

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**        **Deborah Platt Majoras, Chairman**  
                                 **Pamela Jones Harbour**  
                                 **Jon Leibowitz**  
                                 **William E. Kovacic**  
                                 **J. Thomas Rosch**

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**In the Matter of** )  
 )            **Docket No. C-3869**  
**Service Corporation International,** )  
                                 **a corporation.** )  
\_\_\_\_\_ )

**ORDER TO SHOW CAUSE AND ORDER MODIFYING ORDER  
[Public Record Version]**

The Commission’s Decision and Order in Docket C-3869 (“Order”) was issued on April 22, 1999. On February 16, 2006, Respondent Service Corporation International (“Respondent” or “SCI”) filed a Notification and Report Form (“Notification”) pursuant to Paragraph IV of the Order, informing the Commission of its intent to exercise its foreclosure rights under the governing mortgages of certain funeral home properties located in Columbus, Georgia, and Phenix City, Alabama, currently owned by Memorial Operations Inc. (“Memorial”).<sup>1</sup> SCI, the nation’s largest chain of funeral homes and cemeteries, already owns and operates funeral service businesses located in Columbus, Georgia, and in Phenix City, Alabama. The Commission, having initiated an investigation of the proposed exercise of foreclosure rights, now issues this Order to Show Cause and Order Modifying Order (“Modifying Order”).

The Complaint in this matter arose out of SCI’s acquisition of Equity Corporation International (“ECI”), which was the nation’s fourth largest chain of funeral homes and

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<sup>1</sup> Paragraph IV of the Order requires Respondent, among other things, to file a Notification with the Commission prior to acquiring any stock, share capital, equity or other interest in any concern engaged in the provision of funeral services, as defined, in specified relevant local geographic areas, including Columbus, Georgia, and Phenix City, Alabama. Order ¶ IV.A.1.(a)

cemeteries prior to the acquisition. The Complaint charged that SCI's acquisition of ECI would lessen competition in several relevant markets, including the provision of funeral services in Columbus, Georgia, and Phenix City, Alabama, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint ¶¶ 8, 9(a), 13 & 14. The Complaint alleges that the relevant funeral service markets, including the market consisting of Columbus, Georgia, and Phenix City, Alabama, were highly concentrated and that entry into these markets was difficult and would not be timely, likely or sufficient to prevent the anticompetitive effects that would otherwise result from the acquisition. Complaint ¶¶ 11, 12. At the time of the Complaint, both SCI and ECI owned two funeral homes in the Columbus-Phenix City market. In addition, SCI held the governing mortgages of the Memorial funeral homes in the market.

SCI consented to the Order addressing the competitive concerns arising from the acquisition. The Order required SCI, among other things, to divest funeral service assets and businesses in several relevant local geographic areas, including the Columbus, Georgia, and Phenix City, Alabama, market. SCI was required to divest the ECI funeral homes in the Columbus-Phenix City Market. SCI has fully complied with its divestiture obligations under the Order. The prior notification requirement in Paragraph IV of the Order addressed concerns that, given the small size of transactions that could have adverse competitive effects in the local geographic markets in issue in this case, there was a credible risk that, but for the requirement, SCI could engage in future anticompetitive mergers that would fall below the Hart-Scott-Rodino Act premerger reporting threshold. As the Commission explained in the Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions ("Prior Approval Policy Statement"), the need for a prior notification requirement "will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors." *See* Prior Approval Policy Statement, 60 Fed. Reg. 39,745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

