



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

April 25, 2008

David A. Schwartz, Esquire
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019-6150

Re: *Service Corporation International, et al.*, Docket No. C-4174

Dear Mr. Schwartz:

This letter responds to the Motion For Extension Of Time (“Motion”) filed by you on behalf of Service Corporation International (“SCI”) in the above-captioned matter on May 29, 2007. The Commission has reviewed SCI’s Motion, as well as other available information, including that provided by SCI in supplemental submissions, its periodic reports of compliance and its petitions seeking approval of proposed divestitures. The Commission has also reviewed SCI’s efforts to divest as required by the terms of the Decision and Order (“Order”) issued in this matter.

For the reasons discussed more fully below, SCI has not met its burden under our Rules and the applicable legal standards to support the grant of its Motion. However, the Commission has determined in its discretion to take no action on SCI’s Motion in this instance and, with the reservations set forth below, will not seek relief for SCI’s late divestitures. The discussion herein may nonetheless serve to clarify and underscore the Commission’s standards and expectations regarding timely compliance with divestiture requirements, and what is required to make a showing of good cause to justify extending a divestiture deadline under the Commission’s Rules.

The Order issued by the Commission in Docket No. C-4174 on December 29, 2006, resolved competitive concerns arising from SCI’s acquisition of Alderwoods Group, Inc. SCI is the largest funeral home and cemetery operator in the United States and, prior to its acquisition in 2006 by SCI, Alderwoods was the second largest U.S. funeral home and cemetery operator. The acquisition raised antitrust concerns in a total of 35 funeral home markets and 12 cemetery markets located across the United States. In highly concentrated markets where both SCI and Alderwoods owned properties, the Order required SCI to divest 40 funeral homes and 15 cemeteries (“Order ¶ II.A properties”). In an additional six funeral home markets (“Dignity markets”) in which SCI did not own a property but operated through an affiliation agreement with another firm, the Order required SCI to either terminate the relationship with its affiliate or divest the competing Alderwoods property that it acquired in that market, potentially adding another eight funeral homes to the divestiture list (“Order ¶ III.A. requirements”).

The Order required SCI to divest the specified Order ¶ II.A. properties, and to comply with the Order ¶ III.A. requirements, no later than 180 days after the date of the closing of the SCI/Alderwoods acquisition, *i.e.*, by May 29, 2007. Prior to that deadline, SCI completed the divestiture of 31 funeral homes and 15 cemeteries, and terminated an agreement with one affiliated Dignity funeral home. However, SCI failed to divest 9 funeral homes required by Order ¶ II.A., and to terminate affiliate agreements or alternatively divest funeral homes in five Dignity markets, by the Order's deadline, the date on which it filed its Motion. On July 3, 2007, SCI filed its final application for divestiture, and on December 19, 2007, the Commission approved the last application. SCI has now completed all of the required divestitures.¹

In its Motion, SCI requests that the Commission extend the time for divestiture until September 10, 2007, pursuant to Section 4.3(b) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 4.3(b). Commission Rule 4.3(b) provides that "the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or order of the Commission." Under applicable precedent, SCI has the burden of demonstrating good cause, and granting an extension of time rests in the discretion of the Commission. *United States v. Swingline, Inc.*, 371 F. Supp. 37, 45 (E.D.N.Y. 1974). As the Commission's publicly-available guidance makes clear, failure to consummate the required divestitures within the time limit set by the Order (*i.e.*, not just file for approval) is a violation of the Order and can result in liability for civil penalties and other relief pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l).² The Commission has consistently held respondents to a high standard when considering whether to grant an extension of time to divest, and in doing so, forgoing its ability to seek civil penalties or other relief for the period of the extension. Good cause to extend the Order's deadline could include a persuasive showing of extraordinary or unforeseen circumstances not reasonably within a respondent's control that prevented the timely completion of the divestiture, or some harm that would result from denial of the motion. Conversely, indications of a respondent's lack of diligent efforts to complete a Commission-ordered divestiture as expeditiously as possible could negate assertions of good cause to extend the divestiture deadline.

SCI states in its Motion that it had worked diligently and aggressively to accomplish, and had made substantial progress toward completing, the divestitures and other requirements by the Order's deadline. SCI's Motion primarily relies on the fact that the Order required SCI to divest a large number of funeral homes and cemeteries in many different geographic markets as justification for its failure to complete all of the required divestitures on time. The Commission

¹ SCI has divested all of the Order ¶ II.A. properties (40 funeral homes and 15 cemeteries), and divested 6 funeral homes and terminated 2 Dignity Memorial Affiliate Agreements pursuant to the requirements of Order ¶ III.A.

