

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

STEVEN R. LEVENTHAL as representative of a
class consisting of himself and all others similarly
situated,

Plaintiff,

-against-

BAYSIDE CEMETERY, CONGREGATION
SHAARE ZEDEK and COMMUNITY
ASSOCIATION FOR JEWISH AT-RISK
CEMETERIES, INC.,

Defendants.

) Index No.:

) CLASS ACTION COMPLAINT

) Jury Trial Demanded

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff, on behalf of himself and all others similarly situated, alleges as follows against
Defendants Bayside Cemetery and Congregation Shaare Zedek and Community Association For
Jewish At-Risk Cemeteries, Inc. ("CAJAC") on information and belief formed after an inquiry
reasonable under the circumstances:

PRELIMINARY STATEMENT

1. It has been said that a Jewish cemetery is eternity in the eyes of Jews. According
to Jewish law, burial grounds are sacred places in perpetuity and deserve to be respected. This is
a consumer class action which concerns respect for the deceased. This class action is brought on
behalf of all persons or entities who purchased a perpetual care or annual care contract from
Defendants Bayside Cemetery and/or Congregation Shaare Zedek ("Defendants") or their agents
or assigns (the "Class"). While headstones at Bayside Cemetery read "Gone but not forgotten,"
Defendants have all but forgotten the cemetery and refuse to honor perpetual care or annual care
contracts which were entered into in accordance with New York and Jewish law. As a result,

Bayside Cemetery has for years been allowed to fall into and remain in deplorable condition in violation of Defendants' contractual and other legal obligations. See Exhibit A. *The Jewish Week* news article entitled *Weeding Out An Eyesore* dated June 6, 2004 described the cemetery as follows:

much of the cemetery remains mired in overgrowth, and large swaths continue to look like rainforest, where fallen headstones are buried under vines, weeds, wildflowers and fallen trees.

2. The deplorable condition of the cemetery is entirely the result of Defendants' unlawful conduct. Defendants have publicly admitted *to the New York State Attorney General's Office ("NYAG") and the press that they commingled perpetual and annual care monies and used the monies for purposes other than which they were intended, including repairs to the synagogue roof. See Bayside Cemetery is a Disgrace, Suit Says, The New York Daily News* October 4, 2007 ("As to the allegations about misappropriated funds, Shaare Zedek's attorney Steven Axinn said some cemetery funds were borrowed from a non-restricted account to repair the synagogue roof . . .").

3. This illegal conduct has resulted in the utter neglect of a 14 acre tract of land with 34,000 graves. Chest high weeds, overgrown trees and other growth have taken over the cemetery. As Defendants' own Rabbi has publicly stated "*Only a very large-scale professional restoration, costing hundreds of thousands of dollars, can address the situation effectively.*

Beyond the execution of a one-time restoration of this nature, providing for the long-term care of Bayside Cemetery is a very complicated multi-million dollar endeavor".

<http://citynoise.org/article/8696>.

4. No matter how Defendants now attempt to spin this case their admissions are fatal. Given these significant admissions, Defendants' conduct unquestionably constitutes a *per se* breach of contract, a *per se* breach of fiduciary duty, conversion *per se*, a *per se* violation of

New York's false advertising and consumer fraud statutes and unjust enrichment *per se*. For years, Defendants have concealed the truth concerning these stolen funds while also continuing to refuse to provide the required contractual services.

5. The fact that the NYAG has been aware of this problem for six years is of little consolation. For reasons unknown, the NYAG under the Spitzer administration did not immediately open an investigation or timely issue Civil Investigative Demands to Defendants to corroborate and test the accuracy of Defendants' voluntarily admission that they had commingled perpetual care and annual care funds with those of Congregation Shaare Zedek or other entities. Notably, a formal investigation was only commenced after other Plaintiffs met with the NYAG and is now pending before this Court. Those Plaintiffs have repeatedly been told by the current NYAG administration that while the investigation is continuing, it will end within thirty or so days. The investigation continues to this day with no clear end in sight. The NYAG has used the continuing investigation as a basis to frustrate Freedom of Information Law requests for Defendants' public admissions even though those Plaintiffs were allowed to read, but not copy these papers.

6. Nevertheless, the NYAG investigation does not nor could it cover Plaintiff's' private perpetual and annual care contracts which are collectively the subject of this litigation. The NYAG does not 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. *Smithers v. St. Luke's Roosevelt Hospital Ctr*, 723 N.Y.S.2d 426, 2001 N.Y. App. Div. LEXIS 3368 (1st Dep't 2001). Moreover, Bayside Cemetery is registered as a religious group which *is not* subject to governmental regulation and State officials have publicly acknowledged "that they are aware of the problems but powerless to do anything about it". See *The Cemetery that Nobody Wants, The*

Jewish Week dated October 18, 2002. Absent judicial intervention the future of this cemetery is highly uncertain because Defendants have no long term strategy or funding to care for the grounds nor any motivation to honor perpetual or annual care contracts which the NYAG lacks authority to regulate or control.

JURISDICTION AND VENUE

7. This Court has jurisdiction over Defendants pursuant to CPLR §§ 301 and 302 and venue is proper in this district as pursuant to CPLR § 503 because, among other things, (a) one or more defendants reside in this County, (b) the principal place of business of one or more defendants is in this County, and (c) parts of the unlawful conduct complained of herein occurred in this County.

