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

STEVEN R. LEVENTHAL as representative of a class consisting of himself and all others similarly situated, Plaintiff, v. BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK AND COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC. Defendants.	Index No.: 1000530/2011 Hon. Debra A. James

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO DISQUALIFY DEFENDANTS' COUNSEL PURSUANT TO NEW YORK RULE OF PROFESSIONAL CONDUCT 3.7(a)

Plaintiff Steven R. Leventhal, by and through his pro bono counsel, hereby moves to disqualify the law firm of Axinn, Veltrop & Harkrider LLP from representing Defendants Bayside Cemetery and Congregation Shaare Zedek (sometimes referred to hereinafter as "Synagogue") pursuant to Rule 3.7(a) of Part 1200, New York Rules of Professional Conduct (effective April 1, 2009). For the reasons set forth below, Axinn, Veltrop & Harkrider LLP should be disqualified as counsel of record for Defendants.

FACTS

This is a breach of contract class action concerning the sale of perpetual care contracts and services. Plaintiff's Complaint alleges and discovery establishes that Defendants Congregation Shaare Zedek and Bayside Cemetery violated annual and perpetual care contracts for decades by commingling annual and perpetual care monies with cemetery and/or Synagogue monies.

These statements are not made lightly and are based upon documents produced recently in discovery. Indeed, discovery in this case demonstrates that Defendants have been unlawfully "commingling" monies since at least 1907.[1] Defendants have also been routinely stealing perpetual care monies to offset deficits at the Synagogue since at least 1964,[2] and Defendant Congregation Shaare Zedek has internally acknowledged that such conduct violates New York law since at least 1966.[3]

This motion to disqualify Axinn, Veltrop & Harkrider LLP is predicated on two grounds, discussed below.

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[1] *See* Exhibit A ("All of these documents, including those reviewed by representatives of the JCRC at the JTS archives, indicate that, since at least 1907, there has been a comingling of assets between the cemetery and the synagogue until 1999.").
[2] *See* Exhibits B, C.
[3] *See* Exhibit D.

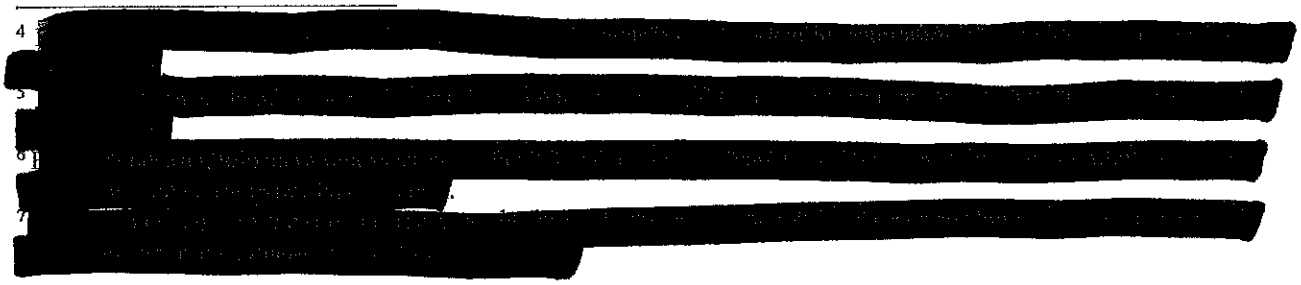
A. Russell Steinthal, Esq.

This motion to disqualify should be granted because Defendants' counsel, Russell Steinthal of Axinn, Veltrop and Harkrider LLP, has been intimately involved in this matter prior to being retained by his clients. Namely, Mr. Steinthal:

- is and has been a member of Congregation Shaare Zedek and is Head of the Cemetery Committee;
- is referenced more than 30 times in the privilege log *prior* to being retained by his clients (Exhibit E);
- has been noticed for deposition in this case as a fact witness in general and, in particular, concerning a conversation he had with Ethan Klingsberg, Esq. to which there are no other witnesses; and
- was a deponent in the New York State Attorney General investigation (Exhibit F).

