

07-2537-cv

United States Court of Appeals for the Second Circuit

DANIEL GOLDSTEIN, JERRY CAMPBELL, as the putative administrator of the estate of Oliver St. Clair Stewart and in his individual capacity, GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL, INC., doing business as Freddy's Bar and Backroom, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ, HUDA MUFLEH-ODEH, JAN AKHTAR, DAVID SHEETS, JOSEPH PASTORE, PETER WILLIAMS ENTERPRISES, INC., 535 CARLTON AVE. REALTY CORP., PACIFIC CARLTON DEVELOPMENT CORP., AARON PILLER and ROCKWELL PROPERTY MANAGEMENT, LLC,

Plaintiffs-Appellants,

– v. –

GOVERNOR GEORGE E. PATAKI, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, doing business as Empire State Development Corporation, BRUCE C. RATNER, JAMES P. STUCKEY, FOREST CITY ENTERPRISES, INC.,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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DOCTOROFF, ANDREW M. ALPER, JOSHUA SIREFMAN, CITY OF NEW YORK
and NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants-Appellees.

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PRELIMINARY STATEMENT

The task before this Court is to resolve the obvious tension between and among *Berman*, *Midkiff*, and *Kelo*. There is no doubt that *Berman* and *Midkiff* generally require courts to afford substantial deference to a legislative determination that a taking serves a public purpose. Nor is there any doubt that *Kelo* reaffirmed that courts must look beyond the face of public purpose pronouncements where there are plausible allegations that ostensibly “public” purposes are pretextual and that the real purpose of a taking is to benefit a private developer. The challenge is to engage in the meaningful pretext analysis that *Kelo* requires without doing violence to the deference that *Berman* and *Midkiff* require.

Plaintiffs-Appellants (“Plaintiffs”) have offered a methodology for resolving this tension that is as straightforward as it is honest, and that is faithful to all three of the Supreme Court’s Public Use Clause opinions. Under Plaintiffs’ approach, legislative public use determinations are presumptively afforded great deference; but this presumption is rebutted, and little or no deference is warranted, where, as in this case, most or all of the indicia of legitimate public decisionmaking are absent, and most or all of the indicia of illegitimate private decisionmaking are present. *See* Point II.B, *infra*. Defendants-Appellees’

(collectively “Defendants”)¹ response – that *Kelo* does not mean what it says, and that if it does, any inquiry into the motive of the condemnors must be “objective” – essentially boils down to a plea that *Kelo* should be ignored entirely, which this Court obviously is not free to do. *See* Point II.A, *infra*.

The tenacity with which Defendants seek to avoid discovery leaves one wondering what it is that they are so afraid of. Notwithstanding the District Court’s entirely unexplained belief that Plaintiffs have pled no facts whatsoever suggesting that improper motive was afoot, the Complaint is teeming with allegations plausibly suggesting that the Project was intended primarily to benefit Bruce Ratner. Although nobody (except Defendants) knows whether discovery will reveal still more evidence that the taking of Plaintiff’s properties is animated by unconstitutional motive, there can be no doubt that discovery should proceed. Anything less would only serve to erode public confidence that the takings deemed necessary for this Project are legitimate. Irrespective of the ultimate outcome, *everyone* will benefit from an examination of the facts that are exclusively in Defendants’ possession.

If Defendants’ insistence that their actions and motives are beyond reproach is supported by the facts uncovered during discovery, then Plaintiffs and

¹ Defendants have divided themselves into four groups (and submitted four briefs) as follows: the Forest City Ratner Defendants, the ESDC Defendants, the Municipal Defendants, and the State Defendants.

the public at large will benefit from knowing that the suspicions aroused by the unusual circumstances surrounding Defendants' decision to take Plaintiffs' homes and businesses were unfounded.

Conversely, if discovery vindicates Plaintiffs' belief that Defendants would not be taking their homes and businesses but for the desire to accommodate Ratner's wishes, then Plaintiffs and the public at large will benefit from knowing that no one, no matter how powerful, can violate the constitution with impunity.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE WRONG STANDARD OF REVIEW

Defendants appropriately concede that "liberal pleading rules apply with particular stringency to complaints of civil rights violations," *Phillip v. Univ. of Rochester*, 316 F.3d 291, 293-94 (2d Cir. 2003) (*see also* Pls.' Br. at 29-30 (citing cases)), and that this Court, like the District Court, "must accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007) (quotation omitted); *see also* Pls.' Br. at 27-28.

Defendants, however, maintain that the District Court applied the correct standard of review. They are wrong. Defendants obfuscate two critical

issues that are related but distinct: (1) the circumstances under which it does and does not make sense to dismiss allegations at the pleading stage because they are “as consistent with lawful behavior as with unlawful behavior”; and (2) the circumstances under which allegations are too “conclusory” to give rise to a plausible inference of unlawful conduct.

With respect to the first issue, the District Court undoubtedly erred in concluding that Plaintiffs’ allegations of an improper motive to confer a private benefit fail as a matter of law merely because they are “as consistent with lawful behavior as with unlawful behavior.” (SPA-105). The Amended Complaint (A-58.1-58.43 (“Complaint”)) undoubtedly alleges facts that, *standing alone*, strongly suggest an unlawful purpose to confer a private benefit on a private party – for example, that Ratner was identified as the beneficiary even *before* the decision to take Plaintiffs’ properties was made, that no other recipients of Plaintiffs’ properties were ever considered, and that the pretext of blight was never mentioned until *at least two years after* Ratner identified Plaintiffs’ properties for acquisition by eminent domain (to name just a few examples).

Of course, it is not the case that *every* fact in the Complaint demonstrates improper intent, for some facts could be consistent with a lawful intent to benefit the public – for example, Defendants’ claim that mass transit in the area is slated for an “upgrade” of undefined character. But that is not the test.

Plaintiffs do not have the burden at the pleading stage to disprove every theory consistent with innocence. Plaintiffs need only plead facts that plausibly raise an inference of improper intent.

A hypothetical example is instructive. Imagine a First Amendment retaliation plaintiff who alleges (1) that her government employer warned her not to engage in any anti-war protesting activity, even during the weekend when she is not at work; (2) that she did not heed this warning and engaged in anti-war protesting activity on a particular weekend; (3) that her employment was terminated the following Monday; and (4) that but for her protected activity she would not have been fired. Imagine further that this plaintiff's complaint candidly acknowledges that she received a poor performance review from her employer the previous week. The allegations in this hypothetical complaint obviously are sufficient to state a claim, even if *some* facts could be consistent with lawful behavior. It simply cannot be conclusively determined at the pleading stage, one way or the other, whether she was terminated in retaliation for her protected protester activity or because of her performance. That task is for the factfinder *after* discovery.

Viewed this way, the District Court's formulation – that it supposedly is fatal to a complaint at the pleading stage if the allegations are “as consistent with lawful behavior as with unlawful behavior” – turns bedrock principles of

civil procedure on their head. Virtually no intent-based claim could ever survive this standard because defendants can almost always posit minimally plausible scenarios under which their behavior is lawful.

To be sure, in the specific and unique antitrust context presented in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Supreme Court found that the plaintiffs’ allegations failed as a matter of law because they were “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.” *Id.* at 1964. In other words, although evidence of parallel conduct is, from a purely logical perspective, relevant to whether there was an actual agreement to engage in anticompetitive conduct, evidence of parallel conduct is so common – indeed, virtually ubiquitous – that, as a practical matter, accepting solely evidence of parallel conduct as sufficient to give rise to a plausible inference of an actual agreement, without more, would mean that every company that behaves like its competitor would expose itself to litigation through discovery and summary judgment. In this context, the normal standard of review would mean that *any* antitrust plaintiff could *always* survive a motion to dismiss without alleging any additional facts suggesting the existence of an unlawful agreement. As the ESDC Defendants put it, “the *agreement* is what makes the conduct unlawful in [the Clayton Act] context.” ESDC Br. at 43 (emphasis in original).

