

IN THE CIRCUIT COURT OF THE 17TH  
JUDICIAL CIRCUIT, IN AND FOR  
BROWARD COUNTY, FLORIDA

JOAN LIGHT, SHIRLEY EISENBERG  
and CAROL PRISCO and GLORIA ZIMMER,

CASE NO. 01-21376 (08)

Plaintiffs,

vs.

SCI FUNERAL SERVICES OF FLORIDA,  
INC., a Florida corporation d/b/a MENORAH  
GARDENS & FUNERAL CHAPELS, SERVICE  
CORPORATION INTERNATIONAL, a Texas  
Corporation, MENORAH PARTNERSHIP, a  
Florida General Partnership, and SHARON  
GARDENS LIMITED PARTNERSHIP, a Florida  
Limited Partnership,

Defendants.

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**ORDER GRANTING CLASS CERTIFICATION**<sup>1</sup>

This cause came before the Court on Plaintiffs' Motion for Class Certification. The Court having fully reviewed Plaintiffs' Complaint, the evidence presented, the parties' memoranda of law, having heard arguments of counsel and being otherwise fully appraised in the premises, grants the motion for class certification based upon the findings of fact and conclusion of law set out below.<sup>2</sup>

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<sup>1</sup> Defendant SCI Funeral Services of Florida, Inc., d/b/a Menorah Gardens & funeral Chapels, will be referred to as SCI Florida. Defendant Service Corporation International will be referred to as SCI Houston. "T" refers to the consecutively numbered transcript of the multi-day hearing on Plaintiffs' motion to certify and for leave to amend to add punitive damages. "Pl.Ex." refers to Plaintiffs' exhibits introduced at the hearing. "Def. Ex." refers to Defendants' exhibits introduced at the hearing. emphasis is supplied by this Court unless otherwise noted.

<sup>2</sup> Without a doubt, the attorneys in this case represent the elite of litigators. Their conduct, both as advocates and as individuals, should stand as a barometer by which all other litigation attorneys measure their performance. The degree of cooperation, courtesy and civility demonstrated during the course of this highly emotional, intense litigation is without parallel in this court's 44 years of participation in the legal profession. Absent conduct of such high quality, this case could have easily degenerated into chaotic conflict which might have seriously impaired the ability of all parties to have their differing positions resolved in a manner acceptable to both law and morals. The undersigned Judge deems it to be both a pleasure and an honor to preside over this case with these distinguished members of the Bar.

## I. INTRODUCTION

### A. General Principles

Certain principles guide the Court's decision on whether to certify a class. First the court only determines whether the requirement of Rule 1.110 have been met. The substantive merit of plaintiffs' case is not an issue. See *Oce Printing, Sys. USA, Inc. v. Mailers Data Serv., Inc.*, 760 So. 2d 1037 (Fla. 2d DCA 2000); *Samples v. Hernando Taxpayers Ass'n*, 682 So. 2d 184 (Fla. 5th DCA 1996). Second, the complaint's allegations are generally taken as true. See *Estate of Bobinger v. Deltona Corp.*, 563 So. 2d 739 (Fla. 2d DCA 1990); *Powell v. River Ranch Pro. Owners Ass'n*, 522 So. 2d 69 (Fla. 2d DCA 1988). Third, if Plaintiffs' submission establishes the requirements for a class action, the court must certify the class. *Rahim v. Sheahan*, 2001 WL 1263493 (N.D. Ill. 2001).<sup>3</sup> Fourth, any doubts are to be resolved in favor of class certification. *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975); *Rahim v. Sheahan, supra*; *In re Carbon Dioxide*, 149 F.R.D. 229 (M.D. Fla. 1993).

Although this court is satisfied Plaintiffs have adequately met the requirements of Rule 1.220, it echoes the observation made in *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 330 (C.D. Cal. 1998):

[A]ny findings made in this Order relating to evidence presented for purposes of Plaintiffs' motion for class certification are limited to this Order and do not bear on any future rulings the Court may make as it considers the merits of this case during dispositive motions and/or trial.

The Court's findings of fact in this Order should not be taken as a prediction of its rulings on future substantive motions.

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<sup>3</sup> Fla. R. Civ. P. 1.220 is modeled after Fed.R.Civ. P. 23. Florida courts look to federal precedent in determining the requirements of the Florida class action rule.

## **B. Plaintiffs' Theories.**

Defendants own or operate Menorah Gardens cemeteries in South Florida. Plaintiffs Joan Light, Shirley Eisenberg, Carol Prisco and Gloria Simmer have relatives who bought plots or who were buried in a Menorah Gardens cemetery. Plaintiffs claim Defendants sold some plots twice, Defendants buried the remains of Plaintiffs' relatives in either the wrong locations or in a way which encroached upon other plots, and Defendants plotted and sold burial sites with insufficient space thereby creating a situation in which there was inadequate room to place bodies in their proper location or position when the remains were ready for burial. Plaintiffs have also alleged Defendants desecrated the remains by:

1. secretly breaking open burial vaults and discarding remains in a wooded area where the remains may have been consumed by wild animals;
2. secretly burying remains in locations other than the plot purchased;
3. secretly crushing down vaults in order to make room for other vaults;
4. secretly burying remains on top of each other rather than side-by-side;
5. secretly digging up and removing remains;
6. secretly burying remains head to foot rather than side-by-side;
7. secretly mixing body parts from different individuals;
8. failing to exercise reasonable care in handling remains.

Plaintiffs have alleged the following causes of action: tortious interference with dead bodies (Count I); intentional or reckless infliction of emotional distress (Count II); equitable and injunctive relief (Count III); unfair or deceptive acts or practices under Fla. Stat. § 497.445 (Count IV); failure to maintain cemeteries in a reasonable and dignified condition pursuant to Fla. Stat. §497.103 and Fla. Admin. Code R. 3F-6.002 (Count V); deceptive and unfair trade practices under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201-213 (Count VI); and negligence (Count VII).

## **II. THE SCOPE OF THE CLASS.**

Plaintiffs seek injunctive and equitable relief as well as money damages. They bring this action on behalf of themselves, individually, and on behalf of all persons with burial plots or deceased relatives at the cemeteries at issue. More specifically, Plaintiffs seek to bring this action on behalf of the following class:

**THE CLASS:** All persons with burial plots or family members buried at Menorah Gardens and Funeral Chapels located at 21100 West Griffin Road, Fort Lauderdale, Florida 33322, and at 9321 Memorial Park Road, West Palm Beach, Florida 33412, excluding all persons whose claims have been reduced to judgment or settled as of the date of the class is certified, and excluding Defendants' officers, directors, subsidiaries or any other person related to, affiliated with, or employed by Defendants.

The Court is persuaded two sub-classes are appropriate at this time; i.e.:

1. Pre-need class. This will include those whose claims rest on pre-need contracts which they or their deceased family members purchased.
2. At-need Class. This will include those whose claims rest on at-need contracts which they or a deceased family member purchased.

If future events demonstrate the need for additional sub-classes in order to protect the interests of class members, the Court will create such sub-classes at an appropriate time. *See Forbush v. J.c. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993); *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975); *Weikel v. Tower Semiconductor, Ltd.*, 183 F.R.D. 377, 395 n.10 (D.N.J. 1998).

### **III. FINDINGS OF FACT.**

The findings of fact set forth below are based upon the record evidence and the Plaintiffs' proffer.

- A. Defendants knew of the spacing problems when they acquired the cemeteries.**

Defendants purchased Menorah Gardens in March 1995.

On March 1, 1995, Area Regional President of SCI Georgia, Mike Struck, authored a due diligence memorandum to then SCI Florida Vice-President of Operations, Earnest Poynter and Regional Vice-President of South Florida, Tim Claiborne. The due diligence memorandum sets out anticipated problems in both the Ft. Lauderdale and West Palm Beach cemeteries. The problems include wrongful burials, poor record keeping, lack of topographic maps, and no existing master plan. (Pl. Ex.21A).

In November 1995, Ms. Fern Panzer, a funeral director, and Frank Depalo, the cemetery grounds superintendent, began a study to assist in correcting spacing of grave sites in the West Palm Beach Cemetery. (Pl.Ex. 21G, T.25-26). The study team membership was handpicked by SCI Florida and later included Mr. Peter Hartmann, the manager of cemetery operations. (T.26-27). The team produced what is known as the "Panzer Book." Pl.Ex 1. The Panzer Book contains the team's assessment of where each person in the cemetery is buried, including garden, space and row number. The team engaged in a "painstaking and thorough" survey in which they tapped a metal probe into the ground to find the corners of a vault and to determine the location of a vault. (T.27-28).

