

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

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In The Matter of the Application of

LANDMARK WEST!, BOARD OF MANAGERS OF  
THE PARC VENDOME CONDOMINIUM, STUART  
URAM, TERI SLATER and HILDA M. REGIER,

Index No. 103689/05

Plaintiffs,

- against -

THE CITY OF NEW YORK and NEW YORK CITY  
ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

### **Preliminary Statement**

This Complaint is nothing more than the latest in plaintiff Landmark West's barrage of far-fetched and frivolous lawsuits, filed in the vain hope of either blocking the City's proposed sale of the building at 2 Columbus Circle to the Museum of Arts and Design, or at least tangling it up in litigation long enough to see the deal fall through. Indeed, having failed to convince the Court in an earlier case that the City did not take a "hard look" at the proposed sale's impact on historic resources; having failed to convince the Court in a second lawsuit that it could even state a claim that a public meeting held by the Manhattan Borough Board, at which the Board passed a resolution approving the sale of the building, was improperly noticed; and with a request for the Court's assistance in a desperate, last-minute fishing expedition undertaken pursuant to the Freedom of Information Law still pending, Landmark West! ("Landmark West") now alleges that the proposed sale violates the "Gift and Loan" clause of the New York State Constitution, Sections 383 and 384 of the New York City Charter, and the common law public trust doctrine.

Neither Landmark West, however, nor its attorney, can point to any reason why these claims were not asserted in any of the prior actions. The terms of the sale were public at the time the Manhattan Borough Board approved the sale, and Landmark West has already challenged that approval. Any challenge to the terms of the sale, or the City Charter procedure used to effectuate it, could, and should, have been brought with that earlier lawsuit; plaintiffs' public trust claim could arguably have been raised even earlier. The motive behind these deliberate delays is obvious: plaintiffs are seeking nothing other than to stall, and thereby frustrate, the sale of the building with an expanding series of lawsuits.

Plaintiffs' frivolous claims should not survive this motion to dismiss. Notwithstanding plaintiffs' misguided conspiracy theories, the sale of the building to the

Museum for \$15 – \$17 million, its appraised value, cannot be said to constitute an illegal gift under the Gift and Loan clause. The sale is for fair and adequate consideration and, in any event, serves a vital public purpose – namely, the support of art, culture and the City’s economy. Similarly, the deed conveying title of the building to the City makes clear that the building was not dedicated as a “public place” under Section 383 and was not vested with the protection of the public trust, just the opposite of what plaintiffs’ contend. Contrary to plaintiffs’ selective reading of the document, the deed restricts the use of the building only for a period of 30 years. The common law requires that public trust protection be afforded only to those areas “forever and irrevocably” dedicated to public use; the City Charter requires not only an intent to dedicate but also that any dedicated “public place” be filed on the City Map. Plaintiffs offer no evidence that this building appears on that Map.

Landmark West’s committed opposition of the sale of the building is apparently grounded in its frequently expressed belief that the building should be designated a New York City landmark. Yet, in 1996 the Designation Committee of the New York City Landmarks Preservation Commission (“LPC”) declined to consider the building for such designation, and neither the Committee nor the Commission has since reversed that decision. As LPC possesses unfettered discretion in this regard, Landmark West has been forced to seek other avenues. However, what may have begun as a noble preservation campaign has devolved into an insistent harassment of City agencies and officers, and a waste of judicial resources. Accordingly, the Complaint should be dismissed and sanctions imposed.

### **Statement of Facts**

#### **A. The City’s Ownership and Use of the Building at 2 Columbus Circle**

In 1980, Gulf & Western Industries, Inc. (“G & W”) donated fee title to the building at 2 Columbus Circle to the City of New York, its successors and assigns. Affirmation

of Neal Smith, sworn to April 4, 2005 (“Smith Aff.”), ¶ 5; Ex. A.<sup>1</sup> The deed conveying title to the City contained a restriction on the City’s use of the building, providing that “prior to the thirtieth anniversary of the date hereof, the [building] shall be used solely by the City as its principal public facility for visitors’ services and cultural affairs and for no other purpose . . . otherwise, all right, title and interest . . . shall terminate and all interest in the [building] shall revert to the Foundation.” Ex. A, pp. 2 – 3. The deed further provided that upon the thirtieth anniversary of the donation, the possibility of reverter would “lapse and terminate,” and that thereafter the City, its successors and assigns would own the building in fee simple absolute. Ex. A, p. 3. At the time of the conveyance, the City’s acceptance of the building on the terms contained in the deed had already been approved by the Board of Estimate of the City of New York. Smith Aff., ¶ 6; Ex. B.

Accordingly, in or around 1981, both the New York City Department of Cultural Affairs and the New York City Convention and Visitors Bureau moved their headquarters to 2 Columbus Circle, where the Department of Cultural Affairs remained until 1998. Since then, the building has sat vacant, even as the rest of Columbus Circle has undergone significant redevelopment. Smith Aff., ¶¶ 8. Indeed, the revitalization of Columbus Circle is still underway. Smith Aff., ¶ 11. Plaintiffs’ crusade to prevent the Museum from renovating the building at 2 Columbus Circle has only detracted from this ongoing project.

In July 1996 EDC purchased the reverter interest from Viacom, Inc., the successor in interest to G & W. Smith Aff., ¶ 7; Ex. C.

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<sup>1</sup> All exhibits referenced herein are annexed to the Affirmation of Michael Burger, dated April 1, 2005, or the Smith Aff.

**B. The 2 Columbus Circle Redevelopment Project: Selection of the Museum of Arts and Design**

In March 2000, EDC, as is its common practice when it intends to dispose of City-owned property for economic development purposes, issued a Request for Proposals (“RFP”) for the sale and redevelopment of the building at 2 Columbus Circle. Smith Aff., ¶ 9 - 11; Ex. D. The RFP stated:

This is a letter requesting proposals, **not** a Request for Bids. . . . EDC shall be the sole judge of each response’s conformance with the requirements of this letter and of the merits of the individual proposals. EDC reserves the right to waive any conditions or modify any provision of this letter with respect to one or more applicants, to negotiate with one or more of the applicants with respect to all or any portion of the Site, to establish additional terms and conditions . . . or to reject any or all responses, if in its judgment it is in the best interest of EDC and the City to do so. If all proposals are rejected, this letter requesting proposals may be withdrawn and the Site may be retained, and re-offered under the same or different terms and conditions, or disposed of by another method, such as auction or negotiated disposition.

Ex. D, “Exhibit 2” Sec. G (emphasis in original).

The RFP made clear that price was not the only factor to be considered in evaluating proposals. Smith Aff., ¶ 13; Ex. D, p. 1. In fact, price was only one sub-factor of many identified in the RFP. See Smith Aff., ¶ 14; Ex. D, p. 1. The RFP further stated that acceptable proposals could either reuse the existing building or include construction of a new building, subject to certain design guidelines, the Zoning Resolution of the City of New York and any other regulations affecting the site; that the project had to be compatible with the community while maximizing economic benefits to the City; and that it should relate to elements and features of the surrounding area in order to help “unify” Columbus Circle. Smith Aff., ¶ 15; Ex. D, p. 3. Given EDC’s public interest purposes, this broad range of inquiry and consideration is both typical and appropriate. See Smith Aff., ¶¶ 1, 10.

On June 14, 2002, EDC conditionally designated the Museum of Arts and Design (“Museum”) to renovate and redevelop 2 Columbus Circle (hereafter, the “Museum Project”). Smith Aff., ¶ 16. The Museum Project will allow the Museum to move from its current location at 40 West 53<sup>rd</sup> Street, where there is only enough room to host temporary exhibitions, and expand its offerings to the public. The renovated building at 2 Columbus Circle will enable the Museum to, among other things, display its permanent collection, open an accessory restaurant, and develop a Center for the Study of Contemporary Craft. *Id.*

### **C. Public Review Of The Museum Project And The Terms Of The Proposed Sale**

As required by New York City Charter § 197(c)(10), the proposed sale of the building to the Museum has undergone an extensive public review process pursuant to the City’s Uniform Land Use Review Procedure (“ULURP”), including public hearings before Community Board 5 and the City Planning Commission. As required by ULURP, the proposal also underwent environmental review in accordance with the State Environmental Quality Review Act (“SEQRA”) and the Rules of Procedure for City Environmental Quality Review (“CEQR”). Community Board 5 recommended approval of the sale of the building to the Museum in May 2003; the City Planning Commission approved the sale in July 2003. Affirmation of Michael Burger, dated April 1, 2005 (“Burger Aff.”), ¶ 4, Ex. F.

Pursuant to City Charter § 384(b)(4), final disposition of the building through EDC also required the approval of the Manhattan Borough Board. A public meeting was held by the Borough Board on August 24, 2004, to discuss the Museum Project. Burger Aff., ¶ 5.

The financial terms of the City’s sale of the 2 Columbus Circle site through EDC to the Museum were described in a memorandum sent to the Manhattan Borough Board a month prior to the public meeting. Smith Aff., ¶ 17; Ex. E. As described therein, the purchase price for

the property is \$17,050,000, which is expected to be paid with \$2,000,000 in cash, and \$15,050,000 payable pursuant to a note having the following terms:

\$4 million is to be paid in four equal annual installments of principal only commencing on the first anniversary of the closing and thereafter on the second, third and fourth anniversaries of the closing. The \$4 million will not bear interest.

The remaining \$11.05 million will bear interest at 6% per annum commencing on the closing date until payment is in full. (Interest will not be payable during the first four years of the note. Accrued but unpaid interest will bear interest at the rate of 6% per annum.) The \$11.05 million of principal and the interest accrued during the first four years of the note will be amortized over a period of 11 years, and payable in annual installments on the fifth through fifteenth anniversary of the closing.

If the renovation of the building on the Property is completed and the Museum's new home on the Property is open to the public within 24 months from the start of construction (which date may be extended if an event of force majeure occurs), the \$11.05 million principal portion of the note will be reduced to \$9.05 million as of the closing.

Ex. E.

In June 2004, the building at 2 Columbus Circle was appraised at a value of \$15,200,000. That appraisal did not take into account a number of potential reductions in the property's value for a purchaser, including any environmental mitigation that may be required and the incremental costs attributable to design controls imposed by the City Planning Commission. Indeed, once the building is purchased, the Museum will be required to renovate the entire structure at a cost expected to exceed \$20 million. Smith Aff., ¶ 18.

The intent of the interest-free period included in the note is to provide the Museum with some modest relief while undertaking renovation and expanding fundraising. *Id.*

In addition, as an encouragement to speed development, the note provides for a \$2 million reduction of the purchase price if the Museum is open to the public within 24 months of the start of construction. This reduction would bring the price to \$15,050,000. Smith Aff., ¶ 19. Thus, if one includes this reduction in the purchase price and excludes the potential and real additional costs mentioned above, the price is still approximately equal to the building's appraised value.

At the August 24, 2004, meeting the Manhattan Borough Board passed a resolution approving the sale of the building to the Museum on these terms. Burger Aff., ¶ 5; Ex. G. Separately, the EDC Board of Directors approved the sale on August 3, 2004. Smith Aff., ¶ 21; Burger Aff., ¶ 6. Contrary to plaintiffs' unsubstantiated allegations, any funds appropriated as part of the City budget process were unrelated to the establishment of the negotiated purchase price or the approvals given for the sale. Smith Aff., ¶ 23.

