UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiffs,

06-CV-5827 (NGG) (RML)

- against -

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

Defendants.

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SUPPLEMENTAL EDPL CLAIMS

TABLE OF CONTENTS

PAGE NO(s):

TABLE OF AUTHORITIES

CASES: **PAGE NO(s):**

PRELIMINARY STATEMENT

A lawyer's obligation to acknowledge controlling contrary authority is often honored in the breach, but Defendants' motion to dismiss Plaintiffs' supplemental state law claims is pushing the envelope. Although there are a few district court cases supporting some of their arguments, Defendants fail to cite multiple lines of United States Supreme Court and Second Circuit authority that, as Defendants surely know, squarely refute their strained claims.

Defendants' failure to grapple with *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), is baffling – especially given that Plaintiffs cited it both in their previous opposition brief and in their January 5, 2007 letter informing the Court that Plaintiffs had amended their Complaint to add supplemental state law claims under Eminent Domain Procedure Law ("EDPL") § 207. The notion that this Court lacks supplemental jurisdiction over those state law claims cannot possibly survive *City of Chicago*, the unambiguous holding of which is that 28 U.S.C. § 1367 means exactly what it says, and that the notably broad plain language of that statute encompasses state law claims for so-called "on-the-record" review of state administrative agency decisions.

To be sure, notwithstanding the fact that this Court unquestionably has jurisdiction over Plaintiffs' EDPL claims, this Court does have discretion to decline to hear supplemental state law claims under certain specifically delineated and very narrow circumstances. Tellingly, however, Defendants' plea for this Court to exercise such discretion fails to acknowledge an abundance of well-established cases making clear that courts are *obligated* to hear claims over which they have supplemental jurisdiction except under "truly

compelling circumstances." *See Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 215 (2d Cir. 2004); *Itar-Tass Russian News Agency v. Russian Kurier*, 140 F.3d 442, 445-48 (2d Cir. 1998).

Defendants' lone argument that such "truly compelling circumstances" exist in this case is the fact that EDPL § 207(B) says that jurisdiction over such claims is "exclusive" in the New York Appellate Division. Although Defendants do cite district court cases that have accepted this argument, they fail to mention more than a century of United States Supreme Court case law making unmistakably clear that it would be anathema to our constitutional structure to permit a state to dictate whether or when a federal court may assert jurisdiction over a supplemental state law claim. *See, e.g., Marshall v. Marshall*, 126 S. Ct. 1735, 1749 (2006) (holding that federal jurisdiction "is determined by the law of the court's creation and cannot by defeated by the extraterritorial operation of a state statute"); *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270, 286 (1872) ("Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.").

Stripped of any argument that can be reconciled with controlling precedent, Defendants resort to rhetoric suggesting that Plaintiffs have manipulated procedural rules in a "transparently calculated" effort to "circumvent the EDPL process." ESDC Br. at 6. But it is Defendants, not Plaintiffs, who have engaged in unabashed procedural gamesmanship. In their opening brief, Defendants sought to evade the obvious and inescapable conclusion that a federal court can hear Plaintiffs' federal constitutional claims by urging *Younger* abstention based on the theoretical possibility of a state court proceeding that did not yet exist. Now that it is clear that

such a state proceeding will never exist – because Plaintiffs' state law claims are properly before this Court, as confirmed by copious Supreme Court case law that they would prefer to ignore – Defendants cry foul. We understand their frustration that their attempt to avoid the merits of Plaintiffs claims by concocting a *Younger* defense is not viable, but Defendants' accusation that Plaintiffs have engaged in improper procedural manipulation is as ironic as it is unfounded.

For all of these reasons, Defendants' motion to dismiss Plaintiffs' EDPL claims should be denied.

ARGUMENT

I. PLAINTIFFS' FOURTH CAUSE OF ACTION SHOULD NOT BE DISMISSED

A. The Plain Language of 28 U.S.C. § 1367 and Controlling Case Law Make Clear That This Court Has Supplemental Jurisdiction Over Plaintiffs' State Law Claims

This Court has supplemental jurisdiction over Plaintiffs' claims under EDPL § 207. Defendants' argument to the contrary cannot be reconciled with the plain language of 28 U.S.C. § 1367 (which they begrudgingly acknowledge) or with controlling United States Supreme Court precedent (which they studiously ignore).

