801.10

[redacted]
ATTORNEYS AT LAW

[redacted]

July 6, 2004

By Messenger

Mr. Michael Verne
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
6th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 29580

Dear Mr. Verne:

This correspondence is a follow-up to our exchanges of voice mails concerning a proposed transaction.

The factual circumstances are as follows. A corporation, Company A, is acquiring another corporation, Company B, through a merger of a corporate subsidiary of Company A into Company B, with Company B surviving the merger as a wholly owned subsidiary of Company A. Company B has three classes of outstanding stock: Common Stock, Series A Preferred Stock and Series B Preferred Stock. The Series A Preferred Stock and Series B Preferred Stock have no current rights to vote for directors. Only the Common Stock has the right to vote for directors and to vote on the merger.

In connection with the transaction, the common shareholders are receiving no consideration for their shares of Common Stock[1]. The holders of Series A Preferred Stock, which is the senior preferred stock, are receiving full liquidation value for their shares; however, the holders of Series B Preferred Stock, which is the junior preferred stock, are receiving less than their full liquidation preference. Thus, there is no value attributable to the Common Stock. Most of the holders of the Series A Preferred Stock and the Series B Preferred Stock are also holders of the Common Stock that will be cancelled in the merger for no consideration. The merger agreement provides that at the Closing of the transaction Company A will make (or cause to be made) $108.5 million of cash payments. These payments will include:

[1] Effective upon the consummation of the merger, Company A, on the one hand, and Company B's shareholders, on the other hand, will mutually release each other from any claims based on facts or circumstances occurring prior to the closing date of the merger. Because the holders of Company B Common Stock are not receiving any consideration for their common shares in the merger and there are two holders of Common Stock who are not also holders of Series A Preferred Stock or Series B Preferred Stock, these two holders of Company B's common stock will receive a $1,000 cash payment in consideration of this release.

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1. Payment of approximately $75.5 million (a portion of which will be deposited in escrow to secure certain post-closing obligations) to the holders of shares of Series A Preferred Stock and Series B Preferred Stock of Company B;

2. The payment to Company B of an amount sufficient to enable Company B to repay certain borrowed funds (approximately $23 million);

3. The payment of certain Company B expenses (approximately $4 million); and

4. The payment of certain transaction bonuses to individual employees of Company B (approximately $6 million), a portion of which will be deposited in escrow to secure certain post-closing obligations.

In my voice mail of June 25, 2004, I expressed the view that the transaction described above should not be reportable for HSR purposes because no consideration is being paid for "voting securities" within the meaning of the HSR Act. I also noted Interpretations 93 and 98 in the Premerger Notification Practice Manual of the Section of Antitrust Law of the American Bar Association which deal with certain situations where the provision of funds to enable a target company to retire existing indebtedness does not count toward the HSR size of transaction amount.

In your reply voice mail of June 28, 2004 you concurred that no HSR filing is necessary in the circumstances discussed.

Please contact me as soon as possible at [redacted] if you should disagree with the summary above.

Thank you very much for your assistance.

Sincerely yours,

[redacted]

cc: [redacted]

AGREE - N. OVUKA CONCURS.
B Michel
7/8/04