SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of CONGREGATION SHAARE ZEDEK for Approval to Sell Real Property Pursuant to Sections 511 and 512 of the Not-for-Profit Corporation Law and Section 12 of the Religious Corporations Law	Index No. 155623/2017 Hon. Debra A. James, J.S.C. Part 59

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MEMORANDUM OF FACTS AND LAW
IN RESPONSE TO PETITION OF CONGREGATION SHAARE ZEDEK

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INTRODUCTION

The undersigned respectfully submits this memorandum in response to the Petition of Congregation Shaare Zedek (the "Congregation" or "Petitioner") to sell real property at 212 West 93rd Street, New York, New York (the "Property" or "Synagogue"). The Court should deny the Petition, with leave to refile, for two reasons. First, the Petition omits information that the Court needs in order to determine whether the proposed sale of the Property—at a price *below* its appraised market value—is fair, reasonable and in the interests of Congregation members. Second, Petitioner's Board of Trustees (the "Board") misled members of the Congregation into supporting the sale by misrepresenting the value of the Property. For these reasons, the Court should not approve the proposed sale unless and until Petitioner submits an amended Petition that includes (1) information, described *infra*, sufficient to enable the Court to judge the reasonableness of the proposed sale, and (2) adequate assurances that the Board has disclosed and cured the misrepresentation it made to members of the Congregation regarding the value of the Property.

I. FACTUAL BACKGROUND

Congregation Shaare Zedek was founded in the 1830s, and for the past century its members have worshiped at a Synagogue near the corner of Broadway and 93rd Street in Manhattan. (Petition ("Pet.") ¶ 1.) The six-story Synagogue—which Petitioner characterizes as "beautiful and majestic"[1]—is adorned with stone arches and more than a dozen stained glass windows. Two photographs of the Synagogue are attached as Exhibit A.

[1] See June 25, 2017 Email of Board President Michael Firestone to the Congregation at 3 (attached as Exhibit ("Ex.") B).

Petitioner proposes to sell the Property to a private real estate developer—212 West 93rd Street LLC (the "Developer")—which is wholly owned by a single individual, Scott Leyton. (Pet. ¶ 3.) Leyton intends to demolish the Synagogue and build a high-rise luxury condominium building (the "Proposed Condominium Building") in its place. The proposed 14-story Proposed Condominium Building will contain 20 apartments; many floors will have only a single apartment.

Petitioner will retain title to the basement, ground level and second story of the Proposed Condominium Building. (Pet. ¶ 3.) Upon completion of the Proposed Condominium Building (estimated in 2020), Petitioner intends to spend an estimated $5.07 million to "complete the build-out" of a new synagogue. (Pet. ¶ 6.) The Petition does not estimate a completion date for this "build-out," but during the years of construction, it intends to hold weekly religious services at a local church. (Pet. ¶ 5.) Petitioner claims that it has confirmed a location to hold annual high holy days services, but does not identify that location in the Petition. (Pet. ¶ 5.)

II. APPLICABLE LAW

New York law provides that religious corporations, like Petitioner, "shall not sell . . . or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court or the attorney general therefor pursuant to section 511 of the not-for-profit corporation law." Religious Corporations Law § 12. Section 511 of the Not-for-Profit Corporations Law ("NPCL"), in turn, requires a religious corporation to submit a petition describing the terms and consideration of the proposed transaction. NPCL §§ 511(a)(5)-(6).

Unlike the Attorney General's review process—which is generally conducted in an *ex parte* manner—the Court's consideration of a petition under NCPL § 511 takes place in full view of the public and may benefit from the input of "any person interested." NPCL § 511(d).[2] After receiving such input and reviewing the petition, the Court "may authorize" the proposed transaction—but only if it "appear[s], to the satisfaction of the court, that the consideration and the terms of the transaction are fair and reasonable to the corporation" and that "the interests of the [corporation's] members will be promoted." NPCL § 511(d). In this manner, the Court—not the Attorney General Office—is ultimately responsible for protecting the interests of members of the religious corporation.

III. DISCUSSION

A. The Petition Lacks Information Necessary for the Court to Conclude that the Proposed Below-Market Sale of the Property is Fair and Reasonable

The Petition's most glaring defect is its omission of information the Court needs in order to determine whether the proposed transaction is, in fact, fair and reasonable to members of the Congregation. Close judicial scrutiny of this missing information is especially important because Petitioner proposes to sell the Property for $700,000 less than its appraised fair market value of $35 million. (Pet. ¶ 6.) *Cf Orix Credit Alliance, Inc. v. East End Development Corp.*, 260 A.D 2d 454, 455, 688 N.Y.S.2d 191, 192 (1999) (noting that wide discrepancies between sale price and fair market value "signal a need for close scrutiny").

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[2] The undersigned is a resident of 215 West 92nd Street—a cooperative residential apartment building that directly neighbors the Property to its south—and qualifies as "person interested" under NCPL § 511. *See* Subsection II.E, *infra*; *see also* Order to Show Cause at 2 ¶ 3 (identifying the undersigned).)

Petitioner asserts, in conclusory terms, that the proposed below-market sale price is "fair and reasonable" and "represent[s] the highest and most viable offer received by the Petitioner Corporation." (Pet. ¶ 7.) But critically, Petitioner fails to provide the Court with information or documentation necessary to verify these claims. Most significantly, Petitioner withholds from the Court information related to the process that led to the proposed sale—including information about (1) its purported efforts to market the Property; (2) the competing offers from private developers it rejected; and (3) the bids from local religious organizations it turned down. Without this basic information, the Court cannot reasonably conclude that the proposed sale—for less than the Property's fair market value—is in the best interests of Congregation members.

