

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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In the Matter of Application of :

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

Index No.
IAS Justice

VERIFIED
PETITION

Petitioners, :

-against- :

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

Respondents. :

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

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Gavin Kearney, Esq. and Christina Giorgio, Esq., New York Lawyers for the Public
Interest, 151 W. 30th Street, 11th Floor, New York, New York 10001-4017, (212) 244-4664.

Petitioners, by and through their attorneys, NEW YORK LAWYERS FOR THE PUBLIC
INTEREST and SCHINDLER COHEN & HOCHMAN LLP, as and for their Verified Petition
pursuant to CPLR Article 78, respectfully allege as follows:

1. This is a special proceeding brought against Respondents pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”).

2. This action arises from the New York City Industrial Development Agency’s (“IDA”) discretionary decision to provide approximately \$83 million in tax subsidies and other financial assistance to Fresh Direct, the online home delivery grocer, for the purpose of relocating its operations from Long Island City, Queens to the Harlem River Yard in the South Bronx and the IDA’s issuance of a Negative Declaration in which the IDA found there was no possibility that the Fresh Direct project would have any adverse environmental impact.

3. This proceeding arises out of Respondents’ failure to comply with the New York State Environmental Quality Review Act (“SEQRA”), Environmental Conservation Law (“ECL”) §§ 8-1-1, *et. seq.*, 6 NYCRR §§ 617, *et. seq.*, and the City Environmental Quality Review (“CEQR”), established by Executive Order No. 91 of 1977 and governed by the Rules of the City of New York, Title 62, Chapter 5, and the CEQR Technical Manual (“CEQR TM”) with respect to the issuance of these subsidies, which will enable Fresh Direct’s relocation to the South Bronx.

4. Pursuant to CPLR Article 78 and Section 3001, Petitioners seek: (a) to annul IDA’s December 2011 Environmental Assessment Statement (the “EAS”) and its February 14, 2012 Negative Declaration; (b) a judgment, order, and declaration finding Respondent IDA’s issuance of a Negative Declaration for the Fresh Direct Project (the “Project”) was a violation of law, arbitrary and capricious and an abuse of discretion; (c) an order to compel IDA to prepare a new Environmental Impact Statement (“EIS”) for the Project or, alternatively, an order to prepare a Supplemental Environmental Impact Statement (“SEIS”); (d) an award to Petitioners of the costs of this proceeding, including reasonable attorney fees; and (e) an award of such

other and further relief as this Court deems just and proper. True and correct copies of the Negative Declaration adopted February 14, 2012, the Negative Declaration published in the Environmental Notice Bulletin on May 16, 2012, and the EAS dated December 2011 are attached hereto as Exhibit A, Exhibit B and Exhibit C, respectively.

THE PARTIES

5. Petitioner Ivelyse Andino is a lifelong South Bronx resident and member of South Bronx Unite!, who lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Ms. Andino suffers from asthma and allergies, conditions that are caused and aggravated by particulate emissions and other air pollutants. Her quality of life will be adversely affected as she is active in the neighborhood and uses the parks in the vicinity of the Harlem River Yard. *See* Ivelyse Andino Affidavit, attached hereto as Exhibit D.

6. Petitioner Ruben Austria is a South Bronx resident and an individual citizen taxpayer as that term is defined in section 123-a of the State Finance Law, who lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Mr. Austria's health and his ability to use the parks and waterfront in the vicinity of the proposed Harlem River Yard would be adversely affected by the increased truck traffic that Fresh Direct would introduce into his neighborhood. *See* Ruben Austria Affidavit, attached hereto as Exhibit E.

7. Petitioner Nieves Ayress is a South Bronx resident who resides and works in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Ms. Ayress is executive director and co-founder of Movimiento la Pena Del Bronx, a multicultural community organization in the South Bronx. Ms. Ayress and her family suffer from respiratory problems, including recurrent asthma episodes. Ms. Ayress's quality of life and health will be further adversely affected by the implementation of the Fresh Direct site at Harlem River Yard as it will impede access to green space. *See* Nieves Ayress Affidavit, attached hereto as Exhibit F.

8. Petitioner Melissa Barber is a lifelong South Bronx resident and member of South Bronx Unite!, who lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Ms. Barber's daughter, who lives and attends school in the South Bronx, suffers from frequent asthma attacks. Their quality of life will be adversely affected as they are active in the neighborhood and Fresh Direct's proposed move to the site at Harlem River Yard will negatively affect their ability to access open green spaces. *See* Melissa Barber Affidavit, attached hereto as Exhibit G.

9. Petitioner Amber Bennett is a South Bronx resident who lives and teaches at a middle school in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Ms. Bennett is an individual citizen taxpayer as those terms are defined in section 123-a of the State Finance Law. She frequents the restaurants and shops on Bruckner Boulevard, next to the proposed Fresh Direct site at the Harlem River

Yard and would be adversely affected by the increased traffic congestion and pollutants associated with the Fresh Direct trucks. *See* Amber Bennett Affidavit, attached hereto as Exhibit H.

10. Petitioner Harry Bubbins is a long-time South Bronx resident who resides in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Mr. Bubbin's health and ability to use the parks and waterfront in the vicinity of the proposed Harlem River Yard would be adversely affected if Fresh Direct moved to the Harlem River Yard. *See* Harry Bubbins Affidavit, Individually and in His Capacity as Executive Director of Friends of Brook Park, attached hereto as Exhibit I.

11. Petitioner Daniel Chervoni is a lifelong South Bronx resident and member of South Bronx Unite!, who lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Mr. Chervoni's health and quality of life would be adversely affected by the Fresh Direct project as he suffers from asthma, a condition caused or aggravated by particulate emissions and other air pollutants. Mr. Chervoni is an individual citizen taxpayer as those terms are defined in section 123-a of the State Finance Law. *See* Daniel Chevroni Affidavit, attached hereto as Exhibit J.

12. Petitioner Dirk Ewers is a South Bronx resident and member of South Bronx Unite!, who lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Mr. Ewers volunteers with Friends of Brook Park and his ability to use the parks and waterfront with the youth groups that come to the park would

be adversely affected by the increased truck traffic that Fresh Direct would introduce into the neighborhood. Mr. Ewers is also an individual citizen taxpayer as those terms are defined in section 123-a of the State Finance Law. *See* Dirk Ewers Affidavit, attached hereto as Exhibit K.

13. Petitioner Friends of Brook Park is a non-profit community based organization working to restore nature to the South Bronx and is located in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Friends of Brook Park offers environmental education to local schools and community members, sponsoring canoeing and other water-based activities along the Harlem and Bronx Rivers and the Bronx Kill. *See* Harry Bubbins Affidavit, Individually and in His Capacity as Executive Director of Friends of Brook Park, attached hereto as Exhibit I.

14. Petitioner Eduardo Garcia is a South Bronx resident who lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. His quality of life will be adversely affected as he frequents the parks in the vicinity of the Harlem River Yard. Mr. Garcia is also an individual citizen taxpayer as those terms are defined in section 123-a of the State Finance Law. *See* Eduardo Garcia Affidavit, attached hereto as Exhibit L.

15. Petitioner Libertad Guerra is a South Bronx resident who lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. She rides her bicycle for recreation and transportation, and her safety and health would be adversely affected by the increased truck traffic that Fresh Direct would introduce into

her neighborhood. Ms. Guerra is expecting a child and is also concerned about the effects of increased pollution on the health of her child. Ms. Guerra is also an individual citizen taxpayer as those terms are defined in section 123-a of the State Finance Law. *See* Libertad Guerra Affidavit, attached hereto as Exhibit M.

16. Petitioner Danielle Jackson is an individual citizen taxpayer as that term is defined in section 123-a of the State Finance Law, and she works and lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. *See* Affidavit of Danielle Jackson Affidavit, attached hereto as Exhibit N.

17. Petitioner Arthur Mychal Johnson is a South Bronx resident and member of Bronx Community Board 1 who lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Fresh Direct's proposed move to the South Bronx would negatively impact Mr. Johnson and his family in their recreational pursuits in the vicinity of the Harlem River Yard (including bicycle riding, canoeing, kayaking, and fishing), their health, and their ability to safely navigate local streets. Petitioner is a member of South Bronx Unite! and an individual citizen taxpayer as that term is defined in section 123-a of the State Finance Law. *See* Arthur Mychal Johnson Affidavit, Individually and in His Capacity as representative of South Bronx Unite!, attached hereto as Exhibit O.

18. Petitioner Lily Kesselman is a South Bronx resident and a member of South Bronx Unite! who lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Ms. Kesselman's health, her opportunities to

use the parks and waterfront in the vicinity of the proposed Harlem River Yard, and her ability to safely navigate local streets would be adversely affected by the increased truck traffic that Fresh Direct would introduce into her neighborhood. *See Lily Kesselman Affidavit*, attached hereto as Exhibit P.

19. Petitioner Corrine Kohut, a South Bronx resident and member of South Bronx Unite!, lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Ms. Kohut's health and her ability to use the parks and waterfront in the vicinity of the proposed Harlem River Yard would be adversely affected by the increased truck traffic that Fresh Direct would introduce into her neighborhood. *See Corrine Kohut Affidavit*, attached hereto as Exhibit Q.

20. Petitioner Colleen Lonergan, a South Bronx resident, an individual citizen taxpayer as that term is defined in section 123-a of the State Finance Law, and a member of South Bronx Unite!, lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Ms. Lonergan's health and her ability to use the parks, waterfront, and shopping area in the vicinity of the Harlem River Yard would be adversely affected by the increased truck traffic that Fresh Direct would introduce into her neighborhood. *See Colleen Lonergan Affidavit*, attached hereto as Exhibit R.

21. Petitioner Angel Lopez, a South Bronx resident and member of South Bronx Unite!, lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Petitioner's health and that of his family, his access

to the parks, waterfront, and shopping area in the vicinity of the Harlem River Yard, and his ability to safely commute to work on his bicycle would be adversely affected by the increased truck traffic that Fresh Direct would introduce into the neighborhood. *See* Angel Lopez Affidavit, attached hereto as Exhibit S.

22. Petitioner Movimiento La Pena del Bronx is an unincorporated multicultural, multiracial community organization that seeks to empower the marginalized groups in the South Bronx, and is located in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. The organization is active in the South Bronx neighborhood, advocating for cleaner air, more green space and more equitable distribution of polluting facilities. *See* Nieves Ayress Affidavit, Individually and in Her Capacity as Executive Director of Movimiento La Pena del Bronx, attached hereto as Exhibit F.

23. Petitioner Neyla Orozco, a South Bronx resident, an individual citizen taxpayer as that term is defined in section 123-a of the State Finance Law, and a member of South Bronx Unite!, lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Ms. Orozco's health and that of her family, their access to the parks, waterfront, and shopping area in the vicinity of the proposed Harlem River Yard, and their ability to navigate the streets safely would be adversely affected by the increased truck traffic that Fresh Direct would introduce into the neighborhood. *See* Neyla Orozco Affidavit, attached hereto as Exhibit T.

24. Petitioner Pueblo en Marcha is a longstanding community based organization in the South Bronx and is located in the area that would be directly and adversely affected by

increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. The group provides services to the community and is dedicated to promoting education, open space initiatives, tenants' rights and affordable housing. *See* Neyda Franco Affidavit, Individually and in Her Capacity as Executive Director of Pueblo en Marcha, attached hereto as Exhibit U.

