To be Argued by:
MICHAEL M. BUCHMAN

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New York Supreme Court

Appellate Division—First Department

STEVEN R. LEVENTHAL as representative of a class consisting of himself and all others similarly situated,

Plaintiff-Appellant-Cross-Respondent,

– against –

BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK,

Defendants-Respondents-Cross-Appellants,

– and –

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

Defendant.

REPLY BRIEF FOR PLAINTIFF-APPELLANT-CROSS-RESPONDENT

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A. **The Conversion Claim Should Be Reinstated Because Plaintiff Donor Has a Superior Right In the *Corpus* of the Trust and the Legal Authority to Enforce the Trust**

The lower court improperly dismissed the conversion claim holding Plaintiff did not allege nor provide evidence that he possessed the money "in the first place" or "that the funds *remained* in the custody and control of the Plaintiff." (A-16) (emphasis added). The Complaint alleges, and documents attached to the Complaint evidence, that Plaintiff paid $1,200 to Congregation Shaare Zedek "in the first place."[1] The lower court's dismissal on the ground the funds did not *remain* in Plaintiff's possession or control at the time they were stolen is inconsistent with the law of conversion in New York and demonstrates a fundamental misunderstanding of basic trust principles. The dismissal of the conversion claim on these grounds is erroneous and should be reversed.

"Conversion is any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property." *Meese v. Miller*, 79 A.D.2d 237, 242 (4th Dept. 1981). To make out a claim for conversion, a plaintiff must demonstrate legal ownership or an immediate superior right to the item. *Id*. Money, specifically identifiable and segregated, can be the subject of a conversion action. *Manufacturers Hanover Trust Co. v. Chemical Bank*,

[1] (A-16) ("a plaintiff must have exercised ownership, possession or control of the property in the first place.").

160 A.D.2d 113, 124 (1st Dept. 1990), *lv denied*, 77 N.Y.2d 803 (1991). This is especially true when the monies are subject to conditions that they be treated in a specific manner. *Salatino v. Salatino*, 64 A.D.3d 923, 925 (3d Dept. 2009). "When funds are provided for a particular purpose, the use of those funds for an unauthorized purpose constitutes conversion." *Hoffman v. Unterberg*, 9 A.D.3d 386, 388 (2d Dept. 2004) (*citing Meese*, 79 A.D.2d at 243). And "where possession of the property is initially lawful, conversion occurs when there is a refusal to return the property after a demand." *Id*.

In addition to other general allegations in the Complaint, Plaintiff alleged in his Conversion Count as follows:

> 80. Plaintiff and the Class provided Defendants with monies for placement in a trust with the understanding that only interest monies would be used for the purpose of maintaining or making improvements to the respective perpetual care plot(s) at Bayside Cemetery. By accepting monies in trust, Defendants agreed to hold and maintain the *corpus* of the trust in an account and never invade the trust or remove monies from the trust.
>
> 81. Defendants accepted receipt of these monies under these conditions and placed [or should have placed] them in a trust fund.
>
> 82. Plaintiff and the Class had an ownership right or an immediate superior right of possession of these monies over Defendants. Defendant has previously refused to conduct a formal accounting and/or repay all stolen monies.
>
> 83. By taking perpetual or annual care monies out of the fund without Plaintiff's and Class members' express permission, consent or by court order and by holding or using these monies in a manner entirely inconsistent with the original purpose given to the exclusion of Plaintiff and the Class, Defendants have converted Plaintiff's and Class members' property.

> 84. Plaintiff and the Class have been denied the right to their monies and have been injured. Defendants should be forced to place the monies owed in a trust for the benefit of all perpetual and annual care plots at Bayside Cemetery.

(A 44-45).

It is undisputed that Plaintiff-Appellant paid Defendants-Respondents $1,200 to be placed in trust.[2] Only the income generated from the *corpus* of this trust account was to be used to provide perpetual care services with regard to three specified plots. (A 51-52). Plaintiff's $1,200 payment, by operation of law[3] created a trust which was also acknowledged by the Congregation Shaare Zedek Trust Fund Receipt and accompanying documents. (A 47-52). It is also undisputed that Defendants-Respondents improperly took and used the monies in manners inconsistent with the terms of the Trust Fund Receipt.

