

TABLE OF CONTENTS

INTRODUCTION..... 1

STATEMENT OF FACTS..... 5

 A. Bayside Cemetery..... 5

 B. Annual and Perpetual Care Contracts..... 5

ARGUMENT..... 7

I. PLAINTIFFS POSSESS STANDING TO PURSUE THESE CLAIMS ON
 BEHALF OF THEIR DECEASED RELATIVES 7

II. THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFFS’ CLAIMS 12

 A. Defendant’s Statute of Limitations Defense Ultimately Fails Since the
 Alleged Violations Of Law Are Continuing In Nature 12

 B. Plaintiffs Have Alleged Facts Sufficient To Toll The Statute of
 Limitations for Fraudulent Concealment..... 14

III. THE LUCKER PLAINTIFFS GRANDMOTHER WAS A MEMBER OF
 CHEBRA SHEBATH ACHIM SOCIETY WHICH IS LISTED ON
 DEFENDANT CONGREGATION SHAARE ZEDEK’S OWN DOCUMENT AS
 HAVING PURCHASED PERPETUAL CARE 16

IV. PLAINTIFFS ARE “PERSONS” UNDER THE GBL STATUTES AND
 POSSESS STANDING TO PURSUE THIS ACTION ON BEHALF OF NEW
 YORK CONSUMERS AND THEIR DECEASED FAMILY MEMBERS 17

V. PLAINTIFFS MAY PURSUE THEIR BREACH OF CONTRACT CLAIMS 19

VI. PLAINTIFFS “STANDING IN THE SHOES” OF THEIR DECEASED FAMILY
 MEMBERS MAY PURSUE THE CONVERSION AND UNJUST
 ENRICHMENT CLAIMS 21

VII. DEFENDANT OWED PLAINTIFFS A FIDUCIARY DUTY AS A MATTER
 OF LAW..... 22

CONCLUSION 23

TABLE OF AUTHORITIES

CASES	PAGE
<i>214 Pension Oswego Laborers' Local Fund v. Marine Midland Bank, N.A.</i> , 85 N.Y.2d 20, 647 N.E.2d 741, 623 N.Y.S.2d 529 (N.Y. 1995).....	18
<i>1050 Tenants Corp., v. Lapidus</i> , 735 N.Y.S.2d 47 (1st Dep't 2001).....	12
<i>Alco Gravure, Inc. v. Knapp Foundation</i> , 64 N.Y.2d 458, 479 N.E. 752 (1985)	2, 7, 11
<i>In re Ancillary Receivership of Reliance Insurance Co.</i> , 863 N.Y.S.2d 415 (1st Dept. Sept. 2, 2008).....	21
<i>Associate Alumni of General Theological Seminary</i> , 163 N.Y. 417, 57 N.E. 626 (1900)	2, 8
<i>Barkley v. Olympia Mortg. Co.</i> , 04 Cv 875 (RJD) KAM), 2007 U.S. Dist. LEXIS 61940 (Aug. 22, 2007)	12
<i>Bennett v. 3 C Coal Co.</i> , 180 W. Va. 665, 379 S.E.2d 388 (1989)	9
<i>Blue Cross & Blue Shield of N.J. v. Phillip Morris USA, Inc.</i> , 818 N.E.2d 1140 (N.Y. 2004)	19
<i>Brown v. Hill</i> , 284 Ill. 286, 119 N.E. 977 (1918).....	9
<i>Chace v. Leising</i> , 72 N.Y.S.2d 741 (Sup. Ct. 1947).....	8
<i>Clark v. Rahway Cemetery</i> , 69 N.J. Eq. 636, 61 A. 261 (Chn. Ct. 1905)	10
<i>In The Concerned Loved Ones and Lot Owners Association of Beverly Hills Memorial Gardens v. Pence</i> , 181 W. VA. 649, 383 S.E. 2d 831, 1989 W. VA. LEXIS 146 (1989)	8
<i>Cornwell v. Robinson</i> , 23 F.3d 694 (2d Cir. 1994)	12
<i>Crown Castle USA, Inc., v. Nudd Corp.</i> , 05CV6163T, 2008 U.S. Dist. LEXIS 3416 (W.D.N.Y. 2008).....	16

<i>DiMaio v. State of New York</i> , 135 Misc. 2d 1021 (N.Y.Ct. Cl. 1987)	6, 13, 23
<i>Dutton v. Greenwood Cemetery Co.</i> , 80 N.Y.S.780, 1903 N.Y. App. Div. LEXIS 573 (2nd Dept. 1903).....	5
<i>EBC I, Inc. v. Goldman Sachs & Co.</i> , 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170 (2005).....	16
<i>Erbe v. Lincoln Rochester Trust Company</i> , 214 N.Y.S.2d 849 (4th Dep't 1961)	14
<i>Fourth Ocean Putnam Corp., v. Interstate Wrecking Co.</i> , 66 N.Y.2d 38, 495 N.Y.S.2d 1 (1985).....	3, 20
<i>General Stencils v. Chiappa</i> , 18 N.Y.2d 125, 272 N.Y.S.2d 337 (1966).....	14, 15
<i>The German Evangelical St. Marcus Congregation of St. Louis v. Archambault</i> , 404 S.W.2d 705, 1966 Mo. LEXIS 706 (Mo. 1966)	7, 9
<i>Gleason v. Spota</i> , 599 N.Y.S.2d 297 (2nd Dept. 1993).....	16
<i>Growth Properties v. Cannon</i> , 282 Ark. 472, 669 S.W.2d 447 (1984)	10
<i>Hertle v. Riddell</i> , 127 Ky. 623, 106 S.W. 282 (1907).....	9
<i>Houston Cemetery Co. v. Drew</i> , 13 Tex. Civ. App. 536, 36 S.W. 802 (Ct. App. 1896).....	10
<i>Jordan v. Ford Motor Co.</i> , 426 N.Y.S.2d 359 (4th Dept. 1980).....	16
<i>Kidd v. Delta Funding Corp.</i> , Index No. 601020/99, 2000 N.Y. Misc. LEXIS 29 (N.Y. Sup. Ct. 2000).....	3, 14
<i>Koch v. Dwyer</i> , No. 98 CV 5519, 1999 U.S. Dist. LEXIS 11101, 1999 WL 528181 (S.D.N.Y. July 12, 1999).....	13
<i>Lay v. Carter</i> , 151 N.Y. Supp. 1081 (1915).....	8
<i>Litchmore v. Perez</i> , 851 N.Y.S.2d 70 (N.Y. Sup. Kings Co. 2007)	21

