UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DANIEL GOLDSTEIN *et al.*

Plaintiffs, 06-CV-5827 (NGG) (RML)

- against - ECF Case

GEORGE E. PATAKI *et al.*,

Defendants.

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AARON PILLER *et al.*,

Plaintiffs, 07-CV-0152 (NGG) (RML)

- against - ECF Case

GEORGE E. PATAKI *et al.*,

Defendants.

---x

PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE LEVY'S REPORT AND RECOMMENDATION

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TABLE OF CONTENTS

PAGE NO(s):

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. PLAINTIFFS' CLAIMS ARE RIPE 4

A. *Didden* and *Rosenthal* Control 4

B. The Threatened Deprivation of Plaintiffs' Rights Is Very "Direct and Immediate" 8

C. Defendants Arguments That Plaintiffs' Claims Will Become Ripe When an Article 4 Proceeding Is Commenced Makes No Sense 9

D. Defendants' Focus on Irreparable Harm is Misplaced 10

E. Defendants Rely on Confused Case Law That Is Not Controlling 11

II. ABSTENTION UNDER *YOUNGER V. HARRIS IS UNWARRANTED* 16

CONCLUSION 20

PRELIMINARY STATEMENT

Defendants continue to maintain that Plaintiffs' claims are both unripe and barred under the doctrine of *Younger v. Harris*. This is no small task. They set out to accomplish it by offering the following array of illogical, misguided, and/or misleading propositions:

- They claim that the Magistrate Judge here, and the district court and court of appeals in *Didden v. Village of Port Chester*, 304 F. Supp. 2d 548 (S.D.N.Y. 2004), *aff'd* , 173 Fed. Appx. 931 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1127 (2007), committed "error" that "is not binding on this Court," ESDC Br. at 2, by holding that a Public Use Clause claim accrues when the condemning agency makes its Final Determination and Findings pursuant to EDPL Article 2 – which, in this case, occurred on December 8, 2006.
- They claim that the court's analysis in *Didden* "simply cannot be squared with governing precedent," ESDC Br. at 8, but cite no precedent that calls into question *Didden*'s plainly correct accrual rule.
- They claim that "there is no federal right of action to seek federal-court review of a public use determination," yet acknowledge that Plaintiffs have "a right under section 1983 to be free from unconstitutional deprivations of property." ESDC Br. at 2-3.
- They continue to maintain that although the ESDC's Final Determination and Findings gives rise to a sufficiently justiciable Fifth Amendment Public Use Clause challenge in state court, that fact has no bearing on the question of whether the very same claim is ripe for Article III purposes.

- They maintain, in the face of overwhelming legal authority and factual evidence to the contrary, that claims brought when a injury is threatened are unripe under Article III so long as one can imagine an intervening event – *any* event – that could theoretically come to pass. The upshot of Defendants' argument is that this case is rendered unripe simply because an imaginative person could posit an alternate universe in which Defendants will suddenly have an epiphany – recognizing that the Public Use Clause and fundamental notions of representative government are incompatible with their abuse of the power of eminent domain to consummate a private business deal – and decide to scotch the Project. Anything is possible, after all.
- They conflate, or rely on cases that conflate, *Williamson*'s Prong One requirement of a final *agency* determination (which applies here and is satisfied) with *Williamson*'s Prong Two requirement that Plaintiffs pursue all avenues of state judicial relief before bringing an unjust compensation claim under the Takings Clause (which they concede has no applicability here).
- They, like the court in *Port Chester*, conflate (1) the fact that a plaintiff asserting an as-applied procedural due process claim must demonstrate that available remedies, including state court proceedings, are inadequate by first availing themselves of such proceedings, with (2) the question whether Public Use Clause plaintiffs must first pursue their federal constitutional claims in state court before the same claims become ripe in federal court.

