SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MARTHA GREENBERG et al. Index No.: 64093/2014

Plaintiffs,

-against-

THE PURCHASE COMMUNITY, INC., et al.

Defendants.

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AMENDED MEMORANDUM OF LAW TO SAVE THE PURCHASE FREE LIBRARY AND IN SUPPORT OF PLAINTIFFS' MOTION FOR AN EMERGENCY STAY OF THE TOWN COURT EVICTION ACTION AND OTHER TEMPORARY RESTRAINTS, AND AN ORDER CONSOLIDATING THE EVICTION ACTION WITH THIS ACTION, SETTING ASIDE THE ALLEGED ELECTION OF DIRECTORS OF THE PURCHASE COMMUNITY, INC., DIRECTING A NEW ELECTION OF DIRECTORS, AND PRELIMINARILY ENJOINING DEFENDANTS FROM TAKING CERTAIN ACTIONS AGAINST THE PURCHASE FREE LIBRARY, AND OTHER RELIEF

Steven R. Schoenfeld, Esq.
DelBello Donnellan Weingarten Wise & Wiederkehr, LLP
One North Lexington Avenue, 11th Floor
White Plains, New York 10601
(914) 681-0200

Attorneys for Plaintiffs

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PRELIMINARY STATEMENT

This is an action to save the beloved, local Purchase Free Library (the "Purchase Library" or the "library")[1] from eviction and closure, and keep the library operating at the Purchase Community House (the "Community House"), the library's only home since the library and the Community House were founded together in the 1920s. This is also an action to vindicate the corporate democratic, statutory and common law ownership rights of the 50 individual plaintiffs (the "PCI Member Plaintiffs") from a broad cross-section of residents of the Purchase area. They are all parents, including parents who currently have young children. As residents of Purchase, they are also all voting members of defendant The Purchase Community, Inc. ("PCI"), a New York not-for-profit charitable member corporation.

The PCI Member Plaintiffs, and many of their neighbors who are not parties to this action, will be irreparably harmed if their library is booted from their Community House, thereby depriving children and adults of valuable and convenient library services that they have safely enjoyed for years. The thousands of Purchase residents and PCI members -- and not 11 anti-library members of a 17 member PCI board that was illegally "elected" (as we contend below) by the "directors" themselves in a small meeting attended by only a handful of people -- should have the opportunity to express clearly their democratic voice on what is one of the momentous issues to face this community in decades.

Plaintiffs submit this memorandum of law, together with the **27 affidavits** identified in the Statement of Facts below, and the accompanying verified complaint, in support of their motion by order to show cause for, among other things, consolidation of PCI's Harrison Town Court eviction action with this action, an immediate stay of the eviction action, a declaration that

the June 4, 2014 election of the PCI Director Defendants is null and void for lack of a statutorily required quorum, other statutory violations, and other irregularities, the setting aside of such election, the ordering of a new election of directors, and temporary and preliminary injunctive and related relief to maintain the status quo so the library does not have the executioners axe of eviction hanging over its head while this Court hears and determines this motion and ultimately the claims in this action. (*See* NYSCEF Dkt.34, plaintiffs' proposed order to show cause).

STATEMENT OF FACTS

The facts are set forth in the verified complaint, the affidavit of Rosanna V. Spadini (plaintiff, Purchase resident, mother of young children, member of defendant PCI and Treasurer of the Purchase Library Board Of Trustees), sworn to on September 3, 2014 ("Spadini Aff."), the affidavit of Martha Greenberg (plaintiff, mother, Purchase resident, member of PCI, and President of the Purchase Library Board Of Trustees), sworn to on September 3, 2014 ("Greenberg Aff."), the affidavit of Donald B. Read (grandson of the donor of the William A. Read Memorial Community House that is also known as the Purchase Community House, sworn to on August 27, 2014 ("Read Aff.), the 24 additional affidavits by 21 individuals (some co-plaintiffs) listed in the Order to Show cause who are also residents of the Purchase area and members of PCI. The October 21, 2014 Affirmation of Emergency of Steven R. Schoenfeld, Esq. also explains certain facts related to the timing of this motion – a motion that plaintiffs were going to file at the outset of this action, but held off doing so in response to defendants' request -- and its urgency in light of upcoming deadlines in early November in the PCI eviction action.

[1] Capitalized defined terms in this memorandum are the same as those in the complaint and plaintiffs' other papers..

LEGAL ARGUMENT

I. THE PCI HARRISON TOWN COURT EVICTION ACTION SHOULD BE CONSOLIDATED WITH THIS ACTION AND STAYED AT LEAST UNTIL CONSOLIDATION

A. The Court Should Order Consolidation

This court may order the joint trial or consolidation of two actions, and may make such other orders concerning proceedings "as may tend to avoid unnecessary costs or delay." CPLR 602(a). When an action is pending in this court (the Supreme Court), this court may "remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court." CPLR 602(b).

"Where common questions of law or fact exist, a motion to consolidate should be granted absent a showing of prejudice to a substantial right by the party opposing the motion." *See Kally v. Mount Sinai Hosp.*, 44 A.D.3d 1010, 1011, 844 N.Y.S.2d 415 (2d Dep't 2007). Alleged prejudice from "mere delay is not a sufficient basis upon which to deny consolidation." S*ee Alsol Enters., Ltd. v. Premier Lincoln-Mercury, Inc.,* 11 A.D. 3d 494, 783 N.Y.S.2d 620 (2d Dep't 2004).

