

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

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THE PEOPLE OF THE STATE OF NEW YORK, by  
LETITIA JAMES, Attorney General of the State of New York,

Index No.

Plaintiff,

**VERIFIED  
COMPLAINT**

-against-

DANIEL C. AUSTIN, SR., DANIEL C. AUSTIN, JR., DONALD M.  
PFAIL, JOSEPH LODATO, MICHAEL W. MICHEL, ANTHONY R.  
MORDENTE, AND VERA PRINCIOTTA,

Defendants.

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Plaintiff, the People of the State of New York, by Letitia James, Attorney General of the State of New York (the “Attorney General”), respectfully alleges as follows:

**PRELIMINARY STATEMENT**

1. The Attorney General brings this lawsuit to obtain remedial and injunctive relief from the persistent violation of New York non-profit law by the directors and officers of Lutheran All Faiths Cemetery (the “Cemetery”). Beginning in at least 2014, the Defendants — led by Board Chairman Daniel Austin, Sr. — exploited their positions at the Cemetery to draw fees, salaries, and loans from the Cemetery’s charitable assets while ignoring their basic fiduciary obligation to manage the assets under their control for the benefit of the Cemetery and its property. The Defendants’ conduct produced millions of dollars in operating cost and financial loss to the Cemetery and violated the clear standards of director care and loyalty required by New York law. Through this action, the Attorney General seeks to restore the Cemetery to a position of long-term fiscal security by: removing the individual defendants still serving on the current Board of Directors; recovering charitable assets lost as a consequence of the Defendants’ negligence; recovering monies knowingly diverted by individual defendants in violation of the Not-for-Profit Corporation Law and the Cemetery conflict of interest policy; enjoining the further payment of salary to any individual defendant-executive who acted unlawfully in breach of their duties to the Cemetery; and recovering salary amounts previously

paid to those individuals while those breaches were being committed. The Attorney General also seeks an order that will permanently enjoin the Defendants from serving as officers, directors, trustees, or in any other fiduciary role at a New York charitable entity.

2. The Cemetery occupies 225 acres of land in Middle Village, Queens and has operated as a non-sectarian, non-profit cemetery for more than 160 years. In 2018, the Cemetery reported net assets of \$33.3 million for the year ending December 31, 2017. The Cemetery holds the final resting place of more than 540,000 New Yorkers.

3. For nearly thirty years from 1990 to March 2019, Defendant Daniel Austin, Sr. served as the Cemetery's chief executive and Chairman. His decision-making authority extended to every aspect of the Cemetery's physical and financial management: "I was Chairman, President and CEO," he explained in a 2018 address to his administrative staff, "I did everything." When he formally resigned as Cemetery President in 2014, Austin, Sr. selected his son, Defendant Daniel Austin, Jr., to succeed him as President but continued to serve as Chairman for another five years until March 2019. His authority at the Cemetery remained unchanged throughout: "I don't like to tell people 'I'm the big shot, I'm the boss,' because I'm a humble guy," he commented in 2018, "[b]ut now I have to go and tell everybody, the Chairman of the Board . . . 'Capo de Capo,' boss of all bosses. If Dan Jr. wasn't my son, he would have been gone four years ago. . . . Anybody who doesn't like what I have to say, there's a door over there."

4. During the period from 2014 forward, the Cemetery Board of Directors consisted of seven long-serving directors, led by Austin, Sr. as Chairman. In 2014, five of the seven had served on the Board for more than ten years; four of those five — Defendants Austin, Sr., Anthony Mordente, Vera Princiotta, and Donald Pfail — had served together for more than 20 years. Beginning in August 2016, the director group splintered; three of the directors serving in May 2014 — Defendants Pfail, Austin, Sr., and Austin, Jr. — have since been fired or pressed to resign from their roles. A fourth Defendant, Michael Michel, resigned in November 2018.

5. In May 2014, the New York State Division of Cemeteries began a routine assets verification audit at the Cemetery. That audit discovered, among other things, that Austin, Sr. had received a nearly \$900,000 award from the Cemetery only days before the start of the Division of Cemeteries review and that the record of his entitlement to such an award and the Board approval for the award remained unclear. The Division of Cemeteries referred its preliminary audit findings to the Office of the Attorney General for review, and the Attorney General commenced an investigation pursuant to the New York Not-for-Profit Corporation Law (“N-PCL”) and the New York Estates, Powers and Trusts Law (“EPTL”) (the “Investigation”) to determine whether a proceeding should be instituted against Austin, Sr. and his fellow current and former directors for failing to properly administer the charitable assets entrusted to their care.

6. The Investigation confirmed that, beginning in at least 2014, Austin, Sr. used his role at the Cemetery to extract enormous financial benefits for himself and his son from the Cemetery’s charitable assets. His conduct was enabled by the complacency of his co-Defendants in this action, who were paid as directors to oversee the Cemetery’s operation and to ensure prudent management of the Cemetery’s finances in conformance with the laws governing New York State charities. Together, the Defendants each violated their fiduciary duties of loyalty and care by: paying themselves millions of dollars in salaries, unauthorized retirement benefits, and director fees without any meaningful consideration of cost or controls; ignoring explicit recommendations from the Cemetery’s outside auditor to curtail or control spending; and lending restricted Cemetery assets to individual family members at below-market rates as mortgage “investments.” The Defendants funded their overspending with regular unlawful incursions into a segregated trust fund that is expressly protected under New York law for the care and maintenance of individual burial plots.

7. The Defendants’ financial mismanagement was accompanied by a total abdication of their responsibility for reasonable administrative oversight at the Cemetery. Between May

2014 and August 2018, the Defendants: appointed Mordente and Austin, Jr. to serve as paid chief executives without any examination of their qualification for those roles; secretly hired Defendant Pfail to an unidentified employee position so that Pfail could receive additional income and health benefits, then fired Pfail for “extreme incompetence” as the Cemetery Treasurer and replaced him with two successor Treasurers — Mordente and Defendant Joseph Lodato — who were unable to identify basic elements of the Cemetery’s balance sheet or trust asset structure to the Attorney General; permitted Austin, Jr. to remain in paid positions as President and Director for nearly nine months after learning in December 2017 that he had stolen tens of thousands of dollars through the Cemetery payroll; permitted Austin, Jr. to resign with a full pension benefit despite having issued a formal Resolution in July 2018 that he be removed for cause; and permitted Austin, Sr. to personally repay a portion of the amounts diverted by his son in August 2018, without interest and without any admission of wrongdoing.

8. Last August, the Cemetery retained an independent forensic audit firm named D’Arcangelo & Co., LLP (“D’Arcangelo”) to assess spending, compensation and other financial controls at the Cemetery. D’Arcangelo reported in September 2018 that it could find no evidence in Cemetery records of Austin, Sr.’s entitlement to a \$900,000 award in 2014. Citing D’Arcangelo’s report, the Board directed Austin, Sr. to return the funds at a Special Meeting on October 19, 2018. Meeting minutes for the October 19 meeting indicate that Austin, Sr. consented to the return, but no repayment was made. The Board issued a second, written demand for repayment on November 23, 2018. Austin, Sr. again refused to comply with the Board’s demands and continued to serve as its Chairman without interruption into 2019.

9. D’Arcangelo completed its review in February 2019. The final report confirmed that no consistent program existed at the Cemetery to determine, approve, or monitor executive and management compensation and performance, and it concluded that Austin, Sr.’s 2018 repayment of the funds misappropriated by his son had understated the amount diverted by

\$15,000. The Board terminated Austin, Sr. for cause in 2019, but took no action to recover the unauthorized funds Austin, Sr. and Austin, Jr. obtained from the Cemetery.

