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Plaintiffs concede that the violation they allege—the unconstitutional deprivation of their properties—“admittedly will not occur until their property is actually seized.” (Plaintiffs’ Memorandum of Law in Response to Defendants’ Objections to Magistrate Judge Levy’s Report and Recommendation, dated March 23, 2007 (“Pl. Response”), at 11.) They insist, however, that that fact “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.’” (*Id.* (emphasis added).)

Therein lies the weakness of plaintiffs’ position. There is no right under federal law to obtain review of the “legality” of a public use determination. Indeed, even plaintiffs do not dispute that the core claim they actually assert—a claim brought pursuant to 42 U.S.C. § 1983 (“section 1983”) alleging a future violation of the right to be free from unconstitutional takings of property—cannot be adjudicated in federal court until a deprivation of property is “certainly impending.” Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council, 857 F.2d 55, 63 (2d Cir. 1988) (quotation marks and citation omitted).

As the ESDC Defendants explained in their Objections to Magistrate Judge Levy’s Report and Recommendation, dated March 9, 2007 (“ESDC Objections”), it is not until a prospective condemnor acts upon its public use determination by moving to acquire a plaintiff’s property that a right of review under section 1983 materializes. Plaintiffs’ response to the ESDC Objections fails to grapple with this. Their arguments fall into three categories: First, plaintiffs assert that because ESDC has issued its Determination and Findings, there has been a “final agency decision” sufficient to justify federal-court interference with the state condemnation process. Second, they insist that the steps remaining in that process—and the undeniable fact that, in view of those remaining steps, there is no imminent risk of harm—are irrelevant to the

ripeness question because “[t]he fact of the threatened taking is fixed and immutable at the time the agency issues its final determination.” (Pl. Response at 12 (their emphasis).) Finally, they deny the existence of any requirement that they demonstrate hardship as a result of delayed adjudication. Woven through these legal contentions is the factual suggestion that the taking has, in effect, already begun.

As demonstrated below, each of these responses lacks merit.

I. RIPENESS IN THIS CONTEXT DOES NOT TURN ON THE FACT OF A “FINAL AGENCY DECISION.”

Plaintiffs’ first legal error stems from a mistaken premise that a defendant agency’s “final decision” triggers federal-court review in this context. The fact of a final agency decision may render a claim ripe in a regulatory takings case brought under the Public Use Clause, or in a regulatory takings case brought under the Just Compensation Clause after state-court avenues for seeking compensation have been fully pursued. See Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 190-94 (1985). That is because, in such cases, it is the decision itself that effects the alleged taking, by immediately depriving the plaintiff property owner of a substantial use of his or her land.

That is not the case in situations involving physical takings arising from the exercise of eminent domain. Unlike plaintiffs in regulatory takings cases, plaintiffs here do not allege—nor could they—that any “final agency decision” presently deprives them of their property or the use of it. ESDC’s December 8, 2006 Final Determination and Findings, which concluded that the proposed Atlantic Yards Project will serve a public use, did not in itself effect a taking of any kind. Nor was it the last, or even a near-to-last, step in the ongoing state process that may eventually result in the proposed physical taking. That is why, as the ESDC Defendants have argued, the threat of the alleged constitutional violations for which plaintiffs in

condemnation cases in New York may seek redress in federal court does not become imminent until the condemnor initiates title proceedings under EDPL Article 4.¹

That is also why the district court's reasoning in Didden v. Village of Port Chester, 304 F. Supp. 2d 548 (S.D.N.Y. 2004), and 322 F. Supp. 2d 385 (S.D.N.Y. 2004), aff'd, 173 Fed. Appx. 931 (2d Cir. 2006), cert. denied, 127 S. Ct. 1127 (2007), is impossible to square with governing precedent. The Didden court took the view that a section 1983 claim predicated on an alleged future violation becomes ripe the moment the plaintiff is "expose[d] to the prospect of" such violation. 304 F. Supp. 2d at 559. But as demonstrated in the ESDC Objections, that position is at odds with the Supreme Court's decisions in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), and Pacific Gas & Electric Co. v. State Energy Resources Conservation Development Commission, 461 U.S. 190 (1983), and the Second Circuit's decision in Volvo North America, 857 F.2d 55. Those cases make clear that a federal court lacks jurisdiction to consider a claim until the threat of a violation is "certainly impending." Id. at 63 (quotation marks and citation omitted); see Abbott Labs., 387 U.S. at 152 (holding that a claim is not ripe until the threatened deprivation is "sufficiently direct and immediate"); Pacific Gas, 461 U.S. at 203.

