

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

FRED C. DAMES FUNERAL HOMES,
INC., CALVERT FUNERAL HOMES,
LTD., CLANCY-GERNON FUNERAL
HOMES, INC., AARON TODD DEAN
D/B/A BASS PATTON DEAN FUNERAL
HOME AND TOBERMAN-DEAN
FUNERAL HOME, MCCRACKEN-DEAN
FUNERAL HOME, INC., AND KNAPP
FUNERAL HOMES, INC., individually and
on behalf of all others similarly situated,

Plaintiffs,

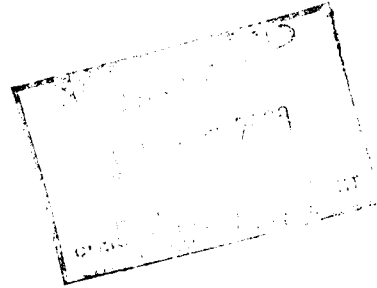
v.

DANIEL W. HYNES, THE ILLINOIS
OFFICE OF THE COMPTROLLER,
MICHAEL T. McRAITH, ILLINOIS
DEPARTMENT OF INSURANCE,
MERRILL LYNCH, PIERCE, FENNER &
SMITH, INC., MERRILL LYNCH LIFE
AGENCY, INC., MERRILL LYNCH LIFE
INSURANCE COMPANY, AND MERRILL
LYNCH BANK & TRUST COMPANY FSB,

Defendants.

Case No.

08 01 89 1989



CLASS ACTION COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs Fred C. Dames Funeral Homes, Inc., Calvert Funeral Homes, Ltd., Clancy-Gernon Funeral Homes, Inc., Aaron Todd Dean d/b/a Bass Patton Dean Funeral Home and Toberman-Dean Funeral Home, McCracken-Dean Funeral Home, Inc., and Knapp Funeral Homes, Inc., on behalf of themselves and all others similarly situated (collectively, “Plaintiffs”), by their attorneys Wexler Wallace LLP and Williams, Montgomery & John Ltd., for their Class Action Complaint for Declaratory Judgment, state as follows:

I. INTRODUCTORY STATEMENT

1. Plaintiffs bring this action pursuant to 735 ILCS 5/2-801 on behalf of themselves and a Class defined as all licensed funeral directors in the State of Illinois who are participants in the Illinois Funeral Directors Association's ("IFDA") Preneed Trust program (the "Class"). Plaintiffs seek relief in the form of a declaration that: (1) the release contained in the Stipulation and Consent Order (the "Consent Order") entered into by Defendant Merrill Lynch Life Agency, Inc. ("ML Life Agency") and the Illinois Department of Insurance ("DOI")¹ is invalid and unenforceable and an impermissible encroachment on this Court's powers to adjudicate matters properly reserved to the judicial branch; and (2) both the DOI and the Illinois Office of the Comptroller ("IOC") have acted and are continuing to act unlawfully outside the scope of their statutory and constitutional authority in attempting to enforce the Consent Order in violation of Plaintiffs' protectable legal interests.

2. Specifically, on May 20, 2009, Defendants announced and initiated steps to implement the Consent Order between the DOI and ML Life Agency pursuant to which:

- (a) ML Life Agency was to pay an \$18 million fine to the DOI, despite the fact that the fine has no correlation to the Preneed Trust's losses;
- (b) The fine was specifically earmarked to be for the benefit of beneficiaries of the IFDA Preneed Trust established pursuant to the Illinois Funeral or Burial Funds Act, 225 ILCS 45/1 *et seq.* (the "Burial Act");

¹ The settlement was entered into and signed by the Illinois Department of Financial and Professional Regulation ("IDFPR")'s Division of Insurance, with Defendant Michael T. McRaith as its Director. As of June 3, 2009, the Division of Insurance became the stand-alone DOI, with Defendant McRaith continuing to act as the Director. All acts taken while under the moniker of the IDFPR's Division of Insurance are imputed to those of the current DOI because, upon information and belief, this name change did not affect any substantive rights, duties, or obligations of the DOI. For the same reasons, all references to the "DOI" include both the IDFPR's Division of Insurance and the current Department of Insurance.

- (c) The only way for beneficiaries of the Preneed Trust to access the funds, which belong to them, is by entering into a document entitled “Discharge and Satisfaction” (the “Discharge and Satisfaction”) that defendant Michael T. McRaith (“McRaith” or the “Director”) has “approved.” While purporting to release ML Life Agency and all subsidiaries, affiliates, agents and employees from civil liability relating to actions taken with respect to the Preneed Trust and which is the subject of pending private civil litigation, the Discharge and Satisfaction appears designed to release unnamed third-parties from liability for their actions, even though defendant Daniel Hynes’ (“Hynes”) office, defendant Illinois Office of the Comptroller (the “IOC”), has confirmed Hynes’ belief that these third-parties engaged in intentional and illegal actions that caused substantial damage to Plaintiffs and the Class; and
- (d) As an additional condition to accessing the funds, the IOC is requiring Plaintiffs and the Class defined below to sign “commitment letters” (“Commitment Letters”) whereby they must agree to (1) guarantee all non-guaranteed contracts to the extent of consumer deposits, and (2) guarantee a blended interest rate of 3.0805% (average annual inflation rate for the past 22 years) on all deposits made by preneed customers, even though the Preneed Trust itself is, upon information and belief, earning approximately .5% in interest since defendant Merrill Lynch Bank & Trust Company FSB (“ML Trust”) took over as Trustee of the Preneed Trust in November 2008 (the “Commitment Letters”). The IOC has stated that the

executed Discharge and Satisfaction documents and Commitment Letters must be received by August 15, 2009.

3. As more fully discussed below, Defendants' actions exceed their statutory and constitutional authority and violate the rights of Plaintiffs and the Class in the following ways, among others:

- (a) The DOI was without authority to impose *any* fine in excess of \$100,000;
- (b) Although Plaintiffs and the Class welcome the deposit of \$18 million into the Preneed Trust, which is suffering massive deficits from the wrongful acts of ML Life Agency and other of its parents, subsidiaries, affiliates, employees and agents, the amount is not based upon the Preneed Trust's losses, but rather, according to the Director, some number of factors, including unidentified "commissions, profits, revenues, and additional payments," and the money has not been put into the Preneed Trust, and the provisions of the Burial Act, the statute which governs administration of the Preneed Trust, do not impose any of the conditions Defendants are seeking to impose for withdrawing Preneed Trust funds;
- (c) The Burial Act outlines the terms that must be in Preneed Contracts, but Defendants are attempting to alter those terms, thus defying duly passed legislation;
- (d) The Burial Act itself provides for two different types of Preneed Contracts – guaranteed and non-guaranteed. The IOC's requirement that Plaintiffs and the Class now guarantee all non-guaranteed contracts is in complete

defiance and derogation of, and contravenes the express language of, the Burial Act;

- (e) The Burial Act has no provision for a guaranteed rate of return on Preneed Contracts. Forcing Plaintiffs and the Class to provide one, much less one that is well in excess of what the Preneed Trust is actually earning, directly contradicts the statute and is outside the scope of the IOC's authority; and
- (f) The Discharge and Satisfaction the Director has approved would create an impermissible encroachment on this Court's jurisdiction to decide cases that are before it while assisting culpable parties in their efforts to obtain secret and unintentional releases for their conduct – all in the guise of obtaining a quick and ill-considered settlement.

II. PARTIES

4. Fred C. Dames Funeral Homes, Inc. is an Illinois corporation that operates a funeral home in Joliet, Will County, where it also maintains its headquarters. It also operates another funeral home in Morris, Grundy County, Illinois. Fred C. Dames Funeral Homes, Inc. is a member of the Illinois Funeral Directors Association (“IFDA”), a participant in the IFDA Preneed Trust program established pursuant to the Burial Act, and has deposited preneed funeral planning customers’ funds in the Preneed Trust established by IFDA’s wholly-owned subsidiary IFDA Services, Inc. (“IFDA Services”).

5. Calvert Funeral Homes, Ltd. is an Illinois corporation with its principal office in Clinton, DeWitt County, Illinois. It operates six funeral homes in DeWitt, Piatt and Macon Counties, Illinois. Calvert Funeral Homes, Ltd. is a member of IFDA, a participant in the IFDA Preneed Trust program established pursuant to the Burial Act, and has deposited preneed funeral planning customers’ funds in the Preneed Trust.

6. Clancy-Gernon Funeral Homes, Inc. is an Illinois corporation operating four funeral homes across the state of Illinois, with its headquarters in Bourbonnais, Kankakee County, Illinois. Clancy-Gernon Funeral Homes, Inc. is a member of IFDA, a participant in the IFDA Preneed Trust program established pursuant to the Burial Act, and has deposited preneed funeral planning customers' funds in the Preneed Trust.

7. Aaron Todd Dean operates Bass Patton Dean Funeral Home as a sole proprietorship in Hillsboro, Montgomery County, Illinois. The Bass Patton Dean Funeral Home is a member of IFDA, a participant in the IFDA Preneed Trust program established pursuant to the Burial Act, and has deposited preneed funeral planning customers' funds in the Preneed Trust. Mr. Dean also operates the Toberman-Dean Funeral Home as a sole proprietorship in Coffeen, Montgomery County, Illinois. The Toberman Dean Funeral Home is a member of IFDA, a participant in the IFDA Preneed Trust program established pursuant to the Burial Act, and has deposited preneed funeral planning customers' funds in the Preneed Trust.

8. McCracken-Dean Funeral Home, Inc. is an Illinois corporation that operates a funeral home and maintains its headquarters in Pana, Christian County, Illinois. McCracken-Dean Funeral Home, Inc. is a member of IFDA, a participant in the IFDA Preneed Trust program established pursuant to the Burial Act, and has deposited preneed funeral planning customers' funds in the Preneed Trust.

