UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

AARON PILLER and ROCKWELL PROPERTY MANAGEMENT, LLC,	:	07 Civ. 0152 (NGG) (RML)
Plaintiffs,	:	ECF Case
v.	:	
GEORGE E. PATAKI, et al.	:	
Defendants.	:	

ESDC DEFENDANTS' OBJECTIONS TO
MAGISTRATE JUDGE LEVY'S REPORT AND RECOMMENDATION

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Two weeks ago, Magistrate Judge Levy recommended that this Court dismiss the amended complaint in Goldstein v. Pataki, 06 CV 5827 (NGG) (RML), pursuant to Burford v. Sun Oil Co., 319 U.S. 315 (1943), and its progeny. (See Report and Recommendation, dated Feb. 23, 2007 ("Report").)[1] The ESDC Defendants support that recommendation, and urge the Court to adopt it. Judge Levy's disposition accords with the approach that federal courts generally have taken to suits like this one; as the ESDC Defendants noted in their memorandum of law supporting dismissal of the amended complaint, in the thirty years since New York's Eminent Domain Procedure Law ("EDPL") was enacted, federal district courts in New York have considered just five Public Use Clause challenges to the exercise of eminent domain, and all of those were dismissed before trial. (See Memorandum of Law of ESDC Defendants in Support of their Motion to Dismiss the Amended Complaint, dated Jan. 19, 2007 ("Second ESDC Mem."), at 2.) This handful of federal-court challenges to public use determinations stands in sharp contrast to the myriad such challenges fully resolved by the state courts of New York during that same thirty-year period (see id. at 3), and underscores the significant and well-established procedural and prudential limits to federal-court review that Judge Levy recognized apply in cases such as this.

The ESDC Defendants respectfully submit, however, that Judge Levy erred in concluding that neither lack of ripeness nor the abstention rule of Younger v. Harris, 401 U.S. 37 (1971), independently supported the recommended disposition. The ESDC Defendants hereby

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[1] On March 1, 2007, this Court so-ordered a stipulation between the parties in Goldstein and Piller v. Pataki, 07 Civ. 0152 (NGG) (RML), that the two cases be consolidated and that the motions to dismiss filed in Goldstein (and the oppositions thereto) be deemed filed in the Piller action. Judge Levy's Report, which was issued after the parties had filed their stipulation but before this Court so-ordered it, should be deemed to have recommended dismissal of the Piller complaint as well, and the objections stated herein should be treated as equally applicable in the Piller action.

lodge their objections to the portions of the Report that incorporate those conclusions. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72.

I. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR ADJUDICATION.

The ESDC Defendants argued before Judge Levy and continue to maintain that plaintiffs' claims pursuant to 42 U.S.C. § 1983 ("section 1983") are not yet ripe for adjudication, and will remain unripe at least until ESDC commences a proceeding for transfer of title pursuant to Article 4 of the EDPL. Although Judge Levy appeared to acknowledge that the vast majority of reasoned authority supported this position, he stated at oral argument and in his Report that Judge McMahon's decisions in Didden v. Village of Port Chester, 304 F. Supp. 2d 548, 558-59, 569 (S.D.N.Y. 2004), and Didden v. Village of Port Chester, 322 F. Supp. 2d 385, 389 (S.D.N.Y. 2004), aff'd, 173 Fed. Appx. 931 (2d Cir. 2006), cert. denied, 127 S. Ct. 1127 (2007), compelled a contrary result. (See Transcript of Oral Argument, dated Feb. 7, 2007 ("Feb. 7, 2007 Tr."), at 7-10, 44; Report at 26-28.) The ESDC Defendants respectfully submit that this was error; Article III of the Constitution mandates dismissal of plaintiffs' case, and the reasoning in Didden, to the extent it suggests otherwise, is not binding on this Court.

