To be Argued by:
MICHAEL M. BUCHMAN

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New York Supreme Court

Appellate Division—First Department

JOHN R. LUCKER, ELIZABETH A. LUCKER, NANCY L. ROUSSEAU, LYNN COHEN and FRAN GOLDSTEIN as representatives of a class consisting of themselves and all others similarly situated,

Plaintiffs-Appellants,

– against –

BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK,

Defendants-Respondents.

– and –

COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC.,

Defendant.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

This case should never have been dismissed and should have been allowed to proceed to trial for eight reasons.

First, the Defendants have admitted to the New York State Attorney General ("NYAG") that they "commingled" annual and perpetual care trust monies of Bayside Cemetery entrusted to them with general operating funds of Congregation Shaare Zedek, thereby making Plaintiffs' breach of contract, breach of fiduciary duty, conversion and unjust enrichment claims uncommonly clear and completely meritorious.

Second, Defendants repeatedly state that the lower court gave "careful consideration" or "carefully reviewed" Plaintiffs' arguments despite the undeniable fact that it utterly failed to conduct any analysis with regard to Plaintiff John R. Lucker nor acknowledge his standing as a Connecticut court appointed representative of his grandmother's estate. (Def. Mem. at 2, 8).

Third, Plaintiffs possess standing to proceed with their claims because they are the intended third-party beneficiaries[1] under the annual and perpetual care contracts.

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[1] *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 485 N.E.2d 208 (1985)

Fourth, Plaintiffs possess standing to proceed with their claims under well-established New York law[2] dating back to 1892 that confers standing on individuals to prosecute actions to protect graves from desecration/spoliation.[3]

Fifth, Plaintiffs possess standing to proceed to enforce perpetual care trusts under *Alco Gravure, Inc., v. Knapp Foundation*, 64 N.Y.2d 458 (1985) because they are a well-defined, limited group with a special interest as intended third-party beneficiaries under the perpetual care contracts.

Sixth, the lower court prematurely and improperly speculated as to potential conflicts in order to claim this case could not proceed as a class action when the U.S. Supreme Court has held that breach of contract cases involving uniform agreements, like those presented in this case, are routinely certified.[4] The lower court's decision to this effect demonstrates a fundamental inability to manage this class action case warranting remand to the Commercial Division.

Seventh, the lower court dismissed the General Business Law ("GBL") claims absent any evidence in the record making clear at what point, or points in

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[2] *Mitchell v. Thorne*, 134 N.Y. 536 (1892); *Lay v. Carter*, 151 N.Y.S. 1081 (Sup. Ct. Seneca Cty 1915); *Chace v. Leising*, 189 Misc. 980 (Sup. Ct Niagara Cty. 1947).

[3] Contrary to Defendants' assertion, Plaintiffs are not asking this Court to rewrite the law on standing or charitable trusts, Plaintiffs are seeking the application of well established, clear law which the Defendants either contort or altogether ignore to serve their own purpose of seeking to avoid liability for their admitted unlawful conduct. (Def. Mem at 4).

[4] *American Airlines v. Wolens*, 513 U.S. 219 (1995).

time, Defendants absconded with perpetual care monies. This is an issue appropriately addressed on a motion for summary judgment based upon a complete factual record.

Finally, Defendants have admittedly stolen monies in violation of their fiduciary duties and made misrepresentations to the lower court to procure a judgment by fraud. They claim before this Court that they have completely remediated the problem at the cemetery. This statement is untrue and consistent with their previous deceitful conduct. The cemetery's condition remains a significant problem and as a result, clean-up and physical remediation continues to this day. Defendants now claim to have made no misrepresentations to the lower court in this case concerning the manner in which the NYAG has authority to regulate these Defendants and is purportedly cooperatively handling this matter with these clearly culpable Defendants. This statement is also untrue and deceitful. Defendants' "win at all costs" strategy is designed to mislead courts to believe that the NYAG is handling this matter and this action is unnecessary. It is an equitable, not legal, argument and totally improper on a motion to dismiss. It is also completely false. As demonstrated below, Defendants made the exact same statements to the lower court which caused it to go well beyond the "four corners of the complaint" to adopt language straight out of Defendants' brief when dismissing this case in its entirety. Defendants, represented by a member of the

