IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
c/o Department of Justice
Washington, D.C. 20530,
Plaintiff,

v.

BLACKSTONE CAPITAL PARTNERS II
MERCHANT BANKING FUND L.P.
345 Park Avenue
New York, N.Y. 10154,

and

HOWARD ANDREW LIPSON
345 Park Avenue
New York, N.Y. 10154,
Defendants.

Civil Ac

CASE NUMBER 1:99CV00795
JUDGE: Ricardo M. Urbina
DECK TYPE: Antitrust
DATE STAMP: 03/30/99

COMPLAINT FOR CIVIL PENALTIES FOR FAILURE TO COMPLY WITH THE PREMERGER REPORTING REQUIREMENTS OF THE HART-SCOTT-RODINO ACT

The United States of America, Plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States and at the request of the Federal Trade Commission, brings this civil action to obtain monetary relief in the form of civil penalties against the Defendants named herein for failing to comply with the premerger reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and alleges as follows:

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted under Section 7A of the Clayton Act, 15 U.S.C. § 18a, ("HSR Act" or "Act") added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, to recover civil penalties for violations of that section.

2. This Court has jurisdiction over the Defendants and over the subject matter of this action pursuant to Section 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), and pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345 and 1355.

3. Venue is properly based in this District under 28 U.S.C. §§ 1391 and 1395, and by virtue of Defendants' consent in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

THE DEFENDANTS

4. Defendant Blackstone Capital Partners II Merchant Banking Fund L.P. ("Defendant Blackstone") is a limited partnership organized under the laws of Delaware, with its principal office and place of business at 345 Park Avenue, New York, N.Y. 10154. Defendant Blackstone is an investment fund specializing in leveraged buyouts and other principal investments. Defendant Blackstone has one general partner, Blackstone Management Associates II L.L.C., a Delaware limited liability company, and numerous limited partners. Defendant Blackstone is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act,

15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1). At all times relevant to this complaint, Defendant Blackstone had total assets in excess of $100 million.

5. Defendant Howard Andrew Lipson ("Defendant Lipson") is a natural person and is a member of Blackstone Management Associates II L.L.C., the general partner of Defendant Blackstone, with his principal place of business at 345 Park Avenue, New York, N.Y. 10154.

OTHER ENTITIES

6. Prime Succession, Inc. ("Prime") was, at times relevant to this complaint, a corporation organized under the laws of Delaware with its principal place of business in Batesville, Indiana. At times relevant to this complaint, Prime directly or indirectly owned and operated funeral homes and cemeteries in the United States, and was engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1).

7. Golder, Thoma, Cressey Fund III Limited Partnership ("Golder") is a limited partnership organized under the laws of Illinois, with its principal office and place of business at 6100 Sears Tower, Chicago, Illinois, 60606. Golder invests in the securities of companies in the United States, and is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1). Until August 26, 1996, Prime was controlled by Golder, or by entities controlled by Golder, within the meaning of 16 C.F.R. § 801.1(b), and Golder was the "ultimate parent entity" of Prime, as that term is defined in 16 C.F.R. § 801.1(a)(3). At all times relevant to this complaint, Golder had total assets in excess of $10 million.

8. The Loewen Group Inc. is a corporation organized under the laws of Canada, with its principal office and place of business at 4126 Norland Avenue, Burnaby, B.C. V5G 3S8, Canada. Loewen Group International, Inc., a wholly-owned subsidiary of The Loewen Group Inc., is a corporation organized under the laws of Delaware, with its principal office and place of business at 50 East River Center Boulevard, Suite 820, Covington, KY 41011. (The Loewen Group Inc. and Loewen Group International, Inc. will hereafter be referred to collectively as "Loewen.") Loewen directly or indirectly owns and operates funeral homes and cemeteries in North America, including the United States, and is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1).

THE HART-SCOTT-RODINO ACT AND RULES

9. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notifications with the Federal Trade Commission and the Department of Justice ("federal antitrust agencies") and to observe a waiting period before consummating certain acquisitions of voting securities or assets. 15 U.S.C. § 18a(a) and (b). The notification and waiting period are intended to give the federal antitrust agencies prior notice of, and information about, proposed transactions. The waiting period is also intended to provide the federal antitrust agencies with an opportunity to investigate proposed transactions and to determine whether to seek an injunction to prevent the consummation of transactions that may violate the antitrust laws. The HSR Act provides that the federal antitrust agencies may grant early termination of a waiting period. 15 U.S.C. § 18a(b)(2).

