SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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,	:	Index No. 114818/2009E
	:	DEBRA A. JAMES, J.S.C.
	:	Part 59
Plaintiffs,	:	
- against -	:	
	:	ORAL ARGUMENT REQUESTED
BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK, and COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC.,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE ACTION IN ITS ENTIRETY PURSUANT TO CPLR 3211(a)

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PRELIMINARY STATEMENT

As we noted before, this case is not about whether a Jewish cemetery should be restored: Bayside Cemetery is being restored thanks to support from the Community Association for Jewish At-Risk Cemeteries ("CAJAC") and UJA-Federation of New York. Instead, the question before this Court is whether, as Plaintiffs suggest, there is some exception to well-settled rules of standing, the statute of limitations and the survival of actions — heretofore unknown to the New York courts — that renders those otherwise generally-applicable doctrines irrelevant to this action, solely because the underlying claims relate to a cemetery.

The only citations Plaintiffs can seemingly muster for that novel proposition are factually inapplicable cases decided outside New York and a short excerpt from a treatise that does not address the immediate matter at hand. Beyond that, Plaintiffs are left solely with an emotional tautology: that because they allege that they are the only parties willing or able to sue Defendants, the Court *must* allow their action to proceed to avoid creating a "wrong without a remedy."

Yet the entire purpose of a motion to dismiss under CPLR 3211 is to test not simply whether there might exist some set of facts on which someone else, at some time in the past, might have been able to obtain relief, but rather whether the plaintiffs actually before the court can state a claim, assuming all of the facts alleged in the Complaint to be true. If this case proceeds, Defendants will rebut Plaintiffs' substantive allegations of wrongdoing at the appropriate point. But Plaintiffs have not even met their burden of *alleging* a viable cause of action. Defendants, therefore, respectfully submit that their motion should be granted and this action should be dismissed with prejudice.

ARGUMENT

I. PLAINTIFFS' CLAIM TO "STAND IN THE SHOES" OF THEIR DECEASED RELATIVES IN BRINGING THIS ACTION IS DIRECTLY CONTRARY TO NEW YORK LAW

Conceding that they have not personally ever suffered any injury-in-fact as a result of Defendants' actions, Plaintiffs nonetheless suggest that they should be permitted to "stand in the shoes" of their deceased relatives to pursue this action on their behalf. Plaintiffs can cite no New York decision, however, ever recognizing such a right. That is unsurprising, as recognition of a general right of relatives to pursue claims such as these would conflict with the comprehensive statutory scheme enacted by the Legislature for the litigation of claims belonging to deceased individuals. Moreover, it is equally clear that Plaintiffs could not have been granted relief had they followed the procedure specified by New York law, as any survival claims that the law would authorize them to bring would now be barred by the statute of limitations.

A. The Provisions of The EPTL Providing for The Survival of Actions Are Exclusive And Would Not Have Permitted These Claims

At common law, death abated causes of action both in favor of and against an individual. Sections 11-3.1 and 11-3.2(b) of the Estates, Powers & Trusts Law, however, codify the Legislature's statutory response to that rule, providing that, respectively, "[a]ny action, other than an action for injury to person or property, may be maintained by and against a personal representative in all cases and in such manner as such action might have been maintained by or against his decedent," id. § 11-3.1, and "[n]o cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent. . . .," id. § 11-3.2(b). In enacting those

provisions, the Legislature explicitly vested such survival actions in the decedent's "personal representative," defined as "a person who has received letters to administer the estate of a decedent," id. § 1-2.13, and required that the representative bring any survival action "in his representative capacity," id. § 11-4.1. Since Plaintiffs here have disclaimed any intent to bring a representative action (Opp. Br. at 11 n.20), it is evident that they do not claim to be following the procedure provided in the EPTL.

