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October 16, 2008

VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable Raymond J. Dearie
Chief United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Lucker, Cohen, Goldstein. v. Bayside Cemetery and Congregation Shaare Zedek*, Civil Action Nos. 07 Civ. 3823, 08 Civ. 3555, 08 Civ. 3923(RJD)(JMA)

Dear Chief Judge Dearie:

I represent Plaintiffs in the above-referenced actions. Under Your Honor's rules, Defendants were required to "serve each party by 5 p.m." on the due date with a hard copy of their twenty-five page motion to dismiss. Defendants untimely served a hard copy of their motion to dismiss[1] at 5:46 p.m. on October 13.th The brief contains the same meritless standing, statute of frauds and statute of limitations arguments which likely caused Your Honor to state at the pre-motion conference:

> [b]ut it seems to me, and this is not a ruling, that the notion of getting rid of this complaint in *toto* at this stage is far fetched. I mean for the very reason you've given me that rather interesting and detailed history, we've got to know a little bit more information before we start sending him packing. Exhibit B, Hearing Transcript, December 19, 2007 pp. 15-16.

For the reasons set forth below, Defendants untimely motion is "dead on arrival" and should be denied now with leave to replead as a motion for summary judgment after the close of discovery.

Standing: Defendants' standing arguments are factually and legally misplaced.[2] Mr. Lucker, Ms. Cohen and Ms. Goldstein all serve as executors of the family members whom they seek to represent. Even if these individuals were not executors, it is hornbook law that family members possess requisite standing. The rule was well stated in *Bogert*, Trusts and Trustees, § 414 pp. 345-346:

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[1] The motion papers are attached hereto as Exhibit A.

[2] Defendants spend ten pages of their brief arguing the complaint is inadequate because the plaintiffs have not alleged an "individualized, particularized injury." Exhibit A at pp. 5-15. Defendants fail to appreciate that Plaintiffs are pursuing claims as legal/personal representatives of their family members *ie* "standing in their deceased family member's shoes." Plaintiffs are not pursuing personal injury claims. Defendants' ten page standing argument is needless noise, patently frivolous and should not be further entertained by this Court for the reasons set forth in the standing section herein.

> A case of somewhat similar type is that of a cemetery trust when regarded as charitable. There the lot owners, persons who are entitled to have their dead buried there, or *who already have friends or relatives interred in the cemetery, all may be said to have a definite interest in the trust.* Other members of the public may also receive benefit, through the opportunity to buy lots, or otherwise; *but the lot holders and others similarly situated are clearly benefited and interested in the upkeep of the cemetery. Such interest may be regarded as sufficient to enable them to sue to compel execution of the cemetery trust.*

See also 14 C.J.S. Cemeteries § 25, p. 85; Jackson, The Law of Cadavers, p. 362. While there does not appear to be a New York case directly on point, the Supreme Court of West Virginia *In The Concerned Loved Ones and Lot Owners Association of Beverly Hills Memorial Gardens v. Pence*, 181 W. VA. 649, 383 S.E. 2d 831, 1989 W. VA. LEXIS 146 (1989) addressed the issue: "Do the plaintiffs have standing and any cause of action against the cemetery corporation and its individual owner for legal and punitive damages based upon desecration of cemetery land, fraud, outrageous conduct, *breaches of contractual duty, breaches of fiduciary and trust duties*, and/or violation of public policies?" *Id.*, at *4 (emphasis added). Answering the question in the affirmative the court stated:

> [the preservation] of remains is a legal right, which in this country is regarded as a quasi right in property, the violation of which is cognizable in and may be redressed at the suit of near relatives by an action on the case against the wrongdoer.

Id.; Accord, Bennett v. 3 C Coal Co., 180 W. Va 665, 379 S.E.2d 388, 392 (1989). Decisions from courts in New Jersey, Pennsylvania, Illinois, North Carolina, Kentucky and Texas have likewise determined that family members or near relatives, like Plaintiffs in this action, possess standing to pursue these types of claims.[3] Thus, Defendants' standing argument, even if they were to focus on the correct issue, is entirely meritless. *See* fn 1.

Statutes of Fraud and Limitations: The Supreme Court has held Plaintiffs are under no obligation to anticipate these *affirmative defenses* in their complaint and plead that the *affirmative defense* does not apply. *Gomez v. Toledo*, 446 U.S. 635 (1980); *E.On AG v. v. Acciona, S.A.*, 468 F. Supp. 2d 559 (S.D.N.Y. 2007). The reason is simple. A court is entitled to a more complete record to analyze the facts and law. Issues surrounding the statute of frauds and statute of limitations "depend[] on matters outside the pleadings, so it is rarely appropriate to grant a Rule 12(b)(6) motion to dismiss" where these types of issues are involved. *Hoffkins v. Monroe-2 Orleans BOCES,* 2007 U.S. Dist. LEXIS 32313, 2007 WL 1288210, at *2 (W.D.N.Y. 2007); *see also Barr v. Charterhouse Group Int'l, Inc. (In re Everfresh Beverages, Inc.),* 238 B.R. 558, 577 (Bankr. S.D.N.Y. 1999). It is also monumentally unfair for Defendants to seek dismissal under Fed. R. Civ. P. 8(a) for failure to plead the specifics of the trust fund agreements which are now exclusively, or should be, in Defendants' possession. Defendants' refusal to turn over the Trust Fund Receipts is patently improper and they should not be allowed to

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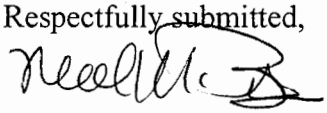
[3] *The German Evangelical St. Marcus Congregation of St. Louis v. Archambault*, 404 S.W. 2d 705, 1966 Mo. LEXIS 706 (1966); *Steele v. Rosehill Cemetery Co.*, 370 Ill. 405, 19 N.E. 2d 189; *Brown v. Hill*, 284 Ill. 286, 119 N.E. 977, 980; *Hertle v. Riddell*, 127 KY. 623, 106 S.W. 282; *Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893, 899; *Smith v. Ladage*, 397 Ill. 336, 74 N.E.2d 497, 500; *Seitzinger v. Becker*, 257 Pa. 264, 101 A. 650, 651; *Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536, 36 S.W. 802, 805; *Clark v. Rahway Cemetery*, 69 N.J. Eq. 636, 61 A. 261.

affirmatively seek dismissal on this and other grounds while "hiding the ball" from those to whom they owe a fiduciary duty[4] of disclosure.[5] *See* Exhibit C; *see also* Exhibit A, pp. 17-19.

Denying this untimely motion will not prejudice Defendants since the standing argument is meritless, and Defendants do not seek dismissal as to Ms. Goldstein's breach of contract claim under the statutes of fraud or limitations. Even if the Court were to partially grant Defendants' motion on the present incomplete record at least one, and likely two,[6] of the three cases would remain. Defendants will, therefore, be unable to avoid discovery. Under these circumstances, Plaintiffs respectfully submit that efficiency and justice would be served if Defendants' arguments were consolidated and brought as a summary judgment motion after a complete record has been developed. Fed. R. Civ. P. 1 ("just, speedy and inexpensive determination of every action and proceeding.") A ruling to this effect is appropriate where, as here, Defendants have already conceded liability.[7]

In light of the foregoing, Plaintiffs respectfully request that Defendants' motion to dismiss be denied at this time with leave to replead at the close of discovery as a summary judgment motion. To the extent the Court wishes the parties to proceed with briefing this tardy, meritless motion, Plaintiffs respectfully request that the Court enter an Order requiring Defendants to produce: (i) all documents given, either voluntarily or pursuant to a Civil Investigative Demand, to the New York State Attorney General's Office ("NYAG"); (ii) all documents concerning William Cohen, Anna Levy, Solomon Levy, Charles Levy, Esther Levy, Ruth Lucker, Harry Lucker, and Chebra Shebath Achim burial society; and (iii) all perpetual care (Trust Fund Receipts) and annual care contracts. These documents, which have already been gathered, bates stamped, produced to the NYAG and placed in storage, can be produced in a few days with virtually no burden to Defendants. Plaintiffs will seek no modification of the current schedule should the Court Order the production of these documents at this time.

Respectfully submitted,



Michael M. Buchman

c: Stephen M. Axinn (Counsel for Defendant Congregation Shaare Zedek)

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[4] *See Yochim v. Mount Hope Cemetery Association*, 163 Misc. 2d 1054 (Cty. Ct Yon 1994) (*citing DiMaio v. State of New York* , 135 Misc. 2d 1021, 1025); *see also* Exhibit D, New York Membership Corporation Law § 92.

[5] Mr. Lucker has previously produced Wills demonstrating he is the legal representative for his grandparents.

[6] Mr. Lucker has already established the existence of a perpetual care agreement by virtue of a contemporaneous document demonstrating his grandparents' burial society purchased a perpetual care contract. *See* Exhibit E. "A case may be taken out of the Statute of Frauds by writings memorializing the agreement." *GB Marketing USA, Inc., Gerolsteiner*, 782 F. Supp. 763 (W.D.N.Y. 1991) (citing *Del Monte Corp. v. Mercantum (US) Corp.*, 175 A.D.2d 72, 572 N.Y.S.2d 678, 680 (N.Y. App. Div. 1991).

