

**Matter of East Midwood Jewish Ctr., Inc.**

2021 NY Slip Op 34247(U)

July 7, 2021

Supreme Court, Kings County

Docket Number: Index No. 509734/2020

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of July, 2021.

PRESENT:

HON. WAVNY TOUSSAINT,  
Justice.

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In the Matter of the Application of

EAST MIDWOOD JEWISH CENTER, INC.,

Index No. 509734/2020

for leave to lease for a term exceeding five years certain real property pursuant to Section 12 of the Religious Corporations Law.

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The following e-filed papers read herein:

NYSCEF #:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

1, 10, 11, 14, 19  
37, 46-47, 49, 54, 61

Answer/Opposing Affidavits (Affirmations) \_\_\_\_\_

18, 19-23, 27, 57, 60

Reply Affidavits (Affirmations) \_\_\_\_\_

Upon the foregoing papers, petitioner East Midwood Jewish Center, Inc. (East Midwood), petitions for a judgment, pursuant to Not-for-Profit Corporation Law (N-PCL) § 511 and Religious Corporations Law § 12, granting nunc pro tunc approval of a lease for a portion of real property it owns (motion sequence number 1). Respondents Ellen Levitt and Laurie Mermelstein (collectively referred to as the Objector Respondents) cross-move for an order, pursuant to CPLR 2201, staying this proceeding pending discovery and the

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determination of the related action, *Levitt, et al. v East Midwood Jewish Center, Inc. et al.*, Kings County Index no. 509604/20 (the *Levitt Action*) (motion sequence number 2). Objector Respondents also move, by way of an order to show cause, for an order, pursuant to CPLR 6301, granting a preliminary injunction (1) enjoining voluntary respondent Urban Dove, Inc. (UD Inc.) and Urban Dove Team Charter School (UD School) (collectively referred to as Urban Dove) from occupying and/or operating a school out of a premises located at 1256 East 21<sup>st</sup> Street, Brooklyn, NY (the Leased Premises), and (2) enjoining East Midwood from permitting Urban Dove to occupy and/or operate a school out of the Premises (motion sequence number 3).<sup>1</sup>

It is **ORDERED** that the petition (motion sequence number 1) is granted and East Midwood is granted leave, nunc pro tunc, to enter into the lease between it and UD Inc. as of the September 1, 2019 commencement date of the subject lease.

Objector Respondents' cross motion for a stay (motion sequence number 2) and motion for a preliminary injunction (motion sequence number 3) are denied.

### **BACKGROUND<sup>2</sup>**

East Midwood is a religious corporation that seeks nunc pro tunc court approval of a lease (Lease) with UD Inc. for the Leased Premises that was executed on September 1, 2019. The Leased Premises is a school building that is located adjacent to East Midwood's

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<sup>1</sup> The Objector Respondents' additional request for a temporary restraining order for the same relief was denied when the order to show cause was signed on September 17, 2020.

<sup>2</sup> The court notes that the caption on the order to show cause is slightly different than that on the petition in that, among other things, the caption on the order to show cause identifies East Midwood as the petitioner, and indicates that petitioner seeks nunc pro tunc relief. For purposes of this order, the court has used the caption from the petition.

Synagogue building. The Synagogue building is used by East Midwood as its house of worship and it is where it conducts other activities, including conducting a Hebrew School for young children and for older children preparing for their bar and bat mitzvot. East Midwood apparently built the school building that makes up the Leased Premises in the early 1950s,<sup>3</sup> and for many years operated its own Jewish day school there. At some point, East Midwood stopped operating its own school and it thereafter rented the Leased Premises to Midwood Jewish Academy, which thereafter defaulted on the rent payments due under its lease and its lease was not renewed.

Following a search for a new tenant, East Midwood reached an agreement to lease the premises to UD Inc., a not-for-profit corporation that has operated the UD School in Brooklyn since 2012, operated a second school in the Bronx since 2017, and that is awaiting a charter to operate a third school in Queens. UD School's focus is on students who have previously failed ninth grade and its mission is to help young people who have not been successful in high school learn the skills needed to succeed as adults, regardless of their economic or social background. UD Inc. desired to rent the Leased Premises because the space UD School had been using was not adequate for its needs.

