

1 (g) A statement that earned annual income is being credited to the account and that
2 administrative expenses, if charged, are paid from income only.

3 (h) A statement, in clear nontechnical language, that the contract is either a
4 guaranteed preneed contract or that it is a nonguaranteed preneed contract, and, if
5 guaranteed only in part, the services or merchandise included in the guarantee shall be
6 specified. This statement shall be printed in bold face type and shall be located on the
7 first page of the contract.

8 (1) If the contract is guaranteed, there shall be included in the contract a
9 complete explanation of all the terms and conditions limiting the guarantee.

10 (2) If the contract is not guaranteed, there shall be included in the contract a
11 complete explanation of how the trust balance will be applied to pay for
12 services and merchandise provided at the beneficiary's death and that there
13 may be additional payments required or a refund due.

14 (i) A statement that the trustees of the trust will deliver the corpus of the trust and net
15 income to the funeral establishment filing a certified copy of the Death Certificate
16 and evidence that said funeral establishment has furnished the merchandise and
17 services. (Corpus of the Trust means all monies paid and all securities delivered
18 pursuant to this prearrangement contract.)

19 (j) A statement that the amount of revocation fee to be charged in the event of
20 revocation, shall in no event exceed ten percent (10%) of the paid-in corpus and is
21 chargeable against earned income only; and a statement that no revocation fee may be
22 charged if the funeral establishment is unable to perform substantially according to
23 the terms of the agreement.

24 (k) In immediate proximity to the space reserved for the purchaser's signature, in a
25 size equal to at least ten point (10-point) bold type, the following statement: "All
26 funds received will be deposited with the trustees within thirty (30) days and held in a
27 trust which is fully refundable upon fifteen (15) days' written notice except when the
28 beneficiary is the recipient of public assistance, as provided in the Welfare and
Institutions Code and this trust agreement has been designated as being irrevocable
thereunder.

FIRST CAUSE OF ACTION

(VIOLATION OF BUS. & PROF. CODE, § 7736)

(UNLAWFUL CONTROL OF PRENEED FUNERAL TRUST)

(AGAINST DEFENDANTS CFDA, FDSC, COMERICA BANK,

MECHANICS BANK, TRUST, KUHN, AND DOES 1 THROUGH 1000)

61. Plaintiff realleges and incorporates by reference paragraphs 9 through 48, above, of
the Complaint as though fully set forth herein.

62. Defendants CFDA, FDSC, COMERICA BANK, MECHANICS BANK, KUHN, and
DOES 1 through 1000 have knowingly and willingly entered into a conspiracy, common

1 enterprise, or common course of conduct to enable defendant FDSC, an unauthorized entity, to
2 operate a preneed funeral trust as the de facto trustee in violation of Business and Professions
3 Code ⁶ Section 7736, and unless restrained and permanently enjoined from doing so by order of
4 this Court, defendant FDSC will continue to operate a preneed funeral trust as the de facto trustee
5 and defendants CFDA, COMERICA BANK, TRUST, KUHN, and DOES 1 through 1000 will
6 continue to aid and abet FDSC in engaging in said practice, in violation of Section 7736, as
7 follows:

8 63. The first overt act of this conspiracy was CFDA's incorporation of FDSC on May 13,
9 1985. In furtherance of the conspiracy, FDSC has controlled the TRUST as its de facto trustee, as
10 described herein below.

11 64. Under Section 7736, trustee of a preneed funeral trust must be "any banking
12 institution or trust company legally authorized and empowered by the State of California to act as
13 trustee in the handling of trust funds or not less than three persons one of whom may be an
14 employee of the funeral establishment." Since FDSC is not a banking institution or a trust
15 company and its board at all times mentioned in this Complaint have had more than one
16 representative of a funeral establishment, it cannot legally be a trustee of a preneed funeral trust.

