

IN THE MATTER OF

THE LOEWEN GROUP INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3677. Complaint, July 29, 1996--Decision, July 29, 1996

This consent order requires, among other things, a Kentucky-based company to divest, within 12 months, one of its three funeral homes in Brownsville, Texas, and either a large funeral home in San Benito, Texas, or two smaller funeral homes in Harlingen, Texas, to Commission-approved acquirers. If the transactions are not completed as required, the Commission may appoint a trustee to divest the properties.

Appearances

For the Commission: *Thomas B. Carter, Gary D. Kennedy and William Baer.*

For the respondents: *Deborah Feinstein, Arnold & Porter, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that The Loewen Group Inc., a corporation, and Loewen Group International, Inc., a corporation, hereinafter sometimes referred to as respondents, have acquired Garza Memorial Funeral Home, Inc., a corporation, and Thomae-Garza Funeral Directors, Inc., a corporation, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 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 its complaint, stating its charges as follows:

I. DEFINITION

1. For the purposes of this complaint, the following definition shall apply:

"Funeral" means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony of the life of the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

II. THE RESPONDENTS

2. Respondent The Loewen Group Inc. ("Loewen Group") is a corporation organized, existing and doing business under and by virtue of the laws of the province of British Columbia, Canada, with its office and principal place of business located at 4126 Norland Avenue, Burnaby, British Columbia, Canada V5G 3S8.

3. Respondent Loewen Group International, Inc. ("Loewen Group International") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 East River Center Boulevard, Covington, Kentucky. Respondent Loewen Group International is a wholly-owned subsidiary of respondent Loewen Group.

4. At the time of the acquisition, Garza Memorial Funeral Home, Inc. ("Garza Memorial") was a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1025 East Jackson Street, Brownsville, Texas.

5. At the time of the acquisition, Thomae-Garza Funeral Directors, Inc. ("Thomae-Garza") was a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 395 South Houston, San Benito, Texas.

6. Loewen Group, Loewen Group International, Garza Memorial, and Thomae-Garza are, and at all times relevant herein have been,

engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and are corporations whose businesses are in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITIONS

7. On or about October 28, 1991, Loewen Group through its wholly-owned subsidiary Loewen Group International acquired 100% of the voting securities of Garza Memorial.

8. On or about July 17, 1992, Loewen Group through its wholly-owned subsidiary Loewen Group International acquired 100% of the voting securities of Thomae-Garza.

IV. THE RELEVANT MARKETS

9. For purposes of this complaint, the relevant line of commerce in which to analyze the effects of the acquisitions of Garza Memorial and Thomae-Garza is the provision of funerals.

10. For purposes of this complaint, the relevant section of the country in which to analyze the effects of the acquisition of Garza Memorial is Brownsville, Texas, and its immediate environs; and the relevant section of the country in which to analyze the effects of the acquisition of Thomae-Garza is Harlingen/San Benito, Texas, and its immediate environs.

11. The relevant markets set forth in paragraphs nine and ten are concentrated, whether measured by the Herfindahl-Hirschmann Index or by two-firm and four-firm concentration ratios.

12. Entry into the relevant markets set forth in paragraphs nine and ten is difficult.

13. In the relevant markets, Loewen Group International and Garza Memorial were actual competitors in the provision of funerals, and Loewen Group International and Thomae-Garza were actual competitors in the provision of funerals.

V. EFFECT OF THE ACQUISITIONS

14. The effect of the acquisitions has been to substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating actual competition between Loewen Group International and Garza Memorial, and between Loewen Group International and Thomae-Garza;

b. By increasing the likelihood of collusion in the relevant markets; and

c. By increasing the likelihood that Loewen Group International will unilaterally exercise market power in Brownsville, Texas, and its immediate environs.

VI. VIOLATIONS CHARGED

15. The acquisitions described in paragraphs seven and eight constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

Chairman Pitofsky recused.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Dallas Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in

such 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 the respondents have violated said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Loewen Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the province of British Columbia, Canada, with its office and principal place of business located at 4126 Norland Avenue, Burnaby, British Columbia, Canada V5G 3S8.

2. Respondent Loewen Group International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 East River Center Boulevard, Covington, Kentucky. Proposed respondent Loewen Group International, Inc. is a wholly-owned subsidiary of The Loewen Group Inc.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Loewen*" means The Loewen Group Inc. and Loewen Group International, Inc., their directors, officers, employees, agents and representatives, predecessors, successors and assigns, their subsidiaries, divisions, groups and affiliates controlled by Loewen, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "*Funeral*" means a group of services provided at the death of an individual, the focus of which is some form of commemorative ceremony of the life of the deceased at which ceremony the body is present; this group of services ordinarily includes, but is not limited to: the removal of the body from the place of death; its embalming or other preparation; making available a place for visitation and viewing, for the conduct of a funeral service, and for the display of caskets and outside cases; and the arrangement for and conveyance of the body to a cemetery or crematory for final disposition.

C. "*Funeral establishment*" means any facility that provides funerals.

D. "*Properties to be divested*" means all of the assets, properties, business and goodwill, tangible and intangible, utilized by: (a) either Thomae-Garza Funeral Directors, Inc. or both Pitts, Kriedler-Ashcraft Funeral Directors, Inc. and Garza-Elizondo Funeral Directors in Cameron County, Texas; and (b) either Garza Memorial Funeral Home, Inc., Paragon Trevino Funeral Home, Inc., or Darling-Mouser Funeral Home, Inc. in Cameron County, Texas; including, but not limited to:

1. All right, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits;

2. All machinery, fixtures, equipment, furniture, tools and other tangible personal property;

3. All right, title and interest in the trade name of any funeral establishment;

4. All right, title and interest in the books, records and files pertinent to the properties to be divested;

5. Vendor lists, management information systems, software, catalogs, sales promotion literature, and advertising materials; and

6. All right, title, and interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bids and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, and consignees.

