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NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JL

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Case No.

FUNERAL CONSUMERS ALLIANCE,
INC., GLORIA JACCARINO BENDER,
ANTHONY J. JACCARINO, JOHN
CLARK, DONNA SPRAGUE, NANCY
HELMAN, IRA HELMAN,
DONALD SPRAGUE, and ROBERT
CHITEL,

CLASS ACTION

COMPLAINT AND DEMAND FOR JURY
TRIAL

on Behalf of Themselves and Those Similarly
Situated,

Plaintiffs

vs.

SERVICE CORPORATION
INTERNATIONAL, ALDERWOODS
GROUP, INC., STEWART
ENTERPRISES, INC., HILLENBRAND
INDUSTRIES, INC. and BATESVILLE
CASKET COMPANY,

Defendants.

1 Plaintiffs Funeral Consumers Alliance, Inc. ("FCA"), and Gloria Jaccarino Bender,
2 Anthony J. Jaccarino, John Clark, Donna Sprague, Nancy and Ira Helman, Donald Sprague, and
3 Robert Chitel (collectively, the "Consumer Plaintiffs"), on behalf of themselves and those
4 similarly situated, upon knowledge with respect to their own acts and upon information and
5 belief with respect to all other matters, allege in their complaint against defendants Service
6 Corporation International ("SCI"), Alderwoods Group, Inc. ("Alderwoods"), Stewart Enterprises,
7 Inc. ("Stewart") (collectively, the "Funeral Home Defendants"), Hillenbrand Industries, Inc.
8 ("Hillenbrand"), and Batesville Casket Company ("Batesville"), as follows:

9 SUMMARY OF CLAIMS

10 1. The anticompetitive and anti-consumer practices that have been rife within the
11 funeral industry for decades are well-known. Consumers of funeral products and services, who
12 are under severe emotional distress and time pressure at the time of purchase, have been easily
13 and routinely preyed upon. Nowhere have such predatory tactics been on greater display than in
14 the sale of caskets by funeral homes.

15 2. In an attempt to protect consumers from these tactics, the Federal Trade
16 Commission (the "FTC") enacted the Funeral Industry Practices Trade Regulation Rule, 16
17 C.F.R. Part 453 (1982). The so-called Funeral Rule, among other things, prohibits funeral homes
18 from refusing to service or from otherwise penalizing consumers who purchase caskets from
19 independent casket discounters ("ICDs") -- third-party sellers of caskets that are unaffiliated with
20 any of the Funeral Home Defendants or their co-conspirators. It also prohibits funeral homes
21 from requiring consumers to purchase funeral packages that force them to buy goods that they do
22 not want, such as caskets.

23 3. Despite the Funeral Rule's prohibitions, defendants and their co-conspirators have
24 suppressed competition in the sale of caskets to consumers in order to fix and maintain their
25 casket pricing above competitive levels. Specifically, they have engaged in three types of
26 anticompetitive conduct.

27 4. First, they have conspired through a group boycott to prevent ICDs from selling
28 Batesville caskets -- the dominant brand of casket -- as well as certain other brands of casket.

1 Consequently, ICDs are foreclosed from competing for the hundreds of thousands of consumers
2 that purchase these caskets every year. This group boycott is an open secret in the funeral
3 industry. Indeed, the executive director of one of the industry's leading trade organizations
4 referred to the boycott as part of the industry's "unwritten tradition."

5 5. Second, defendants and their co-conspirators have engaged in a campaign of
6 disparagement against ICDs and the caskets they sell. This campaign is facilitated by the group
7 boycott which ensures that ICDs do not sell the same caskets that are sold by the Funeral Home
8 Defendants and their co-conspirators. The following statement, made by a spokesperson for the
9 California Funeral Directors Association, exemplifies the comments made in furtherance of this
10 campaign: "The caskets you get online [from ICDs] are inferior, yes they are. They're not as
11 good at all I wouldn't want to get a casket online -- it might be from Mexico!" Another
12 example of the types of comments made in furtherance of this campaign appeared in Funeral
13 Service Insider -- one of the industry's leading publications. There, one SCI-affiliated funeral
14 home advised other funeral homes to tell consumers that all ICDs "**care[] about [is] one thing**
15 **and one thing only: Your Money.**" (Bolded in original.)

16 6. Third, the Funeral Home Defendants and their co-conspirators have engaged in
17 concerted efforts to restrict casket price competition and coordinate their casket pricing. These
18 efforts include restricting or preventing price advertising -- a practice the FTC recently and
19 successfully challenged; sharing price information; and promoting sham discounting of funeral
20 package purchases (which require the purchase of a funeral home casket).

21 7. Defendants' anticompetitive conduct has substantially foreclosed ICDs from
22 competing in the casket market, and has allowed the Funeral Home Defendants to fix and
23 maintain artificially high prices for caskets. Over the course of the relevant damages period, the
24 Funeral Home Defendants have overcharged consumers hundreds of millions, if not billions, of
25 dollars for caskets.

26 8. FCA, the leading organization dedicated to protecting the rights of funeral
27 consumers, and the individual Consumer Plaintiffs on behalf of themselves and a putative Class
28

1 of all those similarly situated, bring this action to enjoin this anticompetitive conduct and to
2 recover damages for the illegal overcharges that the Class has incurred.

3 **JURISDICTION AND VENUE**

4 9. This complaint is filed under Section 16 of the Clayton Act, 15 U.S.C. § 26, to
5 prevent and restrain violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and for
6 damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. This complaint is also brought
7 under California's Unfair Competition Law, Section 17200 of the Business and Professions
8 Code. This Court has jurisdiction over the federal antitrust law claims alleged herein under 28
9 U.S.C. §§ 1331, 1337, 2201, 2202. This Court has supplemental jurisdiction over the state law
10 claim under 28 U.S.C. § 1367.

11 10. Defendants, through their ownership of funeral homes, their servicing of funeral
12 customers, and their sale of caskets, are found and transact substantial business in this state and
13 district. Substantial interstate trade and commerce involved in and affected by the alleged
14 violations of antitrust law occurs within this district. The acts complained of have had, and will
15 have, substantial anticompetitive effects in this district. Venue is proper in this district under 28
16 U.S.C. § 1391 and 15 U.S.C. §§ 15, 22, 26.

17 **THE PARTIES**

18 A. **Plaintiffs**

19 11. FCA is a not-for-profit corporation organized and existing under the laws of the
20 State of Pennsylvania. Its principal place of business is located at 33 Patchen Road, South
21 Burlington, Vermont.

22 12. FCA, whose predecessor-in-interest was founded in 1963, is comprised of
23 nonprofit entities, including memorial societies, that provide consumers with information on
24 funeral-related goods and services. FCA's purpose and mission is to protect, promote, foster and
25 advance the interests of its members and consumers of funeral products and services. It is the
26 only national organization dedicated to protecting consumer rights in the deathcare industry.
27 FCA has approximately 400,000 members nationwide.

28

1 13. FCA is empowered by its members and bylaws, through the action of its Board of
2 Directors, to engage in lawful acts necessary, suitable and useful to the attainment of FCA's
3 mission.

4 14. Having found that consumers generally, and FCA members in particular, who
5 have purchased caskets from the Funeral Home Defendants have suffered injury, and that
6 consumers and FCA members continue to incur threatened injury as a result of the challenged
7 conspiracy, FCA's Board of Directors voted to join in this action as a plaintiff and to seek
8 declaratory and injunctive relief under the antitrust laws on behalf of its members.

9 15. Gloria Jaccarino Bender and Anthony J. Jaccarino are residents of New York. On
10 July 16, 2004, the Jaccarinos purchased a Batesville "Delray" casket for their deceased mother,
11 Lucy Dennino, from Casey Funeral Home ("Casey"). Casey is owned and operated by defendant
12 SCI and is located at 350 Slosson Avenue, Staten Island, New York. Ms. Dennino had died four
13 days earlier, on July 12, 2004, unexpectedly from a heart attack. Although Ms. Dennino was to
14 be cremated, Casey required the Jaccarinos to purchase a casket for her and only offered them
15 two models from which to choose. Because of their grieving state and the time-pressure they
16 were under in making the funeral arrangements, the Jaccarinos purchased a casket for their
17 mother for \$2,095. This price was artificially high because of defendants' anticompetitive
18 conduct.

19 16. John Clark is a resident of California. On April 16, 2004, Mr. Clark purchased a
20 Batesville "Woodbridge" casket for his terminally ill wife, Yvonne Clark, from Dilday Brothers
21 Mortuary ("Dilday"). Dilday is owned and operated by defendant Stewart and is located at
22 17911 Beach Boulevard, Huntington Beach, California. Ms. Clark died five days later, on April
23 21, 2004. Mr. Clark paid \$3,695 for the casket. This price was artificially high because of
24 defendants' anticompetitive conduct.

