To be argued by: **Andrew R. Goldenberg**
Time Requested for Argument: 15 Minutes

Appellate Division Docket Nos.: 2024-01788 & 2024-02298

New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

GREGG SINGER, SING FINA CORP., AND 9TH & 10TH STREET LLC,

Plaintiffs-Appellants,

-against-

BILL DE BLASIO, BOTH INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE MAYOR OF THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, AARON SOSNICK, PAUL WOLF, EAST VILLAGE COMMUNITY COALITION, INC., GEORGE ARTZ COMMUNICATIONS, INC., AND HR&A ADVISORS, INC.,

Defendants-Respondents.

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Respondents' Briefs mischaracterize both the SAC[1] and the 2023 Appellate Division Decision in the same flawed manner as the Motion Court in its January 11th Decisions. The gravamen[2] of the SAC is not seeking to have the DOB issue permits in a manner which may have otherwise been more appropriately addressed at an Article 78 Proceeding. Rather, Appellants are seeking to recover monetary damages against all of the Respondents in a plenary action based on the totality of the utterly corrupt circumstances that allege (and substantiate) a concerted, conspiratorial and illegal effort to undermine and sabotage Appellants' clear rights to use, occupy and develop the Property. Such Claims are properly asserted and cognizable in the form of the SAC as buttressed by the Supplemental Pleadings.

What is being obfuscated by Respondents are the fundamental underlying transgressions, *to wit*, that but for the Mayor's unlawful directions to the DOB to obstruct Appellants' "as of right" development, which were given at the behest of, and in concert with, the other Respondents, the Property would have been developed by Appellants and they would still own it. Since the details and breadth of Respondents' ongoing obstruction were previously concealed (and only recently revealed) during limited discovery, that culminated in City's own acknowledgement

[1] The terms defined in Appellants Brief shall have the same meaning when used herein.
[2] Particularly at this time since the Property was sold at a Bankruptcy Sale to another Sosnick owned entity.

that the Dorm Rule does not apply to the Building (a Class B multiple dwelling), the manufactured "discretionary" permitting requirements that this Court previously referenced in the 2023 Appellate Division Decision never actually existed. In fact, the City failed to identify any other example of requiring an applicant to produce a signed lease and establish an "institutional nexus" before issuing a permit for a Class B Building. This confirmed not only that the City's (and remaining Respondents') entire position was a sham, but also Respondents' years-long effort to maliciously and unduly sabotaged Appellants. (R. 1134, 1137, 1141-1167).

This Court must therefore analyze the SAC and supporting documents in the light most favorable to Appellants to find that: (i) Appellants cured any deficiencies that this Court previously identified in the Original Complaint to assert valid and sufficient allegations supporting the amended Claims against all the Respondents in this plenary action; (ii) Appellants have demonstrated via the Respondents' own recently exposed actions, communications and statements that any conclusions reached in the 2023 Appellate Division Decision that might otherwise bar (as Respondents maintain) consideration of the amended Claims, including any "immunities" claimed by Respondents, do not apply.

A R G U M E N T

I.

The Amended Claims and New Allegations in the SAC Refute Respondents' Argument that the 2023 Appellate Division Decision Precludes Consideration of the SAC

Respondents argue disingenuously that the 2023 Appellate Division Decision categorically bars all the amended claims in the FAC and the SAC because they all arise from the permit denials and this Court already held that the appropriate vehicle for challenging discretionary permit denials is an Article 78 proceeding. However, and as demonstrated throughout Appellants Brief, Appellants had subsequently discovered and presented new, highly probative and irrefutable evidence - including the City's own internal communications as well as the City's own record admissions that the City had no discretion to deny a permit, which requires this Court to now find that the SAC states the Claims asserted. Indeed, not only does this distinguish the new SAC Claims from those in the Original Complaint, but they also support them in a manner that refutes the very bases for the City's decisions – upon which *this* Court relied in dismissing the Original Complaint, without prejudice.

A. The 2023 Appellate Division Decision Does Not Constitute "Law of the Case" or "Res Judicata" to Prohibit Appellants from Amending the Original Complaint in the form of the SAC

A decision granting a motion to dismiss without prejudice does not constitute the "law of the case" which prohibits a plaintiff from seeking to amend the dismissed

complaint to cure any deficiencies. See Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry, Inc., 128 A.D.2d 467, 469 (1st Dep't 1987) ("The law of the case doctrine is … inapplicable herein, as a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action, which addresses merely the sufficiency of the pleadings …."). Moreover, and "[o]f course, a question may be reconsidered if new evidence has come to light since the initial ruling." Holloway v. Cha Cha Laundry, Inc., 97 A.D.2d 385, 386, (1st Dep't 1983) (applying the "law of the case" doctrine) (citation omitted); see also People v. Evans, 94 N.Y.2d 499, 503 (2000), quoting, Arizona v. California, 460 U.S. 605, 618 (1963) (the law of the case doctrine "is necessarily amorphous").

