

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MONUMENT BUILDERS OF PENNA., INC.: CIVIL ACTION  
Plaintiff

V. :

THE CATHOLIC CEMETERIES :  
ASSOCIATION, INC., et al. :

Defendant : NO. 99-2030

**CARACAPPA, J.**

**MEMORANDUM OPINION**

**1. FACTUAL BACKGROUND**

This litigation involves numerous disputes spanning more than two decades of a troubled business relationship. Plaintiff, Monument Builders of Pennsylvania ("Monument"), brings this action to enforce two settlement agreements against the Catholic Cemeteries Association ("CCA"). Monument is a trade association of independent monument builders doing business in the Commonwealth of Pennsylvania who sell products for the memorialization of the deceased.<sup>1</sup> CCA is

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<sup>1</sup>The most common product is a monument, or upright stone, which is generally made of granite, and is carved, inscribed, and installed in cemeteries. Monument also sells memorials that are flush with the ground. Both monuments and memorials are installed in cemeteries by digging a foundation, pouring cement, and then placing the monument or memorial on the foundation. A marker (memorial) marks a grave site, is made of bronze or granite, and is placed over a poured cement or cement block foundation and installed flush to the ground. A monument marks a grave site, is generally made of granite, is placed on a base on top of a foundation of poured cement or cement blocks, and rises above the

a nonprofit corporation affiliated with the Catholic Diocese of Pittsburgh. CCA owns and operates fifteen cemeteries in the Pittsburgh metropolitan area.<sup>2</sup> CCA employs a sales force of "counselors" to sell monuments, memorials, items for memorialization and accompanying services, cemetery plots, and the opening and closing of graves. CCA also owns and operates mausoleums, selling crypts and accompanying products and services for the entombment of the deceased.

In 1984, Monument and other monument dealers,<sup>3</sup> filed a class action suit against CCA and all other Catholic cemeteries in Pennsylvania,<sup>4</sup> claiming that CCA sold memorials and monuments in an anti-competitive manner. On July 25, 1989, the parties entered into

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grave site. It may be of the upright or slant variety.

<sup>2</sup>The fifteen cemeteries have approximately 1,000 developed acres and 300 undeveloped acres. CCA conducts approximately 4,000 burials a year.

<sup>3</sup>Abington Monument; William J. Cartledge Sons, Inc.; Fieldstone, Inc., d/b/a Design Monuments; Easton Memorial Company; Gallagher Memorials Co., Inc.; Harold D. Sausser Memorials; Sausser Monument Works; Watters Memorials; Earl Wenz, Inc.; H.C. Wood, Inc.; Martin Caufield Memorials Works; Copeland Granite & Marble Works; Wisinewski Memorials; Urbach Monumental; Everett Marble & Granite Works, Inc.; and Kurtz Monument Co.

<sup>4</sup>Catholic Cemeteries Association of the Diocese of Scranton; St. Catherine's Cemetery; Cathedral Cemetery; Holy Cross Cemetery; St. Michael's Cemetery; New St. Joseph Cemetery and Mausoleum; Holy Trinity Church, d/b/a Calvary Cemetery; St. Elias Cemetery; St. Joseph Cemetery; Holy Trinity Cemetery; CCA; Ukranian Catholic Cathedral of the Immaculate Conception; Catholic Cemeteries of Lawrence County; Harrisburg Catholic Diocese; and Holy Family Parish Church Cemetery.

a settlement agreement ("1989 Agreement"), which was designed to create a fair competitive environment for the sale of monuments, memorials, and other items for memorialization.

Ten years passed, then in 1999, Monument<sup>5</sup> initiated the underlying suit against CCA and certain other cemeteries<sup>6</sup> claiming that CCA sold markers and memorials in an anti-competitive manner in violation of the 1989 Agreement, and that CCA should be estopped from selling markers and monuments. On October 5, 2001, Monument and CCA entered into a second settlement agreement ("2001 Agreement") which was approved by this court.<sup>7</sup> It supplemented and

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Individually and as assignee of the claims of Fieldstone, Inc., d/b/a Design Monuments; Carlini Brothers Co., Inc.; Kurtz Monument Co.; Paul Gropelli Memorial Co., Inc.; J.H. Ferri & Co., Inc.; Phillips Monument Co., Inc.; Donatelli Granite Co.; and Grundler Monument Com., Inc.

<sup>6</sup>Catholic Family Security Association, Inc.; Braddock Catholic Cemetery; Calvary Cemetery; Good Shepherd Cemetery; Mount Carmel Cemetery; New St. Joseph Cemetery; North Side Catholic Cemetery; Our Lady of Hope Cemetery; Queen of Heaven Cemetery; Resurrection/Holy Souls Cemetery; Sacred Heart Cemetery; St. Mary Cemetery; and St. Stanislaus/St. Anthony Cemetery.

<sup>7</sup>CCA specifically stated at page 1 of this agreement that it entered into such in order to terminate the litigation entitled MBPA v. The Catholic Cemetery Association, et al., EDPA at No. 99-2030, without the admission of wrongdoing or liability on the part of any party. It further stated that it entered into the agreement to "avoid protracted, time consuming, and potentially expensive litigation and to address prospective aspects of the relationship between them and MBPA. . . ."

Paragraph 10(c) states:

"In the event that an action is to be brought to enforce any of the provisions of this Agreement or the Class Action Agreement, the parties agree that the party seeking enforcement

amended, but did not revoke, the 1989 Agreement.<sup>8</sup>

On January 1, 2002, CCA promulgated new rules and regulations ("Regulations") with respect to installations of monuments at its cemeteries. CCA asserts that it did so in an attempt to be in accord with both Settlement Agreements, and formulated the Regulations by conducting a comprehensive internal review of its previous practices, rules, and regulations affecting memorialization to ensure the effective operation of CCA's cemeteries. Barely a month later, on February 5, 2002, Monument filed this instant enforcement action,<sup>9</sup> alleging that the Regulations undermine its ability to compete in the sale of monuments, memorials, and other items for memorialization. Monument

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("Complaining Party") shall first send by certified mail a letter to the party allegedly violation the Agreement ("Responding Party") enumerating in detail the claimed violations of this or the Class Action Settlement Agreement. The Responding Party shall have (30) days from the receipt of the Complaining Party's letter to respond. The parties agree to use thirty (30) days thereafter for good faith efforts to resolve all claims. If such efforts fail, the Complaining Party may bring an action to enforce and shall request and the Responding Party shall consent to expedited consideration and mediation of the claim before a Magistrate Judge of this Court. In any enforcement action, whether by mediation or litigation, the prevailing party shall be awarded its reasonable counsel fees and expenses."

<sup>8</sup>See Paragraph 4 of the Stipulation and Settlement Agreement.

<sup>9</sup>Monument first set forth forty-one (41) claims in detail in a letter dated January 23, 2002 from its counsel, Mitchell Kramer, Esquire, to CCA's counsel, Brian Must, Esquire. Monument specifically incorporated these forty-one claims (41) into its first petition for enforcement by reference.

argues that the Regulations increase the cost and amount of time spent by outside dealers who conduct business in the CCA cemeteries, thus placing dealers at a competitive disadvantage and in direct violation of the spirit and text of the Settlement Agreements.