Because it is the *agreement* that counts, and because evidence of parallel conduct is virtually always present, this antitrust-specific phenomenon caused the Supreme Court to develop a heightened proof burden under Section 1 of the Clayton Act: to survive summary judgment, a plaintiff must affirmatively marshal evidence “tend[ing] to rule out the possibility that the defendants were acting independently.” 127 S. Ct. at 1964 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

But there is no basis to import this antitrust-specific concept into Public Use Clause pleading rules. The context here is completely different. Plaintiffs allege that Defendants were motivated by an unlawful private purpose, and Defendants contend that they were motivated by a lawful public purpose. One side is right. One side is wrong. At the appropriate juncture, the factfinder will make a determination based upon a fulsome factual record. Unlike antitrust, where parallel conduct is common and often innocent, Plaintiffs’ stark evidence of pretext in this case – a fact pattern leading up to the taking that is precisely the opposite of the facts in every controlling precedent – cannot be characterized as ubiquitous. To the contrary, such a pattern is exceedingly rare. There thus is no basis, as there was in *Bell Atlantic*, for this Court to be concerned that Public Use Clause claims are especially easy to plead or prove, or that an especially robust pleading or proof burden is warranted.

Which leads to the second, related issue: the circumstances under which allegations are too “conclusory” to give rise to a plausible inference of unlawful conduct. Another way of viewing the pleading deficiency identified in *Bell Atlantic* is that there were no non-conclusory allegations of an actual agreement. To be sure, there were allegations of parallel conduct, but the Court ignored those because parallel conduct is so prevalent and so easy to allege that such allegations are, as a practical matter, only minimally probative. And the plaintiffs in *Bell Atlantic* failed to allege *any* other facts even remotely supporting their entirely boilerplate allegation that an agreement existed. This was not enough.

Relying on *Bell Atlantic*, the District Court found that Plaintiffs’ allegations of an unlawful private purpose were entirely conclusory. Ironically, that conclusion by the District Court was, itself, conclusory. It failed even to acknowledge, much less analyze, a slew of allegations discussed in Plaintiffs’ Opening Brief. *See* Pls.’ Br. at 3-15, 35-37.

The problem with the District Court’s analysis is that Plaintiffs’ allegations are anything but conclusory. The District Court simply failed to consider the facts that Plaintiffs pled, or at least failed to indicate in its opinion that it had done so. *See Franco v. National Capital Revitalization Corp.*, ___ A.2d ___, 2007 WL 2001652, at *10 (D.C. Jul. 12, 2007) (reversing trial court’s holding

that landowner’s allegations of unlawful private purpose were too “conclusory” because, although the pleading did make that allegation in boilerplate fashion, the boilerplate allegation was sufficiently amplified by a variety of specific factual allegations elsewhere in the pleading).

Although truly conclusory allegations of an unlawful public purpose – empty rhetoric entirely devoid of any and all factual support whatsoever – are insufficient to withstand a motion to dismiss, the copious and very specific facts alleged in the Complaint cannot possibly be swept away and dismissed as “conclusory.”

II. PLAINTIFFS’ PUBLIC USE CLAUSE CLAIM SHOULD NOT HAVE BEEN SUMMARILY DISMISSED ON THE PLEADINGS

A. Defendants’ Invitation To Delete Motive, Purpose and Pretext From Public Use Clause Jurisprudence Should Be Rejected

The District Court held that Plaintiffs can state a Public Use Clause claim by plausibly alleging that (1) “the sole purpose of the taking is to transfer property to a private party,” or (2) “the asserted purpose of the taking is a mere pretext for an actual purpose to bestow a private benefit.” (SPA-98 (citing *Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 245 (1984))). This legal holding is sound. It is pulled verbatim from *Kelo* and *Midkiff*.

No party to this appeal has any quarrel with the first proposition (“Purpose Analysis”). Purpose Analysis dates back to enactment of the Fifth Amendment. If Plaintiffs’ Complaint, construed in the especially liberal manner that Defendants concede is reserved for evaluating civil rights claims, presents a plausible allegation that the decision to take Plaintiffs’ properties was motivated by a desire to benefit Ratner, Plaintiffs are entitled to pursue their claims. This is not controversial.²

Notwithstanding the sound reasoning and interpretation of *Kelo* and *Midkiff* that supports the District Court’s second proposition (“Pretext Analysis”), Defendants are unwilling to accept it without a fight – and for good reason. Plaintiffs unquestionably have stated a cognizable claim for relief under Pretext Analysis.

Defendants make two arguments. First, they claim that in *Kelo*, the Supreme Court intended – but somehow declined to say – that Pretext Analysis is strictly limited to cases in which the asserted justification for eminent domain is economic development. ESDC Br. at 31-33. Second, they contend that when the Supreme Court uses words like “intent,” “motive,” “purpose” and “pretext,” it does not mean to use those words as they are universally understood – *i.e.*, to implicate a person’s state of mind. Rather, Defendants urge that the Supreme

² Defendants similarly do not contest the central importance and probative value of circumstantial evidence. *See also* Pls.’ Br at 42-44 (collecting cases).

Court *really* intended to refer to “objective” intent, “objective” motive, “objective” purpose and “objective” pretext – whatever that means. *Id.* at 37-39. Neither of these arguments withstands scrutiny.

1. Pretext Analysis, Which Is Not New to Public Use Cases, Is Not Limited to Circumstances Where the Justification for Resorting to Eminent Domain Is Economic Development

The ESDC Defendants argue that “*Kelo*’s language about pretext and incidental benefits applies . . . only to cases (like *Kelo* itself) where the *sole* justification for the project and its attendant taking is economic development,” and not to cases where the justifications offered are “*inherently* public purposes” – which they define as “remediation of blight, the building of a sports stadium, the creation of affordable housing, and improvements to mass transit.” ESDC Br. at 34 (emphasis in original). There is no textual or logical support for this argument (which explains why Defendants are unable to cite a single court or commentator that subscribes to their view).

The majority opinion in *Kelo* is divided into four sections. The first two sections review the factual and procedural history of the case. *Kelo*, 545 U.S. 472-77. The third reviews existing Public Use Clause jurisprudence. *Id.* at 477-83. The fourth addresses Ms. Kelo’s various arguments that the Court should craft a new standard for analyzing Public Use Clause cases where the justification for a taking is economic development. In Section III, at the very beginning of its

review of the law, the Court discusses the “long accepted” proposition that a “City is no doubt forbidden from taking [a person’s] land for the purpose of conferring a private benefit on a particular private party.” *Kelo*, 545 U.S. at 477-78 (citing *Midkiff*, 467 U.S. at 245; *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); and *Calder v. Bull*. 3 Dall. 386, 388 (1798)). The sentence that immediately follows is: “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.” *Id.*

That language could hardly be more clear. The reference to pretext in the second sentence is just another way of expressing the central point of the first sentence: the Public Use Clause prohibits a taking, even when just compensation is provided, if the purpose of the taking is to benefit a particular private party. There is nothing remarkable or new about that rule, as demonstrated by the Court’s citation to *Midkiff* and other Supreme Court authority dating back to less than ten years after the enactment of the Fifth Amendment. And there certainly is no basis to conclude that the rule is somehow limited to the economic development (or any other) context.

