

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

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,
FRED C. DAMES FUNERAL HOMES,
INC., MCCracken-DEAN FUNERAL
HOME, INC., KNAPP FUNERAL HOMES,
INC., DERIVATIVELY ON BEHALF OF
THE ILLINOIS FUNERAL DIRECTORS
ASSOCIATION AND I.F.D.A. SERVICES,
INC.

Plaintiffs,

-AGAINST-

ROBERT W. NINKER, PAUL G. DIXON,
KEVIN BURKE, ROB KONZELMANN,
JAMES D. BOSMA, GEOFFREY W.
HURD, CHARLES S. CHILDS, JR., BRENT
M. DAVIS, DEREK S. JOHNSON, JACK R.
KYNION, KING SUTTON, RANDALL L.
EARL, DAVID M. MCREYNOLDS,
DENNIS R. DAVISON, RICHARD D.
YURS, ERIC R. TRIMBLE, CHRIS
WOOLDRIDGE, DONALD HENDERSON,
STEVEN DAWSON, MICHELLE
HARRISON, MICHAEL SAYLES, VICKIE
DIEDRICH, LINDA ALLAN, MARK K.
CULLEN, MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC., AND EDWARD
SCHAIKER,

Defendants,

-AND-

ILLINOIS FUNERAL DIRECTORS
ASSOCIATION, I.F.D.A. SERVICES, INC.,

Nominal
Defendants.

Civil Action No. 09-11-38824

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DERIVATIVE COMPLAINT

Plaintiffs, 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, Fred C. Dames Funeral Homes, Inc., McCracken-Dean Funeral Home, Inc., and Knapp Funeral Homes, Inc. (collectively “Plaintiffs”), derivatively on behalf of the Illinois Funeral Directors Association (“IFDA”) and I.F.D.A. Services, Inc. (“IFDA Services”), bring this lawsuit against Robert W. Ninker, Paul G. Dixon, Kevin Burke, Rob Konzelmann, James D. Bosma, Geoffrey W. Hurd, Charles S. Childs, Jr., Brent M. Davis, Derek S. Johnson, Jack R. Kynion, King Sutton, Randall L. Earl, David M. McReynolds, Dennis R. Davison, Richard D. Yurs, Eric R. Trimble, Chris Wooldridge, Donald Henderson, Steven Dawson, Michelle Harrison, Michael Sayles, Vickie Diedrich, Linda Allan (collectively the “Director and Officer Defendants”), Mark K. Cullen,¹ Merrill Lynch, Pierce, Fenner & Smith, Inc. (“Merrill Lynch PFS”), and Edward Schainker (“Schainker”) (all are collectively “Defendants”). For their Derivative Complaint (“Complaint”), Plaintiffs allege upon personal knowledge as to their own acts, and as to all other matters upon information and belief based upon, *inter alia*, the investigation conducted by counsel, as follows:

INTRODUCTION

1. As part of their efforts to serve their communities by providing as many options as possible in the face of impending grief and great emotional need, duly licensed funeral homes across Illinois, including Plaintiffs, have offered contracts to individuals allowing them to plan ahead for their funerals. These contracts, referred to as Preneed Contracts, enable people to plan

¹ Mr. Cullen has been outside legal counsel for IFDA and the Trust for many years, possibly over two decades, but also acted as Managing Staff Director of IFDA for a period in 2008. For those actions Mr. Cullen undertook as part of his duties as Managing Staff Director, he is included in the defined term “Director and Officer Defendant.”

and pay for their funerals in advance of their death, thus eliminating many of the difficult decisions and financial burdens facing family and friends when a loved one passes away. Customers of funeral homes who signed Preneed Contracts are referred to in this Complaint as “preneed funeral planning customers.”

2. Preneed Contracts are likewise attractive to funeral home directors, whose mission it is to compassionately serve their respective communities’ families during their most difficult, grief-stricken, and often confusing times. Preneed Contracts serve this purpose by enabling funeral directors to handle a decedent’s funeral arrangements without burdening his or her family with the myriad choices, decisions and financial costs associated with an appropriate, dignified funeral.

3. A vast majority of funeral homes in Illinois, including Plaintiffs, are members of the IFDA. In 1979, IFDA’s wholly-owned subsidiary IFDA Services established the IFDA Preneed Trust (“Preneed Trust”), intended to provide an effective vehicle for preneed funeral planning customers to pre-finance their Preneed Contracts. The Preneed Trust program was intended to protect the funds deposited by preneed funeral planning customers by providing “optimum growth plus safety for [their] prefunded funeral arrangements.” <http://www.ifda.org/benefits/indbenefits.php?b=15>.

4. In 1986, the Preneed Trust program was supplemented by the creation of a tax-exempt fund, which was to provide clients the option of having their preneed account grow on a tax-free basis (the “Preneed Trust Tax-exempt Fund”). IFDA explained to its members that the tax-exempt options required long-term commitments by the Preneed Trust, so each deposit commitment was to be for at least five years unless, in the interim, the preneed funeral customer died or, in the case of revocable Preneed Contracts as explained below, requested withdrawal in

writing. This option was and remains the preferred choice for approximately 75% of preneed funeral planning customers.

5. One of the benefits of tax-exempt funds is to avoid reminding the preneed funeral planning customer of his or her own mortality with an annual mailing of an interest reporting form (Form 1099). The mortality concept is critical to the satisfaction of the preneed funeral planning customer insofar as it allows choices to be made while sparing families the emotional and financial obligations associated with a funeral.

6. This lawsuit concerns the Preneed Trust Tax-exempt Fund. Thus, unless otherwise indicated, each future reference to “Preneed Trust” in this Complaint refers only to the Preneed Trust Tax-exempt Fund.

7. During the period relevant to this Complaint, Plaintiffs and other IFDA Members, acting as agents of IFDA, sold Preneed Contracts to their preneed funeral planning customers through IFDA Services, which acted as Trustee of the Preneed Trust for decades. The Illinois Comptroller’s Office stripped IFDA Services of its trustee status in September 2007, and it was ordered to stop performing all activities related to the Preneed Trust on May 30, 2008.

8. During the decades that IFDA Services acted as Trustee of the Preneed Trust, it was the entity that made investment decisions and otherwise managed and administered the IFDA Preneed Trust program. In order to invest their preneed planning customers’ funds in the Preneed Trust, funeral directors were required to sign a Participating Member Firm Agreement. Upon information and belief, the Preneed Trust currently has approximately 600-650 participating funeral home members, and the Preneed Trust currently holds the funds of approximately 49,000 preneed funeral planning customers across the State.

9. While IFDA Services was Trustee, the Preneed Trust program worked as follows: Once an IFDA Member funeral home signed a Preneed Contract with its preneed planning customer, the funds collected (where applicable, net of the up to 5% amount that the funeral director is allowed to retain by law) were invested in the Preneed Trust. The Preneed Contract specified whether the funds were to be deposited in the taxable or tax-exempt Preneed Trust. The preneed funeral planning customers could elect to have a Preneed Contract that was revocable or irrevocable, and guaranteed or non-guaranteed, options that are explained in detail below. When an individual with a Preneed Contract died, the Preneed Trust transferred that individual's funds, plus the interest earned thereon, and less administration fees, back to the IFDA Member funeral home, which used the funds to pay for their preneed planning customer's funeral. The net interest was to be available to account for any increased costs that may have been associated with the services and products (such as the casket) that were contracted for in advance, possibly many years earlier. In the case of a non-guaranteed contract, monies deposited would be applied toward the purchase price of the funeral, although the total price for the goods and services was not guaranteed. Typically, in the case of a non-guaranteed contract, merchandise and services were selected by the legal next of kin when the customer actually passed away. Any excess funds were then transferred to the decedent's estate, or if the preneed funds were insufficient to pay for the merchandise and services, the decedent's family would pay the difference. Thus, for both guaranteed and non-guaranteed contracts, the intention was that regardless of inflation, the principal and accrued interest would pay for the entire funeral or, for non-guaranteed contracts, possibly a portion thereof depending on the amount deposited by the preneed planning customer and the accumulated interest.

10. Each Plaintiff is a member of the IFDA, with voting rights and other benefits. As members of the IFDA, they were eligible to and did participate in the Preneed Trust program offered by IFDA Services.

11. Plaintiffs were informed and reasonably believed that the funds invested in the Preneed Trust were invested in safe and tax-exempt investment vehicles such as laddered AAA municipal bonds. As set forth in at least one version of the Participating Member Firm Agreement between IFDA Services and IFDA Members, the trust funds were to be placed in “high grade investments selected to provide earnings commensurate with safety of principal.”

12. Similarly, a letter from IFDA Services to IFDA Members entitled “IFDA Preneed Trust” promised that:

[w]e will invest your funds predominantly in quality, fixed income securities, such as U.S. Treasury securities, government agency obligations, certificates of deposit, corporate bonds, etc. A portion of the funds will also be placed in equities or mutual funds. These investments are used in an effort to enhance the yield available on fixed income securities. The mix of investments will change in accordance with financial and economic conditions.

IFDA Preneed Trust letter to IFDA Members, dated December of 1999.

13. These representations were in line with the objective shared by Plaintiffs and participating funeral homes of solving in advance many of the planning and financial concerns faced by preneed funeral planning customers. The ability to provide for safety of principal and a reasonable return to account for inflation enabled IFDA Members to ease the minds of their constituents.

14. IFDA’s representations were, however, false and part of a uniform course of conduct intended to attract the funds of preneed funeral planning customers for the benefit of the defendants and to the detriment of both IFDA Members and their customers. Specifically, instead of investing money to preserve principal and provide a safe return, IFDA Services

invested over \$190 million, constituting a substantial majority of the total Preneed Trust funds, in variable universal life insurance products issued by at least seven insurance companies, including over 120 “Merrill Lynch Investor Life” policies, policies that were sold to IFDA Services by an agent of Merrill Lynch PFS.

15. Upon information and belief, many of these insurance policies are modified endowment contracts; a fact which potentially destroys the tax-exempt status of the “investments” because it effectively prohibits the ability to access the value of the policies prior to the date of death of the insured. Modified endowment contracts, or “MECs,” are subject to an excise tax if they are terminated or if funds are withdrawn or borrowed before the insured reaches 59½ years old, in addition to the regular income tax that may be triggered upon accessing the policy proceeds prior to the death of the insured. Upon information and belief, the MEC policies insure the lives of key IFDA funeral director members whose customers, in the aggregate, made large deposits into the Preneed Trust as well as certain officers and directors of IFDA (“key man policies”). That key man policies were to be purchased as the primary “investment” of Preneed Trust monies was never disclosed to Plaintiffs or other participants in the Preneed Trust.