<i>Mills v. Carolina Cemetery Park Corp.</i> , 242 N.C. 20, 86 S.E.2d 893 (1955)	9
<i>Mitchell v. Thorne</i> , 134 N.Y. 536, 32 N.E. 10 (1892)	8
<i>Nieves v. Home Box Office</i> , 815 N.Y.S.2d 495 (N.Y. Sup. Ct. N.Y 2006).....	7
<i>NYSA-ILA Medical & Clinical Serv. Fund v. Catucci</i> , 60 F. Supp. 2d 194 (S.D.N.Y. 1999)	12
<i>Schoeps v. Andrew Lloyd Weber Art Foundation</i> , 17 Misc. 1128(851 N.Y.S.2d 74 (Sup. Ct. - N.Y. City 2007), <i>aff'd</i> , 66 A.D. 3d 137, 884 N.Y.S.2d 396 (1st Dep't 2009)	11
<i>Scruggs v. Beason</i> , 246 Ala. 405, 20 So. 2d 774 (1945).....	10
<i>Seitzinger v. Becker</i> , 257 Pa. 264, 101 A. 650 (1917).....	9
<i>Shelton v. Elite Model Management, Inc.</i> , 812 N.Y.S.2d 745	12
<i>Simcuski v. Saeli</i> , 44 N.Y.2d 442, 406 N.Y.S.2d 259 (1978).....	14
<i>Smith v. Ladage</i> , 397 Ill. 336, 74 N.E.2d 497 (1947).....	9
<i>Smithers v. St. Lukes-Roosevelt Hospital Center</i> , 281 A.2d 127, 723 N.Y.S.2d 426, 2001 N.Y. App. Div. LEXIS 3368 (1st Dep't 2001).....	2, 8, 9, 10
<i>Socket v. Degel Yehudo Cemetery Corp.</i> , 49 N.Y.S.2d 176, 268 A.D. 207 (1st Dept. 1944)	5
<i>Tracey v. Bittle</i> , 213 Mo. 302, 112 S.W. 45 (1908).....	9
<i>Volga v. United Mgmt Corp.</i> , 93-C 1997 U.S. Dist. LEXIS 21711 (E.D.N.Y. Mar. 4, 1997).....	22
<i>WIT Holding Corp., v. Klein</i> , 282 A.D.2d 527, 724 N.Y.S.2d 66 (2nd Dep't 2001).....	6

Westminister Properties Ltd v. Kass,
624 N.Y.S.2d 738 (1st Dep't 1995)..... 12

Yochim v. Mount Hope Cemetery Association,
163 Misc. 2d 1054 (Cty. Ct. Yonk. 1994)6, 13, 22

Zuppano v. Quinn,
6 N.Y. 3d 666, 849 N.E.2d 926 (2006) 12

Plaintiffs John Lucker, Elizabeth Lucker, Nancy Rousseau, Lynn Cohen and Fran Goldstein, by and through their *pro bono* attorney, respectfully submit this memorandum of law in opposition to Defendant Congregation Shaare Zedek's Motion to Dismiss. For the reasons set forth below, Defendant's motion to dismiss should be denied in its entirety.¹

INTRODUCTION

Defendant Congregation Shaare Zedek has admitted to the New York State Attorney General's Office ("NYAG") that it commingled perpetual care trust fund monies with general operating funds of the synagogue and used these monies, in contravention of the trust, to make repairs to the synagogue.² This admission makes liability as to Plaintiffs' breach of fiduciary duty, breach of perpetual care contracts, conversion and unjust enrichment claims uncommonly clear.

In an attempt to avoid liability, Defendant seeks dismissal of the complaint in its entirety on the grounds that: (i) Plaintiffs lack standing to pursue these claims (Def. Mem. pp. 13-18); (ii) the statute of limitations bars Plaintiffs' claims (Def. Mem. pp. 19-24); and (iii) the claims alleged in the complaint by the *Lucker* Plaintiffs lie against the burial society who, acting as an agent, purchased the perpetual care contract on behalf of its members (Def. Mem. p 18).

¹ The Complaint in this action was filed against three Defendants. To the extent this brief refers to "Defendant" in connection with this action, it is referring to Defendant Congregation Shaare Zedek. To the extent the brief refers to Defendants, it is referring to Defendants Congregation Shaare Zedek and Bayside Cemetery. Bayside Cemetery is a religious group and has not formally appeared in this action.

² In general, there seems to have been a general comingling of assets between the synagogue and the cemetery before 1999. The New York Daily News reported in "Bayside Cemetery is a disgrace, suit says" dated October 4, 2007 that "[a]s to the allegations about misappropriated funds, Shaare Zedek's attorney Steven Axinn said *some cemetery funds were borrowed from a nonrestricted account to repair the synagogue roof, which is entirely proper and legal.*" Declaration of Michael M. Buchman dated February 1, 2010, ("Buchman Decl."), Ex., A, Bayside Cemetery is a Disgrace, Suit Says in the New York Daily News dated October 4, 2007 (emphasis added) and Bayside Cemetery Mess Lands In Federal Court in The Jewish Week dated October 5, 2007. *There is absolutely nothing proper nor legal about invading the corpus of a trust and using monies for unintended purposes in violation of a fiduciary duty.*

Defendant also seeks dismissal of Plaintiffs' individual claims such as General Business Law §§349, 350 (Def. Mem. at 4-6), breach of contract (Def. Mem. pp. 7-10), conversion, unjust enrichment and breach of fiduciary duty (Def. Mem. pp. 10-11). Defendant's arguments all fail for the following six reasons.

First, Defendant's standing argument is entirely inconsistent with general hornbook and New York law which confers standing upon a family member or relative to pursue enforcement of a charitable trust.³ Contrary to Defendant's assertion, the NYAG *does not* exclusively possess standing to pursue enforcement of a charitable trust.⁴ And even if he did, it is beyond dispute that Bayside Cemetery is registered as a religious group and *not subject to governmental regulation*.⁵ State officials have publicly acknowledged "they are aware of the problems at Bayside but powerless to do anything about it" because Bayside is not subject to the not-for-profit corporation laws *Id.* Thus, to accept Defendant's standing argument would, therefore, allow Defendant to continue to act with impunity. *See infra* pp. 7-12.

Second and as Chief Judge Dearie previously noted in the federal action, Defendant's statute of limitations argument is "oxymoronic."⁶ This case involves a continuing violation of

³ *Bogert*, Trusts and Trustees, § 414 pp. 345-346; *See also* 14 C.J.S. Cemeteries § 25, p. 85; Jackson, The Law of Cadavers, p. 362; *Assoc. Alumni of Gen Theological Seminary*, 163 N.Y. 417, 422, 57 N.E. 626 (1900); *Smithers v. St. Lukes-Roosevelt Hospital Center*, 281 A.2d 127, 723 N.Y.S.2d 426, 2001 N.Y. App. Div. Lexis 3368 (1st Dep't 2001); *Alco Gravure, Inc. v. Knapp Foundation*, 64 N.Y. 2d 458, 479 N.E. 752 (1985).

⁴ *Smithers v. St. Lukes-Roosevelt Hospital Center*, 281 A.2d 127, 723 N.Y.S.2d 426, 2001 N.Y. App. Div. Lexis 3368 (1st Dep't 2001) ("The rule does not designate the Attorney General as the exclusive representative of donors of charitable dispositions . . .").

⁵ *See* Buchman Decl., Ex., B, The Cemetery Nobody Wants, *Jewish Week* dated October 18, 2002.

