

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU : REFEREE PART

P R E S E N T :

HON. FRANK SCHELLACE, Special Referee

-----X
EDWARD KELLEY a/k/a ADARSI DAS, THE INTERNATIONAL
SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and THE
GOVERNING BODY COMMISSION OF THE INTERNATIONAL
SOCIETY FOR KRISHNA CONSCIOUSNESS,

Plaintiff(s),

-against-

ACTION NO. 1

INDEX NO. 7016/04

ARUNA GARUDA a/k/a ARUNA DEVI DAS, VISWA GARUDA
a/k/a VISWA PRANA DASA, VIJAY SHAW, WYNDELL WYNTER
a/k/a ARAVINDAKSA DAS and SHALINI AGARWAL,

Defendant(s).

-----X
EDWARD KELLEY a/k/a ADARSI DAS, THE INTERNATIONAL
SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. and THE
GOVERNING BODY COMMISSION OF THE INTERNATIONAL
SOCIETY FOR KRISHNA CONSCIOUSNESS,

Plaintiff(s),

-against-

ACTION NO. 2

INDEX NO. 2104/07

IAN DOAMAN and JOSEPH BONOMO a/k/a KRISHNA
BALARAMA SWAMI,

Defendant(s).

THE INTERNATIONAL SOCIETY FOR KRISHNA
CONSCIOUSNESS, INC., IAN DOAMAN and JOSEPH BONOMO
a/k/a KRISHNA BALARAMA SWAMI,

Counterclaim-Plaintiffs,

-against-

EDWARD KELLEY a/k/a ADARSI DAS, THE INTERNATIONAL
SOCIETY OF KRISHNA CONSCIOUSNESS, INC. and the
GOVERNING BODY COMMISSION OF THE INTERNATIONAL
SOCIETY FOR KRISHNA CONSCIOUSNESS,

Counterclaim-Defendants.

-----X

Motion by plaintiff in Action No. 1 for an order vacating the note of issue (motion seq. #16) referred to this Court by order of Justice Mahon dated October 22, 2008 is denied. In the alternative, this Court directs that the trial of action No. 2 be bifurcated to the extent that the trial of the counterclaims be stayed until the disposition at trial of the claims in the complaints in action No. 1 and action No. 2 and that both actions as bifurcated be tried jointly within 90 days of the date hereof. Further, in light of this disposition this Court *sua sponte*:

1. Directs that all depositions remaining to be completed in action No. 2 take place following the document production ordered herein, and completed within 45 days of the date hereof.
2. Stays further discovery as to the counterclaims in action No. 2 except as directed herein.
3. Directs that no further intermediate hearing with respect to compliance with discovery, or remedies to be imposed for non-compliance based upon the report of this Court following the hearing, be ordered.
4. Directs that all motions relating to remedies sought based upon the report of this Court as well as discovery rulings and orders of this Court be referred to the Trial Court.

Motion by defendants in action No. 1, Gupta, Joshi and Zakheim for an

order pursuant to CPLR 3211(a)(7), (8) dismissing the summons and complaint, and by defendants Aruna Garuda, Vishwa Garuda and Shaw for summary judgment dismissing the complaint (motion seq. #14) referred to this Court by order of Justice Mahon dated September 25, 2008 is denied as to that branch of the motion which seeks dismissal pursuant to CPLR 3211 and denied as moot as to that branch of the motion seeking summary judgment for the reasons set forth herein.

Cross motion by plaintiff in action No. 1, The Governing Body Commission of the International Society for Krishna Consciousness (hereinafter referred to as GBC) for an order approving the filing and service of a supplemental summons and complaint (motion seq. #15) referred to this Court by order of Justice Mahon dated September 25, 2008 is moot in light of the disposition of the motion by defendants Gupta, Joshi and Zakheim for the reasons set forth herein.

Motion by the plaintiffs in action no. 2 for an order granting the *pro hac vice* admission of David M. Liberman, Esq. (motion seq. No. 9) referred to this Court by the order of Justice Mahon dated October 22, 2008 is granted, upon condition that plaintiff not seek any adjournments or extensions of time as a result of Mr. Liberman's status in the case. Nor will any adjournments or extensions of time be granted if defendants seek to call Mr. Lieberman as a witness during the trial.

Motion by plaintiff GBC in action No. 2 for an order pursuant to CPLR 3124 compelling defendants to comply with (1) the “notice of demands for the production of documents by counterclaim plaintiff ISKCON Inc. for discovery and inspection—first series dated February 12, 2008” and (2) GBC’s first set of interrogatories dated April 23, 2008 (motion seq. No. 10) referred to this Court by the order of Justice Mahon dated October 22, 2008 is denied for the reasons set forth herein.

Amended cross-motion by the defendants in action No. 2 for a protective order as to plaintiff ISKCON’s document demand dated February 12, 2008 and GBC’s interrogatories dated April 23, 2008 (motion seq. No. 11) referred to this Court by the order of Justice Mahon dated October 22, 2008 is granted for the reasons set forth herein. The alternative relief sought in the amended cross-motion for an order enjoining plaintiffs from communicating with members of the Temple is denied.

Motion by plaintiffs in action No. 2 for an order compelling the defendants to comply with the plaintiffs’ demand for a bill of particulars (motion seq. No. 7) referred to this Court by order of Justice Mahon dated May 8, 2008 is granted for the reasons set forth herein. This Court *sua sponte* compels forthwith compliance with said demand.