10. New York non-profit law outlines a clear regulatory regime for the management of cemeteries that is designed to ensure prudent oversight of cemetery assets and the successful long-term maintenance of the Cemetery property. The Cemetery is required to operate, pursuant to this regime, in accordance with Articles 5-A and 15 of the Not-for-Profit Corporation Law (“N-PCL”), Article 8 of the New York Estates, Powers and Trusts Law (“EPTL”), its Certificate of Incorporation filed with the Department of State, and its adopted Bylaws. Compliance with these obligations represents the primary fiduciary obligation of a Cemetery’s Board and senior executive staff. As set forth below, the Defendants’ conduct since 2014 consistently failed to meet their fiduciary obligations under Sections 715, 717 and 1507 of the N-PCL and Section 8-1.4 of the EPTL.

#### THE PARTIES

11. The Attorney General is New York’s principal regulator of the non-profit sector and acts in this capacity to ensure that the activities of New York not-for-profit corporations — including cemeteries incorporated under the N-PCL — conform to the N-PCL and the EPTL.

12. Daniel C. Austin, Sr. is the former Chairman of the Board of the Cemetery. Until May 2014, Austin, Sr. had served for 24 years as the Cemetery’s President then President/ Chief Executive Officer/ Chairman. Beginning in May 2014, Austin, Sr. served as Chairman for another five years until he was terminated in March 2019 for refusing to repay the nearly \$900,000 that he obtained unlawfully from the Cemetery in 2014.

13. Daniel C. Austin, Jr. served as a member of the Board of the Cemetery from 2006 to 2018. Austin, Jr. succeeded his father as the President of the Cemetery in May 2014. In August 2018, Austin, Jr. resigned his positions at the Cemetery following the Board’s discovery

that he had embezzled tens of thousands of dollars by awarding himself unauthorized performance bonuses for four years without the Board's knowledge.

14. Anthony R. Mordente is the Secretary of the Board of the Cemetery and has served as a director and outside legal counsel to the Cemetery since 1990. In May 2014, Mordente succeeded Daniel Austin, Sr. as the Cemetery's Chief Executive Officer, a position he still holds. From approximately August 2016 to June 2018, Mordente also served as Acting Treasurer for the Cemetery. Mordente has been a licensed member of the New York bar since 1983.

15. Vera Princiotta has served as Vice President of the Board of the Cemetery since approximately 1989. She presently resides in Deerfield Beach, Florida.

16. Donald Pfail served on the Board of the Cemetery for more than 38 years and its Treasurer from approximately 2002 to August 2016. Pfail is a Certified Public Accountant and has been a member of the AICPA and NYSCPA since 1994. Pfail also provided paid professional accounting services to the Cemetery throughout his tenure on the Board and was hired by Daniel Austin, Jr. as an employee of the Cemetery without the Board's knowledge from approximately December 2014 to June 2015. The Board fired Pfail from his positions with the Cemetery in August 2016 and later settled a subsequent wrongful termination claim by Pfail for approximately \$12,000 in December 2017.

17. Joseph Lodato joined the Board of the Cemetery in 2004 to replace his father-in-law, former director William McCaffrey. Lodato worked as an optician and had no previous cemetery or non-profit experience prior to joining the Board but, beginning in approximately June 2018, he succeeded attorney Anthony Mordente as the Board's Treasurer.

18. Michael Michel joined the Board of the Cemetery in 2014 and resigned from the Board in November 2018.

### JURISDICTION AND APPLICABLE LAW

19. The Attorney General brings this action on behalf of the People of the State of New York under the N-PCL and the EPTL.

20. The Cemetery operates as not-for-profit corporation exempt from federal taxation under I.R.C. § 501(c)(13). As a charitable corporation incorporated under the N-PCL, the Cemetery operates subject to several overlapping regulations that impose strict governance and investment standards to ensure the proper use of cemetery assets. N-PCL § 1505(c) designates cemetery corporations as “charitable” corporations under the N-PCL, and EPTL § 8-1.5 identifies cemetery trust accounts as trusts held “for charitable and benevolent purposes.” Through this status, the N-PCL and EPTL impose clear standards for the roles of cemetery officers and directors, including: obedience to common law duties of care and loyalty; prudent management of institutional funds, including cemetery assets held in trust; adoption and enforcement of an internal conflict of interest policy; and compliance with the cemetery trust fund structure created by N-PCL Article 15.

#### Director and Officer Obligations of Care and Loyalty

21. N-PCL § 717 requires the directors and officers of a not-for-profit corporation to act in good faith and with that degree of diligence, care, and skill that an ordinarily prudent person in their position would exercise under similar circumstances. Where a Board delegates investment management of its institutional funds, either to a committee of the Board or to an outside advisor, Section 717’s standard of care further requires the directors and officers to ensure that the corporation’s investments are made pursuant to a written investment policy and in full consideration of the corporation’s overall financial need, purpose, and resources. Pursuant to Section 720-a of the N-PCL, directors who receive compensation for their roles as directors are subject to a higher standard of care than directors that serve in a voluntary capacity.

22. N-PCL § 515(a) prohibits a charitable corporation from “distribut[ing] any part of its income” to the directors or officers of the corporation.

23. Pursuant to N-PCL § 719, directors who vote or concur in the distribution of the corporation’s assets to members, directors, or officers may be held jointly and severally liable to the corporation for the injury suffered by the corporation as a result of that distribution.

24. Article 5-A of the N-PCL instructs that, “[i]n addition to complying with the duty of loyalty imposed by law . . . each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like situation would exercise under similar circumstances.”

#### Cemetery Spending

25. Article 15 of the N-PCL requires a New York cemetery corporation to hold its assets in three separate funds dedicated to the cemetery’s current and long-term maintenance and to the perpetual care of individual endowed lots. Two of these — the Cemetery’s Permanent Maintenance and Perpetual Care Funds — form the primary source of investment income available to support long-term Cemetery lot care and will generate the primary source of income available for Cemetery maintenance once remaining vacant lot and niche space is exhausted. N-PCL § 1507 recites express restrictions on how the assets in each of these three funds may be invested and spent, and it instructs that the income arising from perpetual care lot subscriptions in particular “shall be used solely for the perpetual care and maintenance of the lot or plot or parts thereof for which such income has been provided.”

26. N-PCL § 715 requires the Board of a charitable corporation to undertake special review of any transaction that involves the corporation in which a related party — including a director, officer, or relative of a director or officer — has a substantial financial interest. Prior to entering such a transaction, the Board must determine that the transaction is fair, reasonable, and in the corporation’s best interest. Section 715 further requires the Board to consider alternative



transactions where available and to contemporaneously document “the basis for the board or authorized committee’s approval, including its consideration of any alternative transactions.”

#### Enforcement by the Attorney General

27. The N-PCL and EPTL both expressly contemplate action by the Attorney General on behalf of a cemetery corporation in those instances where the corporation is unwilling or unable to satisfy its obligations under New York law.

28. N-PCL § 112(a) authorizes the Attorney General to bring an action: “(1) To restrain a corporation from carrying on unauthorized activities . . . , (4) To procure a judgment removing a director of a corporation for cause . . . , (7) To enforce any right given under this chapter to members, a director or an officer of a charitable corporation. . . .” and (10) “To enjoin, void, or rescind any related party transaction, seek damages and other appropriate remedies, in law or in equity, in addition to any actions pursuant to section 715 (Related party transactions) of this chapter.” The statute instructs that the Attorney General “shall have the same status as such members, director or officer” in seeking to enforce those rights.