17 65. To evade the restrictions of Section 7736, FDSC appointed as the trustee entities that
18 satisfied the statutory requirements but which agreed to delegate actual control of the TRUST to
19 FDSC. Specifically, on or about September 1, 1995, FDSC appointed MECHANICS BANK, a
20 banking institution authorized to act as trustee of a preneed funeral trust, to be the trustee of the
21 TRUST. Pursuant to the trust agreement, MECHANICS BANK accepted the appointment as the
22 trustee of the TRUST and then delegated actual control of the TRUST to FDSC. In exchange,
23 FDSC paid MECHANICS BANK an annual trustee fee and MECHANICS BANK was able to
24 deposit the trust funds that were not otherwise invested in its bank. From in or about 1995 to
25 February 15, 2002, MECHANICS BANK was the duly appointed trustee of the TRUST.

27 ⁶ All subsequent statutory references are to the Business and Professions Code unless
28 otherwise noted.

1 66. Likewise, on or about February 15, 2002, the effective date of MECHANICS
2 BANK's resignation as trustee, FDSC appointed defendant COMERICA BANK, a banking
3 institution authorized to act as trustee of a preneed funeral trust, as the trustee of the TRUST.
4 Pursuant to the trust agreement, COMERICA BANK accepted the appointment as the trustee and
5 then delegated actual control of the TRUST to FDSC. In exchange, FDSC has paid COMERICA
6 BANK an annual trustee fee and COMERICA BANK has been able to deposit the TRUST's
7 funds that were not otherwise invested in its bank. From February 15, 2002, to the present,
8 COMERICA BANK has been the duly appointed trustee of the TRUST.

9 67. In the aforementioned agreements, MECHANICS BANK and COMERICA BANK,
10 respectively, granted FDSC the sole power to remove the trustee, which gave FDSC ultimate
11 control over the trustee.⁷ FDSC was also given the power to determine how much to pay the
12 trustee. In addition, MECHANICS BANK and COMERICA BANK, respectively, transferred
13 critical trustee decision-making powers to FDSC, including the power to hire, fire and monitor all
14 agents to the TRUST, including administrators, accountants, attorneys, auditors, investment
15 advisors, and other consultants;⁸ the power to determine the investment policy of the TRUST and
16 when to hold or sell investments;⁹ and the power to decide how the funds are received, invested,
17 and dispersed.¹⁰ In contrast, the trustee was allowed to hold trust funds, to disburse those funds
18 pursuant to FDSC's directions, and to observe the performance of the investment advisors and
19 report its observations to FDSC.

20 68. Furthermore, Section 7737 restricts who may be a party to a preneed funeral
21 agreement to the funeral establishment, the trustor, and the trustee(s). The TRUST's preneed trust

22 ⁷ "The power to remove is the power to control." *Silver v. United States Postal Service*
23 (9th Cir. 1991) 951 F.2d 1033, 1039.

23 ⁸ See Prob. Code, § 16247 (trustee's power to hire).

24 ⁹ See Prob. Code, §§ 16047 (trustee's duty to invest and manage trust assets as a prudent
25 investor would, by considering the purposes, terms, other circumstances of the trust, and the law
26 and to evaluate investments as a part of an overall investment strategy having risk and return
27 objectives reasonably suited to the trust), 16049 (trustee's duty to make and implement decisions
28 concerning the retention and disposition of assets, in order to bring the trust portfolio into
compliance with the purposes, terms, other circumstances of the trust, and the governing laws).

27 ¹⁰ See Prob. Code, §§ 16220 (trustee's power to collect, hold, retain, and dispose of trust
28 property), 16246 (power to effect distribution of property and money in divided or undivided
interests and to adjust resulting differences in valuation).

1 agreements are between the funeral establishment, the trustor, the trustee, and FDSC. However,
2 FDSC is not a permitted party to a preneed funeral trust agreement. FDSC with the assistance of
3 said defendants and others have violated Section 7737 by making FDSC a party to the TRUST's
4 preneed funeral agreements. By being a party to these trust agreements, FDSC has obtained an
5 improper level of control of the TRUST.

