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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the matter of the Application of DAVID Y. SHOR, RAFAEL GRAUSZ, LEVI GOLDBERG, FEIVEL UNGER, MOTTI KATZ, MOSHE HERSHKOWITZ, JACOB LEVITMAN, CHAIM KATZ, YITZCHOK LUNGER, MENDEL WEISBERG, LAZER FISCHER, ARON JUNGREIS, DAVID BERKOVITS, and NOSON JOSEPHY, as members of CHEVRA ANSHEI LUBAWITZ OF BOROUGH PARK,

Index No. 515647/2017

Petitioners,

-against-

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent,

and

CHEVRA ANSHEI LUBAWITZ OF BOROUGH PARK, 4024 12TH AVENUE LLC, and WATERFRONT PROPERTY MANAGEMENT, LLC,

Intervenor-Respondents.

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PETITIONERS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR PETITION AND IN OPPOSITION TO ATTORNEY GENERAL'S MOTION TO DISMISS PETITION

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Preliminary Statement

Petitioners, constituting members of Chevra Anshei Lubawitz of Borough Park ("the Synagogue") submit this Memorandum of Law (i) in further support of their Petition to annul the Attorney General's May 3, 2017 Amended Approval ("the Approval") of the Synagogue's April 27, 2017 Amended Application ("the Application") for authority to sell the Synagogue's Property located at 4024 12th Avenue ("the Synagogue Property") to an entity controlled by Moses Karpen ("Karpen" or "the Developer") for a stated (but thoroughly illusory) consideration of $3.1 million ("the Sale"). As part of the Sale, the Developer is to obtain immediate title to the Synagogue Property in exchange for the Synagogue's receipt of a 19% interest in the Developer's LLC; the Developer will then, according to the plan, demolish the Synagogue's Building (constructed in 1906 and constituting the oldest functioning Shul in Borough Park), build a six story residential structure in its place, and deliver to the Synagogue in a few years' time a condo unit consisting of the first floor and basement in the new structure.

As explained in the Verified Petition and the accompanying Affidavits, Petitioners did not learn of the Approval or the Sale until several weeks *after* a Deed to the Synagogue Property was delivered to the Developer's entity, Intervenor-Respondent 4024 12th Avenue LLC on June 14, 2017; and did not obtain the Application filed with the Attorney General until July 19, 2017. At that point-- and based upon the numerous material misstatements in the Application concerning, *inter alia*, the condition of the Synagogue's Building and whether the Synagogue complied with its own Constitution and applicable law in purporting to obtain the necessary approval of the Sale from the Synagogue's membership--Petitioners retained counsel, contacted the Attorney General and commenced this Article 78 Proceeding to annul the Approval and

reclaim their Synagogue's Property.

On the return date of the Order to Show Cause, and over the objections of the Developer and the Synagogue (the Attorney General taking no position), Justice Steinhardt granted a Temporary Restraining Order preserving the *status quo* pending argument and submission of the Article 78 Petition. By So Ordered Stipulation, the Developer and the Synagogue have intervened in the Proceeding as additional Respondents. By subsequent Stipulation, the return date has been adjourned until November 2, 2017. (The Synagogue and the Developer are represented by the same counsel and have submitted a single set of opposition papers; they are sometimes referred to hereafter jointly as "Respondents.")

* * *

In response to the Petition, Respondents have submitted a voluminous set of affidavits and a lengthy Memorandum of Law, in which they advance a number of legal and factual arguments to justify and defend the Sale. But rather than provide this Court with confidence that the Sale was properly authorized by the membership and approved by the Attorney General, the Affidavits and exhibits only serve to raise *further* questions and cast *further* doubt upon (i) the fairness and validity of the underlying Sale transaction; (ii) the conduct of the prime movers behind the sale, Messrs. Asher Gluck (thc alleged Secretary and "Gabbai" of the Synagogue) and Khaim Vaysman (the alleged President); and (iii) the correctness of the Attorney General's Approval. [1]

All parties (the Developer, the Synagogue, the Attorney General and, of course, the

[1] In order to minimize the size of this Memorandum and avoid repetition, we will not repeat all of the factual matters set forth in the Reply Affirmation of David Shor, which is submitted together with this Memorandum and to which this Court is respectfully referred.

Petitioners) concede that an essential predicate for a valid Sale and Approval is the ratification of the transaction by the Synagogue's membership at a validly noticed Special Meeting. Put another way, unless Respondents can convince this Court that such a validly noticed and conducted Meeting took place, the Sale was invalid as a matter of law. Here, the factual record indicates that the February 26, 2017 Meeting at which the Sale was allegedly "overwhelmingly approved" by the Synagogue membership was not noticed in accord with the requirements of either Section 194 of the Religious Corporation Law or the 1914 Constitution of the Synagogue (resulting in the failure to provide all members with an opportunity to vote and be heard on this critical issue). Indeed, the Affirmations we have submitted establish that contrary to the Resolution submitted to the Attorney General as part of the Application and contrary to the statement made under penalty of perjury in the Application, no actual vote was taken to endorse the Sale. Nor could it have been taken, since the attendees at the Meeting were not provided with the most basic material terms of the proposed transaction—such as the purchase price consideration, whether the Synagogue would receive any of the consideration, and the security (if any) to be received by the Synagogue to ensure compliance by the Developer with his obligations. And there is no evidence presented (to either the Court or to the Attorney General) that Messrs. Gluck and Vaysman (the two prime movers of the Sale transaction) were ever properly elected as Trustees and Officers of the Synagogue.

In an attempt to sidestep their failure to provide the requisite notice, Respondents suggest that the Petitioners are somehow not true "members" of the Synagogue, but something they call mere "mispalalim" with no right to vote. There is nothing in the documents to support this purported distinction. Perhaps more importantly, where, as here, Respondents concede that

Petitioners are regular attendees at services and regular financial contributors to the Synagogue, Petitioners are *as a matter of law* "members" with full voting rights by virtue of the statutory definition of "membership" in Section 195 of the Religious Corporation Law.