9. Knapp Funeral Homes, Inc. is an Illinois corporation operating eight funeral homes across the state of Illinois, and maintains its headquarters in Watseka, Iroquois County, Illinois. Knapp Funeral Homes is a member of IFDA, a participant in the IFDA Preneed Trust program established pursuant to the Burial Act, and has deposited preneed funeral planning customers' funds in the Preneed Trust.

10. Defendant Hynes is the Comptroller of the State of Illinois, a position he has continuously held since 1998. Upon information and belief, Hynes is a resident of Chicago, Cook County, Illinois and Springfield, Sangamon County, Illinois.

11. Defendant IOC maintains its Executive Office in Springfield, Sangamon County, Illinois and has an additional office in Chicago, Cook County, Illinois. The IOC is the State's Chief Fiscal Control Officer, responsible for the legal, efficient, and effective operations of state government. As stated on the IOC's website, "[t]hrough most often associated with the state's fiscal matters, a lesser known function of the agency is our oversight of the cemetery and funeral home industry." The IOC and Hynes will be collectively referred to herein as the "IOC."

12. Defendant McRaith is the Director of the DOI, a position he has, upon information and belief, continuously held since being appointed by Governor Blagojevich in 2005. McRaith continues to act as the Acting Secretary of the Illinois Department of Financial and Professional Regulation. Upon information and belief, McRaith is a resident of Chicago, Cook County, Illinois.

13. Defendant DOI maintains its Executive Office in Springfield, Sangamon County, Illinois and has an additional office in Chicago, Cook County, Illinois. The DOI became a stand-alone Department (instead of a division of the IDFPR) on June 3, 2009. According to the DOI, its mission is to protect consumers by providing assistance and information, by efficiently regulating the insurance industry's market behavior and financial solvency, and by fostering a competitive marketplace. The DOI and McRaith will be collectively referred to herein as the "DOI."

14. Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch PFS") is a Delaware corporation that maintains its headquarters in New York and has offices around the

world. Its registered agent is located in Chicago, Cook County, Illinois. Merrill Lynch PFS is a U.S.-based broker-dealer in securities and futures commission merchant, and is registered as an investment advisor with the Securities and Exchange Commission. Merrill Lynch PFS continues to maintain offices and conduct business within the state of Illinois.

15. Defendant ML Life Agency is a Washington corporation headquartered in New Jersey, and licensed to do business in Illinois. ML Life Agency's registered agent is in Chicago, Cook County, Illinois and it is believed to maintain several offices in Illinois. ML Life Agency is a wholly-owned subsidiary of Merrill Lynch PFS but is engaged in an entirely separate line of business, as ML Life Agency places and procures life insurance products and sells products from Merrill Lynch Life Insurance Company pursuant to a general agency agreement. Upon information and belief, even though ML Life Agency is a subsidiary of Merrill Lynch PFS, the latter is legally prohibited from controlling the manner in which ML Life Agency, a licensed "registered firm" under the Illinois Insurance Code, procures, places, and/or binds life insurance. ML Life Agency was formed to provide Merrill Lynch PFS customers with the opportunity to purchase life insurance and insurance planning.

16. Defendant Merrill Lynch Life Insurance Company ("ML Life Insurance") is incorporated in Arkansas, and maintains its principal place of business in Cedar Rapids, Iowa. ML Life Insurance issues insurance and annuity products and, as of December 28, 2007, is believed to have become a wholly-owned subsidiary of Aegon USA, Inc. Prior to that date, ML Life Insurance was a wholly-owned subsidiary of Merrill Lynch Insurance Group, Inc. ML Life Insurance is believed to have issued approximately 129 "Merrill Lynch Investor Life" variable universal life insurance policies to the Preened Trust.

17. Defendant ML Trust is a New Jersey corporation headquartered in New York, New York. ML Trust officially assumed the role as trustee of the Preneed Trust on or about October 23, 2008, and continues to act in that capacity.

III. JURISDICTION AND VENUE

18. This Court has jurisdiction over this class action under 735 ILCS 5/2-209(a), 5/2-209(b) and 5/2-209(c) of the Illinois Code of Civil Procedure. Plaintiffs are businesses registered or incorporated under the laws of Illinois. Hynes and McRaith are residents of Illinois and, along with Merrill Lynch PFS, ML Life Agency, ML Life Insurance, and ML Trust, have submitted to the jurisdiction of this Court by transacting business in Illinois.

19. This Court has jurisdiction over the DOI and IOC because Plaintiffs seek to enjoin the DOI and IOC from taking actions in excess of their delegated authority and in violation of Plaintiffs' and the Class's legal interests. *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 548 (1977); *Rockford Memorial Hospital v. Department of Human Rights*, 272 Ill. App. 3d 751, 755 (1995)(an exception to the doctrine of sovereign immunity applies "where a plaintiff seeks to enjoin a State agency or official from taking actions in excess of his statutory or constitutional authority"); *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 552 (1978)(finding that the doctrine of sovereign immunity did not bar an action in the circuit court seeking a declaration that a state agency was acting beyond its delegated authority).

20. This Court also has jurisdiction over the DOI because Plaintiffs have exhausted all administrative remedies. On May 28, 2009, Plaintiffs filed with the DOI a Petition to Intervene (pursuant to Illinois Administrative Code § 2402.120) and a Petition for Rehearing (pursuant to Illinois Administrative Code § 2402.280) in IN THE MATTER OR THE INVESTIGATION AND EXAMINATION OF THE FOLLOWING: Merrill Lynch Life Agency, Inc., 1215 4th Avenue, 26th Floor, Seattle, Washington 98161. The DOI has not

granted either Plaintiffs' Petition to Intervene or Plaintiffs' Petition for Rehearing. In fact, the DOI has done nothing with respect to Plaintiffs' positions at all except to publicly defend its (the DOI's) actions.

21. Venue is proper in this Court under 735 ILCS 5/2-101(2) and 5/2-103(a) because the transactions or some part thereof from which the causes of action arose took place in this judicial district.

22. This matter presents an actual controversy with respect to which the Court may declare the rights and obligations of the parties pursuant to 735 ILCS 5/2-701.

IV. FACTUAL ALLEGATIONS

A. Background

23. Through the IFDA's Preneed Trust program, Plaintiffs offer their customers ("beneficiaries") the ability to plan ahead for their funeral services, merchandise choices, and costs through Preneed Contracts. Doing so alleviates the burden placed on families at the passing of a family member by eliminating the financial burden of a funeral and minimizing the number of difficult decisions to make in preparation for the memorial or funeral service.

24. Beneficiaries of the Preneed Trust participate in the Preneed Trust program by signing Preneed Contracts with funeral service providers, such as Plaintiffs and members of the Class. Such contracts are subject to the provisions of the Burial Act, the terms of which are, as a matter of law, part of the Preneed Contracts. *See* Preneed Contract at ¶ 27, attached hereto as Exhibit A.

25. Under the Burial Act, when a beneficiary pays for a Preneed Contract, the funds are to be held in the Preneed Trust by a duly authorized trustee ("Trustee") until the beneficiary or entity withdraws the funds or the funds are used for funeral, memorial or burial services.

26. At present, ML Trust is the Trustee of the Preneed Trust in Illinois. As Trustee, ML Trust entered into a Trust Agreement whereby it was agreed to create a trust that complies with the Burial Act, and the provisions of the Trust Agreement are to be liberally construed to affect that intent. A copy of the Trust Agreement is attached hereto as Exhibit B. The Trust Agreement further provides that no power or discretion granted any person or entity by the terms of the Trust Agreement or by law shall be exercised or exercisable in such manner as would cause the Preneed Trust to fail to comply with the Burial Act.

27. At the time of the filing of this Complaint, six actions are pending with respect to the Preneed Trust: (1) a derivative action on behalf of IFDA and IFDA Services, entitled *Calvert Funeral Homes, Ltd. et al. v. Ninker et al.* (Case No. 09-CH-03524), now proceeding in the Chancery Division of the Circuit Court of Cook County, Illinois, the Honorable Daniel A. Riley presiding; (2) a putative class action on behalf of Illinois beneficiaries, entitled *Dunkle v. I.F.D.A. Services, Inc. et al.* (Case No. 2008 L 000682), pending in the Circuit Court of Kane County, Illinois, the Honorable Judith M. Brawka presiding; (3) an insurance coverage declaratory judgment action, entitled *Federal Insurance Company v. Illinois Funeral Director's Association et al.* (Case No. 09-cv-1634), proceeding in the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Samuel Der-Yeghiayan presiding; (4) a putative class action on behalf of Illinois beneficiaries, entitled *Tipsword v. I.F.D.A. Services, Inc. et al.* (Case No. 09-cv-390), pending in the United States District Court for the Southern District of Illinois, the Honorable William D. Stiehl presiding; (5) a declaratory judgment action regarding IFDA and IFDA Services, Inc.'s fees, entitled *Illinois Funeral Directors Association et al. v. Daniel Hynes, Comptroller, State of Illinois*, (Case No. 09 CH 19274), pending in the Circuit Court of Cook County, Illinois, Chancery Division; and (6) a class

action on behalf of Illinois funeral directors that deposited funds into the Preneed Trust, entitled *Clancy-Gernon Funeral Homes, Inc. et al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. et al.*, (Case No. 09 CH 20736), pending in the Circuit Court of Cook County, Illinois, Chancery Division, the Honorable Dorothy Kirie Kinnaird presiding.

