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)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

If the relatives of blood may not defend the graves of their departed, who may? Always the human heart has rebelled against the invasion of the cemetery precincts; always has the human mind contemplated the grave as the last and enduring resting place after the struggles and sorrows of this world. *Ritter v. Couch*, 71 W. Va. 221, 227, 76 S.E. 428, 430 (1912).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER CITES

10 Am. Jur. Charities, § 117, p. 670

14 C.J.S. Cemeteries § 25, p. 85; Jackson, The Law of Cadavers, p. 362.
Fed. R. Civ. P. 11; 28 U.S.C. §1927

GBL §§349, 350.
New York Membership Corporation Law § 92

Restatement [Second] of Contracts ch 14, Introductory Note, at 439 and §302[2]

Plaintiffs John Lucker, Elizabeth Lucker, Nancy Rousseau, Lynn Cohen and Fran Goldstein, by and through their *pro bono publico* attorney, respectfully submit this memorandum of law in opposition to Defendants' Motion to Dismiss.[1] For the reasons set forth below, Defendants' motion to dismiss should be denied in its entirety.

INTRODUCTION

"Mistakes are made on two counts: an argument is either based on error or incorrectly developed."[2] Defendants Bayside Cemetery ("Bayside") and Congregation Shaare Zedek's ("Shaare Zedek") (collectively "Defendants") motion to dismiss suffers on both counts. This mistaken motion should not have been brought for two primary reasons.

First, Defendants' standing arguments are in error. It is hornbook law that Plaintiffs, who also happen to be executors of those whom they seek to represent, possess requisite standing to pursue claims on behalf of deceased family members or near relatives. *See* Section B. Defendants' more than ten pages of argument that Plaintiffs have failed to allege "individualized, personal injuries" is completely inconsistent with the complaint and opposing counsel's stated understanding of this action at the pre-motion conference. The complaint lays bare that Plaintiffs seek damages as the legal representatives of family members for, *inter alia*, Defendants' refusal to: (i) honor

[1] Defendants' motion to dismiss is untimely. At the last conference, Defendants agreed to serve their brief on Columbus Day, October 13, 2008 because of the Jewish holidays the week before and additional holidays thereafter. Under this Court's Motion Practices rules, Defendants were required to deliver a hard copy of their papers to opposing counsel's office by 5:00 p.m. on October 13th. Defendants failed to comply with this rule and cannot now invoke the holiday as a basis for their out-of-time motion to dismiss. Declaration of Michael M. Buchman dated October 10, 2008 ("Buchman Decl."), Exhibit A. Plaintiffs respectfully submit this motion should be summarily denied for Defendants' failure to timely comply with the Court's rules.

[2] Thomas Acquinas (1225-1274).

perpetual care contracts; (ii) maintain perpetual care plots at Bayside; (iii) account for and restore commingled monies; and (iv) otherwise act in accordance with their fiduciary duties. Complaint ¶¶ 19, 20, 21, 51, 52, 53.[3] Opposing counsel recognized this is *not* a personal injury action at the first pre-motion conference when he stated:

> I don't think that he [plaintiff] has any interest other than the same interests as everyone else in this room share which is to get the cemetery back into usable, decent condition as quickly as possible. This case isn't about, I hope, about dollars and cents for particular plaintiffs for psychic injuries. This is about trying to get this cemetery restored.

Buchman Decl., Exhibit B, Hearing Transcript dated December 19, 2007, p. 18. (emphasis added). Having been advised during the pre-motion conferences that Plaintiffs are legal executors and possess standing under the law, Defendants fall back on a strained "personal injury" standing argument which should be rejected. Def. Mem. pp. 5-17.

Second, Defendants' invocation of the statute of frauds and statute of limitations at this stage of the proceedings is misplaced. These affirmative defenses are prematurely raised and incorrectly developed at this stage of the proceeding. The Supreme Court and this Court have made clear that plaintiffs need not anticipate affirmative defenses in their pleading because they are irrelevant on a motion to dismiss.[4] *Gomez v. Toledo*, 446 U.S. 635 (1980); *E.On AG v. v. Acciona, S.A.*, 468 F. Supp. 2d 559 (S.D.N.Y. 2007); *Flash*

---

[3] All "Complaint ¶" references are to the Lucker action. The Complaint in the *Lucker*, *Cohen* and *Goldstein* actions are virtually identical.

[4] Indeed, the Court reinforced this view at the pre-motion conference stating:

> [b]ut it seems to me, and this is not a ruling, that the notion of getting rid of this complaint in *toto* at this stage is far fetched. I mean for the very reason you've given me that rather interesting and detailed history, we've got to know a little bit more information before we start sending him packing. Buchman Decl., Exhibit B, Hearing Transcript, pp. 15-16.

Elecs v. Universal Music, 312 F. Supp. 2d 379 (E.D.N.Y. 2004) (Dearie, J.); *see* Section D(1). These arguments are more appropriately raised after the close of discovery on a motion for summary judgment. At this stage of the proceedings, and on this incomplete record, Plaintiffs respectfully submit that the Court should deny Defendants' "oxymoronic" motion to dismiss.[5]

A review of the motion leads one inescapably to conclude that Defendants subscribe to the belief that "a day without argument is like an egg without salt."[6] There is certainly enough spice in our lives. This Court should not be burdened with argument merely for argument's sake, especially where, as here, Defendants have already conceded liability. In light of the foregoing, it seems quite clear this baseless motion was no error, but designed to burden this Court and impose unwarranted delay which is proscribed by the Federal Rules of Civil Procedure.[7]

---

[5] At the pre-motion conference, the Court noted:

> [a]fter all, for some, if not all of them, perpetual care was paid for, and it seems somewhat oxymoronic to be speaking in the context of the statute of limitations. Or for that matter, even privity. Certainly the poor buried souls cannot speak for themselves . . .

Buchman Decl., Exhibit B, Hearing Transcript, p. 3.

[6] Angela Carter (1940-1992), British postmodern novelist, Introduction, Vintage (1992).