The ESDC Defendants attempt to prop up, in various unconvincing ways, their argument that *Kelo* is so limited. First, they point out that “*Kelo* represents the very first time in the context of a Public Use challenge that the

Supreme Court used the ‘mere pretext’ language.” ESDC Br. at 31. This observation is meaningless, for the law certainly is no stranger to Pretext Analysis. A pretext is a false justification offered to conceal one’s true purpose or motivation. “A pretext, to repeat, is a deliberate falsehood.” *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 419 (7th Cir. 2006) (Posner, J.). The expectation that persons engaged in intentional wrongdoing will often falsely claim a pure or legal motive for their misconduct is as old as man itself. Pretext Analysis plainly applies in any context in which improper motive is at issue.

Second, Defendants observe that the Supreme Court granted certiorari in *Kelo* “to determine whether the city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment,” *Kelo*, 545 U.S. at 477, arguing that *Kelo* must have been establishing legal rules “solely” in that specific factual context. ESDC Br. at 31. Notably, the word “solely” is the ESDC Defendants’, not the Court’s, and nothing in *Kelo* remotely states – or even implies – that its analysis is limited to the economic development context.

Defendants’ attempt to impose an “economic development only” limitation on Pretext Analysis also fails because it would do violence to *Kelo*’s core holding: that for takings purposes, *there is no analytical difference* between an economic development justification and any other takings justification. *Id.* at

484 (rejecting proposed “new bright-line rule that economic development does not qualify as public use”); *id.* at 487 (rejecting argument that “for takings of this kind we should require a ‘reasonable certainty’ that the expected benefits will actually accrue”). Given this core holding of *Kelo*, Defendants’ attempt to read a *sub silentio* “economic development only” limitation on the Court’s pretext analysis rings hollow.

Finally, Defendants point to the “virtually universal consensus that *Kelo* confirmed . . . the already extremely deferential judicial review of the public purposes of proposed takings.” ESDC Br. at 32. Notwithstanding Defendants’ intimations otherwise, Plaintiffs agree. *Kelo* confirmed the holdings in *Midkiff* and *Berman*, which remain good law. *Kelo* made it abundantly clear that cases in which public officials claim that their decision to authorize the taking of private property was animated by a desire to promote economic development will be treated no differently than other Public Use Clause cases. Insofar as there may have been room to argue that economic development takings were different before *Kelo*, that day certainly has passed. But the ESDC Defendants’ argument otherwise should be rejected.

2. Pretext, Purpose, Motive and Intent are Subjective

Relying almost exclusively on *Franco v. National Capital Revitalization Corp.*, ___ A.2d ___, 2007 WL 2001652 (D.C. Jul. 12, 2007),

Defendants claim that the pretext inquiry is “objective.” Defendants’ reliance on *Franco* is sorely misplaced. *Franco* held that the landowner’s factual allegations *did* give rise to a plausible inference that the supposed public purposes were pretextual, and that the trial court erred in dismissing the landowner’s public use claim at the pleading stage. The court then held that on remand, in evaluating the merits of the pretext claim, the subjective “intent of the legislators” *is* part of the inquiry.

To be sure, the *Franco* Court began its analysis by asserting that Justice Kennedy’s use of the word “pretext” in *Kelo* did, to *some* degree, suggest something akin to an objective analysis. Not surprisingly, Defendants quote that statement in their brief. ESDC Br. at 37. But the *Franco* Court then stated, in a sentence that Defendants unfairly edited out of their brief with an ellipsis: “Nevertheless, *the same sentence refers to intent* (‘transfers intended to confer benefits’), presumably *the intent of the legislators.*” 2007 WL 2001652, at *10 (emphasis supplied). Weighing what it viewed as the tension between these two concepts of pretext, *Franco* concluded, rather vaguely, that courts “must focus *primarily* on benefits the public hopes to realize from the proposed taking.” *Id.* (emphasis supplied). Thus, according to *Franco*, the existence of public benefits may be somewhat more important to the pretext inquiry than the subjective intent

of the condemnors, but the word “primarily” confirms unmistakably that subjective intent *is* part of the inquiry.

The main reason that *Franco* was somewhat hesitant to conclude, as it did, that subjective legislative intent is part of the pretext inquiry – the “formidable barriers to discovering the motives and intentions of individual legislators,” *id.* at *10 – is completely absent in this case. As the Court observed, legislators enjoy both statutory and common law privileges and immunities from disclosing their subjective motives and intentions in considering and/or acting on legislation. *Id.* n.12. Although the Court expressly recognized that “*Kelo* may suggest a different approach,” *id.* n.11, the Court plainly was somewhat uncomfortable holding, as it did, that Plaintiffs are, in theory, entitled to take discovery regarding subjective legislative intent, but may have no practical ability to get such discovery given the substantial privileges and immunities that apply.

Here there are no such privileges or immunities, because the decision to condemn Plaintiffs’ properties was rubber stamped by the ESDC, not by the New York Legislature. Any honest reading of *Franco* would have to acknowledge that in this case, where legislative privileges and immunities do not apply, the Court would have been even more quick than it was to conclude that subjective legislative intent is part of the pretext inquiry.

In any event, if this Court chooses to follow *Franco*, the result of this appeal is clear: (1) *Kelo* confirmed that Plaintiffs must be “allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual,” *id.* at *6; (2) a naked allegation, bereft of factual support, that the purpose of the Project is to benefit a private party is too conclusory under *Bell Atlantic*, but the *amplification* of that allegation with specific facts that are consistent with and plausibly suggest an improper purpose is sufficient, *id.* at *7; and (3) on remand, the District Court should examine the subjective intent of the condemnors, *id.* at *10. Read in its entirety, *Franco* could hardly make more plain that the District Court’s dismissal of Plaintiffs’ claims at the pleading stage was error and should be reversed.

Finally, Defendants simply ignore the most obvious shortcoming of their argument that a court screening for pretext must make an “objective” inquiry: they do not explain how this could possibly be done. Virtually all pretexts, after all, have some degree of “objective” facial legitimacy. Otherwise, they would not be pretexts. If, as Defendants urge, courts must dismiss all Public Use Clause claims whenever the putative justification has a modicum of “objective” plausibility – no matter how powerful the evidence of unconstitutional motive – then no case could ever survive a motion to dismiss.

As Defendants would have it, for example, it would not matter if Plaintiffs produced a video tape of former Governor Pataki admitting that he made a deal with his old law school friend, Bruce Ratner, to facilitate his project by seizing private property through eminent domain in exchange for Ratner's fundraising support for Pataki's presidential campaign. The tape would not matter one whit, Defendants say, because as an "objective" matter, the specter of increased taxes, jobs or affordable housing would benefit the public. Case dismissed.³

The Ninth Circuit recognized the fallacy of this proposition in *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (*en banc*). "If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use would be a 'public use,' and if those officials could later justify their decision in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public

³ Defendants criticize Plaintiffs for not alleging a "special relationship" between Ratner and Governor Pataki or Mayor Bloomberg or offering a motive for their decision to give Plaintiffs' properties to Ratner. Plaintiffs have offered a welter of facts that strongly support the inference that Defendants' primary intent was to benefit Ratner. Specific direct evidence of motive is not required. That said, it is public knowledge that Defendants Bloomberg and Pataki have presidential aspirations and that Ratner's friendship with Governor Pataki dates back to their days in law school together. See "*For Brooklyn, a Celebration or a Curse?*", WASHINGTON POST, Jan. 26, 2004, at A1 ("Ratner is . . . top political contributor and law school friend of Pataki.").

use’ provision of the Takings Clause would lose all power to restrain government takings.” *Id.*

Defendants’ “objective” pretext inquiry amounts to nothing more than a complete abdication of what the Court in *Midkiff* held was, “of course, a role for the courts to play in reviewing a legislature’s judgment of what constitutes a public use.” 467 U.S. at 240.

