the decision-making process that led to the alleged constitutional deprivation;⁵ and (2) the immense power of government has been enlisted in service of seizing plaintiffs’ properties and giving them to a group of extremely wealthy and powerful individuals and corporations to further enhance that same power and wealth.

⁵ *See In re Natural Gas Comm. Litig.* 337 F.Supp.2d 498, 509 (S.D.N.Y. 2004) (evidence of defendants’ intent likely to be “uniquely in the possession of Defendants and obtainable only through the formal process of discovery authorized by the federal rules”).

Absent strict adherence to liberal pleading standards in such circumstances, constitutional violations will go largely unchecked, and 42 U.S.C. § 1983 will become a dead letter.

For decades, this Circuit has recognized this important principle. *See Patel v. Searles*, 305 F.3d 130, 135 (2d Cir. 2002) (already liberal standard for assessing pleading sufficiency under Fed. R. Civ. P. 8(a) must be applied “with particular strictness” where “the complaint alleges a civil rights violation”); *see also Phillip v. Univ. of Rochester*, 316 F.3d 291, 293-94 (2d Cir. 2003) (“liberal pleading rules apply with particular stringency to complaints of civil rights violations”); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998); *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991); *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir. 1979). Applied here, it provides yet another factor, in an ever growing list, that strongly militates against dismissal of Plaintiffs’ claims.

II. THE DISTRICT COURT APPLIED THE WRONG STANDARD OF REVIEW

The district court committed two legal errors when it applied standards from *Bell Atlantic* to this case; one significant and one less so on these facts.

First, and importantly, the court mistakenly concluded that the Supreme Court's discussion of parallel conduct as it pertains to Sherman Act § 1 claims, should apply to Plaintiffs' claims for violations of the Public Use, Equal Protection and Due Process Clauses of the Constitution.

The district court held that Plaintiffs' "claims that the public use requirement has been violated must be dismissed" because, as in *Bell Atlantic*, "the facts alleged by Plaintiffs in the present case – the taking of property from some private parties and the resulting benefit to other private parties – are as consistent with lawful behavior as with unlawful behavior." There is no question that this formulation, unlike the "plausibility" standard in general, is limited solely to the context from which it springs.

It is one thing – given the well-settled antitrust conspiracy rule that "neither parallel conduct, nor conscious parallelism, taken alone, raise the necessary implication of conspiracy" at the summary judgment stage – to apply this standard to evaluating the sufficiency of an antitrust pleading. *See Bell Atl.*, 127 S. Ct. at 1968 n.7 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). It is quite another, to use this antitrust standard to eliminate three

constitutional claims alleging acts animated by unlawful intent at the pleading stage. It is as unprecedented as it is wrong.

If the district court's formula were correct, no complaint – not one – asserting a claim alleging an unconstitutional motive (whether retaliation, discrimination, deliberate indifference or a taking intended primarily to benefit a private party) could ever be sustained. It would matter not that the assertion of unconstitutional purpose, or motive, or intent, was supported by a welter of undisputed evidence, whether circumstantial (as is typical), or even direct.

A reviewing court can *always* confidently proclaim, as the district court did here, that undisputed allegations, or allegations accepted as true, while fully consistent with an unlawful purpose, are also plausibly consistent with an lawful purpose. The district court's error in this regard turned Fed. R. Civ. P. 12(b) (6) and 8(a) inside out. Under the district court's regime, instead of sustaining unconstitutional motive claims based on asserted facts that admit of at least *one* plausible unlawful interpretation (the actual standard), claims must be dismissed if the facts allow for at least one plausible lawful interpretation. This makes no sense.

No intent based claims can survive this review. After all, it is hard to conceive of a defendant that will be unable to so much as assert a plausible lawful

justification for allegedly unlawful conduct. Plaintiffs will never get the opportunity to prove that a justification is pretextual because only the most bungling defendant will offer a justification that is implausible on its face and thus an obvious pretext.

The district court also erred, albeit in a manner of less moment, when it concluded that the Supreme Court in *Bell Atlantic* had not merely “retired” the “no set of facts rule,” for all cases governed by Fed. R. Civ. P. 8(a), but in the process had effectively imposed an across the board, heightened “no conclusory allegation rule” as well. This is less significant because Plaintiffs’ allegations are manifestly *not* conclusory, so even if the district court were right on this point, it would not matter.