Based upon the reference directed by the order of Justice Mahon dated April

30, 2008, and based upon the Hearings held on May 13th, June 12th, August 1st, September 3rd and September 10th, this Court makes the following findings and issues the following Report:

1. Despite the discussion during the hearing concerning the date of April 30, 2008, Justice Mahon's order of December 4, 2007 clearly provided that December 31, 2007 was a deadline for plaintiffs to comply with the defendants' April 13, 2007 discovery demand.
2. The plaintiffs did not timely comply with the order of December 4, 2007 which directed that defendants' April 13, 2007 discovery demand be complied with by December 31, 2007 by service upon defendants documents without Bate stamp numbers which reference any document or documents to specific demands.
3. The plaintiffs did not timely comply with the order of December 4, 2007 which directed that defendants' April 13, 2007, discovery demand be complied with by December 31, 2007 by serving documents after the December 31, 2007 deadline.
4. Plaintiffs were justified in not submitting documents which were the subject of their motion for a protective order (action No. 2, motion seq. No. 5).
5. The plaintiffs were not justified in relying upon their motion for a

protective order in not serving documents or in serving documents after December 31, 2007 which were not the subject of the motion for the protective order.

6. Documents with Bate stamp #2370-2631 were served after April 30, 2008 (attorneys' stipulation August 1, 2008 Hearing Transcript p. 21, Lines 4-14).

Application by the defendants for an order granting leave to reargue certain rulings made by this Court during an item-by-item review of defendants' document demand dated April 13, 2007, based upon a protective order granted by this Court during the hearing held on June 12, 2008, whereupon leave to reargue was granted during the August 1, 2008 hearing (Hearing transcript August 1, 2008, pg. 63, line 17-21) is granted in part and has been rendered moot in part by this court deeming defendants' March 3, 2010 letter as a "letter application to renew and reargue a prior motion by the plaintiffs for a protective order which was granted on June 12, 2008. Upon reargument, based upon the item by item review, and the entire record, this Court finds, as argued by the defendants, that the plaintiffs have asserted the protective order in failing to produce documents requested in the April 13, 2007 demand which are not subject to the protective order. In that regard this Court *sua sponte* directs plaintiffs to forthwith comply with document requests no. 2, 3, 7, 8, 12, 13 and 44. This court further finds that

while document demand numbers 5, 10 and 47 were not subject to the protective order said items are impermissibly overbroad and need not be responded to.

Letter application by the defendants in action No. 2 for an order granting leave to renew and reargue a prior motion which resulted in the order of this court dated June 12, 2008 which granted a motion by the plaintiffs for a protective order (motion seq. No. 5) is granted and upon renewal and reargument the motion is denied, the protective order vacated, and the Court *sua sponte* directs plaintiffs forthwith to comply with all the demands which this Court found to be subject to the sealing order except No. 5, 10 and 47.

A detailed review of the procedural history of both actions and a review of the respective pleadings is warranted to place the instant orders and rulings into context. At the outset this Court notes that action No. 1 and action No. 2, while related actions, have not been consolidated and have been set forth above with a joint caption for convenience only. Further, as set forth above, the plaintiff in both actions, The Governing Body Commission of the International Society for Krishna Consciousness will be referred to in this order as plaintiff "GBC." The International Society for Krishna Consciousness, Inc. (hereinafter referred to as ISKCON) is the New York Religious Corporation which has been named both as a plaintiff and a defendant in both actions. All references in this order as to "this Court" refer to the undersigned.

The chronology begins with the May 21, 2004 ex parte order in the action *Kelly v Garuda* (7016-2004) granting the plaintiffs a temporary restraining order.

Said temporary restraining order restrained the defendants from:

1. Selling, mortgaging or otherwise encumbering the property of ISKCON including the temple;
2. Preventing representatives for The Governing Body Commission (GBC) of the International Society of Krishna Consciousness from entering and residing at the temple for purposes of ecclesiastical disputes between the parties;
3. Taking any action to disrupt or interfere with the religious services of ISKCON.

The defendants made an application to vacate the temporary restraining order which was set down for an evidentiary hearing which took place between July 12 and July 20 of 2004.

By written order (labeled “Decision After Hearing”) Justice Mahon framed the issue in the *Kelly v Garuda* action as follows:

“At issue is the operation of a temple located at premises known as 197 South Ocean Ave., Freeport, NY. The property is owned by the International Society for Krishna Consciousness, Inc., hereinafter Iskcon, Inc., a New York religious corporation incorporated in 1966. In 1989, Iskcon, Inc. amended its by-laws. Article V of said by-laws provides for the election of six (6) trustees, initially with staggered terms. It is the responsibility of

the Board of Trustees to select and remove officers and employees of the corporation and to conduct, manage and control the affairs of the Corporation. The term thereafter for each trustee is three years, unless the trustee dies, resigns or is removed from office.”

The decision/order went on to state that “at the hearing testimony and evidence was adduced from the plaintiff and controverted by the defendants as to who constituted the Board of Trustees of Iskcon Inc.

Justice Mahon also made the following findings of fact following the evidentiary hearing in his written decision/order:

A majority of the authorized number of trustees constitutes a quorum for transacting the business of the corporation. At the hearing, testimony and evidence was adduced from the plaintiffs and controverted by the defendants as to who constitutes the Board of Trustees of Iskcon, Inc. Edward Kelley, a/k/a Adarsi Das contends that he is the sole remaining trustee of Iskcon, Inc. However, no resolution or other persuasive evidence of his election or the election of other trustees at any time pertinent to the issues before the Court has been established at the hearing.

Justice Mahon in said order, based upon said findings vacated the provisions of the temporary restraining order except that branch which restrained the defendants from selling and/or encumbering the property of Iskcon or taking any action to disrupt or otherwise interfere with the religious services of Iskcon.

