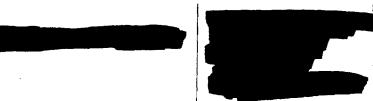
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July 16, 1993

VIA TELECOPIER - (202) 326-20

## CONFIDENTIAL

John M. Sipple, Jr., Esq. Chief, Premerger Notification Office Bureau of Competition Federal Trade Commission Washington, D.C. 20580

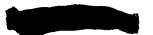
Dear Mr. Sipple:

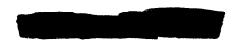
At your request, I am writing this letter to describe the transaction that we discussed by telephone today. The transaction summarized below involves my client ("X") and an unrelated party ("Y"):

X is in the business of selling certain consumer products to retailers. The products are manufactured to X's specifications by selected manufacturers, and they are sold bearing various trademarks and trade names owned by X, along with other marks licensed by X on a nonexclusive basis.

X has entered into a purchase contract with Y, pursuant to which Y will purchase from X the inventory of most of X's product line, plus a small amount of related tangible personal property. After the closing, to the extent that retailers return products previously sold to them by X, X will settle with the retailers, and Y will purchase the products from X.

The purchase contract provides that at closing X and Y will enter into a Trademark License Agreement and a Distribution Agreement (collectively, the "Agreements"). The Agreements pertain to products of the kind purchased from X's inventory and to one other type of product (collectively, the "Products"). Pursuant to the Agreements, Y will be entitled





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(1) to procure Products from manufacturers approved by X and (2) to apply X's trademarks to the Products on an exclusive basis and to apply to the Products on a nonexclusive basis those marks currently licensed by X on a nonexclusive basis. During the term of the Agreements, Y must pay X a distribution fee set at a percentage of X's sales of trademarked Products. The fee will be set at a flat level in the first year, will increase in the second year, and will increase again if an annual sales threshold is exceeded. The term of the Agreements is five years. If cumulative fees during the five-year term exceed a specified amount, the Agreements will automatically renew for one additional five-year term.

The fee level that triggers the right of renewal was calculated on the basis of X's historical sales, plus a growth factor. However, X is retaining all rights to a segment of its product line that represented roughly one-third of its sales in the most recent year, while giving Y the right to affix the trademarks to one additional Product category that X has not heretofore sold. Hence, in order to qualify for the renewal term, Y will have to cultivate substantial sales of the new Product or significantly expand sales volume in existing Products.

I would very much appreciate any guidance that the Premerger Notification Office might provide with respect to the following questions:

- (1) Does entering into the Agreements constitute an asset acquisition for purposes of Section 7A of the Clayton Act?
- (2) If question (1) is answered affirmatively, is the asset acquisition under the Agreements limited to the exclusive trademark license, without reference to the nonexclusive trademark license (such that the value attributable to the latter would not figure in the acquisition price or the fair market value)?
- (3) I assume that the post-closing purchase of inventory is properly viewed as an integral part of the asset acquisition by reason of 16 C.F.R. § 801.13(b) or otherwise. If this assumption is correct and/or if question (1) was answered affirmatively, can the acquisition price be a "determined" one within the meaning of 16 C.F.R. § 801.10(b)?

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Whether or not the acquisition price is determinable, Y must determine the fair market value of the assets to be acquired. Interpretation #116 in the Premerger Notification Practice Manual suggests that the most appropriate formulation . . . would be to determine how much the buyer would pay at present in cash for the [assets] being acquired, without any contingent payment." If Y is required to value the exclusive trademark license, how should Y account for the fact that the license may terminate in five years? In other words, how can the assumption of an all-cash purchase be reconciled with a contingency that itself hinges on the amount of contingent payments made in the first five years?

Please feel free to respond by telephoning me at the above-listed number. Because X and Y are anxious to complete the transaction as soon as practicable, I would greatly appreciate your early attention to this matter. Thank you very much for your consideration.

Respectible.

7/21/93 The water was advered that the PMN Office's response to question as affirmative. In sergouse to question (2) the great of a non-evaluate tribunal Second med at the unlinded in the asymptonic of an asset" (See ABA Steen # 49) (However, of seller extense the bounder (while does not a great to be the case have), such question (3), the seller appears to be such of uncomed to question (3), the seller appears to be secret as "good last estimate of greater (3), the seller appears to greater as "good last estimate of foot closing meenting which will be Bought by function. This abstract aller of great closing meenting which will be Bought by function. This abstract although the country meeting the first of the seller on what will be paid by the spelment tradenant during the first share a walve on what will be paid by the spelment tradenant during the first share a walve on what will be paid by the spelment tradenant during the first share a walve on what will be paid by the spelment tradenant during the first share a walve of after the second five year general argument too resculptive of the trade and the structure and the surprise for great and the surprise for the second five year general argument too resculptive of the trade and the structure and the surprise for market to MM, then addition the first realization that and the last of the surprise beautiful for the surprise for the su Respectfully