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PRELIMINARY STATEMENT

When Plaintiff-Respondent Merkos L'Inyonei Chinuch, Inc. ("Merkos") commenced this lawsuit in 2004, Defendant-Respondent Congregation Lubavitch, Inc. ("CLI") was not named as a defendant. Rather, CLI voluntarily came to court and sought to be joined. R.1189, 1195. It argued to the trial court that it was a necessary party because it was the congregation that used the synagogue at the premises in question[1] and it therefore had the right to determine the contents of a plaque that was part of the "main entrance" to what it described as "*our Synagogue*." R.1190. CLI subsequently argued that *it* was properly occupying the premises based on theories of constructive trust and charitable trust. R.1221. On the basis of CLI's asserted claims, the trial court allowed CLI to become a party to the case.

By the time of the trial of the ejectment cause of action in this matter, CLI had changed its position dramatically. One of the elements of ejectment is that the defendant occupy the premises. At the trial, and now before this Court, CLI took a 180-degree turn from its position early in the case and argued that it did not occupy the Premises because it was an entity distinct from the congregation that was occupying the Premises. However, under the doctrine of judicial estoppel, CLI

[1] The premises at issue here are at 770 Eastern Parkway (the "770 Premises") and 784-88 Eastern Parkway (the "784-88 Premises"). For shorthand purposes the two are sometimes referred to herein jointly as "770" or the Premises.

cannot now be heard to argue that there is some distinction between it and the congregation that uses the Premises, when it was that very lack of distinction between the two that was the basis for the trial court granting CLI's original motion to intervene. As stated by the lower court: "In fact, CLI's entire argument in support of its motion to intervene was premised upon equating itself with the congregation, and that as such it was a necessary and indispensable party." R.700.

Further, even putting aside the concept of judicial estoppel, the evidence adduced at trial established overwhelmingly that CLI and the congregation are one and the same. CLI's Certificate of Incorporation states that the purpose for which CLI was formed is "to succeed and continue the work" of the religious congregation that had been present. R. 1110. CLI's only witness testified that the actions that he took in this lawsuit were taken "as a representative of the Congregation." R. 755:5-8. CLI's checks and letterhead stated that its address was 770 Eastern Parkway. R.1185, 1187, 1349, 1353. There is much more evidence that will be discussed below, but that which has already been mentioned is sufficient to show that there was ample evidence to support Justice Harkavy's determination that CLI and the congregation are one and the same and that they occupied the Premises.

The other issue in dispute concerning ejectment was whether CLI had ousted Agudas and Merkos from 770. To answer that question, one need look no further

than the letter written by the Gabboim[2] (trustees of CLI and the congregation) in which they stated that they were the "only ones authorized . . . to decide and to approve about holding gatherings at" 770. R. 1173. They actually used this "authority" to keep Merkos and Plaintiff-Respondent Agudas Chassidei Chabad ("Agudas") out of the property owned by Merkos and Agudas – 770.

The other elements of the ejectment cause of action have not been contested by Appellant CLI on this appeal. Because the evidence fully supports Justice Harkavy's decision that Agudas and Merkos are entitled to a judgment in ejectment, his decision should be affirmed.

Furthermore, because the trial revealed that, as Agudas and Merkos have argued all along, the real estate issue in this case was capable of being decided based on neutral principles of law, Justice Harkavy was correct in refusing to dismiss the case on the ground that it allegedly implicated religious issues. Likewise, Justice Harkavy was correct, and certainly did not abuse his discretion, in refusing to permit discovery by CLI into numerous irrelevant issues, including issues unrelated to the "neutral principles" under which it was necessary to decide this case.

[2] "Gabboim" is Hebrew, and is plural for the word "Gabbai". Gabboim is spelled various ways including, Gabbaim and Gabboyim.

STATEMENT OF FACTS

A. Facts Relevant to This Appeal

Agudas holds the deed to, and is thus the fee owner of, the 770 Premises (and has been since 1940). PRA[3] 448, ¶6. Merkos holds the deed to, and is thus the fee owner of, the 784-788 Premises. PRA 448, ¶7. As the IAS court held, CLI has no right, title or interest to the Premises.

CLI, who admittedly is neither a tenant nor licensee (R. 961) is in possession of the Premises, as demonstrated by the facts discussed in greater detail in Point II. CLI ousted Agudas and Merkos from the Premises, as demonstrated by the facts discussed in greater detail in Point III.

B. Not All CLI's "Facts" Are True or Relevant

CLI's Opening Brief[4] contains statements that are untrue. For example, CLI states that the Gabboim are the "sole members" of CLI. Opening Brief, p. 17.[5] CLI's own documents contradict that statement. For example, CLI's Certificate of Incorporation submitted to the Secretary of State under the penalty of perjury, states in paragraph 4 that the membership of CLI shall be "those who regularly attend religious services at 770 Eastern Parkway and who support the synagogue financially." R. 1110. CLI also asserted a counterclaim in which it stated that its

[3] "PRA" is a reference to the Previous Record on Appeal, filed in the companion cases.
[4] This is a reference to the Opening Brief for Defendant-Appellant Congregation Lubavitch, Inc., dated March 7, 2008.
[5] The same statement is repeated in footnote 30 of the Opening Brief.

members attend worship at 770. R. 1105, ¶ 90. See also R. 1102, ¶¶ 76-77. And, Trial Exhibit 24 is a letter that has the name of the four Gabboim on the letterhead and is addressed to "Members of Congregation Lubavitch, Inc.," meaning that the Gabboim were writing to a group larger than the four of them. R. 1352-53.

It also important to note that there are many irrelevant facts in CLI's Opening Brief that are apparently included as part of CLI's never-ending effort to turn this into a religious dispute. The discussion on the bottom of page 16 and the bullet points on pages 19-20 are examples. At the very outset of the case, Agudas and Merkos made clear that they did not agree with many of CLI's statements of alleged "fact" in this regard but were not going to get drawn into engaging with CLI on issues that were irrelevant to the dispute at Bar. That remains the position of Respondents in this brief.

Agudas and Merkos also point out that there are many statements in CLI's 78-page Opening Brief that are unsupported by citations to the Record on Appeal. As just one example, CLI states (Opening Brief, p.27) that Rabbi Katz is a "former Gabbai aligned with respondents in the religious and governance disputes." CLI cites to pages 357 to 412 of the Record on Appeal but nothing in those pages supports this assertion. While Agudas and Merkos do not plan to identify each such failure, respectfully, when the Court is analyzing CLI's arguments, it should

consider whether CLI has supported its statements with reference to evidence that has actually been submitted in this matter.[6]

Point I

THE PARTIES AGREE ON THE ELEMENTS OF A CAUSE OF ACTION IN EJECTMENT

One thing on which the parties agree is the elements of a cause of action for ejectment. To establish a *prima facie* case in an action for ejectment a plaintiff must show evidence that:

1. he is owner of an estate in fee, for life, or for a term of years;
2. in tangible real property;
3. with a present right to possession to the property;
4. from which, or of which, within 10 years preceding the commencement of the action, the plaintiff has been unlawfully ousted by the defendant or his predecessors; and
5. of which the defendant is in present possession.

[6] One other example. CLI refers on page 20 of the Opening Brief to an alleged refusal to produce a last will and testament and, on page 33, to purging of a contempt. While CLI can point to testimony concerning an alleged edict of the *Bais Din*, there was no testimony to support those particular details. Neither of these alleged facts is relevant to any issue before this Court but this demonstrates again that CLI is making statements to this Court that are unsupported by the Record.

Carmody Wait 2d, § 89:4, p. 300 (2005); *Crook v. Licourt*, 216 A.D. 237, 214 N.Y.S. 774 (4th Dept. 1926); *Aubuchon v. The New York*, 137 A.D. 834, 836-837, 122 N.Y.S. 581 (2d Dept. 1910).

Here, there is no dispute that the litigation concerns tangible real property—the Premises. Furthermore, the trial court has already held, in its Order and Judgment dated June 19 2006, that Agudas is the fee title owner of the 770 Premises, Merkos is the fee title owner of the 784-88 Premises and CLI has no right, title or interest to either Premises. R. 91. Thus, Agudas and Merkos have met their burden with respect to the first and third elements as well. Indeed, CLI does not contest this point in its appeal. Rather, CLI argues (Opening Brief, Point V) that it has not ousted Agudas and Merkos within the past ten years and that it is not currently in possession of the Premises. Agudas will address the possession issue first and will address the ouster point in the following section of this brief.

In considering the evidence discussed below, the Court should be mindful that, as the Court of Appeals has directed, "[t]he determination of the trial court after a nonjury trial should not be disturbed on appeal unless it is clear that the court's conclusions could not have been reached upon a fair interpretation of the evidence, especially where the findings of fact rest in large measure on considerations relating to the credibility of witnesses." *Thoreson v. Penthouse Intl.*, 80 N.Y.2d 490, 495, 591 N.Y.S.2d 978 (1992). *See also Loughran v. Town*

of Eastchester, 299 A.D.2d 328, 749 N.Y.S.2d 172 (2d Dept. 2002); *Matter of Hartford Ins. Co. v. Khan*, 279 A.D.2d 524, 718 N.Y.S.2d 872 (2d Dept. 2001).