While motions to consolidate are subject to the sound discretion of the trial court, consolidation is favored by courts as it serves the interests of justice and judicial economy. *See, e.g., Viafax Corp. v. Citicorp Leasing, Inc.,* 54 A.D. 3d 846, 864 N.Y.S.2d 479 (2d Dept. 2008). *See also Mideal Homes Corp. v. L & C Concrete Work, Inc.*, 90 A.D.2d 789, 455 N.Y.S.2d 394, 395-96 (2d Dep't 1982) (noting that the present trend favors granting consolidation and that "the interests of justice and judicial economy are better served with joint trials wherever possible."); *Chinatown Apartments, Inc. v. New York City Transit,* 100 A.D.2d 824, 825, 474 N.Y.S.2d 763, 765 (1st Dep't 1984) ("Consolidation is appropriate where it will avoid unnecessary duplication

of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts."). Moreover, removal of an action in an inferior court, such as the Harrison Town court here, to this Supreme Court is particularly appropriate when the inferior court cannot accord the complete relief sought by plaintiffs in the Supreme Court action. *E.g., Kally* 44 A.D. 3d 1010, 1011, 844 N.Y.S.2d 415 (consolidating landlord-tenant holdover proceeding in civil court with Supreme Court action because, among other things, the equitable relief sought in the Supreme Court would not be available in the landlord-tenant proceeding); *DeCastro v. Bhokari*, 201 A.D.2d 382, 382-383, 607 N.Y.S.2d 348 (1st Dep't 1994) (same).

The Court should consolidate PCI's eviction action with this one for at least three reasons. First, it is indisputable that there are extensive common questions of law or fact between this action with the objective of stopping the eviction of the Purchase Library and the PCI eviction action with the objective of evicting the library. Here the actions have common parties (at least PCI and the Purchase Library are parties to both actions) and involve common questions of law and fact with respect to the legality of PCI's actions and the Purchase Library's legal right to remain in the Community House. In short, judicial economy dictates that the eviction action and this one be consolidated so that all the common issues can be resolved by one court.

Second, town landlord-tenant court is an inferior court that cannot provide the complete injunctive and other relief that plaintiffs seek in this Court. For example, the PCI Member Plaintiffs seek to vindicate their rights under the N-PCL by asking this Court to set aside the purported June 4, 2014 election of the PCI Defendant Directors under N-PCL 618, and to enjoin further action by that illegally constituted Board of Directors at least until a PCI Board is

properly and legally elected. N-PCL 618, which is discussed further below, only grants to this Supreme Court (and not to the Harrison Town court) the broad power to provide relief with respect to the election of directors of a not-for-profit corporation like PCI. Only this Court can decide all of the issues in the eviction action and this action, and do so in one action rather than two.

Third, there is considerable risk of injustice from inconsistent decisions because the parties are seeking diametrically opposite relief in two different courts.

By contrast to the harm to plaintiffs and the people of Purchase who are threatened with the loss of their library as long as the eviction action is pending in town court, PCI cannot show substantial prejudice to its rights if this Court grants consolidation. As noted, any alleged delay of an eviction action is not the kind of prejudice that warrants denial of consolidation. *See Alsol*, 11 A.D. 3d 494, 783 N.Y.S.2d 620. Moreover, consolidation is sought here at the outset of the proceedings, and this Court is well-equipped upon consolidation to manage the litigation as needed. *Id.*

PCI can hardly claim any prejudice if some time is taken to adjudicate the issues in dispute in an orderly and efficient way in one court. In fact, PCI concedes that there is no harm or danger to anyone if the library remains in place and the status quo is maintained until this Court resolves all issues in one forum. (*See* NYSCEF Defs. Mem. Law, Dkt. 85, p. 24) ("indicated" that PCI "will allow the Library to stay" until the court decides defendants' motion); (NYSCEF Defs. October 24, 2014 letter, Dkt. 86 (telling Court "Defendants have repeatedly stated the Library will remain in place until this Court rules . . .".).

Therefore, the Court should consolidate the PCI eviction action with this one. *E.g., Hae Sheng Wang v. Pao-Mei Wang*, 96 A.D.3d 1005, 947 N.Y.S.2d 582 (2d Dep't 2012) (removing

city civil court eviction/holdover proceeding and consolidating it with plaintiffs' supreme court action); *Kally*, 44 A.D.3d 1010, 1011, 844 N.Y.S.2d 415 (reversed trial court denial of motion to remove and consolidate eviction proceeding in city civil court with supreme court action and rejected the trial court's ill-conceived notion that consolidation was not warranted because civil court is a "preferred forum for resolving landlord-tenant issues."); *43rd St. Deli v Paramount Leasehold, L.P.*, 89 A.D. 3d 573, 932 N.Y.S.2d 694 (1st Dept. 2011) (overruling the trial court and granting plaintiff lessee's motion, like here, to remove an eviction/holdover proceeding from city civil court).

B. The Court Should Immediately Stay The Town Court The Eviction Action

The PCI Member Plaintiffs and the plaintiff Purchase Library also ask this Court to issue a narrow order staying the PCI Harrison Town Court eviction action at least until this Court can hear and determine this motion for consolidation, implement the consolidation of the actions, and then determine an orderly manner of managing the consolidated actions. *E.g., Hae Sheng Wang*, 96 A.D.3d 1005, 947 N.Y.S.2d 582 (granting a stay of a city court eviction/holdover proceeding, and removal and consolidation with a supreme court action). *See also Trieber v. Hopson*, 27 A.D.2d 151, 277 N.Y.S.2d 241 (3d Dep't 1967) ("The court in which an action is pending, may grant a stay of proceedings in a related action, particularly where the stay is granted to prevent an unnecessary multiplicity of suits.").

