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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)

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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

[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).

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[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,
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