

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

MARTHA GREENBERG, et al.,

Plaintiff,

- against -

THE PURCHASE COMMUNITY, INC. et al.,

Defendants.

Index No.: 64093/2014

**ORAL ARGUMENT REQUESTED**

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO  
DISMISS THE COMPLAINT AND FOR A PRELIMINARY INJUNCTION**

**VENABLE LLP**

Edmund M. O'Toole

Thomas J. Welling, Jr.

Rockefeller Center

1270 Avenue of the Americas, 24th Floor

New York, New York 10020

Tel: (212) 307-5500

Fax: (212) 307-5598

**CUDDY & FEDER LLP**

Joshua E. Kimerling

445 Hamilton Avenue, 14<sup>th</sup> Floor

White Plains, New York 10601

Tel: (914) 761-1300

Fax: (914) 761-5372

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT ..... 1

FACTUAL BACKGROUND..... 5

    A. *The Purchase Community House and PCI’s By-laws and Certificate of Incorporation* ..... 5

    B. *The Library Is Created After the Incorporation of PCI*..... 7

    C. *PCI Leases Space at the Purchase Community House to Various Third Parties, Including the Library*..... 8

    D. *The Library’s Status as a Public Space Becomes a Security Problem for the Community House*..... 10

    E. *PCI Investigates the Security Threat, Evaluates Its Options and Decides Not to Offer the Library a New Lease* ..... 11

    F. *PCI Announces the Security Threat to Its Members, the Possibility of Terminating the Library’s Tenancy and Notices Its Annual Meeting*..... 12

    G. *PCI Holds Its Annual Meeting Without Objection and Reelects the Same Directors* ..... 13

    H. *PCI Votes to Terminate the Library’s Tenancy and Commences Eviction Proceedings*..... 13

    I. *Plaintiffs’ Commence this Action*..... 14

    J. *Plaintiffs Demand a Special Meeting for Improper Purposes*..... 15

ARGUMENT ..... 16

I. PLAINTIFFS CANNOT ESTABLISH A LEGAL OR EQUITABLE BASIS TO DISTURB THE GOOD FAITH BUSINESS DECISION OF THE PCI BOARD TO EVICT THE LIBRARY ..... 16

    A. *The PCI Board’s Decision to Terminate the Library’s Tenancy Is Protected By the Business Judgment Rule* ..... 17

    B. *The PCI Directors Were Validly Elected*..... 22

II. THE LIBRARY’S BREACH OF CONTRACT CLAIM AGAINST PCI FAILS TO STATE A CAUSE OF ACTION AND SHOULD BE DISMISSED AS A MATTER OF LAW ..... 28

III. THE SPECIAL MEETING OF MEMBERS DEMANDED BY PLAINTIFFS MUST BE ENJOINED ..... 29

    A. *The Purposes for Which Plaintiffs Have Called a Special Meeting Violate PCI’s By-laws, Certificate of Incorporation, and New York Not-For-Profit Law* ..... 30

    B. *PCI and Its Members Will Suffer Irreparable Injury if a Special Meeting Is Convened Prior to this Court’s Ruling on the Propriety of Any Such Meeting* ..... 34

    C. *The Balance of Equities Weighs in Favor of Granting an Injunction*..... 35

    D. *Judicial Supervision of Any Special Meeting Is Required* ..... 35

CONCLUSION..... 37

**TABLE OF AUTHORITIES**

**Cases**

*Aetna v. Capasso*, 75 N.Y.2d 860 (1990) ..... 29

*Auerbach v. Bennett*, 47 N.Y.2d 619 (1979)..... 17, 18, 22

*Brenntag Int’l Chems., Inc. v. Bank of India*, 175 F.3d 245  
(2d Cir. 1999)..... 34

*Consumers Union of U.S., Inc. v. New York*, 5 N.Y.3d 327  
(2005)..... 16

*Cuva v. U.S. Tennis Ass’n. Eastern, Inc.*, 13 Misc. 3d  
1221(A) (Sup. Ct. Westchester Cnty. 2006)..... 16, 24, 27

*Davidson v. James*, 172 A.D.2d 323 (1st Dep’t 1991) ..... 24

*Ellis v. Broder*, 812 N.Y.S.2d 851 (Sup. Ct. N.Y. Cnty.  
2006) ..... 34

*Esformes v. Brinn*, 52 A.D.3d 459 (2d Dep’t 2008) ..... 22

*Gerard v. Empire Square Realty Co.*, 195 A.D. 244 (2d  
Dep’t 1921) ..... 23

*Higgins v. New York Stock Exch., Inc.*, 10 Misc. 3d 257  
(Sup. Ct. N.Y. Cnty. 2005) ..... 17

*In re Election of Directors of Rapid Transit Ferry Co.*, 19  
Misc. 409 (Sup. Ct. Kings Cnty. 1897) ..... 22, 27

*In re Election of the Officers and Directors of F.I.G.H.T.,  
Inc.*, 79 Misc. 2d 655 (Sup. Ct. Monroe Cnty. 1974) ..... 22, 24

*In re Schroeder*, 70 A.D.3d 583 (1st Dep’t 2010) ..... 22

*Machne Menachem, Inc. v. Hershkop*, 237 F. Supp. 2d  
227 (E.D.N.Y. 2002)..... 27

*Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 715  
N.Y.S.2d 575 (Sup. Ct. N.Y. Cnty. 1999) ..... 19

*Matter of Hammond Light & Power Co.*, 131 Misc. 747  
(Sup. Ct. St. Lawrence Cnty. 1928) ..... 16

*McLaughlin, Piven, Vogel Inc. v. W.J. Nolan & Co. Inc.*,  
114 A.D.2d 165 (2d Dep’t 1986) ..... 29

<i>Nyitray v. New York Athletic Club, Inc.</i> , 195 A.D.2d 291 (1st Dep’t 1993) .....	24
<i>Parisi v. New York Cnty. Medical Socy.</i> , 177 A.D.2d 369 (1st Dep’t 1991) .....	24
<i>Prudential Real Estate Affiliates Inc. v. PPR Realty, Inc.</i> , 204 F.3d 867 (9th Cir. 2000) .....	34, 35
<i>Rex Med. L.P. v. Angiotech Pharm. (US), Inc.</i> , 754 F. Supp. 2d 616 (S.D.N.Y. 2010).....	35
<i>Simoni v. Civil Serv. Employees Ass’n, Inc.</i> , 507 N.Y.S.2d 371 (Sup. Ct. Albany Cnty. 1986) .....	16, 30
<i>Smith v. Ellerbe</i> , 141 Misc. 2d 699 (Sup. Ct. Queens Cnty. 1988) .....	24
<i>Weiss v. Opportunities for Cortland Cnty.</i> , 40 A.D.2d 45 (3d Dep’t 1972).....	30
<b>Statutes</b>	
C.P.L.R. § 3001.....	1
C.P.L.R. § 3211.....	1, 32
C.P.L.R. § 6301.....	1, 32
C.P.L.R. § 6311.....	1
C.P.L.R. § 6313.....	1
Del. Code Ann. Tit. 8, §211(c) .....	27
N.Y. Educ. L. §216-a.....	7
N-PCL § 509 .....	16, 21, 31
N-PCL § 608.....	26
N-PCL § 618.....	22, 23
N-PCL § 701 .....	16
N-PCL § 703.....	27
N-PCL § 804(a).....	32

Defendants The Purchase Community, Inc. (“PCI”) and its volunteer board of directors (“PCI Directors” or “PCI Board”)<sup>1</sup> respectfully submit this memorandum of law, together with the affidavit of James E. Kelly, dated October 16, 2014 (“Kelly Aff.”), and the respective exhibits annexed thereto, in support of their motion, pursuant to Civil Practice Law and Rules (“CPLR”) §§ 3001, 3211, 6301, 6311, and 6313, and the New York Not-For-Profit Corporation Law (“N-PCL”), for an order dismissing the Complaint<sup>2</sup>, declaratory relief affirming the 2014 election of the PCI Directors, declaring the PCI Directors the valid directors of PCI, affirming their decision to evict Plaintiff Purchase Free Library (“Library”), and for a preliminary injunction enjoining any special meeting of members until such time as this Court has resolved the issues raised herein.

### **PRELIMINARY STATEMENT**

Plaintiffs—a small minority of members of PCI (a private New York not-for-profit corporation) plus non-member tenant of PCI, the Library (a New York education corporation)—brought this action seeking to invalidate the decision of the PCI Directors to discontinue renting space to the Library due to security threats emanating from the Library’s status as a public institution. In this action, Plaintiffs also seek to call a special meeting of members on November 12, 2014 for the improper purposes of obtaining the relief their Complaint fails to establish, namely changing the corporate purpose of PCI to accept the Library as a tenant in virtual perpetuity. Neither law nor equity warrants this relief. Defendants thus move this Court to dismiss the

---

<sup>1</sup> The individual defendants, each a volunteer director of PCI, are Loren Canell, Clare Conlin, Karen Cousin, Allison Danzig, Jill Evans, Justine Gaeta, Christine Griff, Dan Lovinger, Thomas Manisero, Jini Sachse, Scott Sherman, Lisa Smith, Sharlise Smith-Rodriguez, Alison Summer, Robert Warshauer, Evan Wiederkehr, Carol Wolf and James Kelly (collectively “PCI Directors”). The PCI Directors were elected as directors at both the 2013 and 2014 annual meetings of members of PCI.