By order dated October 25, 2004 Justice Mahon denied plaintiffs’ motion for a preliminary injunction and vacated all provisions of the temporary restraining

order on the grounds that the plaintiff failed to sustain its statutory burden of proof for preliminary injunctive relief pursuant to Article 63 of the CPLR. This written order went further than the written decision/order following the hearing held on the temporary restraining order. It provided in relevant part:

Upon review of the plaintiffs' submission, the plaintiffs have not established the three prong test set forth in *Aetna Insurance Company v Capasso, supra*. As such, the plaintiffs' application for an Order pursuant to CPLR § § 6301 and 6311, for a preliminary injunction enjoining and restraining defendants from conducting a purported election for the Board of Directors of ISKCON in violation of its duly adopted bylaws, which election has been noticed for Sunday, May 23, 2004 at 5:00 p.m. at the Temple; selling, mortgaging or otherwise encumbering the property of ISKCON, including the Temple; requiring defendants to allow representatives of the Governing Body Commission of the International Society for Krishna consciousness to enter and reside ta the Temple for the purposes of exercising its [sic] of resolving the ecclesiastical dispute between the parties; entering upon and/or remaining on the property of ISKCON, including the Temple; and taking any action to disrupt or otherwise interfere with the religious services, operations and other activities of ISKCON; entering upon and/or remaining on the property of ISKCON, including its grounds and temple located at 197 South Ocean Avenue, Freeport, New York (the "Temple") is **denied**.

It also appears from the record that by an order of the same day, October 25, 2004, Justice Mahon granted a motion by the defendants to dismiss the first and second causes of action in action No. 1. (Motion seq. No. 2, 3). Said order also denied the defendants motion pursuant to CPLR 3211(a)(11) to dismiss the third

cause of action for declaratory relief finding that the relief sought was not warranted based upon the alleged documentary proof submitted.

The plaintiffs appealed from both orders of Justice Mahon.

By order dated December 13, 2005 Justice Mahon denied a motion by the defendants for summary judgment dismissing the complaint (motion seq. no. 4) and denied a cross-motion by the plaintiffs for an order pursuant to CPLR 2201 staying the action pending an appeal of the two orders of October 25, 2004. In denying the motion for summary judgment Justice Mahon further framed the issues in action no. 1 as follows:

“The plaintiffs’ third cause of action seeks a declaratory judgment declaring that:

- (i) Edward Kelley a/k/a Adarsi Das, is the sole active director of ISKCON;
 - (ii) that GBC is the Trustee of the Temple;
 - (iii) that Kelley is the only person authorized to act for ISKCON and the GBC with respect to the Temple;
 - (iv) that defendants have no right or interest in the Temple; and
 - (v) that GBC shall be permitted to enter the property and remain there, in accordance with established customs of the International Society for Krishna Consciousness;
- and’ ”

In denying the motion for summary judgment Justice Mahon found that “an issue of fact existed as to whether plaintiff Edward Kelly . . . was duly elected as a director of the Temple and authorized to act for the Temple.”

Discovery proceeded throughout the year 2006 with the Court file reflecting

numerous letters sent by all counsel, conferences with the Court, motion practice relating to discovery and Court orders issued directing discovery. Clearly, the attorneys for the respective parties were unable to agree upon anything relating to discovery including but not limited to the scheduling of depositions. The only agreement this court could locate was a stipulation of discontinuance as to defendant Wyndell dated July 26, 2006. It also appears that the action was discontinued as to defendant Agarwal.

On January 7, 2007 the Appellate Division Second Department issued an order based upon the appeals of the two orders of October 25, 2004.

The Appellate Division modified the order as it related to injunctive relief by the plaintiffs and reversed the dismissal of the first and second causes of action. (36 AD3d 593).

The Appellate Division did not disturb, however, certain findings made by Justice Mahon. It held:

“This case involves a property dispute between two factions affiliated with the Long Island Hare Krishna Temple located in Freeport (hereinafter the Temple). The individual parties are members of the International Society for Krishna Consciousness, Inc. (hereinafter ISKCON), a New York religious corporation incorporated in 1966. The property at issue is located at 197 South Ocean Avenue in Freeport and was acquired by ISKCON in 1980.

Despite some language in the pleadings and much argument in the motion papers on religious matters, the

causes of action alleging trespass and usurpation are based, essentially, on legal principles of corporate government and property. Resolution of these issues hinges on a determination of who owns and has authority over the Temple and its grounds, the Governing Body Commission of ISKCON or the defendants.”

The Appellate Division further found that a resolution of the issues in case could be resolved:

“by applying neutral principles of law to analyze the deed to the property, the certificate of incorporation of ISKCON, the terms of the by-laws, and the documents submitted by the parties, and evaluating the parties’ credibility when they testify as to the circumstances surrounding the acceptance of the by-laws, the elections, and the rest of the documents.”

By order of Justice Mahon dated January 25, 2007 action No. 1 was certified as ready for trial. On or about January 31, 2007 action No. 2 was commenced. Other than naming different defendants the allegations in the complaints in both action No. 1 and No. 2, and the relief sought are identical.

Notwithstanding the certification of action No. 1 on January 25, 2007 and the commencement of action No. 2 on January 31st, the plaintiff GBC by order to show cause brought on a motion in action No. 1 (motion seq. No. 11) to amend their complaint to add new allegations, new parties, vacate the certification order and compel further discovery. The order to show cause sought an order

“(i) pursuant to CPLR 3025(b) granting plaintiff leave to file a verified amended and supplemental complaint to add new allegations in support of plaintiffs’ causes of

action . . . (ii) pursuant to CPLR 1002(B) adding Nikhil Gupta a/k/a Nimdi Dandit Das, David Sbordoni and John Doe #1-10 and Jane Doe #1-10 as additional defendants on the grounds that they are continuing in escalating the unlawful acts of the original defendants . . . (iv) pursuant to CPLR 305(a) for leave to file and serve their supplemental summons and (vi) . . . vacating the certification order to allow discovery from the new defendants . . .”

By order of Justice Mahon dated June 8, 2007, the motion was denied.