Such relief is urgently requested because otherwise the Purchase Library (which, like PCI, is a charitable entity) will be irreparably harmed if it is forced to start incurring costs to defend the eviction action by having to prepare a response (motion or answer) by November 6 (just 10 days from now), and pay counsel to appear at an initial court conference date on November 13, and then participate in subsequent proceedings in town court. The town court will also have to

start becoming engaged in the eviction action thereby unnecessarily wasting judicial resources. The limited stay will afford this Court the time to hear and determine plaintiffs' motion for consolidation before the judiciary, as well as the parties, spend resources litigating common issues in two different courts.

In addition, as long as there is no stay there is a substantial risk of inconsistent decisions and injustice that consolidation is intended to avoid. In other words, absent a stay a later consolidation order by this Court could be rendered meaningless by events in or rulings by the Town Court action.

Statements by defendants' counsel in a memorandum of law and a letter to the Court saying that defendants will supposedly let the library stay in place for some undefined time period do not have the force of a court ordered stay, and an order is needed to bind the defendants and so the Town Court can be advised that it need not spend time on proceedings there. Such statements by defendants sound nice, but they are suspect when defendants refuse to consent unconditionally to consolidation and, instead, insist that the library first waive defenses to eviction before giving such consent. (Defs. October 24, 2014 letter, NYSCEF Dkt. 86). Consolidation is the right thing for the judiciary and the parties, and there is no reason that the library has to waive any defenses to get defendants to do the right thing and consent to consolidation.

Given the litigation already going on in this Court there is no urgent need for the library to have to respond to the eviction petition by November 6, 2014, as PCI is insisting. That is a matter that can be addressed with this Court after the actions are consolidated. The issue for now with this limited stay is that PCI can at least wait for this Court to determine -- as plaintiffs

contend it should -- that the PCI eviction action should be combined with this one, and the library needs a court-ordered stay to avoid duplicative litigation that will start in only 10 days.

II. THE PCI DIRECTOR DEFENDANTS WERE NOT LEGALLY ELECTED AND THEREFORE THEIR ELECTION SHOULD BE SET ASIDE AND A NEW ELECTION ORDERED; THEIR EFFORTS TO EVICT THE PURCHASE LIBRARY SHOULD BE ENJOINED AT LEAST UNTIL A NEW AND FAIR ELECTION OF A PCI BOARD BY PCI'S MEMBERS/PURCHASE RESIDENTS IS HELD

The members of a New York not-for-profit member corporation are the owners of the corporation. The N-PCL statutory scheme embraces democratic principles for not-for-profit corporate governance. The N-PCL is designed to ensure that the member/owners -- like the members of PCI who are the residents of the Purchase community -- have input into the election of management of the corporation and the activities of the corporation that was created to serve them. *See generally* N-PCL 601-623 (member rights). *See also* New York's Not-For Profit Corporation Law, 47 N.Y.U. L. Rev. 761, 783 (1972) ("members of the corporation should have the right to participate in the administration of its affairs on a broad, democratic basis. This is the ideal toward which the draftsmen of the N-PCL have moved.") (Schoenfeld Aff. Ex. C).

This Court has the power to protect and vindicate the democratic rights of the corporate members. Thus, upon the "petition" and proof by a member of a not-for-profit corporation, like PCI, this Court has the power to set aside a board election, order a new election, and "take such other action as justice may require." N-PCL 618. The court's power "to take such other action as justice may require" includes granting an injunction to prohibit the illegally elected board and the corporation from taking certain further action as discussed in Section II D. below. *See, e.g., Matter of Ionescu v. Barbu*, 255 A.D. 2d 584, 680 N.Y.S. 2d 653 (2d Dept. 1998) (enjoining purportedly, but not properly, elected Parrish Council from acting in that capacity).

A. The Purported Election Of The PCI Director Defendants At The June 4, 2014 Member Meeting Is Invalid Because It Is Undisputed That There Was No Statutorily Mandated Quorum At The Meeting In Violation Of N-PCL 608(a)

A quorum is required for member meetings of a not-for-profit corporation, including meetings to elect directors. *In the Matter of Sousa,* 10 N.Y.2d 68, 217 N.Y.S.2d 58, 176 N.E.2d 77 (1961). A quorum generally is the number of members entitled to cast a majority of the total number of votes. N-PCL 608(a). The corporation's certificate of incorporation or by-laws may reduce the statutorily required quorum, but may not do so to an amount less than 100 voting members or 10% of the total voting members, whichever is less. N-PCL 608(b).

It is undisputed that PCI's certificate of incorporation and by-laws have not reduced the PCI member meeting quorum to 100 voting members or 10% of all voting members as permitted by N-PCL 608(b). (Greenberg Aff. Ex. B; Spadini Aff. Ex. C; NYSCEF Dkt. 85, Defs. Mem. Law. p. 16) Thus, as a matter of law a majority of PCI's voting members must be present at a PCI member meeting to establish a quorum under N-PCL 608(a), and a legal election.

It is also undisputed that there was nothing close to a majority of PCI voting members present at the June 4 meeting. (Spadini Aff. ¶¶ 36-37, Ex. B; Spadini Aff. ¶¶55-59 (describing a PCI member list showing 1873 individual members); Greenberg Aff. ¶¶ ¶¶ 37-38; *see also* NYSCEF Dkt. 11, Kelly Aff. ¶ 62 (defendant Kelly alleging that only 18 voting members were at the meeting); NYSCEF Dkt. 85, Defs. Mem. Law. pp. 16-17 (admitting that there was no statutorily required quorum at the June 4 meeting, and arguing that it does not matter). Hence, there was no quorum under N-PCL 608.