[7] Defendants seek dismissal under *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1965 (2007) on the grounds Plaintiffs' claims are implausible. *See* Exhibit A at 6-7. The argument is belied by opposing counsel's admission of his client's liability: Mr. Axinn has said Defendants "did 'borrow' money from the cemetery's general operating accounts and subsequently repaid its debts. Such a practice, he said, is "not at all unusual for charitable corporations, including religious corporations." Bayside Cemetery Mess Lands in Federal Court, *The Jewish Week*, October 3, 2007. Defendants were required to segregate the perpetual care monies, invest the monies, use the investment income solely for upkeep of perpetual care plots and maintain the corpus of the trust inviolate. *See People Ex Rel Vacco v. Woodlawn Cemetery*, 173 Misc.2d 846, 662 N.Y.S2d 369 (Sup. Ct Alb. Cty 1997); *see also* Exhibit D. Defendants have failed to do so and their attorney's statement constitutes an admission of *per se* liability. *Id.*

EXHIBIT A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN R. LUCKER, ELIZABETH A. LUCKER, NANCY L. ROUSSEAU, individually and on behalf of all others similarly situated, Plaintiffs, -against- BAYSIDE CEMETERY and CONGREGATION SHAARE ZEDEK, Defendants.	No. 07 Civ. 3823 (RJD) (JMA)
LYNN COHEN, individually and on behalf of all others similarly situated, Plaintiff, -against- BAYSIDE CEMETERY and CONGREGATION SHAARE ZEDEK, Defendants.	No. 08 Civ. 3555 (RJD) (JMA)
FRAN GOLDSTEIN, individually and on behalf of all others similarly situated, Plaintiff, -against- BAYSIDE CEMETERY and CONGREGATION SHAARE ZEDEK, Defendants.	No. 08 Civ. 3923 (RJD) (JMA)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This motion to dismiss is based upon black letter principles of law, but because it involves a situation that raises significant emotional and religious issues, it is important to point out that dismissal of this litigation is appropriate and necessary for reasons that go beyond straightforward legal arguments. The simple fact is that these lawsuits are impeding the goal that Defendants, the Court, and, we assume, the Plaintiffs all share: the restoration of Bayside Cemetery to an appropriate condition. Thus dismissal is not only legally appropriate, but also in the best interests of the entire Jewish community.

The understandable desire for an improvement at Bayside should not obscure the fact that the cemetery's condition and the Congregation's efforts to fix it are completely distinct from the legal claims asserted in these actions. Indeed, even if Plaintiffs were granted all of the relief that they seek, it would not work any material improvement in the condition of the cemetery.

Defendants' motion to dismiss is grounded on fundamental principles of law: namely that, to bring a claim in federal court, a plaintiff must have standing to sue based on a particularized, legally cognizable injury; that a claim must be brought within the time period established by the relevant statute of limitations; and that a plaintiff's complaint must allege facts that, if true, would establish the relevant elements of each of the plaintiff's claims for relief. Since the Plaintiffs in these actions do not, and cannot, state claims upon which the court could grant them relief, their cases should be dismissed. With the dismissal of these actions, Congregation Shaare Zedek and the Jewish communal agencies with which it is working can focus on their efforts to find and fund a permanent and sustainable solution for Bayside Cemetery without the obstacles created by the pendency of this litigation.

BACKGROUND

Congregation Shaare Zedek (the "Congregation") is one of the oldest synagogues in New York City, with origins dating back to 1837. In the early 1850s, the Congregation acquired the 6.7 acres of land that is now Bayside Cemetery ("Bayside"), and over the ensuing years, sold all but approximately 5% of the property to more than 100 different synagogues and burial societies from across the then-burgeoning New York Jewish community, pursuant to deeds by which the purchasers assumed responsibility for the upkeep and maintenance of their sections of the cemetery. Over the next century and a half, however, the Jewish community in New York underwent significant demographic changes, and all but a handful of those organizations—including the Chebra Shebath Achim Society (the "Society"), to which the Lucker Plaintiffs' grandparents apparently belonged—ceased to exist.[1] The Congregation itself nearly died as its membership aged and dwindled. It is undisputed that, beginning no later than the early 1970s, conditions at the cemetery deteriorated, primarily as the result of the lack of upkeep by the by-then-defunct burial societies and a shortage of funds for routine maintenance.[2]

Thanks largely to a generous bequest from one member, the Congregation was not forced to close its doors and was able to survive into the 1990s, when it was essentially reborn as a group of younger Jewish residents moved into the Congregation's

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[1] The factual allegations as to all three named plaintiffs in No. 07 Civ. 3823 are identical, and this brief will refer to them collectively (including Nancy Rousseau) as the Lucker Plaintiffs. The Complaints in No. 08 Civ. 3855 and No. 08 Civ. 3923 contain virtually identical substantive allegations, except for the description of the named plaintiffs' ("Cohen" and "Goldstein", respectively) relationship to the cemetery in paragraph 18, and the inclusion of a contract with the Goldstein Complaint. Except where noted or required by context, citations to the Complaint are to the identical paragraphs of the Complaints, with possible changes in gender and number for purposes of grammatical agreement.

[2] Notably, it appears that this pattern was not confined to Bayside, but can be seen in many older Jewish communities around the United States. Recognizing that, a number of Jewish communities — including those of Massachusetts, Cincinnati, and MetroWest New Jersey — have launched and funded efforts to assume responsibility, on a communal basis, for older cemeteries that were once owned and administered by individual synagogues.

Upper West Side neighborhood. Lacking financial resources but not commitment, the Congregation's new leadership has invested significant effort, both financial and physical, to restore Bayside to an appropriate condition and then endow it with the funding necessary to allow it to continue as a self-sustaining entity in perpetuity. All of that work has been done in cooperation with responsible parties in the larger New York Jewish community and with the knowledge of the Charities Bureau of the New York State Attorney General's Office.

Those efforts have recently begun to bear fruit. Last year, the Jewish community, in partnership with the Congregation, established the Community Association for Jewish At-Risk Cemeteries ("CAJAC"), a not-for-profit corporation with the specific purpose of raising funds for the ongoing management and maintenance of Bayside and other similar at-risk Jewish cemeteries in New York State. Although CAJAC's initial effort to hire an executive director was stymied by the filing of the first of these lawsuits, it has recently, with the encouragement and financial support of UJA-Federation of New York, retained a noted Jewish philanthropic executive to begin implementing its action plan, which includes long-term fundraising and coordinating cleanup efforts at Bayside and elsewhere. UJA-Federation has also reaffirmed its commitment to contribute towards the cost of a future one-time cleanup of the cemetery, once CAJAC has received substantial funding, and to provide partial funding for a fundraiser for CAJAC. The foundation has thus been laid for a long-term, sustainable, community-wide solution to the larger Bayside problem. Yet it is unclear whether that progress can be sustained if this litigation is allowed to continue to drive supporters and organizations away from tackling the necessary and difficult work

SUMMARY OF ARGUMENT

Although the Complaints in these actions purport to state eight different state law claims, each suffers from one overriding defect, requiring their dismissal pursuant to Rule 12(b)(6): by their own admission, none of the Plaintiffs have any direct or legally-cognizable relationship with either of the Defendants that would suffice to give them either standing to sue or any substantive claim under New York law. Indeed, other than perhaps visiting a relative's grave at Bayside, none of the Plaintiffs allege that they have had any interaction whatsoever with either Defendant. It is unsurprising, therefore, that the Complaints do not provide any explanation for how the Plaintiffs were personally injured by any of Defendants' alleged misconduct (or have any other cognizable standing to sue), and instead seek to blur the line between the Plaintiffs, their relatives, and the other members of the purported plaintiff class. It is well-settled, however, that individual injury — not simply the ability to point to someone else who might have been injured — is the touchstone not only of standing to sue under Article III, but also of each of the statutory and common law claims Plaintiffs assert under New York law.

Each of the Complaints also suffers from its own combination of other defects. The Lucker and Cohen Complaints, for example, omit crucial information that is necessary to sustain their breach of contract claims, while the Lucker Plaintiffs' claims should, based on their allegations, have been brought against the Society. The Lucker and Goldstein Complaints (which were the only two to provide sufficient information to even assess their timeliness), meanwhile, are barred by the statute of limitations.

Finally, it is worth noting that dismissing these actions will not immunize the Defendants from appropriate scrutiny. Regardless of the outcome of this motion, the Attorney General of the State of New York will retain standing to bring each of the

claims asserted in these Complaints. The Attorney General's staff is, of course, already aware of the Plaintiffs' allegations, and is more than competent to vindicate the interests of the Plaintiffs' relatives and others buried at Bayside if the Attorney General concludes that bringing suit is in the best interests of the cemetery and the broader community.

STANDARD FOR REVIEW

A motion to dismiss for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), tests the legal sufficiency of a complaint, assuming, for purposes of the motion, the truth of all of its factual allegations. See, e.g., Bilick v. Eagle Elec. Mfg. Co., 807 F. Supp. 243, 247 (E.D.N.Y. 1992). As the Supreme Court has recently emphasized, however, surviving a motion "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," Bell Atl. Corp. v. Twombly, 127 Sup. Ct. 1955, 1965 (U.S. 2007), and the court need not accept conclusory allegations, particularly where they are contradicted by other allegations in the complaint, Straus v. Prudential Empl. Sav. Plan, 253 F. Supp. 2d 438, 449 (E.D.N.Y. 2003).

ARGUMENT

I. PLAINTIFFS, WHO CONCEDE THAT THEY DID NOT ENTER INTO ANY CONTRACTUAL OR OTHER RELATIONSHIP WITH EITHER DEFENDANT, CANNOT STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

A. None of the Plaintiffs can allege the individualized, particularized injury necessary to give them standing to bring these actions.

It is elementary that, to bring a claim in federal court, plaintiffs bear the threshold burden of establishing their standing to sue. That requires, at a minimum, that the plaintiffs "have suffered an injury in fact - an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco

Managed Care, LLC, 433 F.3d 181 (2d Cir. 2001) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). The Plaintiffs in these actions cannot meet that threshold burden because, as is clear from the face of their Complaints, they do not seek to vindicate any particular interest of their own. Rather, Plaintiffs claim that Defendants have breached duties that were allegedly owed to third parties, including one or more of each Plaintiff's relatives. Since Plaintiffs cannot point to any way in which *they* even *could have been* personally injured by Defendants, their claims should be dismissed for want of standing.

