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

JOHN R. LUCKER, ELIZABETH A. LUCKER, NANCY L. ROUSSEAU, LYNN COHEN and FRAN GOLDSTEIN as representatives of a class consisting of themselves and all others similarly situated,	Index No. 114818/2009-E Part 59 Justice Debra A. James
Plaintiffs,	
- against -	ORAL ARGUMENT REQUESTED
BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK, and COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC.,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES INC.'S MOTION TO DISMISS THE ACTION IN ITS ENTIRETY PURSUANT TO CPLR 3211(a)

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Defendant Community Association for Jewish At-Risk Cemeteries, Inc. ("CAJAC") respectfully submits this memorandum of law in support of its motion under CPLR 3211(a) to dismiss all of Plaintiffs' claims against CAJAC.

INTRODUCTION

Plaintiffs purport to bring this class action on behalf of individuals who contracted with Defendants Congregation Shaare Zedek (the "Congregation") or Bayside Cemetery between 1970 and the present for the annual or perpetual care of their burial sites at Bayside Cemetery in Ozone Park, New York. (Compl. ¶ 1.) (Smith Affirm. Ex. 1.) Plaintiffs allege that the Congregation and Bayside Cemetery breached their contractual and fiduciary duties arising under these contracts by failing properly to maintain those sites. (Compl. ¶ 32.)

CAJAC is not alleged to be a party to any of the contracts at issue in the Complaint, but has been charged by Plaintiffs with their violation. CAJAC, a New York not-for-profit corporation with 501(c)(3) tax-exempt status, was founded in 2006—long after the execution of the contracts and the other Defendants' alleged defalcations—for the specific purpose of helping to restore and maintain New York's historic Jewish cemeteries, including Bayside Cemetery. To date, CAJAC has raised approximately $150,000 to help restore Bayside Cemetery and has begun the restoration.

Notwithstanding CAJAC's benevolence to remedy a problem it did not create, Plaintiffs seek to impose liability on CAJAC on an "alter ego" theory—i.e., that CAJAC was an alter ego of the Congregation and is thus derivatively liable for the Congregation's alleged misconduct. Plaintiffs' only reference to CAJAC—and thus the sole basis for urging liability against CAJAC—occupies a single paragraph of the complaint:

> Community Association for Jewish At-Risk Cemeteries, Inc. ("CAJAC") previously called "Friends of Bayside Cemetery," is a New York not-for-profit corpo-

> ration with its principal place of business at One Barker Avenue, Suite 260, White Plains, New York. CAJAC has entered into at least one recent contract concerning Bayside Cemetery and holds itself out as the steward of the cemetery. CAJAC was previously registered with the New York Secretary of State's Office with an address of 212 West 93rd Street, New York, NY – this is the same address for Defendant Congregation Shaare Zedek. The President of CAJAC, Gary Katz, is also a member of Congregation Shaare Zedek and a Board of Directors member of Hebrew Free Burial Society which provides references to CAJAC on their website, has been involved with CAJAC's activities at Bayside Cemetery and also served as a money conduit for CAJAC prior to CAJAC receiving its tax exempt status. There are additional overlapping ties between Congregation Shaare Zedek and CAJAC which suggest that CAJAC is an arm of Defendant Congregation Shaare Zedek which has been designed as a straw person upon which to unload all of Shaare Zedek's legal and other responsibility for Bayside Cemetery.

(Compl. ¶ 16.)