29. N-PCL § 706(d) authorizes the Attorney General to bring an action to remove a director for cause. The Court may also bar a director from future service on the board following removal pursuant to this section.

30. Section 8-1.4 of the EPTL authorizes the Attorney General to investigate transactions and relationships among the Cemetery directors to determine whether or not property held for charitable purposes has been and is being properly administered. Section 8-1.4 also empowers the Attorney General to institute proceedings to “secure compliance” with that statute and to “secure the proper administration of any trust, corporation, or other relationship” to which the statute’s provisions apply.

31. Pursuant to N-PCL § 715(f) and EPTL § 8-1.9(c)(4), the Attorney General may bring an action to enjoin, void or rescind any unlawful related party transaction that was not

reasonable or in the best interests of the Cemetery at the time the transaction was approved and may seek both restitution and the removal of trustees or officers involved in connection with such an action. The Attorney General may also require an accounting of the profits earned from such transaction, repayment of those profits to the charitable trust, repayment of the value of the use of the charitable assets, and payment of a penalty amount up to the value of double the amount improperly obtained from the charitable trust.

32. N-PCL § 720 authorizes the Attorney General to bring an action to compel an accounting by any director or officer that has neglected, failed to perform, or otherwise violated their duties in the management and disposition of corporate assets. Section 720 further authorizes the Attorney General to bring an action to set aside an unlawful conveyance or transfer of corporate assets where the recipient of that conveyance knew of its unlawfulness.

33. Venue for this proceeding is properly laid in New York County pursuant to New York Civil Practice Law and Rules § 503 because the Attorney General resides in New York County.

#### STATEMENT OF FACTS

34. The Attorney General began its Investigation with a targeted review of the May 2014 payment to Daniel Austin, Sr. referred by the Division of Cemeteries. Documents and testimony obtained during the Investigation revealed far more extensive misconduct and mismanagement by the Defendant directors.

#### The 2014 Award Reveals a Captive Board

35. In May 2014, Austin, Sr. formally resigned his positions as President and CEO after 24 years as chief executive of the Cemetery. On his announced resignation, the Cemetery paid Austin, Sr. nearly \$900,000. The Cemetery's Financial Statement for 2014 characterized the payment as the liquidation of a retirement rabbi trust created for Austin, Sr.'s benefit, but the terms of that trust agreement provided only an annual retirement pension supplement, payable in monthly

installments. During the five years that followed, Austin, Sr. continued to serve as a salaried Chairman of the Board, received health and insurance employee benefits, and oversaw executive administration of the Cemetery without interruption. None of the Defendants, including Austin, Sr., questioned or even considered the reasonableness or propriety of Austin, Sr.'s sham retirement and the simultaneous pension and salary incomes that followed.

36. Documents obtained during the Investigation indicate that Austin, Sr. earned approximately \$5.4 million in salary for his positions at the Cemetery between 1990 and 2014. His starting Cemetery salary — \$45,000 in 1990 — multiplied by more than seven times to \$325,000 during his tenure as chief executive. In the same period, Austin, Sr. received significant — and singular — supplemental benefits from his role. In 1997, for example, Austin, Sr. requested and received an employment contract from the Cemetery, drafted by Mordente, that guaranteed him a minimum base salary regardless of the Cemetery's financial condition and an annual bonus. Austin, Sr.'s agreement was amended — with Board approval — to increase his compensation three times between 1997 and 2009, and he received a second guarantee in 2004 that provided an annual Chairman salary of \$75,000 following his resignation from the positions of President and CEO. No other executive has received such an agreement from the Cemetery during the 29 years that Mordente has served as its counsel.

37. In 2003, Austin, Sr. obtained an incremental retirement benefit to supplement the pension he would already receive as a member of the Cemetery's defined benefit retirement plan. No other Cemetery employee has received such a benefit during the 29 years that Mordente has served as Cemetery counsel. Austin, Sr.'s 2003 supplemental benefit consisted of a rabbi trust account funded from the Cemetery's general operating funds. The benefit was recorded in a pair of written agreements between Austin, Sr. and the Cemetery and provided Austin, Sr. with an annuity payable in monthly installments during his retirement for the balance of his life (with a survivor benefit for his spouse).

38. The terms of Austin, Sr.'s 2003 agreement specified that funds allocated to the supplemental benefit trust would remain assets of the corporation until disbursed, "subject to the

claims of the Organization's general creditors under federal and state law in the event of Insolvency." The agreement also prohibited payment of benefits from the rabbi trust in the event of a Cemetery insolvency. The account created to fund the supplemental benefit was managed by the same group at Wells Fargo (the Burke Group) that managed the investment of the Cemetery's restricted Perpetual Care and Permanent Maintenance Fund assets.

39. Until 2014, Austin, Sr.'s rabbi trust remained untouched. Cemetery records from 2003 to 2014 do not discuss allowing Austin, Sr. to draw from the account or accrue unpaid benefits while he continued to receive his salary as Chairman, President, and CEO.

40. Austin, Sr. testified during the Investigation that he "wound up retiring when [he] really didn't want to retire," because the Burke Group advisors requested a meeting in April 2014 and described to him the amount of money being generated by his retirement trust account's principal. According to Austin, Sr., the Burke Group informed him that it would be in his "best interest" to retire and claim the full balance of the trust account. Documents obtained during the Investigation reveal that Austin, Sr. had in fact begun preparing to liquidate the trust well before the only recorded Burke Group presentation on April 22, 2014, but there is no record of Austin, Sr. or the Burke Group disclosing those preparations to the full Board.

41. On April 22, 2014, four members of the Board — Austin, Sr., Austin, Jr., Mordente, and Pfail — met in the Cemetery's Board Room. The Burke Group advisors joined the meeting by phone. Meeting minutes for the meeting, titled "Special Meeting of the Executive Committee" and signed by Mordente as Secretary, state that: "[t]he special meeting was called to order by President, Daniel C. Austin, who announced that Vera Princiotta was fully aware of the purpose of the meeting since she orchestrated the idea behind the meeting. The purpose of the meeting was for Daniel C. Austin to announce his resignation from employment at the Cemetery effective May 1, 2014 and to discuss a succession plan." Austin, Sr. "announced that he was told by William J. Burke, Jr., in the presence of all of the attendees . . . that William J. Burke, Jr. [of the Burke Group] told him that he was, in fact, permitted to receive the entire principal balance contained in the account established

pursuant to the [rabbi trust] plan and managed by The Burke Group, and that if he did not retire before sustaining an unforeseen incident resulting in his death, then there would be no benefits under the plan for either him or his wife.” The minutes note: “Mr. Austin stated that he discussed his retirement plan with all of the board members and that they affirmed his decision to retire and his succession plan.”

42. The Cemetery has no independent record of any analysis or rationale for the purported advice from the Burke Group or the Board approval referenced in the April 22, 2014 Special Meeting minutes. Mordente, as Secretary of the Board, did not record in the minutes any analysis or rationale provided by the Burke Group during the meeting. No member of the assembled group asked for or obtained a written explanation from the Burke Group of the representations described in the minutes. The Burke group was not retained by the Board as a compensation consultant concerning Austin, Sr.’s post-employment benefit.

43. Upon learning of Austin, Sr.’s decision to resign as President and CEO, none of the three other Defendants present at the April 22 meeting took steps — either independently or together with the other members of the Board — to evaluate whether the terms of Austin, Sr.’s rabbi trust permitted a lump distribution or required Austin to terminate his paid employment by the Cemetery prior to receiving payment from the trust.

