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

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| NEIL LEVENTHAL,<br>as representative of a Class consisting of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>BAYSIDE CEMETERY, CONGREGATION SHAARE ZEDEK AND COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC.,<br><br>Defendants. | New York County Index No. 100530/2011E<br><br>Hon. Debra A. James<br><br>**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND RELEASE AND CERTIFICATION OF A SETTLEMENT CLASS** |

Pursuant to CPLR §§ 907 and 908, Plaintiff Neil Leventhal, by and through his undersigned counsel, respectfully submits this Memorandum of Law in Support of Plaintiff's Motion for Preliminary Approval of the Proposed Class Action Settlement and Certification of a Settlement Class with Defendants Congregation Shaare Zedek and Bayside Cemetery (collectively, "Defendants"). For the reasons set forth below, Plaintiff respectfully submit this motion should be granted in its entirety.

## INTRODUCTION

After approximately sixteen years of hard-fought litigation in both federal and state court, the parties have reached a proposed Settlement in which Defendants Congregation Shaare Zedek and Bayside Cemetery have agreed to modify the Order, entered by this Court on July 27, 2017 (as subsequently amended on September 18, 2018) in the special proceeding known as *In re Application of Congregation Shaare Zedek*, Index No. 155623/2017. Under the existing Order, the Defendants reserved the right to drawn down funds in the Reserve Fund with prior permission

from this Court and the New York State Attorney General's Office. The proposed Settlement Agreement and Release ("Settlement Agreement"), annexed hereto as Exhibit A to the Declaration of Michael M. Buchman dated March 12, 2024 ("Buchman Decl.,"), seeks to modify the existing Order and to establish a $6.5 million *irrevocable* Reserve Fund for the maintenance and care of Bayside Cemetery, including the lots, plots, mausoleums and graves covered by perpetual care contracts. The proposed Settlement Agreement was reached after sixteen years of hard-fought litigation and negotiation. The proposed Settlement Agreement is a product of four years of arms-length negotiations between well informed and prepared counsel. Further, it bears mentioning that, under the proposed Settlement Agreement, counsel for the Plaintiff is not seeking and shall not receive any fees or expenses in connection with this *pro bono* matter.

The parties have also agreed, as part of the proposed Settlement Agreement, to jointly seek certification of the proposed Settlement Class solely for the purposes of settlement. Plaintiff respectfully submits that the requirements for class certification have been satisfied and that Preliminary Approval of the proposed Settlement Agreement should be granted. Defendants are stipulating to certification of the proposed Settlement Class as part of the proposed Settlement Agreement and do not necessarily subscribe to the factual characterizations set forth in Section II of the brief. Defendants reserve the right to oppose certification stemming from any further litigation.

In connection with the request for Preliminary Approval, Plaintiff has prepared a proposed Notice and Notice Plan which shall be timely disseminated to provide Class members with sufficient information concerning the proposed Settlement Agreement. The proposed Notice and Notice Plan, annexed as Buchman Decl., Exhibit B – Declaration of Elaine Pang In Support of Plaintiff's Preliminary Approval Motion and Notice Plan, were prepared by A.B. Data, Ltd, an experienced notice and settlement claims administration provider, in coordination with

the parties. The proposed Notice and Notice Plan constitute the best notice practicable under the circumstances, which concern the sale of perpetual care dating back to at least 1907. Accordingly, Plaintiff respectfully submits that the Court should now schedule Final Approval briefing and set a date for a Final Approval hearing.

## FACTUAL AND PROCEDURAL BACKGROUND

In 2007, John R. Lucker and several other litigants commenced a breach of contract class action in the United States District Court for the Eastern District of New York against Bayside Cemetery and Congregation Shaare Zedek alleging that, for decades, Defendants had abused perpetual care trust monies in order to fund and maintain the synagogue. Chief Judge Raymond J. Dearie dismissed the action on jurisdictional grounds under 28 U.S.C. § 1332(d)(2). *Lucker v. Bayside Cemetery*, 262 F.R.D. 185 (E.D.N.Y. 2009). The action was later refiled in this Court. Defendants filed a motion to dismiss under on the grounds that the plaintiffs lacked standing because they were not parties to the perpetual care arrangements, but merely relatives of deceased family members who allegedly purchased such care. The motion was granted. *See Lucker v. Bayside Cemetery et. al*, 2011 N.Y. Slip. Op 32466. On appeal, the First Department affirmed in part and modified the lower court's decision to dismiss Plaintiff's breach of fiduciary duty claim, which the lower court had allowed to proceed. *See Lucker v. Bayside Cemetery*, 114 A.D.3d 162, 175–76 (1st Dep't 2013).

