

[REDACTED]

April 30, 1999

VIA FACSIMILE (202) 326-2624

Mr. Mike Vorné
Federal Trade Commission
Room 303
600 Pennsylvania Avenue NW
Washington DC 20580

Re: Pre-Merger Notification (Reporting and Waiting Period Requirements in
Connection with Transaction Described Below)
Our File No. [REDACTED]

Dear Mr. Vorné:

The purpose of this letter is to confirm in writing my understanding of the conclusions we reached during our various telephone conferences on April 29, 1999, regarding [REDACTED] limited liability company ("Buyer"). Pursuant to those conversations you concluded that, based on the facts and analysis set forth below, there would be no pre-merger notification requirement in connection with the below described transaction either prior to the proposed acquisition or prior to or after any distributions from Buyer to its equity holders. If the following is not consistent with our discussions it is my understanding that you will contact me at [REDACTED].

FACTS

Buyer is in the process of acquiring \$47,000,000 of assets, (including closing costs), from [REDACTED] corporation ("Seller") (such acquisition sometimes referred to herein as the "Transaction").

Seller has in excess of \$100,000,000 of assets and net sales as determined pursuant to the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976 (the "Act").

Buyer is a limited liability company organized on January 8, 1999. The ownership percentages, type of ownership interests, and capital contributions are set forth on Schedule 1 attached hereto. Attached as Schedule 2 are the provisions in the limited liability company documents (the "Operative Documents") setting forth the priority of distributions for profits and distributions at liquidation. The Operative Documents, in conjunction with certain loan and franchisor

[REDACTED]

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40003
Disputed, pending 8/1/99

documents, prohibit any distributions in respect of equity ownership for at least one year following the closing of the Transaction (the "Closing"). There has not been and will not be any distributions in respect of equity ownership made prior to or within one year of the Closing. After the one year anniversary of the Closing, distributions shall be made on a quarterly basis, provided that there is sufficient distributable cash.

Upon receipt of certain third party approvals, [redacted] will transfer (i) 10% preferred interest to [redacted] (ii) 7% to [redacted], and (iii) 5% to [redacted]. None of [redacted] or [redacted] have individually \$10,000,000 in assets or net sales as determined under the Act. However, [redacted] may have in excess of \$10,000,000 of total assets and net sales.

LAW

Under the Act, parties to certain transactions must comply with certain reporting and waiting period requirements prior to completing a transaction involving acquisition of voting securities or assets if (i) the parties meet the size-of-the-person test, (ii) the transaction satisfies the size-of-the-transaction test, and (iii) the transaction is not covered by a specific exemption.

In general, the size-of-the-person test is satisfied if either the buyer or seller has \$10,000,000 net sales or total assets and the other party has \$100,000,000 net sales or total assets. Annual net sales and total assets are measured at the level of "Ultimate Parent Entity" (i.e., an entity that is not controlled by any other entity). Based on our telephone conversations yesterday, that the only factors relevant in determining whether a control person exists in the case of a limited liability company are whether any equity holder has a contractual right in respect of its equity ownership to receive 50% or more of the profits of the entity or has the right in the event of a dissolution to 50% or more of the assets of the entity.

ANALYSIS

the Premier Officers

Based on our discussion yesterday, and although there is no legal authority directly on point regarding the method of determining whether a person has a right to receive 50% or more of the profits or has the right in the event of a dissolution to 50% or more of the assets, the Federal Trade Commission's ("FTC") position is that such determination is made by reviewing the operative company documents to determine if there is an explicit requirement that (i) 50% or more of the profits of the entity are to be distributed to any person or (ii) any person has an explicit right in the event of a dissolution to 50% or more of the assets of the entity. In the absence of such distribution requirements, the determination is made by reviewing distributions, if any, to see if any person received more than 50% of the profits of the entity. Such test is repeated after each distribution.

50% or

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In the Transaction, if the Ultimate Parent Entity is the Buyer, regardless of whether 50% or more of any distributions are ultimately received by any equity holder, there will not be any pre-merger notification requirement in the future, in connection with the Buyer's assets acquired in the Transaction.

Based on our conversations, we may rely on the telephone conversations and this letter in our determination as to the lack of the necessity to submit a pre-notification filing. In the event that a determination is subsequently made that a filing was required, this letter will prevent the Buyer from being subject to any penalties for failure to comply with the Act's notification requirements.

CONCLUSION

Buyer does not satisfy the \$10,000,000 person requirement as defined in the Act, unless the Ultimate Parent Entity is determined to be [redacted] and he satisfied the \$10,000,000 person requirement. No equity holder (including [redacted]), has a right to receive 50% or more of the profits of the entity or has the right in the event of a dissolution to 50% or more of the assets of the Buyer and there has not been and will not be any distributions prior to Closing. Therefore, no equity holder of the Buyer satisfies the FTC's current test for control and the "Ultimate Parent Entity" will be the Buyer. The Buyer does not satisfy the Size of the person test. Therefore, there is no pre-merger notification and filing requirement for the above described transaction. Additionally, there is no subsequent filing required regardless of whether any person ultimately receives more than 50% of any regular distribution and this letter can be relied on by the Buyer.