With regard to the privilege log, Mr. Steinthal was directly involved in a number of allegedly privileged pre-representation communications concerning this matter including the following:

Author	Recipient	cc'd
10/24/2005[4]	10/24/2005[4]	10/24/2005[4]
10/24/2005[4]	10/24/2005[4]	10/24/2005[4]
10/24/2005[4]	10/23/2005[4]	10/24/2005[4]
10/24/2005[4]	10/27/2005[4]	10/24/2005[4]
10/24/2005[5]	10/20/2005[4]	10/24/2005[4]
10/24/2005[4]	10/24/2005[4]	10/24/2005[4]
6/18/2006[6]	10/24/2005[4]	2/3/2006[5]
	11/9/2005[5]	2/3/2006[5]
	6/14/2006[7]	2/6/2006[5]
	10/20/2005[6]	10/24/2005[4]
	10/23/2005[6]	10/24/2005[4]
	10/24/2005[5]	10/24/2005[4]
	5/19/2005[4]	



Mr. Steinthal was involved in an allegedly privileged communication with Ethan Klingsberg, Esq. of Cleary Gottlieb Steen & Hamilton LLP concerning a fraudulent representation to the New York State Attorney General's Office ("NYAG"). That communication, and others, will be the subject of a soon-to-be-filed crime-fraud motion. The facts pertaining to that motion bear on this motion and follow below.

In late 2003, former New York State Supreme Court Justice Burton Roberts filed a formal complaint with the NYAG concerning the potential theft of annual and perpetual care monies by Congregation Shaare Zedek. The NYAG contacted the Synagogue and began an informal investigation. Under investigation and no longer able to freely divert perpetual care monies to maintain the Synagogue, Defendant Congregation Shaare Zedek contacted the NYAG to request permission to use perpetual care monies to maintain the cemetery, thereby relieving it of a significant financial obligation. (Exhibit G). The NYAG requested that Defendants first provide it with sufficient information in order to set aside a proper reserve for perpetual care plots. Instead of truthfully disclosing the number of known perpetual care contracts to the NYAG as requested, Defendants, through a letter prepared by Ethan Klingsberg, Esq. and signed by Synagogue President Joel Shaiman and Rabbi Mark Ankcorn,[8] misrepresented the number of perpetual care contracts and monies as follows:

- a list of each reference in the Bayside Cemetery financial statements to both a 'perpetual care' payment and an expressly identified family name and plot that corresponds to such payment (There were 21 such references relating to an aggregate of $26,700 in payments, based on a review of Bayside Cemetery financial statements previously provided to you for the years ending December 1965 through December 2003); and
- a list of the actual perpetual care contracts that we have found in the files of Congregation Shaare Zedek (There were two such contracts relating to an aggregate of $2,700 in payments).[9]

[8] Rabbi Ankcorn was and is a licensed attorney in the State of California. *See* http://www.markankcorn.com/about/.
[9] Exhibit H.

Expressly stating that it was entirely relying upon this representation, the NYAG, shortly thereafter, granted Congregation Shaare Zedek's request by allowing it to use approximately $120,000 over a two-year period.[10]

In 2007, this action was filed in federal court. As part of jurisdictional discovery, counsel for Congregation Shaare Zedek produced a list of approximately 300 perpetual care contracts covering roughly 700 graves.[11] The monies concerning these contracts exceeded $300,000. Defendant Congregation Shaare Zedek belatedly disclosed this misrepresentation to the NYAG in 2007, claiming it was "an oversight." (Exhibit K). The NYAG took the deposition of Defendants' counsel Russell Steinthal in connection with this matter, thereby further evidencing that he is a key witness. Under oath, Mr. Steinthal testified that Mr. Klingsberg of Cleary Gottlieb Steen & Hamilton LLP publicly told the NYAG that the failure to properly state the number of perpetual care contracts was "an oversight" or "words to that effect." *Id.* Mr. Steinthal, however, refused to disclose, on grounds of privilege, precisely what Mr. Klingsberg told him as to the real reason for the failure to disclose the true number of perpetual care contracts and the truth about the search for documents and information as requested by the NYAG. Mr. Steinthal testified as follows:

> I would respectfully decline to answer what predecessor counsel told me about his document search. But I was present when Mr. Klingsberg told Mr. Piggott of [the NYAG] that it was an oversight. It was overlooked. Things happen. Or words to that effect.

