

Complaint

IN THE MATTER OF

**MISSOURI BOARD OF EMBALMERS
AND FUNERAL DIRECTORS**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4223; File No. 061 0026
Complaint, June 19, 2008 – Decision, June 19, 2008*

This consent order addresses a regulation issued by the Missouri Board of Embalmers and Funeral Directors, the sole licensing authority for the practices of embalming and funeral directing in Missouri, that limited the selling of funeral merchandise to duly licensed and registered funeral directors. This regulation deterred competitive entry into the retail sale of funeral caskets by discouraging non-licensed persons from selling funeral caskets to the public. The order prevents the Board from prohibiting, restricting, impeding, or discouraging any person from engaging in the sale or rental to the public of funeral merchandise, directly or indirectly, or through any rule, regulation, policy, or conduct. The order requires the Board to publish information that its rules do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles, or other funeral merchandise to the public in the State of Missouri, in its newsletter, on its website, and in professional publications. The Board must notify the Commission prior to any filing with the Missouri Secretary of State of any Proposed Order of Rulemaking concerning the Board's rules or regulations, or prior to proposing any change that may affect compliance obligations. The order also contains standard provisions requiring the filing of regular written reports of the Board's compliance with terms of the order.

Participants

For the Commission: *Joel Christie, Patrick J. Roach, and
Melanie Sabo.*

For the Respondent: *Jane A. Rackers, Missouri Attorney
General's Office.*

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Missouri Board of Embalmers and Funeral Directors has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

NATURE OF THE CASE

This case involves Respondent Missouri Board of Embalmers and Funeral Directors (the “Board”), which is the sole licensing authority for the practices of embalming and funeral directing in Missouri. The Board is composed of six members, five of whom must be licensed embalmers or funeral directors. At the time it adopted the regulation at issue in this matter, the Board included five licensed funeral directors. Funeral directors compete in the sale of funeral caskets at-need to consumers in Missouri. Respondent is authorized to promulgate, adopt and enforce rules that it deems necessary for the public good and consistent with the laws of the State of Missouri. The Missouri statute that created and empowered Respondent to regulate the professions of embalming and funeral directing includes a provision stating that its licensing qualifications and conditions (Mo. Rev. Stat. Chapter 333 (2005)) shall not apply “to any person engaged simply in the furnishing of burial receptacles for the dead.” Mo. Rev. Stat. § 333.251 (2005). The Board promulgated a regulation that defined the practice of funeral directing to include selling funeral merchandise on an at-need basis to consumers in the State of Missouri. This regulation deterred competitive entry into the retail sale of funeral caskets.

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RESPONDENT

1. The Board is an agency of the State of Missouri, established and existing pursuant to Mo. Rev. Stat. § 333.151, for the purpose of administering and enforcing Chapter 333 and portions of Chapter 436, Mo. Rev. Stat., and the regulations promulgated thereunder. It has authority to license and regulate those persons in the businesses of embalming and funeral directing in Missouri.

2. The Board's principal office and place of business is located at 3605 Missouri Boulevard, Jefferson City, Missouri, 65102-0423.

3. The Board is comprised of six members; one public member and five members that hold a license in either funeral directing or embalming, or both. Each member is appointed by the governor with the advice and consent of the state senate.

4. Except to the extent that competition has been restrained as alleged below, and depending on their geographic location, licensed funeral directors in Missouri compete with each other and with funeral director members of the Board in, among other activities, the sale of funeral caskets at-need to the public.

5. The Board is the sole licensing authority for those who engage in the business of embalming and funeral directing in Missouri. It is unlawful for an individual to practice or offer to practice embalming or funeral directing in Missouri unless he or she holds a current license to practice.

6. Under Mo. Rev. Stat. § 333.241 (2005), the Board is empowered to seek a court order to enjoin any person from engaging or offering to engage in any act that would require a license from the Board.