The Supreme Court's decision in Pacific Gas illustrates the point. In that case, a challenge to a statute authorizing denial of permission to construct a nuclear facility was held to

¹ Plaintiffs' attempts to import the final agency decision analysis from the regulatory takings context is all the more peculiar because they attack others for doing just that. Plaintiffs' principal criticism of the analyses in HMK Corp. v. Chesterfield County, 616 F. Supp. 667 (E.D. Va. 1975), Eddystone Equipment & Rental Corp. v. Redevelopment Authority, No. 87 Civ. 8246, 1988 WL 52082 (E.D. Pa. May 17, 1988), aff'd, 862 F.2d 307 (3d Cir. 1988), Hemperly v. Crumpton, 708 F. Supp. 1247 (M.D. Ala. 1988), and Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir. 2006), is that the courts in those cases blindly applied Williamson County's ripeness test to claims challenging exercises of eminent domain. (See Pl. Response at 13-14.) In fact, all of those cases applied the general ripeness principle from which Williamson County's first prong is drawn. None made the mistake plaintiffs make here—viz., portraying final agency action as the touchstone for ripeness in non-regulatory takings cases.

be unripe even though the agency's authority to issue the denial and its intent to exercise that authority in the future were unquestioned. See id. at 197, 203 & n.16. In other words, notwithstanding that the plaintiff was "expose[d] to the prospect of" the denial, the Court held that there was no jurisdiction. Plaintiffs' only attempt to distinguish Pacific Gas rests on their plainly erroneous assumption, discussed above, that the final agency decision in this case actually effectuates the unconstitutional deprivation about which they complain. (See Pl. Response at 6 ("Here, however, the final agency determination occurred on December 8, 2006, when ESDC issued its 'Final Determination and Findings.'") (their emphasis).) Once one strips away that untenable assumption, and (properly) views the agency's unexercised authority to deny permission in Pacific Gas as the doctrinal equivalent of the un-acted-upon Determination and Findings in this case, plaintiffs have effectively conceded that "a claim challenging a presumed" future violation "is premature." (See id. (their emphasis).)

It should be emphasized, finally, that the point at which the ESDC Defendants submit plaintiffs' claims will become ripe—viz., upon initiation of an EDPL Article 4 proceeding, at a minimum—is hardly "arbitrary." (Id. at 10.) To the contrary, it is the very point of justiciability identified in other cases involving similar claims—including one case that plaintiffs acknowledge adopted the correct analysis. See Wendy's Int'l Inc. v. City of Birmingham, 868 F.2d 433, 436-37 (11th Cir. 1989) (per curiam) (discussed, Pl. Response at 15 n.3.). "[R]ipeness is peculiarly a question of timing," Regional Rail Reorganization Act Cases, 419 U.S. 102, 140 (1974), and, as the Wendy's court explained, "the threat of condemnation simply is too attenuated to stir up an actual controversy" in circumstances where the prospective condemnor has not yet "brought condemnation proceedings against" the subject property. Wendy's Int'l, 868 F.2d at 435-36; see also, e.g., Aaron v. Target Corp., 269 F. Supp. 2d 1162,

1176 (E.D. Mo. 2003) (holding that claims were ripe “because the pending state court condemnation action constitute[d] a manifest and palpable threat” of a taking), rev’d on other grounds, 357 F.3d 768 (8th Cir. 2004).²

II. PLAINTIFFS HAVE NOT MET THE BURDEN OF PROVING THEIR CLAIMS ARE RIPE.

Aside from their erroneous focus on a “final agency decision,” plaintiffs commit another major error. They assert that “[t]he fact of the threatened taking is fixed and immutable at the time the agency issues its final determination under the EDPL” (Pl. Response at 12 (emphasis omitted)), and that their takings claim is therefore ripe at the point the public use determination is made—no matter how long it will take to act upon that determination or how many procedural hurdles must be cleared before such action is even permitted. Relatedly, they suggest that it falls upon defendants to identify some specific event or occurrence, aside from the procedural steps of the EDPL itself, that will intervene to frustrate the goal of eventual condemnation. Defendants, in plaintiffs’ view, must prove the absence of inevitability. (See id. at 2 (ridiculing the notion that “[a]nything is possible, after all”); id. at 9 (same).)

