801.50
801.10

[redacted]

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September 9, 2008

VIA E-MAIL

B. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Hart-Scott-Rodino Informal Interpretation

Dear Mike:

Thank you for taking the time to speak with [redacted] and me last Wednesday, and having a follow-up call with me last Thursday, regarding our Hart-Scott interpretation question. I am writing to memorialize my understanding of our conversations. As you may recall, [redacted] and I presented you with the following scenario:

> Company A and Company B intend to form a new (unincorporated) limited liability company ("Newco"). Company A and Company B both meet the applicable size-of-person test and are engaged in interstate commerce.
>
> In connection with the formation of Newco: (i) Company A will transfer to Newco certain customer contracts, tangible equipment and other assets at Company A's book value which, in the aggregate, is approximately $40 million; and (ii) Company B will transfer to Newco certain customer contracts and tangible assets at Company B's book value and transfer all of its right, title and interest to certain trademarks at a value determined by a third party appraiser, with the aggregated book value of the tangible assets and the appraised value of the trademarks being approximately $40 million. In exchange for the transfer and assignment of the foregoing assets, Company A and Company B will each acquire a 50% equity interest in Newco during its formation. Each party's capital account in Newco will be $40 million.
>
> In addition, the following will occur in connection with the formation of Newco, at the moment immediately following the initial formation:

1. Newco will lease from Company A ("Leases") certain real estate (land and buildings) associated with the tangible equipment and assets conveyed by A to Newco in the formation transaction. The Leases will be for a fixed term with consecutive options to renew at a rental rate believed to be fair market value. The real estate reverts to Company A upon expiration or termination of the Leases.

2. Newco will enter into an exclusive trademark license agreement ("License Agreement") with Company B under which Newco will be granted an exclusive license to use certain trademarks ("Licensed Marks") in a particular segment of an industry. Company B will retain the right to use the Licensed Mark in all other segments of the industry. The License Agreement terminates at the same time the Leases terminate and have a royalty rate that is believed to be fair market value. The trademarks subject to the License Agreement revert to Company B upon expiration or termination of the License Agreement.

3. Company A and Company B will each make loans of approximately $100 million to Newco. The two loans shall bear the same market interest rate and will require repayment of principal and interest over a term of years.

4. Newco will enter into agreements with Companies A and B respectively to act as a sales agent to sell the finished goods inventory that Company A and Company B possess at the time of formation. Newco will be paid a sales commission on all sales of Company A's or Company B's finished goods inventory, but the profit or loss on such sales remains with Company A and Company B. After the finished goods inventory of Company A and Company B has been sold, the agent agreements terminate.

5. Company B will enter into a tolling agreement to manufacture finished goods for Newco for a limited period of time after the formation of Newco. Newco will pay Company B a market rate for the goods supplied. The agreement terminates at the time Newco's production facilities become capable of producing all of Newco's products.

Presented with these facts, you agreed with the following conclusions:

The initial formation transaction is governed by 16 C.F.R. § 801.50. Each of Company A and Company B is deemed to be acquiring a potentially reportable controlling interest in Newco. For purposes of the size-of-transaction test, the value of each party's 50% interest in Newco is the fair market value, as determined in good faith by each of Company A and Company B, respectively. You indicated that acquisition price was not relevant in the context of a § 801.50 formation transaction.

In our follow-up conversation, you indicated that for the fair market value determination, it would be appropriate for each party to calculate the fair market value of the assets it contributed to the joint venture and use that number as the fair market value of its 50% interest in the joint venture, since the value of what it gets back (the 50% membership interest) would equal the value of what it put in (the contributed assets). You said that the parties would not need to assign a "going concern" or similar value to the entity being created. This was true notwithstanding the fact that the parties were contributing existing customer contracts to Newco.

You also indicated that steps 1-5 above would not be considered contributions of assets to the joint venture or acquisitions of assets by the joint venture. Accordingly, they would not need to be considered when the parties value their respective 50% membership interests in the initial formation transaction. Neither would they be considered potentially reportable assets acquisitions by the joint venture.

Please let me know if I have misstated our conversation in any way or if you disagree with any of the conclusions above. As always, thank you for your time and assistance.

Sincerely,

[redacted]

Agree -
B
9/10/08