7. The unlicensed practice of embalming or funeral directing in Missouri may be prosecuted as a class A misdemeanor under Mo. Rev. Stat. § 333.261 (2005).

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8. The Board is a state agency and is a “person” within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

9. The acts and practices of the Board, including the acts and practices alleged herein, have been or are affecting “commerce” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44. In particular, funeral directors in Missouri purchase and receive funeral caskets and other funeral merchandise that are shipped across state lines by manufacturers and suppliers in other locations, transfer substantial sums of money that cross state lines in payment for that merchandise, perform funerals for residents of other states, and receive substantial sums of money that cross state lines in payment for funeral services and merchandise including funeral caskets. Furthermore, the regulation at issue deterred competitors in other states from selling funeral caskets to Missouri consumers at need, and affected interstate commerce in funeral merchandise in neighboring states.

10. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

THE CHALLENGED CONDUCT

11. The “practice of funeral directing” is defined in Mo. Rev. Stat. § 333.011(7) (2005) as “[E]ngaging by an individual in the business of preparing, otherwise than by embalming, for the burial, disposal or transportation out of this state of, and the directing and supervising of the burial or disposal of, dead human bodies or engaging in the general control or supervision or management of the operations of a funeral establishment.”

12. Mo. Rev. Stat. § 333.251 (2005) states that: “Nothing in this chapter shall apply to nor in any manner interfere with the duties of any officer of local or state institutions, nor shall this chapter apply

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to any person engaged simply in the furnishing of burial receptacles for the dead, but shall only apply to persons engaged in the business of embalming or funeral directing.”

13. Beginning on or about June 30, 1998, and continuing through approximately July 29, 2004, Regulation 4 CSR 120-2.060(18) stated that: “No person other than a duly licensed and registered funeral director may make the following at-need arrangements with the person having the right to control the incidents of burial: . . . (C) For the sale or rental to the public of funeral merchandise, services or paraphernalia from a funeral establishment.”

14. Prior to July 30, 2004, Regulation 4 CSR 120-2.060 (18) prohibited the sale of at-need funeral merchandise “from a funeral establishment” by anyone other than a licensed funeral director.

15. Beginning on or about July 30, 2004, and continuing through approximately September 29, 2006, 4 CSR 120-2.060(18) stated that: “No person other than a Missouri licensed funeral director shall be allowed to make the following at-need arrangements with the person having the right to control the incidents of disposition: . . . (C) Sale or rental to the public of funeral merchandise, services or paraphernalia.”

16. During the process leading up to the amendment of 4 CSR 120-2.060 that took effect in July 2004, the Board sought to amend other portions of the regulation but not 4 CSR 120-2.060(18)(C).

17. After the period for public comments for amending 4 CSR 120-2.060 was completed, the Board amended subsection 4 CSR 120-2.060(18)(C) by deleting the phrase “from a funeral establishment.”

18. Regulation 4 CSR 120-2.060(18)(C) as amended was published in the Missouri Register on June 1, 2004. This amended regulation, which was in effect beginning on or about July 30, 2004, and continuing through approximately September 29, 2006, is hereinafter referred to as the “Regulation at Issue.”

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19. Funeral directors in Missouri sell funeral caskets and provide funeral services to consumers.

20. Non-licensed persons who market and sell funeral caskets to consumers in Missouri compete with funeral directors for those sales.

21. Adoption and publication of the Regulation at Issue had the effect of restraining competition and injuring consumers in the following ways, among others:

A. discouraging non-licensed persons from selling funeral caskets to the public at-need in Missouri;

B. depriving consumers of the benefits of price competition that could have been offered by retail sellers of funeral caskets who were not licensed funeral directors; and

C. reducing consumer choices in Missouri concerning the purchase of funeral caskets.

22. The Board filed an amended order of rulemaking on February 16, 2006 to initiate the process for rescinding the Regulation at Issue. After receiving public comment on a proposed amendment, the Board voted unanimously to rescind the Regulation at Issue on May 10, 2006. The amended regulation, published at 20 CSR 2120-2.060(18)(C), became effective on September 30, 2006.

