

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

----- X  
STEVEN R. LEVENTHAL as representative of a :  
class consisting of himself and all others similarly : Index No. 100530/2011  
situated, : IAS Part 59  
: J. Debra A. James  
Plaintiff, : (Motion Seq. 001)  
: :  
- against - : :  
: :  
BAYSIDE CEMETERY, CONGREGATION :  
SHAARE ZEDEK, and COMMUNITY :  
ASSOCIATION FOR JEWISH AT-RISK :  
CEMETERIES, INC., :  
: :  
Defendants. :  
----- X

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

Ari M. Selman  
Sean Marlaire  
Four Times Square  
New York, New York 10036  
Telephone: 212-735-3000  
Fax: 212-735-2000

*Attorneys for Community Association for Jewish At-Risk Cemeteries, Inc.*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	4
I.    PLAINTIFF FAILS TO PLEAD FACTS SUFFICIENT TO PIERCE THE CORPORATE VEIL.....	4
A.    Plaintiff Cannot Satisfy the Second Prong of the Veil-piercing Test—a Fraud or Wrong Resulting in Actual Injury to Plaintiff.....	4
B.    Plaintiff Does Not Plead Complete Domination.....	13
II.   CAJAC IS NOT A NECESSARY PARTY .....	19
A.    New York Real Property Actions and Proceedings § 1511 Is Facially Inapplicable to This Case.....	19
B.    C.P.L.R. § 1001(A) Does Not Mandate Joinder of CAJAC.....	20
III.  PLAINTIFF'S CLAIMS AGAINST CAJAC SHOULD BE DISMISSED WITH PREJUDICE .....	23
CONCLUSION .....	25

## TABLE OF AUTHORITIES

### CASES

<u>Adelaide Productions, Inc. v. BKN International AG</u> , No. 602361/03, 2004 WL 5487741 (Sup. Ct. N.Y. County May 12, 2004), <u>aff'd</u> , 15 A.D.3d 316, 789 N.Y.S.2d 881 (1st Dep't 2005).....	21
<u>Bagel Brothers Maple, Inc. v. Ohio Farmers, Inc.</u> , 279 B.R. 55 (W.D.N.Y. 2002) .....	15
<u>Bowles v. Errico</u> , 163 A.D.2d 771, 558 N.Y.S.2d 734 (3d Dep't 1990).....	13
<u>Bravado International Group Merchandising Services, Inc. v. Ninna, Inc.</u> , 655 F. Supp. 2d 177 (E.D.N.Y. 2009) .....	4, 7, 15, 16
<u>Capricorn Investors III, L.P. v. Coolbrands International, Inc.</u> , 24 Misc. 3d 1224(A), 2009 N.Y. Slip Op. 51608(U), 897 N.Y.S.2d 668 (Sup. Ct. N.Y. County) <u>aff'd</u> , 66 A.D.3d 409, 886 N.Y.S.2d 158 (1st Dep't 2009).....	10, 11, 12, 13
<u>Crucen ex rel. Vargas v. Leary</u> , 55 A.D.3d 510, 511, 867 N.Y.S.2d 49, 51-52 (1st Dep't 2008) .....	23, 24
<u>EED Holdings v. Palmer Johnson Acquisition Corp.</u> , 228 F.R.D. 508 (S.D.N.Y. 2005) .....	7, 16
<u>East Hampton Union Free School District v. Sandpebble Builders, Inc.</u> , 66 A.D.3d 122, 884 N.Y.S.2d 94 (2d Dep't 2009), <u>aff'd</u> , – N.E.2d –, 16 N.Y.3d 775 (2011) .....	14
<u>Goodell v. Rosetti</u> , 52 A.D.3d 911, 859 N.Y.S.2d 770 (3d Dep't 2008) .....	21
<u>Guptill Holding Corp. v. State</u> , 33 A.D.2d 362, 307 N.Y.S.2d 970 (3d Dep't 1970), <u>aff'd</u> , 31 N.Y.2d 897, 191 N.E.2d 782, 340 N.Y.S.2d 638 (1972).....	11
<u>Morris v. New York State Department of Taxation &amp; Finance</u> , 82 N.Y.2d 135, 623 N.E.2d 1157, 603 N.Y.S.2d 807 (1993).....	passim
<u>Palisades Office Group, Ltd. v. Kwilecki</u> , 233 A.D.2d 490, 650 N.Y.S.2d 990 (2d Dep't 1996).....	7

<u>Prichard v. 164 Ludlow Corp.</u> , 14 Misc. 3d 1202(A), 2006 N.Y. Slip Op. 52381(U), 831 N.Y.S.2d 362 (Sup. Ct. N.Y. County 2006), <u>affd</u> , 49 A.D.3d 408, 854 N.Y.S.2d 53 (1st Dep't 2008) .....	17
<u>Ragto, Inc. v. Schneiderman</u> , 69 A.D.2d 815, 816, 414 N.Y.S.2d 746, 747 (2d Dep't 1979), <u>aff.</u> 49 N.Y.2d 975, 428 N.Y.S.2d 949 (1980) .....	24, 25
<u>Rappaport v. VV Pub. Corp.</u> , 223 A.D.2d 515, 515, 637 N.Y.S.2d 109, 110 (1st Dep't 1996) .....	23
<u>Sheridan Broadcasting Corp. v. Small</u> , 19 A.D.3d 331, 798 N.Y.S.2d 45 (1st Dep't 2005).....	10
<u>Official Committee of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley &amp; Co.</u> , (In re Sunbeam Corp.) 284 B.R. 355 (Bankr. S.D.N.Y. 2002) .....	12, 15
<u>TNS Holdings Inc. v. MKI Securities Corp.</u> , 92 N.Y.2d 335, 703 N.E.2d 749, 680 N.Y.S.2d 891 (1998).....	5, 14
<u>Taran Furs, Inc. v. Champagne Bridals, Inc.</u> , 116 A.D.2d 970, 498 N.Y.S.2d 595 (4th Dep't 1986) .....	22
<u>Treeline Mineola, LLC v. Berg</u> , 21 A.D.3d 1028, 801 N.Y.S.2d 407 (2nd Dept. 2005) .....	15
<u>Triemer v. Bobsan Corp.</u> , 70 F. Supp. 2d 375 (S.D.N.Y. 1999).....	4
<u>Washington Title Ins. Co. v. Streamline Agency Inc.</u> , 26 Misc. 3d 1214(A), 2010 Slip Op. 50098(U), 906 N.Y.S.2d 784 (N.Y. Sup. Nassau County 2010).....	20
<u>William Passalacqua Builders, Inc. v. Resnick Developers South, Inc.</u> , 933 F.2d 131 (2d Cir. 1990).....	15

## STATUTES

N.Y. C.P.L.R. § 1001(a) (McKinney 2011).....	passim
N.Y. C.P.L.R. § 2001(McKinney 2009).....	10
N.Y. C.P.L.R. § 3101 (a) (4) (McKinney 2009).....	22
N.Y. Real Property Actions and Proceedings Law § 1511 (McKinney 2009).....	19

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

### **INTRODUCTION**

After two "virtually identical"<sup>1</sup> complaints, multiple motions to dismiss by all Defendants, and significant correspondence with this Court, the case against CAJAC boils down to one issue: Whether Plaintiff may hold CAJAC liable for the alleged violation of contracts to which CAJAC was not a party; that predated CAJAC's existence by years, and even decades; and where all, or virtually all, of the contracts were allegedly violated years before CAJAC came into existence, by a different corporate entity.

