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December 16, 2008

VIA ELECTRONIC CASE FILING SYSTEM

The Honorable Joan M. Azrack
United States Magistrate Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Lucker et al. v. Bayside Cemetery & Congregation Shaare Zedek*,
No. 07 Civ. 3823 (RJD) (JMA)
Cohen v. Bayside Cemetery & Congregation Shaare Zedek,
No. 08 Civ. 3555 (RJD) (JMA)
Goldstein v. Bayside Cemetery & Congregation Shaare Zedek,
No. 08 Civ. 3923 (RJD) (JMA)

Dear Judge Azrack:

We write as counsel to the Defendants in the above-referenced actions, in response to Plaintiffs' counsel's letter of today's date in which he makes a request for jurisdictional discovery.

Plaintiffs' counsel's assertion that he "did not previously challenge" our refusal to provide him with discovery is incorrect. From the outset of this litigation, he has sought production of the information that was provided by Defendants to the New York Attorney General, both from us and from the Attorney General. Indeed, as recently as October 16, 2008, Plaintiffs asked Chief Judge Dearie to order production of the exact information sought in today's letter to assist in their response to Defendants' pending Rule 12(b)(6) motion, despite the lack of any authority supporting such discovery in connection with a motion that addresses the legal sufficiency of the claims in Plaintiffs' Complaints. Neither the Attorney General nor Chief Judge Dearie has granted any of Plaintiffs' discovery requests to date.

While Defendants have cooperated fully with the requests of the Attorney General, both before and after these actions were filed, Defendants have consistently declined to provide discovery to a set of Plaintiffs who do not even allege any legally cognizable interest in Defendants' affairs or standing to bring these actions. In light of the substantial questions as to Plaintiffs' standing to sue that were raised in Defendants' pending motion to dismiss, Defendants had intended to ask Your Honor, at the now-adjourned initial conference, to stay discovery pending Chief Judge Dearie's decision on the motion to dismiss. The additional questions of subject matter jurisdiction raised by Chief Judge Dearie in his *sua sponte* order of December 11, 2008 only make discovery even less appropriate at this time.

While we will fully address the issue of the impact of the Class Action Fairness Act on the subject matter jurisdiction of this Court in our supplemental brief, we respectfully submit that the Court's questions as to jurisdiction cannot be answered by the information that Defendants produced to the Attorney General. The Plaintiffs in these actions purport to represent a class not only of all purchasers of perpetual or annual care, but also "all relatives of [such] persons." (Compls. ¶ 24.) The records in question could not even begin to *identify* all of the members of the proposed class, let alone determine their respective states of citizenship as would be required under § 1332(d)(3)-(4). Even as to the purchasers themselves, Defendants possess, at most, a partial list of mailing addresses for such purchasers, most of which were provided to Defendants decades ago or even earlier. Thus, we have no reliable information about even this limited group of purchasers' present citizenship, whether they are dead or alive, or, to the extent the claims are deemed to be covered under § 1332(c)(2), the states of which they were citizens at the times of their death.

Plaintiffs' counsel further suggests that discovery is necessary to establish the amount in controversy. Yet, Plaintiffs filed three separate complaints, each of which alleged that the amount in controversy exceeds $5,000,000, presumably on the basis of a good faith evaluation of the damages they intend to seek at trial. While Defendants vigorously dispute that they are liable to these Plaintiffs for *any* damages, it is well-settled that the Court may rely, for the purposes of ascertaining its jurisdiction, on the allegations of the Complaint as to the amount in controversy, absent a showing that the "legal impossibility of recovery [in an amount exceeding the jurisdictional minimum is] so certain as virtually to negate the plaintiff's good faith in asserting the claim." Chase Manhattan Bank, N.A. v. American Nat'l Bank & Trust Co., 93 F.3d 1064, 1070 (2d Cir. 1996). At this point in the litigation, before the Plaintiffs have even attempted to enumerate their damages (in either an individual or representative capacity), Defendants are not challenging Plaintiffs' allegation as to the amount in controversy, nor do we read Chief Judge Dearie's order as raising the issue *sua sponte*.[1]

[1] Even if the Court were to conclude that Chief Judge Dearie intended to question the amount in controversy, the most that could be determined from the documents that Plaintiffs now seek would be the amounts that Defendants believe should be held in trust for perpetual care, funds that are presently on deposit in appropriate financial institutions. Since Plaintiffs' theory of recovery in these actions explicitly and necessarily disputes the accuracy of

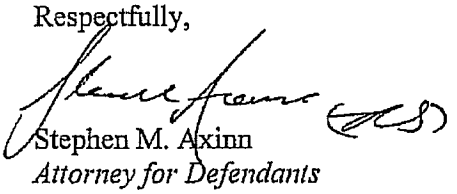
Lastly, Plaintiffs' counsel suggests that he needs this discovery because we might change our position at the last moment and offer documents from these files in connection with our response to Chief Judge Dearie's request for memoranda on December 24th. This is a point Mr. Buchman referred to in a telephone conversation with the undersigned yesterday. I specifically advised him at that time that I would provide him with a representation today as to whether or not we intend to offer such documents. At 11:14 am this morning, I sent him the following e-mail:

> "Yesterday you asked whether we intend to bring to the Court's attention any documents in the files of the defendants or information derived from such documents in connection with the Court's request for briefs on the CAFA issue. The answer is that, unless you first introduce or attempt to introduce new factual matter into the record in connection with this issue, or the Court, on its own volition, requires us to do so, we do not intend to offer or refer to any such documentary information in our December 24th filing with the Court."

I do not understand what portion of that communication is unclear.

In sum, Plaintiffs should not be allowed to use the Court's questions about subject matter jurisdiction to obtain discovery to which they would otherwise not be entitled at this time and which does not appear reasonably calculated to answer the questions pending before the Court. If the Court is inclined to order discovery, however, Defendants would respectfully request that it be narrowly focused on specific jurisdictional questions of interest to the Court, and not simply a preview of merits discovery with some incidental relevance to the preliminary questions now pending before the Court.

Respectfully,



Stephen M. Axinn
Attorney for Defendants

cc: All Counsel (by ECF)

Defendants' records and accounting of the perpetual care funds (a theory which, for purposes of the pending motion, the Court must accept as true), the records sought would not resolve the question of subject matter jurisdiction.