VIOLATION

23. The combination, conspiracy, acts and practices described above constitute anticompetitive and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices or the effects thereof, continued for approximately two years and may recur in the absence of the relief herein requested.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this nineteenth day of June, 2008, issues its Complaint against Respondent Missouri Board of Embalmers and Funeral Directors.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Missouri Board of Embalmers and Funeral Directors (the “Board”), hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission have voluntarily executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in the aforementioned Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its

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charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment filed by an interested person, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34 (2004), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent, the Missouri Board of Embalmers and Funeral Directors, is an industry regulatory board established by the State of Missouri with its principle office and place of business located at 3605 Missouri Boulevard, Jefferson City, Missouri 65102-0423.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that for the purposes of this Order, the following definitions shall apply:

- A. “Respondent” or “Board” means the Missouri Board of Embalmers and Funeral Directors, its officers, members, employees, consultants, agents, successors and assigns.
- B. “Licensee” means any person licensed to practice as an embalmer and/or funeral director in the State of Missouri.
- C. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

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IT IS FURTHER ORDERED that Respondent, in connection with its activities in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from prohibiting, restricting, impeding or discouraging any person from engaging in the sale or rental to the public of funeral merchandise or burial receptacles for the dead, directly or indirectly, or through any rule, regulation, policy, or other conduct authorized by MO. REV. STAT. § 333.251 (2005).

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Publish in the Newsletter of the Board of Embalmers and Funeral Directors the full text of MO. REV. STAT. § 333.251 (2005), this Order, and an accompanying statement that: “The Rules and Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri,” with such prominence as is given to regularly featured articles, and distribute such Newsletter to all Licensees within one hundred and twenty (120) days after the date this Order becomes final. Respondent shall similarly publish the full text of MO. REV. STAT. § 333.251 (2005) and an accompanying statement that: “The Rules and Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri” in subsequent issues of such Newsletter, which shall be distributed to all Licensees at least once each calendar year, for the years 2007, 2008 and 2009;
- B. Display an advisory on its public website (<http://pr.mo.gov/embalmers.asp>) that: “The Federal Trade

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Commission and the Board Have Agreed to Settle FTC Allegations Regarding Restrictions and Prohibitions on the Sale of Funeral Merchandise or Caskets.” Such advisory shall link to a new web page on the Board’s website that contains the full text of MO. REV. STAT. § 333.251 (2005), a statement that: “The Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri,” a link to MO. CODE REGS. ANN. tit. 20, § 2120-2.060 (2006), and a link to this Order. Respondent shall modify its website as described above no later than ten (10) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The advisory and this Order shall remain publicly accessible through common search terms and archives on the website for five (5) years from the date this Order becomes final, except in the event that the Missouri Office of Administration changes the structure or functionality of the Board’s public website, in which case the Board shall notify the Commission and propose alternative means of access to the advisory, the information on the new web page and this Order;

- C. Publish notice of this Order in three consecutive issues of *Missouri Funeral Director’s Association Magazine*, beginning with the next available placement opportunity for the Board to include its notice in the magazine following publication of this Order on the Board’s website. For purposes of this provision, such notice will be deemed satisfactory if it includes the following language: “The Missouri Board of Embalmers and Funeral Directors (the “Board”) announces agreement with the Federal Trade Commission regarding the FTC’s allegations of restrictions and prohibitions on the sale of funeral merchandise or caskets. Persons may offer for retail sale caskets and other

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funeral merchandise to customers in Missouri without obtaining a license from the Board. Full details of the settlement are posted on the Board's website at www.pr.mo.gov.embalmers.asp." The minimum size of such notice shall be one-half of one page in *Missouri Funeral Director's Association Magazine*;