B. Absent Any Indicia of Legitimacy, Ratner’s Decision to Target Plaintiffs’ Properties Is Worthy of No Deference

Defendants make no sincere attempt to harmonize *Berman*, *Midkiff* and *Kelo*. Instead, they present a false choice: either (1) ignore *Kelo*’s references to “purpose,” “motive,” “intent” and “pretext” in favor of the “rationally related to a conceivable public purpose” language in *Midkiff*; or (2) endorse what they falsely claim to be Plaintiffs’ polar opposite position that *Midkiff* and *Berman* were somehow overruled or significantly undermined by *Kelo*. Obviously, neither extreme is tenable.

The real task is to reconcile, harmonize and apply the teachings of *all three* of the Supreme Court’s modern Public Use Clause opinions in light of the unique allegations presented here. Notwithstanding Defendants’ misleading characterization of Plaintiffs’ analysis, Plaintiffs’ *actual* approach to this less-than-simple task succeeds. Plaintiffs’ analysis gives due consideration to *all* of the

cases and reconciles the very real tension between *Kelo* and *Midkiff*. Defendants' rhetoric does not.

Two principles flow inescapably from *Berman*, *Midkiff* and *Kelo*. First, courts considering a Public Use Clause claim must treat *legislative* judgments concerning whether a taking is necessary to accomplish a public purpose with substantial deference. This principle is so engrained that its application by the Supreme Court has resulted in the dismissal of all three of the Public Use Clause cases it has decided since 1954 (albeit, where necessary, *after* the party challenging the seizure of their land had been afforded an opportunity to develop and present evidence). *See, e.g., Kelo*, 545 U.S. 475 (discovery followed by seven day bench trial); *Berman*, 348 U.S. 26 (cross-motions for summary judgment based on uncontested facts).

Second, the Public Use Clause unquestionably *does* prohibit the government from seizing a private citizen's property when the purpose of the taking is to benefit another, more favored, private citizen. *Kelo*, 545 U.S. at 477 (government is "no doubt forbidden from taking [a private party's] land for the purpose of conferring a private benefit on a particular private party") (citing *Midkiff*, 467 U.S. at 245; *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); and *Calder v. Bull*. 3 Dall. 386, 388 (1798)).

No one can honestly dispute these two principles. They create a clear analytical divide in Public Use Clause cases. On one side are cases in which the facts present sufficient indicia of legitimate public purpose such that no further intrusion into the legislative prerogative can be countenanced. On the other side are cases that have none, or almost none, of these important indicia of legitimacy, thereby vitiating any judicial deference that otherwise would presumptively apply.

1. Indicia of Legitimacy Necessary to Invoke Substantial Judicial Deference

While no court has expressly addressed the *quantum* of indicia of legitimacy necessary to warrant substantial deference to a legislature's takings decision, copious case law makes clear what those indicia are. Substantial deference was afforded, and the takings were upheld, in *Kelo*, *Midkiff*, *Berman* and *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44 (2d Cir. 1985) ("*Rosenthal II*"). A careful examination of these four cases reveals that such deference is afforded when specific indicia of legitimacy are present.⁴

⁴ The underlying facts and background in *Kelo* and *Midkiff* were outlined previously. See Pls.'s Br. at 38-41. Insofar as the key underlying facts in *Berman* and *Rosenthal* – e.g., the role of a legislative body in making the takings decision and the competitive bidding for developers who would benefit greatly from the takings – are less obvious and thus more prone to manipulation, it is important to understand the details of the takings decisions in those cases.

Rosenthal involved a challenge to the use of eminent domain by the New York State Urban Development Corporation ("UDC") (now doing business as ESDC) as part of the plan to redevelop the Times Square area in New York City.

(continued...)

The rule that flows from *Kelo*, *Midkiff*, *Berman* and *Rosenthal* is plain. When a taking is challenged on public use grounds, substantial deference will be given to the decision to condemn private property where all factors indicate that the decision was driven by a desire to benefit the public. These factors include:

⁴(...continued)

In June 1980, the UDC “and the City of New York entered into a Memorandum of Understanding that the City and UDC would jointly prepare a plan and designate a developer to redevelop the Times Square vicinity.” *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 605 F. Supp. 612, 614 (S.D.N.Y. 1985), *aff’d*, 771 F.2d 44 (2d Cir. 1985) (“*Rosenthal I*”); *see also Jackson v. New York State Urban Dev. Corp.*, 67 NY2d 400, 411, 503 N.Y.S.2d 298 (1986). Unlike here, a pre-selected developer was not a party to that agreement. (A-1005-1034.) In February 1981, the UDC and the City “issued a 100-page discussion document, identifying among its goals elimination of blight” and “revitalization of the area” and “presented options for the development of eight sites within the tentatively designated project area.” *Jackson*, 67 N.Y.2d at 411. Six months later, UDC “invited private developers to submit proposals.” *Id.* Eight months after that, in April 1982, “after reviewing 26 proposals, UDC conditionally designated several developers.” *Id.* Hearings under the EDPL were completed in September 1984. *Id.* at 412. The City Board of Estimate, a legislative body comprised primarily of the five borough presidents, *see Morris v. Board of Estimate*, 489 U.S. 688 (1989), held hearings in October and November 1984 after which it authorized the Mayor to execute binding agreements with the UDC and developers. *Rosenthal I*, 605 F. Supp. at 614; *Jackson*, 67 N.Y.2d at 413.

In *Berman*, the takings were authorized in the first instance by Congress, followed by the consideration of multiple plans before final approval by the local legislative body (the District Commissioners), followed by the solicitation of “proposals to negotiate for the purchase or lease of land in the project area [and a]fter due consideration the Agency accepted the proposals of five bidders.” *Schneider v. District of Columbia*, 117 F. Supp. 705, 708 (D.D.C. 1953) (three-judge court), *aff’d sub. nom.*, *Berman v. Parker*, 348 U.S. 26 (1954).

- **Legislative Decision:** A legislative body, including representatives of the people who will be adversely effected by the taking, makes a determination that a taking of private property is necessary to address a specific public need or purpose. *Kelo*, 545 U.S. at 475 (“city council approved plan” and “authorized . . . eminent domain”); *id.* at 484 (“thorough deliberation . . . preceded adoption” of plan); *Midkiff*, 467 U.S. at 233; *Berman*, 348 U.S. at 28-29 (first Congress and then the Board of Commissioners approved need to wield power of eminent domain and the map of targeted properties); *Rosenthal I*, 605 F. Supp. at 614 (as detailed in *Jackson*, 67 N.Y.2d at 413) (takings map approved by Board of Estimate).
- **Public Purpose Goal Identified at the Outset.** The specific public need or purpose is identified before the possibility of seizing private property is considered. *Kelo*, 545 U.S. at 473 (state designated entire City a distressed municipality two years before the City approved a redevelopment plan and four years before authorizing the use of eminent domain); *id.* at 483 (“determination that area was sufficiently distressed to justify a program of economic rejuvenation”); *id.* at 491-492 (state and local legislatures were “aware of New London’s depressed economic condition and evidence corroborating the validity

of the concern”); *Midkiff*, 467 U.S. at 233 (before deciding to “redress these problems,” the “legislature concluded that concentrated land ownership was responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare”).