PARTIES

8. Plaintiff Steven R. Leventhal is a resident of the State of New York. In 1985, Plaintiff paid Defendant Congregation Shaare Zedek \$1,200 to place in trust in order to provide perpetual care services for three graves at Bayside Cemetery. A copy of the "Trust Fund Receipt" and correspondence between Plaintiff and Defendant Congregation Shaare Zedek evidencing this transaction is annexed hereto as Exhibit A. At times relevant herein, Defendants have failed and refuse to abide by their fiduciary and contractual obligations to provide perpetual care services for these and other graves at Bayside Cemetery. Defendants' theft of perpetual care monies, failure to report the theft of perpetual care monies to Plaintiff, failure to provide an accounting for these monies and refusal to honor the contract by performing the requisite perpetual care services has, *inter alia*, caused injury to the Plaintiff.

9. Defendant Congregation Shaare Zedek ("Shaare Zedek") is a New York not-for-profit corporation with its principal place of business located at 212 West 93rd Street, New York,

New York. Shaare Zedek is a multi-generational, egalitarian Conservative congregation on the Upper West Side of Manhattan purportedly embracing a traditional approach to contemporary Judaism. Shaare Zedek owns, operates, manages, maintains and controls Bayside Cemetery. Defendant Shaare Zedek marketed and sold perpetual and annual care contracts, either directly or through its agents, to class members. Defendant Shaare Zedek has received in excess of \$5 million in perpetual and annual care monies since 1846.

10. Based upon documents created by Defendant Shaare Zedek and other information, Defendant Bayside Cemetery is a legal entity which maintains its principal place of business at 80-35 Pitkin Avenue, Ozone Park, New York. Defendant Bayside Cemetery marketed and sold perpetual or annual care contracts, either directly or through its agents, to members of the Class.

11. Community Association For Jewish At-Risk Cemeteries, Inc. (“CAJAC”) previously called “Friends of Bayside Cemetery”, is a New York not-for-profit corporation with its principal place of business at One Barker Avenue, Suite 260, White Plains, New York. CAJAC has entered into at least one recent contract concerning Bayside Cemetery and holds itself out as the steward of the cemetery. CAJAC was previously registered with the New York Secretary of State’s Office with an address of 212 West 93rd Street, New York, New York – this is the same address for Defendant Congregation Shaare Zedek. The President of CAJAC, Gary Katz, is also a member of Congregation Shaare Zedek and a Board of Directors member of Hebrew Free Burial Society which provides references to CAJAC on their website, has been involved with CAJAC’s activities at Bayside Cemetery and also served as a money conduit for CAJAC prior to CAJAC receiving its tax exempt status. There are additional overlapping ties between Congregation Shaare Zedek and CAJAC which suggest that CAJAC is an arm of

Defendant Congregation Shaare Zedek which has been designed as a straw person upon which to unload all of Shaare Zedek's legal and other responsibility for Bayside Cemetery.

FACTS

A. Facts Specific To All Defendants

12. Bayside Cemetery, located at 80-35 Pitkin Avenue, Ozone Park, New York (the "cemetery"), is one of the oldest Jewish cemeteries in New York City. The cemetery, founded in the mid-nineteenth century, includes the graves of Jewish veterans of the Civil War and subsequent conflicts. It is the final resting place for approximately 34,000 Jews.

13. In 1842, Congregation Shaare Zedek was located on the lower East Side of New York. It purchased the land at Bayside Cemetery for five percent of its congregation members and sold the remaining burial plots to individuals and burial societies.

14. In connection with the burial plots it sold to individuals and burial societies, Defendants have routinely advertised and offered to the general public for sale perpetual care contracts to maintain land located at the cemetery. In addition to offering, selling and entering into perpetual care contracts concerning plots at the cemetery, Defendants have also offered, sold and entered into annual care contracts for plots at the cemetery. Perpetual care or annual care is a contractual undertaking to provide, in exchange for compensation, all general work necessary to keep one or more plots at a cemetery property in a presentable condition at all relevant times including, but not limited to: (i) the cutting of grass at reasonable intervals; (ii) raking, cleaning, filling, seeding, and/or sodding of graves; (iii) replacement, pruning, or removal of shrubs and trees; and (iv) prevention and removal of wild foliage growth in order to assure access to interment rights and grave visitation by surviving family, friends, and other interested parties. This is in addition to general cemetery grounds maintenance which includes maintenance of

fencing, signage, roadways and walkways, lighting, buildings, water, power and sanitary sewage, etc.

15. Defendants used standard form contracts to enter into perpetual care or annual care agreements with consumers. Upon the purchase of a perpetual or annual care contract, Defendants recorded the appropriate information, issued necessary paperwork memorializing the purchase of the contract and marked plots to identify those plots under perpetual care or annual care. For example, Defendants placed “stickers” with the embossed large black letters “PC” on headstones for which perpetual care had been purchased in order to be able to identify such plots.

16. Despite having received large sums of money to provide perpetual or annual care for numerous graves, Defendants have not been maintaining plots for which perpetual or annual care has been purchased.