⁶ At the pre-motion conference, the Court noted:

[a]fter 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 cannot speak for themselves . . .

law as Defendant refuses, even today, to honor perpetual care contracts and abide by its fiduciary duties. The statute of limitations has not, therefore, run. Defendant's deceptive conduct and breach of its affirmative duty as a trustee to inform Plaintiffs and class members of its violations of law also tolls the statute of limitations since the law will not allow a fiduciary to wrongfully invoke the statute of limitations as a defense. *Kidd v. Delta Funding Corp.*, Index No. 601020/99, 2000 N.Y. Misc. LEXIS 29 (N.Y. Sup. Ct. 2000). *See infra* pp. 12-16.

Third, the document annexed as Exhibit C to the Complaint makes clear that the Chebra Shebath Achim burial society, acting as an agent for the Lucker Plaintiffs' grandparents, purchased perpetual care from Defendant Congregation Shaare Zedek. *See infra* pp. 16-17.

Fourth, Plaintiffs have alleged a "consumer injury or harm to the public interest" concerning a consumer oriented activity – the sale of perpetual care contracts by Defendant in New York. GBL § 349. Contrary to Defendant's assertion, this is not a derivative action – this action is being pursued by Plaintiffs as though they "stand in the shoes" of their family members or relatives who purchased perpetual care contracts. *See infra* pp. 17-19.

Fifth, Plaintiffs may pursue breach of contract claims as though they "stand in the shoes" of their deceased. Plaintiffs also possess third-party standing since Defendants Congregation Shaare Zedek and Bayside Cemetery sold the perpetual care contracts to Plaintiffs' deceased. Perpetual care is purchased in order to encourage future generations to visit a well maintained grave and safely pay their respects. Perpetual care is, therefore, purchased for the benefit of "surviving family, friends and other interested parties." Complaint ¶5. Thus, Defendants intended to give Plaintiffs, as third-party beneficiaries, the benefit of performance under the contracts. Accordingly, Plaintiffs are in privity with Defendants by virtue of "assumedly

Buchman Decl., Ex., C, Transcript of Civil Cause For Pre-Motion Conference Before The Honorable Raymond J. Dearie dated December 19, 2007, p. 3.

standing in the shoes” of their relatives and/or possess third-party beneficiary standing in accordance with *Fourth Ocean Putnam Corp., v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 43-44, 495 N.Y.S.2d 1 (1985). *See infra* pp. 19-21. The unjust enrichment and fiduciary duty claims should be upheld as Plaintiffs have a superior right to restore the monies to their intended use and Defendants clearly owe Plaintiffs a fiduciary duty as a matter of law. *See infra* pp. 21-23.

Sixth and contrary to Defendant’s assertion, this is not vexatious litigation. This is a meritorious lawsuit brought by those who possess the ability to now successfully bring a summary judgment motion on their breach of fiduciary duty, breach of contract, conversion and/or unjust enrichment claims based upon Defendant Congregation’s Shaare Zedek’s admission to the NYAG and media. Defendant asks this Court to dismiss this action on the ground that it has already “begun and made substantial progress towards completing the large scale, professional cleanup” at the cemetery. That is grossly inaccurate. Over the past three years, only ten to fifteen percent of the fourteen-acre cemetery has been cleaned up as part of a one-time clean-up.”⁷ Most importantly, there is little hope that Defendant, an organization which consciously invaded trusts and used entrusted monies inappropriately in violation of the law, will continue restoration efforts or honor the numerous perpetual care contracts at the cemetery if freed from further legal scrutiny. Accordingly, Defendant’s motion to dismiss should be denied in its entirety. A decision to the contrary would be inconsistent with the legal maxim “*ubi jus ibi remedium*” – “for every wrong the law provides a remedy.”

⁷ Buchman Decl., Ex., D, Transcript of Motion Before The Honorable Raymond J. Dearie dated June 29, 2009, pp. 7-8. Defendants conceded this point six months ago when they made a similar representation to Chief Judge Dearie and that virtually no work has been performed since June of last year.

STATEMENT OF FACTS

A. Bayside Cemetery

Bayside Cemetery, a fourteen acre tract of land with over 34,000 graves, was opened as a cemetery in 1842 by its owner Congregation Shaare Zedek. Defendants sold rights to individuals and burial societies for the interment of human remains in certain cemetery plots. Upon the completion of these burial interment sales, Congregation Shaare Zedek, under New York law, retained and continues to own all the land at Bayside Cemetery.⁸

B. Annual and Perpetual Care Contracts

In addition to selling burial rights to plots, Defendant also offered individuals and burial societies the opportunity to purchase annual or perpetual care. Defendant sold perpetual care contracts to individuals and burial societies by entering into standard form contracts entitled “Trust Fund Receipt.” These “Trust Fund Receipts” incorporated by reference New York Membership Corporation Law sections which required that:

funds so received shall be kept invested only in securities authorized by law for the investment of trust funds, and the income arising there from 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.*

Buchman Decl., Exhibit E, New York Membership Corporation Law §92 (emphasis added); see also Complaint ¶¶ 6, 50, 52. The title of the document, and the reference to New York

⁸ See *Socket v. Degel Yehudo Cemetery Corp.*, 49 N.Y.S.2d 176, 268 A.D. 207 (1st Dept. 1944) (“The purchaser of a burial plot does not acquire a title in fee simple but ordinarily is regarded as acquiring only an easement or license to make interments in the lot purchased so long as the lot remains a cemetery.”); *Dutton v. Greenwood Cemetery Co.*, 80 N.Y.S.780, 1903 N.Y. App. Div. LEXIS 573 (2nd Dept. 1903) (“the Defendant is the absolute owner of the property in full possession and control of it, those to whom receipts for lots have been given having no estate or interest in the land as such, but merely a right to use it for burial purposes, subject to the rules, regulations and general control of the defendant.”).

Membership Corporation Law created a fiduciary relationship⁹ by operation of law.¹⁰ The maintenance of a plot in “presentable condition” in perpetuity is commonly known as perpetual care. Complaint at ¶ 5. It is well recognized that perpetual care is traditionally purchased for the benefit of “surviving family, friends and other interested parties.” Complaint ¶5.

After commencement of the federal action, Defendants, for the first time, publicly admitted in the press that monies were “commingled” and used to repair the roof and/or make other capital repairs at the synagogue.¹¹ Whether characterized as commingling accounts, absconding with monies, embezzlement or even theft, the sad reality is that the cemetery is in deplorable condition - a disrespectful condition which Defendants have acknowledged publicly including the synagogue’s now former Rabbi Julia Andelman when she referred to the cemetery conditions as “very distressing” in a New York Daily News article called “Bayside Cemetery is a disgrace” on October 4, 2007. Dismissing this case will only compound the problem since Bayside is not subject to the enforcement of N.Y. State Cemetery Law, is registered as a “religious group” not a foreign or domestic “not for profit” corporation and, therefore, beyond governmental regulation.¹² Notably, “state officials say that they are aware of the problems at Bayside, but are powerless to do anything about it.” *Id.* Thus, contrary to Defendants’ impassioned pleas for dismissal on the ground the NYAG will oversee this matter going forward,

⁹ Under New York law, a fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the others expertise or knowledge. *WIT Holding Corp., v. Klein*, 282 A.D.2d 527, 529, 724 N.Y.S.2d 66 (2nd Dep’t 2001).