1. Petitioner Provides Insufficient Information About Its Purported Efforts to Market the Property

As an initial matter, the Petition fails to show that Petitioner adequately marketed the Property. Petitioner claims that it signed an "exclusive listing agreement" with Massey Knakal Realty Service ("Massey") in mid-2010 and that Massey "*actively marketed* the Property for approximately one year." (Pet. ¶ 7 (emphasis added).) But Petitioner does not provide the Court with a copy of this listing agreement. Nor does it explain what Massey did or what Petitioner's definition of "active[] market[ing]" entails. (Pet. ¶ 7.)

After canceling its listing agreement with Massey in 2011, Petitioner never again retained a professional real estate firm to market the Property. Instead, Petitioner claims that it "then marketed the Property directly to the community through Petitioner Corporation's *real estate contacts*." (Pet. ¶ 7 (emphasis added).) But again, Petitioner does not identify these anonymous "real estate contacts" or explain what they did to market the

Property. Thus, the Court is left with no way to reasonably evaluate the adequacy of Petitioner's ad hoc efforts to market the property from 2011 to present.

The worse Petitioner's marketing efforts, the lower the likelihood that Petitioner received fair bids for the Property. Based on the minimal information in the Petition, the Court cannot reasonably conclude that Petitioner's marketing efforts were adequate, which in turn undermines Petitioner's assertion that it received fair and reasonable offers for the Property.

2. Petitioner Provides Insufficient Information About Competing Offers It Received from Private Developers

An alternative way for Petitioner to show that the proposed sale is reasonable would be to demonstrate that the Developer's offer was better (or at least as good as) other offers it received. But while Petitioner acknowledges that it received three "qualified bids with competitive offers" from three different "potential developers," it inexplicably chooses not to give the Court any details about these bids. (Pet. ¶ 7.) Petitioner does not, for example, disclose the identity of these developers, when it received these offers, the consideration (cash and non-cash) offered by the developers, or any other material terms of the offers.

Petitioner also claims that it "worked with each of the three finalists to maximize the bids and offers for the Property." (Pet. ¶ 7.) But again, Petitioner does not explain how it "worked" with these "finalists" or what it did to "maximize the bids and offers." (Pet. ¶ 7.) So the Court is left without any basis to conclude that Petitioner's purported efforts to negotiate a development contract were reasonable.

Most significantly, Petitioner claims that "Developer's offer was determined to be the highest ***qualified*** bid, and the one that it most beneficial to the Petitioner Corporation." (Pet. ¶ 7 (emphasis added).) The use of the word "qualified" in this context is a red flag. It implies that the Developer's below-market bid was *not* in fact the highest or most lucrative bid Petitioner received—that is, that another entity made a higher bid which Petitioner deemed *unqualified* for reasons it chooses to withhold from the Court. Significantly, Petitioner never defines what constitutes a "qualified" bid.

It is unreasonable for Petitioner to request the Court's approval of the proposed sale without, at the very least, affirming that it did not receive and reject a higher or more lucrative bid than the Developer's. If Petitioner did in fact reject such a bid (or bids), the Court should require Petitioner to explain its reasons for doing so.

3. Petitioner Withheld from the Court Information About Offers It Received from Religious Organizations

Perhaps more troubling than its failure to disclose the material terms of competing bids from private developers is Petitioner's omission of information about offers made by religious organizations—presumably local synagogues—to purchase the Property. (Pet. ¶ 7.) While Petitioner obliquely acknowledges the existence of these offers—by stating that "the only offers received from religious organizations or congregations were not substantial enough to be viable or constitute a qualified bid" (Pet. ¶ 7)—it provides no information whatsoever about these bids, much less information sufficient for the Court to test Petitioner's perfunctory assertion that the offers were "not substantial." (Pet. ¶ 7.) And again, because Petitioner declines to define what constitutes a "qualified bid" (Pet. ¶ 7), the

Court has no way of knowing how the consideration offered by the Developer compares to the consideration offered by these religious organizations.

Petitioner's passing reference to receiving offers from local religious organizations raises numerous questions, including the following: (1) How many offers from religious organizations did Petitioner receive? (2) Which religious organizations made these offers? (3) What were the terms of these offers? (4) How much (and what type of) consideration did these religious organizations offer?

The answers to these questions are especially relevant because, on information and belief, Petitioner rejected an offer from a Jewish congregation based on the Upper West Side of Manhattan that included $20 million in cash consideration—$4 million *more* than Petitioner stands to receive from the Developer. In addition, and again on information and belief, when a representative of that same congregation later approached Petitioner to discuss terms, Petitioner rebuffed the representative, stating that it had already entered into a binding contract with the Developer.

4. The Court Should Decline Petitioner's Invitation to "Disregard" the Below-Market Sale Price

Petitioner concedes that it is not receiving fair market value for the Property, but claims that the Court should "disregard[]" this fact for several reasons, including the "subjective nature of appraisals," the "potential for market risk," the "extensive[ness]" of its negotiations with the Developer, and the "difficult financing market for condominium projects in Manhattan." (Pet. ¶ 7.) These arguments should be rejected for various reasons.

First, Petitioner's claim that appraisals are subjective is disingenuous. In consideration for selling the Property—which has an appraised value of $35 million—

Petitioner will receive from the Developer $16 million in cash and a "new synagogue facility" with an *appraised* value of $18.3 million. Thus, Petitioner would have the Court accept the $18.3 million appraisal figure while questioning the accuracy of the $35 million appraisal figure—even though both appraisals were performed by the same company, at the same time, using the same market assumptions. (See Appraisal (Pet. Ex. G).)