[7] *See* Fed. R. Civ. P. 11; 28 U.S.C. §1927; *Sallam v. Nolan*, No. 90 CV 1877(RJD), 1991 U.S. Dist. LEXIS 3069 (E.D.N.Y. Mar. 1, 1991) (Dearie, J.) ("objectively unreasonable" motion sanctioned);*Gutterman v. Eimicke*, 125 F.R.D. 348 (E.D.N.Y. 1989) (Dearie, J.) (imposing sanctions for frivolous pleading); *Madarsh v. Long Island Rail Road Company*, 654 F. Supp. 51 (E.D.N.Y. 1987) (Dearie, J.) (imposing sanctions on an inexcusably late motion to dismiss).

STATEMENT OF FACTS

Bayside was opened as a cemetery in 1842 by its owner Shaare Zedek. Defendants sold rights to individuals and burial societies for the internment of human remains in certain cemetery plots. Upon the completion of these burial interment sales, Shaare Zedek, under New York law, *retained and continues to own* ***all*** the land at Bayside. While opposing counsel has repeatedly represented to the Court and others that Shaare Zedek sold the plots to individuals and burial societies who own the land and are now "kaput,"[8] that view is in error.[9] Indeed, Defendants' position mirrors that of the mistaken superintendant in *George v. Cypress Hills Cemetery*, 52 N.Y.S. 1097, 1898 N.Y. App. Div. LEXIS 1755 (2nd Dept. 1898) wherein the court noted:

---

[8] "[T]the synagogue's lawyer, contends that the congregation owns only a fraction of the 12-acre site. 'The synagogue doesn't own 90 percent of the land in the cemetery,' Axinn reportedly said." Kin Sues Jewish Cemetery, *The Queens Courier* dated August 27, 2008; *See also* Weeds Among the Graves, and Dismay Among the Survivors, *The New York Times* dated August 15, 2008. Buchman Decl., Exhibits C and D.

[9] *See Sockel v. Degel Yehudo Cemetery Corp.,* 49 N.Y.S.2d 176, 268 A.D. 207 (1st Dept. 1944) ("The purchaser of a burial plot does not acquire a title in fee simple but ordinarily is regarded as acquiring only an easement or license to make internments in the lot purchased so long as the lot remains a cemetery."); *Dutton v. Greenwood Cemetery Co.*, 80 N.Y.S.780, 1903 N.Y. App. Div. LEXIS 573 (2nd Dept. 1903) ("the Defendant is the absolute owner of the property in full possession and control of it, those to whom receipts for lots have been given having no estate or interest in the land as such, but merely a right to use it for burial purposes, subject to the rules, regulations and general control of the defendant."); *Whitmore v. Woodlawn Cemetery*, 71 A.D. 257, 1902 N.Y. App. Div. LEXIS 945 (1st Dept. 1902) (the title to the land, however, remains in the cemetery association, and it holds the legal title subject to the exclusive right of the lot holder); *Buffalo City Cemetery v. City of Buffalo*, 46 N.Y. 503, 505 (1871) ("The association remains the owner in general, and holds that relation to the public and to the government, while subject to this, the individual has a right exclusive of any other person to bury upon the subdivided plat assigned to him. He holds a position analogous to that of a pew holder in a house for public worship. It is a right exclusive of any other of the congregation, but subject to the right of the religious corporation, which represents the ownership of the property to the public, and is the legal owner of the fee of the property.").

> The superintendant describes it as the public ground in which persons buy graves for twelve dollars each. According to his testimony 'the cemetery does not own the soil, the purchasers buy graves out and out, and they have jurisdiction themselves over the grave.' In this view of the legal relation of the parties, the witness was in error, as it appears that the plaintiff received a mere ticket of internment. The position of the plaintiff, as the purchaser of the graves, was analogous to that of the owner of a church pew.

Id.

In addition to selling burial rights to plots, Defendants also offered individuals and burial societies the opportunity to purchase annual or perpetual care. Defendants sold perpetual care to individuals and burial societies by entering into standard form contracts entitled "Trust Fund Receipt." These "Trust Fund Receipts" incorporated by reference New York Membership Corporation Law sections which required that:

> funds so received shall be kept invested only in securities authorized by law for the investment of trust funds, and the income arising there from shall be used solely for the perpetual care and maintenance of the lot or lots for which such income has been provided. The officers of the corporation shall keep accurate accounts of such funds separate and apart from its other funds.

Buchman Decl., Exhibit E, New York Membership Corporation Law §92; *see* also Complaint ¶¶ 6, 50, 52[10]. The title of the document, and the reference to New York Membership Corporation Law created a fiduciary relationship[11] by operation of law.[12] In their Complaints, Plaintiffs describe the perpetual care services Defendants are contractually obligated to provide, *i.e.* maintaining a plot in "presentable condition."

---

[10] For an example of a "Trust Fund Receipt," *see* Buchman Decl., Exhibit M.

[11] Under New York law, a fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the others expertise or knowledge. *WIT Holding Corp., v. Klein*, 282 A.D.2d 527, 529, 724 N.Y.S.2d 66 (2nd Dep't 2001).

[12] *See Yochim v. Mount Hope Cemetery Association*, 163 Misc. 2d 1054 (Cty. Ct. Yonk. 1994) (*citing DiMaio v. State of New York* , 135 Misc. 2d 1021, 1025 (N.Y.Ct. Cl. 1987)).

Complaint at ¶ 5. They further allege perpetual care is traditionally purchased for the benefit of "surviving family, friends and other interested parties." Complaint ¶5.