The proposed Settlement Agreement is the product of extensive, arm's-length negotiations with Defendants in an effort to resolve Plaintiff's claims. The negotiations between counsel were informed by extensive discovery, which included the production of documents and an examination before trial. The parties also engaged in significant motion practice in litigating the claims at issue, including a dispute concerning the disqualification of counsel. The parties also litigated a significant crime-fraud discovery motion in which plaintiff sought documents on

the ground that Defendants have been committing a crime or fraud by commingling monies and diverting Bayside Cemetery's perpetual care trust monies since at least the 1960s. Although this Court initially ruled from the bench to compel a limited number of crime-fraud documents, it later denied the motion in its entirety. The First Department affirmed. *See Leventhal v. Bayside Cemetery*, 163 A.D.3d 433 (1st Dep't 2018).

In parallel to this proceeding, Defendant Shaare Zedek entered into negotiations with a developer to demolish the synagogue building and construct a new mixed-use building on the site which included a new synagogue for the Congregation in the first three floors and residential units above the synagogue. As with any sale of real property of a religious corporation, the transaction required the approval of either the New York State Attorney General or a Justice of the Supreme Court. After considerable negotiation with the Office of the Attorney General, Shaare Zedek applied for and received the approval of this Court, which entered an Order on July 27, 2017 authorizing the sale of the synagogue, but requiring Shaare Zedek to place $8 million (half of the cash consideration it would receive in the transaction) into a Cemetery Reserve Fund to be used exclusively for the benefit of Bayside Cemetery, under terms specified in the Court's Order. Several provisions of the 2017 Order are particularly relevant to this litigation and the proposed settlement:

*First*, the Order established a *quasi*-endowment for the benefit of Bayside Cemetery known as the Cemetery Reserve Fund (the "Reserve Fund"). The income from the Reserve Fund is to be used to fund the regular operation of Bayside Cemetery, while the principal of the Reserve Fund is available, with the approval of the Attorney General or the Court, for certain capital projects designed to improve the safety, security, or (under a subsequent amendment to the Order) physical condition, appearance, or accessibility of Bayside Cemetery. This has allowed

Defendants to pay for regular landscaping and maintenance of the graves at Bayside Cemetery, including those under perpetual care.

*Second*, the Order requires Defendants to maintain a separate perpetual care fund of $552,346 in accordance with Section 1507(c) of the Not-for-Profit Corporation Law.

*Third*, the Order permits Shaare Zedek to apply to the Court for the release of some portion of the Reserve Fund if it can show that "the reservation of such funds pursuant to [the] Order is unnecessary to ensure that Bayside Cemetery is maintained in a safe and respectful condition." As set forth in the 2017 Order, there are no express limitations as to how much Shaare Zedek may seek to withdraw, although no such application has been made and any application would be subject to Court approval on notice to the Office of the Attorney General. A parallel provision of the 2017 Order recognizes that, if Shaare Zedek were to seek Court approval to sell Bayside Cemetery to a third-party, it could seek to transfer some (but not all) of the Reserve Fund to that purchaser and, if the Court were satisfied as to the reasonableness of those terms, the remainder would revert to Shaare Zedek for its "lawful charitable and religious purposes." These provisions are the subject of the amendments agreed to as part of the proposed Settlement Agreement.

With the onset of COVID and the impending opening of the new building, the parties renewed settlement discussion which began in 2018 and reached the proposed settlement currently before the Court.