25. Petitioner Marty Rogers, a lifelong South Bronx resident and an individual citizen taxpayer as that term is defined in section 123-a of the State Finance Law, lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Mr. Rogers' health, his access to the parks, waterfront, and shopping area in the vicinity of the proposed Harlem River Yard, and his ability to navigate the streets safely would be adversely affected by the increased truck traffic that Fresh Direct would introduce into the neighborhood. *See* Marty Rogers Affidavit, attached hereto as Exhibit V.

26. Petitioner Juan Carlos Taiano, a South Bronx resident, lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Mr. Taiano's health would be adversely affected by the increased truck traffic that Fresh Direct would introduce into the neighborhood, particularly since he and his wife are elderly, and Mr. Taiano has respiratory issues, eye irritation, and cardiovascular disease. Furthermore, the Fresh Direct project poses a threat to Mr. Taiano's access to the parks, waterfront, and shopping area in the vicinity of the proposed Harlem River Yard, and his ability to navigate the streets safely. *See* Juan Carlos Taiano Affidavit, attached hereto as Exhibit W.

27. Petitioner Daniel Wallace, a South Bronx resident, an individual citizen taxpayer as that term is defined in section 123-a of the State Finance Law, and a member of South Bronx Unite!, lives in the area that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Petitioner's health, his access to the parks, waterfront, and shopping area in the vicinity of the proposed Harlem River Yard, and his ability to navigate the streets safely would be adversely affected by the increased truck traffic that Fresh Direct would introduce into the neighborhood. *See* Daniel Wallace Affidavit, attached hereto as Exhibit X.

28. Petitioner South Bronx Unite! is an unincorporated coalition of South Bronx residents, organizations, and allies that brings interested parties together to collaborate on improving and protecting the neighborhood. Its members reside within areas that would be directly and adversely affected by increased pollution, traffic, emissions, noise, and other adverse environmental impacts from the proposed Fresh Direct relocation to the Harlem River Yard. Many South Bronx Unite! members have respiratory or other illnesses that are caused and exacerbated by particulate emissions and other air pollutants. *See* Arthur Mychal Johnson Affidavit, Individually and in His Capacity as representative of South Bronx Unite!, attached hereto as Exhibit O.

29. Respondent New York City Industrial Development Agency is a corporate governmental agency of the State of New York, constituting a corporate and politic body and a public benefit corporation, created by and having the powers and functions set forth in the General Municipal Law, Article 18-A, and Section 917 thereunder. IDA has an office within the New York City Economic Development Corporation ("EDC") at 110 William Street, New York,

NY 10038. IDA is the lead agency for the Fresh Direct project and issued a Negative Declaration on February 14, 2012. As lead agency, IDA is responsible for ensuring compliance with SEQRA and CEQR.

30. Respondent New York State Department of Transportation (“DOT”) is an agency of the State of New York having an office at 50 Wolf Road, Albany, NY 12232. DOT is the landowner of the Harlem River Yard and the Lessor on the Lease of the Harlem River Yard.

31. Respondent Empire State Development Corporation (“ESDC”) is a public authority of the State of New York having an office at 633 Third Avenue, New York, NY 10017. Fresh Direct has submitted an application for financial assistance to ESDC in relation to its proposed move from Long Island City to the South Bronx.

32. Respondent Fresh Direct LLC is an online food and grocery retailer operating in New York and New Jersey, and having an office at 23-30 Borden Avenue, Long Island City, NY 11101. Fresh Direct’s plan to move its corporate headquarters and shipping facility to the Harlem River Yard and its application to the IDA for financial assistance is the subject of this Verified Petition.

33. Respondent UTF Trucking, Inc. is the trucking division of Fresh Direct, having an office at 23-30 Borden Ave., Long Island City, NY 11101-4515, and its application to the IDA for financial assistance is the subject of this Verified Petition.

34. Respondent Harlem River Yard Ventures, Inc. (“Ventures”) is a corporation organized and existing under the laws of the State of Delaware and is authorized to conduct business in the State of New York. Ventures has an office at 98 Lincoln Avenue, Bronx, NY 10454-4426 and is the Lessee of the Harlem River Yard.

JURISDICTION AND VENUE

35. This Court has jurisdiction to hear this proceeding pursuant to CPLR § 7801. Venue is proper in Bronx County pursuant to CPLR § 506(b) because the Harlem River Yard, the proposed site for the Fresh Direct project, is located in Bronx County.

TIMELINESS OF ACTION

36. This action is timely commenced as IDA adopted its Negative Declaration on February 14, 2012 and provided public notice of its Negative Declaration in the New York State Department of Environmental Conservation Environmental Notice Bulletin on May 16, 2012.

FACTUAL BACKGROUND

A. Mott Haven and Port Morris Residents Suffer from Staggering Rates of Asthma and Other Health Problems Associated with Environmental Pollution.

37. Harlem River Yard is located along the waterfront in the Mott Haven and Port Morris neighborhoods of the South Bronx. The South Bronx, one of the poorest congressional districts in the nation, is burdened with a disproportionate amount of New York City's polluting facilities, including waste transfer stations, power plants, distribution warehouses, and other industry. In addition, the Triborough Bridge (RFK), the Bruckner Expressway and the Major Deegan Expressway girdle the Mott Haven and Port Morris neighborhoods exposing residents to high levels of traffic-related pollution. Due to these environmental exposures, residents of the South Bronx suffer from some of the highest rates of asthma in the nation. The recent State of the Air Report issued in April 2012 by the American Lung Association shows a high percentage of vulnerable population members in the Bronx. Specifically, more than 20% of residents in the Bronx are children and more than 10% are older than 65 years old. Furthermore, there are more than 30,000 cases of pediatric asthma, more than 100,000 cases of adult asthma and more than

40,000 cases of chronic bronchitis in the Bronx. Cardiovascular disease, which has clearly been associated with poor air quality and more directly with fine particulate matter, i.e. PM 2.5, is prevalent in the Bronx, affecting 20% of the total population (more than 300,000 cases). Asthma rates in the Bronx are eight times higher than the national average. *See* Affidavit of Dr. Leopoldo Segal in Support of Verified Petition (“Segal Aff.”), sworn to June 11, 2012, attached hereto as Exhibit Y, ¶ 4.

B. History of the Harlem River Yard and the Intermodal Terminal

38. New York City and the adjacent region east of the Hudson River have the lowest rate of rail-freight use in the country. The region’s consequent dependence on trucking imposes steep penalties on local businesses and residents. Traffic-generated delays cost businesses and consumers billions of dollars a year. Truck-transported freight, with its high levels of airborne emissions, has contributed to very high rates of asthma and other ailments in corridors closest to major highways, such as the South Bronx. Moreover, truck-transported freight has caused significant damage to the region’s roads, costing the State hundreds of millions of dollars in maintenance. *See* Affidavit of Benjamin Miller in Support of Verified Petition (“Miller Aff.”), sworn to June 7, 2012, attached hereto as Exhibit Z, at ¶ 3.

39. The lack of freight-rail service in the downstate New York region has meant that rail freight originating anywhere west of the Hudson River that is ultimately destined for east-of-Hudson markets must stop at a rail yard in Pennsylvania or New Jersey to have the freight containers or trailers (the boxes that hold the freight) removed from the railcars and placed on trucks. The containers or trailers are then trucked east across the Hudson River to their final destination, or to warehouses west of the Hudson from which the majority of inbound freight is shipped in smaller trucks to east-of-Hudson locations. *Id.* at ¶ 4.

40. To address New York City's lack of rail freight service, in 1982, the New York State Department of Transportation purchased the Harlem River Yard, a 96-acre waterfront piece of land located in the South Bronx. DOT originally envisioned using the Yard as a "trailer on flatcar" ("TOFC") freight terminal. *Id.* at ¶ 5.

41. The purpose of the intermodal terminal at the Harlem River Yard, part of the State's Full Freight Access Program, was to allow freight to remain on railcars as it traveled east across the Hudson rather than stopping in Pennsylvania or New Jersey for transfer onto trucks which would continue eastbound across the Hudson, most commonly across the George Washington Bridge. Traffic congestion, air pollution, and damage to the region's transportation infrastructure were all to be relieved by removing these trucks hauling freight east across the Hudson River. *Id.* at ¶ 6.

42. To help implement the Full Freight Access Program, DOT, the City of New York ("City") and the Port Authority committed significant sums of public funds for the construction of the Harlem River Yard and the Oak Point Link ("the Link"), a connecting track between Highbridge and the Harlem River Yard. The Oak Point Link would make it possible to avoid the "zig-zag route" that crossed three of the world's busiest passenger tracks which limited freight movement to a few late-night/early morning hours and required a double-back reverse movement for entering the Harlem River Yard. Specifically, DOT, the Port Authority, and the City have invested over \$300 million in public funds in these two projects. *Id.* at ¶ 7.

43. As the flagship projects in the State's plan to keep freight on rail while heading east across the Hudson, Harlem River Yard and the Link were expected to reduce total shipping costs in the region by more than \$100 million per year, create more than 5,000 permanent jobs, reduce air pollution by decreasing truck traffic on the region's highways, and avoid \$500 million

in road improvements. Both projects were expected to be completed by the end of 1987; however, due to construction and financing challenges, DOT stopped the construction at the Link and Harlem River Yard. *Id.* at ¶ 8.

44. Based upon a report prepared by consultants Temple, Baker and Sloane (“TBS”), in 1989, the DOT introduced a scaled down plan for an intermodal terminal at the Harlem River Yard. The TBS Plan, set forth in a Request for Proposals and attached to the Lease, called for the short-term development of a privately operated intermodal terminal and industrial park. Among the four proposals submitted, the DOT selected Harlem River Yard Ventures, Inc. to develop the Yard, as its proposal presented the clearest plan for the intermodal terminal. *Id.* at ¶ 9.

C. DOT Enters 99-Year Lease with Harlem River Yard Ventures to Develop an Intermodal Terminal to Provide Freight Rail Service for the New York Metropolitan Area.

45. In August 1991, the DOT entered into a 99-year lease with Ventures. According to the DOT’s consultants, the lease contained excessively favorable terms for Ventures including: a) well below market rent, b) a 99-year term amounting to a transfer of property when a 10- to 40-year term was the industry standard, and 3) no risk assumed by Ventures because the Lease allowed it to use public funds to develop the land despite promises by Ventures that it would use private capital. *See State of New York Office of State Comptroller Division of Management Audit, Staff Study: The Viability of the Oak Point Link and Harlem River Projects*, true and correct copy is attached hereto as Exhibit AA, at 16-19.

46. The DOT’s articulated reason for giving such favorable terms to Ventures was that the Yard presented the last opportunity to bring an intermodal freight yard to NYC and in so doing remove from the road tens of thousands of trucks currently driving through the City by transferring their freight load at the Yard rather than in New Jersey.