In the enforcement petition, Monument detailed forty-one (41) alleged infractions, primarily focusing on the Regulations which were allegedly designed to escalate the time and cost required for Monument to install monuments in CCA cemeteries. Conversely, CCA averred that its Regulations comply with the Settlement Agreements. CCA contends that Monument's claims are baseless because the Regulations apply equally and uniformly to all parties,<sup>10</sup> and are otherwise reasonable.

In June 2002, Monument filed an Amended Petition to enforce the provisions of the Settlement Agreements.<sup>11</sup> CCA asserts that this Amended Petition fully withdrew nineteen (19) claims and

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<sup>10</sup>CCA filed a response and addressed, in order, all of Monument's forty-one (41) claims. The matter then went to mediation before the Honorable Jacob P. Hart of this court. Mediation sessions were held on March 14, 15, and May 2, 2002. On May 2, the mediation efforts failed and Monument indicated to Judge Hart that they wished to advance some new claims. On this date, Judge Hart granted them leave to file an amended petition.

<sup>11</sup>CCA asserts that many of the claims made by Monument in the first petition have been abandoned in the Amended Petition after Monument received the benefit of extensive and expensive legal research and factual investigation reflected in its response and participation in the mediation sessions. CCA further states that Monument's actions in abandoning several claims was prompted by the "fee-shifting" provisions of the 2001 Agreement that entitles the "prevailing party" to its fees and costs related to claims upon which it prevails.

partially withdrew two (2) additional claims of the original forty-one (41) claims advanced in the original petition.<sup>12</sup> Each party asserts that it should be determined to be the "prevailing party," thereby granting attorneys fees and costs pursuant to the fee shifting arrangement.<sup>13</sup>

We first state that the sole purpose of the proceedings before this court is to determine if the settlement agreements that were executed between the parties in 1989 and 2001 were violated. As the Honorable Stewart Dalzell of this court stated in a related action, Monument Builders of Pennsylvania, Inc. v. American Cemetery Association, et al., No. 84-3014 at plaintiff.2 (July 9, 2002), quoting Harris v. City of Philadelphia, 137 F.3d 209, 209, 212 (3d

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<sup>12</sup>CCA's response to the Amended Petition lists at least nineteen (19) claims that they argue Monument withdrew. They then go on to reassert and incorporate by reference its responses to the first petition and then give responses to claims that it contends are raised for the first time in the Amended Petition.

<sup>13</sup>With so many claims raised, withdrawn, and reasserted, it was a challenging task for this court to ascertain exactly what claims Monument still asserts. After a review of both petitions, we agree with CCA's position that Monument has, indeed, completely withdrawn nineteen (19) and partially withdrawn two (2) of its claims from the first petition. Instead of naming these claims word for word, we will identify them by their number in the first petition. They are claims 2, 4, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 30, 31, 32, and 41. Accordingly, we will not address the merits of such, and find that Monument has withdrawn them from our consideration.

In addition, we have chosen to address the remaining claims in the order that they appear in the original petition and then address Monument's new contentions.

Cir. 1998), “[W]e are mindful of Harris’s admonition that in this enterprise, ‘we must not strain the decree’s precise terms or impose other terms in an attempt to reconcile the decree with our own conception of its purpose.’”

As is readily apparent from the history of this matter, these parties have been through two extensive litigations over seventeen years, resulting in two hard-earned settlement agreements. Our purpose is to look at the language of the Agreements that the parties worked hard and long to enter, and determine if the agreements have been violated.

There exists a strong public policy of minimizing needless litigation. Darien Capital Management, Inc. V. Commonwealth of Pennsylvania, Public School Employees’ Retirement System, 700 A.2d 395 at 399. As such “the law favors the amicable settlement of controversies and it is the duty of the courts to encourage rather than discourage the parties from resorting to compromise.” Sanders v. Lawn Mut. Ins. Co., 168 A.2d 758, at 761. Ordinarily settlement agreements are determined using general principles of contract law Pulcinello v. Consolidated Rail Corp., 784 A.2d 122 at 124, and are deemed valid absent a clear showing of fraud, duress or mutual mistake. Felix v. Giuseppe Kitchens & Baths, Inc., 848 A.2d 943 at 947.

This court assumes that the Settlement Agreements were consummated in good faith to avoid needless litigation; created

without fraud, duress, or mutual mistake, and therefore bind the parties to the Settlement Agreements.

## **II. PRELIMINARY FINDINGS**

Before addressing each of Monument's claims individually, we first address the issue of the Regulations that CCA has promulgated, in general, and make some preliminary determinations.

Section 5(c)<sup>14</sup> of the 2001 Agreement clearly gives CCA the right to make Regulations, and states that they [Regulations] "may reasonably protect the legitimate concerns of the cemeteries without restricting the ability of Dealers to compete in the sale or installation of Memorials, foundations and other Items for Memorialization." Based on this clear language, we look at each Regulation challenged by Monument with an eye as to whether the

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<sup>14</sup>Section 5(c) of the 2001 Agreement provides:

"CCA will promptly provide Dealers who have requested, in writing, to be kept current with such information. . . with updated copies of its regulations dealing with the permissible size and locations of Memorials within each of its cemeteries, and with all rules and regulations, and Fees regarding Items for Memorialization. Such regulations may reasonably protect the legitimate concerns of the cemeteries without restricting the ability of Dealers to compete in the sale or installation of Memorials, foundations and other Items for Memorialization. CCA will also promptly provide such Dealers with a schedule of all Fees charged to Dealers and to Dealers' customers. Nothing herein shall require Defendants, or any of them, to disclose to Dealers any prices Defendants charge their own customers for Items of Memorialization."

Regulation "reasonably" protects the concerns of the cemeteries without restricting the ability of the dealers to compete.

Next, CCA asserts that the standard that this court should use in determining whether a challenged Regulation violates the settlement agreements is if such violates Section 5(j)<sup>15</sup> of the 2001 Agreement. This section states in relevant part that "[F]ees and regulations will be deemed reasonable if they apply equally to customers of Defendants and Dealers." We agree. Thus, we also look at any Regulation at issue as to whether it is applied equally to both sides.

Furthermore, with regards to the Regulations, Monument argued at trial that the Regulations are not specific enough and should include every bit of information necessary for a dealer to give a customer a final price on an initial contract. We reject this position. We find nothing in either settlement agreement which mandates or even infers that any Regulations that CCA intended to draft had to be all-encompassing, to include all possible rules and

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<sup>15</sup>Section 5(j) of the 2001 Agreement states:

"Dealers will not be prohibited, either directly or indirectly through the mechanism of unreasonable Fees or Regulation, from selling and installing all Items for Memorialization in CCA owned and operated cemeteries and mausoleums. Fees and regulations will be deemed reasonable if they apply equally to customers of Defendants and Dealers (emphasis added). Nothing in this subparagraph shall be deemed to amend, modify or rescind any provision of this Settlement Agreement or the Class Action Settlement."

regulations governing the sales, installations, maintenance, etc.  
. . . concerning items for memorialization.<sup>16</sup>

After a four-day bench trial, and upon consideration of the parties' pre-trial submissions, this court makes the following conclusions of fact and law.

