

**MICHAEL M. BUCHMAN**  
c/o Pomerantz Haudek Grossman & Gross LLP  
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(212) 661-1100

October 11, 2011

**VIA ELECTRONIC FILING AND OVERNIGHT COURIER**

The Honorable Debra A. James, J.S.C.  
Supreme Court of the State of New York  
Part 59  
71 Thomas Street  
New York, New York 10013

Re: *Lucker v. Bayside Cemetery*, Index No. 114818/2009  
*Leventhal v. Bayside Cemetery*, Index No. 10530/2011

Dear Justice James:

I represent Plaintiff John R. Lucker, a Connecticut Probate Court Appointed Administrator of his grandmother's estate. *See* Exhibit A (emphasis added).

I also represent his sisters and Plaintiffs Lynne Cohen and Fran Goldstein who are pursuing this case as family members of their grandparents and parents' estates respectively.

Moreover, I represent Plaintiff Steven Leventhal who purchased a perpetual care contract directly from Congregation Shaare Zedek. *See* Exhibit B.

I write concerning Defendant Congregation Shaare Zedek and Bayside Cemetery's letter of October 10, 2011 concerning the September 15, 2011 Order of dismissal in the *Lucker* action ("Order") which was predicated on mistake by the Court and Defendants' fraudulent representations.

**A. The Mistaken September 15 Order**

This case presents three groups of individuals. By virtue of Your Honor's Order, Messrs. Lucker and Leventhal undeniably possess standing to pursue their common law causes of action against Defendants. In the Order, the Court concluded a "court-appointed representative of the estate also has standing to bring an action for a defendants' [sic] breach of duty to the trust grantor."<sup>1</sup> *Lucker v. Bayside Cemetery*, Index No. 114818/09, 2011 NY Slip. Op. S51771U (Sup. N.Y. Sept. 15, 2011). The Court mistakenly did not address Mr. Lucker's standing nor acknowledge *record evidence establishing his standing as a court appointed administrator*, but rather dismissed Mr. Lucker's claim.<sup>2</sup> Indeed, this *record evidence* was directly called to the Court's attention during oral argument on the *Lucker* motion to dismiss:

Mr. Buchman: Your Honor, one procedural point?

The Court: Sure.

Mr. Buchman: Just so the record is clear, we filed an affidavit showing that Mr. Lucker has letters of administration from the Court in Connecticut appointing him as the administrator of his grandmother's –

The Court: He agreed with that.

Mr. Buchman: And it wasn't mentioned in the papers you referenced earlier when you were going through the motion papers.

The Court: I didn't go through each paper separately, I don't have the time. I did say, though, I will review each of the papers that have been submitted on the motion, but there is no time to do that on oral argument, but I certainly will.

See Exhibit C Proceedings, Index No. 114818/2009, page 23-24. Thus, the dismissal of Mr. Lucker's claim is *reversible error* and now the subject of a soon to be filed motion for reargument.

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<sup>1</sup> The Court held that the "donor of a charitable trust and the donor's successor in interest have standing." *Id.* As the direct purchaser of a perpetual care contract from Congregation Shaare Zedek, Mr. Leventhal has standing.

<sup>2</sup> The Court specifically references Plaintiffs Cohen and Goldstein in the second to last paragraph of the decision, but conspicuously absent from the decision is any reference to the first named Plaintiff in this case – John R. Lucker who is a "court appointed representative."

**B. The Defendants' Deliberate Misrepresentations To Procure Dismissal by Fraud On The Court.**

Plaintiffs are understandably disappointed: (i) with the Order in *Lucker*; (ii) with the absence of a decision in the *Leventhal* matter; and (iii) that Mr. Leventhal's request was never addressed by the Court earlier this year to be allowed to proceed with discovery during the pendency of the motions given his undeniable standing.

Words cannot describe Plaintiffs' feelings concerning the manner in which Defendants have compounded their illegalities by deliberately making misrepresentations to this Court on a critical motion.

Having achieved their desired result of obtaining dismissal on false grounds, Defendants now have the temerity to suggest the misrepresentation in the Introduction of the motion to dismiss had no impact on the manner in which this Court reviewed the matter. That too is absolutely false as the Court relied on the misrepresentations when holding as follows:

Plaintiffs argue that without an expanded standing rule they are without any means to remedy the defendants' alleged failure to maintain the cemetery. Such an assertion is incorrect. First, the Attorney General has standing to bring the claims at issue here, has already begun an investigation, and is overseeing negotiations to find a sustainable solution to the maintenance of Bayside Cemetery.

*Lucker v. Bayside Cemetery*, Index No. 114818/09, 2011 NY Slip Op. S51771U (Sup. N.Y. Sept. 15, 2011).

Throughout this and the federal court proceeding, Axinn Veltrop & Harkrider LLP ("Axinn") and Defendants used every opportunity to contend this was misguided, vexatious litigation which was being resolved by the New York State Attorney General ("NYAG") on an amicable basis despite the admitted illegalities.

Contrary to Defendants' deliberate misrepresentations, the NYAG lacks jurisdiction to prosecute claims in this case. Plaintiffs never represented that the NYAG was "overseeing negotiations" – another misrepresentation that came exclusively from Defendants. Moreover, Plaintiffs have been and remain under the distinct impression that the investigation is entirely adversarial given the serious nature of the crimes committed. This is even more true today based upon the NYAG's awareness of Defendants' misrepresentations to this Court which necessitated the October 10, 2011 admission. Finally, the NYAG's investigation to our knowledge remains open and we understand that the NYAG will be in communication with this Court concerning this matter.

*Most importantly*, the misrepresentation in the Introduction, and other similar false statements, were designed to minimize the wide scale theft which has occurred and to lead this Court to incorrectly conclude, as it did, that the problem regarding the perpetual care plots at the cemetery is not the result of theft, but rather demographic change within the Jewish community.

The central purpose for making that and similar false statements was **to lead this Court to mistakenly conclude that the NYAG agreed with the Defendants, sided with the Defendants in this litigation, was cooperatively working with them to resolve the problem and is foregoing civil or criminal prosecution because the theft of monies was a minor mistake.** In other words, Defendants claimed this case should be dismissed because the NYAG has this matter completely under control even though Defendants know the NYAG lacks jurisdiction over issues concerning the perpetual care contracts.

To suggest that these statements have not fundamentally impacted the manner in which this Court reviewed this case is to call what is day in fact night.

It is also intellectually dishonest given the placement of the statement in the Introduction and the language referenced above directly from the Order.


In light of the foregoing, Plaintiffs respectfully request that this Court: (i) *sua sponte* vacate the Order on the ground that it was procured by fraud upon the Court; and (ii) transfer this case back to the Commercial Part for renewed motion practice because Section 202.70 Rules of the Commercial Division of the Supreme Court require in subsection 5 that “commercial class actions – without consideration of the monetary threshold” must be maintained in the Commercial Part.

At a minimum and in the alternative, Plaintiffs respectfully request, under these highly unusual circumstances, a *sua sponte* ruling modifying the Order as to Mr. Lucker on the ground that he possesses standing to pursue his common law claims as a court appointed administrator. And an Order in the *Leventhal* action that discovery may proceed while the Court entertains the pending motion.