Notwithstanding obligations under the "Trust Fund Receipts," Defendants have refused to honor perpetual care contracts at the cemetery. Plaintiffs commenced this action after unsuccessfully attempting to obtain documents and information in an effort to resolve their dispute with Defendants. Defendants, which owe a fiduciary duty to Plaintiffs, have refused to produce documents and information to Plaintiffs, including perpetual care "Trust Fund Receipts" and other highly relevant documents.[13]

After the commencement of this suit, Defendants, for the first time, publicly admitted that monies were "commingled" and used to repair the roof and/or make other capital repairs at the synagogue.[14] Whether characterized as commingling accounts, absconding with monies, embezzlement or even theft, the sad reality is that the cemetery is in deplorable condition. Dismissing this case will only compound the problem since Bayside is not subject to the cemetery laws, is registered as a "religious group" not a foreign or domestic "not for profit" corporation and, therefore, beyond governmental regulation.[15] Notably, "state officials say that they are aware of the problems at Bayside, but are powerless to do anything about it." *Id.* Thus, contrary to Defendants' impassioned pleas for dismissal on the ground the New York State Attorney General ("NYAG") will oversee this matter in Plaintiffs' absence, no progress will be made if this

---

[13] Buchman Decl., Exhibit O.

[14] Buchman Decl., Exhibit F, Bayside Cemetery Suit Groundless, Shul Says, *The Jewish Week* October 03, 2007; Buchman Decl., Exhibit G, Cemetery Woes to be Weeded Out, *The Daily News* October 4, 2007.

[15] Buchman Decl., Exhibit H, The Cemetery That Nobody Wants, *The Jewish Week* dated October 18, 2002.

case is dismissed. Dismissal of this case will grant Defendants a free pass to continue to do nothing, but provide "lip service"[16] to those whom they are contractually obligated.

Defendants also conveniently fail to disclose to the Court that the Community to Assist Jewish At Risk Cemeteries ("CAJAC") is not an entity independent of Shaare Zedek. CAJAC is conveniently headquartered at Shaare Zedek.[17] It is also not a 501(c)(3) charitable organization so no hope should be placed in this entity which appears to be closely aligned with and dependent upon Shaare Zedek.

Plaintiffs respectfully submit that the well pleaded complaints concerning this private dispute should be sustained and discovery commenced in earnest since the NYAG's Office, which has not intervened to stay this proceeding, has expressed to Plaintiffs, and likely the Court as well, that it has neither the power nor the inclination to become entangled in what is a purely private contractual dispute.[18]

ARGUMENT

Defendants have moved to dismiss Plaintiffs' complaints on the following three principal grounds: standing, the statute of frauds and the statute of limitations. For the reasons demonstrated below, Defendants' infirm motion should be denied in its entirety.

---

[16] Buchman Decl., Exhibit I, Frustration at Bayside Cemetery, *The Jewish Week* dated August 1, 2003.

[17] Buchman Decl., Exhibit J.

[18] See *The German Evangelical St. Marcus Congregation of St. Louis v. Archambault*, 404 S.W. 2d 705, 1966 Mo. LEXIS 706 (Mo. 1966) ("[the Attorney General] does not, however, represent each and every member of the public, particularly where private interests exist, in which case "those with a special interest may enforce a trust, or a localized or group charity may be enforced by a class suit. . . .).

A. The Standard of Review on a Motion To Dismiss

On a motion to dismiss, the Court "takes as true all facts alleged in the complaint and draws all reasonable inferences in plaintiffs' favor." *Jackson Nat'l Life Ins. Co., v. Merrill Lynch & Co., Inc.*, 32 F.3d 697, 699-700 (2d Cir. 1994).

B. Plaintiffs, Who are Not Pursuing Psychic Injury Damages, Possess Legal Standing to Pursue the Claims Alleged In Their Complaints

Defendants have moved to dismiss Plaintiffs' General Business Law ("GBL") §§ 349, 350,[19] breach of contract,[20] unjust enrichment,[21] breach of fiduciary duty[22] and

---

[19] **The "Derivative Claim" argument under GBL §349**: Defendants contend Plaintiffs' claims are derivative and not cognizable under GBL §§349, 350. Def. Mem., pp. 8-10. Plaintiffs' claims are not "derivative." *Blue Cross & Blue Shield of N.J. v. Phillip Morris USA, Inc.*, 818 N.E.2d 1140 (N.Y. 2004). As the legal representative/family member of the deceased person with rights under the contracts in question, Plaintiffs are pursuing non-derivative claims on behalf of those who contracted with a Defendant and would be able to assert these claims if they were alive. Moreover, Plaintiffs have alleged a "consumer injury or harm to the public interest" which constitutes the type of "person" who possesses standing under GBL §§349, 350. *See Blue Cross and Blue Shield of New Jersey, Inc., Phillip Morris USA, Inc.*, 344 F.3d 211 (2d Cir. 2003) (*citing Securitron Magnalock Corp., v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) ("although the statute is, at its core, a consumer protection device . . . it does provide a right of action to *any person* who has been injured.") (emphasis added).

[20] **Contractual Privity/Third Party Beneficiary Standing**: Defendants' argument that Plaintiffs are not in privity with Defendants is "oxymoronic." Plaintiffs may not be signatories to the contracts in questions, but they unequivocally posses standing to bring a breach of contract claim. *See infra Section B.* They also possess standing as third-party intended beneficiaries. A person is a third-party beneficiary if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary [not relevant here] or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *See Fourth Ocean Putnam Corp., v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 43-44, 495 N.Y.S.2d 1 (1985). As alleged in the Complaint, perpetual care is purchased for the benefit of "surviving family, friends and other interested parties." Complaint ¶ 5. Under the second prong of *Fourth Ocean* and the allegations in the Complaint, Plaintiffs are intended third-party beneficiaries under the contract since Defendants intended to give Plaintiffs and future generations performance. These are precisely the people the signatories to the contract expected to benefit from and enforce the contract in their

conversion[23] claims on the grounds plaintiffs lack standing. Def. Mem., pp. 5-17. Plaintiffs have made clear that they are descendents of individuals who purchased

---

absence. *Restatement [Second] of Contracts* ch 14, Introductory Note, at 439 and §302[2]. There is also nothing expressed in the "Trust Fund Receipts" to negate this intention. The absence of language in a contract Defendants created excluding these intended beneficiaries from commencing suit is fatal to Defendants' position since this contract is construed *against* the maker. *In re Ancillary Receivership of Reliance Ins. Co.*, 863 N.Y.S.2d 415 (1st Dept. Sept. 2, 2008) ("[S]uch ambiguity must be construed against the insurer under the doctrine of *contra proferentum*."); *Litchmore v. Perez*, 851 N.Y.S.2d 70 (N.Y. Sup. Kings Co. 2007) ("One doctrine governing the interpretation of ambiguous contracts is *contra proferentum*, which holds that ambiguities in a contractual instrument will be resolved against the party who prepared it and in favor of the party who had no voice in the selection of its language.").