Given that the basic premise of these actions—despite the inclusion of claims sounding variously in false advertising, deceptive trade practices, breach of fiduciary duty, etc.—is that Defendants allegedly failed to honor perpetual or annual care contracts, it is particularly notable that Plaintiffs do not allege that they ever entered into any contracts with a Defendant, or even contemplated doing so. They do not allege that they were induced to give any money to a Defendant (or any other person), nor do they allege that Defendants have damaged any property belonging to them. Indeed, if one credits the allegation that it was Plaintiffs' *relatives* who made perpetual care contracts with the Defendants (see, e.g., Compls. ¶ 19), there is no reason for Plaintiffs to have paid Defendants anything for grave care or for any other reason. All that remains of Plaintiffs' allegations of injury, therefore, are entirely conclusory statements that Plaintiffs have been injured by Defendants' conduct, which contradict Plaintiffs' overall factual theory. (See, e.g., Compls. ¶¶ 35, 41, 48, 60, 65, 71.) As the Second Circuit has long recognized—even before the Supreme Court's recent articulation of a higher "plausibility standard", see Twombly, 127 Sup Ct. at 1966; ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.,

493 F.3d 87, 98 n.2 (2d Cir. 2007)—"courts do not accept conclusory allegations on the legal effect of the events plaintiff has set out if the allegations do not necessarily follow from his description of what happened." In re Am. Express Co. S'holder Litig., 39 F.3d 395, 400 n.4 (2d Cir. 1994) (affirming dismissal pursuant to Rule 12(b)(6) despite "cursor[y]" allegations of injury and proximate causation).

Nor are Plaintiffs' claims saved by denominating their Complaints as class actions pursuant to Rule 23. It is well-settled that the Federal Rules of Civil Procedure, including Rule 23, cannot expand any party's substantive rights. Rules Enabling Act, 28 U.S.C. § 2072(b); see also In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 149 n.2 (2d Cir. 2001) (recognizing defendants' right to assert affirmative defenses against the claims of each plaintiff in a Rule 23 class). It follows, therefore, that where a motion to dismiss is brought prior to the certification of a class, the court must evaluate the sufficiency of plaintiffs' own claims, not those of other members of the purported class. Lorber v. Beebe, 407 F. Supp. 279, 291 n.11 (S.D.N.Y. 1975), cited with approval by Schweizer v. Trans Union Corp., 136 F.3d 233, 239 (2d Cir. 1998). As the Supreme Court and Second Circuit have made clear, that principle applies with all the more force to the evaluation of standing, given its constitutional dimensions, "and class plaintiffs must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Central States, 433 F.3d at 199 (collecting Supreme Court cases).

Finally, Plaintiffs do not claim to bring these actions in any type of representative capacity that would authorize them to sue in the names of their relatives. None of the Complaints alleges that it is brought on behalf of a decedent's estate, or that the Plaintiffs

are the executors or personal representatives of such an estate; indeed, the Cohen and Goldstein Complaints do not even *identify* the relatives on whose behalf those Plaintiffs might seek to sue.[3] In the absence of such allegations, the only reasonable reading of the Complaints is that these actions are brought by Plaintiffs in their personal capacities, necessitating their dismissal.

B. New York law imposes similar requirements as a substantive element of each of Plaintiffs' claims for relief, which Plaintiffs do not meet.

1. The Plaintiffs' claims under the General Business Law are insufficient, as a matter of law, because Plaintiffs do not allege that they were personally "injured by reason of" Defendants' alleged violations of the statute.

Counts I-III of the Complaints attempt to state claims under the New York General Business Law for, respectively, false advertising, N.Y. Gen. Bus. L. § 350, deceptive trade practices, id. § 349, and to recover an enhanced civil penalty for deceptive trade practices directed at individuals aged 65 or over, id. § 349-c. Although each of those claims has separate elements under New York law, they are similar in one crucial aspect: a private right of enforcement that is conferred only on a "person who has been injured by reason of" a violation of the statute. Id. § 349(h), § 350-e(3). Moreover, as both the New York and Second Circuit Courts of Appeals have emphasized, the right to enforce the General Business Law belongs only to one who has been actually, personally, and directly injured, a standard that none of the Plaintiffs here can satisfy.

The New York Court of Appeals resolved whatever uncertainty there might have been as to that point in its opinion in Blue Cross & Blue Shield of N.J., Inc. v. Phillip

[3] Even if the Plaintiffs were named as the executors in their respective relatives' wills, it is unclear that that fact, by itself, would grant them standing to pursue these claims. Rather, "[i]t is well established in New York that a person who has not obtained letters as personal representative lacks standing or the legal capacity to commence an action on behalf of an estate." Schoeps v. Andrew Lloyd Webber Art Found., 851 N.Y.S.2d 74 (N.Y. Sup. Ct. 2007). The Complaints, of course, do not allege that any Plaintiff was named as an executor or that any letters of administration or letters testamentary were ever issued by Surrogate's Court.

Morris USA, Inc., 818 N.E.2d 1140 (N.Y. 2004). Answering a certified question from the Second Circuit Court of Appeals, New York's highest court concluded that the General Business Law did not abrogate the common law rule prohibiting recovery for derivative injuries. Id. at 1144. Thus, despite the fact that the plaintiff insurer had "actually paid the costs incurred by its subscribers" as a result of the tobacco companies' deceptive practices, it could not state a claim under § 349 because "the losses it experienced arose wholly as a result of smoking related illnesses suffered by those subscribers." Id. at 1145. As the court summarized its holding, "Of course, it is beyond dispute that section 349-h permits an actually (nonderivatively) injured party to sue a tortfeasor. We hold simply that what was required is that the party actually injured be the one to bring suit." Id. See also Ortho Pharm. Corp. v. Cosprophar, Inc., 32 F.3d 690, 697 (2d Cir. 1994) (affirming dismissal of § 349 and § 350 claims where the district court found that plaintiff "had shown no damages whatsoever").

While paragraphs 40 and 45 of the Complaints allege that "Defendants' deceptive conduct caused highly vulnerable individuals who placed their trust in Defendants to pay monies for the perpetual or annual care for their own or family member's plots located at [the] cemetery," Plaintiffs pointedly do not allege that *they* were among the individuals who paid such money or suffered such injury. Plaintiffs, therefore, are not even in the same position as was Blue Cross, which the Court of Appeals accepted as having suffered an actual monetary loss. Nor do they allege that they personally took any action as a result of Defendants' conduct or advertisements, or even that they viewed or were aware of the advertisements or deceptive conduct when they occurred. In short, despite the entirely conclusory statement that they are "entitle[d] to damages," (Compls. ¶ 36),

Plaintiffs do not provide a discernible theory of injury—let alone a permissibly non-derivative one—anywhere in Counts I-III. That failure is fatal to their statutory claims.

Finally, although the New York Court of Appeals' holding in Blue Cross was limited to § 349, there is no reason to be believe that § 350 provides any broader private standing.[4] As noted above, the statutory language creating a private cause of action is identical. Compare N.Y. Gen. Bus. L. § 349(h) and § 350-e(3). Further, even apart from Blue Cross, the courts have limited the right to recover for false advertising to those who actually relied on the false advertisement, while disclaiming such a reliance requirement in connection with § 349. See, e.g., Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005); Colbert v. Rank Am., Inc., 743 N.Y.S.2d 150, 151 (N.Y. App. Div. 2002) (affirming dismissal where advertising "did not play a role in [plaintiffs'] decision to purchase"); Gershon v. Hertz Corp., 626 N.Y.S.2d 80, 81 (N.Y. App. Div. 1995) ("Plaintiff's cause of action under General Business Law § 350 for false advertising is legally insufficient absent an allegation that he relied upon or even knew of defendant's advertising."). Plaintiffs' failure to allege that they viewed or relied upon the allegedly deceptive advertisements thus provides an independent basis for dismissing Count I of the Complaints.

2. Plaintiffs, who are neither parties to, nor intended beneficiaries of, the contracts that they claim were breached, and who do not claim to have been personally injured by such breaches, cannot state a valid breach of contract claim.

Count IV of the Complaints alleges that Defendants have breached perpetual care contracts. Since it is well-settled under New York law that a plaintiff asserting a breach

[4] The same is true for § 349-c, which incorporates the substantive provisions of § 349 and adds the age of the victims of the deception as an additional element. Even that assumes that there is a private right to recover the supplemental civil penalty provided for by § 349-c, all of which must, by statute, be paid into a special fund in the New York State treasury. See N.Y. Gen. Bus. L. § 349-c(3).

of contract must be either a party to, or an intended beneficiary of, the agreement it seeks to enforce, see, e.g., Highlands Ins. Co. v. PRG Brokerage, Inc., No. 01 Civ. 2272, 2004 U.S. Dist. LEXIS 83 (S.D.N.Y. Jan. 5, 2004); Equitable Life Assurance Soc'y of the U.S. v. Nico Constr. Co., 652 N.Y.S.2d 269, 270 (N.Y. App. Div. 1997) (a corporation that is "neither a party to th[e] contract nor a third-party beneficiary thereof, lacks standing to enforce any rights thereunder"), and it is clear from the Complaints that Plaintiffs do not allege that they were party to any such perpetual care contracts, their claimed standing must be as third-party beneficiaries. The case law establishes a high bar for such status, however, which Plaintiffs cannot reach.

Most fundamentally, a third party seeking to enforce a contract must show that it is an "intended," rather than merely an "incidental" beneficiary of the agreement. Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 85 N.E.2d 208, 211-212 (N.Y. 1985) (adopting the rule of the Restatement (2d) of Contracts). The Plaintiffs bear the heavy burden of demonstrating the parties' intent to give them standing to sue. "To create a third party right to enforce a contract, the language of the contract must clearly evidence an intent to permit enforcement by the third party," Consolidated Edison, Inc. v. Northeast Utils., 426 F.3d 524, 528 (2d Cir. 2005) (following Fourth Ocean), and "[a]bsent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent," id. (quoting LaSalle Nat'l Bank v. Ernst & Young LLP, 729 N.Y.S.2d 671, 676 (N.Y. App. Div. 2001)). Dismissal under Rule 12(b)(6) is, in turn, appropriate where the Plaintiffs have failed to allege facts that, taken as true, would be legally sufficient to establish standing to sue as a party or intended third-party beneficiary. See, e.g., Subaru

Distributors Corp. v. Subaru of Am., Inc., 425 F.3d 119, 124 (2d Cir. 2005); Sanders v. Bressler, Amery & Ross, P.C., No. 03-CV-5283, 2006 U.S. Dist. LEXIS 8352 (E.D.N.Y. Feb. 10, 2006).

