

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

*In the Matter of Service Corporation International and
Keystone North America Inc., File No. 1010013*

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 Keystone North America Inc. (“KNA”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from SCI’s acquisition of KNA. Under the terms of the proposed Consent Agreement, SCI and KNA are required to divest 22 funeral homes in 16 local funeral services markets and four cemeteries in three local cemetery services markets to acquirers who receive the approval of the Commission. The proposed Consent Agreement also requires SCI and KNA to divest all related assets and real property necessary to ensure the buyer(s) of the divested facilities will be able to quickly and fully replicate the competition that would have been eliminated by the acquisition. Finally, the Commission, SCI, and KNA have agreed to an Order to Hold Separate and Maintain Assets (“Hold Separate Order”) that requires SCI and KNA to maintain and hold separate the 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 to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw the Consent Agreement or make it final.

On October 14, 2009, SCI and KNA executed a definitive support agreement pursuant to which SCI agreed to acquire all of the outstanding voting securities of KNA. The Commission’s complaint alleges that the proposed acquisition, 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, by removing an actual, direct, and substantial competitor from 16 funeral services markets, and three cemetery services markets. The proposed Consent Agreement would remedy the alleged violations by requiring divestitures that will replace the competition that otherwise would be lost in these markets as a result of the acquisition.

II. THE PARTIES

SCI is the largest funeral and cemetery services provider in North America. SCI owns and operates 1,266 funeral homes and 372 cemetery locations worldwide, including 1,073 funeral homes in 43 states and the District of Columbia, and 357 cemeteries in 31 states. SCI’s 2009 revenue from all operations totaled approximately \$2.05 billion.

KNA is the fifth largest funeral and cemetery services provider in North America. KNA owns and operates 199 funeral homes and 15 cemeteries in the United States and Canada,

including 196 funeral homes in 31 states, and 15 cemeteries in seven states. KNA's revenue for the 12 months ending June 30, 2009 totaled approximately \$124 million.

III. FUNERAL AND CEMETERY SERVICES

SCI's proposed acquisition of KNA presents substantial antitrust concerns in two relevant product markets: funeral services and 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, cremation or other final disposition; and goods and services used to arrange, supervise, or conduct funeral ceremonies or final disposition of human remains. Cemetery services include all activities relating to the promotion, marketing, sale, and provision of property, goods and services to provide for the final disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, disposition in a niche, or scattering of cremated remains on the cemetery grounds.

The 16 funeral services markets and three cemetery services markets at issue in this transaction are relatively local in nature. Indeed, data analysis and evidence gathered from market participants indicate that pre-need purchasers of funeral services and cemetery plots, and families making at-need purchases, typically choose a local funeral home or cemetery to make the memorial service, burial, and subsequent visitation more convenient. The 16 funeral services markets are: Yuma, Arizona; Monterey, California; Denver, Colorado; Auburndale/Winter Haven, Florida; Vidalia, Georgia; Bossier City, Louisiana; Lansing, Michigan; East Aurora, New York; Northern Rockland County, New York; Charlotte, North Carolina; Greensboro, North Carolina; Columbia, South Carolina; West Columbia/Lexington, South Carolina; New Tazewell, Tennessee; Lynchburg, Virginia; and Yakima, Washington. The three cemetery services markets are: Yuma, Arizona; Macon, Georgia; and Columbia, South Carolina.

Each of the relevant funeral and cemetery services markets is highly concentrated, and the proposed acquisition 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 1992 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 the HHI by more than 100 points and results in a post-acquisition HHI that exceeds 1,800 points. SCI's proposed acquisition of KNA creates market concentration levels well in excess of these thresholds. For funeral services, the post-acquisition HHIs range from 3730 to 8632, and HHI levels will increase by 295 to 4130 points above pre-acquisition levels. The proposed acquisition also will result in SCI controlling between 52 percent and 93 percent market share in each of the affected funeral services markets. With respect to the cemetery services markets, the proposed acquisition will reduce the number of cemetery services providers from five to four in the Columbia, South Carolina and Macon, Georgia areas, and from three to two in Yuma, Arizona.

The anticompetitive implications of such dramatic increases in concentration are buttressed by evidence of intense head-to-head competition that would be eliminated by the proposed acquisition. Consumers have benefitted from the rivalry between SCI and KNA in the form of lower prices, improved products, and better service. Left unremedied, the proposed acquisition likely would cause 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. Transparency in the pricing of funeral services and consumers' selection of funeral homes and cemeteries facilitate the ability of providers to reach and monitor terms of coordination, or alternatively promote tacit forms of collusion. In several funeral and cemetery services markets, coordinated interaction or tacit collusion is likely due to the transparency of important competitive information, high concentration, and few market participants.

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

IV. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies completely the anticompetitive effects of the acquisition by requiring the divestiture of all of the SCI or KNA assets in each relevant geographic market to a Commission-approved buyer (or buyers) within 90 days of SCI acquiring KNA. Specifically, the proposed Consent Agreement requires the divestiture of 22 funeral services facilities and four cemetery services facilities, as well as related equipment, customer and supply contracts, commercial trade names, and real property in the 19 funeral and cemetery services markets at issue in this transaction. *See Appendix A* for a complete list of the divestiture assets. Each funeral and cemetery services facility to be divested is a stand-alone business, and includes all of the assets necessary for a Commission-approved buyer to independently and effectively operate each facility.

The proposed Consent Agreement contains several provisions designed to ensure that the divestitures are successful. First, the Commission will evaluate the suitability of possible 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 90-day time period to a Commission-approved buyer, the Consent Agreement permits the Commission to appoint a trustee to divest the assets. Second, SCI is required to provide transitional services to the Commission-approved buyer. 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 managers of the facilities to be divested from accepting offers of employment from any Commission-approved acquirer and to obtain all consents necessary to transfer the required assets. The Agreement also appoints an Interim Monitor, Shaun Martin, to monitor SCI's compliance with the terms of the Agreement. Mr. Martin is well-qualified for this role, having extensive experience managing businesses on a short-term basis. Finally, to ensure that the Commission will have an opportunity to review any attempt by SCI to acquire any funeral or cemetery services asset in any of the 19 geographic markets at issue, the proposed Consent Agreement contains a ten-year prior notice provision.

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 buyer. Specifically, the parties must maintain the confidentiality of sensitive business information, and take all actions required to prevent the destruction or wasting of the divestiture assets. After SCI acquires KNA, the Hold Separate Order requires that SCI separately hold and maintain the KNA divestiture assets and appoints a Hold Separate Manager to operate these assets pending their divestiture. SCI is also required to separately operate the SCI divestiture assets and the KNA assets that SCI acquires in the same geographic market. Finally, the Hold Separate Order appoints an Interim Monitor to monitor the operation of the separately-held KNA assets and the parties' compliance with the terms of the Hold Separate Order and the Consent Agreement.

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.