Characterizing as “conclusory,” Plaintiffs’ allegations that by “taking plaintiffs’ property and giving it to FCRC, defendants intend to benefit FCRC” and Defendants’ “desire to confer a private benefit to FCRC was a substantial, motivating factor, in defendants’ decision to seize plaintiffs’ property and transfer it to FCRC,” the district court held that Plaintiffs’ Public Use allegations were “not sufficient to withstand a motion to dismiss.”⁶ This, of course, is in direct

⁶ The district court’s view on this point is doubly curious, as the court elsewhere acknowledged that the *Bell Atlantic* Court “derived the plausibility rule (continued...)

conflict with the Supreme Court's opinions in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). It is also beside the point. For even the district court's incorrect standard should not be applied where, as here, the conclusory allegations are accompanied by a raft of factual allegations that strongly support the conclusion. Here, it cannot be plausibly maintained that the Complaint "does not set forth a single fact" that suggests that Defendants' decision to take Plaintiffs' properties was intended to benefit FCRC.

As *Iqbal* now confirms, the district court's interpretation that *Bell Atlantic* held that conclusory allegations are now insufficient as a matter of law, is wrong. *Iqbal*, 2007 WL 1717803, at *11 ("we conclude that a heightened pleading rule may not be imposed," however, "in order to survive a motion to dismiss under the plausibility standard of *Bell Atlantic*, a conclusory allegation concerning some elements of plaintiff's claims might need to be fleshed out by plaintiff's response to a defendant's motion for a more definite statement" under Rule 12(e)); *see also id.* at *9-10 (setting forth the five primary reasons why *Bell Atlantic* should not be interpreted as announcing an heightened pleading standard).

⁶(...continued)
at least in part from Fed. R. Civ. P. 8, which" the district court correctly observed "applies to all federal civil litigation." Op. at 63.

III. THE DISTRICT COURT MISCONSTRUED THE NATURE OF PLAINTIFFS' ALLEGATIONS

Not only was the legal standard the district court applied to dismiss Plaintiffs' claims mistaken, so too was its factual determination that Plaintiffs' claims are nothing more than unsupported conclusory allegations, bereft of factual support. In reaching this conclusion, the district court misconstrued and/or ignored many of the detailed factual allegations that support the factual inference of improper purpose.

The district court made little to no mention of Plaintiffs' critical factual allegations, including without limitation:

- (i) that no later than 2002 (and likely significantly earlier), Ratner determined the geographic outlines of the property he needed to acquire to realize *his* dream and maximize *his* profits, including Plaintiffs' properties in the Takings Area;
- (ii) that after targeting the exact footprint he needed, Ratner went to Bloomberg and Pataki and convinced them to support his vision;
- (iii) that from that point onward the Project was a *fait accompli*;
- (iv) that the State and City Defendants *never* considered a single alternative development plan for the area;

(v) that the State and City Defendants *never* considered awarding the Project to anyone other than Ratner, and that not a single proposal or bid was so much as solicited;

(vi) that the MTA, an entity then controlled by Pataki, told reporters, on two separate occasions in 2004 and through its official spokesperson, that the railyards it owned (and that covered more than one-third of the area Ratner had earlier targeted for acquisition) had been conveyed to Ratner without considering any other offers;

(vii) that the MTA later officially retracted those statements;

(viii) that the MTA thereafter conducted a sham RFP process with a predetermined outcome;

(ix) that the amount of time allotted for submission of bids was woefully inadequate for anyone other than Ratner who had the benefit of having worked on the Project for three years prior to the RFP;

(x) that the MTA accepted and “reviewed” Ratner’s proposal even though it did not include any financial projections or data and was thus manifestly and materially incomplete and non-compliant;

(xi) that the Extell bid fully complied with the RFP requirements by including complete financial projections and data;

(xii) that the Ratner bid was contingent upon bypassing local legislative and community input, overriding municipal zoning restrictions and taking private property by wielding the power of eminent domain;

(xiii) that the Extell bid contemplated local land use review by the City Council, no zoning overrides and no use of eminent domain;

(xiv) that the MTA then “selected” Ratner’s bid for \$50 million over the competing Extell bid for \$150 million;

(xv) that Defendants never claimed that the Takings Area was blighted until years after the Project was officially announced and *Kelo* had been decided;

(xvi) that the ESDC then engaged in a sham “public” review process whose outcome was predetermined long before; and

(xvii) that the area the ESDC finally determined must be condemned for “public benefit” in December 2006, was (coincidentally and with one damning exception),⁷ exactly the same geographic area that Ratner had selected for acquisition more than four years before.