- D. Publish the statement: "The Missouri Board of Embalmers and Funeral Directors (the "Board") has settled antitrust allegations by the FTC regarding restrictions and prohibitions on the sale of funeral merchandise or caskets. Persons may offer for retail sale caskets and other funeral merchandise to customers in Missouri without obtaining a license from the Board. Full details of the settlement are posted on the Board's website at www.pr.mo.gov.embalmers.asp." on Page 1 in the next version of the Missouri State Board of Embalmers and Funeral Directors Rules and Regulations, Chapters 333, 436, 193, 194, which shall be provided to all Licensees within one (1) year from the date this Order becomes final; and,
- E. Notify the Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580, at least thirty (30) days prior to: a) filing with the Missouri Secretary of State any Proposed Order of Rulemaking concerning the Board's rules or regulations; or b) proposing any change in Respondent; if such proposed change may affect compliance obligations arising out of this Order.

Analysis to Aid Public Comment

IV.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

V.

IT IS FURTHER ORDERED that this Order shall terminate on June 19, 2018.

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with the Missouri Board of Embalmers and Funeral Directors (“the Board” or “Respondent”). The agreement settles charges that the Board violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices described below. The Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed Order final.

Analysis to Aid Public Comment

The purpose of this analysis is to facilitate comment on the proposed consent Order. This analysis does not constitute an official interpretation of the agreement and proposed Order, and does not modify the terms in any way. Further, the proposed consent Order has been entered into for settlement purposes only, and does not constitute an admission by the proposed Respondent that it violated the law or that the facts alleged in the Complaint against the Respondent (other than jurisdictional facts) are true.

I. The Respondent

Respondent is the sole licensing authority for the practices of funeral directing and embalming in the State of Missouri. It is authorized to promulgate, adopt and enforce rules and regulations governing and defining those practices. Respondent is able to seek a court order to enjoin any person from engaging or offering to engage in any act that requires a license from the Board. The unlicensed practice of funeral directing or embalming in Missouri may be prosecuted as a class A misdemeanor.

At the time it adopted the regulation at issue in the proposed complaint, the Board was composed of five (5) licensed funeral directors, all of whom competed in the sale of at-need funeral caskets to consumers in Missouri.

II. The Conduct Addressed by the Proposed Consent Order

The proposed Complaint alleges that Respondent violated Section 5 of the Federal Trade Commission Act by unlawfully restraining competition in the retail funeral casket market in the State of Missouri by promulgating a regulation that defined the practice of funeral directing to include selling at-need funeral merchandise.

The at-issue regulation stated: “No person other than a duly licensed and registered funeral director may make the following at-need arrangements with the person having the right to control the incidents of burial: . . . (C) sale or rental to the public of funeral

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merchandise, services or paraphernalia.”¹ Under the laws of the State of Missouri, however, licensing qualifications and conditions for persons practicing or offering to practice funeral directing and embalming do not apply to anyone engaged simply in the furnishing of at-need burial receptacles to the public.²

The proposed Complaint alleges that the Board’s regulation had anticompetitive effects by discouraging non-licensed persons from selling funeral caskets to the public in Missouri, depriving consumers of the benefits of price competition, and reducing consumer choices concerning the purchase of funeral caskets.

The Commission has previously found that funeral director conduct that limits entry by non-licensed casket sellers harms competition. In its 1994 review of the Funeral Rule,³ the Commission found that funeral-director-imposed “casket handling fees” excluded competition from third-party casket sellers, and the record evidence indicated that the fees “prevent[ed] potential price competition and reduce[d] consumer choice.”⁴ The Commission further found that “the long-term effect of [banning these fees] will be increased competition in the casket market such that prices will eventually go down and all consumers will pay less.”⁵

¹ 4 CSR 120-2.060(18).

² See Mo. Rev. Stat. § 333.251 (2005). The at-issue regulation was revised during the course of the investigation and published in 20 CSR 2120-2.060 (18)(C) effective September 2006.