By April 16, 1996, even before Ms. Panzer's team reported its finding, SCI Florida knew the "worst problems" at the West Palm Beach Cemetery "are the failure to have room for the spouses burials" and the "most common problem is the failure to properly place a burial in its correct grave." (Pl.Ex. 21G at 2-3). This information came from Mr. Peter Hartmann, the Manager of Cemetery Operations for the West Palm Beach and Ft. Lauderdale cemeteries. (Pl.Ex. 21G).

By June 12, 1996, Panzer's team determined approximately 130 families were affected by spacing problems in the Garden of Ben Gurion West. (T.31-32; Pl.Ex. 2 at attachment 3). Many

people were either buried in wrong spaces or one burial site intruded upon a plot owned by another client. (T.31-32). Except for the Garden of Reuben the team physically checked each grave in every garden in the West Palm Beach cemetery in order to determine the exact location of prior burial vaults (T.27-28). In Ms. Panzer's opinion, the spacing problems documented by the team had a "domino" effect or "mushroom [ed]" and increased with time, because selling continued despite the problems. (T. 56).

**B. Defendants had knowledge inadequate spacing was an on going problem affecting burials.**

Ms. Panzer's conclusion a "domino" effect existed in reference to the spacing problems was corroborated by several individuals, including Mr. Tom Chaney, a former cemetery manager of Menorah Gardens West Palm Beach. Mr. Chaney testified the spacing was off in all the gardens in the West Palm Beach Cemetery except in the Garden of Abraham. (T.289-290). In Mr. Chaney's judgment, there were entire rows which were off in their spacing throughout all the gardens. (T.289). It was "hit or miss," whether there was going to be room for a new burial. (T.289-290). Mr. Chaney estimated in at least 25% to 30% of the time the gravediggers had a problem fitting a new burial vault in the space designated in a contract. (T.290).

According to Gravedigger Claude Etienne, finding inadequate space for a burial vault happened "pretty often." (T.90-91).

Mr. William Richmond, a salesman at the West Palm cemetery, was aware of the spacing problems by virtue of his familiarity with the cemetery records and from walking the grounds. (T.146-147).

**C. Defendants intentionally broke vaults.**

As a result of the spacing problems, the grounds crew broke vaults next to existing burial plots in order to create room for new burials plots. One example of the way spacing problems were handled is the burial of Frances Gold. There, a gravedigger was told by cemetery manager Mr. Bob McKay to "do what you got to do to get it [the burial vault of Frances Gold] in there." To comply with this command, the vault of Lt. Col. Hyman Cohen was broken. (T.294-295). Lt. Col. Cohen's remains, and the remains of others, were dug up, taken in the back area of the cemetery and left in the woods. (T.295). Plaintiffs' proffered the results of DNA testing conducted by the Florida Department of Law Enforcement which confirmed the bones found in the woods behind the West Palm Beach cemetery were those of Lt. Col. Cohen.

Plaintiffs also proffered an FDLE test of another set of human remains found in the woods, which tests determined such remains to be those of Mr. David Wells. DNA testing on a third set of remains found behind the woods has not been completed.

Defendants' breaking of vaults was not isolated to the Lt. Col. Cohen incident. Mr. Chaney testified he had seen vaults broken with a backhoe and sides of vaults were caved in to make room for another vault. (T.291). As Mr. Jerome Hyppolite put it:

They were putting the graves so close that there was no space. And we used to report it to the bosses. They would tell us to chip off a piece off each side to create space.

(T.176-177). Mr. Hyppolite recalled at least three occasions in which vaults were broken.

(T.178-179) When Mr. Hyppolite and another employee, Mr. Charlie Albert, could not fit a new burial next to an existing one, they informed their supervisors. (T.178-179, 179-180). The supervisors told them to break the sides of the vaults to make room for new burials. (T.180).

Mssrs. Hyppolite and Chaney's descriptions of breaking vaults due to a lack of space were corroborated by Mr. Claude Etienne, another of the grounds crew. According to Mr. Etienne, in the three-year period he was employed at West Palm Beach, approximately 1,000 vaults were cracked. (T. 103-105). "[N]ot one day would pass without a vault having to be cracked." (T.104). On at least three occasions Mr. Etienne was ordered by his supervisor, Mr. Frank DePalo, to remove an existing grave in order to make room for a new burial. (T.112). On one occasion when Mr. Etienne was digging a grave at the instruction of his supervisor, Mr. DePalo, he uncovered what he thought to be a human skull. (T. 102-103). Mr. DePalo instructed him to cover it with dirt and throw it in the dump. (T.103).

Breaking open neighboring vaults was the most common solution to the frequently reoccurring spacing problem. Some vaults were accidentally broken because of tight spacing and use of a backhoe to open a new grave site. The back hoe was also used to break open the neighboring vault. According to Mssrs. Etienne, Chaney and Hyppolite, in the course of breaking a vault, parts of the remains in the broken vault were dug up by the backhoe and unceremoniously discarded.

The grounds crew was not only ordered to break open vaults, knowing the remains inside would be disturbed, they were also ordered at times to **toss out the buried remains**. The court is satisfied the sum total of record evidence establishes knowledge by management of the described practice.

**D. Due to Defendants' mismanagement of the cemeteries, there are "mystery graves" in which the identity of the person buried is unknown.**

Another result of the Defendants' acts and omissions regarding the handling of the cemeteries is the presence of "mystery graves." Vaults were found in more than one section of

the cemetery in which the identity of the remains could not be ascertained. (T-292,305,508-509).

The Florida comptroller's investigation confirmed the existence of inept, insufficient and inaccurate records of interment. The comptroller's office confirmed people were buried in the wrong site and graves were not properly identified. As a result of these defalcations, it is unknown whose remains are in each grave. (T.267; Pl.Ex. 9).

"Mystery graves" were also found by the court appointed examiner. (Pl.Ex.17).

**E. The Defendants' poor record keeping aggravated the problems at Menorah Gardens.**

Mr. Frucht, an area vice-president for SCI Florida, admitted there were problems with the record keeping at Menorah Gardens. (T.502).

On September 29, 1998, Ms. Panzer sent a memorandum to the General Manager of Cemetery Operations, Mr. Mitch Feld, and Cluster Manager/Area Vice-President, Ms. Rita Conway in which she pointed out deficiencies of the office staff and inaccuracies, mistakes, and untimeliness of their paperwork. (Pl. Ex.10K). Ms. Panzer's memorandum notes burial numbers missing from the interment and work orders. Work orders were given to the grounds crew only on the day of a funeral, sometimes within hours of a funeral, thereby creating confusion for the grounds crew. More importantly, any changes in the location of the burial were not reflected in the interment records, the work orders, or the burial book. (Pl.Ex. 10K).

The Comptroller found record keeping to be, at the least, inaccurate at both the Ft. Lauderdale and West Palm Beach cemeteries. (T.255, 214). Mr. Rusty Scott admitted the records at Menorah Gardens were problematic. It took him approximately four or five hours to reconcile just one burial. (T.766).

**F. SCI Florida had on-going knowledge of the problems but did not correct them.**

On October 24, 1997, over a year after the June 1996 report, Ms. Panzer sent a memorandum to Mr. Jack Maginnis, the Palm Beach Cluster Manager, emphasizing the problems in Ben Gurion West. (Pl.Ex. 2). According to the report, of the 136 burials in Ben Gurion West, 44 were in the incorrect spaces. (Pl.Ex.2 at 2).

The Ms. Panzer reported there were families buried in plots owned by other families. There were many situations where one spouse was buried but there was not enough space available to bury the second spouse. (Pl.Ex. 2 at 2).

On March 5, 1998 a focus group composed of management level officials convened to discuss the land use problems at Menorah Gardens. (Pl.Ex. 101). The focus group: Mssrs. Jack Maginnis, the Cluster Manager/Area Vice-President; Peter Hartmann, Manager of Cemetery Operations for both cemeteries; Ed Aleman; Stuart Greenblatt, West Palm Beach Location Manager; Joe Kalish, who was subsequently appointed Location Manager for the West Palm Beach location; Jim Benard; and Jerry Peck, Area Sales Director.

The document memorializing the meeting of the focus group states:

On March 4, 1998 a Focus Group was brought together to discuss land use problems at Menorah Gardens. The location has consistent and ongoing problems with interments. These problems cause a significant amount of confusion to those that we serve and present potential liabilities to our firm.

(Pl.Ex. 101). The land use problems referred to included the problems documented in the June 1996 report and in Ms Panzer's memorandum to Mr. Maginnis in October 1997. (Pl.Ex. 2; Pl.Ex. 2 at attachment 3).

The focus group recommended Defendants take the following actions: (1) hire someone to make an accurate plat map of the cemetery; (2) contact those clients who could not be buried

in the plots they had purchased; (3) sell only to families with pre-need contracts in certain sections of Ben Gurion West until an accurate plat map was produced; and (4) develop the Garden of Abraham as soon as possible and divert all sales there. The focus group concluded an emergency situation existed. (Pl.Ex. 101). Defendants implemented none of the solutions set forth by the focus group. They continued to sell in areas which they knew were fraught with problems.

