

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

JOHN R. LUCKER, as CONNECTICUT PROBATE  
COURT APPOINTED ADMINISTRATOR FOR  
THE ESTATE OF RUTH B. LUCKER, and  
BEATRICE WOLIN as representatives of a class  
consisting of all others similarly situated,

Plaintiffs,

-against-

BAYSIDE CEMETERY, and CONGREGATION  
SHAARE ZEDEK,

Defendants.

) Index No.:

) **SUMMONS**

To the above named defendants:

**YOU ARE HEREBY SUMMONED** and required to serve upon plaintiffs' attorney, at the address stated below, an answer to the attached complaint within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York; and in case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York  
November 16, 2015

DEFENDANTS' ADDRESSES:

Bayside Cemetery  
80-35 Pitkin Avenue  
Ozone Park, New York 11417-1228  
(718) 843-4840

Congregation Shaare Zedek  
212 West 93<sup>rd</sup> Street  
New York, New York 10025-7408  
(212) 874-7005



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)  
) **[CORRECTED CLASS ACTION**  
) **COMPLAINT**

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) **Jury Trial Demanded**  
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Plaintiffs, on behalf of all persons who purchased annual or perpetual care from a Defendant, allege as follows against Defendants Bayside Cemetery and Congregation Shaare Zedek on information and belief formed after an inquiry reasonable under the circumstances:

**INTRODUCTION**

1. As in many religions, Jewish law dictates precise rules for burying and mourning the dead. According to Jewish law, burial grounds remain sacred places in perpetuity.

2. Defendants in this lawsuit prohibited the loved ones of hundreds, or perhaps thousands, of Jewish souls buried at Bayside Cemetery in Queens, New York from mourning their family and friends according to Jewish law or their personal preferences. According to evidence in the record, despite entering into annual or perpetual care contracts, Defendants knowingly breached those contracts and left the plots and gate common areas at Bayside Cemetery in an appalling state of disrepair to the point at which individual graves could not be

accessed or even identified. In addition, some areas were left desecrated for years with human remains entirely exposed.

3. Worse still, discovery in this case demonstrates that Defendants have been unlawfully “commingling” perpetual care monies since at least 1907<sup>1</sup> and routinely stealing those monies to offset deficits at the synagogue since at least 1964.<sup>2</sup> Defendants’ own documents establish it has known for at least 50 year that its conduct violated New York law<sup>3</sup> and yet Defendants continued to solicit annual and perpetual care contracts for decades with no intention of fulfilling their legal obligations.

### **PARTIES**

4. Connecticut Probate Court appointed Administrator John R. Lucker resides in Simsbury, Connecticut. Mr. Lucker is the Connecticut Probate Court appointed Administrator of his grandmother’s estate – Ruth B. Lucker.<sup>4</sup> In the 1970s, Ruth B. Lucker purchased perpetual care from a Defendant through the Chebra Shebath Achim Society. Mrs. Lucker is buried at Bayside Cemetery. Defendants have admittedly violated perpetual care contracts, failed and refused to abide by their contracts to class members concerning the provision of perpetual care services at Bayside Cemetery. Defendants have also refused to conduct a forensic accounting. In an earlier decision, this Court did not consider whether Mr. Lucker, as a court appointed representative of his grandmother’s estate, had standing to sue. *Lucker v. Bayside Cemetery*, 33

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<sup>1</sup> See Exhibit A (“All of these documents, including those reviewed by representatives of the JCRC at the JTS archives, indicate that, since at least 1907, there has been a comingling of assets between the cemetery and the synagogue until 1999.”).

<sup>2</sup> See Exhibit B (“For a number of years, the congregation has been drawing upon the cemetery funds to balance its budget and as at [sic] December 31, 1975, the total of such withdrawals from the Cemetery Fund is \$172,548.08. Since the cemetery’s assets include perpetual care funds, the legality of such withdrawals has been questioned.”); Exhibit C.

<sup>3</sup> See Exhibit D.

<sup>4</sup> See Exhibit E.

Misc.3d 1203(A) (N.Y. Sup. Ct. Sept. 15, 2011) (“With respect to deceased donors, the court-appointed representative of the estate also has standing to bring an action for a defendant’s breach of a duty to the trust grantor.”). Nor did the First Department. *Lucker v. Bayside Cemetery*, 114 A.D.3d 162, 1<sup>st</sup> Dept. 2013) (“None of them is an executor or administrator of an estate whose deceased possessed a viable claim against defendants at the time of his or her death.”). This Complaint is replete with exhibits evidencing that Plaintiffs possessed pre-death injuries upon entering into a contact with a Defendant and was directly injured as a result thereof. *Lucker*, 33 Misc 3d. 1203A. (“In this case, there is no evidence that plaintiffs were directly injured in the claimed wrongs.”). Indeed, Plaintiff Beatrice Wolin is still alive and brings suit concerning her annual care purchases from 1949 to 2009. These purchases are recorded in documents Defendants produced to the New York State Attorney General.

5. Plaintiff Beatrice Wolin is a resident of the State of New York. Since 1949, Plaintiff has purchased annual care for the Weinstein plots found within Gate 58 at Bayside Cemetery. Documents produced to the New York State Attorney General’s Office by Defendant Congregation Shaare Zedek evidence that Ms. Wolin has purchased annual care from 1949 until approximately 2009. Defendants have admittedly violated annual care contracts, and failed to abide by annual care contracts to class members concerning the provision of annual care services at Bayside Cemetery. Defendants have also refused to conduct a forensic accounting.

6. Defendant Congregation Shaare Zedek (“Shaare Zedek”) is a New York not-for-profit corporation with its principal place of business located at 212 West 93<sup>rd</sup> Street, New York, New York. Shaare Zedek is a multi-generational, egalitarian Conservative congregation on the Upper West Side of Manhattan purportedly embracing a traditional approach to contemporary Judaism. Shaare Zedek owns, operates, manages, maintains and controls Bayside Cemetery.

