To be Argued by:
EDWARD S. RUDOFSKY
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York

APPELLATE DIVISION—SECOND DEPARTMENT

MERKOS L'INYONEI CHINUCH, INC. and
AGUDAS CHASSIDEI CHABAD OF UNITED STATES,
Plaintiffs-Respondents,

- against -

2010-6942

MENDEL SHARF, YAACOV THALER, BENTZION FRISHMAN and "JOHN DOE" 1-30, the names of "John Doe" 1-30 being fictitious as their actual names are unknown to the plaintiff,
Defendants,

- and -

CONGREGATION LUBAVITCH, INC.,
Defendant-Appellant.

BRIEF FOR APPELLANTS

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EDWARD S. RUDOFSKY
of Counsel

Kings County Clerk's Index No. 40288/04

Supreme Court of the State of New York
Appellate Division : Second Department

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MERKOS L'INYONEI CHINUCH, INC. and AGUDAS CHASSIDEI CHABAD

Plaintiffs-Respondents,

-against-

MENDEL SHARF, YAACOV THALER, BENTZION FRISHMAN and "JOHN DOE" 1-30, the names of "John Doe" 1-30 being fictitious as their actual names are unknown to the plaintiff,

Defendants,

-and-

CONGREGATION LUBAVITCH, INC.,

Defendant-Appellant.

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Docket No. 2010/6942

STATEMENT PURSUANT TO CPLR §5531

1. The Index Number is the trial court was 40288/04.

2. The full names of original parties were:

   Plaintiff - Merkos L'Inyonei Chinuch, Inc.

Defendants - Mendel Sharf; Yaacov Thaler; Bentzion Frishman;

Subsequent to the commencement of the action, the following parties were added:

Plaintiff - Agudas Chassidei Chabad

Defendant - Congregation Lubavitch, Inc.

In addition, the Order appealed from purports to grant relief against the following parties, without amendment of the caption:

Defendant - Congregation Lubavitch of Agudas Chasidei Chabad

Defendant - Gabbai Zalman Lipskier

Defendant - Gabbai Avrohom Holtzberg

Defendant - Gabbai Menachem Gerlitzky

Defendant - Yosef Losh

3. The action was commenced in Supreme Court, Kings County.

4. The action was commenced on December 10, 2004. The Complaint was served on December 14, 2004. The Amended Complaint was served on or about March 3, 2005. The Second Amended Complaint was served on or about May 10, 2007.

5. This is an action for a declaratory judgment and injunctive relief. By Judgment dated dated December 27, 2007 and entered January 4, 2008 (Hon. Ira B. Harkavy, J.S.C.) granted ejectment of defendant Congregation Lubavitch, Inc. ("CLI") as well as "that congregation presently located at 770 and 784-788 Eastern Parkway, Brooklyn, New York" (the "Congregation") and "the current gabboim Zalm[an][Lipskier, Avrohom Holtzberg, Menachem Gerlit[z]ky, and Yosef Losh (the "Gabboim"). By Order dated and entered February 3, 2009, the Appellate Division, Second Department, deleted all reference to the Congregation and the Gabboim from the Judgment on the ground that they were not parties to the action.

6. The appeal is from an Order dated June 18, 2010 and entered June 25, 2010, (a) granting a motion to add the Congregation and the successors to the Gabboim as defendants in the action *nunc pro tunc* and directing that they vacate the premises, and (b) holding in abeyance a motion to hold Congregational Lubavitch, Inc. in contempt of Court pending the Congregation and the successor Gabboims' compliance with the Order appealed from.

7. The appeal is on the full record, printed or reproduced.

Dated: New York, New York
October 8, 2010

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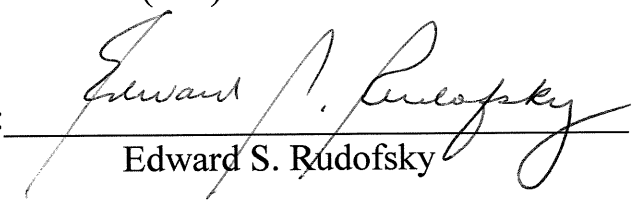
By: 
Edward S. Rudofsky

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Preliminary Statement

In its Judgment entered January 9, 2008, Supreme Court (Harkavy, *J.S.C.*) ordered the ejectment of defendant, Congregation Lubavitch, Inc. ("CLI"), as well as the religious congregation (the "Congregation") occupying the Lubavitch Synagogue located 770-784-788 Eastern Parkway, Brooklyn, New York ("770"), and the Gabboim (Trustees) of the Congregation, whom the Judgment identified as Zalm[a]n Lipskier, Yehuda Blesofsky, Menachem Gerlit[z]ky and Yosef Losh, from the Synagogue. [18 Misc.3d 1111(A)]

By Decision & Order entered February 3, 2009, this Court modified the Judgment "to delete reference to the [C]ongregation and the Gabboim, since neither is a party to this action." [59 A.D.3d 408]

The Decision & Order of this Court on the appeal from the Judgment, as well as the companion Decision & Order on an appeal from an earlier injunction issued by Supreme Court, made it clear that the Congregation referred to in the Judgment is "Congregation Lubavitch – Agudas Chassidei Chabad," which has continually met and prayed in the Lubavitcher Synagogue since 1940. 59 A.D.3d 403 (2009), at 405 ("The properties

house the central Lubavitch Synagogue, in which the congregation, known formally as Congregation Lubavitch-Agudas Chassidei Chabad, worships. The synagogue is managed by individuals known as the "Gabboim," or trustees, who were originally appointed by the Grand Rebbe and are now elected by the congregation. Neither the Gabboim, individually, nor the congregation itself are parties to this action."); *see, also,* 59 A.D.3d at 409.

Exactly ten (10) months later, on December 3, 2009, without ever obtaining, much less serving a Warrant of Eviction, or taking any other steps to enforce the Judgment against CLI - - and despite a clear showing by CLI that it had eliminated any presence whatsoever at 770 - - plaintiffs frivolously moved to hold CLI in contempt for failing to vacate the premises pursuant to the Judgment.

When CLI vigorously defended against that contempt motion and cross-moved for sanctions, noting, *inter alia,* that the Synagogue was not occupied by CLI, but rather by Congregation Lubavitch of Agudas Chasidei Chabad, plaintiffs, on March 3, 2010, fully thirteen (13) months after this Court ruled, moved Supreme Court to join the Gabboim and the Congregation as parties defendant *nunc pro tunc* and order their ejectment,

based on the very same arguments and evidence on which plaintiffs had previously but *unsuccessfully* urged this Court to sustain the original Judgment against the very same parties.

Both of plaintiffs' motions and defendant's cross-motions came on to be heard in Supreme Court by Justice Bernadette Bayne (to whom the action was re-assigned in light of Justice Harkavy's retirement) on June 8, 2010, at which time - - even after acknowledging that she was being asked to grant relief against the very parties in respect of whom this Court had directed the Judgment be modified to delete any reference - - Justice Bayne summarily ruled from the Bench, granting the motion to join the Gabboim and the Congregation as parties defendant *nunc pro tunc,* denying the cross-motions for sanctions, directing CLI, the Congregation, and the Gabboim to deliver possession of the Synagogue to plaintiffs within thirty (30) days, and holding the contempt motion "in abeyance" pending compliance with Her Honor's Order.

CLI, the Congregation, and three (3) of the four (4) Gabboim named in the Order have appealed.[1] This brief is submitted on their behalf.

Delivery of possession has been stayed pending appeal by the posting of an Undertaking pursuant to CPLR 5519(a)(6).

Questions Presented

Did Supreme Court erroneously grant plaintiffs' motion to join the Gabboim and the Congregation as parties defendant *nunc pro tunc* and order them to deliver possession of the Synagogue to plaintiffs?

Did Supreme Court erroneously hold plaintiffs' contempt motion in abeyance pending compliance with its order to deliver possession?

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[1] The original Notice of Appeal herein was filed on behalf of CLI, the Congregation and all of the Gabboim. However, Gabbai Yosef Losh subsequently requested that an Amended Notice of Appeal be served and filed, not identifying Gabbi Losh as an appellant, for religious reasons. *See* Congregation Yetev Lev D'Satmar, Inc. v. Kahan, 5 Misc.3d 1023(A) (Sup. Ct. Kings Co. 2004) ("It is axiomatic among Orthodox Jews that Jewish law as codified by the *Shulchan Aruch; Choshen Mishpat 22,26* demands that disputes among Jews be adjudicated by a Jewish court referred to as a Beth Din unless permission is obtained from the Beth Din to submit the controversy to a secular court. In Jewish tradition, the failure to comply with these rules constitutes a *Chilul HaShem* [desecration of G-d's name] and could subject the violator to severe penalties including excommunication from the Jewish community."), *aff'd* 31 A.D.3d 541 (2nd Dept. 2006), *aff'd* 9 N.Y.3d 281 (2007). Although all of the Gabboim agree that the matter belongs before a Beth Din rather than a secular court, the appealing Gabboim believe that they have no choice but to defend themselves against plaintiffs' attempt to use the secular courts against them, as representatives of the Congregation, and have been granted permission to do so by their rabbis.