<sup>2</sup> All references herein to “Complaint” or “Compl.” refer to the complaint filed by Plaintiffs in this action on or about September 3, 2014.

Complaint and enjoin any special meeting of members until this Court can rule on the legitimacy of the PCI Board's decision and adjudicate the proper purposes of any special meeting.

Since shortly after its incorporation in 1926, PCI has been the owner and operator of the Purchase Community House (the "Community House"), located in the neighborhood of Purchase, in the town of Harrison, New York. PCI provides Purchase community families with pre-school and after-school programs during the school year, an eight week day camp for ages 3 to 15 and an outdoor family pool program in the summer. PCI's by-laws, consistent with New York not-for-profit law, grant the Board the exclusive power to lease space at the Community House to various third parties so long as their purposes are consistent with PCI's broad corporate mission of providing "the people of Purchase...[the] opportunity for closer fellowship and for the encouragement of all such wholesome activities as tend to unite the neighborhood in loyalty and service to the Community, the State and the Nation." One such tenant is the Library, which has rented "one large room, one small office and a bathroom" at the Community House since 1979, and a smaller room previously. Contrary to Plaintiffs' allegations, PCI and the Library have maintained an arms-length landlord-tenant relationship freely terminable at the sole discretion of the PCI Board, as indicated by the execution each year of a one year lease agreement with no right to renewal. In 2013, however, the PCI Board decided that it would not offer the Library a new lease for 2014 while it addressed a number of security concerns involving the Library.

Careful investigation, including the hiring of independent security consultants, established that the Library's status as a public space permitted any individual to access the Community House, regardless of the security threat those individuals may pose to young children, and despite PCI's request for police assistance in many of these situations. After the PCI Board informed its members of this unacceptable security risk to children, who principally use the

Community House, and the likely need to terminate the Library's tenancy, the Board noticed and held PCI's annual meeting of members on June 4, 2014 and were reelected. On July 17, 2014, after months of painstaking deliberation, the PCI Board made the final decision to terminate the Library's tenancy. Following the Library's refusal to accept PCI's decision and vacate the premises as required by the express terms of the lease agreement, PCI was forced to initiate a holdover proceeding in Harrison Town Court, captioned as *The Purchase Community, Inc. v. Purchase Free Library Harrison Town Court*, Case No. 1409-0233 (the "PCI Town Court Action").

For the following reasons, each of the Complaint's eight causes of action fail as a matter of law and equity warranting dismissal of the Complaint.

**First**, the decision to rent space at the Community House is reserved to the sole and exclusive good faith judgment of the PCI Board. Plaintiffs seek to wrest that decision-making authority from the Board, despite clear statutory and decisional case law prohibiting them from doing so.

**Second**, PCI's broad corporate purpose makes no reference to the maintenance of a public library, much less Plaintiff Purchase Free Library, which was incorporated after PCI and therefore, cannot possibly be considered an essential and necessary part of PCI's corporate mission.

**Third**, Plaintiffs' naked attempt to use technicalities to overturn the good faith business judgment of the PCI Directors by challenging the 2014 board election fares no better. These objections were waived, and even if they were not, none of the alleged defects rise to the level of fraud or wrongdoing sufficient to warrant judicial upending of PCI's corporate governance.

*Fourth*, Plaintiffs' claim to an "implied right" to renew its lease is completely without merit. The clear language of Plaintiffs' lease agreement provides for the Library's obligation to vacate the premises upon termination of the lease and makes no reference to a right of renewal.

Concurrent with the filing of the Complaint, Plaintiffs demanded a special meeting of members, which is currently set to occur on November 12, 2014, which Defendants seek to preliminarily enjoin until this Court has had an opportunity to rule. As set forth herein, the purposes for which Plaintiffs have called the meeting are in violation of PCI's by-laws, certificate of incorporation, and New York not-for-profit law. To be clear, Defendants are not seeking to permanently enjoin a special meeting of its members. Defendants simply ask that this Court adjourn the meeting until such time as it can rule on the propriety of the purposes for which any such meeting may be called.<sup>3</sup> Absent injunctive relief, Plaintiffs will be able to usurp the power of the PCI Board, supplant the interests of the Library over that of all of PCI's members, including the interest in protecting the security of the Purchase community's children, and alter the corporate purpose of PCI—none of which is permitted by law or equity. To allow such injustice would cause irreparable harm to PCI and its members. In contrast, Plaintiffs will suffer no harm by any delay occasioned by this Court's review to ensure Plaintiffs' actions are legal.

---

<sup>3</sup> Indeed, Defendants do not challenge Plaintiffs' (excluding the Library) right to call a special meeting and have stipulated that Plaintiffs do not need to acquire new signatures or issue a new demand if the Court were to order a special meeting. Instead, Defendants simply request that this Court rule on the proper purposes of any such meeting.



## **FACTUAL BACKGROUND**

### *A. The Purchase Community House and PCI's By-laws and Certificate of Incorporation*

In 1926, Purchase Community, Inc. ("PCI") was incorporated under the New York Membership Corporations Law, the predecessor to the Not-for-Profit Corporation Law. Compl. ¶ 55; Kelly Aff. ¶ 3, Ex. 1. The following year, the Read Memorial Community House, which was is now referred to as the Purchase Community House (the "Community House") was transferred to PCI by the Read family. Comp. ¶ 86; Kelly Aff. 5. The grant was made contingent on the continued use of the Community House for the following purposes:

[t]his conveyance is made and accepted upon express condition that the premises hereinabove described [i.e. the Purchase Community House] are to be used only as a community house in such manner as to provide for the people of Purchase opportunity for closer fellowship and for the encouragement of all such whole-some activities as tend to unite the neighborhood in loyalty and service to the community, the State and the Nation, and that when the said premises are no[] longer used as aforesaid the title to said premises is to revert back to the grantor, the party of the first part, or to her heirs.

Compl. ¶ 86; Kelly Aff., Ex. 2. Since that time, PCI has been the owner and operator of the Community House, providing Purchase community residents with recreational and enrichment programs. Kelly Aff. ¶ 6. The original indenture makes no reference to any requirement to house a public library, much less the Purchase Free Library, at the Community House. Kelly Aff. ¶ 5, Ex. 2. Indeed, the indenture unambiguously envisions that the Community House would be used for a wide variety of purposes. In any event, in 1958, the Read family and PCI entered into a second indenture agreement, whereby the Read family gave PCI all right, title and interest of the Community House to PCI, free and clear of any further encumbrances or limits upon its use. Kelly Aff. ¶ 7, Ex. 3.

PCI's original corporate purpose has remained unchanged since its creation:

to provide the people of Purchase in the Town of Harrison in the County of Westchester and the State of New York, opportunity for closer fellowship and for the encouragement of all such wholesome activities as tend to unite the neighborhood in loyalty and service to the Community, the State and the Nation.

Compl. ¶ 85; *see also* Kelly Aff., Ex. 1. This broad corporate purpose allows PCI to offer a wide range of activities for the entire Purchase community. It does not tie PCI to any particular activity, and contains no mandate to operate a public library. Kelly Aff., ¶ 9.<sup>4</sup> Indeed, PCI's website reaffirms this general purpose, stating that its purpose is to: "foster fellowship among Purchase residents, and for wholesome activities which unite the neighborhood in loyalty and service to the community, the state and the nation." Compl. ¶ 87; *see also* Kelly Aff., ¶ 12, Ex. 6. Today, PCI provides pre-school and after-school programs during the school year, an eight week day camp for ages 3 to 15 and an outdoor family pool program in the summer. Kelly Aff. ¶ 13.

PCI is supported entirely by user fees and donations. Kelly Aff. ¶ 14. The members of PCI are residents of Purchase as determined by eligibility to attend Purchase Elementary School, who are 21 years of age and over. *Id.* PCI relies on a volunteer board of directors to manage its affairs. *Id.* The directors are elected by the members each year at the annual meeting of members. *Id.* Each member is entitled to vote at PCI's annual meeting. *Id.* Unfortunately, like many community not-for-profits, PCI has difficulty attracting its members each year to attend the annual meeting. *Id.*

---

<sup>4</sup> Aside from a single reference to the Library and Educational Committee, among eight different committees of the PCI Board, PCI's governing documents make no reference to a library. Compl. ¶ 91, Kelly Aff. ¶10, Ex. 1. And nowhere in PCI's governing documents is there any reference to a public library or the Purchase Free Library. Moreover, PCI's current by-laws make no reference to a "Library and Educational Committee," and instead grant the board the power to establish special committees from time to time as appropriate. Kelly Aff. ¶11, Ex. 5.

As James E. Kelly, PCI's Director since 1998 and Assistant Director from 1985 to 1998, explains in his affidavit attached hereto, by the late 1980s, the average attendance at the annual meeting dropped from nearly one-hundred members to between fifty to seventy members. Kelly Aff. ¶¶ 15-17. Since 1998, when Mr. Kelly became Director, the number of members attending an annual meeting has not exceeded fifty. *Id.* ¶ 17. And, in the last five years, PCI has struggled to get thirty members to attend, and at times struggled to get the minimum ten to fifteen members required by the PCI by-laws for a quorum. *Id.* During this time, however, PCI has held the annual meeting each year at the same place (the Community House) and within the same week (late May or early June). *Id.* ¶ 18. The challenges attracting a quorum persist despite the fact that notices of the annual meeting are sent to anywhere between 1,000 and 1,600 families each year. *Id.* ¶ 19.