At the risk of repeating arguments made at length in the ESDC Defendants' submissions to Judge Levy (see Memorandum of Law of ESDC Defendants in Support of their Motion to Dismiss the Complaint, dated Dec. 15, 2006 ("First ESDC Mem."), at 10-19; Second ESDC Mem. at 14-19), it bears emphasizing that there is no federal right of action to seek federal-court review of a public use determination. Procedures for such review are creatures of state law and direct plaintiffs to state court. See, e.g., EDPL § 207(C)(4). The federal right of action that plaintiffs seek to enforce here is, instead, a right under section 1983 to be free from

unconstitutional deprivations of property.[2] This right of action ripens for adjudication under Article III only when a deprivation has already occurred or when a threatened deprivation is "sufficiently direct and immediate as to render the issue appropriate for judicial review," Abbott Labs. v. Gardner, 387 U.S. 136, 152 (1967) (emphases added), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977)—not simply when a redevelopment plan has been approved or a public use determination has been made.

This follows from the general rule that federal courts lack jurisdiction to intervene in a given dispute unless the injury the plaintiff alleges has occurred """or is certainly impending.""" Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 63 (2d Cir. 1988) (emphasis added) (quoting Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 143 (1974) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923))); see, e.g., Pub. Water Supply Dist. No. 8 v. City of Kearney, 401 F.3d 930, 933 (8th Cir. 2005) (holding that challenge to city's promised sale of water to property owners upon detachment of owners' property from water supply district was not ripe because the detachment proceedings had yet to be completed and the injury alleged therefore was "not 'certainly impending'"); City of Williams v. Dombeck, 151 F. Supp. 2d 9, 14-16 (D.D.C. 2001) (holding that statutory challenge to land transfer was not ripe because necessary rezoning would not occur for several months; there had been "no actual injury" (i.e., land transfer) and "the transfer w[ould] only be imminent following rezoning")). "Just as the constitutional standing requirement for Article III jurisdiction bars disputes not involving injury-in-fact, the ripeness requirement excludes cases not involving present injury."

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[2] Plaintiffs have twice acknowledged that at least their equal protection claim "will rise or fall with" their takings claim (Feb. 7, 2007 Tr. at 51; see also Transcript of Proceedings, dated Nov. 21, 2006 ("Nov. 21, 2006 Tr."), at 5 (plaintiffs' counsel's acknowledgment that the case is "basically limited" to a takings claim)), and the only property of which they claim they will be deprived without due process of law is the subject of the purportedly illegal future taking.

Wyoming Outdoor Council v. United States Forest Serv., 165 F.3d 43, 48 (D.C. Cir. 1999). Plaintiffs, moreover, bear the burden of proving that their claims are ripe; the Court "must presume that [it] cannot entertain [their] claims 'unless the contrary appears affirmatively from the record.'" Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 347 (2d Cir. 2005) (quoting Renne v. Geary, 501 U.S. 312, 316 (1991)).

Here, the absence of any actual injury is incontestable. The injury of which plaintiffs complain—an alleged future violation of their constitutional rights—has not yet occurred.[3] The only question, then, is whether the alleged future deprivation is imminent and "certainly impending," as required to sustain plaintiffs' claims for injunctive and declaratory relief.

It is not. As the ESDC Defendants explained in their briefs to Judge Levy, the EDPL process is a deliberate one that envisions completion of a number of procedural steps in advance of the actual exercise of eminent domain (i.e., the taking). (See First ESDC Mem. at 14-16.) After publication of the condemnor's Determination and Findings, proposed condemnees have thirty days in which to seek review thereof in the appropriate department of the New York State Supreme Court's Appellate Division. See EDPL § 207(A).[4] Any resulting decision is subject to review by the New York Court of Appeals. Following a "final order or judgment" in such proceeding, the condemning agency then has up to three years to file a petition seeking

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[3] Because there has been no actual injury, plaintiffs' section 1983 claims must be dismissed at least to the extent they seek damages. See, e.g., Los Angeles Mem'l Coliseum Comm'n v. City of Oakland, 717 F.2d 470, 473 (9th Cir. 1983) (affirming denial of leave to amend complaint to add a damages claim because, in the absence of concluded condemnation proceedings, that claim was not yet ripe); see also, e.g., Bourgeois v. Peters, 387 F.3d 1303, 1307 n.3 (11th Cir. 2004) (stating that damages claim under section 1983 was not ripe at time of trial because searches complained of had not yet occurred).