Respondents also contend that even though they deliberately concealed the Sale from the Petitioners—and even though they never obtained valid approval of the Sale from the membership—this Court is somehow powerless to do anything about it by virtue of Section 203 of the Not for Profit Corporation Law. According to Respondents, once the Deed to the Synagogue Property has been transferred (that is, once their scheme has culminated in success) both this Court and the Petitioners can only throw up their hands, watch as their Synagogue Building is demolished, and be content with a lawsuit against the wrongdoers for damages. This is not—and could not possibly be—the law. The very statute upon which Respondents rely indicates that it provides protection to transactions that are "otherwise lawful" and only then from a challenge that the transfer was *ultra vires* (that is, that the "corporation was without capacity or power to…make or receive such transfer.").

Given the deliberate and material misrepresentations in the Application filed with the Attorney General as to the purported ratification of the transaction by the membership (which false filing in a submission to the Attorney General is a felony), the Sale is certainly not "otherwise lawful." Furthermore, while Petitioners assert that the Synagogue failed to obtain the lawful authorization of the membership of the Synagogue for the Sale, the Sale is also challenged on numerous other grounds, including the inadequacy of the consideration, the fundamental unfairness of the transaction, the absolutely extraordinary fact that the Developer is receiving all of the Synagogue's consideration (the Building) up-front while not delivering a

dime to the Synagogue in exchange, and whether the Sale is in the best interests of the Synagogue. None of these issues implicate Section 203.

Significantly, all of the Section 203 cases cited by Respondents concern challenges that were lodged many years after a court approval of a sale in a public judicial proceeding in which all interested parties are given an opportunity to be heard. Here, Petitioners moved promptly (within a few weeks) after learning of the Attorney General's non-public and essentially *ex parte* approval of the Sale in a private administrative proceeding.

* * *

In its Cross-Motion, the Attorney General is careful not to defend the underlying correctness of the Approval, and states that the "allegations [made by Petitioners] concern the Attorney General", and that the Attorney General "is sympathetic to the plight of the Petitioners." (AG Mem.at 1, 4). Nevertheless, the Attorney General tells this Court that the Article 78 Proceeding must be dismissed because "given what was known at the time the decision was made" (that is, assuming the correctness and completeness of the Application filed by the Synagogue), the Approval was not arbitrary or capricious. (*Id.* at 3-4.)

The Attorney General's request that this Court ignore the substantial evidence now presented to this Court indicating that its Approval should not have been issued is, we respectfully submit, a complete abdication of its statutory responsibility to safeguard the assets of religious organizations and is itself contrary to law. For one thing, it is well settled that this Court has authority to direct a remand to the Attorney General to reconsider the Approval based on all of the available evidence.

More fundamentally, the Attorney General concedes that "should the Court determine

that the [Approval] was procured by fraud...the Office of the Attorney General will comply with any orders or findings made." Where, as here, all of the interested parties are before the Court and have made extensive submissions addressing the merits of the dispute, this Court can exercise its authority under CPLR 103(c) to convert the Article 78 Proceeding into a plenary action and grant whatever relief is warranted and appropriate, based upon all of the available evidence and without regard to the limited and incomplete administrative record before the Attorney General when the Approval was issued. In other words, this Court has the unquestioned ability to "do the right thing" for the Synagogue and its members, and should not hesitate from doing so.

But even based upon the Application itself (in the AG's words, "given what was known at the time the decision was made"), the Approval should not have been granted because critical information about the proposed Sale was *not* provided in the Application and the Sale as structured was *not* in the best interests of the Synagogue and was about as unfair and one-sided a real estate transaction as could possibly be imagined. To take one example: the Developer obtains immediate title to the Synagogue Property, in exchange for the Synagogue's receipt of a 19% minority interest in his LLC. There is no escrow created, no transfer of actual funds to the Synagogue, and no real assurance that at the end of the day the Synagogue will not be left homeless, with its minority membership interest in the LLC of no value.

In this regard, we note that the Attorney General's own Regulations governing the sale of condominium units require affirmative disclosure to an offeree, stating "in italics" that "if this offering plan is not consummated for any reason, you may lose all or part of your investment", where "there is no bond, escrow of money or other security which is adequate to assure the

return of all monies in the event of the failure, discontinuance or abandonment of the offering." Yet the Attorney General blithely approved the Sale here—which provided *absolutely no* "bond, escrow of money or other security" to the Synagogue in the event the Developer failed to honor his promise. Why is the Synagogue entitled to less protection that any other purchaser in this State of a condo unit?

* * *

For all of these reasons, this Court should annul the Attorney General's Approval and prevent the Respondents from proceeding with the demolition of the Synagogue Building, based on a profoundly unfair and unlawful process, which generated a profoundly unfair deal for the Synagogue.

ARGUMENT

THE PETITION SHOULD BE GRANTED AND THE AG'S APPROVAL ANNULLED AND THE SALE OF THE SHUL PROPERTY RESCINDED

POINT I

The Evidence Establishes That There Was No Valid or Properly Noticed Meeting in February 2017 to Approve the Sale of the Synagogue Building

Respondents concede that the validity of any action taken at the February 26, 2017 Meeting is dependent upon issuance of valid notice of the Special Meeting to the membership. Respondents also concede that no written notice of the Special Meeting was provided to the membership, but rely upon the statements of Messrs. Gluck and Vaysman that Mr. Vaysman notified the membership orally "by my making an announcement at Sabbath services the 2 consecutive weeks preceding the meeting that a meeting would take place on February 26,

2017." (Vaysman Aff., par. 65; *see* Gluck Aff., par. 96). These self-serving statements—not supported by any corroborating facts—are, we respectfully submit, insufficient to establish that the Synagogue provided proper notice of the Special Meeting at which the most important issue that could possibly come before the membership for decision—the fate of its historic and beloved Building—would be decided. In this regard, we note that we have submitted no fewer than five Affirmations from members who attended services regularly during that period and who expressly deny that any such "oral notice" was ever given.