To address the difficulty in obtaining a quorum, PCI's current by-laws were amended by the Board in 2013. *Id.* ¶ 20, Exs. 5, 7. For example, the number of directors was reduced from not fewer than twenty nor more than thirty, to not fewer than six nor more than twenty. *Id.* Likewise, the number of members required for a quorum was reduced from "not fewer than fifteen Members" to "not fewer than ten Members." *Id.*

*B. The Library Is Created After the Incorporation of PCI*

The Library is a New York education corporation chartered by the New York Board of Regents. Compl. ¶¶ 54, 93. It is subject to both the N-PLC and the New York Education Law. *See* N.Y. Educ. L. §216-a. It is a public institution funded by tax dollars from the Town of Harrison and is part of the Westchester Library System. Kelly Aff., ¶ 21. While the Library alleges it applied for a provisional charter from the New York Board of Regents in 1928, Compl. ¶ 93, according to its website, "[t]he Purchase Free Library was established in 1977 as an addition to the Purchase Community House." *Id.* In either case, the Library was indisputably created after

PCI was incorporated. As a public institution, funded by tax dollars, it is open to residents and non-residents alike, and does not screen its visitors; anyone who appears to be using the Library's services may remain in or near the Library. *Id.* ¶ 21. As discussed below, it is the Library's status as a public space that is the sole reason it presents an unacceptable security risk to the Community House and can no longer remain a tenant of the Community House.

*C. PCI Leases Space at the Purchase Community House to Various Third Parties, Including the Library*

As owner and operator of the Community House, PCI is able to lease some of its space from time to time. PCI's by-laws specifically grant the PCI Board with the exclusive "power to fix and collect rent for use" of the Community House. Kelly Aff. ¶ 22, Ex. 5. Pursuant to this power, PCI has elected to lease space to various organizations engaged in a wide variety of activities, including the Library. Kelly Aff. ¶¶ 22-24. Each such separate organization leased space pursuant to a written lease agreement establishing an ordinary landlord-tenant relationship, terminating at the end of the lease with no right of renewal. *Id.* Specifically, each year, PCI's board of directors, upon the recommendation of its Director and evaluation of all of the facts and circumstances, makes a decision as to which lease agreements to offer, at what rates, and for what period. *Id.* ¶ 22.

While the Library has leased space in the Community House for many years pursuant to a series of one-year lease agreements, PCI and the Library have always maintained a separate arms-length relationship. Compl. ¶¶ 93, 96-97; Kelly Aff. ¶¶ 25, 27, 29-31. As the Library's own website explains: "The Purchase Free Library was established in 1977 as an addition to the Purchase Community House. In 1979 we moved to a slightly bigger space and occupied the

old Post Office.” Kelly Aff. ¶¶ 21, 25-26; *see also* Compl. ¶ 94. This “slightly bigger space,” consists of “one large room, one small office and a bathroom.” Kelly Aff., ¶ 26, Exs. 8-10.<sup>5</sup>

For at least the past decade, PCI offered the Library the same form one-year lease agreement that it offered to other tenants of the Community House. Kelly Aff. ¶ 27.<sup>6</sup> The leases did not provide for any right of renewal. *Id.* ¶ 28. Instead, the leases provided that: “At the end of the Term, the Tenant shall surrender and deliver up the Premises in the same condition (subject to any additions, alternations or improvements, if any), as presently exists, reasonable wear and tear excluded.” *Id.* ¶ 28, Exs. 8-10 (“Termination Provision”). Accordingly, each year the PCI Board would meet and vote as to whether to offer the Library a new lease for the following year and the amount of rent to be charged. Kelly Aff. ¶ 29. If the PCI Board approved a new lease, PCI’s Director, James Kelly, would offer the new lease to the Library. *Id.* At no time, did the Library ever discuss whether the lease would be renewed. *Id.* Nor did the Library ever request a longer term lease. *Id.*

At all times the Library retained the right to leave the Community House and find an alternative location, and PCI remained free to refuse to enter into a new lease and ask that the

---

<sup>5</sup> Prior to the Post Office, this space, which Plaintiffs allude to as the original location of the library when the Community House was created, (Compl. ¶ 90), was in fact an infirmary used by the nurse that used to live in the House, which also had books for patients and others to read. Kelly Aff., ¶26. The changing nature of the tenants of the Purchase Free House, further prove that the Library was always just a tenant of the Community House.

<sup>6</sup> For example, in 2012, PCI’s board of directors approved entry into 3 such lease agreements for 2013. Kelly Aff. ¶ 24. First, PCI entered into a lease agreement with the Purchase Children’s Center for a term of one year to provide pre-school programs for two through five year olds. *Id.* Second, PCI entered into a lease agreement with NIFESA, Inc. for a term of one year to provide dance programs for pre-school and elementary school age children. *Id.* Third, PCI entered into a one year lease with the Library. Kelly Aff. ¶ 27, Exs. 8-10. As more fully set forth in Mr. Kelly’s affidavit each of these lease agreements consisted of the same form agreement. *Id.* ¶¶ 23-25, 27-28. None of them contained an express or implied right of renewal. *Id.* ¶ 24. Instead, each year the board evaluated each lease agreement and made a decision whether to offer a new lease. *Id.*

Library vacate the premises. Kelly Aff. ¶ 30. The Library is charged rent and assumes obligations like any other tenant, including the obligation to vacate the premises upon expiration of the lease agreement. Kelly Aff. ¶ 31. Until this past year, both parties have found it to be in their mutual interest to enter into such a lease agreement. Kelly Aff. ¶ 32.

The Library's most recent lease expired on December 31, 2013. Kelly Aff. ¶ 33. In July 2012, Mr. Kelly recommended, and the PCI Board voted to approve, offering the Library a new one-year lease. Kelly Aff., ¶ 34, Ex. 10. On or about September 18, 2012, the Library and PCI entered into a lease agreement for the term of one year (the "Lease"). Kelly Aff., ¶ 35, Ex.10 ("The term of the Lease (the "Term") shall be for 1 year commencing January 1, 2013 and ending December 31, 2013."). The Lease did not contain any right of renewal and instead contained the aforementioned Termination Provision. Kelly Aff., ¶ 36, Ex. 10. Finally, the Lease called for the Library to pay annual rent in the amount of \$21,600. Kelly Aff., ¶ 37, Ex. 10.

Due to safety concerns fully explained below, PCI decided that the Library likely could no longer remain a tenant of the Community House; therefore, PCI did not offer the Library a new lease for 2014. Kelly Aff. ¶ 50. PCI, however, agreed in good faith to allow the Library to remain at the Community House as a month-to-month tenant while the PCI Board decided whether to terminate the Library's tenancy. *Id.* ¶ 51.

*D. The Library's Status as a Public Space Becomes a Security Problem for the Community House*

As a private facility that undertakes to safeguard the welfare of its members' children, PCI can ask any person to leave its premises if they do not have legitimate business at the Community House, and PCI can ask the police to remove them if needed. Kelly Aff. ¶ 38. The Library, by contrast, is a public institution funded by tax dollars from the Town of Harrison. *Id.* ¶ 39. It is part of the Westchester Library System and is open to residents and nonresidents

alike. *Id.* The Library does not screen its visitors, and anyone who appears to be using the Library's services may remain in or near the building. *Id.*

In 2013, the Library's status as a public institution became an unacceptable security risk to the safety and security of the children attending PCI activities. Kelly Aff. ¶40. Specifically, on several occasions, adult individuals who had no business on the premises were found loitering around the Community House. As more fully set-forth in the affidavit of Mr. Kelly and the police reports attached thereto, these individuals alarmed both PCI and Library staff, such that they sought assistance from the Harrison Police to remove the individuals. Kelly Aff. ¶¶ 41-48. In each instance, however, the individuals claimed to be visiting the Library which, as a public institution, could not make the individuals leave. *Id.* Thus, despite PCI's concerns, the police were unable to force these adults to leave the facility. *Id.*

*E. PCI Investigates the Security Threat, Evaluates Its Options and Decides Not to Offer the Library a New Lease*

Following these incidents, Mr. Kelly had several informal discussions with members of the PCI Board concerning both the threat they posed to the children at the Community House and possible solutions. Kelly Aff. ¶ 49. These discussions continued into the fall of 2013; however the PCI Board was not able to find a solution to the security threat posed by the Library's status as a public institution. *Id.* ¶ 50. Accordingly, PCI did not offer the Library a new lease for 2014. *Id.* Instead, the Board agreed that the Library could remain as a month-to-month tenant while the PCI Board made a final decision. *Id.* ¶ 51.