What's more, Petitioner conveniently omits from the Petition the fact that the $35 million Property appraisal is based on 2016 prices, while the $18.3 million appraisal of the new synagogue facility is based on estimated 2020 prices. This apples-to-oranges comparison ignores that the value of the Property will almost certainly be higher in 2020 than it was on August 1, 2016, when it appraised for $35 million. Indeed, assuming conservative 3% annual increases in the value of the Property from the date of the appraisal onward, the Property will be worth more than $38 million in 2020 (when Petitioner is schedule to take title to the new synagogue facility). Thus, the difference between the proposed sale price of the Property and its fair market value is actually much greater than the $700,000 reflected in the Petition.

Petitioner also fails to mention that the Ground Lease (which Petitioner inexplicably executed *before* obtaining a professional appraisal of the Property and new synagogue facility) estimated the value of the new synagogue facility to be $8.5 million. (*See* Ground Lease § 39.01(b) (Pet. Ex. C).) This valuation is *less than half* of the $18.3 million valuation contained in the August 2016 appraisal. (*See* Appraisal (Pet. Ex. G).) Petitioner never explains why its initial valuation of the new synagogue facility was so wrong. The scale and significance of this error calls into question the expertise of the

anonymous "real estate consultants" Petitioner relied upon in negotiating the proposed sale. (*See* January 28, 2016 Board Resolution (Pet. Ex. A-6, Att. C-1, p. 1).)

Petitioner's remaining arguments are similarly meritless, unsupported or both. Its conclusory assertion that the "financing market for condominium projects in Manhattan" is "difficult" (Pet. ¶ 7) is entirely unsupported and, in any event, would not necessarily justify a below-market sale price. Likewise, Petitioner's claim that the below-market sale price is warranted because it negotiated "extensive[ly]" with the Developer conflates time spent negotiating with the quality of the negotiated outcome. (Pet. ¶ 7)

Finally, Petitioner's claim that "the potential for market risk" (Pet. ¶ 7) justifies approval of the proposed below-market sale is hypocritical given the Board's otherwise head-in-the-sand approach to market risk. Petitioner claims, for example, that it "has structured the transaction in a manner so as to offer *maximum protection* to the Petitioner Corporation." (Pet. ¶ 9 (emphasis added).) This is manifestly false. There are numerous ways Petitioner could have better protected itself—for instance, by requiring that the Developer fund the construction primarily with equity capital instead of allowing it to finance up to 65% of the development with debt. (Pet. ¶ 9.)

As for educating itself about the risks inherent in real estate transactions of this sort, Petitioner claims that,

> All the members of the Board of Trustees have acknowledged and confirmed that they have each read the New York Times article dated April 29, 2014 and titled "A Deal That Collapsed Leaves a Manhattan Synagogue in Shambles" and understands the risks that are inherent in real estate development transactions such as the one contemplated by the Purchase Agreement.

(Pet. ¶ 9.) Petitioner's apparent belief that a lone newspaper article is sufficient to educate Board members about the "risks that are inherent in real estate development transactions" is nothing short of remarkable. Indeed, this belief calls into question whether Board Members fully understood their fiduciary obligations to members of the Congregation when they approved the proposed sale. If Board Members took additional steps to educate themselves about such risk, they apparently were not significant enough to mention in the Petition.

5. The Identity of the Developer Does Not Justify the Below-Market Sale Price

Perhaps recognizing the shortcomings of the Petition and the need to further justify the proposed below-market sale, Petitioner makes the curious assertion that "the identity of the Developer . . . Scott Leyton" is "critically important" to the Petitioner. (Pet. ¶ 3.) It is not clear, however, why Petitioner considers Leyton—a counterparty to a purportedly arms-length commercial transaction (*see* Pet. ¶ 26.) —to be personally critical to the venture, given that he is presumably driven by the same profit motive common to all private real estate developers. Moreover, Leyton's business website suggests that his professional experience is not particularly relevant to this development. Indeed, the website indicates that Leyton is a suburban developer, and that he has never before developed property in Manhattan or a high-rise building anywhere for that matter. (*See* Current, Completed and Future Projects and Communities at www.olcny.com (last accessed July 17, 2017).) And unlike the multiple synagogues and Jewish congregations whose bids Petitioner rejected, Leyton's profit-motive does not necessarily dovetail with Petitioner's larger religious mission. (*See* Pet. ¶ 2.)

After pronouncing Leyton's "critical[] importan[ce]" to the project, Petitioner asserts that it "carefully vetted" him and is "confident" he will perform his obligations:

> [P]rior to entering into the Ground Lease and Development Agreement, Petitioner's Corporation's real estate committee carefully vetted Developer's and Scott Leyton's background, reputation, experience and financial wherewithal. Following the real estate committee's investigation into Developer and Leyton, Petitioner Corporation has determined that it is confident in Developer and Leyton's ability to perform their obligations.

(Pet. ¶ 3.) But while Petitioner claims that its real estate committee "carefully vetted" Leyton, it provides no details that would enable to the Court to judge the quality of its vetting process. Petitioner does not, for example, explain what the committee did to vet Leyton or what information it uncovered related to Leyton's background, reputation, experience or financial wherewithal. Indeed, Petitioner leaves the Court to guess what the term "financial wherewithal" even means. Petitioner does not provide the Court with sufficient information to determine whether its "confidence" in Leyton is appropriate or misplaced. Petitioner merely asserts *that* it is confident in Leyton; it does not tell the Court *why* it is confident in Leyton's ability to perform his obligations, let alone describe the criteria it considered in arriving at this conclusion.[3]

[3] Petitioner's passing reference to its "real estate committee"—which purportedly vetted Leyton—is also noteworthy. Petitioner does not identify the members of this key committee, describe their qualifications or even represent that members of this committee have no preexisting relationship with Leyton or interest in the proposed transaction. Nor does Petitioner provide the Court with the Board minutes describing the creation, composition, or purpose of this committee. It is remarkable indeed that this special committee—to which the Board presumably delegated the task of selling the Property—is not referenced even once in the paragraph of the Petition (*see* Pet. ¶ 7) that describes the Synagogue's seven-year process to sell the Property.