25 17. Donna Sprague is a resident of New York. On February 25, 2003, Ms. Sprague
26 purchased a Batesville "Churchill" casket from James D. Barrett Funeral Home ("Barrett") for
27 her husband, Robert Sprague, who had died the same day. Barrett is owned and operated by
28

1 defendant SCI and is located at 1004 Lake Street, Elmira, New York. Ms. Sprague paid \$2,195
2 for the casket. This price was artificially high because of defendants' anticompetitive conduct.

3 18. Nancy and Ira Helman are residents of Florida. On November 15, 2002, the
4 Helmans purchased a Batesville casket from Deltona Memorial Funeral Home ("Deltona") for
5 Mr. Helman's mother, Shirley Helman, who had died the previous day. Deltona is owned and
6 operated by defendant SCI and located at 1295 Saxon Boulevard, Orange City, Florida. The
7 Helmans paid \$2,395 for the casket. This price was artificially high because of defendants'
8 anticompetitive conduct.

9 19. Donald Sprague (no relation to Donna Sprague) is a resident of Florida. On
10 November 15, 2002, Mr. Sprague purchased a Batesville "Cottage Rose" casket from Arlington
11 Park Funeral Home ("Arlington") for his mother, Myrtle Sprague, who had died the previous
12 day. Arlington is owned and operated by defendant Stewart and is located at 6920 Lone Star
13 Road, Jacksonville, Florida. Mr. Sprague paid \$3,445 for the casket. This price was artificially
14 high because of defendants' anticompetitive conduct.

15 20. Robert Chitel is a resident of New York. On December 18, 2003, Mr. Chitel
16 purchased a Batesville "Judah" casket from Riverside Memorial Chapel ("Riverside") for his
17 wife, Joan Chitel, who died the previous day. Riverside is owned and operated by defendant SCI
18 and is located at 180 West 78th Street in New York City. Mr. Chitel paid \$7,395 for the casket.
19 The price was artificially high because of defendants' anticompetitive conduct.

20 **B. Defendants**

21 21. SCI is a corporation organized and existing under the laws of the State of Texas.
22 Its principal place of business is 1929 Allen Parkway, Houston, Texas. SCI is the largest owner
23 and operator of funeral homes in the United States, owning and operating roughly 1,200 funeral
24 homes in the United States, including in this district. According to its 2003 Annual Report, SCI
25 operates a "network that cannot be duplicated." SCI funeral homes are largely clustered in major
26 metropolitan areas throughout the United States. SCI, through its various funeral home
27 locations, sells tens of thousands of Batesville caskets annually in the United States. SCI's 2004
28 revenues were roughly \$1.86 billion.

1 22. Alderwoods is a corporation organized and existing under the laws of the State of
2 Delaware. Its principal place of business is 311 Elm Street, Suite 1000, Cincinnati, Ohio.
3 Alderwoods is the second largest owner and operator of funeral homes in the United States,
4 owning and operating roughly 710 funeral homes in the United States, including in this district.
5 Alderwoods funeral homes are largely clustered in major metropolitan areas throughout the
6 United States. Alderwoods, through its various funeral home locations, sells tens of thousands of
7 Batesville caskets annually in the United States. Alderwoods' 2004 revenues were roughly \$715
8 million.

9 23. Stewart is a corporation organized and existing under the laws of the State of
10 Louisiana. Its principal place of business is 1333 South Clearview Parkway, Jefferson,
11 Louisiana. Stewart, through its various subsidiaries, is the third largest owner and operator of
12 funeral homes in the United States, owning and operating roughly 240 funeral homes in the
13 United States, including in this district. Stewart funeral homes are largely clustered in major
14 metropolitan areas throughout the United States. Stewart, through its various funeral home
15 locations, sells tens of thousands of Batesville caskets annually in the United States. Stewart's
16 2004 revenues were roughly \$515 million.

17 24. Batesville is a corporation organized and existing under the laws of the State of
18 Indiana. Its principal place of business is One Batesville Boulevard, Batesville, Indiana.
19 Batesville is wholly-owned and controlled by Hillenbrand, a corporation organized and existing
20 under the laws of the State of Indiana.

21 25. Batesville manufactures and sells various funeral service products throughout the
22 United States. It is the largest casket manufacturer in the United States, selling hundreds of
23 thousands of caskets annually. Batesville manufactures approximately 45% of the caskets sold
24 to consumers in the United States. Batesville does not sell its caskets directly to consumers, nor
25 does Batesville sell its caskets to ICDs. Batesville only sells its caskets to licensed funeral
26 directors operating licensed funeral homes.

27 26. Virtually all of the caskets sold by the Funeral Home Defendants are Batesville
28 caskets.

CO-CONSPIRATORS

1
2 27. Various persons, firms, corporations, organizations and other business entities --
3 including funeral homes throughout the United States -- have participated as co-conspirators in
4 the violations alleged herein and have performed acts in furtherance of the conspiracies. Some
5 of these persons, firms, corporations, organizations and business entities are known and some are
6 unknown.

7 28. Among the co-conspirators is the National Funeral Directors Association (the
8 "NFDA"), the "leading funeral service organization in the United States." The NFDA represents
9 thousands of funeral home members including those owned by the Funeral Home Defendants.

10 29. Through its sponsorship of seminars and conferences, its promotion of practice
11 materials and guides, and its involvement in other industry activities, the NFDA has participated
12 in and facilitated the anticompetitive conduct alleged herein.

13 30. The NFDA is governed by both an Executive Board and a Policy Board on which
14 the Funeral Home Defendants are widely represented.

15 31. Among the NFDA's membership are Funeral Director Associations ("FDAs")
16 from each of the fifty states. Several of these state FDAs, including the California FDA, have
17 also taken part in the conspiratorial acts alleged herein. The Funeral Home Defendants are also
18 widely represented on the governing boards of these state FDAs.

19 32. Also included among the co-conspirators are many of the hundreds of non SCI-
20 owned funeral homes that are Dignity Memorial partners with SCI. Through their operations
21 and pricing which SCI develops, influences, and/or controls, these funeral homes have
22 participated in and facilitated the anticompetitive conduct alleged herein.

23 33. The Aurora Casket Company ("Aurora"), The York Group, Inc. ("York") and
24 certain other casket manufacturers are additional co-conspirators in the conduct alleged in this
25 action. While substantially smaller than Batesville, Aurora and York are the next largest casket
26 manufacturers in the United States. Like Batesville, Aurora and York do not sell caskets to
27 ICDs. They only sell them to licensed funeral directors operating licensed funeral homes. The
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1 Funeral Home Defendants do not sell Aurora and York caskets; however, many of their co-
2 conspirators do.

3 **FACTUAL BACKGROUND**

4 34. The FTC has attempted to regulate the funeral industry for more than twenty
5 years. Through its creation and enforcement of the Funeral Rule, the FTC has attempted to curb
6 the anticompetitive practices engaged in by defendants and their co-conspirators. The FTC has
7 specifically targeted its efforts to protecting competition and consumer choice in the casket
8 market. Despite these efforts, defendants and their co-conspirators have, through the
9 anticompetitive acts described herein, been successful in suppressing competition in the casket
10 market and fixing and maintaining supracompetitive prices for the caskets they sell.

11 **A. The FTC's Funeral Rule**

12 35. In 1972, the FTC began a decade-long investigation of funeral practices in the
13 United States. The FTC's investigation uncovered the existence of a number of wide-spread
14 anticompetitive practices. These practices included offering consumers only pre-packaged
15 funerals that forced them to purchase goods and services they did not want. They also included
16 misrepresenting that certain goods and services, such as embalming, or a casket for direct
17 cremation, were required purchases.

18 36. As a result of the investigation, the FTC enacted the Funeral Rule which became
19 effective on April 30, 1984. The Funeral Rule set forth a number of requirements and
20 prohibitions for funeral providers to remedy their unfair practices. In particular, the Funeral Rule
21 required funeral homes to unbundle their pre-packaged funerals and to give consumers an
22 itemized price listing of every good and service the funeral home sold.

23 37. As the FTC made clear in the Funeral Rule's original Statement of Basis and
24 Purpose, the rule was premised on the particularly vulnerable state of funeral consumers that
25 makes them "unusually susceptible to influence from the funeral director's advice:"

26 The Rule was premised on evidence that consumers are uniquely disadvantaged
27 when they purchase funeral services after the death of a loved one. The bereaved
28 usually must arrange to have the body removed within hours after the death, and
make final arrangements within 24 to 48 hours -- a period during which they are
often suffering from shock and intense grief The strain is compounded by

1 inexperience -- fewer than half of all adults had arranged a funeral, and only 25%
2 of adults had done so more than once.

3 **B. Entry of ICDs**

4 38. One of the principal wrongs the FTC attempted to remedy through the Funeral
5 Rule was the universal industry practice of tying the purchase of funeral services with the
6 purchase of caskets. The FTC was particularly concerned about the sale of caskets because they
7 typically represent the largest price component of a funeral (roughly half), costing in the
8 thousands of dollars. For many consumers, a casket can be one of the most expensive purchases
9 they will ever make.

10 39. By prohibiting these tying practices, the Funeral Rule attempted to "lower barriers
11 to price competition" and "facilitate informed consumer choice." It also provided a catalyst for
12 ICDs to enter the market. After the enactment of the Funeral Rule, ICDs emerged as an
13 alternative, less expensive means of purchasing caskets.

14 40. ICDs have taken a variety of forms. Some are physical establishments. Some are
15 Internet-based. Others are a combination of the two. Regardless of their form, ICDs are neither
16 owned, managed, nor controlled by any of the Funeral Home Defendants or their co-
17 conspirators.

18 41. In *Pennsylvania Funeral Directors Association, Inc. v. Federal Trade*
19 *Commission*, 41 F.3d 81 (3d Cir. 1994), the Third Circuit described the entry of ICDs into the
20 casket market as follows:

21 Prior to the enactment of the Funeral Rule, funeral service providers (i.e., funeral
22 homes) were virtually the only parties selling funeral goods. However, after the
23 implementation of the Funeral Rule, the way was paved for third parties to provide
24 various funeral goods -- namely caskets. Because funeral service providers could
no longer require a consumer to purchase a casket in order to receive any other
funeral service, third parties stepped into the markets

25 *Id.* at 84.

26 42. As the FTC anticipated, and consistent with one of the principal goals of the
27 Funeral Rule, the prices charged by ICDs are considerably lower than those charged by funeral
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1 homes. The FTC has noted that "third-party casket sellers typically charge significantly lower
2 prices than do funeral homes for comparable caskets."

3 43. The lower casket pricing by ICDs has been recognized by every court that has
4 considered the issue. *See, e.g., Pennsylvania Funeral Directors*, 41 F.3d at 84 ("The third parties
5 began selling caskets . . . usually at a substantially lower price than did the funeral homes.");
6 *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("funeral home operators generally mark
7 up the price of caskets 250 to 600 percent, whereas casket retailers sell caskets at much smaller
8 margins").

9 **C. The Imposition of "Casket Handling Fees" to Quash ICD**
10 **Competition**

11 44. In response to the competitive threat posed by the entry of ICDs, funeral homes
12 adopted the practice of imposing extra charges or "casket handling fees" on consumers who
13 chose to purchase their caskets from ICDs.

14 45. The FTC found that this new anticompetitive practice was wide-spread and
15 frustrated the anti-tying provisions of the Funeral Rule:

16 The Commission has concluded that substantial "casket handling fees" are
17 imposed on consumers by a significant proportion of providers wherever third-
18 party casket sellers exist, and, as a result, frustrate the Rule's "unbundling"
requirements and result in the reduction of potential competition in the sale of
caskets fostered by the Funeral Rule.

19 46. The imposition of "casket handling fees" had the effect of negating most, if not
20 all, of the cost savings a consumer would otherwise realize from purchasing the less expensive
21 casket offered by an ICD. In fact, as the court noted in *Pennsylvania Funeral Directors*, these
22 fees sometimes resulted in a higher overall price for an ICD casket compared to a funeral home
23 casket. 41 F.3d at 84. According to the Court, with "casket handling fees," what the funeral
24 providers were essentially telling consumers was "'either buy your casket here, or we'll charge
25 you for it anyway.'" *Id.* at 89 n.10.

26 47. The FTC concluded that these fees served no purpose other than to penalize
27 consumers who chose to purchase their caskets from ICDs: "The fee, in any amount, penalizes
28 consumers for exercising their choice afforded by the [Funeral] Rule."

1 48. "Casket handling fees" achieved their desired effect; namely, quashing the growth
2 of ICDs. According to the FTC: "Casket sales by third parties have declined as a result, and
3 several retailers have curtailed their marketing efforts or withdrawn from the market."

4 D. **The 1994 Amendment to the Funeral Rule**

5 49. The FTC amended the Funeral Rule in 1994 to ban "casket handling fees." The
6 ban was designed to guarantee that consumers would benefit from real choice and price
7 competition. In upholding the validity of the ban, the Third Circuit described the increased
8 competition and lower prices that would result therefrom:

9 Consumers will have increased choice in the purchase of caskets. Consumers will
10 not be penalized for exercising that choice. Additionally, competition in the
11 market for caskets can be expected to increase with the ban in effect, given the
12 fact that many third party casket sellers went out of business as a result of casket
handling fees. Increasing competition in the casket market is likely to drive the
cost of caskets down. All consumers will benefit from this result.

13 *Pennsylvania Funeral Directors*, 41 F.3d at 90-91.

14 50. Following the 1994 ban on "casket handling fees," numerous ICDs entered the
15 casket market. This entry was facilitated by the growth of the Internet as a vehicle for consumer
16 purchasing. However, defendants and their co-conspirators have engaged in a series of new
17 anticompetitive practices to again thwart the competitive threat posed by ICDs and to fix and
18 maintain their casket prices at supracompetitive levels.

19 **ANTICOMPETITIVE CONDUCT**

20 51. Despite the efforts of the FTC, defendants and their co-conspirators have been
21 successful in suppressing competition in the casket market and fixing and maintaining
22 supracompetitive prices for caskets. They have accomplished this in three principal ways. First,
23 they have engineered a group boycott to restrict the ability of ICDs to sell Batesville caskets, the
24 dominant brand of casket, as well as certain other casket brands such as Aurora and York.
25 Second, they have engaged in a campaign of disparagement against ICDs and the caskets they
26 sell. Third, they have engaged in concerted efforts to restrict price competition through
27 coordination of their casket pricing.

28

1 52. Defendants' anticompetitive conduct has foreclosed ICDs from competing in the
2 casket market, and has reduced competition among the Funeral Home Defendants and their co-
3 conspirator funeral homes. As a result, consumers have been forced to pay supracompetitive
4 prices for defendants' caskets. These prices are substantially higher -- by hundreds, if not
5 thousands of dollars per casket -- than those charged by ICDs for comparable caskets. And, they
6 are substantially higher than those that defendants would have charged in a world absent their
7 exclusionary acts.

8 A. **Defendants' Group Boycott of ICDs**

9 53. At the heart of defendants' efforts to quash ICD competition and fix and maintain
10 their supracompetitive pricing of caskets is their conspiracy to prevent ICDs from selling to
11 consumers at discounted prices the dominant Batesville brand of casket as well as certain other
12 casket brands. Defendants and their co-conspirators have accomplished this through their
13 collective refusal to sell Batesville and certain other brands of casket to ICDs.

14 1. Batesville's Anti-ICD Policy

15 54. Batesville will only sell its caskets to licensed funeral directors operating licensed
16 funeral homes. It will not sell its caskets to ICDs. Batesville's restrictive sales policy directly
17 flows from defendants' conspiracy to boycott ICDs. Certain other casket manufacturers have
18 similar sales policies which flow from this conspiracy.

19 55. Following the passage of the Funeral Rule, ICDs began to enter the casket market
20 and sell caskets to consumers at discounted prices. In response to this entry, the Funeral Home
21 Defendants and their co-conspirators began collectively to pressure Batesville -- and other casket
22 manufacturers -- to continue to restrict casket distribution to licensed funeral homes.

23 56. This pressure has continued unabated and has come in two principal forms. The
24 Funeral Home Defendants and their co-conspirators have withheld, or threatened to withhold,
25 their business from Batesville and other casket manufacturers if they sell to ICDs. And, they
26 have encouraged other funeral homes to take similar action.

27 57. The Funeral Home Defendants and their co-conspirators have not only conspired
28 to create the boycott. They have also collectively acted to police it to ensure that "rogue" funeral

1 homes -- unaffiliated with the Funeral Home Defendants and their co-conspirators -- do not
2 supply ICDs with Batesville caskets. This typically involves reporting to Batesville the sale by
3 ICDs of Batesville caskets; Batesville tracking down through the casket serial number the funeral
4 home that sold the casket to the ICD; and Batesville threatening to stop dealing with the "rogue"
5 funeral home if it continues to deal with ICDs.

6 58. The exhortations by the Funeral Home Defendants and their co-conspirators have
7 caused Batesville in recent years to refine and broaden its restrictive sales policy to ensure that
8 ICD access to Batesville caskets is completely blocked.

9 59. In May 2001, Batesville adopted a new sales policy which went beyond merely
10 limiting its casket sales to funeral homes. It also restricted Batesville's *delivery* of caskets to the
11 funeral homes that actually ordered them.

