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

STEVEN R. LEVENTHAL as representative of a class consisting of himself and all others similarly situated, Plaintiff, - against – BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK and COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC., Defendants.	Index No. 100530-2011 ORAL ARGUMENT REQUESTED

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

AXINN VELTROP & HARKRIDER LLP
114 West 47th Street
New York, New York 10036
(212) 728-2200

By: Stephen M. Axinn
Russell M. Steinthal

Attorneys for Defendants Congregation Shaare Zedek and Bayside Cemetery

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PRELIMINARY STATEMENT

Over the course of the last year and a half, Congregation Shaare Zedek, working in conjunction with the Community Association for Jewish At-Risk Cemeteries ("CAJAC"), has made substantial progress towards restoring Bayside Cemetery, a goal that has been elusive for decades, ever since demographic shifts in the New York Jewish community led to the demise of most of the almost one hundred different synagogues, burial societies and fraternal organizations that had earlier assumed responsibility for the upkeep of sections of the cemetery. Today, much of that long-awaited restoration is complete and a professional landscaping firm is ready to push into the home stretch once winter ends.

One would not guess that, however, from the Complaint in this action, the latest in a series of essentially identical lawsuits complaining about the conditions at Bayside. Instead, the Complaint recounts page upon page of assertions about conduct that took place years, and even decades, ago. (In perhaps the most sensationalistic allegation in the Complaint, the Plaintiff asserts—without any factual or legal foundation whatsoever—that Defendants have stolen millions of dollars of "perpetual and annual care monies" over the course of more than a century and a half.)

Nor is there more than a cursory attempt to link the allegations in the Complaint to any purported injury to *this* Plaintiff. Indeed, with the exception of a single paragraph alleging that the Plaintiff paid $1,200 for the perpetual care of three graves in 1985, the Complaint is largely a verbatim repetition of that filed by the Lucker Plaintiffs in this Court, which in turn is nearly a verbatim repeat of the three separate actions that those Plaintiffs earlier filed in federal court.

What unfortunately seems to be the case is that the Plaintiff, like those in Lucker, simply disagrees with Shaare Zedek's stewardship of Bayside Cemetery and with the way the Office of the Attorney General has handled its thorough investigation of this matter. The mere fact that he

at one point purchased perpetual care from a Defendant, however, does not give Plaintiff license to conduct a fishing expedition, untethered from any actual, personal injury to his legal interests and without regard to the statute of limitations.

As the Defendants and the Attorney General long ago realized, the origins of the Bayside Cemetery problem lie in long-term cyclic changes in the makeup of the Jewish community in and around New York City. The solution, in turn, lies not with the courts, but with the Jewish community's willingness to fund a professional cleanup, which is now well underway. The Defendants respectfully request that the Court dismiss this action, just like its predecessors, so as to allow the restoration of Bayside Cemetery to continue unimpeded.

ARGUMENT

I. PLAINTIFF CANNOT STATE A CLAIM UNDER THE GENERAL BUSINESS LAW

Counts I through III of the Complaint allege three causes of action under the General Business Law for, respectively, false advertising, Gen. Bus. L. § 350, deceptive business practices, id. § 349, and deceptive business practices aimed at the elderly, id. § 349-c. Since all three claims accrued, if at all, when the Plaintiff purchased perpetual care from Shaare Zedek in 1985 (Compl. ¶ 8 & Ex. A), they are long since barred by the statute of limitations. In addition, Plaintiff has failed to allege facts sufficient to demonstrate his standing to bring Count III.