[4] As Judge Levy observed, one such proceeding concerning the Atlantic Yards Project was filed on January 11, 2007 by tenants (the "Anderson plaintiffs") of certain properties that ESDC presently proposes to condemn. (See Report at 12; see also Declaration of Douglas M. Kraus, dated Jan. 19, 2007 ("Kraus Decl."), Ex. A.)

transfer of title in New York Supreme Court. See EDPL § 401(A)(3). Only after that Article 4 proceeding has concluded and the condemnor has filed both the court's order and an acquisition map with the county clerk or register is the "acquisition of the property" considered "complete." EDPL § 402(B)(5).

In this case, we are still at the Article 2 stage of the process; no Article 4 proceeding for transfer of title has commenced, much less been completed. That the proposed taking is not yet sufficiently imminent is reflected in plaintiffs' counsel's own comments before your Honor and Judge Levy during the first conference in this case; in response to Judge Levy's question about "[w]hat it is that [plaintiffs] will need to enjoin," counsel stated that "[w]hat we will be seeking to enjoin ultimately is the Article IV proceeding." (Nov. 21, 2006 Tr. at 14 (emphasis added).) That, Mr. Brinckerhoff explained, was the "point . . . [of] no return"—"the point in time when there is unquestionably irreparable harm." (Id. at 15.) More generally, as Judge Levy acknowledged, "any number of things—foreseeable or not—could happen to derail" a project like this before title proceedings are initiated and a deprivation of property is thus rendered "certainly impending." (Report at 28; see Second ESDC Mem. at 14-15 (outlining examples of projects that have changed or been abandoned following publication of condemnor's Determination and Findings).) Not least of these would be an adverse ruling in any state-court EDPL § 207 proceeding or other state-court suit arising from the proposed project—for example, a suit under the New York State Environmental Quality Review Act.

Recognizing the possibility of intervening events like these, courts faced with the admittedly few section 1983 suits attacking proposed condemnations before any proceeding seeking transfer of title has begun generally have dismissed them as unripe. See, e.g., Wendy's Int'l, Inc. v. City of Birmingham, 868 F.2d 433, 436-37 (11th Cir. 1989); Hemperly v. Crumpton,

708 F. Supp. 1247, 1250-51 (M.D. Ala. 1988); Eddystone Equip. & Rental Corp. v. Redevelopment Auth., Civ. A. No. 87-8246, 1988 WL 52082, at *2-3 (E.D. Pa. May 17, 1988), aff'd mem., 862 F.2d 307 (3d Cir. 1988); HMK Corp. v. County of Chesterfield, 616 F. Supp. 667, 669-70 (E.D. Va. 1985); Port Chester Yacht Club, Inc. v. Iasillo, 614 F. Supp. 318, 321-22 (S.D.N.Y. 1985); see also, e.g., Urban Developers LLC v. City of Jackson, 468 F.3d 281, 294 (5th Cir. 2006) (takings claim arising from exercise of eminent domain was not ripe because "a mere threat" "to use the City's legal powers" of condemnation "does not constitute a taking"). Indeed, Judge Levy seemed to acknowledge as much. (See Report at 20-23.)

The only cases that plaintiffs were able to cite in opposition to the general rule embodied in the foregoing authorities were Judge Motley's opinion in Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp., 605 F. Supp. 612 (S.D.N.Y. 1985), aff'd per curiam, 771 F.2d 44 (2d Cir. 1985), a handful of cases in which the ripeness issue was neither raised nor discussed, and (as an afterthought, see Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Supplemental EDPL Claims, dated Jan. 26, 2007, at 14-15) Judge McMahon's statute-of-limitations rulings in Didden, 304 F. Supp. 2d at 558-59, and Didden, 322 F. Supp. 2d at 389.[5] None of these should have persuaded Judge Levy to conclude that plaintiffs' claims are ripe, and none should persuade this Court to second that conclusion.

First, the district court's ripeness analysis in Rosenthal was "scant" (Report at 23) and not adopted by the Second Circuit, which affirmed on the merits without addressing the ripeness question. (As the ESDC Defendants explained in their briefs before Judge Levy, the defendants in Rosenthal, having won a resounding victory pursuant to Federal Rule of Civil

[5] Plaintiffs also cited the district court's decision in Aaron v. Target Corp., 269 F. Supp. 2d 1162 (E.D. Mo. 2003), rev'd on other grounds, 357 F.3d 768 (8th Cir. 2004), and Judge Levy appeared to accept plaintiffs' suggestion that that case supported their argument (see Report at 25). In fact, as the ESDC Defendants have explained, the district court's decision in Aaron suggests plaintiffs' claims are not ripe. (See Second ESDC Mem. at 17 n.10.)

Procedure 12(b)(6), declined to press the ripeness issue on appeal, and the Second Circuit, consistent with then-existing circuit precedent, did not address the issue even though it had been squarely presented below. (See First ESDC Mem. at 16 n.16; Second ESDC Mem. at 18.)) It is also in direct conflict with the only other decision directly on point from this circuit, Port Chester Yacht Club, Inc., supra. (See Report at 26 (noting conflict).)

Second, although Judge Levy apparently believed that the decisions in cases where ripeness was never raised or discussed—Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); and 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)—factored into the analysis (see Report at 23-25), those decisions carry no precedential weight. (See Second ESDC Mem. at 17 (discussing rule that a silent resolution of a jurisdictional question lacks precedential force).) Two of the cases (Midkiff and Cottonwood) have no bearing here in any event because, in each, a state condemnation proceeding had been commenced prior to the district court's ruling. (See Second ESDC Mem. at 17 n.11 (discussing Midkiff); id. at 18 n.12 (discussing Cottonwood).) Because ripeness is assessed as of the time of review and not as of the time of filing, see Regional Rail Reorganization Act Cases, 419 U.S. 102, 139-40 (1974), any silent resolutions of ripeness issues by the courts in Midkiff and Cottonwood would be perfectly consistent with the ESDC Defendants' position that section 1983 claims challenging proposed condemnations are not ripe at least until a proceeding seeking transfer of title has been filed.

Third, this Court should not view Didden as an obstacle to dismissal of plaintiffs' claims on ripeness grounds. Didden involved section 1983 claims asserted by private landowners who were seeking to enjoin condemnation proceedings that had been brought against

them as part of an economic redevelopment project. See 304 F. Supp. 2d at 557. The district court construed the claims as amounting to a challenge under the Public Use Clause, and held, inter alia, that they were time-barred. See id. at 558-59; accord Didden, 322 F. Supp. 2d at 388-89, 391 (dismissing complaint). Specifically, the court held that plaintiffs "had reason to know of the basis of their injury" on July 14, 1999, when the condemnor issued its Determination and Findings pursuant to EDPL Article 2, and therefore were required to sue within three years of that date—the limitations period applicable to section 1983 claims in New York. See Didden, 304 F. Supp. 2d at 558-59. No mention was made of Article III constraints on justiciability. Assuming, however, that a section 1983 claim both accrues and becomes ripe for adjudication at the same time (see Report at 27; see also, e.g., Norco Constr., Inc. v. King County, 801 F.2d 1143, 1146 (9th Cir. 1986)), the decisions in Didden arguably stand for the proposition that a section 1983 challenge to a proposed condemnation becomes ripe the moment the condemnor issues its public use determination.