Far more important than the developer's identity, are its capitalization and credit worthiness. Petitioner appears to acknowledge this fact insofar as it requires that any individuals who purchase ownership interests in the Developer from Leyton be "reasonably well capitalized and reasonably credit worthy." (Pet. ¶ 4; *see also* Ground Lease § 10.01(2)(B)(iv) (Pet. Ex. C).) To that end, the Ground Lease requires any individual who buys such ownership interest to have "an individual net worth . . . of at least $60,000,000.00 and liquidity of not less than $30,000,000.00" or post a $15 million security deposit. (Pet. ¶ 4.) But inexplicably, the Ground Lease does not impose the same net worth or liquidity requirements on Leyton or require Leyton to post any security deposit—even though the Petition states that Leyton is presently the *sole* owner of the Developer. (Pet. ¶ 3.)

In addition, absent from the Petition, but discoverable in the fine print of the Ground Lease, is the statement that "[Leyton] intends on causing [the Developer] to issue additional ownership interest in [the Developer] in order to admit one or more joint venture equity partners . . . who shall contribute equity capital toward the Purchase Price and/or the construction of the New Building." (Ground Lease § 10.01(2)(ii) (Pet. Ex. C).) In other words, Leyton plans to bring on high net-worth partners to help him buy the Property and build the Proposed Condominium Building.

Leyton's exemption from the Ground Lease's capital requirements coupled with his stated intention to bring on partners to finance the construction of the Proposed Condominium Building strongly suggests that Leyton himself is unable (or at least unwilling) to finance the proposed development on his own. Nonetheless, Petitioner would have the Court believe that Leyton's personal guarantee—referred to as the "Completion Guarantee" in the Petition—"guarantees . . . the substantial completion of the Synagogue

Unit by the Purchaser [*i.e.*, Leyton]." (Pet. ¶¶ 3 and 9.) But practically speaking, the only thing the Completion Guarantee guarantees is the Synagogue's right to sue not only the Developer (which Leyton wholly owns) but also Leyton himself if the Developer does not complete construction of the new synagogue. An example of the limited protections the Completion Guarantee affords can be seen in Paragraph 9—titled "Bankruptcy of Guarantor"—which acknowledges the possibility that the Leyton may file for personal bankruptcy, and includes a provision requiring him, in the event of such bankruptcy, to find a "replacement guarantor, reasonably acceptable to [Petitioner], to assume all . . . [the] Guarantor's obligations." (Completion Guarantee ¶ 9 (Pet. Ex. E).) To say that this provision is likely unenforceable in practice would be an understatement.

6. Conclusion

While the Court is duty bound to protect the interests of members of religious corporations in all cases involving sales of religious corporation assets, *see* RPL § 12 and NPCL § 511(d), close judicial scrutiny is especially appropriate where, as here, the petitioner proposes selling assets below their appraised fair market value. *Cf Orix Credit Alliance, Inc.*, 260 A.D 2d at 455, 688 N.Y.S.2d at 192 (noting that wide discrepancies between sale price and fair market value "signal a need for close scrutiny"); *see also Leasing Serv. Corp. v. Broetje*, 545 F. Supp. 362, 368 (S.D.N.Y. 1982) ("While a low price is not conclusive proof that a sale has not been commercially reasonable, a large discrepancy between sales price and fair market value signals a need for close scrutiny of the sales procedures").

To be sure, the difference between the proposed sale price and the fair market value of the Property is not enormous. And it is entirely possible that—after evaluating the information and documents Petitioner omitted from the present version of the Petition—the

Court may conclude that the proposed transaction is not unfair or unreasonable. But there are simply too many gaps in the record, too many unanswered questions and too many conclusory assertions in the Petition for the Court to confidently reach that conclusion at this time. Accordingly, the Court should deny the Petition with leave to refile, and refuse to authorize the proposed sale unless and until Petitioner provides the Court the information it needs to carry out its duty under NPCL § 511.

B. The Board Misled Members of the Congregation Regarding the Value of the Property

Petitioner's inadequate disclosure regarding the process that resulted in the proposed below-market sale is not the only red flag in the Petition. There are also indications that the Board misled its membership about the value of the Property. Specifically, in a resolution supporting the proposed sale that members of the Congregation approved in March 2016 (the "March 2016 Membership Resolution" or "Resolution"), the Board implied that the fair market value of the Property was only $24.5 million—just 70% of its appraised $35 million value. More troubling still is that Board did nothing to correct this misrepresentation after it came to light.