28. In addition to the foregoing actions, Merrill Lynch PFS and its agent, Edward Schainker, have been subjected to various regulatory proceedings in Illinois. On or about April 1, 2009, the Illinois Secretary of State, Securities Department, issued a Notice of Hearing to Schainker with respect to *In the Matter of: Edward Louis Schainker*, File No. 0900049. A copy of the Notice of Hearing is attached hereto as Exhibit C. The hearing, which is scheduled for July 28, 2009, seeks to determine whether Schainker's investment adviser representative and/or salesperson registration should be suspended or revoked, whether he should be fined and if so, in what amount, and whether he should be prohibited from offering or selling securities in Illinois.

29. None of the litigation described above involves the relief sought in this case. Rather, the foregoing actions seek damages on the grounds that the Preneed Trust has been mismanaged, with investments of the Preneed Trust's funds made not in laddered municipal bonds or similarly safe instruments, but in variable universal life ("VUL") insurance policies, many of which were issued by ML Life Insurance on the advice of Merrill Lynch PFS. This misuse and abuse of Preneed Trust funds has resulted in, *inter alia*, a serious diminution of Preneed Trust principal, adverse tax consequences, and damages approaching, if not exceeding, \$100 million. This action, in contrast, seeks to enjoin Defendants' actions to eliminate the liability of culpable parties.

B. Relevant Terms Of The Preneed Trust

30. Pursuant to the Burial Act, when a provider such as Plaintiffs enters into a Preneed Contract with its customer, the customer deposits funds for the funeral, merchandise or

services with the provider, who then deposits the money, net of certain prescribed expenses, into the Preneed Trust. When the funds are deposited into the Preneed Trust, an election is made with respect to whether the funds should be invested in the tax-exempt or taxable trust fund.

31. The Burial Act specifies when and how funds, once deposited, may be withdrawn from the Preneed Trust. *See* 225 ILCS 45/4, entitled: “Withdrawal of Funds, Revocability of Contract.” The full text of this section, which prescribes all of the conditions under which funds may be withdrawn from the Preneed Trust, is contained in Exhibit D attached hereto.

32. In general, funds may be withdrawn upon the death of a preneed customer or on demand if a contract is revocable. There are also hardship conditions which, if met, allow for the withdrawal of funds in the presence of an irrevocable contract. **Not one** condition in 225 ILCS 45/4 requires a preneed funeral planning provider or customer to release from liability any entity, much less multiple entities that are defendants in private litigation, in order to have access to their Preneed Trust funds, and there is no discrimination between those preneed providers and customers who provide releases of liability and those who do not.

33. The terms of Preneed Contracts must comply with the Burial Act and they are written to do so. *See* Preneed Contract at ¶ 27, attached hereto as Exhibit A. As such, no Preneed Contract contains provisions for withdrawal of funds that are not otherwise set forth in the Burial Act.

C. The Consent Order Attempts To Alter The Terms Of The Preneed Trust And Preneed Contracts

34. Nevertheless, on May 20, 2009, the DOI announced it had reached a “settlement” of its regulatory investigation of ML Life Agency, pursuant to which ML Life Agency would pay \$18 million for the benefit of the Preneed Trust. A copy of the Consent Order reached between ML Life Agency and the DOI is attached hereto as Exhibit E.

35. In a press release issued by the DOI, the “settlement” was touted as providing benefits to **all** the beneficiaries of the Preneed Trust, including some 49,000 consumers. The IOC has likewise sent letters to funeral directors throughout Illinois telling them of the benefits of the settlement to which they and their clients are entitled. A copy of the DOI’s May 20, 2009 press release is attached hereto as Exhibit F.

36. What none of the parties to the Consent Order disclosed, however, is that the so-called settlement contradicts the Burial Act and the express terms of the Preneed Contracts by inserting provisions not permitted by the Burial Act into those contracts requiring persons seeking access to their funds only if they fulfill certain conditions. By imposing such conditions, the DOI has exceeded its statutory and constitutional authority, as has the IOC, which has fully supported the Consent Order and taken concerted action with the DOI to enforce it.

37. In addition, ML Trust has **for the very first time** sent financial statements to preneed funeral planning customers. These statements, which show dramatic losses in the funds they deposited in the Preneed Trust, have allowed ML Trust to leverage the terror they are causing preneed customers into pressuring customers and their providers to accept the Discharge and Satisfaction (described more fully below) unlawfully being foisted upon them.

38. Defendants are through their actions unilaterally attempting to reform existing Preneed Contracts with a provision not contained in the Preneed Contracts: namely, that in order to access their proportionate share of their Preneed Trust funds, “Matters in Dispute,” between Preneed Trust clients and “Merrill Lynch (defined as [ML Life Agency, Merrill Lynch PFS] and any and all agents, representatives, officers, directors, shareholders, servants, employees, attorneys, successors, parent, assigns, subsidiaries, divisions, affiliates, related entities, and all other persons in privity with [ML Life Agency and Merrill Lynch PFS], including any unnamed

individuals and entities)", are settled (the "Release"). Thus, through their sweetheart "settlement," Defendants are interfering with and altering existing contracts, as well as violating and attempting to change duly passed legislation, *i.e.*, the Burial Act's withdrawal provisions as provided by 225 ILCS 45/4, and, with respect to the DOI and IOC violating the Illinois Constitution by impermissibly encroaching on this Court's jurisdiction.

D. The Discharge and Satisfaction The Director Has Approved Appears Intended Not Only To Release All The Merrill Lynch Defendants And Their Agents, But Also To Release Any And All Other Parties From Liability For Intentional And Illegal Conduct.

39. The Consent Order provided that a "Member shall become eligible to receive a proportionate share of the Fund ... [when] the Member has provided to the Escrow Agent, within 150 days on the date of this Order *on a form approved by the Director* and executed by the Member and MLLA, evidence that all matters in dispute between such Member and MLLA, its subsidiaries, affiliates, directors, officers and employees, have been fully discharged, resolved and satisfied." *See* Exhibit E, Consent Order, ¶ 2.b (emphasis added).

40. On July 1, 2009, Plaintiffs' counsel requested that the DOI provide a copy of the form of the Release the Director had approved for the purposes of paragraph 2.b of the Consent Order. Plaintiffs' counsel also requested that Merrill Lynch provide a copy of the Release. On July 2, 2009, the DOI provided a copy of the form Release; Merrill Lynch's counsel, however, did not provide a copy.

41. The document the DOI provided is not entitled "Release." Instead, it is entitled "Discharge and Satisfaction" and contains broad language that defines the term "Matters in Dispute." The Discharge and Satisfaction defines this term "as claims, disputes, debts, liabilities or causes of action, whether *direct, indirect, or derivative in nature*, whether known or unknown, suspected or unsuspected, at law or in equity, asserted now or in the future, *relating to the IFDA*

Trust and/or to any activity or omission of the parties with regard thereto.” A copy of the Discharge and Satisfaction is attached hereto as Exhibit G.

42. The Discharge and Satisfaction purports to release parties and individuals in addition to Merrill Lynch affiliates. It attempts to release Matters in Dispute that a signing IFDA member has not only with ML Life Agency and Merrill Lynch PFS, but also with “any and all agents, representatives, officers, directors, shareholders, servants, employees, attorneys, successors, parent, assigns, subsidiaries, divisions, affiliates, related entities, *and all other persons in privity with MLLA or MLPF&S, including any unnamed individuals and entities.*” *Id.* (emphases added).

43. Notably, the Discharge and Satisfaction the Director approved does not specifically reserve claims against any other parties or defendants who participated in creating the substantial injuries the plaintiffs have suffered.

44. More importantly, while the Discharge and Satisfaction only identifies the Merrill Lynch defendants, the document appears intentionally drafted to result in the unwitting release of *all* defendants and other parties from their liability to Plaintiffs – without even hinting that this is a possible effect of the document. In particular, because the document purports to provide “satisfaction” to the member who signs it while failing to reserve claims against others, a member who agrees to this may unwittingly release all other potential defendants from their liability to the member under Illinois common law.

45. By endorsing this “approved” Discharge and Satisfaction, McRaith and Hynes are either inadvertently or actively and knowingly assisting parties they have concluded engaged in fraudulent and illegal behavior from the consequence of their actions.

46. Moreover, if the Discharge and Satisfaction agreements were interpreted under prevailing common law, as interpreted by Illinois courts, including the First District Appellate Court, they amount to an attempt by McRaith and Hynes to divest this Court of the ability to resolve derivative and class action allegations that are pending before it without a hearing and without due process. As such, the apparent operation of the Discharge and Satisfaction amounts to an impermissible encroachment by the executive department onto this Court's judicial function.

D. Statutory Authority Of The DOI

47. As an administrative agency, the DOI's jurisdiction is limited. An agency's order must be declared void if the agency lacked jurisdiction of the parties or of the subject matter, or lacked the inherent power to make or enter the particular order involved.

48. Under Illinois administrative law, "jurisdiction" has three aspects: (1) personal jurisdiction – an agency's authority over the parties in a proceeding, (2) subject matter jurisdiction – an agency's power "to hear and determine causes of the general class of cases to which the particular case belongs," and (3) an agency's scope of authority under statute.

49. An administrative agency has no general or common law powers. These are reserved to the judiciary. An administrative agency can act only pursuant to authority conferred by statute.

50. The Director's general powers are provided in § 401 of the Insurance Code as follows:

General powers of the director. The Director is charged with the rights, powers and duties appertaining to the enforcement and execution of all the insurance laws of this State. He shall have the power

- (a) to make reasonable rules and regulations as may be necessary for making effective such laws;

- (b) to conduct such investigations as may be necessary to determine whether any person has violated any provision of such insurance laws;
- (c) to conduct such examinations, investigations and hearings in addition to those specifically provided for, as may be necessary and proper for the efficient administration of the insurance laws of this State; and
- (d) to institute such actions or other lawful proceedings as he may deem necessary for the enforcement of the Illinois Insurance Code [215 ILCS 5/1 et seq.] or of any Order or action made or taken by him under this Code. The Attorney General, upon request of the Director, may proceed in the courts of this State to enforce an Order or decision in any court proceeding or in any administrative proceeding before the Director.

