

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JOHN R. LUCKER, ELIZABETH A. :
LUCKER, NANCY L. ROUSSEAU, :
Individually and On Behalf of All Others :
Similarly Situated, :
Plaintiffs, : No. 07 Civ. 3823 (RJD) (JMA)
-against- :
BAYSIDE CEMETERY and :
CONGREGATION SHAARE ZEDEK, :
Defendants. :

-----X
LYNN COHEN Individually and On :
Behalf of All Others Similarly Situated, :
Plaintiff, : No. 08 Civ. 3555 (RJD) (JMA)
-against- :
BAYSIDE CEMETERY and :
CONGREGATION SHAARE ZEDEK, :
Defendants. :

-----X
FRAN GOLDSTEIN, Individually and On :
Behalf of All Others Similarly Situated, :
Plaintiff, : No. 08 Civ. 3923 (RJD) (JMA)
-against- :
BAYSIDE CEMETERY and :
CONGREGATION SHAARE ZEDEK, :
Defendants. :
-----X

**PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO
THE COURT'S CONCERN REGARDING JURISDICTION**

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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 response to the Court's Order dated December 10, 2008 raising jurisdictional concerns. For the reasons set forth below, this Court does have jurisdiction over these actions.

I.

PRELIMINARY STATEMENT

The Court has raised the question whether it has jurisdiction under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as part of 28 U.S.C. §1332 (“CAFA”). CAFA amends the diversity statute by adding a new §1332(d) to confer original federal jurisdiction over any class action involving: (i) 100 or more class members; (ii) an aggregate amount in controversy of at least \$5,000,000 exclusive of interests and costs; and (iii) minimal diversity where at least one plaintiff and one defendant are citizens of different states. 28 U.S.C. §1332(d)(2),(5)(B),(6); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56 (2d Cir. 2006). CAFA was enacted to expand federal jurisdiction in class actions to address “the gaming of the system to avoid litigating in federal courts and to provide stricter scrutiny of counsel, awards and settlements.” *New Jersey Carpenters Vacation Fund v. Harborview Mortgage Loan Trust*, No. 08 cv5092(HB), 2008 U.S. Dist. Lexis 72039 (S.D.N.Y. Sept. 24, 2008). Indeed, “when a problem affects people in many states or involves a national problem, it is only fitting that the case be heard in Federal Court.” *Id.* CAFA is to “be read broadly, with a strong preference that interstate class actions should be heard in Federal court . . .” *Id.*

This Court has jurisdiction to entertain this uncommonly straightforward case which was made even more basic by virtue of Defendants’ public admission that they commingled and “borrowed” perpetual care funds. This case involves three central motions: (i) the motion to

dismiss; (ii) a motion for class certification; and (iii) Plaintiffs' motion for summary judgment based upon Defendants' admissions which conclusively establish Plaintiffs' breach of contract, breach of fiduciary duty, and conversion claims. The motion to dismiss is now fully briefed and ready for argument. If Plaintiffs are successful on these motions, the case will, thereafter, require only a one day damages trial.

When the *Lucker* Plaintiffs prepared their complaint, which alleges CAFA jurisdiction in paragraph 17,¹ they did not include a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961-1968 ("RICO"), because they believed and continue to believe that jurisdiction exists under CAFA as this case involves the interstate sale of perpetual or annual care and affects people in many states. Furthermore, they did not wish to complicate this case. For the reasons set forth below, Plaintiffs respectfully submit that this Court does indeed possess CAFA jurisdiction. To the extent that this Court determines jurisdiction does not exist under CAFA, Plaintiffs respectfully request leave to consolidate and amend the complaints to allege a RICO claim pursuant to Fed. R. Civ. P. 15(a); *See Cortec Indus. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).

¹ This Court has jurisdiction of this class action pursuant to the Class Action Fairness Act of 2005, which, *inter alia*, amends 28 U.S.C. § 1332 to add a new subsection (d) conferring federal jurisdiction over class actions, where as here, any member of a class of plaintiffs is a citizen of a State different from any defendant and the aggregate amount of the controversy exceeds five million dollars (\$5,000,000.00), exclusive of interests and costs. 28 U.S.C. § 1332(d)(2) and (6). Compl., at ¶17.

