FILED May 31 2013 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 15

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

SOUTH BRONX UNITE!

Index №. **0260462/2012**

-against-

Hon..**MARYANN BRIGANTTI-HUGHES**

NYC INDUSTRIAL DEVELOPMENT

Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **MISCELLANEOUS**
Noticed on **October 09 2012** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Matter is decided in accordance with the annexed Decision and Order of the same date.

This constitutes the Decision and Order of this Court.

Dated: 5/24/13

Hon. Mary Ann Brigantti

MARYANN BRIGANTTI-HUGHES,
J.S.C.

FILED May 31 2013 Bronx County Clerk

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 41 read on the below petition and motions noticed on **October 9, 2012, December 13, 2012,** and **February 14, 2013** and duly submitted on the Part IA15 Motion calendar of **March 4, 2013**:

Papers Submitted	Numbered
Verified Amended Petition, Memo of Law in Support, Exhibits Vol I-II	1,2,3
Fresh Direct/UTF's Answer to Amended Petition, Affidaivts, Exhibits	4,5,6
Fresh Direct/UTF's Motion to Dismiss, Memo of Law, Exhibits	7,8,9
IDA's Answer to Amended Petition, Memo of Law, Exhibits Vol I-III	10,11,12
Empire's Motion to Dismiss, Memo of Law, Exhibits	13,14,15
HRYV's Motion to Dismiss, Memo of Law, Exhibits	16,17,18
HRYV's Answer to Petition, Exhibits	19,20
DOT's Motion to Dismiss, Memo of Law, Exhibits	21,22,23
Petitioners' Memo of Law in Opposition, and in Reply to Pet., Exhibits	24,25,26
Fresh Direct's Memo of Law in Reply	27
HRYV's Memo of Law in Reply	28
Petitioners' Motion for Leave to Amend, Memo of Law, Exhibits	29,30,31
IDA's Memo of Law in Opposition	32
Fresh Direct's Memo of Law in Opposition	33
HRYV's Memo of Law in Opposition	34
DOT's Memo of Law in Opposition	35
Empire's Memo of Law in Opposition	36
Petitioners' Memo of Law in Reply	37
Submissions at oral argument, caselaw, record of decision,	38,39
HRYV's Affirmation in Reply	40
Correspondence from Counsel	41

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In a hybrid Article 78 petition and declaratory judgment action (the "Amended Petition"), individual members of the community in the neighborhood surrounding the Harlem River Yard in the Bronx, as well as organizational petitioners (collectively the "Petitioners") challenge the decision of the New York City Industrial Development Agency ("IDA") to provide certain tax subsidies and financial assistance to Fresh Direct LLC. ("Fresh Direct") for the purposes of relocating its operations from Long Island City, Queens, to the Harlem River Yard, Bronx, as well as the IDA's decision to issue a "Negative Declaration" where IDA found there was no need to prepare a supplemental environmental impact statement concerning the Fresh Direct Project (the "Project"), as the Project would not have a significant adverse environmental impact. The Amended Petition alleges that the respondents failed to comply with the New York State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law ("ECL" §§ 8-1-1, *et seq.*, 6 NYCRR §§617 *et seq.*, and the City Environmental Quality Review ("CEQR"), established by Executive Order No. 91 or 1977 and governed by the Rules of the City of New York, Title 62, Chapter 5, and the CEQR Technical Manual ("CEQR TM") with respect to the issuance of various tax subsidies to enable the Project.

Petitioners also seek, pursuant to State Finance Law§123-b and the New York State Constitution, Article VII, §8, to annul and set aside the lease of the Harlem River Yard between lessor respondent New York State Department of Transportation and lessee respondent Harlem River Yard Ventures, Inc., on the grounds that it is unconstitutional as a gift or loan of public land for a private benefit. The petition seeks to further annul and sublease between Harlem River Yard Ventures and Fresh Direct, LLC, as it's Project would fit squarely into an area previously reserved for the development of an intermodal terminal, and render the conveyance an unconstitutional gift of public land. Finally, the amended petition seeks to annul the decision of Empire State Development Corporation to accept Fresh Direct into the "Excelsior Jobs" program, which found Fresh Direct eligible for up to $18.9 million worth of tax credits.

The Amended Petition therefore seeks (1) annulment of IDA's December 2011 Environmental Assessment Statement ("EAS"), and its February 14, 2012 Negative Declaration;

(2) a judgment/order declaring that IDA's Negative Declaration was a violation of the law, arbitrary and capricious and an abuse of discretion; (3) an order to compel IDA to prepare a new Environmental Impact Statement ("EIS") for the Project or, alternatively, an order to prepare a Supplemental Environmental Impact Statement ("SEIS"); (4) a declaratory judgment that the lease between the Department of Transportation and Harlem River Yard Ventures, Inc. is unconstitutional, and therefore must be invalidated or annulled; (5) a declaratory judgment that the sublease between Harlem River Yard Ventures, Inc. and Fresh Direct is unconstitutional, and therefore must be invalidated or annulled; (6) an order annulling the decision of the Empire State Development Corporation to accept Fresh Direct into its Excelsior Jobs program; and (7) an award to Petitioners of the costs of this proceeding, and attorney fees; and (5) any other relief the Court deems just and proper.

The Amended Petition is opposed by all respondents. Respondents have also moved to dismiss, pursuant to CPLR 3211 and 7804, the Amended Petition's Second, Third, and Fourth Causes of Action.

Petitioners have opposed the dismissal motions. Separately, Petitioners move for leave to amend, and to file and serve a Second Amended Petition. Respondents oppose this motion as well.

All of the above applications were consolidated and set for a return date of March 4, 2013. Oral argument was held on that date. In the interest of judicial economy, all of the pending applications are disposed of in accordance with the following Decision and Order.