Plaintiff-Appellant has specifically alleged that he had and continues to have a superior right to the trust monies over Defendants-Respondents. (A 45, ¶ 82). This allegation is based upon New York trust law which provides that the donor of

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[2] *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 557 N.Y.S.2d 851, 557 N.E.2d 87 (1990) (A trustee's fiduciary duty requires "[n]ot honesty alone, but the punctilio of an honor the most sensitive" *quoting Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545; *see also*, 2A Scott, Trusts § 170, at 311 (Fratcher 4th ed.)).

[3] *WIT Holding Corp., v. Klein*, 282 A.D.2d 527, 529, 724 N.Y.S.2d 66 (2d Dept. 2001); *Yochim v. Mount Hope Cemetery Assoc.*, 163 Misc. 2d 1054 (Cty. Ct. Yonk. 1994) (*citing DiMaio v. State of New York*, 135 Misc. 2d 1021, 1025 (N.Y. Ct. Cl 1987)).

a trust has a superior right over the *corpus* of the trust and the right to enforce strict compliance with the trust terms. *Smithers v. St. Luke's Roosevelt Hospital Center*, 281 A.D.2d 127, 139, 723 N.Y.S.2d 426, 435 (1st Dept. 2001) ("a donor's expressed intention is entitled to protection"); *Stewart v. Franchetti*, 167 A.D. 541, 153 N.Y.S. 453 (1st Dept. 1915) (donor/representative have control over trust to sue to enforce trust but not for reversion of monies placed in trust.); *See* Section D *infra*.

Plaintiff-Appellant, who established and funded this trust, is the donor possessing a superior right over Defendants-Respondents sufficient to plead a claim for conversion under New York law. *See Meese v. Miller*, 79 A.D.2d at 242-243 (4th Dept. 1981). Plaintiff-Appellant is not seeking the reversion of monies, which is barred under *Stewart*, but rather is suing to enforce compliance with the trust by demanding the repatriation of stolen monies into a new trust account for use in accordance with the perpetual care and annual care contracts. (A 44-45, ¶ 84) ("Defendant should be forced to place the monies owed in a trust for the benefit of all perpetual care and annual care plots at the cemetery."). This is entirely permissible under New York law to effectuate the intent of the donor who has a *superior right* over Defendants-Respondents in order to enforce the trust. *See Smithers*, 281 A.D.2d at 139-140, 723 N.Y.S.2d at 435. (noting "the well-settled principle that a donor's expressed intent is entitled to protection" and that

"[w]e have seen no New York case in which a donor attempting to enforce the terms of his charitable gift was denied standing to do so."); *see also infra* n 9.

There is simply no support in the law for the lower court's erroneous conclusion or the Defendants-Respondents' misplaced assertion that Plaintiff-Appellant lost the ability to bring a conversion claim the moment the monies left his physical possession and were placed in a trust. Plaintiff-Appellant *at all times* had and has a superior right concerning the trust funds over Defendants-Respondents who have invaded the trust and misused the *corpus* in violation of the trust agreement. (A 51-52); *Id*. If Defendants-Respondents' argument were correct, which it is not, then the Fourth Department decision in *Meese v. Miller*, 79 A.D.2d 237 (4th Dept. 1981) would be entirely wrong. In that case, Plaintiff relinquished control of the monies to Defendants and *did not* have physical possession of the monies at the time they were converted. The court held in *Meese* that the allegations, similar to those alleged here, constituted a claim for conversion.