44. Austin, Sr. admitted during the Investigation that the April 22 meeting was not intended to be a formal board meeting to evaluate the propriety of his taking a lump sum distribution from the rabbi trust. He testified as follows:

- Q. Why weren’t the three other board members invited to attend this meeting?
- A. That was an informal get together. It was just to discuss this issue. It wasn’t – the people didn’t get paid to attend. [The Burkes, from Wells Fargo] wanted to come in and make a presentation.
- Q. And is it your testimony that no one ever asked why the Burke Group had called the meeting at the time that it did?
- A. They told me on the phone, they wanted to discuss the Rabbi Trust. That I can remember.

45. Austin, Sr. further acknowledged that the Burke Group had a business interest in advising him to seek a lump sum distribution:

Q. Did [the Burke Group] have any interest in distributing the money at the time that they did as an investment company?

A. Sure, they would.

Q. What would that interest be?

A. Because I gave them the money. What was I going to do with it? I invested it with them.

Q. I see. So the same company that recommended that you take the lump payout when you did then worked as your investment company to invest the proceeds of that payout?

A. That is right.

Q. Is the money still invested with them there now?

A. Yes.

46. On May 1, 2014, Mordente authorized the nearly \$900,000 payment to Austin, Sr. in a letter addressed to the Burke Group on behalf of the Cemetery. The payment represented the entire balance of the trust account created in 2003. Mordente admitted to the Attorney General that he issued his authorization for the liquidation solely in reliance on statements from the Burke Group and without independently considering the terms of Austin, Sr.'s benefit agreement. Mordente stated incorrectly in his May 1 letter that he was writing as "the duly authorized trustee" of the account being liquidated. Mordente had ceased to serve as a trustee for the account years earlier but took no steps to confirm his status prior to identifying himself as a trustee.

47. Austin Sr. testified to the Attorney General that Board approval would have been required for payment of the 2014 award. Mordente admitted, however, that no Board vote to approve the transaction occurred prior to the May 2014 distribution. Mordente did not take any steps to obtain authorization from the Cemetery Board for his May 1 letter and he did not circulate the letter to the Board for review, either before or after its execution.

48. The first disclosure to the full Board regarding Austin, Sr.'s 2014 award appears in the minutes to the June 2014 Board meeting convened nearly five weeks after Austin, Sr. received his payment. Those minutes state: "Mr. Pfail then reported that the funds held in the Rabbi Trust

for the benefit of Mr. Austin were fully distributed to him upon his retirement as President and Chief Executive Officer of the Cemetery. Mr. Pfail also reported that payroll taxes were lawfully deducted prior to distribution and that Mr. Austin will be required to pay income taxes on these funds.” The June 2014 minutes do not record any Board consideration or ratification of the payment.

49. None of the Defendants reviewed or sought any independent legal review of Austin, Sr.’s entitlement to the 2014 payment, despite their role as fiduciaries of the Cemetery. Defendant Anthony Mordente, who has served as paid legal counsel to the Cemetery since 1990, did not opine on Austin, Sr.’s entitlement to the award in his capacity as the Cemetery’s attorney and no member of the Board, including Austin, Sr., asked him to conduct a legal analysis of the award’s permissibility. Mordente did not consult an independent attorney and he testified to the Attorney General that he is not aware of anyone at the Cemetery obtaining legal advice in connection with the award.

50. On August 19, 2014, three months after Mordente authorized the May 2014 distribution, Mordente emailed the Burke Group to ask: “Where in the [trust plan document] does it give the authorization for Lump-Sum Election?” and “Generally, Should a recipient write the board to state their election come separation of service? Example a letter stating ‘I elect a Single Lump-Sum Payment’?”

51. The Burke Group responded to the first question in Mordente’s August 2014 email by incorrectly identifying a term in Austin, Sr.’s agreement with the Cemetery that permitted Austin, Sr. to elect a single-sum distribution (and corresponding reduction to his future benefit payments) of the estimated income taxes that would arise by virtue of the income received under the agreement. Mordente admitted in testimony to the Attorney General that he did not understand the provision that the Burke Group identified to him and took no steps to clarify or review the response after receiving it.

52. On September 24, 2014, Mordente wrote to the Cemetery's auditor, in his capacity as counsel to the Cemetery, to provide information about the May 2014 payment for the Division of Cemeteries audit team. Mordente incorrectly represented to the auditor that the Cemetery had underfunded Austin, Sr.'s trust, and he understated the value of the Cemetery's contribution to the trust by nearly \$250,000. Mordente did not seek or obtain authorization for his September 2014 letter from the Board, and he admitted in testimony to the Attorney General that he took no steps to confirm the accuracy of his letter's explanation for the May 2014 payment. Defendants Austin, Sr., Austin, Jr., and Pfail were each copied on Mordente's letter and none took steps to confirm or correct its content in September 2014 or at any time afterwards.

53. Austin, Sr. claimed the right to receive a 2014 lump sum payout in connection with a purported retirement, but documents and testimony obtained during the Investigation demonstrate that he continued to serve in a full-time, paid executive role at the Cemetery for five years afterwards, insisted throughout on being treated as an "employee," and enjoyed considerable benefits. Annual Form 990 tax filings prepared by the Cemetery state that Austin, Sr. worked an average of 40 and 35 hours per week in 2014 and 2015 — *after* having activated a monthly retirement benefit, rolled-over his Cemetery 401-k account, and personally reinvested under his own name the entire balance of the Cemetery's liquidated rabbi trust. In 2015, Austin, Sr. reported working 10 hours per week more than CEO Anthony Mordente and only 2.5 hours per week less than his son, then-President Daniel Austin, Jr.

54. At a Board meeting on June 3, 2015, Austin, Sr. "vehemently disagreed" with being characterized as a "consultant" for the Cemetery: he reported during the meeting that he had "recently bec[ome] aware that his position at the Cemetery was changed from 'employee' to 'consultant' without his knowledge," and he argued that this re-designation "violated his employment contract with the Cemetery and [was] a breach of that contract inasmuch as the employment contract expressly provide[d] that [he] shall continue to serve the Cemetery upon retirement in the capacity of Chairman of the Board at a base salary with portfolio." None of the other Defendants present took steps to identify or review the agreement that Austin, Sr. described



in the June 2015 meeting. The Defendants responded by voting unanimously at the meeting — upon a motion by Princiotta and Mordente — “that Mr. Austin be immediately re-instated as an employee of the Cemetery if he requested.”

55. Between May 2014 and March 2019, Austin, Sr.’s purported retirement period, the Cemetery continued to pay Austin, Sr. an annual salary and paid his long-term care and life insurance premiums as an employee. The Cemetery also provided Austin, Sr. with a car for his exclusive use. At no point during this period did the Defendants question, review, or object to the compensation and benefits being paid to Austin, Sr. from the Cemetery’s charitable assets. None of the Defendants considered whether Austin, Sr. should be a salaried Cemetery employee at the same time that he received monthly pension payments and the investment income from a roughly \$900,000 retirement award.

56. Austin, Sr. not only continued to receive substantial compensation after his purported retirement, he also continued to control Cemetery operations. Contemporaneous administrative memoranda produced to the Attorney General during the Investigation indicate that, as of February 2018, Austin, Sr.’s approval was required for: transfers from the Cemetery investment portfolio to make payroll or pay Cemetery vendor bills; equipment purchases and repairs; development of new lots for sale; vendor selection and outside contractor agreements; contact of any kind with unionized Cemetery staff; and adjustments to administrative staff hours.