47. Under the Lease, Venture is to pay 6% of gross revenues or \$400,000, whichever is greater. For the first five years of the Lease, Ventures paid no rent. *Id.* at 18. According to its December 31, 2011 rental statement prepared for the DOT, for the first quarter of the 19th year of the Lease, Ventures collected \$1,390,805 in total gross rental revenues at the Harlem River Yard. For this same quarterly period, Ventures paid the DOT \$129,452 in rent. *See* Harlem River Yard Ventures December 2011 Quarterly Rent Statements, a true and correct copy is attached hereto as Exhibit BB.

48. Section 6.01 of the Lease provides that Ventures, the Tenant:

recognizes and concurs with the Landlord's purpose and intent to have the Tenant develop and operate the Harlem River Yard in the public interest as a transportation and distribution related facility consistent with the terms and conditions set forth in the State of New York Department of Transportation Request for Proposal (RFP) dated September 29, 1989. In particular, Tenant recognizes and concurs with the Landlord's goal of the use of the Leased Premises in connection with improving East of the Hudson River rail access and the removing of trucks from local highways and bridges. Tenant further recognizes that the Department's interest in leasing the leased Premises is as set forth in the RFP.

See Lease at 51, a true and correct copy attached hereto at Exhibit CC.

49. Section 6.02 of the 1991 Lease defines "Intermodal Services" as:

The systematic merging of different modes of transportation into an operation which permits the efficient movement of freight. Intermodal services for context of this Lease shall primarily involve the direct exchange of freight between rail and the highway transportation modes, and the interchange of truck trailers or containers on a railroad car or its equivalent to motor carrier pick-up and/or delivery purposes.

Id. at 52.

50. In response to an Article 78 petition filed in 1994¹ challenging the validity of the Lease, Bruce Blackie, Deputy Assistant Commissioner of Rail and Freight Policy and Director of

¹ In *South Bronx Clean Air Coalition et al. v. Department of Transportation et al.*, petitioners brought a SEQRA claim over the validity of the 1993 FEIS prepared in relation to the original 1993 Land Use Plan for the intermodal terminal at the Harlem River Yard. Petitioners also challenged legality of the 1991

the Commercial Transport Division in the New York State Department, submitted an affidavit in which he outlined the public purpose of the 1991 Lease:

[F]irst and foremost, it materially advances the State's goal of capitalizing on the site's strategic import by dedicating it to rail use ... [and to] gain direct access to the east of the Hudson market rather than terminating in New Jersey or zig-zagging through the Bronx. The 1993 FEIS projected the transportation savings at between \$78.5 million and \$148.9 million, depending on the discount rate employed, and expected to see additional secondary benefits to businesses and consumers from these freight cost savings. That shift from truck to rail access to the area's markets and shippers is critical to sustaining the region's economy. The site's dedication to improved rail service represents a significant public benefit.

The public will derive further benefits from the project. Regional air quality is expected to improve with the projected reduction in annual vehicle miles traveled of either 23.7 million miles or 26.8 million miles depending on development option selected.

See Affidavit of Bruce Blackie in Opposition of Verified Petition Appellate Record at 08499-8500, a true and correct copy is attached hereto as Exhibit DD at ¶¶ 17-18.

51. Section 8.06 of the Lease provides that Ventures must submit any requests to change the Land Use Plan for the Harlem River Yard to the DOT for approval.

D. 1993 Environmental Review for the Harlem River Yard Intermodal Terminal

52. As lead agency under SEQRA, the DOT retained TAM Consultants Inc. ("TAM") to prepare an environmental impact statement ("EIS") for the proposed intermodal terminal at the Yard. TAM issued a Final EIS ("FEIS") in December 1993. The 1993 FEIS describes the Intermodal Rail Terminal as the "centerpiece" of the Harlem River Yard land use plan. *See* Harlem River Yard Intermodal Terminal and Distribution Center, Bronx, New York,

Lease between the DOT and Ventures on the grounds that it violated the Public Lands Law and Article VII, Section 8 of the NYS Constitution prohibiting the gift or loans of public asset to private industry. The court ruled in favor of petitioners' SEQRA claims but dismissed the Public Lands Law and Article VII, Section 8 claims on the grounds that the lease contemplated a public purpose – the intermodal terminal and that the benefits to Ventures would be incidental to the public benefit derived from getting trucks off the road with the intermodal terminal. The Appellate Division reversed the trial court's decision on the SEQRA claim based on statute of limitation grounds.

Environmental Impact Statement Prepared for Harlem River Yard Ventures and submitted to Department of Transportation (“1993 FEIS”), a true and correct copy is attached hereto as Exhibit EE.

53. The 1993 FEIS provides that the Intermodal Terminal “will occupy the largest acreage of the site (28 acres along the northern portion of the site).” *Id.* at 2.2/2-4. The FEIS states that:

the terminal is designed to function as either a container on flatcar (COFC) or trailer on flatcar (TOFC) facility. The intermodal rail terminal is located on the northern portion of the site to take advantage of the longest straight track sections available, an important element for the efficient operation of a COFC/TOFC terminal. Goods arriving via rail will be transferred to truck for distribution in the New York City area; goods arriving via truck will be transferred to rail cars for transport to regional end users. The facility is anticipated to be ready for full operation at the completion of the Oak Point Link project (approximately last quarter, 1995).

Id. at 2.2/2-5. According to the 1993 FEIS, the Intermodal Terminal was to eliminate approximately 520 daily heavy truck trips. *Id.* at 10-15 to 10-16, Response to Public Comments.

54. Section 7.02 of the 1991 Lease specifies that the Intermodal Terminal would be developed in two phases. Intermodal Terminal Area, Phase I was to be an area not less than 15 acres for the exclusive use of intermodal services under the lease. Phase II was to be an area not less than 10 acres reserved for the exclusive use of intermodal services. Section 7.02 also provides that, “[f]or the term of the Lease, common facilities outside these designated Intermodal areas shall be constructed so as not to reduce the effective use and capacity of the reserved intermodal area.”

55. Figure 2-1 of the 1993 FEIS depicts the approved Harlem River Yard Land Use Plan (Warehouse Option and Paper Recycling Option) dated August 1993. The Land Use Plan maps the location and use of the anticipated land uses evaluated in the 1993 FEIS. Pursuant to

the 1993 Land Use Plan, a 28-acre parcel along the north side of the Yard was reserved for the Intermodal Terminal. Based upon 11 trains per week, the facility was designed to handle 70,000 units per year on site. Another 30,000 units of produce would move through the Yard to be forwarded to the Hunts Point Market. The terminal was designed to operate as either container on flatcar or trailer on flatcar, and was expected to be fully operational by 1995.

56. The Land Use Plan envisioned other land uses at the Harlem River Yard, which were evaluated in the 1993 FEIS, including:

- Bulk Transfer/Team Track Rail Facilities – this facility could serve as a loading/unloading area for rail transferred commodities on the western end of the site. A through track for the Oak Point Link that would pass through the Yard just south of the intermodal terminal west of St. Ann’s Avenue along the shore of the Bronx Kill.
- New York City Wholesale Flower Market – A rail-serviced wholesale flower distribution center would replace a similar market located in Manhattan. This would be comprised of a 170,000 s/f building and parking lot just west of the Triborough Bridge (overlapping the Fresh Direct footprint).
- Refrigerated/Dry Warehouse – An 80,000 s/f warehouse that would serve as a distribution center for rail and truck movement of various commodities (overlapping the Fresh Direct footprint).
- Solid Waste Transfer Station – A 3,000 ton per day (“tpd”) facility that would receive collected waste via truck and export it via rail and that would be accessed via Alexander Avenue.
- Warehouse Option – Two warehouses – one 100,000 s/f at the center of the Yard (north of the Flower Market) and a 460,000 s/f warehouse at the site of the recycling plant.

- Recycling Facility – A facility to receive baled paper to be recycled. The facility would produce 375 tons per day of finished product and access via St. Ann’s Ave.

E. 1993 FEIS Environmental Impacts and DOT Record of Decision

57. The FEIS was submitted to the DOT in December 1993 and approved in May 1994. In its 1994 Record of Decision, the DOT described the need for the project:

The public policy objectives that have motivated the NYDOT’s action in seeking a private developer for the Harlem River Rail Yard are the following:

- Increase the utilization of rail freight service in the New York City metropolitan area by developing an intermodal rail terminal along with ancillary warehousing and support infrastructure;
- Reduce congestion from truck traffic on Hudson crossings;
- Reduce freight transportation cost through increased competition; and
- Utilize the potential Harlem River Yard to enhance economic development and create jobs.

See DOT Record of Decision (“ROD”), dated May 1994, a true and correct copy attached hereto as Exhibit FF at 3.

58. In analyzing the affected environment, the 1993 FEIS used a secondary study area of one-quarter mile to assess environmental impacts on land use, socioeconomics, open space, transportation, air quality and noise. Exh. EE at 3.1.1. The DOT found several areas where the proposed intermodal terminal would have significant adverse environmental impacts.

Land Use

59. The ROD found that the proposed project was compatible with the industrial character of the surrounding area. Exh. FF at 8. The character of the surrounding area has changed substantially since 1993, in part due to City rezonings in 1997 and 2005 to Mixed-Use Residential.

Transportation

60. The ROD noted that the increased rail use associated with the intermodal yard would reduce transportation costs and provide a reduction of 27 million vehicle miles per year. As the Intermodal Terminal has never been built, these transportation benefits have not been realized. *See* Miller Aff., Exh. Z at ¶ 12.

Traffic

61. The DOT concluded that the proposed development would result in significant adverse environmental impacts related to increased automobile and truck traffic and ordered four modifications to existing traffic controls in order to mitigate the adverse impact. Exh. FF at 11. To date, it appears that these mitigation measures have not been put in place.

Air Quality

62. In the ROD, the DOT found that from a regional perspective, the proposed action would have a positive impact on air emissions from mobile sources as a result of increased utilization of rail transportation and the 27 million mile annual reduction in truck traffic. *Id.* at 12. None of these eliminated vehicle miles have been realized because the Intermodal Terminal has never been built.

Noise

63. In the ROD, the DOT found that the 1993 Land Use Plan would result in substantial increases in noise levels from existing conditions at a number of receptors within the study area, with the greatest impacts occurring at night. It found noise impacts as high as 14dB at the site of the Willis Ave. Station, which housed a residential unit, and up to 7dB at several residential units located within an industrial manufacturing zone, primarily as a result of increased traffic volumes. The ROD states that the noise impacts would be significant, adverse

and unavoidable as a result of the increased truck and rail traffic associated with the redevelopment of the rail yard. It also states that there would be no feasible or reasonable mitigation measures for addressing them. *Id.* at 13.

Archaeological Resources

64. Due to the historical significance of the site, the New York City Landmarks Preservation Commission recommended a Stage 1a study of the entire Harlem River Yard, which entailed a detailed archeological and historical survey of all 96-acres. The study concluded that the remains of a Native American settlement and several Morris family residents were likely in the subsurface of the land allotted to the Flower Market and Dry Refrigeration Warehouse, the same location allotted for two of the Fresh Direct structures. Limited Stage 1b testing was conducted at two small test areas at the site of the Morris mansion and Native American settlement. This testing concluded that remains of the Native America Ranachqua Village may be located under the 15 feet of fill located at the proposed site of the Flower Market and Warehouse but that prior excavation appears to have eliminated the archaeological integrity of the structures of the Morris mansion and house of Morris II. Based on the footprint and building specifications for the Flower Market and Dry Refrigerated Warehouse, the State Historic Preservation Office (“SHPO”) gave a conditional no adverse impact finding provided the structure over the archaeological area be limited to a slab parking, that no excavation below the historic fill take place and that a buffer be maintained around the historic Willis Avenue Station. *Id.* at 10.