II.

It is further ordered, That:

A. Within twelve (12) months after the date this order becomes final, Loewen shall divest, absolutely and in good faith, the properties to be divested. The properties to be divested are to be divested only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestitures required by this order is to ensure the continued use of the properties to be divested as ongoing viable enterprises providing funerals and to remedy the lessening of competition alleged in the Commission's complaint.

B. Pending divestiture of the properties to be divested, Loewen shall maintain the viability and marketability of the properties to be divested and shall not cause or permit the destruction, removal, or impairment of any assets or business of the properties to be divested, except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

A. If Loewen has not divested, absolutely and in good faith and with the Commission's prior approval, the properties to be divested as required by paragraph II of this order within twelve (12) months after the date this order becomes final, the Commission may appoint a trustee to divest the properties to be divested. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Loewen shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Loewen to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, Loewen shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Loewen, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Loewen has not opposed, in writing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Loewen of the identity of any proposed trustee, Loewen shall be deemed to have consented to the selection of the proposed trustee.

2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the properties to be divested.

3. The trustee shall have the power and authority to abrogate any contract or agreement between Loewen and any individual which restricts, limits or otherwise impairs the ability of such individual to purchase the properties to be divested or to become a director, officer, employee, agent or representative of any acquirer of the properties to be divested.

4. Within ten (10) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, Loewen shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this order.

5. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.4 to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission, or in the case of a court-appointed trustee, by the court; provided, however, that the Commission may extend the divestiture period only two (2) times.

6. The trustee shall have full and complete access to the personnel, books, records and facilities relating to the properties to be divested, or any other relevant information, as the trustee may

request. Loewen shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Loewen shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Loewen shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or for a court-appointed trustee, the court.

7. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Loewen's absolute and unconditional obligation to divest at no minimum price. The divestitures shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Loewen from among those approved by the Commission.

8. The trustee shall serve, without bond or other security, at the cost and expense of Loewen, on such reasonable and customary terms and conditions as the Commission or the court may set. The trustee shall have authority to employ, at the cost and expense of Loewen, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Loewen and the trustee's power shall be terminated. The trustee's compensation shall be based at least in a significant part on a commission arrangement contingent on the trustee's divesting the properties to be divested.

9. Loewen shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from

misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

10. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

11. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this order.

12. The trustee shall have no obligation or authority to operate or maintain the properties to be divested.

13. The trustee shall report in writing to Loewen and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Loewen shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged at the time of such acquisition, or within the two years preceding such acquisition, in the provision of funerals in Cameron County, Texas or within fifteen (15) miles of the Cameron County, Texas line; or

B. Acquire any assets used for or used in the previous two years for (and still suitable for use for) funeral establishments in Cameron County, Texas or within fifteen (15) miles of the Cameron County, Texas line.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Office of the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is

required only of Loewen and not of any other party to the transaction. Loewen shall provide the Notification to the Commission at least thirty (30) days prior to acquiring any such interest (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Loewen shall not consummate the acquisition until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Commission's Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph IV of this order for:

1. The construction or development by Loewen of a new funeral establishment; or
2. Any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until Loewen has fully complied with the provisions of paragraphs II or III of this order, Loewen shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Loewen shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Loewen shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require,

Loewen shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph IV of this order. Such reports shall include, but not be limited to, a listing by name and location of all acquisitions of funeral establishments in the United States located within forty (40) miles of a funeral establishment owned by Loewen at the time of the acquisition, including but not limited to acquisitions due to default, foreclosure proceedings or purchases in foreclosure, made by Loewen during the twelve (12) months preceding the date of the report.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, Loewen shall notify the Commission at least thirty (30) days prior to any proposed change in its organization, such as dissolution, assignment or sale resulting in the emergence of a successor, or the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of this order.

VII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, subject to any legally recognized privilege, and upon written request with reasonable notice to Loewen made to its principal offices, Loewen shall permit any duly authorized representative or representatives of the Commission:

A. Access, during the office hours of Loewen and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Loewen relating to any matters contained in this order; and

B. Upon five (5) days' notice to Loewen and without restraint or interference therefrom, to interview officers or employees of Loewen, who may have counsel present, regarding such matters.

Chairman Pitofsky recused.

IN THE MATTER OF

THE LOEWEN GROUP INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3678. Complaint, July 29, 1996--Decision, July 29, 1996

This consent order requires, among other things, a Kentucky-based company to divest, within nine months, a funeral home in Castlewood, Virginia to a Commission-approved acquirer. If the transaction is not completed as required, the Commission may appoint a trustee to divest the property.

Appearances

For the Commission: *Gary D. Kennedy* and *James R. Golden*.

For the respondents: *Deborah Feinstein, Arnold & Porter*,
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that The Loewen Group Inc., a corporation, and Loewen Group International, Inc., a corporation, hereinafter sometimes referred to as respondents, have entered into an agreement with Heritage Family Funeral Services, Inc., a corporation, that violates said Act; that through the agreement respondents have agreed to acquire Heritage Family Funeral Services, Inc. and that such acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITION

1. For the purposes of this complaint, the following definition shall apply: