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

LANDMARK WEST! INC, 91 CENTRAL PARK WEST CORPORATION AND THOMAS HANSEN, Petitioners, For a Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules -against- CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, NEW YORK CITY PLANNING COMMISSION, HON. ANDREW CUOMO, as Attorney General of the State of New York, and CONGREGATION SHEARITH ISRAEL, also described as the Trustees of Congregation Shearith Israel, Respondents.	Index No. 650354/08 (Lobis, J.) **AFFIRMATION OF COURTNEY DEVON TAYLOR IN OPPOSITION TO THE POST-JUDGMENT MOTION TO INTERVENE**

COURTNEY DEVON TAYLOR, an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under the penalties of perjury:

Introduction

1. I am associated with Proskauer Rose LLP, counsel to Respondent "Congregation Shearith Israel a/k/a the Trustees of Congregation Shearith Israel in the City of New York" (the "Congregation"). I am submitting this affirmation to set forth the Congregation's opposition to the post-judgment motion to intervene (dated November 9, 2009) filed by the petitioners in the separate action entitled *Kettaneh v. Board of Standards & Appeals*, Index No. 113227/08 (Sup. Ct., N.Y. Co.) (Lobis, J.) (the "*Kettaneh* Parties"). The *Kettaneh* Parties should not be allowed to intervene in this action (the "Landmark West! Action").

2. The *Kettaneh* Parties claim that they should be allowed to intervene here, now that this Landmark West! Action has been dismissed, on the theory that appeals from this action and from the *Kettaneh* Parties' separate, unsuccessful suit might be "joined and heard together" by the First Department and that, if this Court issues another decision (on the motion for reargument that the petitioners in this Landmark West! Action have filed), that decision – allegedly based on an "incomplete argument" in this case – "could be prejudicial" to the *Kettaneh* Parties' appeal. *See* Affirmation of Alan D. Sugarman, dated November 9, 2009, ¶ 2.

3. The Court should not allow the *Kettaneh* Parties to intervene at this late stage. First, the *Kettaneh* Parties' motion to intervene is untimely to say the least. Second, the *Kettaneh* Parties' participation in this action is unnecessary. The arguments in this case have been anything but "incomplete." "Exhaustive" would probably be a conservative description. Moreover, nothing that this Court might do in this action could prejudice the *Kettaneh* Parties in their appeal of the adverse judgment in the Kettaneh Action. Third, the *Kettaneh* Parties have not submitted a proposed pleading with their motion. Their motion can be denied on that ground alone.

Background

4. In September 2008, the *Kettaneh* Parties filed their own Article 78 proceeding entitled *Kettaneh v. Board of Standards & Appeals*, Index No. 113227/08 (Sup. Ct., N.Y. Co) (Lobis, J.) (the "Kettaneh Action") to set aside a resolution of the Board of Standards and Appeals (the "BSA") that granted the Congregation a variance. Around the same time, the petitioners in this action, other opponents of the Congregation's project, filed their own action (then styled as a plenary suit) to invalidate the same BSA resolution (the "Landmark West! Action"). The two actions were deemed related and assigned to this Court. They were not consolidated.

5. The *Kettaneh* Parties took no steps with respect to this Landmark West! Action. They did not seek to intervene here; they did not seek to have the actions consolidated; they did not seek to have this Landmark West! Action stayed; and they did not assist in Respondents' efforts to have it dismissed. Presumably, at the time, the *Kettaneh* Parties viewed it as strategically beneficial for opponents of the BSA resolution to pursue challenges in two different suits (one plenary; one Article 78).

6. In a decision dated July 10, 2009 (the "Kettaneh Decision"), this Court dismissed the Kettaneh Action on the merits. In a decision dated August 4, 2009 (the "Landmark West! Decision"), this Court likewise dismissed the Landmark West! Action. The dismissals in both actions were entered as final judgments.

7. The *Kettaneh* Parties appealed from the adverse judgment in the Kettaneh Action and the petitioners in this suit appealed from the adverse judgment in this Landmark West! Action. The appeals from the separate judgments filed in the separate actions are now pending.