Two undisputed facts compel a negative answer to this question. First, CAJAC is not a signatory to any of the annual or perpetual care contracts allegedly breached by Defendant Congregation Shaare Zedek (the "Congregation"). Second, the Congregation has not transferred a single annual or perpetual care contract to CAJAC, and no obligation of the Congregation under those contracts has been assumed by CAJAC. These facts alone require dismissal of all of Plaintiff's claims against CAJAC.

To avoid this legally required result, Plaintiff asks this Court to pierce the veil, disregard CAJAC's separate corporate identity and hold CAJAC liable for the Congregation's alleged wrongs. To justify this extraordinary equitable relief, Plaintiff advances two fundamentally conflicting theories of CAJAC's alleged misconduct. On the one hand, Plaintiff offers a sham entity theory—first espoused in plaintiffs' opposition brief in Lucker and later re-pled in this matter—that is premised on the notion that CAJAC is a "shell" or "dummy" entity that engages

---

<sup>1</sup> Letter from Plaintiff's counsel Michael Buchman to the Court, dated January 18, 2011, at 2.

in no activities, rather than a legitimate charitable organization (hereinafter, the "Hollow Shell" theory). CAJAC identified a fatal defect in the Hollow Shell theory—Plaintiff pled a purely hypothetical injury, based on a hypothetical transfer of the Congregation's liabilities, to a hypothetically insolvent CAJAC, and thus completely failed to plead a consummated fraud and present injury. (Lucker CAJAC Reply Br. at 1-3; Lucker Hr'g Tr. 26:19 – 30:9 (Selman Aff., Ex. C).)

In his opposition brief, Plaintiff has now reformulated his theory of CAJAC's alleged wrongdoing. Plaintiff's newly minted theory proceeds from a polar opposite premise: he asserts that CAJAC has done too much, not too little, to advance its corporate purpose, by: (i) utilizing a grant provided to the Congregation by the UJA-Federation of New York ("UJA")—subsequently transferred in full to CAJAC—to hire a landscaper, MC Landscape Group, and (ii) obtaining the Congregation's permission to enter the Cemetery to facilitate MC Landscape Group's efforts (hereinafter, the "Substantial Contributor" theory). (See Buchman Decl., Ex. H (news story describing the Congregation's transfer of UJA funds to CAJAC).) By Plaintiff's convoluted reasoning, CAJAC abused the privilege of the corporate form by fulfilling a key charitable purpose for which it was created—cleaning up Bayside Cemetery ("Bayside" or the "Cemetery")—and thereby committed a fraud or wrong warranting extraordinary equitable relief.

Plaintiff's conflicting theories place CAJAC in an untenable bind. On the one hand, if CAJAC furthers its corporate purpose by engaging in clean up activity at Bayside, it is allegedly liable to Plaintiff because it has purportedly assumed "*de facto* ownership" of the Cemetery. Conversely, if CAJAC sits idly on the sidelines, it is nonetheless liable to Plaintiff because it is a mere "shell" or "dummy" corporation. This "heads I win, tails you lose" matrix constructed by

Plaintiff, in which any course of action CAJAC pursues results in the imposition of liability, confirms the fundamental invalidity of Plaintiff's position.

Plaintiff's novel alternative theory—that CAJAC is a "necessary party"—fares no better. It invokes a facially inapplicable statute, New York Real Property Actions and Proceedings § 1511, and ignores this Court's precedents rejecting the very notion of "*de facto* ownership."

Accordingly, because Plaintiff fails to plead a cognizable legal theory for holding CAJAC liable for the Congregation's alleged misconduct, Plaintiff's claims against CAJAC should be dismissed, enabling CAJAC to return to the task for which it was founded—the care and restoration of Jewish cemeteries.<sup>2</sup>

---

<sup>2</sup> Plaintiff accuses CAJAC of deliberately misstating facts throughout his argument; in actuality, it is Plaintiff who consistently employs inaccurate record citations, misleading arguments and starkly conflicting statements. Plaintiff pleads diametrically opposite facts regarding the Congregation and CAJAC's respective involvement at Bayside Cemetery—Plaintiff's central theory of liability. Not once but twice Plaintiff asserts that the Congregation—not CAJAC—exercises control over the Cemetery: "Shaare Zedek owns, operates, manages, maintains and controls Bayside Cemetery." (Lucker Compl. ¶ 14; Leventhal Compl. ¶ 9) (emphasis added). However, only pages later in the Leventhal complaint, and in his opposition brief, Plaintiff pleads the polar opposite fact—that it is CAJAC, not Congregation Shaare Zedek, that exercises control over the Cemetery: "It is undisputed that Defendant CAJAC has now taken over de facto ownership of the cemetery. The transfer of the Cemetery to Defendant CAJAC is neither "hypothetical" nor "speculative"—it is real." (Pl.'s Opp. Br. at 11 (emphasis added); see also id. at 3, 4, 6, 9, 12, 15; Leventhal Compl. ¶ 34 ("Congregation Shaare Zedek has given *de facto* control of Bayside Cemetery to CAJAC while maintaining formal ownership of the property. . . . CAJAC has taken control of and assumed responsibility for Bayside . . . .) (emphasis added).

In addition, scrutiny of a single example paragraph of Plaintiff's brief at page 11 reveals that these misstatements are littered throughout the record: (a) where Plaintiff claims to have alleged "that the NYAG [New York Attorney General] did not authorize a transfer given the pending litigation and the inadequate capitalization of CAJAC," the cited language contains no reference to the NYAG having considered the adequacy of capital; (b) where Plaintiff claims "[i]t is undisputed that defendant CAJAC has now taken over de facto ownership of the cemetery," no citation is provided and the argument is of course vigorously contested (now that Plaintiff has seen fit to introduce it); (c) where Plaintiff cites CAJAC's opening brief for the proposition that the "transfer of the Cemetery to Defendant CAJAC is . . . real," the pages cited do not support the asserted proposition, but rather characterize Plaintiff's statements as allegations (see, e.g., CAJAC Leventhal Br. at 11 (referring to CAJAC's sole "alleged wrong doing" and "hypothetical assumption" of cemetery liabilities) (emphasis added); and (d) where Plaintiff claims that "this de facto transfer was effectuated as an 'end run' around the NY AG decision to not allow a formal transfer to Defendant CAJAC," this contradicts Plaintiff's own allegation that the NY AG merely "defer[red] approval of the transfer." (Compl. ¶ 32; Pl. Opp. Br. at 11.)

## ARGUMENT

### **I. PLAINTIFF FAILS TO PLEAD FACTS SUFFICIENT TO PIERCE THE CORPORATE VEIL**

#### **A. Plaintiff Cannot Satisfy the Second Prong of the Veil-piercing Test—a Fraud or Wrong Resulting in Actual Injury to Plaintiff**

This Court has set forth stringent requirements to pierce the corporate veil—a form of equitable relief "highly disfavored under New York law," which is available "only under extraordinary circumstances." Bravado Int'l Grp. Merch. Servs., Inc. v. Ninna, Inc., 655 F. Supp. 2d 177, 195-97 (E.D.N.Y. 2009) (quoting Triemer v. Bobsan Corp., 70 F. Supp. 2d 375, 377 (S.D.N.Y. 1999) (emphasis added). To impose alter ego liability, a plaintiff must plead particular facts demonstrating (1) the "complete domination of the corporation in respect to the transaction attacked," and (2) "that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." Morris v. N.Y. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 141, 623 N.E.2d 1157, 1160-61, 603 N.Y.S.2d 807, 810-11 (1993).

Here, Plaintiff's twin theories—the Hollow Shell and Substantial Contributor arguments—fail to satisfy the second prong of the veil-piercing test for three reasons: (i) they are utterly self-contradictory; (ii) they plead solely lawful conduct by CAJAC; and (iii) and they fail to identify a cognizable injury to Plaintiff.