synagogue, have stopped short of nothing to avoid liability for their admitted theft of annual and perpetual care monies entrusted to them and they refuse to this day to account for and return those monies as required by law in accordance with their fiduciary duties. To affirm the lower court decision and allow these culpable Defendants to escape responsibility for their admittedly unlawful conduct would be a miscarriage of justice. And make no mistake, if this action is dismissed they will do nothing in the future to maintain the cemetery going forward because they will not have to answer to the NYAG, any other governmental agency or natural person. Simply put, to affirm the decision below would be inconsistent with the letter and spirit of New York law and impose a grave injustice.

POINT ONE

DEFENDANTS CONCEDE THE LOWER COURT FAILED TO APPLY ITS STANDING HOLDING TO PLAINTIFF JOHN R. LUCKER AND IMPROPERLY RAISE NEW ARGUMENTS NEVER BROUGHT BEFORE THE LOWER COURT

In the opening brief, Plaintiffs demonstrated that the lower court ruling is manifestly erroneous because Plaintiff John R. Lucker is a court appointed administrator who possesses standing under the law stated in the decision below. (Plaintiffs' Memorandum of Law pp 13-14).

Defendants turn a blind-eye to the reality that the lower court held that court appointed administrators possess standing, *yet completely failed to conduct any analysis with regard to Connecticut court appointed administrator and the first*

named Plaintiff in this case, John R. Lucker. An affidavit in the record made clear that Mr. Lucker was a court-appointed administrator for his grandmother's estate. (R.A. 268-270) The reason Defendants fail to discuss this fact is simple: it is clearly reversible error and there is no justification for this logically inconsistent ruling.

Instead, Defendants improperly raise new arguments that were not made below and were never available for the lower court's consideration. Defendants' newly minted argument is that Mr. Lucker untimely obtained his status as an administrator after filing suit. But they never raised this argument below because it is baseless.

Even if this argument had been raised in the court below, a *post-hoc* appointment is absolutely no obstacle to proceeding in this action nor a basis for dismissal under New York law. In *Cheliotis v. Stratakis*, 2008 NY Slip. Op. 33503U, 2008 N.Y. Misc. LEXIS 10744 (Surrogate's Court, Nassau Cty. 2008) the court declined to dismiss a complaint for lack of standing since letters of administration issued after commencement of the action cured any standing defect.[5] Similarly, in *In re Matter of the Estate Irving A. Mayo*, 816 N.Y.S.2d 697, 2006 N.Y. Misc. LEXIS 686 (Surrogate's Court, Nassau Cty. 2006) the court

[5] *See also Jakubowski v. Huntington Hospital*, 2012 N.Y. Misc. LEXIS 662, 2012 NY Slip. Op. 30365U (Supreme Suff. Cty 2012) (allowing "proposed executrix" right to continue litigation). *See also*, CPLR § 205.

refused to dismiss claims when it was clear a party would be entitled to and could receive letters of administration. Taken together, these cases make clear that Mr. Lucker's *post-hoc* appointment does not prevent him from pursuing this action. In addition, Mr. Lucker has maintained his court appointed administrator status to this date and continues in that capacity which demonstrates his eligibility to serve in the role for a protracted timeframe.

These cases also demonstrate that Plaintiffs Cohen and Goldstein could similarly proceed as "proposed administrators" pending issuance of letters of administration, through a straight-forward procedural process, which can easily be obtained from the Surrogate's Court. Thus, there was no way this case could be dismissed as to Mr. Lucker nor should have been dismissed as to the other Plaintiffs who can and will obtain letters of administration if procedurally required to do so.