Did Supreme Court erroneously deny defendant's cross-motions for sanctions?

Statement Of The Case

This is the third stage of this action.

In its first stage, plaintiffs sought and obtained a summary declaration that they are the "fee owners" of Lubavitch World Headquarters, i.e., premises 770 and 784-88 Eastern Parkway, Brooklyn, known throughout the Jewish and secular world as "770" - - a proposition which was never in dispute - - and obtained a preliminary injunction against various individuals and CLI interfering with plaintiffs' interest in and enjoyment of the premises. On appeal, that injunction was modified by this Court. 59 A.D.3d 403 (2009). In the course of that decision, this Court carefully explained that:

> The plaintiff Agudas Chassidei Chabad (hereinafter Agudas), a religious corporation, and the plaintiff Merkos L'Inyonei Chinuch, Inc. (hereinafter Merkos), a not-for-profit corporation, hold separate title to adjoining parcels of real property located in Brooklyn at 770 Eastern Parkway and 784-788 Eastern Parkway, respectively. Since 1940, 770 Eastern Parkway has served as the headquarters for the movement of Lubavitch Chasidism, a branch of the greater Chasidic movement of Orthodox

> Judaism. *The properties house the central Lubavitch Synagogue, in which the congregation, known formally as Congregation Lubavitch-Agudas Chassidei Chabad, worships. The synagogue is managed by individuals known as the "Gabboim," or trustees, who were originally appointed by the Grand Rebbe and are now elected by the congregation. Neither the Gabboim, individually, nor the congregation itself are parties to this action.*
>
> ***
>
> Congregation Lubavitch, Inc. (hereinafter CLI) [is] a not-for-profit corporation that was formed in 1996 by the Gabboim ....
>
> [Emphasis added.]

In its second stage, following the summary judgment in favor of plaintiffs, they sought to amend the original petition to add a cause of action for ejectment against CLI. Ultimately, that relief was granted, not only against CLI, which was a party to the action,[2] but also against the religious congregation occupying the Lubavitcher Synagogue at 770 (i.e.,

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[2] CLI, which has an office at 302 Kingston Avenue, had and has no office, and occupied and occupies no space, at 770. As subsequently determined by this Court, CLI is a not-for-profit corporation formed in 1996 by the Gabboim (i.e., not by the members of the Congregation). CLI intervened as a defendant in this action to assert that the premises are held by plaintiffs in a *de facto* trust for the benefit of the religious community. In granting summary judgment for plaintiffs, Justice Harkavy found that this claim was not proven. [18 Misc.3d 1111(A)] This Court affirmed this narrow finding vis-à-vis CLI, but pointedly noted that "whether such a trust exists in favor of the [C]ongregation is not before us, as the [C]ongregation is not a party to this action." [59 A.D.3d 408]

Congregation Lubavitch of Agudas Chassidei Chabad) and its Gabboim, which were never joined as parties. [18 Misc.3d 1111(A)]

On appeal, the Judgment was affirmed as to CLI but modified "to delete reference to the [C]ongregation and the Gabboim, since neither is a party to this action." 59 A.D.3d 408 (2009).

In reaching this decision, this Court again painstakingly explained that:

> The plaintiff Agudas Chassidei Chabad (hereinafter Agudas), a religious corporation, and the plaintiff Merkos L'Inyonei Chinuch, Inc. (hereinafter Merkos), a not-for-profit corporation, hold separate title to adjoining real properties in Brooklyn, located at 770 Eastern Parkway and 784-788 Eastern Parkway, respectively. Since 1940, 770 Eastern Parkway has served as the headquarters for the movement of Lubavitch Chasidism, a branch of the greater Chasidic movement of Orthodox Judaism. *Both properties house the central Lubavitch Synagogue, which, historically, has been occupied by the religious congregation and managed by a group of individuals known as "the Gabboim," who were initially appointed by the Grand Rebbe of the congregation and have since been elected by the congregation itself. In June 1996 the defendant Congregation Lubavitch, Inc. (hereinafter CLI), was incorporated under the Not-for-Profit Corporation Law by the Gabboim then managing the Synagogue, who were listed on CLI's certificate of incorporation as the corporation's "directors."* [Emphasis added.]

The direction that reference in the Judgment to the Congregation and the Gabboim be deleted was *not* accompanied by leave to seek post-appellate amendment of the pleadings to add these parties as defendant. *Compare, e.g.,* TJI Realty, Inc. v. Harris, 250 A.D.2d 596 (2nd Dept. 1998) ("matter is remitted for further proceedings in accordance herewith, *without prejudice to any party to seek, if warranted, an appropriate amendment of the pleadings*"). (Emphasis added.)

Plaintiffs did not seek to reargue either one of this Court's February 9, 2009 Decisions & Orders, nor did they seek review in the Court of Appeals. Instead, it clearly appeared that plaintiffs were acquiescing in this Court's resolution of the issues. Specifically, although the Judgment, as affirmed, clearly contemplated that it would be enforced through a Warrant of Eviction [RA 84],[3] plaintiffs never sought the issuance or execution of a Warrant. Moreover, they did not object to discharge of the Undertaking

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[3] The Judgment provides that "it is ... ORDERED, ADJUDGED and DECREED that a WARRANT is to issue forthwith, with the execution of the warrant stayed ...." This Court subsequently modified the terms of the stay. The stay thereafter expired following affirmance of the Judgment, as modified, on February 9, 2009.

posted to secure a stay pending appeal, and otherwise took no action to enforce the Judgment, as modified (i.e., against CLI) for ten (10) months.

In its newest stage, which began in December, 2009, plaintiffs first sought to hold CLI in contempt for failing to vacate and deliver possession of the Synagogue to plaintiffs. [RA 61, *et seq.*] The gravamen of this motion was that the Congregation, managed by the Gabboim, continue to use and occupy the Synagogue - - as they have since 1940.

In opposition to plaintiffs' contempt motion, and in support of a cross-motion for sanctions [RA 119, *et seq.*], CLI established through an attorney's affirmation, the affidavits on personal knowledge of five (5) individuals, including three (3) of the Gabboim, and documentary evidence that:

- This Court had expressly modified the Judgment to delete any reference to the Congregation or the Gabboim, making it frivolous for plaintiffs to seek to hold CLI in contempt because the Congregation, managed by the Gabboim, continues to use and occupy the Synagogue. [RA 129, *et seq.*]

o Plaintiffs had not obtained a Warrant of Eviction nor taken any other legally required steps to enforce the Judgment, as modified, as against CLI or anyone else. [RA 133]

o CLI's office was and is located at 302 Kingston Avenue and CLI used and occupied (and continues to use and occupy) no space at 770 whatsoever. [RA 131]

o The steps CLI had taken, subsequent to this Court's February 3, 2009 decision, including but not limited to issuing of announcements of events at 770 in the name of the Gabboim (not CLI) and bookkeeping reforms, in order to comply with the Judgement by eliminating any "presence" of CLI at 770. [RA 132]

Clearly stung by the compelling opposition to the contempt motion, plaintiffs *then* sought to join the Gabboim and the Congregation as parties defendant *nunc pro tunc* and order their ejectment.[4] Curiously, this motion -

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[4] Specifically, plaintiffs sought "an order, pursuant to CPLR 305, 1003, 1024, 1025, 2001, 3025(c) and 5019, as well as the inherent power of the court and in the interests of justice ... (i) deeming the caption and all prior proceedings in this action amended *nunc pro tunc*; and (ii) modifying the judgment entered in this action on January 29, 2008, as modified and affirmed by the Appellate Division, Second Department (the "Judgment") , to provide that the third, fifth and sixth decretal paragraphs of the Judgment, *nunc pro tunc,* specify that such decretal paragraphs pertain not only to Congregation Lubavitch, Inc. but, also to (a) Zalman Lipskier, Menachem Gerlitzky,

- made *thirteen (13) months* after this Court's February 2009 ruling - - was based on *the very same evidence* on which plaintiffs had previously but *unsuccessfully* urged this Court to sustain the original Judgment against the very same parties. [RA 316, *et seq.*]

In opposition to this second motion and support of a cross-motion for sanctions, CLI, the Congregation and the Gabboim established that plaintiffs' newest motion was nothing more than a blatant attempt to do an end-run around this Court's modification of the Judgment "to delete reference to the [C]ongregation and the Gabboim." The opposition / cross-motion included an analysis of the evidence of record and arguments made to this Court on the prior appeals, and further included a copy of each of the *ten (10)* briefs filed with this Court on the six (6) consolidated appeals[5]

Yehuda Blesofsky, Yosef Losh, and their successors and assigns, in their capacity as Gabboim and representatives of the Congregation, and (b) the Congregation known as "Congregation Lubavitch," also known as "Congregation Lubavitch 770" and/or holding itself out as "Congregation Lubavitch of Agudas Chassidei Chabad"; ...."

