

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

----- X	:	
JOHN R. LUCKER, ELIZABETH A. LUCKER,	:	
NANCY L. ROUSSEAU, LYNN COHEN and	:	Index No. 114818/2009E
FRAN GOLDSTEIN as representatives of a class	:	
consisting of themselves and all others similarly	:	
situated,	:	PART 59
	:	
Plaintiffs,	:	JUSTICE DEBRA A. JAMES
	:	
- against -	:	ORAL ARGUMENT REQUESTED
	:	
BAYSIDE CEMETERY, CONGREGATION	:	
SHAARE ZEDEK, and COMMUNITY	:	
ASSOCIATION FOR JEWISH AT-RISK	:	
CEMETERIES, INC.,	:	
	:	
Defendants.	:	
	:	
----- X	:	

**REPLY MEMORANDUM OF LAW IN SUPPORT OF
COMMUNITY ASSOCIATION FOR JEWISH AT-RISK CEMETERIES, INC.'S
MOTION TO DISMISS THE ACTION IN ITS ENTIRETY PURSUANT TO CPLR
3211(a)**

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Defendant Community Association for Jewish At-Risk Cemeteries, Inc. (“CAJAC”) respectfully submits this reply memorandum of law in support of its motion under New York Civil Practice Law & Rules 3211(a)(1), (5) and (7) to dismiss all of Plaintiffs’ claims against it.

ARGUMENT

I. Plaintiffs Concede the Second Prong of the Corporate Veil Piercing Inquiry

Plaintiffs concede that the Congregation’s alleged domination of CAJAC has not been used to commit a fraud or wrong. This alone is fatal to their veil piercing theory.

As a matter of law, the corporate form cannot be disregarded unless a fraud or wrong has been *consummated* and resulted in injury to plaintiffs. *See Morris v. N.Y. State Dep’t of Taxation & Fin.*, 82 N.Y.2d 135, 141-42, 623 N.E.2d 1157, 1160-61, 603 N.Y.S.2d 807, 810-11 (1993) (“[S]ome showing of a wrongful or unjust act toward plaintiffs is required.”). This showing justifies a court’s imposition of liability on one corporation for the acts of another. *See id.* at 142, 623 N.E.2d at 1161-62, 603 N.Y.S.2d at 811-12. Accordingly, this element was properly pled—as it must be—in the two cases on which Plaintiffs principally rely. *See Lockett v. Tuff City Records*, No. 602900/08, 2009 N.Y. Misc. LEXIS 2481, at *16 (Sup. Ct. N.Y. County May 20, 2009) (stating that the second prong of the corporate veil piercing test was pled because “[defendant’s] domination has caused plaintiffs to suffer damages”); *Simplicity Pattern Co. v. Miami Tru-Color Off-Set Servs., Inc.*, No. 53298, 1994 N.Y. App. Div. LEXIS 11830, at *2 (1st Dep’t Dec. 1, 1994) (finding that the domination of one corporation by another “caused the wrong to plaintiff by stopping payment of rent and breaching the lease”).

Here, by contrast, Plaintiffs do not and cannot allege that they are victims of a *consummated* fraud or wrong. Rather, they merely fear that CAJAC “is *designed* to perpetrate a fraud.” (Pls.’ Opp’n Br. 7 (emphasis added).) In particular, they allege that the Congregation

may transfer its title to Bayside Cemetery and its contractual obligations concerning the Cemetery to CAJAC, which would be incapable of covering those liabilities:

- “There can be little doubt about Congregation Shaare Zedek’s *intention* to unload Bayside Cemetery on CAJAC” (Pls.’ Opp’n Br. 3 (emphasis added).)
- “The present status of the transfer is *unclear* at this time” (*Id.* (emphasis added).)
- “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” (*Id.* at 4 (emphasis added).)
- “*If* all assets and liabilities concerning the cemetery are transferred to CAJAC” (*Id.* at 4 (emphasis added).)

Plaintiffs’ theory, therefore, is fundamentally bottomed on a hypothetical, rather than an actual, transfer of title and liabilities. Because this theory is incompatible with what *Morris* requires Plaintiffs to plead—a *consummated* fraud or wrong—there is no warrant for piercing the corporate veil here.