Id.

This testimony is not only highly relevant to the issue of whether Defendant Congregation Shaare Zedek violated perpetual care contracts, and perpetrated a fraud on the NYAG in order to obtain greater access to perpetual care monies, but it also goes to the issue of fraudulent concealment alleged in the Complaint. Because Mr. Steinthal is a key witness in this case and is

[10] Exhibit I.
[11] Exhibit J.

the only witness who can testify about the communication with Mr. Klingsberg concerning the fraud perpetrated on the NYAG, this disqualification motion should be granted.

B. Stephen Axinn

Another ground for disqualification concerns Mr. Steinthal's senior partner, Stephen Axinn. On October 4, 2007, the New York Daily News published an article entitled "Bayside Cemetery Is a Disgrace." The relevant portion of the article is as follows:

> As to the allegations about misappropriated funds, Shaare Zedek's attorney Steven Axinn said some cemetery funds were borrowed from a nonrestricted account to repair the synagogue roof, which is entirely proper and legal. The money was repaid, he said.

(Exhibit L).

Mr. Axinn's statement is highly relevant because it constitutes an admission that Defendant Congregation Shaare Zedek did not place perpetual care monies into a trust account, misappropriated the funds, and improperly used the funds to repair the Synagogue roof. While Mr. Axinn may now refute having made this statement, his testimony is now singularly critical as he is the only person who can testify under oath about an alleged admission he made on behalf of a client he is representing. And he is certainly the only person who can recant his statement. Simply put, Mr. Axinn has injected himself into this case as a necessary witness by making factual representations concerning actions taken by his client and their alleged legality. Indeed, where counsel's testimony is "central to the plaintiff's theory of recovery" set forth in the complaint, to wit counsel's actions may give rise to the cause of action, the attorney should be disqualified. *Bridges v. Alcan Contruction Corp.*, 134 A.D.2d 316, 316 (2d Dep't 1987).

ARGUMENT

A. Legal Standard

It is well-recognized that "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." N.Y. R. Prof'l Conduct 3.7(a). The rationale behind this rule is straightforward: "[a]n advocate who becomes a witness is in the unseemly and ineffective position of arguing his credibility since the function of an advocate and a witness are inconsistent." *Tru-Bite Labs, Inc. v. Ashman*, 54 A.D.2d 345, 347 (1st Dep't 1976). "[S]uch a mixture of roles may confuse the factfinder and impair the fairness of the trial..." *People v. Townsley*, 982 N.E.2d 1227, 1230 (N.Y. 2012).

Furthermore, where an attorney "has personal knowledge of the underlying circumstances, he ought to be called as a witness on behalf of his client and it is improper for him to continue his representation." *Zagari v. Zagari*, 295 A.D.2d 891, 891 (4th Dep't 2002) (quoting *Chang v. Chang*, 190 A.D.2d 311, 318 (1st Dep't 1993)) (internal quotation marks omitted). Where, as here concerning Mr. Steinthal, an attorney simultaneously occupies the position of advocate for and member of a client organization, courts have ruled in favor of disqualification. *See 1776 Associates, Inc. v. Lazrus*, 416 N.Y.S.2d 162, 162, 163 (Sup. Ct. Spec. Term 1979) (noting that the relationship between plaintiff corporation and its attorneys where attorneys were directors and shareholders of the corporation was "more than that of attorney-client" and ordering disqualification); *Hitzig v. Borough-Tel Serv.*, 108 A.D.2d 677, 678 (1st Dep't 1985) (disqualifying defendant corporation's counsel who sat on Board of corporation); *Sherbrooke Smithtown Owners Corp. v. Merson*, 2009 WL 9047865, at *1, *6 (N.Y. Sup. Ct. Sept. 30, 2009) (disqualifying plaintiff corporation's law firm where a former associate of the firm was a member of the corporation's Board).