But plaintiffs, not defendants, are the ones who bear the burden on this issue. As the ESDC Defendants pointed out in their objections to Judge Levy’s ripeness analysis, the Court “must presume that [it] cannot entertain [plaintiffs’] claims ‘unless the contrary appears affirmatively from the record.’” Murphy v. New Milford Zoning Comm’n, 402 F.3d 342, 347

² Plaintiffs again take the position that the Second Circuit in Rosenthal & Rosenthal Inc. v. New York State Urban Development Corp., 771 F.2d 44 (1985), actually decided that claims similar to the ones raised here were ripe for adjudication prior to commencement of EDPL Article 4 proceedings. (See Pl. Response at 7-8.) As the ESDC Defendants have explained in prior submissions, that is wrong. Because the Second Circuit in Rosenthal did not discuss the ripeness question (indeed, the parties did not even raise it), and because the Second Circuit at that time embraced the doctrine of hypothetical jurisdiction, the decision cannot be presumed to have silently resolved that the claims were ripe. (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 18.) There is, accordingly, no ripeness ruling in Rosenthal, silent or otherwise, that this Court should “assume[] to be proper.” (Pl. Response at 7 (citation omitted).)

(2d Cir. 2005) (quoting Renne v. Geary, 501 U.S. 312, 316 (1991)). The test, moreover, is not whether obstacles to materialization of the alleged future violation can be identified with specificity, but whether the violation is in fact “certainly impending.” Volvo North America, 875 F.2d at 63 (emphasis added; quotation marks and citation omitted). (See ESDC Objections at 3-4; Memorandum of Law of ESDC Defendants in Support of their Motion to Dismiss the Complaint, dated Dec. 15, 2006, at 12-13.)

Plaintiffs’ proposed rule—that a federal constitutional challenge would become ripe in every case under the EDPL immediately upon issuance of the Determination and Findings unless the condemnor was able to point to some future event, unrelated to the EDPL process itself, that had a high likelihood of delaying or preventing the proposed condemnation—would impermissibly reverse the applicable burden and distort the ripeness inquiry. As demonstrated above, plaintiffs’ claims are not ripe for adjudication unless plaintiffs satisfy the burden of showing that the violations they allege are imminent and “certainly impending.”

As explained in the ESDC Objections, plaintiffs have failed to do so here. Their latest submission does nothing to cure the defect. Plaintiffs accuse the ESDC Defendants of “playing fast and loose with reality” by arguing that the proposed condemnation of plaintiffs’ properties is insufficiently imminent. (Pl. Response at 8.) They suggest that the condemnation has, in effect, already begun (see id.), and that “the Article 2 proceeding concluded with finality long ago” (id. at 10). Neither representation is accurate. As plaintiffs are well aware, there is pending before the Appellate Division right now a challenge pursuant to EDPL § 207. The EDPL Article 2 process with respect to ESDC’s December 8, 2006 Final Determination and Findings is, therefore, still ongoing.

As for the construction activities of Forest City Ratner Company (“FCRC”), the only “demolition” that has begun is preparatory demolition on properties actually owned by FCRC affiliates and, pursuant to a license agreement, on land owned by the Metropolitan Transit Authority. No construction or even preparatory work has begun on plaintiffs’ properties. FCRC has every right to prepare itself for the Project by beginning demolition work on property it owns or has rights to, while bearing the risk that the Project will not proceed. Similar risks have, of course, actually materialized in the past. (See Second ESDC Mem. at 14-15 (giving examples of projects that have been abandoned or altered following publication of the condemning authority’s Determination and Findings).) FCRC’s activities therefore should not distract from the fact that the EDPL process with respect to the proposed condemnations has far from run its course.

