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

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TIMOTHY BROWN, Index No.110334/10

Petitioner, **AFFIRMATION**

-against-

THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, MICHAEL BLOOMBERG, Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, SOHO PROPERTIES INC., JANE DOE AND JOHN DOE,

Respondents.

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BRETT JOSHPE, ESQ., on behalf of the American Center for Law & Justice, and JACK L. LESTER, ESQ., attorneys duly admitted to practice law in the State of New York, affirm the following under the penalties of perjury:

1. We are counsel to Petitioner.

2. We are fully familiar with the facts and circumstances set forth herein.

3. This Affirmation is submitted in support of Petitioner's application for injunctive relief.

## PRELIMINARY STATEMENT

4. This application is necessitated by the inordinate delay in receiving Respondents' answer to this Article 78 proceeding filed on August 4, 2010 and amended on October 13, 2010, the ample need for relevant and material documents under the exclusive possession of Respondents and the danger of imminent harm resulting from the demolition of 45-51 Park Place (the "Buildings").

5. Petitioner is attempting to preserve the status quo in order to maintain the existence of the Buildings and to allow this matter to be determined on the merits.

6. The destruction of the Buildings will render this case moot.

**PETITIONER HAS "AMPLE NEED" FOR DISCOVERY**

7. CPLR § 408 requires leave of Court for discovery in a special proceeding. It is well settled that discovery is appropriate in an Article 78 proceeding when the moving party demonstrates "ample need". New York University v. Farkas, 123 Misc. 2d 649, 468 N.Y.S. 808 (Civ. Ct. N.Y. Co. 1983).

8. In the leading case relating to discovery in a special proceeding, the Court in Farkas set forth six factors to consider in determining whether the moving party has established "ample need" to wit:

a. Whether, in the first instance, the petitioner has asserted facts to establish a cause of action;

b. Whether there is a need to determine information directly related to the cause of action;

c. Whether the requested disclosure is carefully tailored and is likely to clarify the disputed facts;

d. Whether prejudice will result from the granting of an application for disclosure;

e. Whether the prejudice can be diminished or alleviated by an order fashioned by the Court for this purpose; and

f. Whether the Court in its supervisory role can structure discovery so that Respondents will not be adversely affected by the discovery requests.

9. It is beyond argument that Petitioner has "ample need" for documents under the exclusive possession and control of the Respondents.

10. The gravaman of this Article 78 proceeding pertains to Petitioner's contention that prior to the vote of the LPC relating to the designation of landmark status for 45-47 Park Place, the LPC, which is an independent administrative agency appointed exclusively by the Mayor, was subject to undue influence from various parties, particularly the Office of the Mayor. These factors impinged upon the impartial and fair administration of the landmark laws of the City of New York and subverted the quasi-judicial function of the LPC.

11. As set forth in the Verified Petition, Memorandum of Law and Affidavit of Gregory Dietrich, the Petitioner's claim is based upon the LPC's arbitrary and capricious departure from administrative precedent, the LPC's deviation from fundamental principles of administrative fairness and the LPC's violation of fundamental principles of administrative law in denying landmark status to 45-47 Park Place.

12. The designation of landmark status for 45-47 Park Place became a matter of intense public debate in the weeks leading to the LPC vote because the owners of the Buildings proposed demolishing them and developing a mosque in close proximity to the former site of the World Trade Center (the "Project").

13. The Mayor was on record in the weeks leading to the LPC vote unequivocally in favor of developing the Project at the site.

14. On or about July 30, 2010, Petitioner submitted various Freedom of Information Law ("FOIL") requests to the Office of the Mayor and the LPC pursuant to Article 6 of the Public Officer's Law of the State of New York relating to the Mayor's involvement in the LPC's review and consideration of according landmark status to 45-47 Park Place. (See Freedom of Information Law Request annexed as Exhibit "B")

15. The FOIL requests were specifically tailored to determine whether or not improper motivations based upon pressure from the Mayor's Office or other governmental entities influenced the manner in which the LPC heard and determined this matter.

