801.10(b)

[redacted]

November 2, 1999

Re: [redacted]

Dear Ms. Ovuka:

This firm represents [redacted] the United States subsidiary of [redacted] an Australian corporation, [redacted] proposes to acquire from [redacted] certain assets related to the branded prescription product, [redacted] which is used for the treatment of anxiety. Both [redacted] currently sell generic [redacted] and will continue to do so after the transaction described here. The purpose of this letter is to seek your concurrence that, assuming approval by the Board of Directors of the valuation prepared by management and described herein, the acquisition does not require premerger notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act") because it does not meet the size of transaction test of Section 7A(a)(3) of the Act. (The size of person test is satisfied.)

On behalf of both [redacted], we request confidential treatment of all names of parties, products, and other identifying information contained within this letter.

Pursuant to an Asset Purchase Agreement and a Trademark License Agreement, [redacted] will acquire (i) various exclusive rights related to the [redacted] product, including know-how, customer data, and FDA approvals (the "Exclusive Rights"); (ii) inventory; and (iii) sole licenses under U.S. patents (i.e., licenses in which the grantor retains the right to practice the patent) (the "Sole Licenses"). The licenses will not be exclusive in any respect. [redacted] will assume no liabilities, and will not acquire any tangible assets other than inventory. [redacted] will supply product to [redacted] for a limited period after closing under a Product Supply Agreement. The aggregate purchase price for the Exclusive Rights and the Sole Licenses will be $15 million, payable in two installments. In addition, the purchase price of the inventory is expected to be

approximately $120,000, bringing the total price to $15.12 million.

According to Section 801.10(b) of the Premerger Notification Rules, "[t]he value of assets to be acquired shall be the fair market value of the assets, or, if determined and greater than the fair market value, the acquisition price." I am informed that [redacted] management has made a fair market value determination. In making that determination, [redacted] did not include the fair market value of the Sole Licenses because a non-exclusive license is not regarded as an asset for HSR purposes.* [redacted] management determined that the fair market value of the Exclusive Rights and the inventory is less than $15 million. Conceptually, this determination involved three steps: (1) a determination that the fair market value of the entire acquisition does not exceed the purchase price of $15.12 million; (2) a determination that the value attributable to the Sole Licenses is within the range of $0.5 million to $2.25 million; and (3) subtracting the value of the Sole Licenses from the purchase price. In this manner, [redacted] has concluded that the fair market value of the reportable assets is between $12.9 million and $14.6 million, such that their maximum fair market value is less than $15 million.

In reaching this conclusion, [redacted] did not attempt to estimate or exclude value attributable to the FDA approvals that will be transferred as part of the acquisition, although we understand that the Staff does not consider such approvals to be "assets" within the meaning of the Act. If the value of the FDA approvals were to be excluded, then the relevant value of the acquisition for purposes of the Act would be even less than that presented here.

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* See Interpretation 49: "The FTC Staff position is that the grant of a non-exclusive patent or trademark license does not involve the acquisition of an asset...." See also Interpretation 126: A sublease is not considered an asset and is therefore unreportable even if "part of a larger transaction."

[redacted]

As of this writing, the fair market valuation performed by [redacted] management has not yet been presented to the Board of Directors. Management intends to seek Board approval of its valuation as soon as possible, but in any event, as of a date within 60 days prior to the consummation of the transaction. If the Board determines that the fair market value of the assets to be acquired does not exceed $15 million, then no premerger notification and report forms will be filed in connection with the acquisition. If the Board makes a contrary determination, then the transaction will be reported.

I would appreciate your letting me know if any aspect of the analysis presented here does not comport with the Act or the Rules.

As always, your attention to this matter is greatly appreciated.

Yours truly,

[redacted]

Nancy Ovuka, Esq.
Premerger Notification Office
Federal Trade Commission
601 Pennsylvania Ave., N.W.
Room 319
Washington, DC 20580

BY HAND

cc: [redacted] (Via Fax)

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TH Corcoran