16. These insurance policies do not comport with the IFDA Services’ promises of using safe, high-grade, and tax-exempt investment vehicles. Among other problems, the policies that are MECs are not liquid investments because of the substantial adverse tax consequences incurred if a MEC policy’s proceeds are borrowed or withdrawn prematurely. Moreover, there is no connection between the expected life spans of the insureds and the need for funds with which to pay the funeral expenses of preneed funeral planning customers. For example, upon information and belief, the average age of the insureds currently is in the mid-60s and such

average age was much lower when the Preneed Trust purchased the policies. On the other hand, the average time period from the date that funds are deposited into the Preneed Trust to the date of the customer's death is approximately 7 to 9 years. As a result, the timing of the "maturity" of the trust assets (i.e., the date of death of the insureds) did not, and foreseeably would not, match the timing of the Preneed Trust's liabilities (i.e., paying for the funeral costs of the deceased customers).

17. Not only were the investment practices contrary to what had been promised, but IFDA Services engaged in a pattern and practice of deceit which involved periodically sending IFDA Members statements reflecting the prospective rates of return for taxable and tax-exempt Preneed Trust funds for an anticipated period of time. The interest rates reflected in these statements, however, were systematically inflated and had absolutely no relationship to the actual Preneed Trust earnings or performance. Consequently, Plaintiffs and participants in the Preneed Trust program were led to believe, falsely, that the Preneed Trust was performing well and as expected, when it was not.

18. The statements provided to IFDA members likewise failed to mention that the net asset value of the Preneed Trust was rapidly decaying, and that the primary reasons for the losses were because: (1) of the inappropriate and risky investment decisions made with respect to the deposited funds, particularly given the relatively short-term nature of those deposits; and (2), much like a Ponzi scheme and the escapades of Bernard Madoff, IFDA Services had been paying interest rates well above actual earnings for years, taking new deposits to pay returns to, and death claims of, pre-existing preened funeral planning customers. In addition, IFDA Services had been paying for the funeral costs of deceased customers whose deposits were used to pay premiums for insurance policies that would not likely mature for many years after the deposits

were made. Consequently, Plaintiffs have learned (beginning in the fall of 2007 through the spring of 2008) that the net asset value of the Preneed Trust began diminishing in 2001 and its losses have only accelerated dramatically since.

19. It was not in the IFDA's interest to apprise its members of these facts, however. As actually happened when the facts were made known, disclosure to IFDA members and others would have caused the level of new deposits made to the Preneed Trust to fall precipitously, thereby highlighting the cash flow crisis caused by choosing to invest substantially all of the trust assets into the insurance policies which did not match the Preneed Trust's liabilities and, in the case of the MECs, were highly illiquid.

20. Despite these numerous and significant problems, on information and belief, the Preneed Trust's financial adviser, Schinker of Merrill Lynch, Pierce, Fenner & Smith, Inc., and the current IFDA Board of Directors, were recommending continued investment in the Preneed Trust through much of 2008. Eventually, however, as the true financial condition of the Tax-Exempt Preneed Trust and Defendants' shenanigans came to light, an investigation believed to have begun with the Illinois Office of the Comptroller in 2006 revealed that, as of May 31, 2005, the tax exempt portion of the Preneed Trust had a deficit in excess of \$38.0 million. The situation has only become worse since then, with the current deficit being approximately \$ 59.0 million.

21. As a result of this enormous and avoidable deficit, there currently are insufficient funds in the Preneed Trust to pay what were supposed to be the prefinanced funeral expenses of preneed funeral planning customers. Plaintiffs are still morally, ethically, and contractually committed to perform the funeral services requested by their preneed funeral planning customers, even if at a significant loss. Indeed, Plaintiffs have, where necessary, supplied the

funds to make up for the deficit in the Preneed Trust, performing services and providing merchandise for which the Preneed Trust was supposed to pay, but for which it did not.

22. The purpose of this suit is to restore to the Preneed Trust the funds which have been dissipated and, in some circumstances, spirited away as a result of the Defendants' conduct. Plaintiffs are long-standing and highly respected funeral directors whose concern is for the well-being and peace of mind of their customers and customers' families. They are dedicated to their communities, and by making the Preneed Trust whole, Plaintiffs seek to fulfill the needs of their preneed funeral planning customers and further their commitment to easing the pain of the death of a loved one to the greatest extent possible, the very purpose of the Preneed Trust from its inception.

JURISDICTION AND VENUE

23. This Court has jurisdiction over this derivative 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, and Defendants are Illinois corporations, residents, and/or have otherwise submitted to the jurisdiction of this Court by transacting business in Illinois, acting as a fiduciary in Illinois, breaching a fiduciary duty in Illinois, and acting as a director or officer of an Illinois corporation.

24. Venue is proper in this Court under 735 ILCS 5/2-101(1) and (2) because Defendants Charles S. Childs, Jr., Michelle Harrison, and Jack Kynion are located in this judicial district, as is the registered agent for Merrill Lynch, PFS. In addition, a portion of the transactions from which the causes of action arose took place in this judicial district.

THE PARTIES

25. Plaintiff Calvert Funeral Homes, Ltd. is an Illinois corporation with its principle 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, is a participant in the IFDA Preneed Trust program, and has deposited preneed planning customers' funds in the Preneed Trust.

26. Plaintiff 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, is a participant in the IFDA Preneed Trust program, and has deposited preneed funeral planning customers' funds in the Preneed Trust.

27. 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, is a participant in the IFDA Preneed Trust program, and has deposited preneed 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, is a participant in the IFDA Preneed Trust program, and has deposited preneed planning customers' funds in the Preneed Trust.

28. 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 IFDA, is a participant in the IFDA Preneed Trust program, and has deposited preneed planning customers' funds in the Preneed Trust.

29. 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, is a participant in the IFDA Preneed Trust program, and has deposited preneed planning customers' funds in the Preneed Trust.

30. 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, is a participant in the IFDA Preneed Trust program, and has deposited preneed planning customers' funds in the Preneed Trust.

31. Nominal Defendant Illinois Funeral Director's Association is an Illinois not-for-profit corporation headquartered in Sangamon County, Illinois. Its street address is: 215 South Grand Avenue West, Springfield, Illinois 62704. IFDA is one of the largest state funeral directors associations in the country, with over 750 members statewide. Each of IFDA's Directors is also on the Board of Directors of its subsidiary IFDA Services.

32. Nominal Defendant IFDA Services is an Illinois corporation with its headquarters in Sangamon County, Illinois. Its street address is: 215 South Grand Avenue West, Springfield, Illinois 62704. IFDA Services offers funeral directors services including the IFDA Preneed Trust Program, for which it acted as trustee until late 2007 or early 2008 when it was found to be without a valid license. IFDA Services is a wholly owned subsidiary of the IFDA. IFDA Services' Board of Directors is made up of the same individuals as the IFDA's Board of Directors.

33. Defendant Robert W. Ninker was the Executive Director of IFDA from approximately 1971 to 1998, and is currently believed to be a resident of both Springfield, Sangamon County, Illinois and Marco Island, Collier County, Florida.

34. Defendant Paul G. Dixon was the Executive Director of IFDA from approximately 1998 – January of 2008, when he either resigned or was terminated from IFDA. He is believed to be a resident of Springfield, Sangamon County, Illinois.

35. Defendant Kevin Burke is a Certified Public Accountant and has been the IFDA's Controller from approximately 1999 – 2001 and 2007 – mid-2008. Upon information and belief, Mr. Burke is no longer employed by the IFDA. Mr. Burke is a resident of Chatham, Sangamon County, Illinois.

36. Defendant Rob Konzelmann is a Certified Public Accountant and was the IFDA's Controller from approximately 2001 – 2007. Mr. Konzelmann is a resident of Williamsville, Sangamon County, Illinois.

37. Defendant James D. Bosma, is the current President of the IFDA and IFDA Services' Board of Directors, an appointment that will end in June 2009. Mr. Bosma was a member of the Preneed Trust Committee from June 2007- June 2008, and was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. Bosma is a resident of Morrison, Whiteside County, Illinois.

38. Defendant Geoffrey W. Hurd was the President of the IFDA and IFDA Services' Board of Directors from June 2007- June 2008 and serves on the Audit Committee. Mr. Hurd was also present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. Hurd is a resident of Knox County, Illinois.

39. Defendant Charles S. Childs, Jr. was President of the IFDA and IFDA Services' Board of Directors from June 2006 – June 2007, was a member of the Trust Committee from June 2007-2008, and has been a member of the Audit Committee since June 2007. Mr. Childs

was also present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. Childs is a resident of Chicago, Cook County, Illinois.

40. Defendant Brent M. Davis was President of the IFDA and IFDA Services' Board of Directors from June 2005 – 2006, and has been a member of the Audit Committee since June 2006. Mr. Davis was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. Davis is a resident of Carlinville, Macoupin County, Illinois.

41. Defendant Derek S. Johnson was President of the IFDA and IFDA Services' Board of Directors from June 2004 – June 2005 and was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. Johnson is a resident of Benton, Franklin County, Illinois.

42. Defendant Jack R. Kynion was President of the IFDA and IFDA Services' Board of Directors from June 2003 – June 2004, was a member of the Investment Committee from June 1999 – June 2000, and the Audit Committee from June 1999 – June 2000 and since June 2006. Mr. Kynion is a resident of Northbrook, Cook County, Illinois.

43. Defendant King Sutton was President of the IFDA and IFDA Services' Board of Directors from June 2002 – June 2003, and was a member of the Audit and Investment Committees from June 1999 – June 2000. Mr. Sutton is a resident of Paris, Edgar County, Illinois.

44. Defendant Randall L. Earl was President of the IFDA and IFDA Services' Board of Directors from June 2001 – June 2002, and was a member of the Audit and Investment Committees from June 1999 – June 2000. Mr. Earl is a resident of Decatur, Macon County, Illinois.

45. Defendant David M. McReynolds was the President of the IFDA and IFDA Services' Board of Directors from June 2000 – June 2001, was a member of the IFDA Audit and Investment Committees from June 1999 - June 2000, and has been on the Audit Committee since June 2006. Mr. McReynolds was a member of the Trust Committee from June 2007 – June 2008. Mr. McReynolds was also present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. McReynolds is a resident of Marion, Williamson County, Illinois.

46. Defendant Dennis R. Davison was President of the IFDA and IFDA Services' Board of Directors from June 1998 – June 1999, and was a member of the Audit and Investment Committees from June 1999 – June 2000, and June 2006 – June 2008. Mr. Davison is a resident of Decatur, Macon County, Illinois.

47. Defendant Richard D. Yurs was President of the IFDA and IFDA Services' Board of Directors from June 1991 – June 1992, and was a member of the Audit Committee from June 2006 – June 2007. Mr. Yurs is a resident of Geneva, Kane County, Illinois.

