BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **NEPTUNE SOCIETY OF CENTRAL CALIFORNIA- BAKERSFIELD; and GERALD ALDEN BROWN** Respondents.	Case Nos. A1 2009 369 OAH No. 2011010810

DECISION AND ORDER

The attached Proposed Decision of the Administrated Law Judge is hereby accepted and adopted as the Decision of the Director of Consumer Affairs in the above-entitled matter, except that, pursuant to Government Code section 11517(c)(2)C, the following typographical errors are corrected as follows.

Paragraph 1 under Legal Conclusions on page 13 is hereby corrected as follows:

"1. Section 7686 provides that the Bureau may suspend or revoke licenses, after proper notice and hearing to the licensee, upon a finding that the licensee committed any of the acts or omissions constituting grounds for disciplinary action, which include misrepresentation or fraud in the conduct of the business or the profession of a funeral director (§ 7692), and violation of any of the provisions of the Funeral Directors and Embalmers Law or of the rules and regulations adopted pursuant thereto (§ 7703)."

Paragraph 3 under Legal Conclusions on page 13 is hereby corrected as follows:

"3. Cause exists to discipline Respondent Neptune's funeral establishment license under section 7686, in conjunction with 7692 for misrepresenting and failing to disclose material facts to customers in connection with the sale of Preneed Contracts, as set forth in factual finding number 15."

This Decision shall become effective on JANUARY 30, 2013.

IT IS SO ORDERED DEC 3 1 2012.

Doreathea Johnson
DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

BEFORE THE
CEMETERY AND FUNERAL BUREAU
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	Agency No. A1 2009 369
NEPTUNE SOCIETY OF CENTRAL CALIFORNIA-BAKERSFIELD; and GERALD ALDEN BROWN,	OAH No. 2011010810
Respondents.	

PROPOSED DECISION

This matter was heard by Mark Harman, Administrative Law Judge, Office of Administrative Hearings, on February 7, 2012, in Bakersfield, California.

Antonio Lopez, Jr., Deputy Attorney General, represented Complainant, Lisa M. Moore, Deputy Chief, Cemetery and Funeral Bureau, Department of Consumer Affairs.

Steven H. Gurnee, Attorney at Law, represented Respondents Neptune Society of Central California – Bakersfield and Gerald Alden Brown.

Complainant seeks to impose discipline on Respondents' licenses for alleged violations of the Funeral Directors and Embalmers Law in offering and selling contracts that, Complainant maintains, are preneed funeral contracts; and further, for failure to maintain customers' moneys received from these contracts in a preneed trust account; for misrepresentations; for failure to provide a price list to preneed customers; and for failure to maintain customers' preneed funds in a trust account until delivery of purchased items. Respondents assert that Complainant has misapplied the law to Respondents' sales of contracts to preneed customers, which, they argue, are regulated under the Cemetery Act.

Testimonial and documentary evidence was received. At the conclusion of the hearing, the record was held open until March 9, 2012, for the submission of Complainant's written closing argument and until March 30, 2012, for the submission of Respondents' written reply brief. On March 9, 2012, Complainant submitted her closing argument brief, which was marked for identification as Exhibit 8. On March 23, 2012, Respondents requested a continuance until April 13, 2012, to submit their brief, which was granted. On April 13, 2012, Respondents submitted their closing argument brief, which was marked as Exhibit 22. The record was closed and the matter was deemed submitted on April 13, 2012.

LEGAL ISSUES

1. Are Respondents' offers and sales of "preneed contracts" subject to the requirements of Article 9 of the Funeral Directors and Embalmers Law (Funeral Law)?

2. Are the cremation urns purchased preneed "cemetery property" or "merchandise that is delivered as soon as paid for" within the meaning of Business and Professions Code section 7741?

FACTUAL FINDINGS

1. Complainant filed the Accusation solely in her official capacity.

2. On May 13, 1983, the Cemetery and Funeral Bureau (Bureau) issued Funeral Establishment license number FD 1406 to Neptune Society of Central California-Bakersfield (Respondent Neptune). Respondent Neptune is owned by The Neptune Society of Central California, Inc. (NSCC), a California corporation, which is owned and controlled by Buck Kamphausen (Kamphausen) of Vallejo, California.[1] At all times relevant, Respondent Neptune operated a funeral establishment at 201 H Street, Bakersfield, California.

3. The Bureau issued Funeral Director license number FDR 1731 to Gerald Alden Brown (Respondent Brown) on July 14, 1999. At all times relevant, Respondent Brown was the funeral director of Respondent Neptune's funeral establishment in Bakersfield, California. Respondent Brown retired from this position in February 2012.

4. Evergreen Cemetery Association (Evergreen), located at 6450 Camden Street, Oakland, California, is a California corporation formed in 1903. The Cemetery Board, the Bureau's predecessor that regulated cemetery authorities, issued Evergreen a license to act as a cemetery authority in 1950. Kamphausen purchased Evergreen in 1973, and is its President. The same board of directors oversees both Evergreen and NSCC.

5. Kamphausen holds a number of cemetery licenses, including cemetery manager and cemetery broker, and funeral licenses, including funeral director and embalmer. Kamphausen also is licensed to operate a cemetery brokerage branch office at Respondent Neptune's place of business at 201 H Street, Bakersfield, California. Respondent Brown, in addition to being a funeral director, has held a cemetery salesperson license since 1999.

