6-25-14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

SOUTH BRONX UNITE!, ET ALS.

DECISION/ORDER

Petitioners,

-against- Index No.: 260462/2012

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT, LLC., UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,

Respondents.

X

The following papers numbered 1 to 20 read on the below motion noticed on July 19, 2013 and duly submitted on the Part IA15 Motion calendar of **April 7, 2014**:

Papers Submitted	Numbered
Pet.'s NOM, Aff., Exhibits, Memo of Law	1,2,3,4
DOT Aff. In Opp., Exh., Memo of Law	5,6,7
Resp. Aff. In Opp., Exh., Memo of Law	8,9,10
Pet.'s Reply Aff.	11
Pet.'s Supp. Aff., Exhibits	12,13
Correspondence from 10/30/13 - 1/15/14	14-17
Resp. Supp. Aff. In Opp, Exh.	18,19
Oral Argument Transcript	20

Upon the foregoing papers in this hybrid Article 78 petition and declaratory judgment action, the petitioners individual members of the community in the neighborhood surrounding the Harlem River Yard in the Bronx, as well as organizational petitioners (collectively the "Petitioners"), move pursuant to CPLR 2221(e), for leave to renew their motion for leave to amend the pleadings and add new parties as to their third cause of action. The motion is opposed by respondents New York City Industrial Development Agency ("NYCIDA"), New York City Economic Development Corporation ("NYCEDC"), Fresh Direct, LLC and UTF Trucking, Inc. ("Fresh Direct"), Harlem River Yard Ventures, Inc. ("HRYV"), and the New York State Department of Transportation ("DOT").

I. Background and Procedural History

This matter in general arises out of the Petitioners' challenge to Fresh Direct's relocation of its operations from Long Island City, Queens, to the Harlem River Yard ("HRY") in the Bronx, and its associated construction and installation project on that property. This motion is limited to the third cause of action contained in the Petitioners' declaratory judgment action. That cause of action sought to invalidate the sublease between HRYV and Fresh Direct. HRYV leases the property from the DOT, and is seeking to sublease the property to Fresh Direct for its attempted relocation. Petitioners' third cause of action sought to invalidate this sublease on the grounds the conveyance is an unconstitutional transfer of State property to a private entity.

By order dated May 24, 2013, this Court, *inter alia*, dismissed the third cause of action for lack of standing to sue under State Finance Law, and denied the Petitioners' motion for leave to amend the complaint, since the complaint as amended also failed to adequately alleged that a state actor "caused, or is about to cause a wrongful expenditure." The amended petition also did not allege any involvement by the DOT in this attempted conveyance/sublease, and therefore the cause of action failed to adequately assert a mismanagement of state funds or property by a state actor. Petitioners' thereafter appealed that decision.

Petitioners now seek to renew its motion for leave to amend the third cause of action and to add necessary parties with respect to the third cause of action. Petitioners filed this motion on the grounds that new events occurred since their original petition, and they can now plead new and previously unavailable facts regarding the DOT and DOT Commissioner Joan McDonald's involvement in the proposed conveyance of the state property to Fresh Direct at the HRY. Petitioners argue that these newly available facts "adequately address what this Court found to be pleading deficiencies as to standing under State Finance Law §123-b.

The original pleadings and proposed amended pleadings asserted that a material modification of the HRY's 1993 Land Use Plan required DOT's prior approval to ensure its conformity thereto. In their motion papers, the Petitioners assert that on June 17, 2013, Fresh Direct and HRYV submitted an application, along with their revised development plan, to the City Planning Commission seeking approval of a material modification to the 1993 Land Use

Plan in relation to the Fresh Direct Project. Petitioners assert that Fresh Direct and HRYV were required to file any revised development plan application with the City Planning Commission and DOT simultaneously. Petitioners argue that they "have reason to believe that [HRYV] has submitted or will soon submit to the DOT and Commissioner has approved or will soon approve the proposed change to the 1993 Land Use Plan to allow the Fresh Direct project, as well as its construction plans." The Petitioners contend that this approval will violate Article 7, Section 8 of the New York Constitution. The 1991 lease provided that its public purpose was to operate a "70,000 lift per year intermodal terminal to reduce regional truck traffic." The sublease, however, will allegedly frustrate this public purpose by precluding the possibility of an intermodal terminal. Accordingly, the Petitioners argue that this newly-discovered information warrants renewal of its motion for leave to amend their third cause of action, since they now plead adequate facts to allege standing to sue under State Finance Law. Petitioners note that they have reasonable justification for failure to provide this information on their previous motion, because at that time, petitioners understood that HRYV had not yet submitted a request for the DOT to approve the sublease.

In opposition to the motion, the DOT originally contended that the motion must be denied because they had still not taken any action with respect to the Fresh Direct project. Accordingly, the petitioners have not alleged new facts regarding the issue. In any event, the DOT argued that facts that were not in existence at the time of the prior motion are generally not a proper basis for a motion to renew. The DOT also noted that the proposed amendments contained with their moving papers are entirely different from those found in their February 14, 2013 motion for leave to amend. The petitioners now seek to add wholly new claims regarding the commissioner of the DOT, which is inappropriate in an attempted motion to renew.

The remaining respondents submitted a joint opposition to the motion. They argue that the motion should be denied because, first off, the motion is not one to renew. It rather seeks to amend their now-dismissed petition to assert new allegations against new parties, which is outside the scope of a motion to renew. "Renewal" of a dismissed claim is not available here, and the petitioners have not demonstrated "new facts" in existence at the time of the prior motion, for which the petitioners have a "reasonable justification" for their failure to bring to the

court's attention, which would change the previous outcome. Respondents further argue that the motion is barred by the doctrine of *res judicata*.

In reply, Petitioners argued that the arguments made in opposition are contradictory. While the DOT argued that the alleged new facts are "speculative" since the DOT took no action on the sublease, it also joined the other respondents in arguing that the new facts are not new and should have been plead previously. Petitioners note that new facts do not necessarily have to be in existence at the time of a prior motion, where the new facts would change the prior determination. They note that the relief sought in the renewed pleading relating to the third cause of action is identical to that previously sought - namely enjoining the unconstitutional conveyance of public land to Fresh Direct.

After this motion was fully briefed, events occurred that impacted the parties' respective positions regarding the motions' proper disposition. On October 30, 2013, Petitioners wrote to the Court to advise that, through the appellate process, they learned that the DOT had received HRYV's request to modify the subject land use plan to accommodate the Fresh Direct project. This fact therefore "reversed" the factual assertions upon which the DOT based its opposition to the renewal motion. This letter sparked a response from Fresh Direct and HRYV that, first, this remained only a request that was yet unacted upon by the DOT. In any event, the application was not a "new fact" since Petitioners' had always expected it to occur. Moreover, the request to the DOT did not equate to "involvement" by the DOT in the sublease. The DOT also submitted a letter in response.

Thereafter, on December 17, 2013 the DOT wrote to this Court to advise that on December 12, 2013 the DOT completed its review of HRYV's request for certain approvals relative to the project, and found that the project was consistent with the Land Use Plan per section 8.02 of the 1991 Lease. The DOT nevertheless contended that this approval does not alter the motion to renew's lack of merit. In a January 2014 letter, Petitioners disagreed and argued that this approval cures the alleged pleading deficiencies concerning the involvement of a DOT officer in the proposed conveyance, and, consequently, alters this Court's prior determination regarding standing under State Finance Law §123-b.

This Court thereafter directed the parties to appear for oral argument on April 7, 2014.

Prior to argument, on March 27, 2014, the First Department upheld this court's denial of the Article 78 petition and dismissal of all of the petitioners' causes of action, modifying the order only to the extent of declaring that the NYCIDA's issuance of a negative declaration did not violate the New York State Environmental Quality Review Act (SEQRA) and was not arbitrary and capricious or an abuse of discretion. In affirming this Court's dismissal of the third cause of action, and denial of leave to amend, the First Department stated "petitioners' allegations in the amended petition that the Department of Transportation was involved because it must pre-approve a modification of the Land Use Plan is insufficient to confer standing under the statute." (*South Bronx Unite! v. New York City Indus. Development Agency*, 115 A.D.3d 607 [1st Dept. 2014]).

At oral argument, Petitioners urged that amendments are freely granted, and since the DOT has now approved the project, they could not plead these facts previously since the approval had not yet occurred, and therefore they have met the standard for a motion to renew under 2221(e). Arguments with respect to the mootness of the claim is a fact-based argument and is unavailable on a motion to dismiss.

The DOT argued that the motion to renew proffers a new amended petition seeking different relief. It also contains causes of action that have been previously dismissed. A motion to renew cannot be based on facts not previously in existence. They argue that the First Department's affirmance renders this proceeding moot. In December 2013, the DOT, pursuant to the 1991 lease, found that the Fresh Direct project was consistent with a land use plan and approved subtenants. It had no involvement in the negotiation of the sublease. It did not approve the sublease. In fact, under the 1991 lease, HRYV can freely enter into subleases. So under the provisions of the 1991 lease, the DOT's involvement is very limited. And so even if there was some way to allow the amendment, the amendment would be futile because the DOT did not approve the sublease.

Fresh Direct and the remaining respondents argue that the petition seeks to renew claims that have been dismissed, so there is nothing to renew. They reiterate that the DOT, at no time, approve the sublease between HRYV and Fresh Direct, because they had no authority to do so. The 1991 lease did not provide for that. The SEQRA review - which has been determined to be

proper and is not the subject of this motion - included the effect of the project on the intermodal terminal. Respondents argue that the petitioners are seeking to reinvigorate their claim by this "backdoor approach" and claim that this is a challenge to the constitutionality of the DOT lease – but that challenge was deemed time-barred, dismissed, and is not the subject of this motion. The third cause of action challenged the Fresh Direct - HRYV sublease.

Petitioners in reply argue that the new facts don't necessarily have to be in existence at the time of the original motion to constitute grounds for a renewal motion. There has been no finding on the record saying that Fresh Direct does not interfere with the intermodal terminal, the SEQRA claims have no bearing on this cause of action. The sublease violates the state constitution because it evicerates the public purpose for which the DOT leased the 96 acres of state property to the HRYV in order to operate an intermodal terminal. Petitioners argue that Fresh Direct will interfere with that public purpose - and "this is a classic claim brought under the State Constitution."

II. Applicable Law and Analysis

A motion to renew must be based on new facts not presented in the original motion that would change the prior determination (CPLR 2221[e]). The moving party must demonstrate a reasonable justification for not presenting those new facts on the prior application (*see Nicholas v. Curtis*, 104 A.D.3d 526 [1st Dept. 2013][internal citations omitted]).

Generally, as urged by the respondents, a renewed motion must not be based on facts that were not in existence at the time of the original application (*see Johnson v. Marquez*, 2 A.D.3d 786, 789 [2nd Dept. 2003]; *Matter of Weinberg*, 132 A.D.2d 190 [1st Dept. 1987). The First Department, however, has recognized some flexibility with this rule (*see Ramos v. City of New York*, 61 A.D.3d 51 [1st Dept. 2009][renewal was properly based on new evidence - the reversal of plaintiff's conviction - even though the reversal occurred *after* the original motion decision was made]).

At the outset, the Court notes that the proposed new petition appears to renew causes of action that have already been dismissed and are not subject to the renewal motion - which petitioners claim is limited to the third cause of action. The second amended petition adds new

parties, contains claims relating to now-dismissed causes of action. To the extent that the second amended petition contains new parties or allegations unrelated to their limited motion to renew their third cause of action, the new amendments will not be considered by this court. The Court only considers the proposed amendments that relate to the third cause of action - brought pursuant to State Finance Law §123-b, challenging the constitutionality of the Fresh Direct-HRYV sublease, as an unlawful expenditure of property.

In their original application, the petitioners' third cause of action alleged that the Fresh Direct-HRYV sublease must be invalidated as an unconstitutional conveyance of public land for essentially a private purpose. The original and subsequently-amended petitions asserted that the DOT, though its commissioner, must pre-approve the sublease, in accordance with Section 8.05 of the DOT-HRYV 1991 lease. The prior motion then sought to amend the third cause of action to join, among others, Joan McDonald, commissioner of the DOT. The third cause of action was thereafter dismissed for lack of standing under State Finance Law, and leave to amend denied, because this Court found that the cause of action

> "...fails to competently allege that this state officer caused, or is about to cause a wrongful expenditure. The claim involves an attempted sublease between HRYV, the lessor of the state-owned property, and Fresh Direct. The proposed second amended petition alleges no involvement by the DOT in this attempted conveyance/sublease, and the claim thus does not adequately assert a mismanagement of state funds or property by a state actor (*see Transactive Corp. v. The New York State Dept. of Social Services*, 92 N.Y.2d 579 [1998])."
>
> Decision and Order dated May 24, 2013.

In affirming dismissal of the third cause of action, the First Department held that the allegations in the amended petition that the DOT was involved because it must pre-approve any modification of the original land use plan was insufficient to confer standing under State Finance Law §123-b (*South Bronx Unite! v. New York City Indus. Development Agency*, 115 A.D.3d 607 [1st Dept. 2014]).

In support of the instant motion, the petitioners are alleging that in December 2013, the DOT rendered a decision approving the proposed use of the land, and approving Fresh Direct as HRYV's sub-tenant. The petitioners argue that the DOT's approval of the sublease constitutes

"new facts" that evince an unlawful disbursement of State property sufficient to confer them standing pursuant to State Finance Law. The new third cause of action, containing proposed amendments (most recently dated April 1, 2014), asserts that the sublease requires approval from the Department of Transportation through its commissioner, Joan McDonald. It further alleges that Joan McDonald has approved the Fresh Direct - HRYV sublease, including "[HRYV]'s request to allow Fresh Direct to build within the 28 acres reserved for the intermodal terminal and installation of the project as a whole, despite the fact that it eviscerates the stated public purpose of the Lease" (Proposed Second Amended Pet. at par. 261). The cause of action further asserts that the installation of the project represents an abandonment of the adjudicated public purpose of the 1991 lease – its use as a 70,000 lifts-per-year intermodal terminal (*Id.* at par. 264). Petitioners argue that these new developments change this Court's prior determinations as to standing.

After review of all party submissions and considering the oral argument, this Court finds that the alleged new facts will not change the prior determination, and the motion to renew is denied.

Essential in examining this issue is the fact that HRYV's contractual obligation to submit, among other things, land use plan modifications and proposed subtenant information to the DOT for approval, has been known to petitioners since the onset of this action. Indeed, the original petition and subsequently amended petitions alleged, in paragraph 72, that the 1991 lease required HRYV to submit requests to change the land use plan for the HRY to the DOT for approval. This Court took that allegation into consideration when dismissing the cause of action for lack of standing under State Finance Law. The Appellate Division further held specifically that this pre-approval requirement was insufficient to confer standing to sue. Now, the alleged "new facts" – that the DOT has actually performed its obligations under the lease, and made certain approvals for the project – do not alter the prior determinations. At bottom, it has been determined that the DOT's level of involvement here does not amount to an allegation that a State actor is "causing, or about to cause a wrongful expenditure" of State property. This finding is consistent with the requirement that the statute be "narrowly construed" (*see Matter of Human Society of the United States v. Empire State Development Corporation*, 53 A.D.3d 1013, 1016

[3rd Dept. 2008]). Accordingly, the motion to renew must be denied because the purported new facts would not change this Court's prior determination as to standing.

This Court further emphasizes that this motion to renew court must be viewed in its full context – that is, it follows the denial of the original Article 78 petition and dismissal of the declaratory judgment action. In their original, second-amended petition, the petitioners' third cause of action sought to invalidate the HRYV-Fresh Direct sublease on the grounds that it will eviscerate the original intention of the lease - the use of 28 acres within the property as an intermodal terminal. The current procedural posture of this matter is as follows: (1) it has been adjudicated that respondent NYCIDA satisfied their SEQRA obligations in evaluating this project, and its issuance of a negative declaration – taking into account all appropriate environmental concerns, including the project's alleged impact on intermodal terminal space – was not arbitrary or capricious; (2) petitioners' second cause of action, seeking to invalidate the DOT-HRYV 1991 lease, has been dismissed as time-barred. The second cause of action was grounded in allegations that the Fresh Direct-HRYV sublease eviscerated the public purpose of the 1991 lease by rendering impossible the construction of an intermodal terminal, and consequently rendered the 1991 lease an unconstitutional conveyance of public land for a private purpose; (3) petitioners' originally-pleaded third cause of action was dismissed, and leave to amend denied as futile, since as noted, the petition did not adequately allege involvement by a state actor in the HRYV- Fresh Direct sublease/conveyance. The First Department subsequently rejected the contention that the DOT's obligation to approve the sublease was sufficient to confer standing; (4) the fourth cause of action, alleging that Fresh Direct was improperly accepted into the Excelsior Jobs Program and improperly awarded its associated tax benefits, was dismissed for lack of standing to sue.

While generally, leave to amend is freely granted (CPLR 3025), this court is not required to allow an amendment where the proposed amended pleadings patiently lacks merit (*Eighth Ave. Garage Corp. v. H.K.L. Realty Corp. et al.*, 60 A.D.3d 404, 875 N.Y.S.2d 8 [1st Dept 2009]). Here, even if the proposed amendment was permitted, the third cause of action would remain subject to dismissal (*Viacom Int'l. v. Midtown Realty Co.*, 235 A.D.2d 332 [1st Dept. 1997]). Here, assuming *arguendo* that renewal was granted, and the proposed amendment conferred them

standing to sue, this court finds that the factual underpinnings of petitioners' second-amended, renewed third cause of action have been resolved. Allowing the petitioners to amend their third cause of action would amount to an end-around challenge to the constitutionality of the HRYV-DOT lease - a claim that has long been time-barred. The second cause of action sought to invalidate the lease on essentially the same grounds found in the third cause of action – that the Fresh Direct - HRYV sublease frustrates the original land use plan for the HRY. Moreover, permitting this claim to proceed would effectively require re-litigation of the prior adjudication that the NYCIDA's SEQRA review, which took into account the alleged effects of the project on the viability of an intermodal terminal, was proper. Although they are separate causes of action and challenges to this project, the inextricable link between the NYCIDA review/declaration and the proffered reasons why the sublease should be invalidated cannot be ignored. Insomuch as this motion seeks to revive already-dismissed claims, it must be denied. At bottom, this Court finds that even if renewal was granted, upon renewal, the motion for leave to amend the pleadings would still be denied as futile.

III. Conclusion

Accordingly, it is hereby

ORDERED, that the petitioners' motion to renew pursuant to CPLR 2221(e) is denied.

This constitutes the Decision and Order of this Court.

Dated: 6/18, 2014

Hon. Mary Ann Brigantti-Hughes, J.S.C.

IAS 7-19

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of	
SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,	Index No.: 260462/2012 IAS Justice (Brigantti-Hughes, J.) **NOTICE OF MOTION**
Petitioners,	
-against-	
NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,	
Respondents.	
For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	

RRRR SUB

STATE OF NEW YORK)
) ss:
COUNTY OF BRONX)

PLEASE TAKE NOTICE THAT, upon the Affirmation of Christina Giorgio, dated July 2, 2013, and the exhibits thereto, and the accompanying Memorandum of Law in Support of Petitioners' Motion to For Leave to Renew Motion to Amend Pleadings as to the Third Cause of Action, the undersigned will move this Court, at the Courthouse

located at 851 Grand Concourse, Bronx, New York 10451, in Room 217 on the 19th day of July, 2013, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order, pursuant to N.Y. C.P.L.R. § 2221(e), for leave to renew their motion to amend their pleadings as to the third cause of action.

Dated: New York, New York
July 2, 2013

NEW YORK LAWYERS FOR THE PUBLIC INTEREST

By: Gavin Kearney /KS
Gavin Kearney
Christina Giorgio
151 W. 30th Street, 11th Floor
New York, NY 10001-4017

SCHINDLER COHEN & HOCHMAN LLP

By:
Lisa C. Cohen
Karen M. Steel
100 Wall Street, 15th Floor
New York, NY 10005
212-277-6300

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	

IA-15

8/12

SUPPLEMENTAL AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO RENEW MOTION FOR LEAVE TO AMEND PLEADINGS AS TO THE THIRD CAUSE OF ACTION

CHRISTINA GIORGIO affirms under penalty of perjury as follows:

1. I am a member of the Bar of the State of New York and an attorney with New York Lawyers for the Public Interest, which, along with the law firm Schindler Cohen &

Hochman LLP, serves as counsel for Plaintiffs/Petitioners. As such, I am fully familiar with the facts and circumstances of this action and the matters set forth herein.

2. I submit this Supplemental Affirmation in Support of Petitioners/Plaintiffs' Motion for Leave to Renew ("Motion to Renew") Plaintiffs'/Petitioners' Motion for Leave to Amend Pleadings and to Add Necessary Parties ("Motion for Leave to Amend Pleadings") as to the third cause of action.

3. When preparing Petitioners/Plaintiffs' proposed renewed Verified Second Amended Petition and Complaint for purposes of attaching with this Motion to Renew, due to a clerical error I used the incorrect source document to add the new facts that form the basis of Petitioners/Plaintiffs' Motion to Renew.

4. A redlined copy of proposed Renewed Second Amended Pleading reflecting the new allegations that have been added to the February 13, 2013 Second Amended Pleading is attached hereto as Exhibit A.

5. The Renewed Second Amended Pleading contains the following new paragraphs: ¶¶ 108 and 109 noting the simultaneous filing requirement for land use change requests under the 1995 restrictive covenant; ¶¶ 215-222 alleging Harlem River Yard Ventures' and Fresh Direct's June 17, 2013 application for a land use change to the CPC and DOT Commissioner's approval or imminent approval of Harlem River Yard Ventures' application for a land use change; ¶¶ 251, 254-255 reiterating the allegations regarding DOT Commissioner's approval or imminent approval of Harlem River Yard Ventures' application for a land use change to allow the Fresh Direct project as violating Article 7, Section 8 of the State Constitution. The Renewed Second Amended Pleading notes at ¶ 21 that Petitioner/Plaintiff Arthur Mychal Johnson is no longer a

Community Board One member due to the Bronx Borough President's office electing not to renew his membership this year.