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<sup>3</sup> Although East Midwood's appraiser indicates that the Leased Premises was built in 1930, and the Objector Respondents' appraiser indicates that it was built in 1960, East Midwood's website, and the Objector Respondents in their own papers, state that it was built in the early 1950s. Indeed, the original certificate of occupancy for the Leased Premises that is contained on the New York City Department of Building's website is dated February 15, 1951. In any event, the exact construction date of the building is immaterial to the determination of the appropriateness of the lease.

***The Petition:***

In its petition, which is verified by its president, and its appended exhibits, East Midwood provides its name, the law under which it was incorporated, the names and addresses of its directors and principal officers, its activities, a description of its assets to be leased, the consideration to be received, a representation that its dissolution is not contemplated, and a statement that the consideration and terms of the Lease are fair and reasonable to the corporation and that the foundational purposes of East Midwood are served thereby. East Midwood submits the minutes of a September 3, 2019 emergency meeting of East Midwood's Board of Trustees (Board) wherein the Board authorized the Lease on that date. The Board -- which consists of 33 trustees, 25 of whom were present at the meeting -- voted 24 to 1 to approve the signing of the Lease with UD Inc. East Midwood asserts that it did not initially seek court approval of the Lease because its Trustees were unaware of the court approval requirements contained in Religious Corporations Law § 12 and N-PCL § 511. East Midwood has also provided an email, dated March 29, 2020, from the New York State Office of the Attorney General in which the Attorney General acknowledges the receipt of statutory notice of East Midwood's petition and in which the Attorney General states that, "the Attorney General has no objection to the terms of the lease, but will leave it to the Court to determine any issues regarding the claimed membership voting rights."

As is relevant here, the Certificate of Incorporation for East Midwood states that it was formed to provide a place for Jewish worship and religious services, and, among other

things “to engage in social services.” Neither the Certificate of Incorporation nor East Midwood’s Constitution & By-Laws (By-Laws) contains any specific provision that requires East Midwood to use its property solely for Jewish worship or education.<sup>4</sup> While East Midwood’s By-Laws provide that, except in instances of vacancies on the Board of Trustees (Board) (By-Laws, art II, § 7), its membership votes to elect the Trustees (By-Laws, art II, § 2, art VIII) and elects or removes the Rabbi (By-Laws, art III, § 7), the By-Laws also provide that it is the Board that has general control over the funds and property of East Midwood (By-Laws, art III, § 6).<sup>5</sup> For purposes of voting, the quorum for Board votes and member votes is 40 percent of the Board’s trustees entitled to vote (By-Laws, art VII, § 6) and 40 percent of the members entitled to vote (By-Laws, art VII, § 6), and any action by the Board or membership, other than the amendment of the By-Laws, is by a majority vote of those voting (By-Laws, art VII, § 8).

With respect to its search for a new tenant after Midwood Jewish Academy defaulted on its lease, East Midwood states that it reached out to the New York City Department of Education and the New York City School Construction Authority, both of which informed East Midwood that they had no need for a school in the area. East

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<sup>4</sup> The Preamble to the Constitution and By-Laws provides that, “We, the Members of EAST MIDWOOD JEWISH CENTER, to perpetuate traditional, egalitarian Judaism as it is interpreted by the United Synagogue of Conservative Judaism, to spread a knowledge of Torah in our community and to inculcate, develop and strengthen a love for its tenets, precepts and ideals among ourselves and our posterity; and to foster the spiritual, intellectual, social and physical welfare of our people and our eternal faith, do hereby adopt and enact this Constitution & By-Laws for its governance.”

<sup>5</sup> By-Law, article II, § 6 provides that, “The Board shall have general control and management of the funds and other properties of the Center; shall generally govern and control its affairs except as otherwise provided by law; and shall have power to hire and discharge the Associate Rabbi, Cantor, Associate Cantor, Education Director and Executive Director of the Center, fix their titles and salaries, and determine their periods of employment.”

Midwood also listed the property on both the New York Charter School Center Listserv and the MLS Listserv. It also showed the Leased Property to Eva Moskowitz's Success Academy and to several Jewish schools. Only one of the Jewish schools made an offer, which was only made late in the process and was not as competitive as UD Inc.'s offer. East Midwood represents that none of its directors or members has a relationship with Urban Dove or is related to any of Urban Dove's officers, directors or employees and that none of its Trustees, members or employees will receive any direct or indirect financial benefit as a result of the Lease.

