801.10(a)(ii)(2)

(DRAFT)
November __, 1995

Richard B. Smith, Esq.
Federal Trade Commission
Premerger Notification Office
Sixth & Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Mr. Smith:

I am writing to confirm our telephone conversation of November 13, 1995, in which you gave your informal opinion that, under the circumstances described below, a transaction would not be reportable under the Hart-Scott-Rodino Antitrust Improvements Act:

Seller manufactures widgets and sells the widgets through a number of distribution channels. Buyer and Seller's subsidiary compete in the sale of widgets through one such channel, which is seasonal. Seller has over $100 million in assets/sales and Buyer has over $10 million in assets/sales. Buyer ordinarily purchases approximately $2-3 million in widgets from Seller in the ordinary course of business each year.

Buyer will acquire, at a purchase price of $12.1 million, all the assets of Seller's subsidiary <u>except for</u> inventory (valued at approximately $6.2 million), accounts receivable (valued at approximately $1.4 million), and certain raw materials (valued at approximately $0.3 million). Buyer will assume obligations and liabilities of Seller's subsidiary relating to the purchased assets (most likely about $0.3 million, but less than $0.7 million).

After the aforementioned sale of the assets of its subsidiary, Seller would continue to manufacture widgets, but Seller's subsidiary would no longer remain in the business of seasonal widget sales. The unsold inventory of Seller's subsidiary would continue to be stored at the Buyer's warehouse (formerly, the Seller's subsidiary's warehouse) for a period of up to seven months (i.e., until the end of the current widget-selling season). During this period, Seller's subsidiary would retain title to the $6.2 million inventory, and would have the right to sell the inventory to any person at any time. Under the terms of the asset sale, Buyer would have the right (but not any obligation) to purchase any or all of the unsold inventory from Seller's subsidiary on an "as needed" basis on customary terms, without discount. In addition

(If less than 2 then buy what's left) 11/14 - DLW

to any purchases of such inventory that Buyer may make on an "as needed" basis, Buyer would be obligated to purchase (at Seller's cost) $2 million of this inventory at the end of the seven month widget-selling season. (This $2 million obligation was the result of negotiations between Buyer and Seller's subsidiary as to the amount of inventory that Buyer would be required to purchase from Seller's subsidiary.) Seller would then sell, destroy, or remove any unsold inventory from the warehouse prior to the commencement of the next selling season.

Buyer and Seller would also enter into a 5-year widget supply contract, commencing at the beginning of the next selling season; this 5-year contract would increase the number of widgets purchased by Buyer from Seller, in exchange for certain price discounts.

If the foregoing does not accurately reflect our conversation and your informal opinion, please do not hesitate to call me [redacted] Thank you very much.

Sincerely,

[redacted]

11/29/95- Advised writer that acquisition price is sum of $12.1MM, $.7MM, and $2MM <u>plus</u> a good faith estimate on part of buyer as to what amount of "as needed" inventory it will purchase from seller. If this figure is determinable, it must be added to other determined portions of purchase price. If it cannot be determined, then a fair market value determination (including the value of the right to purchase widgets at the agreed upon price over the 7-month period) must be made by the board of the acquiring person.

R B Smith