1. Background Related to the March 2016 Membership Resolution

According to Petitioner, the Board convened at least four meetings with members of the Congregation in February and March 2016 to discuss the proposed demolition of the Synagogue and construction of the Condominium. Petitioner claims that at these meetings, "the Congregation received a full, detailed explanation of the contemplated transaction," (Pet. ¶ 22), even though most of the individuals and entities the Board "invited

[to] explain" the transaction to the Congregation had strong pecuniary motives to support it and no duty to consider the best interests of the membership. (Pet. ¶ 22.)[4]

At a "special meeting" on March 15, 2016, the Board presented the Congregation with a resolution (*i.e.*, the March 2016 Membership Resolution) seeking retroactive approval of the transaction the Board entered into with the Developer two months earlier, on January 20, 2016. According to Petitioner, the Congregation—which is comprised of just 130 "members-in-good-standing" (Pet. ¶ 23)—voted "unamimous[ly]" to approve the transaction: "66 in favor; 0 opposed; and with 0 abstentions." (Pet. ¶ 23.)

This vote is noteworthy for several reasons. First, it is highly coincidental that exactly 50% plus one of the membership (*i.e.*, 66 out of 130 members) voted in favor of the Resolution. Second, it is remarkable that perfect unanimity (*i.e.*, 66 votes in favor; zero in opposition) existed on an issue of such significance and complexity, and which involved the proposed demolition of what Petitioner's President described as "the beautiful and majestic building which served as Shaare Zedek's home for nearly 100 years." (*See* June 25, 2017 Email of Petitioner President at 3 (attached as Ex. B).) This unanimity is all the more remarkable given Petitioner's admission that members of the Congregation were at least initially "reluctant" to authorize the sale. (Pet. ¶ 22.)

[4] These individuals and entities included (1) Scott Leyton, the sole owner of the Developer; (2) RKTB Architects, the architectural firm Leyton retained to design the Condominium; and (3) HE2PD, Inc., the construction firm Leyton retained to build the Condominium. (Pet. ¶ 22.)

2. The March 2016 Membership Resolution Included a Material Misstatement About the Value of the Property

Much more significant than the curious vote tally, however, is the fact that the Resolution presented to the membership included a grossly inaccurate valuation of the Property. (*See generally* March 2016 Membership Resolution (Pet. Ex. A-6, attachment C-2 at pg. 2).) The Resolution stated that the Board intended to sell the Property to the Developer for $24.5 million—comprised of $16 million in cash plus an additional $8.5 million for the value of the new synagogue facility—"which Shaare Zedek's real estate consultants have determined to be *consistent with fair market value*." (*Id.* (emphasis added).)

In other words, the Board led members of the Congregation to believe that the fair market value of the Property was approximately $24.5 million—more than $10 million dollars *less* than the appraised fair market value of $35 million. (See Appraisal (Pet. Ex. G).) Thus, members of the Congregation voting on the Resolution were left with the false impression that the Synagogue would receive approximately two-thirds of the Property's total value from the Developer in cash (*i.e.*, $16 million of $24.5 million). In reality, however, the proposed transaction provides the Synagogue *less than half* of the Property value in cash (*i.e.*, $16 million of $35 million).

The Board's gross underestimate of its Property value apparently resulted from the Board's decision to obtain a professional appraisal of the Property six months *after* executing the Ground Lease and Development Agreement. This error is as inexplicable as it is inexcusable, and plainly constitutes a breach of the Board's fiduciary duty to members of the Congregation.

But worse than the initial breach is the fact that the Board did not immediately correct this error when it came to light in August 2016, or at any time thereafter. This failure directly refutes Petitioner's claim to have "ke[pt] its congregational community well-informed throughout the process." (Pet. ¶ 21.) Indeed, far from keeping its "community well-informed," the Board kept its members *misinformed*—and continued to mislead members of the Congregation nearly a year after receiving the August 2016 appraisal. For example, just last month, in an email to members of the Congregation on June 25, 2017, Petitioner's President stated that,

> Under our agreement with the real estate developer, Shaare Zedek will be the owner of the first three stories of the new building, which have a total estimated value of $18.3 million. In addition, Shaare Zedek will receive a cash payment of $16 million.

(*See* June 25, 2017 Email of Board President Michael Firestone to the Congregation at 1 (attached as Ex. B).) This email states that the Synagogue will receive $34.3 million in cash and other consideration for Property ($16 million in cash and $18.3 million for the value of the "new building"). But it does nothing to correct the prevailing misconception among members of the Congregation that the Property value is still just $24.5 million—*i.e.*, the fair market value implied in the March 2016 Membership Resolution. Thus, members would reasonably conclude that the proposed transaction represents a windfall for the Synagogue when in reality the Synagogue proposes to sell the Property for *below* fair market value.

The Board should have corrected this material misstatement by promptly informing members of the Congregation of the true ($35 million) appraised value of the Property and by presenting an amended resolution to for membership vote. Instead, the Board elected not to correct, or even to disclose this misstatement, to members of the

Congregation. Moreover, the Board touted its "unanimous[]"passage of the March 2016 Membership Resolution to the Court in the Petition (and likely to the Attorney General's Office as well) without ever noting the presence of the misstatement.

Petitioner's misrepresentation regarding the market value of the Property is characteristic of its representations to members of the Congregation about the sale more generally. For example, in his June 25, 2017 email to members of the Congregation, Petitioner's President stated that, "Under our agreement with the real estate developer, Shaare Zedek will be the owner of the first three stories of the new building." (Ex. B at 1.) What Petitioner does not tell the members, however, is that one of these stories is "the cellar" of the Proposed Condominium Building. Indeed, more than 40% of the total square footage of the new synagogue facility will be in the cellar of the Proposed Condominium Building, as the Development Agreement makes clear:

> The Synagogue Facility shall consist of not less than 7,028 square feet in the cellar of the New Building, not less than 5,735 square feet on the ground floor of the New Building and not less than 3,855 square feet on the second (2nd) floor of the New Building.

