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September 12, 1991

BY FAX

Richard B. Smith, Esq.
Premerger Notification Office
Federal Trade Commission
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Smith:

I am writing to memorialize our telephone conversation today and to confirm your advice that the transaction outlined below does not violate the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the regulations promulgated thereunder.

FACTS

As I explained, Shareholder X currently owns and has owned for some time approximately 19% of the voting securities of Company A. X is currently planning a "secondary offering" pursuant to which his shares in Company A will be offered to the public through investment bankers. That offering is scheduled to occur before the end of this month. Our client, Company B, proposes to negotiate with X for a direct purchase from X of approximately 13% of Company A's voting securities at a fixed price. Company B's acquisition of Company A's voting securities from X is reportable under the Act, and Company B intends to file under the Act as soon as possible pursuant to the procedures outlined in 16 C.F.R. §801.30.

The timing of the secondary offering and the Hart-Scott-Rodino waiting period present a problem. The Hart-Scott-Rodino waiting period incident to Company B's acquisition of Company A voting securities will expire only after the date of the secondary offering. Thus, should X commit to sell Company A voting securities to Company B and, for some reason (which we do not anticipate or have any reason to foresee), the FTC or the

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Antitrust Division successfully challenge Company B's acquisition, X will have missed the current opportunity to offer the shares committed to Company B in the secondary offering, which will otherwise proceed before the end of this month.

Accordingly, Company B proposes to agree with X that, as part of X's commitment to sell Company A voting securities to Company B, if Company B should be unable to purchase those voting securities, Company B will reimburse X for the cost of another secondary offering and any diminution in the share price from the time of the first secondary offering to the subsequent secondary offering. Without such a guarantee, X will not be willing to sell the Company A stock to Company B.

ANALYSIS

For the reasons we discussed in our telephone conversation, we do not believe that this proposed agreement between X and Company B in any way violates the Act. It is true that, when X and Company B agree to the transaction, the price risk incident to the ownership of Company A voting securities would pass from X to Company B. In all other respects, however, beneficial ownership of the Company A voting securities will not have passed to Company B. In particular, Company B will not be entitled (1) to any dividends from the Company A stock, or (2) to vote the Company A stock. Thus, these key elements of beneficial ownership of Company A stock will remain with X.

Moreover, the proposed arrangement is not part of an avoidance device. X has not acted as Company B's agent in acquiring Company A voting stock and Company B will not make any open market purchases of Company A stock. Company B is also not delaying its premerger filing under the Act. As we discussed, the arrangement with X is the functional equivalent of X selling Company B an option to purchase Company A stock, the acquisition of which would be clearly exempt under the regulations. 16 C.F.R. §801.1(f); 16 C.F.R. §802.31. In addition, the Staff's approval of the foregoing arrangement based in part on its unusual fact pattern does not provide a significant regulatory gap or loophole to the Act's reporting requirements.

In sum, we believe that the proposed arrangement between X and Company B does not violate the Act or its regulations. In our telephone conversation today, you indicated that you agreed with our position. Given the critical timing

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involved in this transaction, our client will be taking immediate steps in reliance on this advice and, accordingly, we would very much appreciate hearing from you by close of business tomorrow, September 13, whether the Staff disagrees with our conclusion.

We appreciate your consideration of this issue and would, of course, be happy to answer any further questions that you may have.

Sincerely,

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9/13/91 - Advised [redacted] that letter had been reviewed by PHN staff and it was in agreement that Company B's agreement with X did not pass beneficial ownership of the 13% of A's voting stock to B. Although price at which stock was to be purchased was fixed, thus giving B the benefit of any rise in price and the detriment of any fall in price, such is true of any agreement to buy stock at a fixed price. Such agreements also limit the holder's right to transfer the stock (about breaking the agreement) but does not pass such right to the buyer. Since B did not acquire the right to vote the stock, transfer it, or receive dividends, in our view X still holds A's voting stock. B's agreement to reimburse X for any fall in the price of A's stock should X be required to make another "secondary offering" does not change this conclusion.

R.B. Smith

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