III. PLAINTIFFS FAIL TO ALLEGE, MUCH LESS ARGUE, THAT THEY WILL SUFFER ANY HARDSHIP RESULTING FROM DELAYED ADJUDICATION.

There is another reason why plaintiffs’ claims are not yet ripe for adjudication. They have failed to even allege that they will suffer a hardship as a result of delayed adjudication. See Abbott Labs., 387 U.S. at 148-49 (considering as one part of the ripeness test “the hardship to the parties of withholding court consideration”); see also, e.g., Pacific Gas, 461 U.S. at 201-02 (holding that part of challenge was ripe because “postponement of decision would likely work a substantial hardship” on plaintiffs).

Plaintiffs’ only response to this argument is to try to evade it: rather than confront the hardship inquiry, they accuse the ESDC Defendants of “conveniently confla[ing] the irreparable harm question . . . with the markedly different Article III ripeness question.” (Pl. Response at 10.) But this side-tracking effort must fail. As the ESDC Defendants pointed out in their Objections, plaintiffs’ counsel has conceded that the point at which “irreparable harm” will

materialize is upon or after the filing of the EDPL Article 4 petition. (See ESDC Objections at 11.) That concession, when laid alongside plaintiffs' utter failure to demonstrate any present hardship resulting from delayed adjudication, is critical. Although the test for irreparable harm and the hardship inquiry are not identical, they are very similar and often overlap. See, e.g., New York State Bar Ass'n v. Reno, 999 F. Supp. 710, 715 (N.D.N.Y. 1998) (observing that, in evaluating the hardship prong of Abbott Laboratories, "the question of ripeness and the injunctive requirement of irreparable harm converge"). Here, plaintiffs make no attempt to show that either test is met.

IV. PLAINTIFFS' RESPONSES TO THE ESDC DEFENDANTS' POINTS CONCERNING YOUNGER ABSTENTION ARE UNPERSUASIVE.

In their response to the ESDC Objections concerning Judge Levy's Younger analysis, plaintiffs make two points that cry out for correction. First, they erroneously suggest that the ESDC Defendants' only argument in support of the proposition that the Anderson petition pending in the Appellate Division pursuant to EDPL § 207 challenges the condemnation at issue—rather than simply the condemnation of the Anderson plaintiffs' own properties—is that the Anderson petition requests "such other relief as to this court may be just." (See Pl. Response at 17.) In fact, the ESDC Defendants made the point that "the EDPL clearly requires an up-or-down judicial determination concerning the proposed project, not piecemeal adjudications pertaining to individual properties." (ESDC Objections at 13 (citing EDPL § 207(C)).) If the state court rejects ESDC's December 8, 2006 Final Determination and Findings in the Anderson proceeding, ESDC cannot proceed with any condemnations pursuant to that decision. Plaintiffs have no answer to this basic point.

Second, plaintiffs assert that the Second Circuit's decision in Spargo v. New York State Commission on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003), has no bearing here because

the claims of the federal plaintiffs in that case were “entirely derivative” of those asserted by the plaintiff who was a party to the state proceeding. (Pl. Response at 18-19.) That is incorrect. As the court in Hindu Temple Society of North America v. Supreme Court of New York, 335 F. Supp. 2d 369 (E.D.N.Y. 2004), aff’d, 142 Fed. Appx. 492 (2d Cir. 2005), has since clarified, whether the federal plaintiffs’ interests are sufficiently “intertwined” with those of the state-court parties to trigger Younger abstention does not depend on whether the claims are derivative of the state-court parties’ claims. See id. at 375-76.

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 and Recommendation 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 in further support of their objections to the balance of Judge Levy’s Report and Recommendation.

DATED: March 28, 2007

Respectfully submitted,

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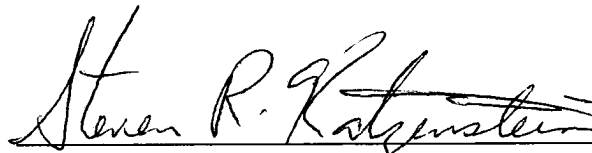
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Certificate of Service

The undersigned, an attorney duly admitted to practice law before this Court, hereby certifies under penalty of perjury, that on March 28, 2007, I caused a true copy of ***ESDC Defendants' Reply Memorandum in Further Support of Their Objections to Magistrate Judge Levy's Report and Recommendation*** to be served upon the parties on the attached service list, in the manner indicated.

Dated: New York, New York
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