¹⁰ See *Yochim v. Mount Hope Cemetery Association*, 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)).

¹¹ Buchman Decl., Exhibit F, Bayside Cemetery Suit Groundless, Shul Says, *The Jewish Week* October 03, 2007; Buchman Decl., Exhibit G, Cemetery Woes to be Weeded Out, *The Daily News* October 4, 2007.

¹² See Buchman Decl., Ex., B, The Cemetery That Nobody Wants, *The Jewish Week* dated October 18, 2002.

no progress will be made if this case is dismissed. Plaintiffs respectfully submit that the well pleaded complaint concerning this private dispute should be sustained and discovery commenced in earnest since the NYAG's Office, which has not intervened to stay this proceeding, has expressed to Plaintiffs and Chief Judge Dearie in the federal proceeding, that it has neither the power nor the inclination to become entangled in what is a purely private contractual dispute.¹³

ARGUMENT

For the reasons demonstrated below, Defendant's motion should be denied in its entirety.¹⁴

I. PLAINTIFFS POSSESS STANDING TO PURSUE THESE CLAIMS ON BEHALF OF THEIR DECEASED RELATIVES

Defendant contends Plaintiffs lack standing as "family members" or "near relatives" to pursue this action. Def. Mem. 14-18. According to Defendant only "the [New York State] Attorney General . . . possesses standing to sue." Def. Mem. at 15.¹⁵ Alternatively, Defendant argues that even if Plaintiffs possess standing, they cannot proceed with this case under *Alco Gravure, Inc. v. Knapp Foundation*, 64 N.Y. 2d 458, 479 N.E. 752 (1985). Defendant's arguments are misplaced for the following three reasons.

First, while the general rule is that a private citizen may not sue to enforce a charitable trust, it is well recognized hornbook law that family members, relatives and even friends of

¹³ See *The German Evangelical St. Marcus Congregation of St. Louis v. Archambault*, 404 S.W. 2d 705, 1966 Mo. LEXIS 706 (Mo. 1966) ("[the Attorney General] does not, however, represent each and every member of the public, particularly where private interests exist, in which case "those with a special interest may enforce a trust, or a localized or group charity may be enforced by a class suit. . . .").

¹⁴ On a motion to dismiss for failure to state a cause of action every fact alleged must be assumed to be true and the complaint liberally construed in Plaintiff's favor. *Nieves v. Home Box Office*, 815 N.Y.S.2d 495 (N.Y. Sup. Ct. N.Y. 2006) (James, J.).

¹⁵ If the Court accepts this argument, Defendant and other unincorporated entities will be accountable to no one and free to commit similar acts of theft with impunity.

deceased in a cemetery possess standing to enforce a trust. This rule was well stated in *Bogert, Trusts and Trustees*, § 414 pp. 345-346:

A case of somewhat similar type is that of a cemetery trust when regarded as charitable. There the lot owners, persons who are entitled to have their dead buried there, or *who already have friends or relatives interred in the cemetery, all may be said to have a definite interest in the trust.* Other members of the public may also receive benefit, through the opportunity to buy lots, or otherwise; *but the lot holders and others similarly situated are clearly benefited and interested in the upkeep of the cemetery. Such interest may be regarded as sufficient to enable them to sue to compel execution of the cemetery trust.*

See also 14 C.J.S. Cemeteries § 25, p. 85; Jackson, *The Law of Cadavers*, p. 362.

It is well settled New York law that enforcement actions by beneficiaries or successors in interest are permissible. *Assoc. Alumni of Gen Theological Seminary*, 163 N.Y. 417, 422, 57 N.E. 626 (1900).¹⁶ Indeed, “[i]f the trustees of a charity abuse the trust, misemploy the charity fund, or commit a breach of the trust, the property does not revert to the heir or legal representative of the donor unless there is an express condition of the gift that it shall revert to the donor or his heirs, in the case the trust is abused, *but redress is by bill or information by the attorney general or other person having the right to sue. Smithers v. St. Lukes-Roosevelt Hospital Center*, 281 A.2d 127 *136-37, 723 N.Y.S.2d 426, 2001 N.Y. App. Div. Lexis 3368 (1st Dep’t 2001) (citing 2 Perry on Trusts, sec. 744; *Sanderson v. White*, 18 Pickering, 328; *Vidal v. Girard’s Executors*, 2 Howard [U.S.], 191; *Mills v. Davidson*, 54 N.J. Eq. 659)) (emphasis added); See also *In The Concerned Loved Ones and Lot Owners Association of Beverly Hills Memorial Gardens v. Pence*, 181 W. VA. 649, 383 S.E. 2d 831, 1989 W. VA. LEXIS 146 (1989)

¹⁶ In *Mitchell v. Thorne*, 134 N.Y. 536, 32 N.E. 10 (1892), the Court of Appeals held that plaintiff, an heir, had standing to restrain the owner of a cemetery from removing and damaging headstones *and a right to recover damages.* In *Lay v. Carter*, 151 N.Y. Supp. 1081 (1915) the Court of Appeals held one or more members of a family who were interested in rights the family acquired in a cemetery could maintain an action to restrain interference. And in *Chace v. Leising*, 72 N.Y.S.2d 741 (Sup. Ct. 1947) the court held plaintiff possessed standing and had the “right to protect the graves and monuments of his ancestors (his great-great grandfather’s grave), and therefore is a proper party to bring this action.” *Id.*

(West Virginia Supreme Court recognizing that near relatives may bring action for breaches of contract and fiduciary duty concerning a cemetery.);¹⁷ 10 Am. Jur. Charities, § 117, p. 670.¹⁸

The underlying rationale for these decisions is clear. If the relatives of a deceased does not have standing, who will act and protect the interests of the voiceless? The answer in this case is not the NYAG since state officials have publicly acknowledged, “they are aware of the problems at Bayside but powerless to do anything about it” because Bayside is not subject to the not-for-profit corporation laws *Id.* Thus, to accept Defendant’s argument is to make Defendant and other unincorporated entities in the State of New York accountable to absolutely no one. That cannot be the law in New York and indeed it is not.

Under New York law, a family member or near relative, in fact, stands in a better position than the Attorney General and, therefore, may pursue the donor’s intent.¹⁹ *Smithers v.*

¹⁷ The law is similar in numerous other states. A survey of state court decisions indicates that courts in New Jersey, Pennsylvania, Illinois, North Carolina, Missouri, Arkansas, Alabama, Kentucky and Texas which have addressed this issue have all determined that family members or near relatives, like Plaintiffs in this action, possess standing to pursue these types of claims.

¹⁸ See also *Tracey v. Bittle*, 213 Mo. 302, 112 S.W. 45, 494 (1908) (“The plaintiff, having near relatives buried in this graveyard, has a peculiar right in the maintenance of this public use and in preventing an obstruction to the public use. In such case he can maintain the action”); *Accord, Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 379 S.E.2d 388, 392 (1989).

