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Verne, B. Michael

From: [redacted]

Sent: Tuesday, January 27, 2009 6:47 PM

To: Verne, B. Michael

Subject: Confirmation of January 26, 2009 Call

Mr. Verne

The purpose of this email is to confirm the conclusions reached on our telephone conversation on January 26, 2009 regarding the transaction described below. At your earliest convenience, can you please confirm whether you agree with the conclusions set forth below?

Proposed Acquisition

A group of four limited partnerships (referred to herein individually as "LP1," "LP2," "LP3" and "LP4," and collectively as, the "LPs") intends to form a new corporation (referred to herein as "Holdco") and contribute sufficient capital to Holdco to allow Holdco to acquire all of the non-corporate interests of two targets that are under common control (the "Target Companies"). Holdco will effectuate the acquisitions through two wholly owned acquisition subsidiaries (referred to herein as "Acquisition Sub 1" and "Acquisition Sub 2"). The size of transaction will be greater than $63.1 million but less than $239.2 million. For purposes of the size of person test, the ultimate parent entity of the acquired person is a $12.6 million person but not a $126.2 million person.

Background Information on UPE of Acquiring Person

Ultimate Parent Entity. At the time of the acquisition of the non-corporate interest of the Target Companies, Acquisition Sub 1 and Acquisition Sub 2 will be controlled by Holdco, as Holdco will hold 100% of the voting securities of these entities. LP1 will hold approximately 55% of the voting securities of Holdco and, as a result, will control Holdco and be the ultimate parent entity of the acquiring person.

Related LPs. The LPs are related in that they have (1) a common general partner, and (2) have some common limited partners. No person, however, is entitled to 50% or more of the profits of any of the LPs or 50% or more of the assets of any of the LPs upon their respective dissolution.

Portfolio Companies of the LPs. Previously, the LPs invested in two separate corporations (referred to individually herein as "Portfolio Company 1" and "Portfolio Company 2," and collectively as, the "Portfolio Companies"). None of the LPs holds 50% or more of the voting securities of either of the Portfolio Companies. In connection with the acquisitions of each of the Portfolio Companies, the LPs entered into a Stockholders Agreement with the other stockholders of the Portfolio Companies (these other stockholders represent co-investors and individuals that were members of management of the Portfolio Companies prior to the LPs' investments). Each of the Stockholders Agreements includes a voting provision pursuant to which the LPs are entitled to designate individuals for election to the board of directors of the Portfolio Companies and, when elected, such individuals would constitute a majority or greater of the board of directors. Under these voting arrangements, each of the parties to the Stockholders Agreements agrees to vote their shares in favor of the individuals designated by the LPs. In order to effectuate the intent of these voting arrangements, each of the parties to the Stockholders Agreements granted an irrevocable proxy to the Secretary of the respective Portfolio Company, which allows the Secretary to vote such stockholder's shares in a manner consistent with the voting agreement.

Total Assets of LPs. At the end of each quarter, a combined (but not consolidated) balance sheet is prepared for the LPs. As of December 31, 2008, the total assets reflected on the LPs combined balance sheet was $78.26 million. Of this amount, $77.05 million was reflected as the LPs' "portfolio investments," which was calculated using Statement of Financial Accounting Standard No. 157, *Fair Value Measurements*.

Conclusions

Based on the facts set forth above, it is my understanding that you agreed with the three conclusion set forth

below:

Conclusion 1: LP1 does not control the Portfolio Companies. Although the LPs have a common general partner and some common limited partners, they are not under common control and, as a result, the voting securities holdings of LP2, LP3 and LP4 in the Portfolio Companies are not attributed to LP1. Accordingly, LP1 is not deemed to control the Portfolio Companies under Rule 801.1(b)(1)(i) (voting securities test), because it individually holds less than 50% of the voting securities of each of the Portfolio Companies.

With regard to Rule 801.1(b)(2) (contractual power to designate 50% or more of the board), although LP1 is a party to the Stockholder Agreements, it does not have the power presently to designate 50% or more of the directors of the Portfolio Companies. That power is held by a group of stockholders of the Portfolio Companies which, although are "related", are not under common control. A "group" of stockholders is not an "entity" (as defined by Rule 801.1(a)(2)) and, as a result, can not control.

During our call I indicated that I believed the conclusion set forth in the immediately preceding paragraph was supported by Interpretation 43 of the Premerger Notification Practice Manual (4th Ed.), which specifically addressed whether a "group" of investors (each of which held a noncontrolling interest in the issuer) controlled the issuer as a result of the existence of a shareholders agreement pursuant to which the group of investors obtained the contractual right to designate a majority of the board of directors of the issuer. Under this arrangement, the group of investors granted one individual investor an irrevocable proxy to vote their shares consistent with the voting arrangement. Under these circumstances, it was concluded that the group of investors did not control the issuer as a result of the shareholders agreement and that the individual holding the irrevocable proxy was the controlling party. Specifically, it was noted:

> There may be an argument that from a practical perspective the issuer is "controlled" by the group of investors as a result of the group's contractual power to designate a majority of the directors of the issuer, but the Rules do not recognize a "group" as an "entity."

Conclusion 2: It is not necessary to recompute the total assets and annual nets sales as contemplated by Rule 801.11(b)(1). Because LP1 does not control the Portfolio Companies, it is not necessary to recompute the total assets and annual net sales of LP1 to include the total assets and annual net sales of the Portfolio Companies as contemplated by 801.11(b)(1).

Conclusion 3: LP1 should prepare a separate balance sheet that reflects its separate total assets (as opposed to just relying on the combined balance sheet of the LPs which reflects the total assets of all the LPs). To determine the total assets of LP1, it is our understanding that it is necessary to prepare a pro forma balance sheet that reflects the total assets of LP1, which would be reflected as LP1's percentage interest in the Portfolio Companies. As we discussed on our call, we believe that this approach is consistent with Interpretation 142 of the Premerger Notification Practice Manual (4th Ed.), which provides:

> The dollar value of asset acquisitions from two or more "related" persons (e.g., from two separate partnerships having some or all of the same partners but not under common control for HSR purposes) is not aggregated. Similarly, for purposes of the size-of-person test in Section 7A(a)(2), the annual net sales and total assets of multiple sellers (or multiple buyers) aggregated only to the extent that any of such sellers (or buyers) are commonly controlled.

Thank you for your consideration of this matter.

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Agree
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