As set forth below, New York law protects the integrity of the corporate form and imposes a stringent pleading burden on one who seeks to impose liability based on an alter ego theory and/or to pierce the corporate veil. Specifically, Plaintiffs must plead particularized facts demonstrating that (i) the Congregation controlled the day-to-day management of CAJAC or vice versa (e.g., interlocking directors or officers, unified books and records and commingling of assets, and the absence of arms-length dealings between the entities), and (ii) CAJAC or the Congregation used that dominion to perpetrate a fraud or wrong upon Plaintiffs. *Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141, 623 N.E.2d 1157, 1160-61, 603 N.Y.S.2d 807, 810-11 (1993); *Sheridan Broad. Corp. v. Small*, 19 A.D.3d 331, 332-33, 798 N.Y.S.2d 45, 46-47 (1st Dep't 2005); *Capricorn Investors III, L.P. v. Coolbrands Int'l, Inc.*, No. 603795/06, at 13-19 (N.Y. Sup. Ct. June 13, 2008) (Smith Affirm. Ex. 2.) Plaintiffs' utterly conclusory allegations do not approach, let alone satisfy, this stringent burden.

Moreover, by naming CAJAC as a defendant, Plaintiffs have ignored a court-ordered stipulation. Previously, Plaintiffs brought a virtually identical action against the Congregation and Bayside Cemetery (but not CAJAC) in the United States District Court for the Eastern Dis-

trict of New York. During that suit, three of the plaintiffs in this case, acting individually and on behalf of all others similarly situated, executed a stipulation in which they specifically covenanted not to sue organizations, such as CAJAC, who (1) are "unaffiliated" with either the Congregation or Bayside Cemetery and (2) "assist or agree to assist with the cleanup or restoration of Bayside Cemetery."[1] (Ex. 3.) That stipulation, incorporated into a formal order entered by Chief Judge Raymond Dearie, applies to "any action filed by [Plaintiffs] in any other court that relates to Bayside Cemetery." (*Id.*)

Accordingly, for all of the reasons stated herein and in the separately filed motion to dismiss of Defendants Congregation and Bayside Cemetery, Plaintiffs have failed to state a claim upon which relief can be granted to them, and this action should be dismissed.

ARGUMENT*

I. Plaintiffs Fail To Plead Facts Sufficient To Allege an Alter Ego Theory.

Under New York law, a plaintiff seeking to disregard the corporate form bears a heavy burden. *See TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339, 703 N.E.2d 749, 751, 680 N.Y.S.2d 891, 893 (1998). Piercing the corporate veil requires a showing (1) of "complete domination of the corporation in respect to the transaction attacked and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury."

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[1] Chief Judge Dearie dismissed the underlying suit for lack of subject matter jurisdiction.

* In deciding a motion to dismiss, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 513, 614 N.Y.S.2d 972, 974 (1994). The Court, however, is not required to accept factual allegations that are plainly contradicted by the documentary evidence or that constitute bare legal conclusions. *Kliebert v. McKoan*, 228 A.D.2d 232, 232, 643 N.Y.S.2d 114, 114-15 (1st Dep't 1996).

Morris, 82 N.Y.2d at 141, 623 N.E.2d at 1160-61, 603 N.Y.S.2d at 810-11. Accordingly, to survive a motion to dismiss, a plaintiff must plead the following:

i. Particularized facts showing indicia of domination, such as

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

Capricorn Investors III, L.P., No. 603795/06, at 15 (quoting *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991)). No one factor, however, is dispositive, *Fantazia Int'l Corp. v. CPL Furs N.Y., Inc.*, 67 A.D.3d 511, 511 (1st Dep't 2009), and courts routinely dispose of veil piercing claims despite particularized factual allegations or evidence of several factors, *e.g.*, *Capricorn,* No. 603795/06, at 13-19; *MarketAxess Holdings, Inc. v. Ziegelbaum,* 17 Misc.3d 647, 654, 843 N.Y.S.2d 817, 822 (Sup. Ct. N.Y. County 2007) ("[E]vidence of interlocking directors and officers, shared office space, and presenting as one-company fails to establish [veil-piercing or alter ego] grounds as a matter of law.").

ii. Particularized facts detailing how the complete domination of the corporation perpetrated a wrong or injustice against plaintiff. *Sheridan Broad. Corp.*, 19 A.D.3d at 332-33, 798 N.Y.S.2d at 46-47.