48. Defendant Eric R. Trimble was a member of the IFDA's Audit Committee from June 2006 – June 2007, and the Trust Committee from June 2007 – June 2008. Mr. Trimble is a resident of Moline, Rock Island County, Illinois.

49. Defendant Chris Wooldridge was the Vice President of IFDA's Board of Directors from June 2007 – June 2008, and currently serves as President Elect, a position he will hold until June 2009. Mr. Wooldridge was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. Wooldridge is believed to be a resident of Brighton, Jersey County, Illinois.

50. Defendant Donald Henderson has been a Regional Director on the IFDA's Board of Directors since 2005 and was present at the June 25, 2008 meeting in which Plaintiffs made a

demand upon the Board. Mr. Henderson is believed to be a resident of Pekin, Tazewell County, Illinois.

51. Defendant Steven Dawson has been a Regional Director on the IFDA's Board of Directors since 2005 and was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. Dawson is believed to be a resident of Franklin Park, Cook County, Illinois.

52. Defendant Michelle Harrison is believed to be a Regional Director on the IFDA's Board of Directors and was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Ms. Harrison is believed to be a resident of Blue Island, Cook County, Illinois.

53. Defendant Michael Sayles has been a Regional Director on the IFDA's Board of Directors since approximately 2006 and was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. Sayles is believed to be a resident of Joliet, Will County, Illinois.

54. Defendant Vickie Diedrich has been a Regional Director on the IFDA's Board of Directors since 2007 and was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Ms. Diedrich is believed to be a resident of Springfield, Sangamon County, Illinois.

55. Defendant Linda Allan has been a Regional Director on the IFDA's Board of Directors since 2007 and was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Ms. Allan is believed to be a resident of Collinsville, Madison County or St. Clair County, Illinois.

56. Defendant Mark K. Cullen of Sorling, Northrup, Hanna & Cullen is and has been both the IFDA and the Preneed Trust's counsel for many years, possibly for over two decades. He was the acting Managing Staff Director of the IFDA beginning in February 2008 for an unknown period of time. Mr. Cullen was present at the June 25, 2008 meeting in which Plaintiffs made a demand upon the Board. Mr. Cullen is believed to be a resident of Springfield, Sangamon County, Illinois.

57. Defendant 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. Upon information and belief, Merrill Lynch PFS and its agent Schainker sold IFDA Services the life insurance policies at issue in this lawsuit. Merrill Lynch PFS continues to maintain offices and conduct business within the state of Illinois.

58. Defendant Edward Schainker is an employee of Merrill Lynch PFS and is based in its Springfield, Illinois office. Schainker has been the financial advisor for the Preneed Trust fund since approximately the mid-1980s and, upon information and belief, has acted as an agent for Merrill Lynch PFS, and sold IFDA Services the life insurance policies at issue in this lawsuit. Mr. Schainker is a resident of Springfield, Sangamon County, Illinois.

SUBSTANTIVE ALLEGATIONS

59. IFDA is a not-for-profit corporation that was originally founded in 1881. It is currently one of the largest state funeral directors associations in the country, with over 750 members statewide. Its stated goal is to provide resources to support its members and make them professionally, ethically, and operationally superior, and to advocate for the funeral service profession.

60. IFDA Services was incorporated in 1976, and is a wholly-owned subsidiary of IFDA. It is a for-profit corporation that offers funeral directors services targeted to the needs of

their business, including the IFDA Preneed Trust program. IFDA Services acted as trustee of the Preneed Trust Program for decades until, in September of 2007, the Illinois Comptroller's Office *ab initio* stripped IFDA Services of its license to act as a trust business, and on May 30, 2008 the Illinois Department of Financial and Professional Regulation issued IFDA Services an Order to Cease and Desist, finding that it was unauthorized to conduct a trust business. Shortly thereafter, Merrill Lynch Bank and Trust Co. FSB ("MLBTC") took over as temporary trustee, a position that became permanent on November 3, 2008.

61. Plaintiffs are all well-respected funeral homes which are family-owned and operated and have been serving their communities for generations. They are highly dedicated to the families and communities they serve, and are fully aware of the important role they play in providing dignified funeral and memorial services.

62. Most funeral homes, including Plaintiffs', offer customers the ability to plan ahead for their funeral services, merchandise choices, and costs through the use of preneed contracts. Doing so alleviates the burdens placed on families upon 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 and funeral service.

63. The sale of funeral and burial services on a preneed basis is governed by Illinois' Funeral or Burial Funds Act, 225 ILCS 45/1 *et seq.* ("the Burial Act"). Under this statute, when a consumer pays for a preneed contract, the funds are to be held in trust by a duly authorized trustee until the individual either withdraws the funds or the funds are used for their funeral and burial services.

A. Explanation of the Various Preneed Contracting Options

64. During the time IFDA Services acted as Trustee of the Preneed Trust, it offered two principal kinds of contracts: guaranteed and non-guaranteed. As explained by the Illinois Comptroller's Office:

- A guaranteed contract is a pre-need contract in which you pay for the goods and services you have selected in full at the same time you sign the contract. This ensures that the price you have paid is fixed, and that there will be no additional charges at the time of need, provided you do not add any goods or services in the future. Though the seller does absorb the interest earned on this money between the time it is paid and the time it is needed, he/she also absorbs the increasing cost of the goods and services, which typically rise over time.²
- A non-guaranteed contract is a pre-need contract in which prices are not fixed. Since this contract does not lock in specific prices, any money paid on it is simply a deposit to be applied to the total bill at the time of need. If the money paid on the contract exceeds the cost of the goods and services contracted for, the excess funds are returned to the consumer.

(<http://www.ioc.state.il.us/office/CCBT/index.cfm?Fuseaction=showPage&PageID=90>).

65. Within each guaranteed and non-guaranteed contract, the other preneed contracting options include: a) taxable or tax-exempt trust options; and (b) revocable or non-revocable contracts. As explained in an IFDA letter to its members:

- Taxable versus Tax-exempt: The Preneed Trust was created in 1986, and allowed preneed funeral planning customers to have their trust accounts grow tax-free. The main difference from the taxable trust is that, "[s]ince the tax-exempt program requires long-term commitments by IFDA Preneed Trust, *your deposit commitment must be for a minimum of five years*, unless the client dies or requests a withdrawal in writing."

² For guaranteed contracts, the excess interest earned on the preneed planning customer's funds, if any, may be retained by the funeral home. Some funeral homes, including some of those owned and operated by Plaintiffs, return any excess interest above and beyond that required to pay for the contracted funeral services and merchandise.

IFDA Preneed Trust letter to members, dated December of 1999 (emphasis in original).

- Revocable versus Non-revocable: Revocable contracts can be cancelled for any reason upon a request in writing from the preneed funeral planning customers. Non-revocable contracts cannot be canceled at any time, and as the Preneed Contracts explain, non-revocability is “necessary for certain federal, state, or local benefits eligibility.” See Funeral Trust – Guaranteed Form contract, ¶5.

B. Participating Member Firm Agreements

66. To facilitate funeral pre-planning programs, Plaintiffs and approximately 600-650 other IFDA members signed Participating Member Firm Agreements (“PMF Agreements”) with IFDA Services during its time as Trustee.

67. According to at least one version of the PMF Agreement, each funeral home was an authorized agent of IFDA Services. At all times, however, Plaintiffs and other similarly situated funeral homes were authorized to accept Preneed Trust contracts on behalf of the IFDA.

68. The Preneed Contracts created by IFDA Services as Trustee but signed by participating funeral homes and their preneed funeral planning customers provided that the funds would be held in the Preneed Trust until the beneficiary’s death. At that time, the contract required that the funeral home “shall provide a funeral with the [specified] merchandise and services.” As allowed pursuant to the Burial Act, the contract also entitled the funeral home provider to charge administrative fees in an amount ranging from 1-5% of the principal and/or 1-25% of the earnings on the invested funds, depending on the terms of the contract.

C. Promises Made and Broken

69. While acting as the Trustee and investing the Preneed Trust funds, IFDA was required to “exercise the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in

regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.” Burial Act, 225 ILCS 45/4a.

70. Similar duties and requirements are set forth in Illinois’ Prudent Investor Rule for Trustees, also applicable to IFDA Services, which include:

(1) The trustee has a duty to invest and manage trust assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust. This standard requires the exercise of reasonable care, skill, and caution and is to be applied to investments not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust.

(2) No specific investment or course of action is, taken alone, prudent or imprudent. The trustee’s investment decisions and actions are to be judged in terms of the trustee’s reasonable business judgment regarding the anticipated effect on the trust portfolio as a whole under the facts and circumstances prevailing at the time of the decision or action. The prudent investor rule is a test of conduct and not of resulting performance.

(3) The trustee has a duty to diversify the investments of the trust unless, under the circumstances, the trustee reasonably believes it is in the interests of the beneficiaries and furthers the purposes of the trust not to diversify.

(5) The trustee has a duty to pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the trustee’s duty of impartiality and the purposes of the trust. Whether investments are underproductive or overproductive of income shall be judged by the portfolio as a whole and not as to any particular asset.

(6) The circumstances that the trustee may consider in making investment decisions include, without limitation, the general economic conditions, the possible effect of inflation, the expected tax consequences of investment decisions or strategies, the role each investment or course of action plays within the overall portfolio, the expected total return (including both income yield and appreciation of capital), and the duty to incur only reasonable and appropriate costs.....

760 ILCS 5/5 (1), (2), (3), (5), (6).

71. Accordingly, in the PMF Agreements between IFDA Services and participating funeral homes, IFDA Services, as Trustee of the Preneed Trust, committed to “plac[ing] trust funds in high grade investments selected to provide earnings commensurate with safety of principal,” and agreed to “to manage the funds using a prudent investment philosophy to provide a reasonable rate of return.”

72. The following are among the many representations made by IFDA Services to IFDA members in a letter that appears to be dated December, 1999, sent in connection with its role as Trustee:

- [IFDA Services] will invest [the Preneed Trust] funds predominantly in quality, fixed income securities, such as U.S. Treasury securities, government agency obligations, certificates of deposit, corporate bonds, etc. A portion of these funds will also be placed in equities or mutual funds. These investments are used in an effort to enhance the yield available on fixed income securities.
- Interest earnings will be based on projected rates specified for the time period in which the funds are received. Since 1980, when the [taxable Preneed Trust] program began, [IFDA Services has] been fortunate that the earnings always met projections, although that may not always be the case.
- The designated rate of earning is projected for a one year period. At the end of the period, [IFDA Services, Inc. will notify participating members] of the anticipated rate which will be valid for the next investment period.
- [IFDA Services] will provide a report on all trust accounts to you and to the Office of the Comptroller on an annual basis, so that you do not have to keep track of trust principal, interest, withdrawals and totals.
- In summary, [the preneed planning customer] has protection of the principal and the anticipated earnings, and [the participating funeral home is] released from much of the administrative responsibility.