The survival provisions of the EPTL would be entirely superfluous if any family member or relative of a deceased individual could bring an action simply by alleging, as Plaintiffs have, that his or her deceased relative, if alive, would possess a cause of action that could not otherwise be vindicated. To the contrary, the provisions of the EPTL are exclusive, and even a relative who might otherwise have a right to be appointed a personal representative lacks standing to bring an action on behalf of a decedent prior to or in default of appointment. Palladino v. Metropolitan Life Ins. Co., 188 A.D.2d 708, 590 N.Y.S.2d 601 (3d Dep't. 1992) (affirming dismissal of action brought by decedent's father because "[i]nasmuch as letters of administration have not been issued to plaintiff, he has no standing to sue. And the fact that [defendant's] attempt to have letters of administration issued to her has purportedly delayed plaintiff from receiving letters of administration does not warrant concluding otherwise.")

Moreover, the EPTL provides only for the *survival* of actions and makes no provision for the creation of a cause of action in favor of a decedent after death. Plaintiffs here do not allege that their causes of action accrued prior to their relatives' deaths (and, undoubtedly, could not do so consistent with the applicable statutes of limitations), meaning that even a duly-appointed personal representative would lack

standing to sue, as no cause of action would have ever passed into the estate. See In re Estate of Gandolfo, 237 A.D.2d 115, 655 N.Y.S.2d 341 (1st Dep't 1997) ("The alleged breach of confidential or fiduciary duty occurred almost a year after the death of plaintiff's decedent. Accordingly, plaintiffs' causes of action did not yet exist in decedent's favor as of his death (cf. EPTL-11-3.2(b)), and plaintiffs cannot press a cause of action that was not viable during decedent's life."); Sweets v. Behrens, 88 A.D.2d 745, 746, 451 N.Y.S.2d 878, 880 (3d Dep't 1982) ("Defendant Behrens' right to [certain assets] only became absolute at his death. Since there was no viable cause of action [to recover them] available to decedent, there likewise is none available to his personal representative under EPTL 11-3.1.").

B. The EPTL And The Statute of Limitations Combine To Place An Effective Limit, Long Since Past in This Action, on The Period for Bringing Survival Claims

Given that a survival claim under sections 11-3.1 or 11-3.2 must accrue prior to the decedent's death, so too the statute of limitations begins to run no later than the date of death. Thus, the EPTL and the applicable statutes of limitations provide an effective limit on the length of time after a person's death that claims may be pursued on his or her behalf. The Court of Appeals recognized as much in an opinion issued just this month, in which the administrator of an estate alleged that the statute of limitations had been tolled, and thus that she should be permitted to bring a survival claim. Despite the fact that a personal representative capable of bringing the survival action had not even been appointed until after the limitations period had run — a situation described by the Court as an "unfortunate occurrence" — the Court rejected the argument for tolling, citing the policy of repose:

> In fact, it is notable that EPTL 11-3.1, a catch-all provision, similarly enables a "personal representative" to commence all other types of action that survive the decedent's death. Taken to its logical conclusion, plaintiff's position would result in the application of the CPLR 208 toll to any cause of action belonging to a decedent — adult and infant alike — who leaves only infant distributees. A decedent's personal claims could potentially be pursued more than a decade later on the basis that an infant distributee would be entitled to any damages recovered by the estate through intestate succession. *The adoption of such a rule, impinging on the settled policies underlying statutes of repose, must be made by the Legislature.*

Heslin v. County of Greene, 2010 N.Y. Slip. Op. 1010 (Feb. 11, 2010), at 13-14 (emphasis added). In a footnote to that passage, the Court offered the possibility of a lapse of 11 years between death and the expiration of the limitations period on a breach of contract claim as an example of a period it viewed as too long. Id. at 14 n.10.