Of the three Complaints, only the Goldstein Complaint includes a copy of the agreement that is the subject of the breach of contract claim, and an examination of its terms does not reveal any reference to Goldstein or any other intent to benefit an unlimited class of cemetery visitors or family members of Mr. Levy, the party who actually made the contract. With respect to the Lucker and Cohen Complaints, meanwhile, no contract language whatsoever is provided, making it objectively unreasonable to conclude that the Plaintiffs have met the "clear intent" standard of Consolidated Edison and Fourth Ocean. None of the Plaintiffs, therefore, have sufficiently alleged their standing to bring a breach of contract claim, and Count IV of each Complaint should be dismissed.[5]

Finally, the Plaintiffs' failure to allege that they were personally injured in any way by the alleged contract breaches provides an additional reason to dismiss their contractual claims. While the Complaints allege that Defendants' purported breaches of contract "have caused injury by allowing plots subject to such contracts to fall into complete disrepair," (Compls. ¶ 53), they do not connect that injury to any of the named Plaintiffs. Apart from general Article III standing considerations, particularized personal injury to the plaintiff is a necessary element of a breach of contract claim under New

[5] In addition, the Lucker Plaintiffs allege that their "grandparents purchased perpetual care from a Defendant through the Chebra Shebath Achim Society." (Lucker Compl. ¶¶ 19-21.) Thus, any breach of contract claims their grandparents may have had would have lay against the Society (with whom they allegedly contracted), and only the Society (if, in fact, it contracted with the Defendants) would have standing to sue Defendants. Neither, of course, suffices to state a claim upon which relief can be granted to the Lucker Plaintiffs.

York law, Spherenomics Global Contact Ctrs. v. vCustomer Corp., 427 F. Supp. 2d 236, 247 (E.D.N.Y. 2006), and the absence of such an allegation requires dismissal.

3. The Plaintiffs have not alleged that they have provided anything of value by which the Defendants could have been unjustly enriched.

Count V of the Complaints sounds in unjust enrichment, which requires Plaintiffs to establish three elements: "(1) that the [Defendants] benefited; (2) at the [Plaintiffs'] expense; and (3) that equity and good conscience require restitution." Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc., 448 F.3d 573, 588 (2d Cir. 2006). In attempting to meet that standard, Plaintiffs allege that "[i]t would be inequitable for Defendants to be permitted to accept and retain the benefit of . . . payments designated for perpetual or annual care services, which were conferred by Plaintiffs and the Class members and retained by Defendants." (Compls. ¶ 55.) The remainder of the Complaints, however, demonstrate that Plaintiffs do not allege that they (perhaps in contrast to other members of the proposed class) ever provided the Defendants with anything of value. Since the Defendants could not, therefore, have "benefited at the [P]laintiffs' expense," Beth Israel Med. Ctr. at 588, Plaintiffs cannot state unjust enrichment claims upon which relief can be granted.

4. Plaintiffs have not alleged that either Defendant stood in a fiduciary relationship with any Plaintiff, and therefore lack standing to claim a breach of fiduciary duty.

Counts VI and VII of the Complaints assert claims for, respectively, breach of fiduciary duty and aiding and abetting a breach of fiduciary duty. The existence of a fiduciary relationship is a necessary element of both claims, although in the latter case the duty must be owed to the plaintiff not by the defendant, but rather by a third party. See Atlantis Info. Tech. v. CA, Inc., 484 F. Supp. 2d 224, 231 (E.D.N.Y. 2007) (identifying "(1) the existence of a fiduciary relationship between the parties; and (2) a breach of the

fiduciary duty" as the two elements of a simple breach of fiduciary duty claim); Sharp Int'l Corp. v. State St. Bank & Trust Co., 403 F.3d 43 (2d Cir. 2005) (listing "a breach by a fiduciary of obligations to another of which the aider and abettor had actual knowledge" as the first element of an aiding and abetting claim).

The Complaints here do not allege that either Defendant owed any duty to any of the Plaintiffs, let alone that of a fiduciary. The closest the Complaints come to alleging the existence of the necessary fiduciary relationship is in paragraph 58, which refers to the Defendants' "grossly negligent mismanagement of the funds entrusted to them for the perpetual or annual care of cemetery plots and the improper or negligent handling of perpetual and annual care monies in violation of Defendants' fiduciary duties." It is clear from the rest of the Complaints, however, that Plaintiffs do not allege that they ever personally provided any funds to Defendants, in trust or otherwise.

Moreover, even if Plaintiffs were allowed to stand in the shoes of their family members who *are* alleged to have provided perpetual care funds to Defendants, Defendants would still not owe Plaintiffs a fiduciary duty as a matter of law. Pursuant to § 8-1.5 of the Estates, Powers & Trusts Law, trusts for the perpetual care of cemetery plots are charitable in nature. The trustee of a charitable trust, meanwhile, owes a fiduciary duty to the trust's ultimate charitable beneficiary (i.e., the People of the State of New York, acting through the Attorney General), not to the settlor of the trust or to the settlor's heirs or assigns. See Restatement (Second) of Trusts §§ 379, 391.

Since Plaintiffs do not, and cannot, allege that either Defendant owed them any type of fiduciary duty, both Counts VI and VII of the Complaints must be dismissed as insufficient as a matter of law.

5. The Plaintiffs are not entitled, as a matter of law, to possession of the allegedly converted funds, and therefore lack standing to claim conversion.

Under New York law, the tort of conversion has four elements: "(1) the defendant acted without authorization; (2) the defendant exercised dominion or a right of ownership over property belonging to another; (3) plaintiff has made a demand for the property; and (4) the demand [was] refused." McCalla v. SUNY Downstate Med. Ctr., No. 03-CV-2633, 2006 U.S. Dist. LEXIS 38715 (E.D.N.Y. June 8, 2008). Further, to have standing to bring a conversion claim, the plaintiff must demonstrate that it has ownership or an immediate right to possession of the allegedly converted property. See, e.g., Bank of Am. Corp. v. Braga Lemgruber, 385 F. Supp. 2d 200, 222-24 (S.D.N.Y. 2005).

In this case, the Complaints do allege that "Plaintiff[s] and members of the class provided Defendants with monies for placement in a trust," (Compls. ¶ 67), and that "Plaintiff[s] and members of the Class had an ownership right or an immediate superior right of possession of these monies over Defendants," (Compls. ¶ 69). Those allegations, however, are legally insufficient. First, it is important to note that despite the inclusion of Plaintiffs in ¶ 67, the factual theory of the entire remainder of the Complaints is that it was Plaintiffs' family members, and not Plaintiffs themselves, that provided Defendants with money for perpetual care. As noted earlier, the Court is not obligated to credit conclusory allegations that are in conflict with all of the other specific facts alleged in the Complaints, see Straus v. Prudential Empl. Savings Plan, 253 F. Supp. 2d 438, 449 (E.D.N.Y. 2003); moreover, even if paragraph 67 were accepted as true, it would be wholly insufficient to give Defendants any notice of the nature of the alleged conversion, since there is no information anywhere else in the Complaints describing the amount of money allegedly provided by Plaintiffs, the terms and date on which it was provided, etc.

See also Bank of America, 385 F. Supp. 2d at 223 ("Plaintiffs' conclusory allegation that they have 'a legal right and superior right of possession to assets currently being held by Defendant Lembgruber' is, without more, insufficient to survive a motion to dismiss.").

More fundamentally, the Complaints are premised on the theory that Plaintiffs' relatives provided the perpetual care funds to the Defendants pursuant to valid trust agreements. Even if the Defendants failed to satisfy the terms of those agreements (as was alleged in, for example, Counts IV, VI, and VII), Plaintiffs would not be entitled, as a matter of law, to recover possession of their relatives' property. Rather, the proper remedy would be to compel the Defendants, at the instigation of a plaintiff having standing, to comply with their obligations or to make restitution of any converted funds to the appropriate trusts. By effecting a final transfer of the principal of their perpetual care payments to Defendants, Plaintiffs' relatives would have terminated their ownership of the funds, including their right to transfer them to their family members, including Plaintiffs. (Of course, the Complaints do not allege that Plaintiffs are, in fact, entitled to any such funds by gift, devise, intestate succession, or any other means.)

Perhaps because they recognized that they lacked such a legal right to the money that their relatives had originally paid for perpetual care, Plaintiffs have also failed to satisfy the requirement of a demand. In fact, even in their prayer for relief, Plaintiffs do not seek the return of any identifiable property. The failure to allege demand and refusal is fatal to any conversion claims by Plaintiffs. See Tompkins v. Fonda Glove Lining Co., 80 N.E. 933, 934 (N.Y. 1907) ("The universal rule in this state is that where property comes lawfully into the possession of a party he cannot be charged for a conversion in failing to surrender it to the owner unless a demand therefor is made."); see also ADP

Comm'n Servs., Inc. v. In House Atty. Servs., Inc., 390 F. Supp. 2d 212, 223 (E.D.N.Y. 2005) (noting that "[i]n order to plead a viable claim for conversion, a plaintiff must allege that they demanded return of the property . . . and were met with refusal").

C. Despite the Plaintiffs' lack of standing, the Attorney General retains the ability to vindicate the interests of Plaintiffs' relatives in connection with Bayside Cemetery.

