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

STEVEN R. LEVENTHAL as representative of a class consisting of himself and all others similarly situated, Plaintiff, -against- BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK and COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC., Defendants.	Index No.: 100530-2011 **REPLY MEMORANDUM IN SUPPORT OF MOTION TO VACATE STATUS CONFERENCE ORDER DATED AUGUST 19, 2016**

Plaintiff, Steven R. Leventhal, by and through his *pro-bono* counsel, hereby submits this reply memorandum seeking to vacate this Court's Status Conference Order of August 19, 2016. For the reasons set forth below, the Court's August 19, 2016 decision must, as defendants concede, be vacated and an Order entered granting the crime-fraud motion as to the two categories of documents, fraudulent sale/misuse of perpetual care monies and avoidance of legal responsibility for their unlawful actions (fraudulent concealment), as indicated during the August 12, 2016 Status Conference.

ARGUMENT

A "probable cause" standard applies to a crime-fraud motion. "Probable cause" means that "a prudent person would have a reasonable basis to suspect." *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F. 2d 1032 (2d Cir. 1984). Notwithstanding their own statements to the New York State Attorney General's Office ("New York State Attorney General" or NYAG") that they commingled/stole perpetual care monies as well as their own documents produced in this litigation which evidence these thefts, Defendants contend Plaintiff has failed to satisfy his burden on this motion or make an even lesser evidentiary showing to

obtain *in camera* review. Nothing could be further from the truth and this Court is well aware of this fact. Indeed, Defendants conveniently fail to mention that during the August 12, 2016 conference *this Court made a determination that the probable cause standard was satisfied with regard to this motion when indicating it would grant the motion and Order the production of two of the five categories requested.*

Defendants also conveniently fail to mention that a few days after this hearing, Mr. John McGowan, the Law Clerk for Part 59, contacted Plaintiff's counsel on August 17, 2016 to request an *immediate* telephonic conference. During this conversation with Plaintiff's counsel, Mr. McGowan indicated the Court was *extremely concerned that it might have to review 513 documents in connection with this motion – even though it would not have to based upon its conclusions at the August 12th conference.* During the telephonic conference the Court required that afternoon, the Court essentially expressed that it had "changed its mind" and would be denying the motion on the ground that no consumer fraud/fraud claim remained in the case to tether a crime-fraud motion. Notably, the Court neither cited nor offered any case law in support of this legally baseless decision. The Court suppressed any attempt by Plaintiff's counsel to fully address this issue on the phone, stated an Order would follow shortly and that any objection could be pursued via a motion to vacate the decision. Two days later, the Court issued an Order not only denying the crime-fraud motion on the fallacious ground that the consumer fraud claim had been dismissed and no fraud claim existed to tether a "crime-fraud" motion to, but also added the "backstop" reasons that Plaintiff failed to establish that: (i) a crime or fraud had been committed; and (ii) the communications at issue were in furtherance of such a crime or fraud. Conspicuously absent from the Order is citation to a single case which supports the Court's conclusion that the crime-fraud motion could not be granted in the absence of an existing fraud claim. Quite tellingly, the Court's conclusion in this regard is *so baseless, so fundamentally wrong* that even the Defendants, after no

doubt boiling the ocean in search of authority to no avail, agree that Plaintiff's position is correct – a crime-fraud exception applies to virtually any case regardless of the claims alleged, including this case. Def. Mem. at 5 (**"Defendants agree with Plaintiffs that the crime-fraud exception is not limited to cases in which the underlying allegation is a crime or fraud.").** At bottom, the Court's conclusion is predicated more on docket management than it is on case law or justice. Unable to defend the Court's denial of the crime-fraud motion on this pre-textual ground, Defendants turn to their arguments in their opposition brief on the initial motion which this Court rejected in their entirety on August 12, 2016 when indicating it would grant the motion.