The First Prong: Domination

By way of a single paragraph, Plaintiffs seek to hold CAJAC—a duly incorporated New York not-for-profit with 501(c)(3) federal tax exempt status—liable under an alter ego theory for the Congregation's alleged wrongs.[2] (Compl. ¶ 16.) Plaintiffs attempt to meet their heavy burden by pleading the following facts—and only the following facts—as evidence of improper ties between the Congregation and CAJAC:

1. The Congregation "owns, operates, manages, maintains and controls Bayside Cemetery." (Compl. ¶ 14) CAJAC entered into at least one contract concerning Bayside Cemetery, holds itself out as the steward of the cemetery, and was previously called "Friends of Bayside Cemetery" (Compl. ¶ 16);

2. CAJAC previously registered with the New York Secretary of State's Office with the same address as the Congregation (*id.*); and

3. CAJAC's President, Gary Katz, is a congregant of Shaare Zedek. (*id.*)[3]

These allegations, however, fail to show that the Congregation dominated, or was dominated by, CAJAC. Indeed, only the second allegation even purports to implicate an enumerated "dominion" factor. The mere sharing of a New York address for service of process purposes, however, hardly demonstrates that the Congregation exerted day-to-day control over CAJAC's decision-making and operations, or vice-versa. Glaringly, Plaintiffs also do not allege that CAJAC ignored corporate formalities, such that the Congregation and CAJAC were essentially one and the same. Moreover, although Plaintiffs allege that CAJAC has "entered into at least one contract

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[2] Plaintiffs do not allege that CAJAC is also an alter ego of Defendant Bayside Cemetery. Accordingly, Plaintiffs have named CAJAC as a defendant solely based on CAJAC's alleged connection to the Congregation. (*See* Compl. ¶ 16.)

[3] Plaintiffs also allege that Mr. Katz is a Board of Directors member of Hebrew Free Burial Society ("HFBS"), which allegedly provides references on CAJAC's Web site, has been involved with CAJAC's activities at Bayside Cemetery, and served as a "money conduit" for CAJAC before CAJAC obtained federal tax-exempt status. (Compl. *(cont'd)*

concerning Bayside Cemetery" (Compl. ¶ 16), they do not allege that the contract resulted from anything other than an arm's length negotiation.

Apparently recognizing the insufficiency of their allegations, Plaintiffs also allege that "there are additional overlapping ties" between the Congregation and CAJAC. (Compl. ¶ 16.) But these additional overlapping ties—to the extent they even exist—are conspicuously missing from the complaint. Plaintiffs' bald assertions are no substitute for the particularized facts they are required to plead.

The Second Prong: Fraud or Wrong and Proximate Cause

Even if Plaintiffs did plead facts sufficient to allege complete dominion (which they have not and cannot), Plaintiffs do not allege particularized facts showing that such dominion was used to commit a fraud or wrong against them that resulted in their alleged injuries. Plaintiffs do not allege that CAJAC was involved in the alleged wrongs giving rise to Plaintiffs' causes of action. Indeed, most, if not all, of the perpetual and annual care contracts and alleged wrongs which form the basis for Plaintiffs' claims were entered into, or alleged to have occurred, well before CAJAC's incorporation in 2006.[4] Rather, Plaintiffs' sole allegation with respect to the second prong of the corporate veil-piercing test is that CAJAC "has been designed as a straw person upon which to unload all of [the Congregation's] legal and other responsibility for Bayside Cemetery." (Compl. ¶ 16.) Such a conclusory statement—even when dominion is ade-

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¶ 16.) These allegations are irrelevant to the veil-piercing or alter ego inquiry, as Plaintiffs do not allege how these facts evidence a relationship, much less an improper one, between CAJAC and the *Congregation.* (*See id.*)

[4] Plaintiffs' only allegation against CAJAC regarding a contract is that it has "entered into at least one recent contract concerning Bayside Cemetery." (Compl. ¶ 16.) That contract is not an annual or perpetual care contract. Instead, it is a contract for restoration work at the Cemetery.

quately pled, which is not the case here—is insufficient to survive a motion to dismiss. *E.g.*, *Goldman v. Chapman*, 44 A.D.3d 938, 939, 844 N.Y.S.2d 126, 127 (2d Dep't 2007) ("[C]onclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil.").