Section 1367 provides that where a federal court has original jurisdiction over a federal claim (such as Plaintiffs' Public Use Clause claim in this case), the court likewise has supplemental jurisdiction over:

> *all other claims* that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (emphasis supplied). This language makes unmistakably clear that the scope of a federal court's supplemental jurisdiction over related state claims is very broad: once there is federal jurisdiction over a federal claim, there also is federal jurisdiction over "all other" claims that are sufficiently "related to" the federal claim that they "form part of the same case or controversy."

It cannot seriously be disputed that Plaintiffs' EDPL claims meet this notably modest standard. The gravamen of Plaintiffs' EDPL claims is that ESDC's decision to condemn Plaintiffs' property violates the federal Constitution and serves no public use. *See* Amended Cplt. ¶¶ 176-177; *see also* EDPL §§ 207(C)(1), (C)(4). It would be ludicrous to suggest that such claims are not "related to" or that they do not "form part of the same case or controversy as" Plaintiffs' Public Use Clause claim. Indeed, it is telling that Defendants expressly contend that Plaintiffs' claim under EDPL § 207(C)(1) is not just "related to" but *identical to* Plaintiffs' Public Use Clause claim, such that – according to Defendants – it should be dismissed as *redundant* under Rule 12(f). *See* ESDC Br. at 8, 13. Obviously, if a supplemental state claim is so similar to a federal claim that it allegedly should be dismissed as redundant under Rule 12(f), then such a state claim is, *ipso facto*, "related to" and "form[s] part of the same case or controversy" as the federal claim for purposes of section 1367(a).[1]

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[1] Defendants' suggestion that Plaintiffs' federal constitutional claims brought pursuant to EDPL § 207 are "entirely duplicative" of their federal constitutional claims brought under 42 U.S.C. § 1983 and thus should be stricken pursuant to Fed. R. Civ. P. 12(f), *see* ESDC Br. at 8, 13, is wrong. To be sure, EDPL § 207 is an enabling statute, creating a right of action for federal and state constitutional claims ((C)(1)), while at the same time it also creates substantive rights and claims ((C)(2-4)). That said, however, there is nothing inappropriate, duplicative, or redundant about bringing federal constitutional claims pursuant to two very different enabling statutes, *i.e.* 42 U.S.C. § 1983 and EDPL § 207. This is particularly so here because the two

(continued...)

Lest there be any confusion about whether section 1367(a) means what it says, the United States Supreme Court squarely so held in *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997). *City of Chicago* involved a decision by the Chicago Landmarks Commission prohibiting a developer from demolishing two landmarked mansions. The developer sued the Commission in state court, claiming that the Commission's decision violated both the Takings Clause of the federal Constitution and the Illinois Administrative Review Law, which provides for so-called "on-the-record" judicial review of state administrative agency decisions. The Commission removed the entire case to federal court, contending that the federal court has supplemental jurisdiction under section 1367(a) over the state claim for administrative review of the Commission's determination. The Seventh Circuit held that the case should be remanded back to state court for lack of subject matter jurisdiction, but the Supreme Court reversed. Relying on the plain language of section 1367, the Supreme Court concluded that the developer's unsuccessful efforts to obtain demolition permits – the focus of its state claim for administrative review – did "form part of the same case or controversy" as its federal Takings

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[1](...continued)
statutes give rise to different remedies. Most importantly, unlike 42 U.S.C. § 1983, a federal constitutional claim brought pursuant to EDPL § 207 gives rise to an automatic stay of any EDPL Article 4 condemnation proceedings. *See* EDPL § 401(A) ("condemnor may commence proceedings under this article . . . after the conclusion of the later of: . . . (3) the entry of the final order or judgment on judicial review pursuant to section two hundred seven of this chapter"). The two claims thus are anything but duplicative. Moreover, even if the claims were redundant, Rule 12(f) is not the device for such an argument. *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) (holding that "courts should not tamper with the pleadings [by granting a motion to strike pursuant to Fed. R. Civ. P. 12(f)] unless there is a strong reason for so doing") (citations omitted); *Sluberski v. Lakeside Manor Home For Adults*, No. 96 Civ. 2689, 1996 WL 1088902, at *4 (E.D.N.Y. Nov. 19, 1996) (denying motion to strike allegedly redundant causes of action); *see also Arias-Zeballos v. Tan*, No. 06 Civ. 1286, 2006 WL 3075528 (S.D.N.Y. Oct. 26, 2006) (denying motion to strike allegedly redundant material).