[21] **Conveyance and retention of a benefit**: Defendants' argument that Plaintiffs have not conferred a benefit on them is patently absurd. Plaintiffs are seeking to establish a constructive trust over monies paid by their relatives that Defendants have converted and used to make repairs to the synagogue. *See* Complaint, Prayer for Relief.

[22] **Establishment of a fiduciary relationship**: Defendants contend "Plaintiffs do not allege that they ever personally provided any funds to Defendants, in trust or otherwise" to establish a fiduciary relationship. Def. Mem., p. 14. Plaintiffs alleged that their relatives entered into perpetual care contracts with Defendants. The title and contents of the document by operation of law created a fiduciary relationship. *See* Buchman Decl., Exhibit M; *Yochim v. Mount Hope Cemetery Association*, 163 Misc. 2d 1054 (Cty. Ct Yonk. 1994) (*citing DiMaio v. State of New York* , 135 Misc. 2d 1021, 1025. Since Defendants drafted the document, the presumption that a "trust" was created is construed against the maker *not* plaintiffs *nor* their legal representatives/family members. *See Consolidated Gas Supply Corp., v. Matula*, 36 N.Y.2d 790, 369 N.Y.S.2d 698 (1975) (contract ambiguities are to construed against the maker of the contract). Plaintiffs' breach of fiduciary duty claims should be sustained because Plaintiffs' complaint clearly charges that Defendants owe a fiduciary duty which they have and continue to violate. *See Nutronics Imaging, Inc., v. Danan*, 96 CV 2950, 1998 U.S. Dist. Lexis 10638 (E.D.N.Y. June 10, 1998) (Dearie, J.).

[23] **Conversion**: Defendants contend Plaintiffs' conversion claim fails because they do not alleged they paid monies to Defendants and have an immediate right to the return of the monies. Def, Mem. 15-16. Again, Defendants fail to appreciate Plaintiffs "stand in the shoes" of the poor deceived souls who paid these monies and who are entitled to the return of converted monies. "By taking perpetual or annual care monies out of the fund without Plaintiffs' and members of the Class' express authorization or consent and by holding or using these monies in a manner entirely inconsistent with the purpose originally given to the exclusion of the plaintiffs and members of the class", (Complaint ¶

perpetual or annual care, "stand in the shoes" of their relatives and sue in their personal capacity as legal representatives/family members. Complaint ¶¶ 19-21. They further allege "Defendants refusal to honor perpetual care or annual care contracts have caused injury by allowing plots subject to such contracts to fall into shameful disrepair." Complaint ¶ 53. Plaintiffs possess requisite standing to proceed for two reasons.[24]

First, each Plaintiff is the executor or legal representative of the family member who purchased perpetual care or for whom it was purchased. Complaint ¶ 19. For example, Plaintiff John Lucker is now the legal representative of his grandmother's estate.[25] Mrs. Lucker is buried in Chebra Shebath Achim Burial Society, Gate 19 a picture of which, attached as Exhibit A to the Lucker Complaint, illustrates the plots are completely inaccessible. This burial society, as the agent for Mrs. Lucker, purchased perpetual care for the Lucker plots. Plaintiff Fran Goldstein, an only child, is the

---

70), Defendants have violated New York law which prohibits "the unauthorized exercise of dominion over property of another [which] constitutes conversion." *Volga v. United Mgmt Corp.*, 93-CV-4229, 1997 U.S. Dist Lexis 21711 (E.D.N.Y. Mar. 4, 1997) (Dearie, J.). Plaintiffs have alleged that Defendants refuse to restore monies and conduct an accounting. (Complaint at ¶16). These allegations are sufficient as a matter of law to establish a claim for conversion by these family members who have an interest in this issue. *See* Section B and n. 19.

[24] Plaintiffs will address the merits of this argument now rather than defer the issue to class certification where it is more appropriately raised. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); s*ee also*, *Sheet Metal Workers Nat. Health Fund v. Amgen Inc.*, 2008 WL 3833577 (D.N.J., Aug. 13, 2008)(finding it premature to make a determination on standing to pursue various state antitrust claims based on lack of injury-in-fact, the court ruled that class certification must be decided before the Court reaches the question of Article III standing with regard to the state claims); *In re Buspirone Patent Litig.*, 185 F.Supp.2d 363, 377 (S.D.N.Y.2002) (deferring on issue of Article III standing on a motion to dismiss, and explaining that "it is appropriate to decide class certification before resolving alleged Article III challenges of the present kind.").

[25] Buchman Decl., Exhibit K.

executor of her mother's estate.[26] Her mother is buried at the Levy plots 13-A with her husband. Defendants entered into a perpetual care contract with the Levy's concerning this plot.[27] Discovery in this case will establish that Plaintiff Lynn Cohen, an only child, is the executor of her mother's estate and that perpetual care was purchased for both her mother and her father's plots by her father who was a New York lawyer.

Second, even if Plaintiffs could not produce evidence of their status as executors of the estates of the individuals whom they seek to represent, it is hornbook law that Plaintiffs unquestionably possess standing to proceed with this lawsuit. The rule was well stated in *Bogert*, Trusts and Trustees, § 414 pp. 345-346:

> A case of somewhat similar type is that of a cemetery trust when regarded as charitable. There the lot owners, persons who are entitled to have their dead buried there, or *who already have friends or relatives interred in the cemetery, all may be said to have a definite interest in the trust.* Other members of the public may also receive benefit, through the opportunity to buy lots, or otherwise; *but the lot holders and others similarly situated are clearly benefited and interested in the upkeep of the cemetery. Such interest may be regarded as sufficient to enable them to sue to compel execution of the cemetery trust.*

See also 14 C.J.S. Cemeteries § 25, p. 85; Jackson, The Law of Cadavers, p. 362.