A. Plaintiff Has Established Defendants Committed A Crime/Fraud.

Relying on the secondary, pre-textual conclusions of the Order, the Defendants make the "bootstrap" argument that the bulk of Plaintiff's crime-fraud motion relates to allegations dismissed by this Court and affirmed by the First Department. This is yet another intellectually dishonest argument by Defendants as the same allegations and evidence form the basis for the breach of contract claim. Moreover, Defendants fail to acknowledge that the "*bulk*" of the evidence on this motion and the renewed *Lucker* Complaint are thousands of pages of highly damning documents Plaintiff received under a Freedom of Information Law request from the New York State Attorney General's Office. Neither this Court nor the First Department had the benefit of considering this *new evidence – evidence which is contained in Defendants' own books, audited financial statements, synagogue board of directors minutes and a myriad of other records that constitute their admissions.*

Defendants contend this new evidence cannot constitute the basis for a consumer fraud claim as the Court held in the initial *Lucker* action. Def. Mem. at 5. But in the initial Lucker action, the Court dismissed the consumer fraud claim on derivative standing grounds. And the

First Department sustained the dismissal on the ground that lacking intent to perform was an insufficient basis to pursue a fraud claim. But what this new evidence shows is decades of fraudulent misrepresentations concerning the material terms of the perpetual care trust. For example, every perpetual care contract contained a provision that perpetual care monies would be placed into a perpetual care trust fund. Exhibit A (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 for the Perpetual Care of lots, plots or graves in Bayside Cemetery . . . ."). But Defendants' documents show that no perpetual care trust fund was ever established. So people were being induced to give money on the false representation that it would be placed into a perpetual care trust account – *a non-existent perpetual care trust account.*

So this case and the *Lucker* action are not solely about the lack of intent to perform as the Defendants profess, the documents and evidence make abundantly clear that Defendants engaged in decades of fraudulent inducement/misrepresentation and thereafter sought to conceal their theft. Thus, to the extent the Defendants, yet again, rely upon the *Lucker* decision from either this Court or the First Department, it is in error as the law of the case doctrine is inapplicable given the new evidence which has emerged demonstrating that Defendants violated GBL 349 for decades.[1]

[1] *See e.g. Cole, Schotz, Meisel, Forman & Leonard, P.A. v Stanton Crenshaw Communications, LLC*, 2014 N.Y. Misc. LEXIS 3990 (N.Y. Sup. Ct. Sept. 3, 2014) (DAJ) (noting the "law of the case" forecloses "re-examination of the question absent a showing of subsequent evidence or change of law."); *Matter of Ronga v New York City Dept. of Educ.*, 2015 N.Y. Misc. LEXIS 2930 (N.Y. Sup. Ct. Aug. 7, 2015) (DAJ) ("Under the law of the case doctrine, an appellate court's resolution of an issue on a prior appeal is binding on the trial court, as well as on the appellate court, and operates to foreclose reexamination of the question absent a showing of subsequent evidence or change of law (quoting *People v. Codina*, 110 AD3d 401, 406, 972 N.T.S.2d 247 (1st Dept 2013))).

Seeking to avoid liability for their crimes/frauds, Defendants now seek to convince this Court that "day is night" by falsely claiming: (i) the fraudulent inducement and theft of perpetual care money does not constitute larceny by false promise under Penal Law 155.05; (ii) they did not perpetrate a fraud on the New York State Attorney General's Office when they misrepresented the number of perpetual care contracts/graves at Bayside Cemetery; and (iii) Defendants didn't engage in fraudulent concealment despite new evidence to the contrary.

1. Penal Law 155.05 – Larceny By False Promise

Larceny by false promise under Penal Law 155.05 includes "common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false promise." It cannot be seriously disputed by Defendants that they tricked consumers into transferring monies and falsely promised that perpetual care monies would be placed into a perpetual care trust, Membership Corporation Law 92 would be followed and perpetual care services would be provided. *See* Exhibit A. Consumers were tricked because no perpetual care fund was in existence at the time they signed their contracts nor has one ever been created to this day. In light of the new evidence containing admissions in internal legal analysis Defendants conducted in 1966, 1976 and 1978, it also cannot be seriously disputed by Defendants that they embezzled perpetual care monies entrusted to them. Exhibit B, C & D.[2] In light of this Court's experience in the Criminal Division, Defendants' argument, no matter how many times they say it, does not make it correct nor conform to what this Court knows from experience is a violation of New York criminal law. Thus, Plaintiff has established that a reasonably prudent person *relying on Defendants' own documents and admissions contained therein* would have a reasonable basis to

[2] Exhibit C "For a number of years, the congregation has been drawing upon the cemetery funds to balance its budget and as of December 31, 1975, the total of such withdrawals from the Cemetery Fun is $172,548.08. Since the cemetery's assets include perpetual care funds, the legality of such withdrawals has been questioned."

believe that Defendants violated Penal Law 155.05 and, therefore, a crime was committed under New York law.