**D. Landmark West, Along With A Revolving Group Of Other Plaintiffs, And By Three Different Lawyers, Has Filed Several Separate Lawsuits In Opposition to the Sale of the Building at 2 Columbus Circle to the Museum**

To stop the Museum Project from moving forward, Landmark West has enlisted others to mount a multi-pronged litigation offensive. Thus far, the offensive has failed to reveal any improper action on the part of any City agency, commission or individual. Rather, the strategy has proved successful only in delaying the sale of the building. This present action appears directed solely at continuing this delay in the hopes of undoing the proposed sale.

**(1) The CEQR Litigation**

The first lawsuit brought by Landmark West, among others, was an Article 78 proceeding that challenged the environmental review for the project and claimed that it did not adequately address the historic and architectural value of the building, despite the fact that the Landmarks Preservation Commission had commented during the review that the building was not eligible for landmark designation (the "CEQR litigation"). In an opinion dated April 15,

2004, Justice Walter B. Tolub determined that a thorough environmental review for the project pursuant to CEQR had been completed, and that the review of historic and architectural resources was entirely adequate, and dismissed the proceeding. *Landmark West! v. Burden, et al.*, 2004 NY Slip Op 50331U, 3 Misc. 3d 1102A (Sup. Ct. New York Co. 2004). That decision was unanimously affirmed by the First Department in an opinion dated February 24, 2005. *Landmark West! v. Burden, et al.*, 2005 N.Y. App. Div. LEXIS 1930. Petitioners recently moved to have the First Department rehear the case. Burger Aff., ¶ 8.

### **(2) The Borough Board Litigation**

The second lawsuit brought by Landmark West, and others, challenged the Manhattan Borough Board's resolution approving the sale of 2 Columbus Circle to the Museum, claiming that the Borough Board violated the New York State Open Meetings Law, Article 7 of the Public Officers Law ("OML"), because the public meeting was held in late August (a time when, they argued, people generally take vacation), and because notice was allegedly not provided to the news media (the "Borough Board litigation"). In a decision dated February 14, 2005, Justice Harold B. Beeler dismissed the complaint, finding that plaintiffs were not aggrieved under the terms of OML because they had received actual notice of the meeting and that plaintiffs failed to state a cause of action under Section 51 of the General Municipal Law ("GML") in that action. Burger Aff., ¶ 9; Ex. H, pp. 2 – 3.

Landmark West and other plaintiffs in that case have filed a Notice of Appeal. Burger Aff., ¶ 10; Ex. I. In the Pre-Argument Statement, plaintiffs express their intention to appeal not only the ruling on the OML issue but also the ruling on plaintiffs' GML § 51 claim. Ex. I, ¶ 8.

### **(3) The FOIL Litigation**

In another lawsuit brought by Landmark West, *Landmark West! v. City of New York, et al.*, Index No. 117996/04, the organization claimed that the Landmarks Preservation Commission violated the Freedom of Information Law (“FOIL”), despite the fact that LPC provided it with responsive documents in accordance with their FOIL request (the “FOIL litigation”). That matter is now pending before Justice Michael D. Stallman in New York State Supreme Court in New York County. Burger Aff., ¶ 12. Notably, Landmark West has made clear in its papers in the FOIL case that it intends to file yet another lawsuit, ostensibly under the State Administrative Procedures Act. Burger Aff., ¶ 13.

**E. Plaintiffs’ Attorney Unreasonably Delayed Bringing The Public Trust Claim**

David Rosenberg, plaintiffs’ attorney in the present matter, also represents Landmark West and others in the Borough Board litigation, and appeared as counsel to the petitioners in the CEQR litigation. Burger Aff., ¶ 14.

In a letter dated August 19, 2003 – approximately 19 months ago – Mr. Rosenberg advised Deputy Mayor Daniel L. Doctoroff and other City officials that he believed the sale of the building to the Museum violated the common law public trust doctrine, and cited to a number of cases in support of that proposition. Burger Aff., ¶ 15; Ex. J. Thereafter, in a letter dated May 7, 2004, Mr. Rosenberg asked Chris Reo, an attorney in the Office of the Corporation Counsel, to “confirm” that it was the City’s position that a public trust claim would not be ripe until after both the Manhattan Borough Board and EDC had approved the sale of the building. Burger Aff., ¶ 16; Ex. K.

In a letter dated June 2, 2004, Mr. Reo explained that the City had not previously stated a position regarding the ripeness of the public trust claim. Mr. Reo also advised Mr. Rosenberg that “[n]either the facts nor cases upon which you rely support the claim that the sale of the building at Two Columbus Circle is prohibited by [the public trust] doctrine. Therefore,

we also write to advise you that the City may seek costs and sanctions in response to any proceeding that relies upon this theory.” Burger Aff., ¶ 17; Ex. L. In the present action, which was commenced more than nine months after Mr. Reo’s letter, Mr. Rosenberg makes the public trust claim that he failed to include in the Borough Board litigation, despite the fact that that lawsuit was commenced after both the Borough Board and EDC had approved the sale of the building. This failure to include the claim in any prior action appears to have been calculated to harass the City with multiple lawsuits and to prolong litigation as long as possible so as to disrupt the sale of the building to the Museum.

**F. The Museum Project’s Public Benefits**

This litigation stands as an obstacle to the completion of the City’s sale of the building to the Museum. Smith Aff., ¶ 25; Affidavit of Jerome Chazin, sworn to April 4, 2005 (“Chazin Aff.”). The sale is an important project for the City, and will provide a boon to the Columbus Circle area. By doubling its current exhibition and educational space, the Museum will promote the expansion of a significant, valuable cultural institution, and increase revenues from local hotels, restaurants and business establishments, all of which enrich the City's tax base. Smith Aff., ¶ 24.

**ARGUMENT**

**POINT I**

**PLAINTIFFS ARE BARRED FROM THIS  
ACTION BY THE DOCTRINE OF RES  
JUDICATA**

**A. The Instant Matter Is Precluded Because It Is Based on the Same Transactions and Facts Alleged in the Lawsuit Against the Manhattan Borough Board**

Under the common-law doctrine of *res judicata*, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are

barred, even if based on different theories or if seeking a different remedy.” *O’Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981) (citing *Reilly v Reid*, 45 N.Y.2d 24, 29 (1978)); see also, *Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 N.Y.2d 343, 347 (1999); *Modell and Co., Inc. v. Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York*, 68 N.Y.2d 456, 461 (1986); *Pauk v. Board of Trustees*, 111 A.D.2d 17, 488 N.Y.S.2d 685 (1<sup>st</sup> Dep’t 1985), *aff’d* 68 N.Y.2d 702 (1986); *Dobkin v. New York Univ.*, 278 A.D.2d 24, 717 N.Y.S.2d 173 (1<sup>st</sup> Dep’t 2001). “What factual grouping constitutes a ‘transaction,’ and what groupings constitute a ‘series,’ are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties expectations or business understanding or usage.” *O’Brien*, 54 N.Y.2d at 357.

Here, the sale of the building to the Museum requires a series of approvals pursuant to ULURP and City Charter § 384(b)(4), all of which are clearly related in time, origin and motivation. Landmark West has challenged each of these decisions in a separate action, starting with the City Planning Commission’s ULURP approval (the CEQR litigation), followed by the Manhattan Borough Board’s § 384(b)(4) approval (the Borough Board litigation), and now, presumably, EDC’s approval and the anticipated sale of the building.<sup>2</sup>

This latest challenge, however, is premised on the same series of decisions that gave rise to the previously dismissed Borough Board litigation. Indeed, as plaintiffs point out, the terms of the proposed sale by EDC to the Museum were made public “in connection with

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<sup>2</sup> Plaintiffs artfully neglect to identify what act or alleged omission constitutes the subject of this lawsuit. For the purposes of preparing a response, defendants must assume that plaintiffs are here challenging EDC’s approval.

[the] meeting of the Manhattan Borough Board.” Complaint at ¶ 23.<sup>3</sup> Moreover, the Board of Estimate’s 1980 resolution approving the Mayor’s acceptance of the gift of the building at 2 Columbus Circle, and the deed conveying the property to the City, were no less relevant to the Borough Board’s approval of the sale than they are to EDC’s approval. Therefore, plaintiffs’ claims are precluded.

**B. Different Legal Theories Do Not Present an Opportunity for A Second Action Based on the Same Transaction.**

The Court of Appeals has also established a rule that requires dismissal, on *res judicata* grounds, where a second action contains a new theory of law omitted in a first action. It has stated that even if it were assumed that the two actions involved materially different elements of proof, the second suit would be barred as to the claim predicated upon the first category allegations. “When alternative theories are available to recover what is essentially the same relief of harm arising out of the same or related facts such as would constitute a single ‘factual grouping’ the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions.” *O’Brien*, 54 N.Y.2d at 357 (emphasis added); *see also, Ellis v. Abbey & Ellis*, 294 A.D.2d 168, 169, 742 N.Y.S.2d 225 (1<sup>st</sup> Dep’t 2001); *Marinelli Assocs. v. Helmsley-Noyes Co.*, 265 A.D.2d 1, 8, 705 N.Y.S.2d 571 (1<sup>st</sup> Dep’t 2000). Similarly, “where the same foundation facts serve as a predicate for each proceeding, differences in legal theory and consequent remedy do not create a separate cause of action.” *Reilly v. Reid*, 45 N.Y.2d at 30. As the Court of Appeals held,

[T]he essential identity of petitioner’s two causes of action requires invocation of the doctrine of claim preclusion. To conclude otherwise would be to

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<sup>3</sup> A copy of the complaint is annexed as Exhibit M to the Burger Aff.

afford petitioner a second opportunity to obtain substantially the same relief he was denied in the prior proceeding, based on the same actions of the respondents. This is precisely the type of repetitive litigation the doctrine of claim preclusion is designed to avoid.

*Id.*, at 31.

Here, plaintiffs' attorney intentionally, and inexplicably, omitted the constitutional, City Charter and common law public trust claims from the first lawsuit brought against the Borough Board, despite having notified the City in August 2003 of his intention to bring just such a suit. Burger Aff., ¶ 15; Ex. J. These claims were available at the time of that earlier litigation. Moreover, plaintiffs are seeking precisely the same relief – an injunction blocking sale of the building to the Museum – that it sought in both the CEQR and Borough Board lawsuits. Because this is an instance where “repetitive litigation” is being used strategically to frustrate the sale of the building, the claims are precluded.

**C. *Res Judicata* Bars The Instant Complaint In Its Entirety Because All Causes Of Action Could Have And Should Have Been Raised In The Prior Proceeding.**

Plaintiffs are additionally barred on a third and related ground: they could have and should have litigated the present claims in a prior action.

