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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

C-CUBED SOLUTIONS, INC., a Delaware corporation, C-CUBED PRIVATE SOLUTIONS LIMITED, a business entity formed in India, and ROCKY STEFANSKY, Plaintiffs, v. MARC HABERMAN aka MOSHE HABERMAN, an individual, Defendant.	Case no. BC255351 **BRIEF IN SUPPORT OF PETITIONER'S MOTIONS FOR RECONSIDERATION OF RULING ON REQUEST TO VACATE ARBITRATION AWARD AND FOR RENEWAL OF PETITION TO CONFIRM AWARD** Date: April 22, 2002 Time: 9:00 a.m. Hon. Helen Bendix Dep't 18
ROCKY STEFANSKY, Petitioner, v. MARC HABERMAN aka MOSHE HABERMAN, an individual, C-CUBED SOLUTIONS, INC., a Delaware corporation, and C-CUBED PRIVATE SOLUTIONS LIMITED, a business entity formed in India, Respondents.	Complaint filed: August 2, 2001 Trial date: (none set)

Petitioner Rocky Stefansky submits this brief in support of his motions: (1) for reconsideration of the Court's ruling of February 28, 2002, vacating the arbitration award issued by the Beis Din Rabbinical Court of the Rabbinical Council of California (the "Beis Din") on December 14, 2001 (the "Award"), and (2) for renewal of his petition to confirm the Award.[1] Following the original hearing on both the petition to confirm and request to vacate the Award, new and different facts have emerged that go to the heart of the Court's rulings. More specifically, the following new evidence is grounds for reconsideration of the Court's rulings and, furthermore, warrants the entry of a new order denying the request to vacate and confirming the Award:

- Statements from two new and independent witnesses who emerged after the hearing and whose testimony will establish that Marc Haberman clearly *knew* that Rabbi Gershon Bess, one of the three Beis Din arbitrators, was the father of Mark Bess, president of Sylmark, Inc., one of the largest customers of Respondent C-Cubed Solutions, Inc, well *before* even Rabbi Bess knew that Sylmark was a customer — thus revealing that Mr. Haberman lied to this Court when he stated under oath that he did not know about the relationship "until November 2001"

- A supplemental statement from Rabbi Bess as to precisely when he first learned that Sylmark was a customer of C-Cubed *and* the document that informed of that fact — thus proving that he was under no obligation to disclose his relationship with his son anytime before November 1, 2001, since he had no knowledge of any purported grounds for disqualification

- Rabbi Union's more complete statement as to the content of his telephone conversation with Mr. Haberman on November 4, 2001 — thus proving that, in any event, the Beis Din timely disclosed the relationship within three days after Rabbi Bess discovered it

- Additional statements from the arbitrators *and* proffered testimony from an individual who was present for the entire arbitration hearings in

[1] Pursuant to Cal. Civ. Proc. Code § 1008, these motions are timely because a motion for reconsideration may be brought within 10 days of service of notice of entry of the order, which in this case was served by mail on March 4, 2002, and because a motion for renewal may be brought at any time.

which Mr. Haberman says that "Sylmark was raised several times" and who says that Sylmark was never mentioned — thus negating Mr. Haberman's suggestion that Rabbi Bess would have recognized in September that Sylmark was a C-Cubed customer

- Rabbi Union's more complete statement as to the content of his telephone conversation with Mr. Haberman on November 4, 2001 — thus negating Mr. Haberman's statement that the Rabbi made the Award contingent on Respondent C-Cubed's continuing to provide services

- E-mail exchanges between C-Cubed and Sylmark establishing that it was *Sylmark* that terminated C-Cubed's services — contrary to Steve Durham's statement that C-Cubed was forced to terminate services to Sylmark — thus negating the inference that the Beis Din was somehow punishing Mr. Haberman for failing to continue providing services

- Checks from Sylmark for over $28,800 that the Beis Din received and deposited *before* it entered its Award — thus negating the inference that the Award was somehow in exchange for enabling Sylmark to avoid having to pay those funds to anyone

- Additional statements and E-mail exchanges between C-Cubed and Sylmark showing why Sylmark refused to pay C-Cubed, why it had nothing to do with Sylmark's cash flow, and why the Beis Din deemed it critical under Jewish law to attach those funds and put them in the Beis Din's escrow — thus negating the suggestion that the Beis Din's interpleading of the $30,000 could have constituted misconduct