- **Carefully Considered Comprehensive Plan.** A legislative body develops or approves a comprehensive plan to advance the predetermined public purpose. *Kelo*, 545 U.S. at 475; *Midkiff*, 467 U.S. at 233; *Berman*, 348 U.S. at 28-29; *Rosenthal I*, 605 F. Supp. at 614 (and *Jackson*, 67 N.Y.2d at 413).
- **Consideration of Multiple Plans.** Multiple plans or options are considered prior to settling upon the plan that maximizes public benefit. *Kelo*, 545 U.S. at 491-492; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708) and *Rosenthal* (as detailed in *Jackson*, 67 N.Y.2d at 411).
- **Comprehensive Plan Includes Takings Map.** The comprehensive development plan created or approved by the legislative body selects the property or series of properties that must be taken to advance the public purpose, *i.e.*, draws the takings map. *Kelo*, 545 U.S. at 474 n.2 (“evaluated six alternative development proposals . . . which varied in

extensiveness and emphasis”); *Berman*, 348 U.S. at 28-29; *Rosenthal I*, 605 F. Supp. at 614 (and *Jackson*, 67 N.Y.2d at 413).

- **Private Beneficiaries Unknown.** The private beneficiaries of the taking, particularly the private parties to whom the seized property will be transferred, are unknown when the comprehensive plan is developed and the properties needed to fulfill the plan are selected. *Kelo*, 545 U.S. at 491-492 (city council “reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand”); *id.* at 478 & n.6; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708 (“accepted proposals of five bidders”)) and *Rosenthal* (as detailed in *Jackson*, 67 N.Y.2d at 411 (“after reviewing 26 proposals, UDC conditionally designated several developers”)).
- **Competitive Bidding Process.** Insofar as the public benefit project contemplates seizure of property that will then be transferred to a private party for redevelopment, those parties are selected through an open, competitive process. *Kelo*, 545 U.S. at 491-492; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708) and *Rosenthal* (as detailed in *Jackson*, 67 N.Y.2d at 411).

- **Funds Committed Before Beneficiary Known.** The legislative body commits public funds to the project before the private beneficiaries are known. *Kelo*, 545 U.S. at 491-492; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708) and *Rosenthal* (as detailed in *Jackson*, 67 N.Y.2d at 411).
- **Procedural Requirements That Facilitate Inquiry Into Purposes.** The decision to exercise eminent domain is subject to “elaborate procedural requirements . . . to facilitate . . . inquiry into the city’s purposes.” *Kelo*, 545 U.S. at 493.

2. There Are No Indicia of Legitimacy In This Case

Two things are clear. When all of the legitimacy factors identified by the Court in *Kelo* and outlined above are present, substantial deference must be paid to takings decisions, including the identification of the precise properties needed to accomplish a public purpose. *Berman*, 348 U.S. at 35-36 (stating that it “is not for the courts to oversee the boundary line” and that “the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch”). The court’s role is limited and deferential. As long as the proposed taking will advance a “conceivable public purpose,” it will be upheld.

Conversely, when none of the legitimacy factors are present, such circumstances give rise to a reasonable “suspicion that a private purpose [may be] afoot.” *Kelo*, 545 U.S. at 487-88 & n.17 (noting that a “a one-to-one transfer of property outside the confines of an integrated development plan” would be “an unusual exercise of government power [that] would certainly raise a suspicion that a private purpose was afoot,” and that such “abberations” should be viewed “with a skeptical eye” and “can be confronted if and when they arise” (citing *99 Cents Only Store v. Lancaster Redevelopment Agcy.*, 237 F. Supp. 2d 1123 (C.D. Ca. 2001))). The presumption of deference must give way so that courts can exercise their constitutional “role . . . in reviewing a . . . judgment of what constitutes a public use.” *Midkiff*, 467 U.S. at 240.

This case most closely resembles *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *rev'd on other grounds*, 356 F.3d 768 (8th Cir. 2003). The factual findings of the district court in *Aaron* are especially illuminating. In *Aaron*, Target had leased its store from the plaintiffs for almost 30 years when it decided it wanted to build a new store on the sight. *Id.* at 1166-67. It approached the plaintiffs with a proposal to demolish and replace the store. The plaintiffs agreed to the concept, but proposed that the prospective rent be based on a percentage of Target’s future profits at the site. Target never responded to the plaintiffs’ proposal and instead approached the town alderman whose ward

included the property “and threatened to abandon the . . . store unless [the Alderman] induced the City to give Target full fee-simple ownership of the Properties through the use of the City’s condemnation power.” *Id.* at 1167. Thereafter, Target and the City jointly prepared a redevelopment proposal appointing Target as the redeveloper; Target commissioned and then “beefed up” a self-serving blight study; the City then waited over two months before soliciting public counter-proposals; and the City designated Target as its chosen redeveloper only days after soliciting alternatives from the public. *Id.* at 1167-69. The district court was able to make factual findings based on evidence submitted by the plaintiffs that had been gathered during discovery in the state court condemnation proceeding where the plaintiffs “were given up to two weeks to conduct discovery, the opportunity to take seven depositions, and the right to obtain all of [LCRA]’s relevant and non-privileged documents.” *Aaron v. Target*, 357 F.3d at 777. Based on those findings, the court enjoined the taking. *Id.*

The important legitimacy factors identified in *Kelo* were nowhere to be found in *Aaron* (or *99 Cents*). They are absent here as well.

The question of where on the continuum between significant indicia of legitimacy (*Kelo*, *Midkiff*, *Berman* and *Rosenthal*) and virtually none (*Aaron*, *99 Cents*, *Armandariz* and *Cottonwood Christian Center v. Cypress Development Agency*, 218 F. Supp. 2d 1203 (C.D. Ca. 2002)) a case must fall to warrant

substantial deference is not an easy one, and need not be answered here. This case is not close. *None* of the factors giving rise to a presumption of validity is present.

a. Legislative Decision

The Complaint alleges that Pataki and Bloomberg personally decided that Plaintiffs' homes and businesses must be sacrificed and transferred to Ratner. Neither the Mayor nor the former Governor are legislative entities. And even if, contrary to the factual allegations in the Complaint, the ESDC made (and did not merely rubber stamp) the decision to take Plaintiffs' properties, no one could mistake the ESDC for a legislative body.

The Complaint alleges and New York law provides that the ESDC is an unelected, quasi-governmental corporation, wholly controlled by the Governor. (A. 58.3, 58.7-58.8); N.Y. Unconsol. L. § 6254(1).⁵ Its members are unelected, have no constituents and are beholden only to the Governor. The ESDC and its members do not enjoy the privileges and immunities of a legislative body. The ESDC is so removed from the traditional structure and function of government

⁵ The Governor controls the MTA, especially when acting in concert with the Mayor of New York City. *See* N.Y. Pub. Auth. L. § 1263 (Governor and Mayor collectively control 10 out of 15 votes on the MTA board).

(whether legislative branch or executive agency) that it is not even afforded immunity under the Eleventh Amendment.⁶

Nearly forty years ago, the New York State legislature created the ESDC as a non-governmental entity. *See* N.Y. Unconsol. Laws § 6252. This was done, at least in part, so that the ESDC would not be burdened or constrained by the requirements imposed on executive branch agencies engaged in real estate development. The decision to bypass pesky governmental restrictions and procedures – such as competitive procurement rules, constituent accountability and legislative oversight – comes with a cost. One such cost is that the ESDC’s public purpose and takings decisions, having none of the earmarks of legislative determinations, should not be afforded substantial deference by the courts – certainly not when the evidence strongly suggests that its role was nothing more than to rubber stamp a decision made by Defendants Pataki and Bloomberg long before 2006.