16. After a nearly five month delay, on December 23, 2010, the Mayor's Office provided only a partial release of responsive documents. The crucial documents relating to the direct communications between the Office of the Mayor and the LPC, or other agencies, were withheld based upon a claimed exemption pursuant to FOIL. (See Mayoral response to FOIL annexed as Exhibit "C")

17. The Mayor's lack of responsiveness, delay and utter disregard for transparency in a matter of great public interest and debate generated editorial comment. (See N.Y. Post Editorial annexed as Exhibit "D")

18. The materials released by the Mayor's Office confirm that his office was working directly with Respondent Soho Properties and other principals involved with the Project, which included assisting Respondents in dealings with other New York City agencies. For instance, an email from Feisal Abdul Rauf of the Cordoba Initiative, which upon information and belief is one of the beneficial owners of the planned Project at the Building, to Nazli Parvizi, the Commissioner of the Community Affairs Unit in the

Office of the Mayor, thanks her for drafting a letter to the Lower Manhattan Community Board 1 (the "Community Board") advocating for the Project. Other emails from Parvizi to Rauf referred to trying to "get the media attention off of everyone's back and giv[ing] you guys time to regroup on your strategy as discussed…" and to the landmarks issue as "a huge deal." Another email from Daisy Khan, the executive director of the American Society for Muslim Advancement ("ASMA"), which upon information and belief is also a beneficial owner of the planned Project, to Fatima Shama of Immigrant Affairs in the Mayor's Office, said, "we need some guidance on how to tackle the opposition." Another email from Daisy Khan to Shama and Sharif El-Gamal, the principal owner of Respondent Soho Properties, said, "Just spoke to Commissioner Nazli Parvizi. She will call Julie Menin to thank them for passing the resolution and ask how she can assist." An email from El-Gamal to Shama also said, "We got unanimous support for the project [Community Board] Wednesday night. Please call me either at [redacted] or below we need your advice." Another email from Parvizi to Rauf, Shama, and Khan, said, "Hi everyone, I haven't heard anything from any of you and I'm curious as to what you are thinking. As I mentioned, *we're* in a really really tough place with this landmarking issue but it is separate from the current community board issue and i really recommend you send the letter to CB1 so they can pull this off their agenda." (emphasis added). The emails reveal such a close relationship that one staff member of ASMA wrote to Shama saying, "We will mail out the $300 check towards the Ramadan event from Cordoba today. I also wanted to let you know that ASMA would like to contribute $150 towards the event. I am not sure if you have already met your target. But we wanted to main [sic] a contribution as well. Shall we also put the ASMA check in the mail following the

instructions in the letter? Thanks so much for your outstanding efforts to make this happen." (See Emails annexed as Exhibit "E")

19. The partial set of documents released by the Mayor's Office also include an email from Respondent Soho Properties' attorney, Shelley Friedman, which was forwarded by Rauf to staff in the Mayor's Office and said,

> You will recall that the idea of going to the community board originated at the meeting we had with Borough President Scott Stringer's office. They suggested it as a means to allowing them to help us at the Landmarks Commission regarding the de-designation of 45 PP as a proposed landmark. The Borough President (and Councilmember Chin) have a firm policy of speaking up at public agencies only after the community board has taken a position on an item. So withdrawing the resolution may affect their thinking about how helpful they can be on June 22. That in itself may not be fatal to getting 45 PP de-designated, but I do know that [Landmarks Preservation Commission] Chairman [Robert] Tierney was looking forward to the 'political cover' their support would bring him.

20. While the documents provided by Respondent Mayor Bloomberg clearly indicate heavy involvement in a process that was still before an administrative body, the failure to fully respond to Petitioner's FOIL requests, and, in particular, the Mayor's claimed exemption for inter-agency and intra-agency materials (which would be most relevant to Petitioner's claim) after months of delay, further compels the issuance of injunctive relief, so as to maintain the status quo, and disclosure so that relevant and material information can be examined relating to fundamental questions raised in this matter.

## IRREPARABLE HARM

21. As set forth in full detail in the Amended Verified Petition annexed hereto, the architecturally and historically unique structures at issue in this proceeding face imminent destruction and demolition.

22. The destruction of the Buildings will render any determination of the Court on the merits of the case moot. If the Court allows the harm sought to be enjoined then any future determination by the Court or reviewing agency will be rendered meaningless. See Schlosser v. United Presbyterian Home at Syosset, Inc., 56 A.D. 2d 615, 319 N.Y.S.2d 881 (2d Dept. 1977).

23. The potential harm to the Buildings and to Petitioner's claims is self-evident. The Petitioner's legal claims cannot exist if the Buildings are destroyed. Petitioner is seeking to prevent this calamity before the Court has had an opportunity to hear and determine the issues raised in this case.

24. Petitioner has reason to believe that Respondent is moving forward with plans to demolish the Building, and that demolition of the Building could be imminent. Respondent, the New York City Department of Buildings, lists two recent complaints on its website, numbers 1289575 and 1289842, noting unauthorized work that is being conducted at the subject property without proper permits. Respondent, Soho Properties Inc. and Jane and John Doe, have also applied for approximately $5 million in funding through a Lower Manhattan Development Corporation and U.S. Department of Housing and Urban Development program, both of which indicate that Respondents are attempting to move forward with the project and demolition as quickly as possible.

25. It is axiomatic that in view of the unique nature of real property which is the subject of this action, Petitioner is entitled to the granting of a preliminary injunction pursuant to the express provisions of New York's Civil Practice Law and Rules, Section 6301 which reads in part as follows:

> A preliminary injunction may be granted in any action where is appears that the defendant threatened or is about to do, or is doing or procuring or

> suffering to be done, an act in violation of the plaintiff's rights respecting and tending to render the judgment ineffectual.

26. It is well settled that a preliminary injunction may be granted where the movant has demonstrated: (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of the equities favors the movant's position. Tucker v. Toia, 54 A.D.2d 322, 324, 388 N.Y.S. 2d 475, 477 (4th Dept. 1976): The affidavit of Gregory Dietrich annexed hereto establishes unequivocally that the architectural and historical value of the buildings compels their preservation until this matter may be heard and fully adjudicated.

27. As the purpose of this interlocutory relief is to preserve the status quo until a decision is reached on the merits, Petitioner respectfully submits that based upon Petitioner's meritorious claims and the failure of Respondents to respond to this proceeding, which was initially filed in early August, in a timely fashion, or to fully respond to Petitioner's FOIL requests, Petitioners are entitled to a preliminary injunction.

28. Any protracted delay in hearing this matter only serves to increase the likelihood that by the time this matter is heard by this Court, the Buildings will no longer exist in their current form. Petitioner is trying to avoid allowing Respondents' dilatory tactics to deny him his day in Court. As the Appellate Court explained in the preeminent case of Tucker v. Toia, 54 A.D.2d 322, 325, 388 N.Y.S. 2d 475, 478 (4th Dept. 1976):

> it is not for this Court to determine finally the merits of an action upon a motion for a preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the *status quo* until a decision is reached on the merits.

**SUCCESS ON THE MERITS**

29. The Affidavit of Gregory Dietrich sets forth the myriad of ways that the LPC violated and departed from clear administrative precedence in summarily denying landmark status to the Buildings.

30. 45-47 Park Place was calendared for landmark review more than 20 years ago. The prior staff and Chair's detailed and comprehensive endorsement of the Building's landmark status was completely disregarded by the current LPC.

31. The rich historical value of the Buildings was ignored by the LPC despite the voluminous data compiled by the LPC's own staff and community members commencing with the 1989 designation for review. (see affidavit of Gregory Dietrich annexed hereto)

32. The decision and determination of the LPC arbitrarily departed from their statutory mandate and administrative precedence by: (a) ignoring their own research and analysis in support of designation; (b) failing to incorporate the Buildings' design, integrity, scale and economic and political history into their determination; (c) ignoring the relation of September 11th to the historical importance of the Buildings; (d) failing to reasonably or adequately distinguish these Buildings from buildings maintaining nearly identical architectural features located at 311 Broadway and 23-25 Park Place that were granted landmark status; (e) failing to allow a vote of the local Community Board prior to the LPC's August 3, 2010 determination; and (f) allowing political considerations related to the proposed use to influence their deliberative process.

33. The arbitrary and capricious disregard of long-established administrative precedence and procedure demonstrated in this matter led to the LPC's disregard of key factors in rejecting landmark status for the Buildings. The fact that the violations of law

as set forth in the annexed Memorandum of Law and in the Dietrich Affidavit were based upon and motivated by undue influence, particularly from the Mayor's Office, compels that this matter be remanded to the agency and the subject Buildings be left intact. See Charles A. Field Delivery Service v. Roberts, 66 N.Y.2d 516 (Ct. of Appeals, 1985).