Point II

THE TRIAL COURT PROPERLY RULED THAT CLI IS IN POSSESSION OF THE PREMISES AND, THEREFORE, IS SUBJECT TO BEING EJECTED

CLI argues that it is not in possession of the Premises. However, upon closer analysis, CLI's real argument on this issue is that the Court should draw a distinction between CLI the corporation on the one hand, and the congregation that CLI says is in possession of the Premises on the other (the "Congregation"). According to CLI, because it is the Congregation – not CLI – that occupies the Premises, CLI cannot be ejected. Justice Harkavy recognized this early in the trial and correctly noted that "the question now is simply, is CLI and the Congregation the same, that's all I want to know." R. 806. As CLI's statements in its pleadings throughout this case demonstrate, as does the other evidence, there is no distinction between the two. Justice Harkavy correctly held that CLI and the Congregation are one and the same and both operate through the same trustees (the Gabboim). Since CLI has no right to be in the Premises that it currently occupies, it should be ejected, along with all those who act in concert with CLI (which includes its officers, directors and trustees, known in this case as Gabboim, as well as the Congregation).

In fact, one of the cases relied on by CLI completely undermines its argument. In *Islamic Center of Harrison, Inc. v. Islamic Science Foundation, Inc.*, 216 A.D.2d 357, 628 N.Y.S.2d 179 (2d Dept. 1995), the defendant was the owner of the property that housed a mosque and the plaintiffs claimed to be the ones that controlled the spiritual services in the mosque. The court permitted the owner to evict the plaintiffs. In its Opening Brief (p. 59), CLI relies upon the following quotation from *Islamic Center:*

> *There is a well settled distinction between a church as a religious corporation and the same church as a religious society.* The corporation, its trustees, and any other persons entitled to vote at corporate meetings have jurisdiction over the property and temporal affairs of the church, while the religious society consisting, *inter alia*, of the worshipers, has authority over spiritual matters.

Opening Brief, p. 59 (emphasis in original). However, *Islamic Center* is fatal to CLI's position because, here, Agudas and Merkos are the religious corporations and, therefore, are the ones with "jurisdiction over the property." Along the same lines, in *Islamic Center*, this Court stated the following:

> Whatever claims the plaintiffs might have over spiritual matters at the mosque in question, they have not demonstrated that they possess any legitimate claims to temporal control over the real property on which the mosque is located, which is owned by the defendant Islamic Cultural Center of New York, Inc., and allegedly controlled by the individual defendants. The plaintiffs' use of that property appears to have been pursuant to a lease which has not been renewed. Thus, we agree with the Supreme Court that the

> plaintiffs have completely failed to demonstrate that they should be awarded a preliminary injunction allowing them to continue to use the defendants' property for their services over the defendants' objections.

This Court also affirmed the *Islamic Center* trial court's order directing the plaintiffs to vacate the premises. Applying this decision to the instant case, regardless of who is in control of the services in the Synagogue in the Premises, Agudas and Merkos, as the undisputed owners of the Premises, have the lawful right to eject them.

A. The Certificate of Incorporation

Putting the *Islamic Center* case to the side, the issue before this Court as framed by CLI is whether CLI is simply the "management company"[7] or "tool"[8] it is now claiming to be (Opening Brief, pp. 17, 33, 56, 61), or whether it is in fact the same as the Congregation. Probably the best place to begin that inquiry is with CLI's Certificate of Incorporation. Paragraph 3 of that document makes clear that the purpose for which CLI was formed was "to succeed and continue the work of the unincorporated Orthodox Jewish religious congregation known as Congregation Lubavitch and located at 770 Eastern Parkway. . . ." R. 1110. Further, according to its own Certificate of Incorporation, the activities of CLI are "weekday, Sabbath and holiday Jewish religious services in accordance with the

[7] See R. 721:14.
[8] See R 752:18-753:2.

principles of the Torah and Code of Jewish Law" and "religious community gatherings marking significant days on the Chabad Chassidic calendar." CLI now claims that it is merely a management company, but that cannot be right; a management company does not engage in the activities of religious services and religious community gatherings. The inescapable conclusion is that this is not the Certificate of Incorporation of a "management company;" it is the Certificate of Incorporation for a congregation and, indeed, specifically represents that CLI is *the* successor to an existing congregation - - Congregation Lubavitch.

The Certificate of Incorporation is critical for another reason as well. The very document that created CLI - - and submitted under oath to the State of New York -- states clearly in paragraph 4 that the membership shall be "those who regularly attend religious services at 770 Eastern Parkway and who support the synagogue financially." R. 1110. If, as CLI now claims, CLI was merely a shell company created to do real estate management work, why would its members consist of people who regularly attend religious services? Moreover, CLI has claimed that the Gabboim are the only "members" of CLI. Opening Brief, p.17. As discussed in greater detail on page 24, *supra*, that statement is contradicted by CLI's own evidence.

B. CLI's Statements When It Entered the Case and Lipskier's Testimony

CLI's Certificate of Incorporation is, standing alone, sufficient evidence to prove that there is no distinction between CLI and the Congregation. But there is much more. As noted above, when this lawsuit was first commenced, CLI was not a named party. Rather, Merkos began the lawsuit against certain named individuals and the subject of the lawsuit was a plaque that hung on the wall on the outside of the Premises. CLI then came to court and sought to intervene in this matter telling the trial court that it was a necessary party to any lawsuit regarding the Premises. To quote from the Affirmation submitted on behalf of CLI:

> 3. As set forth herein, *the Congregation should be joined* as a party to this dispute. The commemorative plaque which is the focus of this proceeding is affixed to a street level wall which forms a portion of the main entrance to *our Synagogue.*
>
> 16. As elected *Trustees of the Synagogue, we have the right to determine* which plaque, if any, should be placed on the entrance to *our place* of worship.
>
> 20. This matter should also be dismissed because the Plaintiff failed to include a necessary party, *Congregation Lubavitch, Inc.*
>
> 21. Plaintiff…failed to include the *Synagogue* as a party, despite the fact that *we* have a substantial interest in this controversy.
>
> 22. Upon the advice of counsel, failing to include *the Synagogue* as a party to this controversy warrants dismissal.

R. 1190, 1195 (emphasis added). CLI was thus using the terms "CLI," "Congregation" and "Synagogue" interchangeably. This same affirmation

submitted on behalf of CLI is rife with references to "our daily worship services," "our synagogue," "our house of worship," "most of our members," and "our congregants." Justice Harkavy noted this in his opinion when he held that the Congregation and CLI were the same. R. 700.

The testimony of CLI's own witness at trial further confirmed that the Congregation and CLI are the same. Zalman Lipskier was the key witness for CLI throughout this case. He was one of the incorporators of CLI and his signature appears on CLI's Certificate of Incorporation. R. 1113. He submitted numerous affirmations on behalf of CLI. R 1117, 1133, 1154, 1189. Mr. Lipskier identified himself as an elected Gabbai of CLI (R. 1133 ¶ 1) and elsewhere as an elected Trustee of CLI (R. 1117, ¶1; R. 1154, ¶1).[9] CLI designated Mr. Lipskier as the CLI representative to be deposed in this case. Opening Brief, p. 27. And he was the witness whom CLI called at trial. R. 834. Although Mr. Lipskier had all of these connections to CLI, at trial, Mr. Lipskier explained that he was really a representative of the Congregation:

> Q. So the actions that you have taken in this lawsuit, they have been as a representative of the Congregation; is that what you're saying?
>
> A. As a representative of the Congregation, yes.

[9] As mentioned, "Gabbai" is a Hebrew word and is the singular form of the plural word, "Gabboim." According to the CLI Certificate of Incorporation, Gabboim is synonymous with trustees. R. 1114.

R. 755:5-8. And, in a more general sense, Mr. Lipskier also testified as follows:

> Q. Are the actions that the Gabboim take through CLI, actions taken for the benefit of the Congregation at 770?
>
> A. I would say so, yes.

R. 756:8-11. To like effect, when Mr. Lipskier was asked about a check that he signed on the bank account of CLI, he testified as follows:

> Q. You signed this as trustees of Congregation Lubavitch, Inc?
>
> A. I signed it as a Gabbai of the Shul [*i.e.*, synagogue].

R. 778:1-13. More testimony from Mr. Lipskier:

> Q. When you sign checks [on the CLI account], are they for expenses that are for the benefit of the Congregation?
>
> A. Yes…..Everything we pay is for the benefit of the Congregation.

R. 761. Try as CLI might in its Opening Brief, there is simply no way for it to sever the inextricable tie that binds CLI and the Congregation. As reflected by the Record in this case, it is undeniable that all acts taken by CLI are in fact acts of the Congregation.