Plaintiffs' position regarding standing here, meanwhile, would lead to a lapse of time far exceeding the 11 years the Court of Appeals hypothesized based on the Heslin plaintiff's argument. For example, the Lucker Plaintiffs purport to "stand in the shoes" of their grandmother, Ruth Lucker, (see Compl. ¶¶ 9-11), who died in August 1987, more than 22 years before the institution of this action, (see Affirmation of Russell M. Steinthal ("Steinthal Aff."), Ex. A.) Plaintiff Lynn Cohen sues by right of her mother (see Compl. ¶ 12), Blanche Cohen, who died in 1980 (see Steinthal Aff., Ex. B at 000026).[1] And while the date of death of Plaintiff Fran Goldstein's mother does not appear to be of record, the perpetual care contract on which she relies is dated in 1967. (See Compl. ¶ 13, citing id., Ex. D.) Since, as is described in the moving brief, the relevant statutes of limitations in this action are between three and six years, it is clear that any viable

[1] The dates of death for the Lucker and Cohen relatives are taken from documents produced by Plaintiffs during jurisdictional discovery in the federal action. On a motion to dismiss pursuant to CPLR 3211, the Court may properly consider documentary evidence that establishes a statute of limitations or other defense. Lessoff v. 26 Court Street Assocs., 58 A.D.3d 610, 610, 872 N.Y.S.2d 144, 146 (2d Dep't 2009).

survival claim under the EPTL, which would have had to accrue prior to Plaintiffs' relatives' deaths, is long-since time-barred. The Court should not permit the Plaintiffs to avoid that result by inventing an entirely new theory of standing outside the well-established rubric of the Estates, Powers & Trusts Law.

II. THERE IS NO "CEMETERY EXCEPTION" PERMITTING PLAINTIFFS TO BRING THESE CLAIMS IN THEIR OWN RIGHT

In addition to suggesting that they "stand in the shoes" of their relatives, Plaintiffs also suggest that as "persons . . . who already have friends or relatives interred in cemetery," they possess an *individual* right to sue to enforce the "cemetery trust[s]" purportedly at issue here. (See, e.g., Opp. Br. at 7-8.) As the sole authority for that proposition, Plaintiffs cite an excerpt from section 414 of Bogert's treatise The Law of Trusts and Trustees, which provides that:

> lot owners, persons who are entitled to have there dead buried there, or who already have friends or relatives interred in the cemetery, all may be said to have a definite interest in the trust. Other members of the public may also receive benefit, through the opportunity to buy lots, or otherwise; but the lot holders and others similarly situated are clearly benefited and interested in the upkeep of the cemetery. Such interest may be regarded as sufficient to enable them to sue to compel execution of the cemetery trust.

Id. § 414, quoted by Opp. Br. at 8.

A solitary general statement in a treatise, unsupported by citation to any New York decision, is always a weak basis for departing from a bedrock principle of law, such as the need for plaintiffs to demonstrate personal injury-in-fact to bring suit. But that is even more true where, as here, there is reason to believe not only that the cases cited in the treatise bear a narrower — and far less novel — interpretation than that offered by Plaintiffs, but that the broader interpretation that they seek to rely on would conflict with principles explained by the Court of Appeals when ruling on a closely-related issue.

In the passage quoted above, the term "cemetery trust" is undefined. Plaintiffs seize on that ambiguity, suggesting that the enforcement of *any* "trust" at all related to a "cemetery" should be subject to the exceptional rule of standing described in the quoted passage, rather than the basic principle, also recognized by Bogert earlier in that very section of The Law of Trusts and Trustees, that "[a]s a general rule, no private citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefited by the trust and will receive charitable or other benefits from the operation of the trust." Id. § 414. Rather, "[t]he courts usually require that suits for enforcement be brought by the established representative of the charity, the Attorney General, so that the trustees may not be vexed by frequent, ill-considered suits leading to unnecessary litigation." Id.