¹⁹ *The German Evangelical St. Marcus Congregation of St. Louis v. Archambault*, 404 S.W. 2d 705, 1966 Mo. LEXIS 706 (Mo. 1966) (“[the Attorney General] does not, however, represent each and every member of the public, particularly where private interests exist, in which case “those with a special interest may enforce a trust, or a localized or group charity may be enforce by a class suit. . . . Generally beneficiaries in a charitable trust have a right to maintain suit to enforce the trust or prevent diversion of its funds and even though in Missouri the purchaser of a cemetery lot does not acquire an estate in fee but merely an easement or privilege of burial, lot owners (or their representative) have such a special interest as to justify respondents’ defense of the trust in the original suit.”); *Brown v. Hill*, 284 Ill. 286, 119 N.E. 977, 980 (1918) (“It is well settled that a court of equity will enjoin the owner of land from defacing or meddling with graves on land used for public burial purposes, at suit of any party having deceased relatives or friends buried therein”); *Hertle v. Riddell*, 127 Ky. 623, 106 S.W. 282 (1907) (same); *Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893, 899 (1955) (plaintiff possessed standing to sue.); *Smith v. Ladage*, 397 Ill. 336, 74 N.E.2d 497, 500 (1947) (action for damages and injunctive relief by relatives against cemetery for desecration upheld); *Seitzinger v. Becker*, 257 Pa. 264, 101 A. 650, 651 (1917) (“the fact that the complainants are the grantees or heirs of grantees of certain lots sold to them by the respondents, gives them such interest and rights in the premises, as to make them proper parties to maintain the bill.”); see *Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536, 36 S.W. 802, 805 (Ct.

St. Lukes-Roosevelt Hospital Center, 281 A.2d 127, 723 N.Y.S.2d 426, 2001 N.Y. App. Div. Lexis 3368 (1st Dep't 2001) (“Without the possibility of pecuniary gain for himself or herself, only a plaintiff with a genuine interest in enforcing the terms of a gift will trouble to investigate and bring this type of action”).

Second, Plaintiffs possess the ability to proceed since the NYAG *does not* exclusively possess standing to enforce charitable trusts. *Id.*

In *Smithers*, the wife of a charitable donor to St. Lukes Hospital sought to enforce a charitable gift given with the express reservation that the monies only be used to expand the hospital's treatment of alcoholism. When it became apparent to Ms. Smithers that the gift monies had been commingled and improperly used, she commenced an enforcement action. The sole issue in that case was whether Ms. Smithers had standing to pursue enforcement of the trust. The First Department concluded that she did since Estate Powers and Trust Law 8-1-1(f), “does not designate the Attorney General as the exclusive representative of the donor's charitable disposition.” *Id.* *138-39. In reaching its decision, the First Department held:

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 [] and the longstanding recognition under New York law of standing for a donor such as Smithers. *We have seen no New York case in which a donor attempting to enforce the terms of his charitable trust was denied standing to do so.*

Id. 139-140 (emphasis added).

App. 1896) (“[t]here can scarcely be any doubt that a lot owner in a cemetery corporation has such an interest therein as may be protected in a proceeding of this kind.”); *Clark v. Rahway Cemetery*, 69 N.J. Eq. 636, 61 A. 261 (Chn. Ct. 1905) (“[h]is interest is, in some degree, that of a beneficiary of a trust, and I cannot imagine why he should not have the right to complain if that is being violated to his prejudice.”); *Scruggs v. Beason*, 246 Ala 405, 20 So.2d 774 (1945) (complainants had right to visit and beautify cemetery and a right to complain.); *Growth Properties v. Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984) (“outraged” and “heart sick” family members had standing to pursue claims Defendants “breached a duty to provide perpetual care to appellees' family members but engaged in a prolonged and callous desecration of the graves of their kinsmen.”).

Third, Defendant contends that Plaintiffs do not possess standing under *Alco Gravure, Inc. v. Knapp Foundation*, 64 N.Y. 2d 458, 479 N.E. 752 (1985). In *Alco Gravure*, the Court of Appeals held “both the individual plaintiffs and the corporate plaintiffs have standing to maintain the action.” *Id.* The Court of Appeals noted that standing exists when a particular group of people has an interest in funds held for a charitable purpose, the class is sharply defined and limited in number. In this case, there is a class of plaintiffs which is both well defined and entitled to protect the donor’s intent. The class in this case is limited to a discrete group of individuals and is not broadly defined to include every public citizen. It is sharply defined and entirely consistent with *Alco Gravure*.²⁰

Accordingly, Defendant’s standing argument is entirely erroneous.²¹

²⁰ Defendant claims Plaintiffs lack standing because they have not alleged letters of administration were issued to pursue this action. (Def. Mem. 13). Plaintiffs *are not* bringing this action as the Executrix of an estate. Plaintiffs have brought this action in their own name and on their own behalf as family members of their parents and/or grandparents. In support of their argument, Defendant refers the Court to *Schoeps v. Andrew Lloyd Weber Art Found.*, 17 Misc. 1128(A), 851 N.Y.S.2d 74 (Sup. Ct. – N.Y. City 2007), *aff’d*, 66 A.D. 3d 137, 884 N.Y.S.2d 396 (1st Dep’t 2009). The *Schoeps* case actually supports Plaintiffs’ position in this case. In *Schoeps*, Plaintiff was seeking to recover a painting his relative was forced to sell in pre-war Germany during 1935. The issue before the court was whether Plaintiff could pursue a claim without first being appointed a representative of his relative’s estate. Although *Schoeps* claimed all living relatives assigned their claims to him, he never presented the assignments making his authority to act highly suspect since he was pursuing the matter for personal gain. That action is distinguishable from this action for enforcement of a contract. Defendant moved to dismiss *Schoep*’s action on the ground he lacked standing. The court granted the motion to dismiss on the ground that *Schoeps* “had neither been appointed a representative of the decedent’s estate, *nor did he have any other personal capacity for bringing such an action.*” *Id.* (emphasis added). In this case, Plaintiffs possess their own personal capacity for bringing this action. As family members or near relatives they possess “[s]uch interest . . . sufficient to enable them to sue to compel execution of the cemetery trust. See also 14 C.J.S. Cemeteries § 25, p. 85; Jackson, *The Law of Cadavers*, p. 362. (emphasis added). Thus unlike the Plaintiff in *Schoeps* who had no independent right to bring suit, Plaintiffs do not need to be appointed representatives of their family member’s estates to bring this suit.

²¹ Contrary to Defendant’s assertion (Def. Mem. 14), Plaintiffs may also pursue this action in a non-representative capacity to defend the estate’s interest in property since they allege their relatives had had an ownership right or an immediate superior right of possession in perpetual care monies over Defendant. Complaint ¶ 78.

II. THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFFS' CLAIMS

A. Defendant's Statute of Limitations Defense Ultimately Fails Since the Alleged Violations Of Law Are Continuing In Nature

Defendant contends the statute of limitations bars Plaintiffs' claims. The general rule is that the statute of limitations begins to run when a person commits a violation of law. The statute of limitations does not, however, bar a claim when the violation is a continuous or reoccurring wrong. *1050 Tenants Corp., v. Lapidus*, 735 N.Y.S.2d 47 (1st Dep't 2001); *Westminister 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) Defendant conveniently ignores, but must concede that it has and continues to refuse to honor perpetual care contracts and act in accordance with its fiduciary duties. This is fatal to its argument since it is well settled that the statute of limitations does not apply when a plaintiff challenges not just one incident of conduct, but an unlawful practice that continues into the limitation period.²²

For example, Defendant contends Plaintiffs' breach of contract and GBL § 349 claims arose "at the time their relatives executed a perpetual care contract." Def. Mem. at 20. Indeed, Defendant characterizes these claims as "fraud in the inducement" in order to contend the violation of law occurred years or decades ago. This is a transparent attempt to narrow Plaintiffs' claims in order to avoid liability. Plaintiffs have alleged claims that bespeak continuous and repeated violations of law.²³ The breach of contract claim is continuing in nature

²² *Barkley v. Olympia Mortg. Co.*, 04 Cv 875 (RJD) KAM), 2007 U.S. Dist. LEXIS 61940 (Aug. 22, 2007) (Dearie, J.) (citing *Havens Realty Corp., v. Coleman*, 455 U.S. 363 (1982)); *Cornwell v. Robinson*, 23 F.3d 694, 703 (2d Cir. 1994).

²³ *Koch v. Dwyer*, No. 98 CV 5519, 1999 U.S. Dist. LEXIS 11101, 1999 WL 528181, at *6, 12 (S.D.N.Y. July 12, 1999) (finding that plaintiff may pursue a claim for breach of fiduciary duty based upon a continued relation and imprudent investment); *NYSA-ILA Medical & Clinical Serv. Fund v. Catucci*, 60 F.Supp.2d 194, 199-200 (S.D.N.Y. 1999) (finding that successive inappropriate payments would give rise to a new cause of action "each time a fiduciary made an improper payment with Fund assets."); *Gruby v. Brady*, 838 F. Supp. 820 (S.D.N.Y. 1993) (holding that each time an excessive benefit

because Defendant has and continues to refuse to this day to honor perpetual and annual care contracts at the cemetery. The claims in this case are much like those in *Elite Model* where the court held the statute of limitations did not bar Plaintiff's claim because the violations of law "continue today." *Id.* The same is true here as the thrust of Plaintiffs' claims stem from the simple fact that Defendant owed Plaintiffs a *continuing fiduciary duty* as a matter of law.²⁴ By refusing to honor the contracts and failing to disclose all information concerning the invasion of perpetual and/or annual care accounts, Defendant has engaged in continuing violations of law as alleged in the complaint. Defendant is engaged in a continuing violation of law each day it refuses to: (i) honor its fiduciary duties of full and complete disclosure to Plaintiffs; (ii) honor perpetual and care contracts; (iii) return stolen perpetual or annual care monies.

Plaintiffs' claims simply cannot be time barred as a matter of law since Defendants, for many years, concealed the truth concerning their misappropriation of monies. Defendants have made untruthful statements in the press that they have run out of monies in order to prevent the disclosure of the truth concerning the "misappropriation" of perpetual care monies. These acts were all done in contravention of their fiduciary duty to affirmatively disclose all improper actions. It is well recognized under New York law that:

when 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.

payment was made the fund was injured giving rise to a new cause of action.); *Buccino v. Continental Assurance Co.*, 578 F. Supp. 1518, 1521-22 (S.D.N.Y. 1983) (holding that the fiduciaries' retention of an unlawful insurance plan was a continuous and repeated violation of the duty to review plan investments.).

²⁴ See *Yochim v. Mount Hope Cemetery Association*, 163 Misc. 2d 1054 (Cty. Ct. Yon 1994) (*citing DiMaio v. State of New York*, 135 Misc. 2d 1021, 1025 (N.Y. Ct. Cl. 1987)); see also Buchman Exhibit E, New York Membership Corporation Law § 92.

Kidd v. Delta Funding Corp., Index No. 601020/99, 2000 N.Y. Misc. LEXIS 29 (N.Y. Sup. Ct. 2000); *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."). Accordingly, Plaintiffs' state law claims are not time barred because Defendant possessed an affirmative duty to speak, engaged in deception by concealing the underlying facts of this case from Plaintiffs and now must be charged with having wrongfully obtained an advantage which the law cannot countenance.

B. Plaintiffs Have Alleged Facts Sufficient To Toll The Statute of Limitations for Fraudulent Concealment

Defendant also contends Plaintiffs have failed to allege facts sufficient to toll the Statute of Limitations. Def. Mem. at 23. If the Court determines that the continuing violation doctrine is inapplicable, Plaintiffs' claims were tolled under the doctrine of equitable estoppel. Equitable estoppel applies "where plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action." *Simcuski v. Sacli*, 44 N.Y.2d 442, 448-449, 406 N.Y.S.2d 259 (1978). The doctrine of equitable estoppel is designed to prevent a defendant from improperly asserting a statute of limitations defense. *General Stencils v. Chiappa*, 18 N.Y.2d 125, 128, 272 N.Y.S.2d 337 (1966). The Court of Appeals has 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 stopped 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.

In this case, Plaintiffs allege in paragraph 40 of the Complaint as follows:

Any applicable statutes of limitation have been equitably tolled by Defendants' affirmative acts of fraudulent concealment, suppression, and denial of the true facts regarding the invasion of the fiduciary account(s) containing monies dedicated exclusively for perpetual care or annual care at Bayside Cemetery. Such acts of fraudulent concealment include intentionally covering up and refusing to publicly disclose critical documents and information concerning the deliberate invasion of fiduciary account(s) containing monies dedicated exclusively for perpetual care or annual care at Bayside Cemetery to class members, their families and the general public. Through such acts of fraudulent concealment, Defendants were able to actively conceal from class members and the public for years the truth about their deceptive practices, thereby tolling the running of any applicable statutes of limitation.

Id. This allegation alone demonstrates that Defendant took affirmative steps to prevent Plaintiffs from discovering their claims concerning an injury to their family members. Defendant's conduct was inherently self-concealing as it exclusively controlled the funds and supporting financial and administrative records absent any oversight. These allegations satisfy the pleading requirement for equitable tolling as they lay bare that Defendant engaged in affirmative acts of concealment and denial of the truth.

In addition, this allegation makes clear that Defendant was acting in a fiduciary capacity. The concealment of facts by a fiduciary is alone sufficient to invoke the doctrine of equitable estoppel. "[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). Here,

Defendant controlled trust monies and, by operation of law in New York, owed Plaintiffs and their family members a duty of candor and loyalty.²⁵ By failing to timely advise Plaintiffs and purchasers of perpetual and annual care that the trust monies had been invaded and inappropriately used, Defendant engaged in acts of concealment which bars a statute of limitations defense in this case. Plaintiffs commenced the federal action six months after their meeting with the NYAG. It was during this meeting that Plaintiffs first learned that Defendant Congregation Shaare Zedek had commingled perpetual care funds with general operating funds. Complaint ¶ 6.