A. Each of Plaintiff's GBL Claims Is Barred by the Statute of Limitations

Since sections 349, 349-c and 350 of the General Business Law are not merely codifications of the common law, but rather create distinct statutory causes of action with different elements, the three-year statute of limitations for "liabilities imposed by statute" applies to Plaintiff's claims. CPLR 214(2); Morelli v. Weider Nutrition Group, Inc., 275 A.D. 607, 608, 712 N.Y.S.2d 551, 553 (1st Dep't 2000). With respect to each of Counts I through III, Plaintiff's cause of action clearly accrued more than three years before the filing of this action:

1. Count I (False Advertising)

Count I of the Complaint alleges that:

> Defendants' advertisement and sale of perpetual and annual care contracts and the subsequent refusal to maintain the plots in accordance with those contracts constitute violations of N.Y. Gen. Bus. Law § 350. Defendants presented papers to Plaintiff which indicated that they [sic] were purchasing perpetual or annual care which Defendants had no intention of providing or have not provided for years. Plaintiff is aware of these services by virtue of Defendants [sic] advertisements in and outside of New York. When purchasing these services based upon Defendants' representations and advertisements, Plaintiff and other class members relied on Defendants' statements. (Compl. ¶ 18.)

Although the Complaint does not provide any details as to when or how the allegedly false advertisements were made, the Plaintiff would have necessarily been injured no later than when he relied upon the advertisement to purchase perpetual care, which in turn was no later than February 5, 1985 (when the Congregation acknowledged his payment). (Compl. ¶ 8, Ex. A.)[1] The alleged "subsequent refusal to maintain the plots," meanwhile, is irrelevant to the Plaintiff's false advertising claim, as are, of course, any other advertisements or payments by other individuals, whether or not they are members of the putative class, since Plaintiff's case must rise and fall on the timeliness of *his* claim. Since Plaintiff had allegedly been injured by Defendant's false advertising more than three years before the date of the Complaint, his claim is untimely. CPLR 214(2).

2. Counts II and III (Deceptive Trade Practices)

Counts II and III sound in deceptive trade practices under General Business Law § 349 and § 349-c. In both cases, however, the alleged injury is described in virtually identical terms: "Defendants' deceptive conduct caused highly vulnerable individuals who placed their trust in

[1] There is no need to decide whether the better accrual date is February 5th, when the payment was acknowledged, January 24th, when the payment was allegedly sent (see Compl. Ex. A), or some earlier date on which the Plaintiff viewed the allegedly false advertisement, as any of those dates would be outside the limitation period.

Defendants to pay monies for the perpetual or annual care for their own or family member's plots located at the cemetery." (Compl. ¶ 53; compare Compl. ¶ 58.) Again, while Plaintiff's allegations confuse injury to himself and to others, the only claims which Plaintiff actually has standing to bring are those for which *he* was injured (see N.Y. Gen. Bus. L. § 349(h), quoted in Compl. ¶¶ 52, 57). As with Count I, the latest point at which it is alleged that Plaintiff "pa[id] monies for the perpetual . . . care of . . . family members' plots located at the cemetery" (Compl. ¶ 53) was in early 1985, well more than three years before the filing of the Complaint. (See Compl. ¶ 8 & Ex. A.). Counts II and III, therefore, are barred by the statute of limitations. CPLR 214(2).[2]

B. Count III Does Not State A Claim Upon Which Relief Can Be Granted

Even if it were timely, Count III would have to be dismissed, as Plaintiff has not alleged any facts supporting his standing to bring such a claim. Count III is purportedly brought under section 349-c of the General Business Law, which provides that "in addition to any liability for damages or a civil penalty imposed pursuant to § 349, § 350-c and § 350-d of [the General Business Law], regarding deceptive practices and false advertising . . . a person or entity who engages in any conduct prohibited by said provisions of law, and whose conduct is perpetrated against one or more elderly persons, may be liable for an additional civil penalty not to exceed ten thousand dollars" if certain factors are present.

