FILED WITH THE BOARD
OF MORTUARY SCIENCE
ON May 9, 1997

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF MORTUARY SCIENCE

In the Matter of the Suspension or Revocation of the License of L. RICHARD SMALDONE License No. JP03255 and THE LITHLAND CORPORATION D/B/A THE BRAVIAK FUNERAL HOME To Practice Mortuary Science and to Operate a Registered Mortuary in the State of New Jersey	CERTIFIED TRUE COPY FINAL ORDER

This matter was opened before the New Jersey State Board of Mortuary Science upon the Attorney General's filing, on February 25, 1997, of a complaint seeking the suspension or revocation of the license of L. Richard Smaldone to practice mortuary science in the State of New Jersey. Thereafter, an amended complaint, and notice of hearing and notice to file answer, was filed on March 13, 1997. The amended complaint generally charges that respondent Smaldone, on nine occasions, accepted substantial sums of money (ranging from a high of $7609.00 to $1998.13) from individual consumers to fund the purchase of funeral insurance policies and prepaid funeral agreements. In each instance, respondent Smaldone is alleged to have misappropriated, misapplied or commingled the funds entrusted to him, specifically by failing to purchase funeral insurance policies and/or failing to deposit monies received in funeral trust funds.

In response to the complaint, respondent L. Richard Smaldone submitted a letter to the Board dated March 5, 1997, wherein he generally

admitted all allegations of the filed complaint.* No response to the complaint, other than that provided by Mr. Smaldone, was submitted by the Lithland Corporation.**

This matter was set down for hearing before the Board on May 6, 1997. Deputy Attorney General John DeCicco then appeared on behalf of complainant Attorney General of New Jersey. Respondent Smaldone waived his right to appear, in person or by attorney, before the Board at the hearing, and no representative of the Lithland Corporation appeared at the hearing. In support of his case, the Attorney General introduced and moved the following documents into evidence:

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* The specific text of Mr. Smaldone's March 5, 1997 letter is as follows:

> Board of Mortuart (sic) Science
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> Re: Answer to Complaints
>
> As I have stated during my prior meeting with the Board of Mortuary Science, I agree that I did not comply with requirements with regard to PreNeed Funeral Funding and have no substantial disagreement with the statements contained within complaints 1 through 10 and I waive any hearing with the Board and will accept whatever decision the Board makes in response to these matters.
>
> As I also stated during my prior meeting with the Board, the monies due to the PreNeed accounts will be replaced from funds owned to Lithland Corporation for funerals conducted prior to January 13, 1997 and will be replaced as quickly as possible. Every effort is being made to collect these funds of the purpose of making the PreNeed files whole.
>
> I would like to point out that no family has been deprived of services as a result of the above mentioned situations.
>
> Sincerely
>
> L. Richard Smaldone

** Respondent L. Richard Smaldone is identified, at paragraph 5 of the general allegations of the amended complaint, as being the principal owner of the Lithland Corporation. Respondent Smaldone's response was thus considered to constitute his own personal response and response on behalf of the Lithland Corporation.

P-1 Original Complaint filed with the Board of Mortuary Science on February 25, 1997.

P-2 Correspondence dated February 25, 1997 from Deputy Attorney General DeCicco to L. Richard Smaldone (forwarding complaint and furnishing discovery).

P-3 Correspondence dated March 5, 1997 from L. Richard Smaldone to State Board of Mortuary Science (see text footnote 1).

P-4 Correspondence dated March 12, 1997 from Deputy Attorney General DeCicco to L. Richard Smaldone (forwarding additional discovery and advising that one of the ten counts of the Original Complaint would be withdrawn).

P-5 Notice of Hearing and Notice to File Answer filed with the Board of Mortuary Science on March 13, 1997.

P-6 Amended Complaint filed with the Board of Mortuary Science on March 13, 1997.

P-7 Correspondence dated March 13, 1997 from Deputy Attorney General DeCicco to L. Richard Smaldone [enclosing amended complaint; noting that Lithland Corporation was added as a respondent in the amended complaint; and advising that in the event no further response was received, the Board would rely solely upon Smaldone's correspondence of March 5, 1997 (P-3 above)].

P-8 Correspondence from Paul C. Brush, Executive Director of the Board of Mortuary Science, to L. Richard Smaldone (re: date and time of hearing).