The case cited by Defendant, *Zuppano v. Quinn*, 6 N.Y. 3d 666, 674, 849 N.E.2d 926, 929 (2006), is factually distinguishable. In that case, Plaintiff *did not* allege the existence of a fiduciary relationship. Plaintiffs have alleged ample facts to equitably toll the statute of limitations by virtue of the concealment of facts by Defendant who owed a fiduciary duty to Plaintiffs.

Accordingly, Plaintiffs' claims are not barred by any applicable statute of limitations.

III. THE LUCKER PLAINTIFFS GRANDMOTHER WAS A MEMBER OF CHEBRA SHEBATH ACHIM SOCIETY WHICH IS LISTED ON DEFENDANT CONGREGATION SHAARE ZEDEK'S OWN DOCUMENT AS HAVING PURCHASED PERPETUAL CARE

Defendant suggests the Lucker/Rousseau Plaintiffs cannot establish that perpetual care was purchased by their grandmother through the Chebra Shebath Achim Burial Society. Def. Mem. at 18-19. Defendant further contends that even "if the society contracted with a Defendant, it is the society (and not its members or their descendants) that would have standing to sue in the event of a breach." *Id.* The arguments fail for two reasons.

²⁵ If on reply defendant contends no fiduciary relationship existed, it is well settled that whether a fiduciary relationship existed is an issue of fact to be determined at trial. *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170 (2005).

First, when the entire January 4, 1973 letter attached to the Complaint is read in context, it is clear that the Chebra Shebath Achim Burial Society was returning monies to Mrs. Lucker and other members that had been requested for perpetual care. The excess monies were returned to avoid an escheat to the State of New York. Upon receipt of these monies, Mrs. Lucker wrote to the burial society to confirm her plot was still available for burial next to her husband and that perpetual care had been purchased for the graves using the monies she paid some of which had been returned. The letter confirms that her grave remained available and that perpetual care had been purchased from Defendant. Notably, Defendant Congregation Shaare Zedek's own documents confirm that the Chebra Shebath Achim Burial Society purchased perpetual care at the cemetery. The document attached to the Complaint entitled "Mausoleums, Plots and Graves Under Perpetual Care" was produced in the federal proceeding during jurisdiction discovery. On page 3 of the document (SZ-EDNY 000042), the first entry indicates the Che[b]ra Shebath Ac[h]im Society purchased perpetual care. Exhibit C to Complaint.

Second, the Chebra Shebath Achim Burial Society was acting as an agent for Mrs. Lucker and other burial society members when purchasing perpetual care from Defendant. To accept the notion that Mrs. Lucker's claim lies exclusively against the burial society turns years of well established principal – agent law upside down. Thus, Defendant's arguments are strained, illogical and should be rejected since they are entirely inconsistent with the synagogue's own documents and basic principles of agency law.

IV. PLAINTIFFS ARE "PERSONS" UNDER THE GBL STATUTES AND POSSESS STANDING TO PURSUE THIS ACTION ON BEHALF OF NEW YORK CONSUMERS AND THEIR DECEASED FAMILY MEMBERS

Defendant contends Plaintiffs cannot pursue their General Business Law ("GBL") § 350, 349 and 349(c) (collectively "GBL statutes") claims because they are not persons injured by reason of a violation of a GBL statute. The GBL statutes are, at their core, consumer protection

devices designed to prevent “consumer injury or harm to the public interest.” *See 214 Pension Oswego Laborers’ Local Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24 647 N.E.2d 741, 623 N.Y.S.2d 529, 532 (N.Y. 1995). As long as the deceptive business practice has a broad impact on consumers at large and constitutes “consumer-oriented activity,” proving a violation of GBL § 349 is straight forward. *Id.* GBL § 349 provides a right of action to any person who has been injured by reason of any violation of this section." *H2O Swimwear, Ltd. v. Lomas*, 164 A.D.2d 804, 560 N.Y.S.2d 19, 21 (N.Y. App. Div. 1st Dep’t 1990). “Person” is not defined in the GBL § 349 statute. *See Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995) (stating, "corporate competitors now have standing to bring a claim under this [statute] . . . so long as some harm to the public at large is at issue."). Plaintiffs have alleged deceptive acts and unfair trade practices concerning the sale of perpetual care contracts. Plaintiffs allege in detail “consumer injury or harm to the public interest” concerning the “consumer oriented activity” of perpetual care contract sales by Defendant in New York to consumers, many of whom were age 65 or older, with the understanding that the trust monies would be maintained inviolate and interest used to maintain plots at the cemetery. Plaintiffs specifically allege that Defendants continued to sell perpetual care contracts knowing they did not intend to maintain the monies in trust or provide perpetual care services. The fraudulent sale of these perpetual care contracts constitutes precisely the type of “consumer injury or harm to the public interest” which may be pursued by Plaintiffs under the GBL statutes.

Defendant claims only the party actually injured may bring suit under the GBL statutes in accordance with *Blue Cross & Blue Shield of N.J. v. Phillip Morris USA, Inc.*, 818 N.E.2d 1140 (N.Y. 2004). *See* Def. Mem. at 5. In *Blue Cross*, the Court of Appeals held that Blue Cross was pursuing a “derivative” claim based upon injuries sustained by its insureds. That case is

factually distinguishable from this action as the insureds were presumed to be alive and capable of pursuing individual actions. That is not the case here since the deceased who purchased perpetual care from Defendants are incapable of speaking. Their claims are now being pursued by family members as though “they stand in their shoes” as if they were still alive. Accordingly, the *Blue Cross* decision is factually distinguishable and inapplicable.²⁶

V. PLAINTIFFS MAY PURSUE THEIR BREACH OF CONTRACT CLAIMS

Defendant contends the breach of contract claims should be dismissed because Plaintiffs are not actual parties to the perpetual care contracts. In the federal proceeding Chief Judge Dearie referred, during the pre-motion conference, to this argument as “oxymoronic.” *See supra* footnote 5. While Plaintiffs concede they were not actual signatories to the contracts in questions, they unequivocally possess standing to bring a breach of contract claim because they essentially “stand in the shoes” of their deceased family members who contracted with Defendant Congregation Shaare Zedek. Alternatively, Plaintiffs can pursue their breach of contract claims as third-party beneficiaries.

²⁶ Defendant also seeks dismissal of the GBL claims on the ground that “the alleged violations of which [Plaintiffs] complain predate the June 19, 1980 effective date of the amendments to the [GBL] statute providing a right of action.” Def. Mem. 6. Defendant conveniently ignores the fact that the GBL violations alleged in the complaint are not limited to just the sale of the perpetual care contracts. Rather, the “alleged violations of which Plaintiffs complain” include post-June 19, 1980, deceptive conduct. Defendant owed perpetual care contract purchasers and their family members and relatives fiduciary duties. Defendant was required to affirmatively inform these individual of the breaches of contract and conversion of perpetual care monies in accordance with their fiduciary duties. Instead, Defendants concealed this information until shortly after the federal action was commenced in 2007. The concealment of this information in violation of its fiduciary duties, while continuing to sell perpetual care contracts to other consumers, for approximately 27 years unquestionably constitutes a violation of the GBL statutes. Plaintiff Lynn Cohen’s GBL claims should not be dismissed for one additional reason. While it is clear that Plaintiff Lynn Cohen’s parents purchased a perpetual care contract from Defendant Congregation Shaare Zedek or Bayside Cemetery, when that contract was purchased is unclear. Neither Ms. Cohen nor Defendant Congregation Shaare Zedek appear to possess a copy of that contract as it was not produced during jurisdictional discovery in the federal proceeding. Defendant Congregation Shaare Zedek *was required* to maintain a copy of this contract as part of its fiduciary duties. It would be inequitable to allow Defendant to benefit from its legal violation to maintain records by granting dismissal of Ms. Cohen’s GBL claims. Accordingly, the GBL claims may be maintained as a matter of law.