6. The allegations listed above are identical to the allegations set forth in paragraphs 108, 109, 221-228 and 254-261 of the proposed Renewed Second Amended Pleading attached as Exhibit A to the Affirmation of Christina Giorgio dated July 2, 2013.

7. No other changes are proposed for the Renewed Second Amended Petition and Complaint.

8. Petitioners/Plaintiffs learned of Harlem River Yard Ventures' and Fresh Direct's application to the New York City Planning Commissioner for a land use change approval by monitoring its website and noticing on June 19, 2013 the posting attached as Exhibit I to the Affirmation of Christina Giorgio dated July 2, 2013.

9. Petitioners/Plaintiffs served a notice of appeal on July 2, 2013.

Dated: New York, New York
August 9, 2013

Christina Giorgio

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of	
SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,	Index No.: 260462/2012 IAS Justice (Brigantti-Hughes, J.)
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For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	

SUPPLEMENTAL AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO RENEW MOTION FOR LEAVE TO AMEND PLEADINGS AS TO THE THIRD CAUSE OF ACTION

CHRISTINA GIORGIO affirms under penalty of perjury as follows:

1. I am a member of the Bar of the State of New York and an attorney with New York Lawyers for the Public Interest, which, along with the law firm Schindler Cohen &

Hochman LLP, serves as counsel for Plaintiffs/Petitioners. As such, I am fully familiar with the facts and circumstances of this action and the matters set forth herein.

2. I submit this Supplemental Affirmation in Support of Petitioners/Plaintiffs' Motion for Leave to Renew ("Motion to Renew") Plaintiffs'/Petitioners' Motion for Leave to Amend Pleadings and to Add Necessary Parties ("Motion for Leave to Amend Pleadings") as to the third cause of action.

3. When preparing Petitioners/Plaintiffs' proposed renewed Verified Second Amended Petition and Complaint for purposes of attaching with this Motion to Renew, due to a clerical error I used the incorrect source document to add the new facts that form the basis of Petitioners/Plaintiffs' Motion to Renew.

4. A redlined copy of proposed Renewed Second Amended Pleading reflecting the new allegations that have been added to the February 13, 2013 Second Amended Pleading is attached hereto as Exhibit A.

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Dated: New York, New York
August 9, 2013

Christina Giorgio

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COUNTY OF BRONX

In the Matter of Application of	
SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,	Index No.: 260462/2012
Petitioners,	IAS Justice
-against-	(Brigantti-Hughes, J.)
NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,	
Respondents.	
For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO RENEW MOTION FOR LEAVE TO AMEND PLEADINGS AS TO THE THIRD CAUSE OF ACTION

CHRISTINA GIORGIO affirms under penalty of perjury as follows:

1. I am a member of the Bar of the State of New York and an attorney with New York Lawyers for the Public Interest, which, along with the law firm Schindler Cohen &

Hochman LLP, serves as counsel for Plaintiffs/Petitioners. As such, I am fully familiar with the facts and circumstances of this action and the matters set forth herein.

2. I submit this Affirmation in Support of Plaintiffs/Petitioners' Motion for Leave to Renew Plaintiffs'/Petitioners' Motion for Leave to Amend Pleadings and to Add Necessary Parties ("Motion for Leave to Amend Pleadings") as to the third cause of action.

3. A true and correct copy of the proposed renewed Verified Second Amended Petition and Complaint is attached hereto as Exhibit A ("Renewed Second Amended Pleading"). With the exception of the newly added Exhibit AAAA, attached thereto as Exhibit I, the Renewed Verified Second Amended Pleading references the same exhibits as the September 6, 2012 Verified Amended Petition ("Amended Pleading"). However, to conserve space and resources, such exhibits are not attached here.

4. A true and correct copy of the Renewed Verified Second Amended Pleading, which has been redlined to reflect changes from Petitioners/Plaintiffs' Amended Pleading, is attached hereto as Exhibit B.

5. On June 5, 2013, Counsel for Plaintiffs/Petitioners received a notice of entry of order in which this Court granted Defendants' Department of Transportation ("DOT"), Fresh Direct, UTF Trucking, Harlem River Yard Ventures, Urban Development Corporation (d/b/a Empire State Development) (collectively "Defendants") motions to dismiss the second, third and fourth cases of action and denying Petitioners'/Plaintiffs' Motion for Leave to Amend Pleadings. A true and correct copy of the Notice of Entry of Order is attached hereto as Exhibit C.

6. This Court granted Defendants' Motion to Dismiss and denied Petitioners/Plaintiffs' Motion for Leave to Amend Pleadings as to the third cause of action

challenging the sublease between Fresh Direct and Harlem River Ventures Holdings on the grounds that Petitioners/Plaintiffs had failed to plead sufficient conduct on the part of an officer or employee of the DOT to establish standing under State Finance Law § 123-b.

7. As pled in their Amended Pleading, the Fresh Direct project is a material modification to the 1993 Land Use Plan governing development at the Harlem River Yard. (Am. Pleading ¶¶ 114-128).

8. As pled in their Amended Pleading, under the terms of the lease between the DOT and Harlem River Yard Ventures ("Ventures"), Ventures must secure DOT's prior approval of any proposed change to the 1993 Land Use Plan governing development at the Harlem River Yard. (Am. Pleading ¶ 63).

9. Prior to June 17, 2013, the facts available to Petitioners/Plaintiffs indicated that Defendant Ventures had not submitted to the DOT its request seeking approval of the changes to the 1993 Land Use Plan necessitated by the proposed Fresh Direct project.

10. Since June 2012, Petitioners/Plaintiffs have diligently sought information on the status of the DOT's and Commissioner McDonald's review of the proposed change to the 1993 Land Use Plan to allow the Fresh Direct project.

11. Specifically, on June 7, 2012, Petitioners/Plaintiffs' counsel made a Freedom of Information Law ("FOIL") request of the DOT seeking all documents relating to requests for changes in land use pursuant to Section 8.06 (or any other section) of the 1991 Lease between DOT and Ventures in relation to the proposed Fresh Direct project at the Harlem River Yard. (Attached hereto as Exhibit D is a true and correct copy of the June 7, 2012 FOIL request submitted to DOT).

12. On June 18, 2012, DOT responded, "A diligent search of the files has revealed no records which are responsive to your request. We have not received any request from the HRYV in relation to a change in the land use and the Fresh Direct project." (Attached hereto as Exhibit E is a true and correct copy of DOT's June 18, 2012 FOIL response).

13. On January 3, 2013, Petitioners/Plaintiffs' counsel made another FOIL request of the DOT seeking all documents and communications in their possession regarding the proposed Fresh Direct sublease at the Harlem River Yard. (Attached hereto as Exhibit F is a true and correct copy of the January 3, 2013 FOIL request submitted to DOT).

14. On January 4, 2013, DOT responded, "We have searched our records and we have no records on file pertaining to your request." (Emphasis in original). (Attached hereto as Exhibit G is a true and correct copy of DOT's January 4, 2013 FOIL response).

15. On April 24, 2013, DOT again responded to the January 3, 2013 FOIL request and asserted that it still had no records relating to the Fresh Direct sublease at the Harlem River Yard. (Attached hereto as Exhibit H is a true and correct copy of DOT's April 24, 2013 FOIL response).

16. Based on the DOT's representations made through the FOIL process and filings before this Court, at the time they filed their initial Motion for Leave to Amend Pleadings, Petitioners/Plaintiffs understood that Ventures had not yet sought DOT approval of the land use changes necessitated by the Fresh Direct project.

17. Petitioners/Petitioners have recently learned that the situation has changed. Specifically, pursuant to the terms of the December 15, 1995 Restrictive Covenant applicable to Ventures' development of the Harlem River Yard, on June 17, 2013, Fresh Direct and Ventures

submitted an application, along with their revised development plan, to the City Planning Commission (CPC) seeking approval of a material modification to the 1993 Land Use Plan in relation to the Fresh Direct project. (Attached hereto as Exhibit I is a true and correct copy of the CPC website page acknowledging Ventures' and Fresh Direct's land use change application).

18. The December 15, 1995 Restrictive Covenant requires Ventures to file any revised development plan application with the DOT at the same time that such an application is filed with the CPC. (Pl. Exh. HHH, ¶ 1(a)).

19. As outlined above, prior to June 17, 2013, the facts available to Petitioners/Plaintiffs indicated that Ventures had not submitted its application to the DOT requesting approval of changes to the 1993 Land Use Plan necessitated by the proposed Fresh Direct project. Newly available facts, however, indicate that the situation has changed and that Ventures has or will soon submit its request for approval to the DOT. Given that these newly developed facts were previously unavailable, Petitioners/Plaintiffs are justified in pleading them now for the first time.

Dated: New York, New York
July 2, 2013

Christina Giorgio

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of	
SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,	Index No.: 260462/2012 IAS Justice (Brigantti-Hughes, J.) **AFFIDAVIT OF SERVICE**
Petitioners,	
-against-	
NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,	
Respondents.	
For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	

STATE OF NEW YORK)
) ss:
COUNTY OF BRONX)

Thomas F. Martecchini, being duly sworn, deposes and says:

1. I am over 18 years of age and am not a party to this action.

2. On July 2, 2013, I served a true copy of the following documents filed in support of Petitioners' Motion for Leave to Renew Motion for Leave to Amend Pleadings and to Add Necessary Parties As to the Third Cause of Action:

- *Notice of Motion*, dated July 2, 2013;
- *Affirmation of Christina Giorgio*, dated July 2, 2013, with exhibits A through I thereto; and
- *Memorandum of Law in Support of Petitioners' Motion for Leave to Renew Motion for Leave to Amend Pleadings and to Add Necessary Parties As to the Third Cause of Action*, dated July 2, 2013 upon counsel for Respondents:

Christopher G. King
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007

Simon Wynn
Empire State Development
633 Third Avenue
New York, NY 10017

Kathryn M. Liberatore
Assistant Attorney General
New York State Office of the
Attorney General
120 Broadway, 26th Floor
New York, NY 10271-0332

Laurie Styka Bloom
Jared C. Lusk
Thomas C. Greiner, Jr.
Nixon Peabody LLP
Key Towers at Fountain Plaza
40 Fountain Plaza, Suite 500
Buffalo, NY 14202

Steven Barshov
Sive Paget & Riesel, P.C.
460 Park Avenue, 10th Floor
New York, New York 10022

by Federal Express overnight delivery by depositing a true and accurate copy of the same enclosed in a properly addressed envelope into the custody of the overnight delivery service.

Thomas F. Martecchini

2nd day of July, 2013

Notary Public

Karen Steel
Notary Public, State of New York
No. 02ST6182239
Qualified in New York County
Commission Expires February 19, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of

SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,

Petitioners,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT, LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

Index No.: 260462-2012

IAS Justice

Mary Ann Brigantti-Hughes

ATTORNEY AFFIRMATION OF LAURIE STYKA BLOOM

Laurie Styka Bloom, an attorney duly admitted to practice law in the courts of the State of New York, under penalty of perjury and pursuant to CPLR 2106, affirms as follows:

1. I am counsel with the law firm of Nixon Peabody LLP, attorneys for Respondents Fresh Direct LLC and UTF Trucking, Inc. (hereinafter collectively "Fresh Direct"). As such, I

am fully familiar with the facts and circumstances of this matter. I make this affirmation in opposition to Petitioners' July 2, 2013 Motion for Leave to Renew ("Motion to Renew").

2. Pursuant to a Stipulation of Adjournment entered into by all parties, respondents Fresh Direct, New York City Industrial Development Agency ("NYCIDA"), New York City Economic Development Corporation ("NYCEDC"), New York State Urban Development Corporation doing business as Empire State Development ("ESD"), and Harlem River Yard Ventures, Inc. ("HRYV") agreed to submit joint responding papers to the Motion to Renew. Thus, this affirmation and the accompanying Memorandum of Law are submitted on behalf of Fresh Direct, NYCIDA, NYCEDC, ESD and HRYV. Respondent New York State Department of Transportation ("DOT") is submitting its own papers in response to the Motion to Renew.

3. As more fully set forth in the accompanying Memorandum of Law, Petitioners' Motion to Renew should be denied as it is not a motion to renew at all and does not "renew" any "prior motion." The Motion to Renew must also be denied because it fails to meet the criteria for a motion to renew. Granting of the motion will serve no legitimate purpose and will only unnecessarily further delay this proceeding. *See* Memorandum of Law.

4. The following documents are offered in support of Respondents' joint opposition to the Petitioners' motion:

Exhibit 1 — This Court's May 24, 2013 Decision and Order (filed May 31, 2013) dismissing/denying Petitioners' claims, denying the Petitioners prior motion for leave to amend, and granting Respondents' motions to dismiss;

Exhibit 2 — Comparison of Petitioners' proposed Second Amended Petition (attached to their February 14, 2013 motion for leave to amend) and their July 2, 2013 proposed Second Amended Petition (attached to Motion to Renew);

Exhibit 3 Petitioners' original Petition dated June 13, 2012;

Exhibit 4 Petitioners' First Amended Petition dated September 6, 2012.

5. Upon receipt of Petitioners' Motion to Renew, I compared the proposed Second Amended Petition attached to the Motion to Renew as Exhibit A to the proposed Second Amended Petition attached to Petitioners' February 14, 2013 motion for leave to amend (as Exhibit A). That comparison, which is attached as Exhibit 2, shows the differences between the two documents. Additions to the proposed Second Amended Petition that were not part of the proposed Second Amended Petition that Petitioners now purport to renew are shown in yellow. Deletions are shown in red boxes. *See* Exhibit 2.

6. This comparison reveals that the two documents are substantially and markedly different in several material respects. Specifically, the "new" proposed Second Amended Petition, which is represented by Petitioner in their Motion to Renew to be the same as their prior proposed Second Amended Petition (*see* July 2, 2013 Affirmation of Christina Giorgio in support of Motion to Renew):

- deletes a party that was previously named (*see* Exhibit 2 at ¶ 47);
- proposes to add a party (the New York Power Authority) that was never named in the original June 13, 2012 Petition, the September 6, 2012 First Amended Petition, or the February 14, 2013 proposed Second Amended Petition (*see* Exhibit 2 at ¶ 49);
- adds nineteen (19) new paragraphs containing allegations that were never part of the February 14, 2013 proposed Second Amended Petition (or the original June 13, 2012 Petition or the September 6, 2012 First Amended Petition) and that

contain substantive allegations that reshape Petitioners' claims and theories. *See* Exhibit 2 at ¶¶ 49, 108-109, 136-141, 221-228, 257, 260;

- modifies eleven (11) other paragraphs and the Wherefore clause, including to bolster allegations that relate to claims this Court has dismissed and that are not relevant to the Third Cause of Action alleged to be the sole subject of the Motion to "Renew." *See* Exhibit 2 at ¶¶ 5, 6, 55, 112, 211, 231, 256, 258, 259, 261, 265;
- changes other paragraphs and headings in other respects that further distinguish the document from the one this Court ruled on in denying the motion to amend. *See* Exhibit 2 at ¶¶ 21, 47, 60 and headings L, Y and Z.

7. For the reasons discussed in the accompanying Memorandum of Law, as well as those set forth in the responding papers of DOT, Respondents Fresh Direct LLC, UTF Trucking, Inc., New York City Industrial Development Agency ("NYCIDA"), New York City Economic Development Corporation ("NYCEDC"), New York State Urban Development Corporation doing business as Empire State Development ("ESD"), and Harlem River Yard Ventures, Inc. ("HRYV") collectively respectfully request that Petitioners' Motion for Leave to Renew Motion to Amend be denied in its entirety.

Dated: July 24, 2013
Buffalo, New York

Laurie Styka Bloom

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of

SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,

Petitioners,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

Index No.: 260462-2012

IAS Justice

Mary Ann Brigantti-Hughes

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

Cynthia C. Beverly, being duly sworn, deposes and says:

1. I am over eighteen years of age and am an employee of Nixon Peabody LLP, attorneys for respondents Fresh Direct LLC and UTF Trucking, Inc.

2. On July 24, 2013, on behalf of Respondents Fresh Direct, UTF Trucking, NYCIDA, NYCEDC, EDC and Harlem River Yard Ventures, I served the Affirmation of Laurie Bloom and Joint Memorandum of Law upon the attorneys designated by the parties to receive service as follows:

a) by depositing true copies thereof securely enclosed in prepaid envelopes marked standard overnight delivery in an official depository under the exclusive care and custody of Federal Express directed to the attorneys for petitioners at the below addresses provided by them for receipt of service, said premises being where they currently maintain their offices:

Gavin Kearney, Esq.
Christina Giorgio, Esq.
New York Lawyers for the Public Interest
151 W. 30th Street, 11th Floor
New York, New York 10001-4017
E-mail: gkearney@nylpi.org
cgiorgio@nylpi.org
Attorneys for Petitioners

Lisa C. Cohen, Esq.
Karen Steel, Esq.
Schindler, Cohen & Hochman
100 Wall Street, 15th Floor
New York, New York 10005
E-mail: lcohen@schlaw.com
ksteel@schlaw.com
Attorneys for Petitioners

b) and also by sending true copies via electronic mail to counsel for all parties using the e-mail addresses provided herein.

Christopher Gene King, Esq.
Kathleen Schmid, Esq.
Assistant Corporation Counsel
100 Church Street
New York, New York 10007
E-mail: cking@law.nyc.gov
E-mail: kschmid@law.nyc.gov
Attorneys for NYCIDA and NYCEDC

Kathryn Liberatore, Esq.
New York State Attorney General's Office
120 Broadway
New York, New York 10271
E-mail: Kathryn.liberatore@ag.ny.gov
Attorneys for NYSDOT

Simon Wynn, Esq.
Empire State Development Corporation
633 Third Avenue
New York, New York 10017
E-mail: swynn@esd.ny.gov
Attorney for Empire State Development Corp

Steven Barshov, Esq.
Sive, Paget & Riesel
460 Park Avenue
New York, New York 10022
E-mail: sbarshov@sprlaw.com
Attorneys for Harlem River Yard Ventures

Cynthia C. Beverly

Sworn to before me this
7th day of August, 2013.

Notary Public

COLLEEN S. DURAMA
Notary Public, State of New York
Qualified in Erie County
No. 01DU4920847
Commission Expires Feb. 16, 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of

SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,

Petitioners,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT, LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,

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Index No.: 260462-2012

IAS Justice

Mary Ann Brigantti-Hughes

ATTORNEY AFFIRMATION OF LAURIE STYKA BLOOM

4-7
ISM

Laurie Styka Bloom, an attorney duly admitted to practice law in the courts of the State of New York, under penalty of perjury and pursuant to CPLR § 2106, affirms as follows:

1. I am counsel with the law firm of Nixon Peabody LLP, attorneys for Respondents Fresh Direct LLC and UTF Trucking, Inc. (hereinafter collectively "Fresh Direct"). As such, I am fully familiar with the facts and circumstances of this matter.

2. On behalf of Respondent Fresh Direct and joined by Respondent Harlem River Yard Ventures, Inc. ("HRYV"), I make this affirmation in further response to Petitioners' July 2, 2013 Motion for Leave to Renew ("Motion to Renew") and in specific response to Petitioners' April 2, 2014 sur-reply in the form of a Supplemental Affirmation from Petitioners' counsel Christina Giorgio with exhibits in further support of the Motion to Renew ("4/2/14 Sur-Reply"). The Motion to Renew is scheduled to be argued on April 7, 2014 at 9:30 am. Because Petitioners served sur-reply papers that raise new arguments and attach yet another proposed Second Amended Petition (the fourth version) without permission of the Court and on the eve of the April 7, 2014 return date, Respondents respectfully request that this Court allow Respondents to submit this response to the 4/2/14 Sur-Reply. Respondents would be prejudiced by an inability to respond to the late-served and unauthorized 4/2/14 Sur-Reply, especially in light of its contents.

Preliminary Statement

3. Petitioners' Motion to Renew is not -- as a matter of law -- a proper motion to renew. It does not seek the same relief originally sought (and denied), but rather different relief; permission to file a different proposed amended complaint than the one proposed in the motion for leave to amend as to which renewal is purportedly sought. For this reason alone, the motion for renewal is improper and must be denied. There is no reason to reach any other argument as this point is both undebatable and dispositive. *See also* Respondents' New York City Industrial Development Agency ("NYCIDA"), New York City Economic Development Corporation

("NYCEDC"), Empire State Development Corporation ("ESDC"), Fresh Direct and HRYV July 24, 2013 Joint Opposition to Motion to Renew ("7/24/13 Joint Opposition") and see Respondent New York State Department of Transportation's ("DOT") July 24, 2013 opposition to Motion to Renew.

Background Facts

4. As this Court has been assigned to this matter from the outset, it is presumed that the Court is generally familiar with its lengthy history. Only facts pertinent to the pending Motion to Renew are set forth herein.

5. On or about December 13, 2012, all of the Respondents moved to dismiss Petitioners' Second, Third and Fourth Causes of Action as set forth in their September 6, 2012 Amended Article 78 Petition, asserting various grounds for dismissal, including, *inter alia*, that Petitioners lacked standing to assert the Third Cause of action challenging the sublease between Fresh Direct and Harlem River Yard Ventures. Respondents also simultaneously answered the Amended Petition and opposed on the merits Petitioners' First Cause of Action arising under the State Environmental Quality Review Act ("SEQRA").

6. Petitioners opposed Respondents' Motions to Dismiss and on February 14, 2013 brought a motion for leave to amend the Amended Petition and serve a Second Amended Petition. Attached to the February 14, 2013 motion to amend was a proposed Second Amended Petition (Version #1). As to the Third Cause of Action, Petitioners sought to amend to name DOT Commissioner Joan McDonald as a party in an effort to avoid dismissal on standing and necessary party grounds.

7. Respondents opposed the motion to amend, arguing that amendment would not cure the fatal deficiencies in Petitioners' claims and would therefore be futile, and that the

claims, including the Third Cause of Action, should be dismissed pursuant to the motions to dismiss.

8. On May 24, 2013, this Court issued a Decision and Order ("5/24/13 Decision") whereby it, *inter alia*, denied the SEQRA claim (First Cause of Action) on the merits and dismissed the Second, Third and Fourth Causes of Action on standing and statute of limitations grounds. The Court further denied the motion for leave to amend, specifically finding that as to the Third Cause of Action, amendment would be futile and would not cure Petitioners' lack of standing as to that cause of action. *See* 5/24/13 Decision and Order (entered May 31, 2013).

9. On July 2, 2013, Petitioners filed a Notice of Appeal from all aspects of the 5/24/13 Decision and filed the Motion to Renew their February 2013 motion to amend solely with regard to the Third Cause of Action.

10. The Motion to Renew had attached to it a markedly different proposed Second Amended Petition (Version #2) than the one attached to the February 14, 2013 motion to amend. *See* Petitioners' Motion to Renew.

11. All Respondents opposed the Motion to Renew on multiple grounds, as more fully set forth in DOT's July 24, 2013 Memorandum of Law in Opposition to Petitioners' Motion for Leave to Renew Motion for Leave to Amend Pleadings as to the Third Cause of Action and Affirmation of Kathryn Liberatore, and the 7/24/13 Joint Opposition. Those arguments, still applicable, are not repeated herein.

12. In their August 9, 2013 Reply papers regarding the Motion to Renew, Petitioners attached yet another proposed Second Amended Petition (Version #3), different from the February 14, 2013 Version #1 and the July 2, 2013 Version #2.

13. On December 5, 2013, the parties argued the Petitioners' appeal before the Appellate Division, First Department.

14. On December 12, 2013, DOT responded to an October 2, 2013 request from HRYV and Fresh Direct for certain approvals related to Fresh Direct's relocation to the Harlem River Yard ("HRY"). The October 2, 2013 request was the first and only request to DOT relative to this Project.

15. On December 17, 2013 counsel for DOT sent Petitioners' counsel a copy of DOT's December 12, 2013 letter outlining the approvals granted. Petitioners acknowledge that they received the December 12, 2013 DOT letter on December 17, 2013.

16. In late January, 2014, Petitioners indicated that the Motion to Renew would be argued on April 7, 2014 subject to counsel availability. By Stipulation dated February 5, 2014, the parties agreed to the April 7, 2014 argument date.

17. On March 27, 2014, the Appellate Division, First Department, issued its Decision and Order, and affirmed this Court's dismissal of the Second, Third and Fourth Causes of Action on standing and statute of limitations grounds. A copy of the First Department Decision and Order is attached as Exhibit A. The First Department further affirmed this Court's denial of the SEQRA claim (First Cause of Action) on the merits, further holding that "[NYC]IDA's issuance of a negative declaration did not violate SEQRA, was not arbitrary and capricious, and was not an abuse of discretion." *See* Exhibit A at p. 2 and 8.

18. On Wednesday, April 2, 2014, just three business days before the April 7, 2014 return date of the Motion to Renew and nearly four months after the December 12, 2013 DOT letter, Respondents received Petitioners 4/2/14 Sur-Reply in the form of an April 1, 2014 Supplemental Affirmation from Petitioners' counsel Christina Giorgio. Attached to the 4/2/14

Sur-Reply as Exhibit K is yet another proposed Second Amended Petition, the fourth version of this document (Version #4) that Petitioners have proffered since serving their February 2013 motion to amend.

19. For the reasons set forth herein as well as in Respondents' collective 7/24/13 Oppositions to the Motion to Renew, the 4/2/14 Sur-Reply should be should be rejected by the Court in its entirety. Should the Court elect to consider it, Respondents respectfully request that the Court then consider this response to the 4/2/14 Sur-Reply, and deny the Motion to Renew.

20. The 4/2/14 Sur-Reply and its fourth iteration of a proposed Second Amended Petition, as with the Motion to Renew that underlies the 4/2/14 Sur-Reply, is improper and without legal basis. Specifically, and in addition to reasons previously stated, the Motion to Renew should be denied because it is moot, it seeks to resurrect dismissed/denied claims, it has no basis in fact or law, is unauthorized, and it mischaracterizes the nature of the claims asserted and the parties' roles.

The Motion To Renew is Moot

21. Petitioners' Motion to Renew seeks solely to renew that portion of their February 14, 2013 motion to amend that sought to amend the Third Cause of Action. The now-dismissed Third Cause of Action sought to nullify the Fresh Direct/Harlem River Yard sublease on the grounds that it would purportedly render the 1991 DOT/HRYV lease an unconstitutional gift of government property. The Third Cause of Action was dismissed on standing grounds by this Court. Leave to amend was simultaneously denied as futile. *See* 5/24/13 Decision and Order.

22. The First Department affirmed this Court's dismissal of the Third Cause of Action, finding that "Petitioners' allegations in the amended petition that the Department of Transportation was involved because it must pre-approve a modification of the Land Use Plan is

insufficient to confer standing . . ." Emphasis supplied. *See* Exhibit A at p. 9. The First Department also tacitly found the denial of the motion for leave to amend was proper by holding that "we have considered petitioners' remaining arguments [which included appeal of the denial of the motion to amend] and find them unavailing."

23. Thus, the Motion to Renew is moot. The Court of Appeals has held that where, by virtue of intervening acts, a court's determination of a dispute would be academic, the matter should be dismissed as moot. *See In Re Validation Review Associates, Inc.*, 91 N.Y.2d 840, (1997). *See also* 97 *New York Jurisprudence,* 2d, Summary Judgment, § 97 (New York law provides that "[a] court will not entertain moot questions, and therefore a cause of action which has become moot through settlement, an intervening change in law, **intervening court action**, or merely the passage of time is subject to dismissal) (emphasis supplied); Siegel, *New York Practice,* § 612 ("'Ripeness' and 'mootness' are similar labels that can dismiss an action as not being a proper 'case' or 'controversy' ... 'Mootness' can work like a dismissal at the other end: the plaintiff's interest, genuine enough at the outset, has been mooted by some later event, like a change of status, the divestiture of an interest, the mere passing of time, etc. In both situations, the 'case' or 'controversy' standard is violated and a dismissal is the result.")

Petitioners Cannot Re-Assert Dismissed Claims

24. Not only does Version #4 of the proposed Second Amended Complaint suffer from all the same infirmities identified in the 7/24/13 Joint Opposition, it ignores the ruling of this Court and the First Department dismissing/denying the First, Second and Fourth Causes of Action. Those claims are dead as this Court ruled and the First Department affirmed and principles of law, including law of the case and *res judicata*, operate to estop Petitioners from re-asserting them in any form. Yet, Petitioners, in the guise of renewal, seek to serve a Second

Amended Petition that not only continues to include the SEQRA claim that was denied on the merits (First cause of action), the dismissed Second Cause of Action challenging the 1991 HRY/DOT Lease, and the dismissed Fourth Cause of Action challenging Fresh Direct's admission into the Excelsior Jobs Program, it seeks to make revisions to those dead claims. *See, e.g.,* 4/2/14 Sur-Reply at Exhibit K.

25. Version #4 of the proposed Second Amended Complaint also includes parties that have no connection to the Third Cause of Action and therefore could not be included in any resurrected Third Cause of Action. These unnecessary parties have no alleged connection to the Third Cause of Action, including NYCIDA (First Cause of Action only), NYCEDC (First Cause of Action only), ESDC (Fourth Cause of Action only), Kenneth Adams (ESDC) (Fourth Cause of Action only), Randal Coburn (ESDC) (Fourth Cause of Action only), New York State Department of Economic Development (Fourth Cause of Action only), Waste Management, Inc. (Second Cause of Action only), NYP Holdings, Inc. (the New York Post) (Second Cause of Action only), and FedEx Corporation (Second Cause of Action only). This is patently improper and requires denial of the Motion to Renew.

26. Even if the Court were to somehow breathe new life into the Third Cause of Action, there is no basis to revive the First, Second and Fourth Causes of Action or the parties to those claims.

The Sur-Reply and Underlying Motion to Renew Have No Basis in Fact or Law

27. In the 7/24/13 Joint Opposition, Respondents articulated numerous reasons why the Motion to Renew should be denied. *See* 7/24/13 Joint Opposition. Chief among those reasons was the fact that the Motion denominated as a motion to renew was not in fact such a motion for the very salient reason that it did not seek to "renew" the February 14, 2013 motion to

amend but rather constituted an entirely new motion to amend that alleged different facts, added new parties, changed the substantive allegations of the Amended Petition in ways not sought in the original motion to amend, was not based on new facts or even facts at all, and was legally barred. *Id.* Those grounds remain valid and are not repeated herein.

28. As more fully set forth in 7/24/13 Joint Opposition, the "new facts" that allow, under certain circumstances, for a motion to renew under CPLR § 2221, are facts that were in existence at the time of the motion sought to be renewed. *Id.* Facts that did not come into existence until December 2013, some 10 months after the motion to amend sought to be renewed was made in February 2013, cannot serve as a basis for a motion to renew.

29. Moreover, some of the "new facts" that Petitioners contend give rise to their fourth iteration of the proposed Second Amended Petition are not "facts" at all, old or new. For example, in paragraph 56 of Version #4 (April 2, 2014) of the proposed Second Amended Petition, Petitioners rely on a non-event in their effort to reinvigorate their deceased Third Cause of Action. Petitioners allege that on December 12, 2013, DOT "approved" the Fresh Direct/ HRYV sublease. No such approval was sought or given for the very simple reason that the DOT/HRYV 1991 Lease (the subject of the dismissed Second Cause of Action) does not provide for any such approval and thus no such approval was sought or obtained. The DOT/HRYV 1991 Lease was attached to the September 6, 2012 Amended Petition as Exhibit CC.

30. The gulf between an actual motion to renew and the papers Petitioners have put before this Court has only grown larger, obliterating any resemblance between what is now before the Court and a true Motion to Renew.

The Sur-Reply is Unauthorized

31. Sur-reply papers are not permitted absent prior court permission. CPLR § 2214(b) sets forth the papers that can be served on a motion (moving papers, opposition papers, and reply

papers) and CPLR § 2214(c) provides that "only papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion **unless the court for good cause shown shall otherwise direct"** (emphasis supplied). Petitioners did not seek court permission to serve the 4/2/14 Sur-Reply that included the fourth version of the proposed Second Amended Petition and thus, fail to offer any "good cause" to warrant their service. Nor did the Court direct the service of sur-reply papers.

32. By Petitioners' own admission, they have been in possession of the facts they rely on to support this fourth and latest version of the proposed Second Amended Petition since December 17, 2013. *See* 4/2/14 Sur-Reply at, *e.g.*, Giorgio Affirmation ¶s 4 and 6. Petitioners offer no excuse or justification for their delay since December 17, 2013 or why they waited until a few days before the return date to serve these papers.

Petitioners Cannot Unilaterally Change The Status of the Parties or the Claims

33. In the 4/2/14 Sur-Reply, Petitioners persistently refer to the parties as "Petitioners/Plaintiffs" and "Respondents/Defendants." *See, e.g.*, April 2, 2014 Giorgio Aff. at ¶s 1, 3, 4, 5, 6, and 8. By making these false designations, Petitioners self-deal and give themselves relief that neither this nor any other court has granted.

34. The original Petition dated June 13, 2012 was solely an Article 78 Petition. Petitioners designated it as a Petition and appropriately designated themselves solely as "Petitioners" and appropriately designated Respondents solely as "Respondents." *See* Verified Article 78 Petition. The Petition sought Article 78 relief.

35. Similarly the September 6, 2012 Amended Petition was solely an Article 78 Petition and Petitioners once again appropriately designated themselves solely as "Petitioners"

and appropriately designated Respondents solely as "Respondents." The Amended Petition sought Article 78 relief.

36. It was not until Petitioners sought to amend their Petition for a second time via their February 14, 2014 Motion for Leave to Amend[1] that, for the first time, they sought to designate the Petition as a "Petition/Complaint" and to designate themselves as "Petitioners/Plaintiffs" and Respondents as "Respondents/Defendants." That motion, however, was denied in its entirety by this Court and that denial was affirmed by the First Department in its March 27, 2014 Decision and Order. *See* Exhibit A. Thus, there is no basis for such designations and Petitioners cannot grant themselves or their pleadings status that was expressly rejected by this Court and the Appellate Division, First Department.

37. Based on the foregoing, as well as the 7/24/13 Joint Opposition, and the July 24, 2013 papers filed by DOT in opposition to the Motion to Renew, it is respectfully requested that this Court deny the Motion to Renew in its entirety.

Laurie Styka Bloom

Dated: New York, New York
April 7, 2014

[1] Because Petitioners had already amended once as of right when they served the September 6, 2012 [First] Amended Petition, any further amendments could only be with court permission per CPLR § 3025(b).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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In the Matter of Application of

SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,

Petitioners,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

----------X

Index No. 260462-2012

(Brigantti-Hughes, J.)

AFFIRMATION OF KATHRYN LIBERATORE

7-14-15

8/12

KATHRYN M. LIBERATORE, an attorney duly admitted to practice law in the courts of the State of New York, affirms the following under penalty of perjury:

1. I am an Assistant Attorney General with the New York State Attorney General's Office and of counsel to Eric Schneiderman, Attorney General of the State of New York, attorney for respondent New York State Department of Transportation ("DOT").

2. This above-captioned proceeding is an article 78 challenge to alleged determinations made by governmental respondents.

3. The May 24, 2013 decision and order of the Court dismissing the petition in its entirety is attached as Exhibit A to this affirmation.

Affirmed this 24th day of
July 2013

New York, NY

Kathryn M. Liberatore

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of	
SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,	Index No.: 260462/2012 IAS Justice (Brigantti-Hughes, J.) **AFFIDAVIT OF SERVICE**
Petitioners,	
-against-	
NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,	
Respondents.	
For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Daryl B. Concha, being duly sworn, deposes and says:

1. I am over 18 years of age and am not a party to this action.

2. On August 8, 2013, I served a true copy of the following documents filed in support of Petitioners' Motion for Leave to Renew Motion for Leave to Amend Pleadings and to Add Necessary Parties As to the Third Cause of Action:

- *Supplemental Affirmation of Christina Giorgio*, dated August 9, 2013, with exhibit A thereto; and
- *Reply Memorandum of Law in Further Support of Petitioners' Motion for Leave to Renew Motion for Leave to Amend Pleadings and to Add Necessary Parties As to the Third Cause of Action*, dated August 9, 2013 upon counsel for Respondents:

Christopher G. King
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007

Simon Wynn
Empire State Development
633 Third Avenue
New York, NY 10017

Kathryn M. Liberatore
Assistant Attorney General
New York State Office of the
Attorney General
120 Broadway, 26th Floor
New York, NY 10271-0332

Laurie Styka Bloom
Jared C. Lusk
Thomas C. Greiner, Jr.
Nixon Peabody LLP
Key Towers at Fountain Plaza
40 Fountain Plaza, Suite 500
Buffalo, NY 14202

Steven Barshov
Sive Paget & Riesel, P.C.
460 Park Avenue, 10th Floor
New York, New York 10022

by Federal Express overnight delivery by depositing a true and accurate copy of the same enclosed in a properly addressed envelope into the custody of the overnight delivery service.

Daryl B. Concha

9th day of August, 2013

Notary Public

Karen Steel
Notary Public, State of New York
No. 02ST6182239
Qualified in New York County
Commission Expires February 19, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of	
SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,	Index No.: 260462/2012 IAS Justice (Brigantti-Hughes, J.) **AFFIDAVIT OF SERVICE**
Petitioners,	
-against-	
NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,	
Respondents.	
For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	

STATE OF NEW YORK)
) ss:
COUNTY OF BRONX)

Thomas F. Martecchini, being duly sworn, deposes and says:

1. I am over 18 years of age and am not a party to this action.

2. On April 1, 2014, I served a true copy of the Suppemental Affirmation of Christina Georgio in Support of Petitioners' Motion for Leave to Renew Motion for

Leave to Amend Pleadings As to the Third Cause of Action, dated April 1, 2014, with Exhibits J-K thereto, upon counsel for Respondents:

Christopher G. King
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007

Simon Wynn
Empire State Development
633 Third Avenue
New York, NY 10017

Kathryn M. Liberatore
Assistant Attorney General
New York State Office of the
Attorney General
120 Broadway, 26th Floor
New York, NY 10271-0332

Laurie Styka Bloom
Jared C. Lusk
Thomas C. Greiner, Jr.
Nixon Peabody LLP
Key Towers at Fountain Plaza
40 Fountain Plaza, Suite 500
Buffalo, NY 14202

Steven Barshov
Sive Paget & Riesel, P.C.
460 Park Avenue, 10th Floor
New York, New York 10022

by Federal Express overnight delivery by depositing a true and accurate copy of the same enclosed in a properly addressed envelope into the custody of the overnight delivery service.

Thomas F. Martecchini

1st day of April, 2014

Notary Public

Karen Steel
Notary Public, State of New York
No. 02ST6182239
Qualified in New York County
Commission Expires February 19, 2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X

In the Matter of Application of

SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,

Petitioners,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001
----------X

Index No. 260462-2012

(Brigantti-Hughes, J.)

AFFIRMATION OF SERVICE

+14.15
8/12

KATHRYN M. LIBERATORE, an attorney duly licensed to practice law before the courts of the State of New York, does hereby affirm under penalty of perjury as follows:

1. I am an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York and attorney for respondent New York State Department of Transportation.

2. In accordance with CPLR 2103(b), on July 24, 2013, I served a true copy of the within (1) Memorandum of Law in Opposition to Petitioners' Motion to for Leave to Renew Motion for Leave to Amend and (2) Affirmation of Kathryn Liberatore upon the attorneys for the petitioners and co-respondents by U.S. mail properly sealed in a first class postpaid wrapper and

deposited in an official depository under the exclusive care and custody of the U.S. Postal Service in New York State, addressed to the persons set forth below.

Dated: New York, New York
July 24, 2013

Kathryn M. Liberatore, AAG

To: Christina Giorgio
New York Lawyers for the Public Interest
151 W. 30th Street, 11th Floor
New York, New York 10001-4017

Lisa C. Cohen
Schindler, Cohen, & Hochman
100 Wall Street, 15th Floor
New York, New York 10005

Christopher King
Corporation Counsel of the City of New York
Attorney for the Respondents New York City Industrial Development Agency and New York City Economic Development Corporation
100 Church Street, Room 6-132
New York, New York 10007

Simon Wynn
Empire State Development Corporation
633 Third Avenue
New York, NY 10017

Laurie Styka Bloom
Nixon Peabody LLP
40 Fountain Plaza Suite 500
Buffalo, NY 14202

Steve Barshov
Sive, Paget & Riesel
Attorney for Respondent Harlem River Yard Ventures, Inc.
460 Park Avenue
New York, New York 10022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of

SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,

Petitioners,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT, LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

Index No.: 260462-2012

AFFIDAVIT OF SERVICE

Laurie Styka Bloom, an attorney duly admitted to practice law in the courts of the State of New York, under penalty of perjury and pursuant to CPLR § 2106, affirms that she is counsel with Nixon Peabody LLP, attorneys for Fresh Direct, LLC and UTF Trucking, Inc.; that on the 7th day of April, 2014 she served the annexed April 7, 2014 Attorney Affirmation of Laurie Styka Bloom upon the following:

Christina Giorgio, Esq. Gavin Kearney, Esq. New York Lawyers for the Public Interest 151 W. 30th Street, 11th Floor New York, New York 10001-4017 E-mail: gkearney@nylpi.org cgiorgio@nylpi.org *Attorneys for Petitioners*	
Kathleen Schmid, Esq. Christopher King, Esq. Assistant Corporation Counsel 100 Church Street New York, New York 10007 E-mail: cking@law.nyc.gov E-mail: kschmid@law.nyc.gov *Attorneys for Respondents NYCIDA and NYCEDC*	Kathryn DeLuca, Esq. New York State Attorney General's Office 120 Broadway New York, New York 10271 E-mail: Kathryn.liberatore@ag.ny.gov *Attorneys for Respondent NYSDOT*
Simon Wynn, Esq. Empire State Development Corporation 633 Third Avenue New York, New York 10017 E-mail: swynn@esd.ny.gov *Attorney for Respondent Empire State Development Corp.*	Steven Barshov, Esq. Sive, Paget & Riesel 460 Park Avenue New York, New York 10022 E-mail: sbarshov@sprlaw.com *Attorneys for Respondent Harlem River Yard Ventures*

by hand delivering same to the above-named persons at approximately 11 a.m. in Room 702 of Bronx Supreme Court (Justice Mary Ann Brigantti-Hughes chambers).

Deponent is over the age of 18 years.

Laurie Styka Bloom

Sworn to before me this
15 day of April, 2014

Notary Public

Karen E. Calabrese
Notary Public, State of New York
Registration No. 01CA4694805
Qualified in Erie County
Commission Expires June 30, 2015

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of	
SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,	Index No.: 260462/2012
Petitioners,	IAS Justice
-against-	(Brigantti-Hughes, J.)
NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,	
Respondents.	
For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITIONERS/PLAINTIFFS' MOTION FOR LEAVE TO RENEW MOTION FOR LEAVE TO AMEND PLEADINGS

Petitioners/Plaintiffs respectfully submit this reply memorandum of law in further support of Plaintiffs/Petitioners' Motion for Leave to Renew ("Motion to Renew") their Motion for Leave to Amend Pleadings and to Add New Parties ("Motion to Amend Pleadings") as to the third cause of action.

PRELIMINARY STATEMENT

Petitioners/Plaintiffs' Motion to Renew their Motion to Amend Pleadings squarely satisfies the requirements of CPLR § 2221(e). Petitioners/Plaintiffs (hereinafter "Plaintiffs") base their motion on new facts unavailable at the time they filed their prior motion to amend the pleadings on February 14, 2013, the inclusion of which change this Court's May 24, 2013 determination on standing as to the third cause of action challenging the unconstitutional conveyance of public land to Fresh Direct. Plaintiffs also have provided a reasonable justification for not alleging the new facts on the prior motion for leave to amend pleadings.