On July 29, 1998 a meeting was held to “once and for all clearly identify the land use problems in existence and agree on an expedited course of action to resolve them.” It was “imperative that immediate action be taken to correct these problems.” Moreover, an “Action Plan” was developed and was “currently being implemented.” (Pl.Ex. 21H at 2). The Plan contained deadlines for resolving the problems. (Pl.Ex. 21H at 2). The deadlines in the Action Plan passed without any significant implementation of the Action Plan.

On November 9, 1998 another memorandum was written, the purpose of which was to determine whether the Action Plan had been implemented. (Pl.Ex. 21H at 1). A handwritten note from Mr. Tim Claiborne asks: “What happened to the action plan?” (Pl.Ex. 21H at 1). A January 28, 1999 memo from Ms. Panzer to the general manager discussed the on-going problem with inadequate burial spaces and inaccurate burials. She recommended procuring an accurate map of the cemetery, tapping and measuring the cemetery to locate all used burial sites, sending a letter to each family whose plot was in question, and contacting SCI’s legal department for guidance on how to proceed once an accurate map of the graves and burials had been accomplished. (Pl.Ex. 3). In a February 20, 1999 memorandum to Ms. Cheryl Godbout, the General/Area Manager, and to Mr. Mike Levy, the location manager in West Palm Beach, Ms.

Panzer noted paperwork errors resulted in grave markers being put on the wrong graves, and Ben Gurion West "continues to be an albatross." (Pl.Ex. 10N).

Between April 27, 1999 and October 13, 1999, eighteen memoranda documenting the spacing problems in Ben Gurion West were sent by Ms. Claire Rosenfeld to either Ms. Cheryl Godbout, General Manager of Cemetery Operations, Mr. Hugh Curran, Location Manager, or Mr. Jeffrey Frucht, who was an Area General Manager at the time. These memoranda document numerous instances of burials in incorrect spaces, an inability to inter a deceased's loved one next to the decedent upon the death of the survivor, and inaccurate record keeping. (Pl.Ex. 101P-Y; Pl.Ex. 10AA-HH).

The same problems existed at the Ft. Lauderdale Cemetery. An internal memorandum from Mr. Pete Hartmann to Mr. Doug Lazarus on April 16, 1996, although expressly directed at specific problems at the West Palm Beach location, makes clear many of the problems in Palm Beach existed at Menorah Gardens in Ft. Lauderdale. It states: "Both cemeteries had only limited pinmarkers ever placed and they are all either out of location or buried beyond retrieval....However, at both locations, there has been more guess work than measurement in the location of the burials." (Pl.Ex. 21G). The memorandum goes on to state: "The most common problem is the failure to properly place a burial in its correct grave. Both cemeteries have used previous burials as the landmark for locating ongoing burials. However, since the earlier burials were not correct in many cases, they have just been compounding the problem over the years." (Pl.Ex. 21LG).

An internal memorandum to Ms. Catrina Murray to Mr. Noel Merwarth on June 5, 1996, similarly notes the same conditions appear at both cemeteries: "In both cemeteries, land gardens

were originally laid out with 36" graves. As you know, our vaults are 34". Not much room for error." (Pl.Ex. 21B).

Mr. Jeffrey Frucht, the Area vice President for SCI Florida and former Vice-President of the South Florida Jewish Group, testified the proper course of action was to inform the affected families when the spacing problem was discovered. (T.494). Mr. Frucht stated if the Defendants had accurate information about the spacing problems by 1996, the families should have been immediately informed and corrective action should have been taken then. (T.494-495).

Plaintiffs' cross-examination of Mr. Ralph D'Amato, Defendants' expert, established Defendants' decision to address the problems on a case-by-case basis was improper. Mr. D'Amato was asked to assume 1) the 1995 due diligence memo indicated numerous wrong burials and inadequate spacing; 2) Panzer's team conducted a methodical search of the West Palm Beach cemetery by probing and tapping and determined that there were numerous and systemic spacing problems; 3) SCI's management was given the information; 4) the 1998 focus group met and discussed how to deal with the problems; and 5) no action was taken to correct the problems by SCI. Assuming these facts to be true, Mr. D'Amato acknowledged Defendants should have taken action when they first saw the problem. (T.1354-1355). Instead, Defendants dealt with the spacing problems on a "case-by-case" basis. SCI Florida addressed the spacing problems at the time of death with the affected families. (T.51-52, 1466)

**G. SCI Florida was monitored by, and it adhered to policies established by, SCI Houston.**

SCI Houston sets policy for its cemeteries and conducts internal audits of all its cemeteries, including SCI Florida. (T.652-653). The Audit consists of verifying whether burial procedures are being followed, a procedure which includes a determination the blind checks of

the grave sites, which should be done before a burial, have been performed correctly.

(T.652-653). SCI Florida's reporting of interments goes directly to SCI Houston. (T.593).

SCI Florida's license renewals with the State of Florida for operating the cemeteries are completed by SCI Houston. (T.647-648). Corporate filings for SCI Florida filed with the State of Florida are completed by SCI Houston. In corporate filings with the State of Florida, the addresses listed for SCI Florida's corporate officers are at SCI Houston's headquarters. (Pl.Exs. 10D, 10H, 10KK, 10MM, 10NN; T.655-656). SCI Houston has business standards in place for the cemeteries. It ensures, on a periodic basis, those standards are being met. (T.652-653). Area Sales Director for SCI Florida, Jerry Peck, testified the communications between SCI Florida and SCI Houston can be "overpowering," including constant e-mails. (T.582). Close examination of the evidence reveals the regional cemeteries that compose SCI Florida are a *de facto* part of the SCI family. (T.635).<sup>4</sup>

#### **H. SCI Houston knew of the problems at the two cemeteries.**

SCI Houston knew of the spacing problems at the cemeteries as early as 1995 when the due diligence documents were completed for the purchase of Menorah Gardens. Mr. Dan Garrison, the Divisional President of SCI Florida at the time, participated in some of the conversations and negotiations leading to the acquisition of the Menorah Gardens cemeteries. (T.601, 614-615, 590). Mr. Garrison later became the Vice-President of North American Operations of SCI Houston. (T.590).

SCI Houston trains the regional officers of its subsidiaries to notify it of any irregularities in the regional cemeteries. Legal issues are brought to the attention of SCI Houston's legal

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<sup>4</sup> SCI Houston also provides payroll services, human resource support services, and accounting services to SCI Florida. (T.626). SCI Houston has a procurement department for hearses, limousines, computers, officer supplies, safety equipment, funeral and embalming equipment. SCI Florida benefits by receiving goods and services through SCI Houston's procurement department, which has greater leverage because it buys on a much larger scale. (T.632-635).

department. The regional managers are informed of this requirement through meetings with and directives from SCI Houston. (T.595-596). SCI Florida followed established policy in reporting problems to SCI Houston as is readily seen in SCI Florida's memoranda. Plaintiffs' Ex. 21B is a memorandum from Mr. Noel Merwath to Ms. Catrina Murray regarding "Property Inventory at Menorah Gardens West Palm Beach and Ft. Lauderdale." It contains an attached request for new garden development, stating: "Current inventory of spaces are all 36" wide spaces. This is causing a lot of problems--please call." (Pl.Ex. 21B at 2). The development request from Mr. Pete Hartmann on April 25, 1996, has handwritten notations which indicate the development request was processed by SCI Houston's construction department. (Pl.Ex. 21B at 4-5) (bates stamped SCI/FL005557-SCI/FL005558).

The March 4, 1998, focus group concluded resolving the land use problems at Menorah Gardens was an emergency situation because of the legal liability which those problems might create. (Pl.Ex. 101 at 2). This potential legal liability is the type of information about which SCI Houston expected to be informed. (T.648).

As reflected in the following, on November 9, 1998, SCI Florida contacted SCI Houston specifically regarding spacing problems:

Back in July, we had issued an action plan to address such issues (attached). We have now received a proposal from a law firm to help us resolve this matter. Although we may be able to get some of this work done through Houston (such as drafting of waivers and releases), given the urgency of this matter, I recommend that we proceed with this proposal expeditiously.

(Pl.Ex.21H).

The referenced action plan was never implemented. A handwritten note from Mr. Tim Claiborne shows the link with SCI Houston, "Rita--This process must be coordinated with Houston legal." (Pl.Ex. 21H).

Mr. Garrison agreed any type of problem which might involve legal advice was a problem about which SCI Houston had to be informed. (T.647-648). He testified SCI Houston was to be contacted by its subsidiaries, including SCI Florida, regarding any irregularities in the cemeteries and any legal issues. (T.595-596, 632). SCI Houston provides significant legal services to SCI Florida through another subsidiary, SCI Management. The legal services include advice on how to avoid litigation and training programs on how to deal with consumers. (T.630-631). The regional officers and employees are instructed to notify SCI Houston's legal department if there is an issue which might involve a legal problem. (T.632). If a dispute arises with an employee or client, SCI Houston's legal department provides guidance to all regional cemeteries and funeral homes. (T.630-631).