While there is 1892 law on point in New York which makes clear Plaintiffs have standing, there does not appear to be a more recent New York case directly on point.[28] Recently, the Supreme Court of West Virginia *In The Concerned Loved Ones and Lot*

---

[26] Buchman Decl., Exhibit L.

[27] Buchman Decl., Exhibit M.

[28] In *Mitchell v. Thorne*, 134 N.Y. 536, 32 N.E. 10 (1892), the court held that plaintiff, an heir, had the right to restrain the owner of a cemetery from removing and damaging headstones *and a right to recover damages. See also Lay v. Carter*, 151 N.Y. Supp. 1081 (1915) (one or more members of a family who were interested in rights the family acquired in a cemetery could maintain an action to restrain interference.).

Owners Association of Beverly Hills Memorial Gardens v. Pence, 181 W. VA. 649, 383 S.E. 2d 831, 1989 W. VA. LEXIS 146 (1989) addressed the issue:

> Do the plaintiffs have standing and any cause of action against the cemetery corporation and its individual owner for legal and punitive damages based upon desecration of cemetery land, fraud, outrageous conduct, *breaches of contractual duty*, *breaches of fiduciary and trust duties*, and/or violation of public policies?

Id., at *4 (emphasis added). Answering the question in the affirmative, the court stated:

> [the preservation] of remains is a legal right, which in this country is regarded as a quasi right in property, the violation of which is cognizable in and may be redressed at the suit of near relatives by an action on the case against the wrongdoer.

Id.; 10 Am. Jur. Charities, § 117, p. 670; *see also Tracey v. Bittle*, 213 Mo. 302, 112 S.W. 45, 494 (1908) ("The plaintiff, having near relatives buried in this graveyard, has a peculiar right in the maintenance of this public use and in preventing an obstruction to the public use. In such case he can maintain the action . . . "); *Accord, Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388, 392 (1989). A survey of state decisions indicates that courts in New Jersey, Pennsylvania, Illinois, North Carolina, Missouri, Arkansas, Alabama, Kentucky and Texas which have addressed this issue have all likewise determined that family members or near relatives, like Plaintiffs in this action, possess standing to pursue these types of claims.[29] Accordingly, Defendants' standing argument is entirely erroneous.

---

[29] *The German Evangelical St. Marcus Congregation of St. Louis v. Archambault*, 404 S.W. 2d 705, 1966 Mo. LEXIS 706 (Mo. 1966) ("[the Attorney General] does not, however, represent each and every member of the public, particularly where private interests exist, in which case "those with a special interest may enforce a trust, or a localized or group charity may be enforce by a class suit. . . . Generally beneficiaries in a charitable trust have a right to maintain suit to enforce the trust or prevent diversion of its funds and even though in Missouri the purchaser of a cemetery lot does not acquire an estate in fee but merely an easement or privilege of burial, lot owners (or their

C. The NYAG Does Not Get Involved In Private Contractual Disputes Especially Those Involving Religious Groups Not Subject to The Not For Profit Corporation Laws

Defendants would have this Court dismiss this action on the mistaken belief that the NYAG "retains the ability to vindicate the interests of Plaintiffs' relatives in connection with Bayside Cemetery." Def. Mem., p. 17. Indeed, Defendants blithely state "the Court need not worry that by dismissing these actions, the Defendants will be freed from legal scrutiny." *Id.* Yet, that is exactly what will happen since Bayside Cemetery is registered as a religious group and not subject to governmental regulation.[30] As state officials have publicly acknowledged, "they are aware of the problems at Bayside but powerless to do anything about it" because Bayside is not subject to the not-for-profit

---

representative) have such a special interest as to justify respondents' defense of the trust in the original suit."); *Brown v. Hill*, 284 Ill. 286, 119 N.E. 977, 980 (1918) ("It is well settled that a court of equity will enjoin the owner of land from defacing or meddling with graves on land used for public burial purposes, at suit of any party having deceased relatives or friends buried therein"); *Hertle v. Riddell*, 127 Ky. 623, 106 S.W. 282 (1907) (same); *Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893, 899 (1955) (plaintiff possessed standing to sue.); *Smith v. Ladage*, 397 Ill. 336, 74 N.E.2d 497, 500 (1947) (action for damages and injunctive relief by relatives against cemetery for desecration upheld); *Seitzinger v. Becker*, 257 Pa. 264, 101 A. 650, 651 (1917) ("the fact that the complainants are the grantees or heirs of grantees of certain lots sold to them by the respondents, gives them such interest and rights in the premises, as to make them proper parties to maintain the bill."); *see Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536, 36 S.W. 802, 805 (Ct. App. 1896) ("[t]here can scarcely be any doubt that a lot owner in a cemetery corporation has such an interest therein as may be protected in a proceeding of this kind."); *Clark v. Rahway Cemetery*, 69 N.J. Eq. 636, 61 A. 261 (Chn. Ct. 1905) ("[h]is interest is, in some degree, that of a beneficiary of a trust, and I cannot imagine why he should not have the right to complain if that is being violated to his prejudice."); *Scruggs v. Beason*, 246 Ala 405, 20 So.2d 774 (1945) (complainants had right to visit and beautify cemetery and a right to complain.); *Growth Properties v. Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984) ("outraged" and "heartsick" family members had standing to pursue claims Defendants "breached a duty to provide perpetual care to appellees' family members but engaged in a prolonged and callous desecration of the graves of their kinsmen.").