17. In an attempt to avoid their legal obligation to provide perpetual or annual care at the cemetery, Defendant Shaare Zedek has baselessly denied that it owns Bayside Cemetery even though well established case law in New York makes clear that a cemetery merely sells interment rights to a plot while retaining ownership of the land. Defendants have further baselessly and without shame denied that they have any legal obligation to earlier filed Plaintiffs or members of the Class.

18. Upon information and belief, Defendants have deliberately destroyed documents which identify perpetual care plots. Graves once marked with perpetual care stickers have had stickers removed or allowed to remain missing. Defendants destroyed these and other documents in order to now contend that they cannot identify which plots are governed by perpetual care contracts. The number of perpetual care stickers visibly present at the cemetery is

entirely inconsistent with adjacent cemeteries of similar or identical age and other Jewish cemeteries in the surrounding area.

19. Defendants, including Defendant Congregation Shaare Zedek which is now located on the Upper West Side of Manhattan and owns a multi-million dollar property, now contend that the cemetery should somehow become the responsibility of the broader Jewish Community. In their public statements, Defendants suggest that the perpetual or annual care monies they collected over the years have all been spent on the cemetery. That simply is neither true nor the entire story.

20. In the 1980s, Defendant 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. It appears these monies were improperly taken from the perpetual/annual care account for the purpose of making significant structural repairs to the synagogue building, thereby using the money for the living and not the deceased as initially promised, represented and intended.

21. While Defendants now contend all of the improperly removed monies have been returned to the perpetual/annual care accounts, no formal, independent accounting has been conducted to show that all monies improperly removed, and earnings from those monies, have been entirely restored. Indeed, Defendants have refused to conduct such an accounting, claiming that they no longer possess or control adequate business records concerning perpetual care or annual care contracts for the cemetery. This statement is incredible since Defendants are required by law to maintain such records. Section 92 of the Membership Corporation Law of

New York, which is cited in Defendants' contracts with consumers, provides in relevant part as follows: "[t]he officers of the corporation shall keep accurate records of such funds separate and apart from its other funds."

22. For years, Defendants have marketed, sold and collected monies from consumers for perpetual or annual care knowing that perpetual and annual care contracts were not being honored and that they had no intention or inadequate resources to honor new perpetual care or annual care contracts. They did not disclose material facts to consumers concerning the perpetual/annual care fund's financial strength, or lack thereof, at the time consumers purchased contracts. Moreover, when accepting monies Defendants led consumers to believe that perpetual care or annual care services would be provided when, in fact, Defendants had not been nor would be providing such services. For example, in 2001 the Chechonover Society paid annual care monies for seasonal care which the Defendants accepted. Defendants, however, refused to provide contractual services in whole or in part. *See The Jewish Week* dated October 18, 2002 entitled *The Cemetery Nobody Wants*. Defendants continue to accept perpetual care and annual care monies from individuals without supplying perpetual care services. Defendants accept this money and use it to fund their failing synagogue rather than pay for their own expenses.

23. Defendants have essentially turned a blind-eye to Bayside Cemetery and have refused to assume responsibility for any activity which occurs on its property. When mausoleums at Bayside Cemetery were vandalized, Defendants did virtually nothing to restore the property in accordance with traditional Jewish law. Instead, Defendants relied on the good will of non-Jewish volunteers to return exposed remains to coffins and vaults. On August 1, 2003, *The Jewish Week* noted Defendants' failure to take corrective action reporting as follows:

For two months now, Leslie and Ralph Francisco have been leading a volunteer effort to re-entomb remains in more than 30 badly vandalized mausoleums at the Bayside Cemetery.

Three days a week, in summer heat, the husband-and-wife funeral directors have taken turns putting their own business needs aside and with a group of volunteers, most of them non-Jewish, taken on the messy work of returning bones to coffins and placing the coffins in vaults in the Ozone Park, Queens, burial ground.

For their work, Leslie Francisco says the couple have 'yet to get a thank you,' from Bayside's owner, Congregation Shaare Zedek.

Worse she says, the Upper West Side Conservative shul for weeks ignored their request for [d]umpsters.

'The last time I was at the cemetery I had to walk past mice -- I won't do it anymore,' she said in an interview last week. 'There are bags and bags of garbage at the front gate. It's rotting piled in bags and attracting vermin. **We've spoken to [Shaare Zedek president Daniel Werlin] and [Councilman] Joe Addabbo has spoken to him, but it falls on deaf ears. He just gives lip service.**' *Id.* (emphasis added).

24. In the fall of 2008, more vandalism occurred at Bayside Cemetery and Defendants did nothing to remedy the problem. Instead, they reached out to volunteers like Leslie Francisco who refused to do any more free work for Defendants. After significant pressure from the NYAG and the media, Defendants eventually restored bones and other remains to their rightful resting places. Had it not been for such pressure, Defendants would be more than content to continue to do nothing.

