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PUBLIC COMMENT OF THE JEWISH FUNERAL PRACTICES COMMITTEE OF GREATER WASHINGTON REGARDING THE PROPOSED CONSENT ORDER IN THE SCI-STEWART MERGER

The Jewish Funeral Practices Committee of Greater Washington (JFPC) greatly appreciates the actions of the Federal Trade Commission in investigating SCI's acquisition of Stewart Enterprises, Inc. We recognize the significant attention given by the staff and the Commissioners on the potential impact of the acquisition on the Jewish Funeral Home market in the Maryland/D.C. area. We appreciate the Commission listening to the concerns expressed by numerous Congressmen, Governor O'Malley and other government officials and over 1200 consumers. Who wrote to the Commission. We welcome the Commission's complaint recognizing the significant competitive problems raised by the acquisition in that market. However the Commission's proposed consent order requiring divesture of Edward Sagel Funeral Direction (Sagel) does not adequately address competitive concerns raised by the merger. We ask that the Commission revise the proposed order to require the divestiture of Hines-Rinaldi instead of Sagel.

The Commission's role in investigating a proposed acquisition under Section 7 of the Clayton Act is to prevent an acquisition that may cause significant competitive harm. As former Justice Brennan said over a half century ago in DuPont "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to preserve competition."[1] As former Bureau Director Rich Parker observed about resolving competitive concerns with a remedy "[t]he foremost obligation of antitrust enforcers is to make sure that a merger does not reduce competition to any significant extent. . . . Consumers should benefit from the same degree of competition after a merger as before a merger. Thus, our first objective is to determine which remedies will effectively and fully preserve competition. A second objective is to select a remedy that will preserve competition with as much certainty as possible."[2] Neither of these objectives are met by the proposed order in this case.

In some cases the competitive concerns can be resolved by providing divestitures to enable a new firm with the ability to fully restore competition. That was the path taken in the proposed consent order. As Bureau Director Deborah Feinstein has observed a "well-crafted consent order can achieve divestitures necessary to preserve existing levels of competition, stop anticompetitive conduct, cause firms to take additional steps to restore competition, or clear

[1] United States v. E.I. DuPont de Nemours & Co.,366 U.S. 326 (1961).
[2] Richard G. Parker, The Evolving Approach to Merger Remedies, Antitrust Report (May 1, 2000), available at http://www.ftc.gov/public-statements/2000/05/evolving-approach-merger-remedies.

away impediments to future competition."[3] In this case, as described in our comments, there are several reasons why the proposed consent order will not achieve these goals and resolve the competitive concerns.

- The divestiture of Sagel does not reduce the incentive and ability of SCI to subvert the JFPC contract with Hines-Rinaldi (now owned by SCI). Since SCI owns Danzansky Funeral Home (the largest Jewish home in the market) it will have the same incentive to reduce competition as it possessed when it owned both Danzansky and Sagel. The divestiture of Sagel does not have any significant impact on SCI's incentive or ability to harm competitive by undermining the JFPC contract.

- The divested asset is not an adequate facility to fully restore competition because it lacks the necessary components of a full service funeral home.

- Even if Mr. Sagel were to ultimately acquire the Danzansky facility that would not make a significant difference in the level of competition in the market.

- As a matter of policy where the harm from a merger is the elimination of a "maverick firm" like Hines-Rinaldi with its implementation of the JFPC contract, the Commission should either block the merger or require divestiture of the maverick -- in this case Hines-Rinaldi.

THE UNDERLYING CONCERNS RAISED BY THE PROPOSED ACQUISITION

In order for the Commission to have brought an enforcement action involving the Maryland/D.C. market it implicitly found the following:

- That the Jewish Funeral Home market in MD/DC is highly concentrated.

- That there are high barriers to entry into that market and a lack of available alternatives for the JFPC contract.

- That Hines Rinaldi through its 11-year arrangement implementing the JFPC contract was a disruptive force in the market (in antitrust parlance a "maverick"). There was substantial evidence that Hines-Rinaldi was a significant low-priced competitor at a standard price of $1,820 and offered key, quite unusual, consumer protections. Overall savings from the JFPC contract exceeded $500,000 annually.

- Absent an enforcement action, SCI would have had both the incentive and ability to undermine the competition provided by Hines-Rinaldi under the JFPC contract. As the owner of both Sagel and Danzansky, SCI suffered from the competition from the JFPC contract. The evidence was clear-cut that once SCI acquired Hines-Rinaldi it would have

[3] Remarks of Deborah L. Feinstein, "The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts" (Sept. 17, 2013), available at http://www.ftc.gov/sites/default/files/documents/public_statements/significance-consent-orders-federal-trade-commission%E2%80%99s-competition-enforcement-efforts-gcr-live/130917gcrspeech.pdf.

the ability to reduce the level of service or effectively increase prices or simply refuse to contract further with JFPC at the close of the contract.

THE PROPOSED CONSENT ORDER DOES NOT ADEQUATELY REPLACE THE COMPETITION LOST FROM THE SCI ACQUISITION.

The proposed consent order solely requires the divestiture of Edward Sagel Funeral Direction for the MD/D.C. market. It does not require the divestiture of Hines-Rinaldi as requested by JFPC and over 1,200 consumers who wrote to the FTC. It is clear that the divestiture of Sagel will not significantly diminish SCI's incentive or ability to undermine the JFPC arrangement.