During the class period, Defendant Shaare Zedek marketed and sold annual and perpetual care contracts, either directly or through its agents, to class members.

7. Based upon documents created by Defendant Shaare Zedek and other information, Defendant Bayside Cemetery is a legal entity which maintains its principal place of business at 80-35 Pitkin Avenue, Ozone Park, New York. During the class period, Defendant Bayside Cemetery marketed and sold perpetual or annual care contracts, either directly or through its agents, to members of the Class.

### **JURISDICTION AND VENUE**

8. This Court has jurisdiction over Defendants pursuant to CPLR §§ 301 and 302 and venue is proper in this district as pursuant to CPLR § 503 because, among other things, (a) one or more defendants reside in this County, (b) the principal place of business of one or more defendants is in this County, and (c) parts of the unlawful conduct complained of herein occurred in this County.

### **FACTS**

9. This is a breach of contract and consumer fraud class action brought on behalf of all persons who purchased annual or perpetual care from Defendant Bayside Cemetery and Congregation Shaare Zedek (Defendants) from at least as early as January 1, 1964 to the present (the “Class Period”). For decades, Defendant Congregation Shaare Zedek has admittedly violated annual care agreements and perpetual care trust agreements, refused to perform annual and perpetual care services, stolen perpetual care *corpus* and income and otherwise allowed Bayside Cemetery to fall into complete disrepair.<sup>5</sup> *The Jewish Week* news article entitled *Weeding Out An Eyesore* dated June 6, 2004 described the cemetery as follows:

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<sup>5</sup> See Exhibit F.

much of the cemetery remains mired in overgrowth, and large swaths continue to look like rainforest, where fallen headstones are buried under vines, weeds, wildflowers and fallen trees.

10. Bayside Cemetery, located at 80-35 Pitkin Avenue, Ozone Park, New York (the “cemetery”), is one of the oldest Jewish cemeteries in New York City. The cemetery, founded in the mid-nineteenth century, includes the graves of Jewish veterans of the Civil War and subsequent conflicts. It is a 14 acre tract of land with approximately 34,000 graves.

11. In 1842, Congregation Shaare Zedek was located on the lower East Side of New York. It purchased the land at Bayside Cemetery for five percent of its congregation members and sold the remaining burial plots to individuals and burial societies.

12. Since at least as early as 1907, Defendants have sold annual and/or perpetual care concerning lots, plots or graves at Bayside Cemetery.

13. Annual care is an undertaking, in exchange for compensation, to perform all general work necessary to keep one or more plots and gate common areas at a cemetery property in a presentable condition including, but not limited to: (i) the cutting of grass at reasonable intervals; (ii) raking, cleaning, filling, seeding, and/or sodding of graves; (iii) replacement, pruning, or removal of shrubs and trees; and (iv) prevention and removal of wild foliage growth in order to assure access to interment rights and grave visitation by surviving family, friends, and other interested parties.

14. Perpetual care is a contractual undertaking to provide, in exchange for compensation, all general work necessary to keep one or more plots and gate common areas at a cemetery property in a presentable condition at all relevant times including, but not limited to: (i) the cutting of grass at reasonable intervals; (ii) raking, cleaning, filling, seeding, and/or sodding of graves; (iii) replacement, pruning, or removal of shrubs and trees; and (iv) prevention and

removal of wild foliage growth in order to assure access to interment rights and grave visitation by surviving family, friends, and other interested parties.

15. Defendants Congregation Shaare Zedek and Bayside Cemetery have sold annual and/or perpetual care for over one hundred years. Defendants sold annual and/or perpetual care to consumers using standard form contracts. The perpetual care contracts entitled “Trust Fund Receipt” provided as follows:

Pursuant to Section 92 of the Membership Corporation Law of New York, said sum shall be held as part of the Special Fund of the “Congregation”, maintained by it for perpetual care of lots, plots or graves in Bayside Cemetery, and deposited by the Congregation in its names in any State or Federal Savings Bank or Association paying interest thereon, or invested or re-invested by it for the purchase in its name of any Federal, State, Municipal or other Government certificates or bonds, or other securities authorized by law for investment of Trust Funds.

The interest or income realized from the “FUND” shall be used toward perpetual care and upkeep of the lots, plots or graves [Name of Persons] 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 . . .<sup>6</sup>

16. Section 92 of the Membership Corporation Law of New York, which is cited in Defendants’ contracts with consumers, provides, in relevant part, as follows: “[t]he officers of the corporation shall keep accurate records of such funds separate and apart from its other funds.”

17. For decades starting as early as 1907, Defendants failed to create a proper perpetual care “Fund,” to segregate such funds, to apply the interest income only to respective perpetual care graves and to reinvest interest income into the perpetual care fund.

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<sup>6</sup> Exhibit G.

18. Perpetual care interest income was routinely misused by the synagogue over decades, as reflected on the year-end financial statements of the synagogue. For example, in 1964 \$10,895.86 of perpetual care interest income was commingled with general synagogue funds.<sup>7</sup>

19. The 1972 year-end financial records for the synagogue reflect “[t]he Defecit [sic] for this year was covered by \$16,740.00 of interest from Cemetery.”<sup>8</sup> The only sizeable asset of the cemetery which could generate this amount of interest was the perpetual care monies.