10. The HSR Act provides that the Federal Trade Commission or Department of Justice may require the parties to an acquisition reportable under the HSR Act to provide additional information or documentary material relevant to the acquisition. 15 U.S.C. § 18a(e)(1). Such a request extends the waiting period for an additional period of not more than 20 days after the date the federal antitrust agencies receive the information required to be submitted pursuant to such request. 15 U.S.C. § 18a(e)(2).

11. Section (d)(1) of the HSR Act, 15 U.S.C. § 18a(d)(1), authorizes the Federal Trade Commission, with the concurrence of the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, to require that the notification required by the Act be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to determine whether such acquisition, if consummated, may violate the antitrust laws.

12. Pursuant to Section (d)(2) of the HSR Act, 15 U.S.C. § 18a(d)(2), Premerger Notification Rules were promulgated to carry out the purposes of the HSR Act. 16 C.F.R. Part 800 *et. seq.* ("Rules"). These Rules require that notification be provided to the federal antitrust agencies in accordance with a Notification and Report Form which is made part of the Rules. 16 C.F.R. § 803.1, and appendix to 16 C.F.R. Part 803.

13. The Instructions to the Notification and Report Form, appendix to 16 C.F.R. Part 803, require the submission of the following documentary material in response to Item 4(c) of the Notification and Report Form:

> all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the

> acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets . . . .

14. Section 803.6(a) of the Rules, 16 C.F.R. § 803.6(a), requires that each Notification and Report Form "shall be certified: (1) In the case of a partnership, by any general partner thereof; (2) In the case of a corporation, by any officer or director thereof; (3) In the case of a person lacking officers, directors, or partners, by any individual exercising similar functions; . . . ." The Notification and Report Form requires the following certification:

> This NOTIFICATION AND REPORT FORM, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

15. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), provides that any person, or any officer, director, or partner thereof, who fails to comply with any provision of the HSR Act is liable to the United States for a civil penalty for each day during which such person is in violation. The maximum amount of civil penalty is $10,000 per day through November 19, 1996, pursuant to § 18a(g)(1), and $11,000 per day thereafter, pursuant to the Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996).

THE ACQUISITION

16. On August 26, 1996, Defendant Blackstone, two other entities related to Defendant Blackstone, and Loewen purchased Prime from Golder through a leveraged buyout ("Acquisition"). (The two other entities related to Defendant Blackstone – Blackstone Family Investment Partnership II L.P., a Delaware limited partnership, and Blackstone Offshore Capital Partners II L.P., a Cayman Islands limited partnership – will hereafter be referred to as "the two other Blackstone limited partnerships.") Defendant Blackstone paid $37 million for 54 percent of Prime's voting securities. The two other Blackstone limited partnerships collectively paid $15 million for 22 percent of Prime's voting securities. Loewen paid $16 million for 24 percent of Prime's voting securities, and $62 million for non-voting securities of Prime. The remaining $190 million of the $320 million cost of purchasing Prime was raised through debt issued by Prime.

17. Pursuant to an agreement with Loewen dated August 26, 1996, Defendant Blackstone and the two other Blackstone limited partnerships will each sell all of their interest in Prime to Loewen, if either they or Loewen elect such a sale.

18. Pursuant to an agreement with Golder dated June 14, 1996, Defendant Blackstone, the two other Blackstone limited partnerships, and Loewen would have forfeited their right to acquire Prime if they had not met certain deadlines for consummating the Acquisition.

19. Prior to the consummation of the Acquisition on August 26, 1996, Loewen did not file Notification and Report Forms for its acquisition of voting securities of Prime with the federal antitrust agencies. Loewen eventually filed Notification and Report Forms on or about October 1996, more than a month after the acquisition was consummated. On March 31, 1998, Loewen

agreed to pay civil penalties to settle federal charges that its failure to file a Notification and Report Form prior to the acquisition had violated the HSR Act. *United States v. The Loewen Group Inc.*, Civ. Action No. 98-815, 1998-1 Trade Cas. (CCH) ¶ 72,151 (D.D.C. March 31, 1998).

VIOLATION BY DEFENDANT BLACKSTONE

20. The allegations contained in paragraphs 1 through 19 are repeated and realleged as though fully set forth herein.

21. Defendant Blackstone was required by the HSR Act to submit a Notification and Report Form and observe the Act's waiting period before it acquired in excess of $15 million of the securities of Prime. On June 28, 1996, Blackstone Management Associates II L.L.C. filed on behalf of Defendant Blackstone a Notification and Report Form ("June 28 premerger filing") for the acquisition by Defendant Blackstone of voting securities of Prime.

