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VIA OVERNIGHT DELIVERY

The Honorable Debra A. James
New York State Supreme Court Justice
New York State Supreme Court
71 Thomas Street
Part 59
New York, New York 10013

Re: *Lucker v. Congregation Shaare Zedek et al., Index No. 114818/2009-E*

Dear Justice James:

I represent Plaintiffs in the above-referenced action.

A. Overview of the Action

Plaintiffs initially filed this class action in the United States District Court for the Eastern District of New York on September 12, 2007 in accordance with the Class Action Fairness Act, Pub. L. 109-2, § 2, 119 Stat. 4, 5 (2005) (“CAFA”).

In their complaint, Plaintiffs alleged that Defendants breached perpetual care contracts and fiduciary duties by, *inter alia*, invading the *corpus* of perpetual care trusts established to maintain certain plots at the cemetery and unlawfully using the *corpus* to make capital improvements at the synagogue.

Notably, Defendant Congregation Shaare Zedek has admitted liability to the New York State Attorney General. Its lawyer has also publicly admitted it took the monies out of these trust accounts in order to repair the synagogue.¹ Given the party admission, this is an uncommonly clear case.

¹ Defendant Congregation Share Zedek’s attorney has also publicly admitted “cemetery funds were borrowed from a nonrestricted account to repair the synagogue roof, which is entirely proper and legal.” See, Exhibit A, *Bayside Cemetery is a Disgrace, Suit Says*, New York Daily News, Oct. 4, 2007. The contracts were entitled “Trust Fund Receipt” and incorporated governing trust law. These were

On September 30, 2009, Chief Judge Raymond J. Dearie dismissed the federal action on jurisdictional grounds holding CAFA did not apply. *Lucker v. Bayside Cemetery*, 262 F.R.D. 185 (E.D.N.Y. 2009). While recognizing the merits of the litigation, Chief Judge Dearie stated as follows:

the Lucker plaintiffs have solely alleged New York causes of action against New York defendants. Although relatives of those interred at Bayside may live outside of the state, [**17] it is beyond serious question that [*191] many of those who actually signed contracts to be buried in Queens are -- or were -- New Yorkers. This is not the type of interstate controversy with national implications contemplated by the Congress when it enacted CAFA. Accordingly, the Court invokes the discretionary exception to CAFA pursuant to 28 U.S.C. § 1332(d)(3), and declines to exercise subject matter jurisdiction over the Lucker matter.

As the Court has noted from the outset of these proceedings, all agree that Bayside Cemetery's state of decay and disrepair is disheartening and in need of a prompt repair. As unfortunate as this lingering dispute is, and fully appreciating the frustration and anger of the affected families, the Court must conclude that it is without jurisdiction to act.

The *Lucker* Plaintiffs immediately refiled their action in this Court on October 22, 2009.

On December 18, 2009, Defendants moved to dismiss the action on two primary grounds: (i) standing; and (ii) the statute of limitations. Defendants claimed that Plaintiffs did not purchase the perpetual care contracts at issue directly from a Defendant and, therefore, cannot represent deceased family members or relatives. We have thoroughly briefed this issue and the statute of limitations issue in our February 1, 2010 opposition to Congregation Shaare Zedek's motion to dismiss.

We also addressed these points at the June 3, 2010 oral argument before Your Honor.

B. Nature of the Request

I write to bring to your attention the filing of a new complaint in this Court – *Leventhal v. Bayside Cemetery et al*, Index No. 100530/2011. See Exhibit A.

The *Leventhal* complaint is virtually identical to the *Lucker* matter with two exceptions. The *Leventhal* Complaint includes facts raised in Plaintiffs' Memorandum of Law In Opposition to Defendant Community Association for Jewish At-Risk Cemeteries, Inc.'s Motion to Dismiss. The *Leventhal* Complaint also alleges *Mr. Leventhal purchased a perpetual care contract directly from Defendant Congregation Shaare*

unquestionably trust accounts which could not be invaded absent a court order. See Exhibit A to the *Leventhal* Complaint attached hereto as Exhibit B.

Zedek. A copy of the contract is annexed as Exhibit A to the *Leventhal* Complaint. Service of the *Leventhal* Complaint has been effectuated. Accordingly, the *Leventhal* action is not subject to the same standing arguments which are now *sub judice* in the *Lucker* matter. And the statute of limitations arguments, which Judge Dearie noted were “oxymoronic,” are also inapplicable.²

In light of the uncommonly clear nature of this case and the *40 months* which have passed since the initial filing of the federal court action, Plaintiffs write to respectfully request that Your Honor: (i) accept the *Leventhal* action as a related matter to the *Lucker* action; and (ii) Order the parties to prepare a case management schedule so that discovery may commence within the next 30 days while any motion to dismiss may be pending since the *Leventhal* action, at a minimum, should now timely proceed.

Plaintiffs are available, at the Court’s convenience, to further discuss this request or any other issue the Court may wish to discuss.

Respectfully submitted,



Michael M. Buchman

c: Russell Steinhall (counsel for Congregation Shaare Zedek)
Ari Selman (counsel for CAJAC)
John Lucker
Lynn Cohen
Fran Goldstein
Steve Leventhal

² See *Kidd v. Delta Funding Corp.*, Index No. 601020/99, N.Y. Misc. LEXIS 29 (N.Y. Sup. Ct. 2000) (“when a defendant [especially a fiduciary] electing to set up the statute of limitations has previously, by deception or any violation of duty towards plaintiff, caused him to subject his claim to the statutory bvar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold.”); see also *1050 Tenants Corp., v. Lapidus*, 735 N.Y.S.2d 47 (1st Dept 2001) (rejecting statute of limitations defense where the violation was continuing in nature.).