20. In 1966, Congregation Shaare Zedek conducted legal research under New York Membership Corporation Law Sections 91 through 93-a to determine the legality of using perpetual care interest income for purposes other than which they were intended. Congregation Shaare Zedek concluded as follows:

The limitations in Section 91 and Section 92-a relating to the income and excess remaining therefrom are clear: Care of graves is to the extent of the income derived from the deposited fund and any excess income is to be credited for use in any future years to make up any deficiencies for cost of care. There appears to be no right to use such excess income for any other purpose. *See Hurtsman v. Lefkowitz* (handwriting of citation illegible). Section 92 requires a trust account for all perpetual care funds; and, unless otherwise provided in the agreement with the plot owner, such funds are to be kept separate and known as the perpetual care fund.<sup>9</sup>

21. The 1973 year-end financial records reflect: “[t]he Deficit of this year was covered by withdrawal from Cemetery of \$23,008.00.”<sup>10</sup>

22. As late as the 1960s and 1970’s, Congregation Shaare Zedek was patently aware that it was a violation of New York law to: (i) invade the *corpus* of a perpetual care fund; (ii) use

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<sup>7</sup> Exhibit H.

<sup>8</sup> Exhibit I.

<sup>9</sup> Exhibit D (emphasis added).

<sup>10</sup> Exhibit J.

annual and/or perpetual care interest income for a purposes other than maintaining the perpetual care, lot, plot or grave at Bayside Cemetery; (iii) fail to establish a perpetual care fund; (iv) to properly treat and account for annual and/or perpetual care funds on an individual basis including with respect to interest income; and (iv) comingle cemetery or synagogue general operating funds with perpetual care funds.

23. Painfully aware that it had been abusing perpetual care funds in violation of New York law for decades, Congregation Shaare Zedek engaged in a scheme to identify the amount of perpetual care monies that had been stolen over the years, create an accounting basis to absolve the liability and remove monies from what should have been a restricted account to an unrestricted account. The scheme was reduced to writing and provides in relevant part as follows:

For a number of years, the congregation has been drawing upon the cemetery funds (perpetual care funds) to balance its budget and as at December 31, 1975, the total of such withdrawals from the Cemetery Fund is \$172,548.08. Since the cemetery's assets include perpetual care funds, the legality of such withdrawals has been questioned. While the withdrawals are listed as an indebtedness from the synagogue to the cemetery, and the synagogue has sufficient assets to repay such withdrawals at any time, the legality of the withdrawals remain in doubt because perpetual care funds may not be used for any purpose other than that specifically authorized by statute and by the terms of the receipt given for such funds.

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However, Section 1401(e), governing perpetual care funds is applicable to every cemetery corporation and every religious corporation operating a cemetery. This section governs the use of income from perpetual care funds and limits its use to the care of plot or plots in the cemetery and restricts the investment of its principal to legal trust investments. It also provides for separating such funds from other funds without co-mingling of them and for the maintenance of accurate accounts of all such funds. There is, therefore, no authorization to use such perpetual care funds as a loan to the synagogue with or without interest.

24. Despite these internal communications concerning the proper way to treat perpetual care funds, Congregation Shaare Zedek made a conscious decision to ignore the law and continue along the path taken for decades to abuse perpetual care monies, violate perpetual care trust agreements and annual care agreements and New York law.

25. In 1977, Congregation Shaare Zedek used perpetual care monies to offset its deficit. The 1977 year-end financial records reflect: “This year’s defecit [sic] was \$37,147.00 before applying income from Cemetery of \$22,367.00 making a Net defecit [sic] of \$14,780.00.”<sup>11</sup>

26. The 1978 year-end financial records reflect: “This years defecit [sic] was \$39,303.00 before applying Profit from the Cemetery of \$17,465 making a Net defecit [sic] of \$21,838.00.”<sup>12</sup>

27. The 1979 year-end financial records reflect: “This years defecit [sic] was \$33,317.00 before applying the Profit from Cemetery of \$20,000 making a net defecit [sic] of \$13,317.00.”<sup>13</sup> The reason for the excessive Defecit [sic] was because of \$8,000.00 paid to choir and about \$10,000 or [sic] extra for Cantors.”<sup>14</sup>

28. The 1980 year-end financial records reflect: “this years defecit [sic] was \$10,334.00 compared to \$33,317.00 of last year. After applying the Profit of the Cemetery there is a Profit of \$4,206.00 compared with a loss of \$13,317.00.”<sup>15</sup>

29. At all times during these years, Defendant sold and continued to sell annual and perpetual care contracts to consumers. Defendants made such sales knowing they would not: (i)

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<sup>11</sup> Exhibit K.

<sup>12</sup> Exhibit L.

<sup>13</sup> Exhibit M.

<sup>14</sup> *Id.*

<sup>15</sup> Exhibit N.

provide annual or perpetual care services in exchange for monies; (ii) place perpetual care funds in a special fund maintained by it for perpetual care lots, plots or graves at Bayside cemetery; (iii) reinvest interest income into a perpetual care account but would instead use the funds to offset the synagogue's deficit; and (iv) maintain proper accounts or use proper accounting mechanisms to manage perpetual care funds.

30. When selling Plaintiffs and other class members annual and/or perpetual care services, Defendants misrepresented the manner in which they had been treating and would treat perpetual care funds. This type of conduct unquestionably constitutes “a consumer oriented activity” and a violation of New York’s consumer protection statute General Business Law 349 and 349-c.

A. The New York State Attorney General Informal Investigation

31. In October, 2003, former New York State Supreme Court Justice Burton Roberts, who had family members buried at Bayside Cemetery, sent a formal written complaint to the New York State Attorney General’s Office concerning the deplorable conditions at Bayside Cemetery. He requested an investigation. Another complaint was sent that year by Lawrence P. Gutterman who owns a large Jewish funeral home in New Jersey. He too requested the commencement of an investigation based upon the deplorable conditions at Bayside Cemetery.

32. In late 2003, the New York State Attorney General’s office began informally investigating Congregation Shaare Zedek.

33. In early 2004, Defendant Congregation Shaare Zedek, through its Board of Trustees member Ethan Klingsberg, Esq., of Cleary, Gottlieb Steen & Hamilton LLP (“Klingsberg”), began communicating with the New York State Attorney General’s Office. Mr. Klingsberg was also the head of the Cemetery Committee at Congregation Shaare Zedek.