#### The Defendants Failed to Exercise Basic Internal Controls

57. Austin, Sr. could not have obtained the payments that he did without a complete failure of internal controls at the Cemetery. During the period from 2014 to 2018, the Defendants received multiple, express reminders from both the Cemetery’s auditor and investment advisor about their fiduciary obligation to operate (i) in good faith, (ii) in a manner that they reasonably believed to be in the best interest of the corporation, and (iii) with such care, including reasonable inquiry, as an ordinarily prudent person would use in similar circumstances. Despite these warnings, the Attorney General’s Investigation found that, as a general practice, the Defendants

exercised only cursory oversight of the Cemetery's finances and routinely ignored basic internal controls to the Cemetery's detriment. The Defendants' conduct routinely violated the plain terms of the Cemetery conflict of interest policy and the standards imposed by N-PCL Section 715.

58. The Attorney General's Investigation found that the Defendants conducted no supervision, formal or informal, of the work performed by the Cemetery's executive team and regularly approved executive salary raises without any recorded basis for the increases and in spite of mounting cost pressures on the Cemetery's lawfully available operating funds. These findings were corroborated by the D'Arcangelo forensic review. D'Arcangelo's February 2019 report noted that:

- “[F]ormal compensation agreements do not exist for those in senior level management positions;”
- Authorization for particular compensation awards is only sporadically recorded, if at all, in Board meeting minutes; and
- “There does not appear to be a consistent program in place to determine executive and management compensation as it relates specifically to retention bonuses, retirement and deferred compensation plans, general performance bonuses, fringe benefits, severance, etc., whereby the aforementioned items are clearly stated, approved and monitored.”

59. Defendants Princiotta, Mordente, Pfail, Lodato, and Michel also permitted Austin, Sr. and Austin, Jr. to continue unchallenged as Cemetery Chairman and President, despite extraordinary misconduct that included:

- Austin, Jr.'s decision to secretly hire Treasurer Donald Pfail as a Cemetery employee in 2014 after having already concluded that Pfail was “useless;”
- Austin, Jr.'s diversion of nearly \$63,000 over a four-year period from Cemetery operating funds beginning in 2014;
- Austin, Sr.'s proposal in March 2018 that Board meeting records be deliberately edited to conceal discussion of Austin, Jr.'s theft and continued employment over Board objections;
- a June 2018 attempt by both Austins to initiate merger talks on the Cemetery's behalf without the Board's knowledge; and
- a July 2018 physical altercation between Austin, Jr. and his fellow Board members during a Board meeting at which Austin, Jr. was in possession of a firearm.

60. The Defendants' conduct between 2014 and 2018 repeatedly violated an internal

conflict of interest policy that each Defendant endorsed annually as required by the N-PCL. That policy, adopted in 2014 as required by N-PCL Section 715-a, requires Cemetery officers to observe “high standards of business and personal ethics in the conduct of their duties and responsibilities” and it expressly identifies “acts that mix the personal or financial interests of an Interested Person with the interests of the Corporation” as indicative of a prohibited conflict of interest. The policy provides a detailed procedure for reviewing and documenting potential conflicts, and it requires periodic reviews to “ensure the [Cemetery] operates in a manner consistent with charitable purposes and does not engage in activities that could be construed as a violation of Section 715 of the [N-PCL].” The policy separately instructs that periodic reviews must expressly consider “[w]hether compensation arrangements and benefits are reasonable, based on competent survey information, and [the] result of arm’s length bargaining.”

61. No periodic review of compensation, benefits, or potential conflicts occurred at the Cemetery between 2014 and 2018. The Defendants did not identify or consider a conflict of interest pursuant to the Cemetery’s policy even when they appointed fellow members of the Board with no relevant expertise or qualification to paid executive roles without considering a single alternative candidate in 2014.

62. The Cemetery also paid professional fees to Defendants Pfail and Mordente for years, but the Defendants took no steps to evaluate the reasonableness of the amounts paid or the value of the services obtained. Mordente testified to the Attorney General that in the nearly 30 years he has served as paid counsel, no one at the Cemetery has ever requested information or documentation to support the amounts billed for his work and no one has disputed the total amounts paid. Between 2013 and 2018, Cemetery records indicate that the Cemetery paid more than \$420,000 in professional fees to Pfail and Mordente, while simultaneously paying them an additional \$121,000 in director fees. Beginning in 2014, both men also received employee salaries from the Cemetery, with Mordente receiving an annual salary of \$100,000 beginning in June 2014 for his position as Cemetery CEO. These payments, executed without any Board review or objective determination of fairness, all violated the express terms of N-PCL Section 715 and the

Cemetery's conflict of interest policy.

63. The Cemetery's by-laws authorize the Board to invest in "such property, real, personal, or otherwise, including stocks, bonds or other securities, as the Board . . . may deem desirable." Between 2014 and 2018, the Cemetery maintained a long-standing practice of using restricted Cemetery assets to provide private mortgage loans to individual borrowers without any Board review of the collateral obtained, the loan terms offered, or the relative value of investment in mortgages versus traditional securities. The Cemetery funded its mortgage loans using restricted trust assets, which are subject to the prudent institutional funds investment standards in N-PCL Article 5-A.

64. Cemetery records obtained during the Investigation confirm that the Defendants were on notice of their obligation to manage the Cemetery's mortgage lending responsibly. In March 2009, minutes of a Board meeting attended by Austin, Sr., Austin, Jr., Mordente, Princiotta, Pfail, and Lodato noted that the Cemetery "should establish a standard to calculate the creditworthiness of the individual or company in order to be more objective in its evaluation of a request for a mortgage." Later in the same meeting, the Cemetery's outside auditor remarked that, in his experience, fewer cemeteries continued to rely on mortgage lending as an investment strategy and that, "if the Cemetery decide[d] to go ahead with making more mortgage loans, then it must be done carefully and handled properly with a sufficient cushion between the debt to equity ratio."

65. Despite these warnings, Defendant Anthony Mordente — who served as paid Lender's Counsel, in addition to serving as CEO and outside Cemetery counsel, in connection with the Cemetery's mortgage lending — testified during the Investigation that the Cemetery does not maintain written standards for the solicitation, selection, and approval of a new prospective borrower or loan: each loan is evaluated "on a case-by-case basis" and no record exists to identify uniform lending standards for the Cemetery's mortgage portfolio. Defendant Joseph Lodato, who served as the Cemetery's Treasurer until approximately June 2019, testified that he could not

identify the individuals at the Cemetery responsible for approving a Cemetery loan.

66. During the period from 2015 to 2018, the Cemetery lent restricted trust assets directly to related parties without complying with the requirements of N-PCL § 715.

67. In July 2015, the Cemetery closed an interest-only loan of \$400,000 to the daughters of Defendant Michael Michel. At the time Mordente executed a March 2015 commitment letter for the loan, the property to be developed with loan proceeds belonged to Michel himself. Board meeting minutes for the quarterly meetings convened in December 2014 and March 2015 make no mention of the March 2015 loan commitment: Mordente first reported the loan to the Board in June 2015, three months after his commitment letter, as an already-agreed loan, and he did not identify the “borrowers who intend to build a house in Far Rockaway.” The June 2015 minutes do not record Board consideration of or inquiry into the loan terms or the borrowers’ identity or relationship to a sitting board member and they do not include a vote to approve the loan.

68. In March 2016, the Cemetery’s investment advisor (the Burke Group) warned that the Cemetery’s private mortgage lending had generated “discretionary income” but that “the Board members must be sure to exercise their fiduciary responsibility to justify investment strategy as well as the cost of the investments.” No Defendant took steps to review or consider the Cemetery’s lending practices in response to the Burke Group’s 2016 instruction.