Here, the 2023 Appellate Division Decision never held that Appellants' claims were dismissed with prejudice, and the lawsuit itself remained (and remains to this day) pending. Thus, pursuant to Favourite Ltd .v. Cico, 42 N.Y.3d 250 (2024) (Appellants Brief at pp. 49-50), the Prior Appeal and long-standing precedent, Appellants were well-within their rights to amend their Original Complaint, and the Motion Court was wholly authorized (and indeed, required) to consider the additional supporting evidence submitted in connection therewith, along with the evidence annexed to the Supplemental Pleadings and the Order to Show Cause seeking partial summary judgment on the application of the Dorm Rule. (R. 455-787, 1137-1167; Motion Court Docket Nos. 429-436). The Motion Court's failure

to properly do so was in error and Respondents arguments to the contrary are unfounded.

B. The Newly Discovered Evidence, Including the Admissions By the City and the Communications Amongst All Respondents, Demonstrate that the Building was Class B, the Dorm Rule Never Applied, the City Had No Discretion to Deny Permit, and that Article 78 Proceedings Could Never Have Provided Comprehensive Relief For Addressing Appellants' Claims

Notwithstanding whether the 2023 Appellate Division Decision had preclusive effect in the manner posited by the City or the other Respondents, even the City concedes that that are circumstances under which Appellants are permitted to amend their Claims – to wit, "a showing of subsequent evidence or change of law." (City Brief at p. 32). Although the standard referenced by the City applies to decisions made at summary judgment, to the extent that Favourite (rendered in 2024) constitutes a "change in the law", or (for example) the City's own subsequent admissions that the "Dorm Rule does *not* apply to a Class B multiple dwelling" constitutes "new evidence" (Appellants Brief pp. 33-35), Appellants satisfy this standard as well with the newly asserted and supported Claims in the SAC and the Supplemental Pleadings.

Similarly, any argument that the Claims are barred by "Res Judicata" (as posited by Sosnick and the EVCC) is equally erroneous. Though Sosnick and the EVCC reference numerous prior court proceedings in a blatant attempt to overwhelm this Court with irrelevancies, none of them bear on the instant

proceedings except to the extent of the underlying Motion Court action and 2023 Appellate Division Decision – all addressed in Appellants Brief. The federal lawsuit (18-cv-00615), which asserted different claims based on different factual allegations (for example, no RICO claims were asserted, let alone those Claims and allegations contained in the SAC and Supplemental Pleadings), was also dismissed without prejudice in 2019, and the Court declined to exercise supplemental jurisdiction over the state law claims. Singer v. City of N.Y., 417 F. Supp. 3d 297 (S.D.N.Y. 2019); see also City of New York v. Caristo Constr. Corp., 94 A.D.2d 688, 463 (1st Dep't 1983), aff'd, 62 N.Y.2d 819 (1984) (judgment without prejudice is not on the merits).[3]

Moreover, at the time, the factual allegations underlying the SAC and Supplemental Pleadings were still being concealed by Respondents. The doctrine of *res judicata* cannot be applied to bar Appellants from asserting a claim "of which [Appellants were] justifiably ignorant at the time the first action was brought, or where the relevant fact had not yet come into existence." 10 New York Civil Practice: CPLR P 5011.17 (2025), citing Ehrlich v. Swiss Constr. Co., 21 Misc. 2d 506 (New York County), *modified*, 11 A.D.2d 644 (1st Dep't 1960); see also Denson v. Donald

[3] Both this Court and the Motion Court (expressly or impliedly) also found that "although this is not the first action brought by Mr. Singer, none of his state law claims asserted in this action have been addressed on the merits in any of the Prior Lawsuits." (R. 433, citing Decision and Order, Apr. 20, 2022, Singer v. de Blasio, Index. No. 158766/2020, NYSCEF doc. 105 at 3.)

J. Trump for President, Inc., 180 A.D.3d 446, 454 (1st Dep't 2020) ("Defendant is hard-pressed to explain how plaintiff could have pursued her rights without setting forth necessary factual statements for the federal court to consider."). To be sure, in the Federal lawsuit, Sosnick also argued emphatically that the case was not "ripe" for adjudication – confirming there was no full and fair opportunity to address the SAC Claims on the merits. Singer, 413 F.Supp. at at 314-315.

C. This Court's References to Article 78 Proceedings in the Prior Appeal Do Not Mandate Dismissal of the FAC or Bar Consideration of the SAC Because the Original Complaint did not Incorporate the Previously Undisclosed Factual Allegations and Amended Claims Which Demonstrate that Respondents Had No Discretion

The City maintains:

> No matter how many facts plaintiffs add, they cannot overcome this Court's prior rul-ing's foreclosing of their claims for damages stemming from govern-ment agency decisions as a matter of law; that ruling was not dependent on the specific facts alleged in the original complaint.

