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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

JOHN R. LUCKER, ELIZABETH A.  
LUCKER, NANCY L. ROUSSEAU,  
individually and on behalf of all others  
similarly situated,

Plaintiffs,

-against-

BAYSIDE CEMETERY and  
CONGREGATION SHAARE ZEDEK,  
Defendants.

No. 07 Civ. 3823 (RJD) (JMA)

LYNN COHEN, individually and on  
behalf of all others similarly situated,

Plaintiff,

-against-

BAYSIDE CEMETERY and  
CONGREGATION SHAARE ZEDEK,  
Defendants.

No. 08 Civ. 3555 (RJD) (JMA)

FRAN GOLDSTEIN, individually and on  
behalf of all others similarly situated,

Plaintiff,

-against-

BAYSIDE CEMETERY and  
CONGREGATION SHAARE ZEDEK,  
Defendants.

No. 08 Civ. 3923 (RJD) (JMA)

**DEFENDANTS' SUPPLEMENTAL BRIEF**  
**ON SUBJECT MATTER JURISDICTION**

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## PRELIMINARY STATEMENT

By order dated December 10, 2008, the Court requested supplemental briefing on the issue of its subject matter jurisdiction over these actions in light of two statutory sections: 28 U.S.C. § 1332(c)(2), which defines the citizenship of decedents' estates for the purposes of diversity jurisdiction, and 28 U.S.C. § 1332(d)(2)-(4), which describe the additional jurisdiction conferred on the district courts by the Class Action Fairness Act of 2005 ("CAFA"). Plaintiffs bear the burden of pleading—and ultimately establishing at trial—not only the substantive elements of their claims, but also all of the necessary elements of federal jurisdiction. Plaintiffs' failure to make the type of allegations required by the statutory provisions cited by the Court thus provides an additional reason for the Court to dismiss these actions.

Before turning to the Court's specific questions, however, Defendants would respectfully note that although their pending motion to dismiss is styled as a motion pursuant to Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted, their principal argument—that these Plaintiffs have failed to allege any individualized, legally cognizable injury-in-fact—is actually jurisdictional as well. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1991) (describing personalized injury-in-fact as one of the elements of the "irreducible constitutional minimum of standing" that "the party invoking federal jurisdiction bears the burden of establishing"); Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.2d 181, 199 (2d Cir. 2005) (applying Lujan's injury-in-fact requirement as a jurisdictional bar even where other unnamed members of the plaintiff class might have suffered injury-in-fact, but named class representatives did not).

Therefore, because Supreme Court precedent does not require a “strict sequencing of jurisdictional issues,” Spargo v. N.Y. State Comm’n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) (citing Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584-85 (1999)), the Court need not resolve the questions of diversity jurisdiction under § 1332(c)(2) or CAFA prior to ruling on Defendants’ pending motion to dismiss for lack of standing to sue. Nonetheless, dismissal in some form is appropriate regardless of the order in which the Court considers the issues.

### **DISCUSSION**

**I. PLAINTIFFS’ FAILURE TO MAKE ANY ALLEGATIONS AS TO THE CITIZENSHIP OF THEIR PUTATIVE DECEDENTS PROVIDES AN ADDITIONAL GROUND FOR DISMISSING ANY ATTEMPT TO RECAST THEIR CLAIMS AS REPRESENTATIVE.**

The first statutory provision cited in the Court’s briefing order, 28 U.S.C. § 1332(c)(2), provides, in pertinent part, that “the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent,” rather than the state in which the representative is personally domiciled. We demonstrated in our previous memoranda that the claims alleged in these Complaints do not belong to these Plaintiffs, but could be brought, if at all, only by the purchasers of perpetual care in the cemetery or the New York State Attorney General. None of the Plaintiffs has properly alleged that he or she is such a purchaser, or even the proper legal representative of such a purchaser. To the extent that such claims belonging to deceased purchasers are now part of their estates, the Complaints do not contain any allegations as to the citizenship of any decedent, as required by (c)(2). Thus, to the extent that the citizenship of the Plaintiffs’ decedents is a jurisdictional issue (e.g. to establish diversity), the Court should dismiss any representative claims for failure to properly allege subject matter

jurisdiction. Cf. Snyder v. Pleasant Valley Finishing Co., 756 F. Supp. 725 (S.D.N.Y. 1990) (dismissing action allegedly brought in plaintiff's individual capacity where New York law required claim to be brought in representative capacity as executor and plaintiff's decedent was not diverse from defendants).