The June 4 election is invalid as a matter of law because the undisputed facts show that there was no legal, statutorily mandated quorum. *See, e.g., Sousa, supra.* (holding that the election of directors of charity without a quorum is invalid and remitting the proceeding to the

lower court to issue an order "annulling all action taken at the annual meeting of members" at which such election occurred). *See also Sealey v. American Soc of Hypertension, Inc.,* 10 Misc. 3d 572, 809 N.Y.S. 2d 421, 425 (Sup. Ct. NY County 2005) (reinstating officers and directors removed at a member meeting under by-laws that were illegally adopted at a member meeting at which there was no requisite statutory quorum), *aff'd.,* 26 A.D. 3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

The statutorily required quorum is not some "technicality" or "minor procedural flaw" that can be ignored as defendants suggest. *Id.* Defendants cite a number of cases in their motion to dismiss this claim that are inapposite given the illegality shown here, but what is most telling is that defendants do not cite a single case in which a court refused to set aside a board election at a member meeting when there was no required quorum and, in particular, no statutorily mandated quorum. (*See* NYSCEF Dkt. 85, Defs. Mem. Law. pp. 13-15).

A statutory quorum is a fundamental requirement of corporate governance to ensure the democratic expression of the desires of the members and to prevent, as has occurred here, a small cohort of "directors" electing themselves, and then deciding the fate of the entire Purchase community. (*See* NYSCEF Dkt. 85, Kelly Aff. ¶ 62 (claiming that 11 of the 18 members at the June 4 meeting were "director" members who were "elected" so that, if accepted as true, the "election" at the meeting was a foregone conclusion because the 11 "director" members had the votes to "elect" themselves)). A violation of the statutory quorum requirement is serious enough wrongdoing alone to set aside the June 4 election.

B. The Purported Election Of The PCI Director Defendants On June 4, 2014 Is Invalid Because PCI Failed To Provide The Required Written Notice Of The Meeting To All PCI Members And To Maintain A Complete And Accurate Record Of Its Voting Members

The democratic principles underlying governance of a not-for-profit member corporation necessarily requires that the corporation maintain a complete and accurate list of each member entitled to vote (*i.e,* a member voting roll), and that it provide advance written notice to all members of the meeting at which a vote will take place. Thus, every not-for-profit corporation like PCI is statutorily required to maintain a "list or record containing the names and addresses of all members . . .", N-PCL 621(a), and to produce, upon request, a list or record of members entitled to vote at a member meeting. N-PCL 607. *Cf.* N-PCL 611 (fixing a record date for determining the members entitled to notice of a meeting and to vote at a meeting); N-PCL 608 (need record of voting members to determine quorum); N-PCL 613 (voting by members "entitled to vote").

Moreover, every not-for-profit corporation is also statutorily required to give written notice of any member meeting, including the annual meeting, "personally, or by mail, to each member entitled to vote at such meeting." N-PCL 605 (emphasis added). See also N-PCL 611. If mailed, notice is deemed given when mailed with postage "directed to the member at his address as it appears on the record of the members . . .". *Id.* Article Three, Section 3 of PCI's by-laws tracks the N-PCL and requires that written or printed notice of a PCI member meeting "shall be given to each member entitled to vote at such meeting . . .". (Emphasis added) (Spadini Aff. Ex. C).

PCI also violated those N-PCL provisions and its by-laws by failing to provide advance written notice of the planned June 4 meeting to each voting member and by failing to maintain a complete and accurate record of each of its voting members. That is another reason that the Court must invalidate the June 4 election and order a new one under N-PCL 618.

First, 15 people who are members of PCI -- most of whom are long-time Purchase residents and five of whom are plaintiffs -- have submitted affidavits stating that they did not receive any written notice of the June 4 meeting and did not have an opportunity to attend. Their rights, and likely the rights of many others, have been violated. (*See* Second Affidavits of Edith Binhak (Plaintiff), and Stephanie B. Furtsch (Plaintiff), and Affidavits of John McManus, Alicia Coash, Irene Perdoncin (Plaintiff), Cynthia Korzelius, Margaret Bogart, Meredith Grossbach (Plaintiff), Irene Glass, Jayshree Banerjea, Paul Abramson, Heidi Komoriya, Brendan McKiernan, and Margot Dilmaghani (Plaintiff) and Claire McManus; *see also* Greenberg Aff. ¶ 38; Spadini Aff. ¶ 56). That evidence alone compels the conclusion that notice was not given to each PCI member, and members have been disenfranchised by defendants' conduct.

Second, the PCI member lists are kept by household, not by individual member (Spadini Aff. ¶¶ 52-58), when such a list must be kept for each member (not a household that may have more than one member), notice of a member meeting must be given to each member (not a household), and voting is to be exercised by each voting member individually (not by household). *See* N-PCL 621(a) (required to maintain record of each member); N-PCL 605 (notice required to each member); N-PCL 607 (required to maintain record of each member entitled to vote). The organization of PCI's member list by household, instead of by each individual member, itself further supports the conclusion that notice of the June 4 meeting was not mailed to each member.

Third, even assuming that a member list kept by household complied with the N-PCL and PCI's by-laws, there is evidence supporting the conclusion that PCI's member lists are inaccurate and incomplete. There are unquestionably people who reside in the Purchase area, and who are thus automatically members of PCI, who are not on the member list. (Spadini Aff. ¶ 56).