Although, given the constitutional underpinnings of the standing doctrine, Plaintiffs could not claim standing merely by demonstrating that there are no other better-suited candidates to bring these claims, the Court need not worry that by dismissing these actions, the Defendants will be freed from legal scrutiny. In addition to the work the New York Attorney General's staff continues to do to facilitate a long-term solution to the Bayside situation, the Attorney General possesses standing to bring each of the claims asserted by Plaintiffs. See, e.g. N.Y. Gen. Bus. L. §§ 349(b), § 350-d; N.Y. Estates, Trusts & Powers L. § 8-1.1(f); cf. People ex rel. Vacco v. Woodlawn Cemetery, 662 N.Y.S.2d 369 (N.Y. Sup. Ct. 1997). Of course, the Attorney General is also vested with the discretion to determine whether and when it is appropriate to bring such claims.

II. THE LUCKER AND COHEN PLAINTIFFS' CONTRACT CLAIMS FAIL TO ALLEGE THE NECESSARY MATERIAL TERMS OF THE CONTRACT.

A. Rule 8(a) requires, at a minimum, that the terms of the contract that are material to the breach of contract claim be described in the Complaints.

Although Federal Rule of Civil Procedure 8(a) is designed to require a plaintiff to plead only a minimum of facts, plaintiffs are required to provide sufficient information to put the defendant on notice as to the claim, namely "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, in a breach of contract claim, the plaintiff must either incorporate the contract into the complaint by reference (as the

Goldstein Complaint does here) or describe its material terms. "A breach of contract claim will be dismissed . . . as being too vague and indefinite where the plaintiff fails to allege, in nonconclusory fashion, the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated." Highlands Ins. Co. v. PRG Brokerage, Inc., No. 01 Civ. 2272, 2004 U.S. Dist. LEXIS 83, at *25 (S.D.N.Y. Jan. 5, 2004).

In this case, neither the Lucker nor Cohen Complaints incorporates a copy of the relevant contract, nor do they identify any of the material terms of the contract, most notably the amount of money deposited for perpetual care. The absence of an allegation as to the amount of money that was deposited is particularly significant. Contrary to the description given in the Complaints, a perpetual care contract is not a promise "to keep one or more plots at a cemetery property in a presentable condition at all relevant times," (Compls. ¶ 5). Rather, as is made clear by both the contract attached to the Goldstein Complaint and by public statements of the New York State Division of Cemeteries, a perpetual care contract requires only that the principal sum be deposited and the income on that deposit be used for the care of the specified grave. Without knowing the size of the deposit, and thus the amount of income to be expected in a given year, it is impossible for a court to judge whether the contract has been breached. Clearly, such a term is "essential" to the contract, and its absence from the Complaints renders the breach of contract claims defective.[6]

[6] The Cohen Complaint, meanwhile, compounds the problem by not identifying the family member(s) who purchased perpetual care, their relationship to the Plaintiff, the graves for which the care was purchased, or even the approximate date of the purchase. Its breach of contract claim thus essentially amounts to the allegation that the Defendants have breached a contract one of them made at some unspecified time in the past, with some unspecified individual or individuals, with some unspecified terms. It is almost hard to imagine a breach of contract claim that would be more "vague and indefinite."

B. In light of the Lucker and Cohen Plaintiffs' failure to allege the existence of, or produce, the written perpetual care contracts on which they rely, their claims are barred by the Statute of Frauds.

The indefiniteness of the Lucker and Cohen Plaintiffs' breach of contract claims is amplified by the applicability of the Statute of Frauds. Section 5-701 of the New York General Obligations Law provides that:

> Every agreement, promise, or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise, or undertaking, (1) by its terms is not to be performed within one year of the making thereof or the performance of which is not to be completed before the end of a lifetime.

The alleged contracts which Plaintiffs claim have been breached are for the perpetual care of cemetery plots, which are self-evidently agreements that cannot be performed within one year (or one lifetime) and are thus covered by the statute. As the New York Court of Appeals has held, "careful pleading is required to overcome the heavy burden created by the Statute of Frauds." Messner Vetere Berger McNamee Schmetterer Euro RSCG, Inc. v. Aegis Group, plc., 711 N.E.2d 953, 957 (N.Y. 1999), followed by, 186 F.3d 135 (2d Cir. 1999) (affirming dismissal on Rule 12(b)(6) motion for failure to satisfy the Statute of Frauds). Yet the Complaints here neither allege the existence of a written contract, nor include the type of information, including the identities of the parties, or even any date more specific than a decade (see Lucker Compl. ¶¶ 19, 20, 21), that would tend to suggest that Plaintiffs are aware of such a writing.

Further, while there is apparently some uncertainty as to whether New York law permits a party to even offer extrinsic evidence to satisfy the Statute of Frauds where it cannot produce the required writing, see AG Ltd. v. Liquid Realty Partners, LLC, 448 F. Supp. 2d 583, 586-7 (S.D.N.Y. 2006) (collecting cases), even those courts that permit

such evidence allow it "only after there has been an adequate explanation of the loss of the original," id. Where, as was the case in AG Ltd. and is true here, the Plaintiffs do not allege that they ever saw or possessed the alleged agreement, the Statute of Frauds cannot be overcome, and operates as a complete bar to Plaintiffs' claims.

III. THE PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

A. Plaintiffs' claims accrued before the earliest allowable date under the relevant statute of limitations.

Although specific dates are few and far between in the Complaints, it is largely undisputed that the events that are the subject of these actions took place decades ago. Given that the statutes of limitations for the various claims brought here are three and six years, the relevant claims accrued long before the earliest allowable date:

1. General Business Law Claims (Counts I-III)

Reduced to their essence, Plaintiffs' General Business Law claims appear to be that Defendants' deceptive trade practices and false advertising induced their relatives to purchase perpetual care contracts, when Defendants allegedly knew that they did not intend to perform; put differently, they are statutory "fraud in the inducement" claims. Although the Complaints do not specify when the asserted deceptive practices or advertising occurred, it is clear that the violations would have been complete as to each Plaintiff at the time their relatives executed a perpetual care contract (and were thus injured by the supposed deceptive conduct). Thus, given the admission in the Lucker Complaint that the Lucker Plaintiffs' grandparents made their purchase "in the 1970s", (Lucker Compl. ¶¶ 19-21), even construing the Complaint in the manner most favorable to the Lucker Plaintiffs, they would have accrued a cause of action under the General Business Law no later than December 31, 1979; Goldstein, meanwhile, would have

accrued her cause of action under the General Business Law no later than July 16, 1967 (the date of Mr. Levy's contract with the Congregation).

It was not until 1980, however, that the General Business Law was amended to permit a private right of action under § 349 and § 350. 1980 N.Y. Laws ch. 346, § 1. As the Second Circuit has recognized, that amendment was not retroactive, and there is no private right of action for conduct occurring prior to June 19, 1980. Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris USA, Inc., 344 F.3d 211, 222 n.6 (2d Cir. 2003). The Lucker and Goldstein Plaintiffs, therefore, cannot assert any claims under the General Business Law.

Even if the statute were construed to have retroactive effect, the same reasoning demonstrates that any claim would be time-barred. In New York, the statute of limitations for "liabilities imposed by statute" is three years. CPLR 214(2). Since § 349 and § 350 are not simply codifications of the common law, they are covered by the three year limitations period. See Williams v. Dow Chem. Co., No. 01 Civ. 4307, 2004 U.S. Dist. LEXIS 10940 (S.D.N.Y. June 16, 2004). Since the Complaints clearly do not allege any injury to the Plaintiffs by reason of deceptive practices or advertisements within the three years before the filing of these actions, the Lucker and Goldstein Plaintiffs cannot state a claim.[7]

2. Unjust Enrichment (Count V)

The statute of limitations under New York law for unjust enrichment is six years, running from the "occurrence of the wrongful act giving rise to the duty of restitution." Town of Oyster Bay v. Occidental Chem. Corp., 987 F. Supp. 182, 210 (E.D.N.Y. 1997).

[7] Cohen is excepted from this analysis only because there is no evidence whatsoever in her Complaint by which Defendants can determine when the violations she complains of allegedly occurred. Defendants have no reason to believe, however, that her claims are any more timely.

Regardless of whether the right to restitution is deemed to have accrued at the time Plaintiffs' relatives purchased perpetual care ("in the 1970s" for the Lucker Plaintiffs or 1967 for Goldstein), or when "[i]n the 1980s," Defendants allegedly made the "conscious decision to inappropriately remove moneys originally intended for perpetual or annual care," (Compls. ¶ 11), Plaintiffs' causes of action for unjust enrichment unambiguously arose more than six years prior to the filing of the Complaints, and are thus barred.

3. Conversion (Count VIII)

The statute of limitations for conversion is three years from the date of the alleged conversion. Sporn v. MCA Records, Inc., 448 N.E.2d 1324, 1326-27 (N.Y. 1983). Moreover, conversion is not a continuing wrong, and a single cause of action accrues at the point the property is converted, not upon each successive misuse or refusal to return the property. Id. Plaintiffs' claim therefore would have accrued no later than 1989, given the Complaints' allegation that "[i]n the 1980s," the Congregation "made a conscious decision to improperly remove monies originally intended for perpetual or annual care," (Compls. ¶ 11), and use them for purposes that were allegedly "inconsistent with the purpose originally given to the exclusion of the Plaintiffs," (Compls. ¶ 70). Given the three year statute of limitations, a timely claim for conversion would have had to have been interposed no later than 1992, meaning that the conversion claims in these actions are time-barred.

4. Fiduciary Duty (Counts VI & VII)

Under New York law, the statute of limitations for claims of breach of fiduciary duty is three years for claims that primarily seek damages. Here, to the extent Plaintiffs have any claim for damages, they would have accrued in a similar fashion to the claims for conversion (since the Plaintiffs' theory of injury appears to be the same, namely the

misappropriation of perpetual care funds), and timely fiduciary duty claims would therefore also had to have been interposed no later than 1992.

B. There is no basis for tolling the statute of limitations.

Recognizing the force of Defendants' statute of limitations defenses, Plaintiffs specifically allege, in paragraph 31 of the Complaints, that "[a]ny applicable statutes of limitations have been equitably tolled by Defendants' affirmative acts of fraudulent concealment, suppression, and denial of the true facts regarding the invasion of the fiduciary account(s) containing monies dedicated exclusively for perpetual care or annual care at Bayside Cemetery." Plaintiffs' rote invocation of the doctrine is insufficient as a matter of law, however, and should not serve as a barrier to any of Defendants' limitations defenses.