[5] Appeals Nos. 2006-07630, 2006-07817, 2007-04457, 2007-09213, 2008-00280, and 2008-00363. The Court administratively divided/consolidated and decided these appeals in two (2) groups. Appeals Nos. 2006-07630, 2006-07817, and 2007-04457 were decided by the Decision & Order reported at 59 A.D.3d 403. Appeals Nos. 2007-09213, 2008-00280, and 2008-00363 were decided by the Decision & Order reported at 59 A.D.3d 408.

which resulted in the two (2) companion February 2009 decisions. [RA 413, *et seq.*]

Plaintiffs' motions and defendants' cross-motions came on for oral argument on June 8, 2010. Out the outset of the argument, plaintiffs submitted over objection a compendium of the documentary evidence on which the claim for *nunc pro tunc* amendment of the pleadings and Judgment rested. [RA 1123, *et seq.*] Review of their "oral argument hand-out" makes it crystal clear that plaintiffs are relying on *the very same evidence as they developed in discovery and at trial during the second phase of this action.*

The motions and cross-motions were argued to Hon. Bernadette Bayne. [RA 16, *et seq.*] Her Honor expressly recognized the inappropriateness of plaintiffs' application to her. Specifically:

> THE COURT: *** *Are you saying, are you asking this Court, requesting that this Court add the parties that the appellate division deleted*?
>
> MR. ZASLOWSKY: The answer is yes and the reason - -
>
> The COURT: *Why would this Court do that*?

MR. ZASLOWSKY: What the appellate division said is those parties were not named as defendants, and, therefore, Judge Harkavy should not have entered a judgment against them.

We are now trying to ask this Court to remedy what - -

THE COURT: *So go back to the appellate division. They deleted them. They deleted them.*

MR. ZASLOWSKY: They deleted them.

THE COURT: Yes.

MR. ZASLOWSKY: And that's fine and everything else in Judge Harkavy's decision was affirmed except deleting them from three specific paragraphs. So now, what we are saying, all right, if that's the problem, is they were not named as defendants. They were not nominally defendants, that can be cured by naming them as defendants. Everything else in the record, Judge is the same.

And the critical point - -

THE COURT: *No, no, if the appellate division deleted certain parties, you cannot now come back to a lower court and say please add these parties.* You go back to the appellate division. That's what you do and say to them, look, you deleted X, Y, Z on such and such a date because of certain reasons. Now, the reason has changed or you misapprehended, and, therefore, we are requesting a re - -

MR. ZASLOWSKY: Your Honor - -

THE COURT: - - yes, reargument.

MR. ZASLOWSKY: The view of the appellate division is, Judge, that since they were not nominally defendants - -

THE COURT: I don't care what the view is, that's what they did. That's what the appellate division did. *This Court cannot undo what the appellate division did.* Either you go back to the appellate division, or you go to the Court of Appeals because you are asking this court to undo what the appellate division did.

MR. ZASLOWSKY: To ask the appellate division to undo what they did would be to say notwithstanding the fact that the ... congregation was not named as a defendant, even though they weren't named as defendant, we think [J]udge Harkavy's [J]udgment should stand against those defendants without their being named. That's what we would to back to the appellate division - -

THE COURT: Whatever you have to do, but *not to this Court.*

MR. ZASLOWKSY: We are not asking.

THE COURT: *Not to a court of original jurisdiction.*

MR. ZASLOWSKY: We are not asking you to undo what the appellate division has done.

THE COURT: That's what you are asking me to do.

[RA 38-40; emphases added]

Faced with the lower Court's reflexive, common-sense recognition that it was being asked to "undo what the appellate division has done," plaintiffs' counsel then disingenuously argued that plaintiffs' claims against the parties it sought to add as defendants "we[re] never adjudicated." [RA 41] This argument was made by plaintiffs even though Justice Harkavy had entered a Judgment against these very parties and this Court had ordered reference to them deleted from the Judgment after consideration of multiple briefs and oral argument focused, *inter alia*, on the specific question of whether CLI and the Congregation were "one and the same" or not - - the exact same argument advanced by plaintiffs to justify relief below.

Despite recognizing that plaintiffs were asking the lower Court to "undo what the appellate division has done [RA 40], that is exactly the relief the lower Court granted. Specifically, the Order appealed from [RA 13-14] provided that:

1. The motion by Plaintiffs to punish by contempt is held in abeyance.

2. The motions [sic] and cross-motions for sanctions are denied.

3. So much of the motion that requested that (i) the Congregation and (ii) Zalmen Lipskier, Menachem Gerlitzky, Yehuda Blesofsky and Yosef Losh and their successors and assigns in their capacity as Gabboim and representatives of the Congregation known as "Congregation Lubavitch" a/k/a "Congregation Lubavitch 770" and/or also holding itself out as "Congregation Lubavitch of Agudas Chassidei Chabad" (collectively, the "Congregation") be added as parties to the action nunc pro tunc, is granted.

4. CLI and all defendants identified in paragraph 3 of this order are ordered to deliver possession to Agudas Chassidei Chabad the 770 premises, including that portion of the premises located at 770 Eastern Parkway, Brooklyn NY, used as a synagogue, within 30 days.

5. CLI and all defendants identified in paragraph 3 are ordered to deliver possession to Merkos L'Inyonei Chinuch, Inc. the 784-88 premises, including that portion of the premises located at 784-88 Eastern Parkway, Brooklyn NY, used as a synagogue, within 30 days.

CLI, the Congregation and the Gabboim[6] timely appealed this Order and posted an Undertaking in an agreed-upon amount [RA 164], thereby staying enforcement pending appeal, pursuant to CPLR 5519(a)(6).

This appeal ensues.

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[6] See note 1, supra.

Argument

Point I

THE LOWER COURT ERRONEOUSLY ADDED BACK THE SAME DEFENDANTS AS THIS COURT ORDERED DELETED FROM THE JUDGMENT

A. **Introduction**

Unlike cases involving the inadvertent failure to name a party correctly, or similar ministerial, clerical or other non-prejudicial error, the belated motion by plaintiffs arose out of explicit litigation over the granting of relief in the Judgment against the "congregation presently located at 770 and 784-788 Eastern Parkway, Brooklyn, New York" and its "trustees (gabboim")", followed by the Order of the Appellate Division, Second Department, modifying the Judgment by *"delet[ing] reference to the congregation and the Gabboim, since neither is a party to this action."* [59 A.D.3d 408 (2nd Dept. 2009]. Thus, the plaintiffs' motion was nothing short of a patently frivolous attempt to *relitigate issues which have already been decided and circumvent the clear holding of this Court*, and is clearly barred by the law of the case. *See,*

e.g., Lipp v. Port Authority of New York and New Jersey, 57 A.D.3d 953 (2nd Dept. 2008) (prior decision of Appellate Division in the same action "constitutes the law of the case and is binding on the Supreme Court and on this Court as well"); *accord,* Frankson v. Brown & Williamson Tobacco Corp., 67 A.D.3d 213 (2nd Dept. 2009) ("As a general rule, the law of the case doctrine precludes this Court from re-examining an issue which has been raised and decided against a party on a prior appeal where that party had a full and fair opportunity to address the issue ....")

B. Plaintiffs Are Attempting To Relitigate Issues Already Decided Against Them

Contrary to the disingenuous factual presentation on which the plaintiffs' motion was based, and contrary to plaintiffs' counsel's argument below, this Court, after thorough briefing of the issues in two (2) companion appeals, determined that "the congregation presently located at 770 Eastern Parkway" is "Congregation Lubavitch – Agudus Chassidei Chabad" (and not CLI).[7]

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[7] Put most simply, this Court accepted the obvious fact that the religious congregation that has used and occupied the Lubavitcher Synagogue since 1940 had not voted to incorporate pursuant to Religious Corporations Law §§ 191-192. Rather, its Gabboim had themselves formed an ancillary not-for-profit corporation in 1996 as a

In the appeal resulting in modification of the lower Court's injunction to vacate relief erroneously granted against CLI, this Court found that:

> Since 1940, 770 Eastern Parkway has served as the headquarters for the movement of Lubavitch Chasidism, a branch of the greater Chasidic movement of Orthodox Judaism. The properties house the central Lubavitch Synagogue, *in which the congregation, known formally as Congregation Lubavitch-Agudas Chassidei Chabad, worships. The synagogue is managed by individuals known as the "Gabboim," or trustees, who were originally appointed by the Grand Rebbe and are now elected by the congregation. Neither the Gabboim, individually, nor the congregation itself are parties to this action.* [59 A.D.3d 403 (2009) (emphasis added)]

In explaining its reasoning for its ruling that CLI had not presented sufficient evidence to support its claim that the plaintiffs held the properties in trust, this Court expressly stated:

> *Whether such a trust exists in favor of the congregation is not before us, as the congregation is not a party to this action.* [Emphasis added.]

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management company. This Court's repeated explanation of how CLI was formed, in juxtaposition to the historical use and occupancy of the Synagogue, clearly resolved as a matter of law, that the Gabboim could not have converted the unincorporated congregation into an incorporated congregation.