- Expert testimony proffered from three world-famous rabbis — Rabbis Chaim Cohen, Yechiel Tauber, and Avrohom Sherman (the last a member of the equivalent of the religious Supreme Court in Israel) — opining on the propriety of the Beis Din's conduct under Jewish law

All of this new and different evidence was unavailable to Petitioner despite the diligence of his counsel, Benjamin Kiss, Esq., who had only a limited time to investigate and gather evidence in the five days or so between the filing of Respondents' request to vacate and the date Petitioner's reply was due. (See Tenenbaum Decl. ¶ 2; Kiss Supp. Decl. ¶ 2.) Indeed, as the Court acknowledged, "I understand what they did because they had the reply

declarations and not a lot of time." (*See* Tr. of Hrg. of 2/28/02 attached as Ex. A to Kiss Supp. Decl. ["Tr."] p. 23.) The result is that the Court was left to make its findings based on a woefully incomplete factual record. Based on the foregoing new and different facts, Petitioner seeks reconsideration of the Court's rulings *as well as* an opportunity to present such evidence at an evidentiary hearing. Petitioner's new evidence will convince this Court — looking beyond the false statements from Mr. Haberman — that there are no valid grounds on which to vacate the Award and that the Award should therefore be confirmed.

STATEMENT OF FACTS

On December 14, 2001, the Beis Din issued the Award, its "Psak Din," in favor of Petitioner and against Respondents Marc Haberman and C-Cubed Solutions, Inc. ("C-Cubed"), and C-Cubed Private Solutions Ltd. ("C-Cubed India"). Petitioner filed its petition to confirm the Award on January 7, 2002. On February 18, 2002 — with over 40 days to prepare it — Respondents filed their response to the petition and requested that the petition be denied and that the Award be vacated. Respondents attached to their response the declarations, with exhibits, of five witnesses, which declarations alone consisted of 23 pages. Petitioner filed his reply on February 25, 2002. During the intervening five days or so,[2] Petitioner's counsel, Benjamin Kiss, Esq., was able to conduct a limited investigation of the allegations in Respondents' papers, and his diligence enabled him to obtain certain brief declarations from the Beis Din arbitrators and from Mark Bess. (Kiss Supp. Decl. ¶ 2.)

On February 28, 2002, this Court held a hearing at which it made various findings on which it based its order vacating the Award of the Beis Din (and thus denying the petition to confirm it). Shortly after the Court issued its ruling, word of the ruling quickly spread throughout the orthodox Jewish community in Los Angeles, and members of the community began inquiring of the Petitioner and the Beis Din arbitrators as to the basis of the Court's decision. When some of the members of this community learned of the

[2] Both Mr. Kiss and virtually every potential declarant in this case are orthodox Jews whose religion prohibits them from working on the Sabbath. (Kiss Supp. Decl. ¶ 2.)

representations made to the Court by Mr. Haberman — and learned that the Court had based its ruling on these statements — they were shocked by the result and contacted Petitioner to express their disbelief. On Thursday, March 7, 2002 (one week before Petitioner's Motion for Reconsideration was due), Petitioner retained his current counsel, Michael Tenenbaum, Esq., to respond to the various offers of new evidence he was receiving from members of the community who know Mr. Haberman and to further inquire of the arbitrators themselves about the procedural issues Mr. Haberman had raised. (Tenenbaum Decl. ¶ 3.) The many new and different facts Mr. Tenenbaum discovered — which evidence cries out for reconsideration of the Court's rulings and a new order confirming the Award — are described in the accompanying Declaration of Michael Tenenbaum and discussed below.

ARGUMENT

While, in the absence of written findings of fact and conclusions of law, it cannot be determined on which of the specific subsection(s) of Cal. Civ. Proc. Code § 1286.2 the Court based its decision to vacate the award, Petitioner's new and different evidence is critical to a determination of what appear to have been the Court's primary concerns at the original hearing. The Court stated its "bottom line" tentative ruling as follows:

> It struck me — I will give you the bottom line and I will say why. It struck me looking at the evidentiary matters set forth in the response, and all of the reasonable inferences created by the respondent's papers, that these things create a possible impression of bias in the eyes of [the] hypothetical reasonable person.