Clause claim. *Id.* at 164-65. As the Court stressed, "[t]hat is all the statute requires to establish supplemental jurisdiction." *Id.* at 165.

The Court then went a significant step further, considering and expressly rejecting the argument that, for policy reasons, section 1367 should be read to exclude claims for so-called "on-the-record review" (*i.e.*, deferential review without additional court factfinding) of a state administrative agency's action. Focusing once again on the plain language of the supplemental jurisdiction statute, the Court held that the statutory language precluded any such exception:

> There is nothing in the text of § 1367(a) that indicates an exception to supplemental jurisdiction for claims that require on-the-record review of a state or local administrative determination. Instead, the statute generally confers supplemental jurisdiction over "all other claims" in the same case or controversy as a federal question, without reference to the nature of review.

Id. at 169; *see also id.* at 171 (noting the "absence of indication in § 1367(a) that the nature of review bears on whether a claim is within a district court's supplemental jurisdiction"). The Court then went on to hold that although Congress is free to decree otherwise, courts are not free to craft a jurisdictional exception that does not appear in the statute:

> Congress could of course establish an exception to supplemental jurisdiction for claims requiring deferential review of state administrative decisions, but the statute, as written, bears no such construction.

Id. at 169.

Given the Court's opinion in *City of Chicago*, it is difficult to understand how Defendants can argue that this Court lacks supplemental jurisdiction to entertain Plaintiffs' claims for on-the-record review of the ESDC's condemnation determination under EDPL § 207.

It is even more difficult to understand how Defendants can make such an argument without so much as citing *City of Chicago*.

To be sure, Defendants cite three lower court cases (*Cartagena I*, *Blatch*, and *Gill*) which have held that federal courts lack supplemental jurisdiction over claims arising under Article 78 of the New York CPLR. *See* ESDC Br. at 9. None of these cases, however, cited – much less discussed or distinguished – *City of Chicago*, presumably because the parties in those cases failed to bring *City of Chicago* to the courts' attention. Given the undeniable applicability of *City of Chicago* to the question presented, the cases cited by Defendants are simply wrong and should be ignored. Notably, those lower court case that *have* considered *City of Chicago* have concluded that federal courts *can* assert supplemental jurisdiction over Article 78 claims. *See Casale v. Metropolitan Transp. Auth.*, No. 05 Civ. 4232, 2005 WL 3466405, at *5-*7 (S.D.N.Y. Dec. 19, 2005); *Nevares v. Morrisey*, No. 95 Civ. 1135, 1998 WL 265119, at *4 (S.D.N.Y. May 22, 1998).[2]

Finally, Defendants argue that, notwithstanding the plain language of section 1367(a), this Court lacks supplemental jurisdiction over Plaintiffs' state law claims because EDPL § 207(B) states that the "jurisdiction of the appellate division of the supreme court shall be exclusive." *See* ESDC Br. at 9, 10, 11. Defendants begrudgingly acknowledge, however, that the Second Circuit has held that "there would be substantial doubt as to the constitutionality of a

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[2] Defendants' reliance on *Town of Haverstraw v. Barreras*, 36 F. Supp. 2d 317 (S.D.N.Y. 2005), *see* ESDC Br. at 12, is similarly misplaced. As Defendants recognize, *Barreras* was a EDPL Article 4 case, not an Article 2 case. Unlike in Article 2 cases, where federal constitutional claims can be raised, constitutional defenses cannot be raised in Article 4 condemnation proceedings. *See* EDPL § 208; *Brody v. Village of Port Chester*, 345 F.3d 103, 113 (2d Cir. 2003). For this reason, there plainly was no federal removal jurisdiction in *Barreras* under 28 U.S.C. § 1331, under 28 U.S.C. § 1367, or otherwise.

state law purporting to preclude federal court [supplemental] jurisdiction over a state-created claim." *TBK Partners v. Western Union Corp.*, 675 F.2d 456, 460 n.3 (2d Cir. 1982) (cited in ESDC Br. at 10 n.6). As the Second Circuit observed in *TBK Partners*, the United States Supreme Court has long recognized that a state is powerless to dictate the limits of federal court jurisdiction, even over claims that the state itself created:

> Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.

