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Plaintiff Steven R. Leventhal, by and through his *pro bono* attorney, respectfully submits this memorandum of law in opposition to Defendant Community Association for Jewish At-Risk Cemeteries, Inc.'s ("CAJAC") motion to dismiss. For the reasons set forth below, Defendant's motion to dismiss should be denied in its entirety.

## I.

### ARGUMENT

Rather than incorporate by reference the relevant portions of its motion to dismiss papers in the *Lucker* action, Defendant Community Association for Jewish At-Risk Cemeteries, Inc. ("CAJAC") seeks a "second bite of the apple" by filing an additional twenty four page motion to dismiss in this case which rehashes many of the same arguments fully briefed in the *Lucker* action.<sup>1</sup> For the convenience of the Court, Plaintiff incorporates by reference herein the *Lucker* Plaintiffs' opposition to CAJAC's motion to dismiss.<sup>2</sup> Plaintiff will endeavor to address only those new arguments raised by CAJAC<sup>3</sup> and the "elephant in the room" at the *Lucker* oral

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<sup>1</sup> Defendant CAJAC's brief is replete with statements that Plaintiffs collectively have conceded numerous points. As reflected in Plaintiffs' briefs in this and the *Lucker* matter, nothing has been conceded. Defendant also claims there was something improper about filing a new complaint alleging a claim by a person who purchased a perpetual care contract directly from Defendant Congregation Shaare Zedek. There was nothing improper about it and if Plaintiffs were so concerned about the arguments raised by Defendant, Plaintiff would have not waited six months to file what Defendant claims is a "corrective action." By virtue of the *Lucker* and *Leventhal* actions, the Court is presented with claims by: (i) a person who purchased a contract directly from Congregation Shaare Zedek; (ii) a court appointed executor on behalf of his grandmother who purchased perpetual care; and (iii) the children of deceased parents who purchased perpetual care. Given this broad array of purchasers, one, if not all, of these Plaintiffs clearly has standing under New York law to proceed with this action against all Defendants.

<sup>2</sup> Defendant CAJAC contends that Plaintiff has a conflict with other class members because he has a direct contract with Congregation Shaare Zedek. Defendant ignores the obvious common denominator among all class members – they all have interests in perpetual/annual care contracts concerning monies which Defendant Congregation Shaare Zedek admittedly stole.

<sup>3</sup> The focus of Defendant CAJAC's piercing the corporate veil argument in the *Lucker* action concerned whether it is "affiliated" with Defendant Congregation Shaare Zedek in connection with the interpretation of paragraph 6 of a Stipulated Order Administrative Order Closing and Tolling Agreement in the federal action between the *Lucker* Plaintiffs and Defendant Congregation Shaare Zedek.

argument - why CAJAC is not a “necessary party” to this litigation under CPLR § 1001(a)? Indeed, Defendant CAJAC had no cogent response. Defendant CAJAC’s only response was it should not be “saddled with litigation” – a statement it repeatedly makes in its opening brief. But that is no reason to exclude Defendant CAJAC from this proceeding given its now *de facto* ownership and control of the cemetery, its voluntary appearance in the federal proceeding to make a formal presentation to the court,<sup>4</sup> and its entry into a landscaping agreement concerning the cemetery. While CAJAC employs “hide the ball” tactics by attempting to deny that it has entered into an agreement with a landscaper concerning the cemetery, *see* p. 3, n. 4 and p 21 (“alleged entry into a landscaping contract”), it completely fumbles the ball and admits on page 22 of its brief that it did, in fact, enter into the contract on its own volition and was not compelled by Defendant Congregation Shaare Zedek to do so. One thing is clear from this brief – CAJAC cannot keep its story straight. The *fact* that it has taken over the cemetery and entered into one or more contracts concerning the cemetery makes it a “necessary party” to this litigation. Given CAJAC’s affirmative acts, it is now a “necessary party” as complete relief cannot be accorded in this litigation absent CAJAC’s participation as a party. Defendant CAJAC’s “saddled with litigation” arguments are even less compelling given the fact that it is being well represented on a *pro bono* basis by Skadden, Arps, Slate, Meagher & Flom LLP (“Skadden”).<sup>5</sup>