#### **(a) The Hollow Shell Theory**

Plaintiff's opposition brief repeats—without factual support—the same talismanic incantation: CAJAC is a "shell" or "dummy" entity on which the Congregation seeks to unload its contractual liabilities. (See, e.g., Pl.'s Opp. Br. at 5.)

Plaintiff's Hollow Shell theory, however, is legally insufficient to satisfy the second veil-piercing requirement for three independent reasons. First, Plaintiff does not—and cannot—allege that he is a victim of a consummated fraud or wrong; rather, he merely fears prospective harms, *i.e.*, that CAJAC is "designed" to perpetrate a fraud; that the Congregation might transfer its contractual obligations concerning the Cemetery to CAJAC in the future; that those liabilities might exceed CAJAC's assets on the date of such transfer; and that, notwithstanding CAJAC's hypothetical insolvency at that future date, the New York Attorney General ("NY AG") and the court might approve the transfer, thus injuring Plaintiff. (Compl. ¶ 11 (emphasis added).) Because Plaintiff solely pleads hypothetical harm based on speculated contingencies, rather than a consummated fraud and actual injury, dismissal of Plaintiff's veil-piercing claims is required under this Court's precedents, without inquiry into the domination issue. *See Morris*, 82 N.Y.2d at 141-42, 623 N.E.2d at 1161, 603 N.Y.S.2d at 811; *see also TNS Holdings Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339, 703 N.E.2d 749, 751, 680 N.Y.S.2d 891, 893 (1998) ("[E]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance.").

Second, even assuming, arguendo, that a prospective harm suffices to pierce the corporate veil, Plaintiff fails even to meet this diluted standard. Plaintiff acknowledges that the NY AG would be "required" to approve any transfer of ownership or liabilities to CAJAC. (Compl. ¶ 32 (emphasis added).) Further, the Lucker plaintiffs in their opposition brief quote—without contradiction—a representation by the Congregation's counsel to Chief Judge Raymond Dearie that the Congregation would attempt this transfer in the future only "once [CAJAC] is adequately funded by charitable contributions." (Lucker Pls.' Opp'n Br. at 3 n.8.) These

safeguards betray Plaintiff's fear of future fraud, and obviate the need for the extraordinary, anticipatory relief he requests.

Third, Plaintiff's theory is incompatible with his own pleadings. Far from evincing fraud, Plaintiff's allegations reflect the Congregation's consistent candor about its plans. Indeed, Plaintiff himself asserts that (1) the Congregation specifically "informed Chief Judge Dearie of this desire [to transfer Bayside Cemetery to CAJAC once it is adequately funded by charitable contributions] in a prior federal proceeding," (Compl. ¶ 32); and (2) the Congregation "requested permission from the New York Attorney General's Office ("NY AG") to effectuate [the] transfer of Bayside Cemetery."<sup>3</sup> (*Id.*; Pl.'s Opp. Br. at 5-6.) The Congregation's disclosure of its request to both the court *and* the chief law enforcement officer of the state eviscerates Plaintiff's theory of the case—that CAJAC was created to fraudulently evade the Congregation's liabilities.

Plaintiff's other pleadings are equally fatal to his thesis. Plaintiff details CAJAC's contributions to clean up efforts at Bayside Cemetery—activities that fundamentally conflict with Plaintiff's hypothesis that CAJAC is a mere shell entity. Indeed, Plaintiff asserts that CAJAC: (i) utilized a "large grant from the UJA Federation of New York" to support its clean up activities; and (ii) "execut[ed] one or more contracts with a landscaper to perform restoration work at the cemetery." (Compl. ¶¶ 33-34.) Further, Plaintiff even appends a news story to his

---

<sup>3</sup> In fact, Plaintiff's counsel, representing similarly situated plaintiffs in the related *Lucker* action, quoted—without contradiction—the Congregation's counsel as representing to Chief Judge Raymond Dearie that CAJAC was "created with the *knowledge of the New York State Attorney General* to assume title and control of Bayside once it is adequately funded by charitable contributions." (*Lucker* Pls.' Opp'n Br. at 3 n.8 (emphasis added) (citation omitted); *Selman Aff., Ex. A* (reflecting Attorney General's approval of waiver of the statutory notice requirement with respect to Friends of Bayside Cemetery [renamed CAJAC], in response to request on CAJAC's behalf by the Jewish Community Relations Council).) Plaintiff pleads no contrary facts.

opposition brief reporting CAJAC's significant efforts at Bayside Cemetery.<sup>4</sup> Accordingly, Plaintiff's Hollow Shell theory cannot survive his own pleadings.

Even if the Court ignored these fatal facts, Plaintiff's conclusory assertion that CAJAC is a "sham" entity formed with an improper intent is just that—an assertion—and is thus insufficient, as a matter of law, to establish a fraud or wrong. See Palisades Office Grp., Ltd. v. Kwilecki, 233 A.D.2d 490, 491 650 N.Y.S.2d 990, 991 (2d Dep't 1996) (dismissing veil-piercing claims because "conclusory allegations that corporation in question was a sham"); Bravado, 655 F.Supp.2d at 197 (same, where plaintiff's claim, which failed to allege which defendant caused the alleged harm, was "too vague and conclusory to allege alter ego liability"); see also EED Holdings v. Palmer Johnson Acquisition Corp., 228 F.R.D. 508, 512 (S.D.N.Y. 2005) (same, where allegations were "conclusory").

**(b) The Substantial Contributor Theory**

To establish a completed fraud and actual injury, Plaintiff pursues a novel line of argument in his opposition brief—the Substantial Contributor theory. In sharp contrast to the Hollow Shell theory, the Substantial Contributor theory maintains that CAJAC has committed a fraud or wrong by doing too much, rather than too little, to advance its stated corporate purpose—"to provide for the welfare, maintenance and restoration and continuity of New York Area Jewish cemeteries." (See Buchman Decl., Ex. J (2009 990-EZ Form), at 2.) Plaintiff argues—without citation to any legal authority—that CAJAC's hiring of a landscaper, MC

---

<sup>4</sup> See Pl. Opp. Br., App. at Ex. H ("Gary Katz has seen the future, and he desperately wants to prevent it from happening. He predicted that 'every cemetery that's filled with Jews' and 'looks nice' now will one day 'look like Bayside,' a graveyard in the Ozone Park neighborhood of Queens that fell into disrepair and has become the focus of a years-long legal fight. 'That's what CAJAC is really about.'"); id. ("The group's [CAJAC's] long-term goal is to create standards to govern the operations and maintenance of dozens of Jewish cemeteries in the New York metropolitan area.") (emphasis added).

Landscape Group, in April 2009 to help clean up the Cemetery was tantamount to an assumption of legal ownership of Bayside Cemetery.<sup>5</sup> (Pl.'s Opp. Br. at 2.) Based on this flawed legal premise, Plaintiff reasons that the Congregation has completed an "unauthorized" transfer of ownership of the Cemetery to CAJAC.

The key factual predicate of Plaintiff's theory—that the Congregation has transferred *de facto* ownership and control over the Cemetery to CAJAC—is squarely contradicted by Plaintiff's own pleadings. (Pl.'s Opp. Br. at 11.) Not once but twice Plaintiff pleads the opposite fact—that the Congregation, not CAJAC, exercises control over the Cemetery: "Shaare Zedek owns, operates, manages, maintains and controls Bayside Cemetery." (Lucker Compl. ¶ 14; Leventhal Compl. ¶ 9) (emphasis added). Notably, both the Leventhal and Lucker complaints post-date the article on which Plaintiff relies for the proposition that CAJAC assumed control and ownership over the Cemetery. (See Buchman Decl., Ex. H.) In any event, the article upon which Plaintiff relies fundamentally conflicts with Plaintiff's theory of the case—that the Congregation has transferred "*de facto* ownership" and control over the Cemetery to CAJAC. (See Buchman Decl. Ex. H, p. 2 (in which the similarly situated named plaintiff in the Lucker matter is quoted as saying "CAJAC is not the owner of Bayside, does not have any legal control over Bayside, [and] does not have access to the cemetery.") (emphasis added).) Lastly, the sole factual predicate for CAJAC's alleged exercise of "*de facto* ownership"—CAJAC's hiring of MC Landscape Group —necessarily fails, because that contractual relationship terminated in the summer of 2010 at the contractor's request. (See Katz Aff. ¶ 3.)