- They conflate the "irreparable harm" a plaintiff must establish to obtain injunctive relief under Fed. R. Civ. P. 65 with "whether a perceived threat is sufficiently real and immediate to show an existing controversy" for Article III purposes.
- They warn that adopting the Magistrate Judge's ripeness determination would be "undesirable" and would "open the floodgates to the federal courts," ESDC Br. at 12, but do not explain how this is a legitimate justiciability consideration in general or ripeness factor in particular. Moreover, aside from making dire, conclusory predictions of federal courts being drowned, Defendants do not explain how this could possibly be so. It is plain that courts must give substantial deference to public use findings when made by true legislative bodies, motivated to achieve a public purpose by condemning land identified by *the government* (not the pre-selected developer) *before* any private beneficiaries are known. Surely Defendants do not envision scores of future takings initiated by wealthy and powerful real estate tycoons who conceive of mammoth developments at precise locations and then persuade executive branch officials to bypass legislative review and forcibly seize the identified parcels from private citizens without so much as considering an alternative recipient of the government's largess.
- They maintain that this Court should abstain under *Younger* to avoid effectively enjoining ongoing state proceedings, but can point to no *ongoing* state enforcement-like proceeding at all, nor indeed any civil action in which Plaintiffs, or anyone closely related to Plaintiffs, or anyone who claims rights that are "entirely derivative" of Plaintiffs, are even parties.

For these reasons, and for the reasons that follow, each of Defendants' ripeness and *Younger* objections should be rejected.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE RIPE

In objecting the Magistrate Judge's recommendation on ripeness, Defendants employ three distinct strategies.

First, they try to find a way to evade *Didden*. They cannot.

Second, Defendants defy common sense by arguing that, despite all of the facts and circumstances of this case, the threat of condemnation is too inchoate to give rise to an actual controversy appropriate for federal judicial resolution. This is so, Defendants claim, because "any number of things – forseeable or not – could happen to derail" the Project. As the Magistrate Judge observed, however, Defendants "do not suggest that there is any danger of the Atlantic Yards Project" being scuttled. Report & Recommendation ("R&R") at 28 n.24. As the Magistrate Judge also recognized, and as is confirmed by centuries of Supreme Court precedent, "the proposed condemnations, and the consequent dispossession of plaintiffs from their homes and businesses, pose a significant threat of harm," such that there exists "a real dispute between the parties." R&R at 29. This Court should reject Defendants' invitation to craft a new ripeness jurisprudence from whole cloth.

A. *Didden* and *Rosenthal* Control

As explained in the Magistrate Judge's Report and Recommendation, the court in *Didden* held, and the Second Circuit expressly affirmed, that a Public Use Clause claim in New

York accrues when a condemning agency makes its Final Determination under Article 2 of the EDPL. *See* R&R at 26-27. Because the plaintiffs in *Didden* did not file their Public Use Clause challenge until more than three years after that accrual date, their claims were deemed barred by the applicable statute of limitations.

"It stands to reason that if plaintiffs' claims accrued, for statute of limitations purposes, at the time of the government entity's public purpose finding, then their claims must have been ripe at that point." *Id.* at 27. This pronouncement by the Magistrate Judge is supported not only by common sense, but also by a formidable wall of well-established authority. *See, e.g., Santos v. District Council*, 619 F.2d 963, 968-69 (2d Cir. 1980) (holding that "a cause of action ordinarily accrues when the plaintiff could first have successfully maintained a suit based on that cause of action"); *see also Franks v. Gross*, 313 F.3d 184, 194 (4th Cir. 2002) (holding that a "cause of action accrues for purposes of the statute of limitations when it is sufficiently ripe that one can maintain suit on it"); *Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources Ltd.*, 99 F.3d 746, 756 (5th Cir. 1996) ("It is axiomatic that a claim that has not yet accrued is not ripe for adjudication."); *Whittle v. Local 641*, 56 F.3d 487, 489 (3rd Cir. 1995) (holding that for "limitations of actions, a cause accrues when it is sufficiently ripe that one can maintain suit on it"); *Gemtel Corp. v. Community Redevelopment Agency*, 23 F.3d 1542, 1545 (9th Cir. 1994) (observing that either "a cause of action has accrued, so it is ripe, or it has not yet accrued, so the complaint fails to state a claim upon which relief could be granted").

Because ripeness for adjudication purposes and accrual for limitations purposes are undeniably co-terminus (a proposition that Defendants expressly assume is correct, *see* ESDC Br. at 8), they are left with the unenviable task of attempting to deal with *Didden*, which held that

a Public Use Clause claim accrues – and thus becomes ripe – when, as in this case, a condemning agency had made its Final Determination under Article 2 of the EDPL. Defendants assert that *Didden* "runs *directly contrary* to the justiciability jurisprudence of the Supreme Court and the Courts of Appeals." Br. at 9 (emphasis supplied). The cases they cite do not support this notably bold proposition.