The plaintiffs again sought preliminary injunction relief as against the new defendants Ian Doaman and Joseph Bonomo (action No. 2, motion seq. No. 1). By order of Justice Mahon dated June 8, 2007 injunctive relief was granted only to the extent of enjoining the defendants from selling or encumbering the property of ISKCON, including the Temple. The remaining injunctive relief sought was denied by Justice Mahon finding:

The defendants are elected directors of the Temple in issue located at 197 South Ocean Avenue, Freeport, NY. The Court observes that although the plaintiffs state that the defendants were “purportedly elected” they offer no further contention as to their conclusory assertion.

In light of the December 29, 2006 “Trespass Notice” which the plaintiffs have not established was not properly enacted, the plaintiffs have not established a probability of success (*see Aetna Insurance Company v Capasso, supra*). As such, those portions of the plaintiffs’ application which seeks an Order pursuant to CPLR § § 6301 and 6311, for a preliminary injunction enjoining and restraining defendants Ian Doaman and Joseph Bonomo a/k/a Krishna Balarama Swami, their servants, employees and all those working in concert

with them from preventing plaintiffs or any other persons behaving peacefully from entering and remaining at the temple, located at 917 South Ocean Avenue, Freeport, New York (the “Temple”), and owned by plaintiff the International Society for Krishna Consciousness, Inc. (“ISKCON”), for worship, fellowship[and/or to attend programs and taking any action to disrupt or otherwise interfere with the religious services, operations and other activities conducted at the Temple by the GBC’s authorized representatives, are both respectively **denied**.

Despite the completion of the discovery process in action No. 1, which had been commenced three years earlier, both plaintiffs were still unable to demonstrate their authority and control of ISKCON Inc.

Action No. 1 was supposed to be tried on September 17, 2007. It was adjourned because the plaintiff GBC, by motion, sought to bring in new counsel (Robert Greene, Esq.) and to adjourn the trial (action No. 1 motion seq. No. 12). By order dated December 4, 2007 Justice Mahon permitted the substitution of counsel, but again denied that branch of the motion to stay the trial. In denying said relief the Court rejected the argument of plaintiffs’ counsel that the order of the Appellate Division “expanded the scope of evidence for the trial.” Moreover, Justice Mahon interpreted the Appellate order as finding that the issues could be determined by the “documents submitted by the parties.” The case was restored to the trial calendar for January 16, 2008.

Notwithstanding the denial of their prior motion (seq. No. 11) to amend, plaintiffs then submitted a proposed order to show cause to stay the trial of action

No. 1 pending a determination of their motion to “substitute party defendants” (motion seq. No. 13). Justice Mahon signed the proposed order on December 11, 2007 and on January 3, 2008 issued a written order staying the trial of action No. 1 pending a determination of plaintiffs’ order to show cause (motion seq. No. 13). The order to show cause sought an order pursuant to CPLR 1018 substituting Nikhil Gupta, Amit Joshi, Krishna S. Kowlesan and Nathan Zakheim as defendants “in the place of all the present defendants in this action and to vacate the notice of issue” In the alternative plaintiffs sought to discontinue the action without prejudice pursuant to CPLR 3217. By order dated March 13, 2008 the motion for substitution was granted pursuant to CPLR 1002(b) but the Court neither struck the note of issue nor granted the alternate relief requested to pursuant to CPLR 3217 discontinuing the action without prejudice. Rather the Court continued a stay of the trial which it had issued on January 3, 2008.

Despite the protracted discovery process in action No. 1 requiring court intervention, the discovery process in action No. 2 was similarly contentious resulting in motion practice.

By order of Justice Mahon dated December 4, 2007 a motion by the defendants in action No. 2 for an order of preclusion pursuant to CPLR § 3124, 3126 (mot. seq. No. 3) was denied with leave to renew in light of the disposition of the plaintiff’s cross motion. The cross-motion (mot. seq. No. 4) for a three-

month stay of discovery was denied. The Court further found that the defendants' discovery demand dated April 13, 2007 was a proper demand and that plaintiffs were directed to comply with said demand by December 31, 2007. The Court further noted that "no plausible explanation" for the six-month delay in responding to the April 13 demand was established by the plaintiffs. Defendants were granted leave to renew their preclusion motion if the plaintiffs failed to comply with the April 13 demand by December 31, 2007.

Thereafter the defendants in action No. 2, in accordance with the order dated December 4, 2007 renewed their preclusion motion and sought monetary sanctions alleging that the plaintiffs had violated the order by failing to comply with the April 13, 2007 discovery demand by December 31, 2007 deadline (motion seq. No. 6).

By order dated April 30, 2008 Justice Mahon, finding an issue of fact as to whether the plaintiffs complied with his December 4th order referred the issue of compliance to this Court pursuant to CPLR 4201 to conduct a hearing and render a report. Justice Mahon again denied the defendants' request for preclusion and monetary sanctions with leave being granted to the defendants to renew following the issuance of this Court's report.

The attorneys for the respective parties appeared before the undersigned on May 13, 2008 pursuant to the order of April 30 which contained the reference to

hear and report pursuant to CPLR 4201. Other than issuing an order directing the plaintiff to bate stamp all documents, the hearing was adjourned as this Court was not in possession of Justice Mahon's order dated May 28, 2008 which referred to this court plaintiffs' motion for a protective order with respect to the defendants' discovery demand dated April 13, 2007 (action No. 2 motion seq. No. 5). On the continued hearing date of June 12, 2008, after further extensive argument by all counsel, this Court:

1. found plaintiff's motion for a protective order to be timely;
2. found that the documents which were demanded and subject to that protective order motion did not have to be produced by the December 4, 2007 order and accordingly their non production was justified;
3. found persuasive plaintiffs' argument that the documents which the motion for the protective order sought to protect were subject to a sealing order issued by a California court.
4. directed defendants' counsel to seek relief from said sealing order from the California Court.
5. interpreted Justice Mahon's April 30, 2008 order of reference to mean that an evidentiary hearing was to be held to determine whether the plaintiffs timely complied with the document demand by producing the requested documents by December 31, 2007.

