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Plaintiff Steven R. Leventhal, by and through his *pro bono* attorney, respectfully submits this memorandum of law in opposition to Defendant Congregation Share Zedek's motion to dismiss. For the reasons set forth below, Defendant's motion to dismiss should be denied in its entirety.

I. **INTRODUCTION**

"Oxymoronic" - that is how Chief Judge Raymond J. Dearie of the Eastern District of New York described Defendant Congregation Shaare Zedek & Bayside Cemetery's statute of limitations argument.¹

Defendants persist in making the same "oxymoronic" arguments in this proceeding.²

Defendants' arguments are "oxymoronic" because:

- Defendant Congregation Shaare Zedek has admitted the cemetery has been in complete disrepair for decades and remains in deplorable condition;³

¹ "After all, for some, if not all of them, perpetual care was paid for, and it seems somewhat oxymoronic to be speaking in the context of the statute of limitations. Or for that matter, even privity. Certainly the poor buried souls can't speak for themselves . . ." Transcript of Civil Cause For Pre-Motion Conference Before The Honorable Raymond J. Dearie dated December 19, 2007. *See* Ex. A to the Declaration of Michael M. Buchman dated March 31, 2011 ("Buchman Decl.").

² Since Mr. Leventhal purchased a perpetual care contract from Defendant Congregation Shaare Zedek, Defendants do not make the same standing arguments raised in the *Lucker* action. The focus of this motion is an unavailing statute of limitations affirmative defense.

³ Buchman Decl., Ex. B letter of Stephen Axinn dated October 22, 2007 ("The Congregation does not deny that Bayside is [in] an unfortunate state of disrepair . . .). Buchman Decl., Ex. C, *The Jewish Week, The Cemetery Nobody Wants* October 18, 2002; Buchman Decl., Ex. D, *The Jewish Week, Bayside Cemetery Mess Lands in Federal Court* dated October 15, 2007 ("In the 1960s and 70s when the congregation - like many neighboring synagogues - fell on hard times, it did 'borrow' money from the cemetery's general operating accounts and subsequently repaid its debts."); Buchman Decl., Ex. E *The New York Daily News, Bayside Cemetery is a Disgrace, Suit Says* dated October 4, 2007 ("some cemetery funds were borrowed from a non-restricted account to repair the synagogue roof which is entirely proper and legal) (there is nothing proper nor legal about failing to put trust monies in a non-restricted account, then taking the monies only to later claim they were in a non-restricted account - this statement is utter jibberish as the monies taken were *trust* monies and it belies the fact that they belonged in a restricted trust account); *See* <http://citynoise.org/article/8696> dated Jan. 6, 2006 (Defendant Congregation Shaare Zedek's Rabbi admitted Congregation Shaare Zedek has failed to maintain the cemetery and breached

- By virtue of the foregoing admission and Defendant Congregation Shaare Zedek's admission to the New York State Attorney General ("NYAG") that it "misappropriated" perpetual care monies,⁴ Defendant Congregation Shaare Zedek also makes the legal admission that perpetual/annual care contracts have been continuously breached, thereby conceding the alleged conduct constitutes a continuing violation of law to which the statute of limitations is inapplicable;
- the law prevents Defendants from utilizing this affirmative defense when "by deception or any violation of duty towards Plaintiff, [they] have caused [Plaintiff] to subject his claim to the statutory bar..." *Kidd Delta Funding Corp.*, Index No. 601020/99, 2000 Misc. LEXIS 29 (N.Y. Sup. Ct. 2000); and
- there is a bedrock principle that "[n]o man may take advantage of his own wrong" by interposing the statute of limitations as a defense when it was Defendants' affirmative wrongdoing which prevented earlier institution of an action. *Erbe v. Lincoln Rochester Trust Company*, 214 N.Y.S.2d 849 (4th Dept 1961); *General Stencils v. Chiappa*, 18 N.Y.2d 125, 128, 272 N.Y.S.2D 337 (1966).

Recognizing the futility in their legal arguments given their damning admissions, Defendants attempt to seek dismissal on the entirely baseless and irrelevant ground that "restoration is complete"⁵ at the cemetery. That is entirely untrue. *See* Def. Mem. at 1.⁶ For the record, restoration work at the cemetery, which began *after* the commencement of the federal action, is not even near half completion. In fact, Defendant has been claiming "substantial progress" is being made at the cemetery since 2007 when the federal action was initially

perpetual care contracts. The cemetery now requires a massive, "multimillion dollar endeavor" to clean it up.).

⁴ Complaint at ¶¶ 2, 3. The Leventhal Complaint is annexed as Exhibit A to the Affirmation of Ari Selman dated February 7, 2001.

⁵ Def. Mem. at 1.