The Lease itself provides for an initial term commencing on September 1, 2019 and expiring on June 30, 2025, with two five-year renewal terms. Under the Lease, UD Inc. must pay rent in the amount of \$505,000 (base rent plus additional rent) for the first year, with a two percent escalation each year. According to the appended appraisal report, this rent for the Leased Premises in its as-in condition was slightly more per square foot than that of competitive buildings in the marketplace.<sup>6</sup> The appraisal report further notes that UD Inc. has plans to perform approximately \$5,000,000 worth of renovations to the premises, which, to the extent that such work constitutes improvements or fixtures, shall remain part of the Leased Premises (Lease § 4.03 [a]). The Lease also provides that UD

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<sup>6</sup> Although the appraisal report submitted by East Midwood is unsworn, the Objector Respondents have waived any issue in that respect by failing to object to consideration of the appraisal report on that ground (*see Lefkowitz v Kelly*, 170 AD3d 614, 614 [2d Dept 2019]; *Thompson-Shepard v Lido Hall Condominiums*, 168 AD3d 614, 614 [1st Dept 2019]).

Inc. is responsible for the cost of any amendment or update to the certificate of occupancy required by its use of or alterations to the Leased Premises (Lease § 4.07).

East Midwood deems the terms of the Lease fair and reasonable and asserts that the terms are consistent with the purposes for which it was formed. East Midwood further asserts that the lease terms will promote the interests of its members and the rental income will enable it to meet its expenses and make repairs and improvements to the Synagogue Building. In addition to the required approval by the Board, East Midwood notes that it held a membership meeting on March 18, 2020, for its 254 family units who are members (By-Laws art. 5). At the meeting, 119 votes were cast, with 115 members voting to approve the Lease and 4 voting to reject it.

***Objector Respondents' Opposition:***

In opposition to East Midwood's application, the Objector Respondents primarily assert that leasing the Leased Premises to a non-Jewish charter school is contrary to East Midwood's purpose to promote Jewish education; that based on an appraisal report submitted by the Objector Respondents, the Lease is not fair and reasonable to East Midwood; and that Religious Corporations Law § 207 mandates that the Lease be approved by the members, and that the Lease was not approved by a majority of East Midwood's membership at the meeting held on March 18, 2020.

Of the affidavits submitted in opposition, Ellen Levitt's is the only one from a member of East Midwood. In her affidavit, Levitt generally details East Midwood's history of using the Leased Premises for its own Jewish day school, and then its leasing the space

to another Jewish school.<sup>7</sup> Levitt asserts that the most recent certificate of occupancy for the Leased Premises is only a temporary certificate. With respect to the March 18, 2020 membership meeting, Levitt asserts that the March 6, 2020 letter from East Midwood's president regarding the special meeting provided little detail about the Lease or indicate the Lease had already been executed,<sup>8</sup> and no such detail or voting options were provided on the proxy forms that were attached to the letter. Levitt notes that the meeting occurred on March 18, 2020, a date by which Governor Cuomo had ordered that schools be closed and had imposed other restrictions relating to the Covid-19 pandemic. Despite the Covid-19 issues, East Meadow's president made no provision for virtual attendance at the meeting.

Laurie Mermelstein states, in her affidavit, that she and her husband are former members of East Midwood. While they were still members of East Midwood, Mermelstein asserts that from the time they learned of the Lease in October 2019, she and her husband were vocal opponents of the decision to lease the Leased Premises to UD Inc. Mermelstein asserts that she had written to East Midwood's president requesting information about the lease in October and November 2019, and received no response. Finally, Mermelstein

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<sup>7</sup> The court notes that Ellen Levitt, in her affidavit submitted with the opposition papers, asserts that 1,500 911 calls were reported to UD School's prior location, that 63 percent of UD School's students admit that students get in physical fights and that 59 percent of the students report the presence of gang activity some or most of the time. The court, however, notes that Levitt has provided no source for her assertion regarding the 911 calls, and has not provided a print-out or URL relating to the survey relating to fights and gang activity. In any event, the court need not consider whether it must consider such facts since the Objector Respondents have not specifically relied on them in making their legal arguments.

<sup>8</sup> Levitt, however, has not attached a copy of this March 6, 2020 letter, or the proxy forms that were appended thereto.

states that on February 28, 2020, she and her husband received a notice that their membership had been revoked, along with a refund of their membership dues.