6. denied an application by the defendants to expand the hearing (A) to permit defendants to introduce evidence, including witnesses, and for this Court to issue a report as to the authenticity or validity of the documents produced and (B) to permit defendants to introduce witnesses or evidence to show that the plaintiffs were in possession of documents which they claimed they did not have. (Hearing transcript, June 12, 2008, p. 20, line 14; p. 22, line 11).
7. Interpreted Justice April 30, 2008 order of references to empower this Court to supervise all discovery in action No. 2 pursuant to CPLR 3104 (Hearing transcript, June 12, 2008 p. 20, lines 9-22).

In light of the rulings made on June 12 as to the motion for a protective order as well as the scope of the hearing, the hearing was adjourned to August 1, 2008 for an item by item review of the April 13 discovery demand and the bate stamp documents produced by the defendants on June 12, as directed by this Court on May 13. At the August 1st Hearing, defendants' attorney argued that the plaintiffs were objecting to the production of documents not covered by the sealing order and sought reargument of this Court's ruling made on June 12th.

The hearing directed by Justice Mahon in his April 2008 order was continued and concluded on September 10, 2008. Following a telephone conference which was conducted on the record on September 19, 2008. This Court

made the following rulings and issued the following orders:

1. That the hearing directed by Justice Mahon was concluded on September 10th.
2. That plaintiffs' motion for an order compelling the defendants to serve a bill of particulars in conformity with the plaintiffs' demand for a bill of particulars dated March 4, 2008 (action No. 2 motion seq. No. 7) which was referred to this Court by order of Justice Mahon dated May 8, 2008 (mistakenly referred to as the May 15th order) was timely made. (Hearing transcript September 18, 2008, p. 2, line 24; p. 4, line 5).
3. Stayed compliance with the demand for a bill of particulars until such time as there was a resolution of the motions relating to plaintiffs GBC's interrogatories served on April 24, 2008. (Motion seq. Nos. 10, 11) (Hearing transcript, September 19, 2008 p. 8, lines 8-17).

It should be noted that the motions relating to plaintiff GBC's interrogatories (mot. seq. Nos. 10, 11) had yet to be submitted to Justice Mahon and after submission were ultimately referred to this Court by order dated October 27, 2008.

Having already sought to substitute another attorney in the place of its original attorney (Steven Lester, Esq.), plaintiff GBC brought another motion in

action No. 2 (motion seq. No. 8) which was submitted on July 18, 2008, for the *pro hac vice* admission of Ramon Storzer, Esq. as an additional attorney on its behalf. While the motion was granted by order dated July 21, 2008, the timing of the motion was significant for the relief not sought by either party. Despite the numerous rulings made by this Court at the Hearing on May 13 and June 12, neither attorney accepted this court's invitation to seek review of those rulings before Justice Mahon pursuant to CPLR 3104. The only relief sought as to the rulings of this Court was an application by defendants' attorney to challenge a procedural ruling and to establish a protocol, in light of the multiple attorneys who were appearing on behalf of both plaintiffs, as who could address this Court at the hearing and discovery conferences. It should be noted that said application by the defendants' attorney was denied and the rulings and orders rendered by the undersigned pursuant to CPLR 3014 are now the law of the case. It should be further noted that all the orders rendered by Justice Mahon subsequent to April 30, 2008, not only confirm that he intended to empower this Court to supervise all discovery pursuant to CPLR 3104, but evidence a desire on his part to empower this court to issue the orders rendered above. Other than the appeal referenced above, no appeals have been taken and no stays have been issued as to all other orders of Justice Mahon in actions No. 1 and No. 2.

The report of this Court following the evidentiary hearing, the disposition of

all the motions outstanding in action No. 1 and action No. 2 which were referred to this Court by Justice Mahon, as well as other *sua sponte* orders relating to discovery and procedure have been set forth above on pages 2-7 of this order. The reasoning and basis for those decisions and orders are now set forth below.

Addressing first the Hearing conducted pursuant to the order of Justice Mahon dated April 30, 2008, at the August 1, 2008 hearing plaintiffs were permitted to introduce into evidence 2 documents. The first is entitled “plaintiffs GBC’s response to defendants’ discovery request to plaintiffs first series, as of June 11, 2008 (Hearing transcript August 1, 2008, plaintiff GBC Exhibit 1) and a document entitled “analysis of plaintiffs GBC’s response to defendants’ discovery request to plaintiffs, first series, as of August 1, 2008” (Hearing transcript August 1, 2008, plaintiff GBC Exhibit 2).

Turning to the findings contained in the report issued, this Court’s finding that December 31, 2007 was a deadline for compliance by the plaintiff with defendants’ document demand dated April 13, 2007 is based upon and finds support in the order of December 4, 2007. That order in addition to setting December 31st as a compliance date, denied the plaintiffs’ cross-motion for a three-month stay of discovery finding that “no plausible explanation was set forth” for the six month delay in complying with the document demand. To deem any date other than December 31, 2007 as a deadline would be illogical based upon the

disposition of the cross-motion.

Throughout the Hearing the plaintiffs constantly and persistently argued that the defendants were in possession of many of the documents that the defendants demanded them to produce. Each party also argued as to the authenticity of documents produced and the defendant sought to have this Court permit the introduction of evidence and witnesses to support their allegations. This court denied an application to expand the hearing as to do so would be a waste of judicial resources which would further delay the ultimate resolution of the dispute, that being a trial. Justice Mahon and the Appellate Division had already found that credibility of witnesses regarding possession of corporate documents to be one of the key issues in the case. Such determinations, in this Court's view, are best reserved for the Trial Judge. The remaining findings made based upon the hearing, as set forth above, are self-explanatory and need no further amplification.