²See Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, at 10 & n.30, www.ftc.gov/bc/bestpractices/bestpractices030401.htm.

has never found the number of required divestitures alone to constitute sufficient good cause for extending the time to divest. SCI expressly represented to the Commission in settling this matter that it could accomplish the full relief contemplated by the Order,³ and is presumed to have understood the obligations it undertook when it signed the consent agreement. The substantial number of divestiture applications that had been approved or that were pending as of the Order's deadline are an indication of SCI's diligence and efforts to comply, but this does not excuse SCI's failure to have *fully* complied by completing all of the required divestitures on time.

SCI also contends in subsequent submissions that its failure to divest certain of the funeral homes on time resulted from conduct by third parties beyond SCI's control, including competitive problems created by potential acquirers' ownership of other funeral homes in the relevant geographic markets, and delay in obtaining consents from third parties to assign contract rights. These circumstances, often encountered in divestitures, are neither extraordinary nor unforeseen so as to constitute sufficient "good cause" under Commission Rule 4.3(b) for extending the time to divest.⁴

Moreover, SCI's history and experience in selling assets and businesses similar to the divestiture properties and with the Commission's divestiture process indicate that it was fully capable of complying with its Order obligations in a timely manner. According to SCI's filings with the Securities and Exchange Commission, SCI has sold several hundred similar properties in the recent past. For example, following an initiative announced in 2000, SCI sold over 500 funeral service locations and cemeteries in North America by year-end 2001.⁵ SCI's sale of funeral home and cemetery assets and businesses continued over the next few years: in 2002, it sold or otherwise disposed of over 700 funeral homes and 24 cemeteries,⁶ and in 2003, it sold or

³Paragraph 12 of the Agreement Containing Consent Orders executed by SCI states:

By signing this Consent Agreement, Proposed Respondents represent and warrant that they can accomplish the full relief contemplated by the attached Decision and Order (including effectuating all required divestitures, assignments, and transfers).

⁴ For example, SCI knew that the Order required it to obtain all third party consents necessary to divest the assets. *See* Order ¶ II.D.

⁵A comparison of SCI's 2000 Form 10-K (filed 3/30/01) with its 2001 Form 10-K (filed 3/28/02) reflects that the overall number of funeral homes SCI operated was reduced from 3611 locations at year-end 2000 to 3099 locations by year-end 2001, and the number of cemeteries it operated was reduced from 569 properties at year-end 2000 to 475 properties by the end of 2001.

⁶Compare SCI's 2001 Form 10-K with its 2002 Form 10-K (filed 3/17/03): the number of SCI's funeral homes was reduced from 3099 in 2001 to 2393 by the end of 2002, and the number of its cemeteries was reduced from 475 in 2001 to 451 by the end of 2002.

otherwise disposed of over 168 funeral homes and 34 cemeteries.⁷ Thus, SCI has demonstrated by its own recent conduct that it had the ability and means to complete all of the divestitures required by the Order in a timely manner. SCI has also been a respondent to several past Commission orders that required divestitures,⁸ indicating that it was sufficiently familiar with the Commission's divestiture process to have anticipated and planned for the kinds of situations and delays that arose in this case so as to assure timely divestitures would nonetheless occur.

For the foregoing reasons, SCI has not demonstrated that its divestiture efforts prior to the divestiture deadline were sufficient to justify the relief requested. Nor has SCI identified any harm, such as harm to the public, if the Commission denies the Motion. After careful consideration, however, the Commission has determined in its discretion to take no action on SCI's Motion. The Commission has also determined to take no further action at this time regarding SCI's failure to comply with the Order's divestiture deadline, but reserves the right to take such action as further inquiry or future conditions may indicate is warranted.

By direction of the Commission.

Donald S. Clark
Secretary

⁷Compare SCI's 2002 Form 10-K with its 2003 Form 10-K (filed 3/15/04): the number of SCI's funeral homes was reduced from 2393 in 2002 to 2225 by year-end 2003, and the number of its cemeteries was reduced from 451 in 2002 to 417 by year-end of 2003.

⁸*See, e.g.*, Docket Nos.C-3869 (SCI acquired Equity Corporation International; upfront divestiture of 14 funeral homes and cemeteries to Carriage Services, Inc.) (1999); C-3579 (SCI acquired Uniservice Corporation; post-order divestiture of 2 funeral homes, 1 cemetery and 1 crematory) (1995); C-3440 (SCI acquired Sentinel Group, Inc.; post-order divestiture of 7 funeral homes) (1993); C-3372 (SCI acquired Pierce Bros.; post-order divestiture of 4 funeral homes) (1992).