675 F.2d at 460 n.3 (quoting *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270, 286 (1872)). Indeed, the Supreme Court unanimously reaffirmed this bedrock principal of federal supremacy less than one year ago in *Marshall v. Marshall*, 126 S. Ct. 1735, 1741, 1749 (2006) (observing that courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," and holding that federal jurisdiction "is determined by the law of the court's creation and cannot by defeated by the extraterritorial operation of a state statute") (quotations omitted). Accordingly, there is no doubt that this Court has supplemental jurisdiction over Plaintiffs' EDPL claims regardless of what section 207(B) purports to say about "exclusive" jurisdiction.[3]

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[3] Defendants suggest, though only in passing, that this constitutional rule – that a state may not create a claim and then strip the federal courts of jurisdiction to hear it – only applies where the state jurisdictional provision at issue appears outside of the statute creating the claim. *See* ESDC Br. at 10 n.6. In addition to their failure to cite any authority supporting this proposition, Defendants offer no logical reason why the power of a state to limit a federal court's jurisdiction over a state claim could possibly rise or fall on the jurisdictional provision's location in the state code.

B. There Is No Basis for Discretionary Dismissal of Plaintiffs' EDPL Claims

Apparently recognizing that their argument that this Court is powerless to hear Plaintiffs' EDPL claims is belied by multiple lines of well-established Supreme Court case law, Defendants retreat to the more modest (but equally meritless) position that this Court should, in its discretion, voluntarily decline to hear Plaintiffs' state law claims. Defendants contend that this Court has such discretion under 28 U.S.C. § 1367(c)(4), which provides that courts "may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . in *exceptional circumstances*, there are . . . *compelling reasons* for declining jurisdiction" (emphasis supplied). In making this argument, Defendants once again fail to acknowledge controlling case law.

In *Itar-Tass Russian News Agency v. Russian Kurier*, 140 F.3d 442 (2d Cir. 1998), the Second Circuit exhaustively analyzed the circumstances under which a court has discretion to decline to exercise supplemental jurisdiction under section 1367(c). The fundamental question in *Itar-Tass* was whether the old common law supplemental jurisdiction standard espoused in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), survived Congress's 1990 enactment of section 1367. In other words, the question was whether courts are free to decline to exercise supplemental jurisdiction based on the common law *Gibbs* factors – including "the values of judicial economy, convenience, fairness, and comity" – or whether courts may only decline to exercise supplemental jurisdiction based on the carefully delineated factors set forth in the language of section 1367(c). After thoroughly examining the structure and language of the statute, its legislative history, and the relative persuasiveness of conflicting case law from other circuits, the Second Circuit squarely held that the 1990 codification of section

1367 "transformed the *Gibbs* analysis in important respects," and that "the discretion to decline supplemental jurisdiction is available *only if founded upon an enumerated category of subsection 1367(c)*." 140 F.3d at 445-48 (emphasis added).

Defendants do not argue, nor could they, that this Court has authority to decline jurisdiction under any of the prongs of section 1367(c) other than the catch-all set forth in (c)(4). Plaintiffs EDPL claims plainly do not "raise a novel or complex issue of State law" per (c)(1); they do not "substantially predominate[] over the [federal] claim[s]" per (c)(2); and the court has not "dismissed all claims over which it has original jurisdiction" per (c)(3). The *only* question for this Court to decide, therefore, is whether there are "exceptional circumstances" that provide a "compelling reason[] for declining jurisdiction" per (c)(4). *See* ESDC Br. at 10-11.

With respect to the breadth of this Court's discretion under the "exceptional circumstances" prong in (c)(4), *Itar-Tass* once again is controlling. In *Itar-Tass*, the Second Circuit made unmistakably clear that subsection (c)(4) is to be read narrowly, and that courts must not decline to exercise jurisdiction under (c)(4) except in the most unusual circumstances:

> The use of "exceptional circumstances" indicates that "Congress has sounded a note of caution that the basis for declining jurisdiction should be extended beyond the circumstances identified in subsections (c)(1)-(3) only if the circumstances are quite unusual." In other words, declining jurisdiction outside of 1367(c)(1)-(3) appears as the exception rather than the rule. Thus, federal courts "must ensure that the reasons identified as 'compelling' are not deployed in circumstances threatening this principle."

140 F.3d at 448 (quoting *Executive Software N. Am. v. United States Dist. Court*, 24 F.3d 1545, 1558 (9th Cir. 1994)). Applying this principle, the Second Circuit reversed as an abuse of discretion Judge Koeltl's decision to decline to exercise supplemental jurisdiction over an

attorney's state law claim for unpaid attorneys' fees incurred in prosecuting the federal question claims at issue in that very case.