Plaintiffs’ allegations also fail to demonstrate that a prospective transfer of liabilities would result in a fraud or wrong. First, Plaintiffs assume, without factual support, that CAJAC would be unable to cover the Congregation’s liabilities at the time when such transfer would be consummated. Second, Plaintiffs’ own factual submissions negate their theory that a fraud or wrong is in the works. They acknowledge that CAJAC was ““created with the *knowledge of the New York State Attorney General* to assume title and control of Bayside *once* adequately funded by charitable contributions.”” (Pls.’ Opp’n Br. 3 n.8 (quoting Buchman Aff. Ex. E (emphasis added).) Plaintiffs admit, moreover, that the Congregation “is required . . . to obtain permission

from the NYAG to effectuate this transfer.”¹ (Pls.’ Opp’n Br. 3.) Because such transfer cannot be made without the required approval, the extraordinary remedy of piercing the corporate veil is unnecessary to protect Plaintiffs, now or in the future. *See Fischer v. Zaks*, 48 A.D.3d 251, 852 N.Y.S.2d 69 (1st Dep’t 2008) (holding that piercing the corporate veil is inappropriate where an entirely proper transfer of debt obligations occurred).

Because Plaintiffs concede that the Congregation has not transferred title or liabilities, Plaintiffs’ allegations fail to demonstrate that a fraud or wrong has occurred. Accordingly, the Court should dismiss Plaintiffs’ claims against CAJAC.

II. Plaintiffs’ Requests for Discovery and Leave to Replead Should be Denied

The discovery requests Plaintiffs served on February 1, 2010, violate a mandatory stay of discovery applicable when a motion to dismiss is filed.² *See* N.Y. CPLR 3214(b) (McKinney 2004). Plaintiffs insist, nonetheless, that they need discovery to ascertain “whether there are grounds to pierce the corporate veil.” (Pls.’ Opp’n Br. 7-8.) Here, however, discovery is necessarily futile because Plaintiffs admit two dispositive facts: (1) that the Congregation has not actually transferred assets or liabilities to CAJAC; and (2) that the New York Attorney General must approve any transfer. Accordingly, the second requirement to pierce the corporate veil—a consummated fraud or wrong—is not and will not be met, and no quantum of evidence will alter that conclusion. Plaintiffs’ request to lift the stay of discovery, and request for leave to replead, should thus be denied.

¹ Plaintiffs do not name the New York Attorney General as a defendant in this litigation.

² In addition to serving document requests, Plaintiffs’ counsel directly contacted a member of CAJAC’s board on back-to-back days to schedule his deposition.

III. Plaintiffs Do Not Plead Facts Sufficient to Show Domination

Plaintiffs' failure to plead facts demonstrating that the Congregation dominated CAJAC—the first prong of the corporate veil piercing test—also compels dismissal of this suit.

Plaintiffs' attempted analogy of this case to *Simplicity Pattern*, 1994 N.Y. App. Div. LEXIS 11830 (1st Dep't 1994), fails. In *Simplicity Pattern*, "the absence of the formalities and paraphernalia of corporate existence" justified, in part, piercing the corporate veil. *Id.* at *2. Here, by contrast, Plaintiffs do not allege a violation of corporate formalities. Moreover, other indicia of corporate domination, which were present in *Simplicity*, are absent here:

Interlocking Officers and Board Members. CAJAC and the Congregation have no interlocking officers or directors, as reflected in the comparative chart below. (*Compare* Smith Affirm. Ex. A, *with* Katz Affirm. ¶¶ 2-3.) Accordingly, the Congregation is incapable of dominating CAJAC, and thus no basis exists to impute the Congregation's liabilities to CAJAC.