II.

ARGUMENT

This Court does indeed have CAFA jurisdiction over this breach of contract case involving New York law. *See Vladimir v. Campbell Cowperthwait*, 06 Civ. 5863, 2007 U.S. Dist. Lexis 48524 (S.D.N.Y. 2007) (finding CAFA jurisdiction applicable in a basic breach of contract case). CAFA has not changed the traditional rule that the party asserting jurisdiction bears the burden of establishing jurisdiction. *Blockbuster*, 472 F.3d 57 (citing *Ditolla v. Doral v. Dental IPA of New York*, No. 469 F.3d 271 (2d Cir. 2006)). Once the party asserting jurisdiction has demonstrated that jurisdiction exists, it is the burden of the person seeking transfer to state court to establish that one of the CAFA exceptions applies.² Defendants may contend that the “local controversy,” “home state controversy” or “interests of justice” exceptions to CAFA apply. The burden is upon Defendants to establish by a “reasonable probability” that one or more of these exceptions applies. *Id.* These exceptions are narrowly construed to ensure there are no jurisdictional loopholes. *Id.* In connection with the Court’s jurisdictional inquiry, it must construe all ambiguities and draw all reasonable inferences in favor of the party asserting federal jurisdiction. *Sorrentino v. Roosevelt Center, LLC*, No. 08CV0550 (ADS) (ETS), 2008 U.S. Dist. Lexis 97384 (S.D.N.Y. Dec. 1, 2008).

² *AVA Acupuncture P.C., v. State Farm Mutual Auto. Ins. Co.*, 08 Civ. 5650, 2008 U.S. Dist. Lexis 99427 (S.D.N.Y. 2008) (citing *Serrano v. 180 Connect Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1167 (11th Cir. 2006); *Frazier v. Pioneer Am. LLC.*, 455 F.3d 542, 546 (5th Cir. 2006); *Hart v. FedEx Ground Package Sys.*, 457 F.3d 675, 679-80 (7th Cir. 2006); *Brook v. UnitedHealth Group Inc.*, No. 06 Civ. 12954, 2007 U.S. Dist. Lexis 73640, 2007 WL 2827808, at *3 n. 5 (S.D.N.Y. Sept 27, 2007); *Mattera v. Clear Channel Commc’ns, Inc.*, 239 F.R.D. 70, 80 (S.D.N.Y. 2006)).

A. The Number of Class Members

To establish CAFA jurisdiction exists, a proponent must establish that the action involves a class of one hundred or more members. *Blockbuster*, 472 F.3d 57. In their respective complaints, Plaintiffs allege that “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.” Compl., at ¶ 26. While there was no transcript at the last hearing to annex as an exhibit to this filing, opposing counsel did state that they have been able to locate at least three hundred (300) perpetual care contracts. These contracts involve multiple plots and persons making it reasonably probable that even on the admitted three hundred (300) contracts, which seems low for a cemetery of this age and size, that the class in this case unquestionably involves 100 or more members. Plaintiffs’ well pled complaint combined with Defendants’ admission concerning the number of perpetual care contracts they have found establish that more than one hundred class members are involved in this case. Accordingly, the first element is satisfied.

B. The Aggregate Amount In Controversy

CAFA explicitly provides for aggregation of each class member’s claims in determining whether the amount in controversy is at least \$5,000,000. 28 U.S.C. §1332(d)(6). A party asserting jurisdiction must show that it appears to a “reasonable probability” that the aggregate claims are in excess of \$5 million. *Sorrentino*, No. 08CV0550 (ADS) (ETS), 2008 U.S. Dist. Lexis 97384 at *7. Plaintiffs specifically allege in paragraph 17 of their Complaint that the aggregate amount of this controversy exceeds \$5,000,000 exclusive of interests and costs. To alleviate any doubt concerning the jurisdictional amount in question, the Court has the option of looking outside the pleading if the pleading is inconclusive as to the value of the controversy.