6 69. Consequently, from a date unknown to Plaintiff but no later than 2000 and continuing
7 to the present, FDSC has exercised control over almost all aspects of the operation of the TRUST.
8 Trustee control over the TRUST has been almost nonexistent. Thus, with the passive approval of
9 MECHANICS BANK and COMERICA BANK, CFDA via FDSC has operated the TRUST for
10 the primary benefit of CFDA and not solely in the interest of the trustor-beneficiaries. In so
11 doing, CFDA was able to advance the fundamental objective of the conspiracy, which was and is
12 to use the assets of the TRUST to fund CFDA's activities and agenda. To achieve this objective,
13 the defendants named in this Complaint and DOES 1 through 1000 and others have violated or
14 aided and abetted others in violating the Short Act, its implementing regulations, and California's
15 Trust Law,¹¹ as well as breached the TRUST's preneed funeral contracts, as described herein
16 below.

17 70. MECHANICS BANK's and COMERICA BANK's imprudent and improper
18 delegation of control of the TRUST to FDSC and FDSC's operating the TRUST as the de facto
19 trustee with the assistance of the other said defendants violates Section 7736 and breaches their
20 respective fiduciary duties toward the trustor-beneficiaries of the TRUST.¹² Importantly,
21 MECHANICS BANK and COMERICA BANK are held to a higher standard of care as
22 professional trustees.¹³

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25 ¹¹ Prob. Code, § 15000, *et seq.*

26 ¹² See Prob. Code, §§ 16002, subd. (a) (duty of loyalty; trustee's duty to administer the
27 trust solely in the interest of the beneficiaries), 16012 (trustee's duty not to delegate), 16006
28 ("The trustee is under a duty to the beneficiary to take reasonable steps to take and keep control of
the trust property.") See Restat. 2d. of Trusts, § 175 ("The duty of the trustee is not only to take
and keep control, but to take and keep exclusive control.")

¹³ *Moeller v. Superior Court* (1997) 16 Cal. 4th 1124, 1134.

1 71. Said defendants' violation of section 7736 caused damage to the California consumer
2 who placed assets in the TRUST, in that FDSC, acting as the de facto trustee of the TRUST and
3 with the assistance of the other said defendants, has misused, misspent, and mismanaged millions
4 of dollars belonging to the TRUST and has fraudulently concealed said defendants' misconduct,
5 as more fully described herein below. As a result of the foregoing, said defendants owe restitution
6 to the trustor-beneficiaries, TRUST, and enrolled funeral establishments who have participated in
7 the TRUST.¹⁴

8 72. Plaintiff is informed and believes and thereon alleges that this conspiracy, common
9 enterprise, and common course of conduct continue to the present date.

10 73. Probate Code section 17200 provides for the modification by the Court of the terms
11 of the TRUST in order to comply with applicable law. Modification of the TRUST's trust
12 agreements by removing FDSC as a party and by eliminating terms that require or permit the
13 TRUST to pay fees to FDSC or CFDA or any party related thereto is necessary in order to
14 address the inordinate level of control that FDSC has over the acts of this preneed funeral trust
15 and to comply with the Funeral Directors and Embalmers Law.

16 74. Unless restrained and permanently enjoined, defendants CFDA, FDSC, COMERICA
17 BANK, TRUST, KUHN, and DOES 1 through 1000 will continue to engage in or will resume
18 said aforementioned practices and acts in violation of the law, as hereinabove set forth.

19 75. Plaintiff, trustor-beneficiaries, and enrolled funeral establishments, will be irreparably
20 injured in that said defendants will continue to engage in or will resume acts and practices in
21 violation of law, as hereinabove set forth.

22 76. Plaintiff has no adequate remedy at law to prevent said defendants from engaging in
23 the aforementioned alleged acts and practices.

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27 ¹⁴ The full amount of restitution that defendants owe the trustor-beneficiaries, TRUST,
28 and/or the State (escheatment) will be determined by proof at trial.