34. On February 2, 2004, Mr. Klingsberg and others met with New York State Attorney General Spitzer and the Charities Bureau to discuss Bayside Cemetery and the problems existing therein.<sup>16</sup>

35. In 2004, Congregation Shaare Zedek was a synagogue with a faltering budget, declining membership, a building with significant structural problems and a cemetery which had not been properly maintained for decades.

36. In June of 2004 while under investigation by the NYAG, Congregation Shaare Zedek was desperate for money and could not afford to fix the synagogue roof on its own.

37. Congregation Shaare Zedek devised a plan to access the perpetual care monies while under informal investigation. The plan was simple: tell the NYAG that if permission to invade the *corpus* of the perpetual care trusts was not given, Congregation Shaare Zedek would lock-up the cemetery and turn the property over to the State of New York.<sup>17</sup>

38. The most recent unlawful conduct concerning perpetual care monies occurred eleven years ago. In June of 2004, Mr. Klingsberg placed a phone call to and left a voicemail with then acting Assistant Attorney General Michele Hirschman which was transcribed as follows:

Hi Michele, its Ethan Klingsberg from Cleary Gottlieb calling on Sunday evening. I will be reachable this this week in my office at 212-225 2588. I am calling about Bayside Cemetery. It sort of reached an urgency in that the synagogue has run out of money due to the fact that their roof is falling in and the costs are really skyrocketing pretty much out of control and so the only way that [we] can continue to put money into the cemetery and not have their building fall apart, fall on people's head's when they show up at services is if they start using funds from the cemetery fund. Now as you recall, that is sort of a very controversial approach, and I think is one of the things that prompted our friends in the Charities Bureau to really start asking all these questions. I'm very reluctant to tell them that they can start using cemetery funds this way. On the

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<sup>16</sup> Exhibit O.

<sup>17</sup> Exhibit P.

other hand, I think if they are not able to do that, then, you know, something else will have to be done that's more dramatic. They're talking about just saying, well just lock it up and send the key to the state and tell them we can't do this anymore. The state can take the cemetery funds. It's a long winded way of saying is there any way we can get some kind of permission to start using cemetery funds. There is about \$300,000 or \$400,000 of cemetery funds. The main issue is there is something in the law, something in the Not-For-Profit Law that says you cannot use the principle of perpetual care funds. Its' not clear if these are perpetual care funds. Nonetheless, since they might be, nobody wants to start using the principle, even if they were.<sup>18</sup>

39. Mr. Klingsberg and Congregation Shaare Zedek, based upon the 1966 and 1976 memos, knew full well that virtually all the cemetery funds were perpetual care monies. Based upon meetings and financial statements, Mr. Klingsberg and Congregation Shaare Zedek also knew that there was or should have been at least \$533,000.00 in the perpetual care account at the time and that monies improperly taken amounted to, at last, another approximately \$500,000.00.

40. The voicemail message suggests the Congregation was seeking permission *to start using cemetery funds* when, in fact the evidence in this case makes clear that Defendants had been abusing perpetual care trusts dating back to at least 1964 and very likely much earlier as suggested by a ledger sheet indicating in 1913 no perpetual care fund had been established in connection with the deposit of such monies.

41. It appears that in response to this voicemail message, the NYAG's Office told Defendant Congregation Shaare Zedek that it needed to provide additional information before the NYAG could grant approval to violate perpetual care trusts and re-dedicate monies to the cemetery in general. The requested information concerned the size of the perpetual care monies, the number of identifiable perpetual care graves/plots at the cemetery and the number of such plots with perpetual care contracts.

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<sup>18</sup> *Id.*

42. On November 1, 2004, Congregation Shaare Zedek wrote to the NYAG, in relevant part, as follows:

As representatives of Congregation Shaare Zedek, we write to follow up on recent conversations that Ethan Klingsberg of Cleary Gottlieb Steen & Hamilton (CGSH) has had with your office about Bayside Cemetery. Prompt action will be needed to prevent a situation where the cemetery is left without any entity attempting to continue its maintenance or operations.

**1. Cemetery Funds**

Pursuant to your request conveyed to CGSH and the Jewish Community Relations Council (JCRC), we have annexed to this letter:

a list of each reference in Bayside Cemetery financial statements to both a “perpetual care” payment and an expressly identified family name and plot that corresponds to such payment (There were 21 such references relating to an aggregate of \$26,700 in payments, based on a review of the Bayside Cemetery financial statements previously provided to you for the years ending December 1965 through December 2003); and

a list of the actual perpetual care contracts that we have found in the files of Congregation Shaare Zedek (There were two such contracts relating to an aggregate of \$2,700 in payments).

This information has been compiled based on a review of (a) the financial statements prepared for the years ending on or after December 1964, and (b) the contracts that could be located at the synagogue or the cemetery. In addition, as described to you at a recent meeting, representatives of the JCRC conducted a limited review of the archival materials relating to the synagogue and the cemetery in the archives of the Jewish Theological Seminary. We think that this was a reasonable review for purposes of identifying specific graves for which perpetual care payments have been made.

We understand that your office has considered the contents of this letter and whether there is any legal impediment to the payment of general operating expenses of Bayside Cemetery by drawing from the approximately \$400,000 of cash and \$20,000 of Israel bonds that are currently held in a segregated account for the benefit of Bayside Cemetery. We understand that it is the view of your office that a portion of such funds (representing excess of the current \$420,000 of assets over the amount equal to the sum of (a) the amount of such assets that such review has expressly listed as

being attributable to specifically identified graves for which perpetual care payment have been made plus (b) a reasonable cushion amount) may be treated by the synagogue or any other entity that may hold such funds (see 2 below) as general assets of the cemetery (*provided* that any entity holding such funds may elect to place the funds in a perpetual care fund.).