The analysis in Didden, however, simply cannot be squared with governing precedent. Although Judge McMahon correctly noted that a section 1983 claim "accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action," Didden, 304 F. Supp. 2d at 558; accord Didden, 322 F. Supp. 2d at 388, she misapplied that standard. As explained above, the "injury" at issue in a section 1983 case is the deprivation of a constitutional right—in this case (and in Didden), the purported deprivation of property for private use. While a public use determination, standing alone, gives rise to a state-law right to review of the proposed state action in state court (see EDPL § 207(A), (C)(4) (instructing Appellate Division to review whether "a public use, benefit or purpose will be served by the proposed acquisition")), it is not, in the absence of an actual or imminent deprivation of property pursuant to that

determination, an "injury" for which redress may be sought under section 1983. And, although a section 1983 claim for injunctive or declaratory relief may accrue marginally earlier than a damages claim—that is, before an actual deprivation of a constitutional right, but when the deprivation is imminent and "certainly impending"—there is no support for Judge McMahon's contention that it accrues when the plaintiff is "expose[d] to the prospect of" a deprivation. Didden, 304 F. Supp. 2d at 559 (emphasis added). Indeed, that contention runs directly contrary to the justiciability jurisprudence of the Supreme Court and the Courts of Appeals, which makes clear that a claim often will be unripe even though "expos[ure] to the prospect of" a constitutional or statutory violation has already occurred. See, e.g., Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 197-99, 203 (1983) (holding that a challenge to a statutory provision threatening plaintiffs with denial of permission to construct nuclear facilities was not ripe because no denial of permission had actually occurred); City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) ("The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct . . . .") (emphasis added); Murphy, 402 F.3d at 350-52 (holding that homeowners' First Amendment and statutory challenges to cease-and-desist order issued pursuant to zoning regulations were not ripe); see also Pub. Water Supply Dist. No. 8, 401 F.3d at 933.

It is noteworthy, in this respect, that the justiciability implications of Judge McMahon's accrual rulings were never raised before the district court in Didden, or before the Second Circuit (which affirmed dismissal of the complaint, see Didden v. Village of Port Chester, 173 Fed. Appx. 931, 932-33 (2d Cir. 2006), cert. denied, 127 S. Ct. 1127 (2007)). Only when the case got before the United States Supreme Court on a petition for certiorari was the problem

finally flagged. A group of amici law professors argued in support of certiorari review that the Second Circuit's affirmance of Judge McMahon's statute-of-limitations ruling was patently erroneous. See Brief of Law Professors D. Benjamin Barros, Eric R. Claeys, Viet D. Dinh, Steven J. Eagle, James W. Ely, Jr., Richard A. Epstein, Adam Mossoff, and Ilya Somin as Amici Curiae in Support of Petitioners at 14-16, Didden v. Vill. of Port Chester, 127 S. Ct. 1127 (2007) (No. 06-652), available at 2006 WL 3610985. As the amici explained, "[t]he statute of limitations does not begin to run until all elements of the claim have accrued in order to avoid the spectacle of tens or hundreds of individual lawsuits with respect to properties that may never be taken at all." Id. at 16. Moreover, had the plaintiffs "tried to file a suit to block the Village's actions before [the Article 4 proceeding was filed], it might have been dismissed for lack of ripeness." Id. The Didden respondents' only answer to this argument (aside from urging the Court to treat it as waived) was that the action became ripe when the Determination and Findings were published because the requisite "condemnation proceeding" in fact began at or around the time of such publication. See Supplemental Brief for Respondents at 4, Didden v. Vill. of Port Chester, 127 S. Ct. 1127 (2007) (No. 06-652) ("[T]he public use determination and the filing of a condemnation petition are part of the same condemnation proceeding[.]"), available at 2006 WL 3825276. As the Court is well aware, plaintiffs here (along with Judge Levy) have flatly rejected that very argument. (See Report at 32-33 n.28; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated Jan. 5, 2007, at 25.)

