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August 20, 2009

The Honorable Joan M. Azrack
United States Magistrate Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East - Room 1210S
Brooklyn, NY 11201

Re: *Lucker et al. v. Bayside Cemetery & Congregation Shaare Zedek*,
No. 07 Civ. 3823 (RJD) (JMA)
Cohen v. Bayside Cemetery & Congregation Shaare Zedek,
No. 08 Civ. 3555 (RJD) (JMA)
Goldstein v. Bayside Cemetery & Congregation Shaare Zedek,
No. 08 Civ. 3923 (RJD) (JMA)

Dear Judge Azrack:

We write as counsel to Defendants in the above-referenced actions, to briefly reply to a few of the arguments contained in Plaintiffs' letter opposition to our request for a stay of class certification proceedings.

As a threshold matter, however, Defendants dispute that their request was in any way untimely. As noted in our letter motion, Defendants simply did not, and do not, understand opposing counsel's colloquy with Chief Judge Dearie to have established a briefing schedule, as the Court did not seek Defendants' counsel's acquiescence on the record, nor was any order contained in the minute entry for that day's proceedings.¹ As we have previously mentioned, this colloquy occurred as Chief Judge Dearie was literally halfway out of the courtroom and was hardly a ruling of any kind. At most, we understood Plaintiffs' counsel to have been informing the Court of his eagerness to file his motion to certify his alleged class and of our earlier agreement as to a reasonable schedule for briefing *should the motion to dismiss be denied*, an agreement which we continue to be willing to stand by. Accordingly, since both Chief Judge

¹ As was the case when, for example, the Court set the briefing schedule for the motion to dismiss. See Lucker Docket Entry # 24 (Sept. 25, 2008).

Dearie's and Your Honor's motion practices require a briefing schedule to be submitted to and approved by the Court prior to the service of any motion papers, Defendants would respectfully submit that no deadline for a response had yet attached, and yesterday's request for a stay was not a "request for extension of time" within the meaning of paragraph III(C) of Your Honor's Individual Rules.

Turning to the merits, Plaintiffs' counsel completely ignores the fact that the question of this Court's jurisdiction is currently sub judice. Until that issue is resolved in Plaintiffs' favor, the Court should not proceed to address substantive and time-consuming issues. It is telling, moreover, that Plaintiffs' opposition is in many ways a capsule summary of their argument at the motion to dismiss hearing before Chief Judge Dearie (complete with discussions of what was argued there and similar citations to Bogert, Alco Gravure, and Smithers). As we have explained to the Court on multiple occasions, the section from Bogert that Plaintiffs quote is not intended to license any and all cemetery-related actions by relatives and friends of those buried there. In context, it is a narrow exception to the general rule that the Attorney General has exclusive authority to enforce charitable trusts, limited to situations in which the cemetery's owner sought to deny the land's status as a cemetery or to take other actions (such as subsurface mining) that were directly inconsistent with its continued use as a burial ground. The cases cited by Bogert (merely, of course, a treatise author, not a source of law) in support of that statement are to that effect, and were largely brought by plaintiffs who either alleged that they owned burial plots in the cemetery or otherwise possessed the right to bury their family members there. None squarely support Bogert's "friends or relatives" language.

Alco Gravure and Smithers likewise support our position. The former recognizes the general rule, on which we have consistently relied, that the Attorney General has standing to enforce charitable trusts, subject to a limited exception where "a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds, and the class of potential beneficiaries is *sharply defined and limited in number*."² A class of *all* relatives, of whatever degree, of individuals who themselves had no right to seek a distribution of the trust funds, cannot possibly satisfy the Alco Gravure exception. Smithers, meanwhile, is a decision of the Appellate Division (over a strong dissent pointing to longstanding contrary precedents of the N.Y. Court of Appeals) that recognized the right of the administrator of the estate of a deceased charitable donor, in possession of special letters testamentary from Surrogate's Court expressly authorizing the action, to pursue a claim of misappropriation of funds that had arisen prior to the donor's death. Plaintiffs here do not claim to meet *any* of those criteria, even assuming the Smithers majority, and not the dissent, correctly states New York law.


Fundamentally, however, the question before the Court today is not which of the parties offers the better reading of the cases. Defendants ask the Court merely to recognize that these

² Alco Gravure, Inc. v. Knapp Foundation, 479 N.E.2d 752, 755 (N.Y. 1985) (emphasis added).

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issues are precisely the same as those that Chief Judge Dearie currently has sub judice, and that a motion for class certification at this point would require the parties to relitigate them before Your Honor, with all of the associated wasted resources and risks of inconsistent determinations. Particularly in light of the significant jurisdictional concerns raised by both the Defendants and Chief Judge Dearie himself, it would be inappropriate for the Court to simply assume that it has jurisdiction to proceed with class certification proceedings³ before receiving a decision on the pending motion to dismiss.

Respectfully submitted,



Russell M. Steinthal

cc: Michael M. Buchman, Esq.

³ Let alone attempt to infer the district judge's leanings from his comments at oral argument.