The letter makes no mention of the purchase or holding of insurance policies.

73. Contrary to these promises and unbeknownst to funeral homes and their clients depositing money in the IFDA Preneed Trust, IFDA Services, through the Director and Officer Defendants, made a “significant investment” of a “large pool of IFDA assets” in key man life insurance policies in addition to a variety of equity and bond investments. *See* IFDA Trust Update Memo, dated May 13, 2008; *See also* IFDA Questions and Answers, <http://www.ifda.org/trustupdate.html>.

74. At an unknown time, IFDA Services engaged Merrill Lynch PFS and its agent and employee, Schainker, as an investment or financial advisor. Upon information and belief, Schainker recommended to IFDA Services that the Preneed Trust invest in the key man life insurance policies referred to above and ultimately sold it policies not only on lives unrelated to the preneed funeral planning customers, but also that did not confer a fixed death benefit. Rather, the policies purchased by IFDA offer a death benefit pay-out dependent on the performance of the investments made within the policies. Upon information and belief, Schainker and perhaps others were paid significant commissions in connection with the sale of the insurance policies to the Preneed Trust. Such commissions, in effect, should have comprised moneys in the Preneed Trust but were instead used to pay premiums in respect of such policies, further depleting the available trust assets.

75. Upon information and belief, many of these insurance policies are modified endowment contracts, or “MECs,” that are subject to a 10% excise tax if they are terminated or if funds are withdrawn or borrowed before the insured reaches 59½ years old. Such policies are also subject to the regular taxes that may be triggered on any deferred gain inside of the policies if they are liquidated for any reason prior to the death of the insureds. Among other problems, because of the tax consequences of such a transaction, these MECs seriously impede IFDA

Services' ability to liquidate the investments to pay death claims or otherwise reinvest the funds in more appropriate investment vehicles.

76. Based on documents available to Plaintiffs and their counsel, it appears as though a substantial portion of the total tax-exempt Preneed Trust fund is currently invested in life insurance policies, many of which are believed to be MECs. As of May 2007, the Preneed Trust Fund possessed approximately 300 life insurance policies issued by seven insurance companies, including over 120 "Merrill Lynch Investor Life" policies.

77. Until the fall of 2007, Plaintiffs and other funeral directors had no reason to suspect any problems with the administration of, or investment practices utilized by, the Preneed Trust during the time IFDA Services acted as Trustee. For years, just as promised, IFDA Services, through the Director and Officer Defendants, provided participating funeral directors with annual statements reflecting the total principal, interest, withdrawals and totals for their preneed funeral planning customers' accounts deposited in trust. These statements made no mention of the fact that key man life insurance policies, much less MECs, were being used in lieu of reliable and responsible tax-exempt investment vehicles such as tax-exempt bonds.

78. As Trustee, IFDA Services, through the Director and Officer Defendants, likewise sent member funeral homes periodic notifications of the Preneed Trust's anticipated interest rate of return for a given period, with earnings posted in each account on the last day of that period. These rates, by and large, were presented as being very competitive with those generally available in the marketplace, which was consistent with the member funeral homes having been told that the Preneed Trust held "laddered" municipal bonds.

79. The funeral directors did not know – and had no way of knowing – that a significant portion of the trust funds were tied up in life insurance policies, many of which were,

for all intents and purposes, completely untouchable until the insured's death, instead of investment vehicles that could be easily liquidated and used to pay death claims as needed. They likewise had no way of knowing that the life insurance policies might not be tax-exempt, or that new Preneed Trust deposits were being used to pay out death claims of long-time depositors, and that the death claim proceeds themselves amounted to no more than the new deposits.

80. Aside from these periodic and summary communications from Trustee IFDA Services to the funeral home members, there was zero transparency as to the inner-workings of IFDA, IFDA Services, or the Preneed Trust generally. IFDA members and their preneed funeral planning customers were kept in the dark regarding the investment vehicles, strategies, and challenges facing the Preneed Trust.

81. IFDA itself recognized this lack of transparency in a February 7, 2008 memo to IFDA Preneed Trust participants:

Can we expect more frequent and transparent communications?

Yes. We acknowledge that previous communication to our members has been less than we would like to see and what you should expect. You will see a lot more open communications from the IFDA office. In fact, you've probably already noticed that you're receiving more communications from us!

82. Because the behind-the-scenes health of the Preneed Trust was shielded from public disclosure, there was no way for the funeral directors to know that IFDA Services, through the Director and Officer Defendants, had "typically [been offering] (interest) rates that may have been in excess of what our investment returns have been...There were some guarantees, correct. In the future, we might not be able to do guarantees like we have in the past." Bruce Rushton, *Funeral Fund Runs a Deficit; Pre-need Trust Financed with Life Insurance*, The State Journal Register, 2/25/2008 ("State Journal Article") (quoting Charles Childs, Jr. a former President of the IFDA). In other words, as explained in a January 30, 2008

letter to IFDA Members, IFDA “paid out higher rates on [its] trust accounts than were received from earnings on [its] investments in anticipation of the Trust receiving proceeds from life insurance policies in the future.”

D. The Trouble Starts to Unfold

83. In 1980, the Comptroller’s Office issued a license to IFDA Services to be Trustee of the Preneed Trust. Thereafter, for almost three decades, the Comptroller’s Office audited IFDA and IFDA Services routinely and reviewed relevant operating policies until at least 2001.

84. On information and belief, in early 2006, the Comptroller’s Office began an investigation of IFDA Services and the IFDA Preneed Trust, which was joined by the Banking Division of the Department of Financial and Professional Regulation (“DFPR”). The Comptroller’s Office was aided by its outside independent auditors, McGladrey & Pullen, LLP (“McGladrey”), which presumably had access to all of the Preneed Trust’s books and records at that time. McGladrey’s audit and/or analysis resulted in a report, referred to herein as the McGladrey Report.

85. As reported in the State Journal Article, the investigation spearheaded by the Comptroller’s Office led to the conclusion that “[the IFDA Preneed Trust] had some assets-and-liabilities issues.... [The Comptroller’s Office] also suggested that [the Trust was a] bit larger than they’re used to regulating.” (quoting Childs). The Comptroller’s Office also noted that in conducting the investigation, “[t]here were some things we saw that raised concerns...One of them was a higher interest rate being paid out than what they were earning.” *Id.* (quoting Carol Knowles, spokeswoman for Illinois Comptroller Daniel W. Hynes).

86. In September of 2007, the Comptroller’s Office voided the license issued to IFDA Services by the Comptroller’s Office in 1980 *ab initio*, meaning it was deemed “void from the beginning.”

87. The Comptroller's Office revoked IFDA Services' license because, among other reasons, the Burial Act only confers authority on its office to license *sellers* of preneed funeral contracts (*e.g.* funeral homes) and provides no authority for the Comptroller's Office to license a trust, much less one created for the entrustment and investment of over \$300 million in assets.

88. The McGladrey Report was never shared with the IFDA members and, although they had requested the report in its entirety, only portions of it were shared with the Plaintiffs in the spring of 2008. Mr. Childs' summary of the report was less than candid, as the McGladrey Report found that the Preneed trust was underfunded by approximately \$39.0 million and that IFDA Services took "unauthorized excess fees" of approximately \$8.6 million during the period from FYE May 31, 2001 through FYE May 31, 2005. (*See also*, Letter dated June 21, 2006 to Mr. Paul Dixon of IFDA from Percy Lucina, Director, Cemetery Care and Burial Trust, Illinois Comptroller's Office.). Mr. Lucina's letter characterized this as an "intolerable situation that IFDA must rectify." The deficit has since grown significantly larger and, on information and belief, the excess fees have not been repaid, in whole or in part.

89. IFDA effectively remained in control of the investment of those funds until June 5, 2008, when the members were advised that MLBTC had agreed to become the temporary trustee, a position that became permanent on October 15, 2008.

90. Despite this serious turn of events, and even though IFDA and IFDA Services, through the Director and Officer Defendants, knew or should have known about the serious financial problems facing the Preneed Trust, on October 4, 2007 IFDA sent all members a letter informing them of the Comptroller's recent license revocation but promising that "there is no need for concern. All of the funds that Illinois funeral homes and their clients have placed into the IFDA trust have been safely invested, and all of the money is accounted for."

91. The licensing issues aside, the increasingly dismal financial information that started trickling out of the IFDA and IFDA Services in early 2008 was extremely alarming to Plaintiffs and other funeral home members with clients' funds invested in the Preneed Trust. The writing on the wall disclosed undeniable and significant deficiencies in the Preneed Trust's assets.

92. Among the leading causes of the Preneed Trust's financial difficulties are the life insurance policies that comprise a significant portion of the Preneed Trust's investments. As explained to IFDA members in a January 30, 2008 letter, "there is a difference between stated assets and stated liabilities in our IFDA Preneed Trust fund because no value is given to the proceeds which will be paid from life insurance policies to the Trust."

93. Another leading cause of the deficit, as explained in the same letter, is "[t]he simple truth [that]: we paid out higher rates on our trust accounts than we received from earnings on our investments in anticipation of the Trust receiving proceeds from life insurance policies in the future."

94. In a February 7, 2008 memo to IFDA Preneed Trust participants, the IFDA Board of Directors answered as follows in response to the question, "Is there a deficit in trust account balances?:"

There is a deficit in the Trust based on the accounting requirement that our life insurance policy investments be included on the Trust's financial statements as an asset with a value which does not include the entire amount that would be received upon the death of the insured. All of the deficit comes from the tax-exempt portion of the Trust, which invests in these life insurance policies.

During the period 2000 through 2002, the stock market suffered from poor performance, but a relatively high crediting rate for the tax-exempt trust accounts was maintained in order to provide additional funds to you and your customers. This caused the amount of earnings on those accounts to be greater than the corresponding invested assets. We had hoped that this would be

alleviated by future investment performance, but this has not yet occurred. Your Board of Directors has been mindful of this condition and will continue to take all actions that it believes necessary to operate and maintain the Trust in the financial position to pay all of its liabilities, and will very soon be able to finalize a comprehensive plan to address the difference between the stated assets and the stated liabilities in the tax-exempt portion of the Trust.

On the positive side, not taken into account by the regulators are the key man life insurance policies currently in place that will help offset the deficit. The value of the insurance portion of these policies is not reflected in the assets of the Trust, but it is of considerable value and importance.

