801.1; 802.31

[redacted]

[redacted]

CONFIDENTIAL

VIA ELECTRONIC MAIL

August 16, 2006

Ms. Nancy M. Ovuka
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
7th & Pennsylvania Avenue, NW
Washington, DC 20580

Dear Nancy:

I am writing to confirm my understanding of a telephone conversation we had today concerning the potential reportability under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act") of a proposed transaction discussed below.

Proposed Transaction

Please assume for purposes of our hypothetical set forth below that the Size of the Parties Test is met. Pursuant to an Agreement and Plan of Merger, Acquiring Parent will acquire 100% of the issued and outstanding voting securities of Target, a privately held corporation. The structure of the transaction involves a merger whereby Target will be merged with and into Merger Sub, a wholly owned subsidiary of Acquiring Parent, with Target being the surviving corporation. Accordingly, Target will become a wholly owned subsidiary of Acquiring Parent.

While the value of the overall consideration being provided by Acquiring Parent as a part of the transaction is above $56.7 million, the consideration for the stock of Target carrying current rights to elect directors is less than this amount, and accordingly, below the HSR Size of the Transaction Test. The stock of Target with current rights to elect directors consists of common stock and preferred stock of the Target. Prior to closing, the preferred stock will be converted into common stock of Target. However, this conversion will not increase the rights of the holders of the preferred stock with regard to the election of directors of the Target. The consideration for the common stock of Target will be voting securities of Acquiring Parent.

The additional consideration being provided by Acquiring Parent is with regard to the outstanding warrants and options of the Target. These options and warrants will not be exercised and converted into common stock of Target prior to closing, and will cease to be outstanding immediately after closing. The options and warrants will be converted into the right to receive voting securities of Acquiring Parent subject to two exceptions: (1) certain options

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have a sufficiently high exercise price that they are considered "out-of-the-money" such that these options will be cancelled along with the other options and warrants, but without the receipt of any merger consideration; and (2) certain options will be converted or rolled over into stock appreciation rights in Acquiring Parent. None of the options and warrants currently carry any voting rights with regard to the election of directors of any entity. If the amount of the additional consideration for the options and warrants is included in the valuation for HSR purposes, the Size of the Transaction Test would be met.

As a result of this transaction, no shareholder of Target will hold in excess of $56.7 million in voting securities of the Acquiring Parent.

Analysis and Conclusions

You confirmed that the transaction described above is not reportable under the HSR Act as the $56.7 million Size of the Transaction Test is not met.

You confirmed that the conversion of the preferred stock of Target into common stock of Target prior to closing of the transaction is not a potentially HSR reportable event as the preferred stock already carries rights for the election of directors of Target, and those rights will not be increased as a result of the conversion.

You also confirmed that the cancellation of the options and warrants (which do not entitle the holders to current voting rights with regard to the election of directors) is an exempt event for HSR purposes. I understand that these are convertible voting securities under 16 C.F.R. § 802.31. (You addressed a similar issue in FTC Informal Interpretation No. 0603028.) Even though the option and warrant holders will receive the same net consideration as a part of this transaction that they would have received if the options and warrants were exercised immediately prior to closing, the cancellation of the options and warrants is nevertheless a non-reportable part of the transaction. The fact that option and warrant holders will hold voting securities of the Acquiring Parent as a result of the transaction does not change the HSR analysis as no person will be deemed to hold in excess of $56.7 million in voting securities of the Acquiring Parent as a result of this transaction. Accordingly, the consideration paid to the holders of the options and warrants as a part of this transaction is not included in the valuation for HSR purposes.

I understand that this transaction will not be regarded as a transaction or device for avoidance under 16 C.F.R. § 801.90 as the transaction has not been structured in any way for purposes of not filing under the HSR Act.

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Please let me know as soon as possible if you disagree with any of the conclusions discussed above, or if I have misunderstood any aspect of your advice. Thank you for your assistance in this matter.

Sincerely,

[redacted]

8/17/06
Agree
N. Ovuka

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