

**ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS
TO AID PUBLIC COMMENT**

*In the Matter of Service Corporation International and
Stewart Enterprises, Inc., File No. 131-0163*

I. INTRODUCTION

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Service Corporation International (“SCI”) and Stewart Enterprises, Inc. (“Stewart”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from SCI’s acquisition of Stewart. Under the terms of the proposed Consent Agreement, SCI and Stewart are required to divest 53 funeral homes in 29 local funeral services markets and 38 cemeteries in 30 local cemetery markets to acquirers who receive the approval of the Commission. The proposed Consent Agreement also requires SCI and Stewart to divest all related assets and real property necessary to ensure that the buyer(s) of the divested facilities will be able to quickly and fully replicate the competition that would have been eliminated by the merger. Finally, the Commission, SCI, and Stewart have agreed to an Order to Hold Separate and Maintain Assets (“Hold Separate Order”) that requires SCI and Stewart to maintain and hold separate certain facilities to be divested pending their final divestiture pursuant to the Consent Agreement.

The proposed Consent Agreement has been placed on the public record for thirty days (“Public Comment Period”). During this period, interested persons can review the proposed Consent Agreement and file comments with respect to the competitive effects of the Merger and the proposed remedy. At the end of the Public Comment Period, the Commission will review and afford appropriate consideration to all comments filed. The Commission may then determine whether to modify the proposed Consent Agreement, issue the Consent Agreement as final without modifications, or withdraw the Consent Agreement in its entirety.

On May 29, 2013, SCI and Stewart executed a definitive merger agreement pursuant to which SCI agreed to acquire Stewart in an all-cash transaction valued at approximately \$1.4 billion (the “Merger”). The Commission’s complaint alleges that the proposed Merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, removing an actual, direct, and substantial competitor from 29 funeral services markets, and 30 cemetery services markets. The proposed Consent Agreement would remedy the alleged violations by requiring divestitures to replace the competition that otherwise would be lost in these markets as a result of the Merger.

II. THE PARTIES

SCI is the largest funeral and cemetery services provider in North America. SCI owns and operates more than 1,449 funeral-services locations and 374 cemeteries (including 213 combined funeral-services/cemetery locations), and 100 crematories in 44 states and the District of Columbia. SCI's 2012 revenue from all operations totaled approximately \$2.41 billion.

Stewart is the second largest funeral and cemetery services provider in the United States. Stewart owns and operates 217 funeral homes and 141 cemeteries in 24 states and Puerto Rico. For the 12 months ending October 31, 2013, Stewart's total revenues were approximately \$524.1 million.

III. FUNERAL AND CEMETERY SERVICES

SCI's proposed acquisition of Stewart presents substantial antitrust concerns in two relevant product markets: (1) funeral services; and (2) cemetery services. Funeral services include all activities relating to the promotion, marketing, sale, and provision of funeral services and goods, including, but not limited to, goods and services used to remove, care for, and prepare bodies for burial. Funeral services do not include cremation services because consumers generally do not substitute cremation services for burial services based upon price. Since many consumers primarily choose their final disposition based on their personal or religious views, these consumers do not view cremation services as a viable substitute for funeral services. Thus, a hypothetical monopolist of funeral services could profitably impose a small but significant and non-transitory increase in price ("SSNIP") because most consumers would not switch to cremation services. Further, the competitive conditions for cremation services are substantially different than for funeral services.

Cemetery services include all activities relating to the promotion, marketing, sale, and provision of property, goods, and services to provide for the disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, disposition in a niche, or scattering cremated remains on cemetery grounds.

In some local markets, certain funeral-service and cemetery-service locations cater to specific populations by focusing on the customs and rituals associated with one or more religious, ethnic, or cultural heritage groups. In such situations, the provision of funeral or cemetery services targeted to such populations may constitute distinct and relevant product markets. Thus, in Los Angeles, California, for example, the provision of funeral services to Catholic consumers constitutes a relevant product market in which to analyze the competitive effects of the Merger. Likewise, in South Dallas, Texas, the provision of cemetery services to the African-American community constitutes a relevant product market in which to analyze the competitive effects of the Merger.