“A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated . . .” *Schuylkill Fuel Corporation v. B. & C. Nieberg Realty Corp., Inc. et al.*, 250 N.Y. 304, 306-307 (1929) (citations omitted); *see also, Burgess v. Goord*, 285 A.D.2d 753, 755, 729 N.Y.S.2d 203 (3d Dep’t 2001) (“doctrine of *res judicata* bars a cause of action that was raised and adjudicated, or which could have been raised and adjudicated, in a prior proceeding”) (citations omitted); *but see Murphy v. Erie County*, 28 N.Y.2d 80, 85 (1971) (allowing a third action commenced a few days after a second action to stand, but noting “it is certainly desirable that there be an end to taxpayer

suits with respect to a particular matter so that the governmental body involved may function without the fear of repeated complaints challenging the same action”).

Simply put, plaintiffs could have and should have raised each of the claims in this case in the Borough Board litigation. What is more, plaintiffs could arguably have raised the public trust claim in the even earlier CEQR litigation. *See Committee to Save Brighton Beach & Manhattan Beach v. Planning Comm’n of City of New York*, 259 A.D.2d 26, 695 N.Y.S.2d 7 (1<sup>st</sup> Dep’t 1999) (public trust claim brought along with CEQR claim rejected on the merits). Accordingly, plaintiffs’ attempt to frustrate the sale of the building by spreading litigation out over time should be ended.<sup>4</sup>

## POINT II

### **PLAINTIFFS FAIL TO ESTABLISH THAT THE SALE OF 2 COLUMBUS CIRCLE VIOLATES THE “GIFT AND LOAN” CLAUSE OF THE STATE CONSTITUTION**

Plaintiffs’ first cause of action should be dismissed because (a) neither the terms of the City’s sale of the building at 2 Columbus Circle nor the City’s budgetary allocations to the Museum violate Article VIII, § 1 of the New York State Constitution, and (b) plaintiffs are barred by the statute of limitations from asserting their claim as against the sale of the building to the Museum.

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<sup>4</sup> For these same reasons, plaintiffs are also barred by the doctrine of laches. Equitable claims are barred by the doctrine of laches if the defendants can show (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice. *Schultz v. State of New York*, 81 N.Y.2d 336, 599 N.Y.S.2d 469 (1993) (action brought 11 months after sale of bonds pursuant to financial enactment of legislature barred by laches). In the instant proceeding, it is clear that both factors apply. First, as argued above, plaintiffs should have brought these claims along when they challenged the Borough Board’s decision. Second, the prejudice is clear, as the ongoing litigation impedes sale of the building. *See Smith Aff.*, ¶ 25. Therefore, plaintiffs’ request for relief should be dismissed.

**A. Neither The Sale Of The Building To The Museum Nor The City’s Budgetary Allocations To The Museum Violate The “Gift and Loan” Clause**

Plaintiffs allege that the terms of the sale approved by the Borough Board and EDC’s Board of Directors, and the grants approved by the City Council, violate Article VIII, Section 1 of the New York State Constitution, also known as the “Gift and Loan” clause. Plaintiffs, however, provide no legal or factual support for their assertion. In fact, the law is clear that neither the sale of the building to the Museum nor the budgetary provisions constitutes an illegal gift or loan.

Article VIII, Section 1 of the New York State Constitution provides:

“No . . . city . . . shall give or loan any money or property to or in aid of any individual, or private corporation or association, . . . nor shall any . . . city . . . give or loan its credit to or in aid of any individual or public or private corporation or association . . . .”

New York State courts have consistently held that state and municipal expenditures, grants and leases do not violate the Gift and Loan clause where such expenditures, grants or leases further a public purpose, even if a benefit incidentally accrues to a private party. *See Lavin v. Klein*, 12 A.D.3d 244, 783 N.Y.S.2d 815 (1<sup>st</sup> Dep’t 2004) (procurement of insurance coverage for school transportation providers furthered public benefit of providing transportation economically); *Tribeca Community Assoc. v. New York State Urban Dev. Corp.*, 200 A.D.2d 536, 607 N.Y.S.2d 18 (1<sup>st</sup> Dep’t 1994) (financing provided by EDC to convey property to UDC for purpose of keeping stock exchange housed in New York City provided substantial public benefit); *Hamptons Resort & Tourism Assoc. v. County of Suffolk*, 224 A.D.2d 662, 639 N.Y.S.2d 422 (2d Dep’t 1996) (complaint properly dismissed where plaintiffs “failed to demonstrate that the challenged tax has as its primary object a private benefit”); *Imburgia v. City of New Rochelle*, 223 A.D.2d 44, 48-49, 645 N.Y.S.2d 111 (3d Dep’t 1996); *see generally*,

*Murphy v. Erie County*, 28 N.Y.2d 80, 88 (1971) (lease in furtherance of public purpose does not violate Gift and Loan clause); *Hotel Dorset Co. v. Trust for Cultural Resources*, 46 N.Y.2d 358 (1978) (tax increment measure for the Museum of Modern Art upheld because preservation of institution was valid public purpose).<sup>5</sup>

Accordingly, this Court has specifically upheld a \$65,000,000 capital budget grant to the privately-owned Museum of Modern Art in the face of a challenge under the Gift and Loan clause. *680 Fifth Avenue Associates, L.P. v. City Council of the City of New York et al.*, Index No. 107500/01 at 18 (New York Co. 2001) (Abdus-Salaam, J.). A copy of that decision is annexed to the Defendants' Memorandum of Law as Appendix 1. In that case, Justice Sheila Abdus-Salaam reasoned that "financial support of a museum such as MoMa and the myriad other cultural institutions included in the City's capital budget, such as, Lincoln Center, the Guggenheim Museum, and the Studio Museum in Harlem, meets the public purpose requirement of the Constitution." *Id.* at 18.<sup>6</sup>

Significantly, Justice Abdus-Salaam recognized that, as part of its contract with the City, MoMa had committed to operate the property as a museum for a period of 30 years. *Id.*

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<sup>5</sup> Indeed, one appellate court has gone so far as to declare that a county's abandonment of a portion of a right-of-way to adjacent landowners for no monetary consideration was not an illegal gift because the abandonment "relieved the county of long-standing administrative problems and responsibilities . . . ." *Clintwood Associates v. County of Ontario*, 144 A.D.2d 928, 534 N.Y.S.2d 246 (4<sup>th</sup> Dep't 1988).

<sup>6</sup> The situation is analogous to the taking of real property by a municipality for redevelopment by private corporations. Such takings have long been recognized as a species of public use, and have been determined not to violate the State Constitution. *Wheeler v. Town of Islip*, 51 Misc.2d 386, 388, 273 N.Y.S.2d 399 (Sup. Ct. Suffolk Co. 1966) (citing to *Cannata v. City of New York*, 11 N.Y.2d 210, 215 (1962)). See also, *Westchester Creek Corp. v. N.Y. City Sch. Constr. Auth.*, 286 A.D.2d 154, 161, 730 N.Y.S.2d 95 (1<sup>st</sup> Dep't 2001) (taking of property for construction of schools constitutes valid taking).

at 18 – 19. Here, EDC also intends to restrict the Museum’s use of the 2 Columbus Circle property to a public museum for a period of years. Smith Aff., ¶ 20.

The Court’s decision in *680 Fifth Avenue* is buttressed by statutory provisions that specifically permit public funding for cultural institutions. Under the General City Law, the City is empowered “[t]o spend money for any public or municipal purpose.” GCL § 20(5). It is a public purpose for a City to “establish and maintain such institutions and instrumentalities for the instruction, enlightenment, improvement, entertainment, recreation and welfare of its inhabitants as it may deem appropriate or necessary for the public interest or advantage.” GCL § 20(16). Furthermore, under GCL § 21, a “public or municipal purpose,” is defined to “include the promotion of education, art, beauty . . . amusements, recreation . . . and all of the purposes enumerated in section 20 . . . .” Thus, the provision of municipal funds to a private not-for-profit institution for the purpose of maintaining a public museum is consistent with the General City Law.

Nor are the terms of the proposed sale tantamount to an illegal gift or loan. The City and the Museum have negotiated a sale for a sum greater than, or approximately equal to, the building’s appraised value. See Smith Aff., ¶ 17; Ex. E. In addition, the note to be given by EDC, a purchase money mortgage with interest accruing at a rate of approximately 6 percent per year on the principal, see *id.*, is not an illegal loan. N.Y. City Charter § 384(b)(4); *see also*, *Jamaica Water Supply Co. v New York*, 38 Misc. 2d 205, 236 N.Y.S.2d 816 (Sup. Ct. Queens Co. 1962) (promissory note evidencing private party’s repayment over course of years of sum expended by city not an illegal loan), *aff’d*, 25 A.D.2d 957, 270 N.Y.S.2d 975 (1966), *aff’d*, 19 N.Y.2d 1000 (1967); *Tri-County Taxpayers Assn. v Bolton*, 165 A.D.2d 451, 567 N.Y.S.2d 940 (3d Dept 1991), *app. dismiss’d*, 79 N.Y.2d 896 (1992); *Kradjian v Binghamton*, 104 A.D.2d 16,

482 N.Y.S.2d 89 (3d Dept 1984). Indeed, the purchase money mortgage itself is part of the terms of the sale, and should not be considered a loan separate from those terms. *See Christopher v. Gurrieri*, 164 Misc. 2d 779, 782, 626 N.Y.S.2d 424 (Sup. Ct. Queens Co. 1995) (purchase money mortgage “merely a method by which a purchase price is paid and is a means of increasing the nominal purchase price”) (citing, *Mandelino v. Fribourg*, 23 N.Y.2d 145 (1968) (purchase money mortgages exempt from usury requirements under General Obligations Law).

Ultimately, the Gift and Loan clause may not be used to “regulate the price or adequacy of the consideration of sales of public property made in good faith,” *Van Curler Development Corp. v. City of Schenectady*, 59 Misc.2d 621, 626, 300 N.Y.S.2d 765 (Sup. Ct. Schenectady Co. 1969), and the City defendants are to be accorded deference in this matter. Where a municipality possesses the right to sell property, “the wisdom of any such sale is for the governing body of the city to decide, and not for the court.” *Id.* Similarly, the City’s budgetary allocations are to be granted deference by the courts. *Hotel Dorset Co., supra*, 46 N.Y.2d at 369, 370 (“[c]ourts are required to exercise a large measure of restraint when considering . . . public expenditures designed to be in the public interest . . . [t]here is a simple, but well-founded, presumption that an act of the Legislature is constitutional and this presumption can be upset only by proof persuasive beyond a reasonable doubt”). Here, there is no indication of any illegal conduct that would instigate the court’s intervention in an approved, negotiated sale.