69. In July 2017, the Cemetery loaned \$500,000 to Defendant Joseph Lodato’s brother, at Mr. Lodato’s request. There is no record in the meeting minutes for June or September 2017 of the members of the Board considering the loan terms, addressing the identity of the borrower, his relationship to Lodato and the resulting conflict of interest, or voting to approve Mr. Lodato’s loan. Meeting minutes dated eight months later, in March 2018, refer to the loan only as “the Willow Ridge Drive mortgage.” Asked whether the Cemetery is permitted to lend charitable assets to a sitting director’s sibling, Defendant Vera Princiotta testified during the Investigation that: “If they’re not living in the same household, they’re two different people, I would assume there’s no

conflict of interest there.”

70. The Cemetery’s 2015 and 2017 loans to the family relatives of two sitting directors together withdrew nearly \$1 million from the Cemetery’s restricted trust assets for the personal use and benefit of related parties. The Cemetery files for these loans do not include any record of the Defendants considering investment alternatives or assessing the reasonableness of particular loan terms to the Cemetery as required by N-PCL § 715. The loans also violated the plain terms of the Cemetery’s conflict of interest policy.

71. In August 2018, the Defendants’ failure to observe any reasonable standard of conflict review was in plain view when Defendants Princiotta, Mordente, Lodato, and Michel permitted Austin, Sr. to personally repay monies stolen by his son without interest or any admission of wrongdoing and without any subsequent examination of Austin, Sr.’s continued role as Chairman. Indeed, Mordente first discovered Austin, Jr.’s four-year theft nine months earlier in 2017 but admitted during the Investigation that he waited months before informing the full Board because Austin, Sr. assured Mordente that “it would be taken care of.” Mordente further testified that the full Board learned of Austin, Jr.’s diversion at its March 2018 meeting but declined to terminate Austin, Jr. at Austin, Sr.’s urging and excluded that portion of its discussion from the meeting’s minutes.

#### The Defendants’ Conduct Resulted in Substantial Waste of Charitable Cemetery Assets

72. During the last five years, operating expenses driven primarily by salary, fee and miscellaneous expense obligations at the Cemetery rose steadily without any intervention by the Defendants and in spite of express warnings from the Cemetery’s outside auditor.

73. In 2016, executive salaries, professional fees, director fees and office expenses for the Cemetery totaled approximately \$660,000 and consumed almost half (45%) of the total revenue from grave and niche sales for the year. In 2017, the same expenses totaled \$729,320 and represented 54% of the total revenue from grave and niche sales for the year.

74. By 2013, the Cemetery's outside auditor had identified operating costs as a concern and made explicit recommendations to the Defendants that the Cemetery take steps to reduce administrative spending. Despite multiple such reports between 2013 and 2019, the Defendants took no steps to address increasing administrative cost and, in some cases, defied explicit recommendations about spending from its auditor. In March 2015, auditor Andrew Muhlstock instructed the Defendants that: "The Cemetery needs to continue to explore ways to decrease its operating costs."

75. The Board terminated Pfail from his positions at the Cemetery in August 2016 for failure to meet his obligations as Director and Treasurer. In December 2016, Austin, Sr. recommended to the Board that it refrain from replacing Pfail and leave Pfail's Board position open to obtain "monetary savings" that he believed would be in "the best interest of the Cemetery." Later in the same meeting, however, Vice President Vera Princiotta proposed a "compensation increase" for Austin, Sr., Austin, Jr., and Mordente solely because "they ha[d] not had any increase in three years." Austin, Sr. had ostensibly been retired for two and a half years at the time of Princiotta's proposal. Princiotta and the two remaining directors voted to approve raises for all three individuals without discussion.

76. Three months later, in March 2017, auditor Andrew Muhlstock "reiterated" to the Board that then-President Austin, Jr. should "continue to moderate the Cemetery's overhead and even consider eliminating certain projects that the Cemetery may have on hand due to the fact that money [was] 'tight.'" The Board took no steps to address Cemetery payroll costs in response to Muhlstock's warning.

77. In March 2018, auditor Muhlstock reported to the Board that payroll costs at the Cemetery had swollen to nearly 80% of the Cemetery's operating expenses. He warned that the Cemetery should "examine ways to reduce its overhead" because the General Fund used to pay ordinary operating costs for the Cemetery "[had] lost approximately the sum of \$400,000.00 [in 2017] and . . . could be wiped out if that trend continues." The Defendants took no steps to address

Cemetery payroll costs in response to Muhlstock's warning and instead continued to pay hundreds of thousands of dollars in executive salary to Austin, Sr. (purportedly retired four years earlier), Austin, Jr. (then-recently discovered to have diverted four years' worth of self-awarded "bonuses"), and Mordente (separately being paid as outside counsel and director). The Board fired Muhlstock without explanation six months later in September 2018.

#### Unlawful Invasion of the Perpetual Care Fund

78. The Defendants supported their overspending throughout their tenure with a habit of regular incursions into the Cemetery's restricted Perpetual Care Fund. This practice is expressly prohibited by the plain language of N-PCL Article 15.

79. N-PCL Section 1507(c) requires a cemetery corporation to keep, "separate and apart from its other funds, all moneys and property received . . . for the perpetual care of any lot," and it instructs in plain language that the contents of the Perpetual Care Fund represent assets held in trust, so that the income from those funds shall be used "solely for the perpetual care and maintenance of the lots" while the principal remains inviolate.

80. The Cemetery recites these restrictions annually in Note 1 to its Financial Statements, which states: "The perpetual care fund consists of funds endowed to The Lutheran Cemetery for the annual care of graves. The principal of this fund is permanently restricted and only the income therefrom is applied against yearly maintenance charges."

81. Despite its acknowledgment that Perpetual Care Fund assets exist solely for the benefit of individual subscription lots and may not be used for general administrative expenses, the Board routinely violated this prohibition between 2014 and 2019 by permitting withdrawals from the Cemetery's Perpetual Care trust accounts to fund general Cemetery operating expenses.

82. The Defendants were informed of their obligation to refrain from spending Perpetual Care assets on ordinary administrative operating expenses and ignored multiple explicit warnings from the Cemetery's outside auditor. In March 2012, Defendant Donald Pfail reported



to the Board that the Cemetery's General Fund — the unrestricted fund available to pay ordinary operating costs including salary, vendor expenses, utility costs, and machine repair — owed \$600,000 to the Perpetual Care Fund. In June 2013, Austin, Sr. reported a recommendation by auditor Andrew Muhlstock that the Board focus on growing its Perpetual Care Fund.

83. In March 2015, the Cemetery's auditor reported directly to the Defendants that the Cemetery "must decrease the amount of money withdrawn from the perpetual care fund to cover operating expenses."

84. In March 2017, the Cemetery's auditor reported to the Board that the Cemetery's General (Operating) Fund "owe[d] the Perpetual Care Fund the approximate sum of One Million (\$1,000,000.00) Dollars."

85. Board meeting minutes for March 2018 record that the Cemetery's auditor "cautioned the Cemetery that it is drawing funds from the Perpetual Care Fund in an amount greater than it is permitted to take."

86. The Cemetery Financial Statements for each of the years from 2014 to 2017 confirm the continued drain from the Perpetual Care Fund: the audited statement of Cemetery Assets recorded annual inter-fund receivable amounts owed to the Perpetual Care Fund of \$962,660 (2013), \$1.3 million (2014), \$977,363 (2015), \$1.19 million (2016) and \$960,021 (2017) for the years 2013 to 2017, respectively.