Other testimony from Mr. Lipskier also makes clear that the party intervening in the lawsuit was the Congregation, acting through CLI:

> Q. Congregation Lubavitch, Inc. actually came to the Court and asked to be added as a party to this lawsuit, right?

> A. We, the Gabboim, came and asked for it. The name Congregation Lubavitch, Inc. was used in the papers, that is our legal name, as I told.
>
> Q. Was the decision to join this lawsuit made by the trustees.
> A. It was made by the Gabboim.
>
> Q. Was it made by the trustees?
> A. The Gabboim are also trustees of, [Congregation Lubavitch,] Inc.
>
> Q. So it was made by you, by the group of Gabboim with their Gabbai hat on, and with the trustee of CLI hat on?
> A. I don't change hats. The Gabboim made a decision and went ahead with it. When the lawyer wrote the wording, however, they wrote it up. They used "Inc." for the reason probably because that's our legal name. *We didn't come to say we are Inc. We came to say we are the Gabboim of a Shul and we want to start a case* or answer on a case.

R. 764:20-765:14 (emphasis added). Based on the testimony of CLI's own witness, there can be no doubt that the actions taken in this lawsuit in the name of CLI are in fact the actions of the Congregation.

C. Additional Pleadings From CLI

Agudas and Merkos respectfully submit that the CLI Certificate of Incorporation and the testimony of Mr. Lipskier are a sufficient basis for resolving the issue of whether CLI and the Congregation are the same. But other pleadings submitted by CLI lead to the same conclusion. For example, the affirmation submitted by CLI's lawyer in support of CLI's request to intervene explained as follows:

> *CONGREGATION LUBAVITCH, INC. has* a direct personal stake in the outcome of this proceeding and has *established a prima facie interest in* both the operation of the Synagogue located at 770-784 Eastern Parkway, Brooklyn, New York and *the property it occupies.*

Affirmation of Jeffrey Buss, Esq. January 5, 2005 ¶7 (emphasis added).[10]

Thus, at the time that CLI was trying to persuade the trial court that it should be added as a party, CLI certainly did not present itself as a paper company that did nothing more than pay bills. Rather, CLI claimed to have a *prima facie* interest in the property "it occupied." Justice Harkavy properly pointed out the distinction in the way that CLI had identified itself early in the case and the argument it made at trial:

> In fact, CLI's entire argument in support of its motion to intervene was premised upon equating itself with the congregation and that as such it was a necessary and indispensable party. CLI did not then contend, as it does now, that it is only a management company, separate and distinct from the congregation/synagogue itself.

R. 700.

There is yet further evidence on this point. Mr. Lipskier also submitted an affirmation in support of CLI's request to intervene. He affirmed:

> The *Trustees of the Synagogue believe* that the correct approach to resolving this issue involves community participation… Wherefore, it is respectfully requested that

[10] The 1/5/05 affirmation of CLI's attorney, Jeffrey Buss, was submitted by CLI in support of its successful motion to intervene. No appeal was taken from that motion, however, this court may take judicial notice of a record in the same court. *See Long v. State*, 7 N.Y.3d 269 (2006).

> the application of *the Trustees of CONGREGATION LUBAVITCH, INC.* to intervene in this proceeding be granted….

R. 1164 (emphasis added). Again, CLI referred interchangeably to the "Trustees" of the Synagogue and of CLI.

In May 2005, CLI's counsel submitted another affirmation to the trial court. In it, he wrote, *inter alia:*

> 2. I submit this affirmation in support of *Defendant Congregation's* motion for an Order . . . dismissing the Amended Complaint as against *defendant Congregation Lubavitch Inc.*
>
> 12. On December 19, 2004, Zalman Lipskier, Menachem Gerlitzky and Avram Holzperg, three of the five elected Trustees of Congregation Lubavitch, submitted an affidavit to this Court *requesting that the Congregation be allowed to intervene* and that upon its intervention, that the original proceeding be dismissed.

R. 1224-27. Of course, it was CLI that was the actual party that sought to intervene. In this pleading, however, CLI again wanted the trial court to conflate CLI and the Congregation.

At the same time, Mr. Lipskier submitted another affirmation as well. He affirmed:

> 1. I am *a duly elected Trustee of CONGREGATION LUBAVITCH, INC.* . . .
>
> 2. I submit this Affirmation in further support of the *CONGREGATION's request*… to compel Plaintiffs to

> remove the controversial and religiously offensive plaque which they affixed to the front of *our Synagogue*….

R. 1117 (emphasis added). Although Mr. Lipskier referred to the "Congregation's request," he of course meant the "request" of CLI since that is the actual party to the lawsuit.

Subsequent to being permitted to intervene in the action, in December 2005, CLI submitted a brief in which it represented that "the controversy before the Court involves the religious contents and the meaning of a sign which Plaintiffs want the Court to authorize them to affix to the front entrance of *Defendant's synagogue.*" R. 1257 (emphasis added). On page 1 of that brief (R. 1242), CLI specifically defined "Defendant" to be synonymous with CLI. Significantly, CLI was therefore defining the controversy as one that related to *CLI's* synagogue.

Likewise, in a brief filed in another of its appeals submitted to this Court on February 9, 2007, CLI wrote, "Congregation Lubavitch, Inc. appeared and sought to intervene in order to protect *its legal rights* with respect to the Lubavitcher synagogue."[11] Undeniably, the legal rights that were being sought to be protected through intervention were those of the Congregation, not those of a management company that is purportedly nothing more than a paper corporation

[11] This is a reference to page 15 of the brief submitted by CLI on February 9, 2007 in companion Appeals 2007-4457, 2006-7630 and 2006-7817.

CLI's Verified Answer in this case further confirms that there is no real distinction between CLI and the Congregation. CLI said there that "the Synagogue is operated and managed by the Gabboim in their dual capacity as religious officers of the congregation and the trustees of Congregation Lubavitch, Inc." R. 1095, ¶ 40.

D. Judicial Estoppel Bars CLI From Taking a Contrary Position

The doctrine of judicial estoppel (also called estoppel against inconsistent litigation positions) is, alone, sufficient basis to uphold the lower court's finding. This doctrine provides that a litigant may not play fast and loose with the court – it may not argue one set of facts, obtain relief based on that set of facts, and then turn around and repudiate that position or argue an inconsistent set of facts to gain additional or other relief.

This doctrine has been invoked time and time again to prevent the injustice which arises from such improper litigation conduct and to maintain the dignity of the judicial process. For example, in *Mohen v. Mooney*, 205 A.D.2d 670,672, 614 N.Y.S.2d 737, 739, (2d Dept. 1994) the plaintiff had introduced evidence of property value in the context of a summary judgment motion. Summary judgment was granted but the appellate court remanded for a new valuation as of a different date. When the plaintiff sought to introduce valuation evidence inconsistent with his original report, he was precluded from doing so by the doctrine of judicial

estoppel. *See also Environmental Concern, Inc. v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 476 N.Y.S.2d 175 (2d Dept. 1984) ("where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position").

Judicial estoppel applies here. As demonstrated above, CLI asserted in its application to intervene, that it, CLI, was the congregation utilizing and occupying the Premises, that it had members, and that it was the successor to Congregation Lubavitch. These factual assertions were the basis for the IAS Court's allowing the requested relief (intervention). As explained by Justice Harkavy, who granted CLI's request to intervene:

> In fact, CLI's entire argument in support of its motion to intervene was premised upon equating itself with the congregation and that as such it was a necessary and indispensable party. CLI did not then contend, as it does now, that it is only a management company, separate and distinct from the congregation/synagogue itself.

R. 700. At trial, however, and before this Court, CLI attempted to take inconsistent positions by arguing that (i) it was not a successor to, and was distinct

from, Congregation Lubavitch, (ii) it had no members other than the Gabboim, and (iii) that it did not occupy any portion of the Premises.[12]

Thus, should it so choose, this Court need go no further than the doctrine of judicial estoppel to uphold Justice Harkavy's finding that CLI occupies the Premises and can therefore be ejected. Moreover, in accordance with this well established doctrine, this Court would be fully within its rights to preclude CLI from making any argument *in these appeals* inconsistent with the factual and legal position taken by CLI in it motion to intervene.

E. <u>CLI Offers No Defense</u>

How does CLI respond to the fact that its arguments in this case are belied by its own Certificate of Incorporation and the numerous pleadings it has filed in this case? That can be found in footnote 31 of the Opening Brief. CLI says that there was a "lack of attention paid" to the Certificate of Incorporation (a document filed under the penalties of perjury with the New York Secretary of State) and that the pleadings (drafted by experienced legal counsel) were "inartful." In essence, CLI is saying, "please just ignore all of the regrettable evidence that reveals our position on this appeal to be false - - it was all an unfortunate mistake." Presumably, the fact that this "evidence" consists of CLI's own documents should

[12] At trial, Agudas and Merkos invoked judicial estoppel and requested that the IAS Court preclude any testimony inconsistent with the positions taken by CLI in its motion to intervene. R. 826.

also be ignored, as should the fact that much of the evidence is not merely random correspondence but consists of documents drafted by lawyers and submitted to the trial court under penalty of perjury.