**B. Plaintiffs’ Constitutional Claim Against The Sale Of The Building To The Museum Is Barred By The Four-Month Statute Of Limitations**

Plaintiffs’ constitutional claim challenging the sale of the building to the Museum, is barred by the four-month statute of limitations applicable under CPLR § 217(1). *Schulz v. Cobleskill-Richmondville Cent. Sch. Dist. Bd. of Educ.*, 197 A.D.2d 247, 252, 610 N.Y.S.2d 694 (3d Dep’t 1992) (claim brought pursuant to Gift and Loan clause subject to 4 month statute of

limitations). Even though plaintiffs did not bring an Article 78 proceeding, plaintiffs' constitutional claims are nonetheless subject to this statute of limitations. *See, Board of Visitors – Marcy Psychiatric Ctr v. Coughlin*, 96 A.D.2d 760, 465 N.Y.S.2d 312 (4<sup>th</sup> Dep't 1983) (SEQRA action properly converted to Article 78 proceeding); *Connor v. Cuomo*, 161 Misc.2d 889, 893, 614 N.Y.S.2d 1114 (Sup. Ct. Kings County 1994) (action challenging City's failure to undergo ULURP review should have been brought as an Article 78 proceeding subject to four-month statute of limitations). Plaintiffs cannot circumvent the four-month statute of limitations by seeking declaratory or injunctive relief. *Asian Americans for Equality v. Koch*, 128 A.D.2d 99, 114, 514 N.Y.S.2d 939 (1<sup>st</sup> Dep't 1987); *Clempner v. Town of Southold*, 154 A.D.2d 421, 546 N.Y.S.2d 101 (2d Dep't 1989).

The Court of Appeals has stated:

In order to determine the Statute of Limitations applicable to a particular declaratory judgment action, the court must 'examine the substance of that action to identify the relationship out of which the claim arises and the relief sought.' If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action.

*Matter of Save the Pine Bush v City of Albany*, 70 N.Y.2d 193, 202 (1987) (citations omitted); *see also, Young v. Bd. of Trustees of Town of Blasdell*, 89 N.Y.2d 846 (1996).

Plaintiffs commenced this proceeding on or about March 17, 2005, approximately seven months after EDC and the Manhattan Borough Board each approved the sale of the building. These two decisions represent the real object of plaintiffs' action, and thus mark the period when the statute of limitations began to run. Indeed, plaintiffs seek to review the City's approvals of the sale of the building on the specific terms identified by EDC prior to the Borough

Board's August 24, 2004 meeting, and approved by the Borough Board at that meeting. Because the City had, with the Borough Board's approval, obtained all necessary approvals for the sale of the building, that approval marks the date at which the statute of limitations began to run.

### **POINT III**

#### **PLAINTIFFS FAIL TO SHOW ANY VIOLATION OF NEW YORK CITY CHARTER SECTIONS 383 OR 384**

Plaintiffs' second cause of action is patently frivolous, and should be dismissed because it has absolutely no basis in law or fact. The sale of the building at 2 Columbus Circle, conducted pursuant to New York City Charter § 384(b)(4), simply does not violate any provision of the New York City Charter.

The City seeks to sell the building pursuant to its express authority under City Charter § 384(b)(4). Plaintiffs contend, however, that City Charter § 383 should bar the City from proceeding with the sale of the building, and that the procedures authorized by City Charter § 384(b)(4) cannot be used to sell the building. Complaint at ¶¶ 39 – 44. Plaintiffs are plainly wrong on both counts.

#### **A. The Sale Of The Building To The Museum Does Not Violate City Charter § 383**

Plaintiffs contend that the building at 2 Columbus Circle is a public place that is prohibited from sale under Charter §383. City Charter § 383 provides, in full part:

The rights of the city in and to its water front, ferries, wharf property, bridges, land under water, public landings, wharves, docks, streets, avenues, highways, parks, waters, waterways and all other public places are hereby declared to be inalienable; but upon the closing or discontinuance of any street, avenue, park or other public place, the property may be sold or otherwise disposed of as may be provided by law, and leases of land under water, wharf property, wharves, docks and piers may be made as may be provided by law.

The building at 2 Columbus Circle is not a “public place” within the meaning of § 383, and therefore that section does not stand as an obstacle to the City’s sale of the building. “Public places,” like streets and avenues, must be shown on the City Map. City Charter § 202(b). Accordingly, in order to establish a public place, approval pursuant to provisions set forth in the City Charter is required. City Charter § 202(a). Here, plaintiffs have neither alleged nor can they show that the building at 2 Columbus Circle is shown on the City Map, much less that it has been subject to the required public approval process required before it can be considered a “public place.”

Moreover, the City Charter requires that “public places” be placed under the jurisdiction of the Parks Department for purposes of management and care. N.Y. City Charter § 533(a)(1) – (9). Again, plaintiffs have not alleged, nor can they show, that the building at 2 Columbus Circle has been placed within the Parks Department’s jurisdiction. In addition, as argued more fully in Point IV below, neither G & W’s donation of the building nor the City’s acceptance of it explicitly or impliedly constituted a dedication of the building to public purposes.

**B. The City’s Use Of City Charter § 384(b)(4) Is Legal**

Plaintiffs imply that the City’s utilization of the procedures set forth in City Charter § 384(b)(4) is somehow illegal. See Complaint at ¶¶ 19 – 27. Yet, plaintiffs can not cite any requirement that the City dispose of the building at 2 Columbus Circle by public bidding or any other competitive public solicitation. While City Charter § 384(b)(1) sets forth a general requirement that real property of the City be disposed of for the highest price through sealed bids or at public auction, Section 384(b)(4) provides that:

Notwithstanding the provisions of this charter, or any general, special, or local law to the contrary, the mayor may, with the approval of a majority of the

members of the borough board of the borough in which such real property is located, lease or sell any real property of the city, except inalienable property or any interest therein, to a local development corporation without competitive bidding and for such purpose or purposes and at such rental or for such price as may be determined by the mayor to be in the public interest....

Thus, City Charter § 384(b)(4) explicitly provides for the sale of the building to the Museum through EDC “without competitive bidding, and for such purpose or purposes and...for such price” as the mayor decides is in the public interest. *See Sutton Area Community v. City of New York*, 196 A.D.2d 793, 602 N.Y.S.2d 828 (1<sup>st</sup> Dep't 1993). Other provisions of law provide a similar flexibility. *See* GML §§ 507 *et seq.* (disposition of property in urban renewal areas); *see also* N.Y. City Charter §§ 1301(2)(f) (approval of leases of waterfront property for non-navigational purposes on a noncompetitive basis if approved by City Council supermajority), and 1301(2)(g) (lease of waterfront property without requirement of competitive procurement for navigational purposes). In short, then, plaintiffs’ objection to the City’s use of the 384(b)(4) procedure is utterly baseless.

#### **POINT IV**

#### **THE SALE OF THE BUILDING AT 2 COLUMBUS CIRCLE DOES NOT VIOLATE THE COMMON LAW PUBLIC TRUST DOCTRINE**

Plaintiffs’ third and final cause of action is similarly frivolous on its face, and should be dismissed out of hand, as there is no support whatsoever for the proposition that the City’s sale of the building to the Museum violates the common law public trust doctrine. The building at 2 Columbus Circle is not a park; nor is it a public beach, wharf, dock, or any other type of property that the common law has, in certain circumstances, found to be held in trust for the public. *See, e.g., Friends of Van Cortlandt Park v City of New York*, 95 N.Y.2d 623 (2001)

(parkland); *Lake George Steamboat Co. v. Blais*, 30 N.Y.2d 48 (1972) (docks); *Cotrone, et al. v. City of New York*, 38 Misc. 2d 580, 582, 237 N.Y.S.2d 487 (Kings County 1962) (police station).<sup>7</sup>

Plaintiffs fail to offer any facts or law that could reasonably support their claim that the building has been dedicated to a public use so as to invest the building with the public trust. Yet, to establish that property has been dedicated for public use, plaintiffs must go much further, and prove that there has been an unequivocal express or implied offer by the owner and an express or implied acceptance by the public that amounted to such a dedication. *Angiolillo v. Town of Greenburgh*, 290 A.D.2d 1, 10, 11, 735 N.Y.S.2d 66 (2d Dep't 2001) (parkway was not explicitly or impliedly dedicated as parkland) (citing *Gewirtz v City of Long Beach*, 69 Misc. 2d 763, 770, (Sup. Ct. Nassau Co. 1972), *aff'd*, 45 A.D.2d 841, 358 N.Y.S.2d 957 (2d Dep't 1974)). To make such a showing, “[t]he acts and declarations of the party must be unmistakable in their purpose, and decisive in their character, showing an intent to dedicate the land, absolutely and irrevocably to public use; and there must also be an acceptance and formal opening by the public authorities.” *In re East One Hundred and Seventy-seventh Street*, 239 N.Y. 119, 127, 128 (1924). Significantly, “it is vital to a dedication of property to public use that it is to be forever

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<sup>7</sup> These cases, like the rest of those cited in Mr. Rosenberg’s August 2003 letter, and upon which plaintiffs’ presumably rely in the present matter, offer no basis to extend to public trust doctrine to the building at 2 Columbus Circle. See Ex. J (citing to *Williams v. Gallatin*, 229 N.Y. 248 (1920) (parkland); *Brooklyn Park Comm’rs v. Armstrong*, 45 N.Y. 234 (1871) (parkland); *Gladsky v. City of Glen Cove*, 164 A.D. 567, 570-572, 563 N.Y.S.2d 842 (2d Dep’t 1990) (waterfront property); *People ex rel. Swan v. Doxsee*, 136 A.D. 400, 120 N.Y.S. 962 (2d Dep’t 1910) (docks); *American Dock Co. v. New York*, 174 Misc. 813, 21 N.Y.S.2d 487 (Kings Co. 1962) (foreign trade zone)). The case of *John Kennedy & Co. v. New York World’s Fair 1939 Inc.*, 260 A.D. 386, 22 N.Y.S.2d 901 (2d Dep’t 1940) is inapposite, having found only that a mechanics lien could not attach to City-owned property.

and irrevocable after acceptance, and that it be for public use.” *Gewirtz v. City of Long Beach*, 69 Misc. 2d at 770 (emphasis added).

To determine whether the donation of the building by G & W to the City was a dedication to public use “one must look to the intention of the parties.” *Roma Development Corp. v. Jones*, 115 N.Y.S.2d 189, 192 (Sup. Ct. Nassau Co. 1952) (no competent evidence offered to show intention of dedication); *see also, Lazore v. Board of Trustees of Village of Massena*, 191 A.D.2d 764, 594 N.Y.S.2d 400 (3d Dep’t 1993) (village’s acceptance of parcel did not indicate intent that parcel be used as park); *cf. Lake George Steamboat Co. v. Blais*, 30 N.Y.2d at 48 (examination of language of conveyance instruments indicated village received docks for public use). Plaintiffs assert, willy-nilly, that the “City accepted the gift of the building expressly for public use and thereafter held it for public use.” Complaint at ¶ 48. However, the deed and Board of Estimate resolution from which plaintiffs selectively quote, and on which plaintiffs exclusively rely, evince no intent to dedicate the building forever and irrevocably to public use. In fact, they show just the opposite.

The July 1980 Deed of Correction required that the building “be used solely by the City as its principal facility for visitors’ services and cultural affairs and for no other purpose” for a period of 30 years following the transfer. Ex. A. This condition was made enforceable by G & W’s reservation of a reverter interest. *Id.* However, the deed provided that at the end of the 30 year period the reverter interest “shall lapse and terminate,” and at that point title would pass to “the City, its successors and assigns” in fee simple absolute. *Id.* It is therefore uncontrovertible that all conditions contained in the deed ended after 30 years, at which point the gift provided the City with unencumbered title.