Upon reaching this conclusion, the PCI Board instructed Mr. Kelly to set a meeting with Martha Greenberg, President of the Library, to discuss these security issues. Kelly Aff. ¶ 51. Ms. Greenberg, however, confronted Mr. Kelly several days before the scheduled meeting. *Id.* To Mr. Kelly's dismay, Ms. Greenberg was unaware of the security issues. Nevertheless, Mr. Kelly

explained the security issues, and that the Library's status as a public library appeared to be causing an unacceptable security risk. *Id.* As a result, Mr. Kelly informed Ms. Greenberg of PCI's decision not to offer a new lease and instead proceed on a month-to-month basis. *Id.* Mr. Kelly told Ms. Greenberg the sole basis for that decision was the security threat. *Id.* ¶ 52.<sup>7</sup>

On or about April 23, 2014, the PCI Board hired a third-party security consultant, Strategic Security Concepts, Inc., to investigate the security issue. *Id.* ¶ 55. Its report concluded that the Library presented a security risk and that, given the Community House's emphasis on children, PCI should "where possible ... be a stand-alone function totally separated from public access and the risks associated with a public access library." *Id.* ¶ 55, Ex. 11. The Library also hired its own security consultant, Comprehensive Solutions, LLC, which also found that the security threats were sufficient to warrant certain changes at the Library. *Id.* ¶ 56, Ex. 12.

The PCI Board evaluated this report and had numerous discussions and deliberations over several months. *Id.* ¶ 55. But it became apparent to the PCI Directors that, to ensure the continued safety of its members and their children, the Library could no longer continue to rent space at the Community House. *Id.* ¶ 57.

*F. PCI Announces the Security Threat to Its Members, the Possibility of Terminating the Library's Tenancy and Notices Its Annual Meeting*

On April 22 and again on May 5, 2014, before the PCI Board made a final decision, it sent open letters to the PCI members informing them of the security issues with the Library, and the very real possibility that the Library would have to find a new home. Kelly Aff. ¶¶ 58-59, Ex.

---

<sup>7</sup> Plaintiffs' allegation that Mr. Kelly indicated there were other "real reasons" PCI wanted to terminate the Library's tenancy is false. Compl. ¶ 100. Mr. Kelly acknowledged that there was work planned for the exterior of the Community House, but that it was completely unrelated to whether or not the Library remained as a tenant. Kelly Aff. ¶ 52.



13, 19. On May 23, 2014, PCI mailed 1,195 notices to its members, notifying them of the annual meeting to be held on June 4, 2014. *Id.* ¶ 59, Ex. 60.

*G. PCI Holds Its Annual Meeting Without Objection and Reelects the Same Directors*

The PCI annual meeting of members was held on June 4, 2014 (the “2014 Meeting”). Kelly Aff. ¶ 61. The notice, approximate date and time, place, procedures and results of the 2014 Meeting were the same as in 2013. *Id.* Indeed, the 2014 Meeting was conducted in much the same manner as it had been for decades prior. *Id.* In all of those years, there was never an objection from any members concerning the procedures used. *Id.* The 2014 meeting was no different. No objection concerning the procedures used was made at the meeting, including by Plaintiff Martha Greenberg who was in attendance and voted to reelect the PCI Directors. *Id.* Moreover, despite the Board’s open letter concerning the possibility of removing the Library a month earlier, PCI still had issues getting a sufficient number of members to attend. Specifically, only 18 members attended the 2014 Meeting, 11 director members and 7 other members. *Id.* ¶ 62. Nevertheless, it did establish a quorum pursuant to PCI’s by-laws. *Id.* The members present at the meeting voted 17 to 1 to reelect the 2013 PCI Directors to the 2014 Board (the “2014 Election”). *Id.*

*H. PCI Votes to Terminate the Library’s Tenancy and Commences Eviction Proceedings*

Shortly after the meeting, the reelected PCI Board met and continued its deliberations and investigation of the security issues raised by the Library. Kelly Aff. ¶ 63. Based on numerous considerations, including the security assessments, the Library’s own admission that the security issues required changes, and the advice of counsel, the PCI Board decided it could no longer continue to rent space to the Library. *Id.* On July 17, 2014, the PCI Directors voted (11 to 1) to evict the Library. *Id.* ¶ 64.

On July 29, 2014, PCI served a notice of termination on the Library to vacate the premises by August 31, 2014. *Id.* ¶ 65, Ex. 15. The Library refused to vacate, and as a result, on September 2, 2014, Defendant PCI filed an eviction action in Harrison Town Court entitled *The Purchase Community, Inc. v. Purchase Free Library Harrison Town Court*, Case No. 1409-0233 (the “PCI Town Court Action”). *Id.*, Ex. 16. Pursuant to a stipulation of the parties, the return date of the PCI Town Court Action has been adjourned to November 13, 2014 and the Library’s time to respond to that action has been extended until November 6, 2014. *Id.*, Ex. 17.

*I. Plaintiffs’ Commence this Action*

On September 3, 2014, Plaintiffs filed the instant Complaint alleging eight causes of action: (i) Invalid June 4, 2014 Election of PCI Directors Defendants; (ii) Invalid Quorum Provision of PCI By-Laws; (iii) Violation of Requirements to Maintain Proper Records of Voting Members; (iv) Violation of the Duty of Obedience to the Charitable Mission of the Corporation and the Intent and Wishes of the Donors of the Purchase Community House; (v) Violation of the Duty of Obedience to Comply with All Applicable State Laws Including with Respect to Corporate Governance; (vi) Purchase Library’s Claim for Breach of the Contract Against PCI; (vii) Purchase Library’s Claim for Breach of Contract Against PCI as Intended Third-Party Beneficiary of Contract; and (viii) Purchase Library’s Claim for Declaratory Relief Barring Any PCI Eviction of the Purchase Library. Compl. ¶¶ 148-198.

Plaintiffs also filed a request for judicial intervention and requested that the Court schedule a prompt conference in anticipation of plaintiffs filing a motion for, among other things, a stay of the PCI Town Court Action and other relief. The Court has scheduled an initial conference for October 28, 2014 at 9:30 am. Pursuant to a stipulation of the parties, Defendants’ time to respond to the verified Complaint in this action is extended until October 16, 2014. Kelly Aff., Ex. 17.

*J. Plaintiffs Demand a Special Meeting for Improper Purposes*

On September 2, 2014, Plaintiffs and a number of other members submitted a demand upon the PCI Board to call a special meeting of the PCI members for the following purposes:

1. reverse, repeal, rescind, suspend and/or repudiate any and all steps taken by The Purchase Community, Inc. and The Purchase Community, Inc.'s purported Board of Directors and officers, to evict the Purchase Free Library from the Purchase Community House and to end the provision of library services at the Purchase Community House (which services have been provided for 88 years and have been an integral part of the Purchase Community House since its founding), and adopt or implement any and all measures including, but not limited to, amending the by-laws and/or the certificate of incorporation of The Purchase Community, Inc., that may be necessary or proper to ensure the continued provision of library services at the Purchase Community House;
2. amend the by-laws and/or the certificate of incorporation of The Purchase Community, Inc. to change the number of directors and/or to permit the removal, the replacement and/or election of directors at any meeting of the members, including the special meeting specified in this demand;
3. remove or replace directors and/or elect directors of The Purchase Community, Inc.; and
4. transact such other business as may come before the meeting.

Compl. ¶ 131; Kelly Aff., Ex. 18. The meeting was adjourned by stipulation of the parties until November 12, 2014. Kelly Aff., Ex. 17. Pursuant to that stipulation Defendants agreed that the request for the special meeting was valid in that Defendants agreed that Plaintiffs would not have to obtain new signatures or issue a second demand for the meeting. Defendants reserved the right to challenge the purposes for which the meeting had been called.

Defendants respectfully request the Court adjourn this meeting while it considers the issues raised herein.

## ARGUMENT

### **I. PLAINTIFFS CANNOT ESTABLISH A LEGAL OR EQUITABLE BASIS TO DISTURB THE GOOD FAITH BUSINESS DECISION OF THE PCI BOARD TO EVICT THE LIBRARY**

It is axiomatic that “a corporation shall be managed by its board of directors,” and that the board’s decision shall not be questioned, absent evidence of bad faith, fraud or other wrongdoing. N-PCL § 701; Kelly Aff., Ex. 5 (PCI by-laws: “The affairs of the Corporation shall be managed by its Board of Directors”); *Consumers Union of U.S., Inc. v. New York*, 5 N.Y.3d 327, 360 (2005) (under business judgment rule, if actions of corporate directors of not-for-profits are taken in good faith and “in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes,” judicial inquiry into those actions is barred). Consistent with this rule, all rental decisions of corporate real property are to be made by the board of directors. See N-PCL § 509; Kelly Aff. ¶ 22, Ex. 5. To allow a subset of members to otherwise usurp the power of the board, would be “impractical and would wreak havoc with any third party attempting to do business with [the corporation].” *Simoni v. Civil Serv. Employees Ass’n, Inc.*, 507 N.Y.S.2d 371, 376-377 (Sup. Ct. Albany Cnty. 1986). Yet, Plaintiffs seek to do just that.<sup>8</sup>

Plaintiffs’ Complaint, which does not allege bad faith, fails to establish a right to the extraordinary remedy of reversing the PCI Board’s decision to terminate the Library’s tenancy. For this reason and those set-forth herein, Plaintiffs’ First, Second, Third, Fourth, Fifth, Seventh

---

<sup>8</sup> Plaintiff Library is not a member of PCI and therefore has no standing to challenge the PCI Board’s decision or the 2014 Election. Accordingly, the Library has no standing to bring the first through fifth causes of action in the Complaint. It is assumed that reference to Plaintiffs with respect to these causes of action refer to the Plaintiffs who are members of PCI. To the extent Plaintiff Library attempts to take a contrary position, it is without merit. See *Cuva v. U.S. Tennis Ass’n. Eastern, Inc.*, 13 Misc. 3d 1221(A), at \*8-9 (Sup. Ct. Westchester Cnty. 2006) (standing denied to nonmembers of corporation because they “cannot be aggrieved by an election in which .... [they] had ... [no] right to participate.” (quoting *Matter of Scheel*, 134 A.D. 442, 443 (1st Dep’t 1909); see also *Matter of Hammond Light & Power Co.*, 131 Misc. 747 (Sup. Ct. St. Lawrence Cnty. 1928))).

and Eighth causes of action addressing the validity of the PCI Board's decision, the 2014 Election, and any alleged breach of the duty of obedience to the Library, fail as a matter of law and equity to state a claim and should be dismissed.