Information contained in SCI's Notification and supplemental submissions, and other information available to the Commission, indicates that competitive conditions in the funeral service market in Columbus, Georgia, and Phenix City, Alabama, remain similar to the conditions that existed when the Commission ordered divestitures in 1999. It further appears there is reason to believe that Respondent's exercise of its foreclosure rights in a manner that maintains control of the Memorial funeral service properties in Phenix City and Columbus would have a competitive impact similar to that of the original SCI-ECI transaction in the Columbus-Phenix City area. SCI also holds the mortgage on a third funeral home owned by Memorial, the Pearson-Treadwell Funeral Home in Blackshear, Georgia. The Pearson-Treadwell home is not in a geographic market relevant to this Order but it is managed jointly with the Columbus and Phenix City homes. SCI has represented that it has no desire to own, control or retain an interest in the Memorial funeral home properties; rather, it seeks to execute a sale of the properties that would result in proceeds to be credited toward the underlying loan obligations of Memorial to SCI. To facilitate such a sale, SCI seeks to exercise its foreclosure rights with respect to such properties and has agreed to be bound by a further order to divest.

In view of the foregoing, the Commission has determined in its discretion that it is in the public interest to reopen the proceeding in Docket No. C-3869, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 CFR §3.72(b), and to modify the Order in this case by adding the following provisions, set forth as Paragraph VIII, which, among other things, require Respondent immediately to hold separate and to divest, through a trustee, any Memorial properties that it obtains pursuant to foreclosure on the mortgages governing such properties, or through any other means.

In addition, the Order contains a typographical error in the seventh and final paragraph of the Order, which is numbered "VI" and should be numbered "VII." This typographical error in the Order should also be corrected.

Respondent SCI has responded that it consents to the changes contained in this Modifying Order, and has waived any further rights it may have under Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R § 3.72(b). Accordingly,

**IT IS ORDERED** that this matter be, and it hereby is, reopened; and

**IT IS FURTHER ORDERED** that the Order in Docket No. C-3869 be, and it hereby is, modified to correct the numbering of the seventh (7<sup>th</sup>) paragraph from "VI" to "VII," and to add a new eighth (8<sup>th</sup>) paragraph, that shall read as follows:

#### **VIII.**

**IT IS FURTHER ORDERED** that

- A. As used in this Order, the following additional definitions shall apply:
1. "Closing Date(s)" means the date(s) on which divestiture of one or more of the Memorial Funeral Homes, as applicable, to a Commission-approved acquirer or acquirers, and in a manner that satisfies the requirements of this Order, is consummated.
  2. "Hold Separate Period" means the time period beginning immediately upon consummation of the Memorial Acquisition and ending the day after the Closing Date for the last divestiture of the Memorial Funeral Homes, *except that* the Hold Separate Period shall not include any period after the Closing Dates for the divestitures of the McMullen Funeral Home and the Colonial Funeral Home have both occurred.
  3. "Hold Separate Business" means the Memorial Funeral Homes, individually and collectively, until all required divestitures are completed; *except that* Hold Separate Business shall not include any Memorial Funeral Home that has been finally divested pursuant to this Modifying Order, and shall not include the Pearson-Treadwell Funeral Home if both the

McMullen Funeral Home and the Colonial Funeral Home have been finally divested.

4. “Memorial Acquisition” means Respondent’s proposed acquisition, directly or indirectly, through foreclosure proceedings or otherwise, of any assets of, or stock, share capital, equity or other interest in the Memorial Funeral Homes.
5. “Memorial Funeral Homes” means the Funeral Service assets and businesses, and all assets, leases, properties, permits (to the extent transferable), contracts (including pre-need Funeral Service contracts), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the businesses operated at the following locations:
  - a. Colonial Funeral Home, 613 Fourteenth Street, Phenix City, Alabama 36867;
  - b. McMullen Funeral Home, 3874 Gentian Boulevard, Columbus, Georgia 31907; and
  - c. Pearson Treadwell Funeral Home, 659 Main Street, Blackshear, Georgia 31516.
6. “Memorial Funeral Homes Confidential Business Information” means all information relating to the Memorial Funeral Homes that is not in the public domain and was not otherwise known to Respondent prior to consummation of the Memorial Acquisition, including all business and proprietary information, including, but not limited to, information regarding finances, inventory, sales, marketing, business plans, cost, pricing, supply, sales, profits, customers and contracts, except for any information that Respondent demonstrates (a) was or becomes generally available to the public other than as a result of a disclosure by Respondent or (b) was available, or becomes available, to Respondent on a non-confidential basis, but only if, to the knowledge of Respondent, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.
7. “Modifying Order” means the Order to Show Cause and Order Modifying Order in Docket No. C-3869 issued on December 27, 2006.
8. “Order” means the Decision and Order in Docket No. C-3869, issued by the Commission on April 22, 1999.
9. “Orders” means the Modifying Order and the Order, individually and collectively.