**BALANCING OF THE EQUITIES**

34. The balance of the equities also favors Petitioner's motion for a preliminary injunction because, even if granted, Respondents would still have a chance to win this case on the merits and proceed with demolition and construction of the Buildings. Alternatively, if Petitioner's motion for a preliminary injunction is denied and the Buildings are demolished, Petitioner will have been deprived of his day in court on the merits. See Walsh v. St. Mary's Church, 248 A.D.2d 792, 794 (N.Y. App. Div. 3d Dept 1998). Accordingly, the harm that Petitioner would suffer by a preliminary injunction not being granted and the Buildings being demolished would be greater than the harm that Respondents would suffer by being temporarily enjoined and the status quo maintained. See Axios Product v. Time Mach. Software, 2010 NY Slip Op 32772U (N.Y. Sup. Ct. Oct. 4, 2010).

35. For all of the above reasons, Petitioners should be granted the motion for a temporary restraining order. The attorneys for Respondents have been advised of the time and place of Petitioner's application for a T.R.O.

WHEREFORE, Petitioner respectfully requests that the relief set forth in the Order to Show Cause be granted.

_____
Brett Joshpe, Esq.
American Center for Law & Justice

_____
Jack L. Lester, Esq.

At the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse thereof located at 71 Thomas Street, New York, New York on the ___ day of January, 2011.

PRESENT:

HON. _____
Justice of the Supreme Court

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

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TIMOTHY BROWN,

Petitioner,

-against-

THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, MICHAEL BLOOMBERG, Mayor of the City of New York, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, SOHO PROPERTIES INC., JANE DOE AND JOHN DOE,

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Index No.110334/10

**ORDER TO SHOW CAUSE**

Upon the annexed Amended Verified Petition of Timothy Brown dated the 13th day of October, 2010, the Memorandum of Law dated the 13th day of October 2010, the Affirmations of Brett Joshpe, Esq. of the American Center for Law & Justice, and Jack L. Lester, Esq. dated the ___ day of January, 2011 and the Affidavit of Gregory Dietrich dated the ___ day of January, 2011:

Let the Respondents or their attorneys show cause before this Court at ___ Part of this Court located at 71 Thomas Street on the ___ day of January, 2011 at 9:30 a.m. in the

forenoon of that day or as soon thereafter as Counsel can be heard, why an Order should not be made and entered herein:

1. Preliminarily enjoining the granting, approval or issuance of any permits to demolish structures located at 45-47 Park Place and 49-51 Park Place in the City, State and County of New York ("the Buildings");

2. Enjoining any construction, excavation or preconstruction activity related to the development of any structure that will impact upon the architectural integrity of the Buildings;

3. Compelling the Respondents to disclose any communications, documents, emails, memoranda, notes and/or correspondence between the Office of the Mayor and the Landmarks Preservation Commission (the "LPC") pertaining to the designation of landmark status upon the Buildings;

4. Pursuant to CPLR §§ 408 and 3102, permitting Petitioner to inspect documents in the possession and control of Respondents, as listed in Petitioner's Notice for Discovery and Inspection, annexed as Exhibit "A," and to take the deposition upon oral examination of representatives of Respondents and other third parties, as listed in Petitioner's Notice of Deposition, annexed as Exhibit "B";

5. Compelling Respondents to comply with Article 6 of the Public Officers Law of the State of New York and provide access to Petitioners of all relevant and material documents relating to the Buildings;

6. Compelling Respondent, the LPC, to comply with the Administrative Code Title 25, Chapter 3 and Chapter 74, Section 3020 of the New York City Charter and

remand this proceeding to the LPC to conduct a legally proper public review pertaining to the landmark status of the Buildings;

7. Annulling the determination of the LPC issued on August 3, 2010 which summarily denied landmark status to the Buildings;

8. Granting such other and further relies as this Court may deem just and proper;

**MEANWHILE**, and pending the hearing of this application based upon sufficient cause, Respondents are hereby enjoined and stayed from approving or commencing any demolition, construction, excavation or preconstruction activity upon the Buildings.

**ORDERED**, that service of a copy of this Order together with the papers upon which it was made and the Amended Verified Petition served upon Respondents on or before January ___, 2011 shall be deemed good and sufficient notice of this application.

ENTER:

_____

J.S.C.