F. Since 1993, Ventures, With DOT Approval, Has Effectively Abandoned the 1993 Land Use Plan and Intermodal Terminal and Instead Developed a Truck Intensive Industrial Park.

65. The original 1993 Land Use Plan envisioned the development of an Intermodal Terminal as the Harlem River Yard’s centerpiece. However, in the twenty-one years since the

Lease was signed, no intermodal freight cars have been handled at the Yard, nor has the Yard been used for any transload operations (operations where freight is transferred between railcars and trucks). The only railcars that have been handled at the Yard are the carloads of municipal solid waste shipped by Waste Management, via the Hudson Line and Selkirk, to Waverly, Virginia, and cars of paper rolls that are delivered to the New York Post printing plant. *See Miller Aff., Exh. Z at ¶ 12.*

66. In addition to abandoning the Intermodal Terminal, Ventures has requested and the DOT has approved numerous changes and additions to the original Land Use Plan to allow for the siting of truck intensive and polluting businesses at the Yard. Specifically, in 1998, the DOT and Ventures modified the original land use to replace the proposed recycling plant with the installation of the New York Post Printing and Distribution Facility. The plant is located on the far eastern portion of the Yard and now prints the Wall Street Journal as well.

67. In late 1999, Waste Management opened a 3,000 TPD waste transfer station on the western portion of the Yard – built with a larger footprint than originally contemplated. The land use was modified in 2004 to increase this waste transfer station’s capacity to 5,000 TPD.

68. In 2000, the DOT and Ventures changed the original land use yet again to introduce a 79.9 Megawatt fossil fuel power plant on 2 acres of the eastern portion of the Yard, an additional land use totally unaccounted for in the 1993 FEIS. In 2006, Ventures modified the land use to introduce a 10-acre Federal Express distribution and delivery hub on the eastern portion of the Yard, on land originally allocated for a portion of the recycling plant.

69. In 2006, Ventures allowed the complete demolition of the historic Willis Avenue Station without consultation with SHPO. In so doing, Ventures violated both the mandatory

preservation buffer around Willis Avenue Station ordered by SHPO as part of the 1993 FEIS and the New York State Historic Preservation Act.

G. Since 1993, the Neighborhood Around the Harlem River Yard has Changed from Primarily Industrial to Significantly Residential and Recreational.

1. New York City Rezoned the Neighborhood Surrounding The Harlem River Yard and a Portion Of The Yard Itself From Exclusively Industrial To Mixed-Use Residential.

70. While Ventures continued to deviate from the land use plan assessed in the 1993 FEIS, the surrounding community saw significant rezoning changes. When the 1993 FEIS was prepared, the Yard, the surrounding neighborhood and much of the 1993 FEIS study areas were zoned M3-1 (heavy industry), M2-1 (medium industry) and M1-2 (light manufacturing). This is no longer the case as the surrounding neighborhood and a portion of the Yard itself – *the proposed site of the Fresh Direct truck maintenance garage* – have been rezoned as mixed used residential. See Rezoning Map, a true and correct copy attached hereto as Exhibit GG.

71. Specifically, in 1997, the City established the Port Morris Special Mixed Use District in the five-block area along Bruckner Boulevard immediately bordering the Harlem River Yard. According to the Department of City Planning, “the rezoning was very successful, serving as a catalyst for strengthening the area’s emerging antique businesses...and allowing for the successful development of approximately 185 new residential units.” *Id.* at Exh. HH.

72. In 2005, the City rezoned an additional 11 blocks near the Harlem River Yard from manufacturing to mixed use, permitting additional residential development. The zoning changed from M3-1 (heavy industry), M2-1 (medium industry) and M1-2 (light industry) to M1-5/R8A, M1-2/R6A and M1-3/R8.²

² Of the 11 rezoned blocks, a four block area was rezoned from M1-2 and R6 to M1-2/R6A, a five block area was rezoned from M1-2 and M3-1 to M1-5/R6A (this borders the Harlem River Yards), and a large

73. Developers and residents have taken advantage of the rezoning. In addition to the development noted above caused by the first rezoning, the following new residential buildings have gone up since the second rezoning:

- In approximately 2009, Bruckner By the Bridge, a new development located at 80 Bruckner Boulevard (on the corner of Bruckner Boulevard and Willis Avenue), containing 419 residential units, was built and is now occupied.
- In approximately 2010, a multifamily building located at 148 Bruckner Boulevard (on the corner of St. Ann's Avenue and Bruckner Boulevard), containing approximately 10 residential units, was renovated and is now occupied.
- In approximately 2010, a former warehouse space located at 225 East 134th Street (on the corner of East 134th Street and 3rd Avenue) was renovated to create approximately 60 residential units that are now occupied.
- In approximately 2010, a former warehouse space at 2417 3rd Avenue (on 3rd Avenue between Harlem River and East 134th Street) had approximately 50 units converted to live/work lofts.
- In approximately 2009, a multifamily building located 700 East 134th Street (on East 134th Street between Bruckner Boulevard and Willow Avenue) was gut renovated, producing approximately 20 residential units.

two block area immediately west of the Harlem River Yard was rezoned from M2-1 to M1-3/R8. http://www.nyc.gov/html/dcp/html/port_morris/index.shtml. See Exhibit HH.

2. Consistent with this Rezoning, a Proposed Amendment to the Waterfront Revitalization Plan Would Remove the Significant Maritime and Industrial Area Designation from a Portion of the Harlem River Yard.

74. When DOT prepared the 1993 FEIS, all of the Harlem River Yard was designated as a Significant Maritime and Industrial Area (“SMIA”), indicating that the City encouraged industrial development there. More recently, the City has proposed a revision to its Waterfront Revitalization Plan (“WRP”) that would remove this designation from a section of the Harlem River Yard that was included in the mixed-use residential rezoning for the surrounding neighborhood. *See* City SMIA Redesignation Map, a true and correct copy is attached hereto as Exhibit II. Nonetheless, the Fresh Direct proposal would build a truck maintenance garage, parking and refueling station in this rezoned area.

3. New York City Has Approved a South Bronx Greenway That Runs Through Harlem River Yard and Throughout the Surrounding Neighborhood.

75. Since 1993, New York City has sponsored and approved recreational uses for a portion of the Harlem River Yard. Specifically, in 2006 the NYCEDC unveiled its plan for the South Bronx Greenway, which traverses the Yard just to the east of the Fresh Direct project and will serve as a connector to Randall’s Island. *See* EDC South Bronx Greenway Website Summary, a true and correct copy is attached hereto as Exhibit JJ. The Greenway runs under the arches of Little Hell Gate Bridge and will connect the South Bronx to Randall’s Island via a bridge over the Bronx Kill. The Randall’s Island Connector is scheduled for completion in 2013.³ The Fresh Direct Proposal would bring thousands of trucks and cars each day to an area designed to attract pedestrians and bicyclists for recreational purposes.

³ After preparing an environmental assessment, as lead agency, the EDC issued a negative declaration in April 2008 for the proposed South Bronx Greenway. On December 17, 2008, the City Planning Commission approved the State DOT, NYC PRD and DCAS’s application for site selection and

4. Significant Increased Recreational Use and Nature Restoration Harlem River and Bronx Kill

76. In 2011, the United States Department of the Interior named the Harlem River watershed one of seven national pilot locations in the Urban Waters Federal Partnership. Moreover, recreational use of the Harlem River and Bronx Kill has grown considerably since 1993, with community organizations sponsoring regular canoeing, kayaking, and fishing trips and cleanup events on these waterways. The Bronx Kill, with its gentle currents and motorboat free passage, is an ideal waterway to learn canoeing and nature appreciation. As such, local youth education organizations use the Bronx Kill regularly to engage South Bronx students in canoe outings and shoreline clean-up with as many as 50 organized trips a season. *See* Bennett Aff., Exh. H, Bubbins Aff., Exh. I, Johnson Aff., Exh. O, Kohut Aff., Exh. Q, Ewers Aff., Exh. K, Guerra Aff., Exh. M, Lopez Aff., Exh. S, and Orozco Aff., Exh. T.

77. In 2010, the Wildlife Habitat Council certified 0.3 acres of the Harlem River Yard for a “Wildlife at Work” project through its wetland restoration program. The project is a pollinator garden comprised of a variety of native wildflowers and trees, such as serviceberry, elderberry and eastern red cedar planted by a team of community partners, including Sustainable South Bronx and Friends of Brook Park, the Council for the Environment of New York City, and 80 volunteers from the Boston Consulting Group.

acquisition of an easement at Block 2543/Lot 1 and Block 2583/Lot 2 in order to facilitate the construction and use of a pedestrian and bike pathway that would run along the Harlem River Yard under the Little Hell Gate Bridge on the eastern most portion of the Yard. *See* City Planning Commission Approval. A true and correct copy is attached hereto as Exhibit KK. The path would connect the South Bronx to Randall’s Island via a bridge over the Bronx Kill. The suspension of the connector bridge was built as part of the NYPA power plant installation in 2000. Paving and grating remains necessary to complete the Greenway.

H. The Fresh Direct Project Would Represent a Complete Abandonment of the 1993 Land Use Plan for the Harlem River Yard, and do so Based on a Cursory and Inadequate Environmental Review.

78. Founded in 2002, Fresh Direct is an online home delivery grocer located in Long Island City (“LIC”), Queens. In late 2011, Fresh Direct developed an expansion plan which included three site alternatives: 1) staying in LIC, 2) moving to the Harlem River Yard or 3) relocating to New Jersey. In late 2011, Fresh Direct submitted applications for financial assistance to the IDA, the Empire State Development Corporation, and the New Jersey Economic Development Authority (“EDA”), (New Jersey’s counterpart to EDC and IDA). In its application to the EDA, Fresh Direct acknowledged that remaining in Long Island City was the most cost effective and least disruptive location scenario compared to moving to either the South Bronx or New Jersey. *See* Fresh Direct Application at EDA, a true and correct copy is attached hereto as Exhibit LL.

79. On February 7, 2012, two days before an IDA public hearing on Fresh Direct’s application for financial assistance, New York Governor Andrew Cuomo, New York City Mayor Michael Bloomberg and Bronx Borough President Ruben Diaz, Jr. announced that they had reached a deal with Fresh Direct - guaranteeing it \$130 million in subsidies with approximately \$83 million to come from the City in a combination of tax exemptions, capital funding and loans. *See* Press Release, dated February 7, 2012, a true and correct copy attached hereto as Exhibit MM.

80. Despite a lack of prior notice to the community, several petitioners attended the February 9, 2012 IDA public hearing and expressed opposition to both the process and the proposed deal. On February 14, 2012, the IDA Board voted to approve an inducement resolution in support of the \$83 million subsidy package. *See* Bennett Aff., Exh. H, Bubbins Aff., Exh. I,

Garcia Aff., Exh. L, Johnson Aff., Exh. O, Kesselman Aff., Exh. P, Kohut Aff., Exh. Q, Ewers Aff., Exh. K.