Defendants observe that *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), holds that a challenge to a statutory provision threatening a plaintiff with denial of permission to construct a nuclear facility is not ripe until the denial actually occurs. That obviously is correct. Plaintiffs have no quarrel with the proposition that, in most circumstances, a claim challenging a *presumed* future final agency determination is premature. Here, however, the *final* agency determination occurred on December 8, 2006 when ESDC issued its "Final Determination and Findings." *Pacific Gas* is as uncontroversial as it is irrelevant.

Defendants next rely on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *Lyons* held that a plaintiff who was once arrested and subjected to an unconstitutionally excessive police chokehold did not have standing to seek prospective injunctive relief proscribing the same conduct because he could not credibly allege both "that he would have another encounter with the police" and that "*all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter." *Id.* at 105-06 (emphasis in original). Like *Pacific Gas*, *Lyons* is entirely inapposite. Plaintiffs do not dispute that a claim is not ripe for review if it is based on an unsupported, hypothetical, or, as the Court put it in *Lyons*, "incredible" assertion that future harm will occur. Here, however, Plaintiffs' allegation that the ESDC intends to condemn their

properties imminently – which is exactly what its December 8, 2006 "Final Determination and Findings" expressly states in no uncertain terms – is anything but "incredible."

Defendants also rely on *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005). *Murphy* holds, consistent with prong one of *Williamson*, *see infra* at 11-12, that a First Amendment challenge to a zoning ordinance does not ripen until the aggrieved party first seeks relief from enforcement of the ordinance in the form of a variance from the local land use authority.

Although *Murphy*, like countless other controlling cases, unexceptionally requires a final agency decision before a constitutional challenge to a zoning claim ripens, it decidedly *does not* require that plaintiffs also must *sue* the government *in state court* alleging constitutional violations before the same claims ever becomes ripe for review in federal court. But that is what Defendants urge the court to require of Plaintiffs here.

Finally, Defendants deride the significance of *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44 (1985), *aff'g* 605 F. Supp. 612 (S.D.N.Y. 1985) (reaching merits of plaintiff's claim because condemnation was imminent after ESDC had made its final determination and findings pursuant to EDPL § 204), because it was affirmed by the Second Circuit without explicit discussion of the district court's ruling on ripeness. In doing so, Defendants ignore the well-established principle that it *is* relevant when a court assumes a case is ripe – even *sub silentio*. As the Supreme Court has held, although courts are not necessarily "bound by previous exercises of jurisdiction in cases in which [the court's] power to act was not questions but was passed *sub silentio*," neither should courts "disregard the implications of an exercise of judicial authority assumed to be proper." *Eastern Enterprises v. Apfel*, 524 U.S. 498,

522 (1998) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962)). Accordingly, it certainly is relevant that the Second Circuit affirmed the district court's ripeness holding in *Rosenthal.*

B. The Threatened Deprivation of Plaintiffs' Rights Is Very "Direct and Immediate"

Defendants struggle to manufacture the illusion that the condemnation of Plaintiffs' homes and businesses is just barely on the horizon, if at all. They refer to the "alleged future violation of [Plaintiffs'] constitutional rights." ESDC Br. at 4. They harp on the "number of procedural steps" that must take place "in advance of the actual exercise of eminent domain." *Id.* They note that the ESDC has "*up to three years*" (their emphasis) in which to commence an Article 4 proceeding following a final order in the Article 2 proceeding. *Id.* They therefore urge that "the proposed taking is not yet sufficiently imminent" to be ripe in federal court. *Id.* at 5.

Defendants are playing fast and loose with reality. The reality is that demolition for the Project *began last month. See Ratner Readies Wrecking Ball*, N.Y. Post (Mar. 2, 2007) (available at <<http://www.nypost.com/seven/03022007/news/regionalnews/ratner_readies _wrecking_ball_ regionalnews_rich_calder.htm>>); *Bruce Ratner Swings His Ball*, Daily Intelligencer (Feb. 20, 2007) (available at <<http:nymag.com/daily/intel/2007/02/bruce_ratner_ swings_his_ball_1.html>>). Forest City Ratner has already sold the Project's naming rights to Barclays (the global banking concern) for a record-breaking price of nearly $400 million. *See Barclays Buys Naming Rights to Nets Stadium*, N.Y. Sun (Jan. 19, 2007) (available at <<http://www.nysun.com/article/47005>>). Indeed, Forest City Ratner intends to *complete and*

open the flagship basketball arena *in two years*. *See Barclays and Nets Announce Partnership to Further Brooklyn Renaissance*, Forest City Ratner Press Release (Jan. 18, 2007) (available at <<http://www.barclayscenter.com/news/news.pdf>>).