⁶ Defendants grossly distort Plaintiff's claims. Defendants contend the Complaint alleges it has stolen monies over the past century and a half. *See* Def. Mem. 1. Defendants' characterization is highly sensational as no such allegation exists in the Complaint. If there were, Defendants would have directly cited or quoted it. They don't do this. Instead, they manufacture such an allegation by cobbling pieces of the allegations together in order to take them entirely out of context. *See* Def. Mem. 1.

commenced.⁷ Purported progress at the cemetery is *irrelevant* to this motion and this case. This case is not entirely about the present, it is about past transgressions, remedying those transgressions and ensuring the future financial health and condition of the cemetery in perpetuity. In other words, this case is not about the stewardship of the cemetery as Defendants suggest, but rather the *theft* of perpetual/annual care monies by a synagogue – a synagogue that used its image as a trustworthy, reliable religious organization capable of providing perpetual/annual care for plots at the cemetery in exchange for monies to be placed in a trust account. That image was clearly an illusion as Defendant Congregation Shaare Zedek has admitted to the NYAG it “misappropriated” perpetual care monies in order to make capital improvements to the synagogue. The theft of money is a terrible thing, but the theft of money by a religious organization holding itself out to the public as a noble and trustworthy organization is unconscionable. In light of the foregoing, this case is now about determining how much money was stolen and the repatriation of the stolen monies to a trust account so that the income from such monies can be prospectively used to maintain the cemetery as intended by Plaintiff and the other class members.

This case should not be about concocting frivolous legal arguments to avoid civil liability after acknowledging to the NYAG that it indeed “misappropriated” monies and concealed, for years, the “misappropriation” of perpetual care monies. But that, most unfortunately, is the present predicament we find ourselves in given these now entrenched Defendants who refuse to return the stolen monies and instead manufacture legal arguments, inconsistent with the record

⁷ Buchman Decl., Ex. F., Hearing Transcript Before The Honorable Raymond J. Dearie dated June 29, 2009, pp. 3-8 (Defendants’ counsel conceding, after making a representation that “substantial progress” is being made at the cemetery, that he couldn’t “hazard to guess” how much progress was being made when Plaintiff indicated that only ten percent of the cemetery has been cleaned up. This exchange evidences the degree to which opposing counsel has no personal knowledge about what is being done at the cemetery and is making statements without a proper basis.)

evidence and their own statements, in order to avoid liability for their unlawful actions. Indeed, the current motion to dismiss now crosses a line into the entirely absurd and patently frivolous by contending, for example, that no trust agreement was ever created nor a fiduciary duty ever owed to Plaintiff – a Plaintiff who, unlike the *Lucker* Plaintiffs, directly entered into a perpetual care trust agreement as the contracting individual with Defendant Congregation Shaare Zedek. While zealous advocacy is one thing, making patently frivolous arguments which are belied by record evidence is a completely different matter.

Finally, Defendants’ suggestion that the NYAG is “on their side “in this litigation is parochial and untrue. The NYAG made clear to Chief Judge Dearie that it takes no position in this clearly *private* dispute. The NYAG abstained from entering the federal case and has abstained from intervening in this state action. To be sure, if the NYAG supported these culpable defendants, he would move to intervene and stay the proceeding while pursuing an investigation which has been on-going for six years. Over the past forty months, the NYAG, a law enforcement agency, has not intervened in the *Lucker* federal or state actions nor this action.⁸ The NYAG’s inaction speaks volumes as to Defendants’ misrepresentation which begs the question why a law enforcement agency would defend a culpable organization in a lawsuit commenced by an injured victim? Like many of Defendants’ positions in this proceeding — they simply defy legal logic and basic common sense. Defendants’ legal arguments and misrepresentations are as shameless as their underlying unlawful conduct which necessitated the filing of the *Lucker* action and this action. Accordingly, Plaintiff respectfully requests that the Court deny Defendants’ motions to dismiss in its entirety for the reasons set forth below.

⁸ Should the Court have any doubt about this representation, the Court can directly contact James Rogers at the New York State Attorney General’s Office who has repeatedly stated that the NYAG is *not* supporting the Defendants and takes no position in this private contractual dispute.

II. **ARGUMENT**

A. Plaintiffs' Claims Are Not Time Barred

Defendants contend Plaintiff's claims are time barred. The claims are *not* time barred because the violations are continuing in nature – perpetual care contracts and fiduciary duties are not being honored today. Alternatively, if Plaintiff's claims are time barred Defendants' fraudulent concealment and affirmative misrepresentations concerning their wrongdoing tolls the statute of limitations.

Continuing Violations of Law – Plaintiff's complaint alleges breach of contract, breach of fiduciary duty, conversion, unjust enrichment and other state law violations. These violations of state law are continuing even today as Defendants admittedly fail to honor⁹ perpetual/annual care contracts and refuse to abide by their fiduciary duties¹⁰ to Plaintiff and the class members. Indeed, Defendants refuse to: (i) disclose what happened to all the perpetual/annual care monies which they admit were improperly taken; (ii) conduct a forensic accounting of all historical and current trust fund monies; and (iii) return the stolen monies and true up the trust accounts with properly accounted for back interest and accruals. Collectively and individually these constitute continuing violations of legal obligations and acts of deception in violation of their contractual obligations, their fiduciary duties and GBL § 349. These continuing violations of law *are not* time barred as a matter of law.¹¹

⁹See n 3.