12 60. Batesville amended its sales policy in response to the growth of Internet-based
13 ICDs that were circumventing the boycott with the help of rogue funeral homes that -- *for a price*
14 -- were willing to purchase Batesville caskets on the ICDs' behalf. The funeral home would then
15 direct Batesville to deliver it to the funeral home actually performing the funeral service for the
16 ICD customer.

17 61. By requiring delivery of the casket to the funeral home that ordered it, Batesville's
18 new sales policy was designed to disrupt this avenue for side-stepping the boycott. This was
19 made clear by the Batesville memo introducing the amended sales policy:

20 The increasing growth of third party casket sales, especially on the Internet,
21 continues to be a challenge that faces all of us in funeral service. . . . The
22 purpose of this [new sales policy] is to ensure we do not inadvertently accept an
23 order from a third party seller for subsequent delivery to a funeral home, thereby
becoming their delivery service. . . . This policy is the way we have chosen to
operate and reflects the relationship between Batesville and our valued funeral
home customers. [Emphasis in original.]

24 62. Despite its amended sales policy, some Internet-based ICDs continued to gain
25 access to Batesville caskets. So, in July 2004, Batesville amended its sales policy yet again, this
26 time requiring that the funeral home ordering and receiving the Batesville casket also be the one
27 ultimately billed for it. In a letter dated July 2, 2004 to its funeral home customers, Batesville
28 described the change in policy as follows:

1 Our previous practice of permitting the receiving funeral home to place the order
2 and then having the invoice go to another business entity has ended. Effective
3 July 12, Batesville will only deliver caskets to the funeral home business entity
4 that will be invoiced for the casket and which will be responsible for payment.

5 63. As reported in *Funeral Monitor*, one of the leading publications in the funeral
6 industry, Batesville's new policy was designed to "close[] the door on third party casket sellers
7" *Funeral Monitor* explained why:

8 Since it is unlikely many [funeral homes] will agree to order, receive, and pay for
9 a casket they then have to turn around and invoice at cost to the seller who marks
10 it up and takes the profit, the new policy may indeed put the skids on casket
11 retailers and Internet marketers who advertise low discount prices and free next-
12 day delivery on Batesville caskets.

13 64. Batesville has taken pains to publicize its new sales policy to consumers in a
14 further effort to cement the boycott of ICDs. Beginning in October 2004, Batesville initiated an
15 on-line consumer "education" program that consists of a sponsored link featuring a "Consumer
16 Alert" on several popular consumer search engines such as Google.com. The link goes to
17 Batesville's home page which prominently displays a "Casket Consumer Alert" icon providing
18 the following message: "Online retailers who are not funeral homes but nevertheless sell
19 Batesville caskets are not authorized to do so Only authorized and licensed funeral homes
20 can guarantee that your casket will be authentic and of the highest Batesville Casket quality
21 standards." (Emphasis in original.)

22 2. Conspiracy to Boycott ICDs

23 65. The conspiracy among the Funeral Home Defendants, their co-conspirators, and
24 Batesville to boycott ICDs is an "open secret" in the industry.

25 66. The April 19, 2004 edition of *Funeral Service Insider*, a "completely
26 independent" publication of "[n]ews, [a]nalysis and guidance for funeral service professionals,"
27 reported the following results of a survey it conducted on what funeral homes are doing to
28 combat the threat of ICD competition:

One third of our survey respondents say they've pulled their business from casket
or vault suppliers who deal with third-party sellers -- and nearly one-fifth say
they've gone even further: *They've urged other funeral homes to boycott
suppliers who deal with third party sellers.* [Emphasis added.]

1 The results of this survey -- which are plainly understated based on the reluctance of most
2 companies to admit to *per se* violations of the antitrust laws -- reflect how pervasive the group
3 boycott is within the funeral industry.

4 67. Indeed, George Lemke, Executive Director of the Casket and Funeral Supply
5 Association -- the principal trade association for the funeral supply industry -- referred to the
6 boycott of ICDs as an "unwritten tradition" in the industry. In the context of Costco's recent
7 efforts to become an ICD, Mr. Lemke stated:

8 I know of no [casket] manufacturer who would willingly risk his relationship with
9 licensed funeral homes by cooperating in such a scheme [to supply Costco with
10 caskets]. . . . *Distributing through wholesale buying clubs would be a violation
of the industry's unwritten tradition.* [Emphasis added.]

11 68. Batesville's new sales policy is simply the latest manifestation of this "tradition" --
12 a "tradition" which the Funeral Home Defendants and their co-conspirators have taken pains to
13 maintain. As reported in the August 2, 2004 *Funeral Monitor*, a representative of SCI admitted
14 as much:

15 Facing continuing complaints from its largest customer [SCI], Batesville Casket
16 Company has moved to stop the sale of its caskets in casket stores and on the
17 Internet. . . . According to an unnamed funeral director with SCI: "Funeral
18 consumers have returned to us after funerals and questioned us about the price we
19 charged them for a particular casket. In many cases they have gone on the
Internet and found the same casket we sold them priced as much as 60 percent
less than we charged. . . . [T]o prevent consumers from comparing apples to
apples, we have asked Batesville to stop selling their caskets to casket stores and
Internet vendors."

20 3. There Is No Legitimate Business Purpose For the ICD Boycott

21 69. Batesville's stated purpose for its restrictive sales policy is that only licensed
22 funeral directors are qualified to sell caskets:

23 We view the casket not just as a piece of merchandise, but as an integral part of
24 the overall funeral service. . . . Working with professional funeral firms gives us
25 a greater assurance that our products will be used with the dignity and purpose
intended.

26 However, this rationale has been recognized by both the courts and the industry as pure pretext.

27 70. The court in *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434 (S.D. Miss.
28 2000), for example, rejected this rationale in striking down a Mississippi statute that prevented

1 ICDs from selling caskets. Finding that a casket is nothing more than a "glorified box," the court
2 concluded that selling one requires "no special skills" and that "any special training that [funeral]
3 licensees may receive does not advance consumer protection" with respect to the sale of caskets.
4 *Id.* at 438-39.

5 71. In striking down as unconstitutional an analogous Tennessee statute, the Fourth
6 Circuit reached the identical conclusion: The proffered justifications for preventing ICDs from
7 selling caskets "come close to striking us with the force of a five-week-old unrefrigerated dead
8 fish, a level of pungence almost required to invalidate a statute under rational basis review."
9 *Craigmiles*, 312 F.3d at 225 (internal quotes and citations omitted).

10 72. The International Cemetery and Funeral Association (the "ICFA"), which
11 represents roughly 6,000 funeral homes, cemeteries, and other industry members, is equally
12 dismissive of any justification for restrictions on who can sell caskets. In comments it submitted
13 to the FTC in October 2002, the ICFA stated that laws preventing ICDs from selling caskets are
14 "anticompetitive." The ICFA scoffed at the notion that only licensed funeral directors should
15 sell caskets:

16
17 Specifically, whether or not casket retailers should be registered sellers does not
18 justify a requirement that such retailers must also graduate from mortuary science
19 school, pass a licensing examination, and serve an apprenticeship at a funeral
20 home, in order to sell a casket. These typical requirements for becoming a
licensed funeral director in most states make no sense when applied solely to the
sale of caskets. Columnist George Will succinctly stated the issue when he
observed that requiring casket sellers to be licensed funeral directors was like
saying only podiatrists can sell shoes.

21 73. The pretextual nature of Batesville's sales policy is further demonstrated by the
22 way it is applied. Batesville has refused to sell its caskets to ICDs even if they are operated by
23 licensed funeral directors; even if these licensed funeral directors were prior customers of
24 Batesville; and even if these licensed funeral directors also own independent funeral homes.

25 74. One example of Batesville's unjustifiable sales policy involved a licensed funeral
26 director and owner of several funeral homes who received from Batesville an award for
27 outstanding service in connection with his sale of Batesville caskets. But when he sold his
28 funeral homes and opened an ICD operation, Batesville refused to continue selling to him.

1 75. The lack of legitimate business purpose behind the refusal of Batesville and other
2 casket manufacturers to sell to ICDs is perhaps best revealed by the fact that by closing down a
3 potentially vibrant and lucrative distribution source, they are acting against their own economic
4 self-interest. One Batesville customer admitted as much when questioned by *Funeral Monitor*
5 about Batesville's newly amended sales policy:

6 In light of increasing cremations, fewer caskets being sold, and the low-cost
7 caskets arriving from China, an intelligent person has to scratch his or her head
8 and wonder why a casket company would willingly reduce its market.

8 76. *Funeral Monitor* agreed with this assessment:

9 I'm no economist and I could be wrong, but it's hard to understand how any
10 manufacturer investing the labor and materials before bringing a product to
11 market could plan to grow by shrinking its channels of distribution Even a
12 groundswell of satisfied [funeral home] customers might not be enough to surpass
13 (or at least balance) the amount of business Batesville is willing to turn away.
14 The last time I checked, every death gets a maximum of one casket (if that, with
15 the rise of cremation). And no matter how appreciative Batesville's [funeral
16 home] customers might be, they are not going to order two caskets out of love and
17 loyalty when only one will do.