Fourth, PCI produced two different member lists between August 14 and August 27, each listing a different number of member households – 1357 households on one list and 1147 households on another list. (Spadini Aff. ¶¶ 52-59). Defendant Kelly now alleges that he mailed a notice to a different number, although he does not say if the alleged mailing was to each member or to member households. (NYSCEF Dkt.11, Kelly Aff. ¶ 60). Those discrepancies raises serious questions as to the completeness and accuracy of any PCI member list used for providing notice to voting members and for member voting.

Fifth, defendants admit they have had a problem complying with legal notice requirements for member meetings, and that necessarily includes the June 4 meeting. That is admitted by their recent motion asking the Court to step in and provide "guidance" in advance "necessary to ensure all PCI members are properly informed" of an upcoming member demanded special meeting. (NYSCEF Dkt.11, Kelly Aff. ¶ 74).

PCI did not provide advance written notice of the planned June 4 meeting to each PCI voting member and did not maintain a complete and accurate record of each of PCI voting members in violation of N-PCL and its by-laws. For those reasons, and certainly in combination with the lack of a statutory quorum, the alleged June 4 election of the PCI Director Defendants is invalid.

C. The Purported Election Of The PCI Director Defendants On June 4, 2014 Is Invalid Because Of Other Irregularities at the June 4 Meeting

The June 4 election of the PCI Director Defendants is also invalid because of other irregularities that occurred at the meeting with respect to the election of directors. The PCI officer/directors who ran the meeting rammed through the election of an uncontested slate of proposed directors in a matter of minutes without calling for or permitting other nominations,

discussion or anything else in violation of Robert's Rules of Order as required by the PCI by-laws and basic fairness. Nothing was done to check which persons attending the meeting were actually voting members for purpose of a quorum or vote count. The officers just announced that the vote carried by a show of hands. (Verif. Complaint ¶ 150; Spadini Aff. ¶ ¶ 33-37, Ex. B). Now defendants, through an affidavit by defendant Kelly, are falsely claiming in their recent motion that the vote was 17 to 1, and falsely claiming that plaintiff Greenberg voted for the defendant "directors," when none of that is true. No such vote count occurred, and no such count was recorded in the minutes. *Id.*

The conduct of the meeting itself, along with the other illegalities described above and Mr. Kelly's false allegations, are further reasons to set aside the June 4, 2014 election and give the PCI member community a real opportunity to express their will.

D. The Court Should Set Aside The PCI Board Election, Order A New Board Election, Enjoin The PCI Directors From Taking Further Actions To Evict The Library Or Interfere With The PCI Member Plaintiffs Exercising Their Rights As Members Until A New Election Is Held, and Grant Other Relief As Justice Requires Under N-PCL 618

The Court should set aside June 4, 2014 election of the PCI Director Defendants and order a new election because of the illegal lack of a statutory quorum and the other illegal conduct and irregularities set forth above, and because the purported June 4 election by a handful of people (and the illegal acts of this current alleged board) does not reflect a clear expression of the will of the nearly 2,000 Purchase residents who are the member owners of PCI. (*See, e.g.,* Spadini Aff. ¶¶ 23-27, Ex. A (hundreds signing petition to keep the library at the Community House with extensive supporting comments), ¶¶ 62-64 (members demand special member meeting to exercise their rights); Schoenfeld Aff. Ex. B (attaching the entire member demand for a special member meeting with 192 member signatures).

Justice requires that a new election be conducted in a legal, untainted manner so that the people of Purchase may exercise their corporate democratic rights and elect a new PCI board that reflects their interests and desires. That is especially so under the circumstances here where their Purchase Community House is facing one of the most momentous decisions in their community in decades -- a decision that could result in the loss of their venerable, little local library. It is not a decision that should be left to the dictates of just a handful of people who "elected" themselves and now claim they speak for the people. N-PCL 618 (court "shall confirm the election, order a new election, or take such other action as justice may require."); *Faraldo v. Standardbred Owners Association, Inc.*, 63 A.D.2d 1010, 406 N.Y.S.2d 336 (2d Dep't 1978) (reversed lower court's dismissal of a N-PCL 618 claim and remanded to the lower court for a hearing on the merits because a claim to set aside an election is not insufficient for failure to show that the outcome would have been different, but for the irregularities, and because the court has broad equitable power to direct a new election when the election at issue is "'so clouded with doubt or tainted with questionable circumstances that the standards of fair dealing require the court to order a new, clear and adequate expression.'") (citations omitted). *See Azzi v. Ryan*, 120 Misc.2d 121, 465 N.Y.S.2d 414 (Sup. Ct., Queens Cty. 1983) (vacating election of officers of not-for-profit corporation for inadequate notice and ordering a new meeting and election with proper notice).

The Court has the power to issue such other orders as justice may require, N-PCL 618, and plaintiffs request that the court issue orders necessary to level the playing field and ensure the fairness of a new election given the fact that the PCI Director Defendants are still in de facto control of PCI and its management. Thus, the Court should also order under N-PCL 618 that the PCI Member Plaintiffs may propose and nominate for election a slate of directors to fill each of

the 17 seats on the PCI Board of Directors, and that defendants deliver to the PCI Member Plaintiffs up-to-date contact information for all PCI members, including addresses, telephone numbers and email addresses so that there is a level playing field for communicating with PCI members

It follows from the Court invalidating the June 2014 election that the PCI Director Defendants should be barred from acting as directors, and that their vote to evict the library is illegal. *See, e.g., Ionescu*, 255 A.D. 2d 584, 680 N.Y.S. 2d 653 (enjoining purportedly, but not properly, elected Parrish Council from acting in that capacity). The Court does not need to go that far -- and we do not need to quibble over the extent to which an entrenched alleged "holdover" board of directors who led an illegal sham "election" has the power to vote to evict the library -- in deciding the parties' competing motions at this early stage of these proceedings. For now, the PCI Member Plaintiffs contend that justice requires under N-PCL 618 that the Court issue narrowly tailored injunctive relief to preserve the status quo -- keeping the library in the Community House and ensuring that the PCI Director Defendants and Defendant Kelly do not use their management position to interfere with the rights of PCI members who support the library -- until a new board election is held. Otherwise, if the status quo is not maintained the defendants could use their management positions to take actions that might render a new board election, or the relief sought by plaintiffs in this action, ineffectual.