³ The FTC’s Funeral Rule, which was promulgated by the Commission in 1982 and revised in 1994, requires providers of funeral goods and services to give consumers itemized lists of funeral goods and services that not only provide price and descriptions, but also contain specific disclosures. The Funeral Rule removed the primary industry restraint on consumer choice (package-only funeral goods and service pricing) and makes clear that consumers may select and purchase only the goods and services they want. See 59 Fed. Reg. 1592 (1994).

⁴ 59 Fed. Reg. at 1603-04.

⁵ *Pa. Funeral Directors Ass’n, Inc. v. FTC*, 41 F.3d 81, 91 (3d Cir. 1994). See also Memorandum of Law of Amicus Curiae The Federal Trade Commission,

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The courts have likewise found that state laws prohibiting the sale of caskets by non-licensed persons harm competition. The Sixth Circuit concluded that a Tennessee state law forbidding anyone but state licensed funeral directors from selling caskets imposed “a significant barrier to competition in the casket market” and “harm[ed] consumers in their pocketbooks.”⁶ A district court in Oklahoma found that “[a]s long as independent sellers stay in the market, casket sales from independent sources ... place downward pressure on casket prices as a result of increased competition.”⁷ A district court reviewing a similar statute in Mississippi also concluded that such requirements result in less price competition and consumer choice in selecting a casket.⁸

The Missouri statute that created the Board and grants it the authority to act was not intended to displace competition in the sale of funeral merchandise with regulation. Indeed, it appears that Missouri intended to preserve price competition with respect to the retail sale of funeral caskets by excepting from application of the at-need funeral statute “*any person engaged simply in the furnishing of burial receptacles for the dead.*”⁹

III. Terms of the Proposed Consent Order

The Board has signed a consent agreement containing the proposed consent Order. The proposed Order would prevent the Board from prohibiting, restricting, impeding or discouraging any person from engaging in the sale or rental to the public of funeral

Powers v. Harris, Case No. CIV-01-445-F (W.D. Okla. Aug. 29, 2002).

⁶ *Craigmiles v. Giles*, 312 F.3d 220, 222, 228 (6th Cir. 2002).

⁷ *Powers v. Harris*, 2002 WL 32026155 at *6 (W.D. Okla. Dec. 12, 2002).

⁸ *Casket Royale, Inc. v. Mississippi*, 124 F.Supp. 2d 434, 440 (S.D. Miss. 2000).

⁹ Mo. Rev. Stat. § 333.251 (2005).

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merchandise or burial receptacles for the dead, directly or indirectly, or through any rule, regulation, policy, or conduct.

The proposed Order requires the Board to publish in the Newsletter of the Board of Embalmers and Funeral Directors, the full text of Mo. Rev. Stat. § 333.251 (2005), the Order, and an accompanying statement that: “The Rules and Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri.”

The proposed Order also requires the Board to display an advisory on its public website stating that it has settled FTC allegations regarding restrictions and prohibitions on the sale of funeral merchandise or caskets, and to provide a link to the Board’s website that contains the full text of Mo. Rev. Stat. § 333.251 (2005), a link to Mo. Code Regs. Ann. tit. 20, § 2120-2.060 (2006), and a link to this Order. The proposed Order further requires the Board to publish notice of the Order and settlement in three consecutive issues of Missouri Funeral Directors’ Association Magazine and in the Missouri State Board of Embalmers and Funeral Directors Rules and Regulations, Chapters 333, 436, 193, 194, which shall be provided to all licensees within one (1) year from the date the Order becomes final.

The proposed Order includes requirements that the Board notify the Commission at least thirty (30) days prior to any filing with the Missouri Secretary of State of any Proposed Order of Rulemaking concerning the Board’s rules or regulations, or prior to proposing any change in Respondent that may affect compliance obligations. The proposed Order contains standard provisions requiring the filing of regular written reports of the Board’s compliance with the terms of the Order for each of the next five years. The Order will expire in ten (10) years.

INTERLOCUTORY, MODIFYING,
VACATING, AND MISCELLANEOUS
ORDERS