Officers	
<u>Congregation</u>	<u>CAJAC</u>
Richard Friedman, President Adam Wallach, Vice President – Membership Daniel Goldberg, Vice President – Finance Russell Steinthal, Vice President – Religious Life Francine Asher Holtzman, Treasurer Sara Marks, Secretary	Gary Katz, President David Billet, Vice President and Secretary Barry Yood, Treasurer
Board of Directors	
<u>Congregation</u>	<u>CAJAC</u>
Richard Friedman Adam Wallach Daniel Goldberg Russell Steinthal Francine Holtzman Sara Marks Michael Bar Linda Gerstein Josiah Gluck Alissa Neil Rosalind Paaswell Ellen Reiss	David Billet Stephen Dann Howard Feinberg Gary Katz Ethan Klingsberg Rabbi Joseph Potasnik Barry Yood
Danny Ripps Janet Sachs Aaron Saiger Meir Schecter <i>Honorary Trustees</i> Suzanne Katz Michael Knopf Joel Shaiman Dan Werlin	

To overcome these otherwise fatal facts, Plaintiffs urge an overlap between Congregation Shaare Zedek's *general membership* and the CAJAC board, alleging that CAJAC's President, Gary Katz, is a former *congregant* of Shaare Zedek. There is no allegation that Katz was an officer or board member of the Congregation, or that he held a position of authority there—which are dispositive factors. *See Capricorn Investors III, L.P. v. Coolbrands Int'l, Inc.*, No. 603795/06, 2009 WL 2208339, at *5 (Sup. Ct. N.Y. County July 14, 2009), *aff'd*, 66 A.D.3d 409, 886 N.Y.S.2d 158 (1st Dep't 2009). Accordingly, Katz's alleged prior membership in the Shaare Zedek congregation is irrelevant to the dominion inquiry.

Straining to support their theory, Plaintiffs next argue that Ethan Klingsberg, a *former* board member of the Congregation,³ sits on CAJAC's board, and that Klingsberg's presence enables the Congregation to dominate CAJAC.⁴ Plaintiffs' assertion fails as a matter of fact and law. As a matter of fact, Klingsberg lacks power to compel CAJAC's board to act, because CAJAC's bylaws require a majority vote at a duly noticed meeting at which a quorum is present (i.e., three votes if a quorum is present). (*See* Buchman Affirm. Ex. C.) Further, Plaintiffs do not identify a single instance in which Klingsberg has exerted, or attempted to exert, his influence to compel the board to act. As a matter of law, Plaintiffs' contention fails because Plaintiffs' principal cases confirm that complete, or near complete, duplication of the officers and directors of two corporations is necessary for total dominion to exist. *See Passalacqua Bldrs. Inc. v. Resnick Developers Inc.*, 933 F.2d 131, 139 (2d Cir. 1990) (finding domination where two entities shared "essentially the same officers and directors"), *cited in Simplicity Pattern Co.*, 1994 N.Y. App. Div. LEXIS 11830, at *2; *see also Frigid Foods Prods. Inc. v. City of Detroit*,

³ Ethan Klingsberg is also not a congregant of Shaare Zedek.

⁴ Plaintiffs make no distinction between officers and directors. Klingsberg is a director of CAJAC, but not an officer. (*See* Katz Affirm. ¶¶ 2-3.)

187 N.W.2d 916, 918 (Mich. Ct. App. 1971) (finding entities were affiliated because all officers of one corporation were officers of the other, and because a near “complete duplication” existed between the corporations’ boards).

Inadequate Capitalization. Plaintiffs rely on circular reasoning to argue that CAJAC is undercapitalized. Plaintiffs allege that, because CAJAC could not satisfy a judgment in this suit, CAJAC is undercapitalized and thus an alter ego of the Congregation. (Pls.’ Opp’n Br. 6.) This reasoning, which presumes a particular disposition of the ultimate issue in this case, would enable a plaintiff to pierce the corporate veil merely by suing a defendant for an amount of damages exceeding its assets. Because Plaintiffs’ argument relies on flawed logic, this dominion factor favors dismissal of Plaintiffs’ claims.

Guarantee of Debt. In their opposition papers, Plaintiffs misleadingly caption their discussion of a contract between CAJAC and a landscaper as a “Guarantee of Debts.” (Pls.’ Opp’n Br. 7.) The discussion that follows this caption does not refer to a guarantee of debts, but rather describes a contract between CAJAC and a landscaper for “restoration work at Bayside Cemetery.” (*Id.* at 3, 7.) Crucially, there is no allegation that the Congregation compelled CAJAC to contract with the landscaper—an action that CAJAC freely undertook to advance its 501(c)(3) tax-exempt purpose of restoring Jewish cemeteries such as Bayside. Because Plaintiffs fail to articulate a link between the landscaping contract and the Congregation’s alleged domination of CAJAC, the contract is immaterial.

Common Office Space. Assuming CAJAC’s corporate headquarters were located at its mailing address for receiving service of process, Plaintiffs maintain that CAJAC was previously “headquartered” at the Congregation’s address. (Buchman Aff. Ex. B.) But CAJAC’s brief use of the Congregation’s mailing address during its formative years—September 2006 to September

2008—fails to establish the requisite dominion. *See Travelers Indem. Co. v. United States*, 543 F.2d 71, 75-76 (9th Cir. 1976) (concluding that entities with individual corporate structure were not affiliated, because “[m]ore is required than . . . a limited sharing of facilities which aids each owner to pursue his independent and separate objectives”).

Use of Property. Plaintiffs also contend that the Congregation has given CAJAC *de facto* control of Bayside Cemetery and its employees. (Pls. Opp’n Br. 3, 7.) As the sole example of this, Plaintiffs allege that CAJAC executed one or more contracts with a landscaper to restore Bayside. (*Id.*) Plaintiffs puzzle why CAJAC would rehabilitate Bayside, or how it could grant a landscaping company access to Bayside, absent domination by the Congregation. (*Id.* at 4.) As previously stated, CAJAC was formed in 2006 for the specific purpose of helping to restore and maintain New York’s historic Jewish cemeteries—a purpose for which it has raised approximately \$150,000. With the Congregation’s consent, CAJAC has begun the restoration and hired a landscaping contractor to perform the work. (*See* Def. CAJAC’s Br. 1.) There is nothing nefarious about this situation, except Plaintiffs’ attempts to mischaracterize CAJAC’s actions. This allegation, moreover, conflicts with Plaintiffs’ alter ego theory. The fact that CAJAC has entered into a contract to perform restoration work belies Plaintiffs’ contention that CAJAC was “created as a shell corporation” (Pls.’ Opp’n Br. 2) rather than as a duly incorporated not-for-profit with the 501(c)(3) tax-exempt purpose of restoring Jewish cemeteries.

Shifting of Funds. Plaintiffs contend that the Congregation has made “arrangements” with the United Jewish Appeal Federation of New York (“UJA”) to “‘redesignate’ monies dedicated to Congregation Shaare Zedek for use to restore Bayside Cemetery directly to CAJAC.” (Pls.’ Opp’n Br. 7.) This allegation is neither consistent with Plaintiffs’ alter ego theory nor probative of dominion. If CAJAC and the Congregation were one and the same, then

the Congregation would not need to persuade UJA to “redesignate” funds dedicated to the Congregation as belonging to CAJAC; rather, the Congregation would simply transfer them to CAJAC without UJA’s knowledge and consent. This redesignation therefore would be relevant only if the Congregation also dominated UJA. But that is not alleged. In addition, a grant from UJA—whether or not redesignated—is not probative of whether the Congregation exercised dominion over CAJAC. The relevant inquiry, rather, is whether the Congregation forced or compelled CAJAC to accept the funds. But CAJAC voluntarily accepted the funds to fulfill its 501(c)(3) tax-exempt purpose of restoring historic Jewish cemeteries.

In sum, the alleged dominion factors overwhelmingly support CAJAC’s distinct corporate identity. Because Plaintiffs fail to allege particularized facts that would even remotely suggest that the Congregation totally dominated CAJAC, the Court should reject Plaintiffs’ veil piercing theory and dismiss Plaintiffs’ complaint without leave to amend.