1. Plaintiffs have failed to plead fraudulent concealment with the particularity required by Rule 9(b).

First, it is well-settled that an allegation of "[f]raudulent concealment, like any other sort of fraud, must be pleaded with particularity, and the plaintiffs must offer 'distinct averments as to the time when the mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether by the exercise of ordinary diligence, the discovery might not have been before made.'" Bilick v. Eagle Elec. Mfg. Co., 807 F. Supp. 243, 255 (E.D.N.Y. 1992). Under Rule 9(b)'s requirement that fraud be alleged with particularity, "a plaintiff should specify the time, place, speaker, and content of the alleged misrepresentations," "should explain how the misrepresentations were fraudulent," and "plead those events which give rise to a strong inference that the defendant had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth." Caputo v. Pfizer, Inc., 267 F.3d 181, 191 (2d Cir. 2001). While the Second Circuit's list arose in the context of an ERISA claim, and the exact

same elements might not be applicable in this case, it is clear that the Complaints do not even approach the level of particularity required by the Second Circuit in Caputo, nor have Plaintiffs met their burden to plead "non-conclusory evidence of a conspiracy or other fraudulent wrong which precluded [the] possible discovery of the harms that [they] suffered," Pinaud v. County of Suffolk, 52 F.3d 1139, 1157 (2d Cir. 1995).

2. Even assuming the particularity requirement were met, Plaintiffs could not allege facts sufficient to successfully invoke the doctrine.

For the statute of limitations to be tolled under New York law due to fraudulent concealment, the plaintiff must allege (and ultimately prove) (1) "wrongful concealment" by the defendant; (2) "which prevented [plaintiffs'] discovery of the nature of the claim within the limitations period; and (3) "due diligence in pursing the discovery of the claim." Lanza v. Merrill Lynch & Co., 154 F.3d 56, 60 (2d Cir. 1998). Plaintiffs have not met their pleading burden in these cases.

Plaintiffs have offered no explanation — at whatever level of particularity — as to how Defendants' alleged concealment prevented them from bringing suit within the limitations period. The allegations in this case are far from "self-concealing," nor could they have been concealed. Plaintiffs' Complaints themselves disclose that the situation at Bayside Cemetery (including allegations of insufficient care of graves) was the subject of multiple news media accounts as early as 2002 and 2003. (Compls. ¶¶ 14-15.) Of course, Plaintiffs were free at any point (even before 2002) to visit the cemetery, and would then have been immediately aware of the condition of their relatives' plots, whether they were being cared for, et cetera, giving them more than enough reason to inquire as to whether they had a claim.

Finally, it is worth noting that Plaintiffs have not described any change in

Defendants' alleged concealment that would explain Plaintiffs' ability to file suit now. Presumably, if Defendants' concealment had earlier prevented Plaintiffs from learning of the existence of their cause of action, there should be some identifiable event which caused Plaintiffs to be able to bring this suit. Significantly, the question is not whether Plaintiffs would have had a weaker suit had it been filed years ago (although there is no evidence that would have been the case), but rather whether it was possible to file at all. As the Second Circuit has explained:

> In applying the doctrine of equitable tolling, we have made an important distinction between fraudulent concealment of the existence of a cause of action and fraudulent concealment of facts that, if known, would enhance a plaintiff's ability to prevail as to a cause of action of which the plaintiff was previously aware. . . . Although some of the facts putatively concealed by the defendants might have strengthened the plaintiffs' case by corroborating her story, we find that the absence of those facts did not sufficiently justify the plaintiff in not pursuing her cause of action as to merit equitable tolling.

Pearl v. City of Long Beach, 296 F.3d 76, 84 (2d Cir. 2002).

Since Plaintiffs have not alleged the elements of fraudulent concealment, their claims should be subject to the various statutes of limitation applicable to each of them.

CONCLUSION

In filing this motion, Defendants do not seek to abandon or deny their responsibility for Bayside Cemetery, or the Congregation's eagerness to see the situation there improved. Rather, they seek relief from these unfortunately misdirected lawsuits that are insufficient as a matter of law and distract attention both from the needed efforts to improve Bayside and from the Congregation's ordinary religious and charitable operations. Defendants therefore respectfully request that the Court dismiss the Complaints in their entirety, with prejudice, for failure to state a claim upon which relief can be granted.

Respectfully submitted,
AXINN, VELTROP & HARKRIDER LLP

By: _____

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Dated: October 13, 2008
New York, New York

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOHN R. LUCKER, et al.,	07-CV-03823 (RJD)
Plaintiff,	
-against-	United States Courthouse Brooklyn, New York
BAYSIDE CEMETERY and CONGREGATION, et al.,	December 19, 2007 10:30 a.m.
Defendants.	

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TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES CHIEF DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

(In open court.)

COURTROOM DEPUTY: Gentlemen, please, come forward.

THE COURT: Mr. Buchman.

MR. BUCHMAN: Yes, Your Honor.

THE COURT: If you'll be good enough to come up. I understand you're handling this pro bono.

MR. BUCHMAN: Yes, Your Honor.

THE COURT: What does that have to do with your business card?

We need to know who you are and where to get you.

MR. BUCHMAN: Your Honor, I can happily fill out a piece of paper with that information. I just didn't want my firm, who I'm doing this separate and apart from, to be implicated in any form or fashion, Your Honor.

THE COURT: Okay. You're a member of our court?

MR. BUCHMAN: Yes, Your Honor.

THE COURT: Okay. If that's all your concern, that's no problem. You've filed a notice of appearance?

MR. BUCHMAN: Yes, Your Honor.

THE COURT: Okay.

COURTROOM DEPUTY: Okay. We are on this morning for a premotion conference. This is Lucker versus Bayside Cemetery.

Can I ask the attorneys, please, to note their appearance, beginning with Counsel for Plaintiff.

MR. BUCHMAN: Michael M. Buchman for Plaintiffs John Lucker, et al.

MR. AXINN: Stephen Axinn, that's me, Your Honor. And Russell Steinthal of Axinn Veltrop & Harkrider, representing both of the Defendants, Congregation Shaare Zedek and Bayside Cemetery.

THE COURT: Okay.

Well, this is not the typical case. And I'll give you my reaction just to through the exchange of correspondence and my review quickly of the Exhibits, press releases and so on.

And if this sounds like I'm buying one side or the other, I don't mean it to be, but it does strike me as an opportunity for us all to do some good.

I can certainly understand the reaction of your clients, to the apparently now too long-standing conditions of these plots in this cemetery. After all, for some, if not all of them, perpetual care was paid for, and it seems somewhat oxymoronic to be speaking in that context of statutes of limitations. Or for that matter, even privity. Certainly the poor buried souls can't speak for themselves, but I'd rather put the legal stuff aside for a moment, at least -- if we have to, we'll litigate it -- and find out what's been going on.

I know the Attorney General's been involved. Is there a way that we can collectively, with or without a

mediator, or with or without the Attorney General, and given the fact that this community now is apparently on the upswing, this congregation --

MR. STEINTHAL: Slowly, Your Honor.

THE COURT: These things do happen slowly, but if New York City is your venue, these days, gentrification is overwhelming all of us. So, I just throw that out. Because here is a need for a remedy, and now I hear, on top of it all, Mr. Buchman is doing this without a fee.

So, what can we do before we spend a lot of time and money litigating some of these issues, if anything, to bring about an acceptable result?

MR. AXINN: Your Honor, both sides are serving without fee this morning, and our firm is also acting pro bono.

THE COURT: For once I'm the highest paid fellow in the room.

MR. AXINN: Not this morning, Your Honor.

THE COURT: Usually the opposite.

MR. AXINN: Not only not this morning, but not for this client, period.

I appreciate what Your Honor is suggesting, and I cannot speak for the Attorney General's office.

THE COURT: Of course not.

MR. AXINN: Nor can I speak for the other Jewish

communal organizations who have pitched in to try to remedy a situation which nobody denies requires a remedy, and sooner rather than later.

THE COURT: I appreciate that.

MR. AXINN: What has happened, and it's an unfortunate and I'm sure unintended consequence of the commencement of this lawsuit, is that it has been made more difficult for everybody involved to do what needs to be done here.

This organization which is known by its acronym CAGAC, the Community --

MR. STEINTHAL: Association for Jewish At-Risk Cemeteries.

THE COURT: Jewish At-Risk Cemeteries?

MR. STEINTHAL: Yes.

THE COURT: Can I interrupt for a second?

Does anybody want a reporter for this informal conference?

MR. BUCHMAN: I would like a transcript, Your Honor, only for the benefit of my client, because he's not here today. And he would have liked to have participated.

THE COURT: That's fine. You can order the transcript.

Go ahead.

MR. BUCHMAN: Thank you, Your Honor.

MR. AXINN: What we have seen happen here is that the commencement of the lawsuit has, I think, justifiably frightened away people who would otherwise have been forthcoming, either as employees of this CAGAC in a fund-raising capacity, or as donors to CAGAC because they are now dealing with a situation in flux in litigation and they are not happy about that.

We've, we have at Congregation Shaare Zedek, and on behalf of them and Bayside Cemetery, we are struggling to come up with the funds to make a significant improvement in the conditions of that cemetery, posthaste.

And the presence of the lawsuit, as I say, as I'm sure is an unintended consequence, is intimidating people and scaring them away. Even people who were willing to come and actually provide the machinery and equipment necessary for the restoration of the cemetery, the groundkeeper types, are nervous about being becoming involved as witnesses and so forth.

I would propose --

THE COURT: How large a plot is this?

MR. AXINN: Oh, it's vast. It's 31,000 gravesites, not all of which are filled.

MR. BUCHMAN: 34,000.

THE COURT: Gravesites?

MR. AXINN: Well, we can disagree about that.

THE COURT: On the average?