Following *Itar-Tass*, courts in the Second Circuit routinely refuse to decline to exercise supplemental jurisdiction over state law claims based on the "exceptional circumstances" prong set forth in section 1367(c)(4). *See, e.g., Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 215 (2d Cir. 2004) (vacating refusal to exercise supplemental jurisdiction under (c)(4) and reminding the district court of *Itar-Tass*'s "caution" that there must be "*truly compelling* circumstances that militate against exercising jurisdiction") (emphasis added); *Treglia v. Town of Manlius*, 313 F.3d 713, 722-23 (2d Cir. 2002) (reversing as abuse of discretion refusal to exercise supplemental jurisdiction in violation of *Itar-Tass*); *Mendez v. Roman*, No. 3:05 Civ. 1257, 2006 WL 276976, at *2 (D. Conn. Feb. 2, 2006) (finding "no reason for declining jurisdiction that can be considered truly compelling"); *Green Hills (USA), LLC v. Aaron Street, Inc.*, 361 F. Supp. 2d 81, 88 (E.D.N.Y. 2005) (noting the Second Circuit's "expansive approach" to supplemental jurisdiction under *Itar-Tass*); *United States Fire Ins. Co. v. United Limousine Serv.*, 328 F. Supp. 2d 450, 454 (S.D.N.Y. 2004) (holding that under *Itar-Tass*, (c)(4) is to be applied only when "circumstances are quite unusual"); *Hutchinson v. United States*, No. 01 Civ. 1198, 2004 WL 350576, at *4 (E.D.N.Y. Feb. 20, 2004) (reaffirming that under *Itar-Tass*, dismissal under (c)(4) is "quite unusual").

Rather than acknowledge and grapple with this formidable wall of authority, Defendants rely on a line of cases – particularly Judge Cote's recent opinion in *Morningside Supermarket Corp. v. New York State Dept. of Health*, 432 F. Supp. 2d 334 (S.D.N.Y. 2006) – declining to exercise supplemental jurisdiction over state law claims brought under Article 78.

See ESDC Br. at 8-11. Notably, however, none of these cases – not a single one – so much as cites *Itar-Tass*, *City of Chicago*, or any of their progeny, much less explains how adjudicating an Article 78 claim would present the "truly compelling circumstances" that the Second Circuit case law clearly requires before a court can decline to hear a related state law claim. Because these cases ignore controlling authority and fail to apply the correct legal standard, they are wrongly decided and do not dictate the outcome here.

Nor is there any merit to Defendants' argument that the purported "exclusivity provision" in EDPL § 207(B) constitutes a "truly compelling circumstance" for purposes of section 1367(c)(4). *See* ESDC Br. at 10, 11-12. To begin with, nothing in the language of section 207(B) suggests that the New York Legislature intended to strip federal courts of jurisdiction to review eminent domain determinations by state agencies. To the contrary, the statutory language merely makes clear that such claims, to the extent they are brought in state court, must be brought in the Appellate Division rather than in New York Supreme Court. *See Brown v. City of Memphis*, 440 F. Supp. 2d 868, 878 n.5 (W.D. Tenn. 2006) (reading similar exclusive jurisdiction language in a Tennessee statute "to pertain to the relationship between the state circuit courts and the general session courts," which has "no bearing on federal court jurisdiction").[4]

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[4] This point is driven home even further by Defendants' reliance on language in EDPL § 207(A) stating that related EDPL challenges should be consolidated with the first filed. *See* ESDC Br. at 12. The first part of the relevant sentence in section 207(A), which Defendants purposefully omitted from their quotation, makes clear that the first-filed consolidation rule applies only to cases brought in different *state court* "judicial departments," and has nothing whatsoever to do with whether an EDPL claim can or cannot be brought as a supplemental claim in federal court.

Moreover, even assuming *arguendo* that section 207(B) made clear that those claims cannot be brought in federal court – which it does not – any such purported jurisdiction-stripping provision would be void. As discussed in the previous section, it is well established that the State of New York has no constitutional authority to decree, in the face of the plain language of section 1367, that federal courts may not exercise supplemental jurisdiction over related state claims. *See Marshall v. Marshall*, 126 S. Ct. 1735, 1741, 1749 (2006); *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270, 286 (1872); *TBK Partners v. Western Union Corp.*, 675 F.2d 456, 460 n.3 (2d Cir. 1982). Given that 207(B) would be void if it meant what Defendants say it means, such an unconstitutional proclamation certainly could not constitute the kind of extraordinary circumstance required to decline to exercise supplemental jurisdiction under section 1367(c)(4).