25. While Defendants have insisted "the cemetery is 'one of our top priorities' . . . [it has] been vague when questioned about what they are doing to improve the situation." *Id.* News articles in *The Jewish Week* document that many other individuals have been outraged by Defendants' refusal to maintain the cemetery in accordance with their contractual obligations and Jewish law. Indeed, one individual, Ms. Beth Rocke, took Shaare Zedek to Small Claims Court and prevailed on a breach contract theory in the amount of \$2,364.00. *See The Jewish Week*

dated October 18, 2002 entitled *The Cemetery Nobody Wants*. It is noteworthy that Shaare Zedek refused to pay the judgment and documents were issued by Ms. Rocke to Shaare Zedek's bank which paid the judgment.

26. Defendants do not dispute that they have violated their fiduciary duties. Indeed, they have publicly admitted to the New York State Attorney General's Office that monies were commingled and improperly used. Notably, Defendants' counsel publicly stated that cemetery funds were "borrowed" from a non restricted account to repair the synagogue roof, but even a layperson knows that perpetual care trust monies are to be placed in "trust" which is a *restricted account*. See *Bayside Cemetery Is A Disgrace, Suit Says, New York Daily News*, October 4, 2007.

27. In sum, Defendant Shaare Zedek has raided the perpetual and/or annual care accounts they held in trust for the benefit of Bayside Cemetery. Defendant Shaare Zedek has stolen monies which it has inappropriately used for purposes other than those for which they were originally bestowed and intended. Each day Defendants refuse to restore monies, refuse to conduct a full and complete formal, independent accounting and refuse to honor perpetual care or annual care contracts, they are complicit in the theft which has occurred. As a direct and proximate result of the foregoing, Defendants have falsely advertised perpetual and annual care contracts, engaged in deceptive conduct, violated their fiduciary duties, engaged in conversion and breached their perpetual and annual care contracts with Plaintiff and hundreds or likely thousands of class members. Defendants' deliberate false statements and fraudulent conduct has resulted in the desecration of thousands of plots at the cemetery in violation of New York and Jewish law.

B. Facts Specific To CAJAC

28. Defendant CAJAC was originally known as "Friends of Bayside Cemetery" ("FOBC"). FOBC was created by members and officers of Defendant Congregation Shaare

Zedek. CAJAC maintained its principal place of business at 212 West 93rd Street in Manhattan which is where Defendant Congregation Shaare Zedek is headquartered. Ethan Klingsberg and Gary Katz, both of whom are lawyers, were members of Congregation Shaare Zedek when they created FOBC. And Messrs. Katz (President) and Klingsberg (Secretary) became officers of FOBC.

29. FOBC formally changed its name to CAJAC on April 13, 2007. It continued to maintain its headquarters at Congregation Shaare Zedek until approximately September 25, 2008 when it changed its address to Mr. Katz's office in White Plains, New York.

30. The listed Officers of CAJAC are Gary Katz (President), Ethan Klingsberg, David Billet (Vice President and Secretary) and Barry Yood (Treasurer). Mr. Klingsberg was at all relevant times until approximately June 15, 2009 the Cemetery Chairman and on the Board of Trustees at Congregation Shaare Zedek. Thus, two of CAJAC's officers have strong ties to Congregation Shaare Zedek.

31. CAJAC was intentionally created by Congregation Shaare Zedek members, who happen to be lawyers, as an under-capitalized, not-for-profit corporation in order to transfer Congregation Shaare Zedek's assets and liabilities concerning Bayside Cemetery. Indeed, there is no indication that Congregation Shaare Zedek, which has admitted it misappropriated and mis-used perpetual care monies, has given monies sufficient to cover any liability concerning its misconduct and this lawsuit. In other words, CAJAC was created as a shell corporation to absolve Congregation Shaare Zedek of any liability or responsibility for its wrongdoing in connection with Bayside Cemetery. Congregation Shaare Zedek's refusal to honor contracts at the cemetery or do anything to maintain the cemetery in a respectable condition bespeaks its

desire to “wash its hands” of Bayside Cemetery. And CAJAC is the vehicle to effectuate this desire.

32. There can be little doubt about Congregation Shaare Zedek’s intention to unload Bayside Cemetery on CAJAC since opposing counsel informed Chief Judge Dearie of this desire in a prior federal proceeding. Based upon communications with a high ranking official within the NYAG’s Office, Defendant Congregation Shaare Zedek’s is required and has attempted to obtain permission from the NYAG to effectuate this transfer. The present status of the transfer is unclear at this time, but the commencement of the prior federal lawsuit has apparently caused the NYAG to defer approval of the transfer.

33. It is also interesting that a large grant from UJA Federation of New York to Congregation Shaare Zedek for restoration work at the cemetery was “redesignated” to CAJAC.

34. It is also noteworthy that in addition to previously sharing office space with FOBC, Congregation Shaare Zedek is now sharing the property at Bayside Cemetery and its employees with CAJAC. Congregation Shaare Zedek has given *de facto* control of Bayside Cemetery to CAJAC while maintaining formal ownership of the property. For example and as alleged in the Complaint, CAJAC has taken control of and assumed responsibility for Bayside Cemetery by executing one or more contracts with a landscaper to perform restoration work at the cemetery.

35. How CAJAC could have entered into this contract concerning property it does not own and granted legal access to the premises while Congregation Shaare Zedek remains the owner of the property is one of many facts which support the conclusion that CAJAC is Congregation Shaare Zedek, thereby necessitating CAJAC’s participation in this lawsuit.