2. Fraud on The New York State Attorney General's Office

It is patently clear, based upon the evidence in the record, that Defendants perpetrated a fraud on the NYAG in order to continue abusing perpetual care monies. From the voicemail message left by Mr. Ethan Klingsberg threatening to drop the keys of the cemetery off to the State of New York (Exhibit E) to the November, 2004 letter (Exhibit F), the record is clear that Defendants intended to stop at nothing, including threatening the NYAG, in order to avoid using their own monies to maintain the cemetery. This is entirely consistent with decades of behavior in which Congregation routinely stole perpetual care monies to offset the synagogue's annual deficit and avoid spending current members' monies as evidenced by their own financial statements. *See* Exhibits G, H, I & J. The 2003-2009 administration, led by Messrs. Shaiman and Klingsberg, was under the same dire financial circumstances of administrations decades before. To ask this Court to accept today that their numerous misrepresentations to the NYAG were "inadvertent errors" is in a word "chutzpah." In 2002, Mr. Shaiman, the President of the synagogue, made statements to *The Jewish Week* concerning 200 perpetual care plots at Bayside Cemetery (Exhibit K), contradicting the assertion in the November, 2004 letter that only two such contracts existed. In light of Mr. Shaiman's 2002 statement, a reasonably prudent person would have a reasonable basis to believe that Mr. Shaiman, the President of the synagogue/signatory to the 2004 letter, and Congregation Shaare Zedek *knew* there were more than two perpetual care contracts when making that misrepresentation to the NYAG.

To be sure, the misrepresentations involved Ethan Klingsberg of Cleary Gottlieb, Mr. Joel Shaiman (CSZ President) and Mark Ankcorn, Esq. (CSZ Rabbi). The misrepresentations evidence no break from the past at all. This misconduct confirms that when faced with the same

financial adversity, CSZ returns to the same unlawful conduct committed by prior administrations – improperly taking perpetual care monies in order to relieve the synagogue of its financial obligations. The crime-fraud motion in this case highlights the 2004 fraud perpetrated on the NYAG to improperly obtain access to perpetual care monies during, yet another, financial crisis at the synagogue.

In 2004, the synagogue was under investigation and could not freely take perpetual care monies as past administrations had done since it was under the watchful eye of the NYAG. During the investigation, CSZ needed permission from the NYAG and resorted to fraudulent misrepresentations in order to gain access to the perpetual care monies it so desperately needed. Prior to granting permission to access perpetual care monies, the NYAG explicitly asked CSZ for information concerning Bayside Cemetery's perpetual care contracts. Rather than truthfully disclose the requested information, CSZ told the NYAG there were *only two perpetual contracts for Bayside Cemetery*. Exhibit F. To represent that only "two such contracts" existed for a 160-year-old cemetery strains credulity, especially considering the letter was prepared by a lawyer from Cleary Gottlieb, and signed by the President of CSZ, Joel Shaiman, who was at one time a Managing Director of Black Rock, Inc., and CSZ's Rabbi who was also a California licensed attorney. While simple logic employed by these sophisticated individuals should have raised a serious "red flag" about the accuracy of the representations, the egregious nature of this situation is highly elevated when one considers that *just two years before this statement, Mr. Shaiman admitted in 2002 to the Jewish Week there were "200 graves with yellow stickers" identifying perpetual care plots.*[3]

[3] Exhibit K, p 4. (""There's a limited amount of dollars. Should I focus on those 200 graves with yellow stickers, or do I focus on the 34,800 graves that don't have stickers?' [CSZ President Joel] Shaiman asks, referring to the stickers that designate perpetual care."). It is worth noting that Defendants physically removed these stickers from headstones after this article was published. And subsequent evidence reveals many more graves than 200 are covered by perpetual care contracts.