SCI Houston's connection with the spacing problems is reflected in Ms. Fern Panzer's January 28, 1999, memorandum regarding the Ben Gurion West Garden Project. (Pl.Ex. 3). It is clear Ms. Panzer knew SCI Houston's legal department would have to be contacted about the spacing problems in Ben Gurion West. Her memorandum states: "SCI Legal Department will be contacted for input on how to proceed with findings." (Pl.Ex.3).

Mr. Garrison testified it was the "normal course of operation" for SCI Houston to be involved in an issue such as the Ben Gurion West Project. (T.649). This is reflected in Ms. Panzer's January 28, 1999 memorandum which specifically notes SCI Houston was to be contacted to obtain maps, stating: "Have new map enlarged and copies, with overlays (corrected version has been requested from Mr. Ron Ayler in Houston, map enlargement will be done

locally)." (Pl.Ex. 3). Mr. Garrison agreed the maps mentioned in Ms. Panzer's memorandum are the type Houston produces. (T.648-649).

SCI Houston's knowledge of the SCI Florida matters is borne out by SCI Houston's actions. In June 1999, Mr. Steve Mack, SCI Houston's vice-president of North American Operations, sent Mr. Rusty Scott to investigate spacing problems in Ft. Lauderdale. (T. 332, 610-612). Mr. Scott found an absence of lot pins in several gardens. (T.334-336). Lot pins are used as a reference point in conjunction with burial records to determine who is buried where. (T.334-336). Mr. Scott told Mr. Mack there were spacing issues which concerned him. (T.610-612). His report discusses the lack of pinning and recommends Menorah Gardens stop selling spaces until the problems were corrected. (T.341-342, 347). He also recommended a new survey and map for the Ft. Lauderdale location be created. (T.342). Mr. Scott's findings and his report to Mr. Mack confirmed the existence of spacing and burial problems which had been previously documented in the March 1995 due diligence memoranda, which memorandum was written when Defendants purchased the cemeteries.

**I. The Comptroller's Report corroborates the existence of these problems.**

After the class action complaint was filed on December 19, 2001, the West Palm Beach and Ft. Lauderdale branches of the Comptroller's office investigated both Menorah Gardens cemeteries. The West Palm Beach Comptroller's report states:

The investigation of the burial records of Menorah Gardens indicated systemic problems in the seven gardens where ground burials are performed. It was also evident to the examiners that the problems existed when SCI became licensed with the Department to operate Menorah Gardens on or about March 16, 1995. It is also evident to the examiners that SCI recognized that the problems existed as early as calendar year 1996, if not earlier. *Not only did SCI not correct the problems, they allowed them to continue, with full knowledge*

*that problems were being compounded.* The examiners reviewed numerous burial cards, owner's cards, at need and preneed contracts, work orders, customer files, burial books, and Menorah Gardens' inventory maintenance data base and determined that the records did not agree with the physical verification of the grave space. The examiners also discovered that Menorah Gardens maintained a comments field in their inventory maintenance database that actually tracked burial mistakes that were in direct conflict with their burial cards (Exhibit 13). *Menorah Gardens knowingly sold the same burial space to two different families, created burial spaces that do not exist on the cemetery map(s), installed grave markers incorrectly, and failed to accurately account for burials.* (emphasis supplied)

(P.Ex. 9 at 14-15). The report also found violations of Florida Statute §§ 497.0255, 497.233, 497.309(1), and 497.515(7).

The Ft. Lauderdale report closely resembled West Palm Beach's report. (Pl.Ex.6). The investigation of the burial records indicated "systemic problems" in the six gardens sampled. (Pl.Ex. 6 at 1). *The report concluded SCI knew of the problems as early as 1996, but "[n]ot only did SCI fail to correct the problems, they continued operations knowing that such would only compound the identified problems."* (Pl.Ex. 6 at 2). (emphasis supplied) It also notes "numerous burial records [did] not agree with the physical verification of grave space." (Pl.Ex. 6 at 3). Additionally, many grave markers were off as a result of which "if family members rely solely on the markers to identify their loved ones, they may actually visit the wrong space." (Pl.Ex. 6 at 4).

The Ft. Lauderdale report discusses some specific examples which illustrate the disarray at the Ft. Lauderdale location.

An example of this is seen in SCI's response to the Department of Banking & Financing regarding consumer complaint CP 19960600062 (Rosenfeld vs. Menorah Gardens & Funeral Chapels.). Southeast Florida Cluster Manager Douglas Lazarus responded that the issue arose in the Garden of Moses, when Thelma Rosenfeld passed away in 1996 and needed to be buried in space #38, next to her husband, who was buried in space #37 in June 1994. However, space #38 could not accommodate Thelma Rosenfeld because William Rosenfeld,

who is buried in Elijah, Block B., Lot I space #39, encroached on space 381 (Exhibit 35). He further explained that in or around April 1996, SCI disinterred Benjamin Rosenfeld from Elijah, Block B., Lot I space #37 and relocated him in the Garden of Solomon so that his wife could be buried beside him. He wrote that this was accomplished with the family's permission. However, our physical inspection reveals that a marker identified Fay Kliener as being buried in Elijah, Block B Lot I space #37. According to her lot card, she was buried on October 24, 1995.

In SCI's response to the complaint, they explained that a disinterment of space #37 was conducted but this does not agree with our physical inspection conducted on February 14, 2002. The probe of grave space #37 revealed the presence of a vault. Therefore the questions arise: Was a disinterment of grave space #37 performed? If so, who was disinterred? And additionally, who is now located in space #37? Furthermore, it is apparent that SCI's response to the Department is a misrepresentation of the facts surrounding the use of grave space #38.

(Pl.Ex. 6 at 3).

The report provides another example:

Upon our review of hundreds of burial cards, owners' cards, at need and preneed burial contracts, burial books and *status report*, we determined that numerous burial records do not agree with the physical verification of grave space.

For example, the *status report* shows that Moses, Block 3, Lot 1, Spaces #1 and 3 were sold to Celia and Jacob Sobel. A copy of the map provided by SCI's personnel of the Garden of Moses, and the marker on the ground shows Jacob Sobel's location as Garden of Moses, Block 3, Lot AA, space #3 and a probe of that location confirmed the presence of a vault (Exhibit 13).

This and other types of burial mistakes appear to be tracked in the comment field of the *status report*. Also it appears that this type of confusion is compounded by the creation of grave spaces that are not reflected on the status report. According to Area General Manager Dave Carroll, as a service to the family, grave spaces are created to allow family members to be interred next to each other.

(Pl.Ex. 6 at 3) ("*status report*" italicized in original).

The Court finds that Plaintiffs presented sufficient factual evidence establishing numerous spacing problems and the common cause of the problems at the Menorah Gardens cemeteries resulted from Defendants' inadequate record keeping as well as its actions and omissions regarding the spacing problems.

#### IV. CONCLUSIONS OF LAW.

Defendants' representatives admit global solution and resolution of the matters presented in this case would be most beneficial to all parties. (T.351.614). This Court agrees and finds Plaintiffs have met the prerequisites for class treatment set out in Fla. R.Civ. P. 1.220(a). Plaintiffs' equitable claims are properly certified under either Rule 1.220(b)(1) or (b)(2). The punitive damage claim is also certifiable under Rule 1.220(b)(1). The claims for money damages are certifiable under either Rule 1.220(b)(1), (b)(2), or (b)(3).

**A. The Rule 1.220(a) prerequisites to class certification are satisfied.**

Fla. R.Civ. P. 1.220(a) provides four prerequisites to class certification, i.e., numerosity, common issues, typicality, and adequate representation. *Union American Ins. Co. v. Rodriguez*, 696 So. 2d 1248 (Fla. App. 3d Dist. 1997); *Samples v. Hernando Taxpayers Ass'n.*, 682 So. 2d 184, 185 (Fla. App. 5 Dist. 1996).

In addition, the class representatives must have standing. Standing is satisfied when there is a genuine dispute between the class representative and the defendant. Here, Plaintiffs Light, Eisenberg, Prisco and Zimmer have a genuine dispute with Defendants arising out of the burial of their relatives at Menorah Gardens.

Defendants suggest the class is too broad because it encompasses both those who purchased pre-need contracts and those whose relatives are buried at Menorah Gardens. In the

opinion of the undersigned judge, all are affected by Defendants' mismanagement of Menorah Gardens. While the injury they sustained may be different, this does not justify failing to certify a class.