### CLAIMS

#### FIRST CAUSE OF ACTION

#### **Breach of Fiduciary Duty and Waste – N-PCL §§ 717 & 720**

87. The Attorney General repeats and re-alleges the preceding paragraphs, as though fully set forth herein.

88. The Defendants were each directors of the Cemetery and, as such, owed fiduciary duties to the Cemetery pursuant to N-PCL § 717.

89. The Defendants failed to discharge their duties as directors with the degree of care, skill, prudence, diligence, and undivided loyalty required of them in that, among other things, they: (a) failed to monitor basic aspects of the Cemetery's financial operation and reporting, including the terms of multiple significant Cemetery transactions; (b) failed to address repeated warnings from the Cemetery's outside auditor regarding excessive operating cost and unlawful use of restricted Cemetery funds; (c) failed to supervise the Cemetery's executive team despite multiple events signaling significant executive misconduct; (d) permitted the serial diversion of Cemetery assets for the personal benefit of individual executives and officers; (e) failed to timely safeguard Cemetery accounts and assets following the discovery of multiple diversions by the Cemetery's then-President, Daniel Austin, Jr.; (f) enabled efforts by the Cemetery Chairman to ignore and/or conceal executive misconduct during the Investigation; and (g) knowingly falsified Board meeting minutes to hide Board discussion of executive misconduct during the Investigation.

90. By the foregoing acts and omissions, the Defendants breached the fiduciary duties they owed to the Cemetery, and are thus liable under N-PCL § 720(a)(1)(A) and (a)(1)(B) to account for their conduct in the neglect and violation of their duties in the management and disposition of corporate assets. The Defendants should be enjoined from serving as officers, directors, or trustees, or in any similar capacity, of any non-profit charitable organization incorporated or authorized to conduct business in New York.

#### SECOND CAUSE OF ACTION

#### **Failure to Properly Administer Charitable Assets and Waste – EPTL § 8-1.4 & § 8-1.5**

91. The Attorney General repeats and re-alleges the preceding paragraphs, as though full set forth herein.

92. As directors of the Cemetery, each of the Defendants was a trustee of charitable assets under EPTL § 8-1.4 and, as such, was responsible for the proper administration of charitable assets. The Defendants failed to properly administer the Cemetery's charitable assets

in that, among other things, they: (a) failed to discharge their fiduciary duties to the Cemetery with the degree of care, loyalty, and obedience that was required of them; (b) diverted charitable assets for improper or unnecessary purposes by causing and/or permitting the Cemetery to wrongfully distribute charitable assets in the form of an unauthorized cash benefit to Defendant Daniel Austin, Sr. in 2014; (c) caused and/or permitted the Cemetery to wrongfully distribute charitable assets to Defendants Austin, Sr., Austin, Jr., and Mordente; (d) caused and/or permitted the Cemetery to wrongfully distribute charitable assets for the use and benefit of the personal relatives of individual directors; and (e) repeatedly caused and/or permitted the Cemetery to spend down restricted trust funds in order to pay the Cemetery's operating expenses.

93. By the foregoing acts and omissions, the Defendants breached the fiduciary duties they owed under the EPTL and should be: ordered to account for their conduct in the waste of assets and/or negligent failure to act; ordered to pay damages resulting from such waste; and enjoined from serving as officers, directors, trustees, or in any other capacity as a fiduciary of any not-for-profit or charitable organization incorporated or authorized to conduct business in the State of New York.

### **THIRD CAUSE OF ACTION**

#### **Failure to Properly Administer Charitable Assets and Waste – N-PCL § 1507**

94. The Attorney General repeats and re-alleges the preceding paragraphs, as though fully set forth herein.

95. As directors of the Cemetery, each of the Defendants was a trustee and custodian of the perpetual care fund required to be maintained pursuant to N-PCL § 1507 for the perpetual care and maintenance of individual endowed lots within the Cemetery property. The Defendants caused and/or permitted unlawful withdrawals from that fund in violation of N-PCL § 1507 through a pattern and practice of transferring monies from the Cemetery's restricted Perpetual

Care Fund for use in meeting ordinary operating costs unrelated to the care of Cemetery lots associated with a perpetual care subscription.

96. The Defendants failed to reduce or curtail the Cemetery's unlawful use of Perpetual Care Fund assets despite multiple warnings from the Cemetery's outside auditor and repeated Board discussion of the amounts owed to the Perpetual Care Fund by the Cemetery's General Fund.

97. By the foregoing acts and omissions, the Defendants caused the Cemetery to violate N-PCL § 1507 and are thus liable to the Cemetery for the amounts lost.

**FOURTH CAUSE OF ACTION**  
**Wrongful Related Party Transactions – N-PCL § 715(f) and EPTL § 8-1.9**  
**(Against Defendant Daniel C. Austin, Sr.)**

98. The Attorney General repeats and re-alleges the preceding paragraphs, as though fully set forth herein.

99. Defendant Daniel Austin, Sr. caused the Cemetery to enter into transactions in which he had a substantial financial interest without obtaining authorization from the Board for those transactions or a determination by the Board that the transactions were fair, reasonable, and in the Cemetery's best interest at the time of the transaction. These transactions included payment of an unauthorized cash award in May 2014 and payment of an annual "base salary with benefits" subsequent to his purported retirement from the Cemetery. Austin, Sr.'s conduct was willful and intentional with respect to these transactions in that as Chairman, President and Chief Executive Officer of the Cemetery he authorized payments he fully understood and intended to derive personal financial benefits from the transactions.

100. By the foregoing acts, Defendant Austin, Sr. is liable under N-PCL § 715(f) and EPTL § 8-1.9 to: (a) account for any profits made from the transactions and pay those profits to the Cemetery; (b) return the assets lost to the Cemetery as a result of these transactions, together with any income or appreciation lost to the Cemetery by reason of such transaction; (c) pay the

Cemetery the value of the use of the charitable assets used in these transactions; and (d) pay an amount up to double the amount of the benefit improperly obtained.

**FIFTH CAUSE OF ACTION**  
**Wrongful Related Party Transactions – N-PCL § 715(f) and EPTL § 8-1.9**  
**(Against Defendant Daniel C. Austin, Jr.)**

101. The Attorney General repeats and re-alleges the preceding paragraphs, as though fully set forth herein.

102. Defendant Daniel Austin, Jr. caused the Cemetery to enter into transactions in which he had a substantial financial interest without obtaining authorization from the Board for those transactions or a determination by the Board that the transactions were fair, reasonable, and in the Cemetery's best interest at the time of the transaction. These transactions consisted of at least five separate payments of undocumented cash bonuses during his term as President of the Cemetery. Austin, Jr.'s conduct was willful and intentional with respect to these transactions in that he fully understood and intended to derive personal financial benefits from the transactions.

103. By the foregoing acts, Austin, Jr. is liable under N-PCL § 715(f) and EPTL § 8-1.9 to: (a) account for any profits made from the transactions and pay those profits to the Cemetery; (b) return the remainder of any unreturned assets lost to the Cemetery as a result of these transactions, together with any income or appreciation lost to the Cemetery by reason of such transaction; (c) pay the Cemetery the value of the use of the charitable assets used in these transactions; and (d) pay an amount up to double the amount of the benefit improperly obtained.