Very truly yours,

[Redacted signature block]

[Redacted block]

AGREE THAT THE FACT SCENARIO DOES NOT
REQUIRE A FILING. ASKED THE WRITER
TO REVISE THE LANGUAGE IN THE LAST
PARAGRAPH OF ANALYSIS SECTION.

Michael Vern 5/3/99

PICK SMITH CONCURS.

may be used by the

in any determination of possible

SCHEDULE 1

PREFERRED MEMBERS

Name, Address	Initial Capital Contribution	Initial Capital Account	Percentage Interest	Membership Units	Preferred Amount
[REDACTED]	\$3,000,000.00		49.95%	49.95	\$3,000,000.00
[REDACTED]	\$ 500,000.00		10.00%	10.00	\$ 500,000.00
Total	\$3,500,000.00	\$3,500,000.00	59.95%	59.95	\$3,500,000.00

OTHER MEMBERS

Name, Address	Initial Capital Contribution	Initial Capital Account	Percentage Interest	Membership Units
[REDACTED]	\$ 350,000.00	\$ 350,000.00	28.05%	28.05
[REDACTED]	\$ 0.00	\$ 0.00	12.00%	12.00
Total	\$ 350,000.00	\$ 350,000.00	40.05%	40.05

SCHEDULE 2

RESTATED LIMITED LIABILITY COMPANY REGULATIONS
OF

ARTICLE 9

9.1. Distributions of Net Cash From Operations. Distributions of Net Cash From Operations with respect to each fiscal quarter of the Company shall be made to the Members with quarterly reports detailing the calculation thereof on the forty-fifth (45th) day after the end of each fiscal quarter, as follows:

(a) first, one hundred percent (100%) of the first Two Hundred Ninety-one Thousand Six Hundred Eighty-one and No/100 Dollars (\$291,681.00) to the Preferred Members pro rata until each Preferred Member has received cumulative distributions in an amount equal to such Member's Preferred Amount; and

(b) second, to all Members in accordance their respective ownership percentages at the time of such distribution.

9.2. Distributions of Net Cash From [REDACTED] Transactions. Distributions of Net Cash from [REDACTED] transactions shall be made to the Members within fifteen (15) days after such [REDACTED] transaction, as follows:

(a) first, one hundred percent (100%) of the first Two Hundred Ninety-one Thousand Six Hundred Eighty-one and No/100 Dollars (\$291,681.00) to the Preferred Members pro rata until each Preferred Member has received cumulative distributions in an amount equal to such Member's Preferred Amount; and

(b) second, to all Members in accordance their respective ownership percentages at the time of such distribution.

9.3. Liquidating Distributions. If the Company is dissolved (i) upon the occurrence of an event set forth in Section 608.441 of the Act, and provided dissolution is not avoided under Paragraph 11.1 hereof and its business is being liquidated in accordance with Section 608.441 of the Act, then the Company shall cease to carry on its business, except to the extent necessary for the winding up of the business of the Company. The Company shall thereafter be wound up and terminated as follows: the Chief Executive Manager shall liquidate the assets of the Company as promptly as possible, unless the Board shall determine that an immediate sale of Company assets would cause undue loss to the Company, in which event (i) the liquidation may be deferred for a reasonable time, or (ii) all or part of the Company assets may be distributed in kind. As promptly as possible after liquidation, the Chief Executive Manager shall prepare a final statement of account which shall reflect the status of each Member's [REDACTED] Account and such other items and matters which he deems appropriate. All tangible or intangible property of the

Company, including money, remaining after the discharge of the debts, obligations, and liabilities of the Company and after taking into account all [REDACTED] account adjustments in the tax year of liquidation shall be distributed to the Members in proportion to and in the amount of their positive [REDACTED] Account balances as adjusted pursuant to paragraph 10.1 of these Regulations as a result of any sale of the Property in connection with such liquidation.

9.4. Tax Distributions. Unless the on-going business of the Company will be impaired, the Company shall make periodic distributions to its members in accordance with the allocations of profits as provided in Article 10 in an amount equal to the anticipated tax liability payable on the member's allocated share of profits assuming the maximum federal and applicable state individual tax rates ("Tax Distributions").

[REDACTED]

ATTORNEYS AT LAW

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FACSIMILE TRANSMITTAL SHEET

TO: Mike Vem FAX NUMBER: (202) 326-2624
COMPANY: Federal Trade Commission DATE: April 30, 1999
TOTAL NO. OF PAGES INCLUDING COVER: 7
RE: Attached

URGENT FOR REVIEW PLEASE COMMENT/REPLY

ORIGINAL BEING SENT VIA REGULAR MAIL OVERNIGHT MAIL OTHER

NOTES/COMMENTS:

RECEIVED
MAY 11 1999
10 25 AM

Please call [REDACTED]

[REDACTED]