## I. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

### A. The Settlement Approval Process

CPLR § 908 provides that a class action cannot be settled, discontinued or compromised without court approval. *See, e.g.*, *Desrosiers v. Perry Ellis Menswear LLC*, 139 A.D.3d 473 (1st Dep't 2016). "Court approval is required for the settlement of a class action, and '[n]otice of the

proposed . . . compromise shall be given to all members of the class in such manner as the court directs.'" *In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154, 160 (1st Dep't 1990) (citing CPLR § 908). While there is no express requirement for preliminary approval under Article 9, in reviewing and approving a class settlement, courts typically intervene only at two stages: first, in granting preliminary approval and, second, in granting final approval. *See id.* (citing CPLR § 908); *Saska v. Metro. Museum of Art*, 2016 N.Y. Misc. LEXIS 4184, at *27-28 (Sup. Ct. N.Y. Cnty. Nov. 10, 2016). The leading treatise on class actions summarizes the settlement approval process as follows:

> *First*, the parties present a proposed settlement to the court for so-called "preliminary approval." If a class has not yet been certified, the parties will typically simultaneously ask the court to conditionally certify a settlement class.
>
> *Second*, if the court does preliminarily approve the settlement (and conditionally certify the class), notice is sent to the class describing the terms of the proposed settlement, class members are given an opportunity to object or . . . to opt out of the settlement, and the court holds a fairness hearing at which class members may appear and support or object to the settlement.
>
> *Third*, taking account of all of the information learned during that process, the court decides whether or not to give "final approval" to the settlement. As the parties may also have moved for class certification at this point in the litigation, final approval can also encompass a decision certifying the class.

Newberg on Class Actions § 13:1 (5th ed.). New York courts follow this same, three-stage procedure. *See*, e.g., *In re Colt*, 155 A.D.2d at 160, *aff'd as modified sub nom*, *Colt Indus. S'holder Litig. v. Colt Indus. Inc.*, 77 N.Y.2d 185 (1991) (setting forth procedure). As the leading treatise explains:

> The goal of preliminary approval is for a court to determine whether notice of the proposed settlement should be sent to the class, not to make a final determination of the settlement's fairness. Accordingly, the standard that governs the preliminary approval inquiry is less demanding than the standard that applies at the final approval phase. . . . More specifically, courts will grant preliminary approval where the proposed settlement "is neither illegal nor collusive and is within the range of possible approval."

Newberg on Class Actions § 13:13 (5th ed.) (citation omitted); *accord Passafiume v. NRA Grp., LLC*, 274 F.R.D. 424, 430-31 (E.D.N.Y. 2010).

B. **The Standard for Preliminary Approval**

The Court may approve the settlement of a class action "only if the proposed settlement is fair, adequate, reasonable and in the best interest of class members." *See, e.g., Conolly v. Universal Am. Fin. Corp.*, 873 N.Y.S.2d 232 (Sup. Ct. 2008) (citations omitted). While CPLR § 908 does not provide specific guidelines for determining the merits of a proposed class settlement, New York courts have suggested consideration of the following factors: (1) likelihood of success; (2) whether and to what extent the settlement is supported by the parties; (3) the judgment of counsel; (4) whether the settlement was achieved as a result of good faith bargaining; and (5) the nature of the legal and factual issues. *Id.* The factors need not be applied in a formulistic manner, rather the court must decide what weight to give these factors in light of the circumstances presented. *Id.* The court should also take into account the risks and costs of continued litigation and balance those risks and costs against the benefits to be derived from the settlement. Ultimately, "'[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement.'" *Pressner v. MortgageIT Holdings, Inc.*, 841 N.Y.S.2d 828 (Sup. Ct. 2007) (quoting *Carson v. American Brands*, 450 U.S. 79, 88, n.14 (1981)).

The proposed Settlement Agreement meets the standards required for preliminary approval. Accordingly, Plaintiff respectfully submits that the proposed Settlement Agreement should be approved and the request for Preliminary Approval should be granted by the Court for the reasons set forth below.

### C. The Settlement is an Excellent Result for the Class

As an initial matter, the proposed Settlement Agreement represents an excellent result for the proposed Class. Under the terms of the Settlement Agreement, $6.5 million will remain untouched in the Reserve Fund in perpetuity and the income from such monies will be used to maintain Bayside Cemetery, including lots, plots, mausoleums and graves, subject only to the provisions of the 2017 Order. If Bayside Cemetery is transferred or sold the Reserve Fund will be transferred to the successor-in-interest upon the condition that $6.5 million must irrevocably remain in the Reserve Fund and the interest income will be used to maintain Bayside Cemetery. Plaintiff has previously estimated that between five and ten million dollars were improperly taken from what should have been a Perpetual Care Trust for Bayside Cemetery. Therefore, the proposed Settlement Agreement is a very favorable outcome since it will provide future financial security and the ability to generate significant interest income that may be used for the care and maintenance of Bayside Cemetery and lots, plots, mausoleums and graves at Bayside Cemetery. Further, the proposed Settlement Agreement serves the best interest of the proposed Class by securing a substantial recovery while avoiding the delays, risks, and uncertainties associated with future litigation while achieving a fair reasonable and adequate result based upon compromise. Accordingly, Preliminary Approval of this proposed Settlement Agreement is appropriate.