Finally, where counsel provides testimony that "may be prejudicial" to his or her client, courts have held that disqualification is warranted. *Wensley & Partners v. Polimeni*, 262 A.D.2d 311, 311 (2d Dep't 1999); *see also Fairview at Old Westfield v. Euro. Am. Bank*, 186 A.D.2d 238, 239 (2d Dep't 1992) ("[Plaintiffs'] attorney made certain averments in various documents which . . . clearly demonstrates that his testimony 'may be prejudicial' to the plaintiffs when he is called to testify by the defendant . . . . We therefore conclude that the Supreme Court did not improvidently exercise its discretion in disqualifying the plaintiff's law firm."). It has long been held that "[i]n a disqualification situation *any doubt* is to be resolved in favor of disqualification." *Solomon v. N.Y. Prop. Ins. Underwriting Ass'n*, 118 A.D.2d 695, 696 (2d Dep't 1986) (emphasis added).[12] For the reasons demonstrated below, Messrs. Steinthal and Axinn and their firm should be disqualified from representing Defendants in this action.

B. <u>Disqualification of Russell Steinthal Is Appropriate</u>

Because Mr. Steinthal possesses necessary and likely prejudicial "knowledge of the underlying circumstances" concerning Congregation Shaare Zedek's fraud on the NYAG and will be called as a witness by Plaintiff, this Court should order disqualification. *Zagari*, *supra*, at 891. Specifically, it is necessary that Mr. Steinthal provide testimony concerning his conversation with Ethan Klingsberg of Cleary Gottlieb Steen & Hamilton LLP in which Mr. Klingsberg told him the real reason for Congregation Shaare Zedek's failure to disclose the true number of perpetual care contracts to the NYAG. The real reason *cannot* simply be that "it was an oversight," as Mr. Klingsberg told the NYAG. That is because Mr. Steinthal is claiming *privilege* over his

[12] *See also, e.g., Tru-Bite Labs, supra,* at 347 ("Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his continuing as an advocate . . . ."); *Stober v. Gaba & Stober, P.C.*, 259 A.D.2d 554, 555 (2d Dep't 1999) ("[A] motion to disqualify is addressed to the sound discretion of the court . . . and any doubts are to be resolved in favor of disqualification . . . .").

conversation with Mr. Klingsberg, and if the conversation truly amounted to no more than Mr. Klingsberg's stating that the failure to disclose to the NYAG "was an oversight," then privilege would be destroyed because that *same information* was conveyed to a third-party—the NYAG. *See* 8 Carmody-Wait N.Y. Prac. 2d § 56:200 ("[N]either information obtained by the attorney from a third person nor information communicated by an attorney to a third party is privileged."). In order to ascertain what was truly said between Mr. Steinthal and Mr. Klingsberg in this conversation, Plaintiff must obtain the testimony of Mr. Steinthal, thereby compelling his disqualification.

Moreover, this testimony is likely to be prejudicial to Defendant Congregation Shaare Zedek, thereby requiring disqualification as well. *See Wensley & Partners, supra,* at 311 ("Since it is apparent that the testimony provided by the attorney may be prejudicial to the plaintiff . . . the Supreme Court providently exercised its discretion in disqualifying the law firm . . . ."). This testimony is likely to be prejudicial because Mr. Klingsberg's explanation as to why Congregation Shaare Zedek provided a *highly* inaccurate report to the NYAG is simply implausible. According to Mr. Steinthal, Mr. Klingsberg told the NYAG that the inaccurate number of perpetual care contracts "was an oversight. It was overlooked. Things happen." (Exhibit K). It is simply inconceivable that one could, in good faith, believe that a 150-year-old cemetery with over 30,000 graves, which was selling perpetual care contracts in 1913, *had sold only 21 such contracts as of 2004*. This was not simply "an oversight." Rather, it was deliberately false and constitutes a fraud on the NYAG that was perpetrated so Congregation Shaare Zedek could improperly obtain access to perpetual care monies as it had done for decades. In light of these facts, Plaintiff is thoroughly justified in believing that the conversation between Mr. Steinthal and Mr. Klingsberg involved an acknowledgement that the inaccurate report to the NYAG was not simply "an oversight," and was,

rather, a fraudulent representation. And because such key testimony by Mr. Steinthal would prejudice Congregation Shaare Zedek, this Court should order disqualification.