In the second appeal, resulting in modification of the Judgment to delete references to the congregation and the Gabboim, this Court found that:

> Since 1940, 770 Eastern Parkway has served as the headquarters for the movement of Lubavitch Chasidism, a branch of the greater Chasidic movement of Orthodox Judaism. Both properties house the central Lubavitch Synagogue, *which, historically, has been occupied by the religious congregation and managed by a group of individuals known as "the Gabboim,"* who were initially appointed by the Grand Rebbe of the congregation and have since been elected by the congregation itself. *In June 1996 the defendant Congregation Lubavitch, Inc. (hereinafter CLI), was incorporated under the Not-for-Profit Corporation Law by the Gabboim then managing the Synagogue, who were listed on CLI's certificate of incorporation as the corporation's "directors."* [59 A.D.3d 408 (2009) (emphasis added)]

Review of the briefs filed on the prior appeals - - all of which were submitted to the Court below - - quickly reveals that the legal and factual relationship between CLI, the Gabboim and the Congregation was sharply disputed by the parties in the trial Court - - as plaintiffs twice amended its pleading and sought different relief against CLI - - and that *plaintiffs made every effort to defend the Judgment on the prior appeal, including the relief erroneously granted by Justice Harkavy against the Gabboim and the*

Congregation. E.g., compare RA 819, *et seq.*, at Point VI, and RA 923, *et seq.*, at Point III, *with* RA 866-69, at Point IV.

The "law of the case" doctrine bars plaintiffs' attempt to relitigate the issues already decided by the Appellate Division in ordering references to the Gabboim and the Congregation deleted from the Judgment. *See* Lipp, *supra* ("The law of the case [doctrine] operates to foreclose re-examination of [an] issue absent a showing of extraordinary circumstances, such as subsequent evidence affecting the prior determination or a change of law ....") (citing cases); *accord,* Frankson, *supra* (reconsideration of issues permitted only "where there are extraordinary circumstances, 'such as subsequent evidence affecting the prior determination or a change of law'") (citing Lipp).

Here, as in Lipp and Frankson, *supra,* plaintiffs "failed to show that the evidence submitted in support of [their] motion ... was unavailable at the time of" trial. To the contrary, *their entire argument was premised on pre-trial and trial evidence* [*see* RA 323, *et seq.,* at ¶¶ 14, 19, 24, 26, 27, 42-53],

and their motion little more than *a re-hash of their summation at trial*[8] *and arguments on appeal* (*see* RA 866-69).

C. Plaintiffs' Motion Should Have Been Denied As Meritless Under Controlling Caselaw

Although plaintiffs relied below on a potpourri of CPLR provisions and a number of cases, they glaringly omitted the controlling case in the Second Department, Smith v. Garo Enterprises, Inc., 60 A.D.3d 751 (2nd Dept.), *lv. dism.*, 13 N.Y.3d 756 (2009), in which this Court affirmed the denial of a motion pursuant to CPLR 305(c) and 3025(b) "to deem a supplemental summons and amended complaint naming ... additional defendants to be timely filed and served nunc pro tunc, and, inter alia, pursuant to CPLR 3025(c) to amend a judgment ... to include those nonparties as additional defendants therein." As explained by Smith:

> "Under CPLR 305 (c), an amendment to correct a misnomer will be permitted 'if the court has acquired jurisdiction over the intended but misnamed defendant provided that . . . the intended but misnamed defendant was fairly apprised that [he] was the party the action was intended to affect . . . [and] would not be prejudiced' by allowing the amendment" (Holster v Ross, 45 AD3d 640, 642 [2007], quoting Simpson v Kenston Warehousing

[8] *See* Joint Record on Appeal, Apps. Nos. 2007-9213, 2008-0280, 2008-0363, at RA 936, *et seq.*, esp. 938 ("one and the same").

> Corp., 154 AD2d 526, 527 [1989]). "Such amendments are permitted where the correct party defendant has been served with process, but under a misnomer, and where the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact seeking to sue" (Creative Cabinet Corp. of Am. V Future Visions Computer Store, 140 AD2d 483, 484-485 [1988]; *see* Ober v Rye Town Hilton, 159 AD2d 16, 20 [1990]). However, "while CPLR 305 (c) may be utilized to correct the name of an existing defendant (*see* Benware v Schoenborn, 198 AD2d 710, 711-712 [1993]), it cannot be used by a party as a device to add or substitute a party defendant (*see* Security Mut. Ins. Co. v Black & Decker Corp., 255 AD2d 771, 773 [1998])" (Hart v Marriott Intl., 304 AD2d 1057, 1059 [2003]). A plaintiff may not invoke CPLR 305 (c) to proceed against an entirely new defendant, who was not served, after the expiration of the statute of limitations (*see* Security Mut. Ins. Co. v Black & Decker Corp., 255 AD2d 771, 773 [1998]).

In Smith, *supra,* as in the case at bar, "this is not a case where a party is misnamed ....; rather it is a case where the plaintiff[s] seek[ ] to add or substitute a party defendant." *Smith*, quoting Achtziger v Fuji Copian Corp., 299 AD2d 946, 947 (2002) (in turn, quoting Jordan v Lehigh Constr. Group, 259 AD2d 962 [1999]). Thus, as explained in Smith:

> The plaintiff failed to establish that he properly served ... the proposed additional defendants (*see* Gennosa v Twinco Servs., 267 AD2d 200, 201 [1999]; Feszczyszyn v General Motors Corp., 248 AD2d 939, 940 [1998];

> Vandermallie v Liebeck, 225 AD2d 1069 [1996]). Having failed to establish that the proposed additional defendants were properly served, the plaintiff was not entitled to the relief he sought pursuant to CPLR 305 (c) or CPLR 3025 (*see* Achtziger v Fuji Copian Corp., 299 AD2d at 947; Gennosa v Twinco Servs., 267 AD2d at 201; Jordan v Lehigh Constr. Group, 259 AD2d at 962; Security Mut. Ins. Co. v Black & Decker Corp., 255 AD2d at 773; Feszczyszyn v General Motors Corp., 248 AD2d at 940; Vandermallie v Liebeck, 225 AD2d at 1069).

At bar, no Summons was ever served on the Gabboim, in any capacity, or on the Congregation, through any representative. Thus, the relief sought by plaintiffs is precluded by the rules of Smith, *supra*, as well by any notion of fundamental fairness and Due Process of Law embodied in the Fourteen Amendment to the United States Constitution. (*And see* discussion, infra, at pp. 37-41)

Plaintiffs' pre-Smith First Department caselaw, cited in the lower Court,[9] is not to the contrary. These cases all stands for the proposition that amendment should be permitted where the party to be added knew that it was intended to be joined in the action and there will be "no cognizable

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[9] Rodriguez v. Dixie N.Y.C., Inc., 26 A.D.3d 199 (1st Dept. 2006); Nat'l Refund & Util. Serv., Inc. v. Plummer Realty Corp., 22 A.D.3d 430 (1st Dept. 2005); Fink v. Regent Hotel, Ltd., 234 A.D.2d 39 (1st Dept. 1996).

prejudice" to the party added. But here that was and is not the case. At bar, plaintiffs were at all times aware of the occupancy of the Lubavitcher Synagogue by the Congregation and the role of the Gabboim, but took no steps to join either the Congregation or the Gabboim as parties. Rather, they initially sought only a declaration that CLI had no cognizable "interest" in 770; and even in their Second Amended Complaint sought only to evict CLI, not the Congregation or the Gabboim.

It was only when plaintiffs requested and succeeded in obtaining a reference to the Gabboim and the "congregation occupying" the Lubavitch Synagogue in the Judgment itself that their intention to evict the Congregation and its religious officers was revealed. And it was precisely that attempt that this Court rejected in its modifications of the Judgment.

Furthermore, enforcement of the relief granted below would obviously lead to immediate and extraordinary "cognizable prejudice" to the additional parties, including but not limited to being subject to eviction from their "historical" house of worship and blatant interference with the Free Exercise of their religious rights.

By directing deletion of "reference to the congregation [occupying the premises] and the Gabboim", this Court surgically avoided the constitutional, Religious Corporations Law, trusts, and corporate governance issues that would otherwise have been raised by the attempted eviction by Agudas Chassidei Chabad of *its own religious congregation and its duly elected religious officers/trustees* from their place of worship, in what would then have been a blatant *internal governance dispute* between Agudas' Trustees and its Gabboim - - in a case arising out of a judicially-recognized (by Justice Harkavy) "schism" between "those who considered [the 'Rebbe,' Grand Rabbi Menachem Mendel Schneerson] Moshiach (Messianists) and those who did not", involving (again, as recognized by Justice Harkavy) a controversy of a "highly emotional nature," with "deep religious underpinnings." (*See* RA 427, *et seq.*, at Point I; RA 619, *et seq.*, at Point II; RA 668, *et seq.*, at Point I; RA 693, *et seq.*, at Point I; RA 742, *et seq.*, at Point I)

Only by eliminating the Gabboim and the Congregation from the case was this Court able to reach its ultimate holding - - that plaintiffs had the right to eject CLI (a management company newly created by the Gabboim)

from the premises - - on neutral principles of real property law not involving the doctrinal and corporate dispute between the "Messianists" and the leadership of plaintiffs.

Moreover, adding the Congregation to the Judgment *ex post facto* would deprive it of its right - - expressly reserved by this Court ("*Whether such a trust exists in favor of the congregation is not before us, as the congregation is not a party to this action")* - - to raise the "trust" argument in defense of plaintiffs' claims.