**A. The PCI Board's Decision to Terminate the Library's Tenancy Is Protected By the Business Judgment Rule**

At bottom, the Plaintiff-members brought this action because they disagree with PCI's decision to terminate the Library's tenancy at the Community House. While Plaintiffs are entitled to their opinion, it is hornbook law that the Board is vested with power that is "without limitation and free from restraint" to make decisions concerning the Library's tenancy, and moreover, that the Board's exercise of such power "for the common and general interests of the corporation may not be questioned . . . ." *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979) (quoting *Pollitz v. Wabash R.R. Co.*, 207 N.Y. 113, 124 (1912)) (emphasis added); see also *Higgins v. New York Stock Exch., Inc.*, 10 Misc. 3d 257, 277-278 (Sup. Ct. N.Y. Cnty. 2005) ("In recognition that courts are ill equipped to evaluate the complexities of [directors' business] decisions...adherence to the business judgment rule bars judicial inquiry into the propriety of actions taken by corporate directors made in good faith on behalf of the corporation ... ." (internal quotations omitted)). Notably, this principle governs even if "the results show that what they did was unwise or inexpedient." *Auerbach*, 47 N.Y.2d at 629.

The PCI Board received reports of several security incidents at the Community House that were serious enough to warrant police intervention. Kelly Aff. ¶¶ 40-48, Ex. 11. Upon investigation, it was determined that the police were unable to intervene because of the Library's status as a public institution. *Id.* Prior to the 2014 Meeting, PCI informed its members and the Purchase Library of the security concerns, solicited input as to possible solutions, and warned of the likely need to evict the Library. Kelly Aff. ¶¶ 50-62, Exs. 13, 19. At the 2014 Meeting, the

PCI Board was reelected. Kelly Aff. ¶ 61-62. Finally, after several months of painstaking deliberation, the PCI Board decided the most prudent way to address to protect its members and their children was to terminate the Library's tenancy. Kelly Aff. ¶ 63.

Plaintiffs simply cannot establish that the PCI Directors acted in bad faith. The PCI Board weighed the interests of those that might wish to see the Library stay as against the security threats to PCI's members and PCI's ability to pursue its other legitimate charitable purposes safely. This is precisely the type of difficult decision that the Court of Appeals has made clear courts are not to second guess:

The authority and responsibilities vested in corporate directors both by statute and decisional law proceed on the assumption that inescapably there can be no available objective standard by which the correctness of every corporate decision may be measured, by the courts or otherwise. Even if that were not the case, by definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility. Thus, absent evidence of bad faith or fraud (of which there is none here) the courts must and properly should respect their determinations.

*Auerbach*, 47 N.Y.2d at 630-31. Because Plaintiffs do not allege any bad faith the PCI Board's decision is beyond judicial scrutiny.

In any event, Plaintiffs' allegations fail on the merits. For example, Plaintiffs concede that something must be done to address the security issues. Compl. ¶ 101 (asserting the Library "has already taken steps" to address the concerns and "will cooperate with PCI on appropriate security measures").<sup>9</sup> Moreover, the unsubstantiated claim that the PCI Directors had some ulterior motive is false and does nothing to show the PCI Directors' bad faith. Compl. ¶ 100;

---

<sup>9</sup> Further evidence of Plaintiffs' utter blindness to all other interests is Plaintiffs' tone-deaf claim that situations resulting in police intervention near where kids play is not that serious. Compl. ¶ 99. As fiduciaries, the PCI Directors are obligated to doing everything in their power to ensure the safety of the children entrusted into their care.

Kelly Aff. ¶ 52. At best, Plaintiffs demonstrate that there might be *added* benefits beyond simply addressing the security concerns if the Library was removed from the Community House.

Finally, and equally unavailing is Plaintiffs' painstaking attempt to weave the Library into PCI's corporate mission, such that forcing the Library to leave the Community House would constitute a breach of the duty of obedience. Compl. ¶¶ 79-96. While there is no explicit reference to the duty of obedience in the N-PCL, it has been defined by courts as the board of directors obligation to ensure that the charitable corporation's corporate purposes is carried out. *Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 715 N.Y.S.2d 575, 593 (Sup. Ct. N.Y. Cnty. 1999) (finding sale of assets would breach of duty of obedience where certificate of incorporation specifically referenced services board sought to stop providing). Here, PCI has no core corporate purpose to have a public library, much less the Purchase Free Library.

The Library was not and is not necessary to PCI's corporate mission. None of PCI's founding documents make any reference to a public library, much less a separate entity created after PCI was formed. Compl. ¶¶ 85-87; Kelly Aff. ¶ 5, 8-11, Exs. 1, 2, 3. Moreover, PCI's corporate mission is directed to the community as a whole without any specific definition of what activities PCI must engage in. In other words, even if any one particular activity was viewed as core to PCI's corporate mission, it necessarily would have to be balanced against what is best for the Purchase community as a whole and the other activities PCI is engaged in. Consistent with this broad corporate purpose, PCI's by-laws make no mention of the Library. Kelly, Aff., Ex. 5.<sup>10</sup> This is fatal to Plaintiffs' claims.

---

<sup>10</sup> While PCI's certificate of incorporation references that PCI had eight different committees one of which was a "Library and Educational Committee," there is no mention of a library in any of the sections defining PCI's corporate purpose. Compl. ¶ 91; Kelly Aff. ¶ 10-11, Ex. 1. Moreover, this reference to a library, not even necessarily the Library, as one of the many activities PCI engaged in on behalf of the community, certainly does not prove that the Library was part of

Plaintiffs' attempt to gloss over this fatal flaw by pointing to vague references to a library, notably not even the Purchase Free Library, being part of the Community House's original design plans,<sup>11</sup> at best shows that library services was one of the many features of or activities conducted at the Community House. Kelly Aff. ¶¶ 9, 13, 24. In other words, the presence of a library was permissive not mandatory; like many other tenants that have come and gone from the Community House over the years.

Plaintiffs fare no better by pointing to the course of dealing between the parties. By Plaintiffs' own admission, the Library and PCI's relationship has always been one of landlord and tenant. Compl. ¶¶ 93, 96-97. Each year, PCI's board met and voted on whether to offer the Library a new lease. Kelly Aff. ¶ 29. Equally damning to Plaintiffs' claim is that there is no allegation that the Library ever asked for a longer lease, ever discussed a right of renewal, or why a lease was even necessary. Kelly Aff. ¶¶ 29-30.

The simple fact remains the Library was PCI's tenant. Compl. ¶¶ 93, 96-97. In 2012, the Library agreed to enter into a one-year lease agreement with PCI for a one-year period January 1, 2013 to December 31, 2013, paid \$21,600 in rent pursuant that Lease, never secured any right to renewal as part of that Lease, and contractually agreed to vacate the premises upon

---

PCI's core mission.

<sup>11</sup> For example, Plaintiffs' reference to extrinsic evidence claiming Mr. Read's plans for the Community House included as "one of its features" a "high class library," (Compl. ¶ 89 (citing to a newspaper article)), or that a reading room existed in the Community House (Compl. ¶ 90 (citing a book noting that "[i]n the beginning the library was in the House, and it was simply a small (750 square feet), very loosely organized reading and lending room.")), says nothing about whether the Library, created after PCI's incorporation, is necessary to PCI's corporate mission. More importantly, the original Indenture was canceled in 1957 and the Community House was transferred to PCI without any limitation upon its use. Even so, Plaintiffs' concede that Mr. Read's original plans for the Community House did not mention a public library but "would contain an auditorium, living quarters for a neighborhood nurse and for school teachers, and a gymnasium for men and boys." (Compl. ¶ 82). The original plans also envisioned an infirmary, fire department and police department, none of which are currently housed at the Community House.



expiration of the Lease. Compl. ¶ 98; Kelly Aff. ¶¶ 34-32, Ex. 10. The decision to offer this lease was made and is statutorily reserved exclusively for, the PCI Board. Kelly Aff. ¶¶ 22, 39, 34, Ex. 5 *see also* N-PCL § 509. In granting this power to the Board, PCI by-laws make no mention of the Library: “[t]he Board of Directors shall have the power to fix and collect rent for the use of the [Community House].... “for a meeting house and for other Town purposes, and generally to all other persons, organizations and corporations.” Kelly Aff. ¶ 22, Ex. 5. Had the Library been at the core of PCI’s mission, the by-laws would not have specifically granted the board the exclusive power to decide to whom and at what costs the Community House is rented to third parties.<sup>12</sup>