In weighing the credibility of Messrs. Gluck and Vaysman, on the one hand, and the Petitioners, on the other, we submit that the Court consider the following. First, it defies credulity that in light of the life and death nature of the decision allegedly placed before the membership at the Special Meeting, the Synagogue would have relied solely upon an oral announcement of the Meeting. Second, given the passion of the Petitioners' opposition to the Sale, had such "oral notice" been given, there would have been immediate and public opposition to the Sale, which (in this close-knit community) would have become the "talk of the town." In this regard, Petitioners would have reaped no benefit by waiting to object until after the submission of an Application, after the Attorney General's Approval of the Sale, and after the conveyance of the Deed to the Developer?

Third, this Court should not be blind to the manner in which Messrs. Vaysman and Gluck falsely represented to the Attorney General in the original Application that the proposed 2016 transaction with Mr. Haut had been properly approved at a membership meeting held on April 3, 2016. The transcript of that Meeting (attached to the Shor Affirmation) conclusively confirms that no such approval was obtained; that Mr. Gluck repeatedly emphasized that the Meeting was

discussing only a concept and not a concrete transaction; and that Mr. Gluck assured the attendees that he would return once a specific deal had been made so that the members could weigh in and cast their votes. There is every reason to conclude that the same deception characterized the "manufacturing of member consent" for the later Sale to the Developer as well; and that there was in fact no approval by the membership for that transaction either. As Mr. Shor explains, this is basically what Mr. Gluck admitted in his conversations with Mr. Unger—that unless he concealed the transaction and its material terms, the opposition from the membership would kill the deal.

For these and other reasons, it is respectfully submitted that Petitioners' sworn Affirmations, denying that any such "oral notice" of a Special Meeting was given, ring true and should be credited by this Court.

POINT II

Petitioners are Valid Members of the Synagogue and Have Standing to Challenge the Invalid Sale of the Synagogue Building

Even though the Synagogue concedes that Petitioners are regular worshipers at the Synagogue, they assert that these individuals are not "real members" but something called "mispalalim", who are not entitled to vote on Synagogue business. The significance of this issue cannot be overstated. If the Synagogue cannot sustain this purported distinction—and, for the reasons explained below, they cannot—this necessarily means (i) that no valid Special Meeting or vote could, as a matter of law, have taken place (because all of the "members" were not given notice and an opportunity to attend and participate); and (ii) that the Sale cannot possibly be

approved by either this Court or the Attorney General. [2]

First, the Synagogue's attempt to disenfranchise regular worshipers and financial contributors is completely inconsistent with Section 195 of the Religious Corporation Law, which contains two distinct definitions of "membership." The first definition is that membership is dependent upon the organization's validly adopted by-laws. (We shall address this issue below.) But the second alternative definition (*see* the use of the disjunctive "or" in Section 195) confers "membership" on those "stated attendants on divine worship in such church and have regularly contributed to the financial support thereof during the year next preceding such meeting."

There is no dispute (as confirmed in the affirmations submitted by Petitioners) that each of the Petitioners (and other opponents of the Sale) (i) regularly attend services, whether on the Sabbath, weekdays and holidays, or on all of these occasions; (ii) purchase seats on an annual basis; (iii) make financial contributions; and (iv) as to some, provide services, such as plumbing, food and leading the congregation in prayer (without compensation). Under the Statute and the case law, they are therefore "members" of the Synagogue.

For example, in *Islamic Center of Harrison, Inc. v. Islamic Science Foundation, Inc.*, 262 A.D.2d 362 (1st Dept. 1999), the Appellate Division held that the plaintiffs were members of

[2] Respondents make a half-hearted effort to argue that this Court has no authority to review the Synagogue's determination of membership because it would require "intrusion into constitutionally protected ecclesiastical matters." But as the very Court of Appeals case cited by Respondents makes clear, where, as here, the membership issues turn on "neutral principles" that do not involve interpretation of religious doctrine, there is no impediment to judicial review. *See Blaudziunas v. Egan*, 18 N.Y.3d 275 (2011). Indeed, the Second Department has repeatedly rejected invocation of the "ecclesiastical matters" doctrine as a way to insulate membership decisions from judicial review. *See, e.g., Temple-Ashram v. Satyanandji*, 84 A.D.3d 1158 (2d Dept. 2011); *Schwimmer v. Welz,* 56 A.D.3d 541 (2d Dept. 2008).

the religious organization "under both the by-laws of [the organization] *and the alternative definition of members in Religious Corporation Law Section 195 which is based upon attendance and contributions.*" (emphasis supplied). *Accord, Sillah v. Tanvir*, 18 A.D.3d 223 (1st Dept. 2005) (membership status found under Section 195 for "regular worshipers [who] contributed financially to the mosque."). *See also Ming Tung v. China Buddhist Association*, 124 A.D.3d 13 (1st Dept. 2014) (acknowledging existence of "alternative definition of 'members' in Religious Corporation Law Section 195, which is based upon attendance and financial contribution"). *Compare Welz* v. *Congregation Anshe Meseritz,* 112 A.D.3d 449 (1st Dept. 2013) (failure to satisfy "alternative definition"); *Rosen v. Lebewohl*, 28 Misc.3d 1226(A) (Sup. Ct. N.Y. Cty. 2010) (same).