A decision to the contrary would make these morally bankrupt and admittedly culpable Defendants free to continue to steal and lie with impunity. And it would impose a grave injustice upon Plaintiffs while sending the wrong message to other entities managing perpetual care funds in the State of New York.

Plaintiffs make themselves available at the Court’s convenience should Your Honor wish to discuss a just and “sustainable solution” to this injustice deliberately created by Defendants.

Respectfully submitted,



Michael M. Buchman

The Honorable Debra A. James, J.S.C.

October 11, 2011

Page 5

cc: Stephen Axinn (Counsel to Defendants Congregation Shaare Zedek and Bayside Cemetery)

Russell Steinthal (Counsel to Defendants Congregation Shaare Zedek and Bayside Cemetery)

James Rogers (New York Attorney General's Office)

# EXHIBIT A

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

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

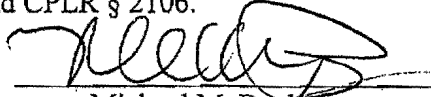
**AFFIDAVIT OF MICHAEL M. BUCHMAN**

STATE OF NEW YORK    )  
                                  ) ss.:  
COUNTY OF NEW YORK )

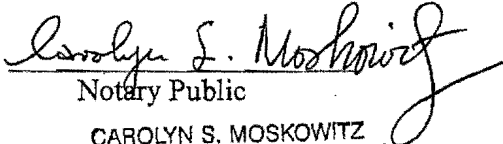
I, MICHAEL M. BUCHMAN, hereby swear under penalty of perjury as follows:

1. Annexed hereto as Exhibit A is a true and correct copy of the State of Connecticut, Court of Probate for the District of West Hartford, Fiduciary's Probate Certificate for the Estate of Ruth B. Lucker establishing John R. Lucker as the fiduciary for the estate.
2. Ms. Lucker passed away approximately twenty three (23) years ago.
3. Upon information and belief, Ms. Lucker was not indebted to any resident of the State of New York at the time of her death nor today.
4. Upon information and belief, no petition for ancillary administration of Ms. Lucker's estate has been made in this or any other court.

This Affidavit has been executed this 3rd day of February, 2010 under penalties of perjury pursuant to the laws of the United States and CPLR § 2106.

  
Michael M. Buchman

Sworn to before me this 3rd  
day of February, 2010

  
Notary Public

CAROLYN S. MOSKOWITZ  
Notary Public, State of New York  
No. 01MO6017657  
Qualified in Kings County  
Commission Expires 12/14/2010

**EXHIBIT A**

FIDUCIARY'S PROBATE  
CERTIFICATE  
PC-450 REV. 8/02

STATE OF CONNECTICUT  
COURT OF PROBATE

COURT OF PROBATE, DISTRICT OF West Hartford

DISTRICT NO. 155

ESTATE OF/IN THE MATTER OF

Ruth B. Lucker, Late of Bloomfield (10-0009)

DATE OF CERTIFICATE

February 2, 2010  
Valid for:  
1 year from this date

FIDUCIARY'S NAME AND ADDRESS

John R. Lucker, 88 Blue Ridge Drive, Simsbury, CT  
06070

FIDUCIARY'S POSITION OF TRUST

Administrator, c.t.a.

DATE OF APPOINTMENT

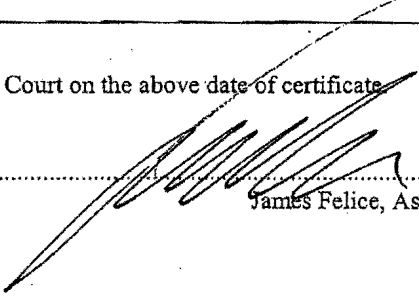
February 2, 2010

*The undersigned hereby certifies that the fiduciary of the above-named estate has accepted appointment, has executed bond according to law or has been excused from executing bond by will or by statute, and is legally authorized and qualified to act as such fiduciary on said estate because said appointment is unrevoked and in full force as of the above date of certificate.*

*Limitation, if any, on the above certificate:*

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Court  
Seal

  
James Felice, Assistant Clerk

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

**EXHIBIT A.1 – THE CONTINUING APPOINTMENT**

FIDUCIARY'S PROBATE  
CERTIFICATE  
PC-450 REV. 8/02

STATE OF CONNECTICUT  
COURT OF PROBATE

COURT OF PROBATE, West Hartford Probate District

DISTRICT NO. PD02

ESTATE OF/IN THE MATTER OF

Ruth B. Lucker, Late of Bloomfield (10-0009)

DATE OF CERTIFICATE

September 19, 2011  
Valid for:  
1 year from this date

FIDUCIARY'S NAME AND ADDRESS

John R. Lucker, 88 Blue Ridge Drive, Simsbury, CT  
06070

FIDUCIARY'S POSITION OF TRUST

Administrator, c.t.a.

DATE OF APPOINTMENT

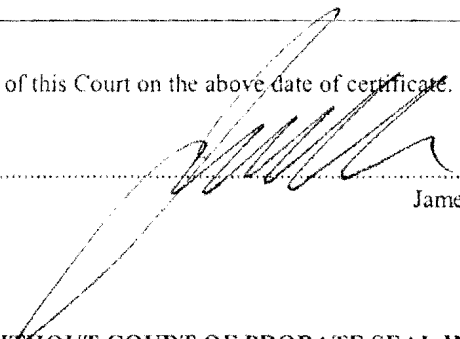
February 2, 2010

*The undersigned hereby certifies that the fiduciary of the above-named estate has accepted appointment, has executed bond according to law or has been excused from executing bond by will or by statute, and is legally authorized and qualified to act as such fiduciary on said estate because said appointment is unrevoked and in full force as of the above date of certificate.*

*Limitation, if any, on the above certificate:*

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court on the above date of certificate.

Court  
Seal

  
James Felice, Clerk

NOT VALID WITHOUT COURT OF PROBATE SEAL IMPRESSED

# EXHIBIT B

CONGREGATION SHAARE ZEDEK

TRUST FUND

RECEIPT

No. \_\_\_\_\_

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

TWELVE HUNDRED DOLLARS

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

Mr. Steven R. Leventhal  
225 West 34th Street

whose address is New York, N. Y. 10001

for the following uses and purposes;

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

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

1. Ethel Leventhal  
Benjamin Stoloff  
Emma Stoloff

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

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

IN WITNESS WHEREOF, THE "CONGREGATION" has caused this instrument to be subscribed by one of its officers and its corporate seal to be affixed this 11th day of February, 1985.