Assuming arguendo that a private right of action exists to collect a civil penalty under section 349-c, it would be available, like all private rights of action under section 349, only to a

[2] As discussed below, the only conceivable way in which Plaintiff could have been injured by a violation of General Business Law § 349-c, and thus have standing to bring Count III of the Complaint, which necessarily alleges that he is a "person who has been injured by reason of any violation of this section," (Compl. ¶ 57), is if he was 65 years of age or older as of 1985. Nonetheless, for statute of limitations purposes, the result is the same as for Count II: his cause of action would have accrued, if at all, no later than when, in 1985, he purchased perpetual care. Count III is, therefore, similarly time-barred.

"person who has been injured by reason of" a violation. Gen. Bus. L. § 349(h). Plaintiff has not alleged that he was, in fact, injured by a violation of § 349-c, as he has not alleged that he was an "elderly person," as defined in the statute, in 1985. Failing that, he lacks standing to bring such a claim, and Count III must be dismissed.[3]

II. PLAINTIFF CANNOT STATE A CLAIM BASED UPON THE MISAPPROPRIATION OF FUNDS

The second principal theory of liability that the Plaintiff advances is that the Defendants (in particular Shaare Zedek) "raided the perpetual and/or annual care accounts they held in trust for the benefit of Bayside Cemetery." (Compl. ¶ 27.) As with much of the rest of the Complaint, the specific factual allegations underlying that charge are few and far between, but they are sufficient to establish that Plaintiff cannot, as a matter of law, prevail on a misappropriation theory, whether denominated as a breach of contract (Count IV), breach of fiduciary duty (Count VI), aiding and abetting a breach of fiduciary duty (Count VII) or conversion (Count VIII).

A. Plaintiff's Claims Based Upon the Misappropriation of Funds Are Untimely

Despite the multiple causes of action that allegedly turn on the Defendants' misappropriation of trust funds, each stems from a common factual allegation: that, "in the 1980's . . . the synagogue made a conscious decision to improperly remove monies originally intended for perpetual or annual care in violation of Defendant's fiduciary duties." (Compl. ¶ 20.) Thus, for purposes of determining the timeliness of any claim for the misappropriation of perpetual care funds, the limitations period began to run no later than December 31, 1989 (giving

[3] Nor would Plaintiff's demand for damages pursuant to Count III (Compl. ¶ 61) be legally cognizable even if he had standing to sue. To the contrary, the General Business Law specifically provides that "all moneys derived from supplemental civil penalties pursuant to this section" must be deposited in a special fund in the state treasury known as the elderly victim fund, precluding any private award of damages. Gen. Bus. L. § 349-c(3).

the Plaintiff the benefit of all reasonable inferences from the Complaint as to when "in the 1980's" the claim accrued, as required on this motion to dismiss).[4]

A claim for conversion must be brought within three years of the date of the alleged conversion. Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 488-89, 448 N.E.2d 1324, 1326-27 (1983). Moreover, conversion is not a continuing wrong, and a single cause of action accrues at the point the property is converted, not upon each successive misuse or refusal to return the property. Id. Therefore, notwithstanding Plaintiff's allegation that "by holding or using these monies in a manner entirely inconsistent with the purpose originally given to the exclusion of the Plaintiff and the Class, Defendants have converted Plaintiff's and Class member's property," (Compl. ¶ 83), the timeliness of the Plaintiff's conversion claim must be judged from the date on which the funds were allegedly improperly removed from the trust fund. Since such a claim would have accrued no later than 1989, the statute of limitations expired no later than 1992, almost two decades before the commencement of litigation.

Nor does Plaintiff's attempt to style the same claim as sounding in breach of fiduciary duty (or aiding and abetting a breach of fiduciary duty) save the claim. Even assuming, arguendo, that Defendants owed Plaintiff a fiduciary duty (an issue discussed below), Plaintiff's conversion claim (Count VIII) would have provided the same relief as he seeks in Counts VI and VII, which sound in breach of fiduciary duty, and thus the statute of limitations for conversion applies. Gold Sun Shipping v. Ionian Transp., 245 A.D. 420, 421, 666 N.Y.S.2d 677, 678 (2d Dep't 1997) ("The cause of action alleging breach of fiduciary duty and the demand for the