(City Brief, p. 33).

In other words, and contrary to their above-referenced position, the City's position (joined substantially with the other Respondents) is that the deficiencies identified by this Court are incurable and the City is "immune" because "the denial of a permit is a discretionary act" which should have been challenged via an Article 78 proceeding since "the underlying claim involved allegations that DOB exceeded its jurisdiction and violated lawful procedure". (City Brief, p. 41).

First and foremost, this Court held that the "allegations that DOB's delay in approving the lease and denial of the permit was the result of political corruption and improper influence are speculative and lacked specificity." (R. 298 - 301 at p. 3). This Court also expressly opined, "[t]he cause of action for tortious interference with prospective business relations should have been dismissed because defendants' conduct, ***as alleged***, did not rise to the level of culpable conduct sufficient to support the claim. (Id.) (emphasis added). Thus, in conjunction with the fact that the FAC had already been filed, and that this Court did not dismiss the Original Complaint with prejudice, and the entire underlying lawsuit was still pending, this Court was acknowledging that Appellants *could* seek to cure and amend. Consideration of the SAC and the Supplemental Pleadings was therefore duly permissible by the Motion Court as a matter of law and were certainly not outright prohibited by the 2023 Appellate Division Decision.

The reference in the 2023 Appellate Division Decision to "immunity" "because the denial of a permit is a discretionary act" or to an Article 78 proceeding being the "proper vehicle to challenge their delay and denial of the permit" does not control as it did not address the additional Claims and allegations made in the FAC/SAC – which cured any defects and added the new Claims. See Section I., B., supra.

Moreover, Article 78 relief is not an "exclusive remedy" in which the underlying allegations incorporate a permit denial/revocation as one basis for stating other claims and seeking other remedies. 14 New York Civil Practice: CPLR P 7801.04 (2025); see also Koerner v. State of New York, 62 N.Y.2d 442 (1984); Kickertz v. New York Univ., 971 N.Y.S.2d 271 (1st Dep't 2013) ("to the extent the gravamen of plaintiff's causes of action is not a challenge to the [respondents'] decision and is not duplicative of the [Article 78] petition's allegations, [plaintiff] is not limited to article 78 review and may seek damages in a plenary action (citations omitted).").

Quite obviously, Appellants would not have been able to obtain all of the monetary relief it is seeking against all of the Respondents in its amended pleadings via Article 78 proceedings, thereby necessitating a plenary action from the outset. See e.g. Abiele Contracting v. N.Y.C. Sch. Constr. Auth., 91 N.Y.2d 1, 8-9 (1997) (since "… the focus of the controversy is on an agency's breach of an express contractual right, or on the agency's violation of the implied obligations of good faith, fair dealing and cooperation, a contract action is the recommended remedy.").

It is also beyond cavil at this point that neither the DOB nor the Mayor had "discretion" to do what it did and that any attendant "immunities" simply do not exist. This Court citation to Haddock v. City of New York in the Prior Appeal actually supports Appellants' contentions in this regard since "ministerial" acts are

exempted from protections the City would otherwise have. Id. 75 N.Y.2d 478, 484 (1990). Surely, the Court of Appeals holds that "governmental immunity under the decisional law of this State does not attach to every act …" and that "[w]hile the line separating discretionary and ministerial action may sometime blur, it is clear that … a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result." Id.

Here, the record evidence obtained and relied upon in support of the SAC/the Supplemental Pleadings and the other evidence, it has been demonstrated that Appellants were, as a matter of law, permitted to construct the Class B Building "as of right" from the outset, which required nothing more from the DOB than the "ministerial act" of issuing the permit on Appellants' Class B Building that Appellants were entitled to as a matter of law. (Appellants Brief, pp. 1 – 6).

Again, the City has admitted this in multiple contexts. John Paul Lupo (the Director of City Legislative Affairs) acknowledged this irrefutable truth in 2015 when he wrote:

> We don't actually have any authority here. We should make clear on background it's a privately owned site with an as of right use and our options are limited.

(Appellate Brief at pp. 16-17) (R. 477, 500, 508, 814, 837, 845).

DOB Assistant Commissioner Patrick Wehle also confirmed that but for City Hall's unlawful involvement and direction, the DOB would have issued the permit.

> Q. And I think I touched on this, but just to be clear. So -- but for City Hall saying whatever it said, doing whatever it did, Tony Shorris being involved to whatever extent he was involved. Even in March or April 2017 - if at that point, City Hall had said, you know what, we're good, we're out of this, we're done, you don't need to hold off anymore, do what you need to do. At that point in time, they just walked away as you understood it, Department of Buildings would have then issued the permit, yes?
>
> A. As I understand it, yes, correct. (Wehle Dep. Tr. 286-87)

(R. 494, 830).

Combined with the City's admission in late 2024 that the "Dorm Rule does not apply to a Class B multiple dwelling" (i.e., the Building) (R. 1190), and the City's prior approval of Appellants' construction plans to create a "Class B multiple dwelling" dormitory in 2014, this undermined any "discretion" the "Dorm Rule" may have otherwise afforded to the City and the basis of this Court's prior holding that the DOB's denial should have been challenged under CPLR Article 78. (Appellants' Brief, p.8; R. 1438).

As one commenter has also described:

> The Zoning Resolution divides the uses of land and buildings into 18 use groups (UG) based on the intensity of the use and its potential impacts.
>
> Uses may be permitted in a zoning district as-of-right or subject to discretionary zoning approvals. As-of-right uses are permitted without discretionary actions by the City Planning Commission (CPC) or Board of Standards and Appeals (BSA). Uses requiring discretionary zoning

> approvals are subject to public and environmental review (including public hearings) and the exercise of discretion by the CPC or BSA.
>
> Examples of discretionary approvals include zoning map changes, zoning text changes, special permits, and variances.

Goldman, Howard, "New York City Zoning Resolution (NY)" (LEXIS, 07/04/2024) https://plus.lexis.com/api/permalink/040f8768-ca66-424d-9b53-770fac640f20/?context=1530671 (emphasis added).

At bottom, the only way in which to seek recompense for all of the City's and the other Respondents' transgressions at this time is via this plenary proceeding and the SAC. The recent revelations that led to the new allegations and the amended Claims confirm that the Appellants are not "merely alleging" the Mayor, City and DOB were committing violations of "lawful procedure" or acting in "excess of their jurisdiction" that requires rectification via a limited Article 78 tribunal. The amended Claims instead show that Respondents were unscrupulously misconducting themselves at the highest levels and in a way that removes the dispute from the confines of an Article 78 relief and supports the Claims. C.f. California Suites Inc. v. Russo Demolition, Inc., 98 A.D.3d 144 (1st Dep't 2012) (acknowledging there are circumstances when Article 78 proceedings are not required and unlike here, finding a decision as to whether a situation constituted an "emergency" to be discretionary); see also Abelesz v. City of N.Y., 175 A.D.3d 1225 (2nd Dep't 2019) ("This was not an alleged discretionary act immune from liability….").

To the extent the City and the other Respondents continue to maintain Appellants should have commenced Article 78 proceedings to challenge the City's revocation of a permit otherwise after the City's admission in December 2024 that the Dorm Rule doesn't apply, they must be estopped from doing so. See Bihn v. Connelly, 162 AD3d 626, 627 (2018) ("a party may not take a position in a legal proceeding that is contrary to a position he or she took in a prior proceeding, simply because his or her interests have changed.").

D. Appellants Sufficiently Demonstrate that *Noerr-Pennington* Doctrine Does Not Apply to Shield the Mayor, Sosnick, GAC, EVCC, Wolf or HR&A from All Liability at the Pleading Stage

As set forth in Appellants Brief (pp. 23, 51, 54-56), *Noerr-Pennington* immunities protect legitimate petitioning and not private schemes or bribery, and certainly does not immunize the kind of clandestine and illegal conduct specified in the amendments. Respondents here are alleged to have surreptitiously bought influence and manipulated government processes, not of advocating policy in the sunshine of public discourse. Certainly, the recent revelations and new allegations more than sufficiently allege as much for the purpose of stating the Claims.

Of course, Respondents argue that the Motion Court was correct in holding that they continue to be immune from liability because they were merely engaged in protected lobbying efforts, or that the 2023 Appellate Division Decision has conclusively disposed of any claim against them without affording Appellants with

an opportunity to cure deficiencies in the Original Complaint. Such arguments fail to overcome the new allegations and Claims asserted in the SAC.

For example, even when Respondents' acts did involve petitioning-type conduct (such as pressuring City officials about the permit), they lost any immunity because the manner and purpose of their petitions were a "sham". Again, even Sosnick recognizes that the *Noerr-Pennington* doctrine includes a well-recognized exception for "sham" petitions – those in which the government process itself is used as a "weapon" to harm another rather than to genuinely obtain a favorable outcome. See Singh v. Sukhram, 56 A.D.3d 187 (2nd Dep't 2008) (a sham is intended to "preclude or delay its competitor's access to governmental processes."). In other words, abusing regulatory procedures solely to inflict cost or delay on a rival is not protected.

That is exactly what the SAC/Supplemental Pleadings highlight here. Respondents did not limit themselves to urging lawful enforcement of zoning rules in the public interest; rather, once Appellants satisfied the DOB's Dorm Rule requirements (even though they did not apply) by securing an institutional tenant, Respondents simply shifted tactics to find another means to block the project. Knowing that the DOB had no legitimate basis to deny the permit at that point, Defendants turned to improper influence – enlisting City Hall to stall and utility sabotage the permit outside normal channels. In essence, Respondents had "no

expectation" of defeating Plaintiffs' as-of-right permit through proper application of the law. Their only hope was to misuse the governmental process itself – via under the table dealings and delay – to frustrate Appellants until their project collapsed. Such conduct falls squarely within the sham exception.

To be sure, the SAC and Supplemental Pleadings detail that Respondents manipulated everything for the purpose of derailing Plaintiffs' project and forcing a fire-sale of the Property – which occurred (R. 456 – 462; 1134-1167). This Court need not take Appellants' allegations for Defendants' motives – as the SAC quotes Defendants' own emails boasting of "behind the scenes conversations at City Hall" after the $50 million proposal to hold up the permit, and details Sosnick's scheme to keep the building vacant and distressed so he could acquire it cheaply. (Id., and R, 478, 481, 505, 517-545). Using a municipal permitting process as a mere pretext to bankrupt a rival is a textbook "misuse of governmental process" outside *Noerr-Pennington's* shield.

The "corruption" exception also bars *Noerr-Pennington* Immunity for the Appellants' misconduct. Separate and apart from the sham exception, Courts have made clear that the doctrine does not protect petitioning activity that crosses the line into illegality. "Illegal, corrupt or unethical means" used to influence government are not immune. Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1317 (E.D.N.Y. 1996).

Here, the SAC explicitly pleads that Respondents engaged in criminal and unlawful conduct to accomplish their aims. Most egregiously, Sosnick is alleged to have offered over $50 million (in concert with the other Respondents) to the City to induce Mayor de Blasio to intervene and "take back" Plaintiffs' property. (R. 456-457, 461, 478). Such a *quid pro quo* offer – essentially a bribe to a public official – lies far outside any protected First Amendment activity. The pleadings further reference charitable tax fraud (using a non-profit entity to advance Sosnick's personal real-estate agenda) (R. 456, 459-480) and spoliation of evidence (routine deletion of emails to cover tracks) (R. 465). These allegations and the supporting documentation support that Defendants "engage[d] in conduct alleged to be criminal" in their dealings with the City. Unlike in prior iterations of this case and this Court's holding in the 2023 Appellate Division Decision, Appellants now duly allege and particularize outright illegality: a pay-to-play scheme at the highest level of City Hall. *Noerr-Pennington* provides no refuge for such misconduct.

At the very least, the presence of these new, meritorious, and serious allegations precluded dismissal at the pleading stage, and necessitated the granting of leave to file the proposed SAC/Supplemental Pleadings. The law is clear that when a plaintiff alleges defendants "engaged in overtly corrupt, criminal behavior in an effort to influence" government officials, a motion to dismiss on *Noerr-Pennington* grounds must be denied. Any "futility" argument and/or assertion that

the SAC/Supplemental Pleadings are "palpably devoid of merit" is squarely belied by all of the foregoing, and any decision about whether the *Noerr-Pennington* doctrine applies should (again, at the very least) be left until after the SAC permitted is filed, discovery proceeds, and is completed in earnest, so as to "more fully develop the underlying acts and possibly establish an exception…." Fox News Network v. Time Warner, 962 F. Supp. 339, 346 (E.D.N.Y. 1997), citing, P.& B. Marina, Lee Pokoik v. Logrande, 136 F.R.D. 50, 61 n.9 (E.D.N.Y. 1991).

E. HR&A Never Raised the February 6, 2023 Order As a Basis for Denying Leave to File the SAC

HR&A argues that the Nuisance and RICO claims cannot be stated against it since a default was never sought on the Original Complaint and the Motion Court dismissed that Complaint on that basis via Order dated February 6, 2023. However, contrary to HR&A's argument, HR&A never relied upon the dismissal of the Original Complaint as a basis for dismissing the amended Claims against them. The Record demonstrates instead that HR&A merely purported to incorporate the arguments of the City Defendants. (HR&A Brief at p. 4 ad § II; R. 1287-1288). Moreover, the Motion Court did not grant dismissal or deny the SAC Motion on the basis of the February 6, 2023 Order. Accordingly, only the bases addressed in their papers and the January 11th Orders may be considered on this Appeal. See Colonial Sur. Co. v Advanced Conservation Sys., Inc., 164 A.D.3d 465 (2nd Dep't 2018) (rejecting contentions raised for the first time on appeal); see also CPLR 3211(e) and

Addesso v. Shemtob, 70 N.Y.2d 689 (1987) (a pre-answer motion to dismiss must include any objections to personal jurisdiction or the objections are waived); In re Hall, 275 A.D.2d 979 (4th Dep't 2000) (by failing to move to dismiss on res judicata grounds, petitioner has waived her right to assert those defenses) (citations omitted); Goldman v. Cotter, 10 A.D.3d 289 (1st Dep't 2004), citing, City of Mount Vernon v. Mount Vernon Hous. Auth., 235 A.D.2d 516, 517 (1997) (on rare occasions, an appellate court may review and alter provisions of an order and judgment that are not described in a limited notice of appeal where subject of limited appeal is "inextricably interwoven" with those that are not).

II.

The Amended Claims Against Respondents Have Been Duly Alleged

The SAC (as supported by the Supplemental Pleadings and accompanying documents) duly states claims for Nuisance, RICO, Breach of Contract, Tortious Interference with Actual and Prospective Business Advantage, and Prima Facie Tort – which Claims speak for themselves. (R. 455-567, 1137-1167). For the sake of brevity, to avoid redundancy, and in observance of word count restrictions, the following addresses some of the more salient arguments made by Respondents while also not conceding any of the others. Notwithstanding, none of the arguments posited by Respondents demonstrate that the Claims are not sufficiently stated, and

Appellants reserve their rights to further elaborate on the sufficiency of their Claims at oral argument.

A. Respondents Fail to Rebut that Appellants State a Nuisance Claim

Respondents address Appellants' well-plead claims of "Nuisance" by once again misdirecting the Court to focus solely on the DOB's denial of a building permit. Again, the scope of Appellants' allegations are far broader than a simple permit denial. See Supra.

As shown in the SAC (¶¶ 255 – 263), the Record (R. 455-491) and Appellants Brief (pp. 30, 38-40, 52-56), the totality of City and the other Respondents' misconduct created a lasting, ongoing interference with the Appellants' rights to use and develop the Property, which is supported by evidence of the City's selective and inconsistent application of the Dorm Rule that "devalued" and rendered the Property unusable for its intended purpose, despite the City being fully aware that it never applied. Again, while *some* permit decisions may be discretionary, this one was not, and the manner in which the City made and executed its decisions – through orchestrated delay and selective enforcement, in concert with the other Respondents – transcends mere discretion and becomes the source of ongoing harm. This meets the threshold for a private nuisance claim as succinctly captured in the SAC:

> As noted, the DOB itself would have issued Plaintiffs' permit, but for City Hall's interference. For this claim, moreover, it does not matter whether City Hall's interference with DOB's decision was based on the

> Mayor's political agenda (to trade control over the Property with the Councilmember's support of a sanitation garage); his eagerness to please prospective campaign donors; or both. It does not even matter if the "final decision" to tell DOB to deny Plaintiffs' permit was made by the Mayor himself, or the Chief of Staff of the First Deputy Mayor (the one who had been having "behind the scenes conversations" with his former boss, then a State Assemblyman), to advance Sosnick's "secret quiet plan" to push the Property into foreclosure. Any one or more of these motives for stopping DOB from issuing Plaintiffs' permit for eight months, and then instructing DOB to deny Plaintiffs' permit, constitute intentional action intended to depress the value of Plaintiffs' property, notwithstanding DOB's own decision of August 2016.
>
> Finding the City liable for creating a nuisance by denying a permit should be rare – but it is apt where, as here, City Hall's instructions to DOB did not represent any change of policy or law (quite the opposite, as detailed above), and where the City's own development agency (the EDC) had concluded that the highest and best use of the Property is as a student dormitory. City Hall's instruction to DOB to deny Plaintiffs' permit was, thus, an intentional decision to deprive Plaintiffs from realizing the value of the Property as an un-renovated, un-tenanted nuisance, to coerce them to sell. The City, itself, is thus liable for creating a nuisance, and since the evidence shows that de Blasio himself intervened in DOB's process to direct them to reject the permit for his own personal benefit, he should also be held liable for the nuisance.

(R. 547-548). See also Kavanagh v. Barber, 131 NY 211 (1892) (private nuisance embraces not just physical injury to the realty, but any injury to the rights of the owner or possessor as to his dealing with, possessing, or enjoying such realty); McCarty v. Nat. Carbonic Gas Co., 189 N.Y. 40, 50 (1907) (nuisance found where

some financial injury caused to the owner); De Moll v. New York, 163 A.D. 676, 676 (2nd Dep't 1914) ("A private nuisance is anything unlawfully or tortiously done to the hurt or annoyance of the person, as well as the lands, tenements, and hereditaments of another); Appellants Brief, pp. 38-40 (citing cases).

The Third Department's decision In Boll v. Kinderhook, 99 A.D.2d 898, 899 (3rd Dep't 1984) is inapposite, and to the extent it requires anything beyond "any injury to the rights of the owner or possessor as to his dealing with, possessing, or enjoying such realty" caused by another's misconduct, it should not be followed.

The facts of Boll must also be distinguished to account for Appellants' non-discretionary "as of right" use of the Property that was interfered with by Respondents. Moreover, while the Boll Court reasoned that plaintiff "has neither pleaded nor shown any invasion whatsoever, physical or otherwise, upon his lawful use or enjoyment of the property, except for the denial of the building permit," here, the "invasion" is both physical and otherwise. An example of a physical invasion (to the extent even required) is that in December 2022, the City engaged in a:

> … monthslong takeover of [the Property] … – literally locking Plaintiffs out with a padlock and putting a sign on public display in front of the Property stating that the "Owner" of the site was no longer [Appellants], but actually the City, while a contractor hired by the City claimed to need over six months simply to brick up the windows of the Property.

(R. 565, 901).

As for the other "invasions" and interferences experienced by the Appellants, Respondents were acting for the purpose of causing the interference or at least knew or is substantially certain that the interference will occur as a result of its activities. See Copart Indus. Inc. v. Consol. Edison Co., 41 N.Y.2d 564, 570 (1977). Thus, the nuisance claim has been duly stated and it is far from conclusory.

B. The City Fails to Rebut that Appellants State a Breach of Good Faith and Dair Dealing Claim

The City maintains that the SAC fails to state a claim for breach of the implied covenant and fair dealing even though it is alleged that the City deliberately deprived Appellants of their rights under the Deed by refusing to allow or enable Plaintiffs to develop the Property for "community facility use" or any other use, whatsoever. The fallacy in the City's argument is that there were no zoning restrictions that led to permit denials, revocations, delays, etc. that could otherwise justify the City impeding the "as of right" use pursued by Appellants. Rather, it was only the City's ongoing misconduct (in concert with the other Respondents) and deliberate breach of their obligations that undermined Appellants' rights and deprived them of their expectation to develop the Property. To be sure, the Mayor (and by extension, the City) controlled these obstructions and undermined Appellants' and the public's trust when the Mayor was offered a better deal (i.e., $50 million) by Sosnick and his cohorts.

The City's attempts to excuse its own deliberate misconduct by misconstruing the Deed's terms and the City's obligations as not providing a "guarantee" as to Appellants' developmental rights is a red herring designed to obfuscate the City's improper withholding of the permit – and its efforts to later justify the withholding. Such actions constitute a breach of the implied promise that the development would proceed under the consistent, predictable and unqualified regulatory framework attendant to Class B Buildings with "as-of-right" uses - without the City undermining it. See Abiele Contracting, 91 N.Y.2d at 8-9. That the Deed restrictions in and of themselves may not impair "marketability" *per se* is irrelevant.

All that Appellants were required to allege is that the City's misconduct subverted Appellants' rights and reasonable expectations under the Deed in the manner otherwise permitted by law. See Dalton v Educational Testing Serv., 87 N.Y.2d 384, 389 (1995) (implied covenant of good faith and fair dealing which "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"); see also 1-10 Indus. Assoc. v Trim Corp. of Am., 297 AD2d 630, 631-632, (2nd Dept 2002) (where relocation agreement did not contain express provision requiring defendant to act reasonably in approving proposed sites, obligation to exercise good faith was implied). Since the SAC is replete with allegations

consistent with the foregoing, the breach of the implied covenant of good faith and fair dealing claim has been duly stated.

C. Respondents fail to Rebut Appellants' Well-Pled RICO Claims

Appellants duly pled their RICO Claims in the SAC, as supported in the Supplemental Pleadings and the newly disclosed evidence not available or ascertainable at the time of the Original Complaint or the 2023 Appellate Division Decision. While the SAC is much more particularized, the elements of RICO are summarized as follows:

- The "Enterprise" consisting of all of the Respondents functioning with the common purpose of obstructing Appellants' lawful use of the Property through illegal and fraudulent means. Boyle v. United States, 556 U.S. 938, 944 (2009) ("enterprise" is expansive and includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity);

- The "Predicate Acts" include, mail and wire fraud; communications with DOB, City Hall, and tenants laced with deceit; extortion by using threats of eminent domain to coerce sale; obstructing justice with the deletion of emails and the misuse of private communications to avoid FOIL laws; all occurring over the span for nearly two decades, which meet both the "relatedness" and "continuity" requirements. DeFalco v. Bernas, 244 F.3d 286 (2nd Cir. 2001) (multiple related acts over time show continuity);

- The injury to Appellants' Business and Property includes the loss of leases and income, the destruction of property value by rendering it uninhabitable, and the forced bankruptcy which led to a sale of the Property at a fire sale price.

(See also R. 549-560).

The City's focuses its arguments on the allegations against the Mayor and claims that the SAC does not state a claims against him, individually. However, the claims against the Mayor in the SAC meet the standard the City references rather easily. (City Brief, p. 2; R. 549-560). The Mayor's role in the Enterprise included directing the DOB to obstruct the permitting process, which caused Adelphi to give up and cancel its lease; making statements on Oct. 12, 2017 that he would re-acquire the Property which killed off any realistic redevelopment opportunity; and making the patently false statements on August 23, 2018 that Plaintiffs were "exceedingly un-cooperative", and that he was considering using eminent domain, which drove the Property to a Bankruptcy sale. Combined with the other allegations in the SAC and the Supplemental Pleadings concerning the Mayor's involvement (including the financial incentives offered), SAC is anything but "conclusive" – particular since the entire charade was deliberately orchestrated in a clandestine manner to avoid detection. (R. 456-462). The SAC asserts more than enough for purposes of pleading and if discovery were permitted to proceed in earnest, additional disclosure will surely fill in any information that may not yet be fully substantiated. At *that* point, perhaps the City can seek summary judgment, but we are far from that day and Appellants need only state a claim at this time.

Sosnick and the EVCC maintain that Appellants do not have "standing" to assert the RICO claims. Incredibly, they argue "there is no relationship, let alone a

direct relationship, between [Appellants'] alleged injury and Defendants' alleged predicate conduct (fraud and extortion)." (Sosnick Brief at p. 17). First, the Claims are not so limited. More significantly, the Supreme Court has considered similar reasoning proffered by Sosnick in connection with frauds committed using the mail causing harm to a plaintiff, and has rejected it. See Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 661 (2008).

Sosnick's and the EVCC's contentions regarding the relationships of the Respondents and their "common purpose" of undermining the development of the Property are wholly without merit. Such a narrow construction belies the statute itself. See Boyle, 556 U.S. at 944 ("… the very concept of an association in fact is expansive" and the "RICO statute provides that its terms are to be 'liberally construed to effectuate its remedial purposes.'"); see also National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 257 (1994) ("RICO broadly defines 'enterprise'"); Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 497 (1985) ("RICO is to be read broadly").

Finally, Singer's extortion allegations are sufficiently detailed in the SAC, except that Sosnick subsequently *did* accomplish his goal and indirectly acquire the Property (albeit through 605 East 9th Community Holdings LLC, which Sosnick is linked). Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 405 (2003) cited by Sosnick, is distinguishable because the property at issue (a clinic's services and the

lost revenue) was not transferable (i.e. able to pass from one person to another) whereas the Property here is.

D. Respondents Sosnick, the Mayor and the City fail To Rebut Appellants' Well-Pled Prima Facie Tort Claims

In the SAC, Appellants asserted the alternative claim of *prima facie* tort against Sosnick, The Mayor and the City.

The City asserts that plaintiffs failed to demonstrate that the City acted solely out of "malice". While "disinterested malevolence" is a consideration, Bums Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314 (1983), here it is evidenced here by the totality of the nefarious circumstances – including documented backchannel communications of the unlawful means by which to block the development of the Property, the 8 month delay in making any determination as Appellants' rights to a permit, the deliberate misapplication and selective enforcement of the Dorm Rule when all else failed. Appellants duly alleged in the SAC that in addition to all of the allegations, the City retaliated against Appellants in a manner that was "separate from and in addition to all of the preceding, the City's conduct from December 2022 onward, regarding Plaintiffs' Property have evinced an overriding motive of retaliation with the clear intention of doing whatever it can do to deprive Plaintiffs of the use and enjoyment of their property … and that "[i]t is certain that this retaliation from the City was not done for economic gain, nor for any good will." (R. 902).

Sosnick's argument that Appellants failed to allege special damages is specious and untenable. The SAC does indeed incorporate particularized claims for all damages suffered, including special damages in the form of lost cash flows and profits. (R. 546, 566-577)

III.

Appellants Did Not Abandon the FAC and are Not Prohibited from Seeking Leave to Amend in the Form of the SAC or the Supplemental Pleadings

Respondents' arguments that amendment in the form of the SAC and/or the Supplemental Pleadings is barred by Appellants' failure to address the motions to dismiss the FAC and the Motion Court's January 11, 2024 Decision (R. 7-10) is inherently flawed. As addressed in Appellants Brief, Appellants duly addressed those motions to dismiss in Appellants' renewed SAC Motion. (Appellants Brief at p. 16; R. 432, 574). The Motion Court clearly contemplated this and acknowledged Appellants' position because the Motion Court continued to analyze the claims asserted in the SAC and the Supplemental Pleadings for sufficiency and pursuant to the 2023 Appellate Division Decision. (R. 9, 24-31). To the extent the Motion Court identified a "default" or Respondents maintain the FAC was "purposefully abandoned" (Sosnick Brief at § I), such an argument is belied by the SAC motion itself.

CONCLUSION

For the foregoing reasons and those set forth in Appellants' Brief, the January 11th Decisions should be reversed in their entirety, leave should be granted for Appellants to file the SAC and these proceedings should be remanded to the Motion Court.

Dated: New York, New York
April 4, 2025

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