36. There are numerous facts which establish domination sufficient to maintain this action against CAJAC, including: (i) overlapping officers (Klingsberg and Katz); (ii) inadequate capitalization (failure to capitalize to cover stolen perpetual care monies); (iii) overlap in use and control of Congregation Shaare Zedek owned property at Bayside Cemetery and personnel working at the cemetery; (iv) the “redesignation” or sharing of monies for Congregation Shaare Zedek to CAJAC; and (v) the guarantee of debts of Congregation Shaare Zedek with respect to the contract for restoration at Bayside Cemetery. There can be little doubt that CAJAC was created to avoid responsibility and liability for an admitted wrong perpetrated by Congregation Shaare Zedek concerning the misappropriation of perpetual care monies for the cemetery. The effort undertaken to create CAJAC by Congregation Shaare Zedek members and to attempt or intend to seek approval of a formal transfer of the property to CAJAC is an additional violation of Congregation Shaare Zedek’s fiduciary duties to the Class and act of fraud.

In sum, Congregation Shaare Zedek and CAJAC are so intertwined so that they should be considered one in the same for the following reasons:

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|---------------------------------------|--|
| <i>Inadequate Capitalization:</i> | CAJAC has not been adequately capitalized to be able to satisfy a judgment concerning the misappropriation of perpetual care monies Congregation Shaare Zedek has publicly admitted it mis-used to fix the synagogue’s roof; |
| <i>Overlap in Corporate Officers:</i> | Ethan Klingsberg and Gary Katz; |
| <i>Common Office Space:</i> | FOBC/CAJAC were headquartered at Congregation Shaare Zedek; |
| <i>Use of Property:</i> | Congregation Shaare Zedek has given CAJAC <i>de facto</i> control of Bayside Cemetery and its employees; |
| <i>Shifting of Funds:</i> | Congregation Shaare Zedek has made arrangements with UJA Federation of New York to “redesignate” monies dedicated to Congregation Shaare Zedek for |

use to restore Bayside Cemetery directly to CAJAC;
and

Guarantee Of Debts:

CAJAC has executed a contract to perform restoration work at Bayside Cemetery – property which Congregation Shaare Zedek owns, thereby CAJAC has undertaken a debt obligation concerning property it does not own.

CLASS ACTION ALLEGATIONS

37. Plaintiff bring this action on his behalf and all other similarly situated as a class action pursuant to Article 9 of the CPLR on behalf of the following Class:

All persons or entities, or any one with authority to act on their behalf, who purchased a perpetual care or annual care contract from a Defendant or their agents or assigns.

38. The Class excludes Defendants, their parents, subsidiaries, affiliates, officers, directors, agents, assigns and employees. Also excluded are any federal, state or local governmental entity, and any judge or judicial officer presiding over this matter, judicial staff, and the members of their immediate families.

39. Because information concerning the purchase and sale of perpetual care and annual care contracts is or should be in the control of Defendants, Plaintiff does not know the exact number of members of each Class. Due to the nature of the trade and commerce involved, Plaintiff believes that Class members number at least in the thousands and are sufficiently numerous and geographically dispersed throughout the United States so that joinder of all Class members is impracticable.

40. Plaintiff's claims are typical of the claims of the members of the Class because Plaintiff and all Class members were injured by the same wrongful conduct as alleged herein.

41. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual Class members. Such common questions include:

- (a) Whether the alleged conduct violates N.Y. Gen. Bus. Law § 350;
- (b) Whether the alleged conduct violates N.Y. Gen. Bus. Law § 349;
- (c) Whether the alleged conduct constitutes a breach of contract;
- (d) Whether the alleged conduct constitutes conversion;
- (e) Whether a formal accounting should be required;
- (f) Whether Defendants were unjustly enriched; and
- (g) Whether Plaintiff and members of the Class are entitled to damages and

the appropriate measure of such damages.

42. As the claims of Plaintiff are typical of the claims of the Class, and Plaintiff has no interests adverse to or which irreconcilably conflict with the interests of other members of the Class, Plaintiff is an adequate class representatives.

43. Plaintiff will fairly and adequately protect the interests of the Class and have retained counsel experienced and competent in the prosecution of complex class action litigation. A class action is superior to other available methods for the fair and efficient adjudication of the controversy and substantial benefits will derive from proceeding as a class action. Such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the duplication of effort and expense that numerous individual actions would engender. Class treatment also will permit the adjudication of relatively small claims by many Class members who could not afford to individually litigate such claims against a large, well funded organization. There are no

difficulties likely to be encountered in the management of this class action that would preclude its maintenance as a class action, and no superior alternative exists for the fair and efficient group-wide adjudication of this controversy.

TOLLING OF APPLICABLE STATUTES OF LIMITATION

44. Any applicable statutes of limitation 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. 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.

COUNT I

Action For Damages Under New York Gen. Bus. Law § 350

45. Plaintiff repeats and realleges each and every prior allegation contained in paragraphs 1 through 44 hereof with the same force and effect as if fully set forth herein.