(Tr. p. 6.)

I. To the Extent that the Court's Rulings Were Based on Cal. Civ. Proc. Code § 1286.2(a)(6), Which Concerns Disclosures Required of the Arbitrators, Petitioner's New Evidence Establishes Not Only that Disclosure Was Made but that Mr. Haberman Knew About the Allegedly Undisclosed Relationship Well Before Even the Arbitrators Did.

Cal. Civ. Proc. Code § 1286.2(a)(6) provides as one of the grounds for vacating an arbitration award that "[a]n arbitrator making the award . . . failed to disclose *within the*

time required for disclosure a ground for disqualification of which the arbitrator was *then* aware." Cal. Civ. Proc. Code § 1281.9 requires disclosure of not only certain statutorily required information but also "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial." Cal. Civ. Proc.Code § 1218.9(a); *see also Ceriale v. AMCO Ins. Co.*, 48 Cal. App. 4th 500 (2d Dist. 1996). The statute requires that such disclosure be made "within 10 calendar days of service of notice of the proposed nomination or appointment." Cal. Civ. Proc. Code § 1218.9(b).

Here, the only matter that Mr. Haberman alleges went undisclosed to him — at least "until November 2001," that is — is the fact that Mark Bess, the president of Sylmark, one of C-Cubed's largest customers, was the son of Rabbi Bess, one of the arbitrators in Mr. Haberman's case. Based on Mr. Haberman's false representations, the Court was misled to conclude as follows:

> Rabbi Bess never disclosed [that] his son was a major client of C-Cubed, even when he learned about it. He has a declaration saying, "I didn't know at the time I was appointed," but he did know before the decision came out, and at no time did he disclose it, and there is no declaration setting forth that he did disclose it, so I have to *assume* he didn't, and there is no — nothing in his declaration indicating why he didn't.

(Tr. 13 [emphasis added].) Indeed, as to whether Mr. Haberman was aware of the allegedly undisclosed relationship, even the Court admitted: "All I have is speculation right now. I don't have competent evidence from you indicating what Mr. Haberman knew or didn't know . . . and when." (Tr. p. 31-32.)

Yet, as Rabbi Bess explains more fully in his supplemental declaration, while he was obviously aware that his son was the president of Sylmark at the time he was selected as an arbitrator, he had no idea that Sylmark was a customer of C-Cubed until on or around November 1, 2001. (Rabbi Bess Supp. Decl. ¶ 2.) It was not until then that he first learned of the relationship, which he discovered in the course of reviewing a document, submitted from an accountant to the Beis Din via Rabbi Union, which listed Sylmark as one of C-

Cubed's customers. (Rabbi Bess Supp. Decl. ¶ 3; Rabbi Union Supp. Decl. ¶ 3 & Ex. A.)[3] Upon discovering this, Rabbi Bess almost immediately ensured that Mr. Haberman was notified of the relationship. (Rabbi Bess Supp. Decl. ¶ 4; Rabbi Union Supp. Decl. ¶ 4.) Indeed, while the statute does not provide a deadline for disclosure of such matters when discovered *after* the arbitrators have been appointed, Petitioner's new evidence makes clear that the Beis Din disclosed the relationship directly to Mr. Haberman within three days of Rabbi Bess' discovery of Sylmark's status as a C-Cubed customer. (Rabbi Union Supp. Decl. ¶ 5.) That was when, on November 4, 2001, Rabbi Union called Mr. Haberman on his mobile phone. In that telephone call, as Rabbi Union's supplemental declaration reveals, Rabbi Union repeatedly referred to Sylmark as "Rabbi Bess's son's company" and "the company of Rabbi Bess's son." (Rabbi Union Supp. Decl. ¶ 5.) Thus, Petitioner's proof establishes that the Beis Din timely disclosed the relationship almost as soon as Rabbi Bess became aware that his son's company was a customer of C-Cubed.