The analogous case of *Lefkowitz v. Cornell University*, 35 A.D.2d 166, 316 N.Y.S.2d 264 (4<sup>th</sup> Dep't 1970), confirms this reading of the deed. In *Lefkowitz*, a private corporation gave a gift of real property to Cornell University for scientific and research purposes, which an affiliated nonprofit corporation, Cornell Aeronautical Laboratory, then used for more than 20 years as a research laboratory. When Cornell offered to sell the lab to a private company, the Attorney General sought to enjoin the sale based on the theory that the property had been given to Cornell “for charitable purposes in the nature of a public trust for educational research and scientific purposes.” *Lefkowitz*, 35 A.D.2d at 170. The Fourth Department found that the original conveyance to Cornell lacked a “clear expression of intent that the gift to Cornell was subject to the restriction that it be forever used as a research laboratory for the public benefit.” *Id.*, 35 A.D.2d at 171. The Court noted in particular that the gift was to Cornell and “its successors and assigns,” and reasoned that “the use of these words is inconsistent with an intent that Cornell be forever obligated to operate the lab in trust for the public benefit.” *Id.*, at 172. The Court of Appeals unanimously affirmed. *Lefkowitz v. Cornell University*, 28 N.Y.2d 876 (1971).

As shown above, the 2 Columbus Circle Deed of Correction conveyed title to “the City, its successors and assigns.” As the Court reasoned in *Lefkowitz*, the use of such words is “inconsistent” with an intent that the City forever own and operate the building at 2 Columbus Circle as a visitors’ center. *Lefkowitz*, 35 A.D.2d at 172. Moreover, the Deed explicitly limited the time period of any restriction on the use of the building to 30 years.

The Board of Estimate’s resolution approving the Mayor’s acceptance of the gift does not add any terms to the transfer, nor does it burden the City with any additional obligations than those contained in the Deed of Correction. The Board noted, in the “Whereas” clauses

preceding the resolution, both the use of the building “for visitors’ services and cultural affairs” and the 30 year duration of the condition, as made enforceable by G & W’s reverter interest. Ex. B, Whereas clauses 1, 3. The resolution itself approved the acceptance of the gift “on terms substantially in accordance with ... the execution of all instruments and documents as the Mayor or his designee may deem necessary or appropriate.” Ex. B. Thus, despite plaintiffs’ willful blindness to the words on the page, the Board of Estimate approved the deed itself, and not only the non-binding “Whereas” clauses, which, in any event, duly noted the 30 year period of the gift’s condition.

Plaintiffs’ presentation of their case is, at best, less than half-honest, and it fails to raise any substantive issues for this Court’s consideration. The frivolity of plaintiffs’ lawsuit – and its dilatory purpose – is made even more apparent by EDC’s present ownership of the reverter interest. Theoretically, should the City’s sale of the building violate the terms of the deed, ownership would revert to EDC, which would then own the building in fee simple absolute, and which could then sell the building without restrictions to the Museum. Thus, plaintiffs clearly do not seek to uphold the conditions of the Deed of Correction or the Board of Estimate’s resolution, but only to delay the sale of the building in the hope that the Museum deal will fall apart.

#### **POINT V**

**PLAINTIFFS ARE COLLATERALLY  
ESTOPPED FROM BRINGING AN ACTION  
UNDER GENERAL MUNICIPAL LAW § 51,  
AND HAVE, IN ANY EVENT, FAILED TO  
STATE A CAUSE OF ACTION UNDER THAT  
STATUTE**

It is unclear from the Complaint whether or not plaintiffs claim that the sale of the building to the Museum violates section 51 of the General Municipal Law (“GML”), though they

do purport to proceed “pursuant to” that provision. See Comp., ¶ 7. Such a claim would, of course, be collaterally estopped, as plaintiff Landmark West has already attempted to argue that claim in the Borough Board litigation. As previously noted, Justice Beeler dismissed that claim. See Ex H, p. 3.

Regardless of the Complaint’s facial deficiency and the clear bar to plaintiffs’ re-arguing their case here, plaintiffs have failed to state a cause of action under GML § 51. Under GML § 51 a taxpayer may sue “to prevent any illegal official act on the part of [municipal] officers, agents, commissioners or other persons, or to prevent waste or injury to ... any [municipal] property.” Although, on its face, GML § 51 might seem to provide for a broad inquiry into official conduct of municipal affairs, the Court of Appeals has expressly rejected such an interpretation and has, instead, read the statute quite narrowly. Indeed, it is well established that a taxpayer action pursuant to GML § 51 lies “only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes.” *Mesivta of Forest Hills Institute, Inc. v. New York*, 58 N.Y.2d 1014 (1983) (citing, *Kaskel v. Impellitteri*, 306 N.Y. 73, 79 (1953)).

In *Talcott v. City of Buffalo*, 125 N.Y. 280, 288 (1953), the Court of Appeals explained that “[f]ull force and effect can be given to the statute” only by confining it to cases where the acts complained of amount to corruption or fraud, and that “[a]ny other construction would subject the discretionary action of all local officers and municipal bodies to review by the courts at the suit of the taxpayers, a result which would burden the courts with litigation, without increasing the efficiency of local administration.” The First Department has similarly recognized that “a taxpayers suit is not available simply to review a determination supposedly made in violation of law . . . to make a taxpayer's suit available to challenge . . . actions such as the one

before us here could severely impede the conduct of public business.” *Fisher v. Biderman*, 154 A.D.2d 155, 159, 552 N.Y.S.2d 221 (1<sup>st</sup> Dep’t 1990) (citing *Starburst Realty Corp. v. City of New York*, 125 A.D.2d 148, 512 N.Y.S.2d 60 (1<sup>st</sup> Dep’t 1987), *lv. den’d*, 70 N.Y.2d 605 (1987)). Questions regarding the legality of the governmental action are more properly and expeditiously resolved by means of a CPLR article 78 proceeding. *Fisher*, 154 A.D.2d at 159.

Plaintiffs, here, have not alleged misconduct of the sort – i.e., fraud, collusion, corruption or bad faith – necessary to justify a taxpayer action pursuant to GML § 51. *Lavin v. Klein, supra.*, 12 A.D.3d 244; *Bettors v. Knabel*, 288 A.D.2d 872, 872-873, 732 N.Y.S.2d 509 (4<sup>th</sup> Dep’t 2001), *lv. den’d*, 98 N.Y.2d 659, 746 N.Y.S.2d 275 (2002). Rather, plaintiffs allege only that the City proposes to sell the building for a net profit of \$15 – \$17 million, plus interest, pursuant to City Charter § 384(b)(4), and that plaintiffs perceive in those sale terms the “appearance” of “favoritism or cronyism.” Complaint at ¶¶ 27, 34. In support of this unsupported accusation, plaintiffs allege that the City’s capital and expense budgets for 2005 and 2006 include provisions granting the Museum funds, and that City Council Speaker Gifford Miller and Manhattan Borough President C. Virginia Fields, neither of whom is named as a defendant in this case, serve on the Museum’s Board of Directors. See Complaint at ¶¶ 28 – 30, 34.

Such haphazard conspiracy mongering hardly merits a response. However, even accepting plaintiffs factual allegations as true, no inference of illegality, fraud or collusion can be drawn here. To the contrary, far from the “cronyism” imagined by plaintiffs, the approval of the disposition of 2 Columbus Circle was a model of integrity and intergovernmental oversight. The disposition of the Property has been the subject of numerous public hearings and has received all the necessary approvals pursuant to ULURP and City Charter § 384(b)(4).

Therefore, should the Court entertain plaintiffs' GML § 51 claim, such a claim should be dismissed for failure to state a cause of action.

#### POINT VI

#### **THIS COURT SHOULD SANCTION PLAINTIFFS AND/OR PLAINTIFFS' ATTORNEY FOR FRIVOLOUS CONDUCT**

Sanctions should be imposed upon plaintiffs, counsel for plaintiffs, or both, pursuant to 22 NYCRR § 130-1.1, for engaging in frivolous conduct.

Conduct is frivolous if it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, or if it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. 22 NYCRR § 130-1.1(c)(1) – (2). In determining whether plaintiffs' and/or plaintiffs' counsel's conduct is frivolous, the Court "shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party." 22 NYCRR § 130-1.1(c)(3).

Sanctions are not merely retributive; they are also goal oriented, "in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation." *Levy v. Carol Management Corp.*, 260 A.D.2d 27, 34, 698 N.Y.S.2d 226 (1<sup>st</sup> Dep't 1999). The proper use of sanctions is a desirable and appropriate way to discourage abusive litigation tactics. *Timoney v. Newmark & Co. Real Estate, Inc.*, 299 A.D.2d 201, 202, 750 N.Y.S.2d 271 (1<sup>st</sup> Dep't 2002).

The present action is the fourth lawsuit filed by plaintiff Landmark West in opposition to the sale of the building at 2 Columbus Circle, and it appears that another lawsuit is waiting in the wings. Burger Aff., ¶ 13. This is also the second lawsuit in which Landmark West has purported to raise taxpayer claims. Moreover, the lawsuit was filed approximately one month after Justice Beeler's dismissal of the Borough Board lawsuit, which itself was filed on the same day that oral argument was heard by the First Department on the CEQR litigation. On top of everything else, plaintiffs offer no reason that these claims were not raised in the Borough Board litigation.

Landmark West, by its attorney David Rosenberg, the same attorney who represented Landmark West and others in the Borough Board litigation and who appeared as counsel to Landmark West in the CEQR litigation, has brought a lawsuit that, as demonstrated above, has absolutely no basis in law or fact. Clearly, Landmark West and Mr. Rosenberg intend to harass the City and the Museum with these serial lawsuits, strategically spread out over time to in order to impair the sale of the building. See Chazin Aff.

It is revealing that the Complaint filed here closely tracks the language of the plaintiffs' attorney's August 2003 letter, Ex. J; the close similarity highlights both Landmark West's and Mr. Rosenberg's intent to delay resolution of litigation that may impact the sale of the building. That these claims – while frivolous – could have been, but were not, raised in one of plaintiffs' prior lawsuits is strong evidence that their sole motive is to frustrate the City's properly considered and approved sale and redevelopment of 2 Columbus Circle. In such circumstances, sanctions are entirely appropriate. See *Minister, Elders & Deacons of Reformed Protestant Dutch Church v 198 Broadway, Inc.*, 76 N.Y.2d 411 (1990) (motion frivolous and sanctions appropriate where motion undertaken to delay resolution of litigation and eventual

eviction); *Jones v. Camar Realty Corp.*, 167 A.D.2d 285, 561 N.Y.S.2d 916 (1<sup>st</sup> Dep't 1990) (sanctions against attorney appropriate where motion had no basis in law or fact, and appeared intended to harass defendant). Indeed, sanctions may be the only way of discouraging plaintiffs, and their counsel, from filing further frivolous lawsuits in the immediate future.

**CONCLUSION**

For the above reasons, defendants respectfully request that the complaint be dismissed, sanctions be imposed on plaintiffs and/or plaintiffs' attorney, and for such other and further relief as the Court deems just and proper.