¹⁰ With regard to the breach of fiduciary duty claims, Defendant owes Plaintiff a *continuing fiduciary duty* as a matter of law to fully disclose what happened to the monies, rectify these violations through an accounting and a full reimbursement of all stolen monies.

¹¹ *1050 Tenants Corp., v. Lapidus*, 735 N.Y.S.2d 47 (1st Dep't 2001); *Westminster Properties Ltd v. Kass*, 624 N.Y.S.2d 738 (1st Dep't 1995); *Shelton v. Elite Model Management, Inc.*, 812 N.Y.S.2d 745 Sup. N.Y. 2005).

Plaintiffs have alleged claims that bespeak continuous and repeated violations of law. By refusing to honor the contracts and failing to disclose all information concerning the invasion of perpetual and/or annual care accounts, Defendants are engaging in continuing violations of law. And by failing to return stolen monies despite Plaintiffs' demand in the *Lucker* action and this action, Defendants continue to engage in acts of conversion and unjust enrichment.

Alternatively, Fraudulent Concealment/Equitable Tolling - For years, Defendants concealed the truth about the theft of monies which is the real reason for the abysmal condition of the perpetual care and annual care plots at the cemetery. Instead, Defendants told the public that they lacked the financial resources and ran out of money to care for the perpetual care and annual care plots.¹² The perpetual/annual care monies didn't "run out," they were stolen — stolen in violation of the perpetual/annual care contracts, stolen in violation of Defendants' fiduciary duties and stolen in violation of New York law. And Defendants concealed the truth about the theft of perpetual/annual care monies rather than disclose them to Plaintiff or other class members as required by law. Under precisely these circumstances, it is well recognized under New York law that:

a Defendant [especially a fiduciary] electing to set up the statute of limitations has previously, *by deception or any violation of duty towards plaintiff*, caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold.

Kidd v. Delta Funding Corp., Index No. 601020/99, 2000 N.Y. Misc. LEXIS 29 (N.Y. Sup. Ct. 2000).¹³

¹² See Buchman Decl. Exhibit C, *The Jewish Week, The Cemetery Nobody Wants*, October 18, 2002.

¹³ *Erbe v. Lincoln Rochester Trust Company*, 214 N.Y.S.2d 849 (4th Dep't 1961) (statute of limitations did not run as to a fiduciary who breached its duties as "no man may take advantage of his own wrong.").

Defendants are estopped from invoking the statute of limitations as an affirmative defense. Equitable estoppel applies “where plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action.” *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-449, 406 N.Y.S.2d 259 (1978). In *General Stencils v. Chiappa*, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337 (1966), the Court of Appeals noted:

Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is defendant’s affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.

Id.

In *General Stencils*, defendant was plaintiff’s head bookkeeper who concealed the theft of monies from her employer for several years by misrepresenting the state of the plaintiff’s finances. In that case, the Court of Appeals held defendant was equitably estopped from asserting the statute of limitations defense because her affirmative conduct in concealing the crime prevented plaintiff from timely bringing its action. In so doing, the Court of Appeals stated that a defendant/wrongdoer cannot take affirmative steps to prevent a plaintiff from bringing a claim and then assert the statute of limitations as a defense. “Generally, the issue of whether a defendant should be equitably estopped from asserting the Statute of Limitations as an affirmative defense to the plaintiff’s complaint is not a question of law, but rather a question of fact, which should be fully developed and determined upon the trial of the action.” *Scharge v. Waterview Nursing Care Center, Inc.*, 907 N.Y.S.2d 103 (Sup. N.Y. Queens, 2010) (citing *McIvor v Di Benedetto*, 121 AD2d 519, 523, 503 N.Y.S.2d 836 [1986])). Thus, dismissal, at this time would be wholly inappropriate.

In this case, Defendants’ motion to dismiss should be denied and the case should be allowed to proceed to trial because the allegations concern continuing violations of law and/or

fraudulent concealment by the Defendants which prevented Plaintiff from instituting a more timely action.¹⁴ It is undisputed that Defendants did not publicly disclose the theft of these monies until *after* the federal action was commenced. After the commencement of the federal action, Defendant Congregation Shaare Zedek's lawyer told *The Jewish Week*:

In the 1960s and 70s when the congregation – like many neighboring synagogues – fell on hard times, it did 'borrow' money from the cemetery's general operating accounts and subsequently repaid its debts.¹⁵

In addition, he told the *New York Daily News*:

Some cemetery funds were borrowed from a non-restricted account to repair the synagogue roof which is entirely proper and legal.¹⁶

This disclosure *after* the commencement of the federal action is evidence that Defendants concealed information and issued false statements to lead the public to believe that the cemetery's woes were not of its making. Defendants made affirmative statements that the monies simply ran out when, truth be told, they were unlawfully taken. Collectively, these actions constitute concealment¹⁷ and acts of affirmative misrepresentation which warrant tolling the statute of limitations if the Court is of the view that the violations of law are not continuing in nature as argued above. Accordingly, Defendants cannot invoke the statute of limitations as an affirmative defense given their continuing violations of law and/or fraudulent concealment of perpetual/annual care monies.