Yet nothing in the cases cited by Bogert suggests any intention to sweep that broadly. Instead, nearly all of the cases cited conform to a common template: when land is used for burial purposes, its fee owner becomes a de facto trustee, and *those who have burial rights in the cemetery* (whether by purchase of a burial plot, a reservation of title to the land, or prior unrestricted public use of the cemetery) can compel the owner to recognize their burial rights and can prevent actions inconsistent with burial.[2] That is consistent with the description in the treatise of the persons possessing such standing as being the "lot holders and others similarly situated," and indeed, in the vast majority of the cited cases, the court recites that the plaintiffs possessed either burial plots in the

[2] Examples of the types of conduct prohibited in the cited cases include the removal of bodies to another cemetery, Smith v. Ladage, 74 N.E.2d 497 (Ill. 1947), the sale of burial plots according to a new plan that overlaps those already in use, Brown v. Hill, 119 N.E. 977 (Ill. 1918), subsurface mining, Concerned Loved Ones and Lot Owners Ass'n of Beverly Hills Memorial Gardens v. Pence, 383 S.E.2d 831 (W. Va. 1989); Bennett v. 3 C Coal Co., 379 S.E.2d 388 (W. Va. 1989), and the burial of non-human remains, Hertle v. Riddell, 106 S.W. 282 (Ky. Ct. App. 1907).

cemetery that would be destroyed (or the effective equivalent thereof) or claimed burial rights by some chain of title.

So, for example, in Mitchell v. Thorne, 134 N.Y. 536, 32 N.E. 10 (1892), the leading New York case cited by Plaintiffs on this point, the plaintiffs sued as heirs of the grantor of a conveyance that specifically reserved burial rights on the property, and a "right of way to the same," to the grantor *and his heirs*. The Court of Appeals allowed the suit, which alleged that the owner of the land had destroyed the existing gravestones and sought to deny the plaintiffs the use of their easement, to proceed.[3] The same two principles of ownership by the plaintiff and a fundamental threat to the treatment of the cemetery *qua* cemetery were also present in Concerned Loved Ones and Lot Owners Ass'n of Beverly Hills Memorial Gardens v. Pence, 383 S.E.2d 831 (W. Va. 1989), which Plaintiffs rely on prominently in their brief. The West Virginia court explicitly recognized that although the defendant corporation held title to the cemetery lands in fee simple, it held it subject to a dedication for burial purposes. Reasoning from earlier decisions regarding cemetery desecration, it held that *lot owners* had the right to seek an injunction to enforce the implicit cemetery trust against an attempt to conduct subsurface mining in a portion of the cemetery.[4]

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[3] The other two New York cases cited in footnote 16 of Plaintiffs' brief are not to the contrary. In Lay v. Carter, 1915 N.Y. Misc. LEXIS 1280 (Sup. Ct. – Seneca Cty. 1915), a 1915 decision of Supreme Court – Seneca County (Defendants can find no record of a decision of the Court of Appeals in that case at the citation provided by Plaintiffs), the court found that the plaintiffs' family had used a plot of land (for which no record of title could be found) for more than 75 years, and permitted a member of the family to sue to prevent an encroachment on that land. And in Chace v. Leising, 189 Misc. 980, 72 N.Y.S.2d 743 (Sup. Ct. – Niagara Cty. 1947), although the plaintiff was described only as the descendent of individuals buried in the cemetery, the question was whether the plaintiff had a right to "prevent the defendants from destroying the cemetery."

[4] Notwithstanding the certified question paraphrased in the parenthetical citation to the case at page 9 of Plaintiffs' brief, the West Virginia Supreme Court clearly limited its decision to the first two questions presented and the desecration theory. Id. at 833. It neither discussed nor ruled upon the questions of breach of contract or fiduciary duty cited by Plaintiffs.