As in *Meese*, Plaintiff-Appellant in this case has: (i) alleged facts and attached documents evidencing the establishment of a trust to which the law recognizes Plaintiff-Appellant has a superior right over Defendants-Respondents (A-25, ¶ 8, A 44-45, ¶¶ 80-81; A 51-52); (ii) alleged facts that Defendant-Respondents took the monies absent express permission, consent or a court order

(A-45, ¶83); (iii) Defendants-Respondents used the monies in a manner inconsistent with the trust (*Id*.); and (iv) Plaintiff-Appellant has demanded the return of the monies to a trust account -- "Plaintiff and the Class have been denied the right to their monies …." These facts combined with basic trust principles make clear that Plaintiff-Appellant has properly alleged a conversion claim. Accordingly, Plaintiff-Appellant's conversion claim should be reinstated and the lower court's decision with regard to the conversion claim reversed.

B. Plaintiff Properly Alleged General Business Law §§ 349, 350 Claims

1. The Complaint Alleges "Concealment, Misrepresentation or Omission" Constituting A General Business Law §§ 349, 350 Claim

The lower court improperly dismissed the General Business Law §§ 349, 350 claims on the ground that the Complaint failed to allege any deceptive act or practice by the Defendants-Respondents when entering into the perpetual care contracts. In other words, the lower court held that the Complaint failed to allege an act of concealment, misrepresentation or an omission constituting an unfair act or deceptive practice.

Plaintiff-Appellant's opening brief cites portions of the Complaint wherein he specifically alleged acts of concealment, deception and significant omissions by Defendants-Respondents. (Pl. App. Op. Br. 9-10). He alleged that Defendants routinely advertised and sold perpetual care contracts to the general public using

standardized contracts knowing that perpetual and annual care contracts were not being honored. (A-30, ¶ 22). He also alleged that they had no intention or inadequate resources to honor new perpetual care contracts. *Id.* Defendants-Respondents affirmatively stated that upon transfer of the trust monies they would provide perpetual care services in accordance with the Trust Receipt. Defendants-Respondents *did not* disclose material facts to consumers concerning the perpetual/annual care fund's financial strength, or lack thereof, at the time consumers purchased contracts. *Id.* Most importantly, Defendants-Respondents *did not disclose* to Plaintiff that his monies *would not* be placed into a trust account, *would not* be used for purposes as specified in the Trust Fund Receipt, but rather would be placed into the synagogue's general operating fund for exclusive use by the synagogue. (A 51-52).

Defendants-Respondents concealed this material information and led consumers to believe that perpetual care or annual care services would be provided when, in fact, Defendants-Respondents had not been nor would be providing such services. *Id.* Had Defendants-Respondents disclosed this to Plaintiff-Appellant and other members of the class at the time they were about to enter into the contract and transfer the monies, no rational consumer seeking perpetual care services would have given these culpable Defendants-Respondents any monies. The misrepresentations made and the information concealed by Defendants-

Respondents was central to the contract/trust. It was absolutely material information and any argument to the contrary is baseless. (Def. Opp. Mem. 15-16).

It is well settled that where a party has fraudulently induced a plaintiff to enter into a contract, a defendant may also be held liable in tort. *Channel Master Corp. v. Aluminum Ltd Sales*, 4 N.Y.2d 403, 406-407, 176 N.Y.S.2d 259 (1958); *Deerfield Comm. v. Chesseborough-Ponds, Inc.*, 68 N.Y.2d 954, 510 N.Y.S.2d 88 (1986). Defendants-Respondents' failure to disclose material facts concerning the manner in which they were treating "trust fund monies" at the time they were inducing Plaintiff and other class members to enter into these contracts constitutes a violation of General Business Law ("GBL") § 349. Defendants-Respondents, as trustees, had a duty to disclose this material information, yet chose not to do so in order to defraud Plaintiff and class members. *See IDT Corp., v. Morgan Stanley Dean Witter & Co.*, 63 A.D.3d 583, 586 (1st Dept. 2009).

Contrary to Defendants-Respondents suggestion, this case clearly involves false advertising and deceptive trade practices under GBL §§ 349, 350. (Def. Opp. Mem. 12-16). The allegations in the Complaint make out a claim for "consumer oriented activity" because they involve the sale of perpetual and annual care to the general public utilizing standard form contracts and misrepresentations or omissions to all consumers through a pattern of deceptive misconduct which caused injury to all who purchased a perpetual or annual care contract.