Second, the Synagogue's attempted disenfranchisement is premised upon the so-called "new" 2015 By-Laws which purport to limit membership to those select candidates who have filed an application with the Trustees and have been granted membership status by the Trustees. The problem is that there is absolutely no evidence that these By-Laws were properly adopted in accordance with Section 5 of the Religious Corporation Law (and therefore supersede the 1914 Constitution of the Synagogue), which provides that "by-laws may be adopted or amended, by a two-thirds vote of the qualified voters present and voting at the meeting for incorporation or at any subsequent meeting, *after written notice, embodying such by-laws or amendment has been openly given at a previous meeting, and also in the notices of the meeting at which such proposed by-laws or amendment is to be acted upon.*" (emphasis supplied).

Neither in this Proceeding or as part of the Application have Respondents presented anything that indicates or even suggests that there was ever given to the membership any notice

of any meeting to adopt or amend by-laws, let alone a notice that complied with Section 5's requirement that the notice "embody[] such by-laws or amendment." Absent valid notice, any action taken at the Meeting (such as an amendment of the By-Laws) cannot be sustained. *See Bynoe v. Riverside Church in the City of New York,* 13 Misc.3d 628 (Sup. Ct. N.Y. Cty. 2006).[3]

Moreover, we note that Respondents admit that they have no Synagogue records, such as "old" By-Laws, "old" Minutes of Meetings or "old" Membership lists. If that is true, how could an "amended" By-Law be discussed and affirmatively approved? And while Messrs. Gluck and Vaysman claim to be the Synagogue's duly elected Trustees, they fail to explain how or when they were elected and pursuant to what set of "old" or "new" By-Laws. If they cannot establish their lawful status as Trustees (and, we respectfully submit, they have not and cannot), the Application they purported to file on behalf of the Synagogue—and the Approval of that Application—is a nullity.

Finally, on a practical/policy level, we also ask this Court to consider the absurdity of the Synagogue's "membership" policy, as advanced to this Court by Respondents and as reflected in the so-called "new By-Laws." According to Messrs. Gluck and Vaysman, the only way to become a member of the Synagogue with a right to vote is to file an application for membership with the Trustees and obtain the Trustees' approval. In simple English, three Trustees of the Synagogue get to decide who becomes a member. A surer route for self-perpetuation in office—

[3] We also note the absence of a genuine "membership list" for the Synagogue; that is, a list maintained as part of the Synagogue's regular books and records (which Respondents claim were destroyed or lost). As Mr. Shor notes, the purported list of members attached to Mr. Vaysman's affirmation was obviously prepared for purposes of this litigation and is not by any stretch a "business record" of the Synagogue. *See* CPLR 4518. Nor is there any evidence as to how or whether this "membership application" process was ever followed, such as, *e.g.,* actual membership applications.

and the complete divestiture of *membership control* over the religious organization-- could hardly be imagined. [4]

POINT III

Section 203 of the Not for Profit Corporation Law Does Not Immunize the Invalid Sale from Challenge by the Members

Respondents' main legal argument is that any attempt to challenge the Sale is barred by virtue of Section 203 of the Not for Profit Corporation Law. According to Respondents, the moment title passed from the Synagogue to the Developer pursuant to the Approval, Petitioners lost all rights to challenge the validity of the transaction—however incomplete and fraudulent the Application upon which the Approval was based, however egregious the deprivation of the membership's right to decide whether or not to sell the Synagogue Building, and however contrary to the best interests of the Synagogue and its membership.

A.

The first—but complete—answer to Respondents' statutory argument lies in the language

[4] The two "membership" cases cited by Respondents lend no support to their attempt to disenfranchise Petitioners. In *Blaudziunas v. Egan*, 18 N.Y.3d 275 (2011), the Court found that the parishioners were "members of the ecclesiastical body—not members of the corporation" and relied upon the specific provisions in the Religious Corporation Law (Sections 91 and 92) that concern "the governance of an incorporated Roman Catholic church and the division and disposition of parish property." The Court of Appeals relied upon these particular provisions (not applicable to a Synagogue) to hold that the archbishop and the trustees had "the authority to demolish the church building." Similarly, in *Citizens for St. Patrick's v. Saint Patrick's Church* of West Troy, 117 A.D.3d 1213 (3d Dept. 2014), the Third Department relied upon the particular provisions governing a Roman Catholic Church, and held that in that context, the plaintiffs were members of the "ecclesiastical body of St. Patrick's", but not "the religious corporation." Neither case has anything to do with whether Petitioners are "members" of the Synagogue under the "alternative definition" of "membership" in Section 5.

of the statute itself, which only purports to immunize a sale if it is "otherwise lawful" and, then, only against a challenge on the grounds that "the corporation was without capacity or power to do such act or to make or receive such transfer." We address each of these limitations below.

The "otherwise lawful" limitation was applied by Justice Ramos in *People ex rel. Spitzer v. Grasso*, 12 Misc.3d 384 (Sup. Ct. N.Y. Cty. 2006), *rev'd on other gds.*, 42 A.D.3d 126(1st Dept. 2007), where the Court rejected the proposed defense of Section 203, and held that where an agreement was alleged to have violated other provisions of the NPCL, "it is not 'otherwise lawful', and the Attorney General's *ultra vires* claim may proceed."

Here, the Sale was not "otherwise lawful" for a number of reasons, including the materially false Application filed with the Attorney General (which violated the disclosure obligation set forth in Section 511 of the NPCL and which false filing was itself the crime of "offering a false instrument for filing in the first degree" under Section 175.35 of the Penal Law). Among other things, the Application falsely represented, in order to procure the Approval of the Attorney General (*see* NPCL, Section 511(a)(6), (7) & (8)) that: (a) there was a favorable vote at a duly noticed Special Meeting of the Membership on February 26, 2017; (b) that the Synagogue Building was dilapidated and unsafe and that the only course of action was demolition; and (c) that the membership was informed of the material terms of the proposed Sale to the Developer. Furthermore, the machinations effected by Messrs. Vaysman and Gluck in proceeding with the Sale transaction also render the Sale not "otherwise lawful", since they constitute an egregious breach of fiduciary duty on their part.