[30] *See* Buchman Decl., Exhibit H, The Cemetery Nobody Wants, *Jewish Week* dated October 18, 2002.

corporation laws *Id.* Bayside is, therefore, distinguishable from the defendant in *People ex rel. Vacco v. Woodlawn Cemetery*, 662 N.Y.S.2d 369 (N.Y. Sup. Ct. 1997) which was subject to government regulation. Thus, Defendants' representation to this Court and reference to *Woodlawn* is entirely misleading. Contrary to Defendants' argument, dismissing this case will result in the denial of a remedy concerning an injury Defendants have publicly admitted. It will also allow them to "to be freed from legal scrutiny" and further delay or altogether avoid instituting appropriate remedial measures at Bayside. Def. Mem., p. 17.

D. The Statute of Frauds and Statute of Limitations Arguments Are Premature and Lack Merit

1. The Statutes of Frauds and Limitation Are Affirmative Defenses Which are Irrelevant On A Motion To Dismiss

Defendants' statutes of fraud and limitations arguments are affirmative defenses. The Supreme Court has held that Plaintiffs are under no obligation to anticipate affirmative defenses in their complaint and plead that a defense does not apply.[31] Indeed, this Court has held affirmative defenses are "particularly irrelevant at the motion to dismiss stage." *Flash Elecs v. Universal Music*, 312 F. Supp. 2d 379 (E.D.N.Y. 2004) (Dearie, J.). The issues surrounding the statute of frauds and statute of limitations "depend[] on matters outside the pleadings, so it is rarely appropriate to grant a Rule 12(b)(6) motion to dismiss" where these types of issues are involved. *Hoffkins v. Monroe-2 Orleans BOCES,* 2007 U.S. Dist. LEXIS 32313, 2007 WL 1288210, at *2 (W.D.N.Y. Apr. 30, 2007); s*ee also Barr v. Charterhouse Group Int'l, Inc. (In re Everfresh Beverages, Inc.),* 238 B.R. 558, 577 (Bankr. S.D.N.Y. 1999). Defendants'

[31] *Gomez v. Toledo*, 446 U.S. 635 (1980); *E.On AG v. v. Acciona, S.A.*, 468 F. Supp. 2d 559 (S.D.N.Y. 2007).

affirmative defenses are more appropriately raised on a motion for summary judgment. Accordingly, the premature and incorrectly developed statutes of frauds and limitations arguments should be denied.

2. The Fed. R. Civ. P. 8(a) Argument is Baseless

Pursuant to Fed. R. Civ. P. 8(a), Defendants contend that the Lucker and Cohen[32] Complaints fail to "incorporate[] a copy of the relevant contract, nor do they identify the material terms of the contract, most notably the amount of money deposited for perpetual care." Def. Mem., p. 18. They further contend this information is necessary "for a court to judge whether the contract has been breached." *Id.* Defendants' arguments are sadly misplaced for two reasons. *First*, Plaintiffs alleged in their complaints that: (i) their relative purchased a perpetual care contract from a Defendant (Complaint ¶ 12); (ii) the Defendants entered into a written contract with the relative using a standard form (Complaint ¶6); (iii) perpetual care was a service to maintain the plot in "presentable condition" for the benefit of "surviving family, friends and other interested parties" (Complaint ¶5); and (iv) the terms of the contract required Defendants to maintain perpetual care monies in separate accounts, invest the monies, use the investment income solely for perpetual care purposes and maintain accurate records separate and apart from other funds pursuant to New York's Membership Corporation law which was incorporated by reference into the contract. (Complaint ¶ 12). These are the "material terms" of the typical two to three page standard form contracts used by Defendants over the years.[33]

---

[32] Defendants concede the Goldstein complaint is sufficient.

[33] *See* Buchman Decl., Exhibit M.

Second, while it is true the Lucker and Cohen Complaints do not allege the actual amount paid for perpetual care, this term is not necessary for this Court to "judge whether the contract has been breached." Def. Mem., p. 18. The Court need look no further than opposing counsel's own admission of liability to determine that the contracts have been breached. Here, the Lucker and Cohen Plaintiffs family members paid monies to Defendants which were to be placed in trust and remain inviolate. Defendants' attorney has admitted that this money was commingled and used to repair a roof at Congregation Shaare Zedek. Buchman Decl., Exhibits F and G. This admission conclusively establishes that the perpetual care contracts in question were in fact breached. Defendants' argument is meaningless noise.

3. Defendants, Who Refuse to Turn Over Contracts and "Hide the Ball," Improperly Seek Dismissal Under The Statute of Frauds

Defendants claim the Statute of Frauds bars the Lucker and Cohen Plaintiffs' breach of contract claims. Def. Mem., p. 19. They further contend "the Complaints here neither allege the existence of a written contract, nor include the type of information, including identities of the parties, or even any date more specific than a decade that would tend to suggest Plaintiffs are aware of such writing." Def. Mem., p. 19. Defendants ignore the allegations in the Complaints that: (i) Defendants entered into a written contract with Plaintiff's relative using a standard form (Complaint ¶6); (ii) perpetual care was the contracted service purchased to maintain the plot in "presentable condition" for the benefit of "surviving family, friends and other interested parties" (Complaint ¶5); and (iii) the terms of the contract required Defendants to maintain perpetual care monies in separate accounts, invest the monies, use the investment income

solely for perpetual care purposes and maintain accurate records separate and apart from other funds pursuant to New York's membership Corporation law which was incorporated by reference into the contract. Complaint ¶ 12.

In addition to this information, Plaintiff Lucker has produced to the Court and Defendants a single page letter from the Chebra Shebath Achim burial society dated January 4, 1973 acknowledging that it purchased perpetual care on behalf of all those buried or to be buried in its area. The document states in relevant part:

> [t]he Chebra is still alive, and will continue so until the last member passes away. After that, who knows what will be. That is why we purchased perpetual care of the cemetery.

Buchman Decl., Exhibit N.