The Preneed Contract

6. Complainant has alleged that Respondents violated provisions of the Business and Professions Code that primarily relate to "preneed" funeral arrangements, contracts, or

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[1] On June 1, 1986, The Neptune Society of Central California, Inc., also was owner of The Nautilus Society of Oakland, The Nautilus Society of Sacramento, The Neptune Society of San Jose, The Neptune Society of Fresno, and The Neptune Society of Modesto.

plans. Since at least 1986, Respondent Neptune has offered and sold to customers a Guaranteed Price/Pre-Need Cemetery Purchase Contract (Preneed Contract). In 2007, the Preneed Contract identified Evergreen as the "seller."[2] The Preneed Contract states that goods and services are provided by Evergreen by agreement with Respondent Neptune, but it also states that "The Neptune Society of Central California [agrees] to honor the conditions and supply the required goods and services contained in the contract." In return for selling Preneed Contracts and related services, Respondent Neptune receives fees or sales commissions deducted from sales proceeds. These services include making full disclosure of all material facts to the preneed customers, completing or providing preneed documentation as required, and issuing warehouse receipts for merchandise sold to the preneed customers. Respondent Neptune may separately offer additional services to preneed customers, such as arranging for embalming or for a memorial service on a chartered boat.

7. Under the Preneed Contract, Respondent Neptune receives customers' funds and, after deducting amounts to pay taxes, sales commissions, overrides, and related sales expenses, remits the balance to Evergreen, which Evergreen deposits into the Evergreen "special care trust." The trustees of the Evergreen special care trust are Kamphausen, Terry Curtola and Thomas Frederick Wells, Jr. Upon the death of the beneficiary, Evergreen ostensibly issues payment from the special care trust for cremation or related services. In 2009, a Bureau examiner inquired about the Preneed Contract and received a blank sample from Respondent Brown.

8. The examiner also reviewed Preneed Contracts from customer files. All customer payments pursuant to the Preneed Contract were applied, first, on "merchandise stored or delivered," then on sales tax, and then on deposits into Evergreen's special care trust. In one example, a purchaser agreed to pay a sum of $1,495: $700 of this amount was consideration paid for "Merchandise Stored or Delivered – Cremains Container,[3] Registration and Information Packet," plus $50.75 in sales tax, and $744.75, the remainder under the contract, was to be deposited and held in the Evergreen special care trust as a guarantee that Evergreen would provide, at the time of need, "cremation, refrigerated container, refrigerated holding facility, scattering of cremated remains at sea or return to family, procurement of death certification, disposition permit, professional and administrative services as needed, [and] removal from place of death within a seventy five mile radius of a Neptune/Nautilus office . . . staff and services available 24 hours a day. See attached itemized preneed price list." The consideration paid for the cremains container (hereinafter, cremation urn) was expressly not placed in the special care trust.

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[2] In a 1992 version, Neptune Society was the seller and Evergreen was "acting as the agents for the deposit of all trust funds."

[3] The "cremains containers," i.e., cremated remains containers, as defined in the Preneed Contract, are "plastic transport urns" that may be used to transport cremated remains, e.g., from a crematory to a designated person, to a boat for scattering at sea, or to a cemetery for scattering in a garden. "The transport urns purchased preneed are fungible and can be retained by purchaser or designee. Transport urns can be reused when properly washed after scattering at sea or garden."

9. Complainant argues that Respondents were not authorized to sell the Preneed Contracts under the Funeral Law, i.e., Business and Professions Code[4] section 7600 et seq., because they failed to comply with the trusting requirements set forth in sections 7735, 7736, 7737.5 or 7737.7. Respondent Neptune argues that the Preneed Contracts are "cemetery contracts" and that the Funeral Law is inapplicable. Respondents distinguish the two statutory schemes that regulate businesses that are engaged in activities related to the final disposition of human remains, one applicable to funeral licensees, and the other to cemetery licensees. Evergreen is the "seller" under the Preneed Contract. Respondent Neptune argues that Evergreen is the promisor that provides the "cemetery-related" services and goods, and that these preneed transactions involve no offers or sales of funeral services and goods. Under an agreement between Respondent Neptune and Evergreen, Respondent Neptune is an "independent contractor" in the performance of services related to the Preneed Contract. Thus, Respondent Neptune argues that the Preneed Contracts are within the purview of the Cemetery Act, i.e., section 9600 et seq. Respondents further argue that Respondent Brown is authorized by his cemetery salesperson's license to offer and sell a Preneed Contract.

10. Complainant contends that a Preneed Contract is a preneed funeral arrangement,[5] that Respondent Neptune is obligated to comply with the trusting provisions of the Funeral Law, and that, when Respondent Neptune presents an offer for preneed funeral services, such as a Preneed Contract, and fails to deposit into trust all of the moneys received in connection with the Preneed Contract, it has violated Article 9 of the Funeral Law, also known as the "Short Act." Thus, Respondent Neptune cannot avoid the requirements of the Funeral Law simply by contracting with Evergreen. The legal issue in this matter cannot be resolved simply by referring to Respondents' description of the Preneed Contract or Respondents' claim to be acting as the agent of a cemetery authority engaging in preneed "cemetery" transactions. The parties' dispute, rather, requires an analysis of the two statutory schemes and, finally, of their relationship to the Short Act.

11. Statutory authority exists for either a funeral director or a cemetery authority to control the final disposition of human remains.[6] Each type of license has overlapping

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[4] All further statutory references are to the Business and Professions Code, unless otherwise noted.

[5] California Code of Regulations, title 16, section 1277, provides that: "'Preneed arrangement,' 'preneed agreement' or 'preneed' is written instruction regarding goods or services or both goods and services for final disposition of human remains when the goods or services are not provided until the time of death, and may be either unfunded or paid for in advance of need."