### III. CONCLUSIONS OF FACT AND LAW

#### **1. CCA DID NOT VIOLATE THE 1989 AGREEMENT BY REQUIRING APPROVAL OF KIND, SIZE, TYPE, DESIGN, AND CRAFTSMANSHIP OF ALL MEMORIALS TO BE BUILT (CLAIM 1).**<sup>17</sup>

Monument first claims that:

"[T]he third paragraph of page 2 of the Rules as written would permit the CCA to determine what is and is not permitted in the way of items for memorialization at any time and to approve and not approve the use of such items at any time. This provision violates paragraphs 5(c) and (j) of the 2001 settlement agreement and paragraph 7(f) of the 1989 settlement agreement. Monument dealers must be given clear and complete rules and regulations specifying what they can and cannot do and such regulations may not be anti-competitive and must be the same as those required of CCA."

Page 3, paragraph 2 of CCA's regulations states that it:

"reserves the right at all times to prescribe and approve the kind, size, type, design, symbolism, craftsmanship, quality, and material of all items for memorialization installed in the cemeteries. All items for memorialization are subject to the approval of the Catholic Cemeteries Association."

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<sup>16</sup>We also find that Monument has not established that CCA has not been providing copies their rules and Regulations.

<sup>17</sup>Claim "1" refers to Monument's first claim in their original petition. In the Amended Petition, paragraphs 14 through 20 correspond to this claim.

As we have already determined above, we do not find that the settlement agreements intended for the Regulations to cover every specification of what the Monument dealers can and cannot do. We also reject Monument's position that CCA should not be left with any discretion as to what gets installed in its cemeteries as there is nothing in the settlement agreements which suggest such.

Moreover, Monument has offered no evidence at trial that CCA abused its discretion in rejecting any item for memorialization. In fact, Monument has failed to produce any evidence of any rejection by CCA.<sup>18</sup> Accordingly, we find that the Regulation itself is not unreasonable or violative of any agreement, and CCA has not exercised this Regulation in an unreasonable manner, or to the detriment of any Monument dealer.

**2. CCA DID NOT VIOLATE THE DEALER NOTIFICATION RULE OR THE FIVE DAY NOTIFICATION RULE BECAUSE BOTH REGULATIONS ARE PERMITTED UNDER THE 1989 AGREEMENT (CLAIMS 3 and 13).**<sup>19</sup>

Monument next argues that "[P]aragraph 5 on page 2 [of

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<sup>18</sup>Monument asserts in paragraph 20 of their Amended Petition that "since January 1, 2002, a number of items for memorialization sold by monument dealers, which conform to products installed in CCA cemeteries, have been rejected for installation by CCA." However, no evidence of such was produced at trial.

<sup>19</sup>These claims correspond to paragraphs 28 through 30 of the Amended Petition.

the Regulations]<sup>20</sup> would seem to indicate that the cemetery does not intend to follow the requirements of Paragraph 7(e) of the 1989 Settlement Agreement. That Agreement provides that a cemetery may not require more than 5 days written notice for installations.”

Initially, the challenged Regulation on its face does not violate the 1989 Agreement because it does not require more than 5 days notice (emphasis added). Next, and most important, Monument has failed to produce evidence that this is an unreasonable regulation under section 5(c) of the 2001 Agreement and/or was applied unreasonably to a Monument dealer. In fact, the trial evidence indicates otherwise.

Monument’s own witness, John Ferri, owner of J.H. Ferri and Company, a dealer of cemetery memorials, testified that he did “not have a problem” with sending in the five-day notification for the installation of a foundation (Tr. 210-212, 8/19/02). In response to the question whether the five-day process affects his

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<sup>20</sup>This Regulation states in its entirety:

The Cemetery provides a Dealer Notification Form to Comply with the [five (5) day] written notice. This form is available from the Cemetery. This form may be faxed, hand delivered, or mailed to the specific cemetery in which the dealer will be working. The date and time stamp on the fax, the date and time Dealer will be working. The date and time stamp on the fax, the date and time that the notice is hand delivered to the cemetery office, or the date and time that the cemetery office receives the notice in the mail will be used to determine the order in which the notice will be placed on the Dealer work schedule for the date requested.”

ability to competitively compete with CCA, Ferri answered "I find sometimes that the process goes smooth enough, sometimes there's a little dragging of the feet" (Tr. 233, 8/19/02).

Monument's witness, Gregory Havrilla, general manager for Fieldstone, Incorporated, a monument dealer, went even further and testified that CCA has never disapproved a five-day notice requirement to do work at one of their cemeteries. He added that the five-day period "makes it difficult to schedule installations around," but it has not cost his company any money (Tr. 45-46, 8/21/02).

In addition, CCA's witness, John Dioguardi, owner of Rome Monument Works, a monument dealer, testified that his company complies with all of CCA's regulations, always gives the five-day notice, and has never been rejected by them. He added that the Regulations have not harmed his business (Tr. 167, 8/21/02).<sup>21</sup>

**3. CCA MAY REQUIRE MONUMENT TO ADDITIONALLY INSURE AND INDEMNIFY ITS CEMETERIES (CLAIMS 4 and 5).**<sup>22</sup>

Monument next contends that there is no basis for CCA to refuse to permit dealers to perform services in CCA owned cemeteries

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<sup>21</sup>Monument also asserts in paragraph 30 of the Amended Petition that CCA failed to lay out locations of foundations within five days. They, however, have presented no convincing proof of such.

<sup>22</sup>These claims correspond with paragraph 32 of the Amended Petition.

unless a monument dealer carries and pays for insurance to protect CCA. Monument argues that the requirement is unduly burdensome, anti-competitive, prohibitively expensive, and would effectively drive monument dealers out of business.

CCA's Regulations require that Monument must "show current proof of liability insurance in the amount of at least \$500,000 to indemnify the Catholic Cemeteries Association,"<sup>23</sup> and that "each liability insurance policy<sup>24</sup> must name The Catholic Cemeteries Association of the Diocese of Pittsburgh, Inc., as an additional insured."<sup>25</sup>

First, as discussed earlier, the settlement agreements are not all-inclusive of all obligations of the dealers. CCA is permitted to reasonably regulate the dealers. We find that this challenged Regulation is reasonable and not violative of any settlement agreement. Importantly, Monument has offered no evidence substantiating their assertions that these insurance requirements are over burdensome, costly, and/or unreasonable.

Second, 6(h) of the 1989 Agreement clearly contemplates

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<sup>23</sup> Regulations (p.2, paragraph 6).

<sup>24</sup> Regulations (p.2, paragraph 7).