⁷ After 2002, when Ratner first secured Pataki’s and Bloomberg’s support for his takings map, he decided to expand the footprint to encompass “Site 5,” which includes a one-story non-descript commercial building, that he built and owned, leased to PC Richards at the corner of Atlantic and 4th Avenues. By expanding the footprint to include Site 5, Ratner has enlisted ESDC to condemn his own property and give it back to him free of the pesky local zoning restrictions that were curbing Ratner’s ability to build a massive condominium tower. Thus, *Ratner himself* redrew his own takings map in order to further enrich himself, and, not surprisingly, the ESDC fell right in line targeting the new site for taking by eminent domain.

IV. PLAINTIFFS ASSERT COGNIZABLE CLAIMS UNDER THE PUBLIC USE, EQUAL PROTECTION AND DUE PROCESS CLAUSES

A. The Public Use Clause

Plaintiffs state a claim for violation of the Public Use Clause. As the district court recognized, the starting point for any analysis under the Public Use Clause is the Supreme Court's opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005).

Kelo instructs that defendants are “no doubt . . . forbidden from taking [plaintiffs'] land for the *purpose* of conferring a private benefit on a *particular* private party.” 545 U.S. at 477 (citation omitted) (emphasis supplied); *see also id.* at 478 (the government is not “allowed to take property under the mere pretext of a public *purpose*, when its actual *purpose* was to bestow a private benefit”) (emphasis supplied). This is a bedrock Fifth Amendment principle. All nine Justices in *Kelo* agreed on this much. No court has ever held otherwise.

Kelo is not ambiguous. The question a court must answer in evaluating whether the Public Use Clause has been violated is whether the primary purpose, motive or intent behind a decision to seize private property through the power of eminent domain is to benefit the public at large, or a private entity instead.

The Court then explained why the taking in *Kelo* was not *intended* to confer a private benefit:

The takings before us, however, would be executed pursuant to a “carefully considered” development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate *purpose* in this case. . . . The record clearly demonstrates that the development plan was not *intended* to serve the interests of Pfizer, Inc., or any other private entity . . . And while the City *intends* to transfer certain of the parcels to a private developer in a long-term lease – which developer, in turn, is expected to lease the office space and so forth to other private tenants – the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken A’s property to benefit the private interests of B when the identity of B was unknown.

Kelo, 545 U.S. at 478 & n.6 (quotations and citations omitted) (emphasis supplied). Lest there be any confusion, everything set forth above is from Justice Steven’s *majority* opinion.

Justice Kennedy, in his concurring opinion, reaffirms the same point. *See, e.g., id.* at 490 (“transfers *intended* to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause”) (emphasis supplied); *id.* at 2670 (“There may be private transfers in which the risk of undetected impermissible *favoritism*

of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause”) (citation omitted) (emphasis supplied).

In cases like this one, when a court is “confronted with a plausible accusation of impermissible favoritism to private parties” it should “treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose.” *Id.* at 491 (Kennedy J. concurring). The trial court in *Kelo* did just that:

Here, the trial court conducted a careful and extensive inquiry into “whether, in fact, the development plan is of primary benefit to ... the developer, and private businesses which may eventually locate in the plan area, and in that regard, only of incidental benefit to the city.” The trial court considered *testimony from government officials and corporate officers; documentary evidence of communications between these parties; respondents’ awareness of New London’s depressed economic condition and evidence corroborating the validity of this concern; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand; and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented.*

The trial court concluded, based on these findings, that benefitting Pfizer was not “the primary *motivation* or effect of this development plan”; instead, “the primary *motivation* for [respondents] was to take advantage of Pfizer’s presence.” Likewise, the trial court concluded that “[t]here is nothing in the record to indicate that ... [respondents] were *motivated* by a desire to aid [other] particular private entities.” Even the dissenting justices on the Connecticut Supreme Court agreed that respondents’ development plan was *intended* to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party. This case, then, survives the meaningful rational basis review that in my view is required under the Public Use Clause.