Finally, even assuming, *arguendo*, the Library is somehow part of PCI’s corporate “mission,” it does not mean that termination of that relationship is inconsistent with or otherwise a breach of the PCI Board’s duty of obedience. There can be no dispute that PCI’s corporate mission includes a wide variety of activities, which are meant to benefit the Purchase community as a whole. Compl. ¶¶ 85-87; Kelly Aff., Ex. 1. There is also no dispute that one of those activities is providing a safe and secure environment to provide a pre-school, after-school programs and summer camps for the children of the Purchase community. Compl. ¶ 102; Kelly Aff. ¶¶ 12-13. And, as discussed, there is no dispute that the Library presented a security risk to the continued safety of these children. Compl. ¶¶ 99-102; Kelly Aff. ¶¶ 40-48, Ex. 11. Presented with this threat to PCI’s ability to pursue its corporate mission the PCI Board complied with its duty of obedience to ensure this threat was addressed. While Plaintiffs may have a difference of opinion as to the best course of action to address this threat, it is precisely the type of difficult decision that the

---

<sup>12</sup> What Plaintiff is essentially arguing is that the Purchase Free Library’s “identity” is very much tied to the Community house. (Compl. ¶ 80). This is irrelevant, however, to the dispositive question of whether the PCI’s core corporate mission is tied to the presence of the Library at the Community House, it is not.

Court of Appeals has made clear courts are not to second guess. *See Auerbach*, 47 N.Y.2d at 630-31.

### **B. The PCI Directors Were Validly Elected**

Unable to challenge the good faith business judgment of the PCI Directors, Plaintiffs' resort to arguing technical infirmities with the 2014 Election as a basis to invalidate the 2014 Election and achieve an end-run around the Business Judgment Rule. This fails as a matter of law and equity for the following reasons.

First, Plaintiffs have waived their right to challenge the results of the 2014 Election. A proceeding challenging the election of directors of a not-for-profit corporation must be brought promptly and only pursuant to N-PCL § 618 by a member of the corporation upon notice to all interested parties. *In re Schroeder*, 70 A.D.3d 583, 584 (1st Dep't 2010); *Esformes v. Brinn*, 52 A.D.3d 459, 462 (2d Dep't 2008) (holding a "special proceeding [pursuant to N-PCL § 618] is the exclusive method available to [members] to test the validity of an election of a director") (internal quotations omitted). Failure to bring such a challenge promptly results in waiver, and all members are deemed to have acquiesced to the validity of the meeting and election. *See In re Election of Directors of Rapid Transit Ferry Co.*, 19 Misc. 409, 409-10 (Sup. Ct. Kings Cnty. 1897) (holding that objection to election must be made "with reasonable promptness" or is deemed to have been acquiesced to); *see also In re Election of the Officers and Directors of F.I.G.H.T., Inc.*, 79 Misc. 2d 655, 659 (Sup. Ct. Monroe Cnty. 1974) (holding failure to challenge ineligibility for election resulting from passage of amendments to certificate of incorporation prior to election of directors constitutes waiver). Courts require prompt notification and petition to redress alleged wrongs to ensure finality and avoid inequitable results. *F.I.G.H.T., Inc.*, 79 Misc. 2d at 659 (holding "it would be inequitable to permit [plaintiffs] to assert the claim [challenging eligibility requirements for election] and aid the petitioners after such lapse of time and set aside the election"). Courts

have long recognized that businesses are being “conducted by officers and directors little informed in the law of corporations, who often act informally, sometimes without meetings or even by-laws. To hold that in all instances technical conformity to the requirements of the law of corporations is a condition to a valid action by the directors, would be to lay down a rule of law which could be used as a trap.” *Gerard v. Empire Square Realty Co.*, 195 A.D. 244, 249 (2d Dep’t 1921). Accordingly, the overriding policies of finality and recognition that a requirement of complete “technical conformity” could result in injustice if they are not raised promptly support dismissal of such claims, particularly where, as here, there is no allegation of bad faith, fraud or other wrongdoing.

Here, Plaintiffs waited too long to challenge the PCI Board election. Had Plaintiffs wished to challenge the technical aspects of the 2014 Election, they were obligated to bring any such challenge promptly in a special proceeding pursuant to N-PCL section 618. *See* N-PCL § 618. They did not. Instead, Plaintiffs’ pretextual technical challenges were prompted by the PCI Board’s decision to evict the Library, which was made over a month after the 2014 Election—an election at least one Plaintiff attended. *Kelly Aff.* ¶¶ 61-62, 64. Moreover, there is no allegation that the conduct of the 2014 Election differed in any way from how it had been conducted for decades prior. In other words, Plaintiffs, having sat on their rights, now seek to usurp the board’s power to conduct the business of the corporation based on stale technical grounds.

Second, even if Plaintiffs had not waived their objections, the court may equitably reject their technical arguments. When asked to evaluate the validity of an election, N-PCL section 618 grants this Court broad discretion to “confirm the election, order a new election, or take such other action as justice may require.” N-PCL § 618. The law is well settled that in reviewing an election pursuant to N-PCL §618, the “court sits as a court of equity, and should not interfere in

the internal affairs of a corporation .... unless a clear showing is made to warrant such action.” *F.I.G.H.T., Inc.*, 79 Misc. 2d at 659; *Nyitray v. New York Athletic Club, Inc.*, 195 A.D.2d 291 (1st Dep’t 1993) (same); *Cuva v. U.S. Tennis Ass’n. Eastern, Inc.*, 13 Misc. 3d 1221(A), at \*7-8 (Sup. Ct. Westchester Cnty. 2006) (same); *see also Davidson v. James*, 172 A.D.2d 323, 324 (1st Dep’t 1991) (refusing to interfere with “internal affairs of [not-for-profit corporation]...where there is no indication [election]...was tainted by fraud or other wrongdoing”) (citations omitted).

“This follows the view that the conduct of private corporate affairs should be interfered with as little as possible.” *Cuva*, 13 Misc. 3d 1221(A), at \*7. Thus, courts hold that “election procedures for not-for-profit corporations are not to be disturbed absent a showing that an election was tainted by fraud or wrongdoing.” *Parisi v. New York Cnty. Medical Socy.*, 177 A.D.2d 369, 370 (1st Dep’t 1991). Accordingly, courts will affirm an election that was tainted by minor procedural flaws, if it was conducted in good faith and devoid of any evidence of fraud or wrongdoing. *See, e.g., Smith v. Ellerbe*, 141 Misc. 2d 699, 702 (Sup. Ct. Queens Cnty. 1988) (holding “irrelevant” whether election was technically conducted in accordance with applicable laws because “Court possesses the equitable power to take whatever action is necessary under the circumstances.”); *F.I.G.H.T., Inc.*, 79 Misc. 2d at 660-61 (upholding election in part because “confusion and irregularity dose not add up to fraud, illegality or wrongdoing”).

Here, equity dictates that Plaintiffs should not be permitted to achieve what they otherwise would not be allowed to—*i.e.* reverse the good faith decision of the PCI Board—based on mere election technicalities that followed good faith efforts to notice over 1,000 members, and unsupported by any allegations that they were caused by bad faith, fraud or other wrongdoing. Accordingly, the Court should exercise its equitable powers under the N-PCL and affirm the 2014 Election.

Third, none of the technical defects raised by Plaintiffs rise to the level of fraud or wrongdoing sufficient to justify interfering with the 2014 Election. Indeed, Plaintiffs' allegations are devoid of any attempt to argue how these alleged defects impacted the results of the 2014 Election, an election that at least one of the Plaintiffs attended without objection. Instead, this Court should reject each of Plaintiffs arguments for what they are: fabricated excuses to do what they otherwise have no right to do.

For example, Plaintiffs claim that the 2014 Election was invalid because it lacked a proper quorum. Compl. ¶¶ 148-149. Notably, Plaintiffs are not alleging that the 2014 Election failed to meet the quorum requirements under PCI's by-laws, which had been in effect for decades. Kelly Aff. ¶ 62. Instead, Plaintiffs claim the 2014 Election should be invalidated because PCI's by-laws were not in compliance with the statutory quorum requirements under N-PCL § 608. Compl. ¶¶ 148-149. Today, PCI's by-laws require ten members to constitute a quorum. Kelly Aff. Ex. 5. As set forth in Mr. Kelly's affidavit, however, PCI had experienced such difficulty in obtaining a quorum for several years, even under the lowered requirements of its by-laws, that in 2013, it approved reductions in its member quorum requirements. Kelly Aff. ¶¶ 15-20; Exs. 5, 7. This reduction was a recognition of the reality that obtaining additional members at an annual meeting was not achievable despite sending notices to as many as 1,600 member residences. Kelly Aff. ¶¶ 19-20. There is no allegation PCI operated under anything other than a good faith belief its by-laws complied with the law. The fact that no one during PCI's long history ever raised any objection provides sufficient grounds for this Court to reject Plaintiffs' objections, affirm the 2014 Election, and judicially authorize the ten member quorum limit set forth in the current by-laws. It would be inequitable to nullify the PCI By-laws' quorum requirements, honored by successive

boards for decades, where it cannot be disputed that but for Plaintiffs' disagreement with the PCI Directors' decision, they would not have objected to the 2014 Election.

