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VIA ELECTRONIC CASE FILING SYSTEM

The Honorable Joan M. Azrack
United States Magistrate Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Room 1210S
Brooklyn, NY 11201

Re: *Lucker et al. v. Bayside Cemetery & Congregation Shaare Zedek*,
No. 07 Civ. 3823 (RJD) (JMA)
Cohen v. Bayside Cemetery & Congregation Shaare Zedek,
No. 08 Civ. 3555 (RJD) (JMA)
Goldstein v. Bayside Cemetery & Congregation Shaare Zedek,
No. 08 Civ. 3923 (RJD) (JMA)

Dear Judge Azrack:

We write as counsel to Defendants in the above-referenced actions, to respectfully request reconsideration of so much of Your Honor's order, issued this afternoon, as requires the Defendants to immediately produce documents that are unrelated to the jurisdictional questions raised by Chief Judge Dearie.

Chief Judge Dearie's order from this morning refers these matters to Your Honor for the supervision of "limited discovery" on the jurisdictional issues that were raised in the motion to dismiss, in light of his substantial doubts that the Court has jurisdiction over these cases and his desire that those doubts be eliminated before *any* non-jurisdictional questions are considered. The narrow scope of the order also avoids the risk that the very act of ordering discovery would exceed the Court's constitutional powers. With respect, the order to produce the entirety of the Defendants' production to the Attorney General, without regard to the jurisdictional relevance of each individual document, exceeds the scope of the district judge's order of reference, and thus potentially the Court's jurisdiction.

The Chief Judge's order must also be understood in the context of this litigation. From the outset, the Defendants have argued that these Plaintiffs have not even *alleged* facts that would give them the concrete, particularized injury-in-fact that the Supreme Court described in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1991), as part of the "irreducible constitutional minimum of standing" under Article III. The Plaintiffs have equally consistently pushed for early discovery, including in particular production of the documents that were submitted by the Defendants to the New York State Attorney General's Office, and which Plaintiffs believe will support their case on the merits. That dispute was crystallized in the parties' respective proposed scheduling orders, submitted to the Court on December 10, 2008, in which the Plaintiffs sought immediate discovery and the Defendants asked for a stay pending determination of their motion to dismiss.

After Chief Judge Dearie requested supplemental briefing on two additional jurisdictional issues that had not been earlier raised by the parties, Your Honor adjourned the initial conference that had been set for December 15, 2008 without date, thus implicitly staying discovery on the merits until the district court resolved the motion to dismiss. While we recognize that Chief Judge Dearie's order from this morning now requires the parties to engage in *some* discovery, we would respectfully suggest that in light of the substantial questions of jurisdiction that the Court has already recognized, such discovery should be confined to the narrowest scope consistent with its goal. The alternative would turn the idea of jurisdictional discovery on its head, giving the Plaintiffs more access to merits discovery than they would otherwise have, precisely because their jurisdictional allegations are unclear.

At today's conference, it was apparent that the only aspect of jurisdiction that remained open (other than the basic injury-in-fact issue, which is not amenable to discovery) was the identity and citizenship of the members of the plaintiff class, so as to determine whether the exceptions to federal jurisdiction set forth in 28 U.S.C. § 1332(d)(3) or (d)(4) would apply. A majority of the documents that are contained in the Defendants' February 10, 2008 submission to the Attorney General contain information that could be relevant to those issues, but many do not.

In the ordinary course, Plaintiffs would have served a request for production, and Defendants would have had the opportunity to object to the relevancy of particular requests. Given the unusual posture of today's hearing, however, that procedure was not followed, and so Defendants are forced to seek relief in the first instance from Your Honor. We have no desire to delay these proceedings, and the universe of documents provided to the Attorney General is relatively small. There is no reason, therefore, to expect that a review for responsiveness should take more than 24-48 hours, at the longest.

While it is undoubtedly true that, as Your Honor suggested earlier, such a review would impose a burden on Defendants that would not be present if we were simply to turn over all of the documents, that confuses the nature of the undue burden inquiry. So long as the Plaintiffs receive their properly requested documents in a timely manner, Defendants should be free to

exclude documents that are wholly irrelevant to the issue at hand, in keeping with the limited scope of discovery ordered by the district court and the general principles of relevancy under Rule 26.

Respectfully,

Russell M. Steinthal
Attorney for Defendants

cc: Michael M. Buchman, Esq.