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SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION–SECOND DEPARTMENT

WILLOUGHBY REHABILITATION AND HEALTH CENTER, LLC, WOODMERE REHABILITATION AND HEALTH CARE CENTER, INC., GOLDEN GATE REHABILITATION AND HEALTH CARE CENTER, LLC, EASTCHESTER REHABILITATION CENTER AND HEALTH CARE CENTER, LLC, NASSAU OPERATING CO., LLC, PARK AVENUE OPERATING CO., LLC, TOWNHOUSE OPERATING CO., LLC, THROGS NECK OPERATING CO., LLC, NEW FRANKLIN REHABILITATION AND HEALTH CARE FACILITY, LLC and FORT TRYON REHABILITATION AND HEALTH CARE FACILITY, LLC,

Plaintiffs-Respondents

-against-

HELEN WEBSTER,

Defendant-Appellant

BRIEF OF AMICUS CURIAE

AGUDATH ISRAEL OF AMERICA

IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF THE AMICUS CURIAE[1]

Agudath Israel of America, founded in 1922, is a national Orthodox Jewish organization with affiliated chapters and congregations in many parts of the country. One of the roles that Agudath Israel plays is that of an advocate for the interests and concerns of American Orthodox Jewry in various governmental arenas.

[1] We acknowledge and thank David Katz, a law student at Harvard Law School and a summer intern at Agudath Israel of America, for his considerable work on this brief.

Agudath Israel generally maintains a policy of non-involvement in disputes between members of our constituency and any related litigation. However, we feel compelled to offer our views in this case due to our deep concern that the ruling below, if upheld, could have ramifications far beyond the specific dispute between the parties. We respectfully offer this short *amicus curiae* brief, in the hope that it will provide a Jewish communal perspective on one of the broad issues raised by this appeal: the importance of interpreting any ambiguity in a formal arbitration agreement to submit a dispute to a Beth Din in favor of compelling arbitration.

We cannot overemphasize that our involvement in this case should not be seen as advocacy on behalf of either party with respect to their underlying claims. We do not know anything about the underlying dispute or its procedural history beyond the facts that appear in the record of the lower court's proceedings. We are not concerned, and take no position whatsoever, as to which side is in the right. Our sole concern in this case is to protect the viability of the institution of Beth Din by ensuring that courts evaluate a *shtar berurin* (the form used to enter into arbitration before a Beth Din) consistent with federal and state laws and policies that mandate that any ambiguities in an arbitration agreement be resolved in favor of compelling arbitration.

ARGUMENT

I. IT IS IN THE BEST INTERESTS OF THE JUDICIAL SYSTEM TO ENCOURAGE AND SUPPORT ARBITRATION, ESPECIALLY WITH REGARD TO AGREEMENTS TO SUBMIT TO RABBINIC ARBITRATION, AND TO CONSTRUE AMBIGUITIES IN SUCH AGREEMENTS IN FAVOR OF ARBITRATION

It has long been a general policy of our country's federal and state judicial systems to support and encourage arbitration as a means of resolving disputes. Arbitration helps prevent further overburdening our already overburdened courts, it often helps to keep disputes amicable, and it often enables disputes to be resolved less expensively and more closely in line with the parties' original intentions. So strong is the support for arbitration that the federal courts have "consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As the Supreme Court has stated, "[t]he [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract

language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25.[2]

New York State law similarly strongly encourages arbitration (state arbitration regulations, codified in CPLR Article 75, are very similar to the Federal Arbitration Act) and New York courts also favor the enforcement of arbitration agreements and frown upon any attempts by a party to evade them. *See Olympia & York OLP Co. v. Merrill Lynch, Pierce, Fenner & Smith*, 214 A.D.2d 509, 511 (1st Dep't 1995); *Hirschfeld Productions v. Mivrish*, 218 A.D.2d 567, 569 (1st Dep't 1995). When it comes to determining the validity of an arbitration agreement, "the courts will not permit a party to elevate form over substance to avoid an otherwise valid arbitration agreement governing the dispute." *Id*. at 569.