### D. The Judgment of Experienced Counsel Supports the Settlement

The second factor, "the judgment of counsel," strongly weighs in favor of Preliminary Approval of the proposed Settlement Agreement. Plaintiff is represented by experienced class action counsel who has approximately thirty years of class action experience in some of the largest antitrust cases in the country.[1] Plaintiff's counsel has taken this matter on a *pro bono* basis, financed the litigation, and vigorously pursued this matter for approximately sixteen years.

[1] https://www.motleyrice.com/attorneys/michael-m-buchman

During that time, Plaintiff's counsel has worked closely with individuals whose family members are buried at Bayside Cemetery. Plaintiff's counsel has also been in communication with local Bayside community leaders to discuss and plan the future of Bayside Cemetery. These family members, as well as the greater Bayside Community, have demanded that Congregation Shaare Zedek ensure the financial health of Bayside Cemetery by dedicating enough funds to generate sufficient interest income to maintain the grounds. Plaintiff's counsel has negotiated a proposed Settlement Agreement which meets the desires of the proposed Class and the greater Bayside community. *See* Exhibit C, Declaration of Sam Saverio Esposito dated June 28, 2023. Moreover, the President of the Ozone Park Block Association has worked closely with Plaintiff's counsel concerning Bayside Cemetery and he and the Association support the proposed Settlement Agreement. *Id.* at 3-5. Given Plaintiff's counsel's extensive class action experience and direct involvement with class members and the greater Bayside community, Plaintiff's counsel believes that the proposed Settlement Agreement is fair, reasonable and adequate. Accordingly, the judgment of experienced counsel strongly supports Preliminary Approval of the proposed Settlement.

**E. The Settlement Is the Product of Good Faith Bargaining**

The third factor, "the presence of good faith bargaining," also strongly supports Preliminary Approval of the proposed Settlement Agreement. The Settlement Agreement was reached by experienced and well-informed counsel after nearly sixteen years of contentious litigation. During the course of this case, there has been significant motion practice, two appeals to the First Department, and extensive discovery, including a large document production and an examination before trial. At the time settlement discussion began in 2018, this case was significantly developed, and the parties were fully informed and aware of the risks and rewards of proceeding with further litigation. In light of this record, the proposed Settlement Agreement

is the product of arm's length negotiations conducted by well-informed counsel in good faith and should be approved.

### F. The Complexity of the Issues Supports Preliminary Approval

The final factor, the "complexity and nature of the issues of fact and law," also strongly supports Preliminary Approval of the proposed Settlement. This case involves decades of alleged misconduct involving witnesses who are no longer living and evidence which likely no longer exists. While the parties are confident that they will prevail throughout the remaining course of this proceeding, they are equally aware of the risks associated with proceeding further. The history of the alleged misconduct, coupled with the age of this case, create significant problems for each side. Accordingly, Preliminary Approval of the proposed Settlement is wholly appropriate.

## II. CLASS CERTIFICATION IS APPROPRIATE FOR SETTLEMENT PURPOSES

In determining whether an action may be maintained as a class action pursuant to CPLR § 901(a), a court should preliminarily determine whether the proposed class satisfies the following requirements:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

CPLR § 901(a). "The determination of whether a lawsuit qualifies as a class action under the statutory criteria 'ordinarily rests within the sound discretion of the trial court.'" *City of New York*

*v. Maul*, 14 N.Y.3d 499, 509 (2010) (quoting *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 52 (1999)). "The criteria set forth in CPLR § 901(a) tracks the standard set forth in Federal Rule 23(a); thus, federal authorities are useful guides in applying the often subtle requisites of CPLR § 901(a)." *Naftulin v. Sprint Corp.*, 16 Misc. 3d 1131(A), n.1, 847 N.Y.S.2d 903 (Sup. Ct. 2007) (citations omitted)*; Accord City of New York v. Maul*, 14 N.Y.3d at 373 ("Federal jurisprudence is helpful in analyzing CPLR 901 issues, because CPLR article 9 has much in common with Federal Rule 23." (citations omitted)).