Moose v. Stant Corp., No. 05-CV-07E, 2006 U.S. Dist. Lexis 18979, 2006 WL 1007611, at *2 (W.D.N.Y. Apr 12, 2006). To the extent the Court finds the complaints inconclusive, Plaintiffs respectfully refer the Court to the Declaration of Hayden Burrus dated December 18, 2008 (“Burrus Decl.”) ¶¶ 5, 8. Hayden Burrus, FCAS, MAAA, an accredited Fellow of the Casualty Actuarial Society and a Member of the American Academy of Actuaries, is an actuary with cemetery related experience who specifically concludes that the amount of this controversy exceeds \$5,000,000. His conclusions are based upon the size, age and scale of this cemetery. Burrus Decl., ¶ 6. Accordingly, the second CAFA jurisdictional element is satisfied.

C. John Lucker, Elizabeth Lucker and Nancy Rousseau Are Diverse

Section 1332(d)(2) requires only minimal diversity of the parties which occurs when:

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or citizen of a foreign state and any defendant is a citizen of a state; (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or citizen or subject of a foreign state.

In the *Lucker* Complaint, Plaintiff John Lucker alleges that he is a resident of Simsbury, Connecticut and Plaintiffs Elizabeth Lucker and Nancy Rousseau allege that they are residents of Little Rock, Arkansas. Compl. ¶¶19-21. Accordingly, it is beyond cavil that these non-New York named Plaintiffs are diverse from Defendants who reside in New York. Accordingly, the third CAFA requirement is satisfied and Plaintiffs have established that this Court has CAFA jurisdiction.

D. The CAFA Exceptions Are Inapplicable

1. The “Local Controversy” and “Home State” Exceptions Do Not Apply

Under the “local controversy” exception, a court may decline to exercise jurisdiction where: (i) more than two thirds of the class members are citizens of the state where the action

was originally filed; (ii) there is at least one defendant from the state where the action was originally filed from whom significant relief is demanded; (iii) the principal injuries suffered by the class were incurred in the state where the action was originally filed; and (iv) no other class action asserting the same or similar factual allegations has been filed against any of the defendants within the past three years. 28 U.S.C. § 1332(d)(4)(A). Similarly, under the “home state controversy” exception a court may decline to exercise jurisdiction over a class in which “two-thirds or more of the members of the proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.” 28 U.S.C. § 1332(d)(4)(B). Notably, the Declaration of Bob Roberts dated December 20, 2008 demonstrates that more than half of the class members in this case are likely from *outside* the State of New York. ¶ 3. While a number of class members may be residents of the states of Connecticut or New Jersey, a significant number of class members are retirees who have moved from the greater New York metropolitan area to warmer climates such as Florida, Arizona, New Mexico, North Carolina, Nevada and other states where the cost of living is much less and more favorable tax treatment may exist. Roberts Decl., ¶¶ 4, 5.

Furthermore, it is well recognized that these exceptions *do not* “apply to cases in which the defendants engaged in conduct that ‘could be alleged to have injured [persons] throughout the country or broadly throughout several states.’” *Kearns v. Ford Motor Co.*, No. 05-5644 (GAF)(JTLX), 2005 U.S. Dist Lexis 41614, 2005 WL 3967998, at *12 (C.D. Cal. 2005)(quoting S. Rep. No. 109-14 at 40-41). The Roberts Declaration makes clear that this case involves the sale of perpetual or annual care services which were sold to individuals across the country. Roberts Decl., ¶ 5. In light of the Roberts Declaration, both the “local controversy” or “home state controversy” exceptions, which require a court to decline jurisdiction where two-thirds or

more the class and the primary defendants are from the same state, are inapplicable. Accordingly, the “local controversy” and “home state” exceptions do not apply.

2. The “Interests of Justice Exception” Should Not Apply

A court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction in a class action involving more than one-third but less than two-thirds of the members of the putative class and the primary defendants are citizens of the same state in which the action was filed based upon consideration of the following factors: (i) whether the claims asserted involve national or interstate interest; (ii) whether the claims asserted will be governed by the laws of the State in which the action was originally filed or the laws of other states; (iii) whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction; (iv) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (v) whether the number of citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states; and (vi) whether during the three year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed. 28 U.S.C. §1332(d)(3).