10. “Pre-need Contract” means any type of contract or other agreement to provide funeral services or merchandise at a future time, regardless of whether such agreement is revocable, or how payment for such services is arranged.
  11. “Select Respondent Employee” means an employee of Respondent’s corporate development department who is regularly involved in the purchase and sale of businesses for Respondent and has no responsibilities for the ongoing operation or marketing of Respondent’s funeral home properties.
  12. “Trustee” means the Hold Separate and Divestiture Trustee appointed by the Commission pursuant to this Modifying Order.
  13. “Trustee Agreement” means any agreement between a Commission-appointed Trustee and the Respondent that receives the prior approval of the Commission.
- B. Immediately upon consummation of the Memorial Acquisition and during the Hold Separate Period, Respondent SCI shall hold the Hold Separate Business separate and apart from all of Respondent’s other businesses and employees, as required by this Modifying Order, and shall not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business, any of its operations or employees, or the Trustee, except to the extent necessary to assure compliance with the Orders and all applicable law.
- C. In complying with the terms and conditions of this Modifying Order, Respondent shall:
1. not have access to, receive, obtain, solicit or use any Memorial Funeral Homes Confidential Business Information (“confidential information”) for any reason or purpose, except that the Trustee may, in consultation with Commission staff, disclose confidential information to Select Respondent Employees as necessary to fulfill the duties of the Trustee, or as necessary to permit SCI to oversee compliance with applicable laws or prepare United States consolidated financial reports, tax returns, reports required by securities laws and personnel reports, *provided however*, that prior to receiving confidential information a Select Respondent Employee shall execute a Confidentiality Agreement agreeing i) to use such information only for the limited purposes stated in the Order, and ii) not to divulge the confidential information; and
  2. not permit any of its employees, officers, or directors to be involved in the operations or divestiture operations of the Memorial Funeral Homes, except to the extent specifically provided in this Modifying Order.

- D. Respondent shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Hold Separate Business, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of the Hold Separate Business, except for ordinary wear and tear and as otherwise would occur in the ordinary course of business. Respondent's responsibilities shall include, but are not limited to, providing the Hold Separate Business with sufficient working capital to operate at least at current rates of operation, and such other funds and resources as are necessary to maintain the viability, marketability and competitiveness of the Memorial Funeral Homes.
- E. Respondent shall divest the Hold Separate Business absolutely and in good faith, at no minimum price, to an acquirer or acquirers that receive(s) the prior approval of the Commission, and in a manner that receives the prior approval of the Commission, within sixty (60) days of the date on which the Memorial Acquisition is consummated, pursuant to and as required by the terms of this Modifying Order, *provided however*, this period may be extended by the Commission pursuant to Paragraph VIII.F.2.d.(2).
- F. Respondent shall hold the Hold Separate Business separate, apart, and independent; consent to the appointment of a Hold Separate and Divestiture Trustee ("Trustee"); execute a Trustee Agreement that receives the prior approval of the Commission; and consent to divestiture of the Memorial Funeral Homes by the Trustee, absolutely and at no minimum price, on the following terms and conditions:
1. Thomas H. Johnson, Johnson Consulting Group, shall serve as the Trustee pursuant to the Trustee Agreement executed by the Trustee and Respondent SCI, attached hereto as Confidential Appendix I to the Orders. This Trustee Agreement shall not be modified without the prior approval of the Commission.
  2. Respondent shall, pursuant to the Trustee Agreement, which shall be contingent and effective upon Respondent's consummation of the Memorial Acquisition, transfer to and confer upon the Trustee all rights, powers, and authorities necessary to permit the Trustee to perform the Trustee's duties and responsibilities pursuant to this Modifying Order to:
    - (i) manage and maintain the Hold Separate Business pending divestiture;
    - (ii) divest the Hold Separate Business in a manner consistent with the requirements of this Modifying Order, and
    - (iii) monitor Respondent's compliance with the hold separate and asset maintenance requirements of this Modifying Order in a manner consistent with the purposes of the Orders.
- a. The Trustee Agreement shall require that the Trustee shall act in a fiduciary capacity for the benefit of the Commission.