See Genesco Ent. v. Koch, 593 F. Supp. 743, 750-754 (S.D.N.Y. 1984), *Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y. 2d 20, 25 (1995). GBL §349 was designed to halt this type of deceptive conduct – "this law was intended to 'afford a practical means of *halting consumer frauds at their incipiency* without the necessity to wait for the development of persistent frauds.'" *Id.* at 25 (emphasis added). This is precisely the type of consumer transaction which uniformly affects a broad set of consumers who fell victim to Defendants-Respondents' misrepresentations and/or omissions.

The cases cited by Defendants-Respondents actually support Plaintiff's position. This case does not involve a single shot contract affecting one consumer as in *Teller v. Bill Hayes*, 213 A.D.2d 141, 630 N.Y.S.2d 769 (2d Dept. 1995). Nor does it involve a complex arrangement, concerning a non-standard contract executed between sophisticated parties with the assistance of expert representation as in *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 639 N.Y.S. 2d 283 (1995). This is a typical "modest" consumer transaction affecting consumers at large and, therefore, falls well within the ambit of "consumer oriented activity" under GBL §349.

C. **The GBL §§ 349, 350 Claims Are Tolled Under the Continuing Violation And Fraudulent Concealment Doctrines**

The lower court did not address the statute of limitations concerning the GBL §§349, 350 claims. Recognizing the weakness in the decision below

concerning these claims, Defendants-Respondents alternatively ask this Court to dismiss the GBL §§349, 350 claims on the ground the statute of limitations purportedly bars reinstatement of the GBL causes of action. Defendants-Respondents contend Plaintiff-Appellant's claims are time barred under GBL §§349, 350 because the injury purportedly arose in 1985 when the contract was entered. This case involves Defendants-Respondents' deception or omission in failing to disclose material information that they were converting or misusing perpetual and annual care monies *and* concealing their misconduct for decades. For decades, Defendants-Respondents engaged in continuing violations of the law by failing to report to Plaintiff-Appellant and others that they converted the monies in violation of their fiduciary duties. They also engaged in continuing violations of law by failing to disclose past trust violations, in accordance with their existing fiduciary duties, to new purchasers of perpetual and annual care contracts. Defendants-Respondents also fraudulently concealed their misconduct to prevent the detection of their misconduct. Whether viewed separately or taken together, these continuing violations of law and acts of fraudulent concealment toll the statute of limitations.

"Oxymoronic" – that is how Chief Judge Raymond J. Dearie of the Eastern District of New York described Defendants-Respondents' statute of limitations argument during the federal proceeding. Chief Judge Dearie recognized that

Plaintiff's claims involve continuing violations of law, continuing to this very day, render the statute of limitations defense inapplicable.[4] He also implicitly recognized that Plaintiff's claims were equitably tolled by virtue of Defendants-Respondents' fraudulent concealment. *Kidd v. Delta Funding Corp.*, Index No. 601020/99, 2000 N.Y. Misc. LEXIS 29 (N.Y. Sup. Ct., Nassau County 2000). Defendants-Respondents were and to this day remain trustees under the Trust Agreement. As such, they owe Plaintiff and class members the duties of candor and loyalty. Time and again, Defendants-Respondents violated these basic fiduciary duties. Indeed, it is well recognized under New York law that when a fiduciary:

> electing to set up the statute of limitations has previously, *by deception or any violation towards plaintiff*, caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold.