**Numerosity.** The first prerequisite of class certification is the members of the class are so numerous requiring separate joinder of each member is impracticable. Fla.R.Civ. P. 1.220(a)(1). "[I]mpracticable does not mean impossible." *Robidous v. Celani*, 987 F.2d 931 (2d Cir. 1992); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1381 (5th Cir. 1974). "[I]t refers to the difficulty or inconvenience of joining all members of the class." *Id.* A class with over 40 persons presumptively satisfied the numerosity requirement. *Feret v. Corestates Fin. Corp.*, 1998 WL 512933 (E.D. Pa. Aug. 18, 1998). Numerosity is certainly met when the class exceeds 100. *Kromnick v. State Farm Ins. Co.*, 112 F.R.D. 124 (E.D. Pa. 1986).

In the instant case, the number of potential class members exceeds 100. By Defendants' own admission and estimates, there are at least 73 "potential disinterments" in West Palm Beach alone. (Def. Ex. 6). Defendants admit there are at least 324 "potential reselects" in West Palm Beach, i.e., situations in which a space which has already been sold must be changed because there is either inadequate space for the burial or a companion burial needs to be disinterred. (Def. Ex. 6). Mr. Scott admitted there are 829 instances where a grave marker had to be moved because it was in the wrong location. (T.927-928). *See also* (Pl.Ex. 2 at 2 & attachment 3; Pl.Ex. 10I; Pl.Ex. 10P-101Y; Pl.Ex. 10AA-10HH; Def. Ex. 5; Def. Ex. 6). The number of problem burials has increased as years have passed. The Comptroller's reports amply corroborate the fact these cemeteries are rife with problem burials.

Plaintiffs' counsel, at the time of these hearings, already represent about 1400 individuals and families; even more have expressed interest in joining the class. Given these numbers,

separate joinder of each class member is impracticable. The alternative to class treatment is a thousand or more separate lawsuits. Defendants have cited no case holding such large numbers do not meet the numerosity requirement.

Although these numbers alone satisfy the numerosity requirement, other factors also favor class certification. See *Clauser v. Newell Rubbermaid, Inc.*, 2000 WL 1053395, at \*3 (E.D. Pa. July 31, 2000) (“When class size is large, numbers alone are generally dispositive”). The potential class members are geographically dispersed. They come from several states and throughout Florida. Judicial economy likewise favors class certification. The negative impact on this Court if over one thousand individual suits were filed is readily apparent. *Christiman v. American Cyanamid Co.*, 92 F.R.D. 441 (N.D. W. Va. 1981). Separate joinder of hundreds of plaintiffs is simply impracticable. See *Maner Prop., Inc. v. Siksay*, 489 So. 2d 842 (Fla. 4th DCA 1986) (over 350 potential class members). The Rule’s numerosity requirement has been met.

**Commonality.** The second prerequisite is that “the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class.” Fla. R.Civ. P. 1.220(a)(2). The threshold for “commonality” is not high; it simply asks whether there is a benefit to be derived from combined treatment of the class members’ claims. *Broin v. Philip Morris Companies, Inc.*, 641 So. 2d 888,890 (Fla. 3d DCA 1994). The standard is met if “resolution of the common issues affect all or a substantial number of the class members.” *Broin*, 641 So. 2d at 890.

“Claims which arise out of the same course of conduct by a defendant but in differing factual contexts may be pled as a class action if they present a question of common interest.” *McFadden v. Staley*, 687 So. 2d 357, 359 (Fla. 4th DCA 1997). Class treatment is permitted

when the class members share a common interest in the remedies sought as a result of a specified common course of conduct. *Id.* A common course of conduct generally yields common questions sufficient to meet the requirement of Rule 1.220(a)(2). As *Imperial Towers Condominium, Inc. v. Brown*, 338 So. 2d 1081 (Fla. 4th DCA 1976), teaches:

A class suit is maintainable where the subject of the action presents a question of common or general interest, and where all members of the class have a similar interest in *obtaining the relief sought*. The common or general interest must be the *object* of the action, in the *result sought* to be accomplished in the proceedings, or in the *question* involved in the action. There must be a common right of recovery based on the same essential facts.

338 So. 2d at 1084 (emphasis in original) (quoting *Port Royal, Inc. v. Conboy*, 154 So. 2d 734 (Fla. 2d DCA 1963)).

Here, Defendants' alleged management of the cemeteries and the spacing problems is the common focus in the case. Factually the claims are based on the same alleged practice or course of conduct. As part of their alleged mismanagement of the cemeteries: Defendants buried remains in the wrong locations; buried remains in a way which encroached on other plots; plotted and sold burial sites with insufficient space thereby creating situations in which there was not adequate room to place bodies in their proper location when the remains were ready for burial; broke vaults; desecrated remains; sold some plots twice; and failed to properly and accurately record who was buried where. The claims of the Plaintiffs and the class members arise out of the described common course of conduct. The class members likewise share a common interest in obtaining the relief sought by the complaint.

The following questions of law or fact are common to the class:

- a. Did Defendants properly handle the spacing problems at the Menorah Gardens cemeteries?

- b. Did Defendants desecrate remains and commit other wrongful acts as alleged in Plaintiffs' complaint?
- c. Are Plaintiffs and class members entitled to injunctive or equitable relief because they are subject to irreparable harm and have no adequate remedy at law?
- d. What type of court supervised injunction or equitable relief, if any, is appropriate?
- e. Was Defendants' conduct malicious, involving willful and wanton misconduct?
- f. Could Defendants have foreseen their conduct was substantially certain to cause mental anguish or resentment?
- g. Did Defendants knowingly make, published, disseminate, circulate or place before the public, either directly or indirectly, statements which were untrue, deceptive or misleading with respect to pre-need contracts they sold to Plaintiffs and class members in violation of Fla. Stat. § 497.103 Fla. Admin. Code R 3F-6.002?
- h. Have Defendants failed to maintain Menorah Gardens and Funeral Chapels in a reasonable condition, in violation of Fla. Stat. §497.103 and Fla. Admin Code R. 3F-6.002?
- i. Was Defendants' conduct intentional?
- j. Should the conduct of Defendants' be considered sufficiently outrageous to support a claim for intentional infliction of emotional distress?

The fact each class member's claimed injury is not the same does not bar a class action certification as the focus is on commonality of liability issues, not commonality of damages. *OCE Printing*, 760 So. 2d at 1043; *In re Carbon Dioxide*, 149 F.R.D. at 234; *United Nat'l Records, Inc. v. MCA, Inc.*, 101 F.R.D. 323 (N.D. Ill. 1984). Similarly, factual variations among the class members do not defeat commonality. *See Roman v. Korson*, 152 F.R.D. 101, 106 (W.D. Mich. 1993); *Christman*, 92 F.R.D. at 451. Commonality does not require complete identity of issues, *Arvida/JMB partners v. Council of Villages, Inc.*, 733 So. 2d 1026, 1030 (Fla.

4th DCA 1998); *Ellis v. O'Hara*, 105 F.R.D. 556,556 (E.D. Mo. 1985), or complete identity of the plaintiffs' claims. See *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978); *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524 (M.D. Fla. 1996); *In re Amerifirst Sec. Litig.*, 139 F.R.D. 423, 428 (S.D. Fla. 1991). Plaintiffs have sufficiently alleged and shown Defendants have engaged in a pattern of wrongdoing as part of a common course of conduct in mismanaging Menorah Gardens. See *Broin*, 641 So. 2d 888.

Moreover, this Court granted Plaintiffs' motion to add a punitive damage claim. A punitive damage claim can, in itself, establish sufficient commonality for class certification. See *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992); *Jenkins v. Raymark Ind., Inc.*, 782 F.2d 468 (5th Cir. 1986); *Sala v. National L.R.R. Passenger Corp.*, 1988 WL 84125 (E.D. Pa. Aug. 4, 1988); *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992).

**Typicality.** The third prerequisite is "the claim or defense of the representative party is typical of the claim or defense of each member of the class." Fla. R.Civ. P. 1.220(a) (3). Typicality "addresses the relationship of the class representatives' claim to the claims of the class members." *Broin*, 641 So. 2d at 892; *W.S. Badcock Corp. v. Myers*, 696 So. 2d 776 (Fla. 1st DCA 1996). Where the complaint relies on the same legal theories, seeks the same remedies, and is based on the same course of conduct by the defendant, typicality is satisfied. *Broin*, 641 So. 2d at 892. See *W.S. Badcock Corp.*, 696 So. 2d at 780; *McFadden*, 687 So. 2d at 359.