IV. Plaintiffs’ Suit Violates a Covenant Not To Sue

Conceding that CAJAC has “assist[ed] or agree[d] to assist” in cleaning up Bayside Cemetery (*see* Pls.’ Opp’n Br. 7), Plaintiffs seek to avoid enforcement of the covenant not to sue on a narrow ground—that CAJAC is “affiliated” with the Congregation. On that point, Plaintiffs’ main contention is that the Congregation and CAJAC share “overlapping officers, directors, or stockholders” and thus are “affiliated” under the court’s holding in the case *Frigid Food Products*, 187 N.W.2d at 917. But *Frigid Food Products* undermines Plaintiffs’ argument. There, the court considered whether two entities, Frigid Food Products, Inc. (“Frigid Foods”) and General Cold Storage, Inc. (“General Cold Storage”), were “affiliates” within the meaning of a property tax provision. *Id.* Answering that question affirmatively, the court noted that *all*

officers of General Cold Storage were also officers of Frigid Foods, and that there was near “complete duplication” in the membership of their boards. *Id.* at 918.

Here, by contrast, CAJAC and the Congregation had *no* overlapping officers and *no* overlapping directors. (*Compare* Smith Affirm. Ex. A, with Katz Affirm. ¶¶ 2-3.) *See In re Schwan 1992 Great, Great Grandchildren’s Trust*, 709 N.W.2d 849, 854-55 (S.D. 2006) (holding that corporation and foundation were not “affiliated organizations,” as that phrase was used in a trust instrument, where the entities maintained “separate and independent” boards of trustees). Further, Plaintiffs solely identify Ethan Klingsberg—a *former* board member (*see* Pls.’ Opp’n Br. 2)—as an interlocking board member or officer. Such overlap fails to approach the “complete” duplication that *Frigid Food Products* suggests is a prerequisite for affiliation. Accordingly, Plaintiffs’ strongest case, *Frigid Food Products*, undercuts their position and supports enforcement of the covenant not to sue.

Quite apart from *Frigid Foods Products*, Plaintiffs’ argument collapses under their own analysis. Plaintiffs urge that the Congregation and CAJAC are affiliated only if the former controls, or is controlled by, the latter. (*See* Pls.’ Opp’n Br. 8 n.10 (adopting definition of “affiliate” appearing in *Merriam Webster’s Dictionary of Law* 17 (1996) (defining “affiliate” as “a business entity effectively controlling or controlled by another or associated with others under common ownership or control”)).) Here, as demonstrated earlier, the Congregation lacks the power to dominate CAJAC, or vice versa, because the entities have separate officers and board members, as they did when Plaintiffs filed this suit. (*See* Pls. Opp’n Br. 1-2). Accordingly, CAJAC is “unaffiliated” with the Congregation and entitled to protection under the covenant. Plaintiffs’ suit should thus be dismissed.

V. An Award of Attorney's Fees Comports with the Policies Underlying *Pro Bono* Litigation

Plaintiffs object to CAJAC's fee request on a narrow ground. Plaintiffs do not dispute that attorney's fees are generally recoverable for breach of a covenant not to sue, but rather assert that CAJAC's request represents a disservice to *pro bono* litigation. For at least three decades, however, Plaintiffs' view has been rejected by New York State and federal courts. These courts have held, instead, that recovery of attorney's fees by unpaid counsel generally *promotes pro bono* litigation, by (1) incentivizing representation of indigent clients, and (2) deterring improper conduct by individuals and companies.⁵ For these reasons, numerous state and federal statutes specifically authorize recovery of attorney's fees by prevailing *pro bono* counsel.⁶ Lastly, an

⁵ See generally *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (noting that the courts "must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act *pro bono publico* than as an effort at securing a large monetary return."); *Ceglia v. Schweiker*, 566 F. Supp. 118, 122, 123 n.4 (E.D.N.Y. 1983) (upholding recovery of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), "despite the pro bono nature of the services rendered," based on both the legislative history of the statute and on the public policy of providing a strong incentive for legal services and other pro bono counsel to represent indigent claimants); *Thomas v. Coughlin*, 194 A.D.2d 281, 283, 606 N.Y.S.2d 378, 379, (3d Dept. 1993) ("[W]e reject respondent's contention that counsel fees may not be awarded to petitioner because, having been represented by Prisoners' Legal Services free of charge, he did not 'incur' any fees."); *Parker 72nd Associates v. Isaacs*, 109 Misc.2d 57, 436 N.Y.S.2d 542 (Civil Ct., N.Y.Co.1980) (noting that an attorney who acts *pro se* is entitled to recover fees under RPL § 234 on the theory that he diverted professional time to his personal litigation when he could have been engaged in other pursuits).