Whenever the Director is authorized or required by law to consider some aspect of criminal history record information for the purpose of carrying out his statutory powers and responsibilities, then, upon request and payment of fees in conformance with the requirements of Section 2605-400 of the Department of State Police Law (20 ILCS 2605/2605-400), the Department of State Police is authorized to furnish, pursuant to positive identification, such information contained in State files as is necessary to meet the requirements of such authorization or statutes.

215 ILCS 5/401.

E. Statutory Authority Of The IOC

51. The IOC's authority with respect to the Preneed Trust is delegated to it by the Burial Act. The Burial Act authorizes the IOC to, *inter alia*:

- (a) Develop a model Preneed Contract form which meets the requirements of the Burial Act (225 ILCS 45/1a-1(d));
- (b) Develop a booklet for consumers describing the scope, application, and consumer protections of the Burial Act (225 ILCS 45/1a-1(e));
- (c) License sellers of Preneed Contracts according to the requirements of the Burial Act (225 ILCS 45/3(a));

- (d) Examine and investigate all of sellers of Preneed Contracts required books, accounts and records pertaining to trust funds, insurance policies, or tax-deferred annuities to ensure compliance with the Burial Act (225 ILCS 45/3(b));
- (e) Order additional audits or examinations as it may deem necessary or advisable to ensure the safety and stability of the trust funds and to ensure compliance with the Burial Act (225 ILCS 45/3(b));
- (f) Revoke, suspend or refuse to a the license upon a hearing of such person who has violated the requirements of the Burial Act (225 ILCS 45/3(b); 225 ILCS 45/3a(a); 225 ILCS 45/3f);

52. If it appears to the IOC that a person has engaged in, is engaging in, or is about to engage in any practice in violation of the Burial Act, the IOC may: (1) require that person to file a statement or report containing all information the IOC may consider necessary to ascertain whether a seller is in compliance with the Burial Act; (2) examine under oath any person in connection with the books and recording pertaining to or having an impact upon trust funds, insurance policies, or tax deferred annuities; (3) examine any books and records of the seller, trustee, or investment advisor; and/or (4) require the production of any record, book, document, account, or paper that is produced in accordance with the Burial Act. 225 ILCS 45/7.2.

53. If any person violates the Burial Act or fails or refuses to comply with any order of the IOC, the IOC may, after notice and hearing at which it is determined that a violation of the Burial Act has been committed, order that the person shall pay to the State of Illinois a fine up to \$5,000 for each violation, which liability may be enforced in an action brought in any court of

competent jurisdiction by the IOC in the name of the People of the State of Illinois. 225 ILCS 45/8.

54. The IOC may also bring a civil action in the county of residence of the seller or any person accepting trust funds to enjoin any violation or threatened violation of the Burial Act. 225 ILCS 45/8.

F. The Consent Order Is Outside The Authority Of Both The DOI And IOC

1. The DOI and its Director Have Overstepped Their Clear Statutory Authority

55. The Consent Order reached by the DOI and ML Life Agency specifically states that ML Life Agency violated 215 ILCS 5/500-70 of the Insurance Code. Section 500-70 prohibits Illinois insurance producers – which the settlement specifically alleges ML Life Agency is – from doing numerous acts, including, by way of example: violating any insurance laws or any rule, subpoena, or order of the Director; obtaining or attempting to obtain a license through misrepresentation or fraud; improperly withholding, misappropriating or converting any moneys received in the course of doing insurance business; intentionally misrepresenting the terms of an insurance contract; and committing any insurance unfair trade practice or fraud.

56. Section 500-70 expressly limits the powers and remedies allowed the Director, if an insurance producer has violated that statute, to: placing the insurance producer on probation, or suspending, revoking, or refusing to issue or renew the insurance producer’s license.

57. In addition, Section 500-70 permits the Director to levy a civil penalty on the insurance producer. That penalty is limited to “\$10,000 for each cause for denial, suspension, or revocation, *however, the civil penalty may total no more than \$ 100,000.*” 215 ILCS 5/500-70(d) (emphasis added).

58. The Director thereby lacked jurisdiction under the Illinois Insurance Code to levy an \$18 million fine on ML Life Agency. In fact, general counsel for the DOI has publicly

admitted to the Director's limitations to fines allowed for in the Insurance Code, acknowledging there is no authority for the \$18 million payment. These actions, therefore, exceed the authority vested in the Director under 215 ILCS 5/500-70.

59. Plaintiffs and the Class welcome the deposit of \$18 million into the Preneed Trust, which has been damaged by some \$100 million. There is nothing in Section 500-70, however, authorizing the DOI to add conditions outside the Burial Act to withdraw funds from the Preneed Trust and which are due and owing under Preneed Contracts, to require releases of defendants in private litigation as part of those conditions, or to team up with another State agency, the IOC, to require Plaintiffs and the Class to give guarantees that are not otherwise found in the Burial Act.

60. The Consent Order further purports to cover entities and activities over which the Director has no authority at all. For example, it requires participants to execute the Release that would exculpate not only ML Life Agency, but also Merrill Lynch PFS and "any and all agents, representatives, officers, directors, shareholders, servants, employees, attorneys, successors, parent, assigns, subsidiaries, divisions, affiliates, related entities, and all other persons in privity with [ML Life Agency and Merrill Lynch PFS], including any unnamed individuals and entities," over whom the DOI has no jurisdiction and regardless of whether the liability being waived arises from wrongdoing with respect to the sale of securities or other instruments over which the Director has no regulatory authority. This is in direct contradiction to the Director's public acknowledgement at a question-and-answer session on June 4, 2009, which dealt with the Consent Order, where he stated in front of funeral directors, other government officials and others that he does not regulate and was not concerned about the "securities implications" of the case and the Consent Order was only an action against "insurance licensees and companies."

Yet, the Discharge and Satisfaction he has approved is designed by him and Defendants to release all Merrill Lynch-related entities and employees, regardless of whether the Director has any regulatory authority over them, and apparently all potential or actual defendants and participants in this injury, over which the Director cannot possibly purport to have jurisdiction. This might include ML Trust for any actions it might have taken, or securities violations by other Defendants, to which the Director has no authority to regulate or respond.

61. Similarly, the Discharge and Satisfaction would absolve Edward Schainker of all liability, again regardless of whether the liability being waived arises from wrongdoing by Schainker with respect to the sale of securities or other instruments over which the Director has no regulatory authority.

62. In addition, the Discharge and Satisfaction required by the Consent Order purports to cover activities wholly unrelated to the Preneed Contracts that are the source of the dispute. It would absolve all Merrill Lynch entities of all “Matters in Dispute” between Plaintiffs and all IFDA members (Plaintiffs and the Class) as having been “settled.” Such broad language would release the Merrill Lynch entities far beyond the scope of the Preneed Contracts to include such disputes as, *e.g.*, something as extreme as personal injury claims, or even claims relating to Plaintiffs and other funeral director’s personal claims against Schainker. Such claims are not even arguably within the scope of the Director’s authority and jurisdiction.

63. In sum, the Director lacks jurisdiction and authority to enter into the settlement as follows:

- (a) Paragraph 2(b) of the Consent Order requires the Discharge and Satisfaction, which provides that a claimant is eligible to receive a proportionate share of the fund only if that claimant provides the fund’s

escrow agent a full release of liability against ML Life Agency, Merrill Lynch PFS and “any and all agents, representatives, officers, directors, shareholders, servants, employees, attorneys, successors, parent, assigns, subsidiaries, divisions, affiliates, related entities, and all other persons in privity with [ML Life Agency and Merrill Lynch PFS], including any unnamed individuals and entities.” The Director is acting to release from liability all Merrill Lynch entities, including Merrill Lynch PFS and ML Trust, both of which have liability to preneed planning customers, but over which the Director has no jurisdiction.

- (b) In addition, the Director is asserting authority to release all Merrill Lynch entities and Schainker of liability without consideration and regardless of their culpability in causing the losses to the Preneed Trust. There is no statutory basis for the Director to do this, particularly given the private litigation that is pending against these defendants and to which the Director is not a party.
- (c) Paragraph 2(a) of the Consent Order provides that a plaintiff is eligible to receive a proportionate share of the fund *only after* that plaintiff commits to the IOC to perform all of that funeral director’s contract obligations to the beneficiaries of the Preneed Trust, including the commitments made to the IOC with respect to the maintenance of such funds. The Consent Order thus imposes obligations on each plaintiff despite the fact that the Director has no jurisdiction over them, and where there has been no showing at all that any funeral director has failed in any way to comply

with its obligations with respect to providing services under Preneed Contracts in accordance with the Burial Act.

- (d) Through the Discharge and Satisfaction, the Director is acting outside the scope of his authority by being complicit in providing ML Trust with presumptively fraudulent pass-on liability. The Discharge and Satisfaction extends a benefit to ML Trust at the expense of the Preneed Trust's beneficiaries. A trustee's duty of loyalty to a beneficiary prohibits the trustee from obtaining, much less seeking, any benefit for itself during the course of the trust relationship. Where a trustee does benefit from a transaction with a beneficiary, such transaction is presumed fraudulent. Here, the Discharge and Satisfaction gives ML Trust the benefit of a release from liability to the detriment of Preneed Trust beneficiaries, who must forego seeking the full measure of their damages against all Merrill Lynch entities in order to withdraw their own money from the Preneed Trust. The Director has no authority to give his *imprimatur* to, much less adjudicate, a presumptively fraudulent transaction
- (e) Moreover, the Discharge and Satisfaction benefits the Trustee by purporting to provide ML Trust, as an affiliate of ML Life Agency, with a release of liability that prevents Preneed Trust beneficiaries from recouping all of the Preneed Trust's lost funds. In this regard, neither the Director, ML Trust nor anyone else made any disclosure to Plaintiffs or preneed customers of the benefits conferred upon ML Trust through the Discharge and Satisfaction. At the same time, while the DOI announced

that the VUL insurance policies in the Preneed Trust were issued without any insurable interests, it failed to disclose that this may render the policies unenforceable and has therefore enabled ML Trust to engage in a fire sale (“surrender”) of said policies, which it can now more readily argue it can do without regard to the consequences because of the Discharge and Satisfaction. With this lack of disclosure, the presumption of fraud by the Trustee and the Defendants with fiduciary duties to the Plaintiffs and Class members can not be overcome.