46. N.Y. Gen. Bus. Law § 350 provides that "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful."

47. As more fully described above, Defendants' advertisement and sale of perpetual and annual care contracts and the subsequent refusal to maintain the plots in accordance with

those contracts constitute violations of N.Y. Gen. Bus. Law § 350. Defendants presented papers to Plaintiff which indicated that they were purchasing perpetual or annual care which Defendants had no intention of providing or have not provided for years. Plaintiff is aware of these services by virtue of Defendants advertisements in and outside of New York. When purchasing these services based upon Defendants' representations and advertisements, Plaintiff and other class members relied on Defendants' statements.

48. Plaintiff and the Class seek damages for their injuries caused by these violations in an amount to be determined at trial.

49. Defendants' willful acts and conduct, as described above, entitle Plaintiff and the Class to an award of damages.

COUNT II

New York Gen. Bus. Law § 349

50. Plaintiff repeats and realleges each and every prior allegation contained in paragraphs 1 through 49 hereof with the same force and effect as if fully set forth herein.

51. N.Y. Gen. Bus. Law § 349 makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state."

52. N.Y. Gen. Bus. Law § 349 (h) provides that "any person who has been injured by reason of any violation of this section may bring . . . an action to recover his actual damages or fifty dollars, whichever is greater"

53. Defendants engaged in deceptive acts or practices within the meaning of N.Y. Gen. Bus. Law § 349 which resulted in injury and broad adverse impact on the public at large, and harmed the public interest of New York State in an honest marketplace in which economic activity is conducted. 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. Defendants have failed to abide by these contracts and have allowed the cemetery to fall into a state of shameful disrepair.

54. Plaintiff and the Class seek actual damages for their injuries caused by these violations in an amount to be determined at trial. Without prejudice to their contention that Defendants' unlawful conduct was willful and knowing, Plaintiff and the Class do not seek in this action to have those damages trebled pursuant to N.Y. Gen. Bus. Law § 349 (h). Plaintiff and the Class seek single damages with respect to this claim.

COUNT III

New York Gen. Bus. Law § 349-c

55. Plaintiff repeats and realleges each and every prior allegation contained in paragraphs 1 through 54 hereof with the same force and effect as if fully set forth herein.

56. N.Y. Gen. Bus. Law § 349 makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state."

57. N.Y. Gen. Bus. Law § 349 (h) provides that "any person who has been injured by reason of any violation of this section may bring . . . an action to recover his actual damages or fifty dollars, whichever is greater"

58. Defendants engaged in deceptive acts or practices within the meaning of N.Y. Gen. Bus. Law § 349 which resulted in injury and broad adverse impact on the public at large, and harmed the public interest of New York State in an honest marketplace in which economic activity is conducted. Defendants' deceptive conduct caused highly vulnerable individuals, who paid monies and placed their trust in Defendants to provide perpetual or annual care for their

own or family member's plots located at cemetery. Defendants have failed to abide by these contracts and have allowed the cemetery to fall into a state of shameful disrepair.

59. Defendants have knowingly directed and sold perpetual care or annual care contracts to individuals age sixty-five (65) years or older or otherwise engaged in conduct in willful disregard of the rights of individuals age sixty-five (65) years or older in violation of GBL 349-c.

60. Defendants' conduct caused individuals age sixty-five (65) years or older to lose monies for personal or family care in violation of GBL 349-c.

61. Plaintiff and the Class seek actual damages for their injuries caused by these violations in an amount to be determined at trial. Without prejudice to their contention that Defendants' unlawful conduct was willful and knowing, Plaintiff and the Class do not seek in this action to have those damages trebled pursuant to N.Y. Gen. Bus. Law § 349(h). Plaintiff and the Class seek single damages with respect to this claim.

COUNT IV

Breach of Contract

62. Plaintiff repeats and realleges each and every prior allegation contained in paragraphs 1 through 61 hereof with the same force and effect as if fully set forth herein.

63. Using standard form contracts, Defendants offered perpetual or annual care contracts for sale at Bayside Cemetery or assumed legal rights and responsibilities for existing perpetual or annual care contracts concerning Bayside Cemetery. A copy of the standard form contract is annexed as Exhibit A. This contract was used by Defendants over the past approximately forty years.

64. Defendants accepted monies from Plaintiff or members of their family, Class members or persons in kinship or as executors, trustees, or legal representatives with such individual(s) to provide perpetual care or annual care of certain plots at Bayside Cemetery.

65. Over the past few years, Defendants have intentionally removed perpetual care stickers from plots and refused to provide perpetual or annual care services in breach of their obligations under contracts.

66. Defendants' refusals to honor perpetual care or annual care contracts have caused injury by allowing plots subject to such contracts to fall into complete disrepair. Plaintiff and class members entered into perpetual care or annual care contracts in order to encourage family members and future generations to visit and pay respect to graves. Defendants promised Plaintiff and class members that they would care for and tend to the grave(s) knowing that family members and future generations would visit the graves and this was the reason individuals and societies purchase perpetual care. Indeed, this is well known and commonplace in the cemetery industry.

COUNT V

Unjust Enrichment

67. Plaintiff repeats and realleges each and every prior allegation contained in paragraphs 1 through 66 hereof with the same force and effect as if fully set forth herein.