Thus, Plaintiffs can point to no authority supporting the broad reading of The Law of Trusts and Trustees they espouse here, namely that any "friend or relative" of someone buried in the cemetery, or even of the settlor of a cemetery-related trust, can sue to enforce such a charitable trust. Such a broad reading would also conflict with the construction by the Court of Appeals of the somewhat more generally-stated rule granting standing to "specially interested beneficiaries" to enforce a charitable trust. In Alco Gravure, Inc. v. Knapp Foundation, 64 N.Y.2d 458, 479 N.E.2d 752 (1985), the Court held that while, in general, only the Attorney General has standing to enforce a charitable trust, an exception exists 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." Id. at 465, 479 N.E.2d at 755 (citing Bogert, § 414). Although there do not appear to be any decisions applying Alco Gravure in a cemetery context, there is no reason to believe that the Court of Appeals would depart from its earlier requirement that the plaintiff class be "sharply defined and limited in number" so as to permit any friend or relative, of whatever degree, to bring suit, particularly where the state already has (as explained elsewhere in this memorandum) a well-established means for dealing with the enforcement of charitable trusts beyond the lifetime of the settlor.[5]

[5] Contrary to Plaintiffs' suggestion, nothing in Alco Gravure suggests that the Court of Appeals meant only to exclude potential classes of plaintiffs "defined to include every public citizen," (Opp Br. at 11). For example, one of the cases cited favorably for the general rule that beneficiaries who do not fit that description lack standing was Revici v. Conference of Jewish Material Claims Against Germany, 11 Misc. 2d 354, 174 N.Y.S.2d 825 (Sup. Ct. – N.Y. Cty. 1958), a decision of this court denying standing to an admitted survivor of the Holocaust seeking to enforce a trust for the "relief, rehabilitation and resettlement of Jewish victims of National-Socialist persecution," id. at 355, 174 N.Y.S.2d at 827, a class of individuals obviously far smaller than the entire general public.

III. TO THE EXTENT *SMITHERS* CONTROLS THE RESOLUTION OF THIS MOTION, IT SUPPORTS DISMISSAL OF THE ACTION.

Plaintiffs also rely prominently on Smithers v. St. Lukes-Roosevelt Hospital Center, 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dep't 2001), which they suggest creates an exception to the general presumption, recognized by the Alco Gravure court and even the treatise relied on by Plaintiffs, that standing to enforce a charitable trust is exclusively vested in the Attorney General. This Court need not resolve the question of whether the Attorney General's standing is actually exclusive, however, as no Plaintiff here can even hope to make the threshold showing of standing relied upon by the First Department in Smithers.

The reasons follow from the principles discussed above, and need not be dwelt on at great length. The plaintiff in Smithers, unlike any of the Plaintiffs here,[6] was the duly-appointed personal representative of her late husband's estate. Id. at 132, 723 N.Y.S.2d at 430; see also Rettek v. Ellis Hosp., 2010 U.S. App. LEXIS 1863 (2d Cir. Jan. 27, 2010) (distinguishing Smithers and dismissing for lack of standing where plaintiff was "not the legal representative of the donors' estates"). His cause of action against the hospital, meanwhile, accrued prior to his death, Smithers, 281 A.D.2d at 139, 723 N.Y.S.2d at 435, and thus validly survived to his estate pursuant to the Estates, Powers & Trusts Law, whereas for the reasons discussed above, no Plaintiff here can make such a showing. And First Department explicitly held that Mrs. Smithers did not bring the action as a representative of beneficiaries (which Plaintiffs claim to be here), but expressly and solely as the personal representative of the donor. Id. at 138, 723 N.Y.S.2d at 434. The Smithers court's holding, therefore, that a donor has concurrent standing

[6] With the possible exception of Plaintiff John Lucker, who secured appointment in Connecticut as the administrator of his grandmother's estate after this motion to dismiss was filed.

with the Attorney General to enforce a charitable trust he or she created simply has no applicability in a case in which, under long-settled principles of law, any claim the donor/settlor may have had has been extinguished by time.

