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December 7, 2001

By Facsimile and U.S. Postal Service

Mr. Michael Verne  
Premerger Notification Office  
Federal Trade Commission  
6th Street and Pennsylvania Avenue, N.W.  
Washington, DC 20580

Re: Size of Transaction Test

Dear Michael:

I am writing to confirm the advice that you gave me in our phone conversation today. Specifically, this letter confirms your advice that, on the facts set forth below, the "size of transaction" test would not be met and the transactions described would not, without more, give rise to a filing obligation under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"). The facts are as follows:

1. Assume that the "size of parties" test is met.
2. Buyer is a foreign company with (among others) a U.S. manufacturing subsidiary ("Buyer Sub").
3. Seller is a foreign company with substantial U.S. assets (sufficient for the U.S. contacts test), including two manufacturing facilities held by a U.S. subsidiary ("Seller Sub"). The estimated fair market value of the operating assets (primarily equipment and related assets) is \$39 million. One parcel of land is held by a municipal government and leased to the Seller Sub under a long-term ground lease (the "Municipal Ground Lease"); the remaining land is held by the Seller Sub directly. The estimated aggregate fair market value of the real property interests to be acquired is \$17.5 million. Seller has indicated that it is exiting its relevant manufacturing operations, has hired an investment banker to "shop" the business, and has talked with a number of potential buyers.
4. Buyer Sub proposes to purchase the operating assets (but not the real property interests) for about \$39 million, which the parties believe to be the fair market value of the operating assets. In addition, Buyer Sub will assume approximately \$4 million of debt in connection with this acquisition.

Established

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5. Buyer Sub and Seller Sub propose to enter into two bondable net leases of the land and buildings (one for each parcel) on market terms (the "Real Property Leases"). Buyer has been advised by its accounting firm that the Real Property Leases qualify as operating leases under FASB 13. Further, the Real Property Leases are being accounted for by Buyer Sub and Seller Sub as operating leases, and are not intended by either party to be treated as capital leases. Until the sale of the real property described in paragraph 6, Seller Sub will retain title to the buildings and the fee interest in both parcels (its leasehold interest in the Municipal Ground Lease will be converted to fee simple prior to or concurrently with closing) and will be free to assign the Real Property Leases to a third party, though Seller Sub has agreed not to grant easements or seek to change the zoning of the property during the lease term. Buyer Sub will be the beneficiary of certain representations, warranties and covenants regarding the real property in the asset purchase agreement for the operating assets, the enforcement of which is consistent with Buyer Sub's maintenance and other obligations as lessee under a bondable net lease. The Buyer and an affiliate of the Buyer will guarantee the obligations of the Buyer Sub under each Real Property Lease. The term of each Real Property Lease is 20 years, which is less than the useful life of the buildings. The Real Property Leases may provide for up to several shorter renewal terms, but Buyer Sub will not be obligated to exercise any renewal option. The rental rate for any renewal term will be a commercially reasonable rate based on the market value of the property or market rental rates. Seller Sub will retain the risk for any loss of value of the property.

6. Seller Sub is still seeking to divest itself of the real property (subject to the Real Estate Leases) as soon as possible. Upon any sale, Seller Sub will assign the Real Property Leases to the real property buyer (though the Real Property Leases may be amended and restated to provide for any additional lease terms that the real property buyer may require). Seller Sub expects to be able to complete the sale to a third party expeditiously. However, if Seller Sub has been unable to find a buyer for the real property satisfactory to Seller Sub by the end of the first year of the Real Property Lease terms, then Seller Sub shall have the right to require Buyer to purchase from Seller Sub ("put") at an aggregate price of about \$17.5 million for both parcels. If Seller Sub has been unable to find a buyer for the real property satisfactory to Seller Sub by the end of the first 18 months of the Real Property Lease terms, then Seller Sub shall thereafter have the continuing right for the remainder of the Real Property Lease terms to "put" the real property to Buyer at an aggregate price of the greater of (a) \$17.5 million for both parcels or (b) the real property's then fair market value.

7. Outside of Real Property Lease agreements, it is possible that Buyer may in the future negotiate with the Seller Sub or a subsequent purchaser of the real property to purchase the property if Buyer can achieve certain financial goals (such as tax savings

[REDACTED]

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under an Internal Revenue Service Code Section 1031 exchange) by acquiring the property directly. No such negotiation has been undertaken, and Buyer represents that in no event would such a purchase by Buyer occur before 2003.

8. Buyer has several reasons for not purchasing the real property at this time (whether directly or through Buyer Sub). First, Buyer's cash and borrowing positions are straitened, and Buyer wants to maintain as much financial flexibility as possible in the current uncertain economic climate. By leasing the land instead of buying it, Buyer will preserve cash and retain borrowing capacity. Second, the effective cost of the Real Property Leases will be lower than the likely interest costs if Buyer were to borrow the purchase price of the land and buildings (at least in the early years of the lease term). Third, leasing will allow Buyer to preserve certain tax options, such as the possibility of matching a future purchase of the land and buildings to a sale of other Buyer-owned property, in order to receive Section 1031 treatment (no such match is currently available). Finally, Buyer prefers where possible not to acquire title to land used for manufacturing operations because of the potential for common law and statute-based legal claims. Buyer currently leases a number of manufacturing sites in the U.S. and in foreign jurisdictions, for liability reasons.

You and I concluded that the "size of transaction" is approximately \$43 million (the sum of the amount to be paid for the operating assets and the value of the assumed liabilities). We have further concluded that the lease payments and the value of the land and buildings should *not* be included in calculating the size of transaction and, on these facts, the transaction is not reportable under the HSR Act because it does not meet the minimum transaction size.

Very truly yours,

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[REDACTED]

[REDACTED]

[REDACTED]

AGREE  
B Michael Verne  
12/10/01



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