Thus, Mr. Shaiman and CSZ *clearly knew* there were more than two perpetual care contracts at the time the letter was signed in 2004. Additionally, a simple visit to the cemetery by the Defendants would have validated the presence of many more than two perpetual care stickers on gravestones which would have been consistent with Mr. Shaiman's statement to the newspaper. The conclusion that a fraud was perpetrated on the NYAG is simply inescapable. This fraud is highly relevant to the fraudulent concealment and punitive damages issues involved in this case.

Had the NYAG been told that perpetual care funds were missing and had been misappropriated, the NYAG would have gone "bonkers"[4] and likely demanded a full scale investigation. This failure to timely and completely disclose information concerning the abuse of perpetual care contracts to a law enforcement agency constitutes an additional act of fraudulent concealment. Thus, it is patently clear that CSZ concealed material information from the NYAG, a law enforcement agency, in order to avoid prosecution and immediately obtain monies it, like prior administrations, desperately needed. Contrary to Defendants' assertion, there is ample evidence in this record for a reasonable person to conclude that Defendants were motivated and intentionally made misrepresentations to the NYAG in November 2004. A reasonably prudent person would seriously question how an allegedly "inadvertent error" of such magnitude could be made - saying there were only two contracts when there were 300 contracts covering more than 700 graves. And how such an "inadvertent error" could be made by the President of the synagogue who signed the letter while publicly acknowledging two years prior that there were at least 200 perpetual care graves at the cemetery is quite telling. No matter what distinctions

[4] ("[I]nitially [Michelle Hirshman in the NYAG's office] misunderstood me and thought we were asking to use the cem funds for the shul's roof. [O]f course, the charities bureau went bonkers when she floated this concept with them.").

opposing counsel attempts to make it cannot overcome the rational conclusion of a reasonably prudent person that this was fraud in its most basic form.

3. Fraudulent Concealment

Defendants seek to avoid Plaintiff's fraudulent concealment allegations by claiming the First Department addressed this issue. But the First Department did not have the benefit of considering a number of newly received emails and documents which were produced to Plaintiff by the New York State Attorney General's Office pursuant to a Freedom of information Law request. The production is replete with documents which evidence the schemes/steps Defendants took to conceal the theft of perpetual care money, including an internal accounting scam to convert perpetual care money to synagogue money. *See* e.ge Exhibit C, pp 5-7. (laying out elaborate scheme using synagogue members to launder perpetual care money). Because Defendants intentionally stole money for decades that they could not or did not want to pay back, they had a strong interest to prevent detection. Indeed, when they were investigated by the New York Attorney General's Office they claimed that financial records – records which evidence decades of theft – did not exist because they knew the documents were damning. Exhibit L ("There are no financial statements available for periods prior to January 1, 1985."). Those documents clearly existed. *See e.g.* Exhibits G, H, I & J. They also knew that if they appeared to be corrupt, there would be no way the NYAG would try to cooperatively resolve the issues facing Bayside Cemetery. So a reasonably prudent person would ask, if the Defendants engaged in schemes to conceal their thefts and prevented full disclosure to a law enforcement agency – how on earth could Mr. Leventhal be expected to have uncovered this fraud? It is implausible that a private individual could accomplish greater disclosure than the NYAG's office. To deny a fraudulent concealment claim under these extreme circumstances would turn the exception upside down and make it virtually inapplicable.