This general federal and state policy of interpreting arbitration agreements in favor of compelling arbitration should be applied even more strongly with regard to agreements to submit disputes to a Beth Din, for several reasons.

[2] There is little doubt that the FAA applies to the arbitration agreement in this particular case. The broad scope of the FAA includes any "written provision in any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C.S. § 2. The Supreme Court has held that the proper definition of the term "involving commerce" is one that equates it with the "more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco*, 539 U.S. 52, 56 (2003). Applying this formula to the nursing home industry, which generates enormous amounts of revenue, employs countless number of people, is heavily regulated by the federal government, and derives much of its revenues from programs that receive federal funds, would seem to mandate the logical conclusion that the FAA applies to all arbitration agreements contained in the contracts used in this industry.

Most basically, since Orthodox Jews are required as a matter of Jewish law to submit disputes to a Beth Din, the strong presumption in evaluating any *shtar berurin* should be that the parties wanted and expected that any and all disputes between them would be resolved by rabbinic arbitration. Jewish law dictates that legal disputes between Jews are required to be arbitrated before a rabbinical court ("Beth Din") that employs substantive Jewish law ("*Halacha*") in making its decisions. *Shulchan Aruch (Code of Jewish Law), Choshen Mishpat* 26:1. That corpus of law encompasses not only matters of religious ritual, but also commercial dealings, interpersonal relationships, rights and duties of fiduciaries – the entire gamut of human experiences. The Beth Din proceeding is known as a "Din Torah". The way that parties formally agree to bind themselves to the outcome of the rabbinic proceeding is through the use of a *shtar berurin* which is the equivalent of an arbitration agreement.

It is well known throughout the Orthodox Jewish community that Jews are required by *Halacha* to have their disputes adjudicated by a Beth Din that makes its decisions in accordance with the Jewish substantive law. Schoolchildren are already taught the requirement that disputes be submitted to a Beth Din starting in fourth and fifth grade, when they learn *Exodus 21:1* and the commentary of

Rashi on that verse. [3] The authoritative work on Jewish law, *Shulchan Aruch (Code of Jewish Law),* widely studied on a daily basis throughout the Orthodox community, codifies the prohibition against use of non-Beth Din forums in very severe terms, describing its transgressor as one who "is regarded as having reviled, cursed, and committed violence against the Torah of Moses our teacher." *Choshen Mishpat,* 26:1. Throughout Jewish history, plaintiffs who transgressed *Choshen Mishpat,* 26:1 and forced Jewish defendants to appear before civil courts met with severe sanctions from the Jewish community.[4] The ban on resorting to the civil courts remains very much in effect today. See FEINSTEIN, 1 IGROS MOSHE CHOSHEN MISHPAT §8 (1963).

In numerous ways, the requirement that disputes between Jews be submitted to a Beth Din is frequently publicized in the Orthodox community. Many synagogue rabbis devote one Sabbath morning sermon a year to precisely

[3] "And these are the laws that you will place before them [the Children of Israel]." The great classic commentator Rashi quotes from the Talmud's explanation of this verse, found inTractate Gittin 88b, which states, "Every place where you find non-Jewish law courts . . . you are not permitted to resort to them, since it says, 'these are the laws that you will place before them.' That is to say, 'before them' [Jewish rabbinic courts of law] and not before non-Jewish [courts]."