CONGREGATION SHAARE ZEDEK

By Seymour Penzner L.S.  
Vice President

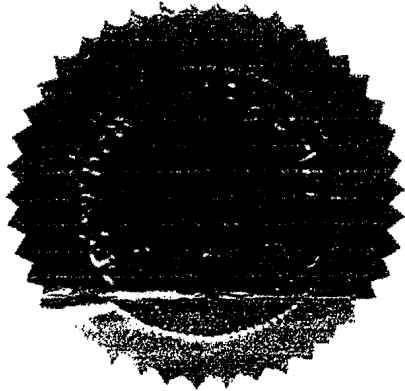
ATTESTED BY:

Seymour Penzner  
Secretary

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) SS

On this 11 day of Feb., 1985, before me personally came Seymour Penzner

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



Seymour Penzner  
Notary Public

# EXHIBIT C

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - CIVIL TERM - PART 59  
-----X

JOHN R. LUCKER,  
  
Plaintiff,

-against-

BAYSIDE CEMETERY,  
  
Defendant.

-----X  
Index # 114818/2009  
PROCEEDINGS

60 Centre Street  
New York, New York 10007  
June 3, 2010

B E F O R E:  
  
HONORABLE DEBRA JAMES,  
Justice.

A P P E A R A N C E S:  
MICHAEL M. BUCHMAN, ESQ.  
100 Park Avenue  
New York, New York  
BY: MICHAEL M. BUCHMAN, ESQ.  
Attorney for Plaintiff

AXINN VELTROP HARKRIDER, LLP  
114 West 47th Street  
New York, New York 10036  
BY: RUSSELL M. STEINTHAL, ESQ.  
Attorneys for Congregation Shaare Zedek

SKADDEN ARPS, SLATE, MEAGHER & FLOM, LLP  
Four Times Square  
New York, New York 10036  
BY: ARI SELMAN, ESQ.  
Attorneys for

ALDORINE WALKER, RPR  
Official Court Reporter

## Proceedings

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2 THE COURT: The Court will base its decision  
3 and order on the records before her. So, the first  
4 order of business will be to confirm that the Court has  
5 the complete set of papers.

6 On Motion Sequence Number 1, there is a notice of  
7 motion brought by defendants, Congregation Shaare  
8 Zedek. I'm not sure if I'm pronouncing that correctly,  
9 and Bayside Cemetery, with accompanying memorandum of  
10 law, complaint and proof of service of the papers. In  
11 support of the motion is an affirmation of Mr.  
12 Steinthal.

13 Opposing the motion is by declaration of a Michael  
14 Buchman, attorney for the plaintiffs; with accompanying  
15 exhibits, the memorandum of law in opposition to  
16 defendant's motion to dismiss; and finally, a reply  
17 memorandum in support of defendant's motion to dismiss.  
18 That is what the Court has as her record, which has  
19 been designated as Motion Sequence Number 001 by the  
20 clerk.

21 MR. STEINTHAL: Your Honor, just for  
22 clarification, I think my affidavit was one of those  
23 replies that you had sequenced after --

24 THE COURT: Oh. Thank you for pointing that  
25 out. So, I will put it in the proper order. It's  
26 dated February 15th.

## Proceedings

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MR. STEINTHAL: Which is the reply date.

THE COURT: I thought I put it in sequence order, but, yes, I did overlook the dates here, so you are absolutely right.

The papers that have been designated as Sequence Number 002 by the clerk are as follows: Defendant, Community Association for Jewish At Risk Cemeteries, Inc.; notice of motion to dismiss; accompanying affirmations and exhibits; a memorandum of law in support of the nonprofit's motion to dismiss; the affidavit of Mr. Buchman in opposition to defendant nonprofit's motion to dismiss; plaintiffs' memorandum of law in opposition to the defendant nonprofit's motion to dismiss. If you don't mind, I'm going to hand back the courtesy copy so that I will not be confused.

MR. BUCHMAN: Thank you, Your Honor.

THE COURT: Then, there is an affirmation of attorney Katz in reply of the memorandum of defendant's nonprofit, and finally -- well, there is another affirmation.

MR. SELMAN: That's correct, Your Honor.

THE COURT: Of Douglas Smith.

MR. SELMAN: That's correct.

THE COURT: And finally, a reply memorandum

## Proceedings

1  
2 in further support of defendant nonprofit's motion to  
3 dismiss.

4 Are there any further papers on Motion Sequence  
5 Number 002?

6 MR. SELMAN: Your Honor, just to clarify, the  
7 affirmation of Douglas Smith is an affidavit to the  
8 reply brief of the Community Association For Jewish At  
9 Risk Cemeteries.

10 THE COURT: As is the affirmation of Eric  
11 Katz.

12 All right, brief argument. This is on matters in  
13 which the Court will have to deliberate, so really  
14 succinct argument. And it would be helpful if you  
15 could point out in the record what the Court should  
16 particularly pay attention to. So, let start then with  
17 the attorney for the movant on Motion Sequence Number  
18 001, which would be Mr. Steinthal.

19 MR. STEINTHAL: Thank you, Your Honor. I  
20 will attempt to be brief.

21 Before launching into the legal argument, I do  
22 want to take one moment to assure Your Honor that the  
23 factual situation that underlies the case is,  
24 obviously, of some concern, and that the plaintiffs,  
25 obviously, are legitimately concerned with the  
26 condition of the cemetery graves. And although I think

## Proceedings

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2 we firmly believe this motion can and should be  
3 determined solely on the law, I just want to take a  
4 moment to address the facts, just to put the Court's  
5 mind at ease at the start.

6 First, several years, now many years at this  
7 point, Congregation Shaare Zedek, which is one of the  
8 oldest synagogues in New York City is now a fairly  
9 small congregation on the upper west side. It's about  
10 100 to 200 members, had been, obviously, very concerned  
11 of the condition of Bayside Cemetery.

12 We have devoted increasing percentages of the  
13 modest budget of the congregation over the years to the  
14 maintenance of it, including employing people, have  
15 employees, but all along, the Congregation have been  
16 trying to raise awareness of the fact that this problem  
17 is larger than any one synagogue could ever be expected  
18 to deal with.

19 This is not a problem unique to Shaare Zedek. In  
20 fact, across the country where there were older Jewish  
21 cemeteries and communities moved and changed over the  
22 years, frequently the cemeteries were left behind by  
23 communities that had founded them.

24 THE COURT: Just by the way of context, is  
25 there an affidavit that addresses this?

26 MR. STEINTHAL: It's spelled out in the

## Proceedings

1  
2 statement of fact. These are, I don't believe,  
3 material facts to the motion, but I think there is some  
4 backgrounds.

5 THE COURT: I understand, but, again, I just  
6 remind everyone that the Court will rely on what's on  
7 the record, unless there is some stipulation otherwise.

8 MR. STEINTHAL: That's fine. I will try to  
9 wrap up quickly, since it's not on the record.

10 The basic fact that matters here is that the  
11 Congregation was very pleased that a year or so ago the  
12 Community Association For Jewish At Risk Cemeteries,  
13 our codefendants now, were founded and were able to  
14 secure funding for professional cleanup of the  
15 cemetery. It began about, I think about a year ago  
16 now. We make no representation that it is done. And  
17 so, I believe that the plaintiffs have pictures of  
18 areas that are not done, and we don't dispute that.  
19 It's probably about 50, 70 percent complete, and we are  
20 sort of making progress. And we look forward to a  
21 speedy completion.