Defendant contends that the breach of contract claims should also be dismissed because Plaintiffs are not intended third-party beneficiaries under the perpetual care contracts. It is well settled in New York that a person is a third-party beneficiary if “recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary [not relevant here] or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *See Fourth Ocean Putnam Corp., v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 43-44, 495 N.Y.S.2d 1 (1985). As alleged in the Complaint, the reason perpetual care contracts are offered for sale and sold is basic – the purchaser of perpetual care wants to ensure the maintenance of his/her plot in order to encourage future generations to visit and pay proper respect. In other words, perpetual care is purchased for the benefit of others including “surviving family, friends and other interested parties.” Complaint ¶ 19. Under the second prong of *Fourth Ocean* and the allegations in the Complaint, Plaintiffs are intended third-party beneficiaries under the contract since Defendant intended to give Plaintiffs and future generations performance. These are precisely the people the signatories to the contract expected to benefit from and enforce the contract in the absence of the deceased. Although “surviving family, friends and other interested parties” are not specifically referenced in the perpetual care contracts, there is nothing expressed in the contracts to negate this general underlying understanding surrounding the purpose of a perpetual care contract. At best, the absence of language in a contract Defendant created excluding these intended beneficiaries from commencing suit is fatal to its position since a contract is construed *against* the maker.²⁷

²⁷ *In re Ancillary Receivership of Reliance Ins. Co.*, 863 N.Y.S.2d 415 (1st Dept. Sept. 2, 2008) (“[S]uch ambiguity must be construed against the insurer under the doctrine of *contra proferentum*.”); *Litchmore v. Perez*, 851 N.Y.S.2d 70 (N.Y. Sup. Kings Co. 2007) (“One doctrine governing the interpretation of ambiguous contracts is *contra proferentum*, which holds that ambiguities in a contractual

Defendant's argument is also inconsistent with hornbook law. *Bogert, Trusts and Trustees*, § 414 pp. 345-346 specifically conveys a definite interest in a perpetual care contract or trust upon family members and relatives since they "*are clearly benefited and interested in the upkeep of the cemetery. Such interest may be regarded as sufficient to enable them to sue to compel execution of the cemetery trust.*" *Id.* Thus, Plaintiffs may pursue the breach of contract claims as parties to the contract or as intended third-party beneficiaries under the contracts.

VI. PLAINTIFFS "STANDING IN THE SHOES" OF THEIR DECEASED FAMILY MEMBERS MAY PURSUE THE CONVERSION AND UNJUST ENRICHMENT CLAIMS

Defendant contends Plaintiffs' conversion and unjust enrichment claims must be dismissed because Plaintiffs do not hold a superior right of possession to perpetual care monies nor have they not conferred a benefit upon Congregation Shaare Zedek. Def. Mem. 10-11. Defendant also conveniently contends that only the deceased can collect the converted monies and that Plaintiffs have no legal right to repayment of the perpetual care monies. *Id.* Before addressing this absurd argument which suggests that only a deceased individual can "rise from the grave" to recollect his/her monies, it is worth noting two additional facts.

First, Defendant's document entitled "Mausoleums, Plots and Graves Under Perpetual Care" (SZ-EDNY 000042), attached as an Exhibit to the Complaint demonstrates, beyond question, that Plaintiffs' relatives paid monies for and entered into perpetual care contracts with Defendant Congregation Shaare Zedek.

instrument will be resolved against the party who prepared it and in favor of the party who had no voice in the selection of its language.").

Second, Defendant Congregation Shaare Zedek has admitted to the NYAG that it commingled perpetual care monies with funds in its general operating account. It is, therefore, beyond dispute that Defendant converted monies²⁸ and was unjustly enriched.

Despite these glaring facts, Defendant, yet again, conveniently fails to appreciate that Plaintiffs are *the only persons* who can reclaim their relatives monies and are entitled to the return of the converted monies for use at the cemetery. Plaintiffs are seeking to establish a constructive trust over monies *paid by their relatives* that Defendants have converted and improperly used to make repairs to the synagogue. *See* Complaint, Prayer for Relief. Thus, Defendant's argument is absurd, inconsistent with the plain language of the Complaint and should be rejected. A decision to the contrary would allow Defendants to benefit from its unlawful conduct and retain in its coffers ill-gotten gains.

VII. DEFENDANT OWED PLAINTIFFS A FIDUCIARY DUTY AS A MATTER OF LAW

Defendants seek dismissal of the breach of fiduciary duty claims on the ground Plaintiffs fail to allege that Defendants owed them a fiduciary duty. Def. Mem. 11-12. Again, Defendant fails to recognize that Plaintiffs essentially "stand in the shoes of their relatives." Plaintiffs allege it is these relatives who entered into perpetual care contracts with Defendants which were entitled "Trust Fund Receipt." A trust fund by operation of law creates a fiduciary relationship.²⁹ Defendant Congregation Shaare Zedek unequivocally owed Plaintiffs' relatives a fiduciary duty as a matter of law. By admitting to the NYAG that it commingled perpetual care funds with general operating funds, Defendant, in so doing, also admitted that it violated its fiduciary duty

²⁸ Defendants have violated New York law which prohibits "the unauthorized exercise of dominion over property of another [which] constitutes conversion." *Volga v. United Mgmt Corp.*, 93-CV-4229, 1997 U.S. Dist Lexis 21711 (E.D.N.Y. Mar. 4, 1997)

²⁹ *Yochim v. Mount Hope Cemetery Association*, 163 Misc. 2d 1054 (Cty. Ct Yonk. 1994) (citing *DiMaio v. State of New York*, 135 Misc. 2d 1021, 1025.

to Plaintiffs' relatives. Plaintiffs, standing in the shoes of their relatives, are entitled to enforce this breach of fiduciary duty action. A decision to the contrary would be entirely inconsistent with *Bogert, Trusts and Trustees*, § 414 pp. 345-346 which specifically conveys a definite interest in a perpetual care contract or trust upon family members and relatives. It would also be inconsistent with Estates Powers and Trust Law 8-1.5, which seeks to make the holder of a trust accountable, since the NYAG has no authority to act and Plaintiffs are the trust's ultimate charitable beneficiary.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied in its entirety.³⁰

Dated: February 1, 2010
New York, New York

Respectfully submitted,

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³⁰ To the extent this Court grants any portion of Defendants' motion to dismiss, Plaintiffs respectfully request leave to replead.