In this case, the legal claims asserted by Plaintiffs Light, Eisenberg, Prisco and Zimmer on their own behalf are the same as those they seek to assert on behalf of the class members. Defendants' alleged course of conduct is the same. The evidence demonstrates a common course of mismanagement of the same, or similar, problems manifested in different ways, i.e., burial sites sold where there was inadequate space, burials in the wrong location, burials which

encroach on another's burial site, burials on top of one another instead of side-by-side, burials head-to-foot rather than side-by-side, breaking and crushing of vaults, mingling of body remains, and discarding the remains. These manifestations all have a common denominator: poor record keeping, spacing problems at the regional cemeteries, and Defendants' failure to honor their obligation to properly manage and maintain Menorah Gardens. These facts may be adjudicated on a class-wide basis pursuant to the claims brought by the class representatives.

Neither the factual variations among class members nor a lack of complete identity in claims defeats typicality. *Powell*, 522 So. 2d at 70. See also *In re Cincinnati Radiation Litig.*, 187 F.R.D. 549, 553 (S.D. Ohio 1999); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378 (D. Colo. 1993); *Sala v. National R.R. Passenger Corp.*, 1988 WL 84125 (E.D. Pa. Aug. 4, 1988). It is not necessary for every issue to be raised by every class member or every class representative.

*Vulcan Society of Westchester County v. Fire Dep't of the City of White Plains*, 82 F.R.D. 379 (S.D.N.Y. 1979); *Herrmann v. Atlantic Richfield Co.*, 65 F.R.D. 585 (W.D. Pa. 1974). Rather, typicality exists when the class representative presents issues common to the class, and the class representative's position on those issues is not antagonistic to the position of other class members. *In re Cincinnati Radiation Litis.*, 187 F.R.D. at 553.

As previously stated, the class representatives' causes of action all stem from Defendants' poor record keeping and management of the spacing problems in the cemeteries. Plaintiff Light's mother and father were buried head-to-toe instead of side-by-side because of the spacing problems. Plaintiff Eisenberg's cousin was buried separately from his wife and in the improper space. Plaintiff Prisco's father purchased pre-need spaces; after her father was interred, she discovered there was insufficient space for her mother's burial in an adjacent plot. Plaintiff Zimmer purchased four burial plots on a pre-need basis; her mother was buried, but a subsequent

search for her mother's plot revealed it was not in the correct space and there may not be enough space to bury the others in the locations purchased. (Deposition Transcript of Gloria Zimmer dated 10/14/2, at 78-83). Given the class-wide applicability of the legal theories brought in this matter and the lack of antagonism between the claims of the class representatives and the class members, the Court finds the typicality requirement of Fla. R.Civ. P. 1.220(a)(3) has been met.

**Adequate representation.** The fourth prerequisite is "the representative party can fairly and adequately protect and represent the interests of each member of the class." Fla. R.Civ.P. 1.220(a)(4). This requirement is met "where the named representatives have interests in common with the proposed class members and the representatives and their counsel<sup>5</sup> will properly prosecute the class action." *Arvida/JMB Partners*, 733 So. 2d at 1030.

Adequate representation does not require each and every issue be raised by each and every member of the class or class representative. *Vulcan Society of Westchester County v. Fire Dep't of the City of White Plains*, 82 F.R.D. 379 (S.D.N.Y. 1979); *Herrmann v. Atlantic Richfield Co.*, 65 F.R.D. 585 (W.D. Pa. 1974). It simply requires the class representative's claims not be antagonistic to the class claims. To demonstrate a conflict of interest sufficient to bar class certification, defendants must show a conflict which is apparent, imminent and which involves an issue central to the case. *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472 (W.D. Pa. 1999). Speculative suggestions of potential conflict do not justify denial of class certification. See *Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 477 (E.D.N.Y. 2001); *Gruby v. Brady*, 838 F.Supp. 820.827 (S.D.N.Y. 1993); *Breedlove v. Tele-Trip Co.*, 1993 WL 284327, at \*7(N.D. Ill. July 27, 1993).

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<sup>5</sup> During the pendency of these proceedings Defendants stipulated the class counsel met the adequacy of representation requirement of Rule 1.220

Plaintiff Joan Light's mother and father, Edith and Sam Berenson, married 65 years, purchased, on a pre-need basis at Menorah Gardens in Ft. Lauderdale, (T.378-377) side-by-side burial plots. (T.378). Defendants did not bury the Berensons side-by-side; they buried the Berensons head to toe. (T.378-379). Defendants did not inform Light of their actions.

Plaintiff Shirley Eisenberg's cousin, Manny Goodstein, purchased a burial plot for his wife when she died and plot for himself on a pre-need basis at Menorah Gardens. The couple was to be buried side-by-side. (T.393,396). Mr. Goodstein was actually buried apart from Ann, his wife, (T.396,1203), without the knowledge of Ms. Eisenberg (T.396).<sup>6</sup> Defendants sold her a double headstone for both Manny and Ann even though the headstone could not serve its purpose since their graves were not parallel to each other. (T.396-398).

Plaintiff Carol Prisco's father, Meyer Goldstein, purchased two burial plots on a pre-need basis at Menorah Gardens so he and his wife could be interred side-by-side. (T.422,423). After Mr. Goldstein was interred, it was discovered there would be insufficient space to bury his wife next to him. (T.438). Ms. Prisco had to disinter her father's remains, ship them to New York, and purchase new burial plots so her parents could be properly buried. (T.424-425).

Gloria Zimmer purchased a pre-need contract for four burial plots for herself and her family. After her mother was buried, a subsequent search revealed her mother was not in the space purchased. (Deposition of Gloria Zimmer, dated 10/14/02 and filed with the Court on 11/12/02, at 78-83).

These facts do not suggest a conflict between the class representatives and the class members which is real, imminent, and substantial. None of the claims require Plaintiffs to prove a fact contrary to what a class member must prove to recover. They are all based on the same or

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<sup>6</sup> Eisenberg was the sole beneficiary of Mr. Goodstein's will. (T.392-292). Mr. Goodstein, a Holocaust survivor, treated Ms. Eisenberg as his daughter, after his own daughter died in a concentration camp. (T.392,398).

similar alleged behavior of Defendants. They all seek to hold Defendants liable for such conduct. All seek the same remedies and pursue the same legal theories based on this conduct. These common interests assure Plaintiffs will properly prosecute this action. *Broin*, 641 So. 2d at 892. Moreover, the class representatives have committed themselves to zealously prosecuting their legal claims on a class-wide basis in a manner designed to benefit all class members. The Court finds the typicality requirement of Fla. R.Civ. P. 1.220(a)(4) has been met.

**B. The Requirements of Fla. R.Civ. P. 1.220(b) are satisfied.**

Rule 1.220(b) establishes three alternative standards for class certification; a claim may meet more than one standard. This Court finds Plaintiffs' claims for injunctive relief meet the standards for certification under Rule 1.220(b)(1) and (b)(2). Their claim for punitive damages satisfies the standards for Rule 1.220(b)(1). Their claims for compensatory damages meet the standards imposed by (b)(1), (b)(2), and (b)(3).

**Rule 1.220(b)(1).** Rule 1.220(b)(1) allows class certification where

the prosecution of separate claims or defenses by or against individual members of the class would create a risk of either:

(A) inconsistent or varying adjudications concerning individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class not parties to the adjudications to protect their interests.

The purpose of Rule 1.220(b)(1) is to prevent the prejudice to parties which might arise if there are multiple suits involving the same subject matter. *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 396 (E.D. Pa. 2001). The first subsection, (b)(1)(A), is designed to

prevent prejudice to the defendant which might arise if the defendant is subject to inconsistent court orders; it applies when the plaintiffs seek to regulate the defendant's conduct. See *Feinstein v. Firestone Tire & Rubber Co.*, 535 F.Supp. 595, 600 n.5 (S.D.N.Y. 1982). The second subsection, (b)(1)(B), is designed to prevent prejudice to absent class members which might arise if a court determination in a case to which they are not parties might prejudice or impair their rights. 7A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure: Civil* § 1774 at 437 (2d ed 1986).

The risks addressed by (b)(1)(A) clearly exist here. The claims of the class members are overlapping. Multiple individual suits create a substantial risk of inconsistent rulings which could impose incompatible standards of conduct on Defendants. Courts might differ on whether injunctive relief was appropriate or on the extent or nature of the injunctive relief, making compliance by the Defendants with multiple injunctions impossible. This would expose Defendants to the risk of being held accountable to competing and incompatible standards of conduct. It is just such situation (b)(1)(A) is designed to prevent.

Plaintiffs also have equitable and injunctive claims which are entitled to class certification under Rule 1.220(b)(1)(B). The evidence demonstrates the remains of relatives of some class members are buried in plots owned by others. Those remains cannot be moved to the correct plot because another class member's relative is buried there. If one person's remains are buried in the wrong plot, it impacts not just the person improperly buried, but the rights of those who should be buried there. This Court cannot rule on one class member's claim without affecting or impairing the rights of others whose relatives are buried at Defendants' cemeteries, or the rights of those who have purchased plots which have not yet been used. Unless a class is certified, class members' rights will be impaired and decided without their interests being

protected--the very situation (b)(1)(B) is designed to address. See 7A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure: Civil* §1774 at 437 (2d ed. 1986).