Also noteworthy is CLI's comment in footnote 31 that Mr. Lipskier "honestly and forthrightly" explained the evidence. Indeed, Mr. Lipskier is the individual that CLI relies on for nearly all of its arguments to this Court. However, Justice Harkavy, who had the opportunity to see and hear him testify, specifically noted that Mr. Lipskier was not a credible witness. Justice Harkavy observed as follows:

> Mr. Lipskier testified at trial that CLI was only a mere management company, that it exists separately and distinctly from the congregation, and that CLI itself does not occupy any space at 770 and 784-788 Eastern Parkway. The court does not find such testimony to be credible. The court finds Mr. Lipskier's testimony to be self-serving and flatly contradicted by the evidence. . . .

R. 700-01. There was certainly a sufficient basis for this conclusion, as already shown above. Indeed, Mr. Lipskier was not truthful in responding to the very first question put to him, when he claimed that he was not an elected Trustee of CLI, but was then confronted with an affirmation in which, under penalty of perjury, he had identified himself in that manner. R. 34:19-35:9; R. 1117 ¶1. Justice Harkavy was correct; Mr. Lipskier was not a reliable witness.

F. Additional Evidence Further Confirms That CLI and the Congregation Are the Same

Beyond the Certificate of Incorporation and CLI's own testimony and pleadings, there is still further evidence which shows that CLI is the same as the Congregation. CLI claims that it has no presence in 770 and that its only location is on Kingston Avenue. Opening Brief, p.18. If, however, Kingston Avenue were CLI's only location, that would presumably be the address printed on CLI's checks. But it is not. In fact, CLI has two separate checking accounts and, on each, the address for CLI is 770 Eastern Parkway. R. 1185-87.

The address CLI holds out to the world as being its address is yet further evidence that CLI and the Congregation are one and the same. CLI has one type of letterhead that identifies CLI's address as "770 Eastern Parkway," which is the location of the synagogue. R. 1183. However, Trial Exhibit 22 is a CLI letter which shows that CLI has its address at 770 and a mailing address on Kingston Avenue. R. 1349. Typically, an entity uses two different addresses when its physical location is at one place but it wants to receive its mail somewhere else. This exhibit with the two addresses shows that CLI's physical address is 770 but it prefers to receive its mail at a mail drop on Kingston Avenue. *See also* R. 1353.

Is the Kingston Avenue address used only for CLI? No, it is not. Trial Exhibit 9 (R. 1173) is a letter written by the Trustees (Gabboim) on the letterhead of the Congregation (as distinct from the CLI Letterhead). R. 867:20-868:3. That

letterhead also uses the 770 address as well as the address on Kingston Avenue. The conclusion is apparent. CLI is the Congregation and the Congregation is CLI.

Trial Exhibit 24 is a letter written by CLI to its members. But it was not signed by representatives of CLI as trustees of CLI. R. 1153-54. Rather, it was signed by the Gabboim, thereby indicating once again that there was no distinction between the Gabboim of the Congregation and CLI.

Trial Exhibit 23 is one last piece of evidence which shows that CLI and the Congregation are one and the same. R. 1351. This letter was signed by Mr. Lipskier and sent to the community. Mr. Lipskier reviewed the letter before it went out and agreed with its contents. R. 868. The letter referred to the "attempt by Aguch[13] and Merkos to evict the congregation led by the elected Gabboim." Thus, there should be no question that the Gabboim were aware about what Respondents were seeking -- to evict those that claimed the right to be in the space owned by Agudas and Merkos. The letter further states:

> The Gabboim are on the verge of abandoning our defense in court.

Mr. Lipskier was therefore clear in his comments. The party to the court proceedings has always been CLI. But the defense being offered in court was the

[13] "Aguch" is another name for Agudas.

defense of the Gabboim. And, as Mr. Lipskier testified at trial, the Gabboim[14] are the elected representatives of the Congregation. R. 746:7-11; R 755:20-23. Thus, the defense offered in the trial of this matter was not only the defense of CLI but also the defense of the Gabboim/Congregation. The two cannot be separated.

G. CLI is not Agudas

There is one last subject to address on this issue of determining who CLI is. Throughout its papers, there are efforts by CLI to equate itself with Congregation Lubavitch of Agudas Chassidei Chabad. Ultimately, that leads to CLI's argument that Agudas cannot possibly eject its own congregation.

CLI's argument in this regard suffers from the same distortion it makes in terms of other mis-statements. Thus, as an example, CLI refers to Congregation Lubavitch of Agudas Chassidei Chabad as a "New York religious corporation." Opening Brief, p. 60. Although *Agudas* is a corporation, it is factually inaccurate to say that Congregation Lubavitch of Agudas Chassidei Chabad is a religious corporation.

In any event, Agudas rejects CLI's effort to say that CLI's congregation is the same as the Agudas congregation.[15] However, if one wanted to assume for

[14] As noted earlier, according to the CLI Certificate of Incorporation, Gabboim is synonymous with trustees. R. 1114.

[15] It is also difficult to understand how CLI can say that it is the congregation of Agudas and yet say in its Answer that Agudas has no right to possession of the Premises. R. 1096, ¶ 46.

purposes of argument that CLI were correct, Agudas hereby stipulates to the ejectment.

H. CLI Admitted It Is A Religious Congregation

At a May 31, 2006 conference before Justice Harkavy, Mr. Rudofsky described his own client, CLI, by saying "we are a religious congregation." R. 1336:4-5. That candid admission stands in stark contrast to the subsequent efforts by CLI at trial and in this appeal to distinguish between CLI and the Congregation. In any event, the evidence summarized above – including CLI's Certificate of Incorporation, the testimony of Mr. Lipskier, CLI's own letters, and the pleadings submitted by CLI throughout this case – demonstrate that CLI is indeed the religious congregation and there is no way to distinguish between CLI and the Congregation. Accordingly, this Court should affirm Justice Harkavy's decision that CLI be ejected, together with its Trustees (Gabboim), officers and any other individual occupying the Premises under color of CLI.

Point III

THE TRIAL COURT PROPERLY RULED THAT CLI OUSTED AGUDAS AND MERKOS WITHIN THE PRECEEDING TEN YEARS

CLI's assertion that Agudas and Merkos have not been ousted from the Premises is contradicted by CLI's own pleadings. In its Verified Answer, CLI stated that, "Merkos has no right to possession at this time of any portion [of the

premises in question]" (R. 1094, ¶ 31) and "Agudas has no right to possession at this time of any portion [of the premises in question]." R. 1096, ¶ 46.

In addition, Mr. Lipskier testified at trial as follows:

> Q. Mr. Lipskier, if Merkos or Agudas wants to use the synagogue at 770 for an event, do they, through an officer, director or employee need to get the consent of the Gabboim.
>
> A. Yes.

R. 865:14-17. If, in fact, Agudas and Merkos had not been ousted and were in control of the Premises, they would not have to ask some third party for permission to conduct an event in the Premises they own. Mr. Lipskier's testimony, that Agudas and Merkos need the consent of CLI before they can conduct an event *in their own property*, leaves no room for doubt as to the true position of CLI on the issue of whether Agudas and Merkos have been ousted.

Furthermore, there is the issue of construction in the Premises. CLI admits that it entered into a contract for a construction project in the Premises.[16] R. 762-63. Neither Agudas nor Merkos ever consented to this construction being done on their property; indeed, they were never even consulted about it. R. 795. When party "A," who admittedly is neither a tenant nor licensee (R. 961), does construction in the property of party "B" without even seeking, much less

[16] CLI was not created until 1996. R. 1110-14. Thus, this construction project by CLI was within 10 years of the commencement of this lawsuit in 2004.

obtaining, the consent of party "B," that is clear evidence that party "A" has constructively ousted party "B."[17]

There was also another piece of critical evidence presented to Judge Harkavy on the issue of ouster. In 1987, Agudas was victorious in a federal court case concerning its ownership of the Chabad library and manuscripts. That victory led to days of celebration in the community in Crown Heights. Starting in the following year, Agudas celebrated the anniversary of that victory – the fifth day of the fourth month of the Jewish calendar, *Hei Teves* -- with a large and festive gathering at 770 (known as a *farbrengen).* R. 788-90.

The annual celebration at 770 was run by Agudas for 10 years but, in 1998[18], that changed. About one week before *Hei Teves* in 1998, the Gabboim, including Mr. Lipskier, sent a letter to the community that stated, in relevant part:

> We clearly announce that we the Gabboim are the only ones authorized . . .to decide and to approve about holding gatherings at the Synagogue [770] . . .
>
> So therefore, we clearly announce that the gathering which is to take place God willing on Saturday night 5 Teves . . .will be conducted by us alone, and no other organization is permitted to organize a different gathering without our permission.