I. Background

According to the Amended Petition, Petitioners are residents, taxpayers, business owners, and other members of the South Bronx community that would allegedly be adversely affected by the Project's environmental impacts. Respondent IDA is the "lead agency" for the Project, and the lead agency for ensuring compliance with SEQRA and CEQR. Respondent New York City Economic Development Corporation is a local development corporation and city agency who will allegedly fund a portion of the City's financial assistance applied for by Fresh Direct. Respondent New York State Department of Transportation ("DOT") is the landowner of the

Harlem River Yard, and lessor on the lease of the Harlem River Yard. Respondent Empire State Development Corporation ("Empire") is the entity that reviewed and approved Fresh Direct's application for financial assistance in relation to the Project. As noted by this respondent, its proper title is "New York State Urban Development Corporation."

Respondent Fresh Direct, LLC. ("Fresh Direct") is an online food and grocery retailer operating in New York and New Jersey, who plans to move its corporate headquarters and shipping facility from Long Island City, Queens to the Harlem River Yard in the Bronx. Respondent UTF Trucking, Inc. is the trucking division of Fresh Direct. Respondent Harlem River Yard Ventures, Inc. ("HRYV") is the entity that leases the Harlem River Yard from the DOT, and is intending to sublease a portion of the Harlem River Yard to Fresh Direct.

History of the Harlem River Yard, Lease, Intended Land Use, and subsequent Re-Zoning

The Amended Petition alleges that New York City's reliance on truck-transported freight has led to both its high levels of airborne emissions, as well as consequent health problems. Pertinently, Petitioners assert that the Harlem River Yard waterfront, located in the Mott Haven and Port Morris neighborhoods of the Bronx, suffer from increased rates of asthma and other pollution-related ailments.

Respondent DOT purchased the 96-acre Harlem River Yard in 1982. At that time, the site was an abandoned rail facility, and the DOT acquired it as part of a program to improve modern rail access to the metropolitan area. The Amended Petition contends that the original purpose of this land was to be developed as an intermodal terminal, to allow freight to remain on rail cars, and remove truck freighting east across the Hudson River. Due to certain construction and financial challenges, however, the DOT stopped construction of such a terminal and rail link in the late 1980's. In 1989, the Amended Petition asserts that the DOT introduced a "scaled down" plan for an intermodal terminal at the Harlem River Yard.

In August 1991, the DOT entered a 99-year lease with Respondent HRYV to develop the Harlem River Yard. According to the Amended Petition, this lease presented the "last opportunity" for an intermodal freight yard in New York City. In 1994, the constitutionality of this lease was challenged in an Article 78 petition captioned *South Bronx Clean Air Coalition, et*

al v. Department of Transportation, et al. Petitioners annex an affirmation that was submitted in opposition to that proceeding, wherein Bruce Blackie, the Deputy Commissioner of Rail and Freight Policy and Director of the Commercial Transport Division in the New York State Department, articulated that the public purpose of the lease was to improve rail service and consequently improve air quality and benefit the public. According to the lease, HRYV was to submit any requests to change the land use plan for the Harlem River Yard to the DOT for approval. Ultimately, the trial court upheld the DOT-HRYV lease, and determined that it was not an unconstitutional gift of public land for a private purpose.

In 1993, the DOT conducted an environmental review of the Harlem River Yard for the proposed intermodal terminal. An Environmental Impact Statement ("1993 EIS") was prepared and submitted to the DOT. According to that EIS, the intermodal terminal would eliminate approximately 520 daily heavy truck trips in the area. According to specific provisions of the 1991 lease, the terminal would be constructed in two phases: Phase I was to be an area of not less than 15 acres for exclusive use of intermodal services. Phase II was to be an area not less than 10 acres reserved for similar services. According to the lease, common facilities outside the intermodal terminal areas were not to interfere with the effective use of those areas.

The 1993 EIS, in part, referred the approved 1993 Land Use Plan for the Harlem River Yard. According to that plan, a 28-acre parcel along the north side of the Yard was reserved for the intermodal terminal, and designed to handle a certain amount of units per year. The Land Use Plan also envisioned other uses of the property, including bulk transfer/team track rail facilities, a wholesale flower market/distributor, a refrigerated/dry warehouse, a solid waste transfer station, a warehouse, and a recycling facility. The 1993 EIS was submitted to the DOT in December 1993, and approved in May 1994. In its Record of Decision ("ROD"), the DOT noted the public policy objectives of the project, including increased rail freight service in the City, reduced congestion from truck traffic, and enhancement of economic development and job creation. The 1994 ROD also found that the project was compatible with the industrial character of the surrounding area. The 1994 ROD also found that the project would result in significant environmental impacts, which would have to be addressed. Petitioners state that, since 1993, the surrounding area has changed substantially due to City re-zoning in 1997 and 2005.

The Amended Petition asserts that, since 1993, HRYV, with DOT approval, has "abandoned" the 1993 Land Use Plan and intermodal terminal, and instead developed a "truck intensive industrial park" on the site. In 1998, the Land Use Plan was modified to allow the installation of a New York Post printing and distribution facility. In late 1999, Waste Management installed a waste transfer station on the western portion of the site. In 2006, the original land use plan was again modified to introduce a 10-acre Federal Express distribution and delivery hub on the eastern portion of the site, originally allocated for a portion of the recycling plant. The Amended Petition alleges that in 2006, HRYV allowed the demolition of the Willis Avenue Station that had been preserved as a historic building.

The Amended Petition notes, pertinently, that the area around the Harlem River Yard has changed substantially since the 1991 lease and 1993 EIS. Petitioners contend that the City re-zoned the neighborhood and a portion of the Harlem River Yard itself from exclusively industrial to "mixed-use residential" in 1997. This re-zoning allowed for the development of approximately 185 new residential units. In 2005, the City re-zoned an additional 11 blocks near the Harlem River Yard from manufacturing the mixed use, permitting additional residential development. Since 2005, several new residential buildings have been constructed in the area. Moreover, the City has recently proposed a Waterfront Revitalization Plan that would remove its designation as primarily a "Significant Maritime and Industrial Area." Since 1993, the City has sponsored and approved of recreational uses for a portion of the Harlem River Yard – in 2006, a plan was unveiled for the South Bronx Greenway, a plan that traverses the Harlem River Yard, just to the east of the proposed project, and would connect to Randall's Island. The Petition alleges that the Project would bring thousands of cars and trucks each day to an area planned to attract pedestrians and bicyclists for recreational purposes.