Further, (b)(1)(B) is particularly apt when there is a "limited fund" for the payment of claims. See, e.g., *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 477 (S.D. Ga. 1991). Here, Plaintiffs have a claim for punitive damages, whereas the legislature has limited punitive damage awards in certain situations:

(2)(a) Except as provided in paragraph (b), punitive damages *may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages...*

(b) In subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior, the court may permit a jury to consider an award of subsequent punitive damages. In permitting a jury to consider awarding subsequent punitive damages, the court shall make specific finding of fact in the record to support its conclusion. In addition, the court may consider whether the defendant's acts have ceased. *Any subsequent punitive damage awards must be reduced by the amount of punitive damages awards rendered in state or federal courts.*

Fla. Stat. §768.73(2)(a) & (2)(b) (emphasis supplied).

Under this statute, if one plaintiff receives a punitive damage judgment, subsequent plaintiffs may find their punitive damage award reduced by prior punitive damage awards against the defendant. Thus, if this statute is applicable here, there is a limited fund for the payment of

punitive damages. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, *In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (2d Cir. 1984), applied the limited fund concept to punitive damages, stating:

*Nevertheless, there is a substantial probability that limited punitive damages may be allowed. If they are, it would be equitable to share this portion of the possible award among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule (b)(1)(B), non-class members who opt out under rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all.*

It is axiomatic that the purpose of punitive damages is not to compensate plaintiffs for their injury, but to punish defendants for their wrongdoing. In theory, therefore, when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction....*At the very least, a trial court in passing on future claims may admit evidence as to the payment of prior awards which may be used by a jury to reduce an award to a party seeking additional punishment for the same misconduct.... There is, therefore a substantial probability that "adjudication with respect to individual members of the class... would as a practical matter be dispositive of the interests of the other members not parties to the adjudication."* [ellipses by court] Accordingly, a class of all those described as members of the (b)(3) class are also certified under (b)(1)(B).

100 F.R.D. at 728. *See also In re First Commodity Corp. Customer Accounts Litig.*, 119 F.R.D. 301, 312 (D. Mass. 1987). The issue of whether punitive damages are warranted and, if so, in what amount, is entitled to class certification under Fla. R. Civ. P. 1.220(b)(1)(B).<sup>7</sup>

**Rule 1.220(b)(2).** Plaintiffs are also entitled to certify a class under rule

1.220(b)(2). This provision allows class treatment if

the party opposing the class has acted or refused to act on grounds

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<sup>7</sup> Plaintiffs have alleged 2 counts based on violations of ch. 497. Punitive damages under those counts may be governed by the common law, not § 768.73. *See* Fla. Stat. § 497.527 & Fla. Stat. § 768.71. The Court makes no such determination at this time, but will consider the issue when it is appropriately presented.

generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate.

Actions which seek declaratory, injunctive, or other equitable relief are appropriate under (b)(2) "when the party opposing the class has acted in a consistent manner towards members of the class so the actions may be viewed as part of a pattern of activity." *Ellis v. O'Hara*, 105 F.R.D. 556, 563 (E.D. Mo. 1985). In other words, (b)(2) certification of class claims for equitable or injunctive relief is proper when a defendant has adopted a consistent practice or pattern of behavior which the plaintiffs seek to alter. *Id.*

The evidence of record, if believed by a jury, strongly supports the proposition Defendants engaged in a course of conduct which is generally applicable to all members of the class. If the activity suggested by the present record is believed by a jury, it could find Defendants have consistently mismanaged the cemetery, engaged in a pattern of activity in which they kept poor records, forced burials in spaces too tight, buried remains in incorrect spaces, broke vaults, desecrated remains, and affected property rights related to the burial plots. The record evidence further supports, to the extent required to defeat a motion for directed verdict, the proposition the Defendants' documents confirm their general policy in operating the cemetery and selling pre-need burial contracts was to bury persons with little regard to the plot actually purchased. Defendants' documents, as well as testimony from its current and former employees, strongly suggest it was their general policy to take whatever actions were necessary for a burial, even if it meant crushing neighboring vaults, burying people on top of each other or in the wrong location, or desecrating neighboring graves and remains.

Given the record evidence of Defendants' practices, it is uncertain whether family members are buried in the proper location. It is equally uncertain whether the plots purchased by

class members but not yet used are actually available for use, whether other remains have been buried there, or whether remains are buried in such a way as to encroach upon that plot.

Defendants' actions have created substantial uncertainty as to the location of particular remains or their identity; this uncertainty applies equally to all class members. As a result, Plaintiffs' request for declaratory, injunctive, and equitable relief is appropriate for class certification under Rule 1.220(b)(2).

Suits seeking money damages may be certified under (b)(1) or (b)(2) when the money damages are incidental to the equitable claims. The principle of law announced in *OCE Printing*, 760 So. 2d at 1044, makes clear a claim for damages is incidental when the equitable relief sought is a real and important part of the remedy requested; i.e.

[T]he Defendants contend that the trial court abused its discretion in certifying the class under rule 1.220(b)(2) because the predominant relief requested is monetary. It is true that five of the six counts in the Plaintiffs' first amended complaint seek monetary relief. The remaining count seeks an injunction permanently enjoining the Defendants from engaging in anti-competitive conduct. Unlike the situations in the cases cited by the Defendants, the Plaintiffs' injunction count does not seek monetary damages through the roundabout method of an injunction requiring the disgorgement of profits. Rather, the Plaintiffs seek actual injunctive relief. Therefore, the trial court did not abuse its discretion in certifying the class under rule 1.220(b)(2).

Here, five out of the seven counts ask for equitable relief. The equitable relief requested is not a front for money damages; it is an important, if not paramount, remedy. In the opinion of this Court Plaintiffs cannot have a satisfactory conclusion to this suit without equitable relief. This Court finds the claims for money damages are also cognizable under Rule 1.220(b)(1) or (b)(2).

**Rule 1.220(b)(3).** Rule 1.220(b)(3) allows class certification of claims for money damages. *See Hessen v. Metropolitan Dade County*, 513 So. 2d 1330 (Fla. 3d DCA 1987).

Class treatment is appropriate under (b)(3) if: (1) questions of law or fact common to the class predominate over any questions affecting individual members of the class, and (2) a class action would be superior to other available methods for the fair and efficient adjudication of the controversy. Class certification "is appropriate whenever the actual interests of the parties can be served best by settling their differences in a single action." 7A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure: Civil* § 1777 at 516-17 (2d ed. 1986) (footnotes omitted). Where the case presents a common issue and all class members share a similar interest in obtaining the relief sought, class certification is appropriate. *See Love v. General Dev. Corp.*, 555 So. 2d 397 (Fla. 3d DCA 1999); *Port Royal v. Conboy*, 154 So. 2d 734 (Fla. 2d DCA 1963). The fundamental question is whether the group seeking class status is seeking to remedy a common legal grievance. 7A C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure: Civil* §1777 at 516-17.

**Predominance.** Here, the group aspiring to class status is seeking to remedy a common legal grievance. The focus at this stage of the proceedings is on liability, not damages sustained by individual class members. *Oce Printing Systems*, 760 So. 2d at 1043. The predominant issue at this point of this case is whether Defendants' handling of the spacing problems at the Menorah Gardens cemeteries was appropriate. The following questions of law or fact relevant to the liability issues are common to the class thereby satisfying the predominance requirement:

- a. Did Defendants properly handle the spacing problems at the Menorah Gardens cemeteries?

- b. Did Defendants desecrate remains and commit other wrongful acts as alleged in Plaintiffs' complaint?
- c. Are Plaintiffs and class members entitled to injunctive or equitable relief because they are subject to irreparable harm and have no adequate remedy at law?
- d. What type of court supervised injunction or equitable relief, if any, is appropriate?
- e. Was Defendants' conduct malicious, involving willful and wanton misconduct?
- f. Could Defendants have foreseen their conduct was substantially certain to cause mental anguish or resentment?
- g. Did Defendants knowingly make, published, disseminate, circulate or place before the public, either directly or indirectly, statements which were untrue, deceptive or misleading with respect to pre-need contracts they sold to Plaintiffs and class members in violation of Fla. Stat. § 497.103 Fla. Admin. Code R 3F-6.002?
- h. Have Defendants failed to maintain Menorah Gardens and Funeral Chapels in a reasonable condition, in violation of Fla. Stat. §497.103 and Fla. Admin Code R. 3F-6.002?
- i. Was Defendants' conduct intentional?
- j. Should the conduct of Defendants' be considered sufficiently outrageous to support a claim for intentional infliction of emotional distress?