- (f) At the same time, the Director’s agreement to the recitation concerning the lack of insurable interests has given ML Life Agency, ML Life Insurance and every other company that issued a VUL insurance policy the argument that they do not have to pay on such policies upon the death of an insured. As a licensed insurance producer under 215 ILCS 5/500-35, Schainker was bound by Illinois’ laws but he acted in derogation of the applicable provisions. Similarly, ML Life Agency and ML Life Insurance, through whom and from whom Schainker procured a majority of the VUL policies, are also obligated to comply with relevant Illinois insurance laws. Nonetheless, Schainker purchased - and ML Life Agency and ML Life Insurance sold - hundreds of life insurance policies for which, according to the DOI, there was no insurable interest as required by Illinois law, *Id.*, even though this finding appears to conflict with a legal opinion on this issue as well as documentary evidence that there is an insurable interest in some, if not all, of the policies. To the extent ML Trust is using the

insurable interest finding as a cover to rid ML Life Insurance of obligations to pay on the policies, the Director is complicit in allowing ML Trust to breach its fiduciary duty as Trustee for the Preneed Trust. This has subjected the Preneed Trust to possibly millions of dollars more in losses and works to exculpate ML Life Agency and ML Life Insurance from having to pay any death benefits.

- (g) In addition, but by no means finally, while each of the Plaintiffs is required to sign the Discharge and Satisfaction in order to access the fund, Plaintiffs themselves are not released from any liability their preneed funeral planning customers might assert they have, regardless of merit. Thus, while the \$18 million fund is insufficient to make the Preneed Trust whole from the wrongdoing of the released parties, the Director is potentially imposing upon the funeral directors with the difference, disabling them from fending off potential liability by seeking to recover funds from the Merrill Lynch entities, trying to foreclose them from bringing third-party actions against ML Life Agency or any other Merrill Lynch-related affiliate seeking indemnity for damages, legal fees and expenses.

2. The Consent Order Violates the Burial Act and Omits Critical Information

64. The Consent Order imposes conditions for withdrawing funds in contravention to the Burial Act and the express terms of Preneed Contracts. The Discharge and Satisfaction provides that, in order to access their proportionate share of their Preneed Trust funds, parties to Preneed Contracts must release ML Life Agency and other defendants in pending litigation from all liability relating to the Preneed Trust. There is nothing in the Burial Act that vests authority

in either the DOI or IOC to do this, and it in fact violates legislation that was duly passed and signed into law. Even if the DOI had the power to enter into such a settlement with ML Life Agency, it certainly has no authority to require releases from liability of other Merrill Lynch entities which it has no authority to regulate. Further, where the DOI may exercise authority, it has the power to levy fines not to exceed \$100,000. So while, Plaintiffs and the Class welcome an additional \$18 million to the Preneed Trust, it is patently clear that the DOI had no authority to obtain it and impose the conditions it is attempting to impose.

65. The Discharge and Satisfaction also violates the Burial Act in multiple ways. Thus, both the DOI and IOC (whose relevant responsibilities are specifically set forth in the Burial Act) are acting outside of the statutory authority for the Preneed Trust. Specifically, the Discharge and Satisfaction violates the Burial Act as follows:

- (a) Section 45/4 of the Burial Act, which governs the conditions for the withdrawal of funds from the Preneed Trust, provides that funds may be withdrawn upon death of a preneed customer or on demand if a contract is revocable. There are also hardship conditions which, if met, allow for the withdrawal of funds in the presence of an irrevocable contract. Not one condition in 225 ILCS 45/4 requires a preneed funeral planning provider or customer to release anyone from liability in order to have access to their Preneed Trust funds, and there is no discrimination between those preneed providers and customers who provide releases of liability and those who do not.
- (b) The Discharge and Satisfaction unilaterally amends and violates the express terms of the Preneed Contracts by inserting an otherwise non-

existent condition for the withdrawal of a preneed customer's funds from the Preneed Trust. Simply put, the Discharge and Satisfaction is nowhere to be found in any Preneed Contract, and Illinois law prevents such terms from being added by strangers to the contracts. In addition, the Preneed Contracts expressly provide that they are to comply with the Burial Act. However, unilaterally amending the Preneed Contracts to include the Release would violate the terms of the Burial Act and, therefore, violate the express terms of the Preneed Contracts.

- (c) The Discharge and Satisfaction also unilaterally amends and violates the Trust Agreement. The express terms of the Trust Agreement require that the Preneed Trust comply with the Burial Act. Yet, by attempting to impose the Discharge and Satisfaction, the Director is violating the Burial Act's conditions for withdrawal. And similar to the Preneed Contracts, the Release is a contrary extra term to the Trust Agreement, the addition of which would be a violation of Illinois law.

66. In addition, the Consent Order fails to specifically outline: (1) how the application and distribution of the so-called \$18 million fund will proceed, including in conjunction with the Preneed Trust; (2) how a Class member or preneed funeral planning customer can challenge its assigned proportion of the fund; (3) how a funeral director or a preneed customer's proportion of the fund was determined; or (4) how a preneed customer can receive his or her share of the fund if that preneed customer has the right to and chooses to cancel his or her Preneed Contract.

67. The Consent Order fails to provide any explanation regarding the tax consequences associated with participating in the settlement fund, which could be to the substantial detriment of preneed planning customers and those on public aid. And even if tax consequences were disclosed, there is no guarantee that the Director's position would be in compliance with federal and state tax laws and authorities. The Director has publicly been unable to respond to these issues.

68. Finally, the form of Discharge and Satisfaction that the Director has approved appears to release all potential defendants from the consequences of their actions, even those that are unnamed.

3. Hynes And The IOC Have Acted Beyond their Authority

69. Likewise, the IOC has acted and is acting beyond the authority delegated to it by the Burial Act. Similar to the DOI, the IOC can not alter the express terms of the Burial Act, or insert terms that are contrary to the Burial Act into Preneed Contracts.

70. Contrary to the Burial Act, the IOC is attempting to change the terms of non-guaranteed contracts by forcing Plaintiffs and members of the Class to guarantee them as a precondition for accessing the Preneed Trust funds that have been supposedly augmented for **all** consumers by the Consent Order. In addition, the IOC is trying to force funeral directors to guarantee a rate of return on the funds deposited with respect to all Preneed Contracts, guaranteed or not. Such a guaranteed rate of return is nowhere to be found in the Burial Act and the IOC is exceeding its statutory authority by trying to extract it. Moreover, the IOC is attempting to impose a guaranteed return at an interest rate in excess of 3.0805%. ML Trust has announced publicly, however, that the Preneed Trust has been earning .5%.

71. Should any member of the Class sign the IOC's Commitment Letter or otherwise "agree" to release ML Life Agency and the other Merrill Lynch entities, agents and employees

from liability, they will have done so under duress and all such releases and guarantees should be void.

4. Additional Inappropriate Consequences Of The Consent Order

72. As expressed in the pending private litigation, because of the deficit in the Preneed Trust, Plaintiffs and the Class are, on a daily basis, making up the difference out of their own pockets between the amounts available upon the death of a preneed customer and the actual cost of services. A funeral director's proportionate share of the \$18 million settlement, though woefully inadequate in the context of actual damages incurred by Plaintiffs and the Class, may well be the difference between hanging on a little longer or going out of business. In this scenario, funeral directors signing on to this travesty may well have no economic choice but to do so.

73. At the same time, many will no doubt sign because of a lack of appreciation of the true effects of their actions. Unlike when a notice is issued under court supervision in a class action, none of the settling parties, including the DOI and IOC have afforded funeral directors of an adequate explanation of the consequences of their actions. No one had an opportunity to object, be heard or have the right to seek review. The Consent Order was a *fait accompli*. The lack of due process afforded Plaintiffs and the Class is but another reason to declare the activities of the DOI and IOC outside the scope of their authority and void all the conditions attendant to participating in the "settlement."

74. On top of everything else, the terms of the "settlement" are unclear and incomplete on their face. For example, the Discharge and Satisfaction requires that all "Matters in Dispute" between a funeral director and ML Life Agency, Merrill Lynch PFS and "any and all agents, representatives, officers, directors, shareholders, servants, employees, attorneys, successors, parent, assigns, subsidiaries, divisions, affiliates, related entities, and all other

persons in privity with [ML Life Agency and Merrill Lynch PFS], including any unnamed individuals and entities” be “settled” before the funeral director is “eligible” to receive any portion of the \$18 million. Further, the settlement seemingly provides no recourse for funeral directors who have already performed funeral services under Preneed Contracts but who received substantially reduced reimbursements from the Preneed Trust due to the write downs of the Preneed Trust balances in the fall of 2008. Moreover, except for limited circumstances involving certain non-guaranteed Preneed Contracts, the Consent Order provides no recourse to any purchaser of a Preneed Contract requesting a return of funds (including his or her share of the \$18.0 million fund) pursuant to the terms of the Burial Act.