¹⁴ See Complaint ¶ 44.

¹⁵ See n 3.

¹⁶ See n. 3

¹⁷ “[C]oncealment without actual misrepresentation may form the basis for invocation of the doctrine ‘if there was a fiduciary relationship which gave the defendant an obligation to inform the plaintiff of the underlying claim.’” *Crown Castle USA, Inc., v. Nudd Corp.*, 05CV6163T, 2008 U.S. Dist. LEXIS 3416 (W.D.N.Y. 2008) (citing *Jordan v. Ford Motor Co.*, 426 N.Y.S.2d 359 (4th Dept. 1980)); *Gleason v. Spota*, 599 N.Y.S.2d 297 (2nd Dept. 1993).

B. Count III (349-c Count) Should Not Be Dismissed

Defendants suggest Plaintiff's GBL § 349-c claim should be dismissed because there is no private right of action under the statute. Defendants cite *no authority* in support of their contention. Nor could they because GBL §349 generally *provides* a private right of action. *See Food Parade, Inc. v. Office of Consumer Affairs of County of Nassau*, 7 N.Y.3d 568, 825 N.Y.S.2d 667 (2006) (“allowing a private right of action by an injured consumer (General Business Law § 349 [h]) or an enforcement action by the State Attorney General (General Business Law § 349 [b]).”). Plaintiff, as a private attorney general, has the right, as a matter of law, to pursue this action. Any monies he may recover would be deposited into a state elderly victim fund as required by statute. The fact that the monies must be deposited in this fund does not mean Plaintiff lacks standing and Defendants cite *no authority* in support of such a position.

Defendants further contend Plaintiff has alleged he was not harmed as a result of a GBL §349-c violation. Paragraphs 58 through 61 of the Complaint make clear that Defendants have “failed to abide by these contracts and have allowed the cemetery to fall into a state of shameful disrepair” and “engaged in conduct in willful disregard of the rights of individuals in violation of GBL 349-c.” The rights which have been violated, as alleged in the Complaint, are contractual rights to provide perpetual care, to maintain the trust accounts and otherwise adhere to their fiduciary duties, including the duty of candor to report the theft of these monies and provide a full accounting. There can be little doubt that Plaintiff, who is presently 76 years of age, qualifies as an “elderly person” under the statute given his sworn statement in this proceeding to that effect.¹⁸ There can also be little doubt that Plaintiff has alleged a violation of GBL 349-c in

¹⁸ *See* Buchman Decl. Ex. G, Affidavit of Steven Leventhal dated March 18, 2011.

the Complaint concerning Defendants' willful disregard of Plaintiffs' rights under the perpetual care contract. Accordingly, Plaintiff's GBL 349-c claims should be sustained.

C. Defendant Has Admitted to the NYAG that it Misappropriated Funds And The Conversion/Breach of Fiduciary Duty Claims Should Not Be Dismissed

Conversion: Defendants contend that Plaintiff's conversion claim is time barred by the statute of limitations. Def. Mem. at 5-9. While it is unclear exactly when the conversion took place, for purposes of this motion that date is irrelevant. It is well settled in New York that a claim for conversion does not begin to accrue *until there is a demand for the return of the property*. *Baratta v. Kozlowski*, 464 N.Y.S.2d 803 (2d Dept 1983) ("We reject the Bank's assertion that the action accrued when the bonds were converted because where there is a delivery of personal property 'not to be returned specifically or in kind at a fixed time or upon a fixed contingency' an action for conversion does not accrue *until there is a demand for return of the property*") (see CPLR 206, subd [a], par 2; *see also*, 1 Weinstein-Korn-Miller, NY Civ Prac, ¶ 206.02).¹⁹

Here, Defendant Congregation Shaare Zedek was under a fiduciary obligation to retain perpetual care monies in trust and to disclose its unlawful conduct. It did not do that. The *Lucker* action was filed in federal court demanding the return of these monies.²⁰ Only after the commencement of this action did Defendant publicly admit that it had "borrowed" monies. The conversion cause of action in the *Lucker* action and this case began to accrue at the time the *Lucker* action was filed demanding the return of the monies. The claim was simultaneously

¹⁹ *See Ryder v. Sheldon*, 415 N.Y.S.2d 35 (1st Dept 1979) (striking affirmative defense of statute of limitations as to conversion claim as the statute was tolled.); *Universal-MCA Music Publishing v. Bad Boy Ent.*, 2003 N.Y. Slip Op. 51037U, 2003 N.Y. Misc LEXIS 831 (N.Y. Sup. 2003) (denying motion to dismiss conversion claim on statute of limitations grounds given Defendants deception.).

²⁰ The filing of the *Lucker* class action tolled the statute of limitations for all claims asserted on behalf of the class.

tolled as to all class members by the filing as a class action complaint.. *Yolin v. Holland America Cruises, Inc.*, 468 N.Y.S.2d 873, 874 (1st Dept. 1983); *see* (1 Newberg, Class Actions § 1.08 [2d ed 1985]). Thus, the conversion claim is timely and cannot be dismissed as a matter of law.