[4] In many cases, the transgressor was placed in *cherem*, a form of communal ostracization. "A decree of cherem meant the virtual expulsion of the person upon whom it was inflicted, and sometimes the family also, from the religious and social life of the community." GOLDSTEIN, JEWISH JUSTICE AND CONCILIATION 8(1981). For example, in 1603 the Synod of Frankfurt decreed that "anyone who sues his neighbor in secular courts shall be . . . separated from the community of Israel, shall not be called to the Torah, and shall not be permitted to marry until he repents and frees his fellow from the power of the [secular] courts." FINKELSTEIN, JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES 257-58 (1924)

this topic in order to remind their congregants of the severity of the prohibition. Many congregations, including those affiliated with Agudath Israel, have rules denying membership privileges to those who have transgressed this law and compelled other Jews to appear before the civil courts. Coalition, January 1992, at 3, col. 4. Many Jewish organizations have bylaws that include provisions that require the resolution of disputes to be before a Beth Din that will apply Jewish law. *See In re National Council of Young Israel*, 2003 NY Slip Op 51716u (N.Y. Misc. 2003); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343 (D.C. 2005). Speeches at Orthodox Jewish gatherings often focus on this topic, and articles detailing this obligation appear from time to time in Orthodox Jewish publications. *See, for example,* BLEICH, *Litigation and Arbitration Before Non-Jews,* TRADITION, Fall 2000 at 58; BRAUNFELD, *A Layman's Guide to a Din Torah,* THE JEWISH OBSERVER, May 1997; KASDAN, *A Proposal for P'sharah*, JEWISH ACTION, Spring 1990; REISS, *Jewish Divorce and the Role of Beit Din*, JEWISH ACTION, Winter 1999; RESNICOFF, *The Secular Enforceability of a Beis Din Judgment*, THE JEWISH OBSERVER, October 1999; ZWIEBEL, *Batei Din vs. Secular Courts: Where Do We Pursue Justice*, THE JEWISH OBSERVER, January 1993.

In short, submitting disputes to a Beth Din represents a religious and cultural norm in Orthodox Jewish circles. It is reasonable to assume, therefore,

that when Orthodox Jews do business with each other, they enter deals and contracts with the underlying assumption that the norms of the community will be respected if there arises a need for dispute resolution. The assumption that these disputes will be resolved within the parameters of Jewish law – which means through the use of rabbinic arbitration – is the backdrop of all business dealings within the Orthodox Jewish community. Therefore, any ambiguities in a *shtar berurin* should be resolved in favor of arbitration before the Beth Din, in accordance with the norms of the community and the parties' expectations throughout their business relationship.

There are other reasons why the general rule in favor of construing arbitration agreements in favor of compelling arbitration should apply with special force in the context of agreements submitting disputes to a Beth Din. If the civil court system will begin looking at *shtarei* (plural of *shtar) berurin*—as the lower court did in this case—with an eye towards invalidating them on technical grounds, many more cases that the parties intended to have resolved by rabbinic arbitration will find their way into the civil court system. That would overburden an already overburdened judicial system, and would be contrary to established judicial policy. Allowing parties to void the agreement that they signed, especially when—as here-they used a standard form which comports with the requirements

of Jewish law, would easily allow any party who is unhappy with the rabbinic arbitration proceeding to use the civil court system as a secondary means of attacking and harassing the other party.

The New York State courts have expressed considerable interest in preventing parties to an arbitration agreement "from using the courts as a vehicle to protract litigation. This conduct has the effect of frustrating both the initial intent of the parties as well as legislative policy." *Weinrott v. Carp*, 32 N.Y.2d 190, 199 (N.Y. 1973). *See also Olympia*, 626 N.Y.S.2d at 71; *Nationwide General Ins. Co. v. Investors Ins. Co.*, 37 N.Y.2d 91, 95 (N.Y. 1975). "The policy of this State is to favor and encourage arbitration as a means of expediting the resolution of disputes and conserving judicial resources." *Rio Algom v. Sammi Steel Co.*, 168 A.D.2d 250 (N.Y. App. Div., 1990). This is made all the more urgent by what, unfortunately, appears to be a growing trend within the Orthodox community of parties who are dissatisfied with the results of a Beth Din proceeding to resort to the civil courts in an attempt to secure a more favorable result. *See* ZWIEBEL, *Batei Din vs. Secular Courts: Where Do We Pursue Justice*, THE JEWISH OBSERVER, January 1993. Allowing disputes that begin with a *shtar berurin* to find their way into the court system will thus further clog up an already overburdened docket in contradiction to state policy.