By the same token, the narrowly tailored injunctive relief that the plaintiffs seek expressly permits the PCI Director Defendants and Defendant Kelly to manage the daily affairs of PCI to ensure continuity in such matters until the Court-ordered new election.

In addition, the 10 member quorum provision in PCI's by-laws that defendants improperly tried use for the June 4, 2014 election is illegal on its face because by-laws may not

provide for a quorum of less than 100 voting members or 10% of the voting members, whichever is less. N-PCL 608(b). Therefore, the Court should declare the PCI by-laws quorum provision null and void, and justice requires that the Court enjoin PCI from using such an illegal provision or otherwise violating the statutory quorum requirements of N-PCL 608. N-PCL 602(f) (by-laws provision may not be inconsistent with N-PCL. *See also, e.g., Sealey v. American Soc of Hypertension, Inc.,* 10 Misc. 3d 572, 809 N.Y.S. 2d 421, 425 (declaring by-laws null and void and enjoining corporation from exercising any powers or taking steps under the illegal by-laws) (Sup. Ct. NY County 2005), *aff'd,* 26 A.D. 3d 254, 810 N.Y.S.2d 48 (1st Dep't 2006).

This does not mean that PCI always has to have a majority of members to have a quorum as was statutorily required for the June 4 meeting. As set forth in plaintiffs' proposed order to show cause, the injunction will not bar PCI and its members from using the 10 member quorum provision in its current by-laws on a one-time basis so they can amend its by-laws or certificate of incorporation (if its members wish to do so) to provide for a quorum at member meetings as low as the statutory minimum of 100 voting members. N-PCL 608(b) and (c).

III. THE ACTIONS OF THE PCI DIRECTOR DEFENDANTS AND DEFENDANT KELLY TO EVICT THE PURCHASE LIBRARY VIOLATES THEIR DUTY OF OBEDIENCE TO THE MISSION OF PCI AS A NOT-FOR-PROFIT CORPORATION AND THAT VIOLATION FURTHER SUPPORTS THE COURT TEMPORARILY AND PRELIMINARILY ENJOINING THEIR ACTIONS TO EVICT THE PURCHASE LIBRARY

Directors and officers of a New York not-for-profit corporation like PCI have a duty of obedience; that is "the duty to ensure that the mission of the charitable organization is carried out." *Manhattan Eye, Ear & Throat Hosp. ("MEETH") v. Spitzer*, 186 Misc.2d 126, 152, 715 N.Y.S.2d 575, 593 (Sup. Ct. N.Y. County 1999). *See also* Right From The Start: Responsibilities of Directors of Not-for-Profit Corporations, NY Office of the Attorney General

7 (describing the duty of obedience of officers and directors of a New York not-for profit corporation board, including "[d]edicating the organization's resources to its mission [,and] [i]nsuring that the organization carries out its purposes . . .".). (Schoenfeld Aff. Ex. D). The duty of obedience "requires the director of a not-for-profit corporation to 'be faithful to the purposes and goals of the organization," since '[u]nlike business corporations, whose ultimate objective is to make money, nonprofit corporations are defined by their specific objectives: perpetuation of particular activities are central to the raison d'etre of the organization.'" *See MEETH, supra.* The doctrine of the duty of obedience to the mission of a not-for-profit corporation -- particularly a corporation like PCI that is created because of an original gift of a single donor -- "derives from trust law [under which] a director (trustee) must administer the corporation's assets (trust) in a manner faithful to the expressed wishes of the creator and donors, who rely on those express purposes when making their contributions." Victoria B. Bjorklund, James J. Fishman and Daniel L. Kurtz, New York Nonprofit Law and Practice: With Tax Analysis § 11.04 (2013). (Schoenfeld Aff. Ex. E).

Actions of officers and directors of a not-for-profit corporate Board in violation of the duty of obedience are not legal and may be stopped by a court. *Cf. MEETH, supra.* (denying petition of charitable hospital corporation for court approval of sale of hospital assets and closure of the hospital because the sale was inconsistent with the corporation's mission).

The inseparable history and connection between the Purchase Community House and the Purchase Library in fulfilling the charitable corporate mission of PCI (the owner of the Community House) and the intent of Caroline Seaman Read (who donated the Community House to PCI in 1927 for the benefit of the residents of the Purchase community) to encourage "all such wholesome activities as tend to unite the [Purchase] neighborhood in loyalty and

services to the Community, the State and the Nation" is recounted in detail in the Greenberg Affidavit and the Affidavit of Donald Read (Mrs. Read's grandson.) (Greenberg Aff. ¶¶ 11-28, Exs. A-H; Read Affidavit ¶¶ 1-8). In short, the Purchase Library was at the center of the original vision of the Community House even before it was built. The library has occupied space in, and been a part of, the Community House since they both were founded by the very same people, including Mrs. Caroline Seaman Read, who particularly loved the library. *Id.* For 88 plus years no one ever questioned the library remaining a part of the Community House until defendants' recent actions. (Greenberg Aff. ¶¶ 10-36, Exs. D,F, G, H; Spadini Aff. ¶¶5, 16; Read Affidavit ¶¶ 1-8). The library at the Community House today is a beloved treasure of the Purchase community and it is the very definition of a community-uniting and community-serving civic institution that the Community House and PCI were created to promote and support for the people of Purchase. (*See* All 27 Affidavits).