Making an entirely new argument, Defendants would also have this Court mistakenly conclude that Mr. Lucker does not possess letters of administration to proceed because they expired on February 2, 2011. (Def. Mem. at 13). Defendants conveniently fail to mention that the letters of administration were renewed and are current as of the filing of this brief. To be clear, the letters were also recently renewed on September 12, 2012 for an additional twelve month period making Mr. Lucker's standing patently clear.

Defendants also call into question Mr. Lucker's letters of administration claiming he cannot proceed as a representative of his grandmother's estate because she passed away in 1987. (Def. Mem. at 13). They conveniently contend that Mr. Lucker is foreclosed from pursuing this action as a representative because the claim allegedly arose after her death. *There has been no discovery in this case and no evidentiary record to conclude that the claim did arise after Mr. Lucker's grandmother's death as conveniently suggested by Defendants*. This is another issue more appropriately addressed after the development of a full record on a motion for summary judgment.[6]

Defendants further contend that the claims are barred by the statute of limitations. *Id*. The lower court never addressed this issue nor considered the facts in this case with *General Stencils v. Chiappa*, 18 N.Y.S.2d 125, 272 N.Y.S.2d 337 (1966) where the statute of limitations was tolled because of the Defendant's fraudulent concealment. Tolling is appropriate here given Defendants' fraudulent concealment of their theft. Failure to timely disclose the theft was in violation of their fiduciary duties. Again, under these circumstances, the statute of limitations

[6] Given Defendants significant misrepresentation below which the Court incorrectly adopted, there is no basis to accept any new factual representations these Defendants make on appeal as it is clear they will say anything to avoid liability.

issue is more appropriately made after discovery on a motion for summary judgment.

Parsing words,[7] Defendants also argue that Mrs. Lucker never purchased perpetual care and has no claim. (Def. Mem. at 14-15). The documentary evidence establishes that Mrs. Lucker used an agent to purchase the perpetual care contract for the *common areas* of their plots and others in the burial society. (R 97, 181). No matter how these Defendants twist the facts to avoid liability the reality is there is a factual and legal basis for Mr. Lucker to pursue his grandmother's claim as a legal representative concerning perpetual care coverage for common areas of her plots. The documentary evidence in the record makes clear she purchased and is entitled to perpetual care pursuant to a contract with the Defendants. (R 97, 181).

Finally, this case is unlike *Schoepps,* cited by Defendants, because in that case no affidavit was ever filed as Plaintiff never obtained letters of administration

[7] Defendants now parse words to contend they never used stolen monies to repair the synagogue roof. (Def. Mem. 4 n.2). The fact that Defendants improperly converted monies is undisputed as they have admitted as much to the NYAG. Regardless, Defendants' new efforts *to deny* they improperly used the monies to "fund synagogue repairs" is irrelevant on this appeal. Whether the monies were used to repair the synagogue or some other purpose inconsistent with the trust agreement is a red herring raised by Defendants to distract attention from the undisputed fact that a theft occurred. How the monies were improperly used will be determined during discovery for the jury to consider at trial.

nor could he.[8] (Def. Mem. at 11). That is not the case here where Plaintiff John R. Lucker possesses letters of administration, has presented them to the lower court and Plaintiffs Cohen and Goldstein as New York residents can obtain letters from the Surrogate's Court.

POINT TWO

PLAINTIFFS POSSESS STANDING TO ENFORCE THE CONTRACTS AS INTENDEDTHIRD-PARTY BENEFICIARIES UNDER THE PERPETUAL CARE CONTRACTS AND WELL ESTABLISHED NEW YORK LAW UNDER *MITCHELL, LAY* AND *CHACE*

Defendants mischaracterize Plaintiffs' position concerning standing. Defendants contend Plaintiffs claim to possess standing as "beneficiaries" of the perpetual care trusts. (Def. Mem. at 16).

To be clear, Plaintiffs primarily argued to the lower court that this case is about perpetual care *contracts*. Under basic *contract* principles they possess standing to enforce the *contracts* as intended third-party beneficiaries in accordance with *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.,* 66 N.Y. 2d 38, 495 N.Y.S.2d 1 (1985). This was never addressed by the lower court.