Likewise inapposite was plaintiffs' reliance below on In re Denton, 6 A.D.3d 531 (2nd Dept. 2004), in which this Court permitted relief on the theory that the plaintiff in that case was "conforming the pleadings to the proof." However, at bar, that very approach to the facts litigated at trial has *already been rejected by this Court* in its summary restatement of the facts and modification of the Judgment to delete all reference to the Gabboim and the Congregation. Moreover, at bar, the Congregation and the Gabboim

have never had the opportunity to establish their right to use, occupy, and manage the Synagogue, in light of the evidentiary rulings at trial.[10]

D. Plaintiffs Have "Slept On Their [Alleged] Rights"; The Motion Is Barred By Laches

Assuming, *arguendo,* that plaintiffs ever had a right to the relief sought at bar (which they did *not*), their initial representations to Justice Harkavy that they were *not* seeking to bar the religious congregation from using and occupying the synagogue (see RA 427, *et seq.*, at Point IV, esp. n.24; RA 506, *et seq.*, at Point VII; RA 579, *et seq.*, at Point V), and their failure thereafter to promptly seek such relief, should have barred consideration of their motion made *thirteen (13) months after this Court ruled. See, e.g.,* Flake v. Board of Elections, 122 A.D.2d 94 (2nd Dept. 1986) ("The dilemma presented to us could have been avoided by prompt

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[10] The remaining caselaw relied upon by plaintiffs below, merely standing for general propositions of law, are likewise inapposite to the facts at bar. Neither Woolfalk v. N.Y.C.H.A., 36 A.D.3d 444 (2007), nor Stansky v. Mellon, 133 A.D.2d 392 (2nd Dept. 1987), and Town of Greenburgh v. Schroer, 55 A.D.2d 602 (1976), are remotely relevant to the fact pattern at bar, in which, the parties have already litigated and this Court has already ruled upon the issue of whether the Gabboim and the religious Congregation are to be ejected pursuant to the Judgment or not, with this Court finding the facts and modifying the Judgment so that they are not to be referred to, much less ejected. Indeed, *plaintiffs' reliance on such caselaw exposes the fatal weakness of their present motion, which is simply an attempt to do an "end-run" around the February 2009 ruling of this Court.*

action .... [The party seeking relief] charted [its] own course and must be held to it."). Moreover, where "lateness" in seeking relief is coupled with "significant prejudice" to the party against whom relief is sought, laches will bar the request. *See, generally,* Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957 (1983).

Here, plaintiffs abjectly failed to seek to add the Gabboim and Congregational as defendants when they served and filed their Second Amended Complaint in August 2006. (*See* RA 742, *et seq.* at Point VI; RA 895, *et seq.* at Point III.) By that time, plaintiffs knew (or could have ascertained) substantially all of the facts and circumstances on which their motion was based. Yet they did not do so, instead proceeding to trial on the basis of a pleading naming only CLI as a defendant.

Moreover, plaintiffs likewise failed to seek appellate relief with respect to the Orders on appeal (i.e., either by way of reargument in the Appellate Division or appeal of the modification to the Court of Appeals) and delayed in seeking the present relief from February 2009 - - when this Court ruled - - until March 2010 - - a period of thirteen (13) months, with absolutely no excuse for the delay.

The prejudice suffered by the delay is significant in at least two (2) respects:

- The Gabboim, reasonably believing that their authority over the religious congregation and the Synagogue was implicitly confirmed by the February 2009 decisions and the apparent acquiescence of plaintiffs, have raised and expended substantial funds for the upkeep and repair of the Synagogue. [RA 422]

- The present *newly-elected* Gabboim ran for office in May 2009, without any indication whatsoever that plaintiffs intended to seek to join them (as the successors-in-office to the prior Gabboim) as parties to this action and eject them from the synagogue. Plaintiffs were well aware of the election, which was widely publicized, and should have at least sought relief prior thereto, so that the candidates had fair warning of the claims now sought to be interposed against them. [RA 423]

E. Failure To Serve A Proposed Amended Pleading Or Affidavit On Personal Knowledge Of The Facts

A motion to amend a pleading "must be accompanied by a copy of the proposed amended pleading." 84 N.Y.Jur. 2d, *Pleading,* § 264 (2010);

Branch v. Abraham and Strauss Dept. Store, 220 A.D.2d 474 (2nd Dept. 1995) (affirming denial of leave to amend where proposed amended pleading was not submitted).

Other than their proposed amended caption (improperly submitted as an exhibit to their *reply* papers,[11] plaintiffs *failed to submit either the Second Amended Complaint sought to be amended, the proposed Third Amended Complaint* against the Congregation and the Gabboim, *or an affidavit of merits from a person with personal knowledge of the facts.*[12] See, 4

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[11] It is axiomatic that if these documents were relevant to plaintiffs' motion, they should have been submitted in support of it, *not in reply*. *See* Stern v. H. Dimarzo, Inc., 19 Misc.3d 1144(A) (Sup. Ct. West. Co. 2008) ("Defendants' argument based on the document[s] submitted with their reply papers fails for multiple reasons. First, it is well-settled that it is improper to raise a new argument for the first time in reply papers. Haggerty v. Quast, 48 A.D.3d 629 ... (2d Dept. 2008). *The purpose of reply papers is to respond to an opponent's argument, not to make a new argument.* Lumbermens Mutual Casualty Co. v. Morse Shoe Co., 218 A.D.2d 624 ... N.Y.S.2d 1003 (1st Dept.1995); *see* Tray Wrap, Inc. v. Pacific Tomato Growers Ltd., 18 Misc.3d 1122(A) ... (Sup.Ct. Bronx County 2008). *The argument based on the document[s] could have - and should have - been presented with the motion papers and will not now be considered.*") (Emphasis added.)

[12] The absence of an affidavit from Rabbi Krinsky (compare the contempt motion), Rabbi Shemtov, or anyone else with actual personal knowledge of the facts is telling. It is respectfully submitted that *no Lubavitcher would sign such an affidavit, asserting a right to eject Congregation Lubavitch from its historical home in accordance with the charter documents of Lubavitch Hasidism and the teachings of the Rebbe.* Rather, plaintiffs are hiding behind the Kravet Affirmation, which is not on personal knowledge and, therefore, of "no evidentiary value," particularly in an effort to seize control of the Congregation in derogation of the requirements of the Religious Corporations Law. *See, e.g.,* Lampel v. Sergel, 297 A.D.2d 709 (2nd Dept. 2002),

Wachtel, New York Practice Under the CPLR (1973), 150 ("*On a motion for leave to serve an amended or supplemental pleading, the moving party submits a copy of the proposed pleading.*") (emphasis added);[13] Clark v. Foley, 240 A.D.2d 458 (2nd Dept. 1997), *lv. dismissed* 91 N.Y.2d 921 (1998) ("Initially, we find that the *plaintiff's motion, supported only by an affirmation of her attorney, who had no personal knowledge of the facts, was*

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citing Zuckerman v. City of New York, 49 N.Y.2d 557 (1980) ("[s]uch an affirmation by counsel is *without evidentiary value*") (emphasis added). *See, also,* L.A. Wenger Contracting Co., Inc. v. Kreisler Borg Florman General Const. Co., Inc., 43 A.D.3d 305 (1st Dept. 2007) ("no probative value").

[13] *See, also,* 84 N.Y.Jur. 2d, Pleading, § 264 (2010); Branch v. Abraham and Strauss Dept. Store, 220 A.D.2d 474 (2nd Dept. 1995) (affirming denial of leave to amend where proposed amended pleading was not submitted), previously cited in the cross-moving papers. Plaintiffs failure to submit a proposed amended pleading (other than the belatedly submitted amended caption) makes it impossible for the Court to evaluate the merits of the proposed amended pleading, i.e., the plaintiffs assertion of rights against the Congregation (which, as found and held by the Appellate Division, has used and occupied the Synagogue since 1940 and continues to do) and the Gabboim (the Congregation's managers, whose duties include both ritual and non-ritual matters), as distinguished from CLI (the management corporation formed by the Gabboim - - *not* by the Congregation; see RCL §§ 191-192 - - in 1996). *The present Second Amended Complaint (not submitted by plaintiffs) alleges no claims against the Congregation or the Gabboim - - whom plaintiffs admitted were never joined as parties - - and hence, in its present form, could not possibly support the summary relief being sought. See, e.g.,* Stillman v. Kalikow, 31 A.D.3d 431 (2nd Dept 2006) (affirming denial of motion to amend complaint and noting that "the court properly denied that branch of the plaintiff's motion which was for leave to amend the complaint to add new causes of action. *Leave to amend a pleading should be denied where the proposed amendment is palpably insufficient as a matter of law .... The proposed amended complaint did not adequately state causes of action ....*") (Emphasis added.)

defective. The attorney's affirmation did not persuasively explain *why the allegations of the [proposed] amended complaint were not contained in the original complaint, nor did the plaintiff provide an affidavit demonstrating the merits of her proposed amendment*. Therefore, the plaintiff was *not entitled* to be granted leave to serve an amended complaint ....") (Citations omitted; emphasis added.)