22 But all that being said, the legal issue here,  
23 which is spelled out in defendant's briefs, is very  
24 simple. It is whether or not -- the principal legal  
25 issue is whether or not these plaintiffs, who do not  
26 purport to have ever purchased any perpetual care

Proceedings

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contract from the Congregation, don't claim it had any relation with the Congregation or any defendant before the institution of the lawsuit, and has claimed only to be the relatives of people, grandchildren, children of people who made contracts, who allegedly made contracts with the Congregation 20, 30, 40 years ago, whether they have standing to bring a suit here to allege the breach of these trusts.

And it's telling, we believe, that although this nearly identical motion was fully briefed and fully argued in Federal Court, and is now being fully briefed again before Your Honor, the plaintiffs have yet produced a single case which supports their theory that they should be allowed to both stand in the shoes of their deceased relatives.

THE COURT: Has the District Court --

MR. STEINTHAL: The District Court dismissed for lack of jurisdiction in Federal Court.

THE COURT: Where is that?

MR. STEINTHAL: I don't believe that decision is in the record.

THE COURT: Why not?

MR. STEINTHAL: The Court dismissed for Federal grounds, lack of diversity of citizenship. So it's --

## Proceedings

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2 THE COURT: It's not a res judicata effect?

3 MR. STEINTHAL: That's correct.

4 But this is, in some ways, a reprieve of the  
5 motion argument. And throughout all that briefing,  
6 there hadn't been a case produced to support the  
7 plaintiffs' theory of standing here. And that's  
8 unsurprising, because when the legislature adopted the  
9 EBTL, it created a comprehensive scheme for directing  
10 the question of how the claim of decedent individuals  
11 should be brought, who should be allowed to bring them  
12 as legal representatives, when they should be  
13 commenced, which ones should survive, and which should  
14 not.

15 And as the Court of Appeals determined just a few  
16 months ago, right before the reply was filed in, I  
17 believe it was Heslin v County of Green, the  
18 legislature adopt the policy of repose. And the mere  
19 fact that a claim for a decedent individual, you know,  
20 arose after that person had passed away doesn't obviate  
21 changing the policy of the EPTL.

22 In this case, we are not claiming impunity here.  
23 There is no dispute that the Attorney General, State of  
24 New York has power to enforce any charitable trust.  
25 And in fact, the Attorney General served subpoenas on  
26 my client. They have taken depositions. They have

## Proceedings

1  
2 served subpoenas duces tecum, and they are actually  
3 investigating the question of the alleged breach of  
4 these trusts. And so, the fact is that the law  
5 establishes the presumption that even if you believe,  
6 and we are not sure that it's a correct statement at  
7 all, the First Department has held that a donor of a  
8 charitable trust, in Smithers, that, of course, or an  
9 ultimate donor could bring suit, and that the legal  
10 representative of a donor, when it actually acts as an  
11 executrix, could bring suit on behalf of that donor for  
12 a claim that arose during the donor's life. That's not  
13 the case here.

14 None of these plaintiffs allege at the time of  
15 complaint that either one of their clients obtained  
16 subsequent appointment from the Probate Court in  
17 Connecticut as the executor 30 years after the decedent  
18 died for purposes of bringing this action. But the  
19 simple fact is that this is not a case where donors  
20 arise. And so, Smithers, which I believe the  
21 plaintiffs intend to rely on or relied on previous in  
22 their briefing, simply does not support their argument.  
23 And in fact, it's just the alternative, that only a  
24 donor or maybe his representative would have standing.  
25 They are not present here. The Attorney General is the  
26 right party to bring this suit, if any.

## Proceedings

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THE COURT: Mr. Steinthal, I know you have other grounds --

MR. STEINTHAL: But I think those are the principal grounds, but the rest you can rest on our briefs.

THE COURT: The Court will thoroughly review all the papers, but I wanted to give you an opportunity to verbally offer salient points.

MR. STEINTHAL: I appreciate that, Your Honor.

THE COURT: So, let's move on to Mr. Buchman. What is your response?

MR. BUCHMAN: Thank you, Your Honor.

First of all, I would like to clear up a couple of points. One thing that Your Honor raised was about jurisdiction and why won't Federal Court hear --

THE COURT: Well, I didn't raise that. I asked what the Federal Court had done.

MR. BUCHMAN: Well, I can briefly explain, that there is something known as the Class Action Fairness Act that required all class actions to be filed in the Federal Court after 2005. So, we filed our case in 2007 in Federal Court. And Judge Thiery found that an exception to the Class Action Fairness Act applied. He found that this case involved New York

## Proceedings

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primarily and not a nationwide issue and, therefore, this case belonged in state court.

THE COURT: That decision I don't have before me, right?

MR. BUCHMAN: We can happily provide it. It's a published opinion on Lexis.

THE COURT: The Court will take a look at it on its own.

MR. BUCHMAN: Second all, Mr. Steinthal has characterized this as not a unique situation, claiming that a lot of cemeteries across the country is abandoned, but this is a very unique cemetery. And what was missing from his presentation was an admission, Your Honor, an admission that this cemetery and the synagogue absconded with these perpetual care monies. This is an admission --

THE COURT: Well, I just want to say that the purpose of oral argument, I understand each of you want to set your own context, but I really need to know what's in the papers.

MR. BUCHMAN: It is in the papers. It's the first paragraph of our introduction.

THE COURT: Of the complaint?

MR. BUCHMAN: Of the complaint -- it's in their complaint as well, that they have admitted to the

## Proceedings

1  
2 New York State Attorney General that they commingled  
3 funds. And whether you want to call it commingling  
4 funds or absconding with monies or thefts, these were  
5 perpetual care trusts that were created by my client's  
6 grandparents and parents. The money was to stay in  
7 perpetuity in a trust account and never invaded, and  
8 only the income used to maintain the plots or common  
9 areas of the cemetery.

10 THE COURT: I understand each position is  
11 that the equities are such that are favorable, I guess,  
12 to your clients. But really, what's the response, your  
13 argument?

14 MR. BUCHMAN: The legal argument, their  
15 primary basis for their motion to dismiss is standing.  
16 And they claim that we had no legal authority cited in  
17 our briefs or our brief regarding standing that  
18 supports our position. That just clearly is not true.

19 If you turn to Page 8 of our brief, there is a  
20 quote from Bogert on Trust and Trustees that,  
21 essentially, said that plaintiffs just like us have  
22 standing. And the last sentence says: "Such interest  
23 may be regarded as sufficient to enable them to sue to  
24 compel execution of the cemetery trust."

25 This is basic Hornbook law that we are talking  
26 about. Now, Your Honor may say, yes, Mr. Buchman, but

## Proceedings

1  
2 what about New York law? But New York law follows this  
3 Hornbook law. And we have cited --

4 THE COURT: Bogert is what case?

5 MR. BUCHMAN: Bogert is a Hornbook treaties  
6 on trusts and trustees. In the Hornbook law, they say  
7 that clients just like ours, mine, have standing to  
8 sue.

9 THE COURT: All right.

10 MR. BUCHMAN: That's Hornbook law. Now, Your  
11 Honor may say, yes, but what's the law in New York?  
12 The law in New York is consistent. In fact, we cited  
13 in our brief, and I was going to hand up to Your Honor  
14 two particular cases. One is the Mitchell case.