Moreover, the New York Court of Appeals has recognized that demanding a high level of specificity from arbitrators when drafting the arbitration agreement "would make the drafting of arbitration agreements burdensome, confusing and often impossible." *Weinrott*, 32 N.Y.2d at 196. That general approach should be applied with even greater deference to rabbinic arbitration agreements. It is quite possible that in many cases the *shtar berurin* signed when the parties submit to rabbinic arbitration will not necessarily be as technically perfect as an agreement drafted by an experienced arbitration attorney. The rabbis that comprise any given Beth Din may not always be as familiar with the technical intricacies involved in creating legally binding agreements; they are chosen to be rabbinic judges because of their knowledge of and expertise in Jewish law, which is the method they will be using to adjudicate the dispute, not their knowledge of arbitration law. Any experienced contract attorney, when consulted by a party who has signed such an agreement, may be able to find some technical difficulties with a *shtar berurin*. That is especially true with respect to one of the issues that troubled the court below: the failure of the *shtar berurin* to identify the corporate entities as parties to the dispute. As a general rule, Jewish law does not recognize corporations as distinct legal entities, and would typically treat corporations as partnerships of their shareholders. *See* Meir, *Halakhot of*

Investing in the Stock Market Part One – The Nature of Stock Ownership, at http://www.besr.org/library/stocks1.html; Tamari, *Shareholder Responsibility: Is There A Corporate Veil in Judaism?*, *at* http://www.besr.org/linrary/shareholder.htm. For this reason, rabbinic arbitrators may often draft *shtarei berurin* exactly as the Beth Din did in this case – by identifying the corporate principals, and not the corporations, as the parties to the dispute. To invalidate a *shtar berurin* because the Beth Din drafted it in a manner that reflects the Jewish legal view of corporate entities would frustrate not only the initial intent of the parties but also the law's general deference to arbitration.

Finally, resolving ambiguities in favor of compelling rabbinic arbitration will often avoid thorny questions of governmental entanglement with religion. Many of these cases involve issues that require knowledge of Jewish law to adjudicate properly. Jewish business partnerships and organizations structure themselves according to the demands of Jewish law, and often times include provisions in their agreements that make reference to and sometimes even rely outright on *Halachic* distinctions. The New York State courts have recognized that it is not within the scope of their designated role to "decide any question of Jewish law." *In re National Council of Young Israel*, 2003 NY Slip Op 51716u at 8. For the courts

to entangle themselves in deciding cases that involve complex matters of Jewish law would lead to the very "excessive entanglement between government and religion" that the Establishment Clause was designed to avoid. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (U.S., 1971)

In conclusion, it is in the best interests of the judicial system that the Beth Din system survives and continues to handle most disputes between Orthodox Jews. For this to happen, the parties who bring their disputes to a Beth Din for adjudication need to feel secure in the knowledge that the decision of the Beth Din will be binding and that they will not have to restart their efforts in a civil court. Such security can only be provided by a civil court system that continues to look at *shtar berurin* at the very least in the deferential and favorable manner that they evaluate all other arbitration agreements, and indeed, that recognizes that there are even stronger grounds in such cases to resolve all technical ambiguities in favor of compelling arbitration.

CONCLUSION

For the reasons set forth herein, amicus curiae Agudath Israel of America respectfully urges the Court to reverse the decision of the court below and grant Defendant-Appellant's motion to compel arbitration pursuant to CPLR § 7503(a) and to stay the current action pending the completion of the arbitration.

RESPECTFULLY SUBMITTED this Tuesday, July 26, 2005

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 670.10.3(f)

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