<sup>25</sup> Monument also asserts that CCA violates the Agreements by requiring the dealers to name the Diocese of Pittsburgh as an additional insured. This assertion, however, is misguided since the applicable Regulation on page 2, paragraph 7 clearly requires Monument to name the "Catholic Cemeteries Association of the Diocese of Pittsburgh, Inc.," to be named as an additional insured not the Diocese of Pittsburgh (emphasis added).

that dealers may be properly required to carry at least \$500,000 of insurance to indemnify the cemetery. This section states in relevant part that CCA agrees that they will not "[r]equire a performance or other bond to insure compliance with its rules and regulations when the Dealer maintains at least \$500,000.00 in liability insurance."

Essentially, Monument contests the Regulation requirement of "additional insured" certifications. Testimony showed this readily available at no extra cost. This court finds that even if it did cost more, insurance premiums are a practical and expected expense of business. Furthermore, the reasonableness of these regulations is illustrated by the testimony of fellow monument dealer, John Dioguardi. In response to the question, "[D]id you comply with CCA's regulation regarding the procuring of a certificate of insurance listing Catholic Cemeteries Association as an additional insured with respect to your general liability insurance policy?", Dioguardi responded "[A]bsolutely." He was then asked, "[D]id it cost you any money to do that? He answered, "[N]o. We had already been asked to do that by various other cemeteries owned by Cornerstone, for example, that those types of insurance needed to be in place" (Tr. 165, 8/21/02).

**4. CCA CANNOT REFUSE ACCEPTANCE OF PERSONALIZED CHECKS FROM MONUMENT'S CLIENTS TO PAY FOR THE MEMORIAL FOUNDATION CARE FEE (CLAIM 11).**<sup>26</sup>

CCA's regulation at page 3, paragraph 8 states that "all payments due to the Cemetery for work by Dealers must be on a Dealer's company check. No cash payments are accepted for such work. Personal checks from the family purchasing the memorial will not be accepted in such cases."

CCA's position on this Regulation is that they accept personal checks for their own work, but do not wish to bear the risk of accepting checks which may default from families whom they are not directly engaged in business.

Looking at this regulation under 5(c) and 5(j) of the 2001 Agreement, we find that this Regulation is both unreasonable and not applied equally to customers of CCA and Monument. Although CCA may bear the risk of a personal check, we do not believe that this is an overly burdensome one. In addition, it clearly violates 5(j) since it is not applied equally to customers of both. Thus we find that CCA must accept personalized checks from Monument's customers.

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<sup>26</sup>This claim corresponds to paragraph 33 of the Amended Petition.

**5. IN CONFORMITY WITH THE 2001 AGREEMENT, CCA MAY LIMIT THE HOURS OF OPERATION FOR MONUMENT'S EMPLOYEES WORKING ON ITS PROPERTIES (CLAIM 12).**<sup>27</sup>

Monument argues that CCA violated Section 6(d) of the 1989 Settlement Agreement<sup>28</sup> by establishing unreasonable hours within which independent monument dealers are permitted to perform work in CCA cemeteries. Specifically, Monument contends that "CCA improperly limits dealers' time to perform, complete, and have work inspected in their cemeteries from 8:30 a.m. to 3:15 p.m., Monday through Friday,<sup>29</sup> whereas CCA's field employees have been seen working in CCA cemeteries as early as 6:45 a.m. and as late as 7:30 p.m., as well as on Saturdays and Sundays."

We find that this Regulation does not violate the Settlement Agreements since Monument has not presented convincing evidence that this regulation is unreasonable, and not applied uniformly. Monument has offered testimony at trial that employees

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<sup>27</sup>This claim corresponds to paragraph 34 of the Amended Petition.

<sup>28</sup>This section prohibits CCA from scheduling installations by dealers "in a manner which is more stringent or burdensome than the manner in which installations are scheduled for performance by the cemetery itself."

<sup>29</sup>Regulation, p. 3. para. 9 states:

"All work must be conducted, completed, and inspected between the hours of 8:30 a.m. and 3:15 p.m. Monday through Friday. No work is permitted on Saturdays or Sundays. No work is permitted on New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day."

of CCA have been seen after hours working in CCA cemeteries, but such testimony has not established that these employees were doing work concerning the installations of memorials. Rather, this testimony only indicated that employees were seen doing maintenance work such as cutting grass.

Monument's witness, Maryann Phillips, owner of Phillips Monument Company, testified that on the Friday before Memorial Day, May 24, 2002, she was in New St. Joseph's Cemetery at about 7:30-8:00 in the evening to put flowers on relatives' graves when she saw men in the cemetery cutting grass and weed-wacking. She also testified that she saw "lettering men," and "their setting trucks" in New St. Joseph's after hours (Tr. 64-65, 8/19/02). On cross-examination, she acknowledged that the workers that she saw at 7:30 at night were not doing anything with respect to items for memorialization, and also could not say for sure that the man she saw doing lettering was doing so on a monument sold by CCA (Tr. 86-87, 8/19/02).

Monument's witness, Oriente Carlini, a partner in the monument dealer, Carlini Brothers Company, Incorporated, testified that he saw CCA's employees working after 3:15. However, he, like Ms. Phillips could only testify that he saw them cutting grass and doing maintenance work, and did not testify that they were working on memorials and/or monuments (Tr. 67-68, 8/20/02).

In addition, Monument has not produced any convincing

evidence that it is overly burdensome for its dealers to get its needed work performed in the CCA cemeteries between these hours. Thus, since there is no definitive proof that this Regulation is not applied equally to both CCA and the Monument dealers, we find that it does not violate the Settlement Agreements.

**6. CCA, IN ACCORD WITH THE 1989 AGREEMENT, MAY REQUIRE MONUMENT TO APPLY FOR A PERMIT AND REGISTER TO WORK ON ITS LAND (CLAIMS 14, 15, and 21).<sup>30</sup>**

\_\_\_\_\_It is next argued that:

“CCA has imposed unreasonable impediments to installation and constrained monument dealers’ activities by requiring monument dealers to go to the cemetery office to register; wait for a one day work permit; stop work and search for a CCA inspector when a foundation is dug and before it is poured; and go to the cemetery office and wait for an employee at the completion of work.”

\_\_\_\_\_ The Regulation, at issue, states that:

“[upon] entering a Cemetery to perform installations or any other work, Dealers must register at the cemetery office upon arrival at the Cemetery. Subject to fulfillment of the requirements of these regulations, a work permit will then be issued for the work to be done on each grave site. The work permit is valid for work on that day only. A new permit is required for each new day of work. No work will be permitted without a permit.”<sup>31</sup>

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<sup>30</sup>Claims 14, 15, and 21 will be addressed together in one section since that all deal with CCA’s regulations requiring work permits. These claims also correspond to paragraph 35 of the Amended Petition.

<sup>31</sup>Regulations (p.3, last paragraph).

In addition, page 4, paragraph 3 of the Regulations provides that "[U]pon completion of the days work, and prior to departure, the employee must report that work has been completed.

This court finds that these Regulations are reasonable under 5(c) of the 2001 Agreement. Monument has offered no convincing testimony or evidence establishing that such intended to harass dealers, and certainly no evidence that these Regulations have caused them undue hardship. In fact, the testimony of their witnesses establish that these regulations have caused them, at best, minor inconvenience.