15 THE COURT: I will take cases, but that's  
16 all. That's the only thing I will take in terms your  
17 argument that's before the Court, although the Court  
18 can look them up herself.

19 MR. BUCHMAN: We have provided these copies  
20 to opposing counsel before argument.

21 THE COURT: If it's a decision that's  
22 published, the Court will take a courtesy copy.

23 MR. BUCHMAN: This is a Court of Appeals  
24 decision in 1892. And in it, it says that this issue  
25 has been decided many times. It's on -- I don't know  
26 if Your Honor has Page 3 or 4. We have highlighted it

## Proceedings

1  
2 for Your Honor.

3 "The issue has been decided many times before,  
4 that the heirs of a decedent have standing to pursue  
5 these types of claims."

6 THE COURT: All right, but, of course, his  
7 argument is that the EPTL supplants whatever the common  
8 law was, right, that include the codification  
9 promulgated by the legislature is what controls here.  
10 Isn't that his argument?

11 MR. BUCHMAN: That is his argument. But if  
12 you read the commentary to the EPTL, it says it  
13 incorporates by reference earlier sections that  
14 control. And these decisions are based on that  
15 particular time period. And these are controlling.  
16 These are Court of Appeals decisions that, basically,  
17 say that my clients have standing. There is another  
18 case --

19 THE COURT: I'm not sure what you are saying.  
20 Are you saying that -- I mean, are you arguing that the  
21 EPTL applies, but is not inconsistent with the common  
22 law, is that your argument?

23 MR. BUCHMAN: What I'm saying is that the  
24 sections of the EPTL that were amended adopted earlier  
25 EPTL provisions of earlier codified sections. And  
26 therefore, these decisions are consistent with the

## Proceedings

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EPTL.

But more importantly, Your Honor, what they are saying is that in this situation where a contract takes effect after a person's death that no one could ever bring suit. That's illogical.

THE COURT: That's not the argument. I think he is arguing it has to be the personal representatives that were appointed or designated, I guess, in the estate plan, appointed by the Surrogate's Court. I think that's his argument.

MR. BUCHMAN: That may be one of his arguments, but we have three grounds for standing under New York law. The first is this law, this Hornbook law.

THE COURT: Well, I'm just asking. In other words, you are saying no one could ever bring suit, but that's not his argument. His argument is particular people could bring suit.

MR. BUCHMAN: But these cases say our client can bring suit. So, it's Hornbook law. It's also the Oatka Cemetery Association case, which we highlighted on Page 3. This is a long-standing rule. This is an English common law rule, Page 3 of the decision. It's the Oatka case. It's highlighted. There are two highlighted sections. And it has long been the rule of

## Proceedings

1  
2 common law that, "if a tombstone at the grave of a  
3 deceased person has been defaced or removed, he who  
4 originally erected it has cause of action against the  
5 guilty party. After his death the right to maintain  
6 such an action passes to the heirs at law of him in  
7 whose honor and memory the monument was erected."  
8 Again, basic English common law that New York State  
9 recognizes.

10 THE COURT: Again, I'm still a little  
11 unclear. Is it your position that the EPTL applies but  
12 is consistent with these persons of 1892 and 1934, or  
13 is it something else?

14 MR. BUCHMAN: We don't think that the EPTL  
15 applies to the situation. As titled, it's a survival  
16 statute. And it basically says that somebody who has a  
17 cause of action shortly before they die have a cause of  
18 action after they died. And what Mr. Steinthal is  
19 saying, if I understand him correctly, is because these  
20 claims arose after the death of the individual, no  
21 claim could ever be brought. And that's just not the  
22 law in New York. There is no case authority that he  
23 cites for that position.

24 THE COURT: No claim could have been brought  
25 by --

26 MR. BUCHMAN: By anyone.

## Proceedings

1  
2 THE COURT: Non-person representatives. I'm  
3 not understanding that's his argument that the  
4 representative would have no claim.

5 MR. BUCHMAN: In his papers, he basically  
6 says, if the claim arises after someone's death, then  
7 no one can sue on behalf of the deceased person.

8 THE COURT: I will ask him for clarification.  
9 I don't understand that to be his argument, perhaps it  
10 is. All right, continue.

11 MR. BUCHMAN: So, we are saying that these  
12 cases and Hornbook law, and, in addition, we are also  
13 saying that the Smithers case supports us.

14 And in Smithers, the First Department -- this is a  
15 2001 decision, which we cite in our brief. The First  
16 Department says that a donor's intent is always to be  
17 effectuated. And we have seen no New York case in  
18 which a donor attempting to enforce the terms of this  
19 charitable trust was denied standing to do so.

20 And in the Smithers case, the wife of the decedent  
21 was found to have standing to pursue the claims  
22 involved in that case.

23 THE COURT: There is no inquiry there whether  
24 she was the executrix under will?

25 MR. BUCHMAN: She was the executrix. She did  
26 get letters of administration from the court. But the

## Proceedings

1  
2 case law that we have demonstrates that she didn't need  
3 to do that. And we don't believe that we need to do it  
4 either. But with regard to Mr. Lucker, we did do that,  
5 just in case. But we also think there is another  
6 ground for standing in this case, and that is  
7 third-party beneficiary law.

8 And basically, what the Court of Appeals said in  
9 the First Ocean case is that if a party can foresee  
10 that it intends to perform with regard to someone in  
11 the future, that that person has standing to bring a  
12 claim. It's basically that the circumstances indicate  
13 that the promisee intends to give the beneficiary the  
14 benefit of the promise performance. That exactly what  
15 happened here.

16 When the plaintiffs' relatives entered into these  
17 contracts, Congregation Shaare Zedek happily took the  
18 money and promised to maintain those plots and those  
19 common areas in perpetuity. And the whole reason that  
20 perpetual care is purchased is so that relatives and  
21 future generations can come and pay honor and respect  
22 in a safe environment. Congregation Shaare Zedek knew  
23 that my client, essentially, would be receiving the  
24 benefits of that promise and, therefore, have  
25 third-party beneficiary standing. So, we don't  
26 understanding how the standing argument holds water at

## Proceedings

1  
2 all. It makes no sense.

3 And this EPTL claim is besides the point. He  
4 cites no case law for the position. None. No case law  
5 for the position that if a claim arises after death  
6 that no one can bring that claim, no natural person.  
7 And that isn't the law, and it can't be the law. And  
8 it would make no sense that if a person signs a  
9 perpetual care contract with a monument company or with  
10 anyone to care for the grave after their death that no  
11 one that's an heir of theirs can sue to enforce the  
12 contract.

13 And it says here in the old English case law and  
14 in New York: Heirs have standing. 1892, 1934, 2001.  
15 It is consistent.

16 THE COURT: All right.

17 MR. BUCHMAN: There are other arguments I'm  
18 happy to address if you wish.

19 THE COURT: In the interest of time, let's  
20 hear from the codefendant.

21 MR. SELMAN: Good morning, Your Honor.

22 THE COURT: Actually, let me, again, hear  
23 from Mr. Steinthal.

24 Is it your position that there is no remedy?

25 MR. STEINTHAL: I think that I'm in a  
26 position of having to agree with Mr. Buchman partially

## Proceedings

1  
2 and disagree partially as well.