**A. The Requirement of Numerosity is Satisfied**

The first requirement for class certification is that "the class is so numerous that joinder of all members . . . is impracticable." CPLR § 901(a)(1). "There is no mechanical test to determine whether the numerosity requirement has been met . . . However, both federal and state courts presume that numerosity is satisfied where the proposed class contains around 40 members." *Krebs v. Canyon Club, Inc.*, 22 Misc. 3d 1125(A), 5, 880 N.Y.S.2d 873 (Sup. Ct. 2009) (collecting cases). Based on information provided by Defendants in discovery, Plaintiffs reasonably estimate that there are well over 300 perpetual care contracts at issue in this case concerning this approximately 14-acre cemetery which has been in use since 1846 such that joinder of all parties is impractical. *See, e.g., Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (generally more than 40 is sufficient); *Pruitt v. Rockefeller Ctr. Properties, Inc.*, 167 A.D.2d 14, 21 (1st Dep't 2015). *See* Buchman Decl., Exhibit D.

**B. Common Questions of Fact and Law Predominate**

The second requirement for class certification is that "there are questions of law or fact common to the class which predominate over any questions affecting only individual members." CPLR § 901(a)(2). This rule "requires predominance" but does not require "identity or unanimity

among class members." *Pludeman v. N. Leasing Sys., Inc.*, 74 A.D.3d 420, 423, 904 N.Y.S.2d 372, 376 (2010) (citation omitted).

Here, the questions of law and fact concerning this breach of contract case are common to the proposed Class and clearly predominate over the questions affecting only individual members. The following issues satisfy the commonality and predominance requirements: (i) the creation and interpretation of the Perpetual Care Trust Agreement; (ii) Congregation Shaare Zedek's fiduciary duty to establish a perpetual care trust fund; and (iii) Congregation Shaare Zedek's fiduciary duty to maintain the fund in accordance with the Perpetual Care Trust agreements while adequately maintaining Bayside Cemetery. New York courts "have uniformly certified breach of contract class actions . . . where, as here, there is uniformity in contractual agreements . . . ." *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 139 (2d Dep't 2008) (collecting cases). This case, which alleges breaches of perpetual care trust agreements involving virtually identical contracts, is especially appropriate for class certification. *See* Buchman Decl., Exhibit D, Perpetual Care Trust Fund Receipt Concerning Bayside Cemetery ; *see also Cherry v. Res. Am., Inc.*, 15 A.D.3d 1013, 788 (4th Dep't 2005) ("[H]ere the common questions of law and fact concern defendants' alleged common use of a methodology to manipulate the figure upon which plaintiffs' royalties were based."). Accordingly, the requirement that common issues predominate on Plaintiffs' claims for breach of contract is satisfied.

**C. Plaintiffs' Claims Are Typical of the Claims of the Settlement Class**

The third requirement for class certification is that "the claims . . . of the representative parties are typical of the claims . . . of the class." CPLR § 901(a)(3). As the Second Department has explained, "[i]f it is shown that a plaintiff's claims derive 'from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory . . . [the typicality] requirement is satisfied.'" *Pludeman*, 74 A.D.3d at 423

(quoting *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 99 (2d Dep't 1980)) (other citations omitted); *see also City of New York v. Maul*, 59 A.D.3d 187, 190 (2d Dep't 2009), *aff'd*, 14 N.Y.3d 499, 929 N.E.2d 366 (2010) ("Plaintiffs' claims meet the typicality requirement" because "plaintiffs' claims and the claims of the class generally flow from the same alleged conduct").

Here, Plaintiffs' claims derive from the same practice—Defendants failure to adhere to the Perpetual Care Trust agreements and maintain Bayside Cemetery in accordance thereto. *Id.* Plaintiff's claims are based on the same legal theory as the claims of other Settlement Class Members. Accordingly, the requirement of typicality is satisfied.