In response to Monument's attorney asking him if CCA's regulations requiring him to stop at their office and get a work permit affects his ability to competitively compete with CCA for memorials, John Ferri stated "I find that the process goes smooth enough, sometimes there's a little dragging of the feet." He explained that the people in the office are interrupted by the telephone and other people standing in line, but he waits his turn. When asked how long has he had to wait, he responded, [I]t could be five, 10 minutes" (Tr. 233-234, 8/19/02). Gregory Havrilla also testified that it takes 5-10 minutes to get a work permit (Tr. 26, 8/21/02). In addition, CCA's witness, John Dioguardi testified that he gets the permit in less than five minutes, and added that "honestly, five minutes is no big deal" (Tr. 170, 8/21/02).

We conclude that obtaining a work permit is fair and

reasonable when performing work on another's property. Just as it is reasonable to expect Monument to check in before performing work, it is also reasonable that the dealers return to the office to report that they are departing and have performed their tasks for the day.<sup>32</sup>

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**7. CCA'S REGULATION REGARDING MEMORIAL FOUNDATION CARE FEES DOES NOT VIOLATE THE 2001 AGREEMENT (Claim 26).**

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Monument's contends that CCA's regulation labeled two on page 5 under "fees"<sup>33</sup> provides for a memorial foundation care fee

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<sup>32</sup>Monument's claim number 28 also deals with the requirement of a permit and the 5 day waiting period. In that claim, Monument asserts that page 6, paragraph 2 of the regulations under "fee" stating that "dealers will be notified when there has been layout and the requirement that dealers must register at the cemetery office and obtain a work permit," violates the 1989 Agreement. As discussed above, however, we find that both the requirement of a permit and the 5-day waiting period are reasonable and not in violation of either settlement agreement.

<sup>33</sup>This section states:

"A memorial foundation fee is also due for all foundations installed in the cemetery. This fee will be used for repairing and maintaining the integrity of the foundation. The memorial foundation care fee will be placed into trust. The income from the trust will be used for the repair and maintenance of the foundation. The memorial foundation care fee does not cover the replacement of any foundation lost to excavation for burial, nor does it cover care of any memorial or any item for memorialization attached to it."

which violates paragraph 5(b) of the 2001 Agreement.<sup>34</sup>

We, first, look to section 5(j) of the 2001 Agreement: Is this Regulation applied equally to both CCA and the monument dealers? The answer is "yes." Because it is applied equally, the Regulation is presumed reasonable. Monument has offered no evidence that this Regulation is not administered in the same manner whether the fee is collected from a CCA customer or a dealer customer. Thus, we find that CCA did not violate the spirit or text of the settlement agreements by evoking a Memorial Foundation Fee.

**8. CCA'S REGULATIONS PERTAINING TO THE DEPTH OF FOUNDATION HOLES AND SETTING REQUIREMENT ARE IN ACCORD WITH THE 1989 AGREEMENT (CLAIM 29).**<sup>35</sup>

Monument next asserts that CCA's Regulations regarding the depth of a foundation hole and inspection of such violate the 1989 Agreement. The Regulations provide that the depth of the foundation hole must be at least thirty-six (36) inches deep, and the

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<sup>34</sup>This section provides in relevant part:

In the event that CCA charges a Memorial care fee, it will charge customers who purchase Memorials from Dealers the same fee it charges those who purchase comparable Memorials from CCA. Such fees, if any will be trusted under the provisions of the Class Action Settlement governing trusting of fees. Customers who purchase Memorials from Dealers will, if charged such a fee, have the fee used for repairing and maintaining the integrity of the foundation. . . ."

<sup>35</sup>This claim corresponds to paragraphs 37 and 38 of the Amended Petition.

foundation must set for a minimum of twenty-four (24) hours.<sup>36</sup> As stated numerous times, CCA may promulgate regulations according to the 1989 agreement providing the specifications are reasonable. Here, the trial testimony supports a conclusion that the Regulations are reasonable and not contrary to any settlement agreements.

Dealer, John Ferri, specifically testified that he had no problem with any cemetery requiring a 24-hour waiting period in letting a foundation cure before putting a monument on it (Tr. 32-33, 8/20/02). Gregory Havrilla testified on cross examination that his cemetery had a 4-day curing waiting period (Tr. 95, 8/21/02). John Dioguardi testified that his company has always dug their foundations to 36 inches because "[W]e are putting in a product that is supposed to last forever" (Tr. 173, 1/21/02).

Monument has offered no convincing evidence that it has been unduly burdened by these Regulations. There was no evidence that such do not apply equally to CCA so as to enjoy the presumption of reasonableness. As John Dioguardi alluded to in his testimony, Memorials for the deceased are created to withstand the tests of time and nature. Requiring a 36-inch deep hole for a foundation and a twenty-four (24) hour curing period are certainly reasonable regulations to ensure the deceased's wishes, to be memorialized for eternity, are honored.

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<sup>36</sup>Regulations (p.7, last paragraph)

**9. CCA MAY, IN ACCORD WITH THE SETTLEMENT AGREEMENTS, GOVERN THE HEIGHTS OF UPRIGHT MEMORIAL AND THE ABILITY TO UPGRADE MEMORIALS ON THEIR PROPERTY (CLAIM 33).**<sup>37</sup>

Monument asserts that:

"The regulations of CCA on page 8 [of the Regulations] under 'upright memorials regulations' are anti-competitive in that they give the monument dealer no indication as to on what lots can exceed the maximum sizes set forth in the regulations be exceeded, in what lots are memorials installed at the foots of the grave and what standards there are for making these exceptions. Basically, the regulations as drafted give CCA a competitive advantage since its salesmen bend and change the requirements at will in order to sell customers whatever the customer wants whereas the monument dealer has no idea of what is permitted or where various things are permitted."

First, Monument has presented no evidence to support the bold statement that CCA's salesmen "bend and change the requirements at will in order to sell customers whatever the customer wants." Second, as we already determined, there is no provision in the 1989 and 2001 Agreements to require CCA to make regulations that are all encompassing and foresee all possible questions that might arise (emphasis added). Monument has produced no evidence that not having a comprehensive map or list of restrictions and variances provides any competitive advantage to CCA.

Moreover, Monument has offered no evidence that CCA's salespeople have more information and/or have easier access to information than its dealers. In fact, Monument witness, John Ferri, testified that since the October 2001 settlement, there has

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<sup>37</sup>This claim corresponds to paragraphs 22 and 23 of the Amended Petition.

been "improvement in that inquiry process." In addition, he could only testify that he thought CCA could handle inquiries "differently," and not that he couldn't get information that he needed. He explained in his testimony that when a customer is interested in buying a monument to be installed in a CCA cemetery, he would call that particular cemetery and ask what is permitted, the rules and regulations, the section, lot, and grave number. In response to the question of whether he gets the information he needs from CCA cemeteries, he stated that "it's been a struggle," but since the October settlement there has been "improvement in that inquiry process." In response to the question of whether he gets "prompt answers to questions from the catholic cemeteries," he stated that "[T]hey are workable enough, but I think it could be handled better and differently" (Tr. 211, 8/19/02).