Id. (emphasis added). The statute of limitations cannot run in favor of a fiduciary who has breached his fiduciary duties as "no man may take advantage of his own wrong." *Erbe v. Lincoln Rochester Trust Co.*, 214 N.Y.S.2d 849, A.D.2d 211, 214 (4th Dept. 1961). Where, as here, a Plaintiff "was induced by fraud, misrepresentation or deception to refrain from filing a timely action," courts toll

[4] *1050 Tenants Corp., v. Lapidus*, 735 N.Y.S.2d 47 (1st Dept. 2001); *Westminister Properties Ltd v. Kass*, 624 N.Y.S.2d 738 (1st Dept. 1985); *Shelton v. Elite Model Mgmt., Inc.*, 812 N.Y.S.2d 745 (N.Y. Sup. Ct., N.Y. Cty. 2005).

the statute of limitations. *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-49, 406 N.Y.S.2d 259 (1978); *General Stencils v. Chiappa*, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337 (1966).

In *General Stencils*, the Court of Appeals noted:

> Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.

Id.

In *General Stencils*, defendant was plaintiff's head bookkeeper who concealed the theft of monies from her employer for several years by misrepresenting the state of the plaintiff's finances. In that case, the Court of Appeals held defendant was equitably stopped from asserting the statute of limitations defense because her affirmative conduct in concealing the crime prevented plaintiff from timely bringing its action. In so doing, the Court of Appeals stated that a defendant/wrongdoer cannot take affirmative steps to prevent a plaintiff from bringing a claim and then assert the statute of limitations as a defense.

"Generally, the issue of whether a defendant should be equitably estopped from asserting the Statute of Limitations as an affirmative defense to the plaintiff's complaint is not a question of law, but rather a question of fact, which should be

fully developed and determined upon the trial of the action." *Scharge v. Waterview Nursing Care Center, Inc.*, 907 N.Y.S.2d 103, 2010 WL 796840, *4 (N.Y. Sup. Queens Cty. 2010) (citing, *McIvor v. Di Benedetto*, 121 A.D.2d 519, 523, 503 N.Y.S.2d 836 (1986)).

In this case, the allegations concern continuing violations of law and/or fraudulent concealment by the Defendants-Respondents which prevented Plaintiff from instituting a more timely action.[5] It is undisputed that Defendants did not publicly disclose the theft of trust monies until *after* the federal action was commenced in 2007 – *22 years after the Leventhal trust was created*. Defendant-Respondent Congregation Shaare Zedek's lawyer, told *The Jewish Week* after the commencement of the federal action in 2007:

> In the 1960s and 70s when the congregation – like many neighboring synagogues – fell on hard times, it did 'borrow' money from the cemetery's general operating accounts and subsequently repaid its debts.

The Jewish Week, *Bayside Cemetery Mess Lands In Federal Court*, Oct. 5. 2007. In addition, he told the *New York Daily News*:

> Some cemetery funds were borrowed from a non-restricted account to repair the synagogue roof which is entirely proper and legal.

The New York Daily News, *Bayside Cemetery Is A Disgrace, Suit Says*, October 4, 2007. There is nothing "proper and legal" about the unauthorized invasion of the

[5] (A-38 ¶ 44).

corpus of a trust fund. This "disclosure" *after* the commencement of the federal action evidences the inequitable nature of their statute of limitations argument. Further evidence obtained during discovery will amplify these points.

Defendants-Respondents concealed information and issued false statements to lead the public to believe that the cemetery's woes were not of its making. Defendants made affirmative statements that the monies simply "ran out" when, truth be told, they were unlawfully taken. (A-29, ¶ 19) ("In their public statements, Defendants suggest that the perpetual or annual care monies they collected over the years have all been spent on the cemetery."). Collectively, these actions constitute concealment[6] and acts of affirmative misrepresentation which warrant tolling the statute of limitations. Accordingly, Defendants-Respondents cannot invoke the statute of limitations given their continuing violations of law and/or fraudulent concealment with regard to perpetual/annual care monies.