14 **B. The Campaign of Disparagement**

15 77. The second aspect of defendants' conspiracy is their campaign to disparage ICDs
16 and the caskets they sell. Such a campaign has been facilitated by defendants' efforts to restrict
17 ICDs from selling Batesville and other major brand caskets. By ensuring that consumers
18 comparing the caskets defendants and their co-conspirators sell to those the ICDs sell are not
19 comparing "apples to apples," defendants and their co-conspirators are free to disparage the ICD
20 caskets without also denigrating the caskets they sell. In truth, the caskets sold by ICDs are
21 generally similar or superior to those manufactured by Batesville and the other boycotting
22 brands. Nevertheless, many consumers will only purchase a Batesville or other major brand
23 casket because of what they are told by the Funeral Home Defendants or their co-conspirators.

24 78. Accordingly, virtually identical comments made by defendants and their co-
25 conspirators maligning ICD caskets abound. Some of the most commonly used lines disparaging
26 ICD caskets include: "their handles fall off," "the bottoms drop out," "they are made by
27 prisoners," "they are tin cans," and "they are all seconds."
28

1 79. These types of disparaging comments are made not only in face-to-face
2 encounters between funeral directors and consumers. They are also made publicly, through the
3 press or other media outlets, to create the wide-spread perception among consumers that ICDs
4 are disreputable and their caskets inferior.

5 80. For example, a spokesperson for the California FDA publicly stated:

6 The caskets you get online are inferior, yes they are. They're not as good at all . .
7 . . Let's say your next door neighbor dies and the family buys a casket online.
8 We put her in the casket, take four steps up the stairs at the ceremony, and mom
9 falls out the bottom. Who are they gonna sue? . . . I sure as hell wouldn't want to
walk into a funeral store and see a guy that looked like a used car salesman I
wouldn't want to get a casket online -- it might be from Mexico! Just the other
day I saw one that looked like a Guadalajara special.

10 81. In addition to the ubiquity of public and private comments disparaging the quality
11 and integrity of ICDs and their caskets, there are a number of "how-to" guides that defendants
12 and their co-conspirators have created to ensure that all funeral providers are spreading a
13 consistent message.

14 82. For example, the NFDA has engaged in an effort to get the funeral industry to
15 adopt a unified anti-ICD stance with consumers through its publication, dissemination, and wide-
16 spread promotion of its "Use of Third-Party Merchandise" form. The NFDA advises its
17 members to request that any customer intending to purchase an ICD casket sign this standard
18 form. The form requires that the consumer indemnify and hold harmless the funeral home from
19 any liability arising out of the consumer's purchase of an ICD casket. It also provides an
20 acknowledgement by the consumer of the purported risks associated with the purchase of an ICD
21 casket:

22 The [consumer] authorizes the FUNERAL HOME to accept, unconditionally, the
23 delivery of the casket. If the [consumer] decides after inspection of the casket
24 that the casket is unacceptable, the [consumer] understands that this could delay
25 and cause the originally scheduled funeral service to be rescheduled and that
additional funeral charges could be added to compensate for the time incurred in
rescheduling the ceremony.

26 83. The true purpose behind the NFDA's wide promotion of the form is not to shield
27 funeral homes against liability or warn consumers about any real risks associated with an ICD
28

1 purchase. Rather, it is to steer consumers -- who are in their most vulnerable and impressionable
2 state -- away from ICDs and their products.

3 84. According to one funeral home that has used this type of form, it has proven
4 extremely successful. Walton's Family of Funeral Homes, an SCI Dignity Memorial partner,
5 trumpeted in a recent edition of *Funeral Service Insider* that through its use of forms to
6 "educat[e] families on the risks of going elsewhere for a casket," it has been successful in
7 shutting down two ICDs in its area and convincing 90% of the customers who were leaning
8 towards an ICD casket to purchase it from the funeral home instead.

9 85. Of particular note is the following language contained in the Walton form, a copy
10 of which the *Funeral Service Insider* published in full:

11 Third party casket marketers are often "fly-by-night" operators working out of a
12 telephone "hot box," cell phone or Internet site They have little or no Casket
13 Inventory of their own because most reputable Casket manufacturers will not sell
14 to them In most cases, the person selling you this Casket has neither seen the
15 actual casket you have purchased, nor can they make an honest representation to
16 you of its condition, when it was manufactured or how long it has been in storage.
17 **Most importantly, the person selling you a Casket cares about one thing and
one thing only: Your Money.** They care little about how satisfied you will be
with the delivered casket and have limited recourse in promptly replacing a
Casket that is delivered damaged or is not the actual Casket that you ordered. . . .
We respectfully offer this information and our opinion to you as a means of
protecting you and your family from any further distress during your time of grief
and loss. [Emphasis in original.]

18 86. Mark Blankenship, Walton's General Manager and Vice President of operations
19 told *Funeral Service Insider* that Walton's use of these customer "education" forms is a much
20 better practice for retaining casket sales than trying to compete with the lower pricing of the
21 ICDs:

22 We tried that before, and it's a slippery slope. You lose the integrity of your
23 pricing Plus, pretty soon you'll find yourself cutting casket prices for every
24 family within certain tight-knit ethnic and religious communities Word
spreads pretty fast.

25 Walton's willingness to openly share its competitive strategy with other funeral homes is further
26 evidence of defendants' conspiracy.

27
28

1 **C. Price Coordination**

2 87. The third aspect of defendants' conspiracy is the collective effort by the Funeral
3 Home Defendants and their co-conspirators to eliminate price competition for casket sales. They
4 have accomplished this through restricting or preventing price advertising, sharing casket price
5 information, and sham discounting funeral packages that require the purchase of a casket. Each
6 of these price coordination measures has enabled the Funeral Home Defendants and their co-
7 conspirators to fix and maintain supracompetitive pricing on the caskets they sell. In addition,
8 the concerted efforts to promote and employ sham discounting have further suppressed the
9 ability of ICDs to compete and constrain pricing in the casket market.

10 1. No Price Advertising

11 88. The funeral industry has historically been opposed to any form of price
12 advertising in order to withhold price information from consumers. As the FTC recognized in its
13 comments surrounding the creation of the Funeral Rule, a lack of price information facilitates
14 reduced price competition and the charging of higher prices: "Consumer ignorance about prices
15 will permit sellers to charge higher than competitive prices, even in a market with numerous
16 sellers."

17 89. Through the price disclosure and anti-tying requirements of the Funeral Rule, the
18 FTC hoped to remedy the lack of price information and price competition that existed in the
19 funeral industry. However, due to the concerted efforts of the Funeral Home Defendants and
20 their co-conspirators in coordinating their pricing, the FTC has not succeeded.

21 90. In some cases, the Funeral Home Defendants and their co-conspirators have gone
22 beyond simply encouraging a unified policy against price advertising; they have actually
23 mandated it. For example, the Virginia Board of Funeral Directors and Embalmers, an industry
24 "regulatory" body comprised primarily of representatives of funeral homes -- including
25 Alderwoods -- recently settled with the FTC after the agency sued the Board for its ban on
26 discount advertising.

27
28

1 91. The FTC complained that the Board's ban violated Section 5 of the FTC Act by
2 constituting a "horizontal agreement[] among competing funeral directors . . . that restricted price
3 competition in the provision of funeral products and services"

4 92. The FTC concluded that the conduct was anticompetitive because it had the
5 following effects:

6 [T]he conduct deprived consumers of truthful information about prices for funeral
7 products and services; . . . the conduct deprived consumers of the benefits of
8 vigorous price competition . . . ; and the conduct caused consumers to pay higher
9 prices for funeral products and services than they would have in the absence of
10 that conduct.

11 2. Price Sharing

12 93. The efforts of the Funeral Home Defendants and their co-conspirators to restrict
13 price advertising is consistent with their overall efforts to coordinate pricing generally. One way
14 they have accomplished this is through the annual pricing surveys that the NFDA has up until
15 recently performed and that the Federated Funeral Directors of America (the "FFDA") still
16 performs. These listings of average prices for funeral products and services, including caskets,
17 are compiled with the assistance of more than one thousand funeral homes nationally.

18 94. According to the late Jessica Mitford, a noted authority on the consumer abuses of
19 the funeral industry, "[i]ndustry observers have no doubt that the dissemination of these numbers
20 within the trade serves to establish uniform price minimums, in violation of the antitrust laws."

21 95. Of particular note is that the FFDA, the current compiler of the survey, is a
22 consultant to more than 1,300 funeral homes. Among the consulting services that FFDA
23 provides to these homes is "pricing recommendations," as advertised on FFDA's website.