8. While their appeal was pending, the petitioners in this Landmark West! Action filed a motion for leave to reargue the Landmark West! Decision. Shortly thereafter, the *Kettaneh* Parties moved to intervene in this Landmark West! Action.

ARGUMENT

9. The Court should deny the *Kettaneh* Parties' motion to intervene. The *Kettaneh* Parties have not (and cannot) satisfy any of the elements of CPLR § 1012, which states that "upon timely motion, any person shall be permitted to intervene in any action . . . . when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." CPLR § 1012. Similarly, the *Kettaneh* Parties cannot meet the standards of CPLR § 1013 (referenced only in the *Kettaneh* Parties' notice of motion), which

allows courts to grant jurisdiction where such intervention will not unduly delay the action or prejudice the rights of the opposing party. *See* CPLR § 1013.

10. **First**, the *Kettaneh* Parties' motion to intervene is so untimely that intervention at this late point would substantially prejudice the Congregation. *See* CPLR § 1012 (requiring that application for intervention be made by a "timely motion"). The Congregation has an interest in proceeding with its project without the cloud of litigation. A post-judgment intervention would undermine that interest, which the Legislature sought to protect by enacting a ***30-day*** statue of limitations on challenging zoning variances. *See* N.Y.C. Admin. Code § 25-207[a]; *see also Soc'y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991) (recognizing that challenges by special interest groups or pressure groups can generate interminable delay and interference with projects). It would be inappropriate to allow the *Kettaneh* Parties to intervene and further complicate this action now. *See Town of Crown Point v. Cummings*, 300 A.D.2d 873, 874 (3d Dept 2002) (denying a post-decision motion to intervene in an article 78 proceeding).

11. The *Kettaneh* Parties do not (and cannot) claim that they were unaware of this action. Indeed, they offer no excuse for their strategic decision to wait more than a year before seeking to intervene. *See Rectory Realty Assoc. v. Town of Southampton*, 151 A.D.2d 737 (2d Dept 1989) (denying motion to intervene in a zoning dispute where movants did not attempt to intervene until more than a year after they became aware of the action). The *Kettaneh* Parties have been aware of this Landmark West! Action since its inception. Having intentionally filed a separate action, and having intentionally kept the actions separate, the *Kettaneh* Parties cannot now complain that they should be permitted to intervene in the very lawsuit that they have eschewed.

12. **Second**, the *Kettaneh* Parties have not (and cannot) show that the petitioners in this Landmark West! Action have litigated this action in an "inadequate" manner ***and*** that the *Kettaneh* Parties "may be bound by the judgment." *See* CPLR § 1012. While the Court decided against the Landmark West! petitioners (as well as the *Kettaneh* Parties), the Landmark West! petitioners have litigated aggressively. The briefing in both actions has been extensive. In any event, the *Kettaneh* Parties' cannot demonstrate that their claims will be affected – let alone determined – by any decision in this Landmark West! Action. This Court has treated the cases separately. The *Kettaneh* Parties in the Kettaneh Action have been able to file their own petition, submit their own briefs, make their own arguments, and pursue their own appeal. The *Kettaneh* Parties do not need to be in the Landmark West! Action as well.

13. **Third**, even if intervention at this point made sense, it would be appropriate for the Court to deny such relief on this record. *See* CPLR § 1014; *Lamberti v. Metro. Transp. Auth.*, 170 A.D.2d 224 (1st Dept 1991); *Farfan v. Rivera*, 33 A.D.3d 755 (2d Dept 2006); *Zehnder v. State*, 266 A.D.2d 224 (2d Dept 1999). The *Kettaneh* Parties have not submitted a proposed pleading with their motion. The Court can deny the motion on that ground alone.

Conclusion

14. For the reasons stated above, this Court should deny the *Kettaneh* Parties post-judgment motion to intervene.

Courtney Devon Taylor

COURTNEY DEVON TAYLOR

Dated: December 29, 2009