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<sup>4</sup> CAJAC touts that it is a 501(c)(3) charitable organization. CAJAC did not receive such status until mid 2009 – more than approximately 2 years after it was renamed CAJAC and after its founding as “Friends of Bayside Cemetery.” Charitable organizations typically obtain charitable status *first* to immediately encourage charitable contributions. CAJAC’s conduct is clearly at odds with that of a real charitable organization. CAJAC is a sham entity designed to relieve Defendant Congregation Shaare Zedek of liability for the cemetery. The individual facts in this case present a colorful mosaic of fraud and sham behavior designed to absolve Defendant Congregation Shaare Zedek of civil liability for its admitted wrongs.

<sup>5</sup> CAJAC’s President, Gary Katz, was previously an associate at Skadden. And Mr. Axinn, counsel for Defendant Congregation Shaare Zedek, was previously a partner at Skadden.

Defendant CAJAC's contention that dismissal is appropriate because Plaintiff has not alleged an injury is misplaced. Plaintiff has alleged in paragraphs 31-36 of the Complaint that the New York State Attorney General ("NYAG") denied Defendant Congregation Shaare Zedek and Bayside Cemetery's request to legally transfer the cemetery to CAJAC. The determination was made by the NYAG in the public interest as Defendant CAJAC is undercapitalized and lacks the financial ability to maintain the cemetery. The fact that these Defendants have done an "end run" around the NYAG's decision and effectuated a *de facto* transfer of the cemetery now constitutes a *per se* injury to Plaintiff. With regard to the piercing the veil factors, the vast majority of the factors tip in favor of veil piercing as demonstrated below.

Accordingly, in light of Defendant CAJAC's *de facto* ownership and control of the cemetery and its creation as a "shell" or "dummy" for Defendant Congregation Shaare Zedek, Defendant CAJAC should remain a party to this action under CPLR § 1001(a), Real Property Actions and Proceedings § 1511 and/or on the "piercing the corporate veil" theory.

**A. CAJAC Is a Necessary Party To This Litigation**

Defendant CAJAC is a necessary party to this litigation under CPLR § 1001(a) and Real Property Law §1511. CPLR 1001(a) provides as follows:

(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

*Id.*<sup>6</sup> While this is not an action to compel the determination of a claim to real property, this case does touch upon such issue, thereby making Real Property Applications and Proceedings § 1511

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<sup>6</sup> See *Calderone v. Wiemeir*, 2010 Slip Op. 7645, 911 N.Y.S. 2d 190 (3rd Dept. 2010) ("primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect nonparties whose rights should not be jeopardized if they have a material interest in the subject matter"); *Allsafe*

additional support for the conclusion that Defendant CAJAC, as the party in possession of the cemetery, is an appropriate party in this proceeding. Real Property Actions and Proceedings § 1511 provides as follows:

1. In an action brought under this article, the person in possession shall be made a party to the action, and *when such person claims the right of possession, or an interest in the real property, under another, such other person shall also be made a party.*

2. Where it appears to the court that a person not a party to the action may have an estate or interest in the real property which may in any manner be affected by the judgment, the court, upon application of such person, or of any party to the action, or on its own motion, may direct that such person be made a party.

*Id.* (emphasis added).

Defendant CAJAC is a “necessary party” to this dispute given a number of overwhelming facts which make clear that complete relief cannot be accorded in this action absent its involvement. Defendant CAJAC is a vehicle created by Defendant Congregation Shaare Zedek to relieve it of liability concerning its theft of perpetual/annual care monies. Defendant CAJAC should remain a defendant in this proceeding as a “necessary party” to the litigation under CPLR § 1001(a) or under the “piercing the veil” theory. Whether one considers CAJAC a “dummy corporation,” the *de facto* owner of the cemetery by virtue of accepting the “keys to the property” and currently having in its possession the original and reproduction historical burial records and maps for the cemetery, or an entity holding itself out to the public as the *de facto* owner of the cemetery by entering into an agreement with a landscaper concerning the cemetery, the conclusion is the same – complete relief cannot be accorded in this litigation absent Defendant CAJAC’s participation. *See* Declaration of Michael M. Buchman dated April 1, 2011 (“Buchman Decl.,”) Ex. H (“In return they basically hand over the keys us.”). Moreover, as the

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*Tech., Inc., v. Benz*, 2010 NY Slip Op. 5067, 902 N.Y.S.2d 462 (4th Dept. 2010); *In re 37 West Realty Co., NYC Loft Board*, 2010 NY Slip Op. 2722, 896 N.Y.S.2d 870 (1st Dept 2010).