Finally, Mr. Steinthal's membership at the Synagogue and his position as Head of the Cemetery Committee means that he "has personal knowledge of the underlying circumstances" and will be called as a witness, thereby also requiring disqualification. *Zagari, supra,* at 891. Mr. Steinthal is referenced more than *30 times* in the privilege log *prior* to being retained by his clients. He has been noticed for deposition in this case as a fact witness in general and, in particular, concerning Plaintiff's crime-fraud claim. Additionally, he was a deponent in the NYAG investigation. As in *Lazrus, supra, Hitzig, supra,* and *Sherbrooke, supra,* Mr. Steinthal's membership at the Synagogue and his position as Head of the Cemetery Committee—through which he has received information as to the "underlying circumstances" of the dispute—make him a key witness, thereby disqualifying him for serving as counsel. *Zagari, supra,* at 891. For all of the foregoing reasons, this Court should disqualify Mr. Steinthal and his firm.

C. <u>Disqualification of Stephen Axinn Is Appropriate</u>

Stephen Axinn should also be disqualified. The New York Daily News article in which he is cited as acknowledging that Congregation Shaare Zedek did not place perpetual care monies into a trust account, misappropriated the funds, and improperly used the funds to repair the Synagogue roof means that he will "likely . . . be a witness on a significant issue of fact" at trial. N.Y. R. Prof'l Conduct 3.7(a). Mr. Axinn's testimony is now singularly critical as he is the only person who can testify under oath about an alleged admission he made. Plaintiff intends to enter the Daily News article into evidence and call Mr. Axinn to testify under oath as to his admission in the article. As "[this] testimony 'may be prejudicial' to the [Defendants] when he is called to testify," this Court should disqualify Mr. Axinn from serving as counsel to Congregation Shaare

Zedek. *Fairview at Old Westfield, supra*, at 239. Even assuming *arguendo* that Mr. Axinn's testimony is not likely to be prejudicial because he intends to testify under oath that he did not make the statements appearing in the article, "it is necessary that [he] give testimony on his clients' behalf" to recant the published statement. *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 76 (1st Dep't 2002).[13] In other words, he is *the only* witness who can recant this statement.

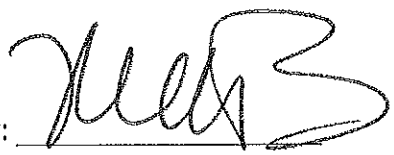
Mr. Axinn, "by having personally involved [himself] in significant issues in this proceeding [has] removed [himself] from the sidelines and moved to the stage . . . . This duality of being the attorney and witness causes the attorney to become[] handicapped in representing his/her client, as the attorney's credibility necessarily becomes an issue in the case." *Zaccaro v. Bowers*, 771 N.Y.S.2d 332, 335 (Civ. Ct. 2003). Accordingly, Mr. Axinn and Axinn, Veltrop and Harkrider LLP should be disqualified as counsel of record for Defendants because Mssrs. Steinthal and Axinn are each key witnesses and as such cannot represent their clients because: (i) they are advocate-witnesses; and (ii) they will likely provide prejudicial testimony to their clients.

CONCLUSION

For the foregoing reasons, Plaintiff Steven R. Leventhal respectfully requests this Court disqualify Axinn, Veltrop and Harkrider LLP pursuant to Rule 3.7(a) of Part 1200 of the New York Rules of Professional Conduct and New York law.

[13] *See also Zagari, supra*, at 891 (stating that where an attorney "has personal knowledge of the underlying circumstances, he ought to be called as a witness on behalf of his client and it is improper for him to continue his representation").

Dated: July 2, 2015,
New York, New York

By: 

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