Moreover, piercing the corporate veil to hold CAJAC liable for wrongs the Congregation is alleged to have committed with respect to its obligations under annual and perpetual care contracts is nonsensical. *See Morris*, 82 N.Y.2d at 144, 623 N.E.2d at 1162, 603 N.Y.S.2d at 812 (holding that piercing the corporate veil of a corporation that is not liable "would be inconsistent with the essential theory of the doctrine"). Plaintiffs do not allege that the Congregation has *in fact* "unloaded" any legal or other responsibility for Bayside Cemetery on CAJAC. (*See* Compl. ¶ 16.) Rather, Plaintiffs only allege—without any factual predicate—that CAJAC was "designed" for such a purpose. (*Id.*)

Contrary to Plaintiffs' conclusory allegation, CAJAC was duly incorporated (Compl. ¶ 16) for the purpose of fulfilling valid nonprofit and 501(c)(3) tax-exempt purposes, including providing for the welfare, maintenance, restoration, and continuity of New York Jewish religious and nonprofit cemeteries which are at-risk and in need of assistance. Saddling CAJAC with liability for the Congregation's alleged wrongs would punish CAJAC for its charitable undertakings—efforts that Plaintiffs should strive to support rather than frustrate.

II. Plaintiffs' Claims Against CAJAC Violate A Court-Ordered Stipulation.

Regardless of the sufficiency of Plaintiffs' allegations, Plaintiffs' claims against CAJAC must be dismissed. In a court-ordered stipulation in the federal lawsuit filed against the Congregation and Bayside Cemetery (but not CAJAC), three of the plaintiffs in this case, acting individually and on behalf of all others similarly situated, agreed to the following covenant:

> **None of the parties to this action shall sue, implead, or seek any discovery or testimony from any individuals or organizations, otherwise unaffiliated with either [Bayside Cemetery or Congregation Shaare Zedek], that assist or agree to assist with the cleanup or restoration of Bayside Cemetery**, whether in a paid or unpaid capacity. Each party shall, upon the request of any such individual or organization, provide a written assurance to that effect, in a form suitable to such individual or organization. The restrictions of this paragraph shall apply in this action, or in any other action filed in this Court, with the same force and effect as a protective order entered pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, and **shall also bind the parties in any action filed by any of them in any other court that relates to Bayside Cemetery** or arises out of common facts, circumstances, or transactions as this action. **The provisions of this paragraph shall not be limited in time, and shall survive the entry of any final judgment in this action**.

(Smith Affirm. Ex. 3 (emphasis added)). As this language makes clear, Plaintiffs covenanted not to impose litigation burdens on—let alone sue—any organization that (1) "assist[s] or agree[s] to assist with the cleanup or restoration of Bayside Cemetery" and (2) is "unaffiliated" with the Congregation or Bayside Cemetery. *Id.*

CAJAC meets the requirements for protection under this covenant. By Plaintiffs' own admission, CAJAC has "entered into at least one recent contract concerning Bayside Cemetery"—an agreement to clean up Bayside Cemetery, in furtherance of CAJAC's corporate mission of restoring at-risk Jewish cemeteries. (Compl. ¶ 16.) Furthermore, without any allegation that the Congregation and CAJAC shared officers or directors, a common corporate parent, or joint authority over management, finances, or policy matters, the Complaint fails to establish that the Congregation exercised *control* over CAJAC, or vice versa—the touchstone of affiliation under New York statutory law,[5] state and federal jurisprudence,[6] and customary usage in the legal