Nothing, of course, in Smithers questions the *Attorney General's* authority to bring the suit, even if the donor *were* present. There is, therefore, no reason to believe that dismissal of the action would allow Defendants — let alone "all unincorporated entities" (Opp. Br. at 7 n.15) — to act wrongfully with "impunity." Plaintiffs appear to fundamentally misunderstand the system for the regulation of not-for-profit corporations, religious corporations, and cemeteries in New York State. Despite Defendants' multiple citations to both statutory and case law authority supporting the Attorney General's standing to bring the claims at issue here against any charitable trustee, including a religious corporation such as Shaare Zedek, Plaintiffs instead cite to a hearsay statement of a "state official" recounted in a 7+-year old newspaper article as their authority on the law. The law is actually simple. The provisions of Article 15 of the Not-for-Profit Corporation Law regulating cemeteries generally do not apply to cemeteries (like Bayside) that are controlled by religious corporations. Nor are such cemeteries subject to the regulatory jurisdiction of the Division of Cemeteries. But there is an explicit exception to that rule, requiring cemeteries operated by religious corporations to observe the exact same requirements regarding perpetual care trusts as Article 15 cemetery corporations. N.P.C.L. § 1507(c). And the Attorney General's authority to sue any charitable trustee, including a religious corporation, on behalf of the ultimate charitable beneficiaries stems from the Estates, Powers & Trusts Law, see id. § 8-1.1(f), and the

common law, and is entirely unaffected by the presence or absence of Division of Cemeteries jurisdiction.[7]

IV. THE STATUTE OF LIMITATIONS HAS NOT BEEN TOLLED AND BARS THESE CLAIMS

As described in the moving brief, the relevant statutes of limitations require that the instant claims be brought within 3-6 years of accrual. Plaintiffs argue, however, that (i) the Defendants' conduct amounts to a continuing violation, on which a new cause of action accrues daily; and (ii) that the statute of limitations has been tolled by reason of fraudulent concealment. Neither of those arguments is availing.

A. The Plaintiffs' Allegations Do Not Set Forth Continuing Violations

Plaintiffs assert that Defendant Shaare Zedek engages in a continuing violation "each day it refuses to (i) honor its fiduciary duties of full and complete disclosure to Plaintiffs; (ii) honor perpetual and [annual] care contracts; [and] (iii) return stolen perpetual or annual care monies." Yet the cases cited by Plaintiffs simply do not support such a broad application of the continuing violation doctrine.

To understand whether a particular claim alleges a continuing violation, one must look to the particular mechanisms of injury alleged in the Complaint, since a continuing violation "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct." Shelton v. Elite Model Mgmt., Inc., 11 Misc. 3d 345, 361, 812 N.Y.S.2d 745, 758 (Sup. Ct. – N.Y. Cty. 2005). Even construed in the manner most favorable to their claims, the Plaintiffs have not alleged discrete unlawful acts within the limitations period sufficient to establish a continuing violation.

[7] Defendants do not understand what basis the Plaintiffs could have for claiming, on page 7 of their brief, to know what transpired during the *ex parte* conference between Chief Judge Dearie and representatives of the Charities Bureau. What Defendants do know, however, is that the *Attorney General* clearly believes he has standing to investigate and possibly sue Defendants over these claims, as Defendants have complied with multiple subpoenas from the Attorney General reciting as much. (See, e.g., Steinthal Aff., Ex. C.)

For example, the Plaintiffs' argument that Defendants have refused to "return stolen perpetual or annual care monies" does not state a continuing violation, because the unlawful conduct is the *misappropriation*, which is complete at the time the funds are allegedly diverted. The Court of Appeals squarely held as much with respect to a conversion claim in Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 448 N.E.2d 1324 (1983), and Plaintiffs should not be allowed to escape that conclusion simply by relabelling their claim as one for breach of contract, breach of fiduciary duty, or unjust enrichment. Similarly, a misrepresentation or deceptive conduct is an essential element of each of Plaintiffs' General Business Law claims and is alleged to be the cause of the injury that Plaintiffs seek to remedy. (See Compl. ¶¶ 43, 49, 54.) To establish a continuing violation, therefore, Plaintiffs would have to allege that they were injured by affirmative acts of deception within the limitations period, which they do not allege.[8] Compare Elite Model, at 361, 812 N.Y.S.2d at 757-58 (reciting allegation that misrepresentations after complaint was filed and finding that each improper fee charged to plaintiffs constituted a new violation within the limitations period).

B. There Has Been No Fraudulent Concealment

Plaintiffs argue that the statute of limitations should be tolled by reason of fraudulent concealment, yet the only allegations that they offer as to the Defendants' supposed "acts of fraudulent concealment" are the Defendants' "suppression and denial of the true facts" regarding their alleged liability, and specifically, "intentionally covering up and refusing to publicly disclose critical documents and information." (Compl. ¶ 40

[8] The allegation in Counts I-III that "Defendants have failed to abide by these contracts and have allowed the cemetery to fall into a state of shameless disrepair" amounts to at most a claim of continuing injury from the earlier alleged deceptive conduct. Moreover, to the extent it is understood to allege an affirmative act of wrongdoing, it would be a breach of contract (already the subject of Count IV), and not an act of false advertising or deceptive business practices.

& Opp. Br. at 15.) None of those allegations, however, rise above a failure to disclose to the level of an affirmative misrepresentation, as is required under New York law to toll the statute of limitations.[9]

Finally, even if the Court were to credit Plaintiffs' allegations that Defendants concealed financial information, the physical state of the cemetery was a matter open to full public view. The statute of limitations will only be tolled (even in the case of a fiduciary owing a duty of disclosure) where the fraudulent concealment actually prevented the plaintiff from bringing suit. Here, unlike in the cases such as General Stencils cited by Plaintiffs, the central fact of the suit — the alleged failure to adequately care for perpetual care plots at Bayside Cemetery — was a fact that was neither concealed nor sought to be concealed. Plaintiffs were free at any point to visit their relatives' graves, and therefore would have been on inquiry notice of the claims they seek to bring here, in particular their claims in Counts II-IV, which allege as injury that the Defendants allowed plots at the cemetery to fall into disrepair. (See Compl. ¶¶ 49 ("Defendants . . . have allowed the cemetery to fall into a state of shameful disrepair."), 54 (same), 62 ("complete disrepair").)

V. PLAINTIFFS LACK ANY OTHER BASIS UPON WHICH TO STATE A CLAIM.

A. The Lucker Plaintiffs Cannot State Any Claim

Unlike Plaintiffs Cohen and Goldstein, the Lucker Plaintiffs assert a claim solely by reason of a purchase allegedly made by the Chebra Shebath Achim Society. To the extent their claim is that because Mrs. Lucker was a member of the Society, she can

[9] Plaintiffs' further argument, namely that a mere failure to disclose should be sufficient to toll the statute of limitations, *assumes* that Defendants owed Plaintiffs a fiduciary duty. For the reasons described elsewhere in this brief, however, that argument fails as a matter of law, since the trusts at issue were for the benefit not of Plaintiffs (or their relatives), but rather for the benefit of the People of the State of New York.

assert its claims (see Opp. Br. at 16, § III), Plaintiffs fail to cite any authority for that assertion of standing. Plaintiffs place more weight on the allegation that the Society was acting as Mrs. Lucker's agent when it made the perpetual care purchase shown on the Defendants' records. Yet despite Plaintiffs' reliance on the letter from the Society dated January 4, 1973, a letter dated just two weeks earlier, also produced by Plaintiffs to the Defendants during the earlier federal litigation (but notably not attached to this Complaint) entirely belies that claim. On December 23, 1972, the same Nathan Lipton, president of the Society, wrote that "As you know, the Board of Trustees has purchased perpetual care for our cemetery grounds. *This of course does not include the care of individual graves*." (Steinthal Aff., Ex. D. (emphasis added))[10] The Lucker Plaintiffs cannot demonstrate that their grandparents purchased perpetual care, or had perpetual care purchased for them, and each of their claims should, therefore, be dismissed.

B. Plaintiffs Are Not Intended Third-Party Beneficiaries of Their Relatives' Contracts

As First Department has held, and Defendants argued in their moving brief, "the parties' intent to benefit a third party must be apparent from the face of the contract. Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent." LaSalle Nat'l Bank v. Ernst & Young LLP, 285 A.D.2d 101, 108-109, 729 N.Y.S.2d 671, 676 (1st Dep't 2001). Plaintiffs have failed to point to *any* contractual language supporting their claim to third-party beneficiary status, instead falling back only on the passage from Bogert discussed above; that non-showing requires dismissal. And in the absence of

[10] Although Defendants first received this document from Plaintiffs' counsel in a discovery production dated February 12, 2009, it first came to their attention after the filing of the moving brief. To the extent the Court views this issue as out-of-scope for the reply brief, however, there are still multiple independent grounds for granting the Defendants' motion.

ambiguous language, *contra proferentum* (which is a rule for the resolution of ambiguity) has no application. Regent Ins. Co. v. Storm King Contracting, Inc., No. 06 Civ. 2879, 2008 U.S. Dist. LEXIS 16513 (S.D.N.Y. Feb. 26, 2008), at n.3.

C. Plaintiffs Lack Standing Under the General Business Law

Plaintiffs appear to argue that because they have alleged conduct that related to "consumer oriented activity," that suffices to establish a claim under the General Business Law. That misses the point, however: while consumer-oriented activity is a necessary condition, Blue Cross & Blue Shield of N.J. v. Phillip Morris USA, Inc., 3 N.Y.3d 200, 818 N.E.2d 1140 (2004), clearly holds that it is not sufficient, as the plaintiffs must also show that they were directly injured by the unlawful conduct. That Plaintiffs here cannot do, other than by a "standing in their shoes" argument that fails for the reasons discussed above.

D. Plaintiffs Have No Legal Right to Possession of the Perpetual Care Funds

An essential element of Plaintiffs' unjust enrichment and conversion claims is the possession of a right to possession or return of the allegedly misappropriated funds. (Opp. Br. at 21.) Although Plaintiffs' "stand in their shoes" argument fails for the reason stated above, Associate Alumni v. General Theological Seminary, 163 N.Y. 417, 57 N.E. 626 (1900), would bar even a claim by Plaintiffs' relatives, as the Court there made clear that absent an express condition of reverter, breach of a charitable trust does not entitle the donor or the donor's heirs to a return of the corpus. Rather, the Court (as it did in Associate Alumni) can only order that the trust be fulfilled. Since it is clear from the text of the perpetual care contracts here that no such reverter exists, Plaintiffs' cannot, as a matter of law, establish any right to possess or have returned to them the corpus of the

perpetual care trusts at issue, and thus cannot state a claim for conversion or unjust enrichment.

E. Defendants Do Not Deny the Existence of a Trust, But Only the Existence of a Duty to Plaintiffs

To be clear, Defendants in no way dispute that each perpetual care contract created a charitable trust, and that as trustee, the Defendants owes a fiduciary duty to the beneficiaries of the trust. Yet it is clear as a matter of law that the ultimate charitable beneficiaries of *all* charitable trusts in this state are the People of the State of New York, not, as they claim on page 23 of their brief, the Plaintiffs. For that reason, Defendants have no objection to accounting for the trusts to the Attorney General, and in fact have done so, but deny any fiduciary duty to these Plaintiffs, whether "standing in the shoes" of their ancestors or in their own right.

CONCLUSION

Faced with Defendants' motion to dismiss, Plaintiffs had the opportunity to present their best legal arguments for the viability of their claims. Ultimately, however, all that they can offer hinges on an entirely unsupported claim to be "standing in the shoes" of their relatives in bringing these actions or the related claim that ordinary rules of standing do not apply to cemetery-related suits brought by friends or relatives of the deceased. Since Plaintiffs have failed to present any New York authority to support those arguments, which in fact run contrary to long-settled principles of New York law, Defendants respectfully suggest that their motion to dismiss pursuant to CPLR 3211 should be granted, and this action should be dismissed in its entirety, with prejudice.

Respectfully submitted,

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