MR. AXINN: It's very, very large. And it's surrounded on both sides by other cemeteries. Acacia on one side and a cemetery called Mokom Shalom on the other side.

THE COURT: Are they at-risk cemeteries? I'm just curious.

MR. AXINN: I can't speak, I don't think Acacia is by any stretch of the imagination. And I can't speak to the conditions at the other cemetery.

THE COURT: Okay.

MR. AXINN: But there are other Jewish at-risk cemeteries, and they're all victims of the same situation.

Cemeteries are covered by the religious corporations law and by the cemetery laws of the State of New York. And a lot of small synagogues over time have gone out of business, and the cemeteries that they were tending have largely been abandoned.

This synagogue hasn't gone out of the business. It has declined in membership and in finances very significantly. And then, sometime in the early '90s began turning the corner and coming back to life.

But in the meantime, what is unusual about this case is that while this cemetery was created back in the 1800s, at first, they sold off 95 percent of the burial plots in this cemetery --

THE COURT: I read your papers on it.

MR. AXINN: -- to people other than the congregants of Shaare Zedek. And there's been very little income. Almost no income coming in to maintain this cemetery for a very long time, which is the cause of our problem.

So --

THE COURT: When a cemetery, just take it out of this one -- sells a plot to a noncongregant, for example, or sells a plot to a congregant, does it undertake as part and parcel of that transaction certain duties, contractual or otherwise?

In other words, I'm going to sell you a burial plot. And if you buy it, I'll see to it that it's maintained in an appropriate fashion.

Is that part of the transaction?

MR. AXINN: Well, it's governed by a contract. And the transactions depend on what contract, in fact, you've entered into.

You can by a plot at our cemetery, or I believe at almost any cemetery, and tend it yourself. You don't pay anybody annual care. You don't pay anybody perpetual care. You get your lawn mower, and get out there and take care of it yourself. Or you can agree with the cemetery for annual care where, for an annual fee, they will take care of those tasks for you.

The perpetual care arrangement is a creature of law, and what it provides, and I don't think there's any dispute amongst any of us about this, under New York law, if you have a perpetual care trust fund, and a owner of a grave deposits money with the cemetery, that money is placed in trust. The principle cannot be disturbed. The interest on that sum of money can be used for one purpose only, as I understand it, and that is the maintenance of the grave to which that trust fund pertains. And if you contributed $100, let's say, to the perpetual care fund for a loved one today, that would generate 4 or $5 in interest. And that 4 or $5 of interest would be all that is permitted to be touched to care for that grave from this fund.

And part of the problem we have in this case, if we ever got to the bottom of who paid perpetual care for what, and that is clearly controverted in the papers here, would prove, I think beyond much doubt, that there was not enough money in the interest that would be accrued on any perpetual care fund for the kind of care that you and I would like to have for our loved ones. That's the problem. Because these monies were deposited a long time ago.

THE COURT: Okay.

MR. AXINN: And they were very small sums of money.

MR. BUCHMAN: To answer Your Honor's question --

MR. AXINN: But I would like to answer Your Honor's

question, if I may before I shut up.

I think that the way for the Court to be helpful here would be if we were to agree with Mr. Buchman that there would be no advantage taken of a time period, an interlude, whereby he would withdraw the complaint without prejudice to renewal, nunc pro tunc, at a time when he was persuaded, that he was not satisfied with the kind of progress that was being made through the good offices of Jewish communal organizations, my client, the Attorney General and all others who play a real here, then I think that by lifting this cloud of this lawsuit, progress could be made to satisfy the reasonable requirements of the class that he claims to represent. And that would be my proposal.

THE COURT: Have you all talked about this?

MR. AXINN: No, no, we have not.

THE COURT: Why not?

MR. BUCHMAN: May I please speak?

First of all, that's not true.

THE COURT: What's not true?

MR. BUCHMAN: We have spoken, but not Mr. Axinn and I.

MR. AXINN: We've spoken, but not about this subject.

MR. BUCHMAN: Correct, not Mr. Axinn.

But let me begin at the beginning because that's

where we need to start with this issue and why we filed this lawsuit.

We, my clients and I, have been seeking to work in a cooperative fashion with Congregation Shaare Zedek regarding this issue. We told them specifically that we wanted to work in a very cooperative fashion. We wanted to participate in meetings with the Attorney General's office, with meetings with Jewish organizations to positively create something new for this cemetery. And they excluded us from meeting after meeting. We learned of these meetings after the fact, and we have been excluded and shut out from this process.

They said they want to create a board that will govern this cemetery going forward. We said we would like to participate on that board, but we think what's necessary is for Congregation Shaare Zedek to ensure the success of that board or that new organization by pledging the monies necessary to make sure that it does succeed. And they have refused repeatedly.

Now, with regard --

THE COURT: Do we have a budget? Does anybody have any idea what we're talking about?

MR. AXINN: Yes, we do.

MR. STEINTHAL: There's some estimates were taken by the Attorney General's office in consultation with Shaare Zedek a few years ago. And they, you know, called cemetery

managers, and tried to get an estimate of what it would cost each year. And the number they came up with was a hundred or so thousand dollars a year in annual expenses. And then they sort of backtracked that to a number of a couple of million dollars of endowment that would be enough to do so.

But those estimates are a few years old. And I understand that the Plaintiffs may have some disagreement with the estimate, but that's the best number that people are working with at the moment.

MR. BUCHMAN: In addition, Your Honor, we've been speaking with the gentleman by the name of Ethan Klingsberg who is an attorney at Cleary Gottlieb. He has been the contact for Shaare Zedek with us. And we have repeatedly said to him we would like to enter into a tolling agreement.

But the Defendants came back and said that the tolling agreement we presented them with was unacceptable. It was very simple. And they said that they wanted to reserve the right to seek sanctions against us if we pursue this case. And we thought that was ridiculous and demonstrated bad faith, and we decided to go forward with this case.

THE COURT: It is ridiculous. Let's just put it out, get it off the table here.

MR. BUCHMAN: That's the kind of thing, Your Honor, we've been facing with these Defendants, and why we've been forced to --

THE COURT: We've got to change that. We do have to -- look, look. We're all trained as lawyers. You thought you had, you wanted to have an ongoing positive working relationship. You weren't satisfied. Fine. You've got their attention now. That's for sure.

You take the view that if we could just deal with this lawsuit and put it aside, maybe with that now-added incentive things can move along a little more quickly.

My question was, a while ago: How do we effectuate that? What can we do? It makes sense to me that, now that you've fired this round, that it may very well be in your clients', putative clients' best interest to call their cards and let's, can you participate in these meetings? Can you be a player at the table? Is there talk about a pledge, and if so, where are those resources coming from? If there's an oversight board, can you participate?

These are very straightforward issues. Why aren't we talking about those? Not necessarily here today, I mean, but I mean, it's crazy. This is crazy. This is an opportunity for lawyers, I include myself, to do something positive.

MR. AXINN: Could I just add one thought, Your Honor?

This organization CAGAC that we've talked about is, in fact, a Jewish communal organization. It has been set up

under the auspices of a number of other Jewish communal organizations such as the Hebrew Free Burial Association, and the UJA Federation of New York.

The community is represented very strongly in CAGAC. It is not Congregation Shaare Zedek, anymore. CAGAC is an independent organization, which if it can be funded with two million dollars, which is a number that's been suggested by the Attorney General as a satisfactory endowment, will then acquire title to the Bayside cemetery and other Jewish at-risk cemeteries and operate them in the public interest.

I don't know what Mr. Klingsberg and Mr. Buchman discussed. I wasn't privy to those conversations, but what I do understand is that we have taken the view that the Jewish community, as opposed to any private plaintiff who claims that a grandparent may be buried in this cemetery and therefore, that gives them some sort of legal standing, is the appropriate oversight body for Jewish at-risk cemeteries such as this one. And that's why perhaps Mr. Buchman has been disappointed with the way he was treated. And I apologize for any discourtesy to him.

But I think that the significant thing for the Court to understand is that Shaare Zedek has put in motion a turnover of this cemetery to the Jewish philanthropic community which is unfortunately, the appropriate place for this problem to be solved now.

And what we need is the right atmosphere to raise the necessary monies to satisfy, amongst other people, the Attorney General who has a legitimate concern that no cemetery be turned over to a public body and set adrift without sufficient funding to maintain it.

THE COURT: Understood.

MR. AXINN: We have to try to raise that money. We have to hire people to do that for us. And then, we have to interest donors. This does take time, and this lawsuit is, unfortunately, interfering with that --

MR. BUCHMAN: But.

MR. AXINN: -- so, that's why I propose that we put the lawsuit on ice in some form so that we can get on with the serious business of restoring the cemetery.

THE COURT: You can agree among yourselves to put it on ice, to stay it as long as this gentleman feels he's getting some meaningful participation in the process. I'm offering myself. Do I get the Attorney General in here? Do I get a representative of Shaare Zedek in here? Do we get Cleary Gottlieb in here? I'll do anything I can, including give it time to see if I can grease the skids here toward a responsible resolution of the problem. That's all I can do. Otherwise I'll just rule on motions.

But it seems to me, and this is not a ruling, that the notion of getting rid of this complaint in toto at this

stage is far-fetched. I mean, for the very reason you've given me that rather interesting and detailed history, we've got to know a little bit more information before we start sending him packing.

Yes, sir?

MR. BUCHMAN: Your Honor, I just have one other point with regard to the information that we've been receiving from the Defendants.

We have requested repeatedly for them to tell us whether or not these perpetual care accounts were invaded. And we only learned of the invasion this March when we inspected letters that they had submitted to the Attorney General's office.

We've been asking --

THE COURT: Do you know what I would suggest to you? I would suggest put it to the side, because it's inconsistent with what we're talking about.

If you can't get a resolution, if you are unsatisfied and you come out with guns blazing, including discovery as to who put his or her hand into what account and who was authorized, et cetera, et cetera, but that's sort of clouded, and if that sounds critical, I don't mean it to be. That I can understand, Mr. Axinn saying; you've got a thread of accusations of embezzlement and mishandling of trusted funds.