*de facto* owner of the cemetery, Defendant CAJAC will be affected by a judgment in this action and should be given an opportunity to meaningfully participate as a party so that all issues are conclusively determined as to all known owners or significant persons with an interest in the cemetery.

### **1. CAJAC – A “Dummy” or “Shell Corporation”**

CAJAC was created by two lawyers, Messrs. Klingsberg and Katz, who were members and/or officers of Defendant Congregation Shaare Zedek. CAJAC, created just before the federal action was commenced, is a “shell” or “dummy” corporation<sup>7</sup> established to absorb all cemetery assets and liabilities from Defendant Congregation Shaare Zedek in order to relieve it of liability for the stolen perpetual/annual care monies which are the subject of this litigation.<sup>8</sup> The goal when creating CAJAC was to protect Defendant Congregation Shaare Zedek from a judgment in a prospective proceeding. Defendant Congregation Shaare Zedek admittedly used the stolen perpetual monies to make capital improvements to the synagogue building, thereby making the building the sole and most logical source for effectuation of a monetary judgment.

### **2. Defendants Seek To Transfer The Cemetery to CAJAC**

Plaintiff alleges that Defendants have already requested permission from the New York State Attorney General’s Office (“NYAG”) to effectuate transfer of Bayside Cemetery to

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<sup>7</sup> *Port Chester Electrical Construction Corp. v. Atlas*, 40 N.Y.2d 652, 357 N.E.2d 983, 389 N.Y.S.2d 327 (1976) (It has been held to be determinative where the subsidiary corporation is “a dummy for the parent corporation.”); *Astrocom Electronics, Inc. v. Lafayette Radio Electronics Corp.*, 63 A.D.2d 765, 404 N.Y.S.2d 742 (3rd Dept. 1978).

<sup>8</sup> Defendant CAJAC now seeks to perpetuate the illusion that it is not an “alter ego” or “shell” to absolve Defendant Congregation Shaare Zedek of liability. It contends that it is working with Mt. Hope Cemetery, Baron Hirsch Cemetery, Sherwood Park Cemetery, Kings Park Jewish Center Cemetery and Beacon Hebrew Alliance. It is most telling that none of these cemeteries is mentioned on its website blog of activities. *See* Buchman Decl., Ex. I. - <http://cajac.us/blog/>. It is also noteworthy that, with one limited exception, none of these cemeteries is mentioned on CAJAC’s Facebook page. Bayside Cemetery is CAJAC’s *sole focus* and CAJAC’s purported interest in and work on behalf of other cemeteries is illusory.



CAJAC. Complaint ¶ 36. Plaintiff further alleges that the NYAG has informed Defendants that they *cannot* transfer the property at this time to an undercapitalized CAJAC given the pendency of lawsuits seeking the recovery of the stolen perpetual/annual care monies. *Id.* This determination was made by a public entity in the public interest.

### 3. “Handing the Keys to CAJAC” – *De Facto* Control

Ignoring the NYAG’s decision, Defendants Congregation Shaare Zedek and Bayside Cemetery effectuated a *de facto* transfer of the property to Defendant CAJAC. As Defendant CAJAC has publicly stated, Congregation Shaare Zedek has “basically hande[ed] over the keys to us.” *See* Buchman Decl, Ex. H. Despite this reality, Defendant CAJAC argues Plaintiff has not sustained an injury under the piercing the veil theory. It ignores the reality that the unauthorized transfer of the property constitutes a *per se* injury to Plaintiff. The transfer is *per se* injurious because it was effectuated in contravention of the NYAG’s directive – a government agency which is designed to protect the public interest, including Plaintiff who is a resident of the State of New York. Moreover, the transfer of *de facto* ownership to Defendant CAJAC allows Defendants to engage in the elaborate “shell game” of “we’re not responsible for the perpetual/annual care contracts.” A game that is clearly not in the public interest or the interests of Plaintiff and other class members whose monies were stolen by Defendant Congregation Shaare Zedek. Moreover, transfer to an undercapitalized CAJAC is by no means in the public interest as CAJAC was created by a tortfeasor in order to help it avoid liability for its admitted wrong doing – wrong doing which is continuing in nature by further scheming to avoid liability and concocting legal arguments in violation of its fiduciary duties to Plaintiff.