V. CLASS ALLEGATIONS

75. Plaintiffs bring this action as a class action pursuant to Illinois Code of Civil Procedure 735 ILCS 5/2-801 on behalf of themselves and the following Class:

All licensed funeral directors in the State of Illinois who are participants in the IFDA’s Preneed Trust program.

76. Excluded from the Class are Defendants, their officers, directors, agents, trustees, corporations, trusts, representatives, employees, principals, servants, partners, joint venturers, or entities controlled by the Defendants; the judge assigned to this action, any member of the Judge’s immediate family; and counsel for Plaintiffs.

77. Certification of the Class is appropriate pursuant to 735 ILCS 5/2-801 in that: (1) the Class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the Class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the Class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy.

78. Numerosity (735 ILCS 5/2-801(1)). Plaintiffs are informed and believe that the proposed Class of approximately 650 similarly situated persons and entities who deposited funds in the Preneed Trust. Thus, the Class is so numerous that joinder of all members would be impracticable.

79. Existence and Predominance of Common Questions of Law or Fact (735 ILCS 5/2-801(2)). Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual questions arise from the Defendants' actions. Common questions of law and fact included, but are not limited to, the following:

- (a) Whether the Discharge and Satisfaction is invalid and unenforceable;
- (b) Whether the Director lacks jurisdiction and authority under the Illinois Insurance Code to enter into and enforce the Consent Order; and
- (c) Whether the IOC lacks jurisdiction and authority to enforce the Consent Order by requiring Plaintiffs and the Class to provide guarantees on non-guaranteed contracts and a guaranteed rate of return on deposited Preneed Trust funds; and
- (d) Whether the Discharge and Satisfaction creates an impermissible encroachment on this Court's jurisdiction.

80. Fair and Adequate Representation (735 ILCS 5/2-801(3)). Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs' claims arise from the same practices and course of conduct that gave rise to the Class members' claims and are based upon the same legal theories. Plaintiffs have retained counsel experienced in complex class

action litigation, and Plaintiffs intend to prosecute this action vigorously. Plaintiffs have no adverse or antagonistic interests to those of the Class.

81. Appropriateness (735 ILCS 5/2-801(4)). A class action is appropriate for the fair and efficient adjudication of this controversy. The detriment suffered by individual members of the Class is relatively small compared to the burden and expense that would be entailed by individual litigation of the Class's claims. Furthermore, individualized claims brought by members of the Class would create delay and expense to all parties and the court system and the danger of inconsistent or contradictory judgments arising from the same set of facts. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

COUNT I

(Declaration That the Release and Discharge and Satisfaction as to ML Trust is Unenforceable)

82. Plaintiffs, on behalf of themselves and all others similarly situated, incorporate by reference the allegations set forth in Paragraphs 1-81 above.

83. Pursuant to the Trust Agreement, ML Trust is the Trustee of the Preneed Trust. In addition, the Trust Agreement provides that the Trustee is a fiduciary. As the Trustee and a fiduciary, ML Trust must abide by the intention to create a trust that complies with the Burial Act, and the provisions of the Trust Agreement shall be liberally construed to affect that intent. No power or discretion granted any person or entity by the terms of the Trust Agreement or by law shall be exercised or exercisable in such manner as would cause the Preneed Trust to fail to comply with the Burial Act.

84. As Trustee of the Preneed Trust, ML Trust owes a duty of loyalty to every beneficiary thereof. Indeed, in Illinois, the duty of loyalty owed by a trustee is higher and more intense than in any other fiduciary relationship. In this regard, transactions with a beneficiary in which a trustee receives a benefit are presumptively fraudulent.

85. ML Life Agency entered into the “settlement” with the DOI which includes the Release and the Discharge and Satisfaction. Specifically, the Consent Order provides that a funeral director “shall become eligible to receive a proportionate share of the Fund subject to the following terms and conditions: The [funeral director] has provided the Escrow Agent, within 150 days on the date of this Order on a form approved by the Director and executed by the [funeral director] and [ML Life Agency], evidence that all matters in dispute between such [funeral director] and [ML Life Agency], its subsidiaries, affiliates, directors, officers and employees, have been fully discharged, resolved and satisfied.” See Exhibit E at ¶ 2(b). The form approved by the Director is the Discharge and Satisfaction.

86. Here, ML Life Agency has entered into a “settlement” agreement with a third party which requires preneed funeral planning customers seeking to withdraw their funds from the Preneed Trust to release **ML Trust** from liability. Thus, to get their own money back, Plaintiffs’ preneed clients must enter into transactions with their Trustee through which the Trustee benefits at the beneficiaries’ expense. In addition to being contrary to the terms of the Preneed Contracts and the Burial Act, such transactions are presumptively fraudulent.

87. Based upon all of the foregoing, Plaintiffs seek a declaration that the Release and Discharge and Satisfaction are unenforceable with respect to ML Trust.

COUNT II

(Declaration That the Release and Discharge and Satisfaction As To Merrill Lynch PFS, ML Life Agency, And ML Life Insurance is Unenforceable)

88. Plaintiffs, on behalf of themselves and all others similarly situated, incorporate by reference the allegations set forth in Paragraphs 1-81 above.

89. At all times relevant herein, ML Life Agency and Merrill Lynch PFS have known of the requirements of the Burial Act, the intention of the Trust Agreement, and the withdrawal rights of Plaintiffs and the Preneed Trust beneficiaries thereunder.

90. With that knowledge, ML Life Agency, in full complicity with Merrill Lynch PFS and all other Merrill Lynch entities, has entered into an agreement which purports to re-write all existing Preneed Contracts in a manner known to be contrary to law. Such agreement prevents Plaintiffs and Preneed Trust beneficiaries from withdrawing their own money without releasing from liability parties responsible for huge losses to the Preneed Trust. Strangers to the Preneed Contracts are attempting to add terms to them, terms which are contrary to the withdrawal provisions of the Burial Act and the plain language of the Preneed Contracts and Trust Agreement themselves.

91. Based upon all of the foregoing, Plaintiffs seek a declaration that the Release and Discharge and Satisfaction are unenforceable with respect to Merrill Lynch PFS, ML Life Agency, and ML Life Insurance.

COUNT III

(Declaration That The DOI Exceeded Its Statutory Authority)

92. Plaintiffs, on behalf of themselves and all others similarly situated, incorporate by reference the allegations set forth in Paragraphs 1-81 above.

93. As an administrative agency, the DOI can act only pursuant to the authority conferred upon it by statute. The DOI and Director's powers are provided by Illinois Insurance Code.

94. The DOI's "settlement" with ML Life Agency exceed its statutory authority. Specifically, the DOI was without authority to impose a fine against ML Life Agency in excess of \$100,000. The DOI's statutory authority also does not permit the DOI to require the Release or the Discharge and Satisfaction.

95. Further, the Consent Order is outside the DOI's statutory authority because it seeks to regulate entities and activities over which the DOI has no authority. Such entities and activities include the sale of securities and other instruments and the entities licensed to engaged in such sales.

96. In addition, the DOI was not authorized to require conditions in addition to those imposed by the Burial Act or Preneed Contracts for the withdrawal of funds from the Preneed Trust. The DOI's "settlement" also unilaterally amends and violates the Trust Agreement.

97. Finally, through the Release and the Discharge and Satisfaction, the DOI has taken actions that unconstitutionally encroach on this Court's jurisdiction to decide the matters in controversy before it.

98. Based upon all of the foregoing, Plaintiffs seek a declaration that the DOI exceeded its statutory authority and that the Release and the Discharge and Satisfaction are void.

COUNT IV

(Declaration That The IOC Exceed Its Statutory Authority)

99. Plaintiffs, on behalf of themselves and all others similarly situated, incorporate by reference the allegations set forth in Paragraphs 1-81 above.

100. The IOC's ability to act with respect to the Preneed Trust is provided by the Burial Act. The Burial Act specifically limits the IOC's authority to limited responsibilities, including the licensing of sellers of Preneed Contracts.

101. Through the Consent Order, the IOC has acted and is continuing to act beyond the authority provided to it by the Burial Act. The IOC is attempting to reform non-guaranteed Preneed Contracts into guaranteed contracts. The IOC is also attempting to force Plaintiffs and the members of the Class to guarantee a rate of return on the funds deposited in the Preneed Trust. Nowhere in the Burial Act does it provide the IOC with the authority to reform Preneed Contracts or require a guaranteed rate of return on Preneed Trust funds.

102. Finally, through the Release and the Discharge and Satisfaction, the IOC has taken actions that unconstitutionally encroach on this Court's jurisdiction to decide the matters in controversy before it.

103. Based upon all of the foregoing, Plaintiffs seek a declaration that the IOC exceeded its statutory authority and that the Release, Discharge and Satisfaction and Commitment Letters are void.

COUNT V

(Declaration that the DOI and the IOC Have Exceeded Their Constitutional Authority)

104. Plaintiffs, on behalf of themselves and all others similarly situated, incorporate by reference the allegations set forth in Paragraphs 1-81 above.

105. Article II, section 1 of the Illinois Constitution provides that "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

106. Hynes, McRaith, the DOI and the IOC are part of the executive branch of this state. Notwithstanding their function, these Defendants seek to exercise powers that properly belong to the judicial branch. In particular, these Defendants have acted, and unless restrained by this Court will continue to act, to resolve litigation and cases that are pending before this Court – without specifically advising Plaintiffs and/or the Class that this result is the apparent effect of their actions.

107. The IOC's ability to act with respect to the Preneed Trust is provided by the Burial Act. The Burial Act specifically limits the IOC's authority to limited responsibilities.

108. Through the Consent Order, the IOC has acted and is continuing to act beyond the authority provided to it by the Burial Act. The IOC is attempting to reform non-guaranteed Preneed Contracts into guaranteed contracts. The IOC is also attempting to force Plaintiffs and the members of the Class to guarantee a rate of return on the funds deposited in the Preneed Trust. Nowhere in the Burial Act does it provide the IOC with the authority to reform Preneed Contracts or require a guaranteed rate of return on Preneed Trust funds.