Moreover, Rabbi Bess would have been under an obligation to disclose his relationship only if a person could reasonably doubt that he could be impartial in light of his attenuated connection with Respondent C-Cubed. Yet here, this allegedly undisclosed information could not cause a *reasonable* person to entertain a doubt about Rabbi Bess's impartiality — and could certainly not lead him or her to think that the Rabbi would sway two other arbitrators to issue an award *against* the very company that is supplying essential services to his son's business. It requires a vivid imagination to conceive of a way in which either Rabbi Bess or his son would benefit in any way from an Award that found C-Cubed

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[3] Contrary to Mr. Haberman's statement that, "[i]n the hearing on September 10th and 11th, Sylmark was raised several times in the Arbitration," all three members of the Beis Din reveal that the name "Sylmark" never came up at any of the Beis Din's hearings, including the arbitration hearings on September 10th and 11th, 2001. (*Compare* Haberman Decl. ¶ 17 *with* Rabbi Bess Supp. Decl. ¶ 5; Rabbi Union Supp. Decl. ¶ __;) In addition, Petitioner's counsel has spoken with *another* individual who was present for the entire Beis Din proceedings on those days and who, under subpoena to appear at the hearing, would testify that the name Sylmark was never mentioned during the hearings. (Tenenbaum Decl. ¶ 7.)

liable to Petitioner. If anything, an award requiring C-Cubed to pay Petitioner would deprive the company of the resources necessary to continue providing services to Sylmark. Indeed, even any perceived bias on Mr. Haberman's part would actually operate only in his favor.

In any event, the declaration of Jacob Wurzburger — one of at least two individuals who came forward after learning of the Court's decision to vacate the Award — should enable the Court to see past Mr. Haberman's lie (there being no more accurate word for it) that he was somehow unaware of the father-son relationship between Rabbi Bess and Mark Bess "until November 2001." Mr. Wurzburger makes it clear that Mr. Haberman *knew* that Rabbi Bess was Mark's father long before the arbitration ever started. When Mr. Haberman's company was sharing office space with Mr. Wurzburger back in the summer of 2000 (a year before the arbitration), Mr. Haberman told Mr. Wurzburger that he wanted to sign up Sylmark as C-Cubed's first big customer and that he planned to accomplish this by making a side payment to Mark to get him to give C-Cubed his business. (Wurzburger Decl. ¶¶ 2-3.) On hearing this, Mr. Wurzburger expressed his disapproval of such a venal idea and suggested, instead, that Mr. Haberman try to get to know Mark better by attending his father's synagogue, where, Mr. Wurzburger told him, Mark prays. (Wurzburger Decl. ¶ 4.) Mr. Wurzburger told Mr. Haberman that, by attending Rabbi Bess's synagogue and forming a friendship with Mark, he would lead Mark to regard him as a person he might be inclined to help in business. (Wurzburger Decl. ¶ 5.) In those conversations, Mr. Wurzburger repeatedly referred to the synagogue Mark attended as "his father Rabbi Bess's synagogue." Indeed, within the orthodox Jewish community in the area near the synagogue, it is better known as "Rabbi Bess's synagogue" than by its formal name, Kehilas Yaakov. (Wurzburger Decl. ¶ 6.)

Sure enough, Mr. Haberman began attending Rabbi Bess' synagogue and was able to make contact with Mark Bess there on several occasions. (Mark Bess Supp. Decl. ¶¶ 5-6.) (Meanwhile, it is inconceivable that, during Mr. Haberman's multiple visits to Rabbi Bess's synagogue, he remained unaware of the identity of the synagogue's sole rabbi.) As a result of these contacts, later in the summer of 2000, Mark Bess agreed to sign up as a

customer of C-Cubed Solutions, Inc. (Mark Bess Supp. Decl. ¶ 6.) Mr. Wurzburger's declaration and proffered testimony thus clearly establish that Mr. Haberman knew of the allegedly undisclosed relationship as early as a year before the arbitration ever began.