Kelo, 545 U.S. at 491-r92 (Kennedy J. concurring) (citations omitted) (emphasis supplied).

In this action, Defendants’ motive or intent is *the* issue that must be resolved. It is also a quintessential question of fact. On the facts alleged in the Complaint, Defendants’ state of mind, cannot be resolved as a matter of law at the pleading stage. Indeed, if facts emerge in discovery, as they have during the pendency of this action even without forced disclosures, this action will likely not be subject to resolution at the summary judgment stage. *See Johnson v. Ganim*, 342 F.3d 105, 117 (2d Cir. 2003) (when “a factual issue exists on the issue of motive or intent, a defendant’s motion for summary judgment . . . must fail”) (citations omitted); *see also Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, (2d

Cir. 1996) (“trial courts must be especially chary in handing out summary judgment” in cases where “intent is ordinarily at issue”). It most certainly cannot be resolved on a motion to dismiss. *Sheppard v. Beerman*, 18 F.3d 147, 151 (2d Cir. 1994) (reversing dismissal on motion pursuant to Fed. R. Civ. P. 12 where the court concluded that employee “was actually discharged for insubordination” and not in retaliation for his protected speech as “the motive behind [plaintiff’s] firing is clearly a question of fact”).

1. Well-Accepted Evidentiary Principles For Evaluating Evidence Probative of Intent Are Applicable in Public Use Cases

The probative value of circumstantial evidence is “intrinsically no different from testimonial evidence,” *Holland v. United States*, 348 U.S. 121, 140 (1954). Indeed, circumstantial evidence can be “more certain, satisfying and persuasive than direct evidence.” *Michalic v. Cleveleand Tankers, Inc.*, 364 U.S. 325, 330 (1960); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 91 (2003) (this “Court has often acknowledged the utility of circumstantial evidence in discrimination cases and has never questioned its adequacy in criminal cases, even though proof beyond a reasonable doubt is required”).

In any claim involving purpose, intent or motive, a defendant’s state of mind is typically established by circumstantial evidence because of the

difficulty of obtaining direct evidence of motive. *See, e.g., Mallette v. Scully*, 752 F.2d 26, 32 (2d Cir. 1984) (“Because intent is formed in the mind in secrecy and silence . . . a determination of whether a deliberate intent was formed must be drawn from all the circumstances of the case, . . . “[c]ircumstantial evidence of this subjective fact is therefore indispensable”).

Defendants who are “of a mind to act contrary to law seldom note such a motive” in writing. *Dister v. Continental Group, Inc.* 859 F.2d 1108, 1112 (2d Cir. 1988). Indeed, “direct evidence of discrimination” or other acts animated by an unconstitutional motive, “is difficult to find precisely because its practitioners deliberately try to hide it.” *Id.*

For present purposes, powerful circumstantial evidence of Defendants’ purpose in targeting Plaintiffs’ homes and businesses for transfer to Ratner, can be garnered from the “specific sequence of events leading up [to] the challenged decision.” *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977); *see also United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1222 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988) (in action also involving ESDC, finding unconstitutional intent based in part on the “numerous instances in which the City deviated from its normal procedural sequences or ignored the usual substantive standards”).

“Departures from the normal procedural sequence . . . afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached.” *Arlington Heights*, 429 U.S. at 267.

2. The Circumstances Surrounding the Drawing of Defendants’ Takings Map Give Rise To “A Plausible Accusation Of Favoritism”

The evidence that most convincingly exposes Defendants’ true intent or purpose in condemning Defendants’ properties is a comparison of the sequence and nature of events preceding the takings in this action as compared to the reported decisions that have sustained takings, *e.g.* *Berman v. Parker*, 348 U.S. 26 (1954) and *Kelo*, with those instances where courts have enjoined takings on public use grounds.

In *Berman v. Parker*, 348 U.S. 26 (1954) and *Kelo*, the identity of the private developer who would benefit from the transfer of plaintiff’s property was *unknown*. In *Kelo*, the legislature considered and adopted a comprehensive plan for economic development (and in *Berman* the elimination of blight).

The beneficiaries of the takings in *Berman* and *Kelo* certainly did not conceive of the Project and drive it to completion. But that is precisely what Plaintiffs allege happened, indeed what did happen, here. The legislature in *Berman* and *Kelo* did not cut a back-room deal to convey a massive swath of government-owned property to a private developer and then try to cover up the favoritism by concocting a sham public bidding process. That is what happened in this case.