81. On February 14, 2012, the IDA also adopted a Negative Declaration for the proposed Fresh Direct project, a Type I action under SEQRA. *See* Exh. A at § 7. IDA provided notice of the Negative Declaration in the Environmental Notice Bulletin on May 16, 2012. *See* Exh. B. IDA based its Negative Declaration upon an Environmental Assessment Statement prepared by AKRF, Inc. on its behalf, dated December 2011. As a further abandonment of the 1993 Land Use Plan, the Fresh Direct project would replace the originally programmed space for warehousing, distribution and the proposed wholesale Flower Market under the warehouse scenario of the original 1993 FEIS and site a facility directly within the land reserved for the Intermodal Terminal under the 1993 Land Use Plan.

82. According to the EAS, Supplement A, Fresh Direct, with both State and City subsidies, proposes to move from Long Island City and construct a new manufacturing and distribution center upon approximately 15.9 acres of land located at the Harlem River Yard in the South Bronx. The project would consist of three structures:

- A 500,547 s/f refrigerated warehouse facility on 12.6 acres in the central portion of the Harlem River Yard;
- An ancillary parking and truck storage facility (.3 acres) located to the north of the main building to provide 16 parking spaces; and
- A 10,000 s/f truck maintenance facility (wash, maintenance, and refueling) located upon 2.6 acres of land in the western portion of the Yard, just north of the Waste Management transfer station.

83. As an online grocer that home-delivers all orders, Fresh Direct's business is truck intensive. Fresh Direct states in the EAS that it currently generates 1,944 vehicle trips a day, 938 of which are trucks. Presumably a significant portion of these also have refrigeration units given that they transport groceries.

84. Fresh Direct's operation would run 24 hours, seven days a week. It currently employs approximately 2,000 employees and the IDA and Fresh Direct estimate that it will add 1,000 new jobs over the next 5 years. *See* Fresh Direct Facts Webpage, a true and correct copy is attached hereto as Exhibit. NN.

85. In issuing a Negative Declaration, the IDA stated the Type I action "will not have a significant effect on the environment and as such a DEIS would not be prepared on the grounds that the Fresh Direct project did not produce different conclusions than those reached in 1993 FEIS." *See* Exh. A.

86. As is clear from this statement, IDA relied heavily upon the conclusions, studies and analyses contained in the 19-year old 1993 FEIS prepared for the original 1993 Land Use Plan and "subsequent environmental assessments".⁴

87. The information contained in the 1993 FEIS not only applies to an entirely different project, it is so outdated that the neighborhood it evaluated no longer exists. In addition, CEQR requirements have changed so significantly over the 19 years since the 1993 FEIS was prepared that its analysis is incomplete and fails to comply with current requirements.

⁴ The EAS does not specify the "subsequent environmental assessments" to which it refers. In response to a Freedom of Information Law request seeking from the IDA all documents reviewed in preparing the Fresh Direct EAS, IDA provided the 1993 FEIS, the 1994 Record of Decision, the January 7, 1998 NY Post EAS prepared by the DOT and the 2006 Federal Express Technical Memo.

I. IDA Prepared a Fatally Flawed EAS and Its Negative Declaration Was Arbitrary and Capricious and an Abuse of Discretion.

88. In violation of SEQRA and CEQR, the IDA failed to identify the relevant areas of environmental impact from the Fresh Direct project, take a hard look at the potential environmental impacts, and make a reasoned elaboration for the basis for its determination. Rather than identifying and analyzing the relevant areas of concern to determine if the Fresh Direct project *may* have a significant adverse impact on the environment, the IDA characterized the proposal as a “minor modification” of the 1993 Land Use Plan and provides summary conclusions for most areas of impact:

Consistent with the findings of the 1993 FEIS and subsequent environmental assessments, the proposed Fresh Direct project was reviewed in consideration of the range of environmental issues for which a minor modification of the original development plan could generate different findings than the prior record. Supplement C provides a traffic screening analysis which is the most critical technical assessment in terms of potential incremental changes. Other considerations are summarized below.

Exh. C at A-3.

89. In so doing, the IDA fails to consider a number of areas of impact, including Greenhouse Gas Emissions, Public Health, and Neighborhood Character and fails to consider extensive changes to the impacted community since 1993. The IDA also glosses over the fact that the DOT’s 1994 Record of Decision found that the 1993 Land Use would have significant adverse environmental impacts and, in the case of noise, significant adverse impacts that could not be mitigated.

90. The IDA acted arbitrarily and capriciously when it issued a Negative Declaration based upon 19-year old FEIS prepared for an entirely different neighborhood and for an entirely different project, the cornerstone of which never materialized and never will if the Fresh Direct project is sited at the Yard.

1. The 1993 Land Use Plan Has been Abandoned by Ventures.

91. As noted above, what Ventures has developed at the Harlem River Yard bears little resemblance to the 1993 Land Use Plan evaluated in the 1993 FEIS. The most significant change is Ventures' abandonment of the Intermodal Terminal, which was the centerpiece of the Yard and shaped all the studies and conclusions contained in the 1993 FEIS. Twenty-one years have passed since the DOT and Ventures signed the Lease and not one intermodal lift, as defined in the Lease, has occurred at the Yard. Miller Aff., Exh. Z at ¶ 12. Due to the failure to develop the Intermodal Terminal at the Harlem River Yard, none of the transportation public benefits articulated in the 1993 FEIS and the 1991 Lease has been realized. Despite a dramatic increase in levels of intermodal freight both nationally and regionally since the DOT and Ventures signed the Lease,⁵ not **one** truck trip across the Hudson has been removed by development of an intermodal terminal.

92. Moreover, the proposed Fresh Direct project so severely encroaches upon the 28 acres reserved for the Intermodal Terminal that it renders the Intermodal Terminal contemplated in the Lease an impossibility. *See* Affidavit of George L. Stern in Support of Verified Petition, sworn to June 8, 2012, attached hereto as Exhibit OO.

2. IDA Failed to Consider Impacts on Land Use and How Fresh Direct Conflicts with the Community's Current Approved Plans and Goals.

93. In adopting the Negative Declaration, the IDA stated that “[l]ike the 1993 FEIS and subsequent supplemental assessments, the land use patterns in, and surrounding the HRY site, are uniformly industrial and commercial in character.” EAS, Exh. C at A-3. Based on this mischaracterization, the IDA concluded: “The proposed land use would be consistent with the

⁵ To provide just one example of the increase in local containerized rail traffic within the past decade: between 2001 and 2007, the volume of containers carried by the Port Authority's Express Rail service increased by 113% (to 338,882 containers in 2007). (Peter T. Leach, “NY-NJ Port Sets Rail Mark,” *Journal of Commerce*, Jan. 23, 2007.)

finding of the 1993 FEIS and subsequent environmental assessments which all concluded no significant adverse impacts as it relates to land use.” *See* EAS, Exh. C at A-3 and Inducement Resolution, Exh. A § 7. None of the subsequent environmental assessments, including the most recent in 2006 for Federal Express (“Fed Ex”), take into account the 16 block rezoning to mixed-use residential. Specifically, the Fed Ex Technical Memo states that the land use has stayed consistent with those detailed in the 1993 FEIS – namely industrial.” *See* Fed Ex Technical Memo, a true and correct copy of which attached hereto as Exhibit PP at 6.

94. This finding is factually incorrect as it ignores the fact that the neighborhood adjoining the Harlem River Yard and the part of the Yard itself where Fresh Direct plans to build its truck maintenance and refueling station have been rezoned to mixed-use residential. Thus, the environmental review performed in 1993 is of a neighborhood that no longer exists.

95. As noted above, the neighborhood surrounding the Harlem River Yard has fundamentally and formally changed since the 1993 FEIS was prepared. In 1997, the City first rezoned from industrial to mixed-use residential a five-block area immediately bordering the Yard and established the Port Morris Special Mixed Use District along Bruckner Boulevard. Due to the success of the first rezoning, which “serv[ed] as a catalyst for strengthening the area’s emerging antique businesses...and allowing for the successful development of approximately 185 new residential units,” the City in 2005 rezoned an additional 11 blocks near the Harlem River Yard from manufacturing to mixed use, permitting additional residential development. *See* Exhibit HH. The zoning changed from M3-1 (heavy industry), M2-1 (medium industry) and M1-2 (light industry) to M1-5/R8A, M1-2/R6A and M1-3/R8.

96. In approving the rezoning, the City Planning Commission acknowledged existing residential uses in the blocks adjacent to the Harlem River Yard and asserted that the rezoning

would expand opportunities for new residential development. The City Planning Commission stated that the new zoning was “to reflect the current mixed-use character of the area, to bring new uses to underutilized land and buildings, to enable existing residences to become conforming uses, to further the city’s housing initiative, to focus on improved waterfront access and to create a vibrant 24/7 neighborhood by enhancing the pedestrian environment (transforming the area into a true Gateway to the Bronx).” *See* Exh. HH.

97. Since the first rezoning in 1995, over 700 residential units have been added to the area that the IDA incorrectly describes as industrial. Moreover, the mixed-use residential designation will bias new development toward residential and commercial retail rather than industrial, further encouraging the transformation of the area from industrial to residential. Many areas in New York City that have been rezoned with the mixed use-residential designations have become largely and often exclusively residential, such as Williamsburg and Greenpoint, Brooklyn. While mixed-use residential permits both as-of-right residential and industrial development, the realities of the land market in places near Manhattan generally produce a strong preference for residential. Since rents and land values for residential uses are significantly higher than for industrial uses, land owners in mixed use districts usually decide to convert from industrial to residential. This has notably occurred in the Williamsburg (Brooklyn) and Long Island City (Queens) areas, where this kind of mixed use zoning was recently instituted. *See* Affidavit of Tom Angotti in Support of Verified Petition (“Angotti Aff.”), sworn to June 8, 2012, attached hereto as Exhibit QQ at ¶ 11.

98. Moreover, the IDA ignores the fact that the location where Fresh Direct intends to build its garage and refueling station has been rezoned for mixed-used residential and has been recommended by the City to have its Significant Maritime Industrial Area designation removed.

See City Planning Rezoning Map, Exh. GG. Presumably, the City has recommended removal of this block of land from the SMIA because it is immediately adjacent to a public park and a major new residential project. Angotti Aff., Exh. QQ at ¶ 13.

99. SEQRA and the CEQR TM require the lead agency to assess the project's consistency with the City's Waterfront Revitalization Program if the project falls within the City's Coastal Zone boundaries, as is the case for the Fresh Direct project. 6 NYCRR §§ 617.11(e), CEQR TM 4-5 § 121. Preparation of a WRP assessment begins with the review of the New Waterfront Revitalization Program and completion of a NYC WRP Consistency Assessment Form. Yet the IDA failed to engage in such an assessment and instead relied exclusively on the analysis and conclusions found in the 1998 EA for the New York Post. This does not comply with the assessment requirements under SEQRA and CEQR. To add to the deficiency, the New York Post 1998 EAS evaluations fail to account for numerous updates the City made in 2002 to the WRP, and fail to account for significant changes to the neighborhood surrounding the Harlem River Yard.

3. IDA Ignored Approved Community Plans for the South Bronx Greenway on the Site of the Harlem River Yard and Throughout the Surrounding Neighborhood.

100. Since 1993, the City has sponsored and approved recreational use for a portion of the Harlem River Yard. Specifically, in 2006 the NYCEDC unveiled its plan for the South Bronx Greenway, which traverses the Yard just to the east of the Fresh Direct project and will serve as a connector to Randall's Island. The Greenway runs under the arches of Little Hell Gate Bridge and will connect the South Bronx to Randall's Island via a bridge over the Bronx Kill. The Randall's Island Connector is scheduled for completion in 2013. The EAS fails to mention the significant increased recreational activities along the waterfront and mischaracterizes the area

as devoid of recreational uses. It makes no mention of the City approved Greenway that crosses a section of the Harlem River Yard to connect the Port Morris to Randall's Island.

4. IDA Ignored Harlem River and Bronx Kill Recreational Uses and the Harlem River Yard Marsh Restoration Program.

101. The EAS mischaracterized the nature of the waterway around the Project as lacking fishing opportunities (EAF ¶ 10, Exh. C), and ignores the fact that the Department of the Interior in 2011 named the Harlem River watershed as among one of seven national pilot locations in the Urban Waters Federal Partnership, and that a .3 acres section of the Harlem River, at the site of Waste Management facility, received Wildlife at Work certification in 2010. Moreover, the IDA completely ignores the fact that recreational use of the Harlem River and the Bronx Kill has grown considerably since 1993, with community organizations sponsoring regular canoe tours and cleanup on these waterways. Since 1993, the Harlem River and Bronx Kill have become important recreational outlets for the local community with canoeing, kayaking, and fishing trips in these waters. The Bronx Kill, with its gentle currents and motorboat free passage, is an ideal waterway to learn canoeing and nature appreciation. As such, local youth education organizations use the Bronx Kill regularly to engage South Bronx students in canoe outings and shoreline clean-up with many organized trips a season. *See* Bennett Aff., Exh. H, Bubbins Aff., Exh. I, Johnson Aff., Exh. O, Kohut Aff., Exh. Q, Ewers Aff., Exh. K, Guerra Aff., Exh. M, Lopez Aff., Exh. S, and Orozco Aff., Exh. T.

5. IDA Failed to Conduct the Sustainability Assessment Required by CEQR.

102. In 2010, the City added a mandatory sustainability assessment to the CEQR TM Land Use chapter. This addition reflects the City's 2008 sustainability policies, adding that projects undergoing CEQR review should generally be consistent with PlaNYC. (TM 4-26.) This consistency analysis applies to air quality, energy, water quality, land use, open space, natural

resource, solid waste and transportation. The IDA and its consultants failed to engage in the mandatory sustainability assessment and, as such, each environment impact suffers from this additional deficiency.⁶ The 1993 FEIS, the document upon which the IDA’s land use conclusions rely, of course, does not engage in any sustainability analysis as it pre-dates the requirement.

J. IDA Failed to Adequately and Accurately Assess Traffic Impacts Generated by Fresh Direct’s Trucks, Vehicles and Employees.

103. Despite the fact that Fresh Direct will, upon completion of the project, introduce into a residential neighborhood approximately 2,000 daily vehicle trips, half of which will be diesel trucks, and up to 3,000 daily trips within the next 5 years, the IDA found that *“the project would not result in potential significant adverse impacts related to traffic not previously disclosed in the FEIS or subsequent environmental evaluations.”* See Negative Declaration, Exh. A §7(b). This conclusion is based upon a fundamentally flawed, misleading and CEQR noncompliant assessment of traffic impacts.

1. IDA’s “Net Increment” Analysis Does Not Comply with the CEQR TM.

104. Rather than perform the traffic analyses required by the CEQR TM, the IDA instead focuses its analysis on the alleged “net-increment” of traffic impacts from the Fresh Direct project, as compared to the original 1993 proposal. Specifically, the IDA subtracts the vehicle generation rates projected for the original Harlem River Yard in the 1993 FEIS from the estimated vehicle generation rates for the Fresh Direct project to reach its conclusion of no potential significant adverse impacts from traffic. Moreover, the 1993 FEIS traffic impacts that the IDA subtracts out in a number of respects were actually found to be significant and require

⁶ The 1993 FEIS, the document upon which the IDA’s land use conclusions are based, of course does not engage in any sustainability analysis as it pre-date our City’s consciousness on climate change and sustainability matters.

mitigation measures that may or may not have been implemented, a point ignored by IDA when it considered the Fresh Direct project. *See* Affidavit of Brian Ketcham in Support of Verified Petition (“Ketcham Aff.”), sworn to June 12, 2012, attached hereto as Exhibit RR.

105. In addition to relying upon this improper analytical approach, the IDA improperly relies upon a number of unsubstantiated assumptions that consistently understate Fresh Direct’s traffic impacts and improperly omits from analysis a number of factors that would have significantly increased traffic impact projections from the proposed project.

a. The CEQR Technical Manual’s Approach to Assessing Traffic Impacts.

106. The CEQR TM states that “transportation analyses should address...the traffic volume expected to be generated in the future with the proposed project in place and the impact of the project-generated volume on traffic levels of service.” TM 16-1.⁷ For projects that would generate “fewer than 50 peak hour vehicle trips ...significant adverse impacts are generally considered unlikely.” TM 16-3. Where the 50 vehicle/hour threshold is surpassed, the lead agency is to assign vehicles to the road system in order to identify specific intersections for which the project would generate more than 50 vehicles per hour. If any exist, the CEQR TM presumes a likelihood of significant adverse impacts and requires a detailed analysis. Importantly for the Fresh Direct proposal, “For proposed projects that generate a significant number of trucks and/or buses, which are considered to be equivalent to more than one car, such vehicle trips should be converted to Passenger Car Equivalent (PCEs).” TM 16-11.

107. Where required, a detailed traffic analysis must identify areas for analysis in light of the initial screen, and include a discussion of the “availability and appropriateness of existing data, and the expected need (if any) to collect new data via field surveys and counts.” TM 16-19.

⁷ The CEQR Technical Manual pagination first references chapter number and then page number.

To be relied upon, “existing traffic data should not be more than three years old assuming no operational, geometric or land use changes have occurred since the time the data was collected.”
TM 16-22.

b. The IDA’s Improper Analytical Approach to Assessing Traffic Impacts from the Fresh Direct Proposal.

108. As noted above, rather than assess the full impacts of a project that would add nearly 2,000 vehicle trips daily, approximately half of which are trucks, to a community that is already impacted by heavy traffic and poor air quality, and which is expected to experience a 50 percent growth in its business within five years of relocation (increasing traffic to nearly 3,000 vehicle trips daily) the IDA instead focuses on the differences between the projected traffic generation from this development and the projected traffic generation from the Land Use Plan for the Harlem River Yard, a now-fictional development that was analyzed in 1993, nineteen years ago:

The purpose of this technical memorandum is to provide a comparison of ‘trip-making’ characteristics of the proposed Fresh Direct distribution warehouse with those of the previously approved Land Use Plan for the Harlem River Yard (HRY), which was the subject of the 1993 [FEIS]. The assessment also incorporates prior changes to the original HRY program, specifically including the completed Federal Express (Fed Ex) as analyzed in 2006 and the New York Post facility as analyzed in 1998. This memorandum discusses the level of traffic (both auto and truck trips) expected to be generated by the proposed warehouse distribution facility and its potential to result in ‘additional vehicular trips’ not consider in the prior studies, most specifically as estimated for in the previously approved 1993 FEIS. (C-1)

109. With this analysis, the IDA actually subtracts projected traffic impacts from the 1993 proposal from the projected impacts of the 2012 Fresh Direct proposal before assessing whether the 50 vehicles/hour threshold is surpassed.

110. The IDA then assesses whether this fictitious net traffic increment exceeds 50 vehicles/hour, but only does so for the two hours of the day that it describes as “peak traffic

hours,” as opposed to all hours of the day for this the threshold is surpassed, as required by the CEQR TM. In so doing, it finds a net increment of 54 vehicles (not PCEs) for the PM peak hour, a number that exceeds the Level 1 50 PCE/hour threshold. The IDA nonetheless decides that there are no significant traffic impacts from this because these 54 vehicle trips will be assigned to two separate entrances to the Harlem River Yard.

111. The IDA concludes that, with the impacts assessed in 1993 subtracted out, “and given the fact that the overall traffic levels in the study area would be similar to or lower than the 2006 traffic levels, the revised development program are [sic] not expected to result in potential significant adverse impacts to the traffic conditions that were not previously disclosed in the 1993 FEIS or the 2006 Technical Memorandum.” *See* Exh. C at C-5.

2. Significant Errors and Omissions in the IDA Traffic Analysis Systematically Understate Project-Related Traffic Impacts.

112. Impermissibly Stale Data. The CEQR TM states that “existing traffic data should not be more than three years old assuming no operational, geometric or land use changes have occurred since the time data was collected.” TM 16-19. The Harlem River Yard traffic data from the 1993 FEIS heavily relied upon by the IDA are at least nineteen years old. While the IDA asserts that the 2006 Fed Ex proposal updates the 1993 traffic assessment, new traffic data were not collected for it, i.e. it too relies on the same traffic data collected for the 1993 FEIS. Moreover, the Fed Ex traffic analysis is six years old, twice the age allowable under the CEQR TM. The considerable land use changes to the affected area since 2006 further invalidate the data relied upon. In the absence of reliable existing data, the CEQR TM states that “conducting original surveys in comparable settings is the recommended course of action.” TM 16-6.

113. Failure to convert trucks and buses to Passenger Car Equivalents. The IDA also fails to convert buses and trucks to passenger car equivalents, as is required by the CEQR TM.

Instead, it simply lumps cars and trucks together as “total vehicles.” Exh. C at Tables 5 and 6. If the IDA had used the mandatory PCE, all vehicle counts assigned to trucks would have increased. Because nearly half of all vehicle trips generated by the project are trucks, a reasonable estimate of overall vehicle counts would be nearly 50 percent higher, i.e., the weekday vehicle count presented in Table 5 would be 2,882 rather than 1,944, and the weekend vehicle count presented in Table 6 would be 2,150 rather than 1,474.

114. Failure to consider all hours of the days surpassing the 50 vehicle threshold. The CEQR TM requires the assignment of projected traffic to intersections for all hours of the day in which the 50 PCE threshold is surpassed. Without adjusting PCEs for trucks, the data provided by the IDA indicate that this threshold is surpassed for 17 out of 24 hours on weekdays (Table 5) and 12 out of 24 hours on weekends (Table 6). If an average PCE of 2.0 for Fresh Direct trucks (medium truck) were assigned, 20 out of 24 weekday hours would surpass this threshold and the total hourly PCE would go as high as 374 (for the 5 to 6 AM hour). On the weekend, 13 out of 24 hours would surpass the threshold and the total hourly PCE would go as high as 323 (again for the 5 to 6 AM hour). Nonetheless, the IDA only performs something akin to a traffic assignment assessment for the two hours of the day it considers to be peak commuter times.