Breach of Fiduciary Duty: With regard to the statute of limitations concerning a breach of fiduciary duty claim, the Court of Appeal has held:

New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging injuries to property within the meaning of CPLR § 214 (4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR § 213 (1) applies. Moreover, where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR § 213(8).

IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139 [2009]).

Whether a three or six year statute of limitations period is applicable here is irrelevant because the Plaintiff has alleged a continuing violation of law and acts of fraudulent concealment. Moreover, it is well recognized under the doctrine of continuous representation that the statute of limitations, whether three years or six years, is tolled while the fiduciary continues to serve in that capacity. *Glamm v Allen*, 57 NY2d 87, 439 N.E.2d 390, 453 N.Y.S.2d 674 [1982]); *Williamson v Pricewaterhouse Coopers LLP*, 9 NY3d 1 [2007]; *Shumsky v Eisenstein*, 96 NY2d 164 [2001]). Defendants have never sent notice to all class members concerning the theft nor did they repudiate their contractual/legal obligation as a fiduciary under the perpetual/annual care contracts. Thus, Defendants, even today, continue to owe fiduciary duties to Plaintiff which they are breaching by refusing to: (i) honor the perpetual care contracts and/or disclose what happened to the perpetual care monies, (ii) perform a complete and professional forensic accounting; and (iii) return the stolen monies and true up the trust accounts

with properly accounted for back interest and accruals.²¹ Accordingly, Plaintiff's conversion and breach of fiduciary duty claims have not run and, even if they had, Defendants should be estopped from invoking this affirmative defense given their deceptive conduct and fraudulent concealment.

D. Plaintiff Has Alleged the Essential Elements of Conversion

Defendants' contention that Plaintiff has not properly alleged a viable conversion claim is pure semantics. Def. Mem. 7. Defendants contend Plaintiff "had" but no longer has a legal ownership or immediate superior right of possession to the perpetual care monies. Plaintiff is the donor and has a superior right over everyone to those monies. *See Smithers v. St. Luke's Roosevelt Hospital Center*, 281 A.D.2d 1127, 723 N.Y.S.2d 426 (1st Dept 2001). The case Defendants cites, *Medscan, LLC v. JC-Duggan, Inc.*, 837 N.Y.S.2d 80, 81 (1st Dep. 2007), is inapplicable since the Plaintiff in that case *never* possessed legal ownership or a right to possess the medical equipment. That is distinguishable from this case where Plaintiff "provided Defendants with [his] monies for placement in a trust"²² which Defendants stole in violation of their fiduciary duties, thereby denying Plaintiff and the Class "*the right to their monies.*"²³ (emphasis added). Defendants' "had" argument is a tortured reading of the Complaint and entirely inconsistent with other unambiguous allegations that Defendants stole Plaintiff's

²¹ As to both the conversion and breach of fiduciary duty claims, "[i]t is the rule in New York that a defendant may be estopped from pleading the Statute of Limitations where plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action (*General Stencils v Chiappa*, 18 NY2d 125, 127-128, 219 N.E.2d 169, 272 N.Y.S.2d 337 (1966); *Erbe v Lincoln Rochester Trust Co.*, 13 AD2d 211, 214 N.Y.S.2d 849 (4th Dept 1961), *mot for rearg. and mot for lv to app den* 14 AD2d 509, 217 N.Y.S.2d 576 (4th Dept), *app dsmd* 11 NY2d 754, 181 N.E.2d 629, 226 N.Y.S.2d 692 [1961]; *see Fraud, Misrepresentation, or Deception as Estopping Reliance on Statute of Limitations, Ann.*, 43 A.L.R.3d 429); *Matter of the Estate of Friedman*, 2009 Slip Op. 31854U, 2009 N.Y. Misc. LEXIS 4335 (Nas. Cty 2009).

²² Complaint ¶80.

²³ Complaint 84.

perpetual care monies and deprived him of monies to which he is legally entitled. *Id.*

Defendants have absolutely no basis to challenge Plaintiff donor's superior right to the monies, especially given their dirty hands. This argument that Plaintiff, who had his monies stolen, is not entitled to their return simply adds insult to injury. Accordingly, the conversion claim should be sustained because Plaintiff has a superior right to *his* stolen monies from these tortfeasors.