P-9 Correspondence dated April 29, 1997 from L. Richard Smaldone to Board of Mortuary Science (forwarding copies of correspondence dated April 29, 1997 from L. Richard Smaldone to the Clark Funeral Home, the All County Funeral Home and N.G., suggesting that Samldone had made restitution to identified individuals and entities).

Additionally, the Attorney General presented testimony from Paul C. Brush, Executive Director of the Board. Mr. Brush stated, *inter alia*, that he had a telephone conference with respondent Smaldone prior to the hearing, in which conversation respondent Smaldone confirmed that

he would not appear before the Board and would instead rely upon his written submission of March 5, 1997 as his sole defense.

Respondent has elected not to contest the charges within the complaint, nor to present any evidence in mitigation of penalty. The undisputed facts of this matter are thus that, in nine instances, respondent accepted sums of money from consumers that he was required by law to remit to insurance carriers or deposit in apecifically designated trust accounts. In each instance, respondent Smaldone failed to remit the monies to the designated insurance carriers and/or to place the monies in the appropriate trust funds. Respondent is presumed by law to have known his obligations with regard to this money. See N.J.S.A. 2A:102-16.* The specific dates on which respondent's misappropriations occurred, consumers effected (identified by initial only), sums misappropriated, and purposes to which the monies received by respondent were supposed to have been devoted, are set forth within the chart below:

Count	Date	Consumer	Amount of Monies Received by Smaldone	Purposes to which the Funds were Supposed to be Devoted	Restitution
I	11/07/95	P.B. on behalf of J.F., her father	$7609.00	To purchase revocable prepaid Heritage Life Insurance Company funeral insurance policy.	None
II	08/01/95	B.M. on behalf of P.K., her father	$5923.00	To purchase irrevocable prepaid Heritage Life Insurance Company funeral insurance policy.	None

* N.J.S.A. 2A:102-16 provides that the failure to deposit money received in connection with an advance funeral agreement, or misapplication or misappropriation of said money constitutes theft. The statute further provides that that individuals and corporations receiving monies under, or in connection with, an advance agreement for funeral services are presumed "to know his or its obligations relevant to criminal liability under [law]; and to have dealt with property as his or its own if he or it fails to pay or account upon lawful demand or if an audit reveals a shortage or falsification of accounts".

Count	Date	Consumer	Amount of Monies Received by Smaldone	Purposes to which the Funds were Supposed to be Devoted	Restitution
III	09/18/96	G.A. on behalf of E.M.B., her sister	$6328.60	To establish irrevocable prepaid funeral agreement with the New Jersey Prepaid Funeral Trust Fund	None
IV	10/11/96	N.G. on behalf of I.L,, her mother	$7143.60	To establish prepaid funeral agreement -- monies to be deposited in a funeral trust on behalf of I.L.	$2556.83 refunded to N.G. on 4/29/97
V	7/18/94 9/25/95	S.A. on behalf of K.S., her mother	$1998.13	To establish irrevocable prepaid funeral agreement with the New Jersey Prepaid Funeral Trust Fund	None
VI	10/20/96	M.G on behalf of J.B., her mother	$5760.70	To establish irrevocable prepaid funeral agreement with the New Jersey Prepaid Funeral Trust Fund	Monies owed deposited with the NJPFTF on 1/22/97, two days after J.B.'s death
VII	03/18/96	H.J.H.	$5358.00	To establish irrevocable prepaid funeral agreement with the Columbian Mutual Life Insurance Company	$5358.00 forwarded to CMLIC on 1/17/97
VIII	09/13/96	P.P on behalf of M.H., her mother	$4854.80	To establish irrevocable prepaid funeral agreement with the Columbian Mutual Life Insurance Company	$4854.80 forwarded to CMLIC on 1/17/97
IX	06/20/96	C.M. and E.B. on behalf of J.K., their aunt	$2994.60	To establish a prepaid funeral agreement with the Clark Funeral Home in Cairo, Georgia	$3134.50 forwarded to Clark Funeral Home on 4/29/97 and $476.00 forwarded to All County Funeral Home on 4/29/97

In aggregate, respondent misappropriated a total of $43,314.44. Said moneys were provided to Smaldone by consumers seeking to make advance arrangements for funerals of loved ones, and the consumers necessarily expected that the substantial sums provided would be used by Smaldone for the intended purposes. The relevant statutes suggest that Smaldone's conduct in this matter constitutes nothing short of criminal theft, and it is clear to this Board that Smaldone's admitted misconduct constituted a fundamental breach of the duty he owed to consumers. The fact that the conduct occurred repeatedly over a period spanning over two years supports a conclusion by this Board that Smaldone has pervasively and irreparably compromised the legal, ethical and moral duties he owed to the public of New Jersey as a licensee of this Board.