As Respondents recognize in their Memorandum, Section 203 applies only to a defense of *ultra vires*; that is, that the religious corporation was not authorized to engage in the sale

transaction. But Petitioners' challenge is not based entirely upon the Synagogue's failure to obtain the valid consent of its membership through a lawfully noticed and conducted Special Meeting. Rather, as the Petition makes clear, Petitioners also challenge the Sale on "substantive" grounds, such as the total inadequacy of the consideration, the lack of security, that apparently (based on the documents) no money actually changed hands, and that the Sale is not in the best interests of the Synagogue and its membership. None of these challenges are in any way implicated by Section 203.

B.

Justice Ramos in *Grasso* distinguished the Second Department's decision in *Congregation Yetev Lev D'Satmar v. 26 Adar N.B. Corp.*, 219 A.D.2d 186 (2d Dept. 1996), upon which Respondents heavily rely. The distinctions between *Yetev Lev* and our facts are dramatic, and illustrate why Section 203 cannot be applied to deny Petitioners their day in court to challenge the Sale.

For one thing, the petitioners challenging the sale in *Yetev Lev* waited more than *ten years* after the transfer of the property to raise an objection. Here, Petitioners went to Court within weeks of learning of the Sale. In addition, the sale in *Yetev Lev* was approved in a public judicial proceeding, and resulted in a final, non-appealable order of the Supreme Court. (In fact, the Second Department's decision emphasizes over and over again that the objectors were challenging a court order approving the sale.) But the Approval of the Sale here was in a private administrative proceeding by the Attorney General, with no notice to and no opportunity of any member to raise an objection. And the Article 78 Proceeding was timely filed within four

months of the Attorney General's Approval. In short, in stark contrast to *Yetev Lev*, there was nothing "final" about the Approval procured by the Synagogue here.

The Court in *Yetev Lev* was primarily concerned that to permit an objection so many years after a consummated sale would "render unstable the title to any parcel of property in New York…even if its conveyance had been accomplished pursuant to a court order." These considerations are wholly inapplicable here. Not only is there no "court order" approving this Sale, but the Developer (who continues to own the Property and must, pursuant to the Approval, continue to own the Property until he complies with his obligations to build and deliver the "new space" to the Synagogue) knew that his title was dependent upon and only as good as the Attorney General's Approval. Indeed, the Deed delivered to the Developer specifically recites the Approval as the predicate for the conveyance. There is therefore no danger of infringing upon the rights of a theoretical bona fide purchaser for value of the Synagogue Property. [5]

C.

There are at least two other reasons why Respondents' Section 203 argument must fail. It is well settled that any order that is obtained by fraud is subject to the inherent authority of the issuing court or agency to vacate the tainted order and at the request of any "interested party." *See Lockett v. Juviler*, 65 N.Y.2d 182, 186 (1985) (inherent power of court to vacate prior order or judgment for fraud); *Gersten v. 56 7th Avenue LLC*, 88 A.D.3d 189 (1st Dept. 2011) (administrative agency "may reverse a prior determination, even long after the time to appeal has

[5] In the other case cited by Respondents, *Congregation Beth Hamedrash Hagodel of Mapleton Park Jewish Center v. Perr,* 16 Misc.3d 1103(A) (Sup. Ct. Kings Cty. 2007), the sale occurred in 1994, was the subject of a court order approving it in 2003, and the challengers did not go to court until 2005. Moreover, following the court approval of the original sale by the synagogue, there were two subsequent court authorized transfers of the property. These facts, unlike the situation before this Court, presented a classic case for applying Section 203.

expired, where the initial order resulted from 'illegality, irregularity in vital matters, or fraud.'")There is no indication—and certainly no supporting authority—suggesting that this inherent authority is somehow displaced or abrogated by Section 203.

And even if Section 203 were otherwise applicable, Respondents are estopped from asserting the bar by virtue of their affirmative misconduct in concealing the Sale from the Petitioners, and thus preventing Petitioners and the membership from asserting their legal rights prior to the delivery of the Deed. In the analogous situation of the statute of limitations, it is fundamental that "equitable estoppel may be invoked to defeat a statute of limitations defense when "the plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action.'" *Vigliotti v. North Shore University*, 24 A.D.3d 752 (2d Dept. 2005), *quoting Matter of Eberhard v. Elmira School District,* 6 A.D.3d 971 (3d Dept. 2004), and *citing Simcuski* v. *Saeli,* 44 N.Y.2d 442 (1978).

The bottom line is this. How can Respondents possibly argue the bar of Section 203 when the only reason the challenge was not brought before the delivery of the Deed was their own intentional and deliberate concealment of the relevant facts from the Petitioners? They cannot. *See Lindsley v. Lindsley*, 54 A.D.2d 664 (1st Dept. 1976) (defendants' affirmative wrongdoing "require the application of equitable estoppel to deny the defense of statute of limitations.")

POINT IV

The Sale of the Synagogue Building is Not in the Best Interests of the Synagogue and the Application to the Attorney General Misrepresented the Condition of the Building

Under Section 511(a)(6) of the Not for Profit Corporation Law, the Sale of the Synagogue Building can only be approved if "the purposes of the corporation, or the interests of

its members, will be promoted thereby." *See in re Nobele Drew All Plaza Housing Corp.*, 24 A.D.3d 678 (2d Dept. 2005). As explained in the Petition and the accompanying Affirmations—and as reiterated in the reply Affirmations—the Sale of the Synagogue Building is plainly *not* in the best interests of the Synagogue and its membership (which is precisely why Messrs. Vaysman and Gluck went to such lengths to conceal what was going on).