Indeed, in addition to granting this Court broad discretion to prevent injustice, the N-PCL also permits exempting an organization from the N-PCL quorum requirements in just this situation. *See* N-PCL 608. For example, when enacting the amendments to the N-PCL to provide for the current 100 member or 10% of members quorum requirement, the legislature recognized that organizations formed before adoption of the N-PCL in 1970 may have quorum requirements that differ from the mandate of N-PCL § 608(b), because of procrastination in updating by-laws or through ignorance. Section 608(c) of the N-PCL, therefore, allows such an organization to amend their certificate or by-laws at a special meeting at which the old, now statutorily impermissible quorum requirements of their old by-laws may be used.

In addition, N-PCL § 608(e) also allows an organization to petition this Court “to dispense with the quorum requirement set by certificate, the by-laws, or by statute,” if it finds for any reason, it is impractical or impossible to obtain a quorum in order to conduct a meeting of its members in the manner prescribed in its certificate, by-laws or by the N-PCL. N-PCL § 608(e) (“petition shall set forth the reasonable efforts the corporation has made to obtain a quorum, including the manner in which the corporation provided notice to its members of prior meetings”). Given the long history of PCI operating under these by-laws, the lack of objection, and the difficulty PCI has had obtaining a greater quorum, this Court should exercise its equitable powers to confirm the 2014 Election pursuant to section 618.

Plaintiffs' additional alleged technical defects concerning the failure to abide by Roberts' Rules (Compl. ¶ 150) and the failure to maintain member voting records (Compl. ¶ 151)—neither of which allege how such procedures were violated and/or how this failure affected

the 2014 Election—are precisely the type of technical arguments, that standing alone, are insufficient to justify the courts intervention. *Cuva*, 13 Misc. 3d 1221(A), at \*9 (holding alleged violation of by-laws for failure to maintain membership records “has no relevance” in action challenging validity of election). Likewise, Plaintiffs’ notice claim, based on certain members’ allegation they did not receive actual notice of the meeting, is insufficient. Compl. ¶ 152. PCI’s annual meeting occurred at the same time and same place for decades, and PCI followed the same procedures it had for decades in circulating notice of the meeting by mail to 1,195 member residences. Kelly Aff. ¶¶ 60-61, Ex. 14. Accordingly, lack of notice played no role whatsoever in the low voter turnout.

Finally, even if this Court were to invalidate the 2014 Election, it does not follow that the PCI Directors’ decision to terminate the Library’s tenancy was invalid. It is well-settled that when an election is deemed invalid, the “holdover” or prior elected board is deemed the valid board of directors. *Rapid Transit Ferry Co.*, 19 Misc. at 409-10 (holding that upon order to set aside election that of the prior year is controlling and those elected are the valid directors of the corporation). The mere fact that a corporation has a holdover board will not cause the dissolution of the corporation or have any effect on otherwise valid corporate actions. *See, e.g., Machne Menachem, Inc. v. Hershkop*, 237 F. Supp. 2d 227 (E.D.N.Y. 2002) (holding original directors named in certificate of incorporation were still directors in part because of the failure to properly elect new directors); Del. Code Ann. Tit. 8, §211(c) (“A failure to hold the annual meeting at the designated time or to elect a sufficient number of directors to conduct the business of the corporation shall not affect otherwise valid corporate acts or work a forfeiture or dissolution of the corporation except as may be otherwise specifically provided in this chapter”); N-PCL § 703 (providing directors hold office “until his successor has been elected or appointed and qualified”).

In this case, the PCI Directors were the same in 2013 and 2014, and Plaintiffs have certainly waived their objection to the procedures used at the 2013 election. Kelly Aff. ¶ 62. Accordingly, even assuming this Court were to invalidate the 2014 Election, it would still mean the 2013 Board were the valid directors in 2014 and permitted to validly act on behalf of PCI. Thus, regardless of whether the 2014 Election is invalidated it has no effect on the PCI Directors' decision to evict the Library.

**II. THE LIBRARY'S BREACH OF CONTRACT CLAIM AGAINST PCI FAILS TO STATE A CAUSE OF ACTION AND SHOULD BE DISMISSED AS A MATTER OF LAW**

Plaintiffs' remaining cause of action for breach of an implied right to renew or continue or extend its lease agreement fails to state a claim. As an initial matter, Plaintiffs seeks an end-run around the Eviction Action by bringing this claim. As discussed, the Library, as a third-party non-member of PCI has no standing to challenge PCI's corporate governance decisions. Accordingly, the validity of the Library's defenses to eviction are properly before the housing court and should be resolved by that court.

As discussed above and more fully set forth in PCI's petition in the Eviction Action, the Library's most recent lease expired on December 31, 2013. Kelly Aff., Ex. 16. The Lease provides in explicit unambiguous terms: "At the end of the Term, the Tenant shall surrender and deliver up the Premises in the same condition (subject to any additions, alternations or improvements, if any), as presently exists, reasonable wear and tear excluded." Kelly Aff., Ex. 10. The Term of this Lease indisputably expired as of December 31, 2013. At that time, the Library became a month-to-month tenant terminable at the sole discretion of the PCI Board, while PCI evaluated its options regarding the security threats. Kelly Aff. ¶¶ 50-51.

Having entered into a lease for the term of one year, containing explicit provisions for what was to occur upon termination of the lease, the Library cannot now claim that some



implied right to renew the lease existed. The Library's repeated decision to enter into such leases demonstrates that the parties intended to enter into a year-long lease without any guarantee of a renewal. Had the parties had any prior "implied agreement" to automatically renew the lease, it was terminated when they executed this lease, which contractually obligated the Library to vacate the premises upon its expiration. Kelly Aff. ¶¶ 27-37, Exs. 8-10.

### **III. THE SPECIAL MEETING OF MEMBERS DEMANDED BY PLAINTIFFS MUST BE ENJOINED**

In addition to dismissing the Complaint, Defendants move this court for a preliminary injunction enjoining Plaintiffs' demand for a special meeting of members, which is currently set to occur on November 12, 2014, until this Court has had an opportunity to rule on the propriety of any such meeting. Comp. ¶ 131; Kelly Aff. ¶¶ 68-69, Ex. 18.

A preliminary injunction is appropriate where movants show (i) a likelihood of success on the merits; (ii) danger of irreparable injury in the absence of an injunction, and (iii) that the balance of equities lies in their favor. *Aetna v. Capasso*, 75 N.Y.2d 860, 862 (1990). Movants need only make a prima facie showing that they are likely to succeed on the merits. *McLaughlin, Piven, Vogel Inc. v. W.J. Nolan & Co. Inc.*, 114 A.D.2d 165, 172-73 (2d Dep't 1986). For the same reasons that Plaintiffs' Complaint must be dismissed, as well as the further reasons set forth below, Defendants have met this burden.

To be clear, Defendants are not seeking to permanently enjoin a special meeting of its members. Defendants simply ask that this Court defer the meeting until such time as it can rule on the propriety of the purposes for which any such meeting may be called. Absent injunctive relief, Plaintiffs will be able to usurp the power of the PCI Board, supplant the interests of the Library over that of PCI's members, and alter the corporate purpose of PCI, none of which is permitted by law or equity. To allow such usurpation would cause irreparable harm to PCI and its

members. In contrast, Plaintiffs will suffer no harm by any delay occasioned by this Court's review and supervision of any special meeting.

**A. The Purposes for Which Plaintiffs Have Called a Special Meeting Violate PCI's By-laws, Certificate of Incorporation, and New York Not-For-Profit Law**

As an initial matter Plaintiffs' demand for a special meeting is inappropriate in light of the pending Court action brought by Plaintiffs, which could potentially invalidate any action taken at the meeting or render any such decision moot. Therefore, the special meeting should be postponed until the Court rules on the issues presented by the Complaint.

Even if the matters presented in the demand were not the subject of pending Court action, the following stated purposes of Plaintiffs' demand for a special meeting are in violation of PCI's by-laws, certificate of incorporation, and/or New York not-for-profit law.

*Action to Reverse, Repeal, Rescind, Suspend and/or Repudiate Prior Board Action:*

The Plaintiffs propose that the members "reverse, repeal, rescind, suspend and/or repudiate" prior board action. Kelly Aff., Ex. 18. As discussed, where, as here, the management of a corporation has been clearly and unequivocally placed in its board, the proposition that other parties may overturn any board decision on an individual basis has been found to be "impractical and would wreak havoc with any third party attempting to do business with [the corporation]" *Simoni*, 507 N.Y.S.2d at 376-377. Any attempt by the Plaintiffs to place general management responsibility in the members without so specifying in the certificate of incorporation also would be a violation of N-PCL Section 701. See *Simoni*, 507 N.Y.S.2d at 377 (citing *Joseph Polchinski Co. v. Cemetery Floral Co.*, 79 A.D.2d 648, 649 (2d Dep't 1980); *Weiss v. Opportunities for Cortland Cnty.*, 40 A.D.2d 45, 47 (3d Dep't 1972)). Therefore, the special meeting should be enjoined as an improper attempt by the members to usurp board authority.