[6] Section 7616, subdivision (a), provides in pertinent part: "A licensed funeral establishment is a place of business conducted in a building or separate portion of a building having a specific street address or location and devoted exclusively to those activities as are incident, convenient, or related to the preparation and arrangements, financial and otherwise, for the funeral, transportation, burial or other disposition of human remains. . . ." A licensed

authorities in a number of areas. The Funeral Law authorizes a licensed funeral director to make preparations and arrangements for disposition. The authority granted to Respondents by their funeral establishment and funeral director licenses "undoubtedly includes the power to contract with licensed facilities for performance of cremation services.[7]" (*Hansell v. Santos Robinson Mortuary* (1998) 64 Cal.App.4th 608, 613.) Respondents, however, have no say in how a licensed crematory performs the cremations. Arrangements for the final "disposition of human remains" may include cremation, but may include other funeral services, such as removal of the body from the place of death, preparation of the body, a memorial service, burial at sea,[8] or completion of certificates and permits. Here, the Preneed Contract promises to provide, in addition to cremation services, "removal from place of death within a seventy five mile radius of a Neptune/Nautilus office," "professional and administrative services," and "scattering of cremated remains." These services are funeral services.

12. A cemetery authority, in addition to offering and selling cemetery property, is authorized to provide services related to cremation, entombment, or interment. Health and Safety Code section 7101 provides that: "A cemetery authority or crematory may make an interment or cremation of any remains upon the receipt of a written authorization of a person representing himself or herself to be a person having the right to control the disposition of the remains pursuant to Section 7100." A cemetery authority may place its cemetery under endowment care and establish general and special endowment care funds for the collection and deposit of moneys in trust to be used for the care and maintenance of cemetery property. Regulations interpreting the cemetery authority's power to take and hold property in "special care trusts" under Health and Safety Code section 8775 et seq.,[9] which became effective in

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funeral establishment shall at all times employ a licensed funeral director to manage, direct, or control its business or profession (§ 7616.2).

[7] Section 7685.2 requires funeral directors to provide an itemized disclosure of cemetery or crematory charges, thus implicitly contemplating that funeral directors may arrange for burial or cremation by other licensed facilities. Section 9784 prohibits cremation by a crematory without a written contract with the person having custody of the remains.

[8] Traditional interment meant inurnment, entombment, or burial, not burial at sea. Funeral services and interment are not contradictory terms. Thus it appears that burial of cremated remains at sea can be a funeral function or a cemetery function. (See Health & Saf. Code, § 7102.)

[9] Health and Safety Code section 8775 provides that:

> A cemetery authority which has established an endowment care fund may also take and hold any property bequeathed, granted, or given to it in trust to apply the principal, or proceeds, or income to either or all of the following purposes:
>
> (a) Improvement or embellishment of all or any part of the cemetery or any lot in it.

1960, provide for collecting and depositing moneys received by a cemetery authority pursuant to a preneed contract into trust.[10] (*Mount Vernon Memorial Park v. Board of Funeral Directors and Embalmers* (1978) 79 Cal.App.3d 874, 880 [*Mount Vernon*].)

13. Kamphausen testified at the hearing. He said that Respondent Neptune, despite being a funeral establishment, was formed with the idea of downplaying the functions of the funeral director and offering cremation services as simpler, more affordable "alternative to traditional funeral arrangements." He maintained that the Funeral Law did not apply to Preneed Contracts because "we are using a cemetery contract and not a mortuary contract. The contract itself controls." He acknowledged that Respondents performed funeral functions,[11] which could include explaining to customers the benefits of a Preneed Contract, and he candidly stated that he wished he could offer this package with just one license, but failed to explain why he needed a funeral establishment licensee to offer to customers a Preneed Contract, since, in his view, the Preneed Contract was only a "cemetery" contract. Respondent Brown and Respondents' expert witness also provided testimony that was somewhat ambiguous regarding the application of the laws to Respondents' performance of services pursuant to the Preneed Contracts.

14. Despite calling themselves Evergreen's agents, Respondent Neptune and its employees have not changed the nature of their function simply by claiming to wear a

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(b) Erection, renewal, repair, or preservation of any monument, fence, building, or other structure in the cemetery.

(c) Planting or cultivation of trees, shrubs, or plants in or around any part of the cemetery.

(d) Special care or ornamenting of any part of any plot, section, or building in the cemetery.

(e) Any purpose or use not inconsistent with the purpose for which the cemetery was established or is maintained.

[10] "Trusts established for burial purposes pursuant to [Health and Safety Code] section 8775 . . . including cremation or other commodities or services furnished at the time of and in connection with such cremation or interment are under the supervision of the bureau and must comply with the following requirements: [¶] (a) All moneys paid directly or indirectly . . . under the trust agreement or any agreement collateral thereto shall constitute 'trust corpus.' [¶] (b) None of the trust corpus shall be used for payment of commission or other expenses of trust administration. [¶] . . . [¶] (d) Other than as provided in Subsection (c) hereof, the trust income shall be used solely for the purposes authorized by Section 8775 of the Health and Safety Code." (Cal. Code Regs, tit. 16, § 2370.)