3 The argument that we did make was that EPTL sets  
4 forth the following rule: If a cause of action existed  
5 prior to the death of the decedent, then the personal  
6 representative of that decedent have the exclusive  
7 right to pursue it.

8 And it is our position and, in fact, it's not our  
9 position, it's the position of the First Department, In  
10 Re Estate of Gandolfo, which is a 1997 opinion  
11 affirming the decision of the Supreme Court, New York  
12 County, which held that a claim which arises after  
13 death could not have passed into the estate. It did  
14 not exist it at the time of the passing of the estate  
15 and, therefore, the executor does not have standing.

16 And the Court held, quote: "The alleged breach of  
17 confidential and fiduciary duty occurred almost a year  
18 after the death of plaintiff decedent. Accordingly,  
19 the plaintiffs' causes of action did not yet exist in  
20 decedent's favor as of his death, and plaintiff cannot  
21 press a cause of action that was not viable during  
22 decedent's life."

23 So, we do agree with the -- and that case we can  
24 pass up to the court reporter if you want, but that  
25 case is cited in the briefs.

26 And so, our position is that the EPTL says,

## Proceedings

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2 basically, that if it happens after death, it didn't  
3 affect the estate of the -- it couldn't have passed  
4 into the estate. Now, that does not create a rule for  
5 impunity. That's precisely because the contract at  
6 issue here and, in fact, most of the contract in this  
7 situation could have arisen, perpetual care contract  
8 being the particular case, exist to create charitable  
9 trust. And the EPTL specifically says that a trust for  
10 maintenance of grave in perpetuity in a charitable  
11 trust, which the court says would otherwise be void  
12 against the rule of perpetuity if it otherwise were not  
13 charitable. And so, the Attorney General, on behalf of  
14 People of the State of New York, is empowered and  
15 charged with enforcing the terms of charitable trust.  
16 And a point of fact, the Attorney General made that  
17 very clear to us, their subpoenas are in the record  
18 here attached to my affidavit that they have served on  
19 us, purporting to say that they are investigating an  
20 alleged violation of perpetual care trust, the Bayside  
21 Cemetery. They cite statutory authority. They served  
22 subpoenas; we have answered them. And we recognize  
23 that at the appropriate point if the Attorney General  
24 decides to bring suit, we will deal with that, but that  
25 doesn't create standing for these plaintiffs.

26 Let me briefly deal with the other points that

## Proceedings

1  
2 were made, Michelle v Thorne, which plaintiffs' counsel  
3 passed up, I will simply point out what is factually  
4 distinguished in our brief I believe at Page 8. Again,  
5 basically, the heirs there sued under a conveyance.  
6 The cemetery was created by a conveyance that says it  
7 is reserved to the grantor and his heirs a right of  
8 access to the cemetery.

9 And so, the Court of Appeals said, fairly  
10 uncontroversially, the heirs can sue to enforce their  
11 easement to get to the cemetery. And that's spelled  
12 out in the briefing papers.

13 And lastly, I will just address Smithers to say  
14 that contrary to the statement of plaintiffs' counsel,  
15 the First Department clearly relied on the proposition  
16 that Mrs. Smithers was the appointed executrix. And in  
17 fact, the Court says - reversing this court, not Your  
18 Honor, the Supreme Court. "Supreme Court incorrectly  
19 characterized Mrs. Smithers as one who positions  
20 herself as the champion and representative of the  
21 possible beneficiaries of the gift." Let me skip a  
22 little bit.

23 THE COURT: Just slow down.

24 MR. STEINTHAL: "Mrs. Smithers did not bring  
25 this action on her own behalf or on behalf of the  
26 beneficiaries of the Smithers Center. She brought it

## Proceedings

1  
2 as the court-appointed special administratrix of the  
3 estate of her late husband to enforce his rights under  
4 his agreement with the hospital through specific  
5 performance of that agreement. Therefore, the general  
6 rule barring beneficiaries from suing charitable  
7 corporations has no application to Mrs. Smithers."

8 I would also point out that at a separate point,  
9 the First Department clearly noted that Mr. Smithers'  
10 claim arose before his death. So, it applies the exact  
11 same rule of saying that the estate can only sue if it  
12 happened before death.

13 So, I will simply say that our position here is  
14 that these plaintiffs lack standing for bringing these  
15 claims. And our argument for impunity, we believe the  
16 brief spelled out as much.

17 MR. BUCHMAN: Your Honor, one procedural  
18 point?

19 THE COURT: Sure.

20 MR. BUCHMAN: Just so the record is clear, we  
21 filed an affidavit showing that Mr. Lucker has letters  
22 of administration from the court in Connecticut  
23 appointing him as the administrator of his  
24 grandmother's --

25 THE COURT: He agreed with that.

26 MR. BUCHMAN: And it wasn't mentioned in the

## Proceedings

1  
2 papers that you referenced earlier when you were going  
3 through the motion papers.

4 THE COURT: I didn't go through each paper  
5 separately. I don't have time. I did say, though, I  
6 will review each of the papers that have been submitted  
7 on the motion, but there is no time to do that on oral  
8 argument, but I certainly will.

9 MR. BUCHMAN: Just for the record --

10 THE COURT: I understand stood that.

11 Again, I have heard argument. I am going to  
12 direct that you order the transcript. I will review  
13 the transcript once again, but only as preliminary to  
14 going painstakingly through the papers. So, I assure  
15 you I will review the entire record, not just what was  
16 referred to during oral argument.

17 MR. BUCHMAN: Thank you, Your Honor.

18 THE COURT: Oral argument is not to amplify  
19 the record. It's only to help me a little bit in  
20 review of the record.

21 So, let's move on to the argument of the  
22 codefendant, Mr. Selman.

23 MR. SELMAN: Yes.

24 Good morning, Your Honor. My name is Ari Selman,  
25 and I am pro bono counsel for the defendant, Community  
26 Association For Jewish At-Risk Cemeteries.

## Proceedings

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2 THE COURT: And if you could focus on maybe  
3 an argument that's particular to your client.

4 MR. SELMAN: Sure.

5 So, the issue before the Court is whether CAJAC  
6 should be liable for breach of the annual and perpetual  
7 care contract to which CAJAC was not a party, which do  
8 not mention much less purport to bind CAJAC, and  
9 virtually all of which predate CAJAC's existence by  
10 years and in some cases decades.

11 The obvious response to that question under be it  
12 the contract law principle, CAJAC is not liable for  
13 breach of the contracts for which it was not a  
14 signatory.

15 THE COURT: And this is a matter of predates,  
16 right?

17 MR. SELMAN: Exactly.

18 So, in order to circumvent very basic contract law  
19 principle that would preclude holding CAJAC liable for  
20 contracts that it never entered into, plaintiffs plead  
21 a veil piercing theory, a theory that you should pierce  
22 the corporate veil as to CAJAC and hold us liable for  
23 contracts entered into by a separate entity; namely,  
24 Congregation Shaare Zedek.