[4] Of course, it follows that any earlier misappropriation of funds is, a fortiori, similarly time-barred. Thus, while the Complaint alleges that "Defendant Shaare Zedek has received in excess of $5 million in perpetual and annual care monies since 1846," (Compl. ¶ 9), Plaintiffs are not entitled to litigate over unspecified defalcations over the period of a century and a half. In fact, it would be hard to imagine a clearer example of the repose and fundamental fairness the Legislature sought to engender by enacting the statute of limitations.

imposition of a constructive trust were also properly dismissed based on the three-year Statute of Limitations applicable to conversion, because the legal remedy for conversion would have afforded the plaintiffs full and complete relief."); see also IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 139, 907 N.E.2d 268, 272 (2009) (holding that where a plaintiff alleging a breach of fiduciary duty "primarily seeks damages . . . and the equitable relief it seeks, including the disgorgement of profits, is incidental to that relief," a three-year statute of limitations applies).[5]

B. Plaintiff Has Failed to Allege the Essential Elements of Conversion

In addition to the statute of limitations bar, Plaintiff has failed to allege an essential element of a claim for conversion, namely that he has "legal ownership or an immediate superior right of possession" to the "specifically identifiable," allegedly converted property. NY Medscan, LLC v. JC-Duggan, Inc., 40 A.D.3d 536, 537, 837 N.Y.S.2d 80, 81 (1st Dep't 2007). Here, Plaintiff alleges only that he *"had* an ownership right or an immediate superior right of possession of these monies over Defendants." (Compl. ¶ 82, emphasis added.) Plaintiff's use of the past tense was necessary, of course, because he had also alleged that he had paid the same "specifically identifiable" property to Shaare Zedek in 1985 "to place in trust in order to provide perpetual care services for three graves at Bayside Cemetery," (Compl. ¶ 8.), and the creation of a valid trust terminates the settlor's legal title to the trust corpus and vests it in the trustee. EPTL § 7-2.1(a). Since he no longer has ownership or a superior right of possession over the funds, he

[5] Count IV, which purports to state Plaintiff's contractual cause of action, does not allege the diversion of trust funds as a breach of contract. (See Compl. ¶¶ 65-66.) Such a claim would, however, be futile, since any breach stemming from the misappropriation of funds would have accrued at the same time as the corresponding conversion claims (i.e. no later than 1989), yet not even the longer six-year limitations period applicable to contract claims, CPLR 213(2), would render such claims timely. The statute of limitations similarly bars *any* alleged breach of contract occurring more than six years prior to the commencement of this action.

cannot sustain a claim for conversion. See also Modjeska v. Greer, 233 A.D.2d 589, 590 (3d Dep't 1996).

C. Plaintiff's Breach of Fiduciary Duty Claims Fail As a Matter of Law

Counts VI and VII of the Complaint allege, respectively, breach of fiduciary duty and aiding and abetting breaches of fiduciary duties. The existence of a fiduciary relationship is a necessary element of both claims. See, e.g., Atlantis Info. Tech. v. CA, Inc., 484 F. Supp. 2d 224, 231 (E.D.N.Y. 2007) (identifying "(1) the existence of a fiduciary relationship between the parties; and (2) a breach of the fiduciary duty" as the two elements of a simple breach of fiduciary duty claim); Sharp Int'l Corp. v. State St. Bank & Trust Co., 403 F.3d 43 (2d Cir. 2005) (listing "a breach by a fiduciary of obligations to another of which the aider and abettor had actual knowledge" as the first element of an aiding and abetting claim).