109. Indeed, a representative of Hynes has contended in a letter to the editor of the Springfield Journal Register on June 26, 2009 that “the damage to the IFDA trust was done by the deliberate actions of those who managed it long before Dan Hynes ever became comptroller.” As such, the representative nonetheless admitted that this damage was done by the *deliberate* actions of others. Additionally, Hynes' representative further characterized this conduct as “illegal” in the same letter.

110. Despite acknowledging the deliberate and illegal actions of others who have damaged the Preneed Trust, the actions of the IOC and DOI appear intended to cause the release of these defendants, “*and unnamed individuals and entities,*” from the consequences of their

deliberate and illegal conduct through the Release and the Discharge and Satisfaction that McRaith has approved, as well as through the Commitment Letters required by the IOC. Additionally, the artificial timeline the Defendants have imposed appears designed to make difficult any meaningful review of the matter, which would divest this Court of jurisdiction to resolve derivative and class claims that are presently pending before it.

111. Based upon all of the foregoing, Plaintiffs seek (1) a declaration that Defendants McRaith, the DOI, Hynes and the IOC have violated the limitations that Article II, section 1 place upon their conduct, and (2) an injunction that would prevent them from exercising powers that properly belong to the judiciary.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. That this Court declare unlawful and unenforceable all terms of the Consent Order purporting to require Preneed Trust beneficiaries to release Defendants from liability in order to obtain their Preneed Trust funds under the withdrawal provisions of the Burial Act.
2. That the Court declare invalid and unenforceable any Releases, Discharge and Satisfaction, and Commitment Letters signed by Plaintiffs and the Class pursuant to the Consent Order.
3. That the Court declare that the DOI and IOC have exceed their statutory authority and that the Consent Order, Release, Discharge and Satisfaction and Commitment Letters are void.
4. That the Court declare that the DOI and the IOC have exceeded their constitutional authority.
5. That the Court enjoin the DOI and IOC from taking further actions exceeding their statutory and constitutional authority.

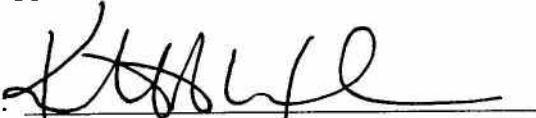
6. That Plaintiffs and the Class be awarded attorneys' fees and all other reasonable expenses incurred in pursuit of this action.

7. For such other and further relief as the Court may deem just and proper.

DATED: July 7, 2009

Respectfully Submitted,

Fred C. Dames Funeral Homes, Inc., Calvert
Funeral Homes, Ltd., Clancy-Gernon
Funeral Homes, Inc., Aaron Todd Dean
d/b/a as Bass Patton Dean Funeral Home
and Toberman-Dean Funeral Home,
McCracken-Dean Funeral Home, Inc.,
Knapp Funeral Homes, Inc.

By: 

Kenneth A. Wexler
Edward A. Wallace
Donald P. Bunnin
Amber M. Nesbitt
Wexler Wallace LLP
55 W. Monroe Street, Suite 3300
Chicago, IL 60603
(312) 346-2222 – Telephone
(312) 346-0022 – Facsimile
kaw@wexlerwallace.com
eaw@wexlerwallace.com
dpb@wexlerwallace.com
amn@wexlerwallace.com

C. Barry Montgomery
Steven J. Roeder
Williams Montgomery & John, Ltd.
20 North Wacker Drive, Suite 2100
Chicago, IL 60606
(312) 443-3200 – Telephone
(312) 630-8500 – Facsimile
cbm@willmont.com
sjr@willmont.com

Counsel for Plaintiffs

Exhibit A

PRE-NEED CONTRACT - GUARANTEED FORM

THIS CONTRACT GUARANTEES THE BENEFICIARY THE SPECIFIC GOODS OR SERVICES CONTRACTED FOR. NO ADDITIONAL CHARGES MAY BE REQUIRED FOR DESIGNATED GOODS AND SERVICES. ADDITIONAL CHARGES MAY BE INCURRED FOR UNEXPECTED EXPENSES INCLUDING, BUT NOT LIMITED TO, CASH ADVANCES, SHIPPING OF REMAINS FROM A DISTANT PLACE, OR DESIGNATED HONORARIA ORDERED OR DIRECTED BY SURVIVORS.

_____ ("Provider") and
_____ ("Purchaser") agree for
the trust funded pre-arrangement of a funeral for the benefit
of _____ ("Beneficiary"):

Provider Information

Name of Principal Office: _____

Address of Principal Office: _____

Parent Company, if any: _____

Purchaser Information

Address: _____

Birth Date: _____

Social Security No.: _____

Beneficiary Information

Name/Address: _____

Birth Date: _____

Social Security No.: _____

1. Describe nature of relationship between Provider and Purchaser (if any): _____

2. At time of Beneficiary's death, Provider will provide the funeral merchandise and services described in the attached Statement of Funeral Merchandise and Services Selected.

3. Name and address of branch location of Provider where funeral is to be provided: _____

4. Upon execution of this agreement, Purchaser has paid the total amount set forth below:

- "Trust Funds" (to be deposited with Trustee): \$ _____
- Provider Fee on Outer Burial Containers (retained by Provider): \$ _____
- Provider Fee on Services and other Merchandise (retained by Provider): \$ _____
- Sales Taxes: \$ _____
- Total Amount Paid by Purchaser: \$ _____

5. By signing this Contract below, Purchaser also is deemed to have signed the Trust Agreement ("Trust Agreement") attached to this Contract and directed the transfer of the Trust Funds to Merrill Lynch Bank & Trust Co., FSB, as trustee of the Trust ("Trustee" and "Trust," respectively). Provider, on Purchaser's behalf, will deliver the Trust Funds to Trustee within 30 calendar days but no earlier than four business days after the execution of this Contract. The transfer of the Trust Funds to Trustee will be

effective upon Trustee's written acceptance of the Trust Funds and the office of Trustee under the Trust Agreement, a copy of which will be sent to Purchaser.

6. Purchaser acknowledges that Provider explained to Purchaser the terms of this Contract before Purchaser signed it. *Initials of Purchaser* _____

7. Purchaser acknowledges receipt of the Pre-Need Booklet prior to signing this Contract. *Initials of Purchaser*. _____

8. Purchaser is signing this statement to waive and renounce Purchaser's right to cancel this Contract, including the rights to cancel pursuant to paragraphs 12, 13, and 14 below. Purchaser understands that the Contract will be irrevocable and Purchaser will not be entitled to a refund of any money that Purchaser has paid. (Federal and State regulations require that such a contract be irrevocable for purposes of Purchaser's eligibility for Supplemental Social Security Income benefits, Medicaid, or other public assistance programs, as permitted under federal law.)
Signed: _____

9. This Contract guarantees Beneficiary the specific merchandise and services contracted for. No additional charges may be required for such merchandise and services. Additional charges may be incurred for unexpected expenses including, but not limited to, cash advances, shipping of remains or designated honoraria. Should Beneficiary's death occur other than Beneficiary's city of residence or municipality stated above, additional charges for transportation of remains may be incurred.

10. If the particular supplies and services specified in this Contract are unavailable at the time of delivery, Provider shall be required to furnish supplies and services similar in style and at least equal in quality of material and workmanship.

11. If cancellation of this Contract has not been initiated as set forth in paragraphs 13 or 14 below, within thirty (30) days of Trustee's receipt from Provider of the affidavits and Beneficiary's certified death certificate as provided in the Trust Agreement, Trustee will pay to Provider and Purchaser the respective amounts described in the Trust Agreement for a non-guaranteed contract.

12. If this Contract is revocable, Beneficiary is not deceased, and cancellation of this Contract has not been initiated pursuant to paragraph 14 below, Purchaser or Purchaser's representative (as described in the Trust Agreement) may cancel this Contract for any reason by providing written notice of cancellation to Provider. Within

five (5) days of receipt, Provider will deliver such notice to Trustee along with an affidavit (as described in the Trust Agreement). Within twenty-five (25) days of receipt, Trustee will liquidate the Trust property and distribute the liquidation proceeds to Purchaser or Purchaser's representative, as applicable, and Provider as described in the Trust Agreement.

13. If this Contract is revocable, Beneficiary is deceased, and cancellation of this Contract has not been initiated pursuant to paragraph 14 below, Purchaser, Purchaser's representative or Beneficiary's representative may cancel this Contract for any reason by providing written notice of cancellation and Beneficiary's certified death certificate to Provider. Within five (5) days of receipt, Provider will deliver such notice and certificate to Trustee along with an affidavit (as described in the Trust Agreement). Within twenty-five (25) days of receipt, Trustee will liquidate the Trust property and distribute the liquidation proceeds as provided in the Trust Agreement.

14. If this Contract is revocable, Purchaser, Purchaser's representative or Purchaser's heirs may cancel this Contract due to Provider's failure to comply with this Contract, by delivering an affidavit to Trustee as described in the Trust Agreement. Within thirty (30) days of receipt of this affidavit, Trustee will liquidate the Trust property and distribute the liquidation proceeds as provided in the Trust Agreement.

15. As Provider's fee, Provider may retain an initial total amount of up to 5% of the purchase price of the services or merchandise (other than outer burial containers), and up to 15% of the purchase price of outer burial containers. The "purchase price" is the amount paid to Provider less sales taxes, as stated in the Statement of Funeral Merchandise and Services Selected.

16. Trustee may retain from the Trust reasonable compensation and expenses, provided that the total compensation and expenses retained cannot exceed any limitation provided in the Illinois Funeral or Burial Funds Act as in effect, which currently is 25% of the earnings of the Trust annually.