Defendants-Respondents' reliance on *Zumpano v. Quinn*, 6 N.Y.3d 666, 674 894 N.E.2d 926 (2006) is misplaced because it is factually distinguishable from this case. In *Zumpano*, the Plaintiffs, victims of sexual abuse by priests, were "aware of the sexual abuse he or she suffered at the hands of the Defendant

[6] "[C]oncealment without actual misrepresentation may form the basis for invocation of the doctrine 'if there was a fiduciary relationship which gave the defendant an obligation to inform the plaintiff of the underlying claim.'" *Crown Castle USA, Inc., v. Nudd Corp.*, 05CV6163T, 2008 WL 163685 (W.D.N.Y. 2008) (*citing Jordan v. Ford Motor Co.*, 73 A.D.2d 422, 424, 426 N.Y.S.2d 359 (4th Dept. 1980)); *Gleason v. Spota*, 599 N.Y.S.2d 297 (2d Dept. 1993).

priests." *Id*. In that case, Plaintiffs *did not establish that Defendants owed them a fiduciary duty to affirmatively disclose their unlawful acts*. Conversely in this case, Defendant-Respondent Congregation Shaare Zedek clearly possessed an affirmative fiduciary duty to disclose the wrong doing given the fact that they were and remain trustees. *Defendant-Respondent Congregation Shaare Zedek concealed its unlawful conduct for years and made misrepresentations to prevent the public from discovering its unlawful conduct.* The concealment of facts by a fiduciary is alone sufficient to invoke equitable tolling. *See supra* n 6. In addition to concealment, there are also affirmative misrepresentations by Defendants that the "money ran out" which also serve as a basis for tolling the statute of limitations. (A-29, ¶ 19) ("In their public statements, Defendants suggest that the perpetual or annual care monies they collected over the years have all been spent on the cemetery.").

Defendants-Respondents' reliance on *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 789 (2012) is also misplaced. In that case, Plaintiff alleged that Verizon tricked him into tolerating the placement of a communication box on his building without seeking payment. Plaintiff claimed Verizon "never disclosed that plaintiffs had a right to compensation and created the false impression that Verizon had a right to attach the box." *Id*. Verizon, unlike Defendants-Respondents here, was not a trustee and *did not* owe Plaintiff any fiduciary duty.

This case is also distinguishable from *Corsello* because Plaintiff alleges that the Defendants-Respondents induced him to enter into a contract for perpetual care services without disclosing material information. Plaintiff further alleges that Defendants-Respondents, thereafter, made affirmative misrepresentations publicly to lead people to believe monies had "run out" when, in fact, they had been stolen. The failure to report the theft in accordance with their fiduciary duties was an act of concealment to prevent detection. Thus, the failure to disclose material information at the time the contract was created and the subsequent acts taken to conceal their breach of contract, breach of fiduciary duty, conversion, and GBL violations tolls the statute of limitations.

As in *General Stencils* and *Simcuski*, Plaintiff, in this case, "allege[s] both the tort that was the basis of the action and later acts of deception by which defendants concealed their wrongdoing . . .". *Id* at 789. Accordingly, the continuing violation and fraudulent concealment doctrines toll the General Business Law §§ 349, 350 claims.

D. **The Breach of Contract Claim Should Be Affirmed**

It is undisputed in this proceeding that Defendants-Respondents have admitted to the New York State Attorney General, nearly eight years ago, that they violated their fiduciary duties and breached perpetual and annual care contracts. In order to avoid civil liability for their wrongdoing, Defendants-Respondents now

argue in the *Lucker* matter that the children and grandchildren of individuals who purchased perpetual and annual care contracts lack standing[7] to enforce the trusts.[8]

Plaintiff Levethanthal, unlike the Plaintiffs in the *Lucker* action, *directly* purchased a perpetual care contract from Defendants-Respondents. Nevertheless, Defendants-Respondents now contend that even a direct purchaser of a perpetual

