This letter supersedes a letter from Heitman/JMB Advisory dated 2-17-95

801.11(e)
801.40
802.63

[redacted]

[redacted]

[redacted]

This letter is nonresponsive to a FOIA request (95-0099) dated 2-9-95

[redacted]

February 27, 1995

VIA FACSIMILE

Mr. Patrick Sharpe
Compliance Specialist
Pre-Merger Notification Office
Room H-303
Federal Trade Commission
Sixth Street and Pennsylvania Avenue
Washington, D.C. 20580

Re: [redacted]

Dear Mr. Sharpe:

Pursuant to our telephone discussion on Friday, I am writing for two purposes: (1) to clarify and elaborate upon the facts contained in the letter from [redacted] dated February 17, 1995; and (2) to confirm that the Premerger Notification Office agrees with our analysis that none of the acquisitions involved in this transaction would be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"). A diagram is attached for your convenience.

I. *Summary of Material Facts*

The essential facts, which are set forth in more detail in [redacted] letter to you dated February 17, 1995, are as follows. Loan Partners General Partnership ("Loan Partners"), a general partnership which is its own "ultimate parent entity" for HSR purposes, made a "pooled" loan to several entities - Owner Nos. 1, 2, and 3 - in connection with their acquisitions of two shopping centers, Center No. 1 and Center No. 2.[1/] The loans were "cross-

[1/] Owners Nos. 1, 2, 3, and Land Partners General Partnership are each either their own ultimate parent entities or are otherwise controlled by other UPE's which are unrelated to one another and are unrelated to Loan Partners.

[redacted]

collateralized" and "cross-defaulted." In other words, each owner was liable for the full amount of the loan for both [redacted] For Center No. 1, the loan was made to Owner No. 1, which owns the improvements of the Center. Both Owner No. 1 and Land Partners General Partnership ("Land Partners") - the owner of the land under Center No. 1 - jointly gave a mortgage back to the lender, Loan Partners. Owner No. 1 is the maker of the note payable to Loan Partners. For Center No. 2, the loan was made to Owner No. 2 and Owner No. 3. Owner No. 2 is the owner of the land and Owner No. 3 is the owner of the improvements under Center No. 2. Owner No. 3 is the maker of the note and Owner Nos. 2 and 3 jointly gave a mortgage on Center No. 2 to Loan Partners. ?

we have no comment on prior letter other than - must be clea and focu

As more fully described in [redacted] letter, the decline in the real estate market has resulted in a significant default by all owners under the loan. As part of a bona fide debt workout, the investors in Loan Partners will form three new limited liability companies (LLC-1, LLC-2, and LLC-3). While each LLC will have common ownership (virtually identical to that of the investors in Loan Partners), each will be its own ultimate parent entity for HSR purposes. ok The LLC's will issue membership interests, but no LLC will have a board of directors or individuals exercising similar functions. The LLC's will be capitalized, collectively, with approximately $2 million in cash.[2] Loan Partners will also assign a portion of its original pooled loan to LLC-1. Thereafter, LLC-1 will pay all the cash with which it was capitalized to Owner No. 1 as an inducement for Owner No. 1 to promptly surrender the property. Owner No. 1 and Land Partners will each give -- either separately or jointly -- LLC-1 a deed in lieu of foreclosure representing their respective ownership interests in both the land and the improvements of Center No. 1. Thereafter, Land Partners and Owner No. 1 will have no ownership interests in Center No. 1 and Owner No. 1 will be released from its obligations under the note. LLC-1 will promptly write off the entire portion of the pooled loan that is being assigned to it. P 10

Loan Partners will not assign any portions of the pooled loan to LLC-2 or LLC-3 in connection with the debt workout. LLC-2 and LLC-3 will use all the cash with which they are capitalized to purchase the land and improvements of Center No. 2 from Owner No. 2 and Owner No. 3 respectively.[3]

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[2] Loan Partners will also make a payment to a management company that manages the property for the owners in an amount of approximately $600,000.