[8] Defendants' argument that the affidavit must be filed by the out-of-state administrator is specious. There is no specific requirement precluding counsel from filing the affidavit. Here, the affidavit was filed by a member of the Connecticut and New York bars concerning the Connecticut issued letters of administration. This is not a situation where no letters were obtained as in *Schoepps* or the affidavit was filed by someone unrelated to the proceeding with no knowledge or accountability that has submitted the affidavit concerning the letters to the New York court.

Plaintiffs further argued that they possess standing in accordance with basic hornbook and New York law. *Mitchell v. Thorne*, 134 N.Y. 536 (1892); *Lay v. Carter*, 151 N.Y.S 1081 (Sup. Ct. Seneca Cty, 1915); *Chace v. Leising*, 72 N.Y.S.2d 741 (Sup. Ct. 1947). Contrary to Defendants' arguments, Plaintiffs are not seeking this Court to "radical[ly] expan[d]" standing law. Rather, Plaintiffs' claims, which are not novel, fall well within the law already established. (Def. Mem at 16).

In their opposition before this Court, Defendants fail to appreciate that basic New York law contained on pages 18 through 21 of Plaintiffs' opening brief lays bare that Plaintiffs possess standing to prevent the on-going desecration/spoliation of their family members plots and common areas by Defendants' refusal to honor perpetual care contracts. It is so clear under New York law that family members possess the right to protect a grave from injury and spoliation. *See also Oatka Cemetery Ass'n v. Cazeau*, 242 A.D. 415, 417 (4th Dept. 1934); *Chace v. Leising*, 72 N.Y.S.2d 741 (Sup. Ct. 1947).

Defendants rely heavily on *Smithers v. St. Luke's – Roosevelt Hospital Center*, 281 A.D.2d 127 (1st Dept. 2001) in order to contend that family members do not have standing to enforce a trust. *Smithers* did not address standing concerning a trust involving a grave nor address desecration/spoliation of a burial plot. Notably, *Smithers never addresses the same issues in this case nor does it*

mention Mitchell, Lay or Chase, which deal with desecration of cemetery plots. (Def. Mem. at 8).

Attempting to distinguish *Mitchell*, *Lay* and *Chace*, Defendants contend "there is no allegation that anyone is destroying gravestones or taking any other action that is inconsistent with Bayside's status as a burial ground." (Def. Mem. at 21). That statement is absurd. The Complaint is replete with allegations that defendants are desecrating the graves of perpetual care holders and engaging in other conduct inconsistent with Bayside's status as a burial ground. (R. 67-68, 70-71, 76-77, 83 & 85 (Complaint, ¶¶ 1-4, 9-11, 28, 29, 54 & 62)) Defendants' position is a complete distortion of the Complaint and the facts as alleged. This argument is so baseless that it would be comical if it was not so tragic, especially when one views the pictures attached to the complaint evidencing the level of desecration by these Defendants.[9]

Defendants primarily contend Plaintiffs lack standing to enforce a perpetual care trust because they are only "possible beneficiaries" under *Alco Gravure, Inc. v. Knapp Foundation*, 64 N.Y.2d 458 (1985). (Def. Mem at 16) That, however, is incorrect because Plaintiffs are actual beneficiaries under third-party beneficiary

[9] For additional pictures *see* http://www.baysidecemeterylitigation.com.

law. *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.,* 66 N.Y. 2d 38, 495 N.Y.S.2d 1 (1985).[10]

Finally, Defendants acknowledge that there is an exception to the general principle that the general public cannot enforce a trust. The exception pertains to a "defined group" with a "special interest" in the trust. As in *Alco*, here there is both a "well defined class " (family members and/or near relatives) with an interest in the trusts as family members and/or near relatives and intended third-party beneficiaries of the contracts. Defendants claim that "family members" or "near relatives" is not a sharply defined group, but instead "nearly limitless." (Def. Mem. at 17). According to Defendants' interpretation of the proposed class, "anyone visiting a grave in the cemetery" would have the right to bring suit. (Def. Mem. at 18). That is a misreading and misunderstanding of both *Alco* and the class as defined in the complaint. It is also a black letter principle in New York that there are degrees of kinship with regard to estates and trusts law, thereby rendering