E. Defendants' Breach of Fiduciary Duty Arguments Are Frivolous

Defendants sink to new lows by claiming the "Congregation Shaare Zedek **Trust Fund Receipt**," which is a perpetual care contract between Defendant Congregation Shaare Zedek and Plaintiff, did not create a fiduciary relationship. *See* Def. Mem. 8-9.²⁴ (emphasis added); *see also* Complaint Exhibit A. Defendants' argument is **stunning** in light of the record evidence in this case. A quick perusal of the "**Trust Fund Receipt**," which is a standard form agreement defendants used over decades to sell perpetual and annual care at Bayside Cemetery, makes abundantly clear the document was created by Defendant Congregation Shaare Zedek and includes language expressly creating a fiduciary relationship. *See* Complaint Exhibit A. The document, by its very title "**Trust Fund Receipt**," created a **trust**. It's just that simple. And as the maker of the document, this plain meaning must be construed *against* Defendants. Notwithstanding the title of the document, New York law recognizes that a trust was created by operation of law²⁵ when Plaintiff conveyed monies and reposed confidence and trust in Defendants. And lest there be any doubt about the creation of a trust and a fiduciary relationship under New York law given these facts, the Trust Fund Receipt specifically incorporates, by

²⁴ This argument is also logically inconsistent with Defendants' brief which concedes the establishment of a trust to which a fiduciary duty is owed — "Plaintiff Lacks Standing to enforce the Perpetual Care Trust at Issue." Def. Mem. at 10. Defendant concedes the obvious — that a trust was created — despite their arguments to the contrary.

²⁵ *See* n. 26.

reference, Section 92 of the Membership Corporation Law of New York. *See* Complaint Exhibit A, Trust Fund Receipt, p 1. Section 92 of the Membership Corporation Law of New York provides as follows:

Every cemetery corporation subject to the provision of this article, every other cemetery corporation or association and every religious corporation having charge and control of a cemetery, which heretofore has been or which hereafter may be used for burials *shall keep separate and apart from its other funds, all moneys and property received by it for the perpetual care of any lot in its cemetery. The funds so received shall be kept invested only in securities authorized by law for the investment of trust funds,* and the income arising therefrom shall be used solely for the perpetual care and maintenance of the lot or lots for which such income has been provided. The officers of the corporation shall keep accurate accounts of such funds separate and apart from its other funds.

Id. Although Defendant Congregation Shaare Zedek might argue it was not a cemetery corporation subject to this provision, the fact that it referenced this provision in the contract means it became contractually obligated to adhere to these provisions – provisions which it has admitted to the NYAG it violated.

Defendant Congregation Shaare Zedek referenced this provision in **all** of its standard form contracts for decades, thereby requiring that monies entrusted to it be “invested in securities authorized by law for the investment of trust funds” and that “accurate accounts of such funds separate and apart from its other funds” would be maintained. There is absolutely *no* wiggle room here for Defendants to contend *no* trust was established or *no* fiduciary duties were owed to Plaintiff – *none*. By title of the document, New York law and the express language of the document, a trust was created and Defendants owe Plaintiffs a fiduciary duty.²⁶ For Defendants to now claim it is not a trust or that no fiduciary duties are owed is *intellectually dishonest* and

²⁶ *Holding Corp., v. Klein*, 282 A.D.2d 527, 529, 724 N.Y.S.2d 66 (2nd Dept. 2001); *Yochim v. Mount Hope Cemetery Assoc.*, 163 Misc. 2d 1054 (Cty Ct. Yonk. 1994) (*citing DiMaio v. State of New York*, 135 Misc. 2d 1021, 1025 (N.Y. Ct. Cl. 1987)).

inconsistent with even basic common sense given this unambiguous evidence. Sanctions²⁷ should be imposed for having to address this, and other, patently frivolous arguments.²⁸

Defendants' argument that Plaintiff lacks standing to enforce a trust he created is equally absurd. In *Smithers v. St. Lukes's Roosevelt Hospital Center*, 281 A.D.2d 1127, 723 N.Y.S.2d 426 (1st Dept 2001), the First Department addressed a similar issue and acknowledged the well settled principle in New York that a donor's intent is entitled to be enforced by the donor or his estate. The court stated as follows:

To hold that, in her capacity as her late husband's representative, Mrs. Smithers has no standing to institute an action to enforce the terms of the Gift is to contravene the well-settled principle that a donor's expressed intent is entitled to protection (*see St. Joseph's, supra; Lefkowitz v Lebensfeld, supra; Alco Gravure, supra*) and the longstanding recognition under New York law of standing for a donor such as Smithers (*see Associate Alumni, supra*). We have seen no New York case in which a donor attempting to enforce the terms of his charitable gift was denied standing to do so. Neither the donor nor his estate was before the court in any of the cases urged on us in opposition to donor standing (*see, e.g., Alco Gravure, supra; Stewart v Franchetti*, 167 App Div 541; *Matter of De Long*, 169 AD2d 1005, *lv denied* 77 NY2d 809; *Lefkowitz v Lebensfeld*, 68 AD2d 488, *aff'd* 51 NY2d 442). The courts in these cases were not addressing the situation in which the donor was still living or his estate still existed. (*Cf., Herzog Found. v University of Bridgeport*, 243 Conn 1, 699 A2d 995.).

In that case, the First Department noted that the Attorney General *did not have exclusive authority* to represent the interests of the trust, as repeatedly argued by defendants herein, because "[t]he donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent." *Id.* at*139 (emphasis added). Defendants' "cut and paste argument" from the *Lucker* matter that the Plaintiff in this case lacks standing is misplaced because Plaintiff is the person who purchased perpetual care

²⁷ Plaintiff has not filed a motion for sanctions, but reserves the right to file such a motion should the Court indicate a desire to entertain such a motion given the arguments made by these defendants and Defendant CAJAC.