Accordingly, we understand that it is the view of your office that the funds may be applied at any time and from time to time to the general operating expenses at Bayside Cemetery, *provided* that at least \$100,000 in cash or cash equivalents (representing \$29,400 attributable to perpetual care for specifically identified graves and a cushion amount of \$70,600) remains at all times in the segregated account for the benefit of Bayside Cemetery. We understand that your office will write a letter to us confirming these views. At this time, the general operating expenses of the cemetery do not cover special care of any particular grave, but are only applied toward payments for general maintenance activities, including salaries of two caretakers.<sup>19</sup>

43. It appears from the files of the New York Attorney General's Office that Defendants sent the NYAG a draft of this letter for review and comment before it was formally sent on synagogue stationary.<sup>20</sup>

44. The Congregation Shaare Zedek letter contained false representations and serious omissions in order to gain greater unrestricted access to perpetual care monies.

45. *First*, Defendants represented "prompt action will be needed to prevent a situation where the cemetery is left without any entity attempting *to continue maintenance or operations*." At the time this letter was signed by the President, Joel M. Shaiman, and the Rabbi, Mark D. Ankcorn, Esq., the cemetery was in a state of complete disrepair as evidenced by newspapers articles at the time. The synagogue was not maintaining the property and had not been maintaining perpetual care plots for quite some time.

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<sup>19</sup> Exhibit Q.

<sup>20</sup> Exhibit R.

46. *Second*, the books and records of the synagogue showed that \$550,878.00 was in the perpetual care fund.<sup>21</sup>

47. *Third*, there were not two, but *over 300* identifiable perpetual care contracts, covering 700 plots, with corresponding amounts paid in the synagogue files.<sup>22</sup> Congregation Shaare Zedek and Messrs. Klingsberg Shaiman and Rabbi Mark Ankorn Klingsberg knew, given their education and experience, that there had to be more than two identifiable perpetual contracts in the synagogue files concerning this 150 year old, 14 acre, 34,000 grave cemetery. There had to be more than two actual contracts or comparable records because as trustees of the perpetual care monies Congregation Shaare Zedek was legally required to maintain and preserve accurate records concerning the care of perpetual care lots, plots or graves and thorough/detailed financial records concerning perpetual care monies. In addition, numerous graves (many more than two) at Bayside Cemetery have stickers affixed to gravestones with the letters “PC” printed on the stickers.

48. On December 9, 2004, the NYAG’s Office in “reliance upon the accuracy and completeness of the contents of the Congregation’s November 1<sup>st</sup> letter” made the determination that “there is no basis, or insufficient basis not to acquiesce to the use of the funds as described in Point 1 of the November 1<sup>st</sup> letter.”<sup>23</sup> It was completely inconceivable that a cemetery of this age, and size could have so few identifiable perpetual care contracts given the legal requirement on Congregation Shaare Zedek.<sup>24</sup>

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<sup>21</sup> Exhibit S.

<sup>22</sup> Exhibit T.

<sup>23</sup> Exhibit U.

<sup>24</sup> Exhibit V.

49. Congregation Shaare Zedek, its Officers and Board of Trustee members had a motivation to misrepresent the amount of perpetual care monies and the number of actual perpetual care contracts because the NYAG required a set-aside – “the excess of the current \$420,000 of assets over the equal amount to the sum of (a) the amount of such assets that such review has expressly listed as being attributable to specifically identified graves for which perpetual care payment have been made plus (b) a reasonable cushion amount may be treated by the synagogue or any other entity that may hold such funds (see 2 below) as general assets of the cemetery . . .” In other words, the more the synagogue understated the number of actual identifiable perpetual care contracts and/or perpetual care payments to a family name/plot, the more money that would be available to it on an unrestricted basis.

50. The Congregation *never used* the monies to perform maintenance services or annual/perpetual care services at Bayside Cemetery after November, 2004. A lawsuit, similar to this one, was filed in the Eastern District of New York in 2007 concerning the deplorable conditions at Bayside Cemetery. Newspapers articles and the Defendants’ own statements at the time confirmed the horrific conditions at the cemetery during the course of that litigation, including exposed crypts and mausoleums.<sup>25</sup>

51. Documents recently produced by the New York State Attorney General’s Office, pursuant to Plaintiffs’ Freedom of Information Law (“FOIL”) request, reveal that Defendants have: (i) routinely abused annual and perpetual care monies entrusted to them; (ii) deliberately failed to segregate perpetual care monies from cemetery or synagogue general operating funds; (iii) misused annual and perpetual care monies; (iv) refused to maintain accurate book and records concerning annual and/or perpetual care; (v) refused to reallocate interest income among

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<sup>25</sup> Exhibit W.

perpetual care accounts and instead used perpetual care interest income for purposes inconsistent with the terms of perpetual care trusts; (vi) refused to conduct a forensic accounting; (vii) deliberately destroyed documents in order to conceal the theft of annual or perpetual care monies and/or to conceal the extent of the fraud and theft of annual care monies.

52. Today, the cemetery is not being properly maintained. As Defendants' own former Rabbi publicly stated "*Only a very large-scale professional restoration, costing hundreds of thousands of dollars, can address the situation effectively. Beyond the execution of a one-time restoration of this nature, providing for the long-term care of Bayside Cemetery is a very complicated multi-million dollar endeavor*". <http://citynoise.org/article/8696>.

53. For decades, Defendants concealed the truth concerning Bayside Cemetery and the stolen annual and perpetual care funds. Defendants have refused to provide annual or perpetual care service in accordance with annual and perpetual care agreements. But throughout the relevant time period they continued to sell annual and/or perpetual care knowing they had not been providing such services, would not provide such services and would instead misuse the funds by applying them to offset annual synagogue deficits.