95. No mention was made in the memo of the fact that the insurance policies were inappropriate investments which did not match the trust's liabilities, either in timing or amount, and undoubtedly caused a substantial amount of trust deposits to be unnecessarily used to pay commissions.

E. The Search for a New – and Licensed – Trustee, and the Cease and Desist Orders

96. In early 2008, IFDA Services began searching for ways to deal with the serious investment problems plaguing the Preneed Trust. It engaged Regions Morgan Keegan Trust ("Regions") to take over as manager and trustee of the IFDA Preneed Trust since it was no longer licensed to act in that regard. Regions ultimately refused to become the trustee solely because of the key man life insurance policies. While IFDA's Board of Directors continued to insist that the life insurance policies provided a significant financial value to the Preneed Trust, Regions' position was that, based on a sampling of the policies by an independent insurance consultant retained by Regions, the key man policies would have to be liquidated before it would agree to become the trustee.

97. In a May 13, 2008 memo to IFDA Preneed Trust Members, Geoffrey Hurd, then-President of IFDA, stated that while there is a benefit to liquidating some of the key man life

insurance policies, “the great balance of policies, *we hope*, still can provide a benefit to the membership. We owe it to you, our members, to thoroughly review our options. Regions’ changed position toward the IFDA life insurance policies is at crossways with our Association’s desire to see, *if possible*, those investments provide a long-term financial benefit to our members. Clearly, this relationship is no longer a good match. Therefore, Regions will not be the new IFDA Trustee.” (emphasis added). IFDA’s reluctance to adjust its investment strategy or admit that it was ill-advised to begin with came at the expense of funeral homes and their preneed funeral planning customers whose funds were deposited in the Preneed Trust.

98. Indeed, despite the fact that problems underlying the Preneed Trust had started to emerge, IFDA, through various of the Director and Officer Defendants, still encouraged its members to deposit funds as they had always done, promising that “IFDA can assist [funeral homes] in achieving optimum growth plus safety for your prefinanced funeral arrangements....Total deposits in the IFDA Preneed Trust now exceed \$300 million, with over 49,000 accounts. Approximately 650 IFDA members now participate. Shouldn’t you?” IFDA 2008 Year Book, at page 61.

99. On May 30, 2008, the DFPR issued IFDA Services an Order to Cease and Desist, finding *inter alia* that IFDA Services did not have a certificate of authority to conduct a trust business, which is a violation of the Illinois Corporate Fiduciary Act, 205 ILCS 620/2-4.

100. The DFPR likewise found that IFDA Services did not meet the standards for receiving a certificate of authority under Illinois’ Corporate Fiduciary Act, which provides:

The Commissioner shall cause to be made an investigation of the truth of the statements therein and the background of the management and controlling shareholder or shareholders and shall not approve the application and issue a certificate of authority unless he shall be of the opinion and finds:

(a) that the proposed capital at least meets the minimum amounts as determined pursuant to this Act including amounts deemed necessary to support the scope of the proposed operations;

(b) that the general character and experience of the proposed management is such as to assure reasonable promise of successful, safe and sound operation; and

(c) that the prior business affairs of the persons who will control the corporate fiduciary or the proposed management personnel, whether as a stockholder, director, officer, or customer, were conducted in a safe, sound manner, and lawful manner.

205 ILCS 620/2-6.

101. The May 30, 2008 Cease and Desist Order also required MLBTC to temporarily assume all responsibilities with respect to the IFDA Preneed Trust and that IFDA Services must cease and desist from conducting a trust business, holding itself out to the public as a fiduciary, and accepting preneed trust accounts as trustee, among other things.

102. On July 7, 2008, as the administrative transition to MLBTC was taking place, the DFPR issued IFDA Services another Order to Cease and Desist, prohibiting it from disbursing, expending, paying out any dividends, liquidating, loaning, refunding, or in any other way alienating funds currently in its possession. The Order likewise noted that the current financial condition of the Preneed Trust could not be determined until an actuarial study was performed.

103. Against this backdrop, on July 11, 2008, James D. Bosma, then-President of IFDA, recognized the severe deficit but nonetheless urged members to “continue [sending] your Preneed account dollars to the IFDA Trust. Please understand that the taxable side of the Trust does not share the large deficit faced by the tax-exempt side of the Trust. Like many of you, I have deposits in the tax-exempt account and I have and will continue to send money into the taxable side of the IFDA Trust.” *See* July 11, 2008 IFDA E-News Bulletin.

104. In the same newsletter, Mr. Bosma commented on the lack of transparency and openness of the IFDA Trust that had been the previous norm, stating:

At our annual convention in Schaumburg, IFDA pledged to provide you with financial information regarding the IFDA Trust. As President, I also pledged to provide greater transparency and openness to members, and today I am pleased to report to you that we are working to compile that information and fully expect to provide it to members next week.

105. On August 1, 2008, the IFDA issued a memo to Preneed Trust participants, responding to requests for additional information as to how the Trust funds had been invested. This request for more information from participants further illustrates the utter lack of transparency that had been available to funeral home directors. This memo quotes Schainker, the same person from Merrill Lynch PFS who had recommended and sold the key man life insurance policies as the Preneed Trust's investments, as stating:

The IFDA Tax Advantaged Preneed Trust has historically been allocated conservatively with the majority of funds invested in the bond market, represented through US Treasuries, government agencies, and corporate debt instruments. The current allocation as reflected in the attached report reflects approximately 65% of the total assets allocated to bonds and cash, and 35% to equities with both domestic and international exposure. The portfolio is managed for risk, with the volatility of the portfolio trading at approximately a 66% discount to the volatility of the S&P index. It should be noted that conservative or low risk portfolio allocation does not prevent negative performance.

This explanation once again omitted any mention of the existence of the life insurance policies, the impact they had on the liquidity of the Preneed Trust funds, or how they factored into the Preneed Trust's available assets and deficits.

106. On October 15, 2008, IFDA announced that MLBTC would be permanently assuming the role of Trustee of the IFDA Preneed Trust effective October 23, 2008. In doing so, the Preneed Trust was segregated into three separate funds: one for existing taxable accounts;

one for existing tax-exempt accounts; and a common trust fund for all new deposits. IFDA promised that no new deposits would be comingled with any of the existing accounts or the life insurance policies used with the tax-exempt trust accounts.

107. During this same time, very difficult questions were being posed to IFDA from frustrated and angry funeral homes across Illinois. In response, IFDA, through various Director and Officer Defendants, provided surface-level information that made no mention of the MECs or the reasons why the problematic life insurance policies could not be cashed in. For instance, the IFDA issued a statement in the fall of 2008 recognizing that “[o]ver the last two years, IFDA has come to recognize that financial challenges were created years ago when IFDA Trust crediting rate policies set too high an interest rate for that the Trust actually earned in the financial markets. This, coupled with serious losses in the financial market, was the source of the imbalance between assets and liability in the IFDA Trust.” IFDA Preneed Trust: Questions and Answers Statement, available at: <http://www.ifda.org/trustupdate.html>.

108. The strategy for reevaluating the trust accounts, both for existing accounts and on an ongoing basis for new deposits, was to transition to the actual value (also known as a “marked-to-market” valuation) basis, which was announced to IFDA Preneed Trust participants in October of 2008. In other words, when an individual with a Preneed Contract passes away, their family’s designated funeral director will receive the actual market value of the account based on the most recent valuation date (done on either a weekly or daily basis).

109. The net effect of this new strategy reduced the size of the tax-exempt portion of the Preneed Trust Fund by approximately \$59 million as of September 30, 2008, or a 24.9% decline. *See* October 31, 2008 IFDA E-News Bulletin. This was quite a stunning difference from the Preneed Trust’s \$18+ million surplus in 2000.

110. The DFPR issued IFDA Services yet *another* Order to Cease and Desist on November 3, 2008 based upon findings that the “IFDA [Services] continues to act as trustee of certain pre-need funeral trusts without authority... and the liquidity of the IFDA Trust is severely impaired.” Until notified otherwise, the DFPR ordered that there be no disbursements, expenditures, or funds withdrawn from either of the Preneed Trusts for any reason except to pay individual burial claims and associated costs.

111. Upon information and belief, the write-down or adjustment to the Preneed Trust has continued to grow.

F. The Practical Reality of the Situation

112. As a direct result of Defendants’ conduct and the damage to the corpus of the Preneed Trust, funeral directors with preneed funeral planning customers’ funds deposited in the Preneed Trust and the industry generally are suffering significant damages in several ways, including but not limited to the following.

113. First, because of Defendants’ actions that caused the DFPR to issue its three Orders to Cease and Desist, all funeral directors are prohibited from withdrawing their clients’ funds for any reason other than to pay a death benefit, contrary to what preneed funeral planning customers understood would be their rights with respect to Preneed Contracts and thus harming the reputations and good will Plaintiffs and other funeral directors have in their communities.

114. Second, upon the death of a preneed planning customer with a Guaranteed Tax-Exempt Contract, funeral directors are obligated to provide the level of services and merchandise specified in the applicable Preneed Contracts, regardless of inflation, while only receiving a fraction of the funds invested in the Preneed Trust.

115. Third, even for Non-Guaranteed Tax-Exempt contracts, the funeral homes must, to maintain their standing in the communities they serve, provide services equal to the full

amount of the principal invested by their preneed funeral customers while again receiving only a fraction of that invested principal from the Preneed Trust.

116. Fourth, due to their own actions, inactions or apathy, Defendants have put at risk the integrity and good will of the funeral service profession as a whole, which Plaintiffs and others, in some cases, have spent generations building. Defendants have also likely created a “chilling effect” for many potential preneed customers who may have considered using this once trusted planning vehicle. This will certainly deprive preneed customers and Plaintiffs the opportunity of providing the most precious and selfless gift to the preneed customers’ surviving families, that is, written instructions as to their final wishes with no outstanding financial obligations.

117. Despite these unavoidable and mounting damages being incurred on a regular basis by funeral homes across Illinois, the IFDA, through the Director and Officer Defendants, still has not been truthful about all of the causes and contributing factors of the deficit. In October 2008, in what may have been the first public reference by the IFDA of the role the life insurance policies play in the Trust’s deficit, the IFDA admitted that their:

financial investments earned too little to meet the interest crediting rate we set going back several years. This put the Trust out-of-balance. In order to re-balance the Trust, those ‘estimated’ earnings in each account had to be adjusted downward. But keep in mind, the money for those earnings is not gone – it is held in life insurance policies. We are working towards a plan we hope will help funeral directors recover earnings as we receive the proceeds of those life insurance policies over the long term.

See IFDA Trust Transition / Frequently Asked Questions, dated October 21, 2008.