Howard Schiffman, in his affidavit, states that he attended school at the Leased Premises in the early 1970s, and participated in East Midwood's activities through his family membership that lapsed with his father's death in 2014. From the time he learned of the plan to rent the Leased Premises to Urban Dove in November 2019, he has been a vocal opponent of the Lease. In November 2019, he reached out to East Midwood's executive director about re-joining East Midwood, but never received a reply from East Midwood.

The Objector Respondents also submit affidavits from Michael Jemal, president of Yeshiva Darche Eres ("YDE") a Jewish day school, and Jack Ani, Esq., real estate counsel for Yeshivat Shaare Torah ("YST"), a Sephardic private Jewish school, who assert that their respective school's expressed interest in the Leased Premises in late August 2019. As relevant here, a YDE term sheet proposed paying an initial yearly rent of \$425,000 with two percent annual increases, and YST proposed paying annual rent of \$435,000, with no offer of annual increases. Neither term sheet contained an indemnification provision that would protect East Midwood from any legal action by Urban Dove, although both Jemal and Ani assert that they would have been willing to negotiate such an indemnification provision.

With respect to the market value of the leased premises, the Objector Respondents have submitted an appraisal report from an appraiser who asserts that the appraisal

submitted by East Midwood understates the as-is rental market value of the Leased Premises. However, this appraisal, unlike the East Midwood appraisal, does not address the impact of Urban Dove's proposed renovations on the overall market value of the Leased Premises.

In addition to their instant opposition to East Midwood's petition, on June 10, 2020, the Objector Respondents, along with Howard Schiffman and Steven Mermelstein, commenced the Levitt Action against East Midwood, East Midwood's officers and trustees and Urban Dove, among others, seeking a declaratory judgment declaring the Lease invalid based on violations of the Religious Corporations Law and breaches of fiduciary duty by East Midwood's trustees.

#### DISCUSSION

Religious Corporations Law § 12 (1) requires that a religious corporation must obtain leave from a court pursuant to N-PLC 511, or leave from the attorney general pursuant to N-PLC 511-a, in order to sell, mortgage, or lease for a term exceeding five years on any of its property. Under N-PLC 511-a (a), the attorney general has the discretion to conclude that a court should review the petition and make the determination thereon. This court approval may be obtained retroactively (Religious Corporations Law § 12 [9]; *Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. v Congregation Yetev Lev D'Satmar, Inc.*, 9 NY3d 297, 301 [2007]; *Solar Line, Universal Great Bhd., Inc. v Prado*, 100 AD3d 862, 864 [2d Dept 2012]).

In determining whether to approve the transaction, a court must first determine whether the terms of the transaction, as of the time of the transaction, were fair and reasonable (*see Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn*, 76 AD2d 712, 717 [2d Dept 1980], *affd* 54 NY2d 742 [1981]; *see also GG Acquisitions, LLC v Mount Olive Baptist Church of Manhasset*, 178 AD3d 1023, 1025 [2d Dept 2019]; *Scher v Yeshivath Makowa Corp.*, 54 AD3d 839, 839 [2d Dept 2008]; N-PLC 511 [d]). The court must also determine, as of the time the application for court approval is made, whether the transaction would benefit the corporation or is in the best interests of its members (*see Church of God of Prospect Plaza*, 76AD2d at 717; *see also Congregation Yetev Lev D'Saatmar of Kiryas Joel, Inc. v Congregation Yetev Lev D'Satmar, Inc.*, 31 AD3d 480, 482 [2d Dept 2006], *affd* 9 NY3d 297 [2007]; *Matter of Agudist Council of Greater N.Y. v Imperial Sales Co.*, 158 AD2d 683, 683-684 [2d Dept 1990], *lv denied* 76 NY2d 707 [1990]; N-PLC 511 [d]). Where no triable issue of fact is raised in a special proceeding brought pursuant to Religious Corporations Law § 12 and N-PLC 511, the court must make a summary determination on the papers submitted as if a motion for summary judgment were before it (*see Matter of Friends World Coll. v Nicklin*, 249 AD2d 393, 394 [2d Dept 1998]; *see also Singh v Baba Ma Khan Shah Lobana Sickh Ctr., Inc.*, 115 AD3d 962, 963 [2d Dept 2014]).