It is well settled that a contemporaneous document memorializing a contract satisfies of the Statute of Frauds.[34] Notwithstanding the allegations in the Lucker and Cohen Complaints, Defendants, citing a summary judgment decision, contend that Plaintiffs have no adequate excuse for failing to attach a copy of the perpetual care contract to the complaint.[35] The Lucker and Cohen Plaintiffs have alleged in their Complaints that they are the descendants of individuals who purchased perpetual care. It is logical that Plaintiffs would not possess a copy of a perpetual care contract since such documents can easily be misplaced from generation to generation and are not typically considered to be family heirlooms. Plaintiffs also alleged that Defendants have refused to turn over documents and likely destroyed or lost documents concerning perpetual care

---

[34] *GB Marketing USA, Inc., Gerolsteiner Brunnen Gmbh & Co.*, 782 F. Supp. 763 (W.D.N.Y. 1991) (citing *Del Monte Corp. v. Mercantum (US) Corp.*, 175 A.D.2d 72, 572 N.Y.S.2d 678, 680 (N.Y. App. Div. 1991)); *see also Bazak Int'l Corp., v. Mast Ind., Inc.*, 73 N.Y.2d 113, 538 N.Y.S.2d 503 (1989); *Western New York Land Conservancy v. Town of Amherst*, 773 N.Y.S.2d 768, N.Y. App. Div. LEXIS 1412 (4th Dept. 2004).

[35] *See AG Limited v. Liquid Realty Partners*, 448 F. Supp. 2d 583 (S.D.N.Y. 2006).

plots in violation of their fiduciary duty to Plaintiffs. Complaint ¶ 9, 16. Defendants' refusal to provide the Lucker and Cohen contracts while affirmatively seeking dismissal on this ground and Fed. R. Civ. P. 8(a) is simply unconscionable and made in bad faith in violation of their fiduciary duty. A more patently inequitable argument cannot be imagined.

4. The Statute of Limitations

a. The Record is Incomplete to Calculate When the Statute of Limitations Began to Run

The first step in analyzing a statute of limitations affirmative defense is determining the length of the statutory period and pinpointing the time the cause of action first accrued. Try as they might, Defendants have not been able to point to a single allegation in the complaint which could serve as a basis for them to argue that Plaintiffs have pled themselves out-of-court via the statute of limitations. Instead, they concoct their own allegation in order to contend that Plaintiffs' claims are time barred. Defendants combine two separate sentences which are alleged in the complaint as follows:

> In the 1980s, Defendants Shaare Zedek was essentially defunct and suffered from a faltering budget. Statements recently made on behalf of the Defendants to the New York State Attorney General's Office make clear that the synagogue made a conscious decision to improperly remove monies originally intended for perpetual or annual care in violation of Defendants' fiduciary duties.

Complaint ¶11. The second sentence references no particular time period at all nor could it since this information has yet to be disclosed by Defendants. Crafting their own allegation, Defendants contend the Complaint alleges:

> '[i]n the 1980s,' the Congregation 'made a conscious decision to improperly remove monies originally intended for perpetual or annual care.'

Def. Mem., p. 22. It does not nor could it. In the absence of discovery, there is simply no way to determine precisely when Defendants commingled the accounts. Accordingly, Defendants' arguments at this stage of the proceedings, absent any discovery, are premature and incorrectly developed.

b. Plaintiffs Allege Continuing Violations of Law As To Which The Statute of Limitations Has Not Run

It is well settled that the statute of limitations affirmative defense does not apply when a plaintiff challenges not just one incident of conduct, but an unlawful practice that continues into the limitation period.[36] This is commonly known as the continuing violation exception. The continuing nature of Defendants' breach of contract, misallocation and misuse of perpetual/annual care funds, refusal to account for and restore said funds and other breaches of fiduciary duty render Defendants' statute of limitations arguments patently absurd.[37] Even if the statute is running, it has yet to lapse so long as these Defendants continue to refuse: (i) to honor the contracts in question; (ii)

---

[36] *Barkley v. Olympia Mortg. Co.,* 04 Cv 875 (RJD) KAM), 2007 U.S. Dist. LEXIS 61940 (Aug. 22, 2007) (Dearie, J.) (citing *Havens Realty Corp., v. Coleman*, 455 U.S. 363 (1982)); *Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994).

[37] *Koch v. Dwyer*, No. 98 CV 5519, 1999 U.S. Dist. LEXIS 11101, 1999 WL 528181, at *6, 12 (S.D.N.Y. July 12, 1999) (finding that plaintiff may pursue a claim for breach of fiduciary duty based upon a continued relation and imprudent investment); *NYSA-ILA Medical & Clinical Serv. Fund v. Catucci*, 60 F.Supp.2d 194, 199-200 (S.D.N.Y. 1999) (finding that successive inappropriate payments would give rise to a new cause of action "each time a fiduciary made an improper payment with Fund assets.); *Gruby v. Brady*, 838 F. Supp. 820 (S.D.N.Y. 1993) (holding that each time an excessive benefit payment was made the fund was injured giving rise to a new cause of action.); *Buccino v. Continental Assurance Co.,*578 F. Supp. 1518, 1521-22 (S.D.N.Y. 1983) (holding that the fiduciaries' retention of an unlawful insurance plan was a continuous and repeated violation of the duty to review plan investments.).

to conduct an accounting; (iii) to restore the improperly taken monies; and (iv) otherwise stop engaging in further obfuscation in violation of their fiduciary duties.

c. The GBL § 349 Claim Is Not Time Barred

Defendants contend that Plaintiff Lucker and Goldstein's GBL § 349 claim sound in "fraud in the inducement." Def. Mem., p. 20. They assert the claims are time barred because the contracts were entered well before a private right of action arose under GBL § 349. The thrust of Plaintiffs' claim stem from the simple fact that Defendants owed Plaintiffs a *continuing fiduciary duty* as a matter of law.[38] By failing to disclose after 1980, when a private right of action arose under GBL § 349, that the perpetual and/or annual care accounts had been invaded in violation of New York law, Defendants violated GBL § 349. It is difficult to fathom that Plaintiffs' complaints could be time barred since Defendants, for many years, concealed this truth despite their affirmative duty to speak. It is well recognized under New York law, and GBL § 349, that:

> when a Defendant [especially a fiduciary] electing to set up the statute of limitations has previously, *by deception or any violation of duty towards plaintiff*, caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold.