#### 4. CAJAC Hires A Landscaper As The De Facto Owner of the Cemetery

Defendant CAJAC would have this Court mistakenly believe that it has *no ties* to Defendants Congregation Shaare Zedek or Bayside Cemetery. Those ties are succinctly briefed in detail in the *Lucker* opposition papers.

In this proceeding, Defendant CAJAC attempts, in yet another way, to convince the Court it has *no ties* with Bayside Cemetery. Defendant CAJAC claims it has not engaged a landscape contractor concerning the cemetery. Def. Mem. at 3, n. 4. A statement by its co-defendant, its own public statements and even a later portion *of its own brief*<sup>9</sup> make crystal clear that CAJAC's representation is **absolutely false**.

During oral argument on the motion to dismiss in the federal proceeding, much like statements made by Defendant Congregation Shaare Zedek during opening briefing on this motion, counsel endeavored to impress the Court with the "substantial progress" occurring at the cemetery.<sup>10</sup> Counsel also disclosed in the federal proceeding the existence of a new contract with a landscaper — a contract which was supposed to be turned over to Plaintiff pursuant to a court Order if Defendants Shaare Zedek or Bayside Cemetery were a signatory to the contract. The relevant portion of the transcript is as follows:

Mr. Buchman: Your Honor, Michael Buchman for the plaintiffs. Just one brief comment before we begin the oral argument on the motion to dismiss.

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<sup>9</sup> CAJAC has admitted on page 22 of its brief that it entered into a landscaping agreement concerning the cemetery — this admission is in conflict with its earlier representation that it "has never executed a contract to perform restoration work at Bayside Cemetery." See page 3, footnote 4 of its brief; see also Def. Mem. at 22 ("an action that CAJAC freely undertook to advance its 501(c)(3) tax exempt purpose."); see also p. 21 of Defendant CAJAC's brief where it claims it only allegedly entered into a contract. ("CAJAC's alleged entry into a landscaping contract . . .").

<sup>10</sup> It is also noteworthy that Defendants conceded that only one-tenth of the cemetery had been restored at this hearing. Buchman Decl. Ex. F. pp 7-8. The cemetery remains in deplorable condition and has by no means been substantially restored as these Defendants profess.

First of all, we were under the impression that we would get a copy of any contract that the defendants entered into regarding the cemetery. In fact, that was one of the conditions that we entered into in order to give them a six month stay the last time and we haven't received a copy of the contract.

Mr. Axinn: It's not a contract the defendants (Congregation Shaare Zedek and Bayside Cemetery) entered into. I don't mean to interrupt Mr. Buchman, *but this is a contract between CAJAC and the MC Landscape Group.*<sup>11</sup>

Buchman Decl., Ex F, Transcript of Motion Before The Honorable Raymond J. Dearie dated June 29, 2009, pp. 6-7 (emphasis added). For CAJAC to now contend dismissal is appropriate because it has *no contractual involvement with Bayside Cemetery* is belied by this unambiguous evidence.

Defendant CAJAC may seek to convince this Court that its co-defendants are somehow mistaken. That too would *not be true* as Defendant CAJAC's contractual arrangement with a landscaping company concerning Bayside Cemetery is widely available public information. Indeed, the contractual relationship created by CAJAC concerning the cemetery is so well recognized that the free online encyclopedia Wikipedia definition of CAJAC includes a reference to the *fact* that CAJAC employed a private contractor to clean up Bayside Cemetery.<sup>12</sup> CAJAC cannot argue this on-line encyclopedia is somehow also mistaken because the information was taken directly from CAJAC's Facebook page. The Wikipedia information is also consistent with CAJAC's statements to the press.<sup>13</sup> Finally, Defendant CAJAC's representation is also belied by

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<sup>11</sup> Defendant CAJAC has moved for sanctions against the *Lucker* Plaintiffs for allegedly violating a court order in the federal proceeding. To the extent that the contract in issue was executed by Defendants Congregation Shaare Zedek or Bayside Cemetery, the *Lucker* Plaintiffs reserve the right to seek sanctions for violation of the order in the federal proceeding requiring disclosure of the agreement.

