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January 26, 2011

VIA ELECTRONIC CASE FILING

The Honorable Debra A. James
Justice of the Supreme Court of the State of New York
71 Thomas Street
Part 59
New York, NY 10013

Re: *Lucker v. Bayside Cemetery et al.*, Index No. 114818/2009-E
Leventhal v. Bayside Cemetery et al., Index No. 100530/2011.

Dear Justice James:

I write as counsel to Congregation Shaare Zedek and Bayside Cemetery (collectively, "Shaare Zedek") in the above-referenced matters, in response to the letters sent to the Court by Michael Buchman, counsel to the Plaintiffs in both referenced matters, on January 18, 2011 and by Ari Selman, counsel to Defendant Community Association for Jewish At-Risk Cemeteries ("CAJAC") in both referenced matters on January 21, 2011.

In his letter, Plaintiffs' counsel asks that the Court "(i) accept the *Leventhal* action as a related matter to the *Lucker* action" and (ii) "order the parties to prepare a case management schedule so that discovery may commence within the next 30 days while any motion may be pending since the *Leventhal* action, at a minimum, should now timely proceed."¹

Shaare Zedek has no objection to the Plaintiffs' first request, as it agrees with the other parties that the *Leventhal* and *Lucker* actions are likely to present substantially similar questions

¹ There appears to be some ambiguity as to whether the January 18th letter requested entry of a case management order and the commencement of discovery in the *Lucker* action or, as CAJAC's January 21st letter apparently understands it, the *Leventhal* action. Shaare Zedek would object to such an order in either action, given its pending motion to dismiss in *Lucker* and its intention, as discussed below, to move to dismiss in *Leventhal*.


of law and fact such that judicial economy would be furthered by the determination of those issues by the same justice.

Shaare Zedek strenuously objects, however, to the Plaintiffs' second request, namely that the parties be ordered to prepare a case management schedule. Pursuant to CPLR 3214, disclosure in the *Lucker* action is stayed pending the Court's determination of Defendants' motions to dismiss. The filing of the *Leventhal* action in no way moots those motions, or otherwise provides good cause to lift the statutory stay. In fact, Shaare Zedek expects to move to dismiss the *Leventhal* action on substantially the same grounds as it moved against the *Lucker* action.

Plaintiffs' letter makes much of the fact that the plaintiff in *Leventhal* personally purchased a perpetual care contract from Shaare Zedek and therefore is not subject to the same standing objections as the *Lucker* Plaintiffs. That may or may not be the case, but either way, it does nothing to increase the *Lucker* Plaintiffs' standing or entitlement to disclosure. To the contrary, the *Leventhal* complaint highlights the defects of their case, in that the *Lucker* Plaintiffs are explicitly *not* "persons or entities . . . who purchased a perpetual care or annual care contract from a Defendant or their agents or assigns" (*Leventhal* Compl. ¶ 37), nor, for the reasons amply explained in the Defendants' motions to dismiss the *Lucker* action, do they possess any legal authority to sue on behalf of any such person. In the absence of standing to sue, the *Lucker* Plaintiffs are *a fortiori* not entitled to discovery. And, of course, Shaare Zedek has asserted other defenses against the *Lucker* Plaintiffs' claims, including but not limited to the statute of limitations, which it also intends to assert against the *Leventhal* Complaint.

Given the overlap of issues between the *Lucker* and *Leventhal* actions, Shaare Zedek joins CAJAC in respectfully requesting that the Court (i) stay any and all deadlines for Defendants to answer or otherwise respond to the *Leventhal* complaint; and (ii) deny Plaintiffs' request for preparation of a case management order and commencement of discovery.

Respectfully submitted,



Russell M. Steinthal

cc: Michael M. Buchman, Esq. (Counsel for Plaintiffs) (by e-mail)
Ari Selman, Esq. (Counsel for Community Association for Jewish At-Risk Cemeteries)
(by e-mail)