⁶ Indeed, if New York State, instead of the ESDC, were exercising the power of eminent domain, Plaintiffs’ supplemental state law claim pursuant to EDPL § 207 would be barred by *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Lest there be any confusion, *see* ESDC Br. at 23 n.6, Plaintiffs *do* challenge the dismissal of their supplemental claim without prejudice, but only insofar as it was premised on the dismissal of their federal claims under Rule 12(b)(6). Insofar as this Court vacates the dismissal of Plaintiffs’ federal claims, it should also reinstate Plaintiffs’ supplemental state claim.

b. Public Purpose Goal Identified At Outset

Since the Project was first publicly announced in early 2003, Defendants have offered various public purpose justifications. First, Defendants promoted the Project because it would allow Ratner to move his professional basketball team to Brooklyn and purportedly stimulate new jobs and tax revenues. Later, Defendants touted the Project by trumpeting the creation of affordable housing. In 2006, for the very first time, Defendants claimed that the Project would remedy blight. (A-105-593.) No mention of blight can be found in the memoranda of understanding executed by the Municipal Defendants, the FCRC Defendants and the ESDC Defendants in 2004 and 2005. (A-1005-1034.)

The appearance of blight as a justifying purpose for the Project first appeared in 2006 when the ESDC commissioned a blight study. (A-213.) Instead of commissioning an open-ended examination of the areas surrounding the MTA's Vanderbilt Rail Yards or the ATURA, the ESDC directed AKRF to examine *only* the Project footprint as designated by Ratner. (A-213.) ESDC's interest in remedying blight was thus confined to the area selected by Ratner for his Project and nothing more. Thereafter, and not surprisingly, AKRF (an entity that has never failed to produce blight justifications when commissioned to do so (A-58.24-58.25)) determined that "51 of the 73 parcels on the project site (70 percent) exhibit one or more blight characteristics, including . . . lots that are built to 60

percent or less of [that] allowable . . . under current zoning” (also known as underutilization). (A-216.) Interestingly, not even Defendants’ biased *post hoc* blight study concluded that Plaintiffs’ properties were blighted. (A-343, 358, 360, 362, 370, 395, 397, 399) (finding that Plaintiffs’ properties are not unsafe or unsanitary, although one has graffiti, and a couple of others are underutilized).

c. Carefully Considered Comprehensive Plan

Here, unlike in *Kelo*, *Berman* and *Rosenthal*, no comprehensive plan to promote economic development or eliminate blight was ever considered by Pataki, Bloomberg or the ESDC. Instead, the only plan considered (and not carefully) was Ratner’s plan. As would be expected, the primary purpose of Ratner’s plan is to maximize the personal benefit and gain to himself, his companies and his companies’ shareholders.

d. Consideration of Multiple Plans

There is no dispute. Defendants considered one plan and one plan only – Ratner’s plan. Not a single alternative plan was considered.

e. Comprehensive Plan Includes Takings Map

The takings map, which of course includes Plaintiffs’ properties, was drawn by Ratner. No amendments or alterations were considered.

f. Private Beneficiaries Unknown

The very first thing Defendants Pataki and Bloomberg knew about the Project was that Ratner would be the private recipient and beneficiary of properties seized by eminent domain. That fact never changed. Indeed, at every turn, every government employee and entity involved in the Project, including ESDC, knew that it was Ratner's Project and that he would reap the benefits of the proposed land transfers.

g. Competitive Bidding Process

There was no bidding process. It is undisputed that Ratner was the only developer ever considered. It is important to distinguish between the Project and the MTA's Vanderbilt Rail Yards, which comprise approximately 40% of the Project footprint. (A-220). While there *was* a (supposedly competitive) bidding process for the MTA's property,⁷ that process only concerned a portion of the land needed for the Project. There was *no* competitive bidding for the Project as a whole or for the privilege of receiving Plaintiffs' properties after they are seized by eminent domain.

⁷ As set forth in the Complaint in abundant, non-conclusory detail, the bidding process for the MTA rail yards was a transparent *post hoc* sham. (A-58.18-58.20) (only 45 days to respond); *see Aaron*, 269 F. Supp. 2d at 1168 (only 10 days to respond).

h. Funds Committed Before Beneficiary Known

Because Ratner was the catalyst for the Project and the only developer considered, the substantial public funds earmarked for the Project were committed *after* the beneficiary was known.

i. Procedural Requirements Facilitate Inquiry Into Purposes

Here, while the procedural requirements set forth in the EDPL were followed by the ESDC, they cannot be equated with the “elaborate procedural requirements . . . to facilitate . . . inquiry into the city’s purposes” that *Kelo* contemplated. 545 U.S. at 493. Under the EDPL procedures, there is no factfinding, no trial, no hearing, and no discovery. EDPL § 207.

* * * * *

Here, there are no indicia of legitimacy. The Court is therefore “confronted with a plausible accusation of impermissible favoritism to private parties” and 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.” *Kelo*, 545 U.S. at 491 (Kennedy J. concurring). To be clear, this does not mean that there should be no deference at all to the takings decision (although there need not be). Rather, Plaintiffs modestly urge that the degree of deference be lessened to the point that

summary dismissal at the pleading stage does not occur. For only in this way will the courts be able to meaningfully review the factual merits of the claim.

C. Plaintiffs Do Not Concede That the Project Will Serve a Public Purpose

Taking their cue from what they characterize as the District Court’s “findings,” Defendants misconstrue the import of Plaintiffs’ factual allegations by repeatedly suggesting that Plaintiffs concede that the Project will serve public purposes (such as remediating blight). This simply is not true. *See* Pls.’ Br. at 3-15, 35-37; A-58.1-58.33.

Moreover, this Court recently reaffirmed the common-sense rule that it may not credit any of the self-serving statements made in the voluminous materials, like the blight study, submitted by Defendants in support of this Rule 12(b)(6) motion to dismiss. There are limited circumstances under which a court may consider documents outside of a plaintiff’s complaint without converting a Rule 12(b)(6) motion to dismiss to a Rule 56 summary judgment motion. Unless the documents are “incorporated by reference” into the complaint – and Plaintiffs’ Complaint in this case plainly does not incorporate Defendants’ voluminous materials by reference – a court may only consider those documents “upon which the complaint *solely* relies and which [are] *integral to the complaint.*” *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (emphasis in original) (quotation

omitted). Importantly, even assuming *arguendo* that this standard were met in this case, *Roth* confirms unmistakably that this Court *cannot credit the truth* of the assertions made in the documents Defendants have submitted. *Id.* The Court can note that the documents exist, and it can “determine *what* the documents stated,” but it cannot consider the documents “*to prove the truth of their contents.*” *Id.* As *Roth* explained, this rule is merely a corollary to the hornbook principle that on a motion to dismiss, all allegations and statements are to be presumed true and viewed in the light most favorable to the plaintiff. Accordingly, this Court can and should note the existence of, for example, the ESDC’s written Determination and Findings, and it can and should note the *purported* justifications for the Project that the ESDC *claims* motivated its decision to condemn Plaintiffs’ properties, but this Court is clearly precluded on this motion from assuming the truth of or crediting the ESDC’s statements in any way.