54. Defendants knowingly made misrepresentations to consumers when selling annual and/or perpetual care contracts. When selling annual and perpetual care contracts, Defendants falsely represented annual and perpetual care monies would be maintained in a special fund which they never established and/or would be used for a specific purpose which Defendants knew they had not been providing and would not provide. The entire purpose for make these false statements was to induce consumers to transfer monies to Congregations Shaare Zedek so it could use those monies to maintain the synagogue – a purpose entirely inconsistent with the purpose initially represented.

55. Defendants falsely represented that they would invest perpetual care monies and use such monies on specific perpetual care plots which they refused to do.

56. Defendants falsely represented that they would reinvest perpetual care interest income. Rather than reinvest perpetual care interest income they misused the money by offsetting the synagogue's deficit, using the money for the general cemetery or otherwise failing to reinvest it as required by New York law.

57. Defendants falsely represented that they would reappportion perpetual care interest income with regard to each perpetual care account, but instead they misused the money by offsetting the synagogue's deficit, using the money for the general cemetery or otherwise failing to reinvest it as required by New York law.

58. Defendants' perpetual care contracts with consumers referenced Sections 91 and 92 of the Membership Corporation Law of New York. Defendants falsely represented to consumers that they would adhere to Sections 91 and 92 of the Membership Corporation Law of New York, but failed to do so for decades.

59. Defendants solicited and in so doing represented they would provide annual care services for specific plots when they knew they would not provide such service and instead would misuse the monies for other purposes than intended.

60. A Board meeting minutes document from 2004 highlights the casual manner in which Defendant Congregation Shaare Zedek treated annual care monies and how they improperly transferred monies in order to use such monies for the operation of the synagogue and not annual care plots at the cemetery.

61. Defendants knew that they were accepting perpetual care monies in accordance with trust principles and failed to disclose that they had been abusing perpetual care contracts

and their fiduciary duties. Defendants did not voluntarily disclose to the NYAG, the general public or consumers entering into annual and/or perpetual care contracts that they had been abusing such monies for decades.

62. The documents and evidence produced to date demonstrate that Defendants knowingly and routinely breached annual and perpetual care contracts for decades. The documents also evidence clear violations of New York General Business Law Section 349 (consumer fraud statute) and Section 350 (false advertising statute).

63. It appears that the NYAG has now closed its informal investigation concerning Congregation Shaare Zedek and Bayside Cemetery since it has produced documents under a FOIL requests which were originally withheld on the grounds that there was an on-going investigation. By virtue of the apparent closure of the investigation, it no longer can withhold documents from the public. The NYAG has now publicly released over 7000 pages of documents some of which are attached hereto.

64. 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.” *See The Cemetery that Nobody Wants, The Jewish Week* dated October 18, 2002. Absent judicial intervention the future of this cemetery is highly uncertain because Defendants have no long term strategy or funding to care for the grounds nor any motivation to honor perpetual or annual care contracts which the NYAG apparently lacks authority to regulate or control these Defendants.

65. Defendants used standard form contracts to enter into perpetual care or annual care agreements with consumers. Upon the purchase of a perpetual or annual care contract, Defendants recorded the appropriate information, issued necessary paperwork memorializing the

purchase of the contract and marked plots to identify those plots under perpetual care or annual care. For example, Defendants placed “stickers” with the embossed large black letters “PC” on headstones for which perpetual care had been purchased in order to be able to identify such plots.

66. Despite having received large sums of money to provide perpetual or annual care for numerous graves, Defendants have not been maintaining plots for which perpetual or annual care has been purchased.

67. Upon information and belief, Defendants have deliberately destroyed documents which identify perpetual care plots. Graves once marked with perpetual care stickers have had stickers removed or allowed to remain missing. Defendants destroyed these and other documents in order to now contend that they cannot identify which plots are governed by perpetual care contracts. The number of perpetual care stickers visibly present at the cemetery is entirely inconsistent with adjacent cemeteries of similar or identical age and other Jewish cemeteries in the surrounding area.

68. While Defendants now contend all of the improperly removed monies have been returned to the perpetual/annual care accounts, no formal, independent accounting has been conducted to show that all monies improperly removed, and earnings from those monies, have been entirely restored. Indeed, Defendants have refused to conduct such an accounting, claiming that they no longer possess or control adequate business records concerning perpetual care or annual care contracts for the cemetery. This statement is incredible since Defendants are required by law to maintain such records. Section 92 of the Membership Corporation Law of New York, which is cited in Defendants’ contracts with consumers, provides in relevant part as follows: “[t]he officers of the corporation shall keep accurate records of such funds separate and apart from its other funds.”

69. A review of the facts in this case makes clear that the current administration of the synagogue engaged in a scheme to: (1) sell annual and perpetual care under false pretenses; (2) take in annual and perpetual care monies; (3) misuse annual and perpetual care monies; (4) deny moral and legal responsibility for Bayside Cemetery and fraudulently conceal the theft of such monies; and (5) relieve the synagogue of its moral and legal obligations concerning Bayside Cemetery and annual and perpetual care monies associated therewith by creating “Friends of Bayside Cemetery” a dummy corporation with no assets or liabilities and attempting to transfer BSC assets and liabilities to that underfunded “shell” entity.

### **CLASS ACTION ALLEGATIONS**

70. Plaintiffs bring this action on their own behalf and as a class action pursuant to Article 9 of the CPLR for the return of all annual and perpetual care monies and earnings to appropriate accounts as well as mandatory injunctive relief on behalf of the following Class:

#### **The Damages Class**

All persons who purchased an annual or perpetual care contract from a Defendant or their agents or assigns from January 1, 1964 to present.

#### **The Injunctive Relief Class**

All persons who purchased an annual or perpetual care contract from a Defendant or their agents or assigns from January 1, 1964 to present.