115. Failure to Consider Bridge and Highway Impacts and to Properly Assess Background Conditions. The IDA also failed to properly consider the Project’s impacts on nearby bridges and highways; instead it simply compared the traffic analysis contained in the Fed Ex EAS of 2006 to NYDOT volume reports from 2010 and concluded that overall traffic has improved by 1% since the 2006 levels. This comparison says little to nothing about actual traffic conditions on the bridges and highway, not does it provide any indication of traffic conditions on local roads and at local intersections. In addition, the IDA provides no analysis of how the

Fresh Direct proposal would impact conditions on these bridges and highways even though it identifies the Major Deegan, Bruckner Expressway, and Robert F. Kennedy Bridge as major routes to and from the Fresh Direct Site.

116. Reliance on unsubstantiated assumptions about hourly vehicle trips. IDA’s conclusion is also based on an unsubstantiated assertion that peak traffic hours for the project will occur between 5 and 6 AM and between 3 and 4 PM, each of which is conveniently outside what the IDA claims are typical peak rush hours. *See* Exh. C at C-2; Tables 3, 4, 5, and 6. Contrary to required CEQR TM methods, no information is provided about how the hourly estimates were generated other than to say that they were provided by Fresh Direct.

117. Reliance on unsubstantiated assumptions about commuting modes. Another critical and suspect assumption of the IDA’s traffic analysis relates to the “modal split” of employee traffic, i.e. the projected “travel modes likely to be used by persons going to and from the proposed project.” TM 16-8. The IDA assumes that 75 percent of Fresh Direct employees will travel to and from work via transit and only 25 percent will use automobiles:

The travel demand estimates for the proposed facility were developed based on the information provided by Fresh Direct regarding employees’ travel characteristics and truck delivery operations. Based on this information, the majority of employees – approximately 75 percent – will use mass transit and will be transferred to and from the subway stations to the project site via exclusive shuttle buses operated by Fresh Direct. The remaining 25 percent would use private autos for commuting purposes. Exh. C at C-2.

No substantiation is offered for this assumption that 75% of employees would use mass transit, and this reliance on unsubstantiated data provided by the project beneficiary is inconsistent with the requirements of the CEQR TM. According to the Technical Manual, it is acceptable to use previously accepted modal splits from similar projects and “in the absence of previously accepted modal splits, it is recommended that original surveys of modal splits for the same type

of land use as the proposed project be conducted in the same or comparable setting.” TM 16-9. There is no evidence that either was done for the current project. If the actual modal split at Fresh Direct is substantially different from the assumed 75/25 split, actual traffic impacts will be substantially different from those projected.

118. Failure to Consider Reasonably Foreseeable Business Growth at Fresh Direct. SEQRA requires a lead agency to assess the reasonably foreseeable or likely impacts of a proposed project. Nonetheless, the IDA’s traffic analysis wholly ignores impacts from projected growth at Fresh Direct. Supplement C states:

For purposes of this analysis, the maximum projected trips were conservatively assumed to take place at the facility’s completion in late 2013. As discussed above, when the facility is in full operation, it is projected to employ up to 2,012 employees in various shifts.” Exh. C at C-2.

119. This assumption ignores the fact that Fresh Direct is projected to eventually provide “over 3,000 jobs,” an increase of at least 50 percent. EAS A-1 at 6, item 9. This growth projection is not speculative. In Supplement A to the EAS, the IDA cites the “growth of Fresh Direct in New York City” as creating the “purpose and need” for the project. EAS A-1. Fresh Direct itself similarly cites overall business growth as creating the need for its relocation to the Harlem River Yards and claims that the project will create “up to 1,000 new jobs over the next five years.” See Fresh Direct Facts website printed on June 11, 2012, a true and correct copy is attached as Exhibit NN.

120. To account for the traffic impacts of this growth, as required by CEQR, the IDA should have assumed at a minimum that 3,000 employees will commute to the Fresh Direct. Accepting the 75/25 modal split discussed above, 3,000 employees would create 1,500 employee vehicle trips on an average weekday, as opposed to the 1,006 analyzed in Table 5.

121. In addition, given the truck-dependent nature of Fresh Direct, this growth in its business and employee base will necessarily result in a growth in truck traffic as well. Assuming a 50 percent growth in employees will lead to a 50 percent growth in truck trips, would yield an estimate of 1,407 trucks on an average weekday, as opposed to the 938 analyzed. Based on the growth rate claimed by Fresh Direct and the IDA, within five years of completion the project would generate a total of 2,907 vehicle trips every weekday as opposed to the 1,944 considered.

122. Failure to Assess the Traffic Impacts of Shuttle Buses. The IDA's traffic assessment wholly overlooks the impact of the shuttle buses needed to serve the 1,509 employees using transit to get to and from the site. Moreover, as noted above, job growth at Fresh Direct will require that 2,250 employees will use shuttle buses to travel between subway stations and the Yard each day.

123. Failure to Consider Transit Impacts. In addition to traffic impacts, the Technical Manual also requires a lead agency to consider the impact of a proposed project on transit: "if, based upon the screening analysis, a proposed project would result in 50 or more bus passengers being assigned to a single bus line (in one direction), or if it would result in an increase in passengers at a single subway station or on a single subway line of 200 or more, a more detailed bus or subway analysis would be warranted." TM 16-17. According to Fresh Direct's Employee Shift Information, more than 200 employees will start or end their work at Fresh Direct in 8 out of 24 hours of the day. During two of these hours, nearly 600 employees will be going to or from the site. By Fresh Direct's own estimates, 75 percent of these employees will be getting off or on transit during these time periods. And employment growth projected for the next five years would increase these figures by 50 percent or more. Despite this substantial

increase in transit usage, there is no analysis of transit-related impacts in the Fresh Direct EAS or accompanying documents.

K. The IDA Fails to Adequately Address Noise Impacts from the Fresh Direct Project.

124. The IDA's discussion of noise impacts from the Fresh Direct proposal consists of one paragraph. Rather than perform a noise analysis for it, the IDA simply concludes that noise impacts from Fresh Direct would be relatively consistent with noise assessments conducted in 1993 obviating the need for further consideration. Because traffic would be a major source of noise from the project, the IDA relies upon the "net increment" analysis discussed above to justify this approach. Again the CEQR Technical Manual provides clear methods for assessing noise. The IDA's subtraction method is not one of them.

1. IDA Acknowledges the Project Will Produce Significant Adverse Noise Impacts, Yet Improperly Declines to Prepare an Environmental Impact Statement.

125. The Fresh Direct EAS states, "As shown in the Supplement C: Traffic Screening Analysis, the replacement of the Fresh Direct project would be expected to reduce overall volumes except for the PM peak hours. The potential incremental increase of 30 vehicles generated by Fresh Direct (and up to 53 vehicles inclusive of the other changes to the original plan with Fed Ex and the New York Post) would not result in changes that would alter the primary findings of the 1993 EIS or supplemental environmental assessments." EAS, Exh. C at A-5.

126. Putting aside the noncompliance of this approach, the primary finding of the 1993 FEIS that the Fresh Direct project supposedly will not alter include significant adverse noise impacts that could not be mitigated at the time. The 1993 FEIS concluded that at some receptors, the increase in noise levels would be as much as 16dBA. Exh. GG at 13. The IDA's

failure to prepare a full environmental impact statement for the Fresh Direct project in the face of a finding of significant adverse impact on noise violated SEQRA and CEQR.

127. In addition, under CEQR's current Public Health evaluation criteria, a finding of significant unmitigated adverse noise impacts requires additional noise studies. TM 20, 6. Yet here, the IDA adopted the conclusions of the 1993 FEIS without further study, an omission made all the more glaring given the residential rezoning in the neighborhood since 1997.

128. In addition, the inappropriateness of relying on the 1993 FEIS monitoring tests for noise impacts in 2012 is underscored by the fact that the residential receptors tested in 1993 all "*[f]ell within a manufacturing district and [were] all nonconforming uses.*" (Emphasis added.) Exh. EE at S-27. This is no longer the case as the study area around the Harlem River Yard and a portion of the Yard itself is now mixed-use residential. Formerly nonconforming residences are now conforming and many more new residential units have been added to the area. The IDA failed to consider this, much less identify and test new residential receptors.

2. IDA Fails to Properly Assess Vehicular Noise Impacts from Fresh Direct.

129. As an initial screen for vehicular noise, the CEQR TM requires that "traffic volumes ... be estimated for the expected hour or hours with the greatest noise level change at sensitive receptors likely to be most affected by the proposed project." TM 19-10. Thus, the initial screen depends upon the assessment of three factors: hourly project traffic volumes; the presence of sensitive receptors in the area impacted by the project; and the assessment of existing hourly noise levels at these sensitive receptor locations so that noise level changes caused by the project can be estimated. Based upon this screen, "[i]f existing Noise PCE values are increased by 100 percent or more due to a proposed project... a more detailed analysis is generally performed." (TM 19-10)

130. Project traffic volumes. Project traffic volumes are determined through the agency's traffic analysis. As a result, all of the flaws and omissions that plague the Fresh Direct traffic analysis plague the Fresh Direct noise analysis. This includes the impermissible consideration of the alleged "net increment" of impacts, the failure to consider foreseeable project growth, the failure to consider shuttle buses, and the reliance on unsubstantiated assumptions related to the mode of transport used by Fresh Direct employees and the hourly distribution of traffic.

131. The IDA's failure to convert trucks to PCEs similarly undermines both its traffic and noise analyses, but the effect of this failure is even more severe in the context of noise. For assessing traffic impacts, the PCE of medium and heavy trucks is 2.0 and 2.5, respectively. For noise, the PCE of medium trucks is 13 and the PCE of heavy trucks is 47. TM 19-16. The shuttle buses omitted from consideration by the IDA have a noise PCE of 18.

132. Sensitive receptors. Sensitive receptors are "area(s) where human activity may be adversely affected when noise levels exceed predefined thresholds of acceptability or when noise levels increase by an amount exceeding a predefined threshold change." TM 19-6. Among other things, sensitive receptors include residential zones and residential developments. There is no indication that the IDA made any effort to identify sensitive receptors in the area around the Fresh Direct proposal. This is particularly significant given the dramatic changes in the area around the Harlem River Yard since the 1993 FEIS.

133. Existing hourly noise levels. Like traffic data, 19-year-old noise data is stale and unrepresentative of current background conditions. This is particularly true in the area around the Harlem River Yards given the many changes affecting background noise conditions that have occurred since 1993. These include the expansion of the Waste Management facility, the siting

of a New York Power Authority power plant, the Fed Ex distribution center, including the vehicular traffic that it generates, and the siting of the New York Post facility, including the vehicular traffic that it generates. In addition, changes in overall background traffic conditions in the last 19 years will affect noise levels, as will the residential developments discussed above. The only way to get an accurate read on existing hourly noise levels will be to go out and monitor it, something which the IDA failed to do.

134. Noise level changes. In determining the degree to which the Fresh Direct project would result in noise level changes, the IDA's assumption that traffic levels would be greatest in the early hour of the morning make it *more likely* that there are significant noise level changes. According to the CEQR TM, "[f]or some projects, the worst-case hour or hours may occur during non-typical time periods (i.e., during the nighttime for projects which produce significant traffic volumes or truck traffic when baseline traffic levels and/or ambient noise levels are low)." TM 19-10. Similarly, the Manual emphasizes that "[n]ighttime (between 10 PM and 7 AM) is a particularly critical time period relative to potential nuisance values for noise level increases." TM 19-20.