Because the focus is on liability issues, the fact class members may be entitled to different damages, or the possibility Defendants may assert different defenses as to individual members, is not fatal to a class action. *W.S. Badcock*, 696 So. 2d at 780. Class certification is proper "notwithstanding that the extent of individual damages may differ." *McFadden*, 687 So. 2d at 359. If necessary, the court may, at a later date hold, mini-trials on damages after deciding all common liability issues. *Broin*, 641 So. 2d at 888.

This Court rejects Defendants' assertion common issues do not predominate over individual issues. Proof as to whether each class member bought a pre-need contract and, if so, the date of the purchase is ministerial. It is evidence which should be readily available from Defendants' own records. It does not require the type of extended and contested litigation which may preclude certification under (b)(3).

As to the misrepresentations, the same or similar advertisements and brochures were used by Defendants. Defendants provided the same guidelines to all the family service counselors who dealt with Plaintiffs, the class members or their deceased relatives.

Individual issues of reliance do not exist. The complaint does not have a count for fraud; it has claims for deceptive and unfair trade practices under Fla. Stat. § 407.445 and Fla. Stat. §501.204. Claims for deceptive and unfair trade practices are suitable for class treatment because proof of individual reliance is not an element of the claims. *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973 (Fla. 1st DCA 2000). *See also W.S. Badcock*, 696 So. 2d at 779; *Urling v. Helms Exterminators, Inc.* 468 So. 2d 451,453 (Fla. 1st DCA 1985); *Rollins, Inc. v. Heller*, 454 So. 2d 580,584 (Fla. 3d DCA 1984).

Whether Plaintiffs or the class members have relatives buried at Menorah Gardens and what the family relationship may be is also a ministerial matter. As with proof of purchasing a pre-need contract, it does not require the type of extended and contested litigation which may preclude certification under (b)(3).

The class member's personal relationship with the deceased, how often the class member visits the relative's grave and when the class member visited the grave, are matters which go to damages. Defendants' suggestion the class members with claims for intentional infliction of emotional distress must show they suffered emotional distress and the severity of the distress

suffers from the same flaw. These are all damage issues, whereas the focus on certification is liability. *OCE Printing*, 760 So. 2d at 1043; *Broin*, 641 So. 2d at 891. Thus, such issues do not preclude class certification under (b)(3).

**Superiority.** A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Factors which should be taken into account include: (a) the respective interests of each member of the class in individually controlling the prosecution of claims or defenses, (b) the nature and extent of any pending litigation to which any class member is a party and in which any question of law or fact controverted in the subject action is to be adjudicated, (c) the desirability of concentrating the litigation in the forum where the subject action is instituted, and (d) the difficulties likely to be encountered in managing the claim or defense on behalf of a class. These factors strongly favor class certification.

The class representatives will adequately represent the class members. Because they share a common interest in establishing Defendants' misconduct, the respective interests of each class member in individually controlling his or her separate claims or defenses is not great.

Class treatment would avoid needless duplication of discovery and trial because the liability findings would apply to all the class members. The alternative is thousands of individual lawsuits in which the same liability issues will be litigated and relitigated. The high number of prospective plaintiffs would clog the court system if individual lawsuits were initiated.

*Arvida/JMV Partners*, 733 So. 2d at 1030 (alternative to class action is "the courts would be clogged *ad infinitum* with the individual suits"). Moreover, the overlapping rights of each of the potential plaintiffs would make any remedy in an individual case problematic.

Litigation in this Court is desirable because the Menorah Gardens cemeteries are located in Broward and Palm Beach counties and managed out of Broward County, Florida.

Claims similar to those raised by Plaintiffs have been found suitable for class treatment by Florida courts under Rule 1.220(b)(3). *See, e.g., Lanca Homeowners, Inc. v. Lantana Casade of Palm Beach, Ltd.*, 541 So. 2d 1121 (Fla. 1988) (unconscionable rent increases and statutory violations); *Frankel v. City of Miami Beach*, 340 So. 2d 463 (Fla. 1976); *Autonation USA Corp. v. Miranda*, 789 So. 2d 1188 (Fla. 4th DCA 2001) (improprieties by used car dealer in sales to consumers; violations of consumer statutes); *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699 (Fla. 3d DCA 2000) (violations of Florida Deceptive and Unfair Trade Practices Act). What was true in those cases is equally true here.

The salutary purpose of the class action rule would be subverted if class certification is not granted. *See Broin*, 641 So. 2d at 891-92. Consequently, Plaintiffs' claims for money damages are appropriately certified under rule 1.220(b)(3). However, since Plaintiffs' claims for money damages are also certifiable under Rule 1.220(b)(1) or (b)(2), those subsections trump 1.220(b)(3). *See Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 119 (3d Cir. 1990); *Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978); *Robertson v. National Basketball League*, 556 F.2d 682,685 (2d Cir. 1977); *Schutte v. Maleski*, 1993 WL 218898, at \*11 (E.D. Pa. June 18, 1993); *In re Real Estate Title & Settlement Serv. Antitrust Litig.*, 1986 WL 6531, at \*10 (E.D. Pa. June 10, 1986); *Meyer v. Citizens & Southern Nat'l Bank*, 106 F.R.D. 356, 363 (M.D. Ga. 1985).

### CONCLUSION

The foregoing considered, it is thereupon,

ORDERED AND ADJUDGED:

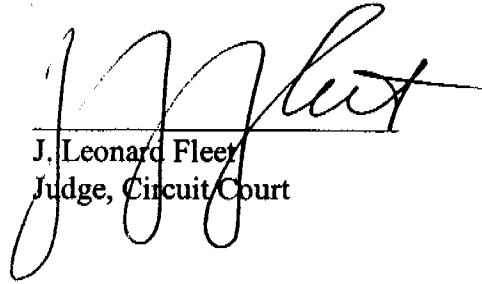
1. Plaintiffs' motion to certify the class is granted.
2. The class is defined as:

All persons with burial plots or family members buried at Menorah Gardens and Funeral Chapels located at 21100 West Griffin Road, Fort Lauderdale, Florida, 33322, and 9321 Memorial Park Road, West Palm Beach, Florida 33412, excluding all persons whose claims have been reduced to judgment or settled as of the date the class is certified, and Defendants' officers, directors, subsidiaries or any other person related to, affiliated with, or employed by Defendant.

3. Two sub-classes are hereby established:
  - a. Pre-need Class. This includes those whose claims rest on pre-need contracts which they or their deceased family members purchased.
  - b. At-need Class. This includes those whose claims rest on at-need contracts which they or a deceased family member purchased.
4. Plaintiffs' injunctive and equitable claims are certified under Rule 1.220(b)(1) and 1.220(b)(2).
5. Plaintiffs' claim for punitive damages is certified under Rule 1.220(b)(1)(B).
6. Plaintiffs' claims for money damages are certified under Rule 1.220(b)(2) and (b)(3).
7. Plaintiffs Joan Light, Shirley Eisenberg, Carol Prisco and Gloria Zimmer are appointed class representatives.
8. Ervin A. Gonzalez of Colson, Hicks, Eidson and Neal Hirschfeld of Greenspoon Marder Hirschfeld Rafkin Ross & Berger and their respective law firms are appointed as co-lead counsel for the class.
9. Within 30 days of this Order Plaintiffs will submit to this court for approval a proposed notice to send to all potential class members of the pendency of this suit pursuant to Fla. R.Civ. P. 1.220(d)(2).
10. Defendants will refrain from initiating direct contact with any class members about matters related to this litigation unless such contact is initiated by a class member and relates to burial services or other personal concerns of the class members.
11. Further sub-classes may be created in the future if necessary.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida, this

19 day of August, 2003.



J. Leonard Fleet  
Judge, Circuit Court

Copies furnished to counsel  
on the attached service list

## SERVICE LIST

### *Counsel for Plaintiffs:*

Ervin A. Gonzalez, Esq.  
Marc Cooper, Esq.  
Julie Kane, Esq.  
Maureen E. Lefebvre, Esq.  
COLSON HICKS EIDSON  
255 Aragon Avenue  
Coral Gables, FL 33134

### *Co-Counsel for Plaintiffs:*

Neal W. Hirschfeld, Esq.  
Kenneth J. Soble, Esq.  
GREENSPOON MARDER  
HIRSCHFELD, ET AL.  
Trade Centre So., Suite 700  
100 W. Cypress Creek Road  
Ft. Lauderdale, FL 33309

### *Counsel for Defendants:*

Barry Davidson, Esq.  
Samuel Dannon, Esq.  
HUNTON AND WILLIAMS  
1111 Brickell Avenue, Suite 2500  
Miami, FL 33131

### *Co-Counsel for Defendants:*

Dennis M. O'Hara, Esq.  
James Zloch, Esq.  
WICKER SMITH O'HARA  
MCCOY, ET AL.  
Southtrust Tower, Suite 500  
One East Broward Blvd.  
Ft. Lauderdale, FL 33302