801.13(b)(2); 801.14

[redacted]

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FEDERAL TRADE
COMMISSION
PREMERGER NOTIFICATION
OFFICE

Nov 15 11 46 AM '95

November 15, 1995

VIA FAX 202-326-2624

Dick Smith, Esq.
Room 303
Federal Trade Commission
Washington, D.C. 20580

Re: Hart-Scott-Rodino Filing

Dear Mr. Smith:

We represent "Subsidiary A", a wholly owned subsidiary of "Company A", in connection with a proposed acquisition of certain real estate (the "Real Estate Acquisition") by Subsidiary A from "Subsidiary B", a wholly owned subsidiary of "Company B". Company A has retained separate counsel to represent it in connection with a proposed acquisition of certain voting securities (the "Securities Acquisition") by Company A from Company B and the shareholders of Company B. The purpose of this letter is to obtain confirmation of our telephone discussion on November 8, 1995, in which you indicated that Company A and Company B are not required to file a notification of the Real Estate Acquisition and the Securities Acquisition with the Federal Trade Commission (the "FTC") and the Department of Justice ("DOJ") under the Hart-Scott-Rodino Act (the "Act").

Company A and Company B meet the minimum requirements of the "size of person" test for filing under the Act. However, during our telephone conversation, you preliminarily concluded that neither the Real Estate Acquisition nor the Securities Acquisition will meet the minimum requirements of the "size of transaction" test for filing under the Act. The following summary of the two proposed acquisitions may be helpful to you for your final determination:

1. As mentioned above, Company A and Subsidiary A are represented by different counsel for their respective transactions.

2. Company A and Company B entered into a letter of intent setting forth the basic terms of the Real Estate Acquisition. As contemplated in the letter

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of intent, Subsidiary A and Subsidiary B intend to enter into a definitive agreement which will more clearly delineate the rights and obligations of the parties regarding the Real Estate Acquisition.

3. Company A and Company B and the shareholders of Company B are negotiating the terms and conditions of the Securities Acquisition. Company A intends to enter into (i) an agreement with Company B for the purchase of treasury shares of Company B, and (ii) separate agreements with certain shareholders of Company B for the purchase of such shareholders' voting securities in Company B. Company A anticipates that once the Securities Acquisition is completed, Company A will own approximately 33% of the outstanding equity shares of Company B, which equity shares will represent at least 10% of the total voting securities in Company B. Company A will obtain separate financing for the Securities Acquisition.

4. The total purchase price of the real estate to be acquired by Subsidiary A in the Real Estate Acquisition is estimated to be between $7 million and $10 million. The total purchase price of the voting securities to be acquired by Company A in the Securities Acquisition is also estimated to be between $7 million and $10 million. Thus, neither the Real Estate Acquisition nor the Securities Acquisition standing alone meets the $15 million threshold under the "size of transaction" test.

5. The closing of the Securities Acquisition will be expressly contingent upon the prior closing of the Real Estate Acquisition, but the Real Estate Acquisition will not be contingent upon the closing of the Securities Acquisition. In other words, the Real Estate Acquisition may occur independently of the Securities Acquisition, but the Securities Acquisition may not. Because the Securities Acquisition will be completed, if at all, only after the completion of the Real Estate Acquisition, under 16 C.F.R. §801.13(b)(2) the Real Estate Acquisition and the Securities Acquisition should not be treated as one transaction and, accordingly, the value of the real estate to be acquired by the Real Estate Acquisition and the value of the voting securities to be acquired by the Securities Acquisition should not be aggregated. Since the value of such voting securities does not equal $15 million or more, filing with the FTC and the DOJ should not be required.

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PMN Staff

Please confirm that the FTC considers the Real Estate Acquisition and the Securities Acquisition to be two distinct transactions and, accordingly, that Company A and Company B are not required to file a notification with the FTC and the DOJ under the Act.

You stated in our telephone conversation that the FTC does not commit to writing any of its decisions in response to letters such as this; rather, the FTC will notify me by telephone and place this letter in the FTC's file, and Company A and Company B will be entitled to rely on such notification. Please call me a[redacted] to notify me of the decision of the FTC or if you have any questions regarding this letter or the Real Estate Acquisition or the Securities Acquisition. Thank you for your courtesy and prompt consideration of this matter.

Very truly yours,

[redacted]

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11/28/95 Advised writer that two acquisitions appear to be separate transactions, assuming no 801.90 issues. Also advised that advice given is that of the PNN office only, and is not binding on the Commission or the DOJ. Rule 801.14 does not require the aggregation of separate transactions when a voting stock purchase follows an asset purchase, which is the case here (See Example 2).

R B Smith

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