[3] For the purpose of this letter, we have assumed ~~that~~ the acquired person ~~is~~ in each asset acquisition has over $100 million in annual net sales ~~on~~ or total assets. Of course, if neither party to any acquistion has over $100 million in annual net sales on total assets, none of

[redacted]

Acquisition in Connection with Center No. 1

The formation of LLC-1 will be exempt from the HSR regulations for the reasons set forth in [redacted] February 17, 1995 letter. In addition, since LLC-1 will issue only membership interests, which will not entitle the holder to vote for a board of directors or any persons exercising similar functions, it is my understanding that the staff of the FTC's Pre-Merger Notification Office will no longer deem such interests to be "voting securities" and will not evaluate the formation transaction under 16. C.F.R. § 801.40. agreed

In addition, LLC-1's acquisition of the ownership interests in Center No. 1 from Owner No. 1 and Land Partners will be exempt for two reasons. First, LLC-1 does not meet the size of person test. LLC-1, as a newly formed entity, will not have a regularly prepared balance sheet at the time of the acquisition. Under 16 C.F.R. § 801.11 (e) the size of LLC-1 would then be determined by the value of the assets then presently held, less any cash used as consideration for the asset acquisition. The only "asset" that LLC-1 will hold - other than the cash to be used in the asset acquisition which may be subtracted from its size of person under 801.11(e) - is the right to the portion of the loan that is being assigned to it by Loan Partners in connection with the debt workout. Although the book value of the loan (on the books of Loan Partners) to be assigned to LLC-1 may exceed $10 million, the economic value of such assignment is zero, and it will be written off immediately after the transaction. Finally, even if LLC-1 were deemed to have assets of over $10 million for purposes of the size of person test (as a result of receiving an assignment of a portion of a loan deemed to have value in excess of $10 million), LLC-1's acquisition of the deed in lieu of foreclosure from Owner No. 1 and Loan Partners would be exempt as a bona fide debt workout of a creditor under 16 C.F.R. § 802.63.[1]

May be a $10.0m person?

OK-since LLC-1 is now the creditor— exempt under 802.6

Acquisitions in Connection with Center No. 2

The formation of LLC-2 and LLC-3 will be exempt for the same reasons as the formation of LLC-1 described above. The membership interests in LLC-2 and LLC-3 will not entitle their holders to elect a board of directors or any persons exercising similar functions. Therefore, neither entity shall have any "voting securities" that will be acquired by the contributors to those joint ventures, and the formation transactions are exempt. Neither LLC-2 nor LLC-3, however, are receiving any portion of the loans in connection with the debt restructuring. Since LLC-2 and LLC- 3 will not be actual creditors, we understand that it is the position of the staff of the Premerger Notification Office that the LLC's subsequent acquisitions of the ownership interests in Center No. 2 (from Owner Nos. 2 and 3) would not be exempt as

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the acqusitions would be reportable.

[redacted]

a bona fide debt workout. Nevertheless, based on our discussion this morning, we understand that the acquisitions by LLC-2 and LLC-3 should nevertheless be exempt because neither entity would satisfy the size of person test. Both LLC-2 and LLC-3 will be newly formed entities that do not have any regularly prepared balance sheet. They will each receive a small amount of cash as a contribution to capital, which cash shall be used entirely as consideration for their acquisition of the ownership interests in Center No. 2. Therefore, under 16 C.F.R. § 801.11 (e) that cash may be subtracted from their size of person. LLC-2 and LLC-3 will have no other assets at the time of their respective acquisitions from Owner No. 2 and Owner No. 3 and therefore do not satisfy the minimum size of person test under HSR.[4] agree

The closing for this transaction is now imminent. Therefore, I would very much appreciate your calling me on Monday, February 17, 1995 to confirm that it is the position of the staff of the Premerger Notification Office that none of the acquisitions described in this letter are reportable under the HSR Act.

Sincerely,

[redacted]

[redacted]

Enclosures

cc: [redacted]

Based on my understanding of the Facts LLC-1 is exempt under §802.63 and LLC-2 & LLC-3 do not meet the size-of-person test in accordance with 801.11(e). PS

Note: I bounced this off PS but he did not read the final letter.

[redacted]

[4] It is possible that the parties may ultimately determine to restructure the debt workout such that LLC-2 and LLC-3 would each be assigned a portion of the original pooled loan and accept deeds in lieu of foreclosure from Owner No. 2 and Owner No. 3. In that case, the acquisitions by LLC-2 and LLC-3 would be exempt under 16 C.F.R. § 802.63.