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

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

Dear Chief Judge Dearie:

We write as counsel to Defendants in the above-referenced actions, and in response to the letter to the Court from Plaintiffs' counsel dated October 16, 2008. In light of Your Honor's request that memoranda of law only be submitted to the Court when the motion is fully briefed and submitted, we trust you would prefer that we not argue the merits of the pending motion in an exchange of letters with Plaintiffs' counsel. Nonetheless, there are two points in particular that we feel constrained to make.

First, Defendants' motion to dismiss is addressed to the legal sufficiency of the facts that Plaintiffs actually pled in their Complaints. None of the Complaints contain even a single reference to any will, estate, Surrogate's Court proceeding, or any other matter that would even suggest that Plaintiffs were proceeding solely in a valid representative capacity, yet Plaintiffs now contend that the instant motion is "patently frivolous" because Defendants have "fail[ed] to appreciate" the nature of these actions. Plaintiffs have been aware of our intention to move to dismiss for, inter alia, lack of standing for nearly a year, ever since we first requested a pre-motion conference. In all that time, Plaintiffs have never moved to amend the original Lucker Complaint, nor do the Cohen or Goldstein Complaints (filed after the standing argument was first raised) make any reference to those Plaintiffs' status as executors. Needless to say, even if

Plaintiffs would have standing as executors, it is well-settled that plaintiffs may not supplement or amend the facts in papers filed in response to a Rule 12(b)(6) motion. See, e.g., Wright v. Ernst & Young LLP, 152 F.3d 169, 178 (2d Cir. 1998) (collecting cases).

Second, Plaintiffs' quotation from *The Law of Trusts and Trustees* only proves the correctness of our argument. The quoted excerpt, itself, is only an exception to a statement that "[a]s a general rule, no private citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefited by the trust and will receive charitable or other benefits from the operation of the trust," id. § 414, at 47. The overwhelming weight of authority cited in both the treatise and Plaintiffs' letter, meanwhile, neither relies on nor supports the expansive and amorphous "friends or relatives" language that Plaintiffs emphasize. Rather, the cited cases involve plaintiffs who claimed direct, personal injury either through their ownership of plots in the cemetery, see, e.g., Steele v. Rosehill Cemetery Co., 19 N.E.2d 189, 190 (Ill. 1938) (plaintiff filed suit "seeking the removal of an alleged cloud on his title to a burial lot in the cemetery"); Clark v. Rahway Cemetery Co., 61 A. 261 (N.J. Ch. 1905), or in a few New Jersey cases, lost business income due to allegedly illegal activities of the cemetery, Terwilliger v. Graceland Mem'l Park Ass'n, 173 A.2d 33 (N.J. 1963); Frank v. Clover Leaf Park Cemetery Ass'n, 148 A.2d 488 (N.J. 1959). That, of course, is consistent with the approach of the New York Court of Appeals which, when it had the opportunity to cite that same section of *The Law of Trusts and Trustees*, emphasized that standing to enforce a charitable trust will only be granted to a private party who not only shows a "special interest" and "tangible stake" in the matter, but who is also part of a "class of potential beneficiaries [that] is sharply defined and limited in number." Alco Gravure, Inc. v. Knapp Foundation, 479 N.E.2d 752, 755 (N.Y. 1985).

Finally, as to the timeliness of Defendants' motion, while we do not dispute that Plaintiffs' counsel received the motion papers at 5:07 pm by electronic mail, and then at approximately 5:45 by hand, October 13th was Columbus Day, a legal holiday defined in Rule 6(a) of the Federal Rules of Civil Procedure. Accordingly, the deadline for service of the motion papers could not have expired until "the next day that is not a Saturday, Sunday, [or] legal holiday." Nevertheless, despite the lack of any conceivable prejudice to Plaintiffs, we would have no objection to extending the Plaintiffs' time to respond by one day (to November 13, 2008), while retaining the same deadline for the filing of the completed motion papers, including Defendants' reply brief.

Respectfully,

Stephen M. Axinn

cc: All Counsel (by ECF)