801.10

[redacted]

[redacted]

July 2, 2003

[redacted]

Ms. Nancy Ovuka
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
Room 303, 6th Street and
Pennsylvania Ave. N.W.
Washington, DC 20580

FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE
2003 JUL -3 A

Re: Hart-Scott-Rodino Compliance Inquiry

Dear Ms. Ovuka:

This letter summarizes our telephone conversations of June 30 and July 1, 2003.[1] It recapitulates the various considerations resulting in the conclusion that [redacted] and [redacted] are not required to file Notification and Report Forms pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"), and accordingly are not subject to the waiting period provided for by 16 C.F.R. § 803.10 in connection with the transaction described below. For the sake of narrative clarity, this letter also includes as background some additional facts related to our conversations.

A. Transaction Summary.

On June 24, 2003, [redacted] a publicly-traded [redacted], announced the acquisition of [redacted] (collectively, the "Parent Companies") for $112.5 million. This acquisition is pursuant to that certain Stock Purchase Agreement by and among [redacted], the [redacted] Trust"), the [redacted] (together with [redacted] the "Equity Sellers") [redacted] (together with [redacted] the "Warrant Sellers"), [redacted] together with [redacted] the "Option Sellers"), the Parent Companies and Seller's Representative as of June 24, 2003 (the "Agreement").

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[1] [redacted] of [redacted] also participated in the first call.

[redacted]

[redacted]

[redacted]owns fifty percent (50%) or more of the voting securities of each of the Parent Companies and therefore would be the acquired person for purposes of the Act if filings were required. The Parent Companies would be the acquired entities if filings were required.

The $112.5 million of consideration being paid by [redacted] pursuant to the Agreement can be divided into four categories: (1) about $76.5 million being paid to the Equity Sellers as consideration for the issued and outstanding equity securities of the Parent Companies; (2) about $6.9 million being paid to the Parent Companies to fund the repurchase of certain restricted voting securities of the Parent Companies held by [redacted] (3) about $2.5 million being paid to the Equity Sellers to compensate them for additional taxes that they likely will pay as a result of an election pursuant to § 338(h)(10) of the Internal Revenue Code of 1986, as amended (the "Code"), whereby [redacted] acquisition of the voting and non-voting securities of Parent Companies will be treated as an asset acquisition for Federal tax purposes (the "338(h)(10) Payment"); and (4) about $26.6 million being paid to the Parent Companies to fund the repurchase of certain issued and outstanding warrants and options for the equity securities of the Parent Companies. Furthermore, after closing, the purchase price will be adjusted upward or downward. Each of the four categories of consideration and the purchase price adjustment are discussed in greater detail below.

B. Issued and Outstanding Equity Securities of the Parent Companies.

[redacted]ill acquire at closing from the Equity Sellers all of the issued and outstanding equity securities of the Parent Companies for approximately $76.5 million. The equity securities of each of the Parent Companies include two classes of common stock: Class A common stock with voting rights ("Class A") and Class B common stock without voting rights ("Class B"). The Agreement attributes equal value to the Class A and Class B shares being acquired from each of the Parent Companies. Therefore, pursuant to the Agreement, [redacted] is paying about $38.4 million for the Class A shares and about $38.1 million for the Class B shares. Accordingly, of the $76.5 million being paid to the Equity Sellers for the equity securities of the Parent Companies, [redacted] will pay the Equity Sellers only about $38.4 million for the voting securities of the Parent Companies for the purposes of the Act.

C. Restricted Voting Securities.

[redacted] will pay at closing to the Parent Companies about $6.9 million to fund the repurchase by the Parent Companies of restricted voting securities of the Parent Companies currently held by [redacted] will make this payment in the following manner. Prior to closing, the various Parent Companies will issue promissory notes to [redacted] in exchange for his restricted voting securities. After the exchange (including at closing), no restricted voting securities of the Parent Companies will be issued and outstanding. At closing, [redacted] will pay the Parent Companies about $6.9 million, which the Parent Companies then will use after closing to pay [redacted] the face value of the promissory notes previously issued to him. You confirmed that this amount is treated as part of the acquisition price paid for voting securities

pursuant to 16 C.F.R. § 801.10(c)(2) and accordingly counts as consideration paid for voting securities for the purposes of the Act.