In sum, the reasons plaintiffs gave, and the reasons Judge Levy accepted, for refusing to dismiss the complaint in this action as unripe do not hold up under scrutiny. Judge Levy compounded his error, moreover, by misapplying what is often described as a "prudential" aspect of the ripeness test—that is, the "hardship" prong of Abbott Laboratories. See 387 U.S. at

148-49; see also Volvo N. Am., 857 F.2d at 63 (treating the hardship inquiry as one "additional" to the basic inquiry into prematurity); City of Williams, 151 F. Supp. 2d at 13-15 (same). He concluded that the hardship prong was satisfied because "the proposed condemnations, and the consequent dispossession of plaintiffs from their homes and businesses, pose a significant threat of harm." (Report at 29.) But the question is not whether the future injury alleged will pose a hardship to plaintiffs (if it is an injury, of course it will); the question instead is whether withholding of immediate review of plaintiffs' claims at this time constitutes a present hardship. See Abbott Labs., 387 U.S. at 149 (stating that the court must "evaluate . . . the hardship to the parties of withholding court consideration"); see also id. at 152-53 (explaining that review was appropriate because the mere existence of the challenged regulation presently—that is, prior to its enforcement—placed the petitioners in a costly dilemma); Pacific Gas & Elec., 461 U.S. at 201-02 (holding that part of challenge was ripe because "postponement of decision would likely work a substantial hardship" on the plaintiffs). There is no indication that it does; nowhere in their amended complaint or their submissions to Judge Levy did plaintiffs identify any hardship they are suffering or will suffer as a result of withholding decision until an Article 4 proceeding has commenced.[6] Indeed, plaintiffs' counsel's concession that the point at which "irreparable harm" will materialize is upon or after the filing of the Article 4 petition (see Nov. 21, 2006 Tr. at 14-15) undermines any claim of present hardship.

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[6] As the ESDC Defendants explained in their first brief before Judge Levy, the underpinnings of our federal system preclude plaintiffs from claiming any supposed "hardship" resulting from their having to air their federal challenges in the state courts before those claims become ripe for adjudication in federal court. (See First ESDC Mem. at 11; see also Report at 18 n.19.) Moreover, the Second Circuit has expressly held that New York's procedures for adjudicating challenges—including federal constitutional challenges— to eminent domain fully comport with the requirements of due process. See Brody v. Vill. of Port Chester, 434 F.3d 121, 134 (2d Cir. 2005) ("We believe that the review procedure provided for by the EDPL is appropriate given the narrow role that the courts play in ensuring that the condemnation is for a public use.").

Admittedly, the case law concerning ripeness of Public Use Clause challenges to the exercise of eminent domain under the EDPL is sparse. But that is because until now only a few plaintiffs had sought to short-circuit the state process by seeking federal-court review of public use determinations. Those few cases that have been brought in federal court have been dismissed. Judge Levy's recommended ripeness ruling threatens to disrupt "the exclusive procedure," EDPL § 101, carefully crafted by New York legislators for judicial review of public use determinations by furnishing prospective condemnees with a basis for circumventing the state process and seeking federal court review of every public use determination. It threatens, in other words, to open the floodgates to the federal courts. That result not only is undesirable but runs contrary to well-established Article III ripeness jurisprudence, which makes clear that section 1983 claims such as those plaintiffs raise here do not accrue and are not ripe until the threatened constitutional injury (the proposed deprivation of property) is imminent—i.e., until the initiation of an Article 4 proceeding. For these and all of the forgoing reasons, the ESDC Defendants' respectfully object to Judge Levy's conclusion that plaintiffs' section 1983 claims are ripe for review at this time, and request that this Court not adopt that conclusion.

II. YOUNGER ABSTENTION IS WARRANTED.

Judge Levy's rejection of the ESDC Defendants' argument that Younger abstention is warranted here rested on two conclusions: (1) the adjudication of plaintiffs' claims in federal court will not directly interfere with the admittedly "judicial" EDPL § 207 proceeding that was filed by the Anderson plaintiffs and is pending in state court (see Report at 32); and (2) the administrative portion of the EDPL proceedings, which unquestionably was "ongoing" at the

time plaintiffs filed their federal suit, is not "judicial in nature" (see id. at 32-33 n.28). If either of these determinations is incorrect, Younger abstention is warranted.[7]