71. The Class excludes Defendants, their parents, subsidiaries, affiliates, officers, directors, agents, assigns and employees. Also excluded are any federal, state or local governmental entity, and any judge or judicial officer presiding over this matter, judicial staff, and the members of their immediate families.

72. Because information concerning the purchase and sale of perpetual care and annual care contracts is or should be in the control of Defendants, Plaintiffs do not know the

exact number of members of each Class. Due to the nature of the trade and commerce involved, Plaintiffs believe that Class members number at least in the thousands and are sufficiently numerous and geographically dispersed throughout the United States so that joinder of all Class members is impracticable.

73. Plaintiffs' claims are typical of the claims of the members of the Class because Plaintiffs and all Class members were injured by the same wrongful conduct as alleged herein.

74. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual Class members. Such common questions include:

- (a) Whether the alleged conduct violates N.Y. Gen. Bus. Law § 350;
- (b) Whether the alleged conduct violates N.Y. Gen. Bus. Law § 349;
- (c) Whether the alleged conduct constitutes a breach of contract;
- (d) Whether a formal accounting should be required; and
- (e) Whether Plaintiffs and members of the Class are entitled to damages, including punitive damages, and the appropriate measure of such damages.

75. As the claims of Plaintiffs are typical of the claims of the Class, and Plaintiffs have no interests adverse to or which irreconcilably conflict with the interests of other members of the Class, Plaintiffs are adequate class representatives.

76. Plaintiffs will fairly and adequately protect the interests of the Class and have retained counsel experienced and competent in the prosecution of complex class action litigation. A class action is superior to other available methods for the fair and efficient adjudication of the controversy and substantial benefits will derive from proceeding as a class action. This action is superior because the New York State Attorney General has now closed its case against these

Defendants. If this action is not certified as a class action Defendants will be allowed to keep monies which they have stolen and be allowed to continue to honor perpetual care contracts.

77. Class treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. Class treatment also will permit the adjudication of relatively small claims by many Class members who could not afford to individually litigate such claims against a large, well funded organization. There are no difficulties likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient group-wide adjudication of this controversy.

#### **TOLLING OF APPLICABLE STATUTES OF LIMITATION**

78. Any applicable statutes of limitation have been equitably tolled by Defendants' affirmative acts of fraudulent concealment, suppression, and denial of the true facts regarding the invasion of the fiduciary account(s) containing monies dedicated exclusively for perpetual care or annual care at Bayside Cemetery. Such acts of fraudulent concealment include intentionally covering up and refusing to publicly disclose critical documents and information concerning the deliberate invasion of fiduciary account(s) containing monies dedicated exclusively for perpetual care or annual care at Bayside Cemetery to class members, their families and the general public. Through such acts of fraudulent concealment, Defendants were able to actively conceal from class members and the public for years the truth about their deceptive practices, thereby tolling the running of any applicable statutes of limitation.

## COUNT I

### **Action For Damages Under New York Gen. Bus. Law § 350**

79. Plaintiffs repeat and reallege each and every prior allegation contained in paragraphs 1 through 77 hereof with the same force and effect as if fully set forth herein.

80. N.Y. Gen. Bus. Law § 350 provides that “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.”

81. As more fully described above, Defendants’ advertisement and sale of annual and perpetual care contracts and the subsequent refusal to maintain the plots and gate common areas in accordance with those contracts constitute violations of N.Y. Gen. Bus. Law § 350. Defendants presented papers to Plaintiffs which indicated that they were purchasing perpetual or annual care which Defendants had not provided for years. When purchasing these services based upon Defendants’ representations and advertisements, Plaintiffs’ relied on Defendants’ statements which were false, misleading and deceptive. The statements were false, misleading and deceptive because since 1964 Defendants knew that it was unlawful to: (i) advertise annual and perpetual care services under false pretenses; (ii) take in monies under the pretense that such monies would be used exclusively for annual or perpetual care of specific plots and gate common areas at Bayside Cemetery; and (iii) misuse annual or perpetual care monies or income for purposes other than which they were intended.

82. Plaintiffs and the Class seek damages for their injuries caused by these violations in an amount to be determined at trial.

83. Defendants’ willful acts and conduct, as described above, entitle Plaintiffs and the Class to an award of damages.

## COUNT II

### **New York Gen. Bus. Law § 349**

84. Plaintiffs repeat and reallege each and every prior allegation contained in paragraphs 1 through 82 hereof with the same force and effect as if fully set forth herein.

85. N.Y. Gen. Bus. Law § 349 makes unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.”

86. N.Y. Gen. Bus. Law § 349 (h) provides that “any person who has been injured by reason of any violation of this section may bring . . . an action to recover his actual damages or fifty dollars, whichever is greater . . . .”

87. Defendants engaged in deceptive acts or practices within the meaning of N.Y. Gen. Bus. Law § 349 which resulted in injury and broad adverse impact on the public at large, and harmed the public interest of New York State in an honest marketplace in which economic activity is conducted. Defendants’ deceptive conduct caused highly vulnerable individuals who placed their trust in Defendants to pay monies for the perpetual or annual care for their own plots and/or family member’s plots and gate common areas located at Bayside Cemetery. Defendants have failed to abide by these contracts, have abused trust monies entrusted to their care and have allowed the cemetery to fall into a state of shameful disrepair.

88. Defendants have also made misrepresentations to the NYAG office in order to improperly gain access to and misuse perpetual care monies.

89. Plaintiffs and the Class seek actual damages for their injuries caused by these violations in an amount to be determined at trial. Without prejudice to their contention that Defendants’ unlawful conduct was willful and knowing, Plaintiffs and the Class do not seek in this action to have those damages trebled pursuant to N.Y. Gen. Bus. Law § 349 (h). Plaintiffs and the Class seek single damages with respect to this claim.