Here, plaintiffs are hoist on the own petard, as they went to great lengths to explain how their motion to add the Congregation and Gabboim is allegedly supported by a plethora of *pre-trial and trial evidence of record - - the very same evidence that they relied upon in this Court* - - but (in addition to *failing* to submit an affidavit on personal knowledge of the Congregation's entitlement to the use and occupancy of the Synagogue; *see* note 4, *infra*) have abjectly *failed* to "explain why" the matters sought to be alleged in the proposed amended pleading "were not contained in the original [i.e, the Second Amended] complaint." Clark v. Foley, *supra.*

Plaintiffs' lame explanation for all of this was that it merely seeks to amend the caption of the action to "add the Gabboim and the Congregation as named parties to the caption," but not plead against them. [RA 965] But,

such an amendment, *standing alone*, would be a *meaningless act.* What plaintiffs actually seek is to *now*, *belatedly* assert their possessory "real property" claim (previously asserted only against CLI) against the Congregation and its Gabboim on *as yet unpleaded* theories of judicial estoppel and/or alter ego.[14] And, of course, to amend the "ad damnum" to include a prayer for relief against these additional defendants.

Moreover, based on such a further amended complaint, plaintiffs then seek to summarily amend the Judgment (without giving the Congregation or the Gabboim an opportunity to defend against the new claims) to include ejectment relief against the Congregation and the Gabboim, *even though this Court, on the basis of the present Second Amended Complaint and other matters of record on the prior appeals, explicitly directed that "reference to the Gabboim and the Congregation be deleted" from the Judgment.* [59 A.D.3d 403 (2009)]

But, the granting of such summary relief against the Congregation and Gabboim, in addition to being improper for a host of legal reasons, is

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[14] Plaintiffs argued their theories in this Court but never pleaded them against the Congregation or the Gabboim in the trial Court.

fundamentally at odds with this Court's clearly expressed view of the facts and explicit direction - - the plain effect of which was that the Congregation and Gabboim were *not to be ejected based on the evidence of record before this Court on the prior appeals*, as underscored by the pointed absence of any provision in the February 2009 Order permitting plaintiffs to seek leave to amend their pleading to add back the parties being "deleted" from the Judgment. *Compare, e.g.,* TJI Realty, Inc. v. Harris, *supra* (including such "without prejudice" language in the appellate decision).

Furthermore, plaintiffs abjectly *failed to explain* their delay in seeking relief (a) between the filing of the Second Amended Complaint and the time of trial (i.e., notwithstanding the pre-trial disclosures on which they now rely), (b) at the time of trial, (c) following the trial, or (d) following the appellate rulings on February 3, 2009, until March 3, 2010, when the motion to amend *nunc pro tunc* was belatedly made. Clark v. Foley, *supra.*

Particularly telling is plaintiffs' failure to seek to add the Congregation and Gabboim as parties defendant *even after CLI raised the distinction between itself and the Congregation as its principal defense at trial.* Rather than seek to undermine CLI's defense by correcting what they

now claim is a mere technical error, plaintiffs *deliberately chose* to litigate against CLI only, thereby precluding the additional defenses available to the Congregation and Gabboim.

Since plaintiffs had all of the "evidence" on which they now rely since at least the time of trial, there is no conceivable justification for their delay in seeking the relief they now claim to be entitled to. Rather, the explanation for their delay is found in the sequence of events: Plaintiffs, without a thought to adding the Congregation and the Gabboim as defendants, made their motion to hold CLI in contempt. That Notice of Motion was served on December 3, 2009. CLI opposed that motion and cross-moved for sanctions, based, *inter alia,* on this Court's direction that all "reference to the Gabboim and the Congregation" was to be "deleted from the Judgment" (in its entirety; not just the decretal paragraphs). That argument was included in the cross-motion papers served January 8, 2010. *Only then, belatedly seeking to collaterally support their contempt motion sub silentio, did plaintiffs move on March 3, 2010, for the relief presently sought.* In other words, plaintiffs' attorneys made their present motion only

as *a desperate attempt to moot one of the grounds advanced for sanctioning plaintiffs on account of the contempt motion.*

F. Due Process Demands That, If Joined In This Action, The Congregation and Its Gabboim Have The Opportunity To Establish Their Right To Use, Occupy & Manage The Central Lubavitcher Synagogue

Assuming, *arguendo,* that it would have been proper for plaintiffs' motion to be granted to the extent of joining the Gabboim and the Congregation at this (post-Judgment) stage of the action (which it would *not* have been), the Gabboim and the religious Congregation which actually uses and occupies the central Lubavitch Synagogue would nonetheless be entitled to be served with process, appear and defend their right to use and occupy the Central Lubavitch Synagogue - - which has never been adjudicated.

Plaintiffs claim that the Congregation and Gabboim (in that capacity) knew that relief was being sought against them is demonstrably false.

Initially, plaintiffs repeatedly disclaimed any interest in barring anyone from the Synagogue. At the outset, when CLI sought to intervene in the action, plaintiffs both advised it, in writing, that plaintiffs' objection was only to the assertion of an interest in control of 770 by CLI - - and *not* in "chang[ing] the status of any person's access to the Synagogue, including access by members of

Congregation Lubavitch, Inc." or seeking relief against *the religious congregation "known as "Congregation Lubavitch (part of Agudas Chasidei Chabad)" which "has operated continuously on the premises from the date of acquisition and possession of 770 Eastern Parkway by Agudas Chasidei Chabad in 1940 to the present."* See RA 1106 (December 21, 2004 letter from Merkos to CLI) and RA 1108 (January 11, 2005 letter from Agudas to counsel for CLI), characterizing CLI as a new entity formed in 1996, unrelated to the Congregation, and eschewing any interest in seeking relief against the Congregation or any individual, other than those involved in the dispute over the "plaque" described in the prior decisions and Orders.[15]

Based in part on these representations by plaintiffs, Justice Harkavy pointedly held the historical interest of the Congregation and its Gabboim in the Synagogue to be irrelevant to the trial and, on that basis, would not permit deposition question on or admit into the record evidence concerning the right to manage, use and occupy the Synagogue pursuant to the tenets of

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[15] The same position was taken by Rabbi Krinsky in an affirmation submitted by him [RA 1113] and in open Court. See RA 1117, an excerpt from the transcript of proceedings on January 12, 2005, in which co-counsel for Merkos represented to Justice Harkavy that "we made a representation to the Court [at the prior appearance] that we would not interfere with anybody's access. Our position then, our position now, is that any person of good intention, good will, who wants to go in and have access to the shul, can have it, as long as they behave appropriately."

Jewish law, including the teachings of the Rebbe. *See* RA 742, *et seq.* at Points II and V; RA 831, *et seq.* at Points VI and VIII; RA 895, *et seq.* at Point VII. Thereafter, this Court avoided "entanglement" with such issues by deleting reference the religious Congregation and its Gabboim from the Judgment.

Plaintiffs did not reveal their true intention until its counsel's summation on *the last day of trial* in December 2007, when plaintiffs' counsel - - *for the first time* - - stated that "[i]f any part of our premises is occupied [without plaintiffs' consent] we have a right to have the people ejected from that portion of the premises. That's what we are asking for, we are asking the court to do it." See RA 1111.

When plaintiffs' then tried to frame the Judgment accordingly, CLI vigorously objected that "*plaintiffs had ample opportunity (three years ago) to join the Gabb[o]im in this action, in any capacity, and did not do so. Thus, granting relief against the Gabb[o]im or other individuals at this time would surely violate their Due Process rights.*" See RA 1119, at p. 2, ¶ 4 (emphasis added).

Due Process requires that a party joined after judgment must nevertheless be accorded the right to be heard and to defend its interests.

See, Greater New York Export House, Inc. v. Hurtig, 239 A.D. 183 (1st Dept. 1933) (reversing amendment of title of action and judgment to add parties in *a different capacity* than originally named):

> The appellants were entitled to the right to defend on the merits as trustees, and the judgment taken against them as individuals cannot now be changed to permit the entry of judgment against them without giving them their day in court.

At bar, the Judgment appealed from was based on the prior ruling of Judge Harkavy that CLI had no rights with respect to the properties. In upholding that portion of the Lower Courts ruling, this Court expressly indicated that the Congregation might have rights which CLI could not claim:

> *The Supreme Court properly rejected CLI's argument that the plaintiffs held the properties in trust. ... Whether such a trust exists in favor of the congregation is not before us, as the congregation is not a party to this action.*

Furthermore, given plaintiffs representations concerning their intention vis-à-vis the use and occupancy of the Synagogue by the historical Congregation, as well as Justice Harkavy's evidentiary rulings limiting the proofs at depositions and trial, and especially in light of the findings and

conclusion of this Court on the prior appeals, it is pellucidly clear that the case against CLI was not a case against the Gabboim (in that capacity), nor against the Congregation, and that neither the Gabboim (in that capacity) nor the Congregation have yet had "their day in court." *See, generally,* Matter of Quinton A., 49 N.Y.2d 328 (1980) ("essence of procedural due process is that a person must be afforded notice and an opportunity to be heard ....").