Dated: New York, New York  
April 4, 2005

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

-----x

LANDMARK WEST!, BOARD OF MANAGERS OF  
THE PARC VENDOME CONDOMINIUM, STUART  
URAM, TERI SLATER and HILDA M. REGIER,

Plaintiffs,

- against -

THE CITY OF NEW YORK and NEW YORK CITY  
ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

-----x

Index No. 103689/05

IAS Part 5

(Stallman, J.)

**REPLY MEMORANDUM OF LAW IN SUPPORT OF**  
**DEFENDANTS' MOTION TO DISMISS**

**Preliminary Statement**

The arguments put forward in Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pl. Memo. of Law") do nothing to dispel the impression that plaintiffs' sole motivation in bringing this lawsuit is to prolong litigation long enough to frustrate the City of New York's proposed sale of the building at 2 Columbus Circle to the New York City Economic Development Corporation ("EDC") for disposition to the Museum of Arts and Design ("Museum"). Indeed, despite plaintiffs' decision to ignore the full import of the deed conveying title of the building to the City, and despite plaintiffs' decision to cloud the terms of the proposed sale with conclusory allegations, even a facial reading of the documentary evidence demonstrates that plaintiffs' claims lack any basis whatsoever in law or fact.

Plaintiffs' claims, designed as they are to harass EDC and the City (collectively, "City" or "defendants"), are patently frivolous. As argued in the Memorandum of Law in Support of Defendants' Motion to Dismiss ("Def. Memo. of Law"), and as further argued below, plaintiffs cannot maintain their common law public trust claim because the building at 2

Columbus Circle was never dedicated to public use. Similarly, the sale does not violate City Charter § 383 because the building is not a “public place” within the meaning of the Charter. Finally, the terms of the proposed sale, as approved by the EDC Board of Directors on August 3, 2004 and by the Manhattan Borough Board on August 24, 2004, do not constitute an illegal gift or loan under Article VIII, § 1 of the New York State Constitution, nor do they constitute illegal waste under General Municipal Law § 51. Accordingly, the Complaint should be dismissed and sanctions imposed.

### **Statement of Facts**

For a complete recitation of the relevant facts to this case, the City respectfully refer the Court to the Affidavit of Neal Smith, sworn to April 4, 2005 (“Smith Aff.”), and the exhibits annexed thereto; the Affirmation of Michael Burger, dated April 4, 2005 (“Burger Aff.”), and the exhibits annexed thereto; the Affidavit of Jerome Chazen, sworn to April 4, 2005, and the exhibit annexed thereto; the Statement of Facts set forth in Def. Memo. of Law; and the Supplemental Affirmation of Michael Burger, dated May 10, 2005 (“Supp. Burger Aff.”).

### **ARGUMENT**

#### **POINT I**

#### **PLAINTIFFS FAIL TO SUPPORT THEIR PUBLIC TRUST CLAIM**

Plaintiffs present no substantive opposition to the City’s argument that the sale of the building at 2 Columbus Circle does not violate the public trust doctrine. *See* Def. Memo. of Law at 22 – 26; *cf.* Pl. Memo. of Law at 15 – 17. Indeed, rather than address the relevant case law cited by the City, including the analogous case of *Lefkowitz v. Cornell University*, 35 A.D.2d 166, 316 N.Y.S.2d 264 (4<sup>th</sup> Dep’t 1970), plaintiffs meekly attempt to distinguish *Gewirtz v. City of Long Beach*, 69 Misc. 2d 763, 770 (Sup. Ct. Nassau Co. 1972), *aff’d*, 45 A.D.2d 841, 358

N.Y.S.2d 957 (2d Dep't 1974) (holding dedication to public use must be irrevocable), and reiterate their intentionally deceptive misreading of both the deed conveying title to the City and the Board of Estimate approval. Yet, to establish that the 2 Columbus Circle building has been dedicated to public use, plaintiffs must show that that was the clear and unequivocal intention of both G & W and the City. See, e.g., *Angiolillo v. Town of Greenburgh*, 290 A.D.2d 1, 10, 11, 735 N.Y.S.2d 66 (2d Dep't 2001). The deed, on its face, shows that neither G & W nor the City intended that the building be restricted in any way beyond the 30-year life of G & W's reverter interest.

Plaintiffs' argument is further undercut by the cases they cite. In *Winston v. Scarsdale*, 170 A.D.2d 672, 567 N.Y.S.2d 269 (2d Dep't), *lv. den'd*, 78 N.Y.2d 855 (1991), the court held that 16 acres of land given by a landowner to the Village of Scarsdale had not been dedicated to public use because the documentary evidence made clear that neither the landowner nor the village ever intended to create a park that was less than 32 acres. *Id.* Thus, the decision in *Winston* only highlights the requirement that the intent to dedicate be absolutely clear.

Similarly, the decision in *Kenny v. Board of Trustees*, 289 A.D.2d 534, 735 N.Y.S.2d 606 (2d Dep't 2001), *lv. den'd* 98 N.Y.2d 507 (2002), supports the City's argument that the building at 2 Columbus Circle is not impressed with the public trust. In that case, the court reiterated the truism that "[a] municipality may hold property either in its corporate capacity as an ordinary proprietor or solely for the public use. Whether it can devote any part of its property even temporarily to a private use depends entirely upon the capacity in which it holds title." 289 A.D.2d at 534. While the court determined that the Village of Garden City had condemned certain property for public use, here there has been no condemnation. Rather, the

deed conveying title to “the City, its successors and assigns” clearly conveyed title to the City in its proprietary capacity. *See Lefkowitz v. Cornell University*, 35 A.D.2d at 172.

In sum, plaintiffs have failed to proffer any evidence that the building at 2 Columbus Circle has been dedicated to public use; thus, as a matter of law, there is no restriction on the use of the building but for the optional exercise of the reverter, now owned by EDC. Therefore, the sale does not violate the public trust doctrine and the City does not require the approval or authorization of the State Legislature to sell the building.

## **POINT II**

### **PLAINTIFFS CONCEDE THAT THE BUILDING IS NOT A “PUBLIC PLACE” WITHIN THE MEANING OF THE CITY CHARTER**

Because the building has not been dedicated to public use, the sale of the building in accordance with the requirements of City Charter § 384(b)(4) unquestionably complies with the law, and should be upheld. *See* Def. Memo. of Law at 20 – 22. Significantly, plaintiffs do not respond in any way to, and thus concede, the City’s argument that the building at 2 Columbus Circle is not a “public place” within the meaning of City Charter § 383. *See id.* The notion that the building was a “public place” previously formed the sole basis of plaintiffs’ City Charter claim. Plaintiffs’ abandonment of this argument only underscores the frivolity of this proceeding.

### POINT III

#### THE SALE OF THE BUILDING TO THE MUSEUM DOES NOT VIOLATE THE “GIFT AND LOAN” CLAUSE OF THE STATE CONSTITUTION

##### A. Plaintiffs’ Fail To Identify Any Triable Issue Of Fact That Could Possibly Show That The Sale Of The Building Violates The “Gift and Loan” Clause

Courts in New York State have consistently upheld the City’s right to allocate funds to cultural and other institutions, such as the Museum, where such allocations promote a public purpose. *See* Def. Memo. of Law at 15 - 16 (citing to cases). Indeed, in *680 Fifth Avenue Associates, L.P. v. City Council of the City of New York et al.*, Index No. 107500/01 at 18 (New York Co. 2001) (Abdus-Salaam, J.), annexed to Def. Memo. of Law as Appendix “1,” this Court specifically upheld the constitutionality of a \$65 million capital budget grant to the Museum of Modern Art, reasoning that the public interest in MoMa’s continued presence in New York City far outweighed the incidental private benefit to the museum. *Id.* at 18. Accordingly, the City’s allocation of budgetary funds to the Museum is patently legal.

Plaintiffs fail to rebut, or even address, the legal precedent cited by defendants; similarly, plaintiffs fail to tackle the case law’s statutory underpinnings. *See* General City Law §§ 20(5), 20(16), 21. Rather, plaintiffs cling to their wholly unsubstantiated allegation of “cronyism,” and assert, without basis, that discovery is required to determine whether the City is getting “fair value” for the building. *See* Pl. Memo. of Law at 32. Yet, plaintiffs’ qualms with the terms of the proposed sale are both irrelevant and inaccurate.

City Charter § 384(b)(4) provides that the City can sell the building to EDC for disposition to the Museum without competitive bidding for the price it determines to be in the public interest. While § 384(b)(4) does not excuse the City from compliance with the Gift and Loan clause, here the § 384(b)(4) process has ensured that the proposed sale has undergone

appropriate public reviews and received necessary approvals, and has resulted in the proposed sale of a derelict and vacant building to a valuable cultural institution for a purchase price of approximately \$17 million. It is true, as plaintiffs contend, that that price will be reduced to an amount roughly equal to the building's appraised value of \$15.2 million if the Museum is open within 24 months; on the other hand, if the Museum does not open within 24 months, the City will receive a purchase price that exceeds the appraised value. Smith Aff., ¶¶ 17, 18; Ex. E. In neither instance would the sale violate the Gift and Loan Clause.<sup>1</sup>

In addition, plaintiffs' contention that the Museum's payment over a period of years with interest will result in "the present value of the purchase price [being] far below \$15 million," Pl. Memo. of Law at 31, is incorrect. As with any mortgage, if one discounts the payments with the interest rate, the present value of the payments is the same as the principal. Thus, the purchase money mortgage is not an illegal gift or loan. *See also* Def. Memo. of Law at 17 – 18 (citing to cases not addressed by plaintiffs).

Ultimately, the Gift and Loan clause is not intended to regulate a sale made in good faith, *Van Curler Development Corp. v. City of Schenectady*, 59 Misc. 2d 621, 626, 300

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<sup>1</sup> Plaintiffs' argument that a copy of the appraisal is required to rule on plaintiffs' constitutional claim is a classic feint of misdirection. *See* Pl. Memo. of Law at 32. There is no City Charter mandate nor any other requirement that real property sold pursuant to City Charter § 384(b)(4) be sold for a price equal to or greater than the property's appraised value; nor is there any requirement that property sold pursuant to § 384(b)(4) be sold to the highest bidder. Indeed, the very purpose of the § 384(b)(4) process is to allow the City flexibility to promote and encourage economic development projects, including projects such as the expansion of cultural institutions. *See* Smith Aff. at ¶ 10. Therefore, the appraised value is not essential to determination of the defendants' motion. Nonetheless, to dispel plaintiffs' apparent suspicions regarding the veracity of the appraisal's existence, defendants have annexed the appraisal's "Summary of Salient Facts and Conclusions" to the Supp. Burger Aff. as Exhibit C.

N.Y.S.2d 765 (Sup. Ct. Schenectady Co. 1969), and the City defendants should be accorded deference in this matter. *See* Def. Memo at 17 – 18.