B. The Challenged Communications Were In Furtherance of a Crime/Fraud.

Plaintiff alleges, and the evidence establishes, that Defendants were involved in an overarching scheme to: (i) sell perpetual care contracts under false pretense; (ii) take in perpetual care monies; (iii) misuse those monies; (iv) later endeavor to relieve the synagogue of its legal obligations concerning the cemetery and perpetual care plots by transferring all assets and liabilities of the cemetery to an underfunded "shell" entity; and (v) otherwise seek to avoid any responsibility[5] for their unlawful actions.[6]

The scheme also involved an effort to affirmatively conceal information in order to avoid criminal or civil prosecution for the theft of perpetual care monies. Indeed, during an investigation by the NYAG, Defendants failed to disclose to the NYAG that the synagogue had been stealing perpetual care monies for decades as reflected in their year-end financial statements. *See* Exhibits G, H, I & J. Defendants also misrepresented to the NYAG the number of perpetual care contracts and plots at Bayside Cemetery as of November, 2004. *See* Exhibit F. The misrepresentations were made in order to improperly gain access to perpetual care monies. These acts and omissions will be collectively referred to herein as the "overarching scheme."

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[5] *See* Congregation Shaare Zedek Bayside Cemetery memo, dated September 13, 1976 detailing a "cover-up" scheme to avoid detection and "sanitize" the thefts. ("[T]here appears to be no justification for charging the cemetery for the value of volunteer services where no expense has been incurred. The best way of handling this, in order for the synagogue to get the benefit of such volunteer services, is to have the persons rendering such services built [sic] the cemetery and then contribute the amount received from the cemetery to the synagogue.").

[6] *See e.g.* Class Action Complaint, ¶¶ 22 ("For years Defendants have marketed, sold and collected monies from consumers for perpetual or annual care knowing that perpetual and annual care contracts were not being honored and that they had no intention or inadequate resources to honor new perpetual care or annual care contracts. They 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. Moreover, when accepting monies Defendants led consumers to believe that perpetual care or annual care services would be provided when, in fact, Defendant had not been nor would be providing such services.").

It is undisputed in this litigation that Defendants unlawful conduct commenced in 1907 and continued until approximately 2009 when they stopped selling annual care contracts. Exhibit M, p. 3. This evidence makes patently clear that Defendants were involved in an on-going, multi-decade crime or fraud. Given the breadth of this unlawful conduct, it is difficult to understand how Defendants can contend that during this period no communications were in furtherance of an on-going crime or fraud. Defendants' criminal/fraudulent conduct and coordinated effort in order to avoid detection necessarily required continuing communication with lawyers. For example, documents dating back to the 1960s and 1970s evidence communications with lawyers concerning these issues and ways to avoid detection. Exhibit B, C & D. While Plaintiff could have sought disclosure of all of the privileged documents, Plaintiff has instead narrowly focused his request for the production on 513 allegedly privileged documents which concern communications during the pendency of the NYAG investigation. Instead of fully disclosing the thefts of perpetual care monies to the NYAG, Mr. Klingsberg and Defendants stated in a letter to the NYAG that there was merely "commingling" of monies. And to prevent disclosure of the extent of the thefts, Mr. Klingsberg and Defendants affirmatively misrepresented to the NYAG that "[t]here are no financial statements available for periods prior to January 1, 1985." Exhibit L. That is entirely untrue. Financial records dating back over fifty years or more have been produced in this litigation and evidence the thefts. Exhibits G, H, I, & J.

Mr. Klingsberg and the Defendants were directly involved in the "overarching scheme" and their communications in this regard were in "furtherance" of a scheme to prevent detection as to the thefts (as opposed to "commingling") and the extent of the theft. To be sure, the decision to make these misrepresentations to the NYAG did not occur in a vacuum absent formal authorization. A reasonably prudent person would have a rational basis to believe that the communications with the NYAG were the result of consultation between Mr. Klingsberg and

others at the synagogue. The documents recorded in the privilege log as "allegedly privileged" during the 2002-2007 time period were clearly in furtherance of an effort to: (i) make misrepresentations in order to gain access to perpetual care monies; and (ii) mislead the NYAG in order to avoid civil or criminal prosecution concerning the sale of annual and perpetual care contracts. Thus, Plaintiff has established much more than "probable cause" to believe that the 2002-2007 communications were in furtherance of the "overarching scheme." Plaintiff has proven the communications were in furtherance of the overarching scheme and one need look no further than the description of the communications in order to reach this conclusion.