[11] Other traditional funeral functions may include services such as embalming or other preparation of human remains for transportation, burial, or disposal; or maintaining an establishment for the preparation or care of human remains, or for commemorative or religious ceremonies; or selling caskets, vaults, markers, and other items.

different hat when offering and selling a Preneed Contract to the public. Respondent Neptune is still engaged in the business of a funeral licensee when it offers Preneed Contracts to the public, because the act of arranging for cremations and related services falls within the scope of the duties authorized by a funeral establishment license. Furthermore, Respondent Neptune and Evergreen, although they are separate entities, can be treated as one when they offer and sell a Preneed Contract. They are owned by the same person and controlled by the same officers and directors. Although they purport to be acting independently, they are acting in concert with regard to the Preneed Contracts. They are engaged in a single business, the success of which relies on the efforts of Respondent Neptune and of Evergreen. Respondent Neptune does marketing, sales, and administrative functions; Evergreen performs cremations and holds customers' trust funds. Respondent Neptune's claim that it is only Evergreen's agent is a subterfuge intended to render the Funeral Law inapplicable and to create a fund to pay its selling fees and expenses. Respondent Neptune cannot use its agreement with Evergreen to evade regulatory requirements. (See *H.A.S. Loan Service v. McColgan* (1943) 21 Cal. 2d 513 523 [the court applied the alter ego doctrine to prevent use of the corporate form to circumvent usury law and franchise tax].)

15. Furthermore, a preneed customer, when entering Respondent Neptune's funeral establishment and contracting for preneed services, has a reasonable expectation that he or she will be afforded the consumer protections imposed under the Funeral Law. Respondent Neptune has a storefront with signage that says "Neptune Society," and the business looks like a funeral home. It offers the Preneed Contracts to its customers and promises to provide certain services, any one of which may constitute funeral arrangements. These are professional activities that require Respondent Neptune to have a funeral establishment license, whether Respondent Neptune is acting as seller, provider, arranger, agent or guarantor of these services. Respondent Neptune's customers likely will expect the funeral director to exercise ordinary skill and competence in performing his duties, including making full disclosure of all material facts regarding the purpose and intent of the Preneed Contract, particularly with regard to the law's trusting requirements, which Respondents failed to do.

The Legislative Intent of Preneed Contract Trusting Requirements

16. "In 1965, the Legislature enacted . . . the 'Short Act,' which added certain provisions to the Business and Professions Code and thereby placed restrictions upon preneed funeral contracts. . . . Section 7735 for example, precludes any licensed funeral director from entering into any such contract 'unless said contract requires that all money paid . . . shall be held in trust for the purpose for which it was paid or delivered until the contract is fulfilled. . . .'" (*Mount Vernon, supra*, at 879.) This strict regulation of a prepaid funeral arrangement would assure performance by requiring all consideration paid be held in trust until the need arises. The Legislature determined that "the public interest in securing performance of prepaid funerals was greatly endangered by the large sums attributed to sales expenses and commissions." (*Mount Vernon, supra*, at 885, citing the Hamilton Opinion, 52 Ops.Cal. Atty.Gen. 202, 204) Thus, the trusting requirement was imposed so that money paid for future provision of goods and services could not be dissipated prior to the time the need for them accrued. (*American Funeral Concepts v. Board of Funeral Directors and*

Embalmers (1982) 136 Cal.App.3d 303, 310.) This money is not earned on a Preneed Contract until the goods and services have been provided.

17. A customer who pays a funeral licensee in advance for funeral services expects the funeral licensee to place the money in trust pursuant to a trust agreement, and that the trustee shall deposit the corpus of the trust in a specified, federally-insured, financial institution. (§§ 7736, 7737.5, & 7737.7.) The same expectation applies to a Preneed Contract. The salient features of a Preneed Contract are the same as other preneed funeral arrangements: advance payment is received for services, property, or merchandise the use or delivery of which is not immediately required. Section 7735 of the Funeral Law specifically requires its licensees to deposit moneys received in trust for the purpose for which it was paid, until the death of the person for whose benefit the trust is established.[12] A funeral

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[12] Section 7735 provides that:

> No funeral establishment licensed under the laws of the State of California, or the agents or employees of a funeral establishment, shall enter into or solicit any preneed arrangement, contract, or plan, hereinafter referred to as "contract," requiring the payment to the licensee of money or the delivery to the licensee of securities to pay for the final disposition of human remains or for funeral services or for the furnishing of personal property or funeral merchandise, wherein the use or delivery of those services, property or merchandise is not immediately required, unless the contract requires that all money paid directly or indirectly and all securities delivered under that agreement or under any agreement collateral thereto, shall be held in trust for the purpose for which it was paid or delivered until the contract is fulfilled according to its terms; provided, however, that any payment made or securities deposited pursuant to this article shall be released upon the death of the person for whose benefit the trust was established as provided in Section 7737. The income from the trust may be used to pay for a reasonable annual fee for administering the trust, including a trustee fee to be determined by the bureau, and to establish a reserve of not to exceed 10 percent of the corpus of the trust as a revocation fee in the event of cancellation on the part of the beneficiary. The annual fee for trust administration may be recovered by withdrawals from accumulated trust income, provided that total withdrawals for this purpose shall not exceed the amount determined by the bureau. In no case shall the total amount withdrawn in a year for trust administration exceed the total amount of posted trust income for the immediate 12 preceding months. In addition to annual fees and reserves authorized by this section, a trustee may, at its election, pay taxes on the earnings on any trust pursuant to Section 17760.5 of the Revenue and Taxation Code. In no event, however, shall taxes paid on the earnings of any trust be considered part of the fees or reserves authorized by this section. All remaining income shall be accumulated in trust.
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> None of the corpus of the trust shall be used for payment of any commission nor shall any of the corpus of the trust be used for other expenses of trust administration, or for the payment of taxes on the earnings of the trust.

licensee furthermore is prohibited from paying any sales expenses or commissions out of the trust corpus. A trustee's fee or trust expenses may be paid only from the trust income.