Here, East Midwood's petition contains the information required by N-PLC 511 (a), including a showing that the Lease was authorized by East Midwood's Board (N-PLC 511 [a] [7]). Contrary to the Respondent Objectors' assertions, the Lease here did not need to

be approved by East Midwood's members. Under East Midwood's By-Laws (By-Laws, art III, § 6) and Religious Corporation Law § 5, it is the Trustees who have control of East Midwood's property (*see Blaudziunas v Egan*, 18 NY3d 275, 282 [2011]). This is consistent with the Not-For-Profit Corporation Law, which governs to the extent that it is not inconsistent with the Religious Corporations Law (*see Religious Corporations Law § 2-a; Rector, Church Wardens & Vestrymen of St. Bartholomew's Church v Committee to Preserve St. Bartholomew's Church*, 84 AD2d 309, 313-314 [1st Dept 1982], *lv dismissed* 56 NY2d 645 [1982]), and which provides that it is the board of directors, the not-for-profit equivalent to a board of trustees, that has the authority to sell or lease the property of a not-for-profit corporation (*see N-PCL 509 [b]; National Church of God of Brooklyn, Inc. v Carrington*, 56 Misc 3d 1215 [A], 2017 NY Slip Op 51007, \*10 [U] [Sup Ct, Kings County 2017]; *see also Weiss v Opportunities for Cortland County*, 40 AD2d 45, 47 [3d Dept 1972]).

Religious Corporation Law § 207 does not provide to the contrary. Rather, it generally provides that the right of members to vote at meetings shall be fixed by the by-laws, and, only if the members are allowed to vote at a meeting relating to the sale or lease of the corporation's property, does it require that they shall be allowed to vote by proxy (*see Congregation Petach Tikvah v Septimus*, 276 AD 913, 913 [2d Dept 1950], *lv denied* 276 AD 962 [1950]; *Matter of National Council of Young Israel*, 2 Misc 3d 1003 [A], 2003

NY Slip Op 51716, \*5-6 [Sup Ct, New York County 2003]).<sup>9</sup> The decision in *Kroth v Congregation Kadisha, Sons of Israel* (105 Misc 2d 904 [Sup Ct, New York County 1980]), is distinguishable because the court therein held that the members of the congregation had authority to vote on the sale of its synagogue where the congregation had no by-laws setting forth the right and manner of voting (*id.* at 913).

East Midwood's petition also demonstrates that the terms of the Lease were fair and reasonable at the time it was executed. East Midwood gave notice that the Leased Premises was available on listing services that would likely reach schools seeking to lease space; it showed the Leased Premises to many schools; and of the schools that expressed an interest in the Leased Premises, UD Inc. offered to pay the highest rent.<sup>10</sup> The appraisal report submitted by East Midwood shows that the rent offered by UD Inc. is consistent with rent for comparable properties. East Midwood's submissions also show that UD Inc. plans to perform substantial renovations to the premises that will increase the value of the Leased Premises to East Midwood's benefit. Taken as a whole, East Midwood has shown that it has entered into an arms-length transaction on reasonable terms (*see Scher*, 54 AD3d at 839-840; *Matter of Sculpture Ctr., Inc.*, 2001 NY Slip Op 40368, \*2 [U] [Sup Ct, New

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<sup>9</sup> As is relevant here, Religious Corporation Law § 207 provides that, "The right of the members of such congregation to vote at meetings thereof shall be fixed by its by-laws, but every member of such congregation entitled to vote at any meeting thereof may vote by proxy on any proposition to sell, mortgage or lease any of its property or for its consolidation with one or more other religious corporations of the Jewish faith, or, in a city having a population of one million or more according to the latest federal census, in any election of trustees or officers."

<sup>10</sup> The court notes that, while it is possible that East Midwood could have found additional prospective tenants if it had listed the Leased Premises with a real estate broker, it avoided having to pay a broker's fee by proceeding without a broker.

York County 2001]; *Matter of Church of St. Francis de Sales of N.Y. City*, 110 Misc 2d 511, 515-516 [Sup Ct, New York County 1981]).