Plaintiff's position also fails as a matter of law for three reasons. First, despite the ominous label—"de facto ownership"—that Plaintiff affixes to CAJAC's charitable work,

---

<sup>5</sup> On April 27, 2009, CAJAC hired MC Landscape Group to clean up Bayside Cemetery. There were no other signatories to the contractual arrangement other than CAJAC and MC Landscape Group. (Katz Aff. ¶ 3.)

Plaintiff fails to plead any unlawful conduct by CAJAC. (Pl.'s Opp. Br. at 2.) Plaintiff points to no law that would prohibit CAJAC from using UJA funds for their contemplated purpose— hiring a landscaper to clean up the Cemetery. (Buchman Decl., Ex. H.) Nor does Plaintiff identify any law prohibiting the Congregation from granting CAJAC permission to enter the Cemetery—what Plaintiff would likely characterize as "hand[ing] over the keys"—to ensure MC Landscape Group performed the contract. (See Pl.'s Opp. Br. at 6.) To the contrary, the Congregation's exclusion of CAJAC from the Cemetery grounds would have frustrated the aims held by both Defendants and, one assumes, the Plaintiff—to ensure UJA funds were responsibly spent on improving the Cemetery's condition. Lastly, Plaintiff fails to plead any fraudulent or improper clandestine activity. Far from playing an "intricate shell game," CAJAC proclaimed its collaboration with MC Landscape Group, as Plaintiff's own evidence demonstrates.<sup>6, 7</sup> Nor has

---

<sup>6</sup> (See Buchman Decl., Ex. I (Buchman Decl., Ex. I (CAJAC website) (noting that CAJAC has "hire[d] professionals for the really heavy work" and that "it is the aim of CAJAC and MC [Landscape Group] to preserve as much as possible of the cemetery's remarkable endowment of flora while uncovering buried headstones"); see also id., Ex. H ("To fix Bayside – the group's first priority – CAJAC has employed MC Landscaping Group of Mamaroneck, N.Y., to tidy up the 35,000-grave cemetery. . . ."); id. ("CAJAC's seed money came from a \$145,000 UJA-Federation of New York grant given to Shaare Zedek to clean up the cemetery. The funding was transferred in full to CAJAC, and the cemetery association is now connected to the synagogue in only an informal advisory role."))

<sup>7</sup> Plaintiff attempts to transform an inadvertent error in CAJAC's brief, in which CAJAC indicated that it did not execute a contract to perform restoration work, into a scheme to defraud the court. (See CAJAC Reply Br. at 3 n.4 (stating that "CAJAC has never 'executed a contract to perform restoration work at Bayside Cemetery.'" (Compl. ¶ 36.")) CAJAC has never denied the existence of a landscaping contract. Quite the contrary—CAJAC's hiring of a landscaper was a paramount objective, and crown achievement, of the organization, as reported in a news story appended to Plaintiff's own opposition brief. (Buchman Decl., Ex. H ("To fix Bayside – the group's first priority – CAJAC has employed MC Landscaping Group of Mamaroneck, N.Y., to tidy up the 35,000-grave cemetery. . . .")). CAJAC's own website, which Plaintiff appends to his opposition brief, likewise proclaims CAJAC's hiring of a landscaper to clean up Bayside Cemetery. (Buchman Decl., Ex. I, at 2-3 (noting that CAJAC has "hire[d] professionals for the really heavy work" and that "it is the aim of CAJAC and MC [Landscape Group] to preserve as much as possible of the cemetery's remarkable endowment of flora while uncovering buried headstones"). As Plaintiff acknowledges, CAJAC has repeatedly noted this contractual relationship: CAJAC's reply brief in Lucker and its opening brief in Leventhal both affirm this contractual relationship. (See CAJAC Lucker Reply Br. at 6 ("Crucially, there is no allegation that the Congregation compelled CAJAC to contract with the landscaper—an action that CAJAC freely undertook to advance its 501(c)(3) tax-exempt purpose of restoring Jewish Cemeteries such as Bayside." (emphasis added); CAJAC Leventhal Br. at 22 ("Significantly, there is no allegation that CAJAC assumed any contractual obligation of the Congregation, that the Congregation compelled CAJAC to contract with the landscaper—an action that CAJAC freely undertook to advance its 501(c)(3) tax-exempt purpose . . . .") (emphasis added).) The challenged footnote, which appears only pages before CAJAC's statement on page 22 of its opening brief in Leventhal indicating that it contracted with a landscaper, was a regrettable, inadvertent error.

(cont'd)

the Congregation improperly shuffled its annual and perpetual care contracts: It is undisputed that the Congregation has not transferred, and CAJAC has not assumed, a single annual or perpetual care contract—notwithstanding Plaintiff's strained attempt to impose liability on what appears to be an equitable servitude theory. (See, e.g., Pl.'s Opp. Br. at 15.) Hence, Plaintiff's failure to identify any fraud or illegality requires dismissal of Plaintiff's veil-piercing claims under the second prong of Morris.

Second, Plaintiff's Substantial Contributor theory fails to allege a specific, cognizable injury and thus fails to satisfy the second prong of the veil-piercing test. Although Plaintiff asserts that he suffered a "per se tangible injury," Plaintiff fails to plead "particularized statements," identifying what specific injury, if any, resulted from the landscaper's remediation efforts. Sheridan Broad. Corp. v. Small, 19 A.D.3d 331, 332, 798 N.Y.S.2d 45, 47 (1st Dep't 2005) (citation omitted); Pl.'s Opp. Br. at 12. These omissions are fatal to Plaintiff's claim. See Capricorn Investors III, L.P., 24 Misc. 3d 1224(A), 2009 Slip Op. 51608(U), 897 N.Y.S. 2d 668, at \*7 (Sup. Ct. N.Y. County), aff'd, 66 A.D.3d 409, 886 N.Y.S.2d 158 (1st Dep't 2009). Even assuming, arguendo, that some aspect of the clean up was somehow imperfect—which Plaintiff does not allege in his Complaint—Plaintiff has proffered no facts on which the Court could conclude that the landscaper's efforts adversely impacted the condition of the Cemetery.

---

*(cont'd from previous page)*

Notably, CAJAC's misstatement was not prejudicial to Plaintiff, whose legal position is premised on CAJAC's consistent representations to the Court in its briefs in Leventhal and Lucker, and in public statements, that it did hire a landscaper. Additionally, the erroneous inclusion of this misstatement in a footnote was not in any way intended to mislead the Court.

N.Y.C.P.L.R. § 2001 (McKinney 2011) prescribes the appropriate corrective action in this case. Where, as here, a "mistake, omission, defect or [irregularity]" does not prejudice a "substantial right of a party, the error "shall be disregarded." See C.P.L.R. § 2001. As no "substantial right[s]" of Plaintiff have been prejudiced by this mistake, CAJAC respectfully requests that the Court disregard footnote 3 in CAJAC's opening brief. Should the Court prefer, CAJAC will promptly file an amended memorandum in support of its motion to dismiss the Leventhal complaint, omitting footnote 3.