Although the Complaint alleges, in conclusory fashion, that "Defendants owed a fiduciary duty to Plaintiff and the Class to whom the benefit of the perpetual or annual care contracts run," (Compl. ¶ 73), and that "Each of the Defendants breached fiduciary duties owed to Plaintiff and the Class. . ." (Compl. ¶ 75), neither of those allegations is sufficient as a matter of law, as the Court need not accept "allegations consisting of bare legal conclusions" or "factual claims either inherently incredible or flatly contradicted by documentary evidence" in deciding a motion to dismiss. Kliebert v. McKoan, 228 A.D.2d 232, 232, 643 N.Y.S.2d 114, 114-15 (1st Dep't 1996).

Here, even assuming, arguendo, that Plaintiff is an intended beneficiary of the perpetual care contract, as alleged in paragraph 73 of the Complaint, a mere contractual relationship does not create a fiduciary relationship. Rather, a fiduciary relationship arises only from the fact that the contract established a trust, yet, as a matter of law, the trustee of a charitable trust (which includes one for the perpetual care of a cemetery plot, see EPTL § 8-1.5), owes a fiduciary duty

to the trust's ultimate charitable beneficiary (i.e. the People of the State of New York), not to the settlor of the trust or the settlor's heirs or assigns. See Restatement (Second) of Trusts §§ 379, 391.

Nor is the decision in Smithers v. St. Luke's-Roosevelt Hospital Center, 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dep't 2001), to the contrary. While First Department recognized the plaintiff's standing to sue to enforce the terms of her late husband's charitable gift, it explicitly rejected the argument that the plaintiff brought "the action on her own behalf or on behalf of beneficiaries" of the gift. Id. 138, 434. Rather, First Department recognized only the donor's right "to enforce his rights under his agreement with the Hospital through specific performance of that agreement." Id. For the reasons discussed below, Defendants submit that the Plaintiff here does not fall into the class of donors with standing under Smithers, but in any case, nothing in that decision recognizes the existence of a fiduciary duty to the Plaintiff qua settlor/donor.

III. PLAINTIFF CANNOT STATE A CLAIM FOR BREACH OF CONTRACT

A. Plaintiff Lacks Standing to Assert Any Claim Related to Annual Care

The Complaint is replete with allegations related to the Defendants' handling of "funds entrusted to them for the . . . annual care of . . . cemetery plots," (Compl. ¶ 71), and similar issues. There are, however, two fundamental reasons why Plaintiff cannot state a claim based on such allegations. First, as a matter of law, annual care payments do not create a trust or fiduciary relationship, but are rather a simple contractual relationship with the cemetery. The Court need not explore the contours of that relationship, however, because Plaintiff lacks *any* standing to pursue such a claim, since Plaintiff nowhere alleges that he ever paid any money for annual care, let alone within the relevant limitations period.

B. Plaintiff Lacks Standing to Enforce the Perpetual Care Trust at Issue

Since the Complaint alleges that the Plaintiff's payment for perpetual care created a valid charitable trust, the Plaintiff's ability to pursue a breach of contract claim depends on his right to enforce the terms of that trust. As noted above, the right to enforce a trust is ordinarily vested in the beneficiary, not the settlor. In the case of a charitable trust, that means the Attorney General, as the statutory representative of the People of the State of New York.

The First Department recognized a limited exception to that rule in Smithers v. St. Luke's-Roosevelt Hospital Center, 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dep't 2001), but that exception is inapplicable here. In concluding that the donor in Smithers had standing concurrent with that of the Attorney General, First Department relied on the fact that he had explicitly "reserved to himself the right to veto the Hospital's project plans and staff appointments for the Smithers Center" (which was established by his gift). Id. at 139, 434. Moreover, "he and Mrs. Smithers remained actively involved in the affairs of the Smithers Center until his death, and she thereafter." Id.