D. 338(h)(10) Payment.

After closing, [redacted] will pay to the Equity Sellers the $2.5 million 338(h)(10) Payment as defined above. You confirmed that this amount, to the extent that it is paid by [redacted] to the Equity Sellers for increased taxes payable as a result of the Equity Seller's ownership of voting securities of the Parent Companies, is treated as part of the acquisition price paid for voting securities pursuant to 16 C.F.R. § 801.10(c)(2) and accordingly counts as consideration paid for voting securities for the purposes of the Act. At this time, it is difficult to predict with accuracy how much of the 338(h)(10) Payment will be paid to the Equity Sellers in consideration for voting securities of the Parent Companies.

E. Warrants and Options.

[redacted] will pay at closing to the Parent Companies about $26.6 million to fund the repurchase of various issued and outstanding warrants and options for the equity securities of the Parent Companies. Prior to closing, the Parent Companies will issue promissory notes to the Warrant Sellers and the Option Sellers in exchange for their warrants and options for the equity securities of the Parent Companies. After the exchange (including at closing), no warrants or options for the equity securities of the Parent Companies will be issued and outstanding. At closing, [redacted] will pay the Parent Companies $26.6 million, which the Parent Companies then will use after closing to pay the Warrant Sellers and the Option Sellers the face value of the promissory notes previously issued to them.

All of the warrants and options are either currently convertible into equity securities or would be convertible as of closing if they were still issued and outstanding. However, none of the warrants or options has been converted into equity securities at any time or will be converted into equity securities at any time pursuant to the contemplated transaction. Accordingly, you confirmed that the $26.6 million of consideration that [redacted] is paying the Parent Companies to fund the repurchase of the warrants and options is exempt from the requirements of the Act pursuant to 16 C.F.R. § 802.31, which exempts the acquisition of convertible securities from the Act.

F. Purchase Price Adjustment.

After closing, the consideration paid by [redacted] will be subject to an upward or downward purchase price adjustment equal to the amount by which the current assets of the Parent Companies are greater or less than the liabilities of the Parent Companies on the closing balance sheets. The amount of any upward purchase price adjustment payable by [redacted] to the Equity Sellers should not exceed $1 million and probably will be significantly less.

[redacted]

G. Conclusion.

The maximum amount that [redacted] will pay for the voting securities of the Parent Companies pursuant to the contemplated transaction is about $48.8 million, making the conservative assumptions both (1) that [redacted] pays the Equity Sellers the full, anticipated $2.5 million amount of the 338(h)(10) Payment in consideration only for voting securities and (2) that [redacted] pays to the Equity Sellers a $1 million upward purchase price adjustment and that the entire value of such purchase price adjustment is attributable to [redacted] acquisition of voting securities of the Parent Companies. The approximately $48.8 million includes (a) the approximately $38.4 million that [redacted] will pay to the Equity Sellers for the issued and outstanding voting securities of the Parent Companies; (b) the approximately $6.9 million that [redacted] will pay to fund the Parent Companies' repurchase of [redacted] shares of the restricted voting securities of the Parent Companies; (c) the entire amount of the $2.5 million for the 338(h)(10) Payment (which assumes that the entire amount is paid for voting securities) and (d) the entire amount of an assumed $1 million upward purchase price adjustment (which assumes that the entire amount is paid to holders with respect to voting securities).

Based upon the facts discussed in our conversations and set forth in this letter, you confirmed that [redacted] and [redacted] accordingly are not required to file Notification and Report Forms pursuant to the Act for the contemplated transaction and are accordingly not subject to the waiting period provided for by 16 C.F.R. § 803.10 because [redacted] will not acquire voting securities of the acquired person and acquired entities in excess of $50 million.

I understand that the Premerger Notification Office does not confirm informal advice in writing. However, if this letter misconstrues or misrepresents our conversations in any way, I would appreciate it if you would call me at the number provided above as soon as reasonably possible and inform me of any such inaccuracies. Thank you again for your assistance.

Very truly yours,

[redacted]

[redacted]

cc: [redacted]

7/10
Confirmed advice
NMO
MV concurs