### D. Plaintiff and His Counsel Will Fairly and Adequately Protect the Interests of the Settlement Class

The fourth requirement for class certification is that "the representative parties [] fairly and adequately protect the interests of the class." CPLR § 901(a)(4). To determine "whether plaintiffs are suitable class representatives, th[e] Court must focus on three factors: (i) whether any conflict of interest exists between the representatives and the class members; (ii) the representatives' familiarity with the lawsuit; and (iii) the competence and experience of class counsel." *Casey v. Whitehouse Estates, Inc.*, 36 Misc. 3d 1225(A), 959 N.Y.S.2d 88 (Sup. Ct. 2012) (citations omitted); *accord Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 202 (1st Dep't 1998). Each of these requirements are satisfied.

Plaintiff and the members of the proposed Class were injured as a result of Defendants' failure to honor perpetual care contracts, and no conflict between them exists. Plaintiff, and his father before his passing, have actively assisted counsel in representing the best interests of the proposed Class, and understand and accepted the responsibilities as a proposed Class Representative. Finally, Plaintiff has retained experienced and competent counsel. As set forth above, Plaintiff's counsel has decades of class action experience and has participated in some of the largest antitrust litigations in the history of the Sherman Act. *See* n.1. In *this* litigation, initial

Plaintiff John R. Lucker, and later Class Representative Steven R. Leventhal and Plaintiff's counsel, quickly identified a claim for breach of the *actual terms* of Perpetual Care contracts and the malfeasance that existed for decades *See Buchman Decl.*, Exhibit E. Accordingly, Plaintiff Neil Leventhal, who is equally well versed in the facts underlying this litigation, and his counsel will continue to fairly and adequately protect the interests of the proposed Settlement Class.

### E. A Class Action Is Superior to Other Methods of Adjudication

The final requirement for class certification is that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy." CPLR § 901(a)(5). "One of the most frequently cited grounds for a finding of class-action superiority is the economic impracticability of individual actions. . . . When class members' claims are small in value, individual litigation simply is not a realistic prospect." *Casey v. Whitehouse Estates, Inc.*, 36 Misc. 3d 1225(A), 4 (Sup. Ct. 2012) (citations omitted). In this case, the individual claims of members of the proposed Class are far too small to warrant individual litigation and a class action is the only practical method of adjudication, as courts supervising parallel litigation have consistently found. *Id.*

In addition to the requirements of CPLR § 901, CPLR § 902 directs the Court to consider the following factors in determining whether to certify a class:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticability or inefficiency of prosecuting or defending separate actions;
3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and]
5. The difficulties likely to be encountered in the management of a class action. CPLR § 902. These are the same factors guiding the "superiority" analysis set forth in Rule 23(b)(3)(A)-(D) of the Federal Rules of Civil Procedure.

As to the first two factors, as set forth above, the cost of individual litigation is prohibitive. As one court explained:

> The first two of the considerations under CPLR § 902 (interest and individual control over the action and the inefficiency of individual actions) are essentially the same as the adequacy of representation and superiority of class action requirements. Based on the Court's discussion as to these two factors under CPLR § 901, the Court concludes that there would be very little interest by members of the class in individually controlling the prosecution of this action and further concludes that it would be inefficient to do so because the amounts involved are relatively minimal and the expense of litigating . . . would be extensive.

*Pino Alto Partners v. Erie Cnty. Water Auth.*, 21 Misc. 3d 1114(A), 7, 873 N.Y.S.2d 236 (Sup. Ct. 2008), *aff'd*, 67 A.D.3d 1375, 887 N.Y.S.2d 910 (2009) (citation omitted).

As to the third factor, it has been over eight years since Defendants began addressing the issues in this case and remediating the cemetery. But since 2007, when the federal court action was first commenced, no one who has been adversely impacted by Defendants' conduct has filed an individual case, as opposed to a class action.

As to the fourth factor, Congregation Shaare Zedek maintains its principal offices in Manhattan, and the Court has already issued substantive rulings in this litigation, making this a highly desirable forum in which to concentrate the litigation. *See Pino Alto Partners*, 21 Misc. 3d 1114(A), at 7 ("As to the fourth factor under CPLR § 902, the desirability of this forum is manifest given the residence of the likely class members and the Commercial Division's familiarity with contract issues and complex litigation.").

As the requirements of CPLR §§ 901(a) and 902 are satisfied, the proposed Settlement Class should be conditionally certified, subject to Final Approval of the proposed Settlement Agreement.