22. Defendant Blackstone submitted no documents responsive to Item 4(c) with the June 28 premerger filing.

23. At the time of the June 28 premerger filing, Defendant Blackstone had in its possession an internal decision-making document responsive to Item 4(c) entitled *Project Blackrose Investment Committee Memorandum* ("Investment Committee Memorandum"), which had been prepared for a May 30, 1996, meeting of Defendant Blackstone's Investment Committee ("Investment Committee"). The Investment Committee had the ultimate authority to approve or disapprove Defendant Blackstone's acquisition of an interest in Prime.

24. A memorandum to the Investment Committee is routinely prepared prior to major investments by Defendant Blackstone.

25. Information in the Investment Committee Memorandum formed the basis of the Investment Committee's decision to proceed with the acquisition of an interest in Prime. Therefore, at the time of the June 28 premerger filing, the Investment Committee Memorandum was one of the most central documents in Defendant Blackstone's possession relating to its acquisition of an interest in Prime.

26. Each of the four officials responsible for Defendant Blackstone's acquisition of an interest in Prime had participated in writing the Investment Committee Memorandum and had a copy of the Investment Committee Memorandum in his files at the time of the June 28 premerger filing.

27. The Investment Committee Memorandum identified Loewen as an operator of cemeteries and funeral homes, and contained substantial information concerning those operations. In addition, the Investment Committee Memorandum described the collateral agreement, described in Paragraph 17 above, pursuant to which Loewen was likely to obtain complete ownership and control of Prime, which also operated cemeteries and funeral homes.

28. The Investment Committee Memorandum had the characteristics of a document required to be submitted in response to Item 4(c) of the Notification and Report Form. Those characteristics are enumerated in the Instructions to the Notification and Report Form, as described in Paragraph 13 above. Specifically, the Investment Committee Memorandum was prepared by or for individuals exercising functions similar to those of officers and directors of corporations. In addition, the document described, inter alia, (a) market shares for both Loewen and Prime in funeral homes and cemeteries, (b) the nature of competition in the death care industry, (c) barriers to entry into that industry, and (d) the trend toward concentration in the

industry. Blackstone was required to submit the Investment Committee Memorandum in response to Item 4(c) of the Notification and Report Form before consummating its acquisition of voting securities of Prime.

29. As a result of Defendant Blackstone's failure to submit the Investment Committee Memorandum with the June 28 premerger filing, as required by Item 4(c) of the Notification and Report Form, Defendant Blackstone did not comply with the reporting and waiting requirements of the HSR Act and Rules.

30. Defendant Blackstone's failure to submit the Investment Committee Memorandum with the June 28 premerger filing hindered the ability of the federal antitrust agencies to analyze the competitive effects of the Acquisition prior to its consummation. The Notification and Report Forms submitted by Defendant Blackstone and Golder prior to the Acquisition did not reveal that Loewen, like Prime, was an operator of cemeteries and funeral homes. As described in Paragraph 19, Loewen itself failed to submit a Notification and Report Form prior to the Acquisition. On the basis of the Notification and Report Forms submitted prior to the Acquisition, neither the Federal Trade Commission nor the Department of Justice ascertained that Loewen's acquisition of an interest in Prime was an acquisition between competitors, and, therefore, that the Acquisition raised potential antitrust concerns.

31. As a consequence of the failure of Defendant Blackstone to submit the Investment Committee Memorandum with the June 28 premerger filing, neither the Federal Trade Commission nor the Department of Justice investigated the Acquisition before it was consummated. Neither the Federal Trade Commission nor the Department of Justice issued, pursuant to the HSR Act, Requests for Additional Information and Documentary Material ("Second Requests") prior to the

Acquisition. On July 11, 1996, the federal antitrust agencies granted Defendant Blackstone early termination of the 30-day waiting period for its acquisition of voting securities of Prime.

32. The parties to the Acquisition knew that the federal antitrust agencies were likely to investigate the Acquisition if they learned that Loewen's acquisition of an interest in Prime was an acquisition of one operator of cemeteries and funeral homes by another operator of cemeteries and funeral homes.

33. By consummating the Acquisition before the federal antitrust agencies investigated it, Defendant Blackstone and Loewen avoided the risk that the Acquisition would be delayed by a premerger antitrust investigation. Any such delay could have jeopardized the Acquisition.

34. In October 1996, when Loewen submitted a Notification and Report Form in connection with another transaction, the Premerger Office of the Federal Trade Commission discovered that Loewen should have submitted a Notification and Report Form prior to its acquisition of an interest in Prime. Thereafter, Loewen belatedly submitted that Notification and Report Form.