The Fresh Direct Project (per the Amended Petition)

Petitioners argue that the Fresh Direct project is a "complete abandonment" of the 1993 Land Use Plan for the Harlem River Yard, and it was approved through a "cursory and inadequate" environmental review. Petitioners contend that on February 7, 2012, two days before a public hearing concerning the IDA environmental review findings, the Governor, Mayor

of New York, and Bronx Borough President issues a press release announcing that they had reached a deal with Fresh Direct to guarantee $130 million in subsidies, and approximately $83 million to come from the City in a combination of tax exemptions, capital funding, and loans. At the IDA hearing itself, several of the Petitioners attended and expressed opposition to the project and the proposed deal.

The Amended Petition contends that Fresh Direct's business is "truck intensive" as it generates approximately 1,944 vehicle trips per day, 938 of which are trucks, running 24/7. Fresh Direct currently employs approximately 2,000 and estimates that it will add 1,000 new jobs over the next 5 years. Nevertheless, on February 14, 2012, the IDA adopted a "Negative Declaration" for the proposed project, which is allegedly a "Type 1" action under SEQRA. IDA based its Negative Declaration upon an assessment performed by a consulting firm AKRF, dated December 2011. According to its original plans, the Project would entail approximately 15.9 acres of land located at the Harlem River Yard. The original Project consisted of three structures: (1) Tract I, a 500,000+ square foot refrigerated warehouse on 12.6 acres; (2) Tract 2, an ancillary parking and truck storage facility on 0.3 acres, and (3) Tract 3, a 10,000 square foot truck maintenance facility located on approximately 2.6 acres of land. The Project was later modified to eliminate "Tract 3".

IDA's allegedly improper assessment and decision

In issuing the Negative Declaration, IDA stated that the Type I action "will not have a significant effect on the environment and as such a DEIS would not be prepared on the grounds that the Fresh Direct project did not produce different conclusions than those reached in 1993 FEIS." The Amended Petition states that the IDA failed to identify the relevant areas of environmental impact from the project and adequately assess such impact. IDA, rather, characterized the project as a "minor modification" of the 1993 Land Use Plan. The petition contends that the IDA failed to consider areas of impact such as greenhouse gas emissions, public health, and neighborhood character. Moreover, IDA failed to consider extensive changes to the community since 1993. IDA "glossed over" concerns from 1993 concerning adverse environmental impact that could not be mitigated. Petitioners contend that IDA, therefore, acted

arbitrarily and capriciously when it issued a Negative Declaration. Petitioners also argue that HRYV has "abandoned" in 1993 Land Use Plan for Harlem River Yard, most significantly by failing to construct an intermodal terminal for rail freight. Moreover, the Project will allegedly encroach on the 28-acre portion of the site that was reserved for such a terminal, and render it an impossibility.

The Amended Petition contends that IDA failed to consider the impacts on Land Use and how Fresh Direct conflicts with the community's current approved plans and goals. The petitioners allege that none of the subsequent environmental assessments, including the most recent in 2006 for Federal Express, take into account the 16-block re-zoning to mixed-use residential that took place in 1997 and 2005. IDA also ignored the fact that the project location where it intended to build its garage and refueling station had been re-zoned to mixed-use residential, and a recommendation is in place by the City to have its "Significant Maritime Industrial Area" designation removed. The petition alleges that SEQRA as well as the CEQR technical manual require the lead agency to assess a project's consistency with the City's Waterfront Revitalization Program if the project falls within the City's "Coastal Zone" boundaries, as is the case here. Instead, IDA relied on assessments and evaluations conducted in 1998 for the New York Post facility and failed to account to changes in the surrounding area. IDA, as asserted in the petition, also ignored the approved community plans for the South Bronx Greenway on the site of the Harlem River Yard and throughout the surrounding area. IDA also allegedly ignored the Harlem River and Bronx Kill recreational uses and the Harlem River Yard Marsh Restoration Program. Nor did IDA conduct a "sustainability assessment" as required as of 2010 according to the CEQR technical manual.

The Amended Petition contends that IDA did not adequately and accurately assess traffic impacts generated by Fresh Direct's trucks, vehicles, and employees. IDA performed a "net increment" analysis of traffic impacts, as opposed to an in-depth traffic analysis. Petitioners allege that the Harlem River Yard traffic data was from 1993 EIS, and thus, at least 19 years old. The Fed Ex facility traffic data was at least six years old, twice the 3-year age allowable under CEQR guidelines. Petitioners contend that this traffic analysis "systemically understated" the project-related traffic impacts, since it failed to convert busses and trucks to passenger car

equivalents, or "PCE's," thus decreasing the total vehicle count. The IDA did not consider all hours of the days that traffic levels would surpass CEQR thresholds. IDA did not consider bridge and highway traffic impacts. Petitioners state that IDA relied on unsubstantiated assumptions about hourly vehicle trips and travel modes likely used by persons going to and from the proposed project. While Fresh Direct estimated that 75% of its employees would use public transit to get to work, and only 25% would drive, they offered no evidence to support these claims.

Petitioners also claim that IDA failed to consider the reasonably foreseeable business growth of Fresh Direct. The company, itself, estimated that it would eventually provide "over 3,000 jobs." To account for the subsequent increased traffic growth, Petitioners allege that IDA should have assumed that, at a minimum, 3,000 employees would create 1,500 employee vehicle trips per day, as opposed to the 1,006 actually used. Moreover, the increased business growth would likely increase truck traffic as well. Petitioners calculate that, assuming a 50% increase in business, truck trips would also increase by 50%. IDA wholly overlooked potential impacts on employee shuttle busses and increased public transit passengers.

Regarding potential noise impacts of the project, Petitioners contend that the IDA did not comply with CEQR requirements in assessing the project. Instead, it conclusively stated that the increased vehicle traffic would not alter the noise level findings of the 1993 EIS or supplemental environmental assessments. IDA relied on an allegedly improper "net increment" analysis to find that there would be no significant noise impact as a result of the project. Petitioners note that all of the alleged deficiencies in IDA's traffic analysis were likewise applied to IDA's noise impact analysis. There is no indication that IDA attempted to evaluate the "sensitive receptors" in the area, and IDA relied on "stale" 19-year old data when making its decision. The noise level assessment did not take into account increase truck traffic between the hours of 5 and 6AM.

The Amended Petition continues and criticizes IDA's assessment of the air quality impacts from the increased vehicular traffic caused by the project. IDA, again, relied on its calculation of incremental traffic changes from the 1993 EIS, and concluded that the 1993 findings also hold in 2012. This methodology fails to comply with the requirements of the CEQR technical manual. IDA also failed to consider the impact of greenhouse gas emissions as

a result of the project.

Finally, the Amended Petition asserts that IDA acknowledged that the project site is archeologically sensitive, however did not consult with the New York City Landmark Preservation Office or State Historic Preservation Office before issuing its Negative Declaration. Rather, IDA independently concluded that no negative environmental impact would occur. The petition notes that after the decision was rendered, the State Historic Preservation Organization ("SHPO") sent a letter to IDA objecting to its findings insofar as they relied on the original findings from 1993-94. Only after receiving this letter, and after consultation, did the SHPO issue a conditional no adverse impact finding on May 16, 2012. The finding requires additional consultation if any excavation occurs below the existing soil surface, as opposed to below the historic fill, as was the case with the original 1993 finding.

Ultimately, Petitioners argue that IDA violated SEQRA and CEQR by failing to take a "hard look" at environmental impacts of the project, or have a "reasoned elaboration" of the basis for its determination that Fresh Direct would have no significant environmental impacts. The EAS and Negative Declaration are therefore unsupported by the facts and thus issuance of the Negative Declaration was arbitrary and capricious, and an abuse of discretion.

Petitioners' Second, Third, and Fourth Causes of Action

The remainder of the Amended Petition contends that the Project encroaches upon the 28 acres reserved for the intermodal terminal. Petitioners allege that Project will, therefore, render the public purpose of the original lease impossible. Meanwhile, the Project allegedly confers a private benefit to HRYV. Since 1991, HRYV has received almost $66 million in rent from its tenants, while paying just over $5.3 million in rent to the DOT. As a result, the petition alleges that any public benefit rendered by the lease, (for example, the presence of Waste Management at the site), was rendered incidental to excessive private benefit conferred upon HRYV. Accordingly, in its second and third causes of action, the petitioners allege that since the land use anticipated by the project is not for a public purpose, the lease between the DOT and HRYV, as well as the proposed sublease between HRYV and Fresh Direct, are unconstitutional gifts of

public property to a private third party in violation of Article VII, §8 of the New York State Constitution.

As a final Cause of Action, the Amended Petition seeks to invalidate Fresh Direct's acceptance into New York's Excelsior Jobs program. Petitioners note that the Excelsior Job Program was created by statute, intended to support the growth of industries such as "clean-tech, broadband, informational systems, renewable energy and biotechnology." According to the statute, certain types of businesses were explicitly excluded from receiving tax credit, such as business engaged "predominantly in the retail or entertainment industry." As predominantly a retail business, the Petitioners argue that Respondent Empire exceeded its statutory authority when it admitted Fresh Direct into the Excelsior Job Program.

***

Each of the named Respondents have answered the Amended Petition, and offer points of law in opposition. The Bronx Chamber of Commerce has filed an *Amicus Curiae* brief in opposition to the Amended Petition. Respondents Fresh Direct, Empire, DOT, and HRYV move to dismiss the Second, Third, and Fourth causes of action on various grounds. Petitioners oppose the dismissal motions. In addition, Petitioners separately move for leave to serve a Second Amended Petition. All of the Respondents oppose this motion.

After review of all party submissions, and after hearing oral argument, the above applications are disposed in the following Decision and Order.

II. Applicable Law and Analysis

A. The Amended Article 78 Petition (SEQRA Claims)

In evaluating an administrative decision by way of Article 78 proceeding, this court must determine whether the determination was rational, arbitrary and capricious, or an abuse of discretion (*CPLR* 7803, *Concourse Rehabilitation & Nursing Center, Inc. v. Novello*, 80 A.D.3d 507 [1st Dept. 2011]). Stated another way, an administrative decision may be judicially reviewed as to whether "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of

discretion as to the measure or mode of penalty or discipline imposed." (*CPLR* 7803[3]). The appropriate standard of review is whether the administrative determination is supported by a rational basis (*Matter of Nehorayoff v. Mills*, 95 N.Y.2d 671 [2001]). If the court determines that the administrative determination has such a rational basis, the court's inquiry is finished; it may not substitute its judgment for that of the administrative agency (*Paramount Communications, Inc. v. Gibraltar Cas. Co.*, 90 N.Y.2d 507 [1997]).

It is well-settled that judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion' ((*In re Coalition Against Lincoln West, Inc. v. Weinshall*, 21 A.D.3d 215 [1st Dept. 2005], citing *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 [1986]; CPLR 7803[3]). In applying this standard, "it is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency" (*Id.*). Rather, judicial review is limited to a determination as to whether the lead agency "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." (*Id.*, citing *Matter of Jackson, supra.*); *Chinese Staff Workers Ass'n v. Burden*, 88 A.D.3d 425, 429 [1st Dept. 2011], *aff'd* [2012]).

The decision to conduct a SEIS is a "fact-intensive determination, [in which] the lead agency has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it" (*Riverkeeper Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 231 [2007]). A "rule of reason" governs the judicial inquiry, and the agency need not identify and address every conceivable environmental impact before a final EIS will satisfy SEQRA's substantive requirements (*Matter of Jackson, supra.*; *Matter of Holmes v Brookhaven Town Planning Bd.*, 137 AD2d 601 [2d Dept], *appeal denied* 72 NY2d 807 [1988]). The purpose of an SEIS is to account for new information bearing on matters of environmental concern not available at the time of the original environmental review (6 NYCRR 617.9 [a] [7]; *Matter of Coalition Against Lincoln W., Inc. v Weinshall*, 21 AD3d 215, 223 [1st Dept], *lv denied* 5 NY3d 715 [2005]). Merely because a project has changed, however, does not necessarily give rise to the

need for the preparation of an SEIS. An SEIS is required only if environmentally significant modifications are made after the issuance of an EIS (*Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d at 3). The mere passage of time rarely warrants an order to update the information considered by an agency, since the CIS process necessarily ages data. A requirement of constant updating and further review would render the administrative process perpetual, and subvert its legitimate objectives (*Matter of Jackson, supra*). Moreover, the decision that an SEIS is not necessary does not require a hearing or public comment (*Matter of Coalition Against Lincoln W., Inc. v Weinshall*, 21 AD3d at 223).

Primarily, Fresh Direct argues that Petitioners' lack standing to bring their SEQRA claims, since, allegedly, only one of the Petitioners lives in close proximity to the Harlem River Yard ("HRY"). When viewing the contentions in the verified amended petition, however, Petitioners have met their burden that they will possibly suffer an injury in fact, distinct from that of the public at large (*Matter of Committee to Preserve Brighton Beach & Manhattan Beach v. Planning Commn. of City of N.Y.*, 259 A.D.2d 26, 32-33 [1st Dept. 1999[internal citations omited]). Petitioners have alleged that they live, work, and are active in the community surrounding the HRY. While respondents dispute Petitioners' proximity to the site, "[s]tanding principles, which are in the end matters of policy, should not be heavy-handed ... it is desirable that land use disputes be resolved on their own merits rather than by preclusive, restrictive standing rules." (*Id.*, citing *Matter of Sun-Brite Car Wash v. Board of Zoning & Appeals*, 69 N.Y.2d 406, 413 [1987]). Accordingly, this court will consider Petitioners' SEQRA claim on its merits.

In making its determination, IDA relied on, among other things, existing environmental assessments performed in 1998 and 2006 concerning proposed projects on the Harlem River Yard. As demonstrated by IDA, this method, or "incremental" analysis is approved and, in fact, encouraged by the SEQRA handbook. The environmental consulting firm, AKRF, compared 1993 traffic data to recent data at key intersections, including the Fed Ex review materials and the 2010 Department of Transportation data, to ensure it was not "stale." This data confirmed that overall traffic patterns in the area actually declined since 2006, the date of the Fed Ex review. Fresh Direct provided its own data regarding employee commuting calculations, based

upon its own operational experience, to arrive at the contested 75/25 "modal split". There is no indication that this data is unsubstantiated or otherwise inappropriate for use, as urged by Petitioners. The traffic Environmental Assessment Form ("EAF"), as required, compared traffic patterns to conditions associated with a fully built out Land Use Plan (with flower market/warehouse), and used, as a baseline, updated accounting data from the New York Post and Fed Ex facilities. The EAF concluded that implementing the Project would result in fewer vehicle trips per day than a fully built-out Land Use Plan. IDA therefore found no significant adverse traffic impact as a result of the Project. Contrary to Petitioners' assertions, the traffic data analyzed had a factual basis, and was not outdated. Rather, it appears that the arguments concerning Fresh Direct's growth, the alleged impacts of the employee shuttle bus program, and supposed impact on public transportation, are more based on speculation than fact. Petitioners' other arguments regarding IDA's classification of vehicles rather than "PCEs", and other methodologies used in performing its analysis, does not reveal a finding that IDA failed to take a "hard look" or failed to supply a "reasoned elaboration" for its determination.

The Amended Petition likewise does not present sufficient evidence that the respondents' environmental assessment of air quality or noise levels was arbitrary, capricious, or otherwise deficient. Petitioners' contentions concerning increased air emissions and pollutants was based on allegedly increased traffic in and around the Harlem River Yard. Since, as found above, those traffic based arguments are without merit, Petitioners' air quality contentions must also fail. The record demonstrates that IDA compared air quality impacts with those reviewed in the 1993 FEIS and subsequent projects. IDA concluded that, in fact, the Project would result in fewer vehicle trips than if the original Land Use Plan, from 1993, was implemented. Regarding potential noise impacts, the IDA noted that the 1993 FEIS had already found ambient noise levels in the surrounding area were "high". Since the EAF concluded that traffic levels would actually decline as a result of the Project, IDA found no significant environmental noise impact. All in all, there is ample evidence that the respondents' SEQRA determination was based on a thorough review of all areas of relevant concern. While Petitioners may contest the conclusions drawn from studies, and contend that there were better alternatives, that is not a basis to invalidate the SEQRA determination (*In re Coalition Against Lincoln West, Inc. v. Weinshall*, 21 A.D.3d 215

[1st Dept. 2005], citing *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400 [1986]).

With respect to zoning issues, the EAF determined that construction of the Project was permitted in the areas zoned for industrial and mixed use (M3-1, M2-1, and M1-5/R8A). The record reveals that IDA properly considered zoning issues regarding the Project – and further determined that the Project would not create significant land use or zoning impacts. The 1993 FEIS accounted for residential use around the area and environmental impacts of development on the Harlem River Yard. IDA also considered a technical memo from the 2006 Fed Ex project, which reviewed the Port Morris re-zoning, and yet confirmed that the surrounding land was still characterized by industrial use.

Petitioners' also claim that IDA failed to consider the environmental impact of the Project to the extent that it would eliminate the space necessary to construct an intermodal terminal . The record before the Court on this issue, however, reveals that such an impact was, indeed, considered. The necessary elements of an intermodal terminal are already constructed, but simply not in use. Moreover, the three acre portion (Tract 3) of the Project that allegedly encroached upon the area designated for intermodal terminal use has been eliminated. Further, IDA's consulting firm, AKRF, recently submitted a technical memorandum detailing possible environmental impacts of the proposal to consolidate parking at the site from Tract 3 onto Tract 1. The memorandum concluded that this consolidation, although resulting in a taller warehouse and more excavation, would actually reduce the total land developed by the Project and result in no significant land use or zoning impacts. This memorandum, when viewed under the "rule of reason," took the requisite "hard look" at environmental impacts of this plan modification, in compliance with SEQRA. While Petitioners' expert, Mr. Stern, disagrees as to whether an intermodal terminal will remain viable at the site, even with the modified plan, it is not the Court's function to resolve this disagreement. Moreover, since the modification eliminated Tract 3 use, Petitioners' arguments concerning land use and zoning of that parcel as a "Significant Maritime and Industrial Area" is rendered moot.

The amended petition alleges that the Project will encroach upon a planned bicycle-pedestrian Greenway and connection to Randall's Island. This claim is unsubstantiated by the

record. Annexed to the affidavit of Anthony Riccio, Vice President of HRYV, is a letter from the City requesting an easement through the HRY for the Greenway. Mr. Riccio notes that none of the truck traffic generated by Fresh Direct would interfere with this Greenway or connection.

IDA has demonstrated, in its opposition to the Petition, that the New York State Office of Parks, Recreation, and Historic Preservation found that the Project would have no adverse impact on historic or cultural resources on site, subject to certain conditions that have not been triggered. Respondents have also established that consideration of greenhouse gas emission is not required under SEQRA under these circumstances.

In light of the foregoing, the Amended Petition, with respect to Petitioners' SEQRA claims, is denied.

B. Respondents' Motions to Dismiss

Respondents move to dismiss Petitioners' Second, Third, and Fourth Causes of Action on various grounds. Petitioners oppose, and separately move for leave to serve a Second Amended Petition. The dismissal motions and related motion to amend will be addressed simultaneously, as follows.

On a motion pursuant to CPLR 7804(f) to dismiss a petition upon objections in point of law, only the petition may be considered, and all of its allegations are deemed to be true (*1300 Franklin Ave. Members, LLC. v. Board of Trustees of Inc. Village of Garden City*, 62 A.D.3d 1004 [2nd Dept. 2009]). No additional facts alleged in support of the motion may be considered. (*Id.*, citing *Matter of Mattioli v. Casscles*, 50 A.D.2d 1013 [3rd Dept. 1975][holding that in determining a motion to dismiss an Article 78 proceeding on objections in point of law, the trial court erred in considering affidavits, exhibits, and other materials which have been submitted to the court]; *see also Green Harbour Homeowners' Ass'n, Inc v. Town of Lake George Planning Board*, 1 A.D.3d 744 [3rd Dept. 2003][In determining motions to dismiss in the context of an Article 78 proceeding, a court may not look beyond the petition where no answer or reply has been filed.]) Dismissal, however, may be appropriate where documentary evidence submitted conclusively establishes a defense to the asserted claims (*see Matter of Owens Road Associates, LLC. v. Town Bd. of Town of Goshen*, 50 A.D.3d 908 [2nd Dept. 2008]).

1. The Second and Third Causes of Action

Statute of Limitations

Respondents argue that Petitioners' second and third causes of action must be dismissed as time-barred by the four-month statute of limitations on Article 78 petitions. As alleged by Petitioners, its constitutional claims contained in the second and third causes of action cannot be assessed under the statute of limitations prescribed by Article 78, and CPLR 217. Petitioners assert that the claims within the amended petition seek relief in the form of a declaratory judgment that cannot be afforded under Article 78 (*Saratoga*, 100 N.Y.2d 801, 815 [2003]). The constitutional claims are, therefore subject to the residual 6-year statute of limitation of CPLR 213(1).

In this matter, contrary to Petitioners' arguments, the four month statute of limitations is applicable to the second, third, and fourth causes of action. "[A]n action may not be labeled as one for a declaratory judgment merely to avoid the limitation imposed by CPLR 217." (*Asian Ams. for Equality v. Koch*, 128 A.D.2d 99, 114 [1st Dept. 1987], citing *Solnick v. Whalen*, 49 N.Y.2d 224 [1980]).

Petitioners' second cause of action has long been time-barred. The second cause of action seeks, ultimately, to invalidate the 1991 lease from the DOT to HRYV as an unconstitutional gift of government property. Substantively, it asserts that HRYV has 'received a windfall" of over $64 million in the form of rent payments from its sub-tenants, while paying only $5 million to the DOT, under the terms of this lease, which was executed in August 1991. The amended petition avers that HRYV receives "large rent payments" from another subtenant, Waste Management, who has paid nearly $27.6 million in rent since 1996. The petition alleges that the foregoing "excessive compensation" illustrates the overly private benefit bestowed upon Respondents that will be compounded by the Project sublease, which will allegedly frustrate the public purpose of the lease. This Court finds that any challenge to the validity of the 1991 lease, whose terms were not altered as a result of the sublease between HRYV-Fresh Direct, accrued at the time it was executed in August 1991 (*see Landmark West! v. City of New York, et al.*, 9 Misc.3d 563, 569 [Sup. Ct., N.Y. Cty., 2005][cause of action accrues when transfer of the land

takes place, since the constitution is not violated until the alleged gift or loan actually occurs]). That cause of action, therefore, is dismissed. 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 (*see Viacom Int'l. v. Midtown Realty Co.*, 235 A.D.2d 332 [1st Dept. 1997]).

The Court notes, parenthetically, that Respondents argue that the prior decision in *South Bronx Clean Air Coalition v. R.F.P.*, 218 A.D.2d 520 (1st Dept. 1995) operates to preclude the second cause of action, since that case held that the 1991 DOT - HRYV lease was constitutional in an "identical challenge." In that case, however, the Appellate Division did not review the constitutional challenges to the lease, but rather reviewed the petitioners' claim that the DOT did not violate SEQRA or act arbitrarily in approving HRYV's proposed land use plan. The lower court found no constitutional infirmity with the 1991 lease. However, this matter is presented as a constitutional challenge to the lease, in light of the proposed Project, which Petitioners allege "eviscerates" the original, accepted public benefit of the HRY's site development. The present issues are thus sufficiently different from those addressed in the 1994 action, (*compare Sweeney v. New York City Dept. of Health and Mental Hygiene*, 91 A.D.3d 420 [1st Dept. 2012]). Accordingly, these claims were not barred by the doctrine of *res judicata* (*see generally Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 N.Y.2d 343 [1999]).

Even under the applicable four-month statute of limitations, however, the Petitioners' third cause of action is timely. The third cause of action seeks to invalidate the HRYV-Fresh Direct sublease on the grounds that it is an unconstitutional gift of public property for a private benefit. Generally, the limitations period begins to run on the date when the injury occurs and the plaintiff first becomes entitled to maintain the particular action in question (*see Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 210 [2001]). An action pursuant to Article 78 accrues when a determination to be reviewed becomes "final and binding" (CPLR 217[1]). Here, the challenged sublease was originally executed in February 2012, but thereafter amended in January 2013. It is evident, therefore, that the allegedly offending sublease was not "final" or "binding" in February 2012, and therefore the second and third causes of action within the

amended verified petition, filed in September 2012, were timely. This Court therefore turns to Respondents' alternate arguments with respect to dismissal of Petitioners' third cause of action.

Standing to Sue under State Finance Law

A motion to dismiss an Article 78 petition may be granted where it is determined that the petitioners do not have standing to bring the action (*see, e.g., Scotto v. Giuliani*, 288 A.D.2d 102 [1st Dept. 2001]). Petitioners' third cause of action relies on State Finance Law §123-b and is brought pursuant to New York State Constitution, Article VII, §8. Under State Finance Law §123-b, a citizen taxpayer– regardless of whether he or she is personally aggrieved – may bring suit to prevent the unlawful expenditure of State funds or State property by an officer or employee of the State, in the course of his or her duties (*Rudder v. Pataki*, 246 A.D.2d 183 [3rd Dept. 1998], *aff'd*, 93 N.Y.2d 273 [1999]). The expenditures must be clearly traced to identifiable State funds to allow a plaintiff standing to pursue such an action (*Id.*). The statute is "narrowly construed" as a grant of standing to citizen taxpayers, but it does not in itself create a substantive cause of action (*see Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 812 [2003]; *In re Lancaster Dev., Inc. v. Power Authority of the State of New York*, 145 A.D.2d 806, 807 [3rd Dept. 1988], *app. den.*, 74 N.Y.2d 612 [1989]).

Initially, and contrary to Respondents' assertions, the Petitioners' claim adequately identifies an alleged expenditure of "state property," in the form of a lease and sub-lease of state-owned land. The statute itself provides ... Moreover, there have been cases that recognized a valid constitutional challenge to leased land, before deeming the cause of action deficient on other grounds (*see Stony Brook Environmental Conservancy, Inc. v. State University of New York*, 101 A.D.3d 849 [2nd Dept. 2012]; *Madison Square Garden, L.P. v. New York Metropolitan Transp. Auth.*, 19 A.D.3d 284 [1st Dept. 2005]).

Here, however, the third cause of action do not assert claims against "an officer or employee of the State" and therefore no standing is conferred upon Petitioners to bring these claims (*Matter of Schultz v. De Santis*, 218 A.D.2d 256, 259 [3rd Dept. 1996]). In response, with respect to this issue, the Petitioners have moved for leave to amend their pleading and join, among others, Joan McDonald, commissioner of the DOT.

While it is "fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502 [1st Dept 2011] *citing* CPLR 3025[b]), "a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*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]). Indeed, where leave to amend is sought in the face of a pending motion to dismiss, such leave is properly denied where the proposed amendment suffers from the same deficiencies as the original claim (*"J. Doe No. 1" v. CBS Broadcasting Inc.*, 24 A.D.3d 215 [1st Dept. 2005]), or seeks to assert a claim that is itself subject to dismissal (*Eighth Ave. Garage Corp., supra., see also Viacom Int'l. v. Midtown Realty Co.*, 235 A.D.2d 332 [1st Dept. 1997]).

Here, the 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 caused, 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 v. DOT*, 234 A.D.2d 741, 743 [3rd Dept. 1996]). Even if this Court were to grant leave to amend the petition a second time, the pleading remains deficient in this regard. Although the proposed second amended petition names the DOT commissioner Joan McDonald as a party, its third 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]). In light of the foregoing, Petitioners' third cause of action is dismissed for lack of standing, and Petitioners' motion for leave to amend this cause of action is denied as futile (*Eighth Ave. Garage Corp., supra*).

Due to the procedural infirmities of Petitioners' second and third causes of action, this Court need not address Respondents' additional, contested grounds for dismissal due to the failure to add necessary parties, res judicata, mootness, or failure to state a claim (*see People ex rel. Furde v. New York City Dept. of Correction*, 9 Misc.3d 268 [Sup. Ct., Bx. Cty., 2005]).

2. The Fourth Cause of Action

In its Fourth Cause of Action, the Petition alleges that Empire improperly accepted Fresh Direct into its Excelsior Jobs Program, thus approving Fresh Direct for upwards of $18.9 million in tax credits. Petitioners assert that since Fresh Direct is a business entity engaged predominantly in the retail industry, Empire exceeded its authority when it admitted Fresh Direct into the Excelsior Jobs Program. The claim is predicated on New York State Finance Law, Art. 7-a, §123-b.

As detailed above, under State Finance Law §123-b, a citizen taxpayer– regardless of whether he or she is personally aggrieved – may bring suit to prevent the unlawful expenditure of State funds or State property by an officer or employee of the State, in the course of his or her duties (*Rudder v. Pataki*, 246 A.D.2d 183 [3rd Dept. 1998], *aff'd*, 93 N.Y.2d 273 [1999]). The expenditures must be clearly traced to identifiable State funds to allow a plaintiff standing to pursue such an action (*Id.*). The statute is "narrowly construed" as a grant of standing to citizen taxpayers, but it does not in itself create a substantive cause of action (*see Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 812 [2003]; *In re Lancaster Dev., Inc. v. Power Authority of the State of New York*, 145 A.D.2d 806, 807 [3rd Dept. 1988], *app. den.*, 74 N.Y.2d 612 [1989]).

In this matter, the Fourth Cause of Action must be dismissed for lack of standing, as Petitioners fails to name an officer or employee of the State as a party respondent (*Savaldor v. DOT*, 234 A.D.2d 741, 743 [3rd Dept. 1996]). Petitioners attempt to cure this defect by moving for leave to serve a second amended petition, adding the New York State Department of Economic Development ("NYSDED"), its Commissioner, Kenneth Adams, and the Director of the Excelsior Jobs Program, Randal D. Coburn, as parties. Even if the proposed amendment adequately names an officer or employee of the State, the Fourth cause of action must fail for want of standing nonetheless, because there is no authority to support Petitioners' proposition that the conditional grant of tax credits or abatements constitutes the expenditure of "state funds"(*see Coalition against Columbus Center v. City of New York*, 769 F.Supp. 478, 495

[S.D.N.Y. 1991], *rev'd in part on other grounds,* 967 F.2d 764 [2nd Cir. 1992]). The Southern District in *Coalition against Columbus Center* cites *Erie County Indus. Development Agency v. Roberts*, 94 A.D.2d 532 [4th Dept. 1983], *aff'd*, 63 N.Y.2d 810 [1984] [tax benefits/exemptions afforded to a project are not subsidies or public funds]). The Court is mindful that it is the burden of establishing standing to raise a claim is on the party seeking review (*The Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769 [1991]). Moreover, the alleged "expenditures" are conditioned on the Project achieving certain job growth and investment goals, and therefore are not "clearly traceable to identifiable state funds."

Further, no standing is conferred under the Fourth Cause of Action because it seeks review of the management and operation of a public enterprise (*Matter of Transactive Corp. v. New York State Depts. of Social Servs.*, 92 N.Y.2d 579, 589 [1998]). The Court of Appeals has elucidated that, to confer standing in these circumstances, the "task...is to distinguish between cases that present a challenge to the expenditure of money and those that use the expenditure of money as a pretense to challenge a governmental decision (*Saratoga County Chamber of Commerce, supra*, at 813). Thus, a claim that state funds are not being spent wisely is patently insufficient to satisfy the threshold for standing, while a claim that it is illegal to spend the money *at all* for the questioned activity would likely satisfy the threshold (*Id* at 813-814). Here, the amended petition alleges that the conditional "expenditure" of tax credits or incentives is illegal, since Fresh Direct is not eligible for the Excelsior Jobs Program, since Fresh Direct is a "retail" organization. This claim is more geared toward the state agency's policy and methodology in determining who is an appropriate candidate for the tax incentives. (*Transactive*). It has been recognized that the Excelsior Jobs Program is a "discretionary incentives program" in contrast to a statutory incentives program (Sloss, Andrew C.; Garner, J; and Truelove, Rebecca, *The Excelsior Jobs Program: A Bright Outlook for New York and for Businesses Investing in the State*, Journal of Multistate Taxation and Incentives, 21 Nov. 2011, at p 8-9). "Eligibility determinations based on strategic industry categories will be based on the nature of the business activity at the location for the proposed project, and not based on company-wide activity." (*Id.*, at 9., citing 5 N.Y. Codes, Rules & Regs., §191.3[a]). Where a business proposed a large multifaceted project involving many different types of operations, a

detailed assessment would be carried out by Program staff to assess overall eligibility, and to determine which, if any, jobs could be considered for Excelsior tax credits (*Id.*, citing 5 N.Y.Codes, Rules & Regs., §191.2[a]). It is apparent from the foregoing that Petitioners' challenge targets an agency's methodology in allowing Fresh Direct's admission to the Program, and therefore the fourth cause of action is a "broad policy complaint" that does not confer standing under State Finance Law §123-b (*see Rudder v. Pataki*, 93 N.Y.2d 273 [1999]). Petitioners' Fourth Cause of Action is, therefore, dismissed.

Petitioners' motion for leave to serve a second-amended complaint, regarding their Fourth Cause of Action, is denied, since it would not remedy the above "standing" deficiency (*see J. Doe No. 1" v. CBS Broadcasting Inc.*, 24 A.D.3d 215 [1st Dept. 2005]).

III. Conclusion

Accordingly, it is hereby

ORDERED, that the Amended Petition is denied,

ORDERED, that Respondents' motions to dismiss the Second, Third, and Fourth Causes of Action of the Amended Petition are granted, and those claims are dismissed with prejudice, and it is further,

ORDERED, that Petitioners' motion for leave to serve a second amended petition is denied.

This constitutes the Decision and Order of this Court.

Dated: 5/24, 2013

Mary Ann Brigantti

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