25 This Court has been very clear about the  
26 requirements that need to be pled in order to pierce

## Proceedings

1  
2 the corporate veil.

3 First, the Court has noted its extraordinary  
4 remedy. It says that it requires disregarding the  
5 corporate forum. And in fact, the Court has noted that  
6 plaintiffs trying to pierce the corporate veil bear a  
7 heavy burden. And it can only discharge that burden  
8 through particularized allegation.

9 So, what do the plaintiffs need to show? Two  
10 things.

11 THE COURT: You agree it's alleged, right?

12 MR. SELMAN: Alleged, exactly, Your Honor.

13 They need to allege particularized facts showing,  
14 (1) that the Congregation exercised absolute dominion  
15 over CAJAC with respect to the transaction challenge;  
16 and (2) plaintiffs have to show that that dominion was  
17 used to perpetrate or commit a fraud or wrong that has  
18 resulted in an injury.

19 Now, I would like to take these two requirements  
20 in turn, Your Honor. And starting, actually, with the  
21 second requirement, the fraud or wrong which resulted  
22 in an injury. And I am using that because the two  
23 controlling decisions of the New York Court of Appeals,  
24 Morris versus New York and TNS Holdings versus MKI  
25 Securities, the Court dismissed the complaint solely on  
26 the failure to plead a fraud or wrong that has resulted

## Proceedings

1  
2 in an injury without getting to dominion. And we would  
3 urge the Court do that here.

4 So, addressing the second prong of fraud or wrong,  
5 in order to pierce the corporate veil, plaintiffs must  
6 show that the dominion was used to perpetrate a fraud  
7 or wrong resulting in present injury.

8 So, what does the present injury allege? Well,  
9 the present injury cannot be merely the breach of the  
10 annual and perpetual care contract. Because by  
11 definition, the Congregation's domination of CAJAC  
12 could not have been used to breach contract that  
13 themselves predated CAJAC's very formation.

14 The exercise of domination over CAJAC to breach  
15 contract that all uniformly antedated CAJAC would be a  
16 logical impossibility. So, that's not their theory.  
17 Instead, they claim the injury they could suffer is in  
18 the future. And this is mentioned in two places.  
19 First, on Paragraph 15 of their complaint, the last  
20 sentence, they say:

21 "CAJAC is an arm of defendant Congregation Shaare  
22 Zedek which has been designed as a straw person upon  
23 which to unload all of Shaare Zedek's legal and other  
24 responsibility.

25 In other word, the injury they are pleading is  
26 that at some future point, the Congregation may

## Proceedings

1  
2 transfer its liabilities to an insolvent entity. And  
3 plaintiffs would be injured thereby, because that  
4 insolvent entity would be incapable of covering their  
5 obligation.

6           There is a very critical point here. Both in the  
7 complaint and the response brief, plaintiffs conceded  
8 that not one annual or perpetual care contract has been  
9 transferred to date. In fact, they argue on Page 3 of  
10 the response brief that the New York Attorney General  
11 had physically deferred its response. Further, at four  
12 different points in their response brief, they  
13 specifically note there is merely an intent to  
14 transfer, and that there has not been an actual  
15 assumption of any of the Congregation's liabilities to  
16 date. Why is that significant, Your Honor? It is  
17 significant because if there has not been a transfer of  
18 obligation, the Congregation is still on the hook for  
19 them. So where is the present injury? That Morris  
20 versus New York, that TNS Holdings versus MKI, and two  
21 of plaintiffs' only cases, Morris is one of them, and  
22 the other case is United U.S.A. Holdings versus  
23 TSE-PEO, all of which require a present injury.

24           Second of all, Your Honor, even if your were  
25 comfortable overturning the Court of Appeals  
26 controlling precedent that say you need a present

## Proceedings

1  
2 injury, and even if you are prepared to conclude that a  
3 future injury that is premised on a transfer of  
4 liability to CAJAC, and even if you are willing to  
5 indulge the assumption that on the date of that  
6 transfer, CAJAC lacked adequate asset to cover those  
7 liabilities, and even if you are willing to indulge the  
8 assumption further that they argue that the New York  
9 Attorney General, once receiving that application,  
10 would approve them and the court would approve it,  
11 notwithstanding the fact that CAJAC has allegedly been  
12 deliberately undercapitalized, so assuming all of those  
13 contingencies, even then, where would the injury be?  
14 Because on Page 3 of their response brief, they concede  
15 the New York Attorney General is very heavily involved  
16 in this case. That's their own allegation.

17 Further, there is no argument that CAJAC and the  
18 Congregation will not follow New York law, which  
19 requires judicial approval of any transfer. So my  
20 point is this, where is the injury? Where is the  
21 threat of undercapitalization if the New York Attorney  
22 General is heavily involved, and they concede that the  
23 New York Attorney General needs to approve the  
24 transfer, where they concede that the New York Court  
25 would have to approve the transfer, where they concede  
26 that there is no argument that CAJAC or the

## Proceedings

1  
2 Congregation would ever circumvent those requirements?

3 In fact, they specifically note that the New York  
4 Attorney General, after receiving the application, has  
5 deferred approval. So, we have an adequate remedy, the  
6 chief legal officer. But more than all of those  
7 things, there is something very counterintuitive.  
8 Piercing the corporate veil is reserved for instances  
9 of extraordinary fraud.

10 Plaintiffs' own allegation on Page 3 is that CAJAC  
11 and the Congregation had approached the chief legal  
12 officer, the New York Attorney General for approval.  
13 How is it possible if CAJAC were bent and the  
14 Congregation were bent on a fraud? Why consult the New  
15 York Attorney General?

16 So, the extraordinary anticipatory relief that  
17 plaintiffs seek, they want a judgment now based on  
18 hypothetical acts that may or may not come to pass in  
19 the future. Why is it necessary? If it comes to pass  
20 in the future that CAJAC or the Congregation are  
21 underfunded, or if it comes to pass that the New York  
22 Attorney General or the Court inadvertently and  
23 incorrectly approved a transfer to an insolvent entity,  
24 file a suit then. There would be no reason they  
25 couldn't. In fact, we have not even done discovery, so  
26 there wouldn't be a burden. That's the fraud or wrong.

## Proceedings

1  
2 Would you like me to address the second  
3 requirement?

4 THE COURT: No. That's it for my purposes  
5 today.

6 So, Mr. Buchman, what's your reply?

7 MR. BUCHMAN: First of all, Your Honor, with  
8 regard to the first prong that opposing counsel  
9 mentioned, CAJAC was formally known as Friends of  
10 Bayside Cemetery. It was started by Ethan Klingsberg,  
11 who was on the board of trustees at Congregation Shaare  
12 Zedek and Gary Katz. They kept offices at Congregation  
13 Shaare Zedek. They changed their name two years ago.  
14 They maintained an office at Congregation Shaare Zedek  
15 for a period of time and then changed it to Mr. Katz's  
16 office. But more importantly, in response to opposing  
17 counsel's argument, he seems to misunderstand what we  
18 are alleging here and what we are saying. And we say  
19 it clearly in our brief. We agree that the transfer  
20 legally has not taken effect. But what has happened  
21 here, Your Honor, is Congregation Shaare Zedek in an  
22 attempt to wash its hands of this cemetery has said to  
23 CAJAC, this entity that it helped create, take control  
24 of the cemetery, take de facto control. We say it on  
25 Page 6 of our brief. And Congregation Shaare Zedek had  
26 taken de facto control. In fact, not only have they

## Proceedings

1  
2 taken physical de facto control, but CAJAC had entered  
3 into contracts with landscapers to perform services at  
4 a cemetery that they don't legally own but are  
5 controlling.