While apparently conceding that the new facts change this Court's prior determination on the third cause of action, Respondents/Defendants (hereinafter "Defendants"), in two separate memoranda of law[1], seek to defeat the motion with a series of meritless and frequently contradictory objections, none of which is supported by the law or the facts. First, DOT posits that the new facts alleged in the renewed Motion for Leave to Amend Pleadings are "too speculative" to support a motion to renew. Then DOT disavows its speculation objection and joins the other Defendants to argue that the new facts are not new and should have been pled previously, even though the newly alleged facts occurred after this Court issued its May 24, 2013 opinion (the "Opinion"). In staking out these positions, Defendants ignore the First Department's clear precedent granting motions to renew if the newly pled facts change the prior determination, regardless of whether they were known to the movant at the time of the prior motion.

[1] New York State Department of Transportation ("DOT") submitted a stand-alone memorandum of law on its behalf ("DOT MOL") while the remaining Defendants submitted a joint memorandum of law ("Joint MOL").

Defendants next disregard well established case law by arguing that Plaintiffs' Motion to Renew does not meet the requirements of CPLR §2221(e) because the new pleading contains factual allegations different than those alleged in the February 14, 2013 amended pleading. What Defendants fail to understand is that successful motions to renew motions for leave to amend under CPLR § 2221(e) must contain additional facts sufficiently different from those of the prior pleading so as to alter the prior determination. Defendants also err when arguing that Plaintiffs seek relief different than that in the motion of leave to amend filed on February 14, 2013. The relief sought in the renewed pleading relating to the third cause of action is identical to that previously sought – namely enjoining the unconstitutional conveyance of public land to Fresh Direct.

Last, Defendants attempt to defeat the Motion to Renew with specious contentions that CPLR § 2221(e) is not the proper vehicle under which to bring a motion to renew that was filed prior to the expiration of the time to file a notice of appeal. Defendants in the Joint MOL compound this error by further claiming the Motion to Renew is barred by res judicata. Yet Defendants possess an entirely inaccurate understanding of res judicata, which quite obviously has no application to this motion for both substantive and procedural reasons.

As Plaintiffs have timely filed their Motion to Renew their Motion to Amend Pleadings, which submits new facts that change the outcome of the Court's prior determination on standing and have provided a reasonable justification for not alleging the facts in the prior motion, the Motion to Renew should be granted.

ARGUMENT

A. Contrary To Defendants' Contentions, Plaintiffs' Motion To Renew Meets The Requirements Of CPLR § 2221(e)

Plaintiffs have properly renewed their Motion to Amend Pleadings as to their third cause of action by (1) asserting new facts not offered in a prior motion that would change the prior determination and (2) providing a reasonable justification for not presenting the facts in the prior motion. CPLR § 2221(e) (McKinney 2013); *Tishman Const. Corp. of N.Y. v. City of N.Y.*, 280 A.D.2d 374, 376 (1st Dep't 2001); *Sirico v. F.G.G. Prods., Inc.*, 71 A.D.3d 429, 433 (1st Dep't 2010); *Peebles v. N.Y. City Hous. Auth.*, 295 A.D.2d 189, 190-91 (1st Dep't 2002); *Ramos v. City of N.Y.*, 61 A.D.3d 51, 54 (1st Dep't 2009).

1. Defendants Wrongly Claim That Plaintiffs Have Not Cited New Facts

In their proposed renewed second amended pleading ("Renewed Second Amended Pleading"), Plaintiffs set forth new facts unavailable to them until June 17, 2013 which show that DOT Commissioner Joan McDonald has or will imminently approve a change to the 1993 Land Use Plan to allow the Fresh Direct project. Such approval amounts to an unconstitutional disbursement of public property in violation of Article 7, Section 8 of the State Constitution because the Fresh Direct project eviscerates the adjudicated public purpose of the 1991 Lease – namely to operate an intermodal terminal at the Harlem River Yard. When affording Plaintiffs every possible inference and accepting the allegations as true, as required on motions to dismiss, (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005)), these newly alleged facts cure the standing deficiencies upon which this Court based its denial of the prior motion for leave to amend pleadings. As such, these newly pled facts change the prior determination – a fact Defendants do not contest.

Since day one, Plaintiffs' access to information concerning the proposed Fresh Direct project has been limited to the FOIL process. Despite being public land for which DOT holds title, Harlem River Yard Ventures ("HRYV") manages the Harlem River Yard virtually free of public accountability or transparency simply because the DOT has delegated its management duties to a private intermediary. Through the only means available to them, Plaintiffs have diligently used the FOIL process to gain, albeit limited, access to the facts concerning the siting of Fresh Direct on public land.

At the time they filed their prior motion for leave to amend, Plaintiffs pled the facts available to them. They pled that the Fresh Direct project, as a significant change to the 1993 Land Use Plan, required DOT's prior approval under the terms of the 1991 Lease. Yet, according to DOT, HRYV still had not submitted a request for a land use change to allow the Fresh Direct project.

Through monitoring the New York City Planning Commission's ("CPC") website, Plaintiffs learned on June 19, 2013 that HRYV would soon or had already submitted to DOT, as part of the restrictive covenant process, a request to change the land use to allow the Fresh Direct project. (Supplemental Affirmation of Christina Giorgio, dated Aug. 9, 2013, at ¶ 8). Upon learning of these newly developed facts, Plaintiffs promptly supplemented their amended pleading with new facts that show DOT, through Commissioner McDonald, under the terms of the 1991 Lease, has or will soon approve HRYV's application for a land use change to allow the Fresh Direct project.

2. Contrary To Defendants' Assertions, Plaintiffs Have Alleged Reasonable Justification

Plaintiffs have also provided a reasonable justification for not having pled more DOT involvement in the proposed land conveyance due to DOT's repeated FOIL responses asserting

that DOT had not yet received HRYV's request for a land use change to allow the Fresh Direct project. Not until learning of HRYV's June 17, 2013 land use change application to the CPC, which requires a simultaneous land use change filing with DOT, were Plaintiffs in a position to plead more concerning DOT's and its Commissioner's imminent approval of the project. Accordingly, the Court should grant the Motion to Renew the Motion to Amend Pleadings.

Where newly submitted facts would change the prior determination, courts apply an expansive interpretation of reasonable justification in the interest of justice and substantial fairness. *Sirico*, 71 A.D.3d at 433; *Framapac Delicatessen, Inc. v. Aetna Cas. & Sur. Co.*, 249 A.D.2d 36, 36-37 (1st Dep't 1998). Courts are to exercise their discretion to allow cases to be resolved on the merits. *Tuccillo v. Bovis Lend Lease, Inc.*, 101 A.D.3d 625, 627 (1st Dep't 2012); *Tishman,* 280 A.D.2d at 376-77; *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2nd Dep't 2010). So strong, in fact, is the public policy to resolve claims on the merits, where the new facts change the prior determination, the First Department has allowed renewal motions even in the absence of a reasonable justification for the failure to raise known facts in the prior motion. *Bustamante v. Green Door Realty Corp.*, 69 A.D.3d 521, 522 (1st Dep't 2010); *Rancho Santa Fe Ass'n v. Dolan-King*, 36 A.D.3d 460, 461 (1st Dep't 2007); *Trinidad v. Lantigua*, 2 A.D.3d 163, 163 (1st Dep't 2003); *Garner v. Latimer*, 306 A.D.2d 209, 209-10 (1st Dep't 2003); *see also Mejia v. Nanni*, 307 A.D.2d 870, 871 (1st Dep't 2003).

As noted above, Plaintiffs were justified in not submitting the newly available facts in the prior motion for the obvious reason that the facts upon which the motion is based did not occur until June 17, 2013. Until that point, Plaintiffs diligently sought confirmation of the status of HRYV's request for a land use change and were told repeatedly by DOT through the FOIL process that no requests had been received. Upon learning of what can only be seen as an

imminent request for approval given the application submitted to the CPC under the restrictive covenant, Plaintiffs promptly moved to bring these facts before the Court in a timely motion to renew under CPLR § 2221(e). And even if it were determined that the new facts were in existence at the time of the prior motion, DOT's repeated assertion that it had not received any request for a land use change certainly justifies not pleading facts to the contrary in the prior motion.

Tishman Construction Corp. of New York v. City of New York, 280 A.D.2d 374 (1st Dep't 2001) is particularly instructive in demonstrating that Plaintiffs have alleged reasonable justification. In *Tishman*, defendant moved to amend its answer to interpose a counterclaim against plaintiff, a construction manager, seeking rescission of a contract and damages based upon the project executive's acceptance of a bribe. The lower court denied the motion based on the absence of any evidence in support of this claim, and the denial was affirmed by the First Department. Thereafter, immediately upon receiving bank records of the project executive, which supported the bribery claims, defendant moved for leave to renew its motion to amend the pleadings. The First Department, in overturning the lower court's denial of motion for leave to renew, found that defendant "provided a reasonable excuse for the unavailability of the records until the within renewal motion was made and did not improperly delay obtaining the disclosure order." *Id.* at 377. The Court further found that "[s]ince there was no strategy of delay on the part of defendant in obtaining the records, the court improvidently exercised its discretion in denying the motion to renew." *Id.*

Here, as in *Tishman*, information crucial to the amendment of the pleadings is solely in the hands of another party – here, the DOT.[2] In making multiple FOIL requests to the DOT and

[2] Contrast this with Defendants' reliance on *Brooklyn Welding Corp. v. Chin*, 236 A.D.2d 392 (2nd Dep't 1997). In *Brooklyn Welding*, the Second Department affirmed the Supreme Court's denial of

in tracking public records to obtain the CPC approval status, Plaintiffs have been diligent about procuring information necessary to their claim. Immediately upon discovering that Fresh Direct and HRYV submitted an application to the CPC seeking an approval of a material modification to the 1993 Land Use Plan, which signaled that an identical request to the DOT was imminent, Plaintiffs filed the instant Motion to Renew. Accordingly, Plaintiffs have alleged a reasonable justification for not previously pleading the supplemental facts, and thus the Motion to Renew should be granted.

3. This Court Should Reject Defendants' Contradictory Arguments Concerning The Supplemental Facts Supporting The Motion To Renew

The two sets of opposition papers submitted by the DOT and the remaining Defendants present directly contradictory arguments concerning the supplemental facts supporting the Motion to Renew. On the one hand, the DOT asserts that Plaintiffs' new claims are too "speculative" to serve as a basis for the motion to renew. Likewise, the remaining Defendants assert that Plaintiffs' Motion to Renew fails on the basis that a party cannot base such a motion upon "new" facts. On the other hand, Defendants assert that, despite the "new" and purportedly "speculative" nature of these supplemental facts, Plaintiffs should have included such facts in their original motion to amend the pleadings. Such blatantly contradictory arguments must be rejected.

Defendants assert that Plaintiffs' use of facts that occurred subsequent to the prior motion is impermissible under CPLR § 2221(e) because, according to Defendants, the newly pled facts must have existed at the time of the prior motion. (Joint MOL at 10; DOT MOL at 11). Defendants cite no case that supports their position. On the contrary, they cite to a list of pre-

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movant's motion to renew his article 78 petition on the grounds that the "new" evidence was not new but rather "precisely the same facts" set forth in the petition and constituted information concerning negotiations to which movant was privy and "had played an active and important role." *Id.* at 392.

codification non-First Department cases where the motion was denied not because the evidence was newly developed, but rather because the movant failed to provide a reasonable justification for not having pled the new evidence in the prior motion.[3]

Defendants' distortions aside, the plain language of the statute provides that the motion to renew must be based on new facts – not facts in existence at the time of the prior motion. Moreover, First Department precedent makes clear that movants may move to renew based on facts not in existence at the time of the prior motion. *Peebles*, 295 A.D.2d at 190-91 (reversing denial of a motion to renew where counsel provided reasonable explanation for submitting new evidence not in existence at the time of the prior motion in the form of an expert's affidavit); *Ramos v. City of New York*, 61 A.D.3d 51, 54 (1st Dep't 2009) (motion to renew properly granted where plaintiff presented new evidence of the reversal of the criminal conviction not in existence at the time of the prior motion that formed basis for defendant's motion for summary judgment); *see also Sirico,* 71 A.D.3d at 433.

Moreover, while conceding that the 1991 Lease precludes the Fresh Direct project from moving forward without DOT's prior approval, DOT attempts to defeat the Motion to Renew by characterizing the new allegations concerning the Commissioner's approval, or imminent approval, as too "speculative" to be a basis for a motion to renew. DOT writes: "Since the DOT has not even received construction plans or a request to modify the Land Use Plan based upon the Fresh Direct Project from the HRYV, any allegations about the Commissioner's ultimate decision – should she be presented with a request – are speculative and do not constitute a basis

[3] *See, e.g., Welch Foods v. Wilson*, 247 A.D.2d 830 (4th Dep't 1998) (renewal motion based on public reports in existence at the time the prior motion and submitted under the affidavit of a new expert denied on appeal for failure to provide a reasonable justification for not having previously submitted evidence which was available at the time for prior motion); *Grassel v. Albany Med. Ctr.*, 223 A.D.2d 803 (3rd Dep't 1996) (motion denied on appeal where movant failed to provide reasonable justification for delay in serving untimely expert disclosures).

for petitioners' motion to renew."[4] (DOT MOL at 10). However, there is nothing speculative about Section 8.06 of the 1991 Lease that makes DOT's approval mandatory, a fact pled in the prior motion. Furthermore, DOT has known about the proposed Fresh Direct plan for at least 18 months and has indirectly defended the project the entire time. Allegations regarding DOT Commissioner's imminent approval are not speculative, particularly now that HRYV's has commenced the land use change process under the restrictive covenant.

Incredibly, all the while objecting to Plaintiffs' reliance on newly developed facts, Defendants simultaneously contend that the new facts of DOT Commissioner McDonald's imminent approval are somehow not "new." Defendants fault Plaintiffs for accepting DOT's FOIL representations that HRYV had not submitted an application for a land use change and should have pled that DOT had approved the land use change to allow the Fresh Direct project. And yet, until June 17, 2013, the facts indicated that no request for land use change had been submitted and when learning that one appeared imminent (or had already been submitted), Plaintiffs promptly filed a motion to renew their motion for leave to amend pleadings based on new facts which contradicted DOT's previous representations concerning the status of HRYV's land use change request.

These arguments neatly demonstrate the weakness of the Defendants' opposition to the motion. On the one hand, Defendants claim Plaintiffs should have pled the facts in the prior motion, despite being informed repeatedly by DOT that it had not received any such request. On

[4] It is worth noting as well that DOT now argues, for the first time, that allegations concerning DOT Commissioner's imminent approval of the Fresh Direct project are too speculative to form the "prerequisite predicate for judicial review of 'final' governmental action under article 78." (DOT MOL at 4). In arguing that Commissioner McDonald's imminent approval cannot form the basis for article 78 relief, DOT appears to have adopted Plaintiffs' position that the lease claims should be treated as actions, and not article 78 special proceedings. This conclusion is reinforced by the fact that Defendants argue that the statute of limitations has run on the second and third causes of action concerning the leases, and yet the DOT is saying that the conduct upon which Plaintiffs should base their claim for standing purposes has not occurred and may never happen. (*Id.* at 10).

the other hand, they contend that the new allegations are "too new" or speculative at this point in the Fresh Direct project to be the basis for a motion to renew. Defendants cannot have it both ways.

Nonetheless, it is well settled that the newly available facts prong under CPLR § 2221(e) is flexible and should not be applied if its application defeats the interest of justice. *Tishman*, 280 A.D.2d at 376-77 (*citing Liberty Mut. Ins. Co. v. Allstate Ins. Co.,* 237 A.D.2d 260 (2nd Dep't 1997)); *Vayser v. Waldbaum,* 225 A.D.2d 760 (2nd Dep't 1996); *Bustamante*, 69 A.D.3d at 522; *Tuccillo,* 101 A.D.3d at 627-28 (reversal, in the interest of justice, of the trial court's denial of plaintiff's motion to renew based on a contract previously available to plaintiff but only included on its motion to renew); *Peebles*, 295 A.D.2d 189. This flexible approach is particularly necessary in circumstances such as these, where Defendants' arguments are rife with contradiction.

The holdings of the First Department reflects a clear mandate that where the newly alleged facts change the prior determination, courts are to use their discretion and grant the motion to renew, regardless of whether the facts were known by the movant at the time of prior motion. Under controlling First Department authority, so assiduously avoided by Defendants, the Court should grant the Motion to Renew.

4. Plaintiffs Have Not Sought New Relief, But Simply Allege New Factual Allegations Substantiated By Facts Occurring After The Court Issued Its Decision

Additionally futile is Defendants' attempt to paint Plaintiffs' Motion to Renew their Motion to Amend Pleadings as something other than a motion to renew their February 13, 2013 Motion for Leave to Amend Pleadings. To make this meritless argument, Defendants contend that the Renewed Amended Pleading (1) seeks entirely new relief; (2) contains a "wholly new claim that Commissioner McDonald, in the course of her duties, 'has or is soon to approve'

changes to the 1993 Land Use Plan or the Fresh Direct project"; and (3) contains different factual allegations. (DOT MOL at 12; Joint MOL at 8-9). None of these arguments hold water.

First, the Renewed Second Amended Pleading as to the third cause of action requests identical relief as that sought in the February 13, 2013 proposed Second Amended Pleading, namely to enjoin the conveyance of public land to Fresh Direct as violative of Article 7, Section 8 of the State Constitution. Plaintiffs seek no additional or different relief.

This is in sharp contrast to the totally inapposite case Defendants cite to support their non sequitur argument. (DOT MOL at 12-13; Joint MOL at 9.) Namely in *Sodano v. Faithway Deliverance Ctr., Inc.*, 18 A.D.3d 534 (2nd Dep't 2005), Fairway, the movant, sought unsuccessfully to stay a foreclosure. After the foreclosure and a failed attempt to stay the transfer of the deed, Fairway subsequently moved to redeem the property based on a new ability to pay off the debt. The trial court treated the filing as a motion to renew and granted the motion. The appellate court reversed, noting that subsequent filing was not a motion to renew a prior filing based on new facts, but rather an entirely new motion seeking to redeem the property rather than seeking to stay the foreclosure. In so holding, the Second Department stated:

> The Supreme Court improperly characterized Faithway's second motion as one for leave to renew. By its first motion, Faithway sought to stay the foreclosure sale, and that motion was denied. The second motion was made approximately six months after the sale, and the order Faithway sought at that time was one permitting it to redeem. Thus, Faithway sought completely different relief on its second motion, and it was error to characterize it as one for leave to renew its prior motion (*see* CPLR § 2221(e)(2)).

Sodano at 535-36.[5]

[5] The Joint MOL's citation to *Merkos L'Inyonei Chinuch, Inc., v. Sharf*, 2008 WL 4961589, 2008 N.Y. Misc. LEXIS 9765 (Sup. Ct. Kings Cty., Nov. 3, 2008) does nothing to advance Defendants' arguments. Although *Merkos* cites *Sodano* for the proposition that a motion to renew a prior motion should not seek new or different relief, the issues in *Merkos* are completely different and totally irrelevant to the issues at bar.

Equally unavailing is DOT's erroneous contention that the motion somehow alleges a "wholly new claim" against DOT Commissioner McDonald. (DOT MOL at 12). The third cause of action has always alleged a claim against DOT under State Finance Law § 123-b, which provides that an employee or officer in the course of their duty engaged or is soon to engage in an unconstitutional disbursement of state property. DOT concedes that the proposed Second Amended Pleading filed February 14, 2013 named DOT Commissioner McDonald as a party to the complaint for both the second and third causes of action. Accordingly, the DOT has long been on notice that Plaintiffs brought their third cause of action against it under State Finance Law § 123-b.

Moreover, in writing about the proposed amendment to the third cause, the Court wrote, "Petitioners have moved to amend their pleading and join, among others, Joan McDonald, commissioner of the DOT." (Opinion at 19). That DOT prefers a cramped interpretation of the February 14, 2013 Second Amended Pleading does not change the fact that there are no new claims against DOT Commissioner McDonald in the renewed motion.

Defendants also seek to brand Plaintiffs' Motion to as improper because the Renewed Second Amended Pleading is too different from the prior proposed Second Amended Pleading. Again, Defendants fundamentally fail to understand the nature and application of CPLR § 2221(e). As an initial matter, the only changes to the Renewed Second Amend Pleading are those discussed in the Plaintiffs Memorandum of Law in Support of the Motion and the Affirmation of Christina Giorgio. The additional "changes" are a product of inadvertently using the incorrect source document when adding the new allegations regarding DOT Commissioner's imminent approval of the Fresh Direct project.[6] Plaintiffs did not intend nor desire to add nor subtract

[6] A copy of the Renewed Second Amended Pleading redlined against the correct source document is attached as Exhibit A to the Supplemental Affirmation of Christina Giorgio. The Renewed

parties, change the wording of previously pled paragraphs nor add allegations regarding the reconfigured of the project and amended sublease.

Yet the law is clear that even if Plaintiffs had wanted to make those changes, it would have been entirely proper. *Lambert v. Williams*, 218 A.D.2d 618 (1st Dep't 1995) (reversing Supreme Court denial of renewal of motion to amend complaint which added new cause of action seeking a permanent injunction); *see also Kirchmeyer v. Subramanian*, 167 A.D.2d 851 (4th Dep't 1990) (reversing Supreme Court's denial of plaintiff's renewal motion for leave to amend complaint to assert a new cause of action for wrongful death).

Ultimately, Defendants fail to cite one case that stands for the proposition that motions to renew a motion for leave to amend pleading are denied because the renewed pleading differed too much from the previously denied motion for leave to amend. On the contrary, motions to renew motions for leave to amend are granted *because* the new pleading contained sufficiently different allegations from its predecessor so as to change the prior determination. Here, Defendants concede that the new allegations change the prior determination and, as such, the Motion to Renew should be granted.