Defendants endeavor to refocus this Court's attention to prior administrations at the synagogue in order to contend the attorneys involved in this suit or in connection with representations to the NYAG did not formulate or participate in the thefts which occurred in the 1960s and which continued decades thereafter. But *formulation* of the crime or fraud is not ultimately determinative. Rather, it is whether the attorneys offered advice, participated in an on-going crime or fraud or sought to conceal it. Here, Messrs. Klingsberg and Ankcorn[7] joined in and became part of the on-going crime or fraud and used their skills in order to affirmatively conceal the crime or fraud. They also facilitated the misuse of perpetual care monies by preparing/signing a letter to the NYAG in which the synagogue misrepresented facts in order to improperly gain access to perpetual care monies. Individually and collectively, their conduct was not only designed to conceal the prior unlawful conduct, but they facilitated and participated in a scheme to perpetrate a fraud on the NYAG as part of the new administration at the synagogue.

[7] A Rabbi who was also a California licensed attorney.

Defendants would have this Court believe that "it strains credulity to believe that Shaare Zedek would have admitted to the Attorney General that there had been routine commingling and diversion of funds if it (or its attorney) believed that the practice was ongoing and fraudulent." *First*, Defendants did not fully disclose the extent of the thefts and claimed they lacked financial records. *See* Exhibits F & L. *Second*, Defendants went to great lengths to "buddy up" with the NYAG by attending events where he was speaking so Mr. Klingsberg could build a relationship and rapport with the NYAG before addressing the issues with the NYAG's staff. Mr. Klingsberg was confident that he could make the connection, which he did, and use that connection in order to influence the course of the investigation which was handled largely by the NYAG's staff. Moreover, Mr. Klingsberg did not present a complete nor accurate picture concerning a number of financial issues. *See* Exhibits F & L. The misrepresentations in the November 2004 letter were entirely consistent with a pattern of decades of fraud and deception by Defendants. Defendants "it strains credulity" argument, therefore, entirely misses the mark based upon the evidence in this case.

By granting discovery of two categories of documents, this Court found correctly at the August 12, 2016 conference that the communications sought were indeed in furtherance of the conspiracy to conceal the extent of the theft. The Court's Order a week later, holding *exactly the opposite*, is in error. Plaintiff has shown that Defendants were motivated and did seek to conceal the extent of their thefts from the New York Attorney General's Office.

The record is replete with evidence that the defendants committed a crime and/or fraud and that any person in their shoes who was under investigation by the NYAG would need to craft a strategy to avoid detection and prosecution. Strategies to avoid criminal detection and/or civil liability do not occur in a vacuum – they occur during meetings, on conference calls, in e-mails and other documents during which time multiple members of the criminal enterprise

communicate to avoid detection/prosecution. It is that simple, and if the Court doubts this conclusion based upon the probable cause standard, it or a special master can conduct a random sampling of 100 of the documents or order the Defendant to make 100 documents available for inspection by Plaintiff without a waiver of privilege in order to further develop this point and require supplemental briefing in a manner consistent with the *in camera* standard.

1. The Posture of the Case

Parroting the Court's Order that the 2004 letter to the NYAG and what they discussed from 2003 – 2007 is "highly unlikely to be relevant to the limited remaining issues in the case" Def. Mem at 12, Defendants profess their communications during the investigatory period are irrelevant. But they are highly relevant to fraudulent concealment and the overarching scheme to "seek to avoid any responsibility[8] for their unlawful actions." Much like the argument that the crime-fraud exception cannot apply to cases where there is no fraud, this argument is equally contrived and entirely baseless.

Defendants citation to *Surgical Design Corp., v. Correa*, 799 N.Y.S.2d 584, 2005 N.Y. Slip Op. 06312 (2nd Dept 2005) is unavailing. In that case, the crime-fraud request was denied because the letters in question, which related to a fraudulent scheme, were "not material and relevant to the remaining issues in the litigation." *Id.* Here, Plaintiff alleges that Defendants engaged in a

[8] *See* Exhibit C Congregation Shaare Zedek Bayside Cemetery memo, dated September 13, 1976 pp. 5-7 detailing a "cover-up" scheme to avoid detection and "sanitize" the thefts. ("[T]here appears to be no justification for charging the cemetery for the value of volunteer services where no expense has been incurred. The best way of handling this, in order for the synagogue to get the benefit of such volunteer services, is to have the persons rendering such services built [sic] the cemetery and then contribute the amount received from the cemetery to the synagogue.").

scheme and took affirmative step to conceal the thefts. In light of the allegations in the complaint, the fraudulent concealment claim and the evidence of fraudulent concealment, the requested documents are indeed material and relevant to the issues in this case. Moreover, they are also relevant to the facts alleged in the *Lucker* Complaint – those facts will be contained in an amended complaint in this matter shortly.