[7] The *Lucker* Plaintiffs should all be deemed to possess standing because three administrations of the New York State Attorney General's Office have done nothing for approximately eight years to compel the return of the stolen monies. *Holt v. Coll of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 935 (Cal. 1964). Where the accountability for the acts of an entity managing a charitable trust may be subject to limited or no oversight and where the state Attorney General has demonstrated it does not have the resources or interest to pursue the matter, there is a strong public interest in allowing someone standing. The *Lucker* suit, therefore, should not be frustrated by stringent standing requirements and the Lucker Plaintiffs should be deemed to possess standing. *Paterson v. Paterson Gen. Hospital*, 235 A.2d 487, 495 (N.J. Super Ct. Ch. Div. 1967); *Robertson v. Princeton Univ.*, Civ. Action No. C-99-02 (N.J. Super Ct. Ch. Div. June 20, 2003). Indeed, if a court determines that the attorney general is substantially ineffective, the probability increases that a private party will be afforded standing. Mary Grace Blasko et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F.L. Rev. 37, 69 (1993). The need to grant the *Lucker* Plaintiffs standing is even more appropriate here as Plaintiffs allege that the New York Attorney General and other state agencies lack regulatory oversight concerning these Defendants. (A 24 ¶ 6) ("Bayside Cemetery is registered as a religious group which is not subject to governmental regulation and State officials have publicly acknowledged 'that they are aware of the problems but powerless to do anything about it.'"); s*ee Consumers Union of U.S., Inc. v. State*, N.Y.L.J. at 18 (N.Y. Sup. Ct. Mar. 12, 2003).

[8] The lower court recognized that court appointed representatives of an estate have standing to proceed, but failed to consider and acknowledge that Plaintiff John R. Lucker is a Connecticut Court appointed representative of his grandmother's estate and, therefore, possesses standing to proceed.

care contract, the donor, lacks standing to enforce his intention when creating a trust. Put differently, Defendants-Respondents conveniently contend that *no natural person* has standing to bring a breach of contract or breach of fiduciary duty action. That is not the law in New York as outlined by this Court in *Smithers v. St. Luke's Roosevelt Hospital Center*, 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dept. 2001).

The *Smithers* decision relied on a 1900 Court of Appeals decision which stated "the Court has held that donor of a charitable trust and the donor's successor in interest have standing to maintain an action to enforce the trust." (A-18) (*citing Associate Alumni of the General Theological Seminary of the Protestant Episcopal Church in the United States of America v. General Theological Seminary of the Protestant Episcopal Church of the United States*, 163 N.Y. 417, 420-421 (1900)).[9]

[9] The *Alumni General*, *Smithers* and lower court decisions are entirely consistent with The Uniform Trust Code, adopted by the Uniform Law Commission which provides: "[t]he settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust." U.T.C. § 405(c). They are also consistent with The Restatement Third of Trusts § 94(2) which generally adopts the settlor-standing position of Uniform Trust Code § 405, amending the position in the Second Restatement by stating: "A suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer or by a co-trustee or successor trustee, *by a settlor, or by another person who has a special interest in the enforcement of the trust*." Restatement Third, Trusts § 94(2) (emphasis added). The Restatement Comment explains, "special-interest standing ordinarily *enables the settlor to maintain a suit against the trustee-organization only to enforce the restriction—that is, to restrain the trustee from diverting funds from the specified charitable purpose* or to compel restitution for any such breach of trust." (emphasis added).

Defendants-Respondents' mischaracterize this Court's holding in *Smithers* in order to suggest that "a number of factors" must first be satisfied in order to establish standing. (Def. Opp. Mem. at 21-23). There is no such holding in *Smithers.* To the contrary, this Court recognized a donor's *unqualified* right to enforce his trust, thereby rendering Defendants-Respondents' "number of factors" argument pure fiction. To be sure, this Court noted in *Smithers* as follows:

> as *the founder of the charity, has standing to appear in court to restrains the diversion of the property donated from the charitable uses for which it was given.*

Smithers, 281 A.D.2d at *137, (*quoting Mills v. Davison,* 54 NJ Eq 659, 667 35 A 1072, 1075 [Dec. 1, 1896]). Concluding that Plaintiff Smithers possessed standing to enforce the terms of the trust, this Court held:

