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September 18, 2003

VIA FACSIMILE

Ms. Nancy Ovuka
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, D.C. 20580

Re: Confirmation of Informal Advice regarding Reporting Obligations Where Asset Value Is Disputed

Dear Ms. Ovuka:

Thank you for taking the time to speak with me last month. As you may recall, we represent a party that is selling its business in a court-ordered transaction. The buyer maintained that it had a contractual right to purchase the business; the seller disagreed, but the buyer prevailed in litigation. As a result, the parties expect to conditionally close a transaction later this year. The transaction is structured as an asset acquisition.

Although the requirement to sell has been established, the final purchase price has not. The parties' agreement provides that the purchase price will be the "fair and equitable value" of the business, and the parties continue to dispute the amount of money that buyer must pay for the assets. At closing, the buyer will make a payment, but the seller will treat this as partial payment and seek the rest through litigation. You confirmed that in these circumstances, the purchase price is not "determined" for purposes of 16 C.F.R. § 801.10(b).

Under 16 C.F.R. § 801.10(c)(3), "fair market value" is determined (for HSR purposes) by the board of directors (or its delegee) of buyer's ultimate parent acting in good faith. Seller has no information to confirm that buyer has made this evaluation, much less that it has done so in good faith. Seller believes that the fair and equitable value of the assets far exceeds the \$50 million threshold (although the value does not equal or exceed the \$200 million threshold), and the size of parties test appears to be satisfied.

Nonetheless, the buyer has informed us that it does not intend to file an HSR Notification with respect to this transaction, although it has not disclosed its reasoning. Based on the buyer's litigation position, one reason may be a claim that the "fair market value" of the acquired assets is less than \$50 million. In these circumstances, you advised me that seller may rely upon buyer's communication as indicating that buyer has made the required determination, and even if seller disagrees (indeed, strongly disagrees) with the buyer's assumed determination of fair

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market value, seller need not file an HSR Notification. (Obviously this would not relieve buyer of its obligations or of any consequences for its decision not to report.)

If I have not correctly stated the Premerger Notification Office's view, I would appreciate your letting me know. Thank you again for your assistance.

Very truly yours
[REDACTED]

[REDACTED]

9/22/03
Confirmed advice
w/ writer NMO

M. Verne concurs
[REDACTED]