With respect to whether the transaction would benefit the corporation or be in the best interests of its members, although East Midwood had a history of operating a Jewish school in the Leased Premises, it had ended the operation of its own school on the Leased Premises before entering into the lease with the prior tenant, Midwood Jewish Academy, and nothing in East Midwood's certificate of incorporation or By-Laws require that it operate a Jewish school at that location (*see Matter of Sculpture Ctr., Inc.*, 2001 NY Slip Op 40368, \*3; *cf. Matter of Agudist Council of Greater N.Y.*, 158 AD2d at 683-684 [sale of building housing senior center contrary to specific corporate purpose that included operating a senior center]; *Church of God of Prospect Plaza*, 76 AD2d at 717 [selling church building would leave congregation without a house of worship]; *Matter of Manhattan Eye, Ear & Throat Hosp. v Spitzer*, 186 Misc 2d 126, 155-156 [Sup Ct, New York County 2000] [selling hospital facilities contrary to corporate purpose of operating a hospital]). East Midwood's judgment that Urban Dove's mission is consistent with East Midwood's social action goals is not subject to review by the court (*see Knight v Presbytery of W. N.Y.*, 26 AD2d 19, 22-23 [4th Dept 1966], *aff'd* 18 NY2d 868 [1966]). Further, all of East Midwood's current activities, including worship and Jewish education, are currently conducted in its Synagogue building and the income from the Lease will be used to support these continued activities and maintain its Synagogue building (*see Morris v Scribner*, 69 NY2d 418, 424-425 [1987]). Finally, even though the court has found that the members'

vote was required by the Religious Corporations Law or East Midwood's By-Laws, the prior vote of 115 members (out of the 119 who voted) in favor of the Lease with UD Inc. constitutes some evidence that the Lease is largely supported by East Midwood's congregation (*see Arneson v General Synod of Reformed Church in Am.*, 44 AD2d 648, 648 [4th Dept 1974] [where only a few religious corporation members are dissatisfied, courts are loath to interfere, even when the issue involves temporal affairs of a religious body]; *cf. Church of God of Prospect Plaza*, 76 AD2d at 717 [the sale of the church property was unanimously opposed by church members at the time the issue was presented to the court]).

As such, the court finds that East Midwood has demonstrated its prima facie entitlement to court approval of the Lease. The burden has thus shifted to the Objector Respondents to demonstrate the existence of a factual issue warranting a hearing on the petition (*see Matter of Friends World Coll.*, 249 AD2d at 394; *see also Singh*, 115 AD3d at 963). This court finds that the Objector Respondents have failed to meet their burden.<sup>11</sup>

In this regard, as discussed above, and contrary to the assertions of the Objector Respondents, no member vote was required to authorize the Lease. As such, any defects with the member meeting, including the notice of the meeting, the lack of instructions regarding how the members should use the proxies that were provided, and the fact that the

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<sup>11</sup> The court notes that Urban Dove's assertion that the Objector Respondents do not have standing appears to be limited to the Objector Respondents' right to seek the preliminary injunction. Urban Dove, in its memorandum of law in opposition to the motion for a preliminary injunction, appears to concede that at least Ellen Levitt is an "interested person" who may appear in opposition to the petition under N-PLC 511 (b).

meeting took place after Governor Cuomo had imposed restrictions to counter the Covid-19 epidemic, are immaterial to the determination of East Midwood's petition.<sup>12</sup> For the same reason, even assuming that Mermelstein's membership was improperly cancelled and Schiffman was improperly precluded from rejoining East Midwood, their votes as members would not have been relevant to the Board's determination. Nor does anything in the Objector Respondents' papers mandate finding that the operation of a secular school in the Leased Premises would be contrary to East Midwood's purpose as expressed in its certificate of incorporation or its By-Laws.

The Objector Respondents, in an attempt to attack the reasonableness of the Lease, have submitted an appraisal report from an appraiser who asserts that East Midwood's appraiser significantly undervalued the per square foot value of the comparable properties considered in determining the fair market value of the Leased Premises and as such, the Leased Premises' appraised value was significantly higher than that found by East Midwood's appraisal. An examination of the leases for two of those properties (attached as exhibits B and C to the affidavit of the Objector Respondents' affidavit), however, shows that the landlord for each of those properties was performing, or going to perform, significant renovations to the premises (see exhibit B to the leases). Thus, even if East Midwood's appraiser miscalculated the per square foot value of those properties, the rental price agreed upon in those cases may simply reflect the improved property condition to be

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<sup>12</sup> Even accepting the Objector Respondents' objections to the membership meeting, the court finds that the meeting still had some value as a straw poll regarding the members' feelings regarding the lease, and that the meeting shows that they largely support it.

provided. In addition, the Objector Respondents' appraiser does not in any way consider the value of the renovation work Urban Dove was going to perform in determining the reasonableness of the lease price or the ultimate increase in value of the Leased Premises.