Point II

THE LOWER COURT ERRONEOUSLY HELD THE CONTEMPT MOTION "IN ABEYANCE"

A. Introduction

Plaintiffs' December 2009 motion to hold CLI in contempt, pursuant to Judiciary Law § 753 et seq. and CPLR 5104, for failing to obey the Judgment, by reason of the continued use and occupancy of the Synagogue by the Congregation, managed by the Gabboim, was frivolous on its face and should have been denied. Instead, the lower Court abused its discretion in holding the motion "in abeyance" pending compliance with its (likewise erroneous) direction that the Congregation and Gabboim vacate and "deliver possession" of the Synagogue to plaintiffs.

Plaintiffs' contempt motion was patently frivolous. Among other things:

- By Order of this Court, all reference to the Congregation and the Gabboim had been deleted from the Judgment. See Statement of the Case and Point I, *supra.*

- Subsequent to this Court's February 2009 ruling, CLI has *not* held itself out as using, occupying, managing or controlling Congregation Lubavitch, the Synagogue or any portion of 770, nor actually done so. [RA 132]

- Subsequent to this Court's February 2009 ruling, all public announcements regarding events held at the Synagogue have been in the name of the Gabboim, with *no mention of CLI.* [RA 133; RA 163]

- Subsequent to the Appellate Division ruling, all sales of tickets for High Holiday religious services have been publicized in the name of the Gabboim, with *no mention of CLI.* [RA 133; RA 168]

- The Judgment, as modified by this Court, does *not* "clearly," "explicitly," and "unequivocally" mandate CLI to take any act to "deliver

possession" of any portion of 770 to plaintiffs, nor is any act clearly and explicitly "proscribed."

o Plaintiffs *never* demanded compliance with the Judgment by requesting that CLI take any particular act to "deliver possession," nor did plaintiffs obtain any Warrant of Eviction as expressly contemplated by the Judgment and required by law in order to execute the Judgment. [RA 137]

o CLI has *not* refused to comply with the Judgment. CLI does not physically occupy the Synagogue or any other portion of 770. Moreover, the steps taken to distinguish between CLI, on the one hand, and the Congregation, managed by the Gabboim, on the other hand, evidence good faith attempts to comply. [RA 123, *et seq.*]

o Furthermore, plaintiffs *were* (a) offered keys to the Synagogue, upon request, which they did *not* make, and (b) provided with a key to the shared electric meter room. [RA 149]

o Based on the February 2009 ruling of this Court, deleting reference to the Gabboim and the Congregation from the Judgment, and the continued use and occupancy of the Synagogue by the Congregation, managed by the Gabboim (and *not* by CLI), the conduct of CLI, subsequent

to the February 2009 ruling, has *not* in fact, and could *not* as a matter of law, "defeat, impair, impede, or prejudice" the plaintiffs' rights under the Judgment, nor cause them any damage whatsoever. [RA 1097]

B. <u>Contempt Does Not Lie As A Matter Of Law</u>

On the undisputed facts presented, contempt plainly does not lie as a matter of law.

Judiciary Law § 753(A) reads as follows: :

> A court of record has power to punish by fine or imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded or prejudiced, in any of the following cases:
>
> * * *
>
> 8. In any other case, ... to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

CPLR 5104 reads as follows:

> Any interlocutory or final judgment or order, or any part thereof, not enforceable under either article fifty-two or section 5102 may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or

> wilfully neglects to obey it, by punishing him for a contempt of the court.

As a matter of law, Judiciary Law § 753 does not apply in the case at bar, in which a final judgment has been entered, modified and affirmed as modified by the Appellate Division, and the time to appeal has expired with no appeal taken nor leave to appeal sought by any party. *See, e.g.,* Blatt v. Rae, 37 Misc.2d 85 (Sup. Ct. Kings Co. 1962) (denying motion on ground that, after entry of final judgment, action is no longer "pending" for purposes of § 753).

Be that as it may, this Court has addressed the standard for holding a party in civil contempt of court on many occasions and has consistently held that:

- A finding of civil contempt based on a violation of a court order should not be made unless the order is *clear* and *explicit* and the act complained of is *clearly proscribed.* King v. King, 249 A.D.2d 395 (2nd Dept. 1998). The mandate alleged to have been violated must be *unequivocal.* Sterngass v. Town Bd. of Town of Clarkstown, 27 A.D.3d 550

(2nd Dept.), *lv. den.*, 7 N.Y.3d 715 (2006); Ottomanelli v. Ottomanelli, 17 A.D.3d 657 (2nd Dept. 2005).

Accordingly, an Order which does not direct specific action to be taken is not enforceable by contempt. As explained in Vujovic v. Vujovic, 16 A.D.3d 490 (2nd Dept. 2005):

> A party seeking to hold another in civil contempt bears the burden of proof (*see* McCain v Dinkins, 84 NY2d 216, 227 [1994]; Rupp-Elmasri v Elmasri, 305 AD2d 394, 395 [2003]). In order to prevail on a motion to hold another in civil contempt, "the movant must demonstrate that the party charged violated a *clear and unequivocal* court order, *thereby prejudicing* a right of another party to the litigation" (Rupp-Elmasri v Elmasri, *supra* at 395, quoting Matter of County of Orange v Rodriguez, 283 AD2d 494, 495 [2001]; *see also* Judiciary Law § 753 [A] [3]; *Goldsmith v Goldsmith,* 261 AD2d 576, 577 [1999]). *The contempt must be proven by clear and convincing evidence* (*see* Green v Green, 288 AD2d 436, 437 [2001]).
>
> Here, the plaintiff did not meet her burden. The language in the so-ordered stipulation dated January 30, 2003, did not constitute a *clear and unequivocal* mandate. The stipulation did not direct the defendant to forward, complete, or execute any forms and/or authorizations within 10 days. Indeed, the Supreme Court did not make a finding that the defendant willfully violated a *clear and unequivocal* mandate of the Supreme Court. [Emphases added.]

Plaintiffs had the burden of pleading and proving, *by clear and convincing evidence*, that CLI has violated a "*clear and unequivocal*" mandate to plaintiffs' *prejudice*. Given the critical modification of the Judgment by this Court in February 2009, as well as the conduct of CLI since that time, plaintiffs' submission below falls far short of the mark, and they cannot possibly carry their burden.

C. The "One And The Same" Finding Was Rejected On The Prior Appeal

While Justice Harkavy found that CLI was "one and the same" with the religious congregation occupying the Lubavitcher Synagogue, and that CLI, the Congregation, and the Gabboim of the Congregation were to be evicted, this Court, in two separate Orders [59 A.D.3d 403; 59 A.D.3d 408] clearly distinguished between CLI and the Congregation and expressly found and held, contrary to Justice Harkavy's conclusion, that the congregation occupying the Lubavitcher Synagogue was *not CLI*, but was Congregation Lubavitch of Agudas Chassidei Chabad, i.e., the same religious congregation which has occupied the Lubavitch Synagogue

"continuously" since 1940, managed by Gabboim originally appointed by the Lubavitch Rebbe and subsequently elected.

This Court further rejected the "one and the same" findings and argument on appeal and found and held that the Congregation and the Gabboim were "not parties to the action" and that reference to them in the Judgment had to be "deleted."[16]

In light of the February 2009 Decisions & Orders, the trial Court's conclusion that CLI was physically occupying the Lubavitcher Synagogue, by reason of being "one and the same" with the Congregation, i.e., the religious congregation that actually occupies the Synagogue, was (at best) no longer operative once the Appellate Division directed "deletion" of all "reference" to the Gabboim and Congregation Lubavitch from the Judgment.[17]

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[16] This Court further distinguished between the Congregation and CLI when it held that the rejection of CLI's "trust" argument did not preclude the Congregation from making its own "trust" argument, again noting *in this context* that *the Congregation was not a party*. 59 A.D.3d 403.

[17] Even assuming, *arguendo,* that this was not clear at the time that this Court handed down its rulings, plaintiffs should have sought clarification from this Court, or further review in the Court of Appeals. They did neither.

D. There Was No Unequivocal Mandate; Plaintiffs Never Applied For A Writ of Eviction

Moreover, the Judgment merely directed that CLI "deliver possession" to plaintiffs, but did *not* specify any act to be taken on the part of CLI to do so. The Judgment did not define which portion(s) of 770 CLI was in "possession" of, *nor* how it was to "deliver possession" to plaintiffs.

The Judgment *did* expressly provide for issuance of a "Warrant of Eviction" [*see,* CPLR 5102] but *plaintiffs never applied for a Warrant* after this Court ruled and the stay pending appeal expired. Thus, *no* Notice of Eviction was ever served by the Sheriff, *nor* did the Sheriff (or any other officer) ever attempt to execute the Judgment and evict CLI from the premises.

In these circumstances, it is patent that there was no "mandate" to be obeyed by CLI, much less a clear, explicit and unequivocal mandate such as a Warrant of Eviction complying with the requirements of CPLR 5230 (as *required* by CPLR 5102].

E. There Was No Refusal To Obey

Furthermore, even assuming, *arguendo,* that the Judgment, as modified on the prior appeal, was held to be a mandate capable of being enforced by contempt, plaintiffs abjectly failed to prove a refusal to obey the Judgment and, moreover, CLI has demonstrated that, subsequent to the ruling of this Court, appropriate action has been taken to distinguish CLI from the Congregation.