**B. Plaintiffs’ Constitutional Claim is Untimely**

In *Schulz v. Cobleskill-Richmondville Cent. Sch. Dist. Bd. of Educ.*, 197 A.D.2d 247, 252, 610 N.Y.S.2d 694 (3d Dep’t 1992), the Third Department held that a claim brought under the Gift and Loan Clause is subject to the four-month statute of limitations applicable under CPLR § 217(1). Although plaintiffs argue that their claim is timely because the sale itself has not yet been completed, *see* Pl. Memo. of Law at 28 – 29, plaintiffs are, in fact, challenging the terms of the sale approved by the Borough Board on August 24, 2004. *See* Complaint at ¶¶ 23 – 27, 37, 43, 49. Therefore, the appropriate time to raise this claim was within four months of the Borough Board’s approval. *See Young v. Board v. Bd. of Trustees of the Town of Blasdell*, 89 N.Y.2d 846 (1996) (4-month statute of limitations under SEQRA triggered when respondent committed itself to definite course of action).

The holding in *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003), cited by plaintiffs, does not conflict with the statute of limitations imposed by *Schulz* on Gift and Loan Clause actions. In *Saratoga*, the Court of Appeals held that an Article 78 proceeding could not be instituted against the Governor, and therefore the 4-month statute of limitations did not apply to a separation of powers claim against the executive. Here, as in *Schulz*, the claim of a violation of the Gift and Loan Clause has been made against bodies and/or officers clearly subject to Article 78 proceedings, and, as a matter of law, the four month state of limitations bars plaintiffs’ constitutional claim as untimely.

## POINT IV

### PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION UNDER GEN. MUN. LAW § 51

A taxpayer action pursuant to GML § 51 lies “only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes.” *Mesivta of Forest Hills Institute, Inc. v. New York*, 58 N.Y.2d 1014 (1983). While standing to bring a taxpayer action is liberally construed, *see e.g., Holton v. Bd. of Supervisors of the County of Monroe*, 245 A.D. 144, 281 N.Y.S. 350 (4<sup>th</sup> Dep’t 1935) (cited by plaintiffs), “[f]ull force and effect can be given to the statute only by confining it to cases where the acts complained of amount to corruption or fraud.” *Talcott v. City of Buffalo*, 125 N.Y. 280, 288 (1953). Without imposing this limitation, the courts would be overburdened with frivolous cases such as the present one, where individuals purport to act on behalf of the public but in fact aim only to secure their own narrow self-interest.

The case of *Bauer v. City of Niagara Falls*, 262 A.D. 938, 29 N.Y.S.2d 448 (1<sup>st</sup> Dep’t 1941), cited by plaintiffs, is not to the contrary. In that case, the court held that a city’s purchase from an individual of property for which it had no use, at a price that far exceeded the city’s own appraisal, constituted a waste of public resources. *Bauer*, 262 A.D. at 939. Here, defendants seek to sell an underutilized property for a profit of \$15 – 17 million, a value at least approximately equal to its appraised value, and to further facilitate the rejuvenation of Columbus Circle. It cannot reasonably be argued that selling this building for a profit in order for it to retain its original use as a public museum (at a substantial profit to the City), constitutes fraud or waste.

Ultimately, the facts as alleged by plaintiffs fail, under any reasonable interpretation, to state the elements of a claim against the City or EDC sounding in corruption or fraud.

Moreover, plaintiffs are collaterally estopped from asserting this claim, as plaintiff Landmark West has already attempted to argue that the sale of the building violates GML § 51 in the Borough Board litigation. *See* Def. Memo. of Law at 26 – 29. The allegations made in this case are substantially the same as those raised in the Complaint in the Borough Board litigation. A copy of that Complaint is annexed to Supp. Burger Aff. as Exhibit D.

#### **POINT V**

#### **PLAINTIFFS ARE BARRED BY THE DOCTRINE OF RES JUDICATA FROM BRINGING ALL OF THESE CLAIMS**

Under the common-law doctrine of *res judicata*, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy.” *O’Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981). In addition, “[a] judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated . . .” *Schuylkill Fuel Corporation v. B. & C. Nieberg Realty Corp., Inc. et al.*, 250 N.Y. 304, 306-307 (1929) (citations omitted); *Burgess v. Goord*, 285 A.D.2d 753, 755, 729 N.Y.S.2d 203 (3d Dep’t 2001). Here, each one of plaintiffs’ claims could have, and should have, been made in prior litigation, spearheaded by Landmark West, against the City and various City agencies.

Plaintiffs fail to explain why they waited until March 2005 to bring their constitutional challenge to the terms of the sale, when that challenge could have and should have been brought along with plaintiff Landmark West’s challenge to the Borough Board’s approval

in December 2004. Plaintiffs also fail to explain why they waited to bring their public trust and City Charter claims, which could have and should have been brought along with their challenge to the environmental review conducted pursuant to ULURP in November 2003. *See Committee to Save Brighton Beach & Manhattan Beach v. Planning Comm'n of City of New York*, 259 A.D.2d 26, 695 N.Y.S.2d 7 (1<sup>st</sup> Dep't 1999). The delay in bringing these claims was clearly calculated to prolong litigation against the sale of the building.

## POINT VI

### PLAINTIFFS' PROCEDURAL OBJECTIONS TO THE MOTION TO DISMISS ARE WITHOUT MERIT

#### A. Defendants' Motion To Dismiss Was Timely Filed And Served

Plaintiffs argue that the City's motion to dismiss should be denied because it was untimely served. *See* Pl. Memo at 10 – 11. This procedural argument is factually and legally incorrect. Section 320 of the CPLR provides that a defendant must appear within 20 days by serving an answer or making a motion that has the effect of extending the time to answer. The City filed the motion to dismiss by order to show cause in the Ex Parte Part on April 5, 2005, prior to the expiration of the initial 20-day period. *See* Supp. Burger Aff., ¶ 2; Ex. A. The City also brought the order to the assigned judge that same day. Supp. Burger Aff., ¶ 3. Due to circumstances beyond defendants' control, the Order to Show Cause was signed on April 7, 2005, a day after the 20-day period ran. *Id.*; Ex. B.

Pursuant to CPLR § 2214(d), a court “may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein.” Here, the Order to Show Cause directed the City to serve plaintiffs by 5 p.m. on April 11, 2005. Supp. Burger Aff., ¶ 4; Ex. B. The City served plaintiffs on April 8, three days before service was required. *Id.*

**B. Defendants' Motion Papers Sufficiently Specified That Defendants' Seek Dismissal Of The Complaint And The Grounds For Such Dismissal**

Plaintiffs also contend that the City's memorandum of law poses legal arguments that were not specified in its motion papers. *See* Pl. Memo. of Law at 12 – 15. In particular, plaintiffs suggest that three of the City's points were not adequately noticed in the motion papers; namely, the arguments that all of plaintiffs' claims are barred by the doctrine of *res judicata*, that plaintiffs' constitutional claim is barred by the statute of limitations, and that plaintiffs' are collaterally estopped from re-raising their GML claim. *Id.* at 14. Yet, the Order to Show Cause clearly seeks not only dismissal pursuant to CPLR 3211(a) and but also such other relief as the Court deems just and proper. The Burger Aff., on which the Order to Show Cause is in part based, explicitly presents each of the three arguments to which plaintiffs' now object. Burger Aff., ¶¶ 20 – 22. Thus, the lack of a specific reference to CPLR § 3211(a)(5) in the Order to Show Cause does not constitute improper practice.<sup>2</sup> Moreover, this point is moot, as plaintiffs were clearly placed on notice of these claims, and in fact responded extensively to them in their opposition papers. *See* Pl. Memo. of Law at 19 – 30.

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<sup>2</sup> The cases cited to by plaintiffs are inapposite. *See* Pl. Memo. of Law at 14. For instance, in *Rubin v. Rubin*, 72 A.D.2d 536, 421 N.Y.S.2d 68 (1<sup>st</sup> Dep't 1979), the court decided that a motion to dismiss a complaint alleging that a separation agreement is null and void cannot be used to determine whether the complaint also represented a collateral attack on the divorce judgment. In *Northside Studios, Inc. v. Treccagnoli*, 262 A.D.2d 469, 692 N.Y.S.2d 161 (2d Dep't 1999), the Second Department merely noted that the trial court had granted injunctive relief *sua sponte*, in that the party had not requested such relief, nor had it requested such other relief as the court may deem proper. Similarly, in *Condon v. Condon*, 53 A.D.2d 622, 384 N.Y.S.2d 468 (2d Dep't 1976), the Second Department determined that the trial court's division of marital property was an abuse of discretion where neither party requested such relief. Finally, the case of *Alexander Ave. Kosher Restaurant Corp. v. Dragoon*, 306 A.D.2d 298, 782 N.Y.S.2d 101 (2d Dep't 2003), is entirely off-point.

**CONCLUSION**

For the above reasons, defendants respectfully request that the complaint be dismissed, sanctions be imposed on plaintiffs and/or plaintiffs' attorney, and for such other and further relief as the Court deems just and proper.

Dated: New York, New York  
May 10, 2005

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

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LANDMARK WEST!, BOARD OF MANAGERS OF  
THE PARC VENDOME CONDOMINIUM, STUART  
URAM, TERI SLATER and HILDA M. REGIER,

Plaintiffs,

- against -

THE CITY OF NEW YORK and NEW YORK CITY  
ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

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Index No. 103689/05

IAS Part 5

(Stallman, J.)

**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’  
JUDICIALLY CONVERTED MOTION FOR SUMMARY JUDGMENT**

**Preliminary Statement**

Defendants City of New York and New York City Economic Development Corporation (“EDC”) (collectively, “City”) submit this Supplemental Memorandum of Law in response to the Interim Order of Justice Michael D. Stallman, dated May 16, 2005. Pursuant to CPLR 3211(c) the Interim Order converted the City’s motion to dismiss the Complaint into a motion for summary judgment on all the issues raised in the motion to dismiss.

In this action, plaintiffs claim that the City of New York’s sale of the building at 2 Columbus Circle to the Museum of Arts and Design (“Museum”) violates the common law public trust doctrine, the New York City Charter, the New York State Constitution, and the General Municipal Law. In support of these patently frivolous claims, plaintiffs cobble together a series of conclusory statements and unfounded allegations in the vain hope that their opposition to the Museum’s renovation of the building’s façade will stop the sale. Despite plaintiffs’ attempt to derail the project, however, EDC and the Museum have signed a Contract of Sale, dated May 24, 2005, which, on its closing, will enable the Museum to move into the building and

expand its offerings to the public, thereby furthering the City's ongoing rejuvenation of the Columbus Circle area. The terms of the Contract of Sale comport with the terms approved by the Manhattan Borough Board on August 24, 2004, which plaintiffs originally challenged and which the City has demonstrated comply with all legal requirements.

Given the absence of any material facts warranting a trial and the City's entitlement to judgment as a matter of law on each of plaintiffs' claims, summary judgment should be granted to the City and sanctions imposed on plaintiffs or plaintiffs' counsel.