[17] The situation might be different if party A had a lease or some other contractual right to engage in construction. But there was no lease, license or any other rights given to CLI in this case. R. 961.

[18] This was within 10 years of when this lawsuit was commenced in 2004.

R. 1173. When Agudas attempted to conduct its *farbrengen* in 770 on *Hei Teves*, it was prevented from doing so by representatives of the Gabboim. Indeed, since 1998, Agudas has been unable to celebrate *Hei Teves* – the celebration of <u>its</u> court victory – in its own building at 770. R. 791-94.

In its Opening Brief, CLI does not even address this letter which was admitted in evidence. Rather, it tries to frame the issue as being a dispute over whether Rabbis Krinsky and Shemtov may be permitted to speak publicly in 770. Opening Brief, p. 64. But the letter that the Gabboim wrote in 1998 is not limited to excluding particular speakers. It talks more generally to the issue of who has the right to decide who can organize an event in the Premises. Indeed, Mr. Lipskier reiterated that position in a letter that he wrote in the Jewish month of Kislev 5767[19], in which he stated that the Gabboim, and only the Gabboim, have the final say on who can use the Premises. R. 1175. Thus, from 1998 through now, the Gabboim have been the ones who control certain use of the Premises, meaning that Agudas and Merkos have been prevented from using their own property when, and how, they see fit.[20] This taking of Agudas's and Merkos's property from them

[19] Approximately December 2006. R. 772.

[20] Even if *arguendo* CLI were correct in framing the issue as being a dispute over whether Rabbis Krinsky and Shemtov may speak in 770, the fact that CLI/Congregation, acting through the Gabboim, purports to tell the owners of the property that the Chairmen of the respective owners may not speak publicly in their own building is itself evidence that CLI purports to control the buildings and has ousted Agudas and Merkos.

was likewise made clear when, at the trial, Mr. Lipskier was asked *whether it would be up to him to decide* if Merkos could today have a *farbrengen* (gathering) in 770; he said: "Yes, *we run the show*." R. 773.

In sum, there was ample evidence to support Justice Harkavy's determination that Agudas and Merkos were ousted within ten years from the commencement of this lawsuit.

Point IV

THE TRIAL COURT'S DECISION PROPERLY APPLIES TO THE GABBOIM, WHO ARE THE TRUSTEES OF CLI

CLI also argues that Justice Harkavy committed reversible error because the Order of ejectment is binding on the Gabboim. However, a corporation is not a person but, rather, a juridical entity created by statute, which can act only through its agents. 14 N.Y. Jur.2d *Business Relationships* § 487 (A corporation can only act by its agents). Therefore, it is typical that a court order against a corporation binds those who act on behalf of the corporation – such as its agents, officers and directors. *See Pahlavi v. Laidlaw Holdings, Inc.*, 180 A.D.2d 595, 580 N.Y.S.2d 303 (1st Dept. 1992) (those who act as the agents or servants of the defendant or in assertion of its rights or claims are bound by the terms of an injunction against the defendant); *see also* 67A N.Y. Jur.2d *Injunctions* § 199 (an injunction restraining acts of a corporate body operates and is enforceable against not only the

corporation as an artificial being, but also the persons who act for it in the transaction of its business, that is, corporate officers and agents).

In the case at Bar, CLI is a not-for-profit corporation. As such, it acts through its trustees. As the CLI Certificate of Incorporation makes clear, with respect to CLI, the terms "Gabboim" and "trustees" are synonymous. R. 1111. Mr. Lipskier also testified that the terms were used synonymously. R. 745:12-14. And he testified that the Gabboim were appointed as the trustees of CLI. R. 744:12-21. Moreover, Mr. Lipskier testified that the four "Gabboim are also officers of CLI." R. 748:24-25. Consistent with that testimony, three of the four Gabboim who have submitted affirmations in this case - - Messrs. Lipskier, Gerlitsky and Holzberg -- identified themselves as "the majority of the Trustees of Congregation Lubavitch, Inc." R. 1189, ¶1. To like effect, in its Amended Verified Answer, CLI stated numerous times that "the synagogue is operated and managed by the Gabboim in their dual capacity as religious officers of the congregation and [as] the trustees of Congregation Lubavitch, Inc." R. 1093, 1094, 1095, 1096.

Because the party to this lawsuit, CLI, is a corporation, one would expect that an Order entered against CLI would be binding against its Trustees as well. Here, it is undeniable that the Gabboim are the Trustees of CLI. And, in CLI's

own words, in such capacity the Gabboim "*have conducted the temporal affairs of the congregation as Congregation Lubavitch, Inc.*" R. 1101.

CLI argues that by including the Gabboim in the ejectment order, the Gabboim will be prevented from carrying out their religious duties. Opening Brief, p. 75. But Respondents are not attempting to prevent anyone from carrying out their religious duties or beliefs. Rather, such duties and beliefs can be carried out whenever and wherever Appellants want, other than in Respondents' Premises, to which Appellants have no right recognized by law. R. 961.

In a last ditch effort to avoid ejectment, CLI argues that it is simply unconstitutional to use the power of the state to eject "elected leaders of a religious congregation." Opening Brief, p. 75. Not surprisingly, not a single authority is cited for this facially erroneous proposition.

There is nothing in the Constitution, U.S. or state, which immunizes religious officials from complying with state law or court orders. It is beyond dispute, and indeed not contested by Appellant, that the property at issue is owned by the Respondents. CLI has further conceded that it is neither a tenant or licensee. R. 961. Appellant is a mere trespasser – and religious desire to trespass is simply not a constitutionally protected right.

Accordingly, the lower court properly authorized the ejectment of CLI "and any individual acting on behalf of or under the color of" Congregation Lubavitch

"including without limitation the current gabboim." R.705. The judgment appealed from should be affirmed in all respects.

Point V

APPELLANT'S ARGUMENT, THAT THE TRIAL COURT GRANTED A PREFERENCE, IS WITHOUT FACTUAL SUPPORT

Another of Appellant's arguments is that the trial court granted a trial preference, *sub silencio*. Opening Brief, p. 47. This argument is unsupported by any evidence, was not preserved below and, in any event, did not result in any prejudice to CLI.

CLI claims that there was a trial preference given to this case. *Id.* However, CLI proffers no evidence concerning Justice Harkavy's case load or schedule when the instant matter was tried in mid-December 2007. There is simply no factual basis for CLI's assertion that this case was granted a preference over any other cases that were supposedly ready for trial before Justice Harkavy in mid-December 2007.

Moreover, CLI ignores a certain very relevant fact. Justice Harkavy was set to retire at the end of 2007. When the parties were before him for a conference and the issue of a trial date was raised, Justice Harkavy placed a telephone call to the Administrative Judge, in the presence of counsel for all parties, and asked whether this case was going to be reassigned to another justice of the Court or whether he, Justice Harkavy, should try the case. Significantly, Justice Harkavy did not ask if

he could try the case but, rather, whether he should do so. When Justice Harkavy informed counsel for all parties that he had been directed to try the case, no objection was lodged by CLI's counsel. There is simply no evidence to support the baseless and spurious claim that a preference was granted by Justice Harkavy, *sub silencio*.[21]

Second, at no time did CLI object, on any basis, to Justice Harkavy trying the case, or argue to the trial court that an "impermissible" preference was being granted.[22] Having failed to raise the issue below, it is unpreserved for appeal. *Oszustowicz v. Admiral Insurance Brokerage Corp.*, -- N.Y.S.2d --, 2008 WL 607144 (2d Dept. 2008) (argument improperly advanced for first time on appeal is unpreserved for appellate review); *McNamee Construction Corp. v. City of New Rochelle*, 29 A.D.3d 544, 817 N.Y.S.2d 295 (2d Dept. 2006) (claim raised for the first time on appeal is unpreserved for appellate review).

Third, assuming, *arguendo*, that CLI's argument concerning a trial preference was based in fact and had been preserved for appeal, it still would not

[21] CLI's argument regarding an alleged trial preference is based on a skewed, selective and highly self-serving presentation of the facts. A similarly skewed recitation of these facts was previously made by CLI to this Court in support of a motion for a stay. R.627. Upon being presented with the complete set of facts (R.652-666), however, this Court denied CLI's application.

[22] In a motion to *this Court* (Appellate Division, Second Department) dated October 12, 2007, seeking to consolidate various appeals, CLI claimed that Respondents, in seeking to obtain a trial date, were "attempting to avoid the IAS system for the re-assignment of cases upon the retirement of a judge." There was no assertion, however, that the case should not be tried by Justice Harkavy.

be grounds for a reversal because CLI has failed to demonstrate any prejudice. The case was ready to be tried. Justice Harkavy obviously had time available in his schedule to try the case. Both sides presented their cases at trial and Justice Harkavy rendered a decision. CLI has not articulated any prejudice that actually flowed from Justice Harkavy hearing and determining the case.