This Court ruled on February 3, 2009. Plaintiffs did not even serve the Judgment on CLI until November 16, 2009 -- more than nine (9) months later -- and, when they did so, *failed* to make any explicit demand on CLI for compliance.

As the Court can see from the attorney's letter which accompanied the Judgment (but which was conspicuously omitted from the moving papers below), plaintiff Merkos' attorney merely delivered certified copies of the Judgment and self-servingly stated that, as of that date, CLI "has not complied with the terms of these Orders by, among other things, failing to 'deliver possession of the premises' to Agudas and Merkos as required by the Orders." *See,* Def. Ex. C.

Glaringly *absent* from this letter was *any demand for compliance or any specification of what steps plaintiffs claimed CLI was required to take* in order to comply with the modified Judgment.

Moreover, when counsel for CLI immediately advised counsel for Merkos that "CLI does *not* use, occupy or possess any physical space in premises 770/784-788 . . . ." [RA 105; emphasis added], and that "if there is any aspect of the use, occupation or management of the Synagogue by the Congregation and the Gabb[o]im which you wish to discuss with me, please feel free to do so [*id.*]" there was no response.[18]

Furthermore, even in the absence of either (a) specification in the Judgment of what steps were to be taken by CLI, and/or (b) a demand for compliance by plaintiffs, effective measures have been taken to distinguish CLI from Congregation Lubavitch, including but not limited to (a) events at the Lubavitcher Synagogue being announced in the name of the Gabboim,

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[18] To the same effect, when Merkos inquired through counsel, in September 2009, as to who had installed the new "neutral" plaque on the exterior wall at the main entrance to the Synagogue, the Gabboim immediately responded [RA 106] that *they* had done so in the exercise of their historical role as managers of Congregation Lubavitch and their religious duty to beautify the Synagogue (i.e., in light of the approaching High Holidays). That same letter invited plaintiffs to contact the Gabboim if plaintiffs had any concerns regarding the plaque. There was no contact and no concerns of any kind were raised in any manner.

with no mention of CLI, and (b) ticket sales for High Holiday religious services being solicited by the Gabboim, in that capacity, again with no mention of CLI. Moreover, CLI's role has been carefully restricted to collecting and disbursing funds on behalf of Congregation Lubavitch. [RA 159]

F. <u>There Was No Prejudice To Plaintiffs</u>

Finally, even assuming, *arguendo,* that the Judgment is an "unequivocal mandate" which could be enforced by contempt (which is not the case), and further assuming that CLI had refused to obey the Judgment (which is likewise not the case), the plain fact remains that, given the direction by the Appellate Division to delete reference to the Gabboim and the Congregation there has been no (and cannot possibly be any) prejudice to plaintiffs.

Plaintiffs simply do not want to accept the fact that the net affect of this Court's Decisions & Orders on appeal left the Congregation that had historically and continuously since 1940 to occupy the Lubavitcher Synagogue at 770 -- and the Gabboim who managed Congregation Lubavitch, *in place and unaffected by the Judgment.*

In these circumstances, plaintiffs cannot possibly have suffered any prejudice by any act or omission of CLI since this Court ruled.

G. Holding The Contempt Motion "In Abeyance" To Coerce Compliance With A New Order Was A Clear Abuse of Discretion

For all of these reasons, it was manifestly erroneous and abusive for the trial Court to hold the contempt motion "in abeyance" in order to "wait and see" whether the Congregation and Gabboim "delivered possession" to plaintiffs or not pursuant to the new (June 2010) Order of the Court, with the express admonition if possession were delivered, there would be no contempt, but the equally clear implication that if not, contempt of the Judgment would be established:

However, this inherently coercive, "wait and see" approach flies in the face of the rule that the contempt must be complete, *not inchoate,* when the application is made *See, e.g.,* Onondaga Operating Corp. v. Longo, 7 A.D.2d 615 (3d Dept. 1958) (reversing order of contempt):

> When the drastic remedy of contempt of court is to be invoked the court should have before it *in the first instance* a complete record. The conclusion might be reached that in this proceeding the defendant was not in contempt when it was commenced. Thereafter, it was

> held for some four months while various records were amended nunc pro tunc *to make out a prima facie case of contempt.* [Emphasis added.]

Here, moreover, it was patent that there was no contempt; hence, holding the motion for contempt "in abeyance" served no purpose other than to coerce the Gabboim and Congregation into abandoning the Synagogue in violation of their deep-seated religious beliefs and secular legal and constitutional rights.[19]

Point III

THE LOWER COURT ERRONEOUSLY DENIED THE CROSS-MOTIONS FOR SANCTIONS

The lower Court erroneously denied the cross-motions for sanctions.

Plaintiffs' motions were completely without merit in law and not made in good faith. Accordingly, sanctions should have been imposed on

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[19] The constitutional case law and the Religious Corporations Law are consistent with one another, in that internal governance and doctrinal disputes are to be resolved by the members or religious authorities, such as a Rabbinical Court, rather than by the secular courts, unless the dispute can be resolved under "neutral principles of law." By rejecting plaintiffs' arguments and accepting CLI as merely a "management company" separately organized by the Gabboim (and *not by the members of Congregation Lubavitch as an incorporated religious congregation*, since, *inter alia,* there was no compliance with RCL §§ 191-192), the Appellate Division was able to avoid the internal governance/doctrinal issues and resolve the earlier dispute under "neutral principles." Those issues would, however, be at the heart of any litigation between plaintiffs and the Congregation and its Gabboim over the right to use, occupy and manage the Synagogue - - the "Life House" of Lubavitch Hasidism.

plaintiffs and their motion counsel, including awarding CLI its attorneys' fees and expenses incurred in defending against plaintiffs' patently frivolous motions.

Section 130-1.1 of the Rules of the Chief Administrator of the Courts (22 NYCRR, § 130-1.1) provides as follows, in pertinent part:

> (a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion, may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart. ***
>
> (b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. ***
>
> (c) For purposes of this Part, conduct is frivolous if:
>
> (1) It is completely with merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) It is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

> (3) It asserts material factual statements that are false.
>
> *** In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.
>
> (d) ***

In this case, it is abundantly clear that (a) plaintiffs had ample time to investigate the facts and legal basis for their motions, (b) the motions were made in circumstances in which it was (or at least should have been) apparent that they were meritless, and (c) the fact that CLI has no physical presence in 770 was brought to the attention of Merkos' counsel before the contempt motion was made. [RA 105].

Furthermore, it is painfully obvious from the sequence of the motions that plaintiffs' second motion desperately sought to "close the barn door after the horse got out" - - i.e., to amend the Judgment to apply to parties whom this Court directed all reference to be deleted from the Judgment.

Indeed, even the trial Court immediately recognized the obvious lack of merit in a motion which asked Supreme Cour to "undo what the Appellate Division did," albeit that it then was misled (or at least confused) by plaintiffs' counsel's oral argument into concluding that it was not being asked to "undo" the ruling of this Court - - which was precisely what plaintiffs were seeking, even as they denied it.

In such circumstances, the Court should grant sanctions. See 22 N.Y.C.R.R. § 130-1.1, supra ("In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the jury.")

The continuation of meritless arguments is sanctionable. *Cf.,* Caplan v. Tofel, 65 A.D.3d 1180 (2nd Dept. 2009) (noting that "continuation of ... patently meritless arguments ... would appear to constitute frivolous

conduct" and directing counsel to show cause what additional sanctions, beyond those imposed by the trial court, should not be imposed.

Here, the Court is faced with a similar abuse: the meritless continuation of litigation on the same "one and the same" theory of the case (the only possible basis for plaintiffs motions) when this Court has twice found that it is the Congregation, not CLI, that has occupied the Synagogue since 1940 and continues to do so, plaintiffs neither sought to reargue nor seek review by the Court of Appeals of that conclusion.

Plaintiffs had a long period of time (February 2009 – December 2009) to consider their position; were actually advised by counsel for CLI that their claim of continued possession by CLI was groundless (Pl. Ex. 6); and nevertheless proceeded to make their frivolous motion for contempt. They then compounded their error by seeking relief against the Gabboim and the Congregation, after CLI opposed the contempt motion, inter alia, on the ground that the Judgment had been modified to delete reference to the Gabboim and the Congregation, making the motion for contempt frivolous on its face. In such circumstances, sanctions are more than justified. *See, generally,* 24 N.Y.Jur.2d, *Costs in Civil Actions* (2010), § 65 *et seq.,* 4

N.Y.Prac., Comm. Litig. in N.Y.S. Courts, § 52.14 (2010), Ch. 52, at III(B) ("What Constitutes 'Frivolous Conduct'") (collecting cases).[20]

Conclusion

For all of these reasons, the Order appealed from should be reversed; the plaintiffs' motions should be denied; and the cross-motions for sanctions should be granted, together with such other, further and different relief as is just, necessary and proper.

Dated: New York, New York
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[20] In the event the Court grants the cross-motion for sanctions, appellants request an opportunity to submit an affidavit of services in connection with fixing fees and expenses, as previously requested below. [RA 142]

CERTIFICATE OF COMPLIANCE

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