In *Berman* and *Kelo*, legislative bodies, as part of a deliberative process, decided to green light an economic development project in order to better the community and address various public needs. *After* that initial decision was made, the precise details of the plan and the geographic parameters of the takings area were determined in furtherance of the public goals. Much *later*, the private beneficiaries of the properties selected for condemnation were identified.

Here, the chronology that gave rise to a strong inference of public purpose in *Berman* and *Kelo*, has been turned on its head. The difference is stark.

First, no later than 2002 (and likely much, much earlier), *Ratner* determined the geographic outlines of the property he wanted to condemn to realize *his* dream and maximize *his* profits. Then, in 2002, Pataki, Bloomberg and those under their control agreed to help Ratner realize his vision. Then, by no

later than 2004, the MTA told reporters that it had decided to convey the rail yards to Ratner without considering any other offers. Then, in 2005, Defendants manufactured a sham RFP process to cover up the earlier leak that the decision to convey was a *fait accompli*. Then, in 2005, with the geographic boundaries set by *Ratner* to use as a tracing form, the governmental defendants, including ESDC, decided (or so they unconvincingly claim) that the area that needed to be taken in order to accomplish their goal of benefitting the public was *precisely the same* as had been initially identified by Ratner no later than 2002.⁸ A remarkable coincidence, indeed.

A careful reading of the cases giving rise to a strong inference of public purpose, and thus deference to the decision-makers, reveals the following pattern:

Step One: A legislative body deliberates and decides that a particular economic development project will promote or serve a public

⁸ Actually, there was one modification. After 2002, when Ratner first secured Pataki's and Bloomberg's support for his takings map, he decided to expand the footprint to encompass Site 5, which includes a commercial building at the corner of Atlantic and 4th Avenues that he had built and owned, thus enabling him to condemn his own property through the ESDC process and then build a massive replacement that would have otherwise violated New York City's zoning rules. *Ratner himself* therefore redrew his own takings map in order to even further increase his own wealth, and, not surprisingly, the ESDC fell into line with its tracing pen.

need or purpose. Or, alternatively, a legislative body delegates its eminent domain power with express instructions or guidelines confining the power to authorize the taking of private property to specific circumstances that the legislature deems to satisfy a public use or purpose; and then the recipient of the delegated power determines that a specific economic development project meets those guidelines. *See Kelo, Midkiff and Berman.*

Step Two: The same legislative body, or the recipient of an appropriately circumscribed delegation, after analyzing all relevant facts and circumstances, targets the precise geographic takings area that will accomplish its predetermined goals. *See Kelo and Berman.*

Step Three: The private beneficiaries of the predetermined takings are identified through an open public process designed to maximize the predetermined public goal. *See Kelo and Berman.*

As was most recently reaffirmed by the opinion for the Court in *Kelo*, these circumstances give rise to a presumption of public purpose and, thus, a deferential standard of judicial review.

Conversely, a careful reading of the cases refusing to apply such a standard reveal the opposite pattern.

Step One: A private party covets another's property or pursues a goal that requires the acquisition of property from unwilling owners. That same party identifies the specific property for acquisition. *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003) (Target identified plaintiff's property for acquisition and development of store and then persuaded municipality to condemn the site by declaring it blighted and then transferred title to Target), *rev'd on other grounds*, 356 F.3d 768 (8th Cir. 2003); *99 Cents Only Store v. Lancaster Redevelopment Agcy.*, 237 F. Supp. 2d 1123 (C.D. Ca. 2001) (Costco identified plaintiff's property for acquisition and use as a parking lot for its nearby store and then persuaded municipality to condemn the site and transfer title to Costco); *Cottonwood Christian Center v. Cypress Development Agcy.*, 218 F. Supp. 2d 1203 (C.D. Ca. 2002) (real estate developer identified church's property for acquisition and use as a major discount retail

outlet and then persuaded municipality to condemn the site and transfer title).

Step Two: The same party then approaches a non-legislative governmental entity empowered to condemn property by eminent domain and persuades them to assist. *See Aaron, 99 Cents*, and *Cottonwood*.