Mr. Wurzburger's declaration also establishes that sometime in the early fall of 2000, after landing the Sylmark account, Mr. Haberman was in his office showing Mr. Wurzburger a website he had found while conducting an Internet search for references to his new client. (Wurzburger Decl. ¶ 7.) The website was one on which customers of popular companies could post complaints for public view concerning the companies' products or customer service. (Wurzburger Decl. ¶ 8.) Mr. Haberman read aloud from this website a customer complaint about Sylmark that said something to the effect of "I've discovered who's behind the AbSlide [one of Sylmark's products], and it's a certain Mark Bess who lives or runs the business in the 900-- ZIP code." (Wurzburger Decl. ¶ 9.) Mr. Haberman then jokingly said to Mr. Wurzburger something to the effect of "How funny would it be if I added a posting that said 'and his father is the rabbi of a major synagogue in Los Angeles?'" (Wurzburger Decl. ¶ 10.)

It gets even worse, though. Petitioner, a resident of New Jersey, originally commenced an arbitration of the underlying dispute in this case with a well-known rabbinical court in New York. After being served with notice of that arbitration, Mr. Haberman, a resident of Los Angeles, asked the Beis Din in L.A. if it was possible to demand that the case be heard before it instead, and Rabbi Union told him that he was entitled to such a "change of venue" under Jewish law. (Haberman Decl. ¶ 10; Rabbi Union Supp. Decl. ¶ 2.) In early July 2001, either just as Mr. Haberman was hoping to move the arbitration to Los Angeles or just after he learned from Rabbi Union that he could do so — but in any event *before* the proceedings had begun — Mr. Haberman was boasting to Mr. Wurzburger (the two were still sharing office space) about the strategic advantages he believed he would gain by having the Beis Din conduct the arbitration. (Wurzburger Decl.

¶ 11.) When another individual present[4] said to him something to the effect of "Aren't you concerned that Rabbi Bess is going to be one of the arbitrators, given that his son is one of your customers?" Mr. Haberman's response was something to the effect of "I'm not worried about that." (Wurzburger Decl. ¶ 12.) Mr. Haberman even went further to make statements to the effect that he thought the Beis Din would "judge for the local guy, not the out-of-town investor," and that "Mark Bess would be on my side, and, if anything, it would help." (Wurzburger Decl. ¶ 13.)

Petitioner's new evidence thus establishes that it is wholly untrue that Mr. Haberman "did not find out about the relationship between Rabbi Gershon Bess and his son Mark Bess until November 2001," as he swore to this Court. (*See* Haberman Decl. ¶ 18.) In fact, he knew about the allegedly undisclosed relationship long before even Rabbi Bess knew that Sylmark was a C-Cubed customer. Moreover, let this Court not forget the purpose of the disclosure requirement in the first place, namely, to alert a party to facts such that, if he believes from them that an arbitrator cannot be impartial, he can use those facts as grounds to seek disqualification of the arbitrator. Here, even if the Court were to believe Mr. Haberman's own false declaration, he *admits* learning the allegedly undisclosed relationship between Rabbi and Mark Bess in "November 2001." (Haberman Decl. ¶ 18.) Yet he made no effort to disqualify Rabbi Bess even then, and *of course* he did not, since — as Petitioner's new evidence makes clear — Mr. Haberman had known all along about the relationship and thought he would be the *beneficiary* of it.

"Grounds for disqualification of a judge must be raised at the earliest practicable opportunity after discovery of the disqualifying facts. . . . A party may not gamble on a favorable decision." *Baker v. Civil Service Com.*, 52 Cal. App. 3d 590, 594 (2d Dist. 1975). As the California Supreme Court has long recognized, "It would seem . . . intolerable to permit a party to play fast and loose with the administration of justice by

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[4] This witness is reluctant to testify, would not voluntarily provide a declaration, and will need to be subpoenaed to appear at an evidentiary hearing. (See Tenenbaum Decl. ¶ 6.)

deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not." *Caminetti v Pacific Mut. Life Ins. Co.*, 22 Cal. 2d 386, 392 (1943) (affirming denial of request to vacate ruling of judge whose sister was stockholder of party where other party waited until after ruling to seek disqualification). Here, Mr. Haberman wagered that he could deceive this Court in order to avoid an arbitration award that he agreed to accept from a Beis Din he was betting all the while would stack the odds in his favor based on the very relationship that he now complains was undisclosed to him and somehow made the Award unfair. With new evidence revealing the extent of Mr. Haberman's deceit, this Court should deny his request to vacate the award, grant the petition to confirm the award, and deal Mr. Haberman the hand that he deserves.