Kidd v. Delta Funding Corp., Index No. 601020/99, 2000 N.Y. Misc. LEXIS 29 (N.Y. Sup. Ct. 2000). Accordingly, the GBL § 349 and other state law claims survive because Defendants' possessed an affirmative duty to speak, engaged in deception by concealing the underlying facts of this case from Plaintiffs and now must be charged with having wrongfully obtained an advantage which the law cannot countenance.

---

[38] *See Yochim v. Mount Hope Cemetery Association*, 163 Misc. 2d 1054 (Cty. Ct. Yon 1994) (*citing DiMaio v. State of New York* , 135 Misc. 2d 1021, 1025 (N.Y. Ct. Cl. 1987)); s*ee also* Buchman Exhibit E, New York Membership Corporation Law § 92.

d. The Statutes of Limitations Are Equitably Tolled As A Result of Defendants' Fraudulent Concealment.

Defendants seek to avoid equitable tolling claiming Plaintiffs have failed to plead fraudulent concealment with particularity. They contend the Complaints fail to allege the "who, what, where and when" of the fraud. Def. Mem., p. 23.

Fraudulent concealment of the existence of a cause of action tolls the running of the statute of limitations. *See Glynwill Invests, N.V. v. Prudential Sec., Inc.*, NO. 92 Civ. 9267, 1995 WL 36500, at *4 (S.D.N.Y. June 16, 1995) (applying fraudulent concealment to breach of fiduciary duty and breach of contract claims). The *sine qua non* of fraudulent concealment is that the Defendant fraudulently concealed from the plaintiff his cause of action during the time in which plaintiff could have brought that action.[39] "[C]oncealment without actual misrepresentation may form the basis for invocation of the doctrine 'if there was a fiduciary relationship which gave the defendant an obligation to inform the plaintiff of the underlying claim.'" *Crown Castle USA, Inc., v. Nudd Corp.*, 05CV6163T, 2008 U.S. Dist. LEXIS 3416 (W.D.N.Y. 2008) (*citing Jordan v. Ford Motor Co.*, 426 N.Y.S.2d 359 (4th Dept. 1980)). Plaintiffs have alleged ample facts to equitably toll the statute of limitations by virtue of the concealment of facts by Defendants who owe a fiduciary duty to Plaintiffs.[40]

---

[39] *Barkley v. Olympia Mortg. Co.*, 04 Cv 875 (RJD) (KAM), 2007 U.S. Dist. LEXIS 61940 (Aug. 22, 2007) (Dearie, J.) (*citing Cardiello v. The Money Store Inc.*, No. Civ. 7322, 2001 U.S. Dist. LEXIS 7107 at 14-15 (S.D.N.Y. June 1, 2001), *aff'd*, 29 Fed. App. 780 (2d Cir. 2002)).

[40] *Naval v. Fernandez*, 97-CV-6800, 1998 U.S. Dist. LEXIS 20182 (E.D.N.Y. Nov. 20, 1998) (Dearie, J.) (statute of limitations does not run against a plaintiff who is unaware of his cause of action).

In this case, Plaintiffs have done precisely what is required under Fed. R. Civ. P. 9(b).[41] Plaintiffs alleged fraud by a fiduciary in failing to affirmatively speak as follows:

> 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. Such acts of fraudulent concealment include intentionally covering up and refusing to publicly disclose critical documents and information concerning the deliberate invasion of fiduciary account(s) containing monies dedicated exclusively for perpetual care or annual care at Bayside Cemetery to class members, their families and the general public. Through such acts of fraudulent concealment, Defendants were able to actively conceal from class members and the public for years the truth about their deceptive practices, thereby tolling the running of any applicable statutes of limitation.

Complaint ¶ 31.[42] Plaintiffs have satisfied Fed. R. Civ. P. 9(b) by pleading that: (i) Defendants (who); (ii) suppressed true facts concerning violations of New York law ie breach of contract, breach of a fiduciary duty, conversion, breach of GBL § 349 *etc.* (what); and (iii) concealed these facts from plaintiffs and class member for years and engaged in acts to cover up and prevent disclosure of these facts to U.S. Bayside perpetual/annual care purchasers (where and who), including Plaintiffs to whom a fiduciary duty is owed. This allegation alone demonstrates that Defendants took affirmative steps to prevent Plaintiffs from discovering their claims concerning an injury to their family member which was inherently self-concealing as Defendants exclusively controlled the funds absent oversight.[43] Defendants' contention that this case does not

---

[41] There is a relaxed fraud pleading standard where, as here, plaintiff has not been afforded an opportunity to take discovery of those who possess knowledge of the pertinent facts. *Affiliated FM Ins. Co., v. Jou Jou Designs*, Inc., 1997 U.S. Dist. LEXIS 12271, 1997 WL 473382 at *3 (S.D.N.Y. 1997).

[42] *See Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1127-28 (2d Cir. 1994).

[43] *State of New York v. Hendrickson Bros, Inc.*, 840 F. 2d 1065, 1083 (2d Cir.), *cert. denied*, 488 U.S. 848 (1988).

involve self-concealment is perplexing, Def. Mem., p. 24, since *they waited until after this case was filed* to publicly, acknowledge, *for the first time*, their misuse of perpetual care funds in violation of their fiduciary duty. Accordingly, Plaintiffs' claims are equitably tolled even if the statute of limitations is applicable.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied in its entirety.[44]

Dated: November 10, 2008
New York, New York

Respectfully submitted,

By: _____
Michael M. Buchman
[redacted]

Pro Bono Publico Counsel for Plaintiffs

[44] To the extent this Court grants any portion of Defendants' motion to dismiss, Plaintiffs respectfully request leave to replead. *See Cortec Indus. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991). Pursuant to Fed. R. Civ. P. 11, Plaintiffs have demanded that Defendants withdraw this frivolous motion to dismiss. They have refused to do so. Unlike Defendants, Plaintiffs do not intend to burden this Court with excessive motion practice and, therefore, have refrained from cross-moving for sanctions. To the extent the Court believes sanctions are appropriate, Plaintiffs reserve the right to fully brief this issue.