- b. The Trustee shall serve, without bond or other security, at the cost and expense of Respondent. The Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Trustee's duties and responsibilities.
- c. The Trustee Agreement shall transfer and convey to the Trustee, and the Trustee shall have, all rights, powers and authorities necessary to manage and maintain the Hold Separate Business pending divestiture in a manner consistent with the purposes of the Orders, and in consultation with Commission staff.
  - (1) The Trustee shall have the responsibility, consistent with the requirements and purposes of this Modifying Order, for (i) managing the Hold Separate Business independently from Respondent's other businesses and operations, (ii) maintaining the Hold Separate Business, and (iii) monitoring Respondent's compliance with its hold separate and asset maintenance obligations pursuant to this Modifying Order.
  - (2) The Trustee Agreement shall require that during the Hold Separate Period, the Trustee shall:
    - (a) assure that the Hold Separate Business is managed, operated and maintained in the regular and ordinary course, in accordance with past practice, (including regular repair and maintenance efforts), and all applicable laws; and
    - (b) use best efforts to preserve the existing relationships with suppliers, customers, employees and others having business relations with the Hold Separate Business.
  - (3) Respondent shall provide the Hold Separate Business with sufficient financial and other resources as are appropriate in the judgment of the Trustee to operate the Hold Separate Business at no less than current rates of operation and to maintain the viability, marketability and competitiveness of the Hold Separate Business pending divestiture.
- d. The Trustee Agreement shall transfer and convey to the Trustee, and the Trustee shall have, the exclusive power and authority to

divest the Hold Separate Business in a manner consistent with the requirements and purposes of the Orders, and in consultation with Commission staff.

- (1) The Trustee shall divest the Hold Separate Business and at no minimum price to an acquirer or acquirers that receive(s) the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.
- (2) The Trustee shall have sixty (60) days from the effective date of the Memorial Acquisition to divest the Hold Separate Business, subject to the prior approval of the Commission. If, however, at the end of the sixty (60) day period, the Trustee has submitted a plan of divestiture or if the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court.
- (3) Respondent shall take no action to interfere with or impede the Trustee's accomplishment of the divestitures. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
- (4) The Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available for the divestiture of the Hold Separate Business in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. Each divestiture shall be made only in a manner that receives the prior approval of the Commission and only to an acquirer that receives the prior approval of the Commission as required by this Modifying Order; *provided, however*, if the Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days after receiving notification of the Commission's approval.



- (5) The Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the Trustee, including fees for the Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Trustee's power shall be terminated. The compensation of the Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Modifying Order.
  - e. The Trustee shall have, upon request, full and complete access to information and personnel of Respondent, and to the personnel, books, records and facilities of Respondent related to the Hold Separate Business, and to any other relevant information as the Trustee may request, to the extent necessary to facilitate the management, operation, maintenance, and divestiture of the Hold Separate Business, subject to any demonstrated legally recognized privilege and to the limitations contained in this Modifying Order. Respondent shall develop such financial or other information as the Trustee may request and shall cooperate with the Trustee.
  - f. The Trustee shall not provide Memorial Funeral Homes Confidential Business Information to any employee or representative of Respondent except as provided for elsewhere in this Modifying Order.
  - g. Respondent shall indemnify the Trustee and hold the Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Trustee.
3. Respondent shall cooperate with the Trustee and take no action to interfere with or impede the Trustee's ability to perform the Trustee's duties and responsibilities consistent with the terms of this Modifying Order and with the terms of the Trustee Agreement.
  4. Respondent may require the Trustee and each of the Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a

customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Trustee from providing any information to the Commission.