Step Three: The unrestrained governmental body makes a finding that the precise property first identified by the private party must be condemned to further one of a host of plausible public purposes. No other beneficiary of the taking is seriously considered, or none is considered at all. *See 99 Cents Only Store*, 237 F. Supp. 2d at 1129 (“undisputed that Costco could have easily expanded . . . onto adjacent property *without* displacing 99 Cents at all but refused to do so” (emphasis in original); *Aaron* (same); *Cottonwood* (same)).

Needless to say, the facts in this case are in lock-step with the pattern set forth above. As set forth in *99 Cents*, *Cottonwood* and *Aaron*, and indicated in Justice Kennedy’s concurring opinion in *Kelo*, these circumstances, at minimum, give rise to a presumption that impermissible favoritism is driving the taking.

The Complaint cogently explains the facts that support the conclusion that blight – and Defendants’ other proffered justifications – are a pretext. Surely Defendants cannot avoid the kind of meaningful review endorsed by the majority in *Kelo*, by merely mouthing the words “blight” (or “jobs” or “housing”) in the face of substantial evidence to the contrary.

In a recent case with far less potent evidence of a taking motivated primarily for private purpose, a federal district court denied the government’s motion for *summary judgment*. See *MHC Fin. Ltd. P’ship v. San Rafael*, No. C 00-3785, 2006 WL 3507937, at * 6-*8 (N.D. Cal. Dec. 5, 2006). The court in *MHC Financing* found genuine issues of fact warranting a trial on the plaintiffs’

Public Use Clause claims:

[Plaintiffs’ claim] turns on whether the City’s ordinance serves a “public purpose” – a concept the Supreme Court has defined broadly. . . . The ordinance’s purpose in the present action – providing affordable housing – is a public purpose. . . . Despite the deference to a legislature’s determination compelled by *Kelo* and *Midkiff*, the Supreme Court maintains that “[a] City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party. * * * Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.” . . . In *Kelo*, the City of New London offered a “carefully considered development plan,” which particularly described how the regulation would “revitalize the local economy by creating temporary and

permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront.” Whereas here, the City proffers no such evidence, thereby inviting the court’s inference that the ordinance simply confers a private benefit on the incumbent tenants The trial court in *Kelo* satisfied Justice Kennedy’s standard through “careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer* * * [and] only incidental benefit to the City.” Such an inquiry will likewise be necessary in the present action. Accordingly, the court denies the City’s motion for summary judgment on MHC’s private takings claim.

Id. at *13-*14 (citations omitted).

B. Equal Protection Clause

As set forth in the Complaint, Plaintiffs’ Memorandum of Law In Opposition to Defendants’ Motions to Dismiss, and during oral argument before Magistrate Judge Levy, Plaintiffs Equal Protection claims arise from two distinct sets of factual allegations and two distinct legal theories.

First, Plaintiffs allege that, by selecting Plaintiffs’ properties – instead of the properties of others that are similarly situated, such as Shaya Boymelgreen who owns or controls the Newswalk condominium project that appears to be more contiguous and thus more geographically desirable than Plaintiffs properties – Defendants have targeted plaintiffs for adverse treatment for no rational purpose.

Second, Plaintiffs allege that Defendants violated the principle of equal protection when they selected Ratner as the sole beneficiary of the taking of Plaintiffs' properties. Not a single alternative recipient was even considered, amongst many that are similarly situated. No competitive bids were sought, indeed no competition of any kind was even permitted. That is irrational.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Clause announces a "fundamental principle":

[T]he State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise.

New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-88 (1979).

"The Equal Protection Clause prohibits 'arbitrary and irrational' discrimination even if no suspect class or fundamental right is implicated." *Muller v. Costello*, 187 F.3d 298, 309 (2d Cir. 1999); *see also Burt v. New York*, 156 F.2d 791, 791-92 (2d Cir. 1946) (finding that complaint alleging that City denied architect's applications and "selected him for these oppressive measures" while "unconditionally approving the applications of other architects, similarly situated"

based on Defendants' "personal hostility" adequately alleged purposeful discrimination in violation of the Equal Protection Clause).

Informed by this basic principle, the Supreme Court in *Kelo* suggested that an unusual exercise of the government takings power of the sort that occurred in *99 Cents Only Stores v. Lancaster Dev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), "may also implicate other constitutional guarantees." *Kelo*, 125 S. Ct. at 2667 n.17 (citing *Willowbrook v. Olech*, 528 U.S. 562 (2000) (*per curiam*)).