III. PLAINTIFFS STATE VIABLE DUE PROCESS AND EQUAL PROTECTION CLAIMS

Defendants assert that there is “no basis for distinguishing” between Plaintiffs’ *as applied* due process claim and the due process claim that this Court rejected in *Brody v. Port Chester*, 434 F.3d 121 (2d Cir. 2005). ESDC Br. at 48. That is false. In *Brody*, this Court rejected a broad *facial* attack on the sufficiency of the processes afforded under the EDPL, concluding that it satisfied due process

if the ESDC *actually follows* those processes. In this case, Plaintiffs allege that Defendants did *not* meaningfully follow the processes that this Court upheld in *Brody*. Instead, Defendants merely *pretended* to follow those processes. The putative “process” was a sham because the outcome was entirely predetermined before it began. *Brody* obviously did not hold that a deliberate charade satisfies due process.

Defendants’ attack on Plaintiffs’ Equal Protection claim fares no better. Plaintiffs allege, among other things, that it was irrational for the ESDC to condemn Plaintiffs’ properties rather than the Newswalk condominium project. In response, Defendants do not offer any explanation – rational or otherwise – for this puzzling decision. Their failure to explain themselves is itself fatal to their motion to dismiss Plaintiffs’ Equal Protection claim. *See, e.g., B.F. Goodrich Co. v. Lake in the Hills*, 1997 WL 269481, at *7 (N.D. Ill. Apr. 29, 1997) (denying summary judgment on equal protection claim where village offered no explanation for differential treatment).

IV. BURFORD ABSTENTION IS NOT WARRANTED

The ESDC argues that the District Court should have abstained from exercising jurisdiction over Plaintiffs’ claims under the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). But the United States Supreme Court has repeatedly admonished that federal courts have a “virtually unflagging” obligation to

adjudicate claims within their jurisdiction; that the *Burford* abstention doctrine presents “an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it”; and that “[a]bdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstance.” *New Orleans Public Serv, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358-59 (1989) (“*NOPSP*”); *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 813-14 (1967); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959). So unusual is *Burford* abstention that the Supreme Court has not endorsed its application in more than a half-century. And this Court has emphasized that cases alleging civil rights violations are “the least likely candidates for abstention.” *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265-66 (2d Cir. 1968).

The District Court devoted thirty-one pages of its opinion to this issue, rejecting the ESDC’s *Burford* argument after a particularly rigorous analysis. (SPA-53 to 84). This Court reviews the District Court’s analysis for an abuse of discretion. *Hachamovitch, M.D. v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998). Review of a decision not to abstain under *Burford* is even more deferential than typical abuse-of-discretion review because the doctrine is so exceedingly narrow and seldom invoked. *Id.* (“Generally, we review a district court’s decision to abstain on *Burford* grounds for abuse of discretion, but the scope of that

discretion is narrowed by the federal court’s obligation to exercise its jurisdiction in all but the most extraordinary cases.”). The ESDC has not come close to demonstrating that *Burford* abstention is warranted, especially in light of the heightened deference to which the District Court is entitled.

As the District Court recognized, a variety of factors are relevant to whether a court should abstain from exercising jurisdiction under *Burford*, including: (1) whether “timely and adequate state-court review is available”; (2) the “degree of specificity of the state regulatory scheme”; (3) the “necessity of discretionary interpretation of state statutes”; (4) “whether the subject matter of the litigation is traditionally one of state concern”; and (5) whether the state “ha[s] created a centralized system of judicial review of [ESDC] orders” which gives a specific state court “specialized knowledge” regarding public use determinations. (SPA-72 to 73). The District Court carefully analyzed each factor in detail and correctly held that none of them supports abstention in this case.

The ESDC does not seriously engage with the District Court’s thorough analysis and application of these *Burford* factors. Instead, the ESDC attempts to sidestep the well-established multi-factor rubric by arguing that if the Public Use Clause requires a federal court to examine the “political questions underlying the Project” – that is, to “prob[e] into the hearts and minds . . . of state and local public officials” – then *Burford* abstention is automatically required.

ESDC Br. at 48, 51-53. This argument, which was not presented to the District Court below, lacks merit for a number of reasons.

First, no case supports the novel proposition that pretext claims grounded in the federal Constitution are automatically barred from federal court merely because they “prob[e] into the hearts and minds . . . of state and local public officials.” *Alabama Pub. Serv. Comm. v. Southern Ry. Co.*, 341 U.S. 341 (1951), on which Defendants principally rely, was not a pretext case at all, much less did it hold that cases turning on the motive of government actors necessarily require abstention. Rather, *Alabama* focused on the unique importance of the regulatory issue and on the fact that it was local in character, *id.* at 345, 346, 347, 349, and that the case was primarily a diversity action seeking a declaration that the regulators had violated state law. *Id.* at 343, 347. And, just as in *Burford*, the state provided a particularly thorough judicial review procedure. *Id.* at 348.⁸

Second, the District Court plainly held that Plaintiffs *can* succeed on their Public Use Clause claim by demonstrating that the Project’s asserted

⁸ Nor does the Third Circuit’s decision in *Chiropractic Am. v. Levecchia*, 180 F.3d 99 (3d Cir. 1999), support the ESDC’s strained claim. *Levecchia* found abstention appropriate not merely because the plaintiffs’ challenge to certain regulations of New Jersey’s comprehensive no-fault automobile insurance law involved, in part, an inquiry into the insurance commissioner’s “motivations,” but rather because the plaintiffs’ challenge implicated virtually every recognized *Burford* factor, including that the regulations at issue were “all-encompassing, highly technical, extremely intertwined and interrelated provisions that describe the extent of reimbursable medical treatment, applicable deductibles and co-pays and accepted medical protocols.” *Id.* at 106.

purposes are “merely pretextual.” (SPA-101 to 102). The District Court simply held – erroneously, we submit – that Plaintiffs’ factual allegations of pretext are insufficient to withstand a Rule 12(b)(6) motion. There thus is no truth to the notion that the District Court did not believe that the Public Use Clause enables Plaintiffs to inquire into the “hearts and minds” of state and local officials, and no basis to suggest that the District Court would have abstained if it had believed, as it plainly did, that Public Use Clause claims can involve inquiry into the motivations of state actors.

Moreover, the District Court’s passing statement in the middle of its thirty-one-page *Burford* analysis that it was “not being asked to evaluate the political questions underlying the Project” (SPA-77) was not the only reason – or even one of a few reasons – why the District Court refused to abstain. Rather, the District Court engaged in an extensive and searching analysis of a wide variety of *Burford* factors, holding that *none* of them supports abstention. Even assuming the ESDC’s newfound “hearts and minds” argument has any validity – which it does not – that argument alone would not be enough to trigger the *Burford* doctrine.

Finally, the ESDC’s “hearts and minds” argument simply proves too much, for it would mean that no federal court could ever adjudicate any federal claims implicating the motives of state or local officials – including, for example,

race or gender discrimination claims, First Amendment retaliation claims, etc. That obviously is not the law. *See, e.g., Fralin & Waldron, Inc. v. Henrico County*, 474 F. Supp. 1315, 1319 (E.D. Va. 1979) (refusing to abstain under *Burford* in action turning on whether “defendants were or were not motivated by unconstitutionally discriminatory considerations”).