68. Defendants benefited from their unlawful acts through the payments for perpetual or annual care services which they have failed to provide. It would be inequitable for Defendants to be permitted to accept and retain the benefit of these payments designated for perpetual or annual care services, which were conferred by Plaintiff and the Class members and retained by Defendants, when these Defendants refuse to provide such services.

69. Plaintiff and the Class members are entitled to have returned to each of them the amount paid as damages or restitution.

COUNT VI

Breach of Fiduciary Duty Against Defendants

70. Plaintiff repeats and realleges each and every prior allegation contained in paragraphs 1 through 69 hereof with the same force and effect as if fully set forth herein.

71. Plaintiff and the Class have suffered damages due to the Defendants' conduct as detailed above. The claims asserted herein against the Defendants are asserted on behalf of the Plaintiff and Class members to recover from Defendants the damages sustained and to be sustained by Plaintiff and the Class due to the grossly negligent mismanagement of the funds entrusted to them for the perpetual or annual care of the cemetery plots and the improper handling of perpetual and annual care monies in violation of Defendants' fiduciary duties.

72. The conduct detailed above was not due to an honest error of judgment but to Defendants' conflicts of interest, gross, reckless, bad faith and/or willful disregard of their fiduciary duties and of the rights and interests of Plaintiff and members of the Class. Defendants' conduct cannot be justified as valid acts of business judgment because they engaged in, caused, or permitted, criminal acts of theft, gross mismanagement and violated their fiduciary duties and their duties of due care, diligence and candor.

73. Defendants owed a fiduciary duty to Plaintiff and the Class to whom the benefit of the perpetual or annual care contracts run. By reason of Defendants' breaches, Plaintiff and the Class have sustained and will continue to sustain serious damage and irreparable injury, for which relief is sought herein.

COUNT VII

Aiding and Abetting Breaches of Fiduciary Duties Against Defendants

74. Plaintiff repeats and realleges each and every prior allegation contained in paragraphs 1 through 73 hereof with the same force and effect as if fully set forth herein.

75. Each of the Defendants breached fiduciary duties owed to Plaintiff and the Class in a willful manner as detailed above.

76. Each of the Defendants knowingly gave substantial assistance and encouragement to each other in committing the wrongful acts alleged above.

77. Each of the Defendants acted in concert with at least one other defendant to commit or perpetuate the breaches of fiduciary duties detailed above.

78. Plaintiff and members of the Class were injured as a result of the Defendants' conduct.

COUNT VIII

Conversion

79. Plaintiff repeats and realleges each and every prior allegation contained in paragraphs 1 through 78 hereof with the same force and effect as if fully set forth herein.

80. Plaintiff and the Class provided Defendants with monies for placement in a trust with the understanding that only interest monies would be used for the purpose of maintaining or making improvements to the respective perpetual plot(s) at Bayside Cemetery. By accepting monies in trust, Defendants agreed to hold and maintain the corpus of the trust in an account and never invade the trust or remove monies from the trust.

81. Defendants accepted receipt of these monies under these conditions and placed them in a trust fund.

82. Plaintiff and the Class had an ownership right or an immediate superior right of possession of these monies over Defendants. Defendant has previously refused to conduct a formal accounting and/or repay all stolen monies.

83. By taking perpetual or annual care monies out of the fund without Plaintiff's and Class members express permission, consent or by court ordered consent and by holding or using these monies in a manner entirely inconsistent with the purpose originally given to the exclusion of the Plaintiff and the Class, Defendants have converted Plaintiff's and Class member's property.

84. Plaintiff and the Class have been denied the right to their monies and have been injured. Defendants should be forced to place the monies owed in a trust for the benefit of all perpetual and annual care plots at Bayside Cemetery.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Class members pray for judgment against all Defendants, jointly and severally, as follows:

- A. awarding Plaintiff and the Class their actual damages from Defendants for Defendants' violation of N.Y. Gen. Bus. Law § 349 in an amount to be determined at trial;
- B. granting Plaintiff and the Class the costs of prosecuting this action, together with interest and costs, pursuant to N.Y. Gen. Bus. Law §§ 350 and 349;
- C. awarding Plaintiff and the Class their actual damages from Defendants' breaches of contract;
- D. declaring that the defendants have violated their fiduciary duties to the Class and/or aided and abetted each other in breaching those duties;

E. enjoining Defendants from using any perpetual care or annual care funds for any purpose other than perpetual or annual care of plots at Bayside Cemetery;

F. placing a constructive trust over any funds paid to Defendants for the perpetual or annual care of Bayside Cemetery plots or any other monies paid for upkeep to the cemetery;

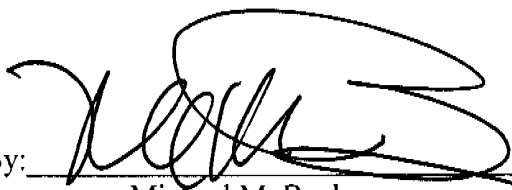
G. requiring the Defendants to conduct a thorough and complete accounting of all perpetual and annual care monies held in their care, custody, possession or control for Bayside Cemetery; and

H. granting such other and further relief as this Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury.

Dated: January 11, 2011
New York, New York

By: 
Michael M. Buchman

c/o Pomerantz Haudek Grossman &
Gross LLP
100 Park Avenue
26th Floor
New York, New York 10019
Telephone: (212) 661-1100
Facsimile: (212) 661-8665

Pro Bono Counsel for Plaintiff

ex. A

Congregation Shaare Zedek

BAYSIDE CEMETERY

80-35 PITKIN AVENUE

OZONE PARK, NEW YORK . 11417

November 15, 1984

Mr. Steven S. Leventhal
325 West 34 Street
New York, N.Y. 10001

Re: Perpetual Care

Dear Mr. Leventhal:

Please be advised that on October 10, 1984 a letter was mailed to you with reference to the graves of Benjamin, Emma Stoloff and Ethel Leventhal.