118. All the while, the IFDA (through various Director and Officer Defendants) continued offering its promise of an impending actuarial study, the results of which were first promised to Plaintiffs in mid-August, which then became the end of October 2008. This study

would allegedly help IFDA formulate a “mechanism of allocating proceeds of the life insurance policies for the benefit of trust participants....While proceeds from the life insurance policies would provide additional support to trust participants in the long term, until the actuarial study determines the value of those policies, we cannot predict any additional proceeds to trust participants.” *See id.* The results of the actuarial study, to the extent they exist, have still not been made available to IFDA members.

119. While the IFDA recognized their member’s desire to know who is to blame for the deficit, it deflected the question:

Q: Who is to blame for this?

A: There are many factors that together caused the imbalance in the Trust. However, what IFDA is focused on is moving forward and continuing to work to find a resolution that is in the best interests of our trust participants.

Id. The real answer is that each Defendant is to blame for this Preneed Trust crisis.

120. Despite the extensive criticism and focus on the damage caused by the key man policies and the promises of improved transparency, IFDA’s Director and Officer named as Defendants still fail to account for the key man policies. As of October 31, 2008, the IFDA described the Tax Advantaged (tax-exempt) Preneed Trust assets as having the following allocation:

- 46% of the portfolio is allocated to fixed income/bonds with emphasis on US Government issues and good quality corporate bonds;
- 30% in a widely diversified group of stocks again with an emphasis on large cap, however still hold exposure to mid and small cap, all with a slant toward growth as opposed to value; and
- 24% in cash/money market.

121. IFDA and IFDA Services have recognized the hardships and damages incurred by funeral directors and funeral homes across the state of Illinois, even calling the mounting damages a “near-term inconvenience” of the “unhappy funeral directors.” See IFDA Trust Transition / Frequently Asked Questions, dated October 21, 2008.

122. Instead of creating a real solution to the problems, the IFDA has offered nothing more than an apology to the funeral directors bearing the brunt of the situation and incurring all of the damages:

The very nature of a “non-guaranteed” preneed contract is earnings are not guaranteed, **but the amount of principal paid by the consumer is protected**. The value of non-guaranteed contracts is determined at the time of need and any paid principal is a deposit toward the final cost. If there are any earnings in the Trust investments, those earnings are credited toward the final purchase price. But if there are no earnings, **the amount of principal paid is still protected by law** and applied on behalf of the consumer to the final purchase price.

In the case of “guaranteed” preneed contracts, Illinois law clearly states those contracts are guaranteed and funeral directors are to provide those services to consumers in full.

The IFDA Board has worked tirelessly to identify a resolution to the Trust’s financial challenges that is in the best interest of all funeral directors who participate in the Trust. The Association **regrets and apologizes for the inconvenience these challenges may create for funeral directors** who hold accounts in the Trust. We are hopeful that a plan can be fashioned to restore earnings to funeral directors over the long term.

IFDA Preneed Trust: Questions and Answers, available at: <http://www.ifda.org/trustupdate.html> (emphasis added).

123. Further, the bolded language noted above states that principal is “protected by law.” Based on the current levels at which death claims are being paid by the trust, it is clear that not only have all previous earnings been written off, but principal has begun to be eroded as well. The statements made by certain Director and Officer Defendants of the IFDA to its

members indicate a fundamental inability to understand, or to truthfully convey the workings of the Preneed Trust, even at this late date. The ineptitude of the IFDA, the Director and Officer Defendants, and its advisors in the manner in which the trust was administered is stunning.

124. Adding insult to injury, upon information and belief, IFDA Services has grossly overpaid itself its Preneed Trust administration fees, which are contractually and statutorily limited to 25% of the Trust's earnings. See ¶15 of the April 2004 version of the Preneed Contract ("A total amount up to 25% of earnings on the trust fund deposited may be retained on an annual basis by the Trustee, Provider and Depository as compensation for custody and administration of the trust funds."); Burial Act, 225 ILCS 45/5 (allowing a maximum of 25% of the earnings of the Trust to be paid out as a combined trustee and trustee depository fee).

125. Upon information and belief, IFDA Services paid itself over \$8.5 million in excess fees from May 1, 2000 – May 31, 2005 alone.

G. Duties and Obligations Have Been Breached

126. IFDA Services' mission statement is to "demonstrate competence, reliability, integrity, and professionalism in developing creative solutions which exceed member expectations." IFDA Preneed Trust Policy and Procedures Manual ("IFDA Manual"), authored by IFDA Services, dated May 18, 2007 and updated on September 13, 2007, at p. 11.³

127. As the IFDA Manual makes clear, the Directors owe the corporation, its parents, its agents, and its members fiduciary duties of care and loyalty. They are obligated to, *inter alia*, act with the level of care an ordinary prudent person in a like position would exercise under similar circumstances and must always put the interest of the corporation first.

³ Plaintiffs and their counsel do not know if an earlier version of this IFDA Manual exists. Even if an earlier version does not exist, IFDA and IFDA Services have always owed these duties to the corporation, its parents, its agents, and its members.

128. The Directors are responsible for the supervision and implementation of the investment policy, and in doing so they are obligated to adhere to the “prudent investor” rule. IFDA Manual at 54-55; Burial Act, 225 ILCS 45/4a. The Directors may hire an investment advisor, and may delegate the investment responsibility to another. IFDA manual at 56.

129. Notably, the IFDA Manual’s section on Investment Standards provides that “fiduciary investments should be limited to marketable securities, which are securities in active trading markets where they may be converted readily into cash. Marketable securities include common stocks, preferred stocks, government securities, corporate bonds, municipal securities, and money market instruments.” IFDA Manual at p. 57.

130. Despite the clear policy that investments should be readily convertible into cash, the IFDA Manual also provides that “[t]he IFDA Preneed tax-exempt fund may utilize life insurance products as investment vehicles. The objective is to provide a vehicle for the accumulation of earnings on which a customer will not pay income taxes on an annual basis as the funds grow in the trust. The investment portfolio within the insurance product should adhere to the current investment allocation guidelines.” IFDA Manual at 61. As described above, the purchase of MECs potentially destroys the tax-exempt status of the applicable investments, and seriously limits the ability to access the amount invested through such policies for any purposes including paying death claims or re-investing those funds into more appropriate investments that better match the timing and the amounts of the liabilities of the Preneed Trust.

FUTILITY OF DEMAND

131. Plaintiffs incorporate by reference the allegations set forth above.

132. While the Illinois Comptroller’s *ab initio* voiding of the IFDA Preneed Trust’s license in September 2007 was alarming to Plaintiffs, the IFDA, through various Director and Officer Defendants, assured them that it was a procedural issue that would be easily solved.

133. However, beginning in early 2008, Plaintiffs became increasingly concerned about the health of the Preneed Trust. Based on the news coming from the IFDA itself and the unease growing in the funeral director community, Plaintiffs began gathering information on the true state of the Preneed Trust funds.

134. On May 30, 2008, the Plaintiffs first met as a group in Bloomington, Illinois to share their concerns and information concerning the Preneed trust and the deficit that it had accumulated. They decided to seek a meeting with the IFDA Board of Directors and Mark Cullen, counsel to IFDA and the Preneed Trust and, per notification through the IFDA's February 29, 2008 newsletter, acting Managing Staff Director of IFDA. Coincidentally, on the same day, May 30th, the DFPR issued its first Order to Cease and Desist.

135. On June 4, 2008, the Plaintiffs met in Springfield, Illinois with Mark Cullen, to attempt to better understand how the Preneed Trust had developed a deficit, the size of the deficit and what actions might be taken to remedy the situation. Although the Plaintiffs had requested that the IFDA board members also attend that meeting, they declined to do so. Plaintiffs received some general information regarding the background and operation of the trust but were unable to get much information concerning the key man policies or why they were purchased as the sole means of achieving a tax-exempt status for the trust. The Plaintiffs requested additional information concerning the Preneed Trust and the key man policies in particular. At the June meeting, Plaintiffs were not told about the cease and desist order that was issued on May 30, 2008 by the DFPR.

136. Having failed to receive adequate details from Mr. Cullen following their meeting with him on June 4, 2008, on June 22 and June 23, 2008, Plaintiffs notified IFDA Services in writing that, as allowed pursuant to the provisions contained in Section 2(g) of the Burial Act,

they had appointed Regions as successor trustee and requested that all funds then held by IFDA Services on behalf of the Plaintiffs be transferred to Regions. This action was taken only after the Plaintiffs were unable to receive calculations of the amounts distributable from the Preneed Trust should the Plaintiffs decide that it was prudent to do so in protecting the families that they serve (notwithstanding repeated assurances from Mark Cullen that the calculations were forthcoming) and after the inability to receive adequate information concerning the key man insurance policies.

137. On the morning of June 25, 2008, Plaintiffs were contacted by James Bosma, the current President of the IFDA, to meet with him and the IFDA Board of Directors that afternoon as they were assembled in Schaumburg, Illinois for the IFDA annual meeting and convention. Plaintiffs agreed to do so and met for several hours with Mr. Bosma, Mark Cullen, IFDA legal counsel and the acting Managing Staff Director of IFDA, and the following IFDA Board members: Chris Wooldridge, Donald Henderson, Stephen Dawson, Geoffrey Hurd, Michelle Harrison, Michael Sayles, Vickie Diedrich, Linda Allan, Charles Childs, Brent Davis, Derek Johnson, and David McReynolds.

138. During this meeting, Plaintiffs expressed their concerns about the investments and deficits in the Preneed Trusts, and demanded that the Board take action to safeguard Fund assets and protect the families who signed Preneed Contracts with the Plaintiffs and whose funds were on deposit with IFDA Services. The Board refused Plaintiffs' demand. Instead, it strongly urged Plaintiffs to withdraw their request to appoint Regions as successor trustee and to keep their deposits with IFDA. Jim Bosma asked Plaintiffs to "stand down." In addition Mr. Bosma promised that an actuarial firm was set to analyze the key man life insurance policies to determine the appropriate course of action, and that this would invariably benefit the Trust itself

and its members. He said that the actuarial study was slated to take 6 weeks and IFDA Board members promised to forward the results to its members. To this day, no such results have been sent to or received by Plaintiffs.

139. As a result of the meeting with the IFDA Board, and in light of the Board's promise to provide Plaintiffs with detailed information concerning the Preneed Trust's financial condition and the key man policies, the Plaintiffs agreed to defer their request to name a successor trustee and to have the funds moved to Regions.