6 So why is CAJAC assuming no legal and financial  
7 responsibility for Congregation Shaare Zedek? It makes  
8 no sense. They are doing it because they are one in  
9 the same. Because the whole purpose is, Mr. Axon said  
10 in Federal Court many times was for Congregation Shaare  
11 Zedek to transfer all the assets and liabilities of the  
12 cemetery to CAJAC. And we point out on Page 6 all of  
13 the factors as to why we satisfy this piercing the  
14 corporate veil theory. We talk about inadequate  
15 capitalization. We talk about the overlapping of  
16 corporate officers. We talk about the shared common  
17 space. We talk about CAJAC taking over de facto  
18 control of Bayside Cemetery. We talk about the  
19 shifting of funds from the UJA Federation to CAJAC.  
20 Money that was supposed to have been dedicated for  
21 Congregation Shaare Zedek was given to CAJAC instead.

22 THE COURT: Where in the complaint do I look?

23 MR. BUCHMAN: It's on Page 6.

24 THE COURT: It's got to be in the complaint  
25 initially, right?

26 MR. BUCHMAN: We say in our section on CAJAC,

## Proceedings

1  
2 we talk about is how they have taken de facto control  
3 of the cemetery.

4 THE COURT: Where do I look?

5 MR. BUCHMAN: It's in the party section, and  
6 we specifically mention by name "CAJAC."

7 THE COURT: That's what I'm going to be  
8 looking at, the allegation of the complaint to make  
9 sure that the allegations are sufficient, correct? So  
10 that's why I wanted you to point out what I should be  
11 looking at.

12 MR. BUCHMAN: And I understand that, but some  
13 of this information has only recently come to light.  
14 And second of all, we have had no discovery. We can  
15 only plead, in fairness, what we know. And we have  
16 respectfully request discovery on this issue. I don't  
17 see why there is any prejudice to CAJAC in re-raising  
18 these arguments through a summary judgment motion after  
19 the conclusion of discovery. We can present a more  
20 complete record.

21 THE COURT: The problem is the Court has to  
22 make a ruling on whether or not the pleadings are  
23 sufficient to set forth a viable cause of action.

24 MR. BUCHMAN: We have requested information  
25 from Congregation Shaare Zedek which owes a fiduciary  
26 duty to us. And they have refused time and again to

## Proceedings

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give us information. We can only plead what we know.

THE COURT: But where do I look?

MR. BUCHMAN: In the party section of the complaint.

THE COURT: Help me.

MR. SELMAN: Paragraph 16 contains all of the allegations regarding CAJAC.

THE COURT: It's a problem, is it not, that there may be overlapping officers or directors to make out a claim seeking to pierce the corporate veil? Perhaps, the complaint should probably be amended, but I don't know that it states --

MR. BUCHMAN: Then we would respectfully request leave to replead as to CAJAC.

THE COURT: Well, it probably should have been done by way of cross-motion.

MR. BUCHMAN: We put in our papers in the last footnote of our brief, to the extent that the Court grants any motion, we would respectfully request leave to replead.

THE COURT: Actually, is there a specific claim for seeking to pierce the corporate veil?

MR. BUCHMAN: There is a practical reason here, Your Honor.

THE COURT: I'm just wondering. I'm trying

## Proceedings

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2 to parse through the complaint.

3 MR. BUCHMAN: There is no claim specifically  
4 as to relief from CAJAC. We are only including CAJAC  
5 in this lawsuit because they told us they intend to  
6 transfer the property. And what we want to avoid, from  
7 a practical perspective, is litigating this case  
8 against Congregation Shaare Zedek for another three,  
9 and then having the transfer legally effectuated and  
10 then have to bring in CAJAC and start all over again.  
11 We have already been litigating for three years. We  
12 don't want to reinvent the wheel. And we think we have  
13 alleged what's enough to pierce the corporate veil and  
14 include CAJAC. And there is no prejudice to CAJAC,  
15 because they are being represented well by pro bono  
16 counsel. It's not costing them a nickle. And there  
17 are practical reasons for having them involved in this  
18 case now.

19 THE COURT: All right, so the last question  
20 posed is to Mr. Selman.

21 Would it not be inefficient to dismiss the  
22 complaint as to your client?

23 MR. SELMAN: Would it be --

24 THE COURT: Inefficient, assuming that the  
25 codefendant is not successful on Motion Sequence Number  
26 001?

## Proceedings

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2 MR. SELMAN: The most inefficient result  
3 would be to keep CAJAC in this lawsuit.

4 First, the continued presence of this lawsuit has  
5 a major stigmatic effect, which makes it difficult for  
6 CAJAC to raise funds, because the organization that's  
7 donating never knows whether it's going to get dragged  
8 into this litigation.

9 The second point, there is no burden to plaintiffs  
10 if this case were dismissed, and if there was a future  
11 fraud ensuing at that point. No discovery has occurred  
12 with respect to CAJAC. And moreover, Your Honor, not  
13 only has no discovery taken place to date, but their  
14 claim would be very easy if we were to circumvent the  
15 New York Attorney General and the Court. But I have  
16 one last point, Your Honor.

17 All of plaintiffs' allegations are contained in a  
18 single paragraph. It doesn't mention veil piercing.  
19 It doesn't mention overlapping officers and directors.  
20 It doesn't mention de facto control. Why is it all of  
21 a sudden coming up in the response brief?

22 THE COURT: It does mention overlapping  
23 officers. My question is, is that enough to pierce the  
24 corporate veil?

25 MR. SELMAN: Your Honor, I need to address  
26 that point. There are zero overlapping officers,

## Proceedings

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2 directors or personnel. Zero.

3 THE COURT: Here is the problem. On a motion  
4 to dismiss, the Court is limited to review the  
5 pleadings, right?

6 MR. SELMAN: But they had access to the board  
7 registry. They have, in fact, cited it and include it  
8 as an attachment. So, why didn't they plead it?

9 THE COURT: All right, the Court will take a  
10 look at all of this, and directs all attorneys to order  
11 a copy of their oral argument, which would be very  
12 helpful in the Court's preparation to thoroughly review  
13 the record on Motion Sequences 001 and 002.


14 We are now recessed. Thank you. The Court  
15 reserves decisions, obviously.

16 MR. SELMAN: Thank you, Your Honor.

17 MR. BUCHMAN: Thank you, Your Honor.

18 \* \* \* \* \*

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20 It is hereby certified that the foregoing is a true  
21 and accurate transcript of the proceedings.

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23   
24 ALDORINE WALKER, RPR  
25 Official Court Reporter  
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