[10] Defendants also suggest the Attorney General possesses exclusive standing to sue. This Court, however, held in *Smithers v. St Luke's – Roosevelt Hospital Center*, 218 A.D.2d 127 (1st Dept 2001) the NYAG does not possess the exclusive right to enforce trust and that family members are likely in a much better position to enforce a trust. Notably, the Attorney General in this case lacks enforcement authority as state authorities have publicly stated. The Cemetery That Nobody Wants, *The Jewish Week* dated October 18, 2002 (R 194-197). The NYAG has done nothing to ensure the enforcement of these trusts over the past seven years and will continue to do nothing for one simple reason – it lacks the authority to do anything as publicly represented in the press. If actions are said to speak louder than words, than the NYAG's inaction for seven years speaks volumes.

Defendants' "limitless" argument entirely absurd as to the class definition of family members and near relatives.[11] To accept Defendants mistaken argument would allow these culpable Defendants to be accountable to no one which is precisely the result they seek so they can retain the ill-gotten monies.

POINT THREE

PLAINTIFFS ARE PURSUING DIRECT CLAIMS ON BEHALF OF THEIR DECEASED FAMILY MEMBERS

Defendants properly contend that *Blue Cross and Blue Shield of N.J., Inc., v. Philip Morris USA, Inc.*, 3 N.Y.3d 200, 205 (2004) stands for the proposition that only "the actually injured [can] be the one to bring suit." (Def. Mem. at 23). It is a convenient argument to make in a case where virtually all of those injured are deceased and voiceless except through a representative acting on their behalf.

Possessing standing under *Mitchell, Lay* and *Chace,* Plaintiffs seek to enforce the rights of their deceased relatives and "stand in their shoes" with respect to their rights and interests. Plaintiff John R. Lucker clearly possesses "direct" standing as he is the Connecticut Court appointed representative of his grandmother's estate and is asserting *her claim*. That is unquestionably a direct claim permitted under *Blue Cross*.

[11] The lower court always has the ability to narrow the class definition on a motion for class certification.

With regard to the merits of the GBL claims, as stated above, there has been no discovery in this case to determine when Defendants absconded with the perpetual care monies, thereby making any GBL or representative determination (i.e., whether the claim arose before death under EPTL 11-3.1) premature as there is no complete record as to when the theft occurred. *See supra* pp, 2, 6. As previously noted, this issue is more appropriately addressed on a motion for summary judgment.

POINT FOUR

DEFENDANTS DID MAKE MISREPRESENTATIONS IN THIS CASE AS THEY DID IN THE *LEVENTHAL* ACTION WHICH WERE NOT IN THE FOUR CORNERS OF THE COMPLAINT WHICH THE COURT RELIED UPON WHEN DISMISSING THIS CASE

Defendants contend that "Plaintiffs charge, without foundation, that the judgment of dismissal in this case was procured by fraud and should be vacated" to which they "deny any fraud, intentional misrepresentation or other misconduct." (Def. Mem. at 24). While acknowledging that they made misrepresentations in another virtually identical matter (Leventhal), on appeal, they contend they made no misrepresentation in this case. *Id.* That is completely untrue.

Throughout this litigation, Defendants have regrettably employed a "win at all costs" strategy in these cases in order to avoid liability for their admitted theft. The strategy from day one has been two-fold: (i) to convince each jurist that it has completed restoration of the cemetery; and (ii) to make abundantly clear they are

working cooperatively with the NYAG's Office to resolve the issue which was not of their own making. Neither is true. The strategy is designed to make the courts believe everything is being done to address the problem with the NYAG's oversight – even though they know the NYAG lacks regulatory oversight, thereby making them accountable to no one if this case is dismissed.