²⁸ *AMP Serv. Ltd. v. Walanpatrias Foundation*, 2011 NY Slip Op. 30351U, 2011 N.Y. Misc. LEXIS 338 (Feb. 15, 2011 Sup. N.Y.); *see e.g. People v. Rivera*, 605 N.Y.S.2d 822 (Sup. N.Y. Brnx 1993).

and, therefore, is the donor. Under *Smithers*, Plaintiff or his estate have the superior right to enforce the terms of the trust. To accept Defendants' argument would be akin to making the recipients of trust monies accountable to no natural person a result which is entirely inconsistent with *Smithers*. Accordingly, Defendants' breach of fiduciary duty and standing arguments are without merit.

F. Plaintiff's Annual Care Breach of Contract Claims Should be Sustained

Defendants contend that Plaintiff lacks standing to pursue a breach of contract claim concerning annual care payments. Def. Mem. at 9. Defendants claim that the payment of monies for annual care does "not create a trust or fiduciary relationship, but are rather a simple contractual relationship with the cemetery." It is well settled in New York that conveying monies and reposing confidence or trust in another creates a fiduciary relationship.²⁹ As an individual who paid monies to Defendant Congregation Shaare Zedek, which were stolen, Plaintiff has clear standing to represent the interests of all "similarly situated" individuals, including those who purchased annual care from Defendant Congregation Shaare Zedek. The common denominator here is the entrustment of monies which Defendants stole in violation of their contracts and fiduciary duties. Plaintiff can represent the interests of all similarly situated class members. Be that as it may, this is really a class definition issue which is more appropriately addressed after discovery on a motion for class certification. Accordingly, this claim should be sustained and Defendants can raise it at the class certification stage of this proceeding.

²⁹ See n. 26.

G. Plaintiff, the Donor, Has Standing To Enforce The Perpetual Care Trust

Defendants contend the only person who can enforce a charitable trust is the NYAG. Def. Mem. at 10. That is *not* the law in New York. Indeed, this argument was expressly rejected in *Smithers v. St. Luke's Roosevelt Hospital Center*, 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dept 2001). In *Smithers*, the First Department held that the EPTL “does not designate the Attorney General as the exclusive representative of donors of charitable dispositions.” *Id.* Plaintiff Mrs. Smithers, the wife of the donor, was found to possess standing to enforce her husband’s intent *Id.* Unlike the *Smithers* case, here the donor, Mr. Leventhal, is still alive and is entitled, as a matter of New York law, to enforce the trust he created. Even the NYAG recognizes this controlling law as two administrations have failed to intervene or move to stay this type of action.

Defendants contend that unlike the Plaintiff in *Smithers*, Mr. Leventhal did not expressly reserve a right of oversight in his Trust Fund Receipt with Defendant Congregation Shaare Zedek. The argument is directly in conflict with the express language in *Smithers* which held that the donor always has the right to enforce a trust s/he creates and stands in a better position than the NYAG. Moreover, Plaintiff was not the maker of this standard form contract used by Defendants so he could not reserve rights in a contract thrust upon him. Defendants undoubtedly recognize the futility of their argument in footnote 6. *See* Def. Mem. at 11. Accordingly, the argument should be rejected.

H. Plaintiff Is Not Pursuing a Claim for Breach of Contract Regarding the Entire Cemetery

Defendants suggest Plaintiff is pursuing claims for disrepair concerning the entire 14 acre tract of land at the cemetery. That is not correct. Plaintiff’s claims concern perpetual and annual care plots/areas at the cemetery

Plaintiff has alleged that he purchased a perpetual care contract from Defendant Congregation Shaare Zedek. The contract provided that the monies entrusted to it would be deposited and remain in violate in a trust account from which the income would be used to maintain Ethel Levanthal, Benjamin Stolof and Emma Stoloff's plots. In the Trust Fund Receipt, Defendant Congregation Shaare Zedek also agreed to maintain accurate books and records. These plots, like other plots and common areas at the cemetery for which perpetual care has been purchased, are the "perpetual care areas." Plaintiff's action concerns these areas not the entire cemetery. Hence, Defendants' motion to dismiss claims involving non-perpetual/annual care areas at the cemetery is without any basis. Accordingly, there is nothing to dismiss and no action is required in response to Defendants' argument. *See* Complaint.