By contrast, the Plaintiff here can allege no such ongoing right of oversight. Nor would such a right make sense as a matter of public policy, as is amply demonstrated by the fact that Plaintiff, who paid $1,500 for the perpetual care of three graves, claims the right to force the Defendants to account for at least $5 million in perpetual care funds, without any factual or legal support. (Compare Compl. ¶ 8 with Compl. ¶ 9.) It is just such a situation that justifies the traditional right of the Attorney General not only to seek to enforce the terms of charitable trusts—a right he has utilized here to seek broad discovery from Shaare Zedek as to all matters related to perpetual and annual care at Bayside Cemetery—but also to exercise prosecutorial discretion in how and when to use those powers. See also Alco Gravure, Inc. v. Knapp Foundation, 64 N.Y.2d 458, 466, 479 N.E.2d 752, 756 (1985) ("Normally, standing to challenge

actions by the trustees of a charitable trust or corporation is limited to the Attorney General in order to prevent vexatious litigation.").[6]

C. Plaintiff Cannot State a Claim Based on Alleged "Disrepair" of the Cemetery

Finally, regardless of the resolution of Plaintiff's standing to enforce the perpetual care contract at issue, it does not, by its own terms, support claims based on the alleged disrepair of the cemetery as a whole or even the specific graves at issue. Specifically, notwithstanding the allegation in paragraph 14 of the Complaint that "perpetual care . . . is a contractual undertaking to provide, in exchange for compensation, all general work necessary to keep one or more plots at a cemetery property in presentable condition at all relevant times," the perpetual care contract that Plaintiff attached to the Complaint as Exhibit B explicitly contradicts that allegation. Rather, it states only that:

> The interest or income realized from the "FUND" shall be used toward the perpetual care and upkeep of the following lots, plots or graves: Ethel Leventhal, Benjamin Stoloff, Emma Stoloff located in said Bayside Cemetery, *limited, however to the extent for which such interest or income derived therefrom will permit and pay,* as provided for in Section 91 of the aforesaid Membership Corporation law, and without applying any part of the principal "FUND" for that purpose.

(Compl. Ex. B at 5, emphasis added.)

It is, of course, well-established that, "a CPLR 3211 dismissal may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," Goldman v. Metro. Life Ins. Co., 5 N.Y.3d 561, 571, 841 N.E.2d 742, 745 (2005), and that such documentary evidence may include the unambiguous language of a contract, id.; Beal Savings Bank v. Sommer, 29 A.D.3d 388, 389, 815 N.Y.S.2d 63, 64 (1st Dep't

[6] Should the Court conclude that Smithers is factually indistinguishable from the present case, Defendants respectfully reserve their right to argue on appeal that that decision was an incorrect statement of controlling law, even as to a donor with reserved rights of oversight. Nonetheless, Defendants recognize that, if the Court is unable to factually distinguish Smithers, it would be bound by its holding.

2006). Given the unambiguous limitation of any obligation under the contract to the amount of interest or income generated from the trust, the mere allegation that "plots subject to such contracts" have "fall[en] into complete disrepair," (see, e.g., Compl. ¶ 66), does not establish or even sufficiently allege a breach of Defendants' contractual obligations. Nor, of course, do any of the other, more general allegations of the Complaint, such as that there was vandalism at the cemetery, (Compl. ¶¶ 23-24), which, while absolutely regrettable, does not support any claim that Plaintiff may have against these Defendants.

IV. PLAINTIFF CANNOT ESTABLISH A CLAIM FOR UNJUST ENRICHMENT

Nor can Plaintiff recover under Count IV of the Complaint, alleging unjust enrichment, which fails as a matter of law for three independent reasons. First, because unjust enrichment "is an obligation the law creates in the absence of any agreement," there can be no unjust enrichment claim where "the matter is controlled by contract." Goldman, 5 N.Y.3d at 572, 841 N.E.2d at 747. Second, Plaintiff here cannot establish that he is "entitled to have returned to [him]" the funds he originally paid, because it is undisputed that the funds were placed in a valid charitable trust. As the Court of Appeals has held, even where the terms of a charitable trust are violated, the proper remedy is a decree of specific performance, not to abrogate the trust and return the fund to the donor. Assoc. Alumni of the Gen. Theological Sem. v. Gen. Theological Sem., 163 N.Y. 417, 422, 57 N.E. 626, 627 (1900). Finally, any claim for unjust enrichment would be untimely, as the statute of limitations for such a claim is six years, running from the "occurrence of the wrongful act giving rise to the duty of restitution." Elliot v. Qwest Comm'ns Corp., 25 A.D.3d 897, 898, 808 N.Y.S.2d 443, 444-45 (3d Dep't 2006). Regardless of whether the right to restitution arose at the time that Plaintiff originally purchased his perpetual care contract (1985) (see Compl. ¶ 8) or when those funds were allegedly removed from the trust fund