18. Respondents concede that preneed customer's moneys received in connection with a Preneed Contract were not deposited in a preneed trust account in accordance with the Short Act or the regulations promulgated thereunder, including the requirement that the corpus of the trust must be deposited with a specified financial institution. On this record, approximately half the moneys received by Respondent Neptune in connection with the sales of Preneed Contracts were deposited into Evergreen's special care trust. The balance of the proceeds, ostensibly from the sale of the cremation urns, was used to pay taxes, sales commissions, and administrative expenses. Respondents, however, maintain that Evergreen is authorized to deposit customers' moneys in the Evergreen special care trust under Health and Safety Code section 8770, and that the moneys used to purchase the cremation urns are specifically exempted from the trusting requirement by section 7741.

19. For a period of 15 years after enactment of the Short Act, dual licensees holding both a certificate to operate as a cemetery authority and a funeral establishment license were authorized to deposit moneys received in connection with preneed funeral arrangements in a special endowment care fund as provided in Health and Safety Code section 8775.[13] (*Mount Vernon, supra,* at 880.) In *Mount Vernon*, the Board of Funeral Directors and Embalmers[14] brought a disciplinary action against a corporation licensed in dual capacities, alleging the entity failed to comply with the Short Act trusting requirements. Mount Vernon contended that it was not bound by the provisions of the Short Act and need only comply with the less restrictive provisions of the Cemetery Law. It argued that the legislative intent, expressed in former section 7738, was to allow preneed funeral contracts of dual licensees to be regulated solely by the Cemetery Board. Upon appeal from the grant of a writ of administrative mandamus upholding the Board's action, the court of appeal interpreted the Short Act and rejected Mount Vernon's argument. The court said that Mount Vernon's interpretation would frustrate the legislative intention to require entrustment of all proceeds paid pursuant to preneed funeral contracts:

> "We cannot conceive that the Legislature would seek to prohibit potential abuses of preneed funeral contracts by mortuaries generally, yet tolerate them by mortuaries which are also cemetery authorities. No legitimate legislative purpose is served by exempting dual licensees from requirements pertaining to the form of the preneed contract (§ 7735), the duty to place contract proceeds in trust within 30 days of receipt (§ 7737), [and] the restriction that none of the proceeds received be used for sales and other expenses (§ 7735) . . . Such an exemption would bestow upon a small class of

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[13] See footnote 9, *ante.*

[14] When *Mount Vernon* was decided, cemeteries and crematories were regulated by the Cemetery Board under the Cemetery Act and parts of the Health and Safety Code relating to cemeteries. Mortuaries and embalmers were regulated by the Board of Funeral Directors and Embalmers under the Funeral Law. The two Boards later were merged to become the Bureau, but the laws and types of licenses remained separate.

funeral directors an opportunity to perpetrate the very abuses which spawned the Short Act." (*Mount Vernon*, *supra*, at 886.)

20. The trusting requirement, therefore, may be applied to cemetery licensees as well as funeral directors. After *Mount Vernon*, the Legislature became even more explicit by repealing and replacing former section 7738 in 1981. This section now provides in part: "A licensed funeral establishment that is also a licensed cemetery authority shall not deposit any money or securities received in connection with preneed funeral arrangements in a special endowment care fund as provided in . . . the Health and Safety Code, nor shall a licensed funeral establishment permit the deposit of any money or securities received in connection with a special endowment care fund into a preneed funeral trust fund."

21. As stated above, Respondent Neptune and Evergreen are separate corporate entities, but they are engaged in a single business in connection with the Preneed Contracts. Under the particular circumstances, they cannot be allowed, by contract, to render the Funeral Law inapplicable. Doing so would promote injustice and sanction the circumvention of a public protection statute. The clear purpose of the Preneed Contract is to evade the Short Act's requirement that all preneed funds must be deposited in a preneed funeral trust fund, and thereby to create a separate fund from which to pay sales commissions and expenses. Under the particular circumstances of this case, Respondent Neptune and Evergreen are splitting hairs regarding the goods and services they provide pursuant to Preneed Contracts. The goods and services being offered are inextricably intertwined and clearly fall within the ambit of protections and benefits the Legislature has provided under the Short Act. In sum, Respondent Neptune, whether it was acting as Evergreen's agent or directly engaged in these preneed transactions, can be held liable for violations of the Short Act if it failed to deposit all of the consideration paid for a Preneed Contract into a preneed trust account.

Are proceeds from the sale of cremation urns exempt from the Short Act?

22. Respondents argue that, even if the Preneed Contract falls within the purview of the Short Act, its provision of "merchandise stored or delivered," e.g., a cremation urn that may be used to transport the cremated human remains to its final resting place, involves a "cemetery commodity" and, therefore, the consideration paid for the cremation urn is exempted from the trusting requirements. Respondents concede that a cremation urn has little value. The urn has a retail value of $25 according to Respondent Neptune's general price list. Cremated remains have to be placed in some form of container directly from the incinerator in order to segregate and properly identify the cremated remains, and to avoid commingling of cremated remains. (See Health and Saf. Code, § § 8345, 8345.5, 8346.5 and 8347.) These plastic transport containers are mere accessories used to remove the cremated remains from the crematory, since the law requires that remains be interred or scattered.

23. These urns are distinguishable from decorative urns used for the safekeeping of remains that are ordinarily bought and sold at the time of need in funeral and cemetery transactions. Preneed Contract customers do not have any particular interest in receiving delivery of the cremation urn, whether immediately, or at any time before the container will actually be needed, if ever. Respondents' and Evergreen's clear purpose for segregating

from the trust corpus the purported consideration paid for these urns, which are almost never actually delivered, is to avoid the trusting requirements.