I. Plaintiff Has Established An Unjust Enrichment Claim

Defendants seeks dismissal of Plaintiffs' unjust enrichment claims. In addition to its breach of contract claims, Plaintiff has alternatively alleged an unjust enrichment claim. "Plaintiffs always have the option of pleading in the alternative." *Fine-Cut Diamonds Corp v. Sherit*, 2009 N.Y. Slip. Op. 5017U, 880 N.Y.S.2d 872 (Nassau Sup. Ct. Feb. 3, 2009); CPLR 3014. "Pleading in the alternative does not provide grounds for dismissal. *Greenstone/Fonstana Corp., v. Feldstein*, 2008 NY Slip. Op. 51387U, 2008 N.Y. Misc. LEXIS 4162 (Nassau Sup. Ct. Jun. 23, 2008) (citing *Gold v 29-15 Queens Plaza Realty, LLC*, 43 AD3d 866, 867, 841 N.Y.S.2d 668 (2d Dept. 2007); *Raglan Realty Corp. v Tudor Hotel Corp.*, 149 AD2d 373, 375, 540 N.Y.S.2d 240 (1st Dept. 1989)). The existence of a valid contract does not require dismissal of an unjust enrichment claim. *EBC v. Goldman Sachs & Co.*, 7 A.d.3d 418, 777 N.Y.S.2d 440 (1st Dept. 2004). Indeed, where, as here, a defendant challenges the sufficiency of the contract, an unjust enrichment pleading in the alternative is entirely appropriate. *Perini v. Sabatelli*, 2010 NY Slip Op. 30381U, 2010 N.Y. Misc. LEXIS 2407 (Nass. Supreme N.Y. Feb. 9, 2010). The

unjust enrichment claims should not be dismissed because “pleading in the alternative is permitted.” *Berner v. Olsen*, 2008 N.Y. Slip Op. 30964U, 2008 N.Y. Misc. LEXIS 10623 (Suffolk Sup. Ct Mar. 17, 2008).

Defendants next contend that Plaintiff cannot seek return of the monies because they were placed in trust. Defendants have admitted during the course of this proceeding that the funds *were never* placed in trust, but rather were commingled with general operating funds.. This argument is also inconsistent with *Associated Alumni of the Gen. Theological Sem. v. Gen Theological Sem.*, 163 N.Y. 417, 422, 57 N.E. 626, 627 (1900), *see* Def. Mem. at 12, and *Smithers* where the Plaintiff was entitled to a return of misappropriated, entrusted monies in order to enforce the donor’s intent. The same holds true here.

Defendants also argue that the statute of limitations has run on the unjust enrichment claims. Def. Mem. at 12. Each day Defendant retains monies dedicated to the provision of perpetual/annual care and fails to provide perpetual care services at the cemetery, it commits a new violation of law to which the statute of limitations cannot run.³⁰ The unjust enrichment claims are, therefore, viable to this day given Defendants’ continuing refusal to adhere to the perpetual care contracts and their refusal to return stolen monies. Even if the claim was somehow time barred, Defendants’ fraudulent concealment and affirmative misrepresentations concerning perpetual care monies toll the statute of limitations.

J. The Statute of Limitations Was Tolloed By Fraud/Deception

Defendants claim the statute of limitations cannot be tolled in this case because “a wrongdoer is not legally obligated to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations.” *Zumpano v. Quinn*, 6 N.Y.3d 66,

³⁰ *Harvey v. Metropolitan Life Ins. Co.*, 2005 N.Y. Slip. Op. 52397U, 2005 N.Y. Misc. LEXIS 8422 (N.Y. Sup. Ct. Ap. 18, 2005)..

674 894 N.E.2d 926, 929 (2006). *Zumpano* is factually distinguishable from this case. In *Zumpano*, the Plaintiffs, victims of sexual abuse by priests, were “aware of the sexual abuse he or she suffered at the hands of the Defendant priests.” *Id.* Moreover, Plaintiffs did not establish that Defendants owed them a fiduciary duty to affirmatively disclose their unlawful acts. In this case, Defendant Congregation Shaare Zedek clearly possessed an affirmative fiduciary duty to disclose the wrong doing given the fact that it acted as custodians of a trust — a trust where monies were suppose to be deposited and remain *in violate* but were not. Defendant Congregation Shaare Zedek concealed its unlawful conduct for years and made misrepresentations to prevent the public from discovering its unlawful conduct. The concealment of facts by a fiduciary is alone sufficient to invoke equitable tolling as “concealment without actual misrepresentation may form the basis for invocation of the doctrine ‘if there was a fiduciary relationship which gave the defendant an obligation to inform the plaintiff of the underlying claim.’” *Crown Castle USA, Inc., v. Nudd Corp.*, 05 CV 6163T, 2008 U.S. Dist. LEXIS 3416 (W.D.N.Y. 2008) (*citing Jordan v. Ford Motor Co.*, 426 N.Y.S.2d 359 (4th Dept. 1980); *Gleason v. Spote*, 599 N.Y.S.2d 297 (2d Dept 1993)). In addition to concealment, there are also affirmative misrepresentations by Defendants that the “money ran out” which also serve as a basis for tolling the statute of limitations. Thus, there are different ways the Court can arrive at the conclusion the statute of limitations has not run or does not apply in this case.

III.
CONCLUSION

For the reasons stated above, Defendants' motion to dismiss should be denied in its entirety.³¹

Dated: April 1, 2011
New York, New York

Respectfully submitted,

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³¹ To the extent this Court grants any portion of Defendants' motion to dismiss, Plaintiff respectfully requests leave to replead.