**10. THE REGULATIONS' SILENCE AS TO WHERE A FLUSH MARKER  
MEMORIALIZING A RECENTLY DECEASED SPOUSE IS TO BE  
PLACED WHEN BEING ENTOMBED WITH A PREVIOUSLY  
DECEASED SPOUSE DOES NOT VIOLATE THE AGREEMENTS  
(CLAIM 34).**<sup>38</sup>

Monument complains that:

"In the regulations, there is no guidance on how to deal with the situation of a flush marker on a single grave when the second to die passes away and is interred in the same plot."

While it is true that the regulations are silent as to

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<sup>38</sup>This contention corresponds to paragraph 21(b) of the Amended Petition.

whether the deceased's family may place a second flush marker at the foot of the grave so that both people may be memorialized, as already determined, we do not read the settlement agreements as necessitating regulations that foresee every possible situation that may arise. This is a situation that a dealer would simply have to contact the proper CCA personnel for answers. At trial, Monument presented no evidence that any dealer had ever contacted CCA with this question or a similar question and was not given a prompt response. In fact, as discussed in the section above, the testimony indicates that the dealers really did not have any problems getting information that they needed from CCA personnel. Thus, we find the Regulations' silent on this issue certainly did not violate the settlement agreements.

**11. CCA'S REGULATION REGARDING "SOLE DISCRETION" TO  
CHANGE DESIGNATIONS OF GRAVES FROM FLUSH MEMORIAL TO  
UPRIGHT MEMORIAL DOES NOT VIOLATE THE AGREEMENTS  
(CLAIM 35).**<sup>39</sup>

Monument's argues in relevant part that:

"The regulations on page 8 under 'general' allows [sic] the cemetery 'sole discretion' to change designations of the graves from flush memorial only to upright memorial. There is no way that a monument dealer can advise a potential customer what is permitted. . . . Moreover, there is no specificity as to the amount of the monument privilege fee."

We find that this Regulation is a reasonable one and does

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<sup>39</sup>This claim corresponds to paragraph 21(c) of the Amended Petition.

not violate either Agreement. As the property owner, we do not believe that it is unreasonable for CCA to retain discretion as to any change of memorials that go on their property. In addition, Monument has offered no evidence that any dealer encountered problems with CCA requesting such upgrades. Neither, was there any evidence of disproportionate or unequal application of discretion.

Annabelle McGannon, executive director of CCA, testified that [I]f there's no operational impediments to installing the upright memorial on the grave, then we're happy to grant the upgrade privilege." She went on to testify that, unfortunately, they no longer grant upgrades, including for its own sales force, because Monument made such an issue over them at an earlier mediation that they felt they could never defend themselves against a claim that they were giving upgrades in a discriminatory manner (Tr. 49-51, 8/22/02). Thus, although this now appears to be a moot issue, we find that CCA did not violate the settlement agreements by retaining this discretion.

In addition we reject Monument's assertion that "there is no specificity as to the amount of the monument privilege fee." The Regulation<sup>40</sup> is quite clear. It states, "[A]n upgrade from flush memorial grave to upright memorial grave requires the lot owner to pay the difference between the price of a flush memorial grave and a grave with upright memorial privilege (Monument Privilege Fee)."

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<sup>40</sup>Regulation at p. 9 under "General."

**12. CCA ACTED IN ACCORD WITH THE SETTLEMENT AGREEMENTS WHEN IT PROMULGATED THE REGULATIONS GOVERNING LETTERING, EMBLEMS, AND VASES FOR MEMORIALIZATION (CLAIMS 36 & 37).**<sup>41</sup>

Monument's next assertions read in relevant part that:

"The regulations dealing with mausoleum lettering are totally lacking in specifics. There is no way to know what can and can't be done since the regulations say that you must conform to CCA's requirements but that the requirements vary 'from one crypt front configuration to another within the same building'. . . . The \$15.00 inspection fee for all crypt front lettering is violative of paragraph 7(i) of the 1989 Settlement which prohibits any fees to be charged other than those specifically set forth in the settlement agreement. . . ."

Monument also claims similar violations of the 1989 Agreement. They allege that the Regulations for emblems/vases on page 9 of the Regulations is vague and that a \$15.00 inspection fee is not permitted.

First, as with specific information on variances and upgrades, information on crypt-front configurations and lettering of emblems and vases is readily available to both CCA's employees and dealers' employees at every cemetery office. In addition, we agree with CCA that it would be "administratively and economically impractical" to compile and publish all of this information in its Regulations. Moreover, as stated before, Monument has offered little or no evidence that any of its dealers have had difficulties obtaining information from CCA's offices.

Next, we find that the "Lettering Inspection Fee" and the

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<sup>41</sup>These claims correspond to paragraphs 21(d), 21(e), 27(a), and 27(b) of the Amended Petition.

"Emblems and Vases Inspection Fee" are permitted under paragraph 6(g) of the 1989 Agreement. This section clearly states that CCA may not "[C]harge a fee, except a fee based on its actual costs and overhead in accordance with general accounting principles, including a reasonable profit, to lay-out where layouts are performed, and to inspect the work product of Dealers of memorial foundation and installation services" (emphasis added). This is a permitted fee and at fifteen dollars, we deem it fairly based on costs and overhead, including reasonable profit.

**13. THE REGULATIONS PERTAINING TO PRIVATE MAUSOLEUMS ARE VALID AND IN ACCORD WITH THE SETTLEMENT AGREEMENTS (CLAIM 38).**<sup>42</sup>

Monument claims in relevant part that:

"[T]he regulations for private mausoleums on page 10 of CCA's regulations are so vague as to be meaningless. The fees to be charged to the monument dealers for erecting a private mausoleum are so excessive that they effectively subsidize the construction of a private mausoleum . . . Therefore, these regulations are violative of paragraph 5(j) of the 2001 Settlement Agreement."

We, however, find that provisions of the 1989 Agreement allow these fees, and that such do not violate 5(j) of the 2001 Agreement. Paragraph 5(b)(7) enables CCA to charge "a one time fee to its customers and lot owners for lot care on lots where foundations and/or memorials are installed so long as any such fee

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<sup>42</sup>This contention corresponds to paragraph 23 of the Amended Petition.

is uniform." Paragraph 5(b)(8) enables CCA to charge "a one time additional fee for the care of a memorial and lot."

Remember, the key phrase in 5(j) states that "[F]ees and regulations will be deemed reasonable if they apply equally to customers of Defendants and Dealers." Here, Monument has provided no evidence that these fees are excessive, unreasonable, and most important, are not "applied equally."

We further find that the listed specifications for private mausoleums are not vague. Specifications include minimum depth, type of reinforcement bar, spacing, and concrete p.s.i. There is nothing in the settlement agreements which mandates that regulations have to include all specifications. Therefore, this court determines that the Regulations governing the erection, cost, and upkeep of private mausoleums, as promulgated, are valid within the spirit and text of the settlement agreements.