⁶ See, e.g., *Thomas*, 194 A.D.2d at 283, 606 N.Y.S.2d at 379 ("Federal courts have overwhelmingly interpreted 28 U.S.C. § 2412(d), in light of the act's legislative history and for reasons of public policy, to allow for the payment of counsel fees when a party is represented by a legal service or other *pro bono* organization."); *Watford v. Heckler*, 765 F.2d 1562, 1567 n.6 (11th Cir. 1985); *Cornella v. Schweiker*, 728 F.2d 978, 986-87 (8th Cir. 1984); *DiGennaro v. Bowen*, 666 F. Supp. 426, 430-431 (E.D.N.Y. 1987); *San Filippo v. Sec'y of Health & Human Servs.*, 564 F. Supp. 173, 176 (E.D.N.Y. 1983); *Maplewood Management, Inc. v. Best*, 143 A.D.2d 978, 978-79, 533 N.Y.S.2d 612, 613, (2nd Dept., 1988) (construing Real Property Law § 234); *Johnson v. Blum*, 58 N.Y.2d 454, 459, 448 N.E.2d 449, 461 N.Y.S.2d 782, 784; *Rahmey v. Blum*, 95 A.D.2d 294, 297, 466 N.Y.S.2d 350, 354-55 (2nd Dep't 1983) (interpreting 42 U.S.C. § 1988); *Greenpoint Hosp. Cmty. Bd. v. New York City Health & Hosps. Corp.*, 114 A.D.2d 1028, 1032, 495 N.Y.S.2d 467, 471 (2nd Dep't 1985) (interpreting Judiciary Law § 753); *Crooker v. U.S. Dep't of Treasury*, 634 F.2d 48, 49 at n.1 (2d Cir. 1980); *Cunningham v. Fed. Bureau of Investigation*, 664 F.2d 383, 384-85 (3d Cir. 1980) (interpreting 5 U.S.C. § 552(a)(4)(E)); *San Filippo*, 564 F. Supp. At 176 (interpreting 28 U.S.C. § 2412(d)(1)(A)).

award of attorney's fees protects indigent clients by deterring frivolous, costly lawsuits.

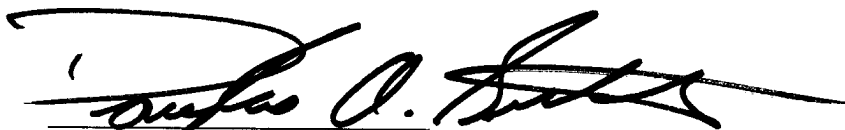
Accordingly, Plaintiffs' objection to counsel's recovery of its fees is meritless.⁷

CONCLUSION

For the reasons set forth in this memorandum and in Defendants' reply memorandum in support of their separately-filed motion to dismiss, Community Association for Jewish At-Risk Cemeteries, Inc. respectfully requests that this Court dismiss Plaintiffs' claims against CAJAC without leave to amend, and award its reasonable attorney's fees and costs.

Dated: February 15, 2010

Respectfully submitted,



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⁷ CPLR 8303-a is inapplicable because it only applies to "an action to recover damages for personal injury, injury to property or wrongful death, or an action brought by the individual who committed a crime against the victim of the crime." CPLR 8303-a. To extent that it is applicable, it does not require CAJAC to seek attorney's fees by separate motion. *See id.*

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JOHN R. LUCKER, ELIZABETH A. LUCKER, NANCY L.
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representatives of a class consisting of themselves and all
others similarly situated,

Plaintiffs,

- against -

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ZEDEK, and COMMUNITY ASSOCIATION FOR JEWISH
AT-RISK CEMETERIES, INC.,

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