2. The Public Disclosure Argument

Plaintiff established that the allegedly privileged documents were created in connection with public disclosures to the NYAG and, therefore, were not privileged. Plt Crime Fraud Initial Ltr. at 5. Defendants contend this is not the law in New York when it indeed is the law. Defendants attempt to obscure relevant New York law through strategic omissions and mischaracterizations of applicable precedent. Documents specifically related to communications with the NYAG, including but not limited to the November 1, 2004 letter, are not protected by attorney-client privileges because Defendants' attorneys, Cleary Gottlieb, were retained to perform services in connection with those communication and those communications were never intended to remain confidential. Plaintiff alleges Defendants knew their communications to the NYAG were false when made and that the documents at issue will prove Plaintiff's allegations. Defendants' attempt to rebut Plaintiff's position based upon two cases: (i) *In re MetLife Demutualization Litig.*, 2007 WL 1017603, No. 00 Civ. 2258 (Mar. 30, 2007); and (ii) *In re Grand Jury Subpoena*, 341 F.3d 331 (4th Cir. 2003). A brief analysis of Defendants' case citations demonstrates the inaccuracy of Defendants' position.[9]

[9] It should be noted that *Delta Fin. Corp. v. Morrison*, 13 Misc. 3d 1229(A) (N.Y. Sup. Ct. 2006), applied South Carolina privilege law, yet Defendants' failed to inform this Court the choice of law analysis in *Delta Fin.* specifically noted that "New York and Florida law is apparently not materially different." *Id.* at *11.

i. In re MetLife Demutualization Litig.

In *In re MetLife Demutualization Litig.*, the court stated that: (i) "Plaintiffs have asserted only federal claims and therefore federal law determines the substance of the attorney-client privilege;" and (ii) the defendant "submitted affidavits asserting that the drafts [at issue] were prepared and revised by counsel as legal advice to the [defendant], were intended to be confidential and were in fact kept confidential to the best of their knowledge." Here, by contrast, Plaintiff has asserted only state law claims and Defendants have *failed to submit any such material affidavits or declarations.* Tellingly, the Declaration of Ethan Klingsberg submitted in support of Defendants' Response to Plaintiff's crime-fraud letter brief, which cites directly to *In re MetLife Demutualization Litig.*, nonetheless declines to provide any of the assertions that *MetLife* court held were critical to its decision. Furthermore, *MetLife* is factually distinguishable. In that case, documents were inadvertently disclosed to a third-party and the alleged omissions were in dispute. The *MetLife* court held that "[w]hatever [the documents at issue] say, they are not crucial to a determination of the accuracy or reliability of the final report" (quoting *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 474 (S.D.N.Y. 1996)). Here, the statements made to the NYAG were voluntary and intentional, and the documents at issue are crucial to Plaintiff's allegations. Unlike *MetLife*, Defendants herein have already admitted the primary document was inaccurate. By virtue of this admission, Defendants have *waived* any basis for claiming privilege as they concede misrepresentations were made to the NYAG. It is vital to review documents and receive information as to what Defendants discussed before making the misrepresentations. In other words, additional documents related to the inaccurate voluntary public disclosure are absolutely vital to Plaintiff's allegations that Defendants defrauded the NYAG. As the court in *MetLife* held, "waiver may be found 'where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the

adversary of vital information'" (quoting *Bowne of New York City v. AmBase Corp.*, 150 F.R.D 465, 490 (S.D.N.Y. 1993)).[10]

ii. In re Grand Jury Subpoena.