The ESDC Defendants are content to rest their objections to Judge Levy's Younger analysis chiefly on the arguments made in their prior submissions, but wish to bring to the Court's attention three errors of fact and law contained in the Report. First, it is incorrect that the Anderson plaintiffs "are non-condemnees" who are "not challeng[ing] the condemnation." (Report at 29, 32.) To the contrary, as tenants, they fall squarely within the definition of "condemnee" set out in EDPL § 103(C) ("'Condemnee' means the holder of any right, title, interest, lien, charge or encumbrance in real property subject to an acquisition or proposed acquisition."), and their suit unquestionably does challenge the condemnation proposed by ESDC. Although, as Judge Levy noted, the Anderson plaintiffs have purported to tailor "their petition to seek only rejection of the Determination and Findings 'with respect to the acquisition of [their own properties]'" (Report at 29), they have also requested "such other relief as to this court may be just." (Kraus Decl. Ex. A, at 1.) Moreover, the EDPL clearly requires an up-or-down judicial determination concerning the proposed project, not piecemeal adjudications pertaining to individual properties; the relevant provision states that the "court shall either confirm or reject the condemnor's determination and findings." EDPL § 207(C).

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[7] Younger abstention will also be required if, at any time before this Court commences "'proceedings of substance on the merits'" of plaintiffs' claims, Midkiff, 467 U.S. at 238 (quoting Hicks v. Miranda, 422 U.S. 332, 349 (1975)), plaintiffs file a petition under EDPL § 207 in state court. Cf. Franco v. District of Columbia, 422 F. Supp. 2d 216, 221-22 (D.D.C. 2006) (holding that two motions to dismiss and an intervening amendment to the complaint did not qualify as "proceedings of substance on the merits"); Stein v. Legal Adver. Comm. of Disciplinary Bd., 272 F. Supp. 2d 1260, 1271 (D.N.M. 2003) (holding that there had been no "proceedings of substance on the merits" in federal case where limited discovery had been ordered and no ruling had yet issued on pending motions for summary judgment); see also Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 429-30, 436-37 (1982) (stating that no "proceedings of substance on the merits" had occurred in federal court where the federal complaint had been dismissed, and that dismissal had been reversed, solely on abstention grounds; the merits had yet to be reached). (But see Report at 32 ("Plaintiffs did not commence a § 207 proceeding in the Appellate Division and their time to do so has expired.").)

Second, the Appellate Division in the pending EDPL § 207 proceeding in all likelihood will have to decide whether the Atlantic Yards Project serves a public purpose. (Cf. Report at 32 (suggesting that no such decision need be made).) Aside from averring generally that ESDC's proposed exercise of eminent domain is "unconstitutional" (Kraus Decl. Ex. A, ¶ 11), the Anderson plaintiffs have alleged that ESDC's taking of their properties will violate Article I, section 7(c) of the New York State Constitution, which prohibits the exercise of eminent domain to create a private road absent a jury determination of necessity (see id. at ¶ 10). That claim can only succeed if the Project does not serve a public use. See City of Plattsburgh v. Terrace West, Inc., 87 A.D.2d 733, 733, 448 N.Y.S.2d 343, 344 (3d Dep't 1982) (holding that N.Y. Const. art. I, § 7(c) was "plainly inapplicable" where it had "been judicially determined" that the property was being taken for a public and not a private purpose). It follows that any determination by this Court that the Project either does or does not serve a public purpose will "interfere directly with" (Report at 32) the EDPL § 207 proceeding pending in state court. Cf. Gilbertson v. Albright, 381 F.3d 965, 976 (9th Cir. 2004) (en banc) (rejecting earlier position that "the prospect that the federal court decision may influence the state court outcome through claim or issue preclusion" is insufficient to trigger Younger).