24 96. In addition to the national pricing surveys, some of the state trade associations
25 perform their own pricing surveys on a state-wide basis which further facilitates the fixing and
26 maintenance of high casket prices. For example, the New Jersey FDA conducts an annual
27 pricing survey of its membership and reports its findings on its website. Among the findings
28 highlighted are the average prices charged for caskets based on three levels of casket quality.

 97. In addition to the sharing of price information facilitated by these pricing surveys,
the industry routinely offers formal training seminars on how caskets should be priced to

1 foreclose competition from ICDs. For example, the Illinois FDA offered a seminar on this
2 subject by industry consultant Ron Hast entitled *Funeral Service Pricing & Packaging,*
3 *Addressing Third Party Casket Sellers & Competition.* Examples of other such seminars that
4 have been held by the NFDA and other state FDAs include: *Putting all your eggs in one basket?*
5 (NFDA presentation by NFDA spokesman David Walkinshaw); *Understanding Innovative*
6 *Funeral Service Pricing* (NFDA presentation by David Walkinshaw); *When it's BYOC (bring*
7 *your own casket) what do you do?* (NFDA presentation by NFDA General Counsel Scott
8 Gilligan); *The New Competitor - Retail Casket Stores* (Massachusetts FDA presentation by John
9 Carmon, past NFDA President).

10 3. Sham Discounting

11 98. A common theme of these seminars, and central to the price coordination efforts
12 of the Funeral Home Defendants and their co-conspirators, is the practice of sham discounting.
13 Under this pricing practice, funeral homes make "discounts" available only to consumers who
14 purchase funeral "packages" that include a casket. Those that purchase a casket from an ICD are
15 not eligible for the "package discount" and must pay artificially inflated a la carte pricing for the
16 goods and services they purchase from the funeral home. The end result is that consumers pay
17 the funeral home for the casket whether they purchase it from the funeral home or not.

18 99. This pricing stratagem -- also referred to as "reverse handling fees" -- represents a
19 clear attempt to undermine the freedom of choice and open competition the Funeral Rule was
20 designed to foster.

21 100. The FTC has recognized the prevalence of sham discounting and the adverse
22 effects it has on competition in the casket market:

23 Since the amendment of the Rule, the Commission is aware that some funeral
24 providers may employ certain practices that may undermine the benefit to
25 consumers and to competition intended by the Rule's unbundling provisions. . . .
26 For example, the prices of itemized goods and services (appearing on the General
27 Price List) may in some instances be inflated to the point of fictitiousness. Thus,
28 virtually all consumers would choose to purchase "discount packages," resulting
in a situation where the discount package represents the de facto prices for the
goods and services. Such a scenario may restrict consumer choice in a manner
that frustrates the intended purpose of the Rule. Further, some members of the
funeral industry have alleged that because such "discount packages" are often

1 conditioned on the purchase of a casket, these packages are artificially constructed
2 by certain funeral providers in order to eliminate competition in casket sales.

3 101. The prevalence and anticompetitive effects of sham discounting has also been
4 widely recognized and attested to by a number of industry observers as well as funeral homes
5 unaffiliated with the Funeral Home Defendants and their co-conspirators.

6 102. For example, in comments it submitted to the FTC, the Graham Funeral Home
7 complained about this pricing practice as follows:

8 It seems that the growing trend in the industry is to artificially inflate the itemized
9 prices to a ridiculous level, and then greatly discount the total price of the funeral
10 if a package deal is selected, including the casket. This has the effect of not only
11 forcing the consumer to purchase items they don't necessarily need, but also
12 unfairly closing the door to competition. If a client chooses to purchase a casket
elsewhere, they are penalized by having to pay the artificially inflated prices taken
from the price list. In effect, the package price becomes the "de facto" price, and
subverts the intent of the funeral rule.

13 103. The Vassar-Rawls Funeral Home similarly complained to the FTC about sham
14 discounting:

15 Funeral packages are a sham used to circumvent the purpose for requiring
16 itemized pricing. Funeral providers that use funeral packages, in most instances,
17 grossly inflate their itemized prices and offer the packages at what they represent
as a discount.

18 104. The prevalence of sham discounting is directly attributable to the concerted
19 efforts of the Funeral Home Defendants and their co-conspirators who have heavily promoted
20 the practice as an effective way to combat the threat posed by ICDs.

21 105. In addition to the industry seminars that spread the gospel of "package pricing,"
22 the NFDA widely circulates to its membership pricing guides that advocate the use of sham
23 discounting as an effective way to restrict ICD sales. Through these guides, the NFDA advises
24 its members to raise their *a la carte* pricing to the point where the consumer will pay the funeral
25 home a supracompetitive profit for the casket whether the consumer purchases it from the funeral
26 home or not.

27 ///

28 ///

1 **RELEVANT MARKET**

2 106. The sale of caskets to consumers is the product dimension of a relevant market.
3 The geographic dimension of this market is the United States.

4 107. Because of the unique purpose they serve -- containing the remains of a loved one
5 for burial -- caskets are not reasonably interchangeable with any other products.

6 108. From the standpoint of both consumers and suppliers, there are no reasonable
7 substitutes for caskets. Even in the face of a small but significant and nontransitory price
8 increase, consumers have not, and would not, substitute their purchase of a casket with the
9 purchase of a different product.

10 109. There is widespread recognition of a casket market by both the industry and the
11 courts. Indeed, in *Pennsylvania Funeral Directors*, the Third Circuit plainly recognized the
12 existence and economic coherence of a casket market when it upheld the validity of the FTC's
13 ban on casket handling fees: "[C]ompetition in the *market for caskets* can be expected to increase
14 with the ban in effect Increasing competition in the *casket market* is likely to drive the cost
15 of caskets down." 41 F.3d at 91 (emphasis added).

16 110. The geographic dimension of the casket market is the United States because of the
17 availability of the Internet as a source for purchasing caskets. The use of the Internet has
18 become particularly prevalent over the past decade. Indeed, it is the emergence of Internet-based
19 ICDs that has prompted defendants to step up their concerted efforts to suppress ICD
20 competition through the exclusionary acts described herein. But for defendants' anticompetitive
21 conduct, the Internet would be a much more vibrant medium through which consumers could
22 purchase caskets.

23 **MARKET POWER**

24 111. SCI, Alderwoods, and Stewart collectively own thousands of funeral homes in the
25 United States and perform hundreds of thousands of funerals annually. Because of the size and
26 scope of their funeral networks, and the large number of funerals they perform, the Funeral
27 Home Defendants, both individually and collectively, have substantial market power over
28 funeral merchandise suppliers such as Batesville.

1 112. With SCI, this market power extends even beyond the number of funeral homes it
2 owns. Through its Dignity Memorial partnerships with hundreds of non-SCI funeral homes, SCI
3 influences and/or controls the pricing and practices of these affiliated funeral homes in locations
4 where SCI otherwise has no presence.

5 113. The Funeral Home Defendants, both individually and collectively, also have
6 substantial market power over consumers. This market power is evidenced by the power over
7 casket pricing each of the Funeral Home Defendants has. The Funeral Home Defendants charge
8 consumers significantly more than ICDs charge for comparable caskets. Despite these large
9 price differentials, consumers continue to purchase caskets from the Funeral Home Defendants.
10 This market power is also evidenced from the Funeral Home Defendants' power to exclude
11 competition and reduce consumer choice.

12 114. The substantial market power of the Funeral Home Defendants is even greater
13 when aggregated with the collective power of the funeral home co-conspirators.

14 **HARM TO COMPETITION**

15 115. Through their group boycott, disparagement and coordinated pricing campaigns --
16 whether viewed independently or collectively -- defendants have harmed competition in the
17 casket market in three principal ways. First, they have excluded competition from ICDs.
18 Second, they have succeeded in charging supracompetitive prices for the caskets they sell
19 consumers. And third, they have limited the variety and choice of caskets available to
20 consumers. In addition, defendants' conduct has suppressed competition in the sale of other
21 funeral goods and services to consumers.

22 **A. ICD Competition Has Been Excluded**

23 116. Through their group boycott of ICDs, defendants and their co-conspirators have
24 succeeded in restricting the ability of ICDs to sell at discount prices the dominant Batesville
25 brand of casket and certain other brands of casket such as Aurora and York. ICDs are either
26 completely blocked from selling these caskets, or severely restricted from doing so by being
27 forced to try to purchase these caskets indirectly from rogue funeral homes unaffiliated with the
28 Funeral Home Defendants and their co-conspirators.

1 117. Many consumers will only purchase the dominant Batesville brand of casket or
2 certain other brands of casket because of the false perception fostered by defendants and their co-
3 conspirators that these caskets are superior to those sold by ICDs. ICDs are foreclosed from
4 competing with funeral homes on a level playing field for these consumers. They either are
5 barred from making the sale altogether, or can do so only on terms that significantly add to their
6 costs or make the product less attractive to consumers.