(Development § 5.02(b) (Pet. Ex. D).) But Congregation members who have not scoured the 76 pages of fine print in the Development Agreement—and have instead relied only on representations from Petitioner's Board—may be surprised to learn that nearly half of their new synagogue facility is underground.

Accordingly, the Court should deny the Petition with leave to refile, and refuse to authorize the proposed sale unless and until Petitioner adequately discloses and cures its misstatement regarding the value of the Property and submits an amended resolution for a membership vote.

C. The Need to Prevent Financial Misconduct

The potential for fraud and embezzlement is present in nearly every real estate transaction. Indeed, Petitioner itself implicitly acknowledges as much by assuring the Court that,

> there have been no bribes or kick-backs offered, paid or received by the Petitioner Corporation or any of its Board Members or Officers, and there has been no "pay for play" whatsoever, in connection with the contemplated transaction, nor has there been any direct or direct [sic] relationship between Petitioner Corporation (including any of its Board members) and Developer in at least the previous five (5) year period.

(Pet. ¶ 26.) Representations of this nature, even under oath, provide little comfort. Presumably any Board Member or Officer taking bribes or kickbacks (or intending to) would deny doing so, especially in a court filing. Moreover, although the affiant claims that his fellow Board Members and Officers have not engaged in any misconduct, he would presumably be unaware of any misconduct they concealed from him.[5] Finally, Petitioner claims that no Board Members or Officers have had a "direct or direct [sic] relationship" with the Developer for the last five years. (Pet. ¶ 26.) While Petitioner's double use of the word "direct"—instead of "direct and indirect"—is almost certainly a typo, it is not an insignificant one. Any amended Petition should confirm whether or not there have been any *indirect* relationships between the Developer and Board Members or Officers and, more

[5] In the interest of fairness and full disclosure, the undersigned would like to make clear that he has no information that any Board Members, Officers or others involved in the proposed sale have engaged in any of the misconduct described in paragraph 26 of the Petition. The undersigned further acknowledges that, in addition to the reasons set forth this memorandum, he opposes the proposed sale on grounds that would not be appropriate to raise in this filing, including the impact of the Synagogue's demolition on the community.

importantly, whether there were relationships of any sort between the Developer and Board Members or Officers before the five-year time period discussed in the Petition.

Certain aspects of the proposed sale underscore the need for the judicial oversight Section 511(d) compels. By way of example, Petitioner's treasurer at the time the Board approved the Ground Lease is the son of Petitioner's accountant. As a general proposition, close relationships between individuals responsible for managing funds (*i.e.*, treasurers) and individuals responsible for accounting for funds (*i.e.*, accountants) increase the potential for collusion and make it more difficult to uncover misconduct.[6]

In addition, some of Petitioner's accounting is imprecise. For example, Petitioner states that it has "allocated . . . the sum of approximately . . . $500,000 for rental payments for the Temporary Space, temporary offices and sanctuary rentals for the High Holy Days for a period of twenty-four (24) months" during which the new synagogue facility will be under construction. (Pet. ¶ 6, 6(iv).) But a review of specific expenses in the Petition and the supporting documents suggests this estimate is too high.

Petitioner states that it contracted to rent "Temporary Space" from the Franciscan Community Center for $10,000 per month. (Pet. ¶ 5; *see also* Pet. Ex. F.) While the Petition does not identify the cost of rent for high holy days, an addendum to the Ground Lease indicates that the "actual costs" for such rent will not exceed $35,000 per year. (Pet. Ex. I-2.) Thus, total rent for facilities to host religious activities during the contemplated 24-

[6] Again, the undersigned has no information indicating that the former treasurer and accountant have engaged in any of the misconduct described in paragraph 26 of the Petition.

month period of construction will not exceed $310,000[7]—nearly 40% less than the $500,000 Petitioner budgeted. Petitioner should either explicitly account for this $190,000 in unattributed funds, or explain to the Court what accounting safeguards are in place to ensure that such surplus funds are used for legitimate Synagogue purposes.

D. The Court Should Reject Petitioner's Exigency Claims

In a short supplementary affidavit, Petitioner's President claims that the Synagogue will be harmed if the Court does not approve the Petition as quickly as possible. (Affidavit of Board President Michael Firestone ("Aff.") ¶¶ 5, 10.) But this newfound urgency is irreconcilable with the lack of urgency Petitioner has consistently exhibited since 2010, when it purportedly began marketing the Property. Petitioner's President attempts to demonstrate prejudice by claiming that Petitioner exhausted its most recent source of funding this month. (Aff. ¶ 7). But he also acknowledges Petitioner's access to additional funds, and, in any event, the Court should not be forced to rush its analysis of the proposed sale simply because Petitioner timed the depletion of its funds to coincide with the filing of its Petition. (Aff. ¶ 8.) The real risk to members of the Congregation comes from not from the normal functioning of the judicial process, but from the approval of a transaction contrary to their interests.

E. The Undersigned Is Entitled to Respond to the Petition

As noted above, the undersigned is a resident of 215 West 92nd Street—a cooperative residential apartment building that directly neighbors the Property to its south.

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[7] This figured is based on the following calculations: 24 months * $10,000/month for Temporary Space = $240,000; 2 years * $35,000/year for "sanctuary rentals for High Holy Days" = $70,000. $240,000 + $70,000 = $310,000.

Petitioner does not object to giving "neighborhood residents," like the undersigned, "the opportunity to present any concerns [they] may have to the Court" in response to the Order to Show Cause (Pet. ¶ 8(a); *see also id.* ¶ 8(b)(iv)). At the same time, however, Petitioner implies that only members, officers and creditors of the Petitioner qualify as "person[s] interested" under NPCL § 511. (*See* ¶ 8.) In other words, Petitioner suggests that NCPL § 511 entitles only members, officers and creditors of the Synagogue to respond to the Petition. Both the language and purpose of NCPL § 511 demonstrate that Petitioner's narrow interpretation of the statute is wrong.