While the historic Synagogue Building is in need of some maintenance work, which is not unusual for a one hundred year old Building, the solution is not to demolish the Building, but rather to raise the relatively modest funds (about $100,000) necessary to refurbish certain parts of the Building so that the members may continue to pray and enjoy their beautiful and profoundly spiritual place of worship. As we have noted elsewhere, the Application filed with the Attorney General upon which the Approval was granted blatantly misrepresented the condition of the Synagogue Building as unsafe and dilapidated, with the only available option being demolition and replacement.

Even if demolition were a reasonable option, the structure of the Sale transaction here—an immediate sale to the Developer, coupled with what is essentially a naked promise with no money actually changing hands that four years from now the Developer will turn over to the Synagogue the new space—plainly does not "promote the interests of [the Synagogue's] members. Given the uncertainties of the real estate market—and even assuming *arguendo* the best faith and intentions of the Developer—there is no assurance that at the end of the day the Synagogue will not be left with a hole in the ground and a homeless membership.

POINT V

The Article 78 Proceeding Against the AG is Properly Brought Because the Approval of the Sale Should Not Have Been Granted

The Attorney General—while very careful not to endorse the validity of either the manner in which the Sale was allegedly "approved" by the Synagogue's membership or the underlying substantive fairness and appropriateness of the Sale—tells this Court that the plethora of evidence amassed by Petitioners must somehow be ignored because the only issue on this Article 78 Proceeding is whether the Attorney General correctly granted its Approval "given what was known [to the Attorney General] at the time the decision was made." In other words, the Attorney General asserts that even though its prior Approval of the Sale is the entire legal predicate for the delivery of the Deed from the Synagogue to the Developer—and even though Petitioners have presented overwhelming evidence that such Approval should never have been granted—this Court is powerless to annul the Approval because the Application "seemed OK" (our words, not the AG's) on its face. With all due respect to the Attorney General, that is not and cannot be the law, and this Court has ample authority to protect the interests of the Synagogue and its membership and to unwind this Sale. [6]

First, as an initial matter, and as explained in the accompanying Affirmation of David Shor, the Attorney General should not have approved the Application even without consideration of what the Attorney General terms "additional evidence submitted after the fact." Thus, Mr. Shor explains that the Application failed to contain critical information as to, among other things, the value of the "new space" to be received by the Synagogue from the Developer in the new

[6] Not surprisingly, the Court of Appeals' case cited by the Attorney General in support of this proposition, *Matter of National Fuel Gas Distrib. Corp. v. Public Service Commission,* 16 N.Y.3d 360, 364 (2011), says nothing of the kind.

building; any supporting detail as to the condition of the Synagogue Building or the cost of making necessary repairs or potential sources of funding; and any identification of the members who allegedly approved the transaction. Nor was there any information (such as an appraisal) provided as to the fair market value of what the Synagogue was getting in return (the basement and first floor unit of the new structure). How could the Attorney General have possibly granted its Approval based on such an incomplete and bare-bones Application?

Furthermore, the structure of the transaction provided no real security to the Synagogue that at the end of the day (perhaps four years from now), the Developer would actually deliver the promised new space. Instead, the Synagogue has a personal guarantee from Mr. Karpen of dubious value and a meaningless minority interest (*see* next paragraph) in the LLC.

No less egregious, based on the documents (the Operating Agreement for the new LLC and the Purchase Agreement between the Synagogue and the Developer [part of Vaysman Aff., Ex. 6]), it appears *that absolutely no funds were actually delivered by the Developer to the Synagogue* (in contrast to the first proposed transaction with Mr. Haut, which would have generated $3 million to be placed in escrow until the new space was delivered, with $100,000 to be made available for the Synagogue's use). Instead, Section 3.1 of the Operating Agreement (Vaysman Ex. 6) provides that "as partial consideration for [the Synagogue's] contribution of their fee simple ownership of the Premises to the Company, [the Synagogue] shall have a stated capital of $3,100,000."

In other words, the Synagogue has contributed its entire asset (fee title to the Synagogue Building) to Karpen in exchange for a minority interest in his LLC! What rational business person would make such a deal? And what was the Attorney General thinking when he

approved it? The unfairness and one-sidedness of the deal is even more pronounced because, according to the Operating Agreement (Section 3.1), Karpen did not put in a dime as a current capital contribution. Rather, the Operating Agreement recites that "Karpen *shall contribute* as his capital contribution(s) all funds required to pay all of the costs and expenses necessary to complete construction of the Project." (emphasis supplied).

But there is more. The Operating Agreement goes on to vest complete control over the LLC in the hands of the Developer. *See* Operating Agreement, Section 5.1. Even "Major Decisions" can be made exclusively by the Developer, with no input from the Synagogue, since the Synagogue has only a 19% interest in the LLC, and such "Major Decisions" can be made by a member (such as the Developer) that holds at least a 75% membership interest. *See* Operating Agreement, Section 5.5. On such a record, it was, we respectfully submit, indeed "arbitrary and capricious" for the Attorney General to find that the transaction was in the best interests of the Synagogue and its membership.

The Attorney General's issuance of its Approval of this "no security"/"no money changing hands" deal is impossible to reconcile with the Attorney General's stated policy to protect purchasers of condo units and coops, as reflected in its own Regulations. Thus, Section 19.2 of the Regulations (13 NYCRR 19.2), entitled "Contents of Offering Plan", sets forth the required disclosures to be made in the Plan. Subparagraph (3) states that "if there is no bond, escrow of money or other security which is adequate to ensure the return of all monies in the event of the failure, discontinuance or abandonment of the offering, the following statement shall be prominently made in the Offering Plan in italicized letters: *If this offering plan is not consummated for any reason, you may lose all or part of your investment.*"