Because Plaintiff has suffered no cognizable injury, the second prong of the veil-piercing test is not met, and Plaintiff's claims against CAJAC must be dismissed.

Plaintiff's thesis—that the impropriety of the Congregation's alleged transfer of "*de facto* ownership" of the Cemetery to CAJAC itself constitutes an injury adequate to pierce the corporate veil—contravenes controlling case law. Plaintiff asserts, "[b]y *effectuating* an unauthorized transfer, Defendants have *per se* injured Plaintiff." (Pl.'s Opp. Br. at 12.) An improper or wrongful act alone will not suffice to pierce the corporate veil; rather, Plaintiff must show how that wrongful or fraudulent act resulted in injury. See Capricorn, 2009 N.Y. Slip Op. 51608(U), at \*4 (requiring showing that domination "was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (emphasis added) (citing Morris, 82 N.Y.2d at 141, 623 N.E.2d 1160-61, 603 N.Y.S.2d at 810-11)); Guptill Holding Corp. v. State, 33 A.D.2d 362, 365, 307 N.Y.S.2d 970, 973 (3d Dep't 1970) ("[T]he elements necessary to disregard the corporate entity are: (1) complete control of the corporation; (2) use of such control to commit the wrong complained of; and (3) an injury proximately caused by said wrong." (emphasis added)), aff'd, 31 N.Y.2d 897, 292 N.E.2d 782, 340 N.Y.S.2d 638 (1972). Because Plaintiff merely alleges that the Congregation engaged in an unauthorized transfer of ownership of the Cemetery—without identifying a cognizable injury resulting from such transfer—Plaintiff's reliance on a "per se injury" fails as a matter of law.

Although Plaintiff characterizes CAJAC's hiring of a landscaper as an "unauthorized" transfer of "*de facto* ownership" of the Cemetery to CAJAC, Plaintiff fails particularly to identify which, if any, of CAJAC's activities required the NY AG's consent. Plaintiff points to no law prohibiting (i) CAJAC from hiring a landscaper to clean up the Cemetery, or (ii) the Congregation from granting CAJAC permission to enter the Cemetery to confirm that

landscaper's performance of the contract. Nor does Plaintiff explain why the Attorney General should oppose CAJAC's provision of assistance, as Plaintiff's purported aim—consistent with the Defendants'—is to clean up the Cemetery. Further, the absence of any enforcement action by the NY AG restricting CAJAC's well-publicized activities confirms the legality of CAJAC's efforts. (See supra n. 7.) Significantly, the Congregation has scrupulously abstained from the only conduct allegedly prohibited by the NY AG's decision—the Congregation's transfer of legal title, and its purported contractual obligations, to CAJAC.<sup>8</sup> Nor did CAJAC's charitable assistance in cleaning up the Cemetery somehow modify terms of the underlying contracts, shifting contractual liability from the Congregation to CAJAC. Accordingly, Plaintiff fails to articulate how CAJAC's provision of assistance constituted an abuse of the Congregation or CAJAC's corporate forms. See Official Comm. of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co., (In re Sunbeam Corp.) 284 B.R. 355, 368 (Bankr. S.D.N.Y. 2002) (rejecting veil-piercing claim because "there is no evidence . . . that Morgan Stanley used MSSF to shield itself from potential liability").

Third, Plaintiff fails to plead any facts demonstrating that the Congregation dominated CAJAC "with respect to the transaction attacked"—that is, that the Congregation forced CAJAC to hire a landscaper. Morris, 82 N.Y.2d at 141, 623 N.E.2d at 1160-61, 603 N.Y.S.2d at 810-11; In re Sunbeam, 284 B.R. at 366 (noting that "the domination shown must be 'complete domination of the corporation' concerning the transaction at issue," and that "it is not sufficient, at the pleading stage, to make conclusory allegations of control" (citation omitted) (emphasis added)); Capricorn, 2009 N.Y. Slip Op.51608(U), at \* 7 (dismissing veil-piercing claim because plaintiff did not particularly describe "how Coolbrands or Integrated caused CBA to breach the

---

<sup>8</sup> The absence of enforcement action by the NY AG confirms CAJAC's position. Because no transfer of ownership occurred, see Section II.B, infra, no impropriety resulted that would require the NY AG's intervention.

Partnership Agreement . . . or any other details as to a relationship between such abuse and the wrong." (emphasis added)). To the contrary, Plaintiff's own evidence confirms CAJAC's independent conviction that hiring a landscaper was imperative to cleaning up Bayside Cemetery, a top priority of the organization.<sup>9</sup> Because Plaintiff pleads no facts on which the Court could conclude that the Congregation completely dominated CAJAC with respect to its decision to hire a landscaper—actions fully consistent with CAJAC's stated corporate mission—Plaintiff's veil-piercing claims must be dismissed. See Morris, 82 N.Y.2d at 141, 623 N.E.2d at 1160-61, 603 N.Y.S.2d at 810-11.

Because neither the Substantial Contributor nor Hollow Shell theories plead a consummated fraud and actual injury, Plaintiff's veil-piercing claims must be dismissed—without inquiry into the domination issue. See Morris, 82 N.Y.2d at 141-43, 623 N.E.2d at 1160-61, 603 N.Y.S.2d at 810-11.

#### **B. Plaintiff Does Not Plead Complete Domination**

This Court has made clear that domination must be "so complete that the corporation has no separate mind, will, or existence of its own." Bowles v. Errico, 163 A.D.2d 771, 773, 558 N.Y.S.2d 734, 736 (3d Dep't 1990). Further, the party seeking to pierce the corporate veil must establish "that the owners, through their domination, abused the privilege of doing business in the corporate form." Morris, 82 N.Y.2d at 142 623 N.E.2d at 1160-61, 603 N.Y.S.2d at 810-11. Relevant factors include whether there was a "failure to adhere to corporate formalities,

---

<sup>9</sup> (Buchman Decl., Ex. H, Forward.com, Offering TLC for Jewish Cemeteries, July 22, 2009 ("The group's [CAJAC] long-term goal is to create standards to govern the operations and maintenance of dozens of Jewish cemeteries in the New York metropolitan area. To fix Bayside – the group's first priority – CAJAC has employed MC Landscaping Group of Mamaroneck, N.Y., to tidy up the 35,000-grave cemetery – clearing away overgrown shrubs and bushes, righting toppled headstones, sealing vandalized mausoleums, and removing such debris as soda cans and beer bottles . . . . 'Bayside is the thing that everyone sees and asks about,' Katz said . . . . 'CAJAC is about solving the long-term problem of Jewish cemeteries in general.'") (emphasis added).)

inadequate capitalization, commingling of assets, and use of corporate funds for personal use."

E. Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc., 66 A.D.3d 122, 127, 884

N.Y.S.2d 94, 99 (2d Dep't 2009) (citation omitted), aff'd, \_\_ N.E.2d \_\_, 16 N.Y.3d 775 (2011).

Here, CAJAC adhered to corporate formalities: CAJAC is a duly-incorporated 501(c)(3) organization that maintained adequate books and records, held board meetings, and maintained a corps of officers and directors. Further, Plaintiff himself alleges CAJAC's contributions to cleaning up Bayside Cemetery—'legitimate corporate activity that alone requires dismissal of Plaintiff's veil-piercing claims. TNS Holdings, 92 N.Y.2d at 339-40, 703 N.E.2d at 751, 680 N.Y.S.2d at 893 ("An inference of abuse does not arise from this record where a corporation was formed for legal purposes or is engaged in legitimate business." (emphasis added)).

For the reasons set forth below, Plaintiff's efforts to contort each of the veil-piercing factors is unavailing.