5. Defendants Confuse This Motion To Renew With A Motion Seeking Relief From Final Judgment Under CPLR § 5105

Defendants base their opposition to the Motion to Renew on an equally spurious argument that the Court's order, for which for a timely notice of appeal has been filed, is a final

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Second Amended Pleading contains the following new paragraphs: ¶¶108 and 109 noting the simultaneous filing requirement for land use change requests under the 1995 restrictive covenant; ¶¶ 215-222 alleging HRYV's and Fresh Direct's June 17, 2013 application for a land use change to the CPC and DOT Commissioner's approval or imminent approval of HRYV's application for a land use change; ¶¶ 251, 254-255 reiterating the allegations regarding DOT Commissioner's approval or imminent approval of HRYV's application for a land use change to allow the Fresh Direct project as violating Article 7, Section 8 of the State Constitution. The Renewed Second Amended Pleading notes at ¶ 21 that Plaintiff Arthur Mychal Johnson is no longer a Community Board One member due to the Bronx Borough President's office electing not to renew his membership this year.

judgment and cannot be renewed through CPLR § 2221(e). (DOT MOL at 12-13; Joint MOL at 17). Defendants cite no authority that supports their position. Rather, they offer a series of cases concerning subsequent motions, all of which concerned matters fully disposed on the merits, the time for appeal had expired *and* the order had been reduced to a judgment. In these cases, the movant erroneously filed a motion to renew under CPLR § 2221(e) when they should have filed a motion for relief from judgment under CPLR § 5105. *See, e.g., Maddux v. Schur*, 53 A.D.3d 738 (3rd Dep't 2008) (motion to renew filed ***two years*** after completion of trial and order of dismissal, improperly brought under CPLR § 2221 should have been brought as a motion for relief from a final order and judgment under CPLR § 5105); *Curry v. Vertex Restoration Corp.*, 252 A.D.2d 360 (1st Dep't 1998) (relief from judgment, not renewal, is proper vehicle to seek relief from final judgment); *Swope v. Quadra Realty Trust Inc.*, 28 Misc. 3d 1209(A), 2010 WL 2802165 (Sup. Ct. N.Y. Cty. June 8, 2010) (CPLR § 5105, not § 2221(e), is the proper vehicle to seek relief from judgment ***where the time to appeal has expired***, no appeal was taken and the decision became a "final and non-appealable judgment).

Defendants fundamentally confuse Plaintiffs' entirely proper motion to renew under CPLR § 2221(e) with motions seeking relief from a final judgment under CPLR § 5105. Plaintiffs filed the Motion to Renew prior to the expiration of time to appeal, and filed a timely notice of appeal of the decision. Under these facts, the Court's decision is not a final judgment, making CPLR § 2221(e) the proper vehicle to renew their Motion for Leave to Amend Pleadings. *See Peebles*, 295 A.D.2d 189 (denial of motion to renew reversed, grant of summary judgment reversed and complaint reinstated); *Haunss v. City of N.Y.*, 100 A.D.3d 428 (1st Dep't 2012) (denial of motion to renew motion to amend notice of claim reversed); *Metcalfe v. City of N.Y.*, 223 A.D.2d 410, 410 (1st Dep't 1996) (complaint properly reinstated after grant of motion

to renew). *See also Bustamante*, 69 A.D.3d at 552 (denial of motion to renew reversed and grant of motion to dismiss reversed; complaint reinstated); *Matter of Lutheran Med. Ctr. v. Daines*, 65 A.D.3d 551 (2nd Dep't 2009) (affirmed grant of motion to renew opposition to article 78 petition and subsequent dismissal of previously granted petition).

B. Res Judicata Does Not Bar Plaintiffs' Motion To Renew

Defendants in their Joint MOL (an argument to which DOT does not join) further contend, erroneously, that the Motion to Renew their Motion for Leave to Amend Pleadings as to the third cause of action is barred by res judicata. To sell their spurious argument, Defendants cite a laundry list of completely distinguishable cases which have no bearing whatsoever on the issues raised in this motion.[7]

The doctrine of res judicata exists to prevent the same parties from continuing to relitigate, in subsequent lawsuits, claims fully disposed of between them in previous lawsuit. *Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 N.Y.2d 343, 347 (1999). It is a doctrine strictly applied and the party invoking it must show that the party against whom it would be used was "afforded a full and fair opportunity to contest the decision said to be dispositive of the present controversy." *Id.*; *Ebanks v. 547 W. 147th St. Hous. Dev. Fund Corp.*, 37 A.D.3d 290, 291 (1st Dep't 2007).

Obviously, Plaintiffs do not seek to resurrect in subsequent litigation a claim that has been fully resolved on the merits in this litigation. On the contrary, Plaintiffs pursue, in the same

[7] *See, e.g., O'Brien v. City of Syracuse*, 54 N.Y.2d 353 (1981) (portions of complaint barred by res judicata concerned identical claims resolved 5 years before in prior litigation between the same parties); *Smith v. Russell Sage Coll.*, 54 N.Y.2d 185 (1981) (subsequent suit barred be res judicata because prior suit had fully litigated the matters for which plaintiff sought to relitigate in subsequent litigation); *Murry v. Nat'l Broad Co. Inc.*, 178 A.D.2d 157 (1st Dep't 1991) (subsequent state court suit seeking the same relief as previously disposed of federal litigation resolved on summary judgment barred by res judicata).

action, an entirely proper motion to renew their Motion to Amend Pleadings as to the third cause of action which was denied for pleading deficiencies relating to standing. Clearly, res judicata does not apply here.

Moreover, for res judicata to attach, a court of competent jurisdiction must have rendered a **final judgment** on the **merits** binding upon the parties or their privy. *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485 (1979). Neither a final judgment nor a ruling on the merits exists here. First, the Court dismissed the claim based on "procedural infirmities" (Opinion at 20) associated with standing which, as a matter of law, are not rulings on the merits and are not subject to res judicata. *Landau v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 14 (2008) (referencing *Schulz v. N.Y.*, 81 N.Y.2d 336, 347 (1993) "when the disposition of a case is based upon a lack of standing only, the lower courts have not yet considered the merits of the claim"); *see also Hodge v. Hotel Emps. & Rest. Emps. Union Local 100 of the AFL-CIO*, 269 A.D.2d 330, 330 (1st Dep't 2000) (dismissal solely for defects in the pleading, are not barred by the doctrine of res judicata). Additionally, as noted above, the May 24, 2013 order is not a final judgment for the obvious reason that orders under appeal are not final judgments subject to res judicata. *See Schwartz v. Soc'y of N.Y. Hos.*, 251 A.D.2d 55, 55 (1st Dep't 1998).

For the above reasons, Defendants' res judicata argument is devoid of merit and should be summarily rejected.

CONCLUSION

With their Renewed Second Amended Pleading, Plaintiffs have alleged newly available facts that alter this Court's prior determination regarding standing under State Finance Law § 123-b. Plaintiffs have also provided reasonable justification for why they could not plead the newly available facts in their prior motion. Accordingly, Plaintiffs have met the requirements of

CPLR § 2221(e) and respectfully request that this Court grant their Motion to Renew the Motion for Leave to Amend Pleadings as to the third cause of action.

Dated: New York, New York
August 9, 2013

NEW YORK LAWYERS FOR THE PUBLIC INTEREST

By: Christina Giorgio /KS
Gavin Kearney
Christina Giorgio
151 W. 30th Street, 11th Floor
New York, NY 10001-4017

SCHINDLER COHEN & HOCHMAN LLP

By:
Lisa C. Cohen
Karen Steel
100 Wall Street, 15th Floor
New York, NY 10005
212-277-6300

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of Application of	
SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,	Index No.: 260462/2012 IAS Justice (Brigantti-Hughes, J.)
Petitioners,	
-against-	
NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,	
Respondents.	
For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO RENEW MOTION FOR LEAVE TO AMEND PLEADINGS AS TO THE THIRD CAUSE OF ACTION

Petitioners/Plaintiffs respectfully submit this memorandum in support of their Motion for Leave to Renew ("Motion to Renew") their Motion for Leave to Amend Pleadings and to Add New Parties as to the third cause of action.

PRELIMINARY STATEMENT

Petitioner/Plaintiffs have brought this action, in part, to challenge the conveyance of state-owned property to the private online grocer Fresh Direct on the grounds that such transfer violates Article 7, Section 8 of the New York State Constitution which prohibits the conveyance of public land to private businesses in the absence of a dominant public purpose derived from the conveyance. In granting Defendants' Motion to Dismiss the Amended Petition ("Motion to Dismiss") and denying Petitioners'/Plaintiffs' Motion for Leave to Amended Pleadings and Add Necessary Parties ("Motion for Leave to Amend Pleadings") as to the third cause of action challenging the constitutionality of the proposed transfer of state property to Fresh Direct, this Court held that Petitioners/Plaintiffs' proposed amended pleadings failed to adequately allege conduct implicating an employee or officer of the New York State Department of Transportation ("DOT"), the owner of the property, in the proposed conveyance to Fresh Direct.

Since receiving the Court's decision on the Motion to Dismiss and Motion for Leave to Amend Pleadings, Petitioners/Plaintiffs have learned of new facts unavailable to them when they filed their Motion for Leave to Amend Pleadings that show that DOT Commissioner Joan McDonald is causing, is about to cause or has caused the unconstitutional disbursement of state property by approving (or imminently approving) the conveyance of state property to Fresh Direct. By incorporating these newly available facts into their proposed renewed Verified Second Amended Petition/Complaint, Petitioners/Plaintiffs have cured what this Court found to be a deficiency in allegations to support standing under the State Finance Law Section 123-b as to the third cause of action. Accordingly, Petitioners/Plaintiffs seek to renew their Motion to

Amend Pleadings as to the third[1] cause of action based upon new facts unavailable to them at the time they filed their Motion for Leave to Amend Pleadings.

As part of this Motion to Renew, Petitioners/Plaintiffs have attached a true and correct copy of the proposed renewed Verified Second Amended Petition and Complaint ("Renewed Second Amended Pleading") as Exhibit A to the affirmation of Christina Giorgio.[2] Attached as Exhibit B is a true and correct redline copy of the Renewed Second Amended Pleading which reflects changes from Petitioners/Plaintiffs' earlier proposed amended pleading.

STATEMENT OF FACTS

A. This Court Found Petitioners/Plaintiffs Failed To Allege Conduct On Behalf Of A DOT Officer Or Employee To Support Standing Under State Finance Law §123-b And Granted Defendants' Motion To Dismiss And Denied Petitioners'/Plaintiffs' Motion for Leave to Amend Pleadings.

On June 5, 2013, Counsel for Petitioners/Plaintiffs received a Notice of Entry of Order to grant Defendants' DOT, Fresh Direct, UTF Trucking, Harlem River Yard Ventures ("Ventures"), Urban Development Corporations (d/b/a Empire State Development) (collectively "Defendants") motions to dismiss the second, third and fourth causes of action and denying Petitioners'/Plaintiffs' Motion for Leave to Amend Pleadings.

The second cause of action alleged that installation of the Fresh Direct project at the Harlem River Yard amounted to conversion of a once constitutionally permissible lease between the DOT and Ventures ("1991 Lease") into a lease violative of the gifts and loans provision of

[1] Petitioners/Plaintiffs do not seek leave to renew the second cause of action given that this Court found that it was barred by the statute of limitations. Rather, Petitioners/Plaintiffs seek to apply the new facts to the second cause of action for purposes of curing any standing deficiencies that cause of action may have in the event this Court's decision on the statute of limitations is reversed on appeal.

[2] Note that the Renewed Proposed Second Amended Petition references the same exhibits as the earlier pleading. However, to conserve space and resources, such exhibits are not attached here.

Article 7, Section 8 of the New York State Constitution because the Fresh Direct project eviscerates the public purpose of the 1991 Lease: operation of the intermodal terminal at the Harlem River Yard to reduce regional long haul truck traffic.

This Court found that although the Petitioners/Plaintiffs' second cause of action was distinct from the constitutional challenge to the 1991 Lease brought in the 1995 case of *South Bronx Clean Air Coalition et al vs. NYS Department of Transportation et al.*, Index No. 21015/1994, it was nonetheless barred by the statute of limitations. Consequently, this Court denied the Petitioners'/Plaintiffs' Motion for Leave to Amend the second cause of action "since the amendment would not render the action timely." (Order at p. 18). In finding the second cause of action barred by the statute of limitations, the Court did not address whether Petitioners/Plaintiffs had standing to bring their constitutional challenge under the State Finance Law § 123-b.

This Court found that the Petitioners/Plaintiffs' third cause of action challenging the lease between Fresh Direct and Ventures ("Fresh Direct Lease") was timely and not barred by the statute of limitations. This Court, however, denied Petitioners'/Plaintiffs' Motion for Leave to Amend Pleadings as to the third cause of action on the grounds that Petitioners/Plaintiffs had failed to adequately plead facts to establish standing under State Finance Law § 123-b and, as such, the Motion to Amend was "futile," writing:

> "[T]he third cause of action within the amended petition does not allege that any 'officer or employee of the state . . . in the course of his or her duties, is now causing, or is about to cause a wrongful expenditure . . . of state funds [or property]' and thus does not confer standing to the petitioners under State Finance Law § 123-b (*Savaldor [sic] v. DOT*, 234 A.D.2d 741, 743 [3rd Dep't 1996]). . . . Although the second amended petition names the DOT commissioner Joan McDonald as a party, its third cause of action fails to competently allege that this state official caused, or is about to cause a wrongful expenditure. The claims involve an attempted sublease between HRYV, the lessor of the state-owned

> property, and Fresh Direct. The proposed second amended petition alleges no involvement by the DOT in this attempted conveyance/sublease, and the claim thus does not adequately assert a mismanagement of state funds or property by a state actor."

(Order at p. 20).

Petitioners/Plaintiffs have filed this Motion to Renew their Motion on the grounds that Petitioners/Plaintiffs have become aware and can now plead new and previously unavailable facts regarding the DOT's and DOT Commissioner Joan McDonald's involvement in the proposed conveyance of state property to Fresh Direct at the Harlem River Yard. These newly available facts adequately address what this Court found to be pleading deficiencies as to standing under State Finance Law § 123-b.[3]

B. Newly Available Facts Show That DOT Commissioner Joan McDonald, Or Her Subordinates, In the Course of Performing Her Duties, Has Caused, Is Now Causing, Or Is About To Cause An Unconstitutional Disbursement of State Property By Allowing The Conveyance of State Land To Fresh Direct.

Newly available facts show the Fresh Direct conveyance cannot be finalized without the approval of the DOT and that Commissioner McDonald, or her subordinates, has or will soon approve the conveyance in violation of Article 7, Section 8 of the NYS Constitution.

[3] Although this Court did not address standing as to the second cause of action, the second cause of action relied on the same factual allegations as the third for purposes of standing. To the extent the newly available facts set forth in the Renewed Second Amended Pleading cure standing deficiencies as to the third cause of action, they will cure any such deficiencies applicable to the second cause of action.

(1) Facts Already Before The Court Establish That The Fresh Direct Project Cannot Be Implemented Without Commissioner McDonald's Prior Approval, As Well As The Prior Approval of the City.

In their Amended Pleading, Petitioners/Plaintiffs alleged that the proposed Fresh Direct project constitutes a material modification to the 1993 Land Use Plan governing development at the Harlem River Yard in numerous ways including:

a. The 500,547 square foot Fresh Direct warehouse and parking lot sited on over 13 acres of land would replace the significantly smaller rail-served Wholesale Flower Market adopted in the 1993 Land Use Plan, thus occupying an additional 6 to 8 acres of the Harlem River Yard. (September 6, 2012 Verified Amended Petition ¶¶120-121) ("Am. Pleading").

b. The Fresh Direct project would build a 20' x 700' truck parking lot entirely within the 28 acre area expressly reserved and exclusively zoned for rail use and the intermodal terminal. (Am. Pleading ¶¶ 95-96, 173-176, Pl. Ex. FFF).

Petitioners/Plaintiffs also pled in their Amended Pleading that the Fresh Direct Project, as a material modification to the 1993 Land Use Plan, required DOT's prior approval. Specifically, Petitioners/Plaintiffs noted that Section 8.06 of the 1991 Lease between Ventures and the DOT mandates that Ventures secure DOT's prior approval of any proposed change to the 1993 Land Use Plan governing development at the Harlem River Yard. (Am. Pleading ¶ 63).

In addition, Section 8.05 of the 1991 Lease provides that Ventures must present to the DOT for prior approval any proposed construction plans to ensure conformity with the 1993 Final Land Use Plan. (Pl. Ex. CC, at p 62); (*see also* DOT Reply Memorandum of Law in Support of its Motion to Dismiss at p. 2).

Petitioners/Plaintiffs also allege in their Amended Pleading that development at the Harlem River Yard is subject to the terms of a December 15, 1995 Restrictive Covenant given by Ventures to the City of New York that requires Ventures to secure the City's prior approval of any proposed material modification of the 1993 Land Use Plan. (Am. Pleading ¶ 97; Pl. Ex. HHH). In seeking such prior approval, Ventures must submit a copy of the proposed revised development plan ("Revised Development Plan") to the City Planning Commission ("CPC") simultaneously with filing its proposed revised development plan with the DOT.[4] (Pl. Ex. HHH ¶ 1(a)).

(2) Facts Newly Available And Set Forth In Petitioners'/Plaintiffs' Renewed Second Amended Complaint Show Commissioner McDonald Has Or Is Soon To Approve Ventures' Request to Change The 1993 Land Use Plan To Allow Installation Of The Fresh Direct Project And Has Or Is Soon To Approve Fresh Direct's Construction Plans.

Pursuant to the terms of the December 15, 1995 Restrictive Covenant applicable to Ventures' development of the Harlem River Yard, on June 17, 2013, Fresh Direct and Ventures submitted an application, along with their revised development plan, to the CPC seeking approval of a material modification to the 1993 Land Use Plan in relation to the Fresh Direct project. (Affirmation of Christina Giorgio ("Giorgio Aff.") at ¶ 17).

Given that the December 15, 1995 Restrictive Covenant requires Ventures to file any revised development plan application with the CPC and DOT simultaneously,

[4] Paragraph 1(a) of the December 15, 1995 Restrictive Covenant provides that, "HRYV shall file a revised development plan for the [Harlem River Yard] and shall provide a project description of any proposed new use or development, including its size, configuration, circulation pattern and function with the Mayor of the City (the "Mayor"), the President of the EDC and the Chair of the New York City Planning Commission ("CPC") simultaneously with any submission to the State, DOT or ESDC of the Revised Development Plan for the development of the [Harlem River Yard], or as soon as reasonably possible after HRYV elects to pursue an alternative development of use." (Pl. Ex. HHH, p. 6).

Petitioners/Plaintiffs have reason to believe that Ventures has submitted or will soon submit to the DOT and Commissioner McDonald a proposed change to the 1993 Land Use Plan. As Ventures cannot, under the terms of the 1991 Lease, move forward with the proposed Fresh Direct project without DOT's approval of this proposed change to the 1993 Land Use Plan, it is clear that DOT Commissioner McDonald has approved or is soon to approve the proposed change to the 1993 Land Use Plan to allow the Fresh Direct project, as well as its construction plans.

C. Since The Fresh Direct Project Will Eviscerate The Public Purpose Of The 1991 Lease, DOT Commissioner McDonald's Approval Of The Fresh Direct Project Violates Article 7, Section 8 Of The State Constitution.

By approving the Fresh Direct project at the Harlem River Yard, Commissioner McDonald herself, or through her subordinates, has engaged, is engaging or will soon engage in the unconstitutional disbursement of state property in violation of Article 7, Section 8 of the State Constitution. In 1995, in the case of *South Bronx Clean Air Coalition et al. v. DOT et al*, this Court found the 1991 Lease in compliance with Article 7, Section 8 because its terms provided for a clear public purpose: the operation of a 70,000 lift per year intermodal terminal to reduce regional truck traffic. (Crispino Decision at p. 21). Yet, as explained by rail expert George Stern, the Fresh Direct project will preclude any possibility of operating this intermodal terminal. (See Stern Supplemental Affidavit concluding that the modified Fresh Direct project, excluding tract 3, continues to preclude operation of the contemplated intermodal terminal, Ex. 1 to Pl. Opposition to Defendants' Motion to Dismiss the Second and Third Causes of Action). Thus, by pleading facts that show Commissioner McDonald's approval of the proposed change to the 1993 Land Use Plan to allow the Fresh Direct project, Petitioners/Plaintiff have stated a

claim of an unconstitutional disbursement of state property in violation of Article 7, Section 8 of the State Constitution.

D. Commissioner McDonald's Impending Approval of the Fresh Direct Project was Previously Unknown to Petitioners/Plaintiffs.

Since June 2012, Petitioners/Plaintiffs have diligently sought information on the status of the DOT's and Commissioner McDonald's review of the proposed change to the 1993 Land Use Plan to accommodate the Fresh Direct project at the Harlem River Yard. Specifically, on June 7, 2012, Petitioners/Plaintiffs' counsel made a Freedom of Information Law ("FOIL") request of the DOT seeking all documents relating to requests for changes in land use pursuant to Section 8.06 (or any other section) of the 1991 Lease between DOT and Ventures in relation to the proposed Fresh Direct project at the Harlem River Yard. (Giorgio Aff. at ¶ 11). On June 18, 2012, DOT responded, "A diligent search of the files has revealed no records which are responsive to your request. We have not received any request from the HRYV in relation to a change in the land use and the Fresh Direct project." (Giorgio Aff. at ¶ 12).

