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Attorneys at Law

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September 1, 1999

Richard B. Smith
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Dick:

This will confirm our telephone conference of yesterday regarding HSR reportability. I sought advice regarding the following events: Company A does a cash tender offer for Company B. An HSR form is filed and the tender offer is completed after expiration of the relevant waiting period. Immediately thereafter, Company A, while the owner of Company B, causes Company B to enter into a binding contract to sell to Company A the stock of Company B's wholly owned subsidiary, "C". The actual closing of this sale will not occur, however, until immediately after Company A sells all of the stock of Company B to Company D. This last transaction would be subject to an HSR filing.

The question posed is whether Company A must file as an acquiring person regarding the sale of Subsidiary C to Company A, which will occur immediately after the closing on the sale of the stock of Company B from Company A to Company D. You advised that, Company A's re-purchase of Subsidiary C could be subsumed in the filing on the sale of Company B to Company D. The event will follow immediately upon the sale of Company B to Company D, and the transaction could be collapsed to reflect essentially a transaction that was no different from Company A selling only to Company D those portions of Company B except the stock of Subsidiary C. Also, the cash tender offer filing has fully enabled a complete review of any issues of competitive significance with regard to Company A's acquisition of Subsidiary C. You further advised that clear reference to these issues should be made in Item 2(a) of the form that would be filed with regard to the sale of Company B to Company D, but that Company A would not need to file as an acquiring party in the transaction or pay an additional filing fee.

Thank you for your cooperation and assistance. If the above does not comport with your understanding of our conversation, please advise me immediately.

Very truly yours,

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Subsequent Events

6. The '693 patent (resulting from the '156 Application) issued to S Company. H Company paid S Company the $3.75 million due upon patent issuance and subsequently paid the two $1.875 million milestone payments "under protest" because the patent had not then survived an interference proceeding. An interference proceeding involving S Company's '693 Patent, and '149 Application and H Company's '542 Application was declared by the U.S. Patent and Trademark Office. Shortly thereafter, the parties submitted the interference to arbitration, as provided in the 1993 Agreement, and evidence has closed. Before the arbitrator unsealed his decision, the parties determined to settle the dispute. This settlement will be effected by closing the 1999 Agreement. Upon implementation of the 1999 Agreement, H Company will become the legal owner of S Company's '693 Patent and '149 Application, and the interference will be dissolved, as an interference cannot exist between patents and patent applications that are all legally owned by the same entity.

The 1999 Agreement

7. While the 1993 exclusive license had conveyed beneficial ownership of the S Company '693 Patent (and contingently the '149 Application) to H Company, the settlement of the interference proceeding required that H Company become legal owner of the '693 Patent (and the '149 Application). Accordingly, the primary purpose of the 1999 Agreement was to assign to H Company legal ownership of the patent and patent application rights of which it was previously the beneficial owner through exclusive license under the 1993 Agreement. In addition, S

Company exclusively licensed to H Company two newer patent applications relating to TC (the "'895 Application"); and (the "'570 Application").

8. The settlement also involved rearrangement of payment terms that had governed under the 1993 Agreement. H Company's "protest" was removed from the two previous payments of $1.875 million made "under protest." And, rather than a possible 4% royalty beginning upon expiration of H Company's '129 Patent in 2001, S company is to receive a 1 1/4% royalty commencing in February 2001 as payment for the assignment of the '693 Patent and '149 Application (and related applications) and for exclusive license rights to S Company's newer patent applications relating to TC. No specific value is assigned to the two new patent applications that did not exist at the time of the 1993 Agreement; H Company has concluded that the fair market value of the exclusive license of the '895 and '570 Applications is less than $15 million.

9/17/99 – Sanders advised that 1993 Agreement had not been filed for. Asked that they confirm that no filing was needed. (At that time, S was privately held & price for stock was just short of [illegible]. [illegible] was over $[illegible], then no filing of acquisition [illegible] based on the [illegible] should have been made.) Sanders advised that 1993 Agreement had [illegible] H only legal title. We agreed that 1999 Agreement gave [illegible] granted by the time limit and did not increase the [illegible] duration of rights. Sanders also advised [illegible]. Consequently, no filing required [illegible] S. Consequently, if the 1993 Agreement [illegible] that H no longer held [illegible] of S [illegible], new exclusive licenses do not exceed 1.5 MM in fair market value, no filing need be made for these. (HW reviewed letter and participated in discussion.)

R B Smith

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