17. This Contract is binding on the heirs, representatives, successors and assigns of the parties. This Contract may not be assigned by Purchaser. This Contract may not be assigned by the Provider, except as approved by the Illinois State Comptroller.

18. This Contract may not be amended or modified without the prior written approval of Trustee.

19. Provider hereby waives the accounting requirements contained in the Illinois Trusts and Trustees Act as in effect.

20. Provider hereby acknowledges and agrees that it is and will remain licensed and bonded under the Illinois Funeral or Burial Funds Act as in effect for the term of this Contract.

21. Purchaser may change Provider under this contract only with the written approval of Trustee and the existing Provider. Any successor Provider of this Contract must be licensed and bonded as required by the Illinois Funeral or

Burial Funds Act.

22. If any of the information set forth on the facing page of this Contract with respect to Purchaser or Beneficiary is or becomes inaccurate or incomplete, Purchaser will notify Provider in writing of such corrections, changes or additions.

23. Provider will promptly notify Trustee in writing of any changes to the information set forth on the facing page of this Contract with respect to Provider, Purchaser or Beneficiary of which it becomes aware.

24. Written notice to any person or entity required or permitted pursuant to this Contract will be made to the person's or entity's address stated in this Contract, unless written notice of a change of address is filed with Provider.

25. Provider may remove Trustee and appoint a successor trustee only as provided in the Trust Agreement.

26. If Provider is prevented from performing by strike, shortage of materials, civil disorder, natural disaster, or any like occurrence beyond the control of Provider, Provider's time for performance under this Contract will be extended by the length of the delay.

27. The parties intend for this Contract to comply with the provisions of the Illinois Funeral or Burial Funds Act as in effect, and the provisions of this Contract shall be liberally construed to effect this intent.

28. Trustee is not an affiliate of Provider. Nothing contained herein shall be deemed to constitute Trustee and Provider as partners or joint venturers. Each of Trustee and Provider are independent contractors, with no rights or obligations except as set forth in this Contract or the Trust Agreement to control or direct the acts of the other. Neither Trustee or Provider shall be considered the agent of the other.

29. Provider does not warrant the merchandise or goods covered by this Contract. The only warranty, if any, is the warranty issued by the manufacturer of the purchased merchandise or goods.

30. YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. PLEASE SIGN, DATE AND DELIVER TO PROVIDER THE ATTACHED NOTICE OF CANCELLATION FORM TO EXERCISE THIS RIGHT.

Purchaser Date

Provider Date

ATTACHMENTS:
Statement Of Funeral Merchandise And Services Selected
Trust Agreement
Cancellation Notice

Exhibit B

TRUST AGREEMENT

By signing the pre-need contract to which this agreement is attached (the "Pre-need Contract"), the "Purchaser" identified in the Pre-need Contract is deemed to have signed this agreement and directed the "Provider" identified in the Pre-need Contract to transfer the property described as the "Trust Funds" in the Pre-need Contract to Merrill Lynch Bank & Trust Co., FSB, as trustee under this agreement. By signing an acceptance of the Trust Funds and the office of trustee under this agreement, Merrill Lynch Bank & Trust Co., FSB, is deemed to have signed this agreement, accepted the Trust Funds, and accepted the office of trustee under this agreement, all as of the date of the acceptance instrument. The trustee shall administer the Trust Funds and any property received or receivable by the trustee from any source (the "trust property") as follows:

Article 1 Background and Purpose

- 1.01 **Pre-Need Contract.** The Provider sold the Pre-need Contract to the Purchaser.
- 1.02 **Purpose of Pre-Need Contract.** The Pre-need Contract provides for the furnishing or performance of funeral services and/or the furnishing or delivery of personal property, merchandise, or services by the Provider upon the death of the "Beneficiary" identified in the Pre-need Contract.
- 1.03 **Purpose of Trust.** The trustee shall take title to the Trust Funds conveyed to it by the Provider on behalf of the Purchaser for the purpose of investing, protecting, and conserving such assets, collecting income earned from such assets and distributing the trust property pursuant to the terms of this agreement and applicable law.

Article 2 Distribution of Trust Property

2.01 **Death of the Beneficiary.** If cancellation of the Contract has not been initiated pursuant to Paragraph 2.03 or Paragraph 2.04 below, within 30 days of the trustee's receipt from the Provider of the Beneficiary's certified death certificate, an "affidavit" (defined in Subparagraph 5.08(b) below) executed by the Beneficiary's surviving spouse, if any, otherwise any adult descendant of the Beneficiary, or if none, any adult relative of the Beneficiary stating that the Provider performed services and delivered merchandise in accordance with the Pre-need Contract and otherwise fulfilled the terms of the Pre-need Contract, and if the Pre-need Contract is non-guaranteed, the Provider's affidavit stating the amount needed to pay for the services performed and merchandise delivered pursuant to the Pre-need Contract, the trustee shall liquidate the trust property and distribute the liquidation proceeds, net of any accrued but unpaid trustee compensation and expenses and taxes, as follows:

(a) **Guaranteed Pre-need Contract.** If the Pre-need Contract is guaranteed, the trustee shall distribute to the Provider the net liquidation proceeds.

(b) **Non-guaranteed Pre-need Contract.** If the Pre-need Contract is non-guaranteed and the net liquidation proceeds are sufficient to pay for the services performed and merchandise delivered pursuant to the Pre-need Contract, as stated in the Provider's affidavit, the trustee shall distribute to the Provider the amount needed to pay for such services and merchandise, and shall distribute the balance of the net liquidation proceeds, if any, to the Beneficiary's estate. If the Pre-need Contract is non-guaranteed and the net liquidation proceeds are insufficient to pay for the services performed and merchandise delivered pursuant to the Pre-need Contract, as stated in the Provider's affidavit, the trustee shall distribute to the Provider the net liquidation proceeds.

2.02 **Cancellation of Pre-need Contract without Cause before the Death of the Beneficiary.** If the Pre-need Contract is revocable, the Beneficiary is living as of the Provider's receipt of written notice of cancellation of the Pre-need Contract from the Purchaser or the Purchaser's "representative" (defined in Subparagraph 5.08(c) below), and cancellation of the Pre-need Contract for

cause has not been initiated pursuant to Paragraph 2.04 below, then within 25 days of the trustee's receipt from the Provider of such written notice of cancellation and the Provider's affidavit stating that the Beneficiary was living as of the Provider's receipt of such written notice of cancellation and the value of any merchandise already delivered and services already performed by the Provider pursuant to the Pre-need Contract, the trustee shall liquidate the trust property and distribute the liquidation proceeds, net of any accrued but unpaid trustee compensation and expenses and taxes, as follows:

(a) **Distributions to the Provider.** The trustee shall distribute to the Provider an amount equal to the value of any merchandise already delivered and services already performed by the Provider pursuant to the Pre-need Contract, as stated in the Provider's affidavit, if any.

(b) **Distribution to the Purchaser.** The trustee shall distribute to the Purchaser or the Purchaser's representative the balance of the net liquidation proceeds, if any.

2.03 Cancellation of Pre-need Contract without Cause after the Death of the Beneficiary.

If the Pre-need Contract is revocable, the Beneficiary is deceased as of the Provider's receipt of written notice of cancellation of the Pre-need Contract from the Purchaser, the Purchaser's representative, or the Beneficiary's representative, and cancellation of the Contract for cause has not been initiated pursuant to Paragraph 2.04 below, then within 25 days of the trustee's receipt from the Provider of such written notice of cancellation, the Beneficiary's certified death certificate, and the Provider's affidavit stating that the Beneficiary was deceased as of the Provider's receipt of such written notice of cancellation and the value of any merchandise already delivered and services already performed by the Provider pursuant to the Pre-need Contract, the trustee shall liquidate the trust property and distribute the liquidation proceeds, net of any accrued but unpaid trustee compensation and expenses and taxes, in accordance with the "Act" (defined in Subparagraph 5.08(a) below).

2.04 Cancellation of Pre-need Contract for Cause. If the Pre-need Contract is revocable, then within 30 days of the trustee's receipt from the Purchaser, the Purchaser's heirs, or the Purchaser's representative of an affidavit stating the existence of the Pre-need Contract and that the Provider failed to comply with the terms of the Pre-need Contract within a reasonable time, the trustee shall file a copy of the affidavit with the Illinois State Comptroller ("Comptroller") and the Provider, liquidate the trust property, and distribute the liquidation proceeds, net of any accrued but unpaid trustee compensation and expenses and taxes, in accordance with the Act.

2.05 Forms. The trustee reserves the right to establish specific forms to be used by the Provider in seeking distributions pursuant to this Article. Such forms, and any changes thereto, shall be communicated to the Provider by the trustee in writing, and the Provider shall make use of such forms after receipt thereof.

2.06 Distribution Determination. In case of doubt as to whether a distribution should be made pursuant to this Article or the proper recipient of a distribution pursuant to this Article, the trustee in its discretion and at the trust's expense may avail itself of the Reliance on Counsel provision in Paragraph 3.11 below, submit the issue to a court for determination, or take any other action to resolve the issue that the trustee determines is advisable.

Article 3 General Administrative Provisions

3.01 Facility of Payment. Whenever the trustee considers that a person entitled to a distribution is incapacitated in any way so as to be unable to manage his or her financial affairs, such payments may be made to the person's representative.

3.02 Income Accrual. The trustee shall add to principal periodically any income not required to be distributed.

3.03 Protection from Creditors. In the event of the Provider's bankruptcy, insolvency or assignment for the benefit of creditors, or an adverse judgment, the trust property shall not be available to any creditor as assets of the Provider or to pay any expenses of any bankruptcy or similar proceeding,

