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October 22, 2007

VIA ELECTRONIC CASE FILING (ECF)

The Honorable Raymond J. Dearie
Chief United States District Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Lucker et al. v. Bayside Cemetery and Congregation Shaare Zedek,
No. 07 Civ. 3823 (RJD) (JMA)

Dear Chief Judge Dearie:

We are counsel to Defendant Congregation Shaare Zedek (the "Congregation") in the above-referenced action. By order dated October 1, 2007, Judge Azrack extended the time to respond to the Complaint until today, October 22, 2007. We now write, per Your Honor's posted Individual Motion Practices, to request a pre-motion conference in anticipation of the filing of a motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint in its entirety for failure to state a claim upon which relief may be granted.

The Congregation originally purchased the land that is now Bayside Cemetery ("Bayside") in the 1850s, and sold approximately 95% of the land to more than one hundred Jewish organizations, including synagogues and fraternal societies, which assumed responsibility for the maintenance and upkeep of their respective plots. Over the last century and a half, almost all of those organizations have ceased to exist, and have abandoned those responsibilities. The Congregation was affected by similar demographic pressures, and it is undisputed that beginning no later than the early 1970s, the steady disappearance of the original burial groups, combined with a reduced level of investment from the Congregation (due to its own declining membership), led to a progressive decline in Bayside's condition.

Plaintiffs are three individuals whose only alleged connection with Defendants is that their grandparents were buried at Bayside in the 1970s. At the same time, Plaintiffs'

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grandparents allegedly also purchased perpetual care through non-party Chebra Shebath Achim Society (the "Society"), a fraternal burial society that owned land at Bayside and, upon information and belief, is now defunct. In this diversity action, Plaintiffs bring a number of state law claims sounding variously in false advertising, deceptive trade practices, breach of contract, unjust enrichment, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and conversion. At their core, however, all are based on a similar claim: that Defendants have failed to maintain the cemetery, and Plaintiffs' grandparents' graves, in an appropriate condition as supposedly required by the perpetual care contracts.

The Congregation does not deny that Bayside is an unfortunate state of disrepair, and has been working, together with the larger New York Jewish community and in cooperation with the New York State Attorney General's Charities Bureau, to develop a viable long-term solution to the problem. This lawsuit, however well-intentioned, is not in the best interests of Bayside or those who are buried there, and the Congregation writes to request permission to file a motion to dismiss the action for failure to state a claim on three principal grounds:

- First, Plaintiffs have not alleged any contractual or other relationship with either Defendant, or that they are the legal representatives of any person who had such a relationship. Moreover, they have not alleged, and cannot show, any personal injury arising from Defendants' alleged actions, which is an essential element of each of their claims. Under controlling New York law as interpreted by the New York and Second Circuit Courts of Appeals, the failure to allege such individual injury bars Plaintiffs' claims as a matter of law.
- Second, despite the obvious applicability of the Statute of Frauds to the perpetual care contract that Plaintiffs seek to enforce, they do not allege the existence of a writing signed by either Defendant. In fact, given the allegations of the Complaint, any breach of contract claim lies against the Society, which allegedly entered into the perpetual care contract at issue, not the Congregation or Bayside. As the district courts in this state have repeatedly recognized, the failure to meet what the New York Court of Appeals has described as the "heavy burden created by the Statute of Frauds" can be an appropriate ground for consideration, as a matter of law, on a Rule 12(b)(6) motion.
- Finally, the Complaint makes clear that the causes of action alleged by Plaintiffs arise out of events that took place, and thus accrued, decades ago. They are, therefore, barred by various New York statutes of limitations, as authoritatively interpreted by the New York Court of Appeals, the Second Circuit, and this Court.

As the Congregation will argue in more depth in connection with its motion, those arguments, together with other specific deficiencies of pleading, render each of Plaintiffs' claims

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insufficient as a matter of law under the controlling New York precedents. The Congregation, therefore, respectfully suggests that the action should be dismissed in its entirety.

On behalf of the Congregation, we are prepared to confer at the Court's earliest convenience, and to file the motion described in this letter as soon thereafter as ordered.

Respectfully,

/s/ Stephen M. Axinn (SA 7445)

cc: Michael Buchman, Esq. (counsel to Plaintiffs)