140. Following the meeting with the IFDA Board, and later in the afternoon of June 25, 2008, the Plaintiffs attended a pre-scheduled meeting open to all IFDA members concerning the then current financial status of the Preneed Trust. Mr. Bosma led the meeting, which lasted several hours, with input also from Messrs Cullen and Schainker. During the meeting, Mr. Bosma alluded to the "consent decree" (presumably the May 30, 2008 Cease and Desist Order) which was the first time the Plaintiffs had been made aware of it, although Mr. Bosma gave them no details concerning the substance or scope of the order. Mr. Schainker's presentation made it clear that the interest rates being credited to the accounts of the depositors bore no relation to the actual earnings of the trust. The key man policies were discussed in general terms but the members were not told of the existence or prevalence of the MECs.

141. On or around June 27, 2008, the Plaintiffs received redacted reports concerning the key man policies including in force ledgers which on their face warned that most of the key man policies issued by Merrill Lynch PFS were MECs. Plaintiffs again demanded that the Board take action, such as by transferring the monies in the Preneed Trust to Regions, but it refused to do so unless Plaintiffs provided the IFDA Board with a full release from liability, a requirement conveyed to Plaintiffs by Defendant Cullen. Plaintiffs have made a demand on the Board, which

has failed to act. The request for Plaintiffs to sign a full release further demonstrates that the Board is only acting in its own self-interest.

142. To the extent that Plaintiffs' demand is somehow deemed to be inadequate, Plaintiffs alternatively allege that demand upon the IFDA and/or IFDA Services' Board of Directors would be futile and should therefore be excused. First, the investment strategies outlined above evidence a failure to act on an informed basis with respect to the investment vehicles chosen for the tax-exempt portion of the Preened Trust and the promises made with respect to the safety of the investments. Moreover, the misstatements made by IFDA to its members regarding the earnings and strength of the Preened Trust likewise evidence action by the Directors without adequate information or, worse, action taken to deceive the members and continue to cause deposits to be made into a trust with serious financial problems known only to the IFDA and, apparently, to the Comptroller's Office as well. The investment strategies and promises made by the Board of Directors were not made on an informed basis, in good faith, and in the honest belief that they were in the best interests of IFDA, IFDA Services, the trust depositors or the IFDA members.

143. Second, the persons to whom such a demand would be made are incapable of objectively considering that demand because of the substantial probability of their own liability. The wrongful acts at issue may constitute violations of law, removing them from the protection of the business judgment rule.

144. Third, upon information and belief, certain Director Defendants may have borrowed significant sums of money from the IFDA and / or IFDA Services, eliminating the impartiality of those Director Defendants necessary to take action as demanded by Plaintiffs.

145. Fourth, demand is excused because the actions alleged herein constitute bad faith violations of fiduciary duties owed by the Director and Officer Defendants to IFDA and IFDA Services. IFDA's directors undertook their course of conduct in an intentional, reckless, or grossly negligent breach of their fiduciary duties in a manner that cannot be entitled to the business judgment rule.

146. Fifth, demand is excused because the Director and Officer Defendants utterly failed to fulfill their oversight duties to detect, prevent and/or halt the violations of law that were occurring at IFDA and IFDA Services. Such inaction cannot be entitled to protection under the business judgment rule because the Directors failed to act on an informed basis, in good faith, and in the honest belief that the practices were in the best interests of IFDA and IFDA Services

147. Sixth, demand is excused because the improper investment decisions were not the product of a valid exercise of business judgment. These investments were not made on an informed basis, in good faith, and in the honest belief that they were in the best interests of IFDA and IFDA Services. Thus, demand is excused as a matter of law, as the investment plan approved by the Board was so egregious on its face that Board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists.

148. Finally, on July 7, 2008, as the administrative transition to MLBTC was taking place, the DFPR issued IFDA Services an Order to Cease and Desist from disbursing, expending, paying out any dividends, liquidating, loaning, refunding, or in any other way alienating funds currently in its possession. This development effectively made any request on the Board to take appropriate action impossible to fulfill, i.e., futile.

CAUSES OF ACTION

COUNT I

BREACH OF FIDUCIARY DUTIES AGAINST INDIVIDUAL DIRECTOR AND OFFICER DEFENDANTS

149. Plaintiffs incorporate by reference the allegations set forth above.

150. The Director and Officer Defendants owed IFDA members that were acting as agents of IFDA Services in selling the Preneed Contracts, duties of care, loyalty, and disclosure.

151. Each Director Defendant, acting in bad faith, breached his or her fiduciary duties of loyalty, care, and disclosure by intentionally or recklessly approving the investment plan for the Preneed Trust that included investing a significant amount of funds in key man insurance policies that were not easily convertible to cash, assuring interest rates that had no relationship to actual earnings, and concealing these practices from IFDA members.

152. Alternatively, the Director and Officer Defendants breached their fiduciary duties of loyalty, care, and disclosure by their deliberate and knowing indifference to the improper investment plan.

153. In particular, the Director and Officer Defendants failed to act to preserve the Preneed Trust despite having knowledge of the inappropriate investments and the resulting deficit in the Preneed Trust that has only increased over the past several years and which is currently approximately \$ 59.0 million.

154. Upon information and belief, the Directors had or should have had knowledge about the Preneed Trust's investment vehicles, the inflated interest rates, the overconcentration in key man life insurance policies, and the resulting deficit and, despite this knowledge, failed to act to protect the Preneed Trust from further losses.

155. The Directors had access to prior audits and, upon information and belief, knew or should have recognized the growing deficits and the improper investment practices and distribution of the funds in the Preneed Trust, and should have known that there were significant problems with the Preneed Trust. Despite obvious signs of trouble, the Director and Officer Defendants failed to do anything to protect the funds in contravention of their fiduciary duties.

156. As a direct and proximate cause of the Director and Officer Defendants' breach of fiduciary duty, the tax-exempt portion of the Preneed Trust has been damaged by the loss of principal and interest, and its condition has deterred and, will continue to deter, further investment and participation therein.

COUNT II

NEGLIGENCE AGAINST INDIVIDUAL DIRECTOR AND OFFICER DEFENDANTS

157. Plaintiffs incorporate by reference each of the foregoing allegations.

158. The Director and Officer Defendants owed IFDA members that were acting as agents of IFDA Services in selling the Preneed Contracts, a duty of care in managing the Preneed Trust.

159. The Director and Officer Defendants were obligated to, *inter alia*, act with the level of care an ordinary prudent person in a like position would exercise under similar circumstances.

160. Each of the Director and Officer Defendants breached his or her duty by intentionally or recklessly approving the investment plan for the Preneed Trust that included the investing of a significant amount of funds in key man insurance policies that were not easily convertible to cash, assuring interest rates that had no relationship to actual earnings, and concealing these practices from IFDA Members.

161. Alternatively, the Director and Officer Defendants breached their duties by their deliberate and knowing indifference to the inappropriate investment plan.

162. In particular, the Director and Officer Defendants breached their duties when they failed to act to preserve the funds in the Preneed Trust despite having knowledge of the inappropriate investments and the resulting deficit in the Preneed Trust which has increased significantly over the past several years and which is currently approximately \$59.0 million.

163. As a direct and proximate cause of the Director and Officer Defendants' negligence, the tax-exempt portion of the Preneed Trust has been damaged by the loss of principal and interest, and its condition has deterred, and will continue to deter, further investment and participation therein.

COUNT III

BREACH OF ILLINOIS' TRUSTS AND TRUSTEES ACT, 760 ILCS 5/1, *et seq.*, AGAINST INDIVIDUAL DIRECTOR AND OFFICER DEFENDANTS

164. Plaintiffs incorporate by reference each of the foregoing allegations.

165. The Director and Officer Defendants have violated Illinois' Trusts and Trustees Act, 760 ILCS 5/1, *et seq.*

166. The Director and Officer Defendants, acting on behalf of IFDA and/or IFDA Services as Trustee of the Preneed Trust, owed the Preneed Trust duties as set forth in the Trusts and Trustees Act.

167. The Director and Officer Defendants, acting on behalf of IFDA and/or IFDA Services as Trustee of the Preneed Trust, were required to act in accordance with the Prudent Investor Rule set forth in 760 ILCS 5/5. The Prudent Investor Rule required the Director and Officer Defendants to comply with the following standards, among others:

The trustee has a duty to invest and manage trust assets as a prudent investor would considering the purposes, terms,

distribution requirements, and other circumstances of the trust. This standard requires the exercise of reasonable care, skill, and caution and is to be applied to investments not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust.

760 ILCS 5/5 (a)(1).

168. The Director and Officer Defendants failed to comply with the Prudent Investor Rule by, among other acts alleged herein, intentionally or recklessly approving the investment plan for the Preneed Trust that included the investing of a significant amount of funds in key man insurance policies that were not easily convertible to cash, assuring interest rates that had no relationship to actual earnings, and concealing these practices from IFDA Members.

169. The Director and Officer Defendants likewise breached their duties set forth in 760 ILCS 5/5 (a)(3) and (5) of the Trusts and Trustee Act by failing to not only diversify the investments of the trust, but also by failing to pursue an investment strategy that considers both the reasonable production of income and safety of capital.

170. Specifically, the Director and Officer Defendants invested a substantial majority of the Preneed Trust in key man insurance policies, which were and are not easily convertible to cash, do not confer a fixed death benefit but instead offer a pay-out depending on the performance of the investments made within the policies, and, to the extent they are MECs, are subject to a 10% excise tax if they are terminated or if funds are borrowed or withdrawn before the insured reaches 59½ years old, in addition to the regular income tax that will be triggered on any deferred gain inside of the policies if they were to be liquidated for any reason prior to the death of the insureds. Such investments are not diversified and do not consider reasonable production of income and safety of capital, a fact confirmed by the significant deficit at which the Preneed Trust is currently operating.

171. As a direct and proximate cause of the Director and Officer Defendants' breach of the Trusts and Trustees Act, the tax-exempt portion of the Preneed Trust has been damaged by the loss of principal and interest, and its condition has deterred, and will continue to deter, further investment and participation therein.

COUNT IV

BREACH OF FIDUCIARY DUTY BROUGHT DERIVATIVELY ON BEHALF OF IFDA AND IFDA SERVICES, INC. AGAINST MERRILL LYNCH PFS AND SCHAIKER PURSUANT TO 805 ILCS 5/7.80 AND 805 ILCS 105/107.80

172. Plaintiffs incorporate by reference each of the foregoing allegations.

173. This claim is brought derivatively by Plaintiffs on behalf of IFDA and IFDA Services against Merrill Lynch PFS and Schainker for breach of fiduciary duty.

174. In connection with the investment advice given to IFDA and IFDA Services, Merrill Lynch PFS and Schainker owed a fiduciary duty of care and loyalty to IFDA and IFDA Services.