More importantly, as Defendants establish in their earlier briefs, the failure to allege the citizenship of Plaintiffs' decedents is in fact symptomatic of a larger issue: that the Complaints lack *any* allegations that would support Plaintiffs' argument that they bring these suits as the representative of any deceased individual's estate, let alone that of a purchaser of perpetual care, or that they would have the legal standing to do so.<sup>1</sup> Lacking are such essential allegations as the status of the decedents' estates, their decedents' dates of death, the Plaintiffs' possession of valid letters testamentary or letters of administration, or even the *names* of the decedents whose interests Plaintiffs purport to represent. As Defendants argued in their Reply Brief, it is well-settled that plaintiffs may not use their opposition to a motion to dismiss to amend or supplement their complaints. See, e.g., Wright v. Ernst & Young LLP, 152 F.3d 169, 178 (2d Cir. 1998) (collecting cases). Rather, the Court must decide the pending motion on the basis of the Complaints as filed, which can only be understood to plead individual and not representative claims, rendering § 1332 (c)(2), which deals only with claims brought on behalf of estates, irrelevant at this stage of the litigation.<sup>2</sup> And since these Plaintiffs do not allege that they

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<sup>1</sup> For example, the Lucker Plaintiffs allege only that perpetual care for their grandparents' graves was purchased by a burial society (Chebra Shebath Achim), with which the Plaintiffs have never had any legal connection whatsoever. (See Lucker Compl. ¶¶ 19-21.)

<sup>2</sup> The very definition of the proposed plaintiff classes in these actions dictates that construction. Instead of merely seeking to represent all purchasers of perpetual care, the proposed class explicitly includes all *relatives* of such purchasers, suggesting that those relatives (including Plaintiffs) claim in their own right. (See Compls. ¶ 24.)

were individually injured in a legally cognizable way, they cannot invoke this Court's Article III jurisdiction for such non-representative claims.

**II. PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF PLEADING JURISDICTION UNDER THE CLASS ACTION FAIRNESS ACT.**

**A. Plaintiffs have failed to allege the facts necessary to establish a prima facie case of jurisdiction under CAFA.**

The second jurisdictional issue raised by the Court in its December 10 order is the proper application of 28 U.S.C. § 1332(d)(2)-(4), which describe the additional subject matter jurisdiction granted to the district courts by the Class Action Fairness Act of 2005. In an effort to ensure the availability of a federal forum for class actions that, while governed entirely by state law (and thus not subject to federal question jurisdiction), nonetheless had substantial interstate effects, CAFA grants the district courts original jurisdiction over class actions that, while not satisfying the pre-CAFA standard of complete diversity between the named plaintiffs and named defendants, nonetheless have at least minimal diversity, *id.* § 1332(d)(2)(A)-(C), 100 class members, *id.* § (d)(5)(B), and more than \$5 million in controversy, *id.* § 1332(d)(2)(A). CAFA's grant of jurisdiction, however, is subject to a number of exceptions set forth in 28 U.S.C. § 1332(d)(3) and (d)(4).

As in any federal case, Plaintiffs, as the parties invoking federal jurisdiction, bear the burden of alleging a prima facie case of jurisdiction under CAFA. At this stage of the litigation it cannot be said to a "legal certainty" that the amount in controversy, assuming the truth of Plaintiffs' allegations, is \$5 million or less; that is particularly true when Plaintiffs have not even attempted to enumerate the categories of their claimed damages.

However, other than a conclusory recitation of the elements of CAFA jurisdiction in paragraph 17 of the Complaints, Plaintiffs in at least two of these actions have not made any allegations that would support the existence even of minimal diversity, i.e. a showing that at least one plaintiff is a citizen of a state other than that of at least one defendant. It is undisputed that Defendant Shaare Zedek is a corporation organized and existing under the laws of the State of New York, with its principal place of business there, and is thus deemed a citizen of New York for purposes of diversity jurisdiction, id. § 1332(c)(1).<sup>3</sup> Yet Cohen and Goldstein, the sole named Plaintiffs in their respective actions, each allege that they reside in the State of New York, (Cohen Compl. ¶ 19; Goldstein Compl. ¶ 19), and the Complaints do not contain any explicit allegation that any member of the proposed plaintiff class is a citizen of a state other than New York.<sup>4</sup> Of course, § 1332(c)(2) plays a role here as well, and if Plaintiffs seek to bring representative claims, they must allege that there exists at least one *decedent* in the proposed class who, at death, was a citizen of a state other than New York, which they also fail to do.

