

801.1 (c) (4); 7A (a) (2) (A) and (C)

[REDACTED]

March 24, 1994

Mr. Dick Smith
Premerger and Notification Office
Room 303
Federal Trade Commission
Washington, D.C. 20580

may be subject to the
provisions of Section
of the Clayton Act which restricts
release under the Freedom of Information
Act.

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FEDERAL TRADE
COMMISSION
PREMERGER AND
NOTIFICATION
OFFICE

RE: Necessity of Hart-Scott-Rodino Filing on Behalf of [REDACTED]

Dear Mr. Smith:

Pursuant to our conversation on March 22, 1994, regarding the necessity of our client, [REDACTED], filing the requisite notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. §18a; "Hart-Scott-Rodino"), we submit, on behalf of the Company, this letter describing the proposed transaction and our interpretation of Hart-Scott-Rodino and request your office's comment.

I. Background

The Company is a specialty retailer primarily engaged in the retailing and distribution of [REDACTED] through its retail stores located in [REDACTED] states. Through one of the Company's subsidiaries, the Company manufactures and distributes high quality [REDACTED]

Unable to resolve its financial problems resulting from its debt leverage, a declining economy and intense competition, the Company and four of its direct and indirect wholly-owned subsidiaries filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §101 et. seq., on [REDACTED]. On [REDACTED] the Company, along with the other debtors, filed a Fourth Amended Joint Plan of Reorganization with the Bankruptcy Court (the "Reorganization Plan"). The Reorganization Plan was confirmed by the Bankruptcy Court on [REDACTED] and became effective on [REDACTED]

[REDACTED]

[REDACTED]

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As a result of the Reorganization Plan, approximately \$ [REDACTED] Million of outstanding principal amount of loans from [REDACTED] Lenders") remained secured by substantially all of the Company's real estate.

The Company, and its subsidiaries, meets both the annual net sales and total assets limits under Hart-Scott-Rodino.

II. General Description of the Proposed Transaction

The Company intends to form a Trust in which substantially all of the Company's real estate which presently secures the loans made by the [REDACTED] Lenders will be transferred. In consideration thereof, approximately \$80 Million of the approximately [REDACTED] Million of debt currently owed by the Company to the [REDACTED] Lenders will also be transferred to the Trust. The beneficiaries of the Trust will be the Company and some of its subsidiaries.

The general purpose of the Trust will be to liquidate the assets of the Trust and pay down the assumed debt and other associated costs and expenses. The trustee of the Trust will be [REDACTED] who shall liquidate the assets in such a manner as it determines in its sole and absolute discretion without the consent from the Company.

The residual of the Trust, if any, after full payment of the assumed debt and the other associated costs and expenses will be distributed 80% to the Company and 20% to the [REDACTED] Lenders to pay down any remaining debt, if any, owed by the Company to the [REDACTED] Lenders.

III. Interpretation Under Hart-Scott-Rodino

In our view the filing of a notification under Hart-Scott-Rodino is not required for the above-described transaction for each of the following reasons:

A. Prior to the proposed transaction the Trust as the "acquiring person" will have no assets or annual net sales, the transaction therefore fails to satisfy any of the [REDACTED]

[REDACTED]

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required tests of §18a(a)(2), each of which require minimum annual net sales or total assets of the "acquiring person".

B. Since the Company and some of its wholly-owned subsidiaries are the beneficiaries of the Trust, the Company should be considered the "parent entity" of the Trust resulting in the lack of a true "acquiring person".

C. Since the Company and some of its wholly-owned subsidiaries retain an 80% interest in the residual of the Trust after the assumed debt is paid off, the Company, again, should be considered the "parent entity" of the Trust resulting in the lack of a true "acquiring person". Based on this reasoning, we feel that Hart-Scott-Rodino is never triggered.

We would appreciate your prompt response to this letter. We understand that your conclusions are to be deemed by us as "informal".

If you have any questions or would like to discuss this matter further, please do not hesitate to contact me.

Very truly yours,

[REDACTED]

[REDACTED]

3/30/94 - ~~Since~~ The Company has named itself and some of its subsidiaries as the beneficiaries of the Trust established by the Company, i.e. the settlor. The Commission, on pg. 33459 of the 7/31/78 SBA, states that "In that case [when the settlor is also a beneficiary of the trust] the settlor is deemed the holder of the trust's assets." ~~Since~~ there has been no transfer of the assets by the Company and no filing is needed. In addition, A and C above may also provide further rationale for not filing. Winters advised that, [REDACTED]

OP - OP - required - 1 11