What Synagogue member in his right mind would vote for a Sale transaction in which the Synagogue could lose its entire investment (the Building) if the Developer does not complete the project? The answer is obvious. And how can a minority interest in an LLC controlled entirely by the Developer possibly be deemed "adequate security." And there is not the slightest evidence that this critical lack of security was either (a) disclosed to the attendees at the February 26, 2017 "Special Meeting"; or (b) considered by the Attorney General in considering the Application and issuing its Approval. Had the Attorney General considered this fact (which was not discussed (in italics or otherwise) in the Amended Application but was instead buried in the Operating Agreement, it is inconceivable, given the public policy considerations codified in the Regulations, that Approval would have been granted. At the very least, the Attorney General would have insisted on proof that the membership specifically considered the risk. Essentially, the Attorney General blew it. [7]

Second, and as noted earlier, it is fundamental that an agency "has inherent power to reconsider its determinations upon a showing of new facts." *Carter v. Adirondack Park Agency,* 203 A.D.2d 788 (3d Dept. 1994). It would be a complete abuse of discretion—as well as an abdication of the Attorney General's statutory mandate to protect the disposition of property of religious organizations under the Not for Profit Corporation Law and the Religious Corporation Law—for the Attorney General *not* to "reconsider its determination" in this case, and to instead conclude that it "did its job" by determining that the Application checked all the right boxes under Section 511 of the NPCL.

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[7] The Attorney General's Co-op Regulations (13 NYCRR 17.2) require similar disclosure. See Section 3(b)(1)(i) (in absence of undertaking to return all money, italicized disclosure that "you may receive back only part of your investment, not your full investment"); Section 3(b)(xxiii) (disclosure "in a new construction, whether there will be a completion bond..")

In *Alberta Gas Chemicals, Ltd. v. Celanese Corporation*, 650 F.2d 9 (2d Cir. 1981), a party made a false submission before an administrative agency (the International Trade Commission), which resulted in a finding in favor of the submitting party and against a competitor. The district court dismissed the competitor's action and the United States Court of Appeals for the Second Circuit reversed, and directed the administrative agency to reconsider its prior determination.

In language equally applicable to the false Application filed with and relied upon by the Attorney General concerning the Sale here, the Second Circuit stated that where, as here, the administrative result is based upon a false submission to the agency, "it may be imperative for the [administrative] tribunal to consider new developments or newly discovered evidence in order to facilitate the orderly and just resolution of conflict…It is a well established principle that an administrative agency may reconsider its own decisions [and] it is hard to imagine a clearer case for exercising this inherent power [to reconsider] than when a fraud has been perpetrated on the tribunal in its initial proceeding…An agency does have an obligation to make corrections when it has been relying on erroneous factual assumptions." *Id.* at 13.

Third, in 2014, Section 511-a of the Not for Profit Corporation Law became effective to permit approval of a sale of property by a religious corporation to be granted exclusively by the Attorney General, without requiring commencement of a proceeding in the Supreme Court. As a result, the approval to sell which previously required a public judicial proceeding could be accomplished through a private, administrative application process by those in control of the Synagogue, which is exactly what happened here. Were the Approval at issue obtained through a public court order, there would be no dispute that Petitioners had an absolute right under CPLR

5015 to seek vacatur of the Approval order—even if they were not parties to the original proceeding. *Oppenheimer v. Westcott*, 47 N.Y.2d 595 (1979) ("interested party" has standing to vacate order that affects its rights); *see True Zion Gospel Temple v. Roberson*, 39 A.D.3d 850 (2d Dept. 2000) (denying motion to vacate sale of property by non-party religious corporation under CPLR 5015 on grounds of fraud only because "the plaintiff failed to set forth the alleged fraud with the required specificity.").

Based on the Affirmations submitted on this Petition, there can be no question that Petitioners have come forward with sufficient factual proof of numerous improprieties, which rise to the level of fraud, concerning the manner in which the Attorney General's Approval was obtained for the Sale. Petitioners' remedies should not turn on whether the Sale was approved by the Attorney General or this Court. Put another way, if the NPCL and the RCL were violated, how can Petitioner have fewer substantive rights merely because of the procedural manner (AG or Court) through which the Approval was obtained?

Fourth, "it is well-established that an Article 78 proceeding may be remitted to the body or officer whose action or determination is at issue for further proceedings where there is a need for further consideration or reconsideration." 6A N.Y.Jur.2d *Article 78*, Section 398. *See, e.g., Peckham v. Calogero*, 54 A.D.3d 27 (1st Dept. 2008) ("there are many appropriate grounds for remand of a matter to the agency"); *Wu v. New York City Water Board*, 2011 WL 13077585 (Sup. Ct. N.Y. Cty. 2011) (remanding to agency "for further consideration in light of new evidence."); *Pacifica Foundation v. Lwisohn*, 79 Misc.2d 550 (Sup. Ct. N.Y. Cty. 1974) (remanding to agency where administrative record is insufficient).

Fifth, and as an alternative to remand, this Court may exercise its statutory authority

under CPLR 7804(h) to resolve any triable issues of fact raised by the Petition. *Church of Scientology v. Tax Commission,* 120 A.D.3d 376 (1st Dept. 1986); *see also Pantelidis v. New York City Board of Standards and Appeals*, 2003 WL 25780830 (Sup. Ct. N.Y. Cty. 2003) (directing evidentiary hearing rather than remanding to administrative agency for reconsideration).