Defendants have unquestionably and intentionally caused the lower court *in this case* to be misinformed. Even a cursory review of the underlying brief on the motion to dismiss *in this case* identifies how the lower court became of the view that these Defendants were working cooperatively with the NYAG to jointly find a "**sustainable solution" t**o the problem, thereby making this litigation unnecessary. **Indeed, Defendants' misleading language contained in their brief appears in the actual decision.** For example, in the introduction of the opening brief Defendant stated as follows:

> At the same time, at least since 2004, Shaare Zedek has been *working with the Attorney General's office to find a sustainable solution for the permanent maintenance of Bayside*. Shaare Zedek has long recognized that the Attorney General must be fully satisfied as to not only the adequacy of the long terms plan for Bayside, but also as to Shaare Zedek's stewardship of the cemetery and, in particular, of the funds it holds in trust for the perpetual care of the graves there. It has, therefore, provided the Attorney General with access to all relevant documents related to the management of the cemetery, as well as its offices. Regardless of the disposition of this action, Shaare Zedek will continue to cooperate fully with the Attorney General as its seeks a *permanent solution* that appropriately respects both the needs of Bayside and those buried there and the cemetery's unique legal history.

Defendants' Memorandum of Law In Support of Defendants' Motion to Dismiss the Action In Its Entirety Pursuant to CPLR 3211(a) (emphasis added). At best, this language is misleading, at worst, it is a deliberate misrepresentation designed to procure a judgment and ensure it can retain stolen monies.

With this backdrop, it is understandable why the lower court used the "sustainable solution" language in the opinion. (R 22). It is further understandable how the lower court reached its conclusions dismissing this case because it was under the false impression that the litigation was duplicative of results being achieved by the NYAG. Notwithstanding the fact that Defendants' misrepresentations were not part of the "four corners" of the complaint and far outside the scope of consideration on a motion to dismiss, the lower court improperly relied upon them to entirely dismiss the case.[12]

Nothing has been done by the NYAG to enforce these contracts and nothing will be done in the absence of this litigation. Defendants' contention that these statements were unintentional and harmless error is yet another part of an effort to

[12] Defendants attempt to make hay by arguing the Plaintiffs never made a motion for reargument . (Def. Mem at 9). Plaintiffs did write to the lower court requesting it correct its clear substantive and procedural errors *sua sponte*. The lower court never responded. Plaintiffs did not immediately file a motion for reargument because the lower court's decision and its failure to correct its errors combined with its demeanor at oral argument, demonstrated a clear desire to get rid of the case and create reasons to dismiss it. Reargument would have been totally futile.

"win at all costs" in order to avoid returning monies that they have admittedly stolen. (Def. Mem. at 25).

Defendants also contend that Plaintiffs failed to file a motion seeking reversal of the decision, but given the totality of events and manner in which the lower court has summarily dispensed with this matter it would have been futile to make any other motion before the court which was clearly predisposed to rid its docket of this case.[13]

POINT FIVE

PLAINTIFFS HAVE WAIVED NO RIGHT TO RAISE IMPROPER TRANSFER ON APPEAL AND PRUDENTIAL REASONS ALSO REQUIRE THIS MATTER BE RETURNED TO THE COMMERCIAL DIVISION

Defendants contend that Plaintiffs have waived the right to appeal the transfer of this matter from the Commercial Division because they did not do so within ten days of the transfer. (Def. Mem. at 26-27). They cite no case law nor other authority for this creative argument. Rule 202.70 provides, in relevant part, as follows:

> Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that the monetary threshold is met or equitable or declaratory relief is sought:

[13] Plaintiffs are reluctant to mention but feel compelled to make clear that the lower court justice was on an extended medical leave shortly before issuing this decision which may explain the reason why a wholesale dismissal was granted.

> (1) Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings ….