The term "any person interested" appears twice in NCPL § 511. In the first instance, the statute provides that the Court may require a petitioner to provide notice of a petition to "*any person interested* therein, as member, officer or creditor of the corporation." NPCL § 511(b) (emphasis added). If, as Petitioner implies, only members, officers and creditors qualify as "person[s] interested," then the words "any person interested" before "member, officer or creditor" would constitute unnecessary surplusage. And as the Court of Appeals and appellate courts in this State have routinely held, "surplusage is a result to be avoided" when interpreting statutory language. *See, e.g., In re Viking Pump, Inc.*, 27 N.Y.3d 244, 257 (2016). The better interpretation is that "member[s], officer[s] and creditor[s]" constitute a subset of all "person[s] interested"—namely, the subset of interested persons potentially entitled to court-ordered notice of a petition.

This interpretation finds further support in the unqualified use of the phrase "any person interested" in the last sentence of NCPL § 511(b), which provides that, "Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted." NCPL § 511(b). Thus, while the statute

makes clear that "member[s], officer[s] and director[s]" are the only interested persons entitled to court-ordered notice, it includes no restriction on the type of interested persons who may appear and show cause why a petition should not be granted.

This broader interpretation of "interested person" is also consistent with the purpose of the statute, which is to ensure that a sale of corporation assets is "fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted." NPCL § 511(d). Under Petitioner's reading of the statute, countless interested persons would be precluded from bringing to the Court's attention defects in a proposed sale that could harm corporation members. For example trustees, non-officer board members, auditors, accountants, and employees (including ecclesiastical staff) would be barred from responding to a petition. In addition, persons interested in the sale by virtue of their association with the counterparty (*e.g.*, a developer) or the local community would be silenced, to the potential detriment of corporation members. This might include, hypothetically, a whistleblower employed by a developer with knowledge of developer's plans to engage in improper conduct, or leaders of a local church defrauded after entering into a similar arrangement with the developer.

Lastly, it is worth noting that the right of an interested person to respond to a petition filed pursuant to NCPL § 511 may be distinct from the right of that person to take affirmative legal action. In other words, an interested person might lack traditional standing to file a lawsuit against a corporation to block the proposed sale of a corporation asset, but still have the right to respond to a petition under NCPL § 511.

CONCLUSION

For the reasons above, the Court should deny the Petition with leave to refile, and refuse to approve the proposed sale unless and until Petitioner submits an amended Petition that includes (1) information sufficient to enable the Court to judge the reasonableness of the proposed sale, and (2) adequate assurances that the Board has disclosed and cured the misrepresentation it made to members of the Congregation regarding the value of the Property.

Dated: New York, New York
July 18, 2017

Respectfully submitted,

/s/ Matthew J. Jacobs
Matthew J. Jacobs
215 West 92nd Street
New York, New York 10025