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[5] Where, as here, an agreement leaves a term undefined, state statutes properly govern interpretation of that term. *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617 (2d Cir. 2001) (approving use of statutory definitions of a term to "fill[] in the gap"). Virtually without exception, New York law treats control as indispensable to affiliation. *See, e.g.*, N.Y. BUS. CORP. LAW § 912 (a)(1) (McKinney 2003); N.Y. P'SHIP LAW § 2 (McKinney 2006); N.Y. BANKING LAW § 36(6) (McKinney 2008 & Supp. 2009); N.Y. PUB. SERV. LAW § 110(2) (McKinney 2000); N.Y. INS. LAW § 107(4) (McKinney 2006 & Supp. 2009).

community.[7] *See In re Marine Sulphur Trans. Corp.*, 312 F.Supp. 1081, 1103 (S.D.N.Y. 1970) (noting that two entities are "affiliated" only when one controls the other's finances, policy, or management); *accord Travelers Indem. Co. v. United States*, 543 F.2d 71, 75-76 (9th Cir. 1976).

CONCLUSION

For the reasons set forth in this memorandum, and in Defendants' separately-filed motion to dismiss, Community Association for Jewish At-Risk Cemeteries, Inc. respectfully requests that this Court dismiss Plaintiffs' claims against CAJAC without leave to amend and award reasonable attorney's fees and costs incurred in bringing this motion.

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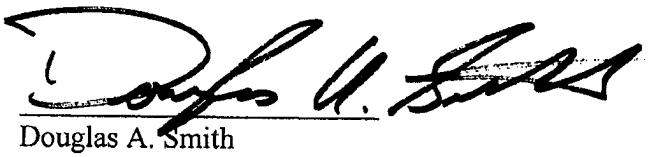
[6] Numerous state courts have held that entities are affiliated only when either of two forms of "control" exists: the entities' officers or directors substantially overlap, or one entity owns a significant share of the other entity's voting stock. *See, e.g., In re Schwan 1992 Great, Great Grandchildren's Trust*, 709 N.W.2d 849, 854-55 (S.D. 2006); *Frigid Foods Prods., Inc. v. City of Detroit*, 31 Mich. App. 402, 405, 187 N.W.2d 916, 917 (Mich. Ct. App. 1971); *Snite v. Life Ins. Co. of N. Am.*, 251 N.W.2d 300, 301-02, 73 Mich. App. 207, 208 (Mich. Ct. App. 1977). Virtually without exception, federal law also treats control as the touchstone of affiliation. *See, e.g., McLean Trucking Co. v. United States*, 321 U.S. 67 (1944) (Interstate Commerce Act); *Checkrite Petroleum, Inc. v. Amoco Oil Co.*, 678 F.2d 5, 8 (2d Cir. 1982) (Petroleum Marketing Practices Act); *Crawfish Processors Alliance v. United States*, 29 Ct. Int'l Trade 1186, 1193, 395 F.Supp.2d 1330, 1336-37 (2005) (Tariff Act of 1930); *Woodward & Lothrop, Inc. v. Schnabel*, 593 F. Supp. 1385, 1400 (D.D.C. 1984) (Securities Exchange Act of 1934); *In re Interlink Home Health Care, Inc.*, 283 B.R. 429, 435 (Bankr. N.D. Tex. 2002) (Bankruptcy Code).

[7] An undefined term in an agreement should also be construed consistently with "widespread custom or usage." *See Hugo Boss*, 252 F.3d at 617-18. In legal parlance, "affiliate" and "affiliated" imply the existence of control. *See* BLACK'S LAW DICTIONARY 6, 7 (9th Ed. 2009) (defining "affiliate" as a "corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation"); MERRIAM-WEBSTER'S DICTIONARY OF LAW 17 (1996) (defining "affiliate" as a "business entity effectively controlling or controlled by another or associated with others under common ownership or control").

Dated: December 18, 2009

Respectfully submitted,



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