



October 25, 1991

Mr. Patrick Sharp
Federal Trade Commission
Room 301
7 Pennsylvania Avenue, NW
Washington, DC 20580

This material may be subject to the confidentiality provision of Section 24 (b) of the Clayton Act. Its release under the Freedom of Information Act.

Re: Formation of Joint Venture by Creditors of Bankrupt Debtor

Dear Mr. Sharp:

This letter is to confirm our conversation of September 30, 1991 concerning the applicability of the Hart-Scott-Rodino Premerger Notification Requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act") to a proposed transaction. The situation we discussed concerned a bankruptcy reorganization under a plan filed with the U.S. Bankruptcy Court. The facts we discussed were as follows:

subject to 24(b) of Clayton Act & 1001 of Bankruptcy Act

In accordance with a Plan of Reorganization ("Plan") filed under the U.S. Bankruptcy Code (which Plan was confirmed by the Court on October 18, 1991 on the terms we discussed), the debtor corporation ("Debtor") will transfer certain of its assets and liabilities to a new corporation formed by the bankruptcy trustee of the Debtor ("NEWCO"). The stock of NEWCO will be distributed 55 percent to a secured creditor of Debtor ("Corporation A") and 45 percent to a newly-formed creditors trust, whose beneficiaries consist of the unsecured creditors of Debtor ("Creditors Trust"). The decision to use a Creditors Trust to hold the shares rather than to make a distribution of shares to individual creditors was made by the unsecured creditors for business and legal reasons unrelated to the HSR Act. Corporation A will contribute \$2 million in new consideration for its shares, but the shares distributed to Corporation A and to the Creditors Trust are essentially issued in exchange for claims against the Debtor, as contemplated by Section 1145 of the Bankruptcy Code. The value of the assets

under 801.40 acquiring persons are public debt from Debtor; they were "Creditors"

US NEWCO the "trust" of the Creditors Trust & secured creditors

what type? irrevocable

plus the value of the frozen debt - o-

The creditors are on by beneficiaries of set this up



Mr. Patrick Sharp
October 25, 1991
Page 2

that will be held by NEWCO is estimated at between \$17-18 million.

While this situation does not fit neatly within any of the typical transaction structures, in our discussion we agreed that this transaction was probably most closely akin to the formation of an incorporated joint venture by Corporation A and Creditors Trust. This analysis seemed applicable because NEWCO would originally have no assets and would receive its assets pursuant to the existing rights of Corporation A and the beneficiaries of the Creditors Trust in the assets of Debtor, as provided in the Plan. The assets are then held jointly in NEWCO. We reviewed the HSR Act jurisdictional requirements applicable to formation of a joint venture, which require that (i) at least one of the joint venture partners have annual net sales or total assets in excess of \$100 million, (ii) the joint venture will have total assets of \$10 or more, and (iii) that at least one other joint venture partner have total assets or annual net in excess of \$10 million. CFR 801.40.

I represented that factor (i) is met due to the size of Corporation A's ultimate parent entity, and that factor (ii) is met by virtue of the value of assets to be held by NEWCO when the transaction is complete. Factor (iii), however, is not met because the Creditors Trust does not have assets or sales in excess of \$10 million (in fact, it has no assets or sales at all) prior to its receipt of the NEWCO stock.

Based on this analysis, we concluded that no Premerger Notification was required with respect to the formation of NEWCO.

I believe this fairly reflects our discussion and analysis. Please call me immediately if this is not the case. The bankruptcy court order becomes effective on October 28, and the plan calls for a closing on or before October 31.

Thank you very much for your assistance.

Very truly yours,

called [redacted] 10-29-91 - 801.40 does not apply since size thresholds are not met (RS) concurs but notes flaws