Defendants cannot establish that the “interests of justice” factors are applicable for four reasons. *First*, the claims involving the sale of perpetual or annual care contracts to individuals outside the state of New York, including New Jersey, Connecticut and Florida, unquestionably involve an interstate issue. *Second*, Defendants cannot prove that Plaintiffs have attempted to plead around federal jurisdiction since Plaintiffs filed their complaint in federal court in

compliance with CAFA. *Third*, it is unclear precisely what the composition of the class is, but logic dictates and the Roberts Declaration suggest that the number of New York class members *is not* substantially larger than the number of citizens from any other state. *Fourth*, the class members in this case consist of family members and near relatives who reside across the country. Simply put, Defendants have not satisfied their burden that one of the CAFA exceptions apply. *See Brown v. SBC Comm, Inc.*, No. 05-cv-777-JPG, 2006 U.S. Dist. Lexis 71208, (S.D. Ill. Sept., 29, 2006).

E. Jurisdiction Exists Under 28 U.S.C. § 1332(c)(2)

28 U.S.C. §1332(c)(2) provides that “the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same state of the decedent . . .” Plaintiffs in this case *have not* sued as the “Executrix” of a deceased family member. Instead, they have sued in their name as a legal representative/family member or near relative. Plaintiffs have standing to proceed in this capacity under well settled New York law. *Mitchell v. Thorne*, 134 N.Y. 536, 539, 1892 N.Y. Lexis 1550 (1892). In *Thorne*, the Court of Appeals citing old English law held:

It has been decided many times, and frequently asserted by text writers, that the heirs of a decedent at whose grave a monument has been erected, or the person who rightfully erected it, can recover damages from one who wrongfully injures or removes it, or by an injunction may restrain one without right, threatens to injure or remove it, and this though the title to the ground wherein the grave is, be not in the plaintiff but in another.

Recent legal treatises restate that family members and near relatives have standing to sue. *Bogert, Trusts and Trustees*, § 414 pp. 345-346; 14 C.J.S. *Cemeteries* § 25, p. 85; Jackson, *The Law of Cadavers*, p. 362.

Should the Court find that Plaintiffs do not have standing in their own name under this well established law, Plaintiff John Lucker, at a minimum, would be able to amend his complaint to sue in his capacity as the current “Executrix” of his grandmother’s estate. Jurisdiction would

exist under 28 U.S.C. §1332 because Ruth Lucker was a citizen of the state of Connecticut on the date of her death. Declaration of Michael M. Buchman dated December 24, 2008, Exhibit A. Thus, jurisdiction would exist here if Mr. Lucker were required to file as the formal Executrix of his grandmother's estate.

F. Plaintiffs' Request For Discovery or Leave to Replead

To the extent that the Court is leaning towards dismissing this case on jurisdictional grounds, Plaintiffs respectfully request jurisdictional discovery as "a federal court may have to engage in some fact finding" on CAFA issues. Judiciary Committee Report on Class Action Fairness Act., S. Rep. No. 109-14, at 44 (1st Sess. 2005). Indeed, "in some instances limited discovery may be necessary to make these determinations." *Id.* Jurisdictional discovery will shed light on the issues raised by the Court. Such discovery can be obtained from Defendants or alternatively from local Jewish funeral homes. Roberts Decl., ¶¶ 6, 7, 8. If the Court does not believe jurisdictional discovery will be helpful, Plaintiffs respectfully request leave to file a consolidated amended complaint which will include a claim under RICO. Fed. R. Civ. P. 15(a); *see Cortec Indus. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).

III.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that CAFA jurisdiction exists and none of the CAFA exceptions are applicable. If the Court determines jurisdiction may be lacking, Plaintiffs respectfully request leave to conduct jurisdictional discovery or alternatively leave to file a consolidated amended complaint alleging a RICO claim.

Dated: December 24, 2008
New York, New York

Respectfully submitted,

By: 

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