The 29 funeral services markets and 30 cemetery services markets at issue in this transaction are relatively local in nature. Indeed, data analysis and evidence gathered from market participants indicate that purchasers of both "preneed" and "atneed" funeral and cemetery

services¹ typically choose a local funeral home or cemetery in order to make the memorial service, burial, and subsequent visitation more convenient.

The 29 geographic markets in which to analyze the effects of the Merger with respect to funeral services are: (1) Mobile, Alabama; (2) Auburn, California; (3) East Los Angeles County, California (Catholic); (4) Los Angeles (Long Beach), California (Catholic); (5) Los Angeles (San Fernando Valley), California (Catholic); (6) Palmdale/Lancaster, California; (7) Northern San Diego, California; (8) Southern and Eastern San Diego, California; (9) Clearwater, Florida; (10) Jacksonville, Florida; (11) Miami-Dade County (Homestead), Florida; (12) Miami-Dade County (Miami), Florida; (13) Ocala, Florida; (14) Orlando, Florida; (15) Port St. Lucie, Florida; (16) Tampa, Florida (Hispanic); (17) Overland Park, Kansas; (18) South Kansas City, Kansas/Missouri; (19) New Orleans, Louisiana; (20) West Jackson, Mississippi; (21) North Kansas City, Missouri; (22) New Bern, North Carolina; (23) Raleigh, North Carolina; (24) Columbia, South Carolina; (25) Nashville, Tennessee; (26) Dallas, Texas; (27) Southeast Fort Worth, Texas; (28) Arlington-Alexandria, Virginia; and (29) Washington, D.C./Maryland suburbs (Jewish).

The 30 geographic markets in which to analyze the effects of the Merger with respect to cemetery services are: (1) South San Diego, California; (2) Jacksonville, Florida; (3) Miami-Dade County, Florida; (4) Ocala, Florida; (5) West Orlando, Florida; (6) Port St. Lucie, Florida; (7) Spring Hill/Hudson, Florida; (8) St. Petersburg/Largo, Florida; (9) Tampa, Florida; (10) Atlanta (Cobb County), Georgia; (11) Atlanta (Fairburn/College Park), Georgia; (12) Atlanta (Henry County), Georgia; (13) New Orleans, Louisiana; (14) Annapolis, Maryland; (15) Baltimore, Maryland; (16) North Kansas City, Missouri; (17) South Kansas City, Kansas/Missouri; (18) High Point, North Carolina; (19) Raleigh, North Carolina; (20) Philadelphia, Pennsylvania; (21) Greenville, South Carolina; (22) Kingsport, Tennessee; (23) Knoxville, Tennessee; (24) Dallas, Texas; (25) South Dallas, Texas (African American); (26) Southeast Fort Worth, Texas; (27) Houston, Texas; (28) Northwest Richmond, Virginia; (29) South Richmond, Virginia; and (30) Kearneysville, West Virginia.

Each of the relevant funeral and cemetery services markets is highly concentrated, and the proposed Merger would significantly increase market concentration and eliminate substantial direct competition between two significant funeral and cemetery services providers. Under the Herfindahl-Hirschman Index (“HHI”), which is the standard measure of market concentration under the 2010 Department of Justice and Federal Trade Commission Merger Guidelines, an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases by more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. SCI’s merger with Stewart creates market concentration levels well in excess of these thresholds in the local markets listed above.

The anticompetitive implications of such significant increases are reinforced by evidence of intense head-to-head competition that would be eliminated by the proposed Merger. This competition between SCI and Stewart benefits consumers in the form of lower prices, improved products, and better service. Left unremedied, the proposed Merger likely would cause

¹ “Preneed” refers to funeral and cemetery arrangements purchased prior to actual need (*i.e.*, death). “Atneed” refers to funeral and cemetery arrangements purchased after a death has occurred.

anticompetitive harm by enabling SCI to profit by unilaterally raising the prices of funeral and cemetery services, as well as reducing its incentive to improve quality and provide better service.