1. **Overlap in Corporate Officers**: Plaintiff concedes that CAJAC and the Congregation have no interlocking officers or directors. (See CAJAC Leventhal Br. ¶ 17.) Absent any overlap in their decision-making apparatus, the Congregation has no ability to control, much less completely dominate, CAJAC.<sup>10</sup> Further, neither Gary Katz's former membership in the general congregation of Shaare Zedek, nor Ethan Klingsberg's former membership on the Congregation's board, suffice to establish complete domination, for the

---

<sup>10</sup> Plaintiff once again accuses CAJAC of "hid[ing] the ball" by misstating Ethan Klingsberg's role at CAJAC. (See Pl.'s Opp. Br. at 13.) Conflating Mr. Klingsberg's professional occupation with his role at CAJAC, Plaintiff argues that CAJAC's 2009 990-EZ Form identifies Mr. Klingsberg as a legal officer of CAJAC. To the contrary, CAJAC's 2009 990-EZ Form clearly identifies Mr. Klingsberg's professional occupation—"practicing attorney"; it does not identify Mr. Klingsberg as CAJAC's legal officer. (Buchman Decl., Ex. J.) CAJAC's internal records corroborate this fact. (See Selman Aff., Ex. B (board roster of CAJAC as of December 4, 2008) (reflecting that Mr. Klingsberg was not an officer of CAJAC). Indeed, Klingsberg had not been an officer of CAJAC since December 2, 2008, when David Billet replaced Mr. Klingsberg as Vice President and Secretary of the organization. (Katz Aff. ¶ 2.)

reasons set forth in CAJAC's opening brief.<sup>11</sup> (CAJAC Leventhal Br. at 18-19.) Further, Plaintiff's reliance on the past presence of one interlocking board member, Ethan Klingsberg, fails to establish the identity, or virtual identity, of officers and directors ordinarily required to demonstrate complete domination. See Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 140 (2d Cir. 1990) (finding domination where two entities shared "essentially the same officers and directors"); see also Treeline Mineola, LLC v. Berg, 21 A.D.3d 1028, 801 N.Y.S.2d 407 (2nd Dep't 2005) (The "corporate veil" will not be pierced simply because the same person or persons controlled multiple entities.). Nor would such an identity—even if it existed—suffice to pierce the corporate veil. Bagel Bros. Maple, Inc. v. Ohio Farmers, Inc., 279 B.R. 55, 65 (W.D.N.Y. 2002) ("The fact plaintiffs may discover that the two corporations have identical controlling shareholders, officers and directors does not, by itself, warrant disregarding the separate corporate entities." (citing Ioviero v. Ciga Hotels, Inc., 101 A.D.2d 852, 853, 475 N.Y.S.2d 880, 881 (2d Dep't 1984))). Further, Plaintiff never explains how Mr. Klingsberg alone could have dominated the Congregation's board, which had no fewer than 10 directors.

Rather than plead specific instances in which the Congregation dominated CAJAC, as required to pierce the corporate veil, Plaintiff merely speculates—without a shred of factual support—that Messers. Katz and Klingsberg formed CAJAC for the purpose of evading the Congregation's contractual obligations. (Pl.'s Opp. Br. at 12-13.) Plaintiff's conclusory assertions fail, as a matter of law, to pierce the corporate veil. See In re Sunbeam, 284 B.R. at 366 (requiring Plaintiff to furnish "examples of alleged domination"); see also Bravado, 655

---

<sup>11</sup> Plaintiff asserts that Mr. Klingsberg was an "officer/director of the synagogue." (Pl. Opp. Br. 14.) Mr. Klingsberg never held an officer position at the Congregation. Mr. Klingsberg served as a non-executive member of the board and on two committees of the Congregation.

F.Supp.2d at 197; EED Holdings, 228 F.R.D. at 512. Further, Plaintiff's central thesis is roundly contradicted by his own evidence, demonstrating that: (i) CAJAC's focus extends beyond Bayside and includes historic Jewish cemeteries in the greater New York area (Buchman Decl., Ex. J, at 2; id., Ex. H (stating that "CAJAC is about solving the long-term problem of Jewish cemeteries in general")); see supra n. 5, 11); (ii) CAJAC's efforts have been recognized by leading Jewish organizations, including UJA, Jewish Community Relations Council, and Hebrew Free Burial Association, squarely contradicting Plaintiff's contention that CAJAC was created shell charity to defraud Plaintiff (id., Ex. I, p. 4/8; see also Selman Aff., Ex. A (reflecting Jewish Community Relations Council's support for CAJAC); and (iii) CAJAC has made tangible contributions to cleaning up the Cemetery, including organizing volunteers and collaborating with MC Landscape Group (Buchman Decl., Ex. I). Further, Mr. Katz's position as Vice President of the Hebrew Free Burial Association, an organization dedicated to providing dignified burials to indigent Jews, contradicts any allegation that Mr. Katz would intend to defraud an individual such as Plaintiff. (Katz Aff. ¶ 1).

2. **Inadequate Capitalization/Guarantee of Debts:** CAJAC is adequately capitalized to meet its current obligations—the sole obligations relevant to the veil-piercing inquiry—and thus this factor supports CAJAC's position. See Morris, 82 N.Y.S.2d at 143-44,623 N.E.2d at 1162,603 N.Y.S.2d at 812 (refusing to pierce the corporate veil because "[t]here is no suggestion that any obligations of the corporation remained unpaid"). Indeed, Plaintiff's own evidence confirms that CAJAC is adequately capitalized to meet these obligations; Plaintiff fails to cite any current, unpaid obligation of the organization, for which CAJAC lacks adequate capital. (Buchman Decl, Ex. J (reflecting net assets of \$71,169); Katz Aff. ¶ 6.) Further, Plaintiff's contention that CAJAC lacks funds adequate to complete a multi-million

dollar restoration of Bayside Cemetery, and to satisfy the Congregation's annual and perpetual care obligations, proceeds from a flawed premise—that CAJAC has a legal duty to perform either of these tasks. CAJAC, however, never assumed the obligations asserted. The Congregation has not transferred, and CAJAC has not assumed, a single annual or perpetual care contract of the Congregation, notwithstanding Plaintiff's strained effort to impose such an obligation through what appears to be a theory based on the law of equitable servitudes.<sup>12</sup> Further, CAJAC's contractual relationship with MC Landscape Group was terminated at MC Landscape Group's request in the summer of 2010. (Katz Aff. ¶ 3.) CAJAC has paid in full all obligations owed to MC Landscape Group, and owes no further obligations to that company. (Katz Aff. ¶ 3.) Moreover, CAJAC is not a party to a contract with any other landscaper. (Katz Aff. ¶ 5.) Lastly, for the reasons set forth in its opening brief, Plaintiff's asserted damages represent a hypothetical rather than a current obligation of CAJAC and thus are irrelevant to the veil-piercing analysis. Plaintiff cites no contrary authority.

3. **Common Office Space:** CAJAC's brief use of the Congregation's mailing address during its formative years—September 2006 to September 2008—was a prudent measure to conserve costs while the organization raised funds. Accordingly, the Congregation and CAJAC's temporary use of the Congregation's mailing address fails to show that CAJAC was a "mere instrumentality" of the Congregation. Prichard v. 164 Ludlow Corp., 14 Misc. 3d 1202(A), 2006 N.Y. Slip Op. 52381(U), 831 N.Y.S.2d 362, at \*5 (Sup. Ct. N.Y. County 2006), aff'd, 49 A.D.3d 408, 854 N.Y.S.2d 53 (1st Dep't 2008).

