

[REDACTED]

April 6, 1992

Mr. William Schechter
Staff Attorney
Premerger Notification Office
Bureau of Competition
Federal Trade Commission, Room 303
Washington, D.C. 20580

Dear Mr. Schechter:

Pursuant to our telephone conversation on April 3, 1992, we are writing to request an informal interpretation by the Federal Trade Commission of whether the below described transaction between Buyer, a cooperative corporation primarily engaged in the [REDACTED] and Seller, a corporation presently engaged in the business of [REDACTED] is required to be submitted to the United States Department of Justice and Federal Trade Commission under the premerger notification rules of the Hart-Scott-Rodino Antitrust Improvements Act.

The proposed transaction is structured as follows:

I. Asset Disposition.

- A. Buyer will purchase for approximately Nine Million Dollars (\$9,000,000) the [REDACTED] inventory in Seller's present distribution facility.
- B. Buyer will sublease Seller's distribution facility for the remaining term of the lease, which expires on April 30, 1993. The distribution facility lease has two five (5) year renewal options. To the extent the lease may be assigned at the end of its term, and if Buyer so elects, Buyer and Seller will use their best efforts to transfer to Buyer all of Seller's rights under the distribution facility lease, including renewal options. At the present time, Buyer does not expect to use the

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facility after April 30, 1993. Thus, Buyer probably will not exercise its rights to obtain renewal of this lease.

- C. Buyer will sublease Seller's fleet of distribution trucks for a term equal to the shorter of the end of the respective lease agreements or the termination of the Supply Agreement.
- D. Seller will grant to Buyer a first refusal offer with respect to fourteen (14) of its [redacted] stores. With respect to Seller's other [redacted] stores, Seller will grant to Buyer a right of first offer. By this, it is meant that Seller must first offer the store(s) to Buyer at a price specified by Seller. Buyer then has an opportunity to accept that offer. If Buyer does not accept the offer, Seller is free to sell the stores for the same or a greater price. If, however, a lesser price is negotiated with a third party, Buyer has a first refusal right with respect to the store(s) in question.

II. Supply Arrangement.

- A. Buyer will advance to Seller [redacted] in exchange for Seller's agreement to purchase its [redacted] from Buyer for a seven (7) year period (the "Supply Agreement").
- B. If (1) Seller transfers any of its [redacted] stores to third parties and such third parties are not supplied by Buyer, and (2) as a result, Seller's purchases from Buyer of [redacted] items is less than ninety percent (90%) of a set target for purchases, the funds advanced must be repaid pursuant to a formula. For example, if Seller, upon the first anniversary of the execution of the Supply Agreement, transfers all its [redacted] stores to a third party who does not purchase from Buyer, Seller would be obligated to begin repayment of six-sevenths (6/7) of the advance [redacted].
- C. Seller may, at any time, elect to terminate the Supply Agreement; however, if the Supply Agreement is terminated by Seller, a prorated portion of the sum advanced must be repaid. Again, for simplicity, if Seller terminates on the first anniversary of the Supply Agreement, the sum mentioned in II.B above, must be repaid to Buyer.
- D. Seller's repayment obligation as mentioned in II.B shall be secured by the granting by Seller to Buyer of a first priority security interest in the furniture, fixtures, and equipment in certain of Seller's [redacted] stores to be agreed upon by the parties and by a collateral assignment to Buyer of Seller's leasehold interest in the premises at which such [redacted] stores are located.

I do not consider this [redacted] to be part of the purchase price

The consideration connected with the "assets," as described in Part I above, could not, under any rational analysis, approach \$15,000,000 (the Size of Transaction threshold). Thus, the transaction would be unmistakably exempt if the transaction only consisted of Part I. If the

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advance paid in connection with the Supply Agreement were somehow treated as the purchase of an asset, however, the value of the "assets" would exceed the Size of Transaction threshold.

Based on our research, it is our conclusion that the funds advanced in connection with the Supply Agreement would not be considered payment for the purchase of an asset, as "asset" is used in Section 7 of the Clayton Act. This is simply an advance to secure an outlet for the sale of goods. The right to sell goods is neither property nor a property right which is subject to transfer.

The payment is not for a license or right of use. There are no patents, copyrights, or trademarks being assigned, licensed, or otherwise transferred. Under the Supply Agreement, nothing flows from the payee to the payor other than the payee's commitment to purchase a target amount.

Under the Supply Agreement, the Buyer will recoup its [redacted] on the profits from the sale of [redacted] to Buyer. Indeed, if, under certain circumstances, the target purchases are not satisfied, Seller must commence repayment of the funds advanced. If the Seller simply wants out, it can terminate the Supply Agreement, but, in that event, a prorated portion of the [redacted] must be repaid. This is clearly inconsistent with the concept of a purchase or other acquisition of a property right.

The Supply Agreement is more akin to a loan of working capital than to a purchase of assets. Indeed, the Seller's financial condition is such that, without this or some other infusion of funds, the vitality of the entity as a participant in the [redacted] market could be seriously undermined. If, however, it can eliminate the costs and headaches of operating its own warehouse and distribution system and can concentrate on the [redacted] products, Seller believes that, with the said infusion of funds, it can survive and be a vigorous competitor for the [redacted] in the region.

We hope that the Federal Trade Commission can confirm our conclusion that the Supply Agreement, as described above, does not constitute an "asset" under the Clayton and Hart-Scott-Rodino Acts. Based on our April 3 phone conversation, we understand that the Federal Trade Commission will be able to respond to this request by Wednesday the 8th of April. If this will not be possible or if you require additional information, please notify us by telephone at the number(s) shown above. Contact either myself or [redacted]. Thank you for your consideration of this matter.

Very truly yours,
[redacted signature block]