**F. The Notice Program Provides the Best Notice Practicable**

As the Court explained in *Drizin v. Sprint Corp.*, 7 Misc. 3d 1018(A), 801 N.Y.S.2d 233 (Sup. Ct. 2005):

> The law requires that the parties provide the best notice practicable under the circumstances to class members. CPLR § 904I requires the court to consider the cost of giving notice by each method considered, the resources of the parties, and the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to be excluded from the class.

*Id.* at 1 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974)). *See also* CPLR § 904(c) (listing considerations).

In this case, the proposed Settlement Agreement provides for Notice by direct mail to all identifiable class members, supplemented by published notice. The proposed Notice Plan is appropriate where, as here, the parties have addresses for some, but not all, of the members of the proposed Class. *See Drizin*, 7 Misc. 3d 1018(A) at 2 (ordering notice by direct mail to identifiable class members billed for improper charges, supplemented by "publication in various newspapers circulated in New York State").

The publication Notice Plan developed by A.B. Data, Ltd., the proposed Notice Administrator, provides for the placement of: (i) print media advertisements of one-eighth publication notice in *The Jewish Standard* and *The Jewish Press;* and (ii) digital media of 400,000 impressions on *70 Faces Media Network*., 25,000 impressions on the *New York Jewish Week* and 800,000 impressions on Google Display/Network/YouTube. *See Buchman Decl.*, Exhibit *B.*, paras 17-18. The proposed Notice Plan will run for 30 days. This proposed media and digital Notice Plan, coupled with the postcard notice, provides the best notice practicable under these unique circumstances. The proposed Notice Plan provides a nationwide notice with a projected reach of approximately 70.6% of the Jewish population in New York City alone. *Id.* at paras, 21 & 29. Plan Delivery. Accordingly, the Notice Program should be approved.

### G. The Proposed Notice Administrator Has Successfully Managed Hundreds Of Class Action Settlements

Plaintiff's counsel respectfully requests that the Court appoint A.B. Data, Ltd. as the Notice Administrator in connection with the proposed Settlement Agreement. In so doing, A.B. Data will be tasked with providing direct mail notice to each class member and issuing publication notice. Plaintiff's counsel has worked closely with A.B. Data where it has been appointed and served as Claims Administrator in antitrust cases. Under Plaintiff's counsel's supervision, A.B. Data will oversee dissemination of the Notice. A.B. Data is highly regarded and has been frequently appointed to serve as the Notice, Claims, Settlement Administrator in hundreds of large consumer, antitrust, securities, ERISA, insurance, and government agency matters. A profile of A.B. Data's background and capabilities is included as Buchman Decl., Exhibit B. Accordingly, A.B. Data should be appointed the Notice Administrator.

### H. A Final Approval Hearing Should Be Scheduled

Lastly, pursuant to CPLR § 908, the Court should schedule a Final Approval Hearing to determine whether Final Approval of the proposed Settlement Agreement is appropriate, after Class Members have been given an opportunity to object or exclude themselves from the Class. *In re Colt Indus. S'holder Litig.*, 155 A.D.2d at 160. The parties propose the following schedule leading up to the Final Approval Hearing:

- Commencement of Dissemination of Mail and Publication – 30 Days After Entry of This Order;
- The Notice Period – 30 Days after the Commencement of Notice;
- The Deadline to Opt-Out of the Class – 30 days after the Completion of the Notice Period;
- Deadline To Object to the Settlement Agreement – 30 days after the Completion of the Notice Period;
- Final Approval Brief to be Filed – 10 Days Before Final Approval Hearing; and
- Final Approval Hearing to he held – [**TBD**]

## III. CONCLUSION

The proposed Settlement Agreement is an excellent result for the members of the proposed Settlement Class, and warrants Preliminary Approval. The proposed Notice Program will provide Class Members with the required information concerning the proposed Settlement, their rights, and their options, and constitutes the best notice practicable under the circumstances. Accordingly, the Notice Program should be approved, and the proposed Notice Administrator appointed to begin implementation of the Notice Plan. The requirements for class certification are satisfied, and the Court should conditionally certify the proposed Settlement Class. Finally, the Court should set a date for the Final Approval Hearing, and a deadline for Settlement Class Members to file objections to the proposed Settlement or exclude themselves from the Settlement Class.

Dated: March 12, 2024
New York, New York

Respectfully submitted,

By: /s/ Michael M. Buchman

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