175. Upon information and belief, Schainker recommended that the tax-exempt portion of the Preneed Trust be invested in key man insurance policies, which were and are not easily convertible to cash, do not confer a fixed death benefit but instead offer a pay-out depending on the performance of the investments made within the policies, and, to the extent they are MECs and are subject to a 10% excise tax if they are terminated or if funds are withdrawn before the insured reaches 59½ years old, in addition to regular income taxes that will be triggered on any deferred gain inside of the policies if they were to be liquidated for any reason before the death of the insureds.

176. Merrill Lynch PFS and Schainker breached their fiduciary duties to IFDA and IFDA Services by making material misrepresentations, omitting material information, suggesting

that the Preneed Trust invest a substantial majority of its funds in key man life insurance policies, and/or representing that such investments comported with prudent investment principles in line with the commitments and needs of IFDA and IFDA Services, the requirements of the Burial Act, and the stated investment goals of the Preneed Trust.

177. By recommending and assisting in the purchase of key man life insurance policies for the Preneed Trust, and by representing that those policies comported with prudent investment principles and that they were in accordance with the stated goals and needs of IFDA, IFDA Services, the Preneed Trust, and its commitments to the IFDA Preneed Trust participants, Merrill Lynch PFS and Schainker breached their fiduciary duties of care and loyalty.

178. Merrill Lynch PFS and Schainker, upon information and belief, are and were at all times aware of the investment objectives of the Preneed Trust and the promise made by IFDA and IFDA Services to its members that the investments would be prudent and intended to protect the principal investments in safe and reliable investment vehicles.

179. IFDA and IFDA Services delegated investment decisions and discretion to Merrill Lynch PFS and Schainker, who had superior knowledge and expertise of possible and appropriate investment vehicles for the Preneed Trust. IFDA and IFDA Services engaged Merrill Lynch PFS and Schainker because of this expertise, but both defendants utterly failed in exercising their duties.

180. As a result of Merrill Lynch PFS and Schainker's breaches of their fiduciary duties, IFDA, IFDA Services, and its agents (funeral home directors) continued to invest client funds in the Preneed Trust in reliance upon, and in accordance with, the expectation that they would be appropriately invested to benefit the Preneed Trust.

181. As a direct and proximate cause of Merrill Lynch PFS and Schainker's breach of their fiduciary duties in providing financial advice, the IFDA and IFDA Services have been damaged because the Preneed Trust is operating at a substantial and growing deficit. Moreover, the Preneed Trust is earning less interest than it would be had Merrill Lynch PFS and Schainker followed the prudent investor rule and not been in breach of their duties, thereby causing IFDA and IFDA Services additional damage.

182. IFDA and IFDA Services have also been damaged because of the significant amount of negative press resulting from the deficit because this deficit is attributable to Merrill Lynch PFS and Schainker. It is likely that the number of IFDA members depositing funds in the Preneed Trust is and will be fewer than it would have been but for Merrill Lynch PFS and Schainker's breaches of their fiduciary duties, and that the number of preneed funeral planning customers also will decrease because of the damages sustained by the Preneed Trust.

COUNT V

NEGLIGENCE BROUGHT DERIVATIVELY ON BEHALF OF IFDA AND IFDA SERVICES, INC. AGAINST MERRILL LYNCH PFS AND SCHAINKER PURSUANT TO 805 ILCS 5/7.80, 805 AND ILCS 105/107.80,

183. Plaintiffs incorporate by reference each of the foregoing allegations.

184. This claim is brought derivatively by Plaintiffs on behalf of IFDA and IFDA Services against Merrill Lynch PFS and its employee or agent Schainker, who is based in Merrill Lynch PFS's Springfield, Illinois office.

185. For an unknown period of time, Defendants Merrill Lynch PFS and Schainker acted as investment or financial advisors to IFDA and IFDA Services. In this capacity, Merrill Lynch PFS and Schainker owed IFDA and IFDA Services a duty of care, among other duties.

186. Upon information and belief, Schainker recommended that the Preneed Trust invest a substantial portion of the Preneed Trust in key man insurance policies, which were and are not easily convertible to cash, do not confer a fixed death benefit but instead offer a pay-out depending on the performance of the investments made within the policies, and, to the extent they are MECs, are subject to a 10% excise tax if they are terminated or if funds are borrowed or withdrawn before the insured reaches 59½ years old, in addition to the regular income tax that will be triggered on any deferred gain inside of the policies if they were to be liquidated for any reason prior to the death of the insureds.

187. Merrill Lynch PFS and Schainker breached their duty of care to IFDA and IFDA Services by making material misrepresentations, omitting material information, and/or suggesting that the Preneed Trust invest a majority of its funds in key man life insurance policies, representing that such investments comported with prudent investment principles in line with the commitments and needs of IFDA and IFDA Services, and the stated investment goals of the Preneed Trust.

188. As a direct and proximate cause of Merrill Lynch PFS and Schainker's negligence in providing such financial advice, the IFDA and IFDA Services have been damaged because the Preneed Trust is operating at a substantial deficit, reducing or eliminating the interest earnings from which administrative fees can be paid. Moreover, the Preneed Trust is likewise earning less interest than it would be had the investment advice from Merrill Lynch PFS and Schainker followed the prudent investor rule and had they not breach their duties to IFDA and IFDA Services.

189. IFDA and IFDA Services have also been damaged because of the significant amount of negative press resulting from the deficit because this deficit is attributable to Merrill

Lynch PFS and Schainker. It is likely that the number of IFDA members depositing funds in the Preneed Trust is and will be fewer than it would have been but for Merrill Lynch PFS and Schainker's negligence, and that the number of preneed funeral planning customers also will decrease because of the damages sustained by the Preneed Trust.

COUNT VI
BREACH OF FIDUCIARY DUTY BROUGHT DERIVATIVELY
ON BEHALF OF IFDA AND IFDA SERVICES, INC. AGAINST
MARK K. CULLEN, AS ATTORNEY, PURSUANT TO
805 ILCS 5/7.80 AND 805 ILCS 105/107.80

190. Plaintiffs incorporate by reference the allegations set forth above.

191. As attorney and fiduciary for IFDA and the Preneed Trust, Mr. Cullen owed duties of care, disclosure, and undivided loyalty, among others, to IFDA and the Preneed Trust.

192. Upon information and belief, as a long-time attorney for the IFDA and Preneed Trust, Mr. Cullen had or should have had knowledge of the investment practices, illiquidity of the Preneed Trust funds, and the resulting deficits. At the very latest, Mr. Cullen gained this knowledge by the fall of 2007.

193. During his tenure as IFDA and Preneed Trust counsel, Mr. Cullen breached his fiduciary duties of loyalty, care, and disclosure, owed to IFDA and the Preneed Trust by his deliberate and knowing indifference to the improper investment plan and increasing deficits, and his failure to recommend actions to protect the interests of the IFDA and Preneed Trust.

194. Upon information and belief, Mr. Cullen, as counsel for the Preneed Trust, had or should have had knowledge about the Preneed Trust's life insurance policies used as the primary investment vehicle, the inflated interest rates, the overconcentration in key man life insurance policies, and the resulting deficit. Despite this knowledge, Mr. Cullen failed to act to protect the Preneed Trust from further losses.

195. Even upon learning of the deficits and the proposals presented to get the Preneed Trust back on the right path, Mr. Cullen failed to act, and instead allowed the course of conduct that caused the damage to the Preneed Trust in the first place to continue.

196. On or around June 27, 2008, when the Plaintiffs again demanded that the Board take action, Mr. Cullen conveyed the message to Plaintiffs that a full release of all liability of the IFDA Board would be required in order to allow Plaintiffs to carry out their proposed course of action to protect their Preneed Trust funds. Mr. Cullen had a conflict of interest in seeking this release, as he was acting to protect the Director and Officer Defendants and not his clients, the IFDA and the Preneed Trust. Mr. Cullen, as a fiduciary counsel to the IFDA and the Preneed Trust, could not also represent the Director and Officer Defendants. This conflict of interest is a breach of his duty of loyalty to the IFDA and Preneed Trust.

197. As a direct and proximate cause of Mr. Cullen's breach of his fiduciary duties, including his role in delaying an intervention to protect the Preneed Trust, the Preneed Trust has been damaged by the loss of principal and interest. The Preneed Trust has also been damaged because its condition has deterred, and will continue to deter, further investment and participation therein.

COUNT VII

CONTRIBUTION AND INDEMNIFICATION AGAINST ALL DEFENDANTS

198. Plaintiffs incorporate by reference each of the foregoing allegations

199. Plaintiffs and similarly situated IFDA members acted as agents on behalf of the Principal IFDA Services in selling IFDA Preneed Contracts to their preneed funeral planning customers.

200. To the extent any liability arises for any IFDA member based on their inability to fully perform their obligations under the applicable Guaranteed Preneed Trust Tax-exempt

Contracts, Plaintiffs hereby seek contribution and indemnification from all Defendants for any costs, legal fees, or any damages those IFDA members incur because of the offering of the Preneed Contracts to preneed funeral planning customers on behalf of IFDA Services.

WHEREFORE, Plaintiffs, derivatively on behalf of IFDA and IFDA Services, demand judgment against defendants and each of them jointly and severally as follows:

A. Determining that this suit is a proper derivative action and naming Plaintiffs as appropriate representatives for IFDA and IFDA Services;

B. Declaring that each of the Director and Officer Defendants breached his or her fiduciary duties to IFDA and IFDA Services;

C. Declaring that each of the Director and Officer Defendants acted negligently with respect to his or her duties to IFDA and IFDA Services;

D. Declaring that Merrill Lynch PFS and Schainker breached their respective fiduciary duties to IFDA and IFDA Services;

E. Declaring that Merrill Lynch PFS and Schainker acted negligently with respect to their duties to IFDA and IFDA Services;

F. Requiring Merrill Lynch PFS and Schainker to disgorge and remit to the Preneed Trust all of the fees and other compensation they received for or in connection with transactions relating to the Preneed Trust;

G. Declaring that Mark K. Cullen, as attorney for the IFDA and the Preneed Trust, breached his fiduciary duties to IFDA and the Preneed Trust;

H. Determining and awarding IFDA and its subsidiary IFDA Services, and in particular the IFDA Preneed Trust, damages sustained as a result of the violations set forth above from each of the Defendants, jointly and severally, together with interest thereon;

- I. Awarding pre-judgment and post-judgment interest as allowed by law;
- J. Ordering an Accounting;
- K. Awarding Plaintiffs' costs and expenses for this action, including reasonable attorneys' and experts' fees; and
- L. Granting such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury.

January 27, 2009

Respectfully submitted,

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, Fred C. Dames Funeral Homes, Inc., McCracken-Dean Funeral Home, Inc., Knapp Funeral Homes, Inc., derivatively on behalf of the Illinois Funeral Directors Association and I.F.D.A. Services, Inc.

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