### **Statement of Facts**

For a complete recitation of the relevant facts to this case, the City respectfully refers the Court to the Affidavit of Neal Smith, sworn to April 4, 2005 ("Smith Aff."), and the exhibits annexed thereto; the Affirmation of Michael Burger, dated April 4, 2005 ("Burger Aff."), and the exhibits annexed thereto; the Affidavit of Jerome Chazen, sworn to April 4, 2005, and the exhibit annexed thereto; the Memorandum of Law in Support of Defendants' Motion to Dismiss ("Def. Memo. of Law"); the Supplemental Affirmation of Michael Burger, dated May 10, 2005 ("Supp. Burger Aff.") and the exhibits annexed thereto; the Reply Memorandum of Law in Support of Defendants' Motion to Dismiss ("Reply Memo. of Law"); and the Supplemental Affidavit of Neal Smith, sworn to May 26, 2005 ("Supp. Smith Aff."), and the exhibits annexed thereto.

## **ARGUMENT**

### **POINT I**

#### **THE STANDARD OF REVIEW IN A MOTION FOR SUMMARY JUDGMENT**

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact.” *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. *Zuckerman*, 49 N.Y.2d at 562. Although the papers submitted in support of and in opposition to a motion for summary judgment are examined in a light most favorable to the party opposing the motion, *Martin v Briggs*, 235 A.D.2d 192, 196, 663 N.Y.S.2d 184 (1st Dept. 1997), mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman v City of New York*, 49 N.Y.2d at 562.

## POINT II

### THE SALE OF THE BUILDING AT 2 COLUMBUS CIRCLE DOES NOT VIOLATE THE COMMON LAW PUBLIC TRUST DOCTRINE

Plaintiffs’ argument that the sale of the building at 2 Columbus Circle to the Museum violates the common law public trust doctrine lacks any basis whatsoever in fact or law. *See* Def. Memo. of Law at pp. 22 – 26; Reply Memo. of Law at pp. 2 – 4; *cf.* Pl. Memo. of Law at 15 – 17. To establish that the building at 2 Columbus Circle has been dedicated for public use, and thus, vested with the protection of the public trust doctrine, plaintiffs must prove that such dedication was the clear and unequivocal intention of both G & W and the City. *Angiolillo v. Town of Greenburgh*, 290 A.D.2d 1, 10, 11, 735 N.Y.S.2d 66 (2d Dep’t 2001); *Gewirtz v City of Long Beach*, 69 Misc. 2d 763, 770, (Sup. Ct. Nassau Co. 1972), *aff’d*, 45 A.D.2d 841, 358 N.Y.S.2d 957 (2d Dep’t 1974). Both the July 1980 Deed of Correction conveying title of the building to the City and the March 1980 Board of Estimate resolution approving the City’s

acceptance of the building, however, show that there was no such intention. Rather, the deed conveys title to “the City, its successors and assigns,” and the restriction on the building’s use was designed to devolve upon the expiration of G & W’s reverter interest. *See* Smith Aff., Exs. A and B. Each of these factors indicates that the building at 2 Columbus Circle was never intended to be dedicated for perpetual public use. *See, e.g., Lefkowitz v. Cornell University*, 35 A.D.2d 166, 316 N.Y.S.2d 264 (4<sup>th</sup> Dep’t 1970).

Despite the governing language and obvious significance of the Deed and the Board of Estimate’s resolution, plaintiffs premise their public trust claim on a calculated misreading of the plain language contained in these same documents. As there are no issues of fact regarding the basis of the common law public trust claim, the City is entitled to summary judgment on this issue as a matter of law.

### **POINT III**

#### **THE SALE OF THE BUILDING AT 2 COLUMBUS CIRCLE DOES NOT VIOLATE CITY CHARTER § 383**

Because the building at 2 Columbus Circle has not been dedicated to public use, its sale in accordance with the requirements of City Charter § 384(b)(4) unquestionably complies with City Charter § 383. *See* Def. Memo. of Law at 20 – 22; Reply Memo. of Law at 4. Originally, plaintiffs argued that the sale violated City Charter § 383 because that section declares that “the rights of the City in and to its . . . public places are . . . inalienable.” *See* Complaint at ¶¶ 40 – 44. However, “public places” in New York City must be shown on the City Map, *see* City Charter § 202, and must be placed under the jurisdiction of the Parks Department for purposes of management and care. *See* N.Y. City Charter § 533(a)(1) – (9). Plaintiffs have failed to produce any evidence that the building at 2 Columbus Circle satisfies

these or any other requirements for establishing a public place. Accordingly, the City is entitled to judgment as a matter of law dismissing plaintiffs' City Charter alienation claim.

#### POINT IV

### **THE SALE OF THE BUILDING AT 2 COLUMBUS CIRCLE DOES NOT VIOLATE THE GIFT AND LOAN CLAUSE OF THE NEW YORK STATE CONSTITUTION**

Plaintiffs' claim that the sale of the building at 2 Columbus Circle violates Article VIII, § 1 of the New York State Constitution (the "Gift and Loan" clause), is wholly without merit. *See* Def. Memo. of Law at 15 – 18; Reply Memo. of Law at 5 – 7. EDC and the Museum have entered into a contract of sale for a sum greater than, or approximately equal to, the building's appraised value. *See* Supp. Smith Aff., ¶ 2, Ex. A; Smith Aff., ¶ 17, Ex. E. Such a price cannot reasonably be said to constitute an illegal gift or loan. Indeed, courts have refused to employ the Gift and Loan clause to "regulate the price or adequacy of the consideration of sales of public property made in good faith." *Van Curler Development Corp. v. City of Schenectady*, 59 Misc.2d 621, 626, 300 N.Y.S.2d 765 (Sup. Ct. Schenectady Co. 1969). Plaintiffs have failed to proffer any evidence suggesting that the sale price was not negotiated in good faith. Thus, the specific terms of the sale, including the purchase money mortgage, which have all undergone extensive public scrutiny and met with approval on all levels, comply with the law.

Moreover, courts in New York State have consistently affirmed the City's statutory right to allocate funds to assist cultural and other institutions, such as the Museum, where such allocations promote a public purpose. *See* Def. Memo. of Law at 15 - 16 (citing to cases); *680 Fifth Avenue Associates, L.P. v. City Council of the City of New York et al.*, Index No. 107500/01 at 18 (New York Co. 2001) (Abdus-Salaam, J.), annexed to Def. Memo. of Law

as Appendix “1”; *see also* General City Law §§ 20(5), 20(16) and 21, and City Charter § 384(b)(4). Thus, the City’s budgetary allocations to the Museum referenced in the separate Funding Agreement, *see* Supp. Smith Aff. at ¶ 5, are lawful.

In addition, plaintiffs’ challenge to the terms of the sale approved by the Borough Board on August 24, 2004, *see* Complaint at ¶¶ 23 – 27, 37, 43, 49, is barred by the four-month statute of limitations applicable under CPLR § 217(1). *Schulz v. Cobleskill-Richmondville Cent. Sch. Dist. Bd. of Educ.*, 197 A.D.2d 247, 252, 610 N.Y.S.2d 694 (3d Dep’t 1992); *see also* Def. Memo. of Law at 18 – 20; Reply Memo. of Law at 7.<sup>1</sup>

Ultimately, despite their attempt to fabricate an issue of fact over the appraised value of the building, *see* Pl. Memo. of Law at 32, plaintiffs have failed to identify any material issue of fact requiring a trial. *See* Reply Memo. of Law at 6, fn. 1. Nor have they articulated any cognizable legal basis for their claim. Accordingly, defendants are entitled to judgment as a matter of law dismissing plaintiffs’ constitutional claim.

#### **POINT V**

#### **PLAINTIFFS ARE BARRED BY THE DOCTRINE OF RES JUDICATA FROM BRINGING ALL OF THESE CLAIMS**

The doctrine of *res judicata* bars each one of plaintiffs’ claims because each claim could have, and should have, been made in prior litigation instigated by plaintiff Landmark West challenging the sale of the building at 2 Columbus Circle to the Museum. *See* Def. Memo. of Law at 10 – 14, Reply Memo. of Law at 9 – 10. Under the common-law doctrine of *res judicata*,

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<sup>1</sup> As noted in the Preliminary Statement, EDC and the Museum have only recently entered into a Contract of Sale, dated May 24, 2005, the terms of which comport with those approved by the Borough Board. Supp. Smith Aff., ¶ 4, Ex. A.

“once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy.” *O’Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981); *see also Schuylkill Fuel Corporation v. B. & C. Nieberg Realty Corp., Inc. et al.*, 250 N.Y. 304, 306-307 (1929) (“[a] judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated”); *Burgess v. Goord*, 285 A.D.2d 753, 755, 729 N.Y.S.2d 203 (3d Dep’t 2001).

Despite their own previous lawsuits and press campaigns, plaintiffs waited until March 2005 to bring these claims. Yet, the constitutional challenge to the terms of the proposed sale could have and should have been brought along with plaintiff Landmark West’s challenge to the Borough Board’s approval in December 2004. Plaintiffs’ public trust and City Charter claims could have and should have been brought even earlier, with plaintiff Landmark West’s November 2003 challenge to the environmental review of the proposed sale. *See Committee to Save Brighton Beach & Manhattan Beach v. Planning Comm’n of City of New York*, 259 A.D.2d 26, 695 N.Y.S.2d 7 (1<sup>st</sup> Dep’t 1999). The delay in bringing these claims was clearly calculated to prolong litigation against the sale of the building in the hopes of sinking the project; such practice should be discouraged.

#### POINT VI

**PLAINTIFFS ARE COLLATERALLY ESTOPPED FROM BRINGING AN ACTION UNDER GENERAL MUNICIPAL LAW § 51, AND HAVE, IN ANY EVENT, FAILED TO STATE A CAUSE OF ACTION UNDER THAT STATUTE**

Plaintiffs are collaterally estopped from asserting a claim pursuant to GML § 51 because plaintiff Landmark West has already attempted to argue that the proposed sale of the

building violates GML § 51 in the Borough Board litigation. *See* Def. Memo. of Law at 26 – 29; Def. Reply Memo. of Law at 9. That claim was dismissed because the facts alleged could not reasonably be said to amount to a violation of GML § 51. *See* Burger Aff., Ex. H. The allegations made in this case are substantially the same as those raised in the Complaint in the Borough Board litigation. *See* Supp. Burger Aff. as Exhibit D.

Even if plaintiffs were not collaterally estopped, however, they nonetheless have failed to produce any facts that support their claim. A taxpayer action pursuant to GML § 51 lies “only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes.” *Mesivta of Forest Hills Institute, Inc. v. New York*, 58 N.Y.2d 1014 (1983). While standing to bring a taxpayer action is liberally construed, *see e.g., Holton v. Bd. of Supervisors of the County of Monroe*, 245 A.D. 144, 281 N.Y.S. 350 (4<sup>th</sup> Dep’t 1935) (cited by plaintiffs), “[f]ull force and effect can be given to the statute only by confining it to cases where the acts complained of amount to corruption or fraud.” *Talcott v. City of Buffalo*, 125 N.Y. 280, 288 (1953). Without imposing this limitation, the courts would be overburdened with frivolous cases, such as the case at hand. Plaintiffs have not offered any evidence whatsoever of fraud, corruption or illegality.

**CONCLUSION**

For the above reasons, defendants respectfully request that summary judgment be granted, sanctions be imposed on plaintiff Landmark West and/or plaintiffs' attorney, and for such other and further relief as the Court deems just and proper.

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