On January 3, 2013, Petitioners/Plaintiffs' counsel made a FOIL request to the DOT seeking all documents and communications in their possession regarding the proposed Fresh Direct sublease at the site of the Harlem River Yard. (Giorgio Aff. at ¶ 13). On January 4, 2013, DOT responded that it had no records responsive to the request. (Giorgio Aff. at ¶ 14). On April 24, 2013, DOT again responded to the January 3, 2013 FOIL request and asserted that it still had no records relating to the Fresh Direct sublease at the Harlem River Yard. (Giorgio Aff. ¶ 15).

Moreover, according to their pleadings before this Court, as of February 28, 2013, DOT had taken no action related to the proposed Fresh Direct project. (*See* DOT Reply Memorandum of Law in Further Support of Its Motion to at page 4).

Based on the DOT's representations made through the FOIL process and filings before this Court, at the time they filed their initial Motion for Leave to Amend Pleadings, Petitioners/Plaintiffs understood that Ventures had not submitted a request to the DOT regarding proposed land use changes or approval of construction drawings associated with the Fresh Direct project.

In light of Ventures' and Fresh Direct's June 17, 2013 application to the CPC for approval of a change to the 1993 Land Use Plan and the simultaneous filing of such application with the DOT, Petitioners/Plaintiffs now can allege facts that show Commissioner McDonald has caused, is now causing, or is about to cause an unconstitutional disbursement of state property by approving the proposed modification to the 1993 Land Use Plan and allowing the conveyance of state land to Fresh Direct.

ARGUMENT

A. Petitioners/Plaintiffs Meet The Standard For Renewal Of Their Motion For Leave To Amend Pleadings As To Their Third Cause Of Action.

Motions to renew under CPLR § 2221(e) are properly granted where the motion (1) is based upon new facts not offered in a prior motion that would change the prior determination and (2) the movant provides a reasonable justification for not presenting the facts in the prior motion. N.Y. C.P.L.R. § 2221(e) (McKinney 2013);[5] *see also Peebles v. New York City Housing Auth.*, 295 A.D.2d 189, 190-91 (1st Dep't 2002) (reversing denial of a motion to renew where counsel

[5] CPLR § 2221(e) provides:
A motion for leave to renew (1) shall be identified specifically as such; (2) shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and (3) shall contain reasonable justification for the failure to present such facts on the prior motion.

provided reasonable explanation for submitting new evidence in the form of an expert's affidavit); *Ramos v. City of New York*, 61 A.D.3d 51, 54 (1st Dep't 2009) (motion to renew properly granted where plaintiff presented new evidence of the reversal of the criminal conviction that formed basis for defendant's motion for summary judgment).

Grounded in the strong public policy of resolving cases on the merits, renewal motions under CPLR § 2221 advance the interest of justice and promote substantive fairness. *See Tuccillo v. Bovis Lend Lease, Inc.*, 101 A.D.3d 625, 627-28 (1st Dep't 2012); *Mejia v. Nanni*, 307 A.D.2d 870, 871(1st Dep't 2003); *Tishman Const. Corp. of N. Y. v. City of New York*, 280 A.D.2d 374, 376 (1st Dep't 2001); *Framapac Delicatessen, Inc. v. Aetna Cas. & Sur. Co.*, 249 A.D.2d 36, 36-37 (1st Dep't 1998).

Moreover, it is well settled law that the new or additional facts requirement of Section 2221(e) is a "flexible one", with courts possessing broad discretion to grant such motions "in the interest of justice, upon facts which were known to the movant at the time the original motion was made." *Tishman*, 280 A.D.2d 376-77 (citing *Liberty Mut. Ins. Co. v. Allstate Ins. Co.,* 237 A.D.2d 260; *Vayser v. Waldbaum,* 225 A.D.2d 760); *Bustamante v. Green Door Realty Corp.*, 69 A.D.3d 521, 522 (1st Dep't 2010); *Tuccillo*, 101 A.D.3d at 628 (reversal, in the interest of justice, of the trial court's denial of plaintiff's motion to renew based on a contract previously available to plaintiff but only included on its motion to renew).

Here Petitioners/Plaintiffs have properly moved to renew their Motion for Leave to Amend Pleadings as to their third cause of action. Although the Defendants moved to dismiss the Petitioners/Plaintiffs' third cause of action on statute of limitations grounds, this Court held the challenge to the Fresh Direct Lease was timely even when applying a four-month statute of limitations. However, this Court found that Petitioners/Plaintiffs lacked standing under State

Finance Law § 123-b because their proposed Second Amended Pleading filed with their Motion for Leave to Amend Pleadings failed to allege sufficient conduct on the part of an officer or employee of the DOT in the proposed conveyance of state land to Fresh Direct.

Petitioners/Plaintiffs have submitted with this motion a Renewed Second Amended Pleading that incorporates newly available facts demonstrating DOT has or will soon have Ventures' request for DOT to approve a material modification to the 1993 Land Use Plan to accommodate the Fresh Direct project. As outlined above, under the terms of the 1991 Lease, Ventures must obtain the DOT's approval of the proposed land use modification before it can move forward with the conveyance and implementation of the project at the Harlem River Yard.

Since June 2012, Petitioners/Plaintiffs have diligently sought to determine the status of the DOT's approval of the proposed Fresh Direct project and until June 17, 2013, it appeared that DOT had not received any such request for approval. On June 17, 2013, however, Ventures and Fresh Direct applied to the CPC for approval of their Revised Development Plan. Because the terms of the 1995 Restrictive Covenant require Ventures to simultaneously make the same filing with the DOT, Petitioners/Plaintiffs now can allege that DOT is in possession of Ventures' requested amendment to the 1993 Land Use Plan request and that Commissioner McDonald has caused, is about to cause or is causing the unconstitutional disbursement of state property by approving changes that would preclude operation of the intermodal terminal at the Harlem River Yard, the stated public purpose of the 1991 Lease. By alleging the newly available fact that Ventures has submitted or will soon submit to the DOT for approval its request to modify the 1993 Land Use Plan to allow the Fresh Direct project, Petitioners/Plaintiffs have cured what this

Court found to be a deficiency in facts to support standing as to the third cause of action.[6] Therefore, this Court should grant Petitioners/Plaintiffs' Motion to Renew their Motion for Leave to Amend Pleadings.

B. Petitioners/Plaintiffs Were Justified In Not Alleging The Newly Available Facts In Their Original Motion For Leave To Amend.

Where the facts introduced through a motion to renew constitute new evidence and the movant provides a reasonable justification for not presenting the evidence in the first instance, the motion to renew should be granted. *Peebles*, 295 A.D.2d at 190; *Ramos*, 61 A.D.3d at 54-55. Here Petitioners/Plaintiffs were justified in not previously pleading the newly available facts concerning Commissioner McDonald's impending approval of Ventures' request to modify the 1993 Land Use Plan for the obvious reason that these facts did not exist at the time they filed their original Motion for Leave to Amend Pleadings.

Prior to June 17, 2013, the facts available to Petitioners/Plaintiffs indicated that Ventures had not submitted its application to the DOT requesting approval of changes to the 1993 Land Use Plan necessitated by the proposed Fresh Direct project. Newly available facts, however, indicate the situation has changed. First, on June 17, 2013, Ventures and Fresh Direct filed their application to the CPC for approval of a change to the 1993 Land Use Plan pursuant to the December 15, 1995 Restrictive Covenant. Under the terms of the Restrictive Covenant, Ventures must simultaneously file this application with any revised development plan it files with the DOT. Accordingly, Petitioners/Plaintiffs may now plead that DOT has received or will soon receive Ventures' request for a change to the 1993 Land Use Plan and that Commissioner

[6] As noted above, these new facts cure any standing deficiencies that may exist as to the second cause of action.

McDonald has or is soon to approve it. Given that these newly developed facts were previously unavailable, Petitioners/Plaintiffs are justified in pleading them now for the first time.

CONCLUSION

With their Renewed Second Amended Pleading, Petitioners/Plaintiffs have alleged newly available facts that alter this Court's prior determination regarding standing under State Finance Law § 123-b. Petitioners/Plaintiffs have also provided reasonable justification for why they could not plead the newly available facts in their original motion. Accordingly, Petitioners/Plaintiffs have met the requirements CPLR § 2221 and respectfully request that this Court grant their motion.

Dated: New York, New York
July 2, 2013

NEW YORK LAWYERS FOR THE PUBLIC INTEREST

By: Gavin Kearney/ ICS

Gavin Kearney
Christina Giorgio
151 W. 30th Street, 11th Floor
New York, NY 10001-4017

SCHINDLER COHEN & HOCHMAN LLP

By: _____

Lisa C. Cohen
Karen Steel
100 Wall Street, 15th Floor
New York, NY 10005
212-277-6300

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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In the Matter of Application of

SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE,

Petitioners,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT, FRESH DIRECT LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,

Respondents.

Index No. 260462-2012

(Brigantti-Hughes, J.)

IA-15

8/12

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

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NEW YORK STATE DEPARTMENT OF TRANSPORTATION'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO RENEW MOTION FOR LEAVE TO AMEND PLEADINGS AS TO THE THIRD CAUSE OF ACTION

Of Counsel
Kathryn M. Liberatore, Assistant Attorney General

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Environmental Protection Bureau
120 Broadway, 26th Fl.
New York, New York 10271
Attorney for New York State
Department of Transportation

Respondent New York State Department of Transportation (DOT) submits this memorandum of law in opposition to petitioners' July 2, 2013 motion for leave to renew their February 14, 2013 motion for leave to amend pleadings as to the third cause of action.

PRELIMINARY STATEMENT

The amended petition in this article 78 proceeding was dismissed in its entirety by this Court in a May 24, 2013 decision and order which also denied petitioners' motion to further amend the amended petition. Petitioners, having appealed the Court's decision and order by notice of appeal dated July 2, 2013, now move, pursuant to CPLR 2221 to "renew" the previously-denied motion to amend, purportedly based upon new facts. However, the proposed renewal motion is futile because the purported post-dismissal "facts" that petitioners seek to interject into the petition are not even facts. Instead, they consist of speculation about what the DOT Commissioner may or may not do at some point in the future pursuant to the terms and conditions of the 1991 lease between DOT and Harlem River Yard Ventures, Inc. (HRYV). Moreover, petitioners' motion is a motion to renew in name only. The proposed amendments that are the subject of this renewal motion are not the amendments petitioners previously sought.

In the now dismissed amended petition, petitioners challenged a 1991 lease between DOT and HRYV for use of the Yard, property owned by the State. Petitioners claimed that the Fresh Direct project rendered the 1991 lease an unconstitutional gift of government property to a private third party pursuant to Article 7 § 8 of the New York State Constitution. Petitioners did not allege that the terms and conditions of the 1991 lease have changed or been altered in any manner since 1991, nor did they allege that DOT has taken any action, let alone final action, with respect to the proposed move by Fresh Direct.

Although the 1991 lease does provide for DOT review of proposed construction in the

Yard for consistency with the 1993 Land Use Plan for the site as well as a procedure to request amendments to the Land Use Plan, petitioners did not allege that petitioners are aggrieved by any such review related to Fresh Direct. Nor did petitioners allege that any such review had even been conducted by DOT. Indeed, petitioners could not so allege because no construction plans or request to amend the Land Use Plan for the Yard had even been submitted to DOT and, consequently, no such review could have been conducted.

In addition to challenging the 1991 lease, petitioners alleged, *inter alia*, that the sublease between HRYV and Fresh Direct would render the 1991 lease between DOT and HRYV an unconstitutional gift of government property to a private third party. To establish standing to challenge the constitutionality of the 1991 lease, petitioners relied upon State Finance Law, article 7-a, § 123-b, which allows for a claim only against "an officer or employee of the State who is responsible for the alleged wrongful disbursement of state funds or property." N.Y. State Finance Law § 123-b(1).

After DOT moved to dismiss the amended petition, petitioners sought leave from the Court to amend a second time on February 14, 2013. Petitioners sought to add DOT Commissioner McDonald as a party, although they did not include any allegations related to the Commissioner except for a description of the Commissioner under the heading "The Parties." Petitioners also sought to convert the petition to a plenary action, and to make various other textual changes.

On May 24, 2013, the Court denied petitioners' motion to amend the amended petition and dismissed all of petitioners' claims in a decision and order disposing of the entire petition. The Court found petitioners' challenge to the 1991 lease to be barred by the statute of limitations. As to the sublease between Fresh Direct and HRYV, although the Court found that

claim was not time-barred, the Court found that petitioners failed to assert claims against an officer of employee of the State and, therefore, lacked standing under State Finance Law. A copy of the decision is attached to the Affirmation of Kathryn M. Liberatore, dated July 24, 2013, as Exhibit A (Liberatore Aff. Ex. A.).

Now, petitioners seek leave to renew their February 14, 2013 motion to amend, purportedly based upon new facts. Their proposed amendment alleges that Commissioner McDonald "has or is soon to approve changes to the 1993 Land Use Plan" and that "by her approval or her impending approval of installation of the project at the Harlem River Yard, has engaged in or is soon to engage in the unconstitutional conveyance of state property to a private entity." Aff. of Christina Giorgio in Supp. of Mot. to Renew, Ex. B ¶¶ 257, 260 (July 2, 2013). However, there are no new facts upon which petitioners can base their amendment—DOT has still not taken any action with respect to the Fresh Direct project and the 1991 lease. In fact, HRYV has still not submitted any construction plans or request to amend the Land Use Plan to DOT. Furthermore, although petitioners' motion is styled as a motion to renew, it seeks to renew the prior February 14, 2013 motion in name only. In actuality, petitioners are seeking to bring speculative claims, setting forth in new allegations that were not the subject of their February 14, 2013 motion. For all these reasons, the motion to renew should be denied.

STATEMENT OF FACTS

DOT leased the Yard to HRYV in August 1991. Am. Petition ¶¶ 51, 56. The lease between DOT and HRYV contemplates a Land Use Plan for the Yard that would be consistent with the previously issued Request for Proposal. *See* Petitioners' Ex. CC at article 7. There have been no amendments or changes to the lease since 1991, and petitioners do not allege otherwise in any of their pleadings, including the instant motion for leave to renew. In 1993, DOT retained

a consultant to draft a Final Environmental Impact Statement for the Land Use Plan (Am. Petition ¶¶ 51, 56), which DOT approved in a July 1994 Record of Decision (Petitioners' Ex. FF).

Under the terms of the lease, HRYV may sublet the premises, in whole or in part. *See* Petitioners' Ex. CC at § 4.04. Any proposed construction of facilities including utilities and infrastructure in furtherance of such a sublease are subject to review and approval by DOT for consistency with the 1994 Land Use Plan. *See* Petitioners' Ex. CC at § 8.05. In the event that DOT would find that proposed construction was not consistent with the Land Use Plan, then the 1991 lease establishes a procedure by which HRYV could apply to DOT for a modification of the Land Use Plan. Am. Petition ¶ 62; Petitioners' Ex. CC at § 8.06.

To date, no construction plans regarding Fresh Direct have been submitted to DOT for consistency review and HRYV has not applied to DOT for a modification to the 1994 Land Use Plan in connection with the Fresh Direct relocation. Petitioners factual allegations made in the alternative—that the DOT Commissioner "has or is soon to approve" changes to the 1993 Land Use Plan—are improper and cannot provide the requisite predicate for judicial review of "final" governmental action under article 78.

PROCEDURAL HISTORY

A. June 6, 2012 Article 78 Petition

On June 6, 2012, petitioners filed an article 78 petition containing one cause of action: that, in connection with the decision to provide tax subsidies and other financial assistance to Fresh Direct for relocating its operations from Long Island City, Queens to the Harlem River Yard in the South Bronx, New York City Industrial Development Agency (NYCIDA) violated State Environmental Quality Review Act (SEQRA) and City Environmental Quality Review

(CEQR) requirements. The original petition failed to assert any claim against DOT and, on August 16, 2012, DOT moved to dismiss.

B. September 5, 2012 Amended Article 78 Petition

On September 5, 2012, petitioner filed an amended petition. The amended petition retained much of the original petition, including the first cause of action challenging NYCIDA's SEQRA and CEQR review. The amended petition also added new petitioners, new allegations, three new causes of action, and new requests for relief.

The added second cause of action argued that "the Fresh Direct project renders the 1991 lease an unconstitutional gift of government property to a private third party pursuant to Article 7 § 8 of the New York State Constitution" and requests that the lease be invalidated. Am. Petition ¶ 207. To establish standing to bring this proceeding against DOT challenging the constitutionality of the 1991 lease, petitioners rely upon the "citizen-taxpayer actions" provisions of the State Finance Law, article 7-a, § 123-b. Petitioners' Mem. of Law in Supp. of Am. Verified Petition (Sept. 6, 2012) at 82.

The amended petition's added third and fourth causes of action were not directed to DOT. The third cause of action claimed the sublease between HRYV and Fresh Direct should be invalidated, alleging that it would render the lease between DOT and HRYV an unconstitutional gift of government property to a private third party. Am. Petition ¶¶ 213-14. No relief against DOT was sought in the third cause of action. Likewise, the fourth cause of action challenging ESD's Excelsior Jobs Program, was directed to respondents other than DOT and did not seek relief against DOT.

On December 13, 2012, DOT moved to dismiss the amended petition's article 78 challenge to the 1991 lease as time-barred. DOT's Mem. of Law in Supp. of Mot. to Dismiss

Am. Petition (Dec. 13, 2012) at 4-7. Although DOT leased the Yard to HRYV in August 1991 (Am. Petition ¶¶ 51, 56), the amended petition did not allege that the terms and conditions of the 1991 lease had changed or been altered in any manner since 1991. Nor did the amended petition allege that DOT had taken any action, let alone final action, with respect to the proposed move by Fresh Direct. Although the 1991 lease provided for DOT review of proposed construction in the Yard for consistency with the Land Use Plan and a procedure to modify the Land Use Plan (Petitioners' Ex. CC at §§ 8.05, 8.06), the amended petition did not allege that petitioners were aggrieved by any such review related to Fresh Direct or that any such review has even been conducted.[1] Indeed, petitioners could not and cannot so allege because to date no construction plans have been submitted to DOT and, consequently, no such review could have been conducted.

Moreover, DOT argued that, to the extent that petitioners invoke article 7-a § 123-b of the State Finance Law in support of their challenge to the 1991 lease, such a claim must be dismissed on the additional ground that petitioners fail to state a claim against DOT. *Id.* at 7-9. No relief can be had against DOT as petitioners did not assert their claim "against an officer or employee of the state who in the course of his or her duties has caused, is now causing, or is about to cause a wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property." N.Y. State Finance Law § 123-b(1).

[1] Petitioners alleged that the Land Use Plan has been changed several times from 1998 to 2006 in connection with activities unrelated to the Fresh Direct relocation, but did not allege these changes were improper. Am. Petition ¶¶ 100-05.

C. Petitioners' February 14, 2013 Motion to Amend the Petition a Second Time

On February 14, 2013, petitioners filed a motion seeking leave to amend their petition a second time and convert it to a plenary action. With respect to the second cause of action asserted against DOT and the third cause of action asserted against Fresh Direct and HRYV, petitioners sought to add DOT Commissioner Joan McDonald as a party. *See* Aff. of Christina Giorgio in Supp. of Mot. to Am., Ex. B (Feb. 13, 2013). The only allegation in the proposed second amended petition regarding Commissioner McDonald is a description under the heading "The Parties." *Id.* ¶ 40. The proposed second amended petition also contained some textual changes, including changing "petitioners" to "plaintiffs" in the text of the second and third causes of action. *See id.* ¶¶ 227, 228, 238 (Feb. 13, 2013).

D. May 25, 2013 Supreme Court Decision

On May 24, 2013, the Court denied petitioners' motion to amend the petition for a second time. Additionally, the Court dismissed the second, third, and fourth causes of action by granting DOT's motion to dismiss and the motions to dismiss filed by co-respondents. The Court also denied the first cause of action on the merits. *See* Liberatore Aff. Ex. A.

With respect to the second cause of action challenging the 1991 lease between DOT and HRYV, the Court found that it "seeks, ultimately, to invalidate the 1991 lease from the DOT to HRYV as an unconstitutional gift of government property" such that it "has long been time-barred." *Id.* at 17. The Court then found that "Petitioners' later-filed motion for leave to serve a second-amended petition, as it relates to this Cause of Action, is denied, since the amendment would not render the action timely." *Id.*

With respect to the third cause of action challenging the sublease between HRYV and Fresh Direct, the Court found the action to be timely, given that the February 2012 sublease was

amended in January 2013. *Id.* at 18-19. The Court found, "however, the third cause of action do[es] not assert claims against 'an officer or employee of the State' and therefore no standing is conferred upon Petitioners to bring these claims." *Id.* at 19 (citation omitted). The Court denied petitioners' attempt to add the DOT Commissioner as a party as futile because "third cause of action fails to competently allege that this state officer caused, or is about to cause a wrongful expenditure." *Id.* at 20. The Court explained that "[t]he claim involves an attempted sublease between HRYV, the lessor of the state-owned property, and Fresh Direct," but "[t]he proposed second amended petition alleges no involvement by the DOT in this attempted conveyance/sublease, and the claim thus does not adequately assert a mismanagement of state funds or property by a state actor." *Id.* (citation omitted).

E. Petitioners' July 2, 2013 Motion to Renew the February 14, 2013 Motion to Amend

On July 2, 2013, petitioners filed the instant motion seeking leave to "renew" their February 14, 2013 motion to amend the petition for a second time.[2] In their motion to renew, Petitioners allege that on June 17, 2013, Fresh Direct and HRYV submitted documents to the New York City Planning Commission pursuant to a December 15, 1995 Restrictive Covenant made by HRYV for the benefit of the City of New York. Petitioners' Mem. of Law in Supp. of Mot. for Leave to Renew (July 2, 2013) at 7 (Mot. to Renew). Petitioners further allege that "the December 15, 1995 Restrictive Covenant requires [HRYV] Ventures to file any revised development plan application with the [City Planning Commission] and DOT simultaneously." *Id.* In their proposed amendment, petitioners seek to add, *inter alia*, two new paragraphs:

[2] Petitioners state that their motion to renew is limited to "the third cause of action based upon new facts unavailable to them at the time they filed their Motion for Leave to Amend Pleadings." Mot. to Renew at 3. Petitioners state that they "do not seek leave to renew the second cause of action[, but] . . . . seek to apply the new facts to the second cause of action for purposes of curing any standing deficiencies that cause of action may have in the event this Court's decision on the statute of limitations is reversed on appeal." *Id.* at 3, n.1.