II. To the Extent that the Court's Rulings Were Based on Cal. Civ. Proc. Code § 1286.2(a)(3), Which Concerns Misconduct Resulting in Substantial Prejudice, Petitioner's New Evidence Establishes that There Was No Misconduct — Let Alone Any that Resulted in Substantial Prejudice.

While the Court's ruling never once mentions the word "prejudice" — let alone the term "substantial prejudice"— the Court in a single passing reference did allude to Respondents' allegation of "misconduct" on the part of the Beis Din by indicating that the claim of misconduct "hinge[d] on the conduct of the son of one of the rabbis . . . and the alleged telephone calls to Mr. Haberman." (Tr. p. 9.) The Court also suggested that one could infer "something strange here," namely that, because "monies owed by the arbitrator's son were withheld by the rabbinical court, but no mention or record is there of — that they were ever paid by Mr. Mar[k] Bess, the son . . . [t]hat adds to the inference that *the award was in exchange*, at least in part, *for voiding the debt owed by Mr. Bess*, Mar[k] Bes[s], the rabbi's son." (Tr. pp. 13-14 [emphasis added].) Nothing could be further from the truth.[6]

[6] That an incomplete set of facts and false allegations before the Court were "susceptible to an impression of bias" (Tr. p. 14), however, does not mean that Respondents satisfied their burden of proof — a preponderance of the evidence, not an inference of a possibility — that they were "substantially prejudiced" by the

Petitioner's new evidence establishes that: (1) Rabbi Union never made any threat to the effect that, if C-Cubed discontinued services to Sylmark, it would result in an adverse decision; (2) it was *Sylmark*, not C-Cubed, that terminated the services days later, so the Beis Din could not have been concerned about what for Sylmark, a $100 million company, was a tiny account; (3) the Beis Din sought to interplead the $30,000 that Sylmark owed C-Cubed (which procedure is permitted under Jewish law) only because it had discovered that Mr. Haberman was concealing that receivable as part of his diversion of the company's assets; and (4) Sylmark actually deposited the $30,000 with the Beis Din *before* it issued its Award.

Rabbi Union's supplemental declaration provides this Court with the information it was missing at the time of its ruling at the original hearing. Recognizing that Rabbi Union had denied Mr. Haberman's allegations concerning the threat, the Court remained concerned that "he doesn't tell you what he said. He doesn't set forth the substance of what he said in the call," admittedly leaving the Court in "an odd position." (Tr. p. 14.) Rabbi Union now explains that, at the time of his original declaration, he believed that it was unnecessary to go further than a denial of the accusations he considered ridiculous and that, if confirmation of the Award were to have hinged on a credibility determination between him and Mr. Haberman, he would be afforded an opportunity to testify more fully about the matter — as he indicated he was willing to do in the very first paragraph of his declaration. (Rabbi Union Supp. Decl. ¶ 14.) Rabbi Union now explains that, during his conversation with Mr. Haberman, he never threatened *anything* to the effect that the outcome of the arbitration would depend on C-Cubed's continuing to provide services to Sylmark. (Rabbi Union Supp. Decl. ¶ 6.)

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alleged misconduct of the Beis Din. *See* Cal. Civ. Proc. Code § 1286.2(a)(3). A comparison of subsections (a)(3) and (a)(6) of section 1286.2 reveals that the "person-aware-of-the-facts-could-reasonably-entertain-a-doubt-that-the-proposed-neutral-arbitrator-would-be-able-to-be-impartial" standard of section 1281.9 incorporated into subsection (a)(3) by the *Ceriale* case is applicable only to the arbitrators' required