POINT VI

Alternatively, the Matter Should be Converted to a Plenary Action Against the Synagogue and the Developer for Appropriate Relief

Even if there were some merit to the Attorney General's contention that Petitioners are not entitled to Article 78 relief, the appropriate result is, of course, not dismissal of this Proceeding—which would leave the Petitioners without a remedy—but conversion of this Special Proceeding under CPLR 103(c) into a plenary action for declaratory and injunctive relief against the Attorney General, the Synagogue and the Developer (all of which are present and subject to the jurisdiction of this Court and which have made extensive submissions on the merits of the dispute). [8]

[8] The Attorney General suggests that the Petition must be dismissed because "the proper vehicle for judicial redress is an action by the petitioners against the trustees for fraud and/or breach of fiduciary duty", and because "the trustees of the Synagogue" are "necessary parties" and must be joined. The Attorney General cites no authority in support of this position, and the argument completely misperceives the nature of the relief requested—which is to rescind the Sale of the Synagogue Building, which Sale is predicated upon the Attorney General's Approval. While Petitioners have alleged that Messrs. Vaysman and Gluck have not acted properly, Petitioners seek no relief against these individuals and have no interest in pursuing a (probably meaningless) damage claim against them. Petitioners' sole focus and goal is to prevent the demolition of the Synagogue Building, and full relief on this claim can be accorded because the Synagogue and the Developer have intervened in the Proceeding. In any event, it is clear, based upon the papers submitted by Respondents (including lengthy affirmations from each of Messrs. Gluck and Vaysman), that these individuals are effectively part of the litigation and that their interests and positions are being fully represented by the attorneys for the Respondents—whether or not they

The Second Department and other courts have repeatedly reaffirmed and endorsed the authority of the trial court under CPLR 103(c) to convert an Article 78 proceeding into a plenary action or to convert a plenary action into an Article 78 Proceeding. As the Second Department has stated, "the courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its prosecution." *Walsh v. New York State Thruway Authority*, 24 A.D.3d 755 (2d Dept. 2005). *See, e.g., Dolce-Richard v. New York City Health and Hospitals Corporation*, 149 A.D.3d 903 (2d Dept. 2017); *Wander v. St. John's University*, 99 A.D.3d 891 (2d Dept. 2012); *Perrin v. Bayville Vil. Bd.*,70 A.D.3d 835 (2d Dept. 2010); *Raykowski v. New York City Department of Transportation,* 259 A.D.2d 367 (1st Dept. 1999) (all granting conversion between Article 78 and plenary action).

This plenary authority should (if the Court deems it necessary) be exercised here, where the merits have been fully presented and all interested parties (Petitioners, the Attorney General, the Synagogue and the Developer) are before the Court. *See Long Island Pine Barrens Society, Inc. v. Suffolk County Legislature*, 31 Misc.3d 1208(A) (Sup. Ct. Suff. Cty. 2011) ("since the instant proceeding was incorrectly styled as an Article 78 proceeding, and jurisdiction has been obtained over all indispensable parties, this court hereby converts this proceeding into a plenary action for declaratory and injunctive relief pursuant to CPLR 103(c)).")

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are technically "parties" in their own right. In short, both individuals have had a full "opportunity to be heard" and there is no danger of inconsistent results.

POINT VII

The Temporary Restraining Order was Properly Granted and Should Be Extended and No Undertaking Should Be Required for its Continuation

Respondents' argument that Justice Steinhardt erred in granting a Temporary Restraining Order preserving the *status quo* (and that this Court should not compound that error by extending the TRO) is completely without merit. CPLR 7805 expressly provides that "on the motion of any party or on its own initiative, the court may stay…the enforcement of any determination under review, upon terms, including notice, security and payment of costs…" Under this Section, it is axiomatic that "a temporary restraining order may be obtained to preserve the status quo during the pendency of an Article 78 proceeding." 67A N.Y.Jur. 2d *Injunctions,* Sec. 103. Accord, 6 N.Y.Jur. 2d *Article 78*, Section 350. *See Infinity Outdoor, Inc. v. City of New York,* 165 F.Supp.2d 403 (E.D.N.Y. 2001).

This Court should also recognize Respondents' request for a $500,000 undertaking for what it is—a last ditch attempt to achieve a successful end-run around the provisions of the Religious Corporation Law and to insulate from attack a Sale transaction that is unlawful and not in the best interests of the Synagogue and its membership. Indeed, it is far from clear that an undertaking is required when a stay is issued under CPLR 7805. *See Matter of Town of East Hampton v. Jorling*, 181 A.D.2d 781 (2d Dept. 1992) (stay under CPLR 7805 granted without requiring an undertaking); *Yungbros Real Estate Co., Inc. v. Linamandri*, 26 Misc.3d 1203(A) (Sup. Ct. N.Y. Cty. 2009) (same; no undertaking required).

But even if an undertaking must be posted in connection with a stay granted under CPLR 7895, the amount of an undertaking is a matter within the discretion of the court. *Griffin v. 70*

Portman Road Realty, Inc., 47 A.D.3d 883 (2d Dept. 2008). Here, the Developer went into the Sale transaction with his eyes open, and took the risk that the Application filed by the Synagogue and the Approval obtained from the Attorney General might not be valid. Indeed, the Developer could have, but did not, wait the four months proscribed by CPLR 217 to see if there would be any challenges to the Sale, but instead proceeded immediately to obtain the Deed and begin his construction process even before the Attorney General's administrative Approval became "final." Under these circumstances, any prejudice suffered by the Developer is purely self-created.

One more thing. "It is improper to require, as a condition of a preliminary injunction, an undertaking in an amount which would result in denial of the relief to which the plaintiffs show themselves to be entitled." 67A N.Y.Jur.2d *Injunctions*, Sec. 172, *citing Zonghetti v. Jeromack*, 150 A.D.2d 561 (2d Dept. 1989). Because that is *precisely* what will happen here, this Court should, at most, require a nominal undertaking.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their Petition to annul the Attorney General's approval of the Sale, direct the rescission of the transaction, and grant such other and further relief as to the Court may seem just and proper. Alternatively, the Court should remand the matter to the Attorney General with a direction to reconsider the Application based on the new evidence presented by Petitioners, while continuing the Temporary Restraining Order preserving the *status quo*. If the Court deems it necessary, this

Court should also convert the pending Article 78 Proceeding into a plenary action for declaratory and injunctive relief against the Attorney General, the Synagogue and the Developer and, upon such conversion, should grant all necessary relief. The Court should also extend the Temporary Restraining Order pending the determination of the Proceeding, without requiring an undertaking.

Dated: New York, New York
October 31, 2017

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