### **COUNT III**

#### **New York Gen. Bus. Law § 349-c**

90. Plaintiffs repeat and reallege each and every prior allegation contained in paragraphs 1 through 88 hereof with the same force and effect as if fully set forth herein.

91. N.Y. Gen. Bus. Law § 349 makes unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.”

92. N.Y. Gen. Bus. Law § 349 (h) provides that “any person who has been injured by reason of any violation of this section may bring . . . an action to recover his actual damages or fifty dollars, whichever is greater . . . .”

93. Defendants engaged in deceptive acts or practices within the meaning of N.Y. Gen. Bus. Law § 349 which resulted in injury and broad adverse impact on the public at large, and harmed the public interest of New York State in an honest marketplace in which economic activity is conducted. Defendants’ deceptive conduct caused highly vulnerable individuals, including Plaintiffs’ relatives, who paid monies and placed their trust in Defendants to provide perpetual or annual care for their own or family member’s plots and gate common areas located at Bayside Cemetery. Defendants have failed to abide by these contracts and have allowed the cemetery to fall into a state of shameful disrepair. These individuals, and their relatives who seek to enforce the contracts and law, possess standing because they have been injured by reasons of a violation of GBL § 349. Indeed, the relatives pursuing these actions are precisely the intended third party beneficiaries who defendants promised they would provide perpetual or annual care for.

94. Defendants have knowingly directed and sold perpetual care or annual care contracts to individuals age sixty-five (65) years or older or otherwise engaged in conduct in

willful disregard of the rights of individuals age sixty-five (65) years or older in violation of GBL 349-c.

95. Defendants' conduct caused individuals age sixty-five (65) years or older to lose monies for personal or family care in violation of GBL 349-c.

96. Defendants have also made misrepresentations to the NYAG office in order to improperly gain access to and misuse perpetual care monies.

97. Plaintiffs and the Class seek actual damages for their injuries caused by these violations in an amount to be determined at trial. Without prejudice to their contention that Defendants' unlawful conduct was willful and knowing, Plaintiff and the Class do not seek in this action to have those damages trebled pursuant to N.Y. Gen. Bus. Law § 349(h). Plaintiffs and the Class seek single damages with respect to this claim.

#### **COUNT IV**

##### **Breach of Contract**

98. Plaintiffs repeat and reallege each and every prior allegation contained in paragraphs 1 through 96 hereof with the same force and effect as if fully set forth herein.

99. Using standard form contracts, Defendants offered annual and perpetual care contracts for sale at Bayside Cemetery or assumed legal rights and responsibilities for existing annual or perpetual care contracts concerning Bayside Cemetery.<sup>26</sup> This contract was used by Defendants over the past approximately forty years.

100. Defendants accepted monies from Plaintiffs or members of their family, Class members or persons in kinship or as executors with such individual(s) to provide annual or perpetual care of certain plots at Bayside Cemetery.

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<sup>26</sup> Exhibit U.

101. Defendants have violated perpetual care contracts by: (i) never establishing a perpetual care fund and invading the *corpus* of a perpetual care monies; (ii) using perpetual care interest income for a purposes other than maintaining the perpetual care, lot, plot, grave or gate common area at Bayside Cemetery as designated under contracts; (iii) failing to properly use annual care monies; (iv) failing to properly treat and account for perpetual care funds on an individual basis including with respect to interest income; (iv) comingling cemetery or synagogue general operating funds with perpetual care funds; (v) deliberately violating Sections 91 and 92 of Membership Corporation Law of New York.

102. Defendants have also made misrepresentations to the NYAG office in order to improperly gain access to and misuse perpetual care monies.

103. Defendants have also destroyed documents. Over the years, Defendants have intentionally destroyed perpetual care stickers from plots, destroyed or given away records they were legally required to maintain concerning perpetual care while refusing to provide perpetual or annual care services in breach of their obligations under contracts entered into between Defendants and Plaintiffs their relative or others acting on their behalf as well as other Class members.

104. Defendants' refusals to honor annual or perpetual care contracts have caused injury by allowing plots and gate common areas subject to such contracts to fall into complete disrepair. Defendants promised performance to Plaintiffs and other persons when they had not been performing such services in the past and would not perform such services in the future. Plaintiffs have previously demand injunctive relief in the form of a forensic accounting paid for by Defendants and the repayment of stolen monies. Defendants have refused to conduct a forensic accounting and should be ordered to do so.

## **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs and the Class members pray for judgment against all Defendants, jointly and severally, as follows:

A. awarding Plaintiffs and the Class their actual damages from Defendants for Defendants' violation of N.Y. Gen. Bus. Law § 349 in an amount to be determined at trial;

B. granting Plaintiffs and the Class the costs of prosecuting this action, together with interest and costs, pursuant to N.Y. Gen. Bus. Law § § 350 and 349;

C. awarding Plaintiffs and the Class their actual damages from Defendants' breaches of contract as well as punitive damages;

D. declaring that the defendants have violated their contractual duties to the Class and/or aided and abetted each other in breaching those duties;

E. enjoining Defendants from using any annual or perpetual care funds for any purpose other than annual or perpetual care of plots at Bayside Cemetery;

F. issuing a mandatory injunction requiring Defendants to honor all perpetual care contracts going forward;

G. placing a constructive trust over any funds paid to Defendants for the annual and perpetual Bayside Cemetery plots or any other monies paid for upkeep to the cemetery;

H. requiring the Defendants to conduct a thorough and complete forensic accounting, at their expense, of all annual and perpetual care monies held in their care, custody, possession or control for Bayside Cemetery since they began selling each service

I. granting an award of punitive damages against Defendants; and

J. granting such other and further relief as this Court deems just and proper.

**JURY TRIAL DEMAND**

Plaintiffs demand a trial by jury.

Dated: November 16, 2015  
New York, New York

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