**14. THE REGULATIONS PERTAINING TO THE SIZE, COMPOSITION, AND PLACEMENT OF BENCHES ARE IN ACCORD WITH THE SETTLEMENT AGREEMENTS (CLAIM 39).**<sup>43</sup>

Claim 39 of the original petition states:

"CCA's regulations on page 11 dealing with benches are violative of the provisions of the settlement agreement and are anti-competitive. There are no regulations or indication as to where benches may be placed. The foundations for benches are longer and wider than benches which is an unnecessary and unreasonable requirement which violates

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<sup>43</sup>This claim corresponds to paragraphs 21(f), 22, and 27(c) of the Amended Petition.

paragraph 5(j) of the 2001 Settlement Agreement. There is a provision for a bench privilege fee which violates paragraph 7(i)<sup>44</sup> of the 1989 Settlement since it is not a fee provided for in that settlement agreement. Moreover, the regulations do not inform the monument dealer of the amount of the bench privilege fee which violates paragraph 5(c) of the 2001 Settlement Agreement.”

Annabelle McGannon testified at trial that the type of bench that the Regulations are referring to is the type that is not intended to be used for memorialization at the head of a grave. Rather, benches are the type that are placed throughout a cemetery in specified areas for people to use as solely as benches. She added that these areas were not on current maps, but would be appearing on all future maps that would designate special sections where benches would be permitted. She clarified that a bench that is placed at a grave that is intended as a memorial like a headstone would not require any special permission or fees. She added that the bench privilege fee that the regulation refers to is the type not on the grave, and it is a fee a customer pays for the property or the right to put a bench on a piece of property that the bench sits on (Tr. 59-62, 8/21/02).

We find these clarifications and explanations reasonable. In addition, Monument has not produce any evidence that such fees

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<sup>44</sup>This section states that CCA may not:

“Charge the Dealer fees of any nature in connection with the foundation and/or memorial except as specifically provided in this agreement where installation thereof is performed by a Dealer.”

are excessive, and/or applied differently to its dealer's customers than those of CCA. We, therefore, conclude that CCA can charge a bench privilege fee for benches not used as memorials on their properties, and the amount of such would be discretionary as long as such is uniformly applied. CCA is encouraged to put the location of bench sites in all future cemetery maps if they have not already done so.

**15. MONUMENT HAS NOT ESTABLISHED THAT CCA "BUNDLES" ITS PRICES AND SERVICES IN VIOLATION OF THE 2001 SETTLEMENT AGREEMENT. EVIDENCE OF BUNDLED DISCOUNTS, HOWEVER, VIOLATES SUCH AGREEMENT.**

Monument claims in its Amended Petition that:

"CCA is bundling its prices and discounts to customers for products and services it offers, in direct violation of paragraph 6(j) of the 1989 Settlement<sup>45</sup> and paragraph 5(g) of the 2001 Settlement<sup>46</sup>. CCA is offering a single price for

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<sup>45</sup>This section provides in relevant part that [CCA] will not:

"Offer all pre-need sales only upon the condition that the memorial or foundation be purchased from the cemetery, make such memorial or foundation pre-need sales without each item or service being priced separately nor impose a condition that any one item or service may be purchased only if another item or service is purchased."

<sup>46</sup>Section 5(g) states:

"Prior to the time that a customer enters into an agreement to purchase Items for Memorialization from CCA, the customer must be shown and given an opportunity to review a document (which can be an unexecuted purchase agreement) listing every good and service and discount (including discounted or free financing) being offered, the price for each, and the fact that each item may be purchased separately. No discount of a plot, a right of interment, grave opening,

multiple products and services, and offering discounts off the sale of multiple products and services.”

Monument asserts that a customer must be shown and given an opportunity to review a document which can be an unexecuted purchase agreement listing every good and service discount including discounting or free financing being offered, the price for each and the fact that each such item may be purchased separately. In addition, they state that CCA is not permitted to condition a discount on a sale of an item that the dealers don't sell themselves,<sup>47</sup> and that the settlement agreements require CCA to itemize a sale even if the dealers do not sell that item or service. Monument also contends that CCA is “bundling” the cost of a creation vault with the cost for opening and closing a grave to entomb cremation remains.

In support of such, Monument offers the following deposition and trial testimony:

Ida Provost, a customer of CCA, testified at her deposition that she recalled receiving a unitary discount off a pre-need sale that encompassed the opening, closing, and sale of a

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and/or closing, perpetual care, or any other item or items not constituting Items for Memorialization also be purchased in order to receive such discount. Nothing contained herein shall prevent Defendants from discounting Items for Memorialization.”

<sup>47</sup>In other words, Monument claims that CCA is not permitted to tell a customer that he/she would be eligible for a discount on a total purchase price as long as he/she purchased an item/or service that a Monument dealer does not sell or provide.

memorial. She referred to a Retail Installment Contract and Security Agreement between her and CCA (attached to her deposition), which did itemized the items and services she was purchasing, but also reflected a general \$150.00 discount off the total purchase price. Ms. Provost stated that CCA's salesperson did not specify what was being discounted (Plaintiff's Exhibit 63, Provost deposition at 11-15, 37).

Suzan Kircher, a customer of CCA whose brother had died and was attempting to purchase a memorial to be placed on his grave, testified at her deposition that her understanding of the purchase agreement<sup>48</sup> she signed with CCA was that a total price of \$925.00 included the headstone with lettering, and anything else that would be needed to get the marker on the grave. She stated further that the agreement gave her a \$100.00 discount with no indication as to what was being discounted (Plaintiff's Exhibit 61, deposition of Kircher, at 6-8).

Sidney Franklin, a customer of CCA, testified at trial that a CCA salesman gave him a sheet that wrote out the things he requested- two graves, the vaults, and the memorial. A total price of \$7315.00 for such was written, less a discount of \$600.00 (Plaintiff's Exhibit 5). He noted that he was not told what was

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<sup>48</sup>In her deposition, Ms. Kircher refers to a purchase agreement number "86007." However, such is not attached to this deposition, and it was not on plaintiff's exhibit list dated August 9, 2002.

being discounted (Tr. 95-98, 8/19/02).

Dolores Bramhall, a secretary for Stiffler's Funeral Home, testified at her deposition that she contacted one of CCA's cemeteries, Calvary, and asked for a price for the interment of cremation remains of a deceased. She was then told that the price to do so would be the same with or without a vault (Plaintiff's Exhibit 59, Bramhall deposition at 9).

Philip Smith, a maintenance worker for Fieldstone, Inc, testified at his deposition that he met with a sales representative from New St. Joseph's Cemetery about an entombing of cremation remains. He stated that the representative said that the price of entombment would be the same whether or not he had his own vault (Plaintiff's Exhibit 60, Smith deposition at 8-9).

Charles Danforth, a funeral director at Striffler Funeral Home, testified at his deposition that he met with a representative of New St. Joseph's Cemetery about entombing cremation remains, and was given the same information (Plaintiff's Exhibit 58, at 8-9).