The Rule sets forth that the following claims *will be heard, not may be heard*, if the amount in controversy is satisfied: (i) breach of contract; (ii) breach of fiduciary duty; and (ii) unfair competition. The rule also provides that all class actions shall be heard in the Commercial Division. This *class action* involves *all three types of claims* and also satisfies the amount in controversy for such class action claims. There is no valid reason for this case to have been transferred out of the Commercial Division and Justice Fried offers no reasoning as part of his decision for transfer. The case, therefore, should have been heard in the Commercial Division before an able commercial jurist familiar with these types of claims in the class action context.

Contrary to Defendants' assertion, there is no authority cited which precludes a party from raising the issue on appeal. Indeed, the plain language of the rule cited by Defendants makes clear that an aggrieved party "may" seek review before an administrative judge within ten days. There is no requirement that an aggrieved party *must* immediately take an appeal and is precluded from raising it on appeal to the Appellate Division. And it is only *if* an aggrieved party files an appeal with an administrative judge that it is bound by such decision which

is not subject to review or appeal. Here, Defendants concede no one raised this issue below within ten days before an administrative judge and, therefore, nothing prevents Plaintiffs from raising this issue on appeal now.

Even if Defendants' creative interpretation of the rule were correct, which it is not, prudential concerns require remand of this action back to the Commercial Division. The totality of facts concerning the underlying decision suggest, when taken together, that this matter should be remanded back to the Commercial Division and not Justice James because the lower court:

i. failed, at a minimum, to apply its legal holding in the decision to the first named plaintiff in the case which would have resulted in only a partial dismissal and ignored a critical affidavit establishing this plaintiffs' standing to proceed;

ii. improperly went beyond the "four corners of the complaint" and specifically adopted Defendants' misrepresentations in order to conclude the central issues in the litigation would be addressed by the NYAG *despite record evidence that the NYAG lacks authority in this case*;

iii. summarily dismissed the GBL claims absent any discovery when a central issue concerning those claims involved a factual determination as to when the theft of perpetual care monies occurred;

iv. failed to adopt legal precedent dating back to the late 1890s which establishes that family members possess standing to prevent desecration/spoliation of a burial plot as alleged in the Complaint;

v. went out of its way to suggest the case could not be certified because of a perceived conflict among class members when U.S. Supreme Court law makes clear that such breach of contract actions are

routinely certified[14] because the class members sustained common injury stemming from a uniform contract;

vi. failed to correct its clear mistake concerning Plaintiff John R. Lucker when the issue was timely brought to its attention; and

vii. failed to vacate the decision in this case and the accompanying *Leventhal* action because the decisions were procured by fraud and grounded upon the false impression that the NYAG will impose a remedy – a remedy which has not come in more than seven years since the Defendants admitted liability.

While one or two of these errors would be understandable today given the judicial systems' heavy docket, these *seven "errors"* bespeak a clear misunderstanding of class action law and even suggest a hostility toward this particular action.

The lower court's decision in this case conclusively establishes that this case deserves the attention of the Commercial Division. This case was brought there, properly belongs there under the rules of the Supreme Court and should be remanded there. Remand to the Commercial Division is appropriate because the NYAG lacks authority to act and Plaintiffs are entitled a remedy to correct the wrong which these Defendants admit they made causing horrific desecration and financial harm to annual care and perpetual care plots at the cemetery – plots the Defendants have a fiduciary duty to maintain. They should also be required to return the monies they stole in accordance with New York law and the Ten

[14] *American Airlines v. Wolens*, 513 U.S. 219, 233 (1995).

Commandments[15] which this and other religious entities daily espouse as the basic principles of law and follow devotedly.

CONCLUSION

For the foregoing reasons, the lower court's decision should be reversed and remanded to the Commercial Division.

Respectfully submitted,

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[15] Commandment Number 8: Thou shalt not steal; Commandment Number 9: Thou shalt not bear false witness against thy neighbour. http://en.wikipedia.org/wiki/Ten_Commandments.

APPELLATE DIVISION – FIRST DEPARTMENT
PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word 2010.

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