Despite this Court's ruling on June 12th that it would not expand the hearing to allow defendant to introduce evidence, including witnesses to determine the authenticity of documents submitted by GBC or determine the credibility of representations by the plaintiffs that they did not possess documents requested by the defendants, this Court permitted defendant to introduce into evidence hard copies of web site pages allegedly owned and maintained by plaintiff GBC during the hearing held on August 1, 2008. This Court also permitted both attorneys to

supplement their arguments at the Hearing in support of their positions. (Greene letter dated September 16, 2008, Chittur letter dated October 30, 2008).

The crux of the defendants position, consistent with the position they had argued throughout the hearing, as stated above, was that the plaintiffs were withholding documents in their possession. This Court does note that the documents submitted by the defendant (Defendants' Exhibits A, B) indicate that the web sites ISKCONGBC.info and ISKCONGBC.org were registered by plaintiff GBL and that said plaintiff is the billing organization. Plaintiff GBC denies ownership and control of said sites. Again, as stated above and in conformance with the ruling made on June 12, 2008, whether these or other web sites are owned and controlled by GBC and whether plaintiff GBC has in its possession documents requested by defendants or whether GBC owned and maintained web sites that it terminated in order to obstruct and prevent defendant from obtaining documents which were otherwise available to the public on-line, are issues to be determined by the Trial Judge.

This Court's finding of plaintiffs' failure to timely comply with the December 4, 2007 order of Justice Mahon is consistent with the prior rulings made by Justice Mahon as to the plaintiffs. The plaintiffs in both action No. 1 and action No. 2 have demonstrated a consistent pattern of dilatory conduct. Other than Other than blaming the defendants for having possession of and failing to produce

documents the plaintiffs have not set forth any reasonable explanation for their non-compliance.

This court has deemed defendants' March 3, 2010 as a "letter application to renew and reargue a prior motion which resulted in the order of this court dated June 12, 2008 which granted defendants' motion for a protective order (motion seq. No. 5). This Court further deemed plaintiff's letter dated March 5, 2010 to be opposition to the letter application. As stated above, by order of Justice Mahon dated May 28, 2008, the motion by the plaintiffs for a protective order was referred to this Court. Following extensive oral argument and over the objections of defendants' counsel this Court granted the motion based upon the sealing order granted by a California Court (see Hearing transcript, June 12, 2008).

In addition to granting the protective order this court also directed defendants' attorney that his remedy for seeking the requested materials was to seek relief from the California Court which issued the sealing order. No appeal of this court's ruling was taken and defendants' attorney complied with the order and sought relief from the California Court. Further, at the hearing on August 1, 2008, this Court granted an oral motion by the defendants' attorney to reargue the June 12th ruling to determine whether the plaintiff was seeking a protective order as to documents not covered by the sealing order (Hearing transcript August 1, 2008, p. 63, line 17). In its letter application of March 3, 2010, defendants' attorney

attaches an order issued on March 1, 2010 from the Court of Appeals, Second District, Division 7, of California, in the case of *Bhaktivedanata Book Trust International Inc., et al. v International Society for Krishna Consciousness, Inc.* (2010 WL 685320, Cal. App. 2 Dist.).

Said order vacated a judgment of the Superior court of Los Angeles County which denied a motion by Iskcon Inc. (the defendant herein) to unseal a Superior Court record that had been ordered sealed in 1998 by the Superior Court as part of the settlement and judgment in a lawsuit involving the above mentioned parties. This Court notes that the defendant in the California case, ISKCON, Inc. is a California corporation and not the New York Religious Corporation which is a party in this case.

This Court is not persuaded by the arguments which have been set forth by the plaintiffs in their letter in opposition dated March 5, 2010 that said Appellate Court remanded the matter back to the Superior Court for further proceedings and thus the instant application by the defendants is premature. This Court rejects plaintiffs' argument that "nothing that was in fact sealed has yet to be unsealed."

In addition to rejecting all the arguments set forth by the respondents in a detailed 7 page order and finding that they failed to demonstrate an "overriding interest that would outweigh disclosure, the Court of Appeals found that the original sealing order did not apply to every document in that litigation. It found

that:

By its own terms the original sealing order only applied to the documents in the court file, and not other documents. Moreover, sealing orders cannot apply to discovery documents that are not used at trial or are not a part of the court's file as exhibits to dispositive motions; therefore documents that are part of the file in connection with discovery motions are not subject to being sealed under the Rules of Court. (See *Mercury Interactive Corp. v Klein* (2007) 158 Cal App.4th 60, 101).

The Court of Appeals did not merely remand the case to the Superior Court

but rather, remanded the case with instructions:

The order denying the motion to unseal the superior court record is vacate and this matter is remanded to the superior court for further proceedings. On remand, the superior court is directed to reconsider the motion and conduct a new hearing on the matter in light of the California Rules of court and the views expressed in this opinion to determine whether the motion should be granted. Appellant is awarded costs on appeal.