> To hold that, in her capacity as her late husband's representative, Mrs. Smithers has no standing to institute an action to enforce the terms of the Gift is to contravene *the well-settled principle that a donor's expressed intent is entitled to protection* (s*ee St. Joseph's, supra; Lefkowitz v. Lebensfeld, supra; Alco Gravure, supra*) and the longstanding recognition under New York law of standing for a donor such as Smithers (*see Associate Alumni, supra*). *We have seen no New York case in which a donor attempting to enforce the terms of his charitable gift was denied standing to do so.* Neither the donor nor his estate was before the court in any of the cases urged on us in opposition to donor standing (*see, e.g., Alco Gravure, supra; Stewart v Franchetti,* 167 App Div. 541; *Matter of De Long,* 169 A.D.2d 1005, *lv denied,* 77 N.Y.2d 809; *Lefkowitz v Lebensfeld,* 68 A.D.2d 488, *affd* 51 N.Y.2d 442).

Id. at 139. (emphasis added).

The lower court's ruling is predicated on the well settled principle that a donor's expressed intent is entitled to protection and that the donor or heirs stand in the best position to enforce a trust. *Smithers v. St. Luke's Roosevelt Hospital Center*, 281 A.D.2d 127, 723 N.Y.S.2d 426, 435 (1st Dept. 2001). This is especially true, whereas here, Plaintiff is not seeking the return of monies for himself and has no pecuniary or other material interest in this litigation other than enforcing the trust. Thus, a donor has a categorical right to sue to enforce his/her trust. Accordingly, the lower court's decision sustaining the breach of contract claim should be affirmed.

E. **The Breach of Fiduciary Duty Should Be Affirmed**

Defendants-Respondents contend the breach of fiduciary duty claim should have been dismissed because they owe no fiduciary duty to Plaintiff. (Def. Opp. Mem. 23-25). Defendants-Respondents contrived argument finds no support in the law. Indeed, the absence of their citation to any authority directly on point speaks volumes.

The law in New York defining the existence of a fiduciary relationship and duty owed to plaintiff is quite clear. "[A] fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another, and embraces both technical fiduciary relations and those informal relations which exist when one man trusts in and relies upon another." *DiMaio v.*

State, 135 Misc. 2d 1021, 1025, 517 N.Y.S.2d 675, 677 (1987). By failing and refusing to honor its trust obligations as outlined in the Trust Fund Receipt (A 51-52), which it entered into directly with Plaintiff, Defendants-Respondents breached their fiduciary duties – fiduciary duties they owed to Plaintiff with whom they contracted, accepted monies to be placed in trust and to which New York law recognizes the existence of a fiduciary obligation. *WIT Holding Corp., v. Klein*, 282 A.D.2d 527, 529, 724 N.Y.S.2d 66 (2d Dept. 2001); *Yochim v. Mount Hope Cemetery Assoc.*, 163 Misc. 2d 1054 (Cty. Ct. Yonk. 1994).

Defendants-Respondents' argument that they owe no fiduciary duty to the donor of a trust is belied by the Court of Appeal decision in *Associate Alumni of the General Theological Seminary*, 163 N.Y. at 420-421 and this Court's decision in *Smithers*, 281 A.D.2d 127. In each case, the donor possessed standing to enforce basic trust principles against the trustee, including the breach of fiduciary duty for failing to honor the terms of the trust.[10] Accordingly, the lower court's decision sustaining the breach of fiduciary duty claim should be affirmed.

[10] Defendants-Respondents' reliance upon *Matter of Heller*, 6 N.Y.3d 649 (2006) is misplaced. In *Heller*, a trust was created by virtue of a will. In this case, however, the trust was created by Plaintiff pursuant to a direct contract to which fiduciary duties attached the moment Plaintiff reposed trust and confident in Defendants-Respondents to manage the perpetual care of the three plots specified in the contract. While it is convenient for Defendants-Respondents to, yet again, argue that the only people who possess the right to sue in this case are unfortunately deceased, the law in New York does not support their arguments.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's decision dismissing the conversion and General Business Law §§ 349, 350 claims. Moreover, this Court should sustain and affirm the breach of contract and breach of fiduciary duty claims.

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Respectfully submitted,

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