---

<sup>12</sup> For the reasons set forth in Section I.A. supra, and Section II.B infra, the Congregation did not transfer ownership of Bayside to CAJAC and, therefore, none of the Congregation's purported obligations "ran with the land" to CAJAC. Previously in Lucker, plaintiffs sought to impose liability against CAJAC solely on a veil-piercing theory—they did not assert independent claims against CAJAC. (Selman Aff., Ex. C, 6/3/2010 Lucker Hr'g Tr. at 35:3 – 6 ("There is no claim specifically as to relief from CAJAC. We are only including CAJAC in this lawsuit because they told us they intend to transfer the property."))

4. **Shifting of Funds:** Plaintiff asserts—without analysis—that the Congregation's transfer of grant monies to CAJAC is probative of dominion. Plaintiff, however, does not plead facts demonstrating that the Congregation compelled CAJAC to accept and expend these funds to hire a landscaper, such that CAJAC was a mere instrumentality of the Congregation. To the contrary, Plaintiff's own evidence confirms that CAJAC perceived the funds as critical to restoring Bayside Cemetery;<sup>13</sup> however, CAJAC initially lacked 501(c)(3) status and thus was unable to receive funds directly from UJA. Accordingly, the Congregation's transfer of funds to CAJAC—lawful conduct contemplated, and consented to, by the grantor UJA, which was reported in the press and complied with all corporate formalities—was entirely proper. (See Buchman Decl., Ex. H (news article reporting the Congregation's transfer of all UJA funds to CAJAC); Katz Aff. ¶ 4.) Further, Plaintiff's own evidence confirms that this transfer of funds did not encroach on CAJAC's autonomy, much less reduce CAJAC to a mere instrumentality of the Congregation: "CAJAC's seed money came from a \$145,00 UJA-Federation of New York grant given to Shaare Zedek to clean up the cemetery. The funding was transferred in full to CAJAC, and the cemetery association is now connected to the synagogue in only an informal advisory role." (Buchman Decl., Ex. H (emphasis added).) Lastly, Plaintiff does not allege that the Congregation and CAJAC in any way commingled membership dues, donations, assets or liabilities.

Because the alleged dominion factors overwhelmingly support CAJAC's distinct corporate identity, the Court should reject Plaintiff's veil-piercing theory and dismiss Plaintiff's complaint without leave to amend.

---

<sup>13</sup> Buchman Decl., Ex. H ("To fix Bayside—the group's first priority—CAJAC has employed MC Landscaping Group of Mamaroneck, N.Y., to tidy up the 35,000-grave cemetery").

## II. CAJAC IS NOT A NECESSARY PARTY

To avoid dismissal of CAJAC from the suit, Plaintiff now asserts that CAJAC is a "necessary party" to the litigation. Although Plaintiff characterizes his newly spun theory as the "'elephant in the room' at the Lucker oral argument," this particular elephant has never before entered the room. An examination of the hearing transcript reveals no reference to the controlling statute, N.Y. C.P.L.R. § 1001(a), or the "necessary party" doctrine. Nor does this theory appear in Plaintiff's pleadings in Leventhal and Lucker, or in his opposition papers in Lucker. (See generally Selman Aff., Ex. C (Lucker v. Bayside Cemetery, June 3, 2010 Hr'g Tr.) (containing no reference to N.Y. C.P.L.R. § 1001(a) or discussion of a "necessary party").) Nonetheless, Plaintiff now asserts that CAJAC is an indispensable party, warranting its continued involvement in the suit, notwithstanding the absence of a plausible legal theory for holding CAJAC liable for the Congregation's alleged wrongs. Specifically, Plaintiff maintains that CAJAC's involvement is compulsory under alternative provisions— C.P.L.R. § 1001(A) and New York Real Property Actions and Proceedings § 1511. Neither provision, however, entitles Plaintiff to the relief requested.

### A. New York Real Property Actions and Proceedings § 1511 Is Facially Inapplicable to This Case

Plaintiff's invocation of New York Real Property Actions and Proceedings § 1511 fails where it must begin—the plain terms of the statute. The first six words of the cited provision expressly limit its application to "an action brought under this article": "*In an action brought under this article*, the person in possession shall be made a party to the action, and when such person claims the right of possession, or an interest in the real property, under another, such other person shall also be made a party." N.Y. R.P.A.P.L. § 1511 (McKinney 2009). Here, Plaintiff acknowledges that this suit is not "an action brought under this article [§ 1511]." (Pl.'s

Opp. Br. at 3 ("While this is not an action to compel the determination of a claim to real property . . ."). Further, Plaintiff cites no precedent applying the provision to actions brought under a different statute. Accordingly, Plaintiff's reliance on § 1511 is unavailing.

**B. C.P.L.R. § 1001(A) Does Not Mandate Joinder of CAJAC**

C.P.L.R. § 1001(A) does not mandate CAJAC's joinder in this suit. That provision provides for joinder of a party only when one of two conditions are met: (i) joinder is required to afford "complete relief" to a party, or (ii) the absence of the party sought to be joined would "inequitably affect[]" that party. C.P.L.R. § 1001(A). Here, neither requirement is met.

First, CAJAC's joinder in this suit is not necessary to afford Plaintiff complete relief. The Congregation's liability to Plaintiff may be determined without joining CAJAC as a party. Indeed, CAJAC was not a party to the contracts at issue, and all, or virtually all, of the Congregation's alleged defalcations predated CAJAC's existence. Further, because CAJAC owes no legal obligation to Plaintiff, and is not liable to Plaintiff for any damages resulting from the Congregation's alleged misconduct, CAJAC's joinder would not enhance Plaintiff's ability to obtain the relief requested. Rather, Plaintiff may obtain adequate relief from the Congregation, its purported counterparty under the contracts. See also Washington Title Ins. Co. v. Streamline Agency Inc., 26 Misc. 3d 1214(A), 2010 Slip Op. 50098(U), 906 N.Y.S.2d 784, at \*8 (N.Y. Sup. Nassau County 2010) ("[T]he outcome of this action will not affect the buyers and sellers of real property for whom the funds were maintained in escrow, in light of the fact that Washington Title remains obligated, as the title underwriter, under the title policies issued in connection with the transactions involving these buyers and sellers.")

Further, Plaintiff fails to articulate a cogent theory of why CAJAC's joinder is required to provide "complete relief" to Plaintiff. This deficiency alone is fatal to Plaintiff's theory. See

Adelaide Productions, Inc. v. BKN Int'l AG, No. 602361/03, 2004 WL 5487741, at 12 (Sup. Ct. N.Y. Cty. May 12, 2004) ("Defendants have not [text illegible]iculated in what manner CPE would be inequitably affected by a judgment in this action. Moreover they have not articulated in what manner the parties herein will not be given 'complete relief' if CPE is not joined."), aff'd, 15 A.D.3d 316, 789 N.Y.S.2d 881 (1st Dep't 2005). Rather, Plaintiff merely rehashes his veil-piercing arguments under the rubric of the "necessary party" doctrine. Nonetheless, giving Plaintiff every benefit of the doubt, we address three arguments that may be distilled from Plaintiff's brief: (i) CAJAC is a *de facto* owner of the cemetery and thus liable to Plaintiff for the Congregation's alleged wrongs; (ii) joinder is necessary to obtain allegedly critical evidence in CAJAC's possession; and (iii) joinder would not be burdensome to CAJAC.

Plaintiff's first argument—that CAJAC exercises "*de facto* ownership" of the Cemetery—relies on a contrived phrase, unsupported by citation to any legal authority and devoid of any ascertainable, applicable legal meaning. Under New York law, ownership of Bayside Cemetery could not be accomplished by CAJAC's mere hiring of a landscaper. To the contrary, a deed or conveyance in writing from the Congregation to CAJAC was required to create, grant, assign, surrender, or declare an "ownership interest in real property":

In order to transfer an ownership interest in real property, there must be a deed, or other conveyance in writing. Although it is not necessary that such conveyance be recorded, it is a well-established rule that delivery of the deed with intent to transfer title is required and the absence thereof will render the attempted transfer of ownership ineffective.