We conclude that the admitted facts in this matter clearly support the charges made, within each count, that respondent's conduct violated N.J.S.A. 2A:102-13, N.J.S.A. 2A:102-16, and N.J.S.A. 45:7-92; and the additional charges that the violations provide bases for disciplinary action pursuant to N.J.S.A. 45:1-21(b) (engaging in the use or employment of fraud, deception and misrepresentation), 45:1-21 (e) (engaging in professional misconduct), 45:1-21(h) (failure to comply with the provisions of statutes or regulations administered by the Board) and 45:1-21(i) (incapacity to discharge the functions of a licensee in a manner consistent with the public's health, safety and welfare).

Complainant Attorney General has additionally charged, within each Count of the complaint, that respondent's conduct constitutes a violation of the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. We find it unnecessary to reach the issue whether this Board has any independent jurisdiction to make such a finding, and thus decline to determine whether respondent's conduct constitutes the violation charged. Rather,

we simply will adopt Deputy Attorney General DeCicco's suggestion that this Order be forwarded to the attention of the Director of the Division of Consumer Affairs, for his independent consideration whether the Board's findings in this matter might support charges that respondent violated the Consumer Fraud Act.

While we are aware that respondent has made appropriate restitution in five of the nine cases, we note that there is no suggestion that respondent's conduct would have abated, or that restitution would have been made, but for respondent's having first learned that he was under investigation by the Board in January 1997.* Further, we are convinced that no penalty short of revocation of licensure is sufficient to redress the substantial and fundamental breach of professional ethics which occurred in this case. We thus unanimously conclude that the public could only be adequately protected by the revocation of respondent Smaldone's license to practice mortuary science in the State of New Jersey. We additionally order that Smaldone make restitution, with interest, to those consumers identified in Counts I, II, III, and V of the complaint (consumers from whom respondent misappropriated a total sum of $21,858.13) and we impose a civil penalty of $22,500 (representing the statutory maximum fine of $2,500 per count) upon the Lithland Corporation.

WHEREFORE, it is on this 9th day of May, 1997

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* For purposes of this hearing, we have accepted the written representations embodied in respondent's April 29, 1997 correspondence (P-9 in evidence) as being true. Within that correspondence, respondent has provided the Board with copies of letters and refund checks made to N.G. ($2556.83), the Clark Funeral Home ($3134.50) and the All County Funeral Home ($476.00). Assuming the checks clear, respondent's actions constitute the making of restitution for funds misappropriated in Counts IV and IX of the complaint. We reserve the right to reopen this matter, for consideration of additional sanctions, in the event that respondent made any misrepresentations in his correspondence to the Board of April 29, 1997, or in the event that the checks referenced within that correspondence fail to clear.

ORDERED

1. The license of respondent L. Richard Smaldone to practice mortuary science in the State of New Jersey is hereby revoked, with prejudice.*

2. Respondents L. Richard Smaldone and the Lithland Corporation are hereby forever enjoined from engaging in the practice of Mortuary Science in the State of New Jersey or from being employed by, or having any ownership interest in any registered facility from which the practice of Mortuary Science is conducted in the State.

3. Respondent L. Richard Smaldone, and/or respondent Lithland Corporation d/b/a the Braviak Funeral Home, is hereby ordered to make restitution of all monies received, plus interest at a rate of no less than 5% per annum, to the consumers identified in Counts I, II, III and V of the complaint. Respondent L. Richard Smaldone shall be individually responsible and liable for satisfying the requirements of this paragraph.

4. Respondent Lithland Corporation d/b/a the Braviak Funeral Home is hereby assessed a civil penalty in the amount of $22,500.

NEW JERSEY STATE BOARD
OF MORTUARY SCIENCE

By: Donald Codey 5/8/97
Donald Codey
Board President

* For purposes of this Order, the phrase "with prejudice" is to mean that respondent may only seek reinstatement of licensure upon making a showing that "extraordinary circumstances" exist to warrant reinstatement.