It appears that this particular argument by CLI is actually an unpreserved disguised allegation of bias against Justice Harkavy. But there was never any previous allegation of bias, nor did CLI ever file a motion seeking to have Justice Harkavy recuse himself. The failure to do so speaks volumes and, as a legal matter, precludes CLI from now attempting to make the spurious allegation on appeal. *See Aaron v. Kavanagh*, 304 A.D.2d 890, 757 N.Y.S.2d 361 (3d Dept. 2003) (any claim of judicial bias was unpreserved for review where petitioner consented to nonjury proceedings, and never raised the issue of disqualification until he perfected his appeal from the verdict rendered in the nonjury trial); *Kemp v. Erie County Dept. of Social Services,* 266 A.D.2d 905, 697 N.Y.S.2d 797 (4th Dept. 1999) (Claim on appeal that ALJ was biased was not raised previously below, and thus not preserved for review on appeal). The order appealed from should be affirmed.

Point VI

THE TRIAL COURT PROVIDENTLY EXERCISED ITS DISCRETION IN REFUSING TO ALLOW IRRELEVANT DISCOVERY

CLI has also appealed Justice Harkavy's order regarding disclosure, which granted in part and denied in part Respondents' motion for a protective order. R.3. According to CLI, Justice Harkavy, who handled the case from nearly inception through trial, committed reversible error by denying CLI disclosure on a myriad of issues that Justice Harkavy ruled (properly) were unrelated to the action in ejectment. Opening Brief, p. 42.

It is well settled that, "[t]he supervision of disclosure and the setting of reasonable terms and conditions therefore rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed." *Gilman v. Ciocia, Inc. v. Walsh*, 45 A.D.3d 531, 845 N.Y.S.2d 124 (2d Dept. 2007); *Mattocks v. White Motor Corp.*, 258 A.D.2d 628, 629, 685 N.Y.S.2d 764 (2d Dept. 1999) (same). The IAS Court's determinations concerning CLI's discovery requests were not an abuse of discretion, and CLI has failed to demonstrate otherwise.

CLI's argument on this appeal appears to be that, since most of its affirmative defenses were never dismissed (nor were they the subject of any motion), any and all discovery should have been permitted by Justice Harkavy with

respect to those defenses. Opening Brief, p. 43. No authority is cited by CLI to support this proposition and, indeed, it is contrary to the well established rule that the trial court has broad discretion to supervise disclosure and set reasonable terms and conditions. *Id*.

As concerns the lower court's exercise of its discretion, Justice Harkavy had repeatedly and consistently stated that he would try the ejectment proceeding on the basis of "neutral principles" of New York real estate law. R. 96-97, 265:12, 266:14. Moreover, Justice Harkavy made this position clear *prior* to CLI's seeking discovery. When CLI then chose to seek discovery that blatantly ignored the IAS Court's directives, that the case would be tried on the basis of New York real estate law principles, it should not have been surprised that Justice Harkavy did not permit such discovery.

Although CLI argues on appeal that the lower court had indicated that CLI was entitled to "all" discovery, Justice Harkavy had made clear to CLI's counsel, that that was not correct: "Mr. Rudofsky, I think you are putting the wrong emphasis on the word 'all.' The word 'all' means that before I make a determination, I want discovery to be completed, not that every item is to be discovered that you are requesting." R.284:18.

As the Record reflects, Justice Harkavy considered each of CLI's document requests, and addressed why particular requests were unnecessary, irrelevant or

immaterial to the issues to be tried. "[M]y intention is to go through each item separately and hear from both parties on each item separately, and make a ruling immediately after I hear from both parties on the item." R. 274-275. That is precisely what Justice Harkavy did. R. 284 *et seq*.

On page 44 of its Opening Brief, CLI quotes from *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968) in which the Court of Appeals held that, "The test [to determine if the information sought is material and necessary] is one of usefulness and reason." It is submitted that this is precisely the test Justice Harkavy applied in exercising his broad discretion.

For example, in addressing the attempts by CLI's counsel to introduce religious issues into the case, Justice Harkavy stated:

> . . . Mr. Rudofsky, I already ruled it's a real estate case. It's not a case of Halakah [Jewish law]. It's a case of real estate. That's my decision from the beginning . . ." *** I will decide this case on real estate principles.

R. 265:12, 266:14; 284:3, 292:7, 303:10.

On this basis, Justice Harkavy rightfully refused to permit discovery on matters such as:

> "Rabbinic authorization, if any, to commence this action" (R. 31, CLI Request #10); and
>
> "[t]he teachings and writings of Grand Rabbi Menachem Mendel Schneerson regarding the use, occupancy, expansion, operation, management, maintenance, repair and/or control of the Synagogue" (R.31, CLI Request #13).

Justice Harkavy did permit CLI's discovery, however, to the extent it related to real property issues. Thus, for example, he ruled, "I will allow any correspondence that deals with simply the occupation of the premises. Nothing to do with any religious matters. But if there's any correspondence or letters that say something about the occupation, I will allow that." R. 300:9.

Similarly, Justice Harkavy providently exercised his discretion in not permitting other CLI requests that were neither material, necessary, nor relevant to the real property ejectment issue. Thus, he disallowed CLI's request for all documents relating to "[t]he incorporation of 'Lubavitch Headquarters' as a religious corporation by Agudas." R.32, CLI Request #17. For the same reason, he did not permit CLI's request for "any and all other religious or not-for-profit corporations formed by Agudas since in or about the year 1996." R.32, CLI Request #18.

Yet other of CLI's requests were improper because they sought to challenge the *bona fides* of Merkos or Agudas as existing corporate entities (s*ee for example*, R.29-31, Requests 1-10) and/or the *bona fides* of Respondents' commencement of the action. Thus, CLI's document requests included the following:

> "all corporate resolutions concerning the designation, appointment or election of directors of Merkos" (R. 30; CLI Request #3)
>
> "all corporate resolutions concerning the qualifications of individuals to be members of Merkos" (R. 30; CLI Request #5)

> "all minutes of meetings of Merkos . . . concerning (a) the designation, appointment or election of directors of Merkos, (b) the qualification of individuals to be members of Merkos" (R. 30; CLI Request #7)
>
> "all documents on which plaintiffs rely as the basis of the alleged legal and corporate authority to commence this action and seek the ejectment of CLI" (R. 30; CLI Request #9).

CLI has acknowledged in its Opening Brief (pp. 25-26) that the IAS Court dismissed its fifteenth affirmative defense and counterclaim on the ground that CLI (which is not a member of Agudas or Merkos) lacked standing to raise an internal Agudas corporate governance issue, such as a challenge to an election. CLI likewise lacked standing to raise these other issues concerning the *bona fides* of Agudas and Merkos or whether the lawsuit was properly commenced.[23] Justice Harkavy was right to deny such requests in the exercise of his broad discretion.

The trial court's determination should not be disturbed. *Gilman v. Ciocia, Inc., v. Walsh, supra*.

[23] CLI also did not have a right to challenge the *bona fides* of Agudas and Merkos because that right is exclusively reserved to the Attorney General of the State of New York. *See Harosym v. St. John's Greek Catholic Church*, 239 A.D. 563, 267 N.Y.S.2d 906 (4th Dept. 1933) ("The right to question the validity of the corporate organization rests solely under our law in the Attorney General."); *see also* N-PCL §203; *Cucchi v. NYC Off-Track Betting Corp.*, 818 F.Supp. 647 (S.D.N.Y. 1993).

Point VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLI's MOTION TO STRIKE THE NOTE OF ISSUE

In addition to appealing Justice Harkavy's decision on the discovery motion, CLI has also appealed from the denial of its motion to strike the Note of Issue and Certificate of Readiness. That motion, however, was essentially a motion to reconsider the discovery motion and was properly denied because there was no error in the decision on the discovery motion.

After Justice Harkavy's decision concerning the discovery dispute, all depositions ordered by the Court were concluded.[24] R. 648, ¶3. The sole exception was the deposition of Rabbi Katz and, as to him, arrangements were made with Rabbi Katz for the deposition. However, CLI decided not to go forward with that particular deposition. *Id*. In addition, all documents that the lower court required to be produced were produced. In short, when the Note of Issue and Certificate of Readiness were filed, there was no outstanding discovery. *Id.*

Nevertheless, CLI moved pursuant to Rule 202.21 of the Uniform Court Rules, which provides that a Note of Issue and Certificate of Readiness may be vacated on motion of a party, based on an affidavit "showing in what respects the case is not ready for trial." Uniform Court Rules 202.21(e). In support of its

[24] In fact, a total of three (3) depositions were conducted, with all three taking less than four (4) hours cumulatively. R.658, ¶11.

motion, CLI submitted the affirmation of its counsel, Edward S. Rudofsky, in which Mr. Rudofsky claimed that, "It is the position of defendant [CLI], most respectfully, that this action is not ready for trial. Notwithstanding the IAS Court's Order of September 6, 2007 . . . discovery deemed necessary and appropriate by defendant has not, in fact, been completed…." R.552-553, ¶5.