Ultimately, the best evidence of the market price is the price agreed upon as part of an arms-length transaction, and as there is nothing in the Objector Respondents' papers suggesting that the transaction was anything other than an arms-length transaction, the agreed upon rent reached as part of the transaction is the best evidence of the market price (*see Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277-278 [1975]; *Weslowski v Assessor of City of Schenectady*, 152 AD3d 1035, 1036-1037 [3d Dept 2019]; *Matter of Western Ramapo Sewer Extension Project*, 120 AD3d 703, 704 [2d Dept 2014], *lv denied* 24 NY3d 917 [2015]; *Diocese of Buffalo v McCarthy*, 91 AD2d 213, 221-222 [4th Dept 1983], *lv denied* 59 NY2d 605 [1983]). In this regard, as noted, many schools toured the premises, and Urban Dove was the only entity to make an offer until late in the game. Even then, the Jewish schools that finally made offers, offered to pay significantly less rent than Urban Dove and did not intend to perform any significant renovations to the premises. Thus, while, in the abstract, the appraisal report submitted by the Objector Respondents suggests that the property could have been valued higher, the report fails to show the existence of an issue of fact with respect to the reasonableness of the Lease.

The Objector Respondents' additional argument that the lease is unreasonable in view of the possible issues relating to the certificate of occupancy fails to raise an issue of

fact because Lease § 4.07 places the burden on UB Inc to obtain any amendment to or update of the certificate of occupancy based on its use of and/or alterations to the premises.

In sum, the opposition by the Objector Respondents [only one of whom is a member of East Midwood, and who have submitted no evidence suggesting that the Lease was opposed by more than a few of East Midwood's members], fails to demonstrate the existence of a factual issue with respect to the reasonableness of the Lease and whether it is in the best interest of the corporation or its members that would warrant the denial of the petition (*see Scher*, 54 AD3d at 839-840; *Matter of Sculpture Ctr., Inc.*, 2001 NY Slip Op 40368, \*2; *Matter of Church of St. Francis de Sales of N.Y. City*, 110 Misc 2d at 515-516).

***Cross Motion For A Stay:***

The Objector Respondents' cross motion for a stay is denied, because the *Levitt Action* is only in its early stages, and delaying this proceeding to await the determination of the *Levitt Action* would deprive East Midwood of the speedy and efficient remedy provided to it in this special proceeding (*see Wachovia Bank, N.A. v Silverman*, 84 AD3d 611, 612 [1st Dept 2011]; Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C401:1 [online version]; *see also L.B. v Stahl York Ave. Co.*, 188 AD3d 421, 422 [1st Dept 2020]; *Steuerman v Broughton*, 123 AD2d 681, 681 [2d Dept 1986]). Moreover, in this regard, the Objector Respondents have made no suggestion that the discovery associated with that action is necessary, let alone that there are facts essential to opposing the petition that are in East Midwood's exclusive possession that would emerge during discovery so as to warrant delaying determination of the petition

to await the determination of the *Levitt Action* (see *Maurie Kassimir & Assoc., P.C. v Omri*, 189 AD3d 581, 582 [1st Dept 2020]; *Westport Ins. Co. v Altertec Energy Conservation, LLC*, 82 AD3d 1207, 1212 [2d Dept 2011]; *Matter of Park Knoll Owners, Inc. v Park Knoll Assoc.*, 175 AD3d 1410, 1411-1412 [2d Dept 2019]).

***Motion For A Preliminary Injunction:***

Finally, the Objector Respondents' motion for an order, pending the determination of the petition, granting a preliminary injunction barring Urban Dove from occupying the school is denied as academic, given that the court has determined East Midwood's petition on the merits (see *Wells Fargo Bank NA. v Area Plumbing Supply, Inc.*, 150 AD3d 932, 935 [2d Dept 2017]; *Matter of c/o Hamptons, LLC v Zoning Bd. of Appeals of Inc. Vil. of E. Hampton*, 98 AD3d 738, 740 [2d Dept 2012]).

This constitutes the decision, order and judgment of the court.

ENTER,



J. S. C.

**HON. WAVNY TOUSSAINT  
J. S. C.**

KINGS COUNTY CLERK  
FILED  
2021 JUL -9 AM 9:53