24. Nevertheless, Respondents argue that the Legislature specifically excepted such items from the funeral arrangement trusting requirements of section 7735.[15] Calling these containers "cemetery commodities" skews the ordinary meaning.[16] Further, a reasonably prudent person would not presently pay $700 for a plastic container that, on a future date uncertain, would briefly transport cremated remains and then could be reused by the crematory if the purchaser did not claim it. Why would anyone take possession of such goods "preneed." These urns are not cemetery commodities specified in section 7741.

25. Even if the cremation urns are commodities, the Legislature did not intend to exclude purchases of these urns from the trusting requirement, since they are not items needed immediately or "merchandise" that is delivered to the customer as soon as paid for, despite Respondents arguments to the contrary. (See § 7741.) Respondents argue that a customer who has fully paid for a cremation urn pursuant to the Preneed Contract will immediately acquire its ownership and take delivery. The evidence that any urns were actually delivered to customers was much more ambiguous and not persuasive. As if acknowledging this defect, a Preneed Contract limits the purchaser's right to delivery and possession of the urns "at seller's principle [*sic*] place of business . . . only upon payment in full of Total Sales Price of this Agreement. Upon such full payment seller will store, issue and deliver a warehouse receipt to Purchaser for all such items." California Code of Regulations, title 16, section 1262, prohibits the use of a warehouse receipt to accomplish delivery of goods under the trusting provisions.[17]

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[15] Section 7741 states: "Nothing in this article shall apply to cemetery property; cemetery commodities; cemetery service; or merchandise that is delivered as soon as paid for."

[16] Examples of cemetery commodities include statuary or outdoor sarcophagi, memorial tablets and vases, grave boxes and vaults, urns for safekeeping, or vaultage.

[17] California Code of Regulations, title 16, section 1262 provides as follows:

> Delivery of merchandise within the meaning of Business and Professions Code Section 7741 shall mean actual personal delivery to a purchaser, trustor or beneficiary of funeral merchandise that is used or is intended to be used in connection with a preneed arrangement or any agreement collateral thereto. Any payment or payments received for funeral merchandise, where actual personal delivery of that merchandise will be delayed, shall be held in a trust as provided in Business and Professions Code, Division 3, Chapter 12, Article 9, until that merchandise is actually and personally delivered to, and is in the immediate possession of, the purchaser.
>
> (b) Neither the delivery of a warehouse receipt, nor any other form of constructive delivery shall constitute delivery of funeral merchandise within the meaning of Section 7741.

26. A Preneed Contract, first and foremost, is an agreement, for a fixed price, regarding the future disposition of the remains following a customer's death. All funds received in connection with a Preneed Contract and any contract collateral thereto must be held in trust. (§ 7735.) In economic terms, the cremation urns are a de minimis part of this preneed transaction. The Preneed Contract, in its current form, allows Respondent Neptune to take profit from the sale of the urns, which lessens the protection afforded the customers when less of their money is being held in trust.

Other matters

27. In October 2009, Respondent Brown could not provide the Bureau's examiner with a price list for preneed sales, which is an item that must be provided to a customer upon beginning discussion of prices or of the funeral goods and services offered under section 7685. At hearing, Respondents again failed to produce a preneed price list, apparently because they believed they have never offered preneed funeral arrangements to their customers, since they believe that the Preneed Contracts do not involve offers and sales of funeral goods and services.

Mitigation

28. Respondent Brown was the funeral director for Respondent Neptune for 17 years. The violation alleged as to him resulted from a misunderstanding caused by the unlawful manner in which the owners of Respondent Neptune were doing business. Further, Complainant has not established nor argued that any customers failed to receive any goods or services promised by Respondents in the Preneed Contract, or otherwise was harmed by Respondents' conduct. Respondent Brown's failure to use a price list to disclose prices or itemization of services or merchandise is a remediable violation of the Funeral Law.

Costs

29. Pursuant to Business of Professions Code section 125.3, Complainant requested Attorney General's fees of $12,007.50 for the costs of prosecution in this case. No request was made for the recovery of investigative costs. Complainant's request included costs incurred when another Deputy Attorney General was preparing for litigation, and it appears that the reassignment of the matter caused some duplication in costs while the current Deputy Attorney General made his preparations. Costs shall be reduced by $1,000 on that basis, leaving $11,007.50 as the total cost recovery that is deemed just and reasonable.

(c) Funeral merchandise includes, but is not limited to, caskets, alternative containers, clothing, printed materials and any other merchandise usually sold by a funeral establishment for use in connection with the funeral or preparation for disposition of human remains.

30. Except for those previously found to have merit, all other allegations in the Accusation and all other contentions of the parties at the hearing are found to lack merit or to be surplusage.

LEGAL CONCLUSIONS

1. Section 7786 provides that the Bureau may suspend or revoke licenses, after proper notice and hearing to the licensee, upon a finding that the licensee committed any of the acts or omissions constituting grounds for disciplinary action, which include misrepresentation or fraud in the conduct of the business or the profession of a funeral director (§ 7692), and violation of any of the provisions of the Funeral Directors and Embalmers Law or of the rules and regulations adopted pursuant thereto (§ 7703).