That's it. That's my speech, for lack of a better way of putting it. I cut you off. Go ahead, sir.

MR. BUCHMAN: The only other thing I was suggesting, Your Honor, is it's important to know what amount of money was improperly taken out of the account so we can then say to Shaare Zedek this is money you should be putting towards this new entity. And they've been saying to us we're not putting a nickel toward new entity. We have no responsibility for the cemetery. We just want to pass it on to someone else.

And we don't think that's a responsible way of dealing with this problem. There should be complete disclosure. They have a fiduciary duty to give us this information, and they're refusing to do it over and over again.

That's all I have to say.

MR. AXINN: Your Honor, we are dealing with the Attorney General's office.

THE COURT: What does the Attorney General have to say about this? I mean, your logic is unassailable.

What does the Attorney General have to say about this?

MR. BUCHMAN: I can't speak for the Attorney General.

THE COURT: I suspect he saying let's look prospectively.

I want a suggestion. What are we going to do?

MR. AXINN: I would adjourn this conference for six months. And during that period of time, stay proceedings. And then I hope that in six months' time or hopefully, much less, Mr. Buchman would find it in his heart to dismiss his complaint, because he's satisfied that the cemetery is being mended appropriately.

I don't think that he has any interest other than the same interests that everyone else in this room shares which is to get the cemetery back into usable, decent condition as quickly as possible.

This isn't a case about, I hope, about dollars and cents for particular Plaintiffs, for psychic injury. This is about trying to get this cemetery restored. And that's what we want to do.

And with respect to the comment that Mr. Buchman just made, the Attorney General is the appropriate body and office to handle questions about misallocation of funds or appropriate --

THE COURT: It's certainty the appropriate public body --

MR. AXINN: Right.

THE COURT: -- but it doesn't impede a private party who feels that he has a standing privity to press the point, as well.

MR. AXINN: And Mr. Buchman has, as he said here this morning, has been in touch with the Attorney General, has spoken with them on many occasions. And so have we. And we're working with the Attorney General. And if the Attorney General is not satisfied with the behavior of Congregation Shaare Zedek, it has an arsenal of tools it can employ.

And I think this court should not set up a second kind of enforcement mechanism under Mr. Buchman's control and discretion while there's one working very well at 120 Broadway in Manhattan.

THE COURT: I'm not in the business of setting anything up, and if I did, Mr. Buchman wouldn't be controlling it. I would.

But he's brought a lawsuit. And all I'm simply saying is that we ought to at least create a period of time, and he'll be, you'll be from the Show Me State, and you'll see to what extent you're being brought into this process, to what extent there is meaningful progress being made.

And if at the end of that period of time, you feel otherwise, we'll reconvene. I will invite the Attorney General's representative in here, if we have to have motion practice, we'll have motion practice. But just to plunge headlong into it now makes no sense, from my perspective. You're entitled to disagree.

MR. BUCHMAN: Your Honor, as a former New York State

Attorney General in the antitrust bureau, I know that the resources of that office are very overwhelmed. And this may not be on their radar screen entirely, but we will certainly work with Mr. Axinn.

I can convey what Your Honor has said to my client. We would suggest that maybe reconvening the end of March would be better.

THE COURT: That's fine. End of March.

MR. BUCHMAN: We've been hearing from these Defendants over and over again we're making progress, we're making progress, and there has been no progress, but --

THE COURT: End of March. As long as we proceed in good faith, and if there is measurable progress, that we allow that to go forward.

I'll see you at the end of March. In the meantime, nothing happens.

MR. AXINN: Thank you, Your Honor.

THE COURT: Back burner.

MR. BUCHMAN: Thank you, Your Honor.

THE COURT: Ellie, can we have a date for these gentleman?

COURTROOM DEPUTY: Yes, certainly.

We'll put it on for Thursday, March 27, at 12:00 o'clock.

MR. AXINN: We'll be here.

COURTROOM DEPUTY: You know what, Friday the 28th at 12:00 o'clock. Okay? I'm changing that to Friday the 28th at 12.

MR. AXINN: Enjoy your holidays, Your Honor.

(WHEREUPON, the proceedings were adjourned to March 28, 2008, at 12:00 p.m.)

* * *

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

_____

Victoria A. Torres Butler, RPR
Official Court Reporter

EXHIBIT C

TRUST FUND

RECEIPT No. _____

CONGREGATION SHAARE ZEDEK, hereinafter called "CONGREGATION", a domestic religious corporation, of No. 212 West 93rd Street, Manhattan Borough, New York City, and the owner of BAYSIDE CEMETERY, Wood haven (Ozone Park), Queens County, New York, hereby acknowledges the receipt of the sum of

Twelve hundred Dollars

($ 1200.00), hereinafter called "FUND", from

Sol D. Levy

whose address is 260 Fort Washington Avenue, New York Cit

for the following uses and purposes;

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 it for the perpetual care of lots, plots or graves in Bayside Cemetery, and deposited by the "CONGREGATION" in its name in any State or Federal Savings Bank or Association paying interest thereon, or invested or re-invested by it for the purchase in its name of any Federal, State, Municipal or other Government certificates or bonds, or of other securities authorized by law for investment of Trust Funds.

The interest or income realized from the "FUND" shall be used toward the perpetual care and upkeep of the following lots, plots or graves of Levy Plot No. 13-A

located in said Bayside Cemetery, limited, however to the extent for which such interest or income derived therefrom will permit and pay, as provided for in Section 91 of the aforesaid Membership Corporation law, and without applying any part of the principal "FUND" for that purpose. PROVIDED, however, that the "CONGREGATION" will not allow, pay or apply in any year or be in any way responsible for a higher rate of interest on the principal sum of the aforesaid "FUND" than the average rate of interest it may receive in such year from its total perpetual care funds.

The "CONGREGATION" shall not be held responsible for any loss, depletion or depreciа-

of No. 212 west 93rd Street, Manhattan Borough, New York City, and the owner of BAYSIDE CEMETERY, Wood haven (Ozone Park), Queens County, New York, hereby acknowledges the receipt of the sum of

Twelve Hundred Dollars

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The "CONGREGATION" shall not be held responsible for any loss, depletion or depreciation of the principal of said "FUND", or the value of any investment made therewith after it makes such deposit or investment.

IN WITNESS WHEREOF, THE "CONGREGATION" has caused this instrument to be subscribed by one of its officers and its corporate seal to be affixed this 16 day of July , 1967 .

CONGREGATION SHAARE ZEDEK

By _____ L.S.
President

ATTESTED BY:

_____
Secretary

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

On this 16 day of July, 1967, before me personally came Barnet Kaprow

to me known, who, being by me duly sworn, did depose and say; that he resides at No. 7 West 96th Street Borough of Manhattan , City and State of New York; that he is President of Congregation Shaare Zedek, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation, and that he signed his name thereto by like order.

_____
Notary Public
JOSEPH L. BLUM
Notary Public, State of New York
No. 31-5325400
Qualified in New York County
Commission Expires March 30, 1968

EXHIBIT D

THE CONSOLIDATED LAWS
OF
NEW YORK
ANNOTATED

Book 34
Membership Corporations Law

With
Annotations From State and Federal Courts

Kept to Date by Cumulative Annual Pocket Parts

Brooklyn, N. Y.
EDWARD THOMPSON COMPANY

such executor, trustee or administrator with the will annexed thereupon shall pay over to the treasurer of such perpetual care fund of such cemetery association any moneys remaining or being in his hands belonging to such trust, and upon making such payment and accounting therefor to the surrogate's court may be discharged from said trust as such executor, trustee or administrator with the will annexed.

Historical Note

Prior to the general amendment by L.1926, c. 722, the subject matter of this section was contained in former section 85 as added by L.1912, c. 315 and amended by L.1925, c. 75.

§ 92. Disposition of moneys paid for care of burial lots

Every cemetery corporation subject to the provision of this article, every other cemetery corporation or association and every religious corporation having charge and control of a cemetery, which heretofore has been or which hereafter may be used for burials shall keep, separate and apart from its other funds, all moneys and property received by it for the perpetual care of any lot in its cemetery. The funds so received shall be kept invested only in securities authorized by law for the investment of trust funds, and the income arising therefrom shall be used solely for the perpetual care and maintenance of the lot or lots for which such income has been provided. The officers of the corporation shall keep accurate accounts of such funds separate and apart from its other funds.

Historical Note

Prior to the general amendment by L.1926, c. 722, the subject matter of this section was contained in former section 87 as added by L.1924, c. 12.

§ 92-a. Designation of fiduciary corporation by directors or trustees of cemetery corporation to act as custodian of funds

Notwithstanding the provisions of any other law, the directors or trustees of cemetery corporations are hereby authorized to designate a bank or trust company to act as custodian and trustee of the funds of such cemetery corporation received by it for the perpetual care of lots in the cemetery thereof, and to expend and apply the income of the same to the perpetual care of the lots in such cemetery which are entitled thereto; and for which the funds so placed in trust were paid by the owners thereof. Such corporate trustee shall be designated by a resolution duly adopted by the board of directors or trustees and approved by a justice of the supreme court of the judiciary district in which the cemetery of said corporation is located; and the directors or trustees of such cemetery corporation may, with the approval of the justice of the supreme court, revoke such trust, and either take over such trust

EXHIBIT E

January 4, 1973

Dear Mrs. Lucker:

This is in reply to your letter regarding the Chebra Shebath Achim.

Yes, you are still a member on the society, and you still have your grave reserved next to your husband. I hope it will be many years yet before you use it.

The reason for making the distribution was because if this was not done while the members are alive to share it the money would eventually go to the State.

The Chebra is still alive, and will continue so until the last member passes away. After that, who knows what will be. That is why we purchased perpetual care of the cemetery.

Let me wish you a very Happy and Healthy New Year to you and your family.

With best regards, I remain

Sincerely,

Nathan Lipton

Nathan Lipton
467 Central Park West
New York, N. Y. 10025