**SIXTH CAUSE OF ACTION**  
**Wrongful Related Party Transactions – N-PCL § 715(f) and EPTL § 8-1.9**  
**(Against Defendant Anthony Mordente)**

104. The Attorney General repeats and re-alleges the preceding paragraphs, as though fully set forth herein.

105. Defendant Anthony Mordente caused the Cemetery to enter into transactions in which he had a substantial financial interest without obtaining authorization from the Board for

those transactions or a determination by the Board that the transactions were fair, reasonable, and in the Cemetery's best interest at the time of the transaction. These transactions included monthly retainer payments and mortgage closing fees beginning in at least 2014 for unidentified professional services to the Cemetery. Mordente's conduct was willful and intentional with respect to these transactions in that he fully understood and intended to derive personal financial benefit from the transactions.

106. By the foregoing acts, Mordente is liable under N-PCL § 715(f) and EPTL § 8-1.9 to: (a) account for any profits made from the transactions and pay those profits to the Cemetery; (b) return the assets lost to the Cemetery as a result of these transactions, together with any income or appreciation lost to the Cemetery by reason of such transaction; (c) pay the Cemetery the value of the use of the charitable assets used in these transactions; and (d) pay an amount up to double the amount of the benefit improperly obtained.

**SEVENTH CAUSE OF ACTION**  
**Wrongful Related Party Transactions – N-PCL § 715(f) and EPTL § 8-1.9**  
**(Against All Directors)**

107. The Attorney General repeats and re-alleges the preceding paragraphs, as though fully set forth herein.

108. The Defendants caused the Cemetery to enter into transactions in which related parties had a substantial interest without obtaining authorization from a majority of disinterested directors based on a determination that the transactions were fair, reasonable, and in the Cemetery's best interest at the time of the transaction. Specifically, the Defendants permitted: (i) a personal mortgage loan in the amount of \$400,000 to the daughters of Defendant Michael Michel in July 2015 and (ii) a personal mortgage loan in the amount of \$500,000 to the brother of Defendant Joseph Lodato in July 2017. The Defendants permitted both loans without considering alternative transactions available to the Cemetery and without documenting a basis for approval, including a review of alternatives considered, as required by N-PCL § 715(f).

109. The Defendants' conduct was willful and intentional with respect to these transactions in that they fully understood and intended the financial benefits to be derived by related parties from the transactions.

110. By the foregoing acts, the Defendants are liable under N-PCL § 715(f) and EPTL § 8-1.9 to: (a) account for any personal profit obtained from the loans and pay that profit to the Cemetery; (b) return the assets lost to the Cemetery as a result of these transactions, together with any income or appreciation lost to the Cemetery by reason of such transaction; (c) pay the Cemetery the value of the use of the charitable assets used in these transactions; and (d) pay an amount up to double the amount of the benefit improperly obtained.

**EIGHTH CAUSE OF ACTION**  
**Breach of Fiduciary Duty**  
**(Against Defendants Daniel Austin, Sr., Daniel Austin, Jr. and Anthony Mordente)**

111. The Attorney General repeats and re-alleges the preceding paragraphs, as though fully set forth herein.

112. Beginning in 2014, Defendants Daniel Austin Sr., Daniel Austin, Jr., and Anthony Mordente served as co-executives of the Cemetery: Austin, Sr. served in a paid position pursuant to an Employment Agreement drafted by Mordente, and Austin, Jr. and Mordente served as President and Chief Executive Officer, respectively. Through these officer roles, each owed fiduciary duties of loyalty and good faith to the Cemetery.

113. Beginning in 2014 and continuing through at least August 2018, Austin Sr., Austin, Jr., and Mordente breached their duties of loyalty and good faith to the Cemetery in that, among other things, they: (a) permitted the serial diversion of Cemetery assets for their personal benefit, including by enabling Austin, Sr. to divert the contents of a supplemental retirement trust even as he continued to be employed by the Cemetery; (b) failed to timely safeguard Cemetery accounts and assets following the Board discovery of multiple diversions by then-President, Austin, Jr.; (c) enabled efforts by Austin, Sr. to ignore and/or conceal his son's misconduct

during the Investigation; and (d) knowingly falsified Board meeting minutes to hide Board discussion of President Daniel Austin, Jr.'s misconduct during the Investigation.

114. By the foregoing acts and omissions, Austin, Sr., Austin, Jr. and Mordente breached the fiduciary duties of loyalty and good faith they owed to the Cemetery as employees and are thus liable to return amounts earned in salary from the Cemetery during the period in which they breached those duties.

**PRAYER FOR RELIEF**

Plaintiff requests judgment against Defendants as follows:

A. Removing Defendants Mordente, Princiotta, and Lodato for cause and barring all Defendants from future service as an officer, director, trustee or other fiduciary of any not-for-profit or charitable organization incorporated or authorized to conduct business in New York;

B. Directing the Defendants to account for their conduct in the failure to perform their duties in the management of charitable assets, to make full restitution for waste and misuse of charitable assets, and to pay damages resulting from the breach of fiduciary duties;

C. Directing Defendant Daniel Austin, Sr. to account for benefits obtained through improper related-party transactions with the Cemetery and to pay an amount up to double the amount of benefits improperly obtained through self-dealing transactions;

D. Directing Defendant Daniel Austin, Jr. to account for benefits obtained through improper related-party transactions with the Cemetery and to pay an amount up to double the amount of benefits improperly obtained through self-dealing transactions;

E. Directing Defendant Anthony Mordente to account for benefits obtained through improper related-party transactions with the Cemetery and to pay an amount up to double the amount of benefits improperly obtained through self-dealing transactions;

F. Directing Defendants Daniel Austin, Sr., Daniel Austin, Jr. and Anthony Mordente to make full restitution for the amounts received in salary and other compensation



during the period, beginning no later than May 1, 2014, in which they breached their duties of loyalty and good faith as Cemetery employees;

G. Rescinding the Cemetery's 2017 loan to related party Vincent Lodato;

H. Restraining the Cemetery from payment of future salary amounts to Anthony Mordente; and

I. Granting such other and further relief as is just and proper.

Dated: New York, New York  
September 3, 2019

**LETITIA JAMES**  
Attorney General of the State of New York  
*Attorneys for Plaintiff*

By: \_\_\_\_\_



Catherine Suvari  
Assistant Attorney General  
Charities Bureau  
28 Liberty Street  
New York, New York 10005  
Tel. (212) 416-6172

VERIFICATION

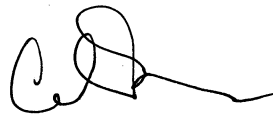
STATE OF NEW YORK        }  
  } ss.:  
COUNTY OF NEW YORK     }

CATHERINE SUVARI, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Letitia James, Attorney General of the State of New York (the "Attorney General"). I am duly authorized to make this Verification.

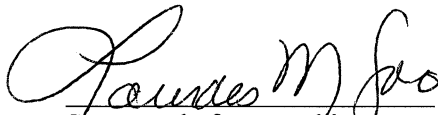
I have read the foregoing complaint and am acquainted with the facts alleged therein based upon the Attorney General's investigation of the transactions upon which the complaint is based, the annual filings and other reports made by the Lutheran All Faiths Cemetery with the New York State Division of Cemeteries, and the investigative materials contained in the files of the Attorney General's office. To my knowledge based on such acquaintance with the facts, the complaint is true.

The reason this Verification is not made by Plaintiff is that Plaintiff is a body politic and the Attorney General is its duly authorized representative.



\_\_\_\_\_  
CATHERINE SUVARI  
Assistant Attorney General

NOTARY PUBLIC



Sworn to before me this  
3rd day of September, 2019

LOURDES M. SOTO  
NOTARY PUBLIC OF THE STATE OF NY  
NO. OJS04612108  
COMMISSION EXPIRES 10/16/2021