Exhibit A

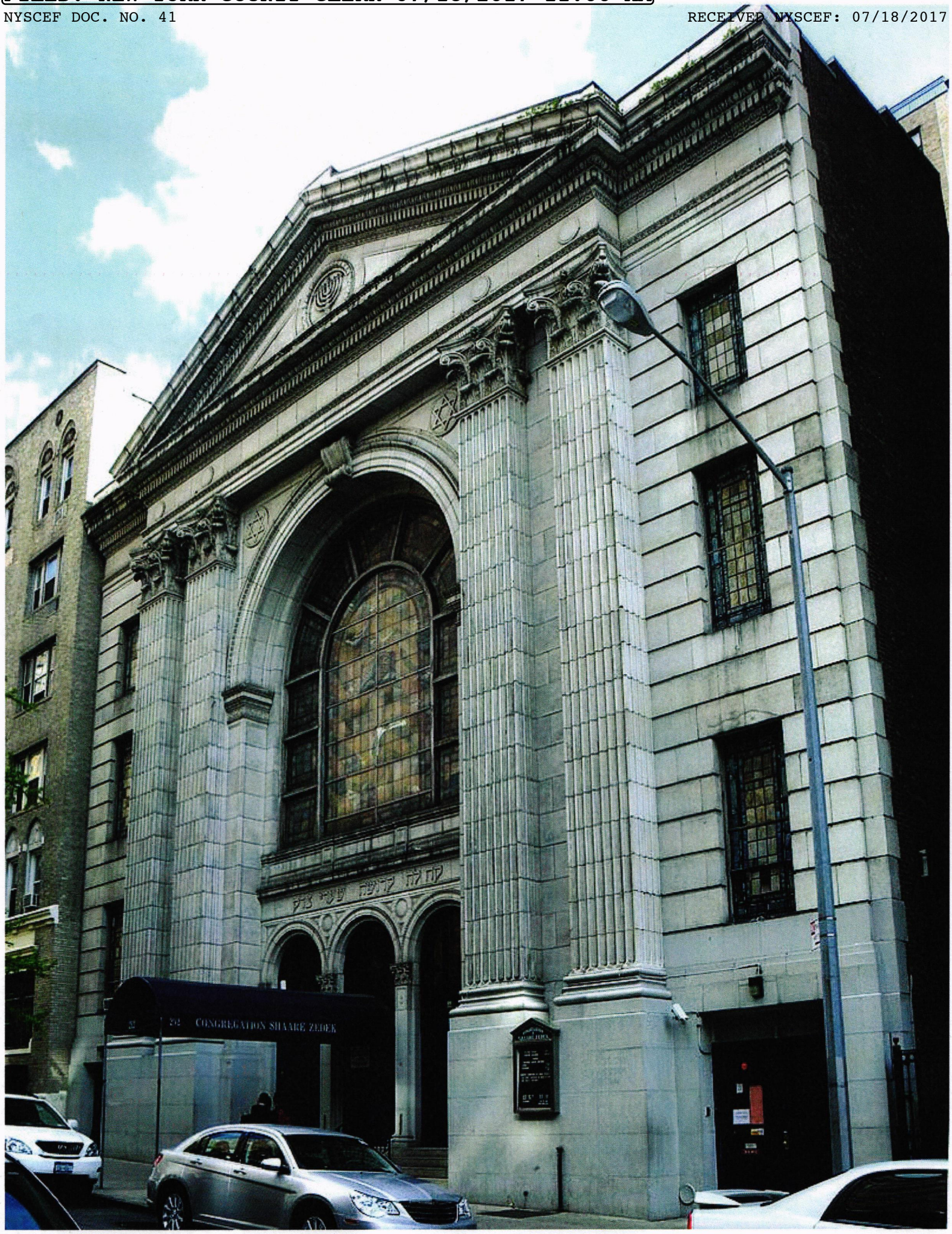
CONGREGATION SHAARE ZEDEK

Exhibit B

Congregation
Shaare Zedek
ק"ק שערי צדק

June 25, 2017
1 Tammuz 5777

Dear Friends,

I am very happy to report that on Tuesday, June 20, Congregation Shaare Zedek filed a petition in New York Supreme Court requesting final approval of the sale of its building on West 93rd Street. Once the petition is approved, we will proceed to close the real estate transaction and begin the next chapter of Shaare Zedek's long and storied history. I am writing to provide you with certain details concerning the transaction and to update you on the next steps in this process.

As you know, the State Attorney General is responsible for ensuring that the sale of Shaare Zedek's building represents a fair and reasonable transaction. The State Attorney General also has a significant interest in the status of Bayside Cemetery, and in particular that sufficient funds from the sale of our building are used for Bayside Cemetery's ongoing maintenance and necessary capital improvements. For the past few months, Shaare Zedek has been involved in negotiations with the State Attorney General concerning the appropriate level of funding for Bayside Cemetery. It was only after we reached an agreement with the State Attorney General on this issue that we were able to file the petition.

Under our agreement with the real estate developer, Shaare Zedek will be the owner of the first three stories of the new building, which have a total estimated value of $18.3 million. In addition, Shaare Zedek will receive a cash payment of $16 million. Under the agreement reached with the Attorney General, Shaare Zedek will allocate equal amounts of cash to the Synagogue and to Bayside Cemetery. Thus, $8 million will be used by Shaare Zedek for Synagogue needs, including:

1. Paying for the build-out of the new Synagogue space,
2. Paying rent, moving and storage expenses while the building is under construction,
3. Repaying certain loans and legal fees, and
4. Establishing an endowment for the benefit of Shaare Zedek.

Shaare Zedek will place the remaining $8 million into a restricted fund for the benefit of Bayside Cemetery, up to $2 million of which may be used immediately for certain capital improvements approved by the Attorney General or the Court. As there are a range of estimates for the long-term cost of operating and repairing Bayside Cemetery, it was necessary to proceed conservatively and allocate half of the cash proceeds to the cemetery in order to reach an agreement with the State Attorney General. At the same time, however, the Board sought and obtained the right to seek a downward adjustment of this amount if it turns out that $8 million exceeds Bayside Cemetery's actual financial needs. Thus, the agreement provides that, no sooner than three years after the closing, Shaare Zedek may seek the Court's permission to transfer funds from the Bayside Cemetery fund to Shaare Zedek's endowment if it can show that such funds are not needed to ensure that Bayside Cemetery continues to be maintained in a safe and respectful condition. While there is no guarantee that the Court will consent to such a transfer, the Board believes that this represents the best possible outcome for Shaare Zedek. Additionally, nothing prevents Shaare Zedek from transferring ownership of Bayside Cemetery to a third party in the future, which may be possible once the Cemetery's financial and physical situations improve.

I want to thank our Trustees for the tremendous care, attention, and patience that they showed in overseeing these negotiations. I also want to thank our legal counsel, Nick Donovan of Donovan LLP, and Russell Steinthal of Axinn, Veltrop & Harkrider, LLP. I particularly want to express *hakarat hatov* to Russell and his firm for the many years of *pro bono* legal services that they have generously provided to our community.

We have asked the Court to consider our petition at a hearing in mid-July. It is our hope that the Court will approve the petition at that time, but the Court may choose to issue its decision at a later date. We will inform you as soon as the Court rules. If, as we expect, the petition is granted, we will immediately take steps to move out of the synagogue building and into our temporary location at the Franciscan Community Center on West 97th Street. If you have any questions concerning the transaction, please feel free to contact me directly at president@sznyc.org.

Lastly, I will soon be sending an email concerning the date of our annual meeting and the elections of officers and trustees. Our membership season will also open this week, when we invite our members to renew and new members to join us at this momentous time. If you have any questions regarding membership, please contact Lianna Levine Reisner, our Vice President of Community Building and Membership.

This is an exciting but bittersweet time for our community. It is not easy to say goodbye to the beautiful and majestic building which served as Shaare Zedek's home for nearly 100 years. I am confident, however, that completing the real estate transaction will place Shaare Zedek in the best possible position for growth and success in the years to come.

Best regards,

Michael Firestone
President, Congregation Shaare Zedek