> [T]he Fresh Direct project cannot be implemented without the prior approval of DOT Commissioner McDonald. DOT Commissioner McDonald, in the course of her duties, ***has or is soon to approve changes to the 1993 Land Use Plan*** to allow the Fresh Direct project at the Harlem River Yard, despite the fact that it eviscerates the stated public purpose of the Lease.
>
> ***
>
> Commissioner McDonald, ***by her approval or her impending approval of installation of the project at the Harlem River Yard,*** has engaged in or is soon to engage in the unconstitutional conveyance of state property to a private entity in violation of Article 7, Section 8 of the State Constitution.

Aff. of Christina Giorgio in Supp. of Mot. to Renew, Ex. B ¶¶ 257, 260 (July 2, 2013) (emphasis added). Petitioners provide no factual evidence that Commissioner McDonald, in the course of her duties, has approved changes to the 1993 Land Use Plan or reviewed the Fresh Direct project because, to date, HRYV has not submitted to DOT construction plans or a request to modify the Land Use Plan regarding the Fresh Direct project.

ARGUMENT

POINT I

PETITIONERS' MOTION TO RENEW SHOULD BE DENIED BECAUSE IT DOES NOT ALLEGE ANY NEW FACTS AND IS NOT REASONABLY JUSTIFIED

Under CPLR 2221(e), a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." A motion to renew is ordinarily based upon "*additional material facts which existed at the time the prior motion was made*, but were not then known to the party seeking leave to renew." *Foley v. Roche*, 68 A.D.2d 558, 568 (1st Dep't 1979) (emphasis added). Petitioners have failed to allege new facts or reasonable justification. There are no new facts regarding DOT review of construction plans or approval of an amendment to the Land Use Plan—to date no construction plans or request to

amend the Land Use Plan for the Yard have been submitted to DOT and, consequently, no such review could have been conducted.

Petitioners' new allegations that Commissioner McDonald "has or is soon to approve changes to the 1993 Land Use Plan" and that "by her approval or her impending approval of installation of the project at the Harlem River Yard, has engaged in or is soon to engage in the unconstitutional conveyance of state property" (Aff. of Christina Giorgio in Supp. of Mot. to Renew, Ex. B ¶¶ 257, 260 (July 2, 2013)) lack a basis in fact and are wholly speculative. Petitioners attached the 1991 lease to their June 6, 2012 petition over a year ago and they have long been aware that the lease provisions providing for DOT review of construction plans and the procedure for modification of the Land Use Plan. *See* Petitioners' Ex. CC at §§ 8.05, 8.06; *see also* Petition ¶ 51; Am. Petition ¶ 62. That HRYV may sometime in the future submit construction plans or a request to modify the Land Use Plan to DOT and that DOT may at some point in the future review those plans and/or approve a request are not new to petitioners. Since DOT has not even received construction plans or any request to modify the Land Use Plan based upon the Fresh Direct project from HRYV, any allegations about the Commissioner's ultimate decision—should she be presented with a request—are speculative and do not constitute a basis for petitioners' motion to renew.

In the original petition, the amended petition, and the proposed second amended petition, petitioners chose not to include speculative claims based on the potential for DOT review of construction plans or amendment of the Land Use Plan. Petitioners now attempt—after their claims have been dismissed—to insert allegations speculating on the potential future actions of DOT under the 1991 lease. The motion to renew should be denied in its entirety as improper and futile.

Petitioners' allegations regarding the submission of documents to the New York City Planning Commission pursuant to a 1995 Restrictive Covenant, which was attached to the September 5, 2012 petition as Exhibit HHH, are separate from DOT's obligations under the 1991 lease. The Covenant was entered into by HRYV for the benefit of the City of New York—not the State. The State is not a signatory to the Covenant. While HRYV may have obligations under the Covenant, those obligations are separate from its lease with DOT.[3]

In any event those facts, which occurred after the final disposition of the petition by this Court, are not a proper basis for a motion to renew. HRYV's June 17, 2013 application to the New York City Planning Commission pursuant to the Covenant (Mot. to Renew at 12) occurred after the February 14, 2013 motion to amend. Facts like these that were not in existence at the time the prior motion was made are generally not a proper basis for a motion to renew. *See, e.g.*, *Foley*, 68 A.D.2d at 568; *Sullivan v. Harnisch*, 100 A.D.3d 513, 514 (1st Dep't 2012).

In addition to failing to allege new facts to support their motion to renew, petitioners have also not established "reasonable justification" under CPLR 2221(e). Courts recognize that motions to renew do not provide "a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." *Town of Tusten v. Clark Eng'rs*, 187 A.D.2d 772, 773 (3d Dep't 1992) (quoting *In re Beiny* , 132 A.D.2d 190, 210 (1st Dep't 1987). In sum, any approval by DOT with respect to the project has not yet occurred. If petitioners wished to allege that the DOT Commissioner "is soon to approve changes to the 1993 Land Use

[3] The Covenant states that "HRYV shall file a revised development plan for the Premises . . . and shall provide a project description of any proposed new use or development . . . with the Mayor of the City (the "Mayor"), the President of EDC and the Chair of the New York City Planning Commission ("CPC") simultaneously with any submission to the State, DOT, or [Empire State Development Corporation] ESDC of a Revised Development Plan for the development of the Premises, or as soon as reasonably possible after HRYV elects to pursue an alternate development or use." Petitioners' Ex. HHH at 6. This provision does not change the fact that, to date, HRYV has not submitted anything to DOT regarding the Fresh Direct project.

Plan" or argue that due to "her impending approval of installation of the project at the Harlem River Yard, [she] . . . is soon to engage in the unconstitutional conveyance of state property to a private entity" (Aff. of Christina Giorgio in Supp. of Mot. to Renew, Ex. B ¶¶ 257, 260 (July 2, 2013)), petitioners could have brought those speculative claims in their original petition and there is no reasonable justification for not doing so. In any event, any such speculative allegations would have been fatally defective and subject to dismissal. Hence, petitioners' motion to renew should be denied.

POINT II

PETITIONERS' MOTION TO RENEW SHOULD BE DENIED BECAUSE IT DOES NOT ACTUALLY "RENEW" PETITIONERS' PRIOR MOTION TO AMEND

Although petitioners style their motion as a motion to renew their February 14, 2013 motion to amend, it is a motion to renew in name only. CPLR 2221(a) allows a party to seek leave to renew "a prior motion," but it is an "error to characterize" a motion that seeks "completely different relief" than the relief sought on the prior motion as a motion to renew. *Sodano v. Faithway Deliverance Ctr., Inc.*, 18 A.D.3d 534, 536 (2d Dep't 2005).

Petitioners current motion is entirely different from their February 14, 2013 motion. The amendments petitioners proposed on February 14, 2013 are materially different than the amendments petitioners currently propose. The substantive changes proposed in the instant motion and not in the February 14, 2013 motion amendment include an additional new party, nineteen new paragraphs, deletion of a party, and additional/different textual changes. Although the February 14, 2013 petition did seek to add Commissioner McDonald as a party, it did not include any allegations regarding the Commissioner except a description under the heading "The Parties." Now, petitioners seek to add a wholly new claim that Commissioner McDonald, in the course of her duties, "has or is soon to approve" changes to the 1993 Land Use Plan or the Fresh

Direct project. Petitioners' most recent attempted amendment improperly seeks to assert an entirely new, albeit speculative, claim against DOT under the guise of a motion to renew. *See Maddux v. Schur*, 53 A.D.3d 738 (3d Dep't 2008) (a motion to renew is not a proper vehicle to address a final judgment); *Curry v. Vertex Restoration Corp.*, 252 A.D.2d 360 (1st Dep't 1998) ("Renewal is not a proper vehicle for obtaining relief from the judgment"). The time to bring a new motion to amend has long since passed, given the fact that petitioners have received a final decision from Supreme Court and have appealed. The motion to renew should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny petitioners' motion to for leave to renew.

Dated: New York, New York
July 24, 2013

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondent New York State Department of Transportation

BY:
KATHRYN M. LIBERATORE
Assistant Attorney General
Environmental Protection Bureau
120 Broadway, 26th Fl.
New York, New York 10271
(212) 416-8482

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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In the Matter of the Application of
SOUTH BRONX UNITE!, IVELYSE ANDINO, RUBEN AUSTRIA, NIEVES AYRESS, MELISSA BARBER, AMBER BENNETT, HARRY BUBBINS, DANIEL CHERVONI, DIRK EWERS, ANGEL FRANCO, FRIENDS OF BROOK PARK, EDUARDO GARCIA, LIBERTAD GUERRA, ARTHUR MYCHAL JOHNSON, DANIELLE JACKSON, CHARLES JOHNSON, LILY KESSELMAN, CORRINE KOHUT, COLLEEN LONERGAN, ANGEL LOPEZ, MOVIMIENTO LA PENA DEL BRONX, PUEBLO EN MARCHA, DANISHA NAZARIO, NEYLA OROZCO, KARLA RODRIGUEZ, WILFRED RODRIGUEZ, MARTY ROGERS, JUAN CARLOS TAIANO, DANIEL WALLACE

Petitioners,

-vs-

Index No.: 260462-2012

NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT, LLC, UTF TRUCKING, INC., and HARLEM RIVER YARD VENTURES, INC.,

IAS Justice:
Mary Ann Brigantti-Hughes

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

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RESPONDENTS NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, EMPIRE STATE DEVELOPMENT CORPORATION, FRESH DIRECT, LLC, UTF TRUCKING, INC., AND HARLEM RIVER YARD VENTURES, INC.'S JOINT MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION TO RENEW

NIXON PEABODY LLP
Laurie Styka Bloom
Jared C. Lusk
Attorneys for Respondents,
Fresh Direct LLC and UTF Trucking, Inc.
437 Madison Avenue

New York, New York
(212) 940-3000
L. Bloom Direct Dial: (716) 853-8102

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Christopher King
Kathleen Schmid
Attorneys for the Respondents New York City Industrial Development Agency and New York City Economic Development Corporation
100 Church Street, Room 6-132
New York, New York 10007
(212) 788-0905

EMPIRE STATE DEVELOPMENT
Simon Wynn
Attorney for Respondent Empire State Development Corporation
633 Third Avenue
New York, NY 10017
(212) 803-3755

SIVE, PAGET & RIESEL
Steven Barshov
Attorney for Respondent Harlem River Yard Ventures, Inc.
460 Park Avenue
New York, New York 10022
(212) 421-2150

INTRODUCTION

Respondents NEW YORK CITY INDUSTRIAL DEVELOPMENT AGENCY ("NYCIDA"), NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION ("NYCEDC"), NEW YORK STATE URBAN DEVELOPMENT CORPORATION doing business as EMPIRE STATE DEVELOPMENT ("ESD"), FRESH DIRECT, LLC, UTF TRUCKING, INC. (collectively "Fresh Direct") and HARLEM RIVER YARD VENTURES, INC. ("HRYV")[1] collectively submit this Memorandum of Law in opposition to Petitioners' July 2, 2013 motion, which they disingenuously disguise as a motion seeking leave to renew a portion of Petitioners' prior February 14, 2013 motion for leave to amend the Article 78 Petition ("Motion to Renew"), but which, in fact, bears no resemblance to a genuine renewal motion. In a Decision and Order dated May 24, 2013 (filed May 31, 2013) (the "Decision"), this Court denied Petitioners' February 14, 2013 motion for leave to amend in its entirety and granted Respondents' motions to dismiss, dismissing the Second, Third and Fourth causes of action. The Court further ruled on the merits of the First Cause of Action and denied that claim. As a result, the Petition was dismissed in its entirety. A copy of the Court's Decision and Order is attached to the Affirmation of Laurie Bloom, as Exhibit 1.

Petitioners' Third Cause of Action, the sole claim addressed on this purported Motion to Renew, asserted that the Sublease between Harlem River Yard Holdings, Inc. ("HRYH") and Fresh Direct would vitiate the public purpose of the Harlem River Yard ("HRY") and therefore should be "annulled and invalidated." In granting the Respondents' motions to dismiss[2] the

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1 By Stipulation of Adjournment dated July 12, 2013, the parties agreed that all Respondents other than the New York State Department of Transportation ("DOT") would submit a joint set of papers in opposition to the Motion to Renew. DOT will submit its own papers in opposition to the Motion to Renew.

2 Interestingly, Petitioners do not seek leave to renew their opposition to Respondents' Motions to Dismiss, which this Court granted. *See* Exhibit 1.

Third Cause of Action, this Court held that Petitioners lacked standing to assert the claims in the Third Cause of Action, even if the Court were to permit the amendments to this claim that Petitioners sought in February. Thus, in essence, this Court has already ruled that, even with amendment of the Third Cause of Action (which Petitioners now purport to seek to renew), the claim would still fail.

Petitioners' Motion to Renew fails and this Court should deny the motion because:

- First and foremost**, it is not a motion to renew**. A motion to renew seeks to obtain the same relief sought on a "prior motion" based on new facts. Petitioners do not seek to leave to renew to assert the claims that they sought permission to plead in their prior February 14, 2013 motion for leave to amend. Rather, Petitioners attempt to misuse renewal to obtain leave to amend their now-dismissed Petition to assert new allegations, against new parties. Such relief is plainly outside the scope of a motion to renew. *See* Point One, *infra.*
- The claim Petitioners seek to "renew" has been dismissed and thus the relief requested is beyond the jurisdiction of the Court to grant. *See* Points One and Two, *infra.*
- Petitioners' motion satisfies none of the criteria for a motion to renew. It is **not** based on "new facts" that were in existence at the time of the prior motion, for which Petitioners have "reasonable justification" for their failure to bring to the Court's attention, and which, if known, would change the outcome of the prior motion. *See* Point Two, *infra.*
- Petitioners' alleged "new facts" are neither "new" nor "facts." *See* Point Two, *infra.*

- Petitioners' Motion to Renew is barred by the doctrine of *res judicata*. *See* Point Two, *infra.*

FACTS

On June 13, 2012 Petitioners commenced an Article 78 special proceeding asserting a single cause of action under SEQRA by Notice of Petition and Petition ("Petition"). Attached to the original Petition as Exhibit CC was the 1991 lease between HRYV and DOT ("Lease") and its terms were heavily referenced in the original June 13, 2012 Petition (*see* paragraphs 30, 44, 45, 47, 48, 49, 50, 51, 54, 65, 91, 92 and fn 1).

On September 6, 2012, Petitioners served a First Amended Petition that substantially modified the prior Petition, asserting three additional causes of action[3]. The First Amended Petition referenced the Lease in no less than 34 paragraphs (5, 39, 55, 56, 57, 58, 59, 60, 61, 62, 77, 78, 79, 80, 81, 82, 83, 84, 99, 173, 174, 177, 180, 201, 202, 204, 205, 207, 208, 210, 211, 212, 213, and 214) and the Wherefore clause. The Lease was attached to the First Amended Petition, also as Exhibit CC. [4] *See* Exhibit 4.

The September 6, 2012 First Amended Petition also referenced and relied upon the 1995 Restrictive Declaration regarding the HRY (*see* paragraphs 97 and 98), including the fact that any proposal to change the Land Use Plan for the HRY had to be submitted to the City Planning

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[3] Petitioners asserted a Second Cause of Action challenging the constitutionality of the 1991 Lease between HRYV and DOT. This Court dismissed that claim as time-barred. Petitioners asserted a Third Cause of Action seeking to invalidate the sublease between HRYV and Fresh Direct. This Court dismissed that claim for lack of standing. The Fourth Cause of Action challenged Fresh Direct's acceptance into the Excelsior Jobs Program. This Court also dismissed that claim for lack of standing. *See* Exhibit 1 at pp. 16-20. As to all three causes of action, the Court denied leave to amend because the claims were subject to dismissal even with the proposed amendments, rendering amendment futile. *See* Exhibit 1.

[4] For ease of reference, the prior pleading are attached to the Bloom Affirmation served herewith as follows: Exhibit 3- June 13, 2012 original Petition; Exhibit 4 – September 6, 2012 First Amended Petition. The contents of the February 14, 2013 proposed Second Amended Petition are compared to the July 2, 2013 proposed Second Amended Petition in Exhibit 2.

Commission and its approval obtained. The Restrictive Covenant was also attached to the First Amended Petition, as Exhibit HHH. *See* Exhibit 4 at ¶¶ 97 and 98.

In February 2013, in response to Respondents' collective motions to dismiss, Petitioners sought leave to serve a Second Amended Petition (attached to their February 14, 2013 moving papers as Exhibit A), which they contended would remedy one of the fatal defects in their First Amended Petition, the lack of necessary parties. Respondents opposed that motion to amend yet again and further pressed their pending motions to dismiss, establishing that even with the proposed amendments as set forth in their proposed Second Amended Petition (Exhibit A to Petitioners' February 14, 2013 motion for leave to amend), Petitioners' claims were still subject to dismissal.

By Decision and Order dated May 24, 2013 (and filed May 31, 2013), this Court denied Petitioners' motion to amend in its entirety, granted the Respondents' motions to dismiss and dismissed the Second, Third and Fourth causes of action "with prejudice" and denied the Petition as to the First Cause of Action. The case was accordingly disposed of with no open matters or issues. *See* Exhibit 1.

Petitioners' Third Cause of Action, as set forth in their September 6, 2012 First Amended Petition, and as set forth in their February 14, 2013 proposed Second Amended Petition, sought to "annul" and "invalidate" a sublease between Fresh Direct and HRYV regarding the Fresh Direct parcel at the HRY. Underlying Petitioners' Third Cause of Action was the allegation that the mere presence of Fresh Direct (or indeed any commercial development) at the HRY would render full implementation of the intermodal impossible. This claim pervaded Petitioners' pleadings and was a cornerstone of their overall claims. In rejecting and denying the Petitioners' claims, this Court found that the NYCIDA's SEQRA review, which concluded that there would

be no significant adverse impact on intermodal use, properly assessed the alleged impact of the Project on the intermodal. *See* Exhibit 1 at p. 15. The Court further found that the elements of the intermodal terminal were "already constructed." *Id.* In dismissing the Third Cause of Action for lack of standing, the Court found that:

> The claims [of the third cause of action] involve an attempted sublease between HRYV, the lessor of the state-owned property, and Fresh Direct. The proposed second amended petition alleges no involvement by the DOT in this attempted conveyance/sublease, and the claim thus does not adequately assert a mismanagement of state funds or property by a state actor.

Id. at p. 20.

On July 2, 2013, Petitioners filed a Notice of Appeal from the May 31, 2013 Decision and Order and simultaneously served a motion labeled as a motion to renew whereby Petitioners purport to seek leave to renew their February 14, 2013 motion for leave to amend as to a single cause of action, the Third Cause of Action. Curiously (and fatally), Petitioners do not seek leave to renew their opposition to Respondents' successful motions to dismiss (which included dismissal of the Third Cause of Action).

In their Motion to Renew, Petitioners attach a proposed Second Amended Petition that they characterize as a "renewed" Second Amended Petition. *See, e.g.,* July 2, 2013 Giorgio Affirmation in support of Motion to Renew ("Giorgio Affirmation") at ¶ 3. Also in the July 2, 2013 Giorgio Affirmation, Petitioners suggest that the only "change" they have made to the February 2013 proposed Second Amended Petition is the addition of a single exhibit (Exhibit AAAA). *See* Giorgio Affirmation at ¶ 3.

A comparison of the "renewed" Second Amended Petition attached to the Motion to Renew to the "proposed" Second Amended Petition that was the subject of the motion for leave to amend reveals, however, that the documents are markedly different. *See* Exhibit 2 (document

prepared by Respondents comparing the February 14, 2013 proposed Second Amended Petition and the July 2, 2013 proposed Second Amended Petition attached to the Motion to Renew (additions in yellow; deletions in red). Specifically:

- One party (Randal Coburn, alleged to be "an employee and director of the Excelsior Jobs Program at the New York State Department of Development") has been dropped. *See* Exhibit 2 at ¶ 47;
- A new party is proposed to be added (the New York Power Authority) that was never named in the original June 13, 2012 Petition, the September 6, 2012 First Amended Petition, or the February 14, 2013 proposed Second Amended Petition. *See* Exhibit 2 at ¶ 49;
- Nineteen (19) **new** paragraphs have been added containing allegations that were never part of the February 14, 2013 proposed Second Amended Petition (or for that matter the original June 13, 2012 Petition or the September 6, 2012 First Amended Petition). These new allegations (paragraphs 49, 108-109, 136-141, 221-228, 257, 260) contain substantive allegations that reshape Petitioners' claims and theories. *See* Exhibit 2 at ¶¶ 49, 108-109, 136-141, 221-228, 257, 260;
- Eleven (11) other paragraphs (5, 6, 55, 112, 211, 231, 256, 258, 259, 261, 265) and the Wherefore clause have been changed, including to bolster allegations that relate to claims this Court has dismissed and that are not relevant to the Third Cause of Action alleged to be the sole subject of the Motion to "Renew." *See* Exhibit 2 at ¶¶ 5, 6, 55, 112, 211, 231, 256, 258, 259, 261, 265;

- Still other paragraphs (21, 47, 60) and headings L, Y and Z have been changed in other respects that further distinguish the document from the one this Court ruled on in denying the motion to amend. *See* Exhibit 2 at ¶¶ 21, 47, 60 and headings L, Y and Z.

In their July 2, 2013 Motion to Renew, Petitioners assert that they are now possessed of "new facts" that they did not have in February, 2013 when they moved for leave to amend. First, they allege as "new" facts the provisions of the Lease between DOT and HRYV and/or the Restrictive Covenant, documents that were attached to and heavily referenced in their original June 2012 Petition, their September 2012 First Amended Petition and their February 2013 proposed Second Amended Petition. There is nothing "new" about these documents or their contents.