In re Grand Jury Subpoena is a case in which a suspected terrorist was interviewed by the FBI and claimed attorney-client privilege related to false written statements made during those interviews. In stark contrast to Defendants' first cited case, *In re MetLife Demutualization Litig.*, the relevant facts in *In re Grand Jury Subpoena* are applicable here. In *In re Grand Jury Subpoena*, the voluntary written statements were false and their falsity was not in dispute. The relevant issue was whether disclosure of attorney-client communications related to those false voluntary statements could be compelled. Tellingly, Defendants failed to inform this Court that the motion to compel the communications at issue in *In re Grand Jury Subpoena* was granted.

> Although the information sought by the Government falls within the scope of the attorney-client privilege, we agree with the district court that Appellant waived that privilege through his statements to the FBI agents. The client is the holder of the attorney-client privilege and can waive it either expressly, or through conduct. As a general rule, implied waiver occurs when the party claiming the privilege has made any disclosure of a confidential communication to any individual who is not embraced by the privilege. Such a disclosure vitiates the confidentiality that constitutes the essence of the attorney-client privilege.

In re Grand Jury Subpoena, 341 F.3d at 336 (internal quotations and citations omitted).

However, Defendants do not cite *In re Grand Jury Subpoena* for its holding. Instead, Defendants' latch onto a parenthetical in the case and insinuate it is the *In re Grand Jury Subpoena* holding. In reality, the parenthetical is from a different case in which the defendant was required

[10] It should also be noted that the Court in *In re MetLife Demutualization Litig.* ultimately reviewed a select portion of the documents at issue *in camera* to determine the accuracy of the defendant's representations.

to produce the documents at issue. Of course, Defendants' could not cite that case either as doing so would further substantiate Plaintiff's position. Unable to cite *In re Grand Jury Subpoena* for its holding, Defendants misleadingly focus on a distinction between cases in which an attorney is retained "to perform services that demonstrate the client's intent to have his communications published" and those cases involving "a filing the client intended to make in the future." First and foremost, the "future" filing issue was not discussed in *In re Grand Jury Subpoena*. To the extent case law supports a distinction between an attorney retained specifically in connection with a public filing and one retained for a more general purpose which later included a public filing, Defendants' conduct falls squarely within the former. The Declaration of Ethan Klingsberg, provides as follows:

> In the fall of 2003, the Congregation engaged the law firm at which I am a partner, Cleary Gottlieb Steen & Hamilton LLP, to assist in resolving the Bayside issue as *pro bono* counsel. I was the supervising partner for this engagement.

Klingsberg Decl., at ¶ 7. The "fall of 2003" time period in which Defendants assert its counsel was retained coincides directly with the time period in which the NYAG inquiries regarding Defendants began. Defendants retained Cleary Gottlieb as counsel related to the NYAG inquiries and Defendants' voluntary submissions to the NYAG, including but not limited to the November 1, 2004 letter. Cleary Gottlieb was retained to convey to the NYAG the extent to which Defendants had comingled perpetual care monies in the past and the financial obligations resulting from all perpetual care contracts to date. Thus, as previously asserted by Plaintiff, those voluntary submissions were not intended to be confidential and the communications related to those submissions are not privileged.

CONCLUSION

For the foregoing reasons, Plaintiff Steven Leventhal respectfully requests this Court vacate the Status Conference Order dated August 19, 2016 and grant the crime-fraud motion as to the two categories of documents, fraudulent sale/misuse of perpetual care monies and avoidance of legal responsibility for their unlawful actions (fraudulent concealment), as indicated during the August 12, 2016 Status Conference.[11]

Dated: October 5, 2016,
New York, New York

Respectfully submitted,

By: */s/ Michael M. Buchman*

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[11] At the conference, the Court made inquiry concerning two separate issues regarding the NYAG's office: (i) whether the investigation of annual and perpetual care thefts by Defendants; was still under investigation; and (ii) whether an investigation as to Defendants perpetration of a fraud on the NYAG's office in connection with the November, 2004 letter has concluded. The NYAG's office requested a meeting with Plaintiff's counsel and Mr. Lucker a few months ago concerning the latter and no determination has been made as of yet. *See* Exhibit N.