~~Perpetual Care for the three graves cost \$1200.00.~~

If you wish to proceed with this please make out check payable to Congregation Shaare Zedek and in a few weeks you will receive an official Perpetual Care receipt from them.

Very truly yours,

Ethel Sheiker
ETHEL SHEIKER
BAYSIDE CEMETERY

January 24, 1985

Congregation Shearith
Bayside Cemetery
80-35 Pitkin Avenue
Ozone Park, N.Y. 11417

Att: Ms. Ethel Sheiker

Gentlemen:

In line with your November 15th letter regarding perpetual
care for three graves, enclosed is my check in the sum of

Ethel Leventhal
Benjamin Stoloff
Emma Stoloff

Please acknowledge the above. Many thanks for your co-
operation.

Very truly yours,

STEVEN LEVENTHAL
SL:ma
Encl.

CONGREGATION SHAARE ZEDEK

212 West 93rd Street • New York, N. Y. 10025

Nº 1810

File 5

19 *85*

We acknowledge with thanks and sincere appreciation the receipt from
you of *One Thousand Two Hundred* Dollars
as your donation for *Perpetual Care @ grave*

TO *Mrs Steven R Leventhal*
225 West 34 Street
New York, N.Y. 10001

CONGREGATION SHAARE ZEDEK

By *A. Blumenthal*

February 11, 1985

Congregation Shaare Zedek
Bayside Cemetery
80-85 Pitkin Avenue
Ozone Park, N.Y. 11417

Gentlemen:

This is with reference to invoice No. 2349 covering care of Krakower Lot No. 217 for the 1985 season.

On January 24th I sent a check for \$1,200.00 to cover perpetual care for the graves of Emma and Benjamin Stoloff and Ethel Leventhal which are all part of Lot 217.

The balance of graves in this lot will not be covered.

I would appreciate receiving a confirmation of this information; acknowledgement of receipt of check and an understanding accordingly.

Very truly yours,

STEVEN LEVENTHAL
SL:ma

CONGREGATION SHAARE ZEDEK

TRUST FUND

RECEIPT

No. _____

CONGREGATION SHAARE ZEDEK, hereinafter called "CONGREGATION", a domestic religious corporation, of No. 212 West 93rd Street, Manhattan Borough, New York City, and the owner of RAYSIDE CEMETERY, Wood Haven (Czone Park), Queens County, New York, hereby acknowledges the receipt of the sum of

TWELVE HUNDRED DOLLARS

(\$ 1,200.), hereinafter called "FUND", from :

Mr. Steven R. Leventhal
225 West 34th Street
whose address is New York, N. Y. 10001

for the following uses and purposes;

Pursuant to Section 92 of the Membership Corporation law of New York, said sum shall be held as part of the Special Fund of the "CONGREGATION", maintained by it for the perpetual care of lots, plots or graves in Rayside Cemetery, and deposited by the "CONGREGATION" in its name in any State or Federal Savings Bank or Association paying interest thereon, or invested or re-invested by it for the purchase in its name of any Federal, State, Municipal or other Government certificates or bonds, or of other securities authorized by law for investment of Trust Funds.

The interest or income realized from the "FUND" shall be used toward the perpetual care and upkeep of the following lots, plots or graves:

1. Ethel Leventhal
Benjamin Stoloff
Emma Stoloff

located in said Rayside Cemetery, limited, however to the extent for which such interest or income derived therefrom will permit and pay, as provided for in Section 91 of the aforesaid Membership Corporation law, and without applying any part of the principal "FUND" for that purpose. PROVIDED, however, that the "CONGREGATION" will not allow, pay or apply in any year or be in any way responsible for a higher rate of interest on the principal sum of the aforesaid "FUND" than the average rate of interest it may receive in such year from its total perpetual care funds.

The "CONGREGATION" shall not be held responsible for any loss, depletion or depreciation of the principal of said "FUND", or the value of any investment made therewith after it makes such deposit or investment.

IN WITNESS WHEREOF, THE "CONGREGATION" has caused this instrument to be subscribed by one of its officers and its corporate seal to be affixed this 10th day of February , 19 85.

CONGREGATION SHAARE ZEDEK

By *Stephen S. L.S.*
Vice President

ATTESTED BY:

[Signature]
Secretary

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

On this // day of Feb. , 1985, before me personally came Seymour Penzner

to me known, who, being by me duly sworn, did depose and say; that he resides at No. 680 West End Avenue Borough of Manhattan , City and State of New York; that he is President of Congregation Shaare Zedek, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation, and that he signed his name thereto by like order.



[Signature]
Notary Public