In addition, the specific subject matter of the board action proposed for reversal – “all steps taken ... to evict the Library from the Purchase Community House” – is particularly inappropriate for member action because the decision to lease real property of the corporation is specifically reserved for the PCI Board pursuant its by-laws and statute. *See* N-PCL §509; Kelly Aff., Ex. 5. Therefore, the special meeting should be enjoined as an improper attempt to take action regarding the leasing of the real property of the corporation without the statutorily required board action.

*Action to Amend the by-laws and/or the Certificate of Incorporation of PCI:*

Another stated purpose of the Plaintiffs’ demand for a special meeting of members is to “adopt or implement any and all measures including, but not limited to, amending the by-laws and/or the certificate of incorporation of [PCI] ... to ensure the continued provision of library services at the Purchase Community House.” It is unclear from the demand the exact nature of the changes the Plaintiffs are proposing to each document. Absent further details, the proposed action(s) cannot be properly noticed to the members so that they may consider the specific actions being proposed. The PCI by-laws require that notice to the members of proposed by-law changes contain “the text of the proposed new by-laws, or the proposed amendment to the by-laws or shall explain the nature and content of the proposed by-laws or amendment, and state that the complete text will be posted on the bulletin board of the Purchase Community House for at least ten days immediately preceding such meeting.” Kelly Aff., Ex. 5, Art. 11, Sect. 1. The Plaintiffs have provided no such details in their demand for the special meeting; therefore, the special meeting should be postponed due to the lack of specificity contained in the demand with regard to proposed amendments to PCI’s by-laws and certificate of incorporation.

If, as it appears from the demand, the Plaintiffs are proposing that the members amend the purposes contained in PCI's certificate of incorporation, such a change of purpose would require the approval of either the Attorney General or the Supreme Court pursuant to N-PCL Section 804(a). In addition, under N-PCL § 804(b), a change of purpose may also require notice to or consent of other state agencies, depending on the nature of the purpose being added or amended. Of particular relevance, a certificate of incorporation that includes among its purposes the operation of a library requires the approval of the State Commissioner of Education, and a certificate of incorporation that includes other purposes for which a corporation may be chartered by the Regents of the University of the State of New York—which purposes include (under Education Law Section 216(d)), the promotion of science, literature, art, history or other department of knowledge or education—requires notice to the Commissioner of Education (N-PCL § 404(d)).

Based on the information contained in the Plaintiffs' demand for a special meeting, it seems likely that a change of purpose is intended, and that such change of purpose would require both (i) the approval of Attorney General or the Supreme Court, and (ii) the approval of or notice to the Commissioner of Education. After approval of any such change of purpose by the members, the amendment would not become effective until the required agency approvals have been obtained and a certificate of amendment has been accepted for filing by the New York department of state. N-PCL § 804. Therefore, any contemplated action proposed to be taken under an amended certificate of incorporation cannot be considered at the same meeting as the proposed amendment, but could only be considered at a meeting called and convened after such amended certificate of incorporation has taken effect.

If Plaintiffs are proposing to amend the by-laws in any way that would alter the purposes of PCI in order to “to ensure the continued provision of library services at the Purchase Community House,” without first amending PCI’s certificate of incorporation, such a change would be inconsistent with the certificate of incorporation and therefore prohibited as pursuant to N-PCL Section 602(f). Amending the by-laws for such purpose could also be interpreted as both an attempt to circumvent the New York State agency approvals required to amend the certificate of incorporation and an attempt to circumvent the board approval required for leasing transactions under NPCL Section 509. Therefore, such by-law amendment would be an inappropriate subject for member action.

Action to Remove or Replace and/or Elect Directors: The Plaintiffs’ demand proposes that the members “remove or replace and/or elect directors” of PCI at the special meeting. Kelly Aff., Ex. 18. Pursuant to N-PCL Section 706, directors may not be removed by the members without cause unless the certificate of incorporation or the by-laws so provide. Neither PCI’s certificate of incorporation nor PCI’s by-laws give the members a right to remove the directors without cause; therefore, the PCI members must have cause to remove and replace the PCI Directors. Kelly Aff., Ex. 1, 5. No such “cause” was set forth in the Plaintiff’s demand for a special meeting; therefore, the members cannot be properly noticed as to the proposed reason for the removal of directors. In addition, the members do not have a right to elect directors other than at the annual meeting as provided in Article 4, Section 2 of the PCI by-laws. Kelly Aff., Ex. 5. To the extent that there are any vacancies among the directors, for any reason, such vacancies would be filled by the directors, not the members, under both the PCI by-laws (Art. 4, Sect. 8) and N-PCL Section 705. Kelly Aff., Ex. 5. In addition to the need to provide notice of the cause for removal of directors to the members, a director whose removal is sought has a common-law right

to have notice and an opportunity to defend against any cause asserted. *See Ellis v. Broder*, 812 N.Y.S.2d 851, 853 (Sup. Ct. N.Y. Cnty. 2006) (holding removal of director invalid in part because no notice was given, noting dismissal of director “accomplished without notice of any kind or the right of confrontation, is offensive and contrary to our fundamental process of democratic and legal procedure, fair play and the spirit of the law” (citations omitted))

Therefore, the removal or election of directors is an inappropriate subject for the special meeting.

**B. PCI and Its Members Will Suffer Irreparable Injury if a Special Meeting Is Convened Prior to this Court’s Ruling on the Propriety of Any Such Meeting**

There can be no serious dispute that the special meeting currently proposed for November 12, would cause irreparable harm to PCI. As set forth herein, PCI has established its legitimate concerns that the Library’s presence within the Community House presents an unacceptable security risk to PCI’s members and their children. Moreover, PCI has established that the Library was not and is not necessary to PCI’s corporate purpose. Allowing a special meeting to proceed with the stated purpose of exacerbating that security threat by granting the Library a lease in perpetuity and fundamentally altering PCI’s corporate purpose will cause irreparable harm. *See Brenntag Int’l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999) (finding irreparable harm where, “but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied”); *see also Prudential Real Estate Affiliates Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 878 (9th Cir. 2000) (allowing minority shareholder of brokerage firm to acquire more shares pre-litigation would cause majority shareholder irreparable harm as minority shareholder could “materially influence the business decisions” of the brokerage firm during the pendency of the suit thus making the acquisition difficult to undo). This court should rule on the validity of the

parties' respective claims before any special meeting, to ensure the members are given a full and fair opportunity to let their voices be heard. Kelly Aff. ¶¶ 71-75. Moreover, given the improper purposes for which Plaintiffs have called the special meeting, Court intervention is required to avoid unnecessary future litigation. *Id.*

### **C. The Balance of Equities Weighs in Favor of Granting an Injunction**

Finally, Plaintiffs' demand for a special meeting seeks to accomplish through a special meeting that to which their Complaint clearly fails to establish they are entitled; i.e. a reversal of the PCI Board's decision and granting of a lease in perpetuity to the Library. Accordingly, there can be no question that the balancing of equities favor the granting of a preliminary injunction, where, as here, the failure to grant a preliminary injunction would render any decision on the merits futile. *See Rex Med. L.P. v. Angiotech Pharm. (US), Inc.*, 754 F. Supp. 2d 616, 625-26 (S.D.N.Y. 2010) (finding balance of hardships weighed in favor of granting preliminary injunction to stop distributor from ceasing distribution of plaintiff's product because while plaintiff would suffer irreparable harm to its goodwill and reputation, distributor would only lose money doing exactly what they had contracted to do). Plaintiffs will suffer no harm waiting for this Court to rule on the propriety of its claims, before putting any appropriate issues to a vote of PCI's members. Moreover, PCI has indicated that it will allow the Library to stay at the Community House until this Court resolves the instant motion.

### **D. Judicial Supervision of Any Special Meeting Is Required**

Finally, to the extent this Court were to allow any special meeting to proceed, Defendants respectfully request that the Court appoint an independent observer to supervise any such meeting. Defendants want to ensure every member entitled to vote is counted. Defendants also wish to avoid any further litigation and anticipate that Court guidance and supervision will be required with respect to all aspects of the meeting. For example, the form and content of any notice

of the special meeting should be approved by the Court prior to circulation by the Board, including but not limited to, to whom, how and when the notice should be sent, the description of the agenda, and the text of any proposed amendments to PCI's by-laws or certificate of incorporation. In addition, Defendants anticipate that members may seek to use proxies to vote at any such meeting, and seek court supervision to ensure that each proxy is valid and submitted by a valid member of PCI.



**CONCLUSION**

For all of the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motion to dismiss the Complaint, declare the PCI Directors the valid directors of PCI, affirm the validity of PCI's decision to terminate the Library's tenancy, and grant Defendants' motion for preliminary injunction enjoining any special meeting of PCI's members.

Dated: October 16, 2014  
New York, New York

**VENABLE LLP**

/s/ Thomas J. Welling, Jr.

Edmund M. O'Toole  
Thomas J. Welling, Jr.  
Rockefeller Center  
1270 Avenue of the Americas, 24th Floor  
New York, New York 10020  
Tel: (212) 307-5500  
Fax: (212) 307-5598

**CUDDY & FEDER LLP**

Joshua E. Kimerling  
445 Hamilton Avenue, 14<sup>th</sup> Floor  
White Plains, New York 10601  
Tel: (914) 761-1300  
Fax: (914) 761-5372