This Court further rejects the argument that the plaintiff does not have possession of or access to the documents in the litigation. First, it appears from the Appellate decision that David Lieberman, Esq. was one of the attorneys of record in the proceeding which resulted in the Appellate order. This Court has granted a motion by the plaintiffs, over the objection of the defendants, to allow Mr. Lieberman to appear in this proceeding *pro hac vice* on behalf of the plaintiff The Governing Body Commission of the International Society for Krishna

Consciousness (hereinafter referred to as GBC). In his supplemental affidavit dated May 21, 2008, Mr. Lieberman represents that he has represented GBC for over 30 years and that he represented Iskcon of California. In light of the representations that the plaintiffs herein have set forth regarding the authority of GBC this Court rejects the argument that they cannot obtain access over the subject documents. This court is also not persuaded that plaintiff Kelly cannot obtain access to his deposition transcript or any document he signed or filed in that litigation. It has been alleged that plaintiff Edward Kelley a/k/a Adarsi Das is a “long time member of the Society and prominently involved in the management of ISKCON, Inc. and the establishment of the Freeport Temple (July 17, 2008 affirmation, Robert Greene, p. 2, 3, ¶ 3, motion seq. No. 10, action No. 2). While this Court showed deference to the California Court’s sealing order and directed defendants’ counsel to seek relief therein, this court will show the same deference to the clear and unambiguous order of the California Appellate Court. It is unclear from the appellate order as to whether plaintiff GBC joined in support of the defendants’ motion to unseal the records or opposed the relief. It does appear, however, that two of the defendants in the California litigation supported the motion. This Court further notes that the California Appellate court specifically referenced the New York action in its order and quoted from this court’s order which directed defendants to seek relief in California. This Court is not concerned

with what methods the plaintiffs decide to utilize to comply with this order. This court has previously found and again finds that plaintiffs have been dilatory in not only prosecuting these actions but also with regard to complying with the defendants' discovery requests. Such conduct will no longer be tolerated.

The disposition of the letter application vacating the protective order granted by this Court based upon the sealing order does not entirely render moot the application by the defendants for reargument of the rulings made at the August 1, 2008 hearing based upon the sealing order. Again, defendants argue that the plaintiffs mistakenly or improperly relied upon the protective order in failing to produce documents requested to which the sealing order did not apply. It should be noted that the plaintiffs in opposing reargument of the item by item review argued that in support of their motion for a protective order (action No. 2, motion seq. No. 5) they also argued, in addition to the sealing order, that the demands were over broad and burdensome.

While this Court agrees plaintiff GBC that document demands which seek "any and all documents" from various broad categories are improper, plaintiffs have asserted said objection in response to narrowly tailored demands. Stated another way, demands which seek all of the records of plaintiff GBC "in all of its activities related to all the other Temples and devotees around the world" are overbroad and improper. For example, document request No. 5 seeks all "financial

statements, reports/ or other financial documents concerning GBC” is overbroad. Similarly demand No. 47, which seeks all documents relating to funds received by GBC from other temples is not only overbroad but seeks documents not relevant to the issues herein. While document demand No. 2 seeks all documents “relating to the corporate structure of GBC, including amendments to certificates of incorporation, by-laws, amendment to by-laws . . .”, such demand is narrowly tailored and not overbroad. On the other hand, document demand No. 10 which seeks all communications between plaintiffs and any other party/parties concerning management or corporate structures of GBC is overbroad. This Court does not agree with plaintiff GBC that defendants’ remaining document demands are overbroad. To the contrary, said demands while seeking “any and all” documents relate to a narrowly defined category of documents relevant to this action.

Turning now to plaintiff’s document demand and motion pursuant to CPLR 3124 (action 2, mot. seq. No. 10) as a threshold matter the demands fail to specify the documents sought with reasonable particularity and are thus over broad. This court does not find persuasive plaintiff GBC’s argument that the word “any document” instead of the words “any and all documents” renders the demands proper. Moreover, even if the demands could be modified defendants’ attorney in his affirmation alleges that in the “mid 1990 . . . when plaintiff Kelley was booted

out of ISKCON . . . plaintiff Kelley” carted off all of ISKCON’s corporate documents (Chittur affirmation in opposition to motion/support of cross motion, August 6, 2008, p. 8 § 15, motion seq. No. 10, 11). This is supported by the affidavit dated August 6, 2008 submitted by defendant Gupta who alleges that he is the duly elected President and Trustee of ISKCON and that he is not in possession of the corporate documents being sought “especially those in the 1990's.” He also supports the allegations made by his attorney regarding plaintiff Kelley taking the corporate documents to an undisclosed location. While plaintiff GBC’s attorney takes issue with whether defendant Gupta has actual knowledge of the allegations made against plaintiff Kelley, the issues of document possession, authenticity and spoliation are issues to be determined by the Trial Court, in accordance with this court’s prior order.

That branch of the motion and cross-motion as to plaintiff GBC’s service of interrogatories can be disposed of summarily as a party cannot serve interrogatories upon a party previously served with a demand for a bill of particulars (CPLR 3130[1]). Notwithstanding the stay issued as to discovery on the counterclaims plaintiffs are entitled to have their demand for a bill of particulars as to those counterclaims complied with and accordingly the defendants are directed to serve a bill of particulars forthwith.

A resolution of the dispositive motions (action No. 1, motion seq. No. 14)

turns simply on a review of the prior procedural history. The plaintiffs' motion to amend the complaint and add parties (action No. 1, mot. seq. No. 11 was denied by order dated June 8, 2007 as stated above in the procedural chronology. Moving defendants Gupta, Joshi and Zakheim were substituted "in the place of all the present defendants, and were served in accordance with the order of Justice Mahon dated March 13, 2008. The affidavits of service upon these defendants reflect personal service pursuant to CPLR 308(1). Said defendants do not argue that they were not personally served, but rather raise procedural arguments which this court finds to be without merit. Even assuming said arguments had merit, the alleged defects could be cured by the relief sought by the plaintiffs in their cross motion (action No. 1, mot. seq. No. 15), which this Court has found as moot in light of the disposition of the motion.

Turning to that branch of the motion by defendants Garuda and Shaw this Court notes initially that said summary judgment motion is the third one made by these defendants. The first (action No. 1, mot. seq. No. 4) was denied as stated above by the order of Justice Mahon dated December 13, 2005. It also appears that said defendants again made a motion for summary judgment (action No. 1, mot. seq. 7, 8, 9) which was again denied by Justice Mahon by order dated March 9, 2006 with an admonishment regarding the practice of successive motions for summary judgment. This third motion for summary judgment by these defendants

is perplexing as said defendants are no longer defendants in the case by the substitution order dated March 13, 2008. Accordingly said branch of the motion is moot. Even if this Court were to deem the motion to be made by defendants Gupta, Joshi and Zakheim, said relief would also be denied.