The Petitioners also allege that certain events have occurred (or are about to occur) since their motion for leave to amend was argued that constitute "new facts." Yet, the events they allege were either anticipated by them and formed the basis for their claims in the first instance (and were disposed of previously) and are therefore not "new", or such events have not occurred and are therefore not "new."

POINT ONE

THE MOTION DOES NOT "RENEW" A "PRIOR MOTION"

A motion to renew pursuant to CPLR 2221, which the pending motion purports to be, is limited to those circumstances in which a party seeks to revisit a "**prior motion**" based on new facts or new law. *See* CPLR 2221(a) ("A motion to renew . . . a **prior motion** . . .") (emphasis supplied). **Here, however, Petitioners do not seek to "renew" any "prior motion."** The relief sought in their February 14, 2013 motion for leave to amend was to serve the Second Amended Petition attached to that motion as Exhibit A. The relief sought in the pending Motion to Renew

is to serve a very different (and previously unseen) Second Amended Petition, attached to the Motion to Renew as Exhibit A. As the comparison of the two "Second Amended Petitions" reveals and as set forth above, the differences between the two Second Amended Petitions are substantial and include a new party, nineteen new paragraphs asserting new substantive allegations, deletion of a party, and other substantive changes affecting the factual and legal underpinnings of Petitioners' claims. *See* Exhibit 2.

Thus, what Petitioners seek under the false guise of "renewal" is not a second look at the earlier motion based on "new facts," but a "do-over" with a new and different pleading. Nowhere do they offer any legal authority that would allow such relief.

Particularly disturbing in this regard is Petitioners' false suggestion in their moving papers that the only "change" they have made to the Petition is the addition of a single exhibit (Exhibit AAAA) (*see* Giorgio Affirmation at ¶ 3), never acknowledging, let alone justifying, that the relief they now seek is markedly different from the relief sought on the prior motion. Petitioners even characterize their proposed Second Amended Petition as a "renewed Second Amended Petition," as if it were the same as their February 2013 proposed Second Amended Petition. *See, e.g.,* Giorgio Affirmation at ¶ 3. Petitioners' subterfuge should not be countenanced. This is particularly true here where this Court already ruled that even if it allowed the amendment of the Third Cause of Action that Petitioners sought in February (and now purport to "renew"), the claim was still subject to dismissal. *See* Exhibit 1at p. 20 ("The proposed second amended petition . . . does not adequately assert a mismanagement of state funds or property by a state actor . . . and Petitioners' motion for leave to amend this cause of action is denied as futile.").

A motion to renew, in essence, seeks a second bite at the relief sought in the "prior motion." CPLR 2221. Where, as here, the relief sought is not the relief sought in the prior motion, but rather new relief (here in the form of a **new** Second Amended Petition), it is not a motion to renew at all.

Petitioners do not assert that new facts entitle them to serve the Second Amended Petition that was attached to their February 14, 2013 Motion for Leave to Amend. Instead, they seek to yet again amend the now-dismissed[5] Petition and to serve a **completely new** Amended Petition that was **never** before this Court. In *Sodano v. Faithway Deliverance Center, Inc.*, 18 A.D.3d 534, 536 (2d Dep't 2005), this very issue was addressed and the court held that it was "error to characterize" a motion as a motion to renew where it sought "completely different relief" than the relief sought on the prior motion. *See also Merkos L'Inyonei Chinuch, Inc. v. Sharf*, 2008 N.Y. Misc. LEXIS 9765, *6 (Sup. Ct. Kings Cty, November 3, 2008) ("A motion to renew should not seek new or different relief.").

Petitioners cannot overcome the Grand Canyon proportioned chasm between what they seek here and what they sought in their "prior motion," regardless of the moniker they attach to that effort. Because Petitioners do not seek to "renew" anything, their motion must fail.

POINT TWO

PETITIONERS' MOTION FAILS TO MEET THE CRITERIA FOR A MOTION TO RENEW

Even if the motion could overcome the infirmities identified above and the Court were to consider it a Motion to Renew, the motion must still be denied because it fails to meet the CPLR

[5] *See* discussion at subsection C *infra* as to the availability of a motion to renew as to a dismissed matter.

2221 criteria for such a motion for the simple and fundamental reason that the alleged "new facts" upon which petitioners rest their motion are either not "new" or not "facts."

Specifically, it is not based (i) on "new facts" that were in existence at the time of the prior motion, (ii) for which Petitioners have "reasonable justification" for their failure to bring to the Court's attention, and (iii) which, if known, would change the outcome of the prior motion. *See* CPLR 2221(e). *See also, e.g., Welch Foods, Inc. v. Wilson* , 247 A.D.2d 830, 831(4th Dep't 1998) (reversing grant of motion to renew where movant neither established that "new" material was unavailable at time of initial motion nor proffered a valid excuse for failing to submit it originally); *Grassel v. Albany Medical Center Hosp.* , 223 A.D.2d 803, 804 (3d Dep't 1996) *app. den.* 88 N.Y.2d 842 (1996) (same); *Klein v. Mount Sinai Hosp.* , 121 A.D.2d 164, 164-65 (1st Dep't 1986) (same); CPLR 2221(e).

To constitute a "reasonable justification" under CPLR 2221(e), a party's reason for failing to submit facts on the original motion must consist of more than its mere failure to anticipate the basis for the adverse decision. *See, e.g., Ramsco, Inc. v. Riozzi*, 210 A.D.2d 592, 593 (3d Dep't 1994) (affirming denial of motion to renew); *Foley v. Roche*, 68 A.D.2d 558, 568 (1st Dep't 1979) (renewal is not available where party has "proceeded on one legal theory on the assumption that what has been submitted is sufficient"). Courts recognize that renewal is not "a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." *Town of Tusten v. Clark Engineers*, 187 A.D.2d 772, 773 (3d Dep't 1992) (quoting *In re Beiny*, 132 A.D.2d 190, 210 (1st Dep't 1987), *app. den.* 71 N.Y.2d 994 (1988).

Given these criteria, Petitioners' motion fails at every turn.

A. The "New Facts" Alleged are Neither "New" or "Facts."

Petitioners' Motion to Renew is based on either "old facts" that were admittedly known to Petitioner at the time of the February 2013 motion for leave to amend and well before (*see* Exhibits 2, 3, 4) or "new facts" that are not "facts" at all. Thus, the "new facts" that Petitioners allege are either not "new" or not "facts." And more importantly, none of the "facts" (old, new or false) have any bearing on the Third Cause of Action addressed to the Sublease between Fresh Direct and HRY and thus would not change the outcome of the prior motion (even assuming Petitioners actually sought to revisit that prior motion – *see* Point One, *supra.*).

First, Petitioners allege as "new" facts provisions of the lease between DOT and HRYV (the "Lease") and/or the Restrictive Covenant that they have known (or certainly could have known) from the outset. The Lease was attached to the original June 13, 2012 Petition as Exhibit CC and its terms were heavily referenced in the original June 13, 2012 Petition. The First Amended Petition referenced the Lease in 34 separate paragraphs as well as the Wherefore clause and it was attached to the First Amended Petition. *See* Statement of Facts above.

The Restrictive Declaration the Petitioners now purport to rely on as a new fact was likewise attached to their prior pleadings (Exhibit HHH) and likewise referenced in the First Amended Petition, including the fact that any proposal to change the Land Use Plan must be submitted to the City Planning Commission and its approval obtained. *See* Exhibit 3 at ¶¶ 97, 98.

Petitioners now seek to label as a "new fact" that the provisions of the Lease and the Restrictive Declaration, that they themselves cited and anticipated, are now being implemented by way of an application to City Planning for a minor modification to the Land Use Plan. In

other words, exactly what Petitioners expected to happen and what they said would happen, has happened as expected. This is not a new fact.

A strikingly similar argument was rejected in *Brooklyn Welding Corp. v. Chin*, 236 A.D.2d 392 (2d Dep't 1997), also in the context of a motion to renew an Article 78 determination. As here, Petitioner relied on alleged "new facts" in the form of documentary evidence. In rejecting the motion, the Second Department held:

> The substance of these documents presented neither new nor additional facts not known to the petitioner at the time of the CPLR article 78 proceeding. Rather, they merely represented summaries of negotiations in which the petitioner had played an active and important role, and thus already had substantive knowledge of (*see, Pahl Equip. Corp. v. Kassis*, 182 AD2d 22, 27). Indeed, the alleged "new" facts were precisely the same facts the petitioner had set forth at both the administrative hearing on the default issue and the CPLR article 78 proceeding to support its argument that the contracts had been orally modified. To the extent that the petitioner now asserts the claims of mutual or unilateral mistake, renewal is not available where a party moves on a different legal argument merely because he was unsuccessful upon the original application" (*Foley v. Roche, supra,* at 568).

Second, Petitioners assert as "fact" that DOT has been requested to act on one or more applications, but of course provide no evidence of same. That is because no such request has been made. Thus, to the extent the Motion to Renew relies on such alleged new "facts," they are not facts at all and cannot form the basis for any relief.[6]

B. "New Facts" Underlying a Motion to Renew Must Have Been in Existence When Prior Motion Was Made.

"Facts" arising after the motion sought to be renewed are not the "new facts" contemplated by a motion to renew and cannot be considered. The "new facts" must have been available at time of original motion, but unknown or unavailable to movant. *See Rush v. County of Nassau*, 24 A.D.3d 560 (2d Dep't 2005*) lv to app dsmsd in part and den in part*, 7 N.Y.3d

[6] Petitioners even suggest that DOT has been less than truthful in its responses to Petitioners' myriad FOIL requests. *See* Giorgio Affirmation at ¶¶ 11-17.

862; *Silverman v. Leukadia, Inc.*, 159 A.D.2d 154 (1st Dep't 1990); *James v. Nestor*, 120 A.D.2d 442 (1st Dep't 1986); *Kirby v. Suburban Elec. Engineers Contractors, Inc.*, 83 A.D.3d 1380 (4th Dep't 2011) *lv. den.* 17 N.Y.3d 783 (2011). Courts will reject motions to renew based on post-motion "new facts." *See, e.g. Chernysheva v. Pinchuck*, 57 A.D.3d 936 (3d Dep't 2008); *see also Garcia v. Battista*, 53 A.D.3d 1068 (4th Dep't 2008); *Amodeo v. State*, 257 A.D.2d 748 (3d Dep't 1999).

Even if such post-motion "facts" could be considered, it would not make any difference here. The post-February (but nonetheless anticipated) application to City Planning Commission ("CPC") for a minor modification to the Land Use Plan and small extension of the zoning override to allow use of the 0.3 acre parcel within the intermodal for parking does not equate in any way, shape or form to "action" on the part of the Commissioner of the New York State Department of Transportation that would give rise to standing on Petitioners' Third Cause of Action. Petitioners' attempt to equate the "notice" that must be given ***to*** DOT of the decision regarding the Land Use Plan into some type of "action" **by** DOT Commissioner McDonald that would constitute a "wrongful expenditure" under State Finance Law 123-b as required for standing reveals not only the desperation of this motion, but the tortured lengths to which Petitioners will go to press their doomed claims. Equally non-availing to Petitioners is any anticipated approval by DOT of a change in the Land Use Plan, as contemplated by everyone including Petitioners. As this Court found in its Decision and Order in dismissing the Third Cause of Action for lack of standing:

> The claims [of the third cause of action] involve an attempted sublease between HRYV, the lessor of the state-owned property, and Fresh Direct. The proposed second amended petition alleges no involvement by the DOT in this attempted conveyance/sublease, and the claim thus does not adequately assert a mismanagement of state funds or property by a state actor."

See Exhibit 1, Decision and Order at p. 20. Nothing in the Motion to Renew or the "new" proposed Second Amended Petition changes that fact.

Moreover, Petitioners' entire argument that any "new" action by DOT would be actionable is based on the false and rejected contention that the Fresh Direct project would render the intermodal impossible. In rejecting and denying the Petitioners' claims that the Fresh Direct Project would render the intermodal impossible (a claim that forms the cornerstone of this Motion to Renew), this Court found that the NYCIDA's SEQRA review, which concluded that there would be no significant adverse impact on intermodal use, properly assessed the alleged impact of the Project on the intermodal. *See* Exhibit 1 at p. 15. That issue, like all others, is on appeal, and should be left to the appellate court to review.

While a motion to renew is addressed to the sound discretion of the trial court, it nonetheless requires the movant to discharge a heavy burden of proof and persuasion. *See, e.g., Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72, 73-74 (1st Dep't 1994); *Wilmington Trust Co. v. Metro. Life Ins. Co.*, 2009 NY Misc. LEXIS 3993, at *9 (N.Y. Sup. Ct. Feb. 2, 2009). Importantly, a motion to renew is simply not intended to provide an unsuccessful party with successive opportunities to argue the very matters previously decided. *See William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992), *leave dismissed in part, denied in part,* 80 N.Y.2d 1005 (1992).

A motion to renew must be rejected unless the "new facts" presented would change the prior determination of the court. *See, e.g., Amodeo v. State of New York* , 257 A.D.2d 748, 749 (3d Dep't 1999) (affirming denial of motion to renew where additional material did not warrant a different result); *Laxrand Constr. Corp. v. R.S.C.A. Realty Corp.*, 135 A.D.2d 685, 686 (2d Dep't 1987) (same); *Banow v. Simins*, 53 A.D.2d 542 (1st Dep't 1976) (same); CPLR

2221(e)(2). When all is said and done, and even accepting all of Petitioners' claims of "new" "facts," the motion must be denied for the simple reason that nothing contained in the Motion to Renew would "change the prior determination." *See In re Iceland Inc.*, 97 A.D.3d 579, 580 (2d Dep't 2012) (motion for leave to renew opposition to motion to dismiss for lack of standing properly denied where movant "failed to demonstrate that that the alleged 'new facts' would change the Supreme Court's prior determination."

For all these reasons, the motion fails.

C. Petitioners Are Precluded From Revisiting Issues and From Seeking Amendment of a Dismissed Claim.

To the extent the pending motion could be construed as a new motion to amend dressed up as a motion to renew, the time to amend is long past. The claims have been dismissed and are on appeal. A motion to renew is not a proper vehicle to address a final judgment (as exists here). *See, e.g., Maddux v. Schur*, 53 A.D.3d 738 (3d Dep't 2008); *Curry v. Vertex Restoration Corp.*, 252 A.D.2d 360 (1st Dep't 1998) ("Renewal is not a proper vehicle for obtaining relief from the judgment"); *see also Swope v. Quadra Realty Trust, Inc.*, 28 Misc. 3d 1209(A), * 4-5 (Sup. Ct. N.Y. Cty 2010) ("Once a decision and order of the court has been reduced to a final judgment and the time to appeal has expired, CPLR 2221(e) is not the proper vehicle to address that final judgment."). This Court's original disposition is now law of the case and a trial court cannot "arrogate to themselves powers of appellate review." *See* CPLR 2221, McKinney's Practice Commentary 2221:2 ("Original Disposition is Law of the Case"), citing and quoting *George W. Collins, Inc v. Olsker-McLain Indus., Inc.*, 22 A.D.2d 485, 489 (4th Dep't 1965). That is particularly true here, where Petitioners do not seek to renew or

reargue or otherwise resurrect their opposition to Respondents' Motions to Dismiss, rendering any effort to amend at this date futile at best.

To the extent the motion seeks to revisit issues that have already been decided or to assert facts or issues that could have been asserted earlier, those efforts are barred by the doctrine of *res judicata*. Even if Petitioners now seek to make new use of these old facts in support of a new (or the same) theory or to obtain a different remedy, the doctrine of *res judicata* precludes such an effort.

A final judgment on the merits of an action (as exists here in the Court's May 24, 2013 Decision and Order) precludes a party from relitigating matters that were or ***could have been*** raised in that action, even if based upon a different legal theory or seeking a different remedy. *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981) ("Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy."); *State of New York v. Town of Hardenburgh*, 273 A.D.2d 769, 772 (3d Dep't 2000); *Murray v. National Broadcasting Co.*, 178 A.D.2d 157, 158 (1st Dep't 1991). A party is thus barred from raising any matter it could have raised earlier. *Matter of Reilly v. Reid,* 45 N.Y.2d 24, 28-31 (1978). *Res judicata* pertains not only to matters actually litigated, but also to any which might readily have been litigated. *Partlow v. Kolupa*, 122 A.D.2d 509, 510 (3d Dept. 1986), *aff'd.* 69 N.Y.2d 927 (1987).

The dismissal of a claim is a "valid final determination on the merits" that is subject to the doctrine of *res judicata*. *O'Connell v. Hill*, 179 A.D.2d 1057 (4th Dep't 1992) ("By reason of the summary dismissal of the 1984 action, the doctrine of res judicata operated as a bar to further maintenance of the 1980 action."). *Res judicata's* purpose of providing finality in the

resolution of dispute so parties are not vexed by further litigation is particularly apt here. *Reid, supra,* 45 N.Y.2d 28-31.

Petitioners' instant motion frustrates this policy by raising facts (and then using those facts to assert entitlement to relief) which were not only available to them, but admittedly in their possession. Prompt assertion and resolution of challenges to governmental agency actions are beneficial to both the agency and the parties impacted by the actions. *Public Service Commission v. Rochester Tel. Corp.,* 55 N.Y.2d 320, 327 (1982). Petitioners' article 78 action here arises out of the same transaction or factual groupings as the earlier proceedings, mandating invocation of the doctrine of claim preclusion. To conclude otherwise would be to afford Petitioners endless opportunities to resurrect their dismissed claims.

Petitioners' new allegations, based on the Lease and the Restrictive Declaration were as available to them in June 2012 (initial Petition), in September 2012 (First Amended Petition) and in February 2103 (motion for leave to amend to serve Second Amended Petition) as they are now. *See Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 192-194 (1981). Thus, Petitioners cannot credibly contend that they could not have made the arguments earlier that they now seek to make and renewal (even assuming a renewal motion is viable) is futile and legally barred.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the accompanying papers of DOT, and any supporting Affidavits/Affirmations and the exhibits hereto, Respondents named below respectfully request that the Court deny the Motion to Renew in its entirety.

Dated: New York, New York
July 24, 2013

NIXON PEABODY LLP

By: _____
Laurie Styka Bloom
Jared C. Lusk
Attorneys for Respondents,
Fresh Direct LLC and UTF Trucking ,Inc.
437 Madison Avenue
New York, New York 10022
(212) 940-3000
L. Bloom Direct Dial: (716) 853-8102

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York

By: _____
Christopher King
Kathleen Schmid
Attorneys for the Respondents New York City Industrial Development Agency and New York City Economic Development Corporation
100 Church Street, Room 6-132
New York, New York 10007
(212) 788-0905

EMPIRE STATE DEVELOPMENT

By:_____
Simon Wynn
Attorney for Respondent Empire State Development Corporation
633 Third Avenue
New York, NY 10017
(212) 803-3755

SIVE, PAGET & RIESEL

By:_____
Steven Barshov
Attorney for Respondent Harlem River Yard Ventures, Inc.
460 Park Avenue
New York, New York 10022
(212) 421-2150

Dated: New York, New York
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NIXON PEABODY LLP

By: _____
Laurie Styka Bloom
Jared C. Lusk
Attorneys for Respondents,
Fresh Direct LLC and UTF Trucking ,Inc.
437 Madison Avenue
New York, New York 10022
(212) 940-3000
L. Bloom Direct Dial: (716) 853-8102

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York

By: _____
Christopher King
Kathleen Schmid
Attorneys for the Respondents New York City Industrial Development Agency and New York City Economic Development Corporation
100 Church Street, Room 6-132
New York, New York 10007
(212) 788-0905

EMPIRE STATE DEVELOPMENT

By:_____
Simon Wynn
Attorney for Respondent Empire State Development Corporation
633 Third Avenue
New York, NY 10017
(212) 803-3755

SIVE, PAGET & RIESEL

By:_____
Steve Barshov
Attorney for Respondent Harlem River Yard Ventures, Inc.
460 Park Avenue
New York, New York 10022
(212) 421-2150

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NIXON PEABODY LLP

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Laurie Styka Bloom
Jared C. Lusk
Attorneys for Respondents,
Fresh Direct LLC and UTF Trucking ,Inc.
437 Madison Avenue
New York, New York 10022
(212) 940-3000
L. Bloom Direct Dial: (716) 853-8102

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York

By: _____
Christopher King
Kathleen Schmid
Attorneys for the Respondents New York City Industrial Development Agency and New York City Economic Development Corporation
100 Church Street, Room 6-132
New York, New York 10007
(212) 788-0905

EMPIRE STATE DEVELOPMENT

By: _____
Simon Wynn
Attorney for Respondent Empire State Development Corporation
633 Third Avenue
New York, NY 10017
(212) 803-3755

SIVE, PAGET & RIESEL

By: _____
Steve Barshov
Attorney for Respondent Harlem River Yard Ventures, Inc.
460 Park Avenue
New York, New York 10022
(212) 421-2150

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Laurie Styka Bloom
Jared C. Lusk
Attorneys for Respondents,
Fresh Direct LLC and UTF Trucking ,Inc.
437 Madison Avenue
New York, New York 10022
(212) 940-3000
L. Bloom Direct Dial: (716) 853-8102

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Corporation Counsel of the City of New York

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Christopher King
Kathleen Schmid
Attorneys for the Respondents New York City Industrial Development Agency and New York City Economic Development Corporation
100 Church Street, Room 6-132
New York, New York 10007
(212) 788-0905

EMPIRE STATE DEVELOPMENT

By:_____
Simon Wynn
Attorney for Respondent Empire State Development Corporation
633 Third Avenue
New York, NY 10017
(212) 803-3755

SIVE, PAGET & RIESEL

By: Steven Barshov / JSB with permission
Steven Barshov
Attorney for Respondent Harlem River Yard Ventures, Inc.
460 Park Avenue
New York, New York 10022
(212) 421-2150