The high levels of concentration also increase the likelihood of competitive harm through coordinated interaction. In several funeral and cemetery services markets, coordinated interaction or tacit collusion may be likely due to the transparency of important competitive information, high concentration, and relatively small number of competitors.

New entry is unlikely to deter or counteract the anticompetitive effects of the proposed Merger. Among other entry barriers, both heritage (the consumer's tendency to use the same funeral home or cemetery for multiple generations) and reputation pose substantial barriers to entrants attempting to establish new funeral-services locations. The availability of suitable land and local zoning, health, and environmental regulations significantly hinder the ability of firms to enter into new cemetery-services locations. As a result, new entry sufficient to achieve a significant market impact is unlikely to occur.

IV. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies completely the anticompetitive effects of the Merger by requiring the divestiture of SCI or Stewart funeral homes, cemeteries, and related assets in each relevant geographic market to a Commission-approved buyer (or buyers) within 180 days of SCI acquiring Stewart. Specifically, the proposed Consent Agreement requires the divestiture of 53 funeral-services facilities and 38 cemeteries, as well as related equipment, customer and supplier contracts, commercial trade names, and real property in the funeral and cemetery services markets at issue in this transaction. The assets to be divested include all of the associated assets and real property necessary for a Commission-approved buyer to independently and effectively operate each facility. *See* Appendix A to the proposed Decision and Order for a complete list of the divestiture assets.²

The proposed Consent Agreement contains several provisions designed to ensure that the divestitures are successful. First, the Commission will evaluate the suitability of the proposed purchasers of the divested assets to ensure that the competitive environment that would have existed but for the transaction is replicated by the required divestitures. If SCI fails to divest the assets within the 180 day time period to a Commission-approved buyer, the Consent Agreement permits the Commission to appoint a divestiture trustee to divest the assets. Second, SCI is required to provide transitional services to the Commission-approved acquirer. These transitional services will facilitate a smooth transition of the assets to the acquirer, and ensure continued and uninterrupted operation of the assets during the transition. Third, the Consent Agreement requires SCI to remove any contractual impediments that may deter the current employees of the divested facilities from accepting offers of employment from any Commission-

² When reviewing Appendix A to the proposed Decision and Order, please note: 1) the column marked "FH/CEM" denotes the area of competitive concern as funeral homes ("FH"), cemeteries ("CEM"), or both ("FH/CEM"); and 2) in the far right column marked "Property Name & Address," those properties marked with a "(c)" next to the property name indicates that the facility is a "combo" (i.e., both a funeral home and cemetery). In all instances in which a combo asset is identified, the facility must be divested in its entirety regardless of whether the competitive concern is in funeral homes, cemeteries, or both.

approved acquirer and to obtain all consents necessary to transfer the required assets. The Agreement also appoints a Hold Separate Trustee to monitor SCI's compliance with the terms of the Agreement. Finally, the Commission will have an opportunity to review any attempt by SCI to acquire any funeral or cemetery services asset in any of the geographic markets at issue, as well as certain markets where any future acquisition by SCI would likely cause substantial competitive harm. This prior notice provision has a term of ten years.

The Hold Separate Order requires the parties to maintain the viability of the divestiture assets as competitive operations until each facility is transferred to a Commission-approved acquirer. After SCI acquires Stewart, the Hold Separate Order requires that SCI segregate the 91 locations to be divested separate and apart from SCI's own death services business, and maintain these assets as independent competitive enterprises pending divestiture. To facilitate this process, the Hold Separate Order allows Paul A. Houston, the proposed Hold Separate Trustee, to appoint one or more Hold Separate Managers to assist with the management the daily operations of the held separate businesses in an effort to ensure competition in the relevant geographic markets. Additionally, the Hold Separate Order obligates SCI to provide sufficient working capital to the held separate businesses and to provide continued support services as needed in the interim. Overall, the Hold Separate Order and the Consent Agreement are designed to safeguard competition in the provision of death care services in these markets immediately post-acquisition.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. This analysis does not constitute an official interpretation of the Consent Agreement or modify its terms in any way.