The Sixth Circuit's decision in *Gregory v. Shelby County*, 220 F.3d 433 (6th Cir. 2000), does not require a contrary result. First, *Gregory* did not apply the "truly compelling circumstances" standard required by *Itar-Tass* and its progeny, which of course is not binding on the Sixth Circuit. Moreover, the cursory analysis in *Gregory* (barely two sentences, *see id.* at 446) did not even begin to consider any of the copious case law making clear that states lack constitutional authority to dictate the scope of supplemental federal court jurisdiction over state law claims. Indeed, at least one post-*Gregory* district court within the Sixth Circuit boldly refused to follow *Gregory* precisely because *Gregory* failed to consider the constitutional ramifications of declining to exercise jurisdiction. *See Brown v. City of Memphis*, 440 F. Supp. 2d 868, 876-78 (W.D. Tenn. 2006) (refusing to follow *Gregory*, after a thorough analysis of the underpinnings of section 1367 and the Supreme Court's Supremacy Clause jurisprudence,

because "State legislatures are powerless to impose jurisdictional constraints upon the federal judiciary," and because refusing to exercise supplemental jurisdiction due to the language in a state statute "would be to imply that a state could nullify two centuries of case law and an entire federal statute on the subject of supplemental jurisdiction by merely expressing a preference that all state law controversies be kept 'in-house'").

C. Plaintiffs' State Law Claims Should Not Be Dismissed On The Merits

In response to Defendants' argument that Plaintiffs' EDPL claims should be dismissed as unripe, for failure to state a claim, and on abstention grounds, *see* ESDC Br. at 13, Plaintiffs generally refer the Court to their prior opposition brief, which set forth all of the reasons why Plaintiffs have stated viable claims that the Project violates the Public Use Clause, the Equal Protection Clause, and the Due Process Clause.[5] But a few specific issues merit brief attention.

First, it is axiomatic that, unless this Court first exercises supplemental jurisdiction over Plaintiffs' EDPL claims and then rejects them on their merits, this Court cannot possibly dismiss those claims with prejudice as Defendants urge. *See* ESDC Br. at 12. No dismissal for want of jurisdiction can ever be made on the merits with prejudice.

Second, Defendants' contention that Plaintiffs' EDPL claims are unripe because this Court's jurisdiction is constrained by Article III of the Constitution is plainly foreclosed by *Didden v. Village of Port Chester*, 332 F. Supp. 2d 385, 388-89 (S.D.N.Y. 2004) (dismissing Fifth Amendment Public Use Clause claim on statute of limitations grounds because that claim

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[5] Plaintiffs withdraw their claim under EDPL § 204(A) (*see* Amended Cplt. ¶ 178).

accrued when condemning authority issued it final determination under EDPL § 204), *aff'd*, 173 Fed. Appx. 931 (2d Cir. 2006), *cert. denied,* 2007 WL 91474 (Jan. 16, 2007). Obviously, a claim cannot accrue for statute of limitations purposes and yet still be unripe. Defendants' ripeness argument is therefore frivolous.

Third, whether Defendants "vigorously contest" it or not, ESDC Br. at 7, were this Court to decline to exercise supplemental jurisdiction, Plaintiffs' time to file their EDPL § 207 claims in state court would undoubtedly be tolled "while the claim is pending and for a period of 30 days" after dismissal. 28 U.S.C. § 1367(d). The Supreme Court has made clear that no state legislature, court, agency, or instrumentality (such as ESDC) has the power to provide otherwise. *See Jinks v. Richland County*, 538 U.S. 456, 461-65 (2003) (rejecting constitutional challenge to the power of Congress to extend the time to file a state court claim pursuant to 28 U.S.C. § 1367(d)).

Finally, this Court should not be dissuaded from applying controlling law by Defendants' histrionic policy arguments, such as that "federal courts will be flooded with state EDPL proceedings'" or that "New York State's carefully calibrated legislative scheme . . . will [be]. . . completely undermined." ESDC Br. at 7-8. Ten years ago, when the Supreme Court decided *City of Chicago*, the two dissenting Justices worried that "[a]fter today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." 522 U.S. at 175. Ten years of practice have demonstrated that those fears were unwarranted.

CONCLUSION

For all the foregoing reasons, Defendants' motions to dismiss Plaintiffs' state law claims should be denied.

Dated: January 26, 2007
New York, New York

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