("in the 1980's") (see Compl. ¶ 20), the claim would have arisen more than six years prior to the commencement of this lawsuit, and is thus untimely.

V. THERE ARE NO GROUNDS FOR TOLLING THE STATUTE OF LIMITATIONS

In a preemptive effort to avoid the preclusive effect of the statute of limitations, Plaintiff alleges that "[a]ny applicable statutes of limitation have been equitably tolled by Defendants' affirmative acts of fraudulent concealment, suppression, and the denial of the true facts regarding the invasion of the fiduciary account(s) containing monies dedicated exclusively for perpetual or annual care at Bayside Cemetery." (Compl. ¶ 44.) Such allegations, however, do not suffice to invoke the doctrine of equitable tolling.

As the Court of Appeals has held, equitable estoppel is available "where plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action," and plaintiff reasonably relied on the misrepresentations. Zumpano v. Quinn, 6 N.Y.3d 666, 674, 849 N.E.2d 926, 929 (2006). The only such acts alleged in the Complaint, however, are "intentionally covering up and refusing to publicly disclose critical documents and information" concerning the alleged violations "to class members, their families, and the general public." (Compl. ¶ 40.) Those allegations are wholly insufficient to establish equitable tolling, as "a wrongdoer is not legally obliged to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations." Zumpano, 6 N.Y.3d at 675, 849 N.E.2d at 930. Rather, the plaintiff must show a "specific misrepresentation to them by defendants." Id. at 675, 849 N.E.2d at 930.

Not only have Plaintiffs failed to allege specific misrepresentations, they have not alleged any change in Defendants' alleged concealment that allowed them to finally file the federal action in November 2007. If they were able to bring such an action in 2007 without new information, then they could have brought such an action years earlier as well. Indeed, the

physical condition of Bayside Cemetery was anything but a secret: the Complaint itself alleges that it was the subject of multiple news reports as early as 2002 and 2003, and Plaintiffs or anyone else certainly could have visited the cemetery at any point before then and immediately seen the condition of the cemetery. They thus have not alleged and cannot demonstrate the requisite reasonable reliance to toll the statute of limitations.

CONCLUSION

Plaintiff's Complaint, as with the complaint in the related Lucker action, is full of allegations that may seem appealing on the surface. When one strips the Complaint to its legally relevant core, however, it is clear that each of Plaintiff's claims are deficient for one or more of the following fundamental reasons: they are barred by the statute of limitations or they go beyond Plaintiff's extremely limited standing to sue. Moreover, this Complaint is itself merely a repeat of that in the earlier action, which Defendants have also moved to dismiss.

Defendants therefore respectfully request that this Court dismiss this action in its entirety, with prejudice, or, in the alternative, dismiss so much of Counts I, II, III, V, VI, VII and VIII as allege injuries accruing more than three years before the date of the Complaint and so much of Count IV as alleges injuries accruing more than six years before the date of the Complaint, so as to cabin this litigation to those claims that have not already been extinguished by the controlling statute of limitations.

Respectfully submitted,

AXINN, VELTROP & HARKRIDER LLP
114 West 47th Street
New York, New York 10025

By: /s/_ Russell M. Steinthal_____

Stephen M. Axinn
Russell M. Steinthal

Attorneys for Defendants Congregation Shaare Zedek and Bayside Cemetery