7 118. Defendants' campaign of disparagement further forecloses ICD competition by
8 steering consumers -- who are extremely impressionable because of grief, time pressure, and
9 inexperience -- away from making ICD purchases.

10 119. Defendants' concerted efforts to engage in sham discounting have also foreclosed
11 ICD competition. Sham discounting prevents consumers from making purchase decisions based
12 on price since they will pay the funeral home for the casket whether or not they actually purchase
13 it from the funeral home.

14 120. As a result of defendants' anticompetitive conduct, numerous ICDs have either
15 lost a significant percentage of their sales to funeral homes, or have gone out of business
16 altogether.

17 **B. Consumers Pay Fixed and Supracompetitive Prices For**
18 **Caskets**

19 121. Defendants' exclusionary acts have also resulted in consumers paying fixed and
20 supracompetitive prices for caskets. Foreclosed from competing on a level playing field because
21 of the group boycott, campaign of disparagement, and sham discounting practices of defendants
22 and their co-conspirators, ICDs are unable to constrain the Funeral Home Defendants' casket
23 pricing to the extent they would have in a world absent the conspiracies. The Funeral Home
24 Defendants and their co-conspirators have further fixed prices and eliminated price competition
25 among themselves through their various price coordination activities.

26 122. Accordingly, the Funeral Home Defendants and their co-conspirators have
27 charged consumers fixed and supracompetitive prices for caskets. These prices are substantially
28 higher than those charged by ICDs for comparable caskets. And, they are substantially higher

1 than the prices the Funeral Home Defendants and their co-conspirators would have charged in a
2 world absent their exclusionary acts.

3 123. In an unrestrained environment where they would have faced substantially greater
4 price competition from ICDs, the Funeral Home Defendants and their co-conspirators would
5 have been forced to lower their casket prices in order to compete with the lower pricing of ICDs.
6 They also would have been forced to engage in price competition among themselves absent their
7 price coordination efforts.

8 124. The price-constraining effect of unrestrained competition by ICDs has been
9 recognized by every court that has considered the issue. For example, in upholding the FTC's
10 ban on "casket handling fees," the Third Circuit found that these fees "precluded much true
11 competition from third parties which would ordinarily result in prices charged being driven
12 down." *Pennsylvania Funeral Directors*, 41 F.3d at 91.

13 125. Similarly, in invalidating Tennessee's requirement that only licensed funeral
14 providers may sell caskets, the Sixth Circuit held:

15 The licensure requirement imposes a significant barrier to competition in the
16 casket market. By protecting licensed funeral directors from competition on
17 caskets, the [rule] harms consumers in their pocketbooks. . . . [W]e invalidate
only the [state's] naked attempt to raise a fortress protecting the monopoly rents
that funeral directors extract from consumers.

18 *Craigsmiles*, 312 F.3d at 228-29.

19 126. In rescinding an analogous statute from Mississippi, the court in *Casket Royale*
20 similarly concluded:

21 As a result of this [restriction], consumers in Mississippi are offered fewer
22 choices when it comes to selecting a casket. Consequently, there is less price
23 competition among the sellers of caskets. Ultimately, the consumer is harmed by
this regulation as one is forced to pay higher prices in a far less competitive
environment.

24 124 F. Supp. 2d at 440.

25 **C. Consumer Choice Has Been Restricted**

26 127. Through their concerted efforts to foreclose competition from ICDs -- particularly
27 those that sell through the Internet -- defendants have also substantially restricted the range of
28 casket choices available to consumers.

1 128. The Funeral Home Defendants offer consumers only one brand of casket --
2 Batesville. Moreover, they routinely steer their customers to a limited selection of Batesville
3 caskets, typically the most expensive caskets the consumer can (or in some cases, can't) afford.

4 129. In contrast, ICDs -- particularly those that are Internet-based -- offer consumers a
5 pressure-free environment to view a large variety of caskets from various manufacturers, and in
6 different styles and price ranges. ICDs also provide consumers with a source for highly
7 individualized caskets which funeral homes are unable or unwilling to offer.

8 130. The expanded casket variety and choice available to consumers only through the
9 ICD channel has been recognized by the FTC as another key reason for its creation of the
10 Funeral Rule:

11 [T]hird-party casket sellers can benefit consumers by expanding the range of
12 casket choices available in a market along additional dimensions. For example,
13 consumers desiring highly individualized caskets made by artists or craftsmen
14 may be unable to find such caskets through funeral homes.

15 **D. Competition in the Sale of General Funeral Services Has Been**
16 **Suppressed**

17 131. The threat to the Funeral Home Defendants and their co-conspirators from
18 unrestrained ICD competition is not simply about fixing and maintaining their supracompetitive
19 pricing on caskets. It is also about maintaining their pricing power over consumers with respect
20 to all of the other funeral goods and services they provide. If ICDs become a viable alternative
21 source from which consumers can purchase lower-priced caskets, consumers will begin to
22 challenge the high prices charged by the Funeral Home Defendants and their co-conspirators for
23 the other funeral goods and services they sell.

24 132. Moreover, ICDs offer a potential vehicle for consumers to shop around for low-
25 cost funeral providers through referral services that some ICDs offer. Indeed, some Internet-
26 based ICDs offer their customers a nationwide network of funeral homes unaffiliated with the
27 Funeral Home Defendants and their co-conspirators that will provide deep discounts over their
28 general prices.

 133. Costco, which recently has taken steps to enter the casket market as an ICD, also
has in place plans to establish a national network of funeral providers that will provide

1 discounted services to Costco members. In the industry press describing Costco's entry into the
2 casket market, Costco's planned referral network was highlighted as one of the principal threats
3 to and concerns of funeral homes.

4 **E. There Is No Legitimate Business Purpose For Any of**
5 **Defendants' Conduct**

6 134. There is no legitimate business justification for the concerted efforts of defendants
7 and their co-conspirators to suppress competition in the casket market. Their conduct and
8 conspiracies are solely for the purpose of excluding competition from ICDs, fixing and
9 maintaining supracompetitive prices for the dominant Batesville brand and certain other brands
10 of casket, restricting consumer choice, and protecting the Funeral Home Defendants and their co-
11 conspirators from competition in the sale of other funeral goods and services that would result if
12 consumers had free and open access to ICDs.

13 **CLASS ACTION ALLEGATIONS**

14 135. The Consumer Plaintiffs bring this action as a class action under Rule 23(b)(3) of
15 the Federal Rules of Civil Procedure for violations of Sections 1 and 2 of the Sherman Act, 15
16 U.S.C. §§ 1, 2, and the California Unfair Competition Law, Section 17200 of the California
17 Business and Professions Code. The Rule (b)(3) Class is comprised of all consumers located in
18 the United States who purchased Batesville caskets from the Funeral Home Defendants during
19 the fullest period permitted by the applicable statute of limitations.

20 136. All of the members of the Rule (b)(3) Class were injured as a result of the
21 supracompetitive prices charged for caskets by the Funeral Home Defendants --
22 supracompetitive prices achieved as a result of the conspiracies detailed herein. The Rule (b)(3)
23 Class does not include the defendants or their co-conspirators.

24 137. Members of the (b)(3) Class include hundreds of thousands, if not millions, of
25 consumers. They are so numerous that their joinder would be impracticable.

26 138. FCA and the Consumer Plaintiffs also bring this action as a class action under
27 Rule 23(b)(2) of the Federal Rules of Civil Procedure, for violations of Sections 1 and 2 of the
28 Sherman Act, 15 U.S.C. §§ 1, 2 and the California Unfair Competition Law, Section 17200 of

1 the California Business and Professions Code. The Rule (b)(2) Class includes the FCA, all
2 members of the Rule (b)(3) Class, and all consumers who are threatened with injury by the
3 conspiracies detailed herein.

4 139. Defendants have acted, continued to act, refused to act and continued to refuse to
5 act on grounds generally applicable to the Rule (b)(2) Class, thereby making appropriate final
6 injunctive relief with respect to the Rule (b)(2) Class as a whole. The Rule (b)(2) Class does not
7 include defendants or their co-conspirators.

8 140. Members of the Rule (b)(2) Class include hundreds of thousands, if not millions,
9 of consumers. They are so numerous that their joinder would be impracticable.

10 141. Common questions of law and fact exist with respect to all Class members and
11 predominate over any questions solely affecting individual Class members. Among the
12 questions of law and fact common to the Class are the following:

- 13 • Whether defendants and their co-conspirators have engaged in a concerted effort to
14 fix and maintain supracompetitive casket prices.
- 15 • Whether defendants and their co-conspirators have engaged in a concerted effort to
16 suppress or exclude competition in the casket market.
- 17 • Whether the prices for Batesville caskets the Funeral Home Defendants sold
18 during the limitations period were higher than they would have been absent the
19 anticompetitive conduct alleged herein.
- 20 • Whether, and to what extent, defendants' anticompetitive conduct has harmed
21 competition in the casket market.
- 22 • The duration and scope of defendants' conspiracies.
- 23 • Whether there is any legitimate business purpose for defendants' anticompetitive
24 conduct (for plaintiffs' rule of reason claims).