2. Cause exists to discipline Respondent Neptune's funeral establishment license under section 7686, in conjunction with sections 7735, 7736, 7737.5, or 7737.7, in that, Respondent Neptune failed to hold payments made in connection with Preneed Contracts in a preneed trust as required under the Funeral Law, as set forth in factual finding numbers 6 through 26. Respondent Neptune has been engaged in activities regulated under the Funeral Law when offering and selling Preneed Contracts. Respondent Neptune has failed to comply with the provisions of the Funeral Law that require specific trusting of moneys received in connection with preneed funeral arrangements.

3. Cause exists to discipline Respondent Neptune's funeral establishment license under section 7686, in conjunction with 7592, for misrepresenting and failing to disclose material facts to customers in connection with the sale of Preneed Contracts, as set forth in factual finding number 15.

4. Cause exists to discipline Respondent Brown's funeral director's license under section 7686, in conjunction with 7685, for failure to maintain and provide a preneed price list, a set forth in factual finding number 15.

5. Cause exists to discipline Respondent Neptune under section 7686, in conjunction with 7735 and 7741, for failing to place in trust the consideration that was purportedly paid for providing cremation urns to purchasers at the time of sale, but which provision never resulted in the actual delivery of said urns, and instead, involved Respondent Neptune providing only a warehouse receipt, as set forth in factual finding number 25.

6. Cause exists under Business and Professions Code section 125.3 to direct Respondent Neptune to pay costs of $11,007.50. (Factual finding number 29.)

ORDER

1. Respondent Neptune's funeral establishment license number FD 1406 is suspended for a period of 60 days; however, 50 days of this suspension is stayed pending Respondent Neptune's demonstration to the Cemetery and Funeral Bureau that it has corrected its business practices. If Respondent Neptune fails to demonstrate corrective action, the stay may be lifted and the Cemetery and Funeral Bureau may impose the entire term of the suspension.

2. Respondent Brown's funeral director license number FDR 1731 is suspended for a period of five days.

3. Respondent Neptune shall pay to the Bureau its costs of prosecution in the amount of $11,007.50 within 15 days of the effective date of this Decision.

Dated: November 30, 2012

MARK HARMAN
Administrative Law Judge
Office of Administrative Hearings

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BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **NEPTUNE SOCIETY OF CENTRAL CALIFORNIA-BAKERSFIELD and GERALD ALDEN BROWN, Manager and Licensed Funeral Director** **201 'H' Street** **Bakersfield, CA 93304** **Funeral Establishment License No. FD 1406** **Funeral Director License No. FDR 1731** Respondents.	Case No. A1 2009 369 ACCUSATION

Complainant alleges:

PARTIES

1. Lisa M. Moore (Complainant) brings this Accusation solely in her official capacity as the Deputy Chief of the Cemetery and Funeral Bureau (Bureau), Department of Consumer Affairs.[1]

2. On or about May 13, 1983, the Bureau issued Funeral Establishment License Number FD 1406 to Neptune Society of Central California-Bakersfield (Respondent Neptune). The

[1] Effective January 1, 1996, the Department of Consumer Affairs succeeded to, and was vested with, all the duties, powers, purpose, responsibilities and jurisdiction of the Cemetery Board and the Board of Funeral Directors and Embalmers, and consolidated the functions into the Cemetery and Funeral Programs. Effective January 1, 2001, the regulatory agency is designated as the Cemetery and Funeral Bureau.

Funeral Establishment License was in full force and effect at all times relevant to the charges brought herein and will expire on May 31, 2011, unless renewed.

3. On or about July 14, 1999, the Bureau issued Funeral Director License Number FDR 1731 to Gerald Alden Brown (Respondent Brown). The Funeral Director License was in full force and effect at all times relevant to the charges brought herein and will expire on July 31, 2010, unless renewed.

JURISDICTION

4. This Accusation is brought before the Director of Consumer Affairs (Director) for the Bureau, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

5. Section 118, subdivision (b) of the Code provides that the suspension/expiration/surrender/cancellation of a license shall not deprive the Director of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

STATUTORY AND REGULATORY PROVISIONS

6. Section 7685 of the Code states, in pertinent part:

"(a) Every funeral director shall provide to any person, upon beginning discussion of prices or of the funeral goods and services offered, a written or printed list containing, but not necessarily limited to, the price for professional services offered, which may include the funeral director's services, the preparation of the body, the use of facilities, and the use of automotive equipment. All services included in this price or prices shall be enumerated."

7. Section 7686 of the Code states, in pertinent part, that the Bureau "may suspend or revoke licenses, after proper notice and hearing to the licensee, if the licensee has been found guilty by the bureau of any of the acts or omissions constituting grounds for disciplinary action."

8. Section 7692 of the Code states: "Misrepresentation or fraud in the conduct of the business or the profession of a funeral director or embalmer constitutes a ground for disciplinary action."

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9. Section 7735 of the Code states, in pertinent part:

"No funeral establishment licensed under the laws of the State of California, or the agents or employees of a funeral establishment, shall enter into or solicit any preneed arrangement, contract, or plan, hereinafter referred to as 'contract,' requiring the payment to the licensee of money . . . to pay for the final disposition of human remains or for funeral services or for the furnishing of personal property or funeral merchandise, wherein the use or delivery of those services, property or merchandise is not immediately required, unless the contract requires that all money paid directly or indirectly . . . shall be held in trust for the purpose for which it was paid or delivered until the contract is fulfilled according to its terms . . . .

"None of the corpus of the trust shall be used for payment of any commission nor shall any of the corpus of the trust be used for other expenses of trust administration, or for the payment of taxes on the earnings of the trust."