Rabbi Union believes that Mr. Haberman is falsely misrepresenting to the Court the only statement that Rabbi Union made concerning the consequences of discontinuing services to Sylmark. (Rabbi Union Supp. Decl. ¶ 7.) Rabbi Union now explains that he first told Mr. Haberman that, in order to prevent Mr. Haberman's further dissipation of C-Cubed's assets, the Beis Din would be demanding that the monies Sylmark owed C-Cubed be deposited in an escrow account with the Beis Din pending the issuance of the Award. (Rabbi Union Supp. Decl. ¶ 8.) In response to that, Mr. Haberman first told Rabbi Union that such action was of no concern to him as he was no longer involved with C-Cubed. (Rabbi Union Supp. Decl. ¶ 9.) Mr. Haberman then added something to the effect of "well, if C-Cubed doesn't get paid, it won't be able to continue providing services to Sylmark." (Rabbi Union Supp. Decl. ¶ 10.) In response to this statement, Rabbi Union told Mr. Haberman that failing to perform on its contract with Sylmark could subject C-Cubed to damages to Sylmark. (Rabbi Union Supp. Decl. ¶ 11.) Rabbi Union declares that he never told Mr. Haberman what to do with the Sylmark account and certainly never threatened Mr. Haberman with any adverse consequence — or promised to look more favorably on the case — based on whether C-Cubed continued providing services or not. (Rabbi Union Supp. Decl. ¶ 12.)

Second, Petitioner submits two newly-discovered E-mails that further evidence the fact that it was Sylmark that terminated C-Cubed's services and not the other way around, as Respondents declared. In the first E-mail, sent shortly after Sylmark switched its live chat service to another provider, C-Cubed's Chief Operating Officer, Steve Durham, asks Sylmark's Director of Customer Service, Peter Babaian, "[W]here's the chat icons? They seem to have disappeared." (Mark Bess Decl. ¶ 7 & Ex. A.) If C-Cubed had been the one to terminate the services, surely it would have known why the icons were missing; Mr. Durham's E-mail reveals that the removal of C-Cubed's chat icons from Sylmark's website was the first alert C-Cubed received that, contrary to its representations to this Court, *it* and

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disclosures, and not to their subsequent *conduct*, which is judged by the "substantially prejudiced" standard.

not Sylmark was being cut off. In the second E-mail, dated November 18, 2001, Mark Bess writes to Messrs. Durham and Haberman, "[W]e discontinued service until your disputes are resolved, at which time we can discuss again." (Mark Bess Decl. ¶ 8 & Ex.. B.) As a $100 million company with significant cash flow, Sylmark was hardly in desperate need of C-Cubed services — or a short-term extension of time to pay a $30,000 bill. (Mark Bess Decl. ¶¶ 3-4.)[7] Of course, in order for Rabbi Union's alleged threat to have made any sense, Respondents *need* to claim that C-Cubed cut Sylmark off from a vital service or that it was short on cash, but Petitioner's new evidence confirms that is simply not the case.

Third, Petitioner's new and different facts explain that the Beis Din sought to interplead the $30,000 that Sylmark owed C-Cubed not as part of some hypothetical scheme to assist Mark Bess's company but because the Beis Din had discovered that Mr. Haberman was concealing C-Cubed's receivables — including payments from Sylmark — as part of his diversion of the company's assets. (Rabbi Union Supp. Decl. ¶ 13.) Moreover, as the proffered testimony of three esteemed rabbinical court judges will show, the Beis Din's actions in preventing these funds from being dissipated pending the outcome of the arbitration were well within the strictures of Jewish law governing rabbinic courts (which provides the procedure which Respondents agreed would govern their arbitration). (Tenenbaum Decl. ¶ 7.)[8] Thus, Respondents' speculation that the Beis Din's conduct somehow amounted to substantially prejudicial *mis*conduct is entirely unfounded.

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[7] Mr. Bess submits this information to address the Court's concern at the hearing: "I haven't seen any declaration indicating that [Mark Bess] . . . was not in debt up to his eyeballs . . ." (Tr. p. 27.)

[8] The same provisions of the California Code of Civil Procedure that establish grounds for disqualification of a judge also *prohibit* disqualification in the circumstances here: "It shall not be grounds for disqualification that the judge . . .[h]as in any capacity expressed a view on a legal or factual issue presented in the proceeding . . ." Cal. Civ. Proc. Code § 170.2(b). Here, Rabbi Union's statements amount to nothing more than his expression of the Beis Din's views on the facts it had learned about Mr. Haberman's management of C-Cubed and the legal mechanisms that Jewish law supplies to ensure the effectiveness of the Beis Din. Indeed, the Beis Din's internal

Finally, Petitioner was unable to determine by the time of hearing whether Sylmark had deposited the $30,000 with the Beis Din; indeed, his counsel at the hearing, Steve Globerman, Esq., admitted, "I don't know whether that $30,000 was or wasn't paid to the Beis Din" (Tr. p. 27), and the Court recognized the issue as "is there any proof that Mr. Bess ever paid it, creating the inference of arbitrators working to the benefit of the son of one of the arbitrators" (Tr. p. 28). Following the hearing, however, Mr. Bess was able to obtain copies of his company's checks which conclusively prove that the Beis Din received and deposited $28,838.75 of the interpleaded funds before it issued its Award. (Mark Bess Decl. ¶ 13 & Ex. D.) Accordingly, the speculation and inference that led this Court to conclude that something sinister was under way must yield to Petitioner's new evidence establishing that the Award could not have been in exchange for saving Mr. Bess $30,000 when he was required to pay in any event.

* * *

Here — because material facts were not available until after the Court's ruling at the hearing became known — the Court was presented with such a skeletal set of facts that it was forced to make a variety of dangerous inferences about the Beis Din's conduct based mainly on testimony of Mr. Haberman that Petitioner's new evidence makes clear was nothing short of perjury. In light of Petitioner's new evidence, Mr. Haberman's conspiracy theory simply makes no sense, and this Court should not indulge his misrepresentations by allowing its order vacating the Beis Din's Award to stand. An evidentiary hearing is thus essential to resolving this dispute based on these new facts (as it would have been especially helpful at the original hearing on the motion), particularly where this Court recognized that

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rules of procedure — like those of any arbitral tribunal — should not be reviewed by a court for their conformity with the rules that a court might follow, particularly where, in submitting their dispute for resolution under Jewish law, the parties consent to those procedures. Indeed, as the proffered testimony from these rabbis will show, this Court should not consider any evidence that the arbitrators allegedly exceeded their powers because the Beis Din's conduct was entirely proper under Jewish law.

its finding of facts depended on critical determinations of credibility that can only effectively be made by calling witnesses to the stand.[9]

Petitioner's counsel, Mr. Kiss, had just a handful of days to investigate and gather evidence in response to the many scandalous allegations raised in Respondents' request to vacate the Award. By comparison, parties are given a greater opportunity to prepare to present evidence in even a small claims case. Particularly in light of the strong policy favoring the finality and general unreviewable nature of arbitration awards — and where a $600,000 award and the integrity of the Beis Din hang in the balance — the matter deserves both reconsideration and an evidentiary hearing to make the critical credibility determinations that the Court recognized were necessary to resolve the matter.

Indeed, in repeatedly referring to the incomplete set of facts it was faced with, the Court itself expressed this view at several points during the original hearing: "It is an odd position I'm in" (Tr. 14); "There is a competing declaration. It is a credibility match." (Tr. 15); "I have no idea what happened there, and I can't resolve that on the basis of these two declarations, saying yes versus not yes. I don't know." (Tr. 15); "[I]t is a basic credibility match. I would have to have them up here and have them testify and see which one I believe." (Tr. 16.) Questions of credibility are more appropriately decided at an evidentiary hearing than on declarations drafted by lawyers (and particularly on declarations necessarily drafted in haste). In the face of Petitioner's new evidence, such a hearing is perhaps the only appropriate manner for the Court to get at the truth of this matter.

CONCLUSION

In an effort to avoid the award of an arbitration tribunal that he selected in the belief that it would be partial to his side, Respondent Mr. Haberman has submitted sworn

[9] Moreover, it is obvious from the brevity of their declarations that the declarants did not make detailed statements because they believed such statements were unnecessary to the limited issues in dispute, because they believed it was sufficient simply to negate Respondents' preposterous statements and innuendos, and because they believed that they could provide additional facts at an evidentiary hearing in the event

declaration testimony that — without reconsideration in light of Petitioner's new and different evidence — will constitute a fraud upon this Court. Accordingly, this Court should grant Petitioner's motions: (1) for reconsideration of its ruling on Respondent's request to vacate and (2) for renewal of Petitioner's petition to confirm the award and schedule an evidentiary hearing at which the truth will lead the Court to deny

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Respectfully submitted,

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that there were a need to resolve any conflict. (Rabbi Bess Supp. Decl. ¶ 6; Rabbi Union Supp. Decl. ¶ 14; Mark Bess Decl. ¶ 17.)