**B. Although these actions appear to be the type of predominantly intrastate cases that Congress intended to leave to the state courts, the vague definitions of the proposed plaintiff classes make it impossible to determine whether the statutory exclusions apply.**

Having allowed the federal courts to exercise jurisdiction over a wide class of minimally diverse class actions, Congress limited that authority in 28 U.S.C. § 1332(d)(3) and (d)(4), which, respectively, authorize and require the court to decline jurisdiction

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<sup>3</sup> The Complaints allege, and Defendants take as true for the purposes of the pending motion only, that Defendant Bayside Cemetery is a legal entity having its principal place of business in the State of New York, (Compls. ¶ 23.), making it likewise a citizen of New York for this purpose.

<sup>4</sup> The Lucker Plaintiffs, by contrast, allege that they “reside[]” in Connecticut and Arkansas. Technically, even those allegations are insufficient to demonstrate diversity, since a plaintiff’s state of residence and state of domicile can be different. See John Birch Soc’y v. National Broadcasting Co., 377 F.2d 194, 199 (2d Cir. 1967).

under CAFA in certain circumstances. Section (d)(3) authorizes the district court to decline jurisdiction if more than 1/3 and less than 2/3 of the proposed plaintiff class members and the “primary defendants” are all citizens of the state in which the action was originally filed, and the court believes that, “in the interests of justice and considering the totality of the circumstances,” certain enumerated factors favor a state forum. Section (d)(4)(B), meanwhile, *requires* the court to decline jurisdiction if two-thirds or more of the proposed plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed.<sup>5</sup>

Given the current Complaints, particularly in light of their inclusion of an unbounded set of “relatives” as part of the proposed plaintiff classes, it is simply impossible at this time to compute the percentage of those class members who are New York citizens with any degree of accuracy.<sup>6</sup> Moreover, if the Court ultimately determines that these claims must be brought in a representative capacity, the relevant denominator under (c)(2) will be the citizenship of the various decedents at their time of death, rather than those of their purported representatives.

In light of the other pleading deficiencies identified above and in Defendants’ earlier briefs, the best way to resolve the issue of the applicability of CAFA would be to dismiss these Complaints, without prejudice to the Plaintiffs repleading with sufficient specificity as to the scope of their proposed classes, the capacity in which they sue, and the likely distribution of state citizenships so as to more clearly establish their claim of

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<sup>5</sup> Section (d)(4)(A) provides an alternate set of conditions that also require the court to decline CAFA jurisdiction even if only one of the primary defendants is a citizen of the forum state. Since both Defendants in these actions are citizens of New York, however, (d)(4)(A) cannot apply in any situation not already covered by the (d)(4)(B) exception discussed above.

<sup>6</sup> Even if one were to assume that all purchasers of perpetual care were citizens of New York (an assumption that is not necessarily supported), the non-purchaser “relatives” could still easily make up more than 2/3 of the proposed class, with entirely unknown citizenship, assuming each purchaser had at least two living relatives.

subject matter jurisdiction. The Court will ultimately still need to decide whether (d)(3) or (d)(4) applies to these actions (at the point Plaintiffs apply for class certification, if not before), but clearer allegations will greatly aid the Court in making that determination.

### **CONCLUSION**

Plaintiffs' Complaints fail not only to state claims upon which relief can be granted as a substantive matter, but also fail to clearly allege the basis for the Court's subject matter jurisdiction over these actions. While some of those deficiencies may be simple to correct, others, such as the Plaintiffs' lack of personal injury-in-fact, are more fundamental. Defendants respectfully request, therefore, that the Court grant their pending motion to dismiss, and direct that if Plaintiffs wish to file amended Complaints, that they clearly state both the substantive and jurisdictional bases on which they intend to proceed.

Dated: December 24, 2008  
New York, New York

Respectfully submitted,

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