Defendants argue that the attorney for plaintiff GBC has made an admission against plaintiff GBC in his papers which warrants summary judgment dismissing the complaint by GBC. In support of their argument, defendants rely upon paragraph 2 of attorney Robert Green's affirmation dated December 11, 2007 submitted in support of the substitution motion (action No. 1, mot. seq. No. 13). Defendants argue that attorney Green admitted that GBC is not the ecclesiastical authority over ISKCON "but allegedly a Society registered in West Bengal, India Exhibit F, Green Aff. 2, ¶ 4 (Chittur affirmation May 20, 2008, p. 12, ¶ 37). Defendants' reliance is without merit. A review of said paragraph only indicates that plaintiff GBC "was a society registered West Bengal India" with the authority to sue and not an unincorporated association as had been alleged by prior attorney Lester.

The rationale for this Court's order in disposing of the plaintiff's motion to vacate the note of issue in action No. 1 (motion seq. No. 16) requires a review of portions of the pleading.

The complaint alleges that ISKCON Inc.'s Board of Directors are elected in

accordance with ISKCON's 1989 by-laws and that the directors are elected by the Board and not by regular attendees (complaint p. 3, ¶ 8). The complaint further alleges GBC named plaintiff Kelley as the sole trustee of the Temple (complaint pg. 3, ¶ 11). The defendants while admitting that plaintiff Kelley was in charge of ISKCON Inc. operation from 1989-1995, allege that he misappropriated \$225,000.

Defendants further allege that the original GBC appointed by the board expired in 1978 and since then no elections have been held to fill vacancies as had been directed by the board. (counterclaim p. 12, ¶ 54). The counterclaims also seek affirmative and monetary relief from the plaintiff. In relevant part the counterclaims allege:

1. That plaintiff Kelley sold ISKCON's property at 26 Rose St., by misrepresenting himself to be a corporate officer with due authorization to sell (counterclaim p. 12, ¶ 52).
2. That the plaintiffs wrongfully obtained a trademark on the "International Society for Krishna Consciousness" with the trademark name "rightfully belongs to ISKCON" (counterclaim p. 12, ¶ 53).
3. That ISKCON is the beneficiary of the Bhaktivedanata Book Trust (counterclaim p. 10, ¶ 46).
4. That most of the Temples were brought in the name of ISKCON (p. 10, ¶ 45) and that plaintiff GBC sold off property without authority as

required by New York Religious Corporation Law (counterclaim p. 10, ¶ 47).

In the definition section of the counterclaims the reference to ISKCON in the answer with affirmative defenses and counterclaims is defined as the Religious Corporation under New York Law (counterclaim p. 5, ¶ 23).

Accordingly, the plaintiffs not only have the burden of proof with respect to the validity of ISKCON's 1989 Bylaws which they rely upon in the complaint, but also have the burden of proof with respect to the validity, power and authority of plaintiff GBC. While this Court can take judicial notice that ISKCON is a worldwide religion whose founder is A.C. Bhaktivedanata Swami Prabhupada, also known as Srila Prabhupada and that the founder executed a legal document on July 28, 1970 entitled Direction of Management wherein he created a Governing Body Commission these are the only facts this Court can take judicial notice of. While this court directs defendants' attorney to desist from both orally and in writing referring to the plaintiff GBC as "Sham GBC" and referring to it as "plaintiff West Bengal Society", the validity, power and authority of the plaintiff in this action are triable issues of fact. The number of attorneys brought in *pro hac vice*, and the list of citations to prior Court cases are not dispositive. Nor does the affirmation of plaintiffs' GBC attorney wherein he refers to Dr. William Deadwyler, who submitted an affidavit on the dispositive motion, as a "Scholar of

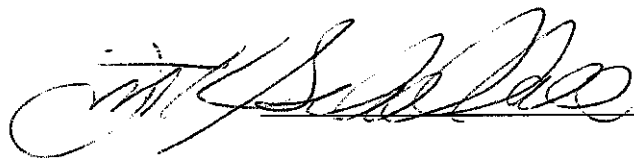
ISKCON” who speaks “authoritatively”, transform Dr. Deadwyler into an expert witness. Whether the plaintiffs’ attempt to qualify him as an expert witness or merely call him as a witness at trial, the weight to be given to his testimony will be for the Trial Judge. Finally, plaintiff GBC has the burden of proof with respect to the allegations set forth in paragraph 11 of its complaint which provides:

“Under the implied trust, the GBC is charged with the responsibility and authority to take any measures necessary to protect the integrity of ISKCON. Pursuant to that authority, the GBC named plaintiff Edmund Kelley as the sole trustee of the Temple after learning of the defendants’ improper practices.”

As set forth above in the detailed chronology multiple efforts by the plaintiffs to expand discovery and delay the trial in action No. 1 have been denied and dispositive motions by both parties in action No. 1 have been denied. Other than the limited discovery which this Court has ordered based upon the order of the California Court of Appeals, and the completion of depositions in action No. 2, the interests of justice dictate that the complaints in both action No. 1 and action No. 2 should be tried forthwith. If the plaintiff in actions No. 1 and No. 2 were to prevail upon the allegations in the complaint and the relief requested, then the defendants would have no standing to interpose the counterclaims they have brought, and thus no further discovery on these counterclaims would be needed.

This provides yet another reason for the bifurcation and immediate trial of this now six-year dispute.

DATE: May 4, 2010

A handwritten signature in black ink, appearing to read 'Frank Schellace', written over a horizontal line.

FRANK SCHELLACE
Special Referee