Significantly, Mr. Rudofsky did *not* claim that discovery which the trial court had approved was incomplete. Rather, he was complaining about "discovery deemed necessary and appropriate *by defendant*." However, that was the exact same discovery which Justice Harkavy had just decided in the exercise of his discretion that CLI was not entitled to, as set forth in the IAS Court's September 6, 2007 Order. In other words, CLI filed a motion to strike the Note of Issue and Certificate of Readiness because it had not obtained the discovery to which the Court had previously ruled it was not entitled.

Justice Harkavy obviously recognized that CLI's motion to strike the Note of Issue and Certificate of Readiness was simply a back-door challenge to his decision on the discovery motion. He was correct in denying the motion. More importantly, it was certainly within his discretion to deny the motion and, accordingly, there is no basis for reversal. *Grossman v. Amalagated Warbassse Houses, Inc.*, 21 A.D.3d 448, 799 N.Y.S.2d 748 (2d Dept. 2005) ("The Supreme Court providently exercised its discretion in denying that branch of the cross-

motion which was to vacate the note of issue").

Point VIII

THE IAS COURT PROPERLY DECIDED THIS DISPUTE ON THE BASIS OF "NEUTRAL PRINCIPLES" AND CORRECTLY REJECTED CLI'S REQUEST THAT THE CASE BE DISMISSED ON THE GROUND THAT IT REQUIRES THE COURT TO DETERMINE RELIGIOUS QUESTIONS

As CLI has done throughout the three-plus years of this litigation, it falls back on begging the Court not to decide the case because it undoubtedly recognizes that, on the merits, it will lose. This case is, and always has been, about a straightforward secular, property law issue. Nevertheless, CLI asserts that this is really a dispute over a religious matter and then argues that, because the lawsuit now supposedly implicates the religious issues that CLI has unilaterally sought to interject into the case, the Court cannot decide the case. This Catch-22 effort to prevent a court from deciding a case must fail because, otherwise, any defendant in any case could render a matter non-justiciable simply by raising "religious issues," even when the case can be decided on the basis of neutral, secular law principles and without resort to religious doctrine.

A. The Neutral Principles Doctrine

This Court, as well as the United States Supreme Court, has long recognized that individuals and entities are not immune from secular law and may not escape liability by the mere invocation of religion or religious belief. The fundamental

principle of separation of Church and State enshrined in both the U.S. and New York State constitutions precludes the state from endorsing a particular religion and from making religious determination; it does not however provide a zone of absolute immunity within which the assertion of the word "religious" closes the court doors. To the contrary, courts, including this Court, have established the doctrine of "neutral principles of law."

Almost all of the arguments raised by CLI concerning the constitutional issue are not new and were discussed in detail on pages 21-40 of Plaintiff-Respondents' Brief dated April 5, 2007.[25] Rather than repeating those arguments in detail here, Agudas and Merkos respectfully refer the Court to that brief. The only new argument by CLI concerns the intervening decisions of the Court of Appeals in the *Satmar* cases, but the affirmance of this Court's decision in those cases merely supports further the position of Justice Harkavy and of Respondents.

In *Satmar I*[26], the dispute concerned the election of the officers of a congregation. As the court explained, the background and context of the election dispute was a deep divide in the Satmar community between the followers of the

[25] The instant appeal has been consolidated for argument with appeals bearing Docket Numbers 2007-4457, 2006-07630 and 2006-07817. Plaintiff-Respondents' Brief of April 5, 2007, has been filed in connection with those consolidated matters.

[26] *Cong. Yetev Lev D'satmar v. Kahan*, 5 Misc.3d 1023(A), 799 N.Y.S.2d 159 (2004), *affd* 31 A.D.3d 541, 820 N.Y.S.2d 62 (2d Dept. 2006). This brief refers to the analysis by Justice Barasch in his decision. This Court affirmed his decision without its own analysis of this issue. The other "Satmar" case is: *Cong. Yetev Lev D'satmar of Kiryas Joel, Inc. v. Congregation*, 31 A.D.3d 480, 820 N.Y.S.2d 69 (2d Dept. 2006) aff'd 9 N.Y.3d 297 (2007) (*"Satmar II").*

Williamsburg Rov and the Kiryas Joel Rov. But the court's decision that the election issue could not be decided based on neutral principles did not derive from the existence of the split in the community. Rather, it was based on the application of simple legal principles.

The issue before the court was which (if either) of two board elections was proper. As Justice Barasch explained, a fundamental pre-requisite to the court's making that decision was knowing which members of the congregation were entitled to vote. But membership was defined, in part, as being a person that "generally conducts himself in the ways of the Torah and educates his children in the ways of the Torah . . . ." By definition, deciding who was a member entitled to vote -- that is, deciding which individuals conducted themselves in the ways of the Torah -- could not, in the court's view, be done under "neutral principles." Another pre-requisite to making a decision about the election was knowing whether a person purporting to be an officer and thereby authorized to call elections had been expelled from the congregation. But, as the court stated, "that decision would also require ecclesiastic determination." *Id.* at *13.[27]

The court's decision as to why the issue concerning the elections was not for a secular court came down to the following statement:

[27] Although the *Satmar I* decision specifically quotes the portions of bylaws that defines a member in terms of conducting himself in accordance with the Torah, it makes only general reference to the grounds for expelling a member being based on ecclesiastic issues.

> Since the questions of who are appropriate members of the Congregation and who are the original officers entitled to call for elections are hotly contested, this Court appropriately declines to don a rabbinical *Shtreimel* and ecclesiastical garb in order to make those determinations.

Id. at *13-*14. In contrast, in the case at Bar, no *Shtreimel* is needed to determine that five elements of an ejectment cause of action summarized in Point I above. The Court of Appeals affirmed this Court's decision. Indeed, at the trial, when CLI argued that the secular courts did not have jurisdiction over this case, Justice Harkavy read portions of the decision of the Court of Appeals into the record to show that he fully understood the issue and that he was going forward because it was clear that this case could be decided on the basis of neutral principles. R. 731-33.

CLI also seeks to rely on *Satmar II*, but that case likewise does not support CLI's position. There, the dispute was over the enforceability of the grant of a deed to a one-half interest in a cemetery in which the Satmar Rebbe was buried. Justice Rosenwasser granted summary judgment holding that the deed was enforceable. This Court reversed, holding that the case raised the same issue as discussed in *Satmar I*. However, as shown above, the religious issues in the *Satmar I* case are not found in the case at Bar and, thus, the *Satmar II* reference to them is likewise irrelevant.

Furthermore, despite this Court's statement in *Satmar II* that the case could not be decided, the Court effectively proceeded to decide the case. The Court explained that the grant from a religious corporation for no consideration is only valid if done for religious or charitable purposes. The Court then ruled that the grant of the half-interest in the cemetery was not for such a purpose and therefore held that defendant was entitled to summary judgment canceling the deed.

On appeal, the Court of Appeals discussed, and affirmed, this part of the holding. In other words, it was appropriate to decide the issue of the ownership of the cemetery plot because the court was able to do that based upon neutral principles. When, during trial, CLI's counsel implied that Justice Harkavy had ignored this decision, Justice Harkavy read verbatim from this decision in explaining why he disagreed with CLI's contention that he could not decide the case. R. 905-06.

In addition, noticeable by its absence from CLI's brief is a discussion of this Court's most recent ruling on the "neutral principles" issue, *Malankara Archdiocese of Syrian Orthodox Church in North America v. Thomas*, 33 A.D.3d 887 (2d Dept. 2006). There, the issue was the ownership of certain property held in the name of St. Mary's Malankara Syrian Orthodox Church of Rockland (St. Mary's). St. Mary's constitution stated that St. Mary's was under the spiritual direction of the Syrian Orthodox Church and could "not be amalgamated with any

other Church or religious group" without the consent of the Patriarch of the Syrian Orthodox Church (the Patriarch) and the Archbishop of its diocese, known as the Malankara Archdiocese of the Syrian Orthodox Church in North America (the Archdiocese). The constitution further provided that the Archdiocese was to be notified of any sale, transfer, or transaction of real estate.

When the Patriarch replaced the archbishop, who in turn replaced the church's vicar, the dissenting members of the church signed a document stating that the church had resolved to be affiliated with a religious group separate and distinct from the national church and refused to allow the new vicar into the church. The Archdiocese Plaintiff moved for summary judgment on its request to enjoin the dissenting members from entering the premises and using the property of St. Mary's. This Court held that the ownership issue could be decided based on neutral principles and, thus, affirmed summary judgment and an injunction. Significantly, the Second Department also addressed the following:

> [T]he defendants attempted to inject a dispute over religious doctrine into this controversy by asserting that their decision to change their affiliation was prompted by a desire to remain faithful to the true teachings of their religion.

The dissenting judge stated that this was a sufficient basis for holding that the case raised non-justiciable religious issues. However, the majority disagreed, holding that the trial court was correct in not considering this argument. So too, here, this

Court should reject CLI's effort to "inject a dispute over religious doctrine into this controversy."