First, the proposed remedy does not address the harm arising from the merger. As Bureau Director Feinstein has instructed "a merger remedy should (i) address the competitive harm from the merger [and] (ii) fit the facts of the case and characteristics of the relevant market by having a close and logical nexus between the theory of harm and the remedy."[4] In this case that close and logical nexus is missing. The purpose of the enforcement action was to preserve the arrangement between Hines-Rinaldi and the JFPC contract -- the key competitive force in the market. Divestiture of Sagel has little impact on protecting that competition. Even if the Sagel facility were adequate, which it is not, its divestiture would not impact SCI's incentive to undermine the contract. SCI still would be the owner of the most significant competitor in the market -- Danzansky. So long as it owns Danzansky, SCI would have the incentive and ability to undermine the JFPC contract.

Second, Sagel is not an adequate alternative for consumers seeking the low prices or consumer protections offered by the JFPC contract. Sagel will be a new competitor in the market, but it is highly likely to be a price follower. Sagel has never offered the JFPC price for Jewish funerals generally, nor has it offered the consumer protections in the contract. There is no reason to expect those policies to change after it is divested. It is highly unlikely a firm would charge widely different prices for the same product to the same population.

Third, the competitive significance of the Sagel operation is doubtful. Over the past three years, Sagel has seen its market share diminish from 25% to 11%. Its diminishing market share may signal its future prospects. It is highly unlikely to be able to replace the competition lost through the loss of the JFPC contract, which accounts for over 25% of the market.

Fourth, Sagel's facility is a small storefront, not a full service funeral home. It relies on the sister SCI-owned Danzansky facility for a chapel and for handling the deceased. It is significantly inferior to the Hines-Rinaldi facility. As Bureau Director Feinstein has observed "[e]ffective divestitures require strong viable businesses, not just a collection of assets, and analysis of what a robust business requires may go beyond the straight-up market definition exercise."[5] The divestiture of Sagel will not lead to a strong viable business capable of fully restoring competition.

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[4] Id.
[5] Id.

Finally, even if Sagel's facility were adequate it is highly unlikely that it would contract with the JFPC. Sagel has declined to even bid on the JFPC contract terms in the past. A JFPC contract funeral would be the same as any Sagel funeral with the same elements. Would Sagel have two price tiers for the same product? It is not practical and Sagel's s revenue would be seriously diluted.

THE POSSIBLE DIVESTITURE OF DANZANSKY DOESN'T MAKE A DIFFERENCE

Mr. Edward Sagel has announced publicly that he is working to acquire both the Sagel and Danzansky facilities from SCI, with SCI's blessing. Divestiture of Danzansky is not required under the proposed order and there is no reason to presume it will occur.

Such an arrangement would not necessarily change the competitive dynamic. The arrangement between Mr. Sagel (a current employee of SCI) and SCI in acquiring these two funeral homes could be structured in any of a number of ways in which Mr. Sagel would remain highly dependent on SCI and SCI would be able to influence Mr. Sagel's competitive initiatives going forward. In this situation SCI will still have the incentive to undermine the JFPC contract.

Moreover, Mr. Sagel's acquisition of both the Sagel and Danzansky facilities would produce a market that is less competitive than that envisioned by the proposed order. Under the proposed order there are four separate competitors in the market (SCI through Danzansky, the JFPC through SCI's Hines-Rinaldi, Torchinsky and Sagel). If Mr. Sagel is able to acquire Sagel and Danzansky there will be only three competitors (Sagel/Danzansky, Torchinsky and the JFPC through SCI's Hines- Rinaldi).

ANTITRUST POLICY REQUIRES PRESERVATION OF A MAVERICK

As a matter of sound antitrust policy, where a firm is a maverick it is essential to preserve that maverick in the market. Accepting a divestiture to create simply an alternative firm is not sufficient. What is essential is to retain the maverick in the market. If the FTC required the divestiture of Hines-Rinaldi the JFPC contract would be preserved. Since Stewart has continued with the JFPC for 11 years, with renewals every two years, the FTC should find that it has been successful with that business. A third-party purchaser of Hines-Rinaldi would likely continue that business. No conjecture is necessary about SCI. SCI has already told Bloomberg Business Week that it would not, once the contract ends.[6]

Recent merger enforcement actions by the antitrust agencies have demonstrated the wisdom of blocking mergers involving mavericks in the market. In both ATT/TMobile and H&R Block/TaxAct, the DOJ went to court to block a merger to prevent the acquisition of a maverick in the market. In both cases DOJ was successful and TMobile and TaxAct are currently strong competitors. Preserving a maverick is crucial to a competitive market. That is why the FTC should follow DOJ's lead and require divestiture of Hines-Rinaldi the maverick in the market.

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[6] Paul M. Barrett, *Is Funeral Home Chain SCI's Growth Coming at the Expense of Mourners?* Bloomberg Business Week (Oct. 24, 2013), available at http://www.businessweek.com/articles/2013-10-24/is-funeral-home-chain-scis-growth-coming-at-the-expense-of-mourners.

CONCLUSION

Therefore we respectfully request that the Commission renegotiate the consent order to require divestiture of Hines-Rinaldi.