Given that demolition on the Project has begun, that the naming rights to the arena have been sold, and that the arena is slated for *completion* in 2009, Defendants' claim that Plaintiffs' properties may never be condemned is disingenuous at best.

C. Defendants' Argument That Plaintiffs' Claims Will Become Ripe When an Article 4 Proceeding Is Commenced Makes No Sense

Defendants' argument that Plaintiffs' claims will become ripe once an Article 4 proceeding is *commenced*, *see* ESDC Br. at 12, makes no sense at all. Given Defendants' strained position that any conceivable contingency that might theoretically stop a condemnation proceeding renders a federal court challenge unripe, there is no logical or principled basis to conclude that Plaintiffs' claims will become ripe when an Article 4 proceeding *begins*. After all, even after an Article 4 proceeding begins, there still are – in Defendants' imagination, at least – an infinite array of circumstances that, in theory, could derail such a proceeding. The ESDC could have a change of heart. The Legislature could repeal Article 4 retroactively. Plaintiffs' properties could fall into the sea.

Why, then, do Defendants insist that Plaintiffs' claims will be ripe as soon as the Article 4 proceeding *begins*? The answer is simple: they plainly cannot argue that Plaintiffs' claims will not become ripe until their properties are actually seized – *i.e.*, at the *conclusion* of the Article 4 proceeding – because that would be absurd. Even Defendants recognize that "[o]ne

does not have to await the consummation of threatened injury to obtain preventive relief." *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). Given that Plaintiffs' claims undeniably become ripe at some point before the conclusion of the Article 4 proceeding, and given that the Article 2 proceeding concluded with finality long ago, Defendants' sole remaining option is to focus on the commencement of the Article 4 proceeding – the only readily identifiable moment between those two poles. But plainly the commencement of an Article 4 proceeding is an arbitrary line to draw, one devoid of any reasoned principle.

D. Defendants' Focus on Irreparable Harm is Misplaced

Defendants' focus on counsel's discussion of "irreparable harm" before Your Honor and Judge Levy, *see* ESDC Br. at 5, is a sleight of hand. Defendants conveniently conflate the irreparable harm question, which focuses on the *actual occurrence* of harm, with the markedly different Article III ripeness question, which asks whether a harm that has *not* occurred is sufficiently "*real*" to give rise to an actual case or controversy. The two concepts plainly are not the same, and the case law has, not surprisingly, recognized the common-sense distinction between the threshold degree of immediacy required to *hear a case in the first instance* – the ripeness question – and the substantially greater degree of immediacy required to *issue an injunction as an ultimate remedy*. *See, e.g.*, *Newell Co. v. Lee*, 950 F. Supp. 864, 868 (N.D. Ill. 1997) (finding claim ripe for adjudication under Article III, but denying motion for preliminary injunction, because "Plaintiff need not wait until defendant acts on his intention to bring an action to prevent what might well be irreparable harm").

Here, the central harm identified by Plaintiffs – the unconstitutional seizure of their property without a public purpose – admittedly will not occur until their property is actually seized. But that simply has no bearing on whether there currently is a ripe case or controversy with respect to the legality of the ESDC's *final* "Determination and Findings," through which the ESDC unambiguously expressed its final decision to condemn Plaintiffs' properties imminently. Accordingly, although it may not be necessary to issue an *injunction* until an Article 4 proceeding is commenced, surely nothing in Article III of the Constitution prevents this Court from *declaring* that the ESDC's self-described "final" decision violates the Public Use Clause.

E. Defendants Rely on Confused Case Law That Is Not Controlling

Stripped of any compelling factual or legal argument that Plaintiffs' claims are unripe, Defendants lean on a string of cases ostensibly supporting the proposition that "courts faced with the admittedly few section 1983 suits attacking proposed condemnations before any proceeding seeking transfer of title has begun have generally dismissed them as unripe." ESDC Br. at 5-6. Careful scrutiny of the cases Defendants cite – each of which rests on an interpretation of the special ripeness rule set forth in *Williamson County Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985) – reveals that none of them warrants dismissal on ripeness grounds here.

In *Williamson*, the Supreme Court established a two-prong test for determining ripeness when considering a claim asserting an unconstitutional taking under the Just Compensation Clause of the Fifth Amendment. Prong One, "paralleling the initial prong of *Abbott Laboratories*," requires that the agency's determination concerning the property must be

final or definitive. *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005) (citing *Williamson*, 473 U.S. at 186). Prong Two requires a property owner who wishes to challenge the constitutionality of the amount of compensation paid for a physical or regulatory taking to first pursue all avenues of state court relief (*e.g.*, an inverse condemnation proceeding) before filing an action alleging a violation of the Just Compensation Clause in federal court. *See Williamson*, 573 U.S. at 194.

It, of course, makes eminent sense that a federal court should not hear Just Compensation claims until a plaintiff has pursued all avenues, including state court procedures and remedies, thus finally establishing the amount of compensation to be paid. After all, only then can a federal court determine whether the final quantum of compensation is "just" as that term has been interpreted under the Fifth Amendment.

It makes no sense, however, to require a plaintiff challenging the *fact* of the threatened taking under the Public Use Clause – rather than the *amount* of compensation – to first bring that challenge in state court. The *fact* of the threatened taking is fixed and immutable at the time the agency issues its final determination. Nothing that can happen in state court can change the facts undergirding the nature of the Public Use.[1]

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[1] This is also consistent with the "fitness for judicial decision" prong form *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977). "The 'fitness of the issues for judicial decision' prong recognizes the restraints Article III places on federal courts. It requires a weighing of the sensitivity of the issues presented and *whether there exists a need for further factual development*." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005) (emphasis supplied) (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985)). The ripeness doctrine is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs.*, 387 U.S. at 148. Obviously, an action challenging the quantum of compensation under the Just Compensation Clause cannot be "fit[]
(continued...)

In their opening brief to the Magistrate Judge, Defendants correctly conceded that *Williamson* Prong Two – the state court exhaustion requirement – does not apply to Plaintiffs' Public Use Clause claims. *See* ESDC Br. (Dec. 15, 2006), at 13 n.12. Defendants now attempt to muddy the waters, however, by relying on progeny of *Williamson* for the proposition that, when confronted with cases like this one, courts "generally have dismissed them as unripe." ESDC Br. (Mar. 9, 2007), at 5. None of the cases cites by Defendants is persuasive because each of them discusses *Williamson* and then leaps to the erroneous conclusion that *Williamson* requires dismissal of Public Use Clause cases (as opposed to Just Compensation Clause cases) on ripeness grounds.[2] *See, e.g., HMK Corp. v. County of Chesterfield*, 616 F. Supp. 667, 670-71

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[1](...continued)
for judicial decision" when the primary fact needed to decide the claim, *i.e.,* the amount fixed as recompense, has not be finally determined.

[2] In a recent case, a federal district court analyzed the ripeness rule established in *Williamson* and proceeded to deny the government's motion for summary judgment. *See MHC Financing Ltd. Partnership v. City of San Rafael*, No. C 00-3785, 2006 WL 3507937, at * 6-*8 (N.D. Cal. Dec. 5, 2006). The court in *MHC Financing* found genuine issues of fact warranting a trial on the plaintiffs' Public Use Clause claims:

> Considering whether government action meets the public use requirement "is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." . . . Under the takings clause of the Fifth Amendment, a state may transfer property from one private party to another if future "use by the public" is the purpose of the taking. . . . [Plaintiffs' claim] turns on whether the City's ordinance serves a "public purpose" – a concept the Supreme Court has defined broadly. . . The ordinance's purpose in the present action – providing affordable housing – is a public purpose . . . . Despite the deference to a legislature's determination compelled by *Kelo* and *Midkiff*, the Supreme Court maintains that "[a] City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. * * * Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private

(continued...)

(E.D. Va. 1985) (holding that although "the '*Williamson County* finality doctrine' is an area of the law with which I am unfamiliar . . . and as I have admitted from the bench, *Williamson* is or may be a puzzle to me . . . [i]t appears that until the [state court] grants a fee simple title [to the condemnor], the question presented to me is not ripe"); *Eddystone Equip. & Rental Corp. v. Redevelopment Auth. of Del.*, 87 Civ. 8246, 1988 WL *52082 (E.D. Pa. May 17, 1988) (conflating final determination by state *agency* under *Williamson*'s first ripeness prong with final determination by state *court* under second prong that applies only to claims under Just Compensation Clause); *Hemperly v. Crumpton*, 708 F. Supp. 1247, 1250 (M.D. Ala. 1988) (citing *Williamson* and holding that plaintiffs could not assert that the taking of their property was not for public purpose until "defendants actually attempt to take their property"); *Urban Developers LLC v. City of Jackson*, 468 F3d 281, 294 (5th Cir. 2006) (applying *Williamson* and holding that plaintiff's *regulatory* takings claim did not satisfy either prong of *Williamson*, and explaining in *dicta* that insofar as plaintiff "may have ever alleged below an ordinary takings

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[2](...continued)
benefit." . . . In *Kelo*, the City of New London offered a "carefully considered development plan," which particularly described how the regulation would "revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront." Whereas here, the City proffers no such evidence, thereby inviting the court's inference that the ordinance simply confers a private benefit on the incumbent tenants . . . . The trial court in *Kelo* satisfied Justice Kennedy's standard through "careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer* * * [and] only incidental benefit to the City." Such an inquiry will likewise be necessary in the present action. Accordingly, the court denies the City's motion for summary judgment on MHC's private takings claim.

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

claim . . . as distinguished from . . . the regulatory takings claim, it . . . was [n]ever submitted to the jury" and "would in any event also fail the first ripeness prong").[3]

The only other case Defendants cite for the proposition that Public Use Clause claims in New York do not ripen until the Article 4 stage of the EDPL is *Port Chester Yacht Club, Inc. v. Iasillo*, 614 F. Supp. 318, 321-22 (S.D.N.Y. 1985). Although Plaintiffs' initial brief before the Magistrate Judge set forth the reasons why *Port Chester* has little bearing on the ripeness issue in this case, it is worth observing that much like the cases misapplying *Williamson* – *see HMK Corp.*, 616 F. Supp. at 670-71; *Eddystone Equip.*, 1988 WL 52082; *Hemperly*, 708 F. Supp. at 1250 – *Port Chester* also misapplies a doctrine, albeit a somewhat different one. The court in *Port Chester* dismissed the plaintiff's claims – including one procedural due process claim and, apparently, one Public Use Clause claim – by invoking the requirement that a plaintiff asserting a procedural due process claim must allege and prove that no adequate state remedy exists to redress the threat to property or liberty. *See* 614 F. Supp. at 321-22. This rule – which is peculiar to procedural due process claims – is well established. A section 1983 claim for "a violation of the Fourteenth Amendment's procedural due process guarantee. . . . . require[s] analysis of state remedies because the constitutional violation on which to base a § 1983 claim is

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[3] The *only* case Defendants cite in this context that is not infected by an erroneous reading or application of *Williamson* is *Wendy's Int'l Inc. v. City of Birminham*, 868 F.2d 433, 436-37 (11th Cir. 1989). The court in *Wendy's*, however, was careful to distinguish that case from *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), because *Midkiff* involved a circumstance where "[a]lthough condemnation proceedings had not been commenced, the state had made the statutorily required finding" and the process of acquiring the properties "was well under way." 868 F.2d at 463 n.7. That, of course, perfectly describes the case at bar. The Article 4 proceeding has not formally commenced, but the ESDC has "made the statutorily required finding" and the process of acquiring the properties is "well under way." Accordingly, *Wendy's* strongly supports the notion that Plaintiffs claims are ripe for review.

not complete until life, liberty, or property is deprived without due process of law." *Wilbur v. Harris*, 53 F.3d 542, 544 (2d Cir. 1995) (citing *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990)). There can be little doubt that the court in *Port Chester* dismissed the case on ripeness grounds because the plaintiff asserted a due process claim that was indisputably unripe. The fact that plaintiff may have also weakly asserted a Public Use Clause claim that was ripe was not even considered.[4]

II. ABSTENTION UNDER *YOUNGER V. HARRIS* IS UNWARRANTED

Plaintiffs are content to rest their response to Defendants' objections to the Magistrate Judge's conclusion that *Younger* abstention is unwarranted by relying on their prior submissions, but will briefly respond to the "three errors of fact and law" that Defendants contend the Magistrate Judge made. ESDC Br. at 13.