<sup>12</sup> <http://en.wikipedia.org/wiki/CAJAC>. See Buchman Decl, Ex. J..

<sup>13</sup> <http://www.forward.com/articles/110374/> Buchman Decl., Ex. H. ("To fix Bayside — the group's first priority — CAJAC has employed MC Landscape Group of Mamaroneck, N.Y., to tidy up the 35,000-grave cemetery").

*its own admission later in its opening brief* that it did indeed enter into an agreement with a landscaper concerning the cemetery.<sup>14</sup> *These inconsistent representations by CAJAC are disturbing and evidence a lack of candor.* They demonstrate CAJAC's willingness to say or do anything to extricate itself from this lawsuit despite its affirmative acts that warrant its involvement in this action.<sup>15</sup> These collective facts demonstrate that CAJAC is a "necessary party" to this action.

In sum, by its own actions and statements CAJAC has voluntarily assumed *de facto* ownership and control of the cemetery, thereby making its participation in this litigation necessary. CPLR 1001(a); Real Property Applications and Proceedings § 1511. Maintaining CAJAC as a defendant in this litigation is in its own best interest. A judgment rendered in its absence could have an adverse effect on it given its *de facto* ownership of the cemetery. Moreover, equity requires Defendant CAJAC's participation in this litigation for purposes of efficiency and convenience. A decision to the contrary might require naming CAJAC in a new lawsuit if the cemetery is legally transferred to CAJAC during the pendency of this suit. Making Defendant CAJAC a party to this proceeding will also require it to be bound by any Orders concerning the cemetery. It will also ensure that complete relief is effectuated. And since Defendant CAJAC currently has in its possession records and documents of Bayside Cemetery, maintaining Defendant CAJAC as a party to this proceeding will ensure full and complete retention of documents and materials regarding this matter and Bayside Cemetery. Defendant

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<sup>14</sup> Def. Mem. at 22. (admitting it entered into an agreement as a voluntary action - "an action that CAJAC freely undertook to advance its 501©(3) tax exempt purpose.).

<sup>15</sup> In the *Lucker* action, Defendant CAJAC requested costs claiming Plaintiff could not properly name it as a Defendant in the action. While Plaintiffs' counsel argued that costs are off-limits in *pro bono* litigation, Defendant CAJAC argued they were entirely appropriate. To the extent that the Court is as disturbed by opposing counsel and Defendant CAJAC's false and conflicting representations in its brief, Plaintiff requests permission to file a motion for sanctions against opposing counsel and CAJAC who have "opened the door" to this request.

CAJAC's participation in this suit now will also allow its voice to be heard on key issues and prevent the potential inefficiency of having to "re-start" this action down the road.<sup>16</sup> Notably, no prejudice will be sustained by Defendant CAJAC as it has already demonstrated its desire to have its voice heard in court on these issues since it voluntarily appeared in the federal proceeding and made a formal presentation to Chief Judge Raymond J. Dearie. It will also not be prejudiced given the fact that it is being represented on a *pro bono* basis by Skadden. Simply put, Defendant CAJAC has opened the door to its full involvement in this proceeding by:

(i) appearing in the federal proceeding; (ii) accepting unauthorized, *de facto* ownership and control of Bayside Cemetery from Defendant Congregation Shaare Zedek; and (iii) entering into legal obligations concerning the cemetery, including the recent employment of a landscaper to clean the grounds of the cemetery. Accordingly, Defendant CAJAC is a "necessary party" to this litigation.