Finally, the ESDC Defendants respectfully submit that Judge Levy misunderstood the import of the Second Circuit's decision in Spargo v. New York State Commission on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003), when he concluded that it had no application here. (See Report at 33 n.28.) The ESDC Defendants argued to Judge Levy, and continue to maintain, that Spargo supports their position that abstention in favor of a unitary state administrative process integrated with state-court judicial review is required even where, as here, the "primary mission" of the administrative body is "fact-finding." (See Second ESDC Mem. at 22; First ESDC Mem.

at 23-24; Report at 33 n.28.) Judge Levy rejected that argument because, in his view, the Spargo court ruled in favor of abstention only "because the [administrative] proceedings [in that case] afforded adequate opportunity for the plaintiff to raise his constitutional claims." (Report at 33 n.28.)

That determination is incorrect in two respects. First, as the Second Circuit expressly acknowledged, two of the federal plaintiffs in Spargo had no opportunity to raise any claim—much less a constitutional challenge—in the administrative proceedings that were pending at the time the federal action commenced; they were not parties to those proceedings and had no right even to intervene therein. See Spargo, 351 F.3d at 83-85 & nn.20-21. Yet they were still barred from pursuing their claims in federal court because their "legal interests" were "sufficiently intertwined" with those of the defendant in the pending administrative proceedings. Id. at 81-82, 85-86. Second, although the court in Spargo thought that the claims raised by the federal plaintiffs likely could be raised (by one of them) during the administrative proceedings, see id. at 78, it went on to hold that even if they could not be so raised, abstention was still appropriate because the claims could be presented during subsequent judicial review of the administrative proceedings. See id. at 79 (holding that an "ability to raise constitutional claims in subsequent 'state-court judicial review of [an underlying] administrative proceeding' is sufficient" for Younger purposes) (alteration in original) (quoting Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 629 (1986)). The same is true here; the plaintiffs in the pending Article 2 proceeding, whose interests are closely "intertwined" with those of the plaintiffs in this case, see Spargo, 351 F.3d at 81-82; Hindu Temple Soc'y v. Supreme Court, 335 F. Supp. 2d 369, 375-77 (E.D.N.Y. 2004) (Dearie, J.), aff'd, 142 Fed. Appx. 492 (2d Cir. 2005), plainly "have the ability to raise" (and arguably have already raised (see Kraus Decl. Ex.

A, ¶ 11)) the very constitutional challenges to the Project that plaintiffs in the federal action seek to pursue. Indeed, the federal plaintiffs themselves could have raised those challenges before the Appellate Division, but chose instead to rush into federal court.[8]

[8] Part of Judge Levy's discussion appears to rest on a belief that unless the administrative portions of the proceedings are still ongoing at the time a court rules on Younger abstention, abstention is not proper under Spargo and like cases. (See Report at 33 n.28 (stating that there is "no proceeding currently pending" in this case).) That is incorrect; the Supreme Court has assumed—and plaintiffs have cited no case to the contrary—that certain "litigation, from agency through courts, is to be viewed as a unitary process that should not be disrupted, so that federal intervention is no more permitted at the conclusion of the administrative stage than during it." New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 369 (1989). This case involves just that kind of "unitary process."

CONCLUSION

The ESDC Defendants respectfully request that the Court adopt Judge Levy's recommended disposition of plaintiffs' claims, as well as that portion of his Report which recommends application of Burford abstention. Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72, however, they submit the foregoing objections to the balance of Judge Levy's Report.

DATED: March 9, 2007

Respectfully submitted,

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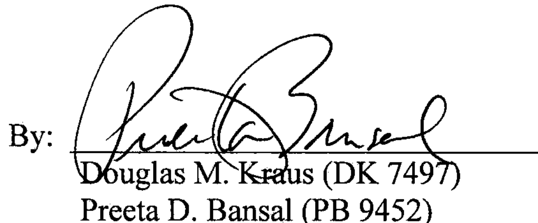

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Certificate of Service

The undersigned, an attorney duly admitted to practice law before this Court, hereby certifies under penalty of perjury, that on March 9, 2007, I caused a true copy of ***ESDC Defendants' Objections to Magistrate Judge Levy's Report and Recommendations*** to be served upon the parties on the attached service list, in the manner indicated.

Dated: New York, New York
March 9, 2007

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