In *Olech*, the Court explained that "the purpose of the Equal Protection Clause is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination," holding that an equal protection claim lies on behalf of a single person "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for this difference in treatment." 528 U.S. at 564 (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)); *see also id.* at 565 (Breyer, J., concurring) (equal protection violation alleged based on vindictive government action).

Olech, however, is not the exclusive means of proving a case of unconstitutional arbitrary discrimination in violation of the Equal Protection

Clause. As the cases indicate, vindictive governmental action violates the Equal Protection Clause even if the government's malice is directed at a single unique entity. *See Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."); *LeClair v. Saunders*, 627 F.2d 606, 611 (2d Cir. 1980) ("If Saunders went after Mr. LeClair to *get him*, for any reason, then he should be liable.") (emphasis in original); *see also Romer v. Evans*, 517 U.S. 620, 634 (1996) (invalidating law that "raise[d] the inevitable inference that the disadvantage imposed is born of animosity towards the class affected"); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (invalidating permit requirement for group for persons with mental disabilities under rational basis test because it "appears to us to rest on an irrational prejudice against the mentally retarded"); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000) ("If the police decided to withdraw all police protection from Hilton out of sheer malice . . . he would state a claim under *Olech*."); *Esmail v. MacCrane*, 53 F.3d 176, 179 (7th Cir. 1995) ("If the power of the government is brought to bear on a harmless individual merely because a

powerful state or local official harbors a malignant animosity towards him, the individual ought to have a remedy in court.”).

Under these standards, Plaintiffs’ Complaint amply pleads violations of the Equal Protection Clause. The Complaint alleges that by selecting Plaintiffs’ properties to be taken for the purpose of conferring a benefit (here, the Plaintiffs’ property) to FCRC, Defendants have targeted Plaintiffs for adverse treatment for no rational purpose. Compl. ¶ 151. At the same time that Defendants singled out Plaintiffs for unequal, adverse treatment, they selected FCRC as the recipient of irrational largess. Conferring a benefit upon FCRC under these circumstances is not rational. *Id.* ¶ 152. Elevating the status of one citizen or group of citizens, here FCRC, by mistreating Plaintiffs is also prohibited by the Equal Protection Clause. *Id.* ¶ 153.

C. Due Process Clause

The district court misconstrued the nature of Plaintiffs’ *as applied* due process claim. Plaintiffs allege that Defendants deprived Plaintiffs of property without due process of law by, among other things, “at all times providing an empty, meaningless process with a pre-determined outcome.” Compl. ¶ 164. That states a claim. *See Francis v. Coughllin*, 891 F.2d 43, 46 (2d Cir. 1989). “Since the touchstone of the right to due process is freedom from arbitrary governmental

action, *Ponte v. Real*, 471 U.S. 491, 495 (1985), it is axiomatic that a . . . hearing in which the result is arbitrarily and adversely predetermined violates that right.”

Id.

CONCLUSION

The Court should vacate the judgment and order of the district court dismissing Plaintiffs' claims for failure to state a claim under Fed. R. Civ. 12(b)(6) and remand so that Plaintiffs are afforded the opportunity to prove their claims.

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EMERY CELLI BRINCKERHOFF
& ABADY LLP

By: _____
Matthew D. Brinckerhoff (MB-3552)
Andrew G. Celli, Jr. (AGC-3598)
Eric Hecker (EH-0989)

75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000

Attorneys for Plaintiffs-Appellants
Daniel Goldstein, Jerry
Campbell, Gelin Group, LLC,
Chadderton's Bar and Grill
Inc., d/b/a Freddy's Bar and
Backroom, Joseph Pastore,
Peter Williams Enterprises,
Inc., 535 Carlton Ave. Realty
Corp., Pacific Carlton
Development Corp., Aarron
Piller and Rockwell Property
Management LLC

SOUTH BROOKLYN LEGAL SERVICES

By: _____
Jennifer Levy (JL-1681)

John C. Gray, Jr.
South Brooklyn Legal Services
105 Court Street
Brooklyn, New York 11201
(718) 237-5000

*Attorneys for Plaintiffs-Appellants
Maria Gonzalez, Jackie
Gonzalez, Yesenia Gonzalez,
Huda Mufleh-odeh, Jan Akhtar,
and David Sheets*