25 142. Neither FCA nor the Consumer Plaintiffs have any conflict of interest with Class
26 members. Their claims are typical of the claims of the Class and they will fairly and adequately
27 protect the interests of the Class. Counsel competent and experienced in federal class action and
28 federal antitrust litigation has been retained to represent the Class.

143. This action is superior to any other method for the fair and efficient adjudication
of this legal dispute since joinder of all members is not only impracticable, but impossible. The
damages suffered by certain members of the Class are small in relation to the expense and

1 burden of individual litigation and therefore it is highly impractical for such Class members to
2 seek redress for damages resulting from defendants' anticompetitive conduct.

3 144. There will be no extraordinary difficulty in the management of the Class action.

4 **CLAIMS FOR RELIEF**

5 **FIRST CLAIM FOR RELIEF**

6 **-- Against All Defendants --**

6 (Per Se Unlawful or Rule of Reason Price-Fixing)

7 145. Plaintiffs repeat and reallege each and every allegation of this complaint as if
8 fully set forth herein.

9 146. Each of the defendants, along with their co-conspirators, have entered into
10 continuing illegal contracts, combinations or conspiracies in restraint of trade, the purpose and
11 effect of which are to fix and maintain supracompetitive prices on caskets. These contracts,
12 combinations or conspiracies are illegal *per se* under Section 1 of the Sherman Act, 15 U.S.C. §
13 1.

14 147. These contracts, combinations or conspiracies have caused substantial
15 anticompetitive effects in the casket market. They have excluded competition from ICDs. They
16 have fixed and maintained supracompetitive prices for the caskets that the Funeral Home
17 Defendants and their co-conspirators sell. And, they have restricted the variety of casket choices
18 available to consumers.

19 148. These contracts, combinations or conspiracies have no legitimate business
20 purpose. They achieve no legitimate efficiency benefit to counterbalance the substantial
21 anticompetitive effects they have caused in the casket market.

22 149. As a result of these violations of Section 1 of the Sherman Act, plaintiffs and
23 Class members have been injured in their business and property in an amount not presently
24 known, but which is, at a minimum, hundreds of millions of dollars, prior to trebling.

25 150. Such violation and the effects thereof are continuing and will continue unless
26 injunctive relief is granted. Plaintiffs and Class members have no adequate remedy at law.

27 ///

28 ///

SECOND CLAIM FOR RELIEF
-- Against All Defendants --
(*Per Se* Unlawful or Rule of Reason Group Boycott)

151. Plaintiffs repeat and reallege each and every allegation of this complaint as if fully set forth herein.

152. Each of the defendants, along with their co-conspirators, have entered into continuing illegal contracts, combinations or conspiracies in restraint of trade, the purpose and effect of which are to fix and maintain supracompetitive prices on caskets and eliminate competition from ICDs in the sale of caskets to consumers. These contracts, combinations, agreements or conspiracies are illegal *per se* under Section 1 of the Sherman Act, 15 U.S.C. § 1.

153. Each of the Funeral Home Defendants -- individually, collectively among themselves, and collectively with their co-conspirators -- possess and exercise market power over Batesville and consumers. Their ability to get Batesville to act against its economic self-interest by not supplying ICDs with caskets as well as their ability to fix and maintain supracompetitive prices is evidence of the individual and collective market power of the Funeral Home Defendants.

154. These contracts, combinations or conspiracies have caused substantial anticompetitive effects in the casket market. They have excluded competition from ICDs. They have fixed and maintained supracompetitive prices for the caskets that the Funeral Home Defendants and their co-conspirators sell. And, they have restricted the variety of casket choices available to consumers.

155. These contracts, combinations or conspiracies have no legitimate business purpose. They achieve no legitimate efficiency benefit to counterbalance the anticompetitive effects they cause in the casket market.

156. As a result of these violations of Section 1 of the Sherman Act, plaintiffs and Class members have been injured in their business and property in an amount not presently known, but which is, at a minimum, hundreds of millions of dollars, prior to trebling.

157. Such violation and the effects thereof are continuing and will continue unless injunctive relief is granted. Plaintiffs and Class members have no adequate remedy at law.

1 **THIRD CLAIM FOR RELIEF**
2 -- **Against Funeral Home Defendants --**
(Conspiracy to Monopolize)

3 158. Plaintiffs repeat and reallege each and every allegation of this complaint as if
4 fully set forth herein.

5 159. Each of the Funeral Home Defendants, along with their co-conspirators, have
6 willfully, knowingly, and intentionally and with the specific intent to do so, combined and
7 conspired to monopolize the casket market. This combination and conspiracy is illegal under
8 Section 2 of the Sherman Act, 15 U.S.C. § 2.

9 160. The combination and conspiracy to monopolize the casket market has been
10 effectuated by the means and overt acts set forth above, among others.

11 161. The combination and conspiracy to monopolize the casket market has caused
12 substantial anticompetitive effects in the casket market. It has excluded competition from ICDs.
13 It has fixed and maintained supracompetitive prices for the caskets that the Funeral Home
14 Defendants and their co-conspirators sell. And, it has restricted the variety of casket choices
15 available to consumers.

16 162. The combination and conspiracy has no legitimate business purpose. It achieves
17 no legitimate efficiency benefit to counterbalance the anticompetitive effects it causes in the
18 casket market.

19 163. As a result of this violation of Section 2 of the Sherman Act, plaintiffs and Class
20 members have been injured in their business and property in an amount not presently known, but
21 which is, at a minimum, hundreds of millions of dollars, prior to trebling.

22 164. Such violation and the effects thereof are continuing and will continue unless
23 injunctive relief is granted. Plaintiffs and Class members have no adequate remedy at law.

24 **FOURTH CLAIM FOR RELIEF**
25 -- **Against All Defendants --**
(For Violations Of California's Unfair Competition Law)

26 165. Plaintiffs repeat and reallege each and every allegation of this complaint as if
27 fully set forth herein.

28

1 166. Defendants' contracts, combinations or conspiracies constitute unlawful or unfair
2 business acts and practices under Section 17200 of the California Business and Professions
3 Code.

4 167. Defendants and their co-conspirators have engaged in "unlawful" business acts
5 and practices by violating Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

6 168. Plaintiffs reserve the right to allege other violations of law which constitute
7 unlawful acts or practices. Such conduct is ongoing and continues to date.

8 169. Defendants and their co-conspirators have also engaged in "unfair" business acts
9 and practices in that the harm caused by their contracts, combinations or conspiracies offends
10 public policy, is immoral, unscrupulous, unethical, deceitful and offensive, and causes
11 substantial economic injury to consumers.

12 170. As a result of these violations of California's Unfair Competition Law, plaintiffs
13 and Class members have been injured in their business and property in an amount not presently
14 known, but which is, at a minimum, hundreds of millions of dollars.

15 171. Such unlawful or unfair business practices are continuing and will continue unless
16 relief enjoining these practices is granted under Section 17204 of the California Business and
17 Professions Code. Plaintiffs and Class members have no adequate remedy at law.

18 **RELIEF SOUGHT**

19 WHEREFORE, the Class requests the following relief:

20 A. That the Court declare, adjudge and decree that defendants have committed the
21 violations of federal and state law alleged herein;

22 B. That defendants, their directors, officers, employees, agents, successors, and
23 assigns be permanently enjoined and restrained from, in any manner, directly or indirectly, fixing
24 casket prices, boycotting ICDs, disparaging ICDs, sharing casket price information, restricting
25 casket price advertising, offering sham discounts through package pricing, and committing any
26 other violations of Sections 1 and 2 of the Sherman Act or California's Unfair Competition Law,
27 and that defendants, their directors, officers, employees, agents, successors, and members be
28

1 enjoined and restrained from, in any manner, directly or indirectly, committing any other
2 violations of statutes having a similar purpose or effect.

3 C. That defendants provide Class members with damages, in an amount to be proven
4 at trial, to be trebled according to law, plus interest -- including prejudgment interest -- to
5 compensate them for the overcharges they incurred from defendants' violations of the federal
6 antitrust laws.

7 D. That defendants provide Class members with restitution for the overcharges that
8 were extracted by violating the California Unfair Competition Law.

9 E. That the Court award the Class attorneys' fees and costs of suit, and such other
10 and further relief as this Court may deem just and proper.

11 **DEMAND FOR JURY TRIAL**

12 Plaintiffs demand a trial by jury.

13 DATED: May 2, 2005

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