B. Deciding A Case On The Basis Of Neutral Principles Is Not The Same As "Taking Sides"

This is not a dispute about whose religious beliefs are correct. Rather, it is a dispute about whether, as a matter of New York State real property law, CLI (and those acting on its behalf) has any basis for avoiding Respondents' request that CLI be removed from the Premises. That issue can be decided – and was decided -- based on neutral principles because the determination of that issue has nothing to do with how to refer to the Rebbe, how the *Gabboim* were elected, who controls prayer services, or alleged rulings from Rabbis that CLI thinks should be binding. Based on the case law discussed above, the New York courts have jurisdiction to decide this case. Furthermore, under prevailing case law, Agudas and Merkos, as the legal owners of the Premises, are entitled to the relief granted by the IAS Court.

It is true that a decision in favor of Agudas and Merkos might make a group of people who have different beliefs unhappy, but for CLI to argue that such a result means that the court is impermissibly "taking sides" in a theological dispute is to ignore the established case law. In *First Presbyterian Church of Schenectady v. United Presbyterian Church,* 62 N.Y.2d 110 (1984) -- the leading case under New York law -- there was a theological dispute between the denominational church and the local church. That did not prevent the Court of Appeals from

deciding under "neutral principles" that the denominational church should be enjoined from interfering with First Church's use and enjoyment of the local church property. Under CLI's argument, however, the court could not have done that because it would have been improperly siding with the local church.

Likewise, in *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville,* 250 A.D.2d 282, 684 N.Y.S.2d 76 (3d Dept. 1999), there was a clear theological dispute that the court referred to as a schism. Nevertheless, the court rejected one side's argument that this was a non-justiciable religious dispute. Under CLI's theory, the court could not have done that because it would have supposedly been taking sides.

The same analysis applies to this Court's most recent decision, in *Malankara*. Once again, there was clearly a theological dispute between the national church and the local church. If CLI is correct, the lower court's decision granting the national church summary judgment on its claim over the property and enjoining the local church from the property would have been an impermissible taking of sides. But this Court obviously did not look at the issue in that way, as it affirmed the lower court's decision.

In all of these cases, the losing side held different beliefs from those of the prevailing parties but that did not prevent the courts from rendering their decisions

under neutral principles. So, too, here, the IAS Court acted properly in deciding this case on neutral principles.

A hypothetical likewise demonstrates the point. If person A enters the house of person B and has a religious vision that tells him that he must remain in the house, that vision does not deprive B of his right to eject A from his house, nor does it deprive B of the right to invoke the power of the courts to eject A. The interlopers' religious beliefs or motives are irrelevant to whether he may remain in B's property. Similarly, B's religious beliefs are wholly irrelevant to whether the trespassers may remain. B may be motivated by antagonistic or competing religious fervor in seeking A's ejectment or by animus or avarice. But B's motivation is irrelevant – the narrow question is whether the property belongs to B and whether, under civil law, A may occupy B's property over B's objection.

That is essentially the situation which the trial court faced. CLI has argued that enforcing Agudas's and Merkos's legal rights in the property they own as fee simple title owners would have the effect of favoring one party over the other in a religious dispute. Agudas and Merkos disagree with much of what CLI has said about the religious issues but, as previously noted, have not engaged CLI on those issues because they are irrelevant. Under the law, however, even assuming that the practical effect of the court's decision would be to make one side of a dispute

believe that its religious position is being aggrieved, the courts must still decide the issue if it can do so, as here, under neutral principles of law.

Point IX

OTHER ARGUMENTS RAISED BY CLI ARE IN ERROR

Agudas and Merkos have explained in Point II and III above why the evidence overwhelmingly supports the conclusion of the trial court that Agudas and Merkos were entitled to a judgment in ejectment against CLI. Agudas and Merkos have also explained why there is no merit to CLI's other requests for reversal. There are, however, numerous other arguments scattered throughout the Opening Brief. Many seem irrelevant to the real issues on this appeal and do not in any way alter the analysis in the previous sections of this brief. In addition, Agudas and Merkos find it difficult to follow certain of the points made by CLI, while others seem to be repeated in different sections of the Opening Brief. Nevertheless, Agudas and Merkos respond in this section to as many of CLI's arguments as it can understand.

First, CLI argues that Rabbi Shemtov (Chairman of Agudas) supposedly testified that CLI did not occupy the Premises. Opening Brief, p. 30. He did not say that. Rather, he said that CLI had made a claim concerning the Premises, which is entirely consistent with Respondents' position in this lawsuit. The

testimony of Rabbi Shemtov referred to by CLI cannot be interpreted as an admission that CLI does not occupy the Premises.

Second, CLI argues that the deposition testimony of Rabbi Krinsky (Chairman of Merkos) shows that CLI did not occupy the Premises. CLI ignored the following deposition testimony of Rabbi Krinsky:

> Q. Rabbi Krinsky, is it Merkos's position that Congregation Lubavitch, Inc. occupies space of either 770 or 784-88 Eastern Parkway?
> A. Yes.
>
> Q. What space does Congregation Lubavitch, Inc. occupy?
> A. All of it. . . . .
>
> Q. How long has Congregation Lubavitch, Inc. occupied the entirety of the [synagogue] as you have testified?
>
> A. I really don't know when. Whenever they got this appellation of CLI.

R. 898-99.

Third, CLI contends that there was something "notable" about Rabbis Shemtov and Krinsky, respective Chairmen of Respondents, not testifying at trial and that they were supposedly concerned about offering damaging testimony. Opening Brief, p. 32. That is silly. CLI noticed both gentlemen for depositions and was free to subpoena them for trial if CLI truly believed what it is now stating. R. 358-65. CLI never issued any such subpoenas. Respondents did not call either

of these gentlemen because no testimony was needed from them concerning the issue at trial – that is, who is CLI and what rights did it claim to the Premises.

Fourth, CLI makes statements on the bottom of page 34 of the Opening Brief concerning testimony that supposedly would have been presented by a number of witnesses. The actual trial transcript demonstrates that the statements in CLI's brief do not match the statements made at trial. R. 869:21- 870:1.

Fifth, CLI tries to create an issue concerning the internal governance of Agudas. Opening Brief, p.21. That is similar to the issue raised by CLI in its Fifteenth Affirmative Defense and Counterclaim. R. 1102. CLI is not, however a member of Agudas and, therefore, lacks standing to raise any issues concerning the governance of Agudas. As CLI acknowledges, that was the basis on which Justice Harkavy dismissed the counterclaim and, while CLI has not been shy about appealing almost every other adverse decision, even CLI recognized that there was not even an iota of merit in its position, and so it did not appeal. Opening Brief, pp. 42-43.

Finally, as already mentioned above, the undercurrent of much of CLI's argument is an accusation of bias against Justice Harkavy. Indeed, while some of CLI's language is subtle, elsewhere, CLI accuses Justice Harkavy outright of

"unmitigated partisanship." Opening Brief, p. 35, n. 21.[28] As mentioned, this was not raised below by CLI, and in any event, it is always better for the judicial system when parties limit their arguments to the merits. The fact that CLI has chosen to do otherwise is unfortunate.

CONCLUSION

This lawsuit is an ejectment action concerning property rights. Agudas and Merkos own the property at 770 and 784-88 Eastern Parkway. An entity calling itself CLI – which has a Certificate of Incorporation that describes itself as a congregation – voluntarily appeared in the courts of this state and claimed to have rights to the Premises. Agudas and Merkos disagreed and asked the courts to remove CLI from the Premises.

The trial of this dispute has now been completed and Justice Harkavy properly held that CLI (and all those acting with CLI) should be ejected because it in fact has no cognizable claim to the Premises. CLI has nothing of substance to say on the merits of that secular law issue. Thus, CLI can do nothing more than say that it supposedly has religiously-based rights and, by unilaterally interjecting that issue into this case, beg this Court to step aside. In other words, CLI asks this

[28] This particular accusation concerned the fact that the Court's opinion was supposedly faxed to Mr. Fisher's office. In fact, it was faxed by Justice Harkavy's chambers to Mr. Grayson who resides in Israel, not Mr. Fisher. The reason for that was simply the coincidence that Mr. Grayson had called Justice Harkavy's chambers that day to inquire when a decision might be forthcoming. Undoubtedly, had Mr. Rudofsky called chambers that day and requested that the decision be faxed to him, that would have happened.

Court to prevent Agudas and Merkos from enjoying the rights to the property those entities indisputably own. If CLI were successful based on the record in this case, it would lay the groundwork for it being impossible for any religious corporation to use the courts to protect its property rights because the party opposing the religious corporation would always recast the property issue as a religious one and argue that the courts must abstain.

CLI can conduct its services anywhere it so chooses – just not in the Premises owned by Agudas and Merkos. Respectfully, Justice Harkavy's decision should be affirmed in its entirety.

Dated: New York, New York
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