We first address the issue of whether CCA is bundling its prices. We will then discuss the issue of the discounts. We interpret bundling, in the context of the 2001 Agreement, as the practice of merging prices and services together without differentiating between them. The practice of bundling has the ability to discourage price comparisons between competitors. Without separating the prices and services, a customer lacks the

knowledge of the different prices which they are being charged, and they potentially would not have the necessary information to be able to "price shop" between competitors.

CCA asserts that they have followed the 2001 Agreement to the letter regarding bundling prices. They submit their form purchase agreement for Items for Memorialization as proof that they separately set forth their prices and discounts, and permit their customers to review such agreements prior to their purchase of goods or services.

A review of this form,<sup>49</sup> indicates that all or most of all of CCA's goods and services are itemized and would clearly be in accord with the 2001 Settlement. The question, here, is whether CCA uses this form in practice. The only evidence that Monument has offered that they do not is from Sidney Franklin who testified that he received a sheet from a CCA salesman listing items that he requested with a total price and discount. A review of such reveals that this sheet is not the form in question, but rather, is handwritten with prices on it. It, however, does itemize the items that Mr. Franklin requested with the individual price for each. In fact, it lists separate prices for two graves, two openings, vaults, and a memorial. Thus, we find that while CCA failed to use its price form in this instance, it did itemize its prices to Mr.

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<sup>49</sup>Attached to Defendant's response to plaintiff's Amended Petition as Exhibit 7).

Franklin. Alone, this does not establish that CCA, as a business practice, has been bundling prices.<sup>50</sup> Thus, we cannot find at this time that Monument has established a pattern of price bundling.

The same cannot be said for CCA's pattern of discounting. Monument has established with the above deposition and trial testimony that CCA is offering uniform discounts off the sale of multiple products and services. CCA is, in other words, giving general discounts without indicating what item or service is specifically being discounted. We find that this practice violates section 5(g) of the 2001 Agreement. In order to comply with such, if a discount is being offered, CCA must specify the item or service that is being discounted.

Lastly, Monument's claim that CCA is bundling the costs of an opening and closing of a grave for the entombment of cremation remains and the price of a cremation vault is without merit. Monument has certainly established through the above testimony that that CCA was, indeed, including the price of a cremation vault with the price of opening and closing the grave. However, what Monument should have discovered through any kind of simple investigation is that CCA charges the same amount for the interment of cremated remains whether or not a customer needs a vault. CCA requires a "rigid" container for the remains, but does not charge for such.

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<sup>50</sup>We also agree with CCA that services that they provide for no charge such as installation/setting services and monument lettering need not be itemized.

In fact, CCA does not require the use of a CCA rigid container. The customer can provide CCA with a rigid container from another source. In either case, there is no charge. Annabelle McGannon, CCA's Director, confirmed this at trial. She testified that CCA requires a rigid container for cremation remains, but a family is free to supply their own such container or CCA would provide one for no cost (Tr. 69-71, 8/22/02).

#### **IV. ATTORNEYS FEES**

As outlined earlier, the parties in this case spent over a decade litigating and mediating their disputes. This resulted in one hard-earned settlement agreement in 1989 and another in 2001. The parties, of course, entered into such with the intention of avoiding further litigation and involvement by this court, and more expenses. As CCA stated in paragraph two of the 2001 Agreement, "[T]hey are entering into this Settlement Agreement to avoid protracted time consuming, and potentially expensive litigation and to address prospective aspects of the relationship between them and MBPA related to, and covered by this lawsuit."

We repeat the procedural history of this matter to illustrate that the last thing that we would think that the parties would want to do regarding any disputes was to rush back into federal court thereby incurring more expense. The 2001 Agreement clearly intended to prevent this in paragraph 10(c). It states:

"In the event that an action is to be brought to enforce any of the provisions of this Agreement or the Class Action Agreement, the parties agree that the party seeking enforcement ("Complaining Party") shall first send by certified mail a letter to the party allegedly violating the Agreement ("Responding Party") enumerating in detail the claimed violations of this or the Class Action Settlement Agreement. The Responding Party shall have (30) days from the receipt of the Complaining Party's letter to respond. The parties agree to use thirty (30) days thereafter for good faith efforts to resolve all claims. If such efforts fail, the Complaining Party may bring an action to enforce and shall request and the Responding Party shall consent to expedited consideration and mediation of the claim before a Magistrate Judge of this Court. In any enforcement action, whether by mediation or litigation, the prevailing party shall be awarded its reasonable counsel fees and expenses."

That Agreement was approved on October 5, 2001. CCA's Regulations became effective January 1, 2001. As the above quoted paragraph provides, Monument was first required to sent a letter to CCA enumerating its claimed violations. CCA had thirty (30) days to respond. The parties were then to "use thirty (30) days thereafter for good faith efforts to resolve all claims." Here, on January 23, 2002, only a little more than three weeks after the Regulations became effective, Monument sent CCA's counsel a letter detailing forty-one (41) claims. However, instead of waiting thirty (30) days for CCA's response and then trying to resolve the claims for thirty (30) days thereafter as Monument was required to do under the Agreement, Monument filed the current Petition to Enforce The Provisions Of the Settlement Agreement on February 5, 2005.

It is apparent from the above that Monument initially violated the very Agreement that Monument asserts CCA did by not,

at least, attempting to resolve its claims in good faith within thirty (30) days after they received CCA's response. In addition, when Monument filed its petition, Monument merely incorporated the forty-one (41) claims from its letter into the Petition, word for word. Monument made no attempt to pare its contentions down to claims that had actual support. As a result, Monument later sought permission to file an Amended Petition after mediation sessions before Judge Hart on March 14, March 15, and May 2, 2002 were unsuccessful. In such Amended Petition, and presumably as a result of the court supervised mediation sessions, Monument withdrew at least nineteen (19), almost half, of its original forty-one (41) claims. Pursuant to the terms of the 2001 Agreement, CCA claims prevailing party status on those nineteen or more claims withdrawn after court mediation.

Moving to the remaining claims that were heard in trial, it is apparent from the above Findings of Law and Fact that we determined that the majority of Monument's assertions were completely unfounded and/or not supported by the evidence presented. CCA is clearly the prevailing party regarding such claims. At the same time, we determined CCA to have been in violation of the Settlement Agreements on two claims, including bundled discounts. Monument is the prevailing party with regard to those.

Pursuant to the 2001 Agreement, both parties are now entitled to petition for attorneys fees. However, they are not

required to do so.

We find it reasonable from the agreements of the parties themselves that paragraph 10 (c) of the 2001 Agreement continues to bind the litigants and applies at this stage of the enforcement litigation regarding the potential for attorneys fees. This is especially so given the nature of the findings here of mutual prevailing party status.

Accordingly, we hold the parties under a continuing obligation to comply with the specific provisions of paragraph 10 (c) should either actually seek an award of attorneys fees based on this opinion. Should either party decide to seek an award of attorneys fees, a petition may not be filed or heard before this court until a good faith effort to resolve these differences has proceeded under the detailed procedures established by paragraph 10 (c).

An order follows.