5. The Commission may, among other things, require the Trustee and each of the Trustee's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Trustee's duties.
6. The Trustee shall serve until the day after the end of the Hold Separate Period; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
7. Thirty (30) days after the effective date of the Commission-approved Trustee Agreement, and every thirty (30) days thereafter until the divestiture(s) of the Hold Separate Business have been completed, the Trustee shall report in writing to the Commission concerning:
  - a. the Trustee's management and maintenance of the Hold Separate Business, including an assessment of the financial, operational and regulatory status of each funeral home, and Respondent's compliance with its hold separate and asset maintenance obligations pursuant to this Modifying Order, and
  - b. the Trustee's efforts to accomplish the divestiture(s).
8. The appointment of the Trustee pursuant to this Modifying Order shall not preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by Respondent to comply with the Orders. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action.
9. If the Commission determines that the Trustee has ceased to act or failed to act diligently and consistent with the Trustee Agreement or the purposes of this Modifying Order, the Commission may appoint a substitute Trustee consistent with the terms of this Modifying Order, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for

opposing, the selection of the substitute Trustee within ten (10) days after written notice by the staff of the Commission to Respondent of the identity of any substitute Trustee, Respondent shall be deemed to have consented to the selection of the proposed substitute Trustee. Respondent and the substitute Trustee shall execute a Trustee Agreement, subject to the approval of the Commission, that is consistent with these Orders and with the terms and conditions of the Trustee Agreement attached as [Confidential Appendix I](#).

10. The Commission or, in the case of a court-appointed trustee, the court may, on its own initiative or at the request of the Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Modifying Order.
- G. Respondent shall not, prior to divestiture of the Hold Separate Business, employ or offer employment to any employee(s) of the Hold Separate Business; *provided, however*, that Respondent may offer a position to an employee of the Hold Separate Business if the proposed acquirer of such funeral home has determined not to offer a position to that employee.
- H. For the remaining term of the Order, Respondent shall not:
1. directly or indirectly, solicit, induce, or attempt to solicit or induce any employees of the Hold Separate Business who have accepted offers of employment with a Commission-approved acquirer to terminate their employment relationship with the acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the acquirer, (2) Respondent advertises for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (3) Respondent hires employees who apply for employment with Respondent, as long as such employees were not solicited by Respondent in violation of this provision; or
  2. directly or indirectly, solicit, induce, or attempt to solicit or induce a consumer who has a Pre-need Contract with the Memorial Funeral Homes, as defined above, to terminate such contract and enter into a Pre-need Contract with Respondent; *provided, however*, a violation of this provision will not occur if: (1) a consumer initiates communications with Respondent regarding a Pre-need Contract; or (2) Respondent advertises in newspapers, trade publications, or other media in a manner not targeted specifically at customers of the Hold Separate Business.

- I. The purpose of Paragraph VIII of this Modifying Order is to: (1) preserve the Hold Separate Business as viable, competitive and ongoing businesses independent of Respondent and engaged in the provision of Funeral Services pending divestiture; (2) ensure that no Memorial Funeral Homes Confidential Business Information is transmitted to or received by Respondent except in accordance with the provisions of this Modifying Order; (3) prevent interim harm to competition pending divestiture; and (4) remedy the lessening of competition resulting from Respondent's acquisition of the Hold Separate Business.

By the Commission.

Donald S. Clark  
Secretary

SEAL  
ISSUED: December 27, 2006

**Confidential Appendix I**

**Hold Separate and Divestiture Trustee Agreement**

**In the Matter of Service Corporation International, Docket No. C-3869**

**[Redacted From the Public Record Version But Incorporated By Reference]**