35. Included with Loewen's Notification and Report Form was a copy of a document that was also addressed to Defendant Blackstone. The document appeared to be one that Defendant Blackstone had been required to submit with its June 28 premerger filing in response to Item 4(c) of the Notification and Report Form. Sometime between October 15, 1996, and October 31, 1996, the Premerger Office of the Federal Trade Commission asked Defendant Blackstone for an explanation of why this document had not been submitted with the June 28 premerger filing.

36. On November 1, 1996, Defendant Blackstone filed a supplementary Notification and Report Form recertifying the June 28 premerger filing. Filed with this supplementary Notification

and Report Form were eight documents responsive to Item 4(c), including the Investment Committee Memorandum.

37. On November 15, 1996, the Federal Trade Commission issued Second Requests to Defendant Blackstone, Loewen, and Golder with respect to the Acquisition.

38. The HSR Act waiting period for Defendant Blackstone's acquisition of voting securities of Prime expired on May 13, 1997, twenty days after compliance with the Second Requests. 15 U.S.C. § 18a(e)(2).

39. Defendant Blackstone was in continuous violation of the HSR Act from August 26, 1996, when it acquired in excess of $15 million of the voting securities of Prime, until May 13, 1997, when the waiting period expired.

VIOLATION BY DEFENDANT LIPSON

40. The allegations contained in paragraphs 1 through 39 are repeated and realleged as though fully set forth herein.

41. Defendant Lipson was the Blackstone executive responsible for negotiating Defendant Blackstone's acquisition of an interest in Prime. The three other Blackstone executives who worked on the Acquisition reported to Defendant Lipson.

42. Defendant Lipson knew that the federal antitrust agencies were likely to investigate the Acquisition if they learned that Loewen's acquisition of an interest in Prime was an acquisition of one operator of cemeteries and funeral homes by another operator of cemeteries and funeral homes. He also knew that any significant delay of the Acquisition might have jeopardized its consummation.

43. Defendant Lipson was fully aware of the existence and the importance of the Investment Committee Memorandum. He was one of the authors of that memorandum. He was a member of the Investment Committee to which the memorandum was addressed. He attended the meeting of the Investment Committee at which the memorandum was discussed. He knew that the memorandum contained the detailed information described in paragraph 28 concerning competition in markets for cemeteries and funeral homes. He had a copy of the memorandum in his own files.

44. Defendant Lipson provided to the staff of the Federal Trade Commission inconsistent and contradictory explanations for the failure to submit the Investment Committee Memorandum with the June 28 premerger filing.

45. Defendant Lipson signed the certification of the June 28 premerger filing. As described in Paragraph 14 above, he attested in the certification to the fact that the June 28 premerger filing was, "to the best of [his] knowledge, true, correct, and complete."

46. Defendant Lipson knew, or should have known, that his certification of the June 28 premerger filing was inaccurate because the premerger filing itself was not "true, correct, and complete."

47. Defendant Lipson was in continuous violation of the HSR Act from August 26, 1996, until May 13, 1997, when the waiting period expired.

PRAYER

WHEREFORE, Plaintiff prays:

1. That the Court adjudge and decree that the August 26, 1996 acquisition by Defendant Blackstone of voting securities of Prime was in violation of the HSR Act, 15 U.S.C. § 18a; and that Defendant Blackstone was in violation of the HSR Act each day from August 26, 1996 through May 13, 1997.

2. That the Court adjudge and decree that the signing by Defendant Lipson of the certification of the June 28 premerger filing was in violation of the HSR Act, 15 U.S.C. § 18a; and that Defendant Lipson is liable for a civil penalty for each day that Defendant Blackstone was in violation of the HSR Act.

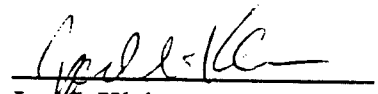
3. That the Court order Defendants to pay to the United States appropriate civil penalties as provided by the HSR Act, 15 U.S.C. § 18a(g)(1), the Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996).

4. That the Court order such other and further relief as the Court may deem just and proper.

5. That the Court award the Plaintiff its costs of this suit.

Dated: March 30, 1999.

FOR THE PLAINTIFF UNITED STATES OF AMERICA:



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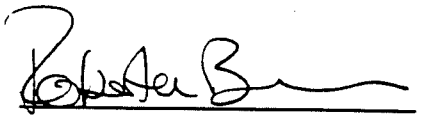

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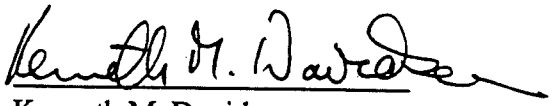

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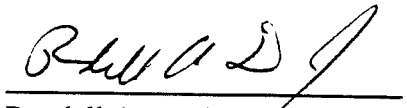

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