**B. The Piercing the Corporate Veil Theory**

Defendant CAJAC contends Plaintiffs have conceded they have not sustained an injury resulting from Defendant Congregation Shaare Zedek's attempted transfer of the property to CAJAC. As demonstrated below, that is not the case. The doctrine of piercing the corporate veil is an equitable concept. It is "a fact laden claim that is not well suited for summary judgment resolution," much less a motion to dismiss. *First Capital Asset Mgt. N.A. Partners*, 300 A.D.2d 112, 117, 755 N.Y.S.2d 63 (1st Dept 2002). Under the piercing the corporate veil theory, all Plaintiff need establish is that Defendants engaged in some type of inequity, fraud, elaborate

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<sup>16</sup> Defendant CAJAC's representation that it has not employed a landscape contractor in the face of abundant public information to the contrary is troubling. It raises doubt about its representations concerning other matters which are not publicly available. If the Court is inclined to grant Defendant CAJAC's motion, Plaintiff respectfully submits this situation highlights the need for formal pre-dismissal discovery as requested by the *Lucker* Plaintiffs. Ordering discovery will create a level playing field and allow this Court to make a fully informed decision on a complete, and most importantly, accurate record.

shell game or malfeasance prohibited by law. *400 East 85<sup>th</sup> Street Realty Corp., v. MIS International, Inc.*, 2011 NY Slip Op. 30404U, 2011 N.Y. Misc. LEXIS 448 (Sup. N.Y. Feb 22, 2011) (James, J.) (citing *Lederer v. King*, 214 A.d.2d 354, 625 N.Y.S.2d 149 (1st Dept 1995); *In re Sunbeam Corp.*, 284 B.R. 355 (S.D.N.Y. 2002) (“There must be an abuse of the corporate form to effect a fraud or an injustice-some sort of "elaborate shell game.""). That is precisely what Plaintiffs have alleged Defendants have done by trying to shift *de facto* ownership of the cemetery to the undercapitalized CAJAC in an unauthorized manner.

**1. The Transfer Is Real, Unauthorized and *Per Se* Injurious.**

While Defendant CAJAC claims Plaintiffs have conceded the second prong of corporate veil piercing - that a fraud or injustice has not been committed, Def. Mem. at 8-11, no such concession has been made. Indeed, Plaintiff alleges in paragraphs 31-36 of the Complaint that Defendants sought permission from the NYAG to legally transfer Bayside Cemetery to Defendant CAJAC. Plaintiff further alleges that the NYAG did not authorize a transfer given the pending litigation and the inadequate capitalization of CAJAC. *Id.* Defendant CAJAC belabors the point that the NYAG refused to bless the transfer of the property to it in order to claim no injury has occurred and any injury is prospective. That argument actually supports the conclusion that Plaintiff has been injured. It is undisputed that Defendant CAJAC has now taken over *de facto* ownership of the cemetery. The transfer of the cemetery to Defendant CAJAC is neither “hypothetical” nor “speculative” — it is real. *See* Def. Mem. at 8, 11, 13. Indeed, CAJAC has publicly admitted it has accepted the keys to the cemetery. Buchman Decl., Ex. H (“In return they basically hand over the keys us.”). This *de facto* transfer was effectuated as an “end run” around the NYAG decision to not allow a formal transfer to Defendant CAJAC.

Plaintiff has specifically alleged that Defendants have *effectuated* a transfer of *de facto* ownership “absent the requisite government approval.” Def. Mem. at 12. The fact that

Defendants have *effectuated* this transfer absent permission from the NYAG constitutes a fraud or injustice since the NYAG represents the public interest and determined the transfer of the property to the undercapitalized CAJAC would not be in the public interest. This undisputed transfer has caused a tangible *per se* injury and is by no means a speculative, future injury. By *effectuating* an unauthorized transfer, Defendants have *per se* injured Plaintiff.<sup>17</sup> Hence, Defendant CAJAC concedes that this allegation is sufficient to establish “evidenc[e] [of] misconduct by CAJAC.” *See* Def. Mem. at 12. Accordingly, Defendant CAJAC has committed a fraud or injustice which *per se* injured Plaintiff by accepting *de facto* ownership of the cemetery in contravention of a determination by the NYAG. *400 East 85<sup>th</sup> Street Realty Corp., v. MIS International, Inc.*, 2011 NY Slip Op. 30404U, 2011 N.Y. Misc. LEXIS 448 (Sup. N.Y. Feb 22, 2011) (James, J.) (citing *Lederer v. King*, 214 A.d.2d 354, 625 N.Y.S.2d 149 (1st Dept 1995); *In re Sunbeam Corp.*, 284 B.R. 355 (S.D.N.Y. 2002) (“There must be an abuse of the corporate form to effect a fraud or an injustice-some sort of “elaborate shell game.”).

## **2. Complete Domination Has Been Adequately Alleged**

It is well settled that no one factor is controlling when determining whether piercing the corporate veil has been adequately alleged. Defendant CAJAC primarily argues that dismissal is appropriate because Plaintiff has not sufficiently alleged inter-locking officers or directors between Defendants Congregation Shaare Zedek and CAJAC. It is noteworthy that Defendant CAJAC concedes President Gary Katz was part of Congregation Shaare Zedek when Friends of Bayside Cemetery (“FOBC”), now CAJAC, was created. Moreover, Ethan Klingsberg was an

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<sup>17</sup> In an attempt to gain ground, Defendant CAJAC suggests Plaintiff conceded the transfer to CAJAC is legitimate because he stated the transfer would occur “once [CAJAC] is adequately funded.” Def. Mem. at 14. Plaintiff did not make that statement and, therefore, conceded no such thing. In its brief, Plaintiff *quoted* counsel for Defendant Congregation Shaare Zedek so the statement cannot fairly be attributed to him. This is just another example of the tortured effort by CAJAC to extricate itself from a case in which it properly belongs based upon its affirmative acts injecting itself in this dispute.

officer/director of the synagogue in charge of the cemetery when FOBC was created. These two lawyers established FOBC to absolve the synagogue of liability for a cemetery that Mr. Klingsberg knew was a ticking time bomb. It is no a coincidence that CAJAC was created while the *Lucker* Plaintiffs were speaking with Mr. Klingsberg and shortly before the federal action was commenced. It is also no coincidence that Messrs Katz and Klingsberg appointed individuals as officers of FOBC/CAJAC whom they knew would “tow the line” for the synagogue. Mr. Katz has remained the President of CAJAC to ensure Defendant Congregation Shaare Zedek’s interest in evading liability are served. And Mr. Klingsberg remains the legal officer of CAJAC, as reflected on CAJAC’s Federal 2009 990-EZ Form, in order make sure the scheme he set in place continues. Mr. Klingsberg is conspicuously absent as the current legal officer of CAJAC on page 17 of CAJAC’s brief even though he is listed on the Federal 2009 990-EZ Form. *See* Buchman Decl., Ex. J. On reply, CAJAC will argue that this was a mere oversight and not another attempt to “hide the ball.”

The argument that these two individuals are no longer part of Congregation Shaare Zedek’s structure is inconsequential as they were at the time FOBC/CAJAC was created. CAJAC is unquestionably the “fruit of the poisonous Congregation Shaare Zedek tree” such that the absence of current interlocking officers is not dispositive because every other factor makes clear that CAJAC is indeed an *alter ego* of Defendant Congregation Shaare Zedek.

*Inadequate Capitalization* – Defendant contends that Plaintiff engages in “circular reasoning” to establish that CAJAC is undercapitalized. Def. Mem. 19-20. It is now undisputed fact in this case that CAJAC entered into a landscaping agreement concerning the cemetery. Defendant CAJAC’s legal obligation under that agreement and its overall responsibility as *de*



*facto* owner of the cemetery far exceed its paltry assets which are well below the \$300,000 it claims to have raised.

As Defendant Congregation Shaare Zedek's former Rabbi publicly stated, a clean up at the cemetery will take "hundreds of thousands of dollars" and long term care will be "a multi-million dollar endeavor." <http://citynoise.org/article/8696>. On a most recent public filing, Defendant CAJAC listed its total net assets of \$71,169. See Buchman Decl., Ex. J (accounting statement). This clearly is not enough to address the problem at the cemetery. Moreover, any judgment in this case concerning the stolen perpetual/annual care monies, which have been estimated to be in excess of \$5 million, also far exceed Defendant CAJAC's assets. See Buchman Decl., Ex. K, Declaration of Hayden Burrus, dated December 24, 2008. There can be no dispute here that Defendant CAJAC was created by Defendant Congregation Shaare Zedek as a undercapitalized boat set adrift with gaping holes to sink far, far away from Defendant Congregation Shaare Zedek's Upper West Side multi-million dollar synagogue building which was repaired using the stolen perpetual/annual care monies.

*Common Office Space* – CAJAC concedes, as it must, that for years it used Congregation Shaare Zedek as its headquarters. See Def. Mem. at 21.

*Use of Property* – CAJAC concedes, as it has publicly stated, that it has taken over *de facto* ownership of the cemetery, and has the "keys to the property."<sup>18</sup>

*Shifting of Funds* - Utilizing circular logic, CAJAC contends the redesignation of funds is not a factor favoring veil piercing. The redesignation from Congregation Shaare Zedek to

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<sup>18</sup> Defendant CAJAC would have this Court believe it has "raised over \$300,000" and is performing good works on its own volition. Def. Mem. at 21. In light of the fact that it has submitted no such proof and those monies are not listed on CAJAC's public filings it is hard to fathom this is an independent charitable organization and not a shell. This is especially true when one considers that it claims to be working on multiple cemeteries in the tri-state area, but only Bayside Cemetery is listed on its blog. <http://cajac.us/blog/>. See Buchman Decl., Ex. I.

CAJAC, the *de facto* owner of the cemetery, confirms the overarching scheme to create the illusion CAJAC is a separate entity even though it is a shell designed to “unload” Bayside Cemetery. To suggest, as Defendant CAJAC does, that Defendant Congregation Shaare Zedek could accept and transfer monies internally to its shell would only compound existing problems, create tax/accounting issues and raise new concerns with government agencies. Thus, the argument is specious. The shifting of funds by UJA Federation of New York from Defendant Congregation Shaare Zedek to CAJAC is a factor strongly favoring veil piercing.

*Guarantee of Debts* – There are two types of contracts at issue here which Defendant CAJAC seeks to conflate. The first contract is the perpetual/annual care contracts which CAJAC has assumed responsibility for as they run with the land which it has taken possession of. Although CAJAC is not a signatory to these contracts, it is now legally responsible for the contracts as the *de facto* owner of the land. The responsibility for those contracts likely exceed \$5 million. *See* Buchman Decl., Ex. K, Declaration of Hayden Burrus, dated December 24, 2008. The other contract is the landscaping contract which the defendants have admitted CAJAC entered into concerning a cleanup costing “hundreds of thousands of dollars” concerning a cemetery which is a “multi-million dollar endeavor.”

<http://citynoise.org/article/8696>. Try as it might, there is simply no dancing around these weighty numbers which Defendant CAJAC has assumed responsibility for as *de facto* owner of the cemetery. And there is no denying CAJAC is inadequately capitalized when weighed against the Bayside Cemetery “million dollar endeavor”. *See* Buchman Decl. Ex. J.

For these Defendants to collectively suggest that a “truly independent,” new, undercapitalized, recently designated 501(c)(3) entity would immediately take on a massive financial obligations which exceeds its endowment for one cemetery, thereby impairing its

ability to work on “other cemeteries” in accordance with its “allegedly broader mission,” is incredible. No truly independent charitable organization would jump “whole hog” into one endeavor and financially overwhelm itself unless there were some hidden agenda or ulterior motive. This reality coupled with the timing surrounding the creation of CAJAC, the people involved in its creation (two Shaare Zedek lawyers – Klingsberg and Katz) and CAJAC’s own conduct and statements collectively do not project an image of “charitable” independence at all. These facts, individually and collectively, lead to the inescapable conclusion that CAJAC is a shell created by a tortfeasor to assist the tortfeasor in continuing to evade responsibility and liability for a conscious decision it made steal money from those who it thought were completely voiceless. Those voiceless souls are well represented by Plaintiffs in the collective action. Under these uncommonly clear circumstances, Defendant CAJAC is a “necessary party” in this litigation and “shell” or “dummy” designed to absolve Defendant Congregation Shaare Zedek of liability and financial responsibility for the synagogue’s admitted theft. Accordingly, CAJAC’s motion to dismiss should be denied.

II.

**CONCLUSION**

For the foregoing reasons, Defendant's motion to dismiss should be denied in its entirety.<sup>19</sup>

Dated: April 1, 2011  
New York, New York

Respectfully submitted,

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<sup>19</sup> To the extent this Court grants any portion of Defendant's motion to dismiss, Plaintiff respectfully requests leave to replead.