Goodell v. Rosetti, 52 A.D.3d 911, 913, 859 N.Y.S.2d 770, 772 (3d Dep't 2008) (citing General Obligations Law § 5-703, other citations omitted). Accordingly, Plaintiff's "*de facto* ownership" theory squarely conflicts with New York law and does not support CAJAC's forcible inclusion as a necessary party.

Further, Plaintiff's compulsory joinder theory proceeds from a flawed legal premise—that CAJAC's asserted liability to Plaintiff for the Congregation's breaches transforms CAJAC into a "necessary party" under C.P.L.R. § 1001(A). The proposition that shared potential liability makes a party necessary, however, has been roundly rejected. See, e.g., Taran Furs, Inc. v. Champagne Bridals, Inc., 116 A.D.2d 970, 498 N.Y.S.2d 595, 596 (4th Dep't 1986) ("At most, [the potentially joined party] may be a joint tortfeasor or co-obligor of the sales contract, but would not be a necessary party in either event.").

Second, Plaintiff argues that CAJAC's possession of allegedly indispensable evidence compels CAJAC's joinder in this suit. Plaintiff's argument fails, however, for two reasons. First, the C.P.L.R. specifically provides for disclosure from non-parties—without imposing the burdens of joinder. N.Y.C.P.L.R. § 3101(a)(4) (McKinney 2011). Second, adoption of Plaintiff's implicit position—that a non-party's possession of potentially probative evidence alone requires its joinder— would produce absurd results: Every non-party possessing evidence would be required to be joined in the litigation.

Lastly, Plaintiff, manufacturing his own legal standard, argues that joinder is required "for the purposes of efficiency and convenience." (Pl.'s Opp. Br. at 9.) Under C.P.L.R. § 1001(A), however, the dispositive inquiry is not whether joinder of a party would be "convenient" for Plaintiff but rather whether joinder is necessary to accord "complete relief" to a party. Further, however "convenient" CAJAC's joinder might be for Plaintiff, defense of this suit exacts a tremendous toll on CAJAC—a not-for-profit with only a single paid employee, for whom the recovery of records, review of drafts and extensive discovery will impose a substantial burden. Further, the specter of litigation hobbles CAJAC's clean up efforts at Bayside Cemetery

and other historic Jewish cemeteries to which CAJAC has turned its attention.<sup>14</sup> Lastly, the specific inefficiency alleged by Plaintiff—that plaintiff may have to "re-start this action down the road"—is groundless. (Pl.'s Opp. Br. at 10.) Because Plaintiff fails to plead facts adequate to pierce the corporate veil and impose liability on CAJAC, no basis exists to "re-start" a successive lawsuit against CAJAC.

Plaintiff also fails to demonstrate that joinder of CAJAC is required because CAJAC would be "inequitably affected" by a judgment. Plaintiff graciously offers that CAJAC "should be given an opportunity to meaningfully participate as a party" because CAJAC "will be affected by a judgment in this action." (Pl.'s Opp. Br. at 5.) While CAJAC appreciates Plaintiff's solicitude, CAJAC respectfully declines the "opportunity" proffered. CAJAC is not a party to the contracts at issue, owes no legal obligation to Plaintiff and, therefore, will not be affected by any legal judgment entered. Its continued "participation" in this litigation is thus unwarranted.

### **III. PLAINTIFF'S CLAIMS AGAINST CAJAC SHOULD BE DISMISSED WITH PREJUDICE**

In his opposition brief, Plaintiff requests leave to amend his complaint to the extent the Court grants all or part of CAJAC's motion to dismiss. (Pl. Opp. Br. at 17 n.19.) Plaintiff's claims against CAJAC, however, should be dismissed with prejudice on two grounds.

First, Plaintiffs' claims against CAJAC fail as a matter of law and, therefore, amendment is necessarily futile. Rappaport v. VV Pub. Corp., 223 A.D.2d 515, 515, 637 N.Y.S.2d 109, 110 (1st Dep't 1996) (denying leave to amend, stating that because the "challenged statements are not actionable as a matter of law, repleading would be futile"); Crucen ex rel. Vargas v. Leary, 55

---

<sup>14</sup> Plaintiff seeks to preclude CAJAC from arguing that it is being "saddled with litigation" because it is "well represented on a pro bono basis by Skadden, Arps, Slate, Meagher & Flom LLP." (Pl.'s Opp. Br. at 2.) Sean Marlaire and Ari Selman are appearing as counsel for CAJAC in their individual names, under the auspices of the pro bono program of the law firm at which they work.

A.D.3d 510, 511, 867 N.Y.S.2d 49, 51-52 (1st Dep't 2008) ("Leave to amend was properly denied because repleading would be futile"). Because the Congregation has not transferred, and CAJAC has not assumed, a single annual or perpetual care contract, Plaintiff's alleged injuries are purely hypothetical, rather than actual; further pleading cannot alter this dispositive fact. Further, Plaintiff's own allegations and appended evidence substantiate CAJAC's legitimate charitable endeavors and, therefore, conclusively foreclose Plaintiff's "sham entity" theory. Lastly, Plaintiff's *de facto* ownership theory contravenes controlling New York law, requiring conveyance of a deed to grant, assign, surrender, or declare an ownership interest in real property.

Second, Plaintiff's repeated failure to plead facts adequate to state a valid claim also compels dismissal of Plaintiff's claims without leave to amend. In Ragto, Inc. v. Schneiderman, the Court dismissed plaintiff's claims with prejudice "in light of the prior history of the action," noting that plaintiff had "continually failed to set forth any further detail supports its claims." 69 A.D.2d 815, 816, 414 N.Y.S.2d 746, 747 (2d Dep't 1979), aff. 49 N.Y.2d 975, 428 N.Y.S.2d 949 (1980). Accordingly, the court found "no reason to believe that it [plaintiff] could buttress its pleadings with facts sufficient to make out a prima facie case." Id. at 816. Here, granting Plaintiff leave to amend would effectively represent a fourth bite at the apple with respect to claims against CAJAC: (i) the Lucker complaint pleads numerous facts but devotes only a single paragraph to CAJAC; (ii) plaintiffs' response to CAJAC's motion to dismiss the Lucker complaint adds factual allegations against CAJAC, and appends seven exhibits, without remedying dispositive defects in the complaint; (iii) the Leventhal complaint, a "virtually identical" class action, incorporates factual allegations in the response brief in Lucker; (iv) Plaintiff's opposition brief in Leventhal adds pages of allegations, appends a dozen exhibits, and introduces several novel legal theories—including "*de facto* ownership" and compulsory joinder

arguments—but fails to overcome the same barriers encountered in Lucker, which foreclosed Plaintiff's claims as a matter of law. (Buchman Letter to the Court dated Jan. 18, 2011, at 2.) "In light of the history of this case," there is no reason to believe that amendments would salvage Plaintiff's veil-piercing claims. Ragto, 69 A.D.2d at 815. Accordingly, Plaintiff's claims against CAJAC should be dismissed with prejudice.

### CONCLUSION

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

Dated: April 7, 2011

Respectfully submitted,



---

Ari M. Selman  
Sean Marlaire  
Four Times Square  
New York, New York 10036  
Telephone: (212) 735-3000  
Facsimile: (212) 735-2000

*Attorneys for Community Association for Jewish At-Risk  
Cemeteries, Inc.*