10. Section 7736 of the Code states:

"For the purposes of this article the term 'trustee' shall mean any banking institution or trust company legally authorized and empowered by the State of California to act as trustee in the handling of trust funds or not less than three persons one of whom may be an employee of the funeral establishment; the word 'trustor' shall mean any person who pays the money or deposits the securities used for those preneed arrangements; the term 'beneficiary' shall be the person for whom the funeral services are arranged; the words 'corpus of the trust' shall include all moneys paid and securities delivered by the trustor pursuant to the provisions of the article."

11. Section 7737.5 of the Code states: "A trustee may deposit the corpus of the trust in any financial institution insured by the Federal Deposit Insurance Corporation."

12. Section 7737.7 of the Code states: "A trustee may deposit the corpus of the trust in any credit union which is insured by the National Credit Union Share Insurance Fund."

13. Section 7741 of the Code states: "Nothing in this article shall apply to cemetery property; cemetery commodities; cemetery service; or merchandise that is delivered as soon as paid for."

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14. Section 1262 of title 16 of the California Code of Regulations states:

"(a) Delivery of merchandise within the meaning of Business and Professions Code Section 7741 shall mean actual personal delivery to a purchaser, trustor or beneficiary of funeral merchandise that is used or is intended to be used in connection with a preneed arrangement or any agreement collateral thereto. Any payment or payments received for funeral merchandise, where actual personal delivery of that merchandise will be delayed, shall be held in a trust as provided in Business and Professions Code, Division 3, Chapter 12, Article 9, until that merchandise is actually and personally delivered to, and is in the immediate possession of, the purchaser.

"(b) Neither the delivery of a warehouse receipt, nor any other form of constructive delivery shall constitute delivery of funeral merchandise within the meaning of Section 7741.

"(c) Funeral merchandise includes, but is not limited to, caskets, alternative containers, clothing, printed materials and any other merchandise usually sold by a funeral establishment for use in connection with the funeral or preparation for disposition of human remains."

COST RECOVERY

15. Section 125.3 authorizes the award of reasonable costs of investigation and prosecution of the case where violations have been found.

FIRST CAUSE FOR DISCIPLINE

(Failure to Hold Pre-Need Payments in Permissible Trust)

16. Respondent Neptune is subject to disciplinary action under Code sections 7686 and 7735 in that Respondent Neptune failed to hold payments from pre-need cremation services contracts in a trust pursuant to Code section 7736, and either Code section 7737.5 or 7737.7. Instead of holding the corpus of the trust with a financial institution insured by the Federal Deposit Insurance Corporation (FDIC) or the National Credit Union Share Insurance Fund (NCUSIF), Respondent Neptune has been giving the funds to Evergreen Cemetery Association Special Care Trust. The circumstances are as follows.

a. A sample blank pre-need contract obtained during a Bureau's inspection of Respondent on or about October 7, 2009 provides that all monies are being trusted in the Evergreen Cemetery Association Special Care Trust.

b. A pre-need contract entered into on or about July 12, 2007 provides "TRUSTING OF ALL MONIES IN THE EVERGREEN CEMETERY ASSOCIATION SPECIAL CARE TRUST . . . ."

c. A pre-need contract entered into on or about September 17, 1992 provides for "TRUSTING OF ALL MONIES IN EVERGREEN CEMETERY ASSOCIATION SPECIAL CARE FUND . . . ."

SECOND CAUSE FOR DISCIPLINE

(Misrepresentation That Monies in Proper Trust Vehicle)

17. Respondent Neptune is subject to disciplinary action under Code sections 7686 and 7692 in that its pre-need contracts state that trusting the pre-need buyers' monies in the Evergreen Cemetery Association Special Care Trust is "SUBJECT TO ALL APPLICABLE LAWS," when in fact the corpus of the trust must be deposited either in an FDIC-insured financial institution (Code § 7737.5) or in an NCUSIF-insured credit union (Code § 7737.7). Complainant refers to and by this reference incorporates the allegations set forth in paragraph 16, subparagraphs a through c inclusive, above, as though set forth fully.

THIRD CAUSE FOR DISCIPLINE

(Failure to Use Price List for Pre-Need Sales)

18. Respondent Brown is subject to disciplinary action under Code sections 7686 and 7685 in that Respondent did not have a pre-need price list. The circumstances are as follows:

a. On or about October 7, 2009, during a Bureau representative's inspection of Respondent, the representative asked to see a pre-need price list. The only price list that Respondent had was a general price list that did not differentiate between pre-need and at-need prices.

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FOURTH CAUSE FOR DISCIPLINE

(Failure to Provide Pre-Need Purchasers Items in Contract at Time of Sale)

19. Respondent Neptune is subject to disciplinary action under Code sections 7686 and 7741, and section 1262 of title 16 of the California Code of Regulations in that Respondent Neptune has not provided the merchandise to the buyers at the time of sale. For example, instead of providing a cremation container to a pre-need purchaser who entered a contract on or about September 17, 1992, Respondent Neptune only provided that purchaser with a warehouse receipt dated September 30, 1992.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Director of Consumer Affairs issue a decision:

1. Revoking or suspending Funeral Establishment License Number FD 1406, issued to Respondent Neptune Society of Central California-Bakersfield;

2. Revoking or suspending Funeral Director License Number FDR 1731, issued to Respondent Gerald Alden Brown;

3. Awarding reasonable costs pursuant to Code section 125.3; and

4. Taking such other and further action as deemed necessary and proper.

DATED: December 6, 2010

Lisa M. Moore

LISA M. MOORE
Deputy Chief
Cemetery and Funeral Bureau
Department of Consumer Affairs
State of California
Complainant

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