135. According to Table 5 of Supplement C, upon commencement of operation Fresh Direct will generate 115 truck trips and 144 car trips between 5 and 6 AM on a weekday. Factoring in the 50 percent business growth discussed above, we can expect 163 trucks and 216 car trips between 5 and 6 AM within five years.⁸ Assuming that the trucks are medium trucks, each with a PCE of 13, overall the project would create 2,335 PCEs in the area around Fresh Direct between 5 and 6 AM each day. Noise impacts of this magnitude occurring during nighttime hours would require a detailed noise assessment.

⁸ This is accepting as given the claimed 75/25 modal split and without correcting for the omission of shuttle buses needed to move hundreds of Fresh Direct employees to and from subway stations during this hour.

L. IDA Fails to Properly Assess Vehicular Air Quality Impacts from the Fresh Direct Project

136. The IDA’s assessment of air quality impacts from vehicular traffic consists of one paragraph:

[T]he Fresh Direct project, overall, generates considerably less vehicular traffic and it is anticipated that the original and subsequent findings of no adverse air quality impacts would remain valid. For the one peak period where Fresh Direct could generate up to 30 more vehicle trips than was anticipated with the wholesale flower mart scenario, the difference in overall volumes would not be sufficient to anticipate incremental changes that would alter the original findings of the FEIS. In addition, as set forth in other sections of the Fresh Direct application for NYC IDA financing, it is noted that Fresh Direct is implementing integration of electric vehicles into the delivery fleet (10 soon to be added with more added) as well as conversion to natural gas for longer truck route operations. TM A-5.

Again, the IDA relies on its calculation of incremental traffic changes from 1993 projections to summarily conclude that the 1993 findings hold in 2012. And again, this approach fails to comply with the requirements of the CEQR TM.

137. The CEQR TM provides a list of “project types that may result in significant adverse air quality impacts from mobile sources and therefore require further analyses.” TM 17-10. The list includes projects that would generate 170 or more auto trips during a peak hour and projects that would generate the equivalent of 12 to 23 “heavy duty diesel vehicles” (“HDDV”) during a peak hour (the specific threshold depends on the type of road the vehicles would use and to some extent on background conditions). *Id.* The Manual also provides a table for converting specific truck types into their HDDV equivalent.

138. When a threshold is surpassed and a more detailed analysis is warranted, the lead agency must identify a study area, which “usually includes those intersections where traffic congestion is expected.” TM 17-14. Intersections with sizable auto impacts are to be assessed

for carbon monoxide (“CO”) impacts and intersections with sizable diesel truck impacts are to be assessed for fine particulate matter (PM 2.5) impacts as well.

139. Because the IDA’s traffic assessment relies upon the improper “net increment” approach, and because it systematically understates the numbers of cars, trucks and buses that would be generated by the Fresh Direct project, it fails to find that these thresholds are surpassed. Had the IDA accounted for the projected 50 percent growth in employees at Fresh Direct, this peak hour would be well in excess of the 170 car threshold. A more accurate determination of the modal split of employees could also significantly increase employee car estimates.

140. Because of the incomplete data provided on the types of trucks to be used by Fresh Direct, it is impossible to convert their trucks into an HDDV equivalent. That said, the data provided by Fresh Direct indicate a peak hour of 115 trucks and the 50 percent growth in business would raise this to 163 trucks. Moreover, there are numerous other hours of the day when the project is expected to generate dozens of truck trips. In addition, as discussed above the project would generate an unknown amount of shuttle bus trips taking thousands of Fresh Direct employees to and from subway stations. Given these, it is highly likely that the HDDV threshold would also be surpassed for the Fresh Direct project, again creating a likelihood of significant impacts warranting a more detailed environmental impact analysis.

M. IDA Fails to Consider Greenhouse Gas Emissions.

141. In 2010, the City added a Greenhouse Gas Emissions (“GHGE”) assessment to the CEQR review process. CEQR TM Chapter 18. Under the GHGE assessment, CEQR obligates lead agencies to determinate if the project is consistent with Citywide GHG emissions reduction goals, and imposes mitigation measures on projects deemed inconsistent with such goals. The CEQR TM identifies three types of projects for which a GHGE assessment is

warranted: (i) power generation projects; (ii) substantial changes to the City's solid waste management system; and (iii) projects under review in an EIS involving "development" of 350,000 square feet or more. TM 18-05. As the Fresh Direct project involves development in excess of 500,000 and the IDA relied upon the 1993 FEIS which found significant environmental impacts, the Fresh Direct project is subject to a GHGE assessment, yet IDA failed to consider this environmental impact.

N. IDA Inappropriately Issues a No Adverse Impact Relating to Archaeological Resources at the Harlem River Yard.

142. IDA acknowledged that the site of the proposed Fresh Direct project is archaeologically sensitive; however, when considering the cultural resources, the IDA consulted neither New York City's Landmark Preservation Office ("LPO") nor the State Historic Preservation Office on the proposed project. Rather, the IDA independently concluded on its own that the conditions of the 19-year old ROD applied to the Fresh Direct project and, as such, the project presented no adverse impact to the culturally sensitive site. *See* Negative Declaration, Exh. A § 7.

143. Upon learning of the IDA's adoption of a no adverse impact determination without having been consulted, SHPO issued a letter on April 25, 2012 stating that IDA's "finding of No Adverse Impact should not be seen as appropriate at this time. The conditions of the original findings have been 'violated' and therefore any state or federal agency involved in the current project should initiate consultation with our office to meet their responsibilities under SHPA [State Historic Preservation Act] and NHPA [National Historic Preservation Act]." *See* SHPO Letter dated April 25, 2012, a true and correct copy attached hereto as Exhibit SS. SHPO strongly objected to the IDA's use of the DOT's 1994 ROD and 1993 FEIS as entirely inappropriate and noncompliant with the State Historic Preservation Law.

144. Only after receiving SHPO's letter did ESDC consult with SHPO regarding the proposed Fresh Direct project. On May 16, 2012, SHPO issued a conditional no adverse impact finding for the proposed Fresh Direct project, which was materially different than that which the IDA adopted when issuing its negative declaration on February 14, 2012. Specifically, the new finding requires additional consultation if any excavation occurs below the existing soil surface, as opposed to below the historic fill, as was the case with the original finding in 1993. *See* SHPO Letter dated May 16, 2012, a true and correct copy attached hereto as Exhibit TT.

CAUSE OF ACTION

145. Petitioners repeat and re-allege each of the allegations made in paragraphs 1-145 with the same force and effect as if fully set forth herein.

146. Respondent IDA violated SEQRA and CEQR by failing to identify environmental impacts, take a "hard look" at the impacts and make a "reasoned elaboration" of the basis for its determination that Fresh Direct would have no significant environmental impacts and that neither a Supplemental EIS nor a full EIS was required. The EAS and the resulting Negative Declaration are incomplete, and based on an outdated and inaccurate FEIS prepared 19 years ago for a different project and on a neighborhood that has been rezoned for mixed used residential. The IDA failed to identify and evaluate numerous potential impacts. Moreover, the IDA ignored certain findings of significant adverse impact in the 1993 FEIS that, by today's criteria and changed circumstances, demonstrate its failure to take a hard look at relevant environmental impacts. The EAS and Negative Declaration are unsupported by the facts and the issuance of the Negative Declaration was therefore arbitrary and capricious and an abuse of discretion.

147. The proposed Fresh Direct project encompasses and pervasively affects 15.9 acres, and as such is properly determined to be a Type I action as defined by SEQRA. *See* 6 NYCRR Section 617.4(b)(6)(i).

148. For Type I actions, SEQRA and CEQR require the preparation of an Environmental Assessment Form (EAS under CEQR) to make a threshold determination of the significance of such actions and whether a full Environmental Impact Statement will be required. *See* NYCRR Section 617.6(a)(2). A Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an Environmental Impact Statement. 6 NYCRR Section 617(a)(1). The CEQR TM Chapter 1, Section B, 121, Type 1 Actions, states that “[b]efore taking a Type 1 action, an agency is required to prepare an EAS. Although it is possible to conclude on the basis of the EAS that a Type 1 action would have no significant impact on the environment, such a determination is less likely than it is for an unlisted action.”

149. For Type I actions, SEQRA requires lead agencies to prepare a full environmental impact statement where it has determined that the action may include the potential of at least one significant adverse impact on the environment. 6 NYCRR § 617(a)(1).

150. Despite the acknowledged and potentially adverse environmental impacts that Fresh Direct will have on the surrounding neighborhoods and despite the fact that Fresh Direct is a Type I that action requires a higher level of environmental scrutiny, the IDA issued a Negative Declaration.

151. IDA’s failure to identify and evaluate the potentially adverse environmental impacts of numerous aspects of the Fresh Direct project, as set forth in the facts, violates SEQRA, ECL §§ 8-101, et seq., and its implementing regulations, 6 NYCRR §§ 617, et seq.

152. In particular, in determining whether an agency's action will have an adverse environmental impact, the agency must compare the likely impacts of the action with a list of criteria set out in the regulations at 6 NYCRR § 617(c). The required analyses included, *inter alia*:

i. a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels, a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems;

iv. the creation of a material conflict with a community's current plans or goals as officially approved or adopted;

v. impairment of the character or quality of important historical, archeological, architectural or aesthetic resources or existing community or neighborhood character;

viii. a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;

xi. changes in two or more elements of the environment, no one of which has a significant impact in the environment, but when considered together result in a substantial adverse impact to the environment.

6 NYCRR § 617(c).

153. The Negative Declaration and EAS failed to identify and to address adequately these types of impacts.

154. The Negative Declaration and EAS failed to account for significant changes to the project and circumstances since the 1993 FEIS was prepared.

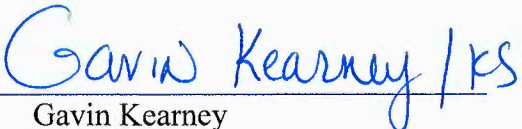
155. IDA's issuance of a Negative Declaration in this matter was arbitrary and capricious and an abuse of discretion and should be annulled pursuant to CPLR 6 §§ 3001 and 7803(3).

WHEREFORE, Petitioners respectfully request that this Court issue an Order:

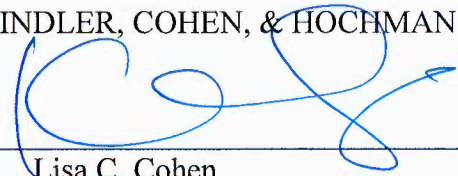
1. Declaring that the IDA's issuance of the Negative Declaration violated SEQRA and CEQR and was arbitrary and capricious and an abuse of discretion;
2. Annulling and vacating the Negative Declaration for failure to comply with SEQRA and CEQR;
3. Compelling IDA to issue a Positive Declaration and prepare an Environmental Impact Statement for Fresh Direct at the Harlem River Yard or alternatively to prepare a Supplemental Environmental Impact Statement;
4. Awarding Petitioners the costs of this proceeding, including reasonable attorney fees; and
5. Awarding such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 13, 2012

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