By contrast, PCI has strayed from its corporate mission by focusing almost exclusively on a summer camp and after school activities for kids from Purchase and from outside of Purchase without regard to PCI's mission to promote activities for the "people" of Purchase (not just the children of Purchase and surrounding communities) that tend to unite the entire community. (NYSCEF Dkt.11, Kelly Aff. ¶ 13). The library -- a core civic institution for any community -- is the one thing left at the Community House that fulfills the corporate mission of uniting the entire community of all ages. (*See* Greenberg Aff. ¶¶ 10-36; Spadini Aff. ¶¶5-15. See All 25 Other Affidavits).

Thus, the steps defendants are taking to kick the library out of the Purchase Community House are a violation of their duty of obedience to the mission of PCI and PCI's corporate charter. (Spadini Aff. ¶¶ 40-50; *See generally* Schoenfeld Aff. Ex. A). What makes it even

worse is that this decision to alter radically the Community House in a way that will have a lasting, negative impact on the entire Purchase community of 6,000 residents was made behind closed doors by, allegedly, 11 of the 17 alleged PCI Director Defendants voting for eviction, with one PCI Director Defendant voting against and five PCI Director Defendants not voting on what was probably one of the most impactful decisions in the history of the Community House. (NYSCEF Dkt.11, Kelly Aff. ¶ 64). Those 11 PCI Director Defendants who voted to evict the library had no mandate whatsoever from the people of Purchase to take such an action, and their efforts to block the community members from having a say in the future of the library at the Community House shows an utter contempt for the PCI members that the directors are obligated to serve and is, itself, a breach of the duty of obedience because it is dividing, not uniting, the Purchase neighborhood.

Defendants' violation of their duty of obedience is reason enough (and certainly is an added reason along with the statutory and corporate governance violations discussed in Point II above) for the Court to provide the narrow injunctive relief that plaintiffs seek.

IV. THE APPLICATION BY PCI MEMBER PLAINTIFFS AND PURCHASE LIBRARY FOR A PRELIMINARY INJUNCTION AND A TEMPORARY RESTRAINING ORDER SHOULD BE GRANTED

A. The Application for a Preliminary Injunction Should Be Granted.

In order to obtain a preliminary injunction under CPLR 6301, the moving party must establish: "(1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor." *Ruiz v. Meloney*, 26 A.D.3d 485, 486, 810 N.Y.S.2d 216, 217 (2d Dept. 2006). Plaintiffs have satisfied each of these requirements.

1. The PCI Member Plaintiffs and Purchase Library Are Likely to Prevail on the Merits

In order to establish a likelihood of success on the merits, the moving party need only set forth a *prima facie* case for its claims; a certainty of success is not required. *See McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 A.D.2d 165, 173, 498 N.Y.S.2d 146, 152 (2d Dept. 1986). *See also Terrell v. Terrell*, 279 A.D.2d 301, 303, 719 N.Y.S.2d 41, 43 (1st Dept. 2001) (evidence demonstrating a likelihood of success on the merits need not be conclusive). Applying this standard, the PCI Member Plaintiffs and the Purchase Library are more than likely to prevail on their claims and related relief discussed above. *See* POINTS I-III, *supra*.

2. The Purchase Library, The PCI Member Plaintiffs, And Non-Party Purchase Residents Will Be Irreparably Harmed Absent Injunctive Relief To Preserve The Status Quo By Keeping The Purchase Library In The Community House Without The Threat of Imminent Eviction and Closure

There is no doubt that the individual plaintiffs, and many others in the Purchase community, will suffer immediate irreparable harm if injunctive relief is not granted. Irreparable harm results where money damages are insufficient to remedy the injury alleged. *See Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633, 588 N.Y.S.2d 424 (2d Dept. 1992). Irreparable harm also results where, as here, the defendants threaten or are about to engage in acts that violate plaintiffs' rights respecting the subject of the action, thereby tending to render the final judgment ineffectual. *See Burmax Co. v. B & S Industries*, 135 A.D.2d 599, 601, 522 N.Y.S.2d 177, 178 (2d Dept. 1987).

In the event that injunctive relief is not granted, the PCI Director Defendants and Defendant Kelly have shown they are determined to use their officer/director perch -- even in the face of a massive outpouring public support for the library (*see* Spadini Aff. ¶¶ 23-28, 39 (Ex. A) (933 signatures on petition to save the library with supportive comments); Spadini Aff. ¶¶ 62-63 ;

Schoenfeld Aff. Ex. B (192 members demand special PCI member meeting to save the library) -- to effect the eviction and removal of the Purchase Library from the Community House, even if it means trampling on the rights of the PCI Members Plaintiffs who support the library. (*See* Spadini Aff. ¶¶ 40-50; Schoenfeld Aff. Ex. A: See Defs. Motion to Enjoin Member Special Meeting).

The stakes for the library, and the Purchase residents who support it, are as high as they can be. Eviction means the end of the library. That is a devastating outcome for the library itself and its employees whose jobs will be lost. It is an even worse one for the Purchase residents, including children, who will be deprived of the valuable services of their local Purchase library and treasure of the community. (Greenberg Aff. ¶¶ 59-62; Spadini Aff. ¶¶ 66-67, Ex. A); *see also* 25 other affidavits).