First, Defendants contend that the Magistrate Judge erred as a matter of fact when he observed that "the *Anderson* plaintiffs 'are non-condemnees' who are 'not challeng[ing] the condemnation.'" ESDC Br. at 13 (citing R&R at 29, 32). That would be news to the *Anderson* petitioners, who, as the Magistrate Judge correctly recognized (*see* R&R at 29), hardly could have been more clear in their petition that: "Petitioners believe that as non-condemnees,

[4] For this same reason, Plaintiffs in this case have not yet asserted a procedural due process claim challenging the EDPL's prohibition on any discovery in EDPL § 207 proceedings. While that provision has withstood a facial challenge (as defendants point out *ad nauseum*), an as applied challenge can yet be pursued based on the application of the prohibition in a particular case or class of cases, *e.g.*, when a prospective condemnee in an EDPL § 207 proceeding presents strong circumstantial evidence of an impermissible private transfer in violation of the Public Use Clause, but the EDPL prevents the condemnee from obtaining discovery and/or presenting the claim to a fact finder.

they lack standing in this proceeding to challenge the condemnation itself." *See* Declaration of Douglas M. Kraus, Esq. dated Jan. 19, 2007, Ex. A, ¶ 3.

Defendants contend that the *Anderson* petition "*unquestionably* does challenge the condemnation proposed by the ESDC." Br. at 13 (emphasis supplied). Defendants' support for this unequivocal statement – the fact that the *Anderson* petition requests "such other relief as to this court [sic] may be just," ESDC Br. at 13 (quoting *Anderson* petition) – is decidedly weak.

Of course, none of this matters because even if the *Anderson* plaintiffs were unquestionably condemnees who were making express claims for violation of the Fifth Amendment's Public Use Clause (which they are not), none of the Plaintiffs *in this case* is a petitioner in the *Anderson* case. Nor are the *Anderson* petitioners even arguably so closely related to Plaintiffs that they are legally indistinguishable. Nor are the *Anderson* petitioners' claims (however limited or broad) even arguably "entirely derivative" of Plaintiffs's claims.

Second, Defendants assert that "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," Br. at 14, and that the Magistrate Judge somehow erred when he observed that the *Anderson* proceeding "will not necessarily address or resolve the claims plaintiffs assert in this matter." R&R at 32. Defendants are off base for two reasons. First, despite their struggle to do so, Defendants cannot deny the plain fact that nobody knows whether the *Anderson* petitioners' § 207 proceeding will or will not address public use issues. The marginal distinction between Defendants' formulation ("in all likelihood will have to decide") and the Magistrate Judge's formulation ("will not necessarily address") is of no moment because the bottom line is that we just don't know, period. Second, as discussed above, it does not matter in any event what

result ensues in the *Anderson* proceeding unless there is some reason why the Plaintiffs here would be bound by that proceeding, which unquestionably is not the case.

Finally, Defendants claim 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." ESDC Br. at 14 (citing R&R at 33 n.28). He did not. Defendants rely on *Spargo* for the proposition that *Younger* should bar federal court claims made by parties against whom no state proceedings are pending. In *Spargo*, the litigants were challenging rules on judicial conduct that they alleged violated the First Amendment by inhibiting judicial candidates' speech. One plaintiff, Spargo, was a judge against whom disciplinary charges were pending.[5] The other two plaintiffs claimed to be injured by their inability to benefit from the judge's speech. The Court abstained under *Younger* on the grounds that the claims of the two plaintiffs who were not parties to the state court proceedings were "entirely derivative" of the claims of the one who was. *Id.* at 83. In other words, the two non-parties to the judicial misconduct enforcement proceeding had claims that sprang entirely from Spargo's speech.

Here, every individual plaintiff and every individual *Anderson* petitioner has asserted their own independent claims. Nothing that can happen in either action can have any binding effect in the other. Instead, like thousands of other lawsuits throughout the nation where different parties raise similar claims (or not so similar claims, as is the case here) in both state

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[5] Professional disciplinary proceedings have been held to be enforcement proceedings that implicate *Younger*. *See Middlesex County Ethics Comm.v. Garden State Bar Ass'n*, 457 U.S. 423 (1983).

and federal court, the final judicial resolution of one party's claim in one forum can have no more than a persuasive effect on the judicial resolution of the other party's claims in the other forum.

Because Plaintiffs' claims in this action are in no way derivative of the *Anderson* petitioners' claims in state court – let alone entirely so – the Magistrate Judge correctly concluded that *Spargo* has no application here.

CONCLUSION

Defendants' objections to Magistrate Judge Levy's Report and Recommendation should be overruled.

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