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COMMISSION
PREMERGER NOTIFICATION
OFFICE

June 30, 2003

VIA FACSIMILE

Nancy Ovuka
Premerger Notification Office
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Purchase of Lease Finance Business

Dear Nancy:

I am writing to memorialize advice you gave me regarding the Staff's view of potential reporting obligations in the transaction described below. Please let me know if you think I have not accurately summarized that advice.

The Proposed Transaction

JV Corp is a 50/50 joint venture between Manufacturer and Lender. JV Corp helps place equipment used in processing Manufacturer's products with Manufacturer's customers by acquiring that equipment from third parties and leasing it to Manufacturer's customers. The terms of the leases run for the estimated useful life of the equipment. Buyer, a large financial services company, intends to acquire substantially all of the assets of JV Corp for an amount in excess of $400 million. At the request of the sellers, Buyer will also pay up to a $14 million "breakage fee" to third parties with interests in the JV Corp portfolio so that those third parties will release restrictions on the sale of the portfolio.

Both Lender and Manufacturer will continue to hold other lease finance contracts following the proposed transaction. Lender will hold lease finance contracts worth in excess of $1 billion, though none covering the type of equipment at issue here. Manufacturer will continue to hold several thousand contracts for similar equipment entered into directly by one of its subsidiaries with customers that did not meet the credit criteria of JV Corp.

Reportability

During our conversations we discussed two different methods of analyzing the proposed transaction, both of which resulted in the conclusion that there was no filing

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obligation. One analysis concluded that the value of the transaction fell below the $50 million reporting threshold, while the other concluded that the transaction would be exempt as an ordinary course transaction. The two approaches are discussed below.

Valuation. In discussing the proper method of determining the value of acquisitions of portfolios of leased assets for HSR purposes, I was confirming advice that you had given to Manufacturer's counsel earlier this month. Manufacturer's counsel had explained to you that Buyer would be purchasing the assets for an amount equal to the aggregate net book value of the lease contracts, plus an adjustment of approximately $12.2 million, and that the residual value of the equipment at lease expiration was no more than a few million dollars. Manufacturer's counsel understood that the Staff agreed that the transaction did not meet the $50 million reporting threshold, stating in a follow-up communication to you that "the value of the transaction for Hart-Scott-Rodino purposes is the premium being paid for the leases – $12.2 million at most – plus the residual value of the equipment."

During our call, I sought to clarify the valuation method that should be applied in evaluating acquisitions of lease or loan portfolios. You agreed that in determining values in these circumstances, the buyer should disregard the amount being paid to the seller for the present value of the income stream from the loan or lease payments but should include any amount or "premium" being paid to the seller for other elements of the transaction besides the present value of the income stream, e.g., for the acquisition of ancillary business activities besides servicing the portfolio such as contracts to maintain/service leased equipment or to service third party loans or for the residual value of equipment at the termination of leases. I understand that this valuation method would apply both in asset acquisitions and in acquisitions of voting securities of entities holding such portfolios.[1]

In the particular circumstances of this transaction, I explained that (i) Buyer was not acquiring any ancillary businesses associated with the portfolio, (ii) Buyer had not attributed any portion of the purchase price to the residual value of the equipment

[1] We initially discussed these valuation rules in the context of this transaction being an acquisition of 100% of the voting securities of JV Corp, but noted that the same rules would apply to the acquisition of a loan/lease portfolio as part of an asset acquisition. As indicated in the description, I now understand that the proposed transaction is actually an acquisition of substantially all the assets of JV Corp.

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because of its assessment that disposal of the equipment would not, in aggregate, generate a positive return, and (iii) while Buyer may purchase some tangible and intangible personal property used by JV Corp in billing and collecting amounts due under the equipment leases, the value of that equipment would not exceed $50,000. Thus, nearly all of the payment (to the sellers and on the seller's behalf to the third parties) is attributable to the value of the income stream of the leases held by JV Corp. Under these circumstances, you agreed that the value of the proposed transaction did not appear to satisfy the $50 million size-of-transaction threshold.

Ordinary Course. I also discussed with you my understanding that the proposed transaction would be exempt from reporting obligations as a transaction in the ordinary course of business. I reviewed with you conversations that I and a colleague here have had with Mike Verne regarding the applicability of ordinary course treatment to acquisitions of loan or lease portfolios. As I understand the Staff's current position, where a buyer is acquiring a portfolio of loans or leased equipment, that transaction will be exempt as a transaction in the ordinary course as long as the seller will continue to hold some existing loans or leased equipment or will continue to originate new loans or equipment leases. This treatment applies (i) whether the portfolio is acquired as an asset acquisition or through an acquisition of the voting securities of an entity holding the portfolio, and (ii) whether or not the buyer will also be acquiring staff and/or facilities servicing the portfolio (although any activities other than servicing of the portfolio must be separately analyzed for potential reporting obligations[2]).

As described above, in the particular circumstances of this transaction, both sellers will continue to hold portfolios of leased assets following this transaction, and while the billings and collections properties may be acquired by Buyer, those assets are devoted to servicing the portfolio and do not provide any ancillary services. Under these circumstances, you agreed that the proposed transaction would be exempt as a transaction in the ordinary course of business.

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[2] For example, equipment leasing operations frequently also offer ancillary services for customers, such as maintaining and servicing the leased equipment and lending operations may have contracts to service third party loans. While the provision of such ancillary services does not render the acquisition of the leased equipment or loan portfolio ineligible for ordinary course treatment, the buyer would need to separately value any such ancillary service business to see if it met the size-of-transaction test or was covered under an available exemption.

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I very much appreciate the time you took to discuss this with me and to review this summary of our discussions. I hope I have accurately summarized the staff's position on these issues, but if I have misinterpreted your comments, please let me know that.

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7/1/03
Contacted writer by phone. Confirmed content & conclusions in letter. nmo

MV concurs