Given the stakes, and defendants' behavior to date, the plaintiffs cannot depend on nice-sounding statements by defendants' counsel that they will let the library stay for some time while the court decides defendants' recent motion, especially when defendants' motion should be readily denied. That's a very coy tactical maneuver in the face of plaintiffs' motion, but such statements do not change the fact that plaintiffs need the force of a court order to be protected.

3. The Balance of Equities Tips Decidedly In Favor Of The PCI Member Plaintiffs, The Purchase Library And The Many Other Residents Of The Purchase Community Who Will Be Harmed By The Eviction Of The Purchase Library

Finally, a balancing of the equities tips in favor of the PCI Member Plaintiffs and the Purchase Library, and many others in the Purchase community because the irreparable injury that will be sustained by them if injunctive relief is denied is more burdensome than the harm which

might befall PCI or the other defendants through imposition of the narrowly tailored injunction sought here. *See Burmax*, 135 A.D.2d at 601, 522 N.Y.S.2d at 179).

If injunctive relief is denied, it will render the relief sought here ineffectual and cause further harm to plaintiffs and Purchase residents and library employees as already described. (Greenberg Aff. ¶¶ 59-62; Spadini Aff. ¶¶ 66-67, Ex. A; *see also* 25 other affidavits). By contrast, defendants will not suffer any harm if injunctive relief is granted and will simply have to live with the status quo that has safely existed for more than 88 years.

Defendants' implication that that this little 700 square foot library poses any meaningful security risk to the safety of the children is belied by the fact that the "incidents" that supposedly triggered the purported concern about security occurred more than year ago, and by the fact that defendants hardly acted with much urgency in response to those "incidents." (Spadini Aff. ¶ 18; Greenberg Aff. ¶ 33; NYSCEF Dkt.11, Kelly Aff. ¶ 55 (alleged security consultant hired on or about April 23, 2014, and report obtained on May 5, 2014, all 8 months after the so-called "incidents" the year before and after PCI officers had already announced they wanted to get rid of the library; plaintiffs' object to the admission in evidence of the content of consultant's "report" and only make a point here about its timing). It is also belied by the fact that defendants essentially concede that the library can safely remain in place during this litigation without endangering anyone. (*See* NYSCEF Dkt. 85, Defs. Mem. Law, p. 24; NYSCEF Dkt. 86, Defs. October 24, 2014 letter).

Plaintiffs dispute defendants' overblown allegations about security, and contend that the so-called "security" issue has been used as a bad faith, pretext and cover for the desire of certain defendants to rid the Community House of the library for other reasons that they do not want to share at this time with the public. (*E.g.,* Verif. Compl. ¶¶ 99-102). To underscore this point, we

direct the Court to the report by the library's security consultant, Larry Eidelman (a Yorktown police officer and expert in safety and security who has worked with many schools and similar facilities in Westchester) that defendants' themselves put in evidence, and that states **"[b]ased on its long standing history with no significant safety or security incidents; and based on current observations, the Purchase Free Library appears to present no significant safety or security risk to patrons, staff or the surrounding community."** (NYSCEF Dkt.11, Kelly Aff. Ex. 12, p. 3) (emphasis added).

The balance of equities therefore tips in favor of plaintiffs and the other non-plaintiff residents of the Purchase community who face the real risk of losing their local library, and who need a court order TRO and preliminary injunction (not just defendants' counsel's nonbinding promises in court submissions) to preserve the status quo for the library and protect their rights as PCI members.

B. The Request Of The PCI Member Plaintiffs And The Purchase Library for a Narrow Temporary Restraining Order Should Be Granted

CPLR 6313 empowers the Court to issue a temporary restraining order pending a hearing on a preliminary injunction in a case such as this where "it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." *See* CPLR 6313(a). *See also A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 272 A.D.2d 854, 854, 708 N.Y.S.2d 226, 227 (4th Dept. 2000).

Plaintiffs need an immediate a stay of the PCI eviction action pending a hearing and determination of plaintiffs' motion for consolidation under CPLR 602 as discussed in Point I above, and an immediate, narrowly drawn temporary restraining order pending a hearing on plaintiffs' motion for a preliminary injunction for the same reasons set forth above that plaintiffs

seek a preliminary injunction. Otherwise, defendants (who were not legally elected) will continue to take steps as directors and officers and otherwise pursue their plan to get rid of the Purchase Library or use their positions to frustrate efforts by the PCI Member Plaintiffs to exercise their rights as members in an effort to save the library, and that conduct threatens to cause plaintiffs (and other Purchase residents) irreparable harm as already discussed above.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that this Court grant plaintiffs' motion for (i) a stay of the PCI Harrison Town Court eviction action and consolidation of that action with this action, (ii) a declaration that the purported June 4, 2014 board election is illegal and of no effect, (iii) an order setting aside such purported election; (iv) an order directing a new election of PCI directors and related relief with respect to the conduct of such a new election, (v) a related temporary restraining order and preliminary injunction, and (vi) such further relief as justice may require under N-PCL 618 or otherwise, all as set forth in more detail in plaintiffs' proposed order to show cause filed on October 21, 2014 and at NYSCEF Dkt.34.

Dated: White Plains, New York
October 27, 2014

DelBello Donnellan Weingarten
Wise & Wiederkehr, LLP

By: _____
Steven R. Schoenfeld
One North Lexington Avenue, 11th Floor
White Plains, New York 10601
(914) 681-0200
Attorneys for Plaintiffs

1415130
0163160-001