V. GOVERNOR PATAKI IS NOT ENTITLED TO DISMISSAL

Governor Pataki argues that Plaintiffs have failed to state a claim against him in his personal capacity, inviting this Court to conclude – as a matter of law, prior to discovery – that he had no personal involvement in the deprivation of Plaintiffs’ constitutional rights. Alternatively, he contends that he is entitled to qualified immunity as a matter of law. He is incorrect on both counts.⁹

A. Plaintiffs Have Adequately Pled Personal Involvement

Governor Pataki’s argument that he is entitled to have this Court rule – at the pleading stage, as a matter of law – that he was not personally involved in the deprivation of Plaintiffs’ constitutional rights has no merit. The Project plainly would not have been approved – and Plaintiffs’ properties would not be subject to eminent domain – without Governor Pataki’s enthusiastic support. As the Complaint alleges, and as New York law makes plain, the Governor wholly

⁹ Notably, the Municipal Defendants made similar arguments to the District Court below but have abandoned those arguments before this Court.

controls the ESDC. (A. 58.3, 58.7-58.8); N.Y. Unconsol. L. § 6254(1) (Governor appoints all nine members of the ESDC). Indeed, the Governor has what amounts to absolute veto power over the ESDC by virtue of the fact that one of the three members of the Public Authorities Control Board – an entity that, by statute, must unanimously approve the financing and construction of any ESDC project – serves at his pleasure. *See* N.Y. Pub. Auth. L. §§ 50(2), 51(1)(e).

None of the cases cited by Governor Pataki supports his strained argument that “once he appoints” members to the ESDC, “he has no further legal authority over their day-to-day decisions.” Pataki Br. at 12. *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032 (2d Cir. 1986), merely held that the ESDC is not entitled to assert a “state action” defense to liability under the Clayton Act. *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289 (2d Cir. 1996), did not involve the ESDC at all, and merely held that the Thruway Authority is not entitled to Eleventh Amendment immunity under the “arm of the state” doctrine. *Schulz v. State of New York*, 84 N.Y.2d 231 (1994), similarly did not involve the ESDC at all, and merely held that the Thruway Authority and the MTA were empowered by the New York Constitution to incur debt. And *Matter of Antonetty v. Cuomo*, 131 Misc.2d 1041 (Sup. Ct. Bronx Co. 1986), involved a claim for an injunction, not damages, and the court dismissed Governor Cuomo as

an improper party because he was not the state actor with official authority over the dispute at issue.

The Complaint alleges that Governor Pataki was (at the urging of his law school classmate, Bruce Ratner) the chief proponent of the Project generally and of the decision to resort to the use of eminent domain specifically, and that he accomplished this goal by wielding his immense power over the ESDC, the PACB, and the MTA. Acting as a main architect of a conspiracy to deprive federal rights gives rise to personal liability under section 1983. *See, e.g., Gronowski v. Spencer*, 424 F.3d 285 (2d Cir. 2005) (sustaining finding of sufficient personal involvement by mayor to give rise to section 1983 liability); *Hous. Works, Inc. v. Giuliani*, 179 F. Supp. 2d 177, 202-03 (S.D.N.Y. 2001) (denying motion to dismiss section 1983 claim against mayor in personal capacity); *Sims v. Kernan*, 29 F. Supp. 2d 952 (N.D. Ind. 1998) (sustaining claim against lieutenant governor).

It bears repeating that this is a motion to dismiss, not a motion for summary judgment. At this stage, the question is not whether Plaintiffs have proven Governor Pataki's personal involvement in the deprivation of the rights, or even whether they have created a genuine issue of fact with respect to that issue. The question is simply whether Plaintiffs have articulated a plausible basis to conclude that Governor Pataki was personally involved in the decision to condemn

Plaintiffs’ properties. *See Iqbal*, 490 F.3d at 157-58 (no heightened pleading standard applies to supervisory liability claims); *James v. Aidala*, 389 F. Supp. 2d 451, 452-53 (W.D.N.Y. 2005) (observing that “the issue is not whether a plaintiff will ultimately prevail [on personal involvement] but whether the claimant is entitled to offer evidence to support the claim”) (quotation omitted); *Shariff v. Goord*, 2005 WL 1863560, at *4-*5 (W.D.N.Y. Aug. 4, 2005) (same).

Governor Pataki’s argument that he has a First Amendment right to cause Plaintiffs’ properties to be condemned without a bona fide public purpose has no merit. This case is not about Governor Pataki’s right to speak. Rather, this case is about Governor Pataki’s *actions* – actions that directly resulted in the unconstitutional taking of Plaintiffs’ private property. Surely a government actor cannot insulate himself from any and all constitutional scrutiny merely by characterizing his actions as protected “speech” or “advocacy.”

B. Governor Pataki Is Not Entitled to Qualified Immunity At This Stage

Governor Pataki’s argument that he is entitled to qualified immunity as a matter of law – at the pleading stage, prior to discovery – is equally unavailing.

Governor Pataki fails to acknowledge the copious case law making clear that a defendant faces a “formidable hurdle” when asserting qualified

immunity on a motion to dismiss. *See, e.g., Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 191-92 (2d Cir. 2006). “Usually, the defense of qualified immunity cannot support the grant of a Rule 12(b)(6) motion for failure to state a claim on which relief can be granted.” *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004) (quotation omitted). “Of course, a defendant presenting an immunity defense on a Rule 12(b)(6) motion instead of a motion for summary judgment must accept the more stringent standard applicable to this procedural route.” *Id.* at 436. “Not only must the facts supporting the defense *appear on the face of the complaint*, but, as with all Rule 12(b)(6) motions, the motion may be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Id.* (emphasis supplied).

Not surprisingly, therefore, Governor Pataki has not cited a single case in which a complaint was dismissed on a Rule 12(b)(6) motion based on qualified immunity. As this Court put it in *McKenna*, “[h]owever the matter may stand at the summary judgment stage,” Governor Pataki “cannot have the complaint dismissed at the pleading stage on the basis of qualified immunity.” 386 F.3d at 437; *see also Iqbal*, 490 F.3d at 158 (expressly refusing to impose heightened pleading requirement to qualified immunity defenses to supervisory liability claims).

Indeed, granting a motion to dismiss based on qualified immunity would be particularly inappropriate where, as here, the alleged constitutional violation turns in part on the defendant's subjective motive. *Johnson v. Ganim*, 342 F.3d 105, 117 (2d Cir. 2003) (“Where a factual issue exists on the issue of motive or intent, a defendant’s motion for summary judgment on the basis of qualified immunity must fail.”); *see also Mandell v. County of Suffolk*, 316 F.3d 368, 385 (2d Cir. 2003); *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir. 2001).

Governor Pataki retreats to the position that the right he is accused of violating was not clearly established because the conduct at issue came before *Kelo*. As discussed previously, however, it has long been established that a state actor may not take a citizen’s property for the purpose of conferring a private benefit on a particular private party, and that a state actor similarly may not take property under the mere pretext of a public purpose with the actual purpose to bestow a private benefit.¹⁰

¹⁰ Governor Pataki expressly declined to move to dismiss Plaintiffs’ Due Process and Equal Protection claims based on qualified immunity. Because he never moved against those claims below – nor does he mention those claims in his brief to this Court – he plainly is not entitled to qualified immunity with respect to those claims.

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.

Dated: September 19, 2007
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's Order granting Plaintiffs-Appellants' motion for leave to file a reply brief of no more than 11,000 words. It contains 10,906 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using WordPerfect 10, in Times New Roman 14 point font.

Dated: September 19, 2007
New York, New York

By: _____
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STATE OF NEW YORK)
COUNTY OF NEW YORK)

SS.

Luigi Scopino, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or 205 Lexington Avenue, New York, New York 10016.

That on the 20th day of September, 2007, deponent personally served via email the

Reply Brief for Plaintiffs-Appellants

upon the attorneys who represent the indicated parties in this action, and at the email addresses below stated, which are those that have been designated by said attorneys for that purpose.

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Sworn to before me this
20th day of September, 2007.

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I, Luigi Scopino, certify that I have scanned for viruses the PDF version of the Reply Brief for Plaintiffs-Appellants that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

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