

[REDACTED]

[REDACTED] 801.10

May 9, 2010

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Calculation of the Size of the Transaction Test

Dear Mr. Verne:

We are emailing you in order to seek your view as to whether or not the below-mentioned sale of membership interests is reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"). We are counsel to Company A, the ultimate parent entity of Company B, the acquiring person. The ultimate parent entity of the acquired person is Company S (the "Seller").

Pursuant to a Membership Interest Purchase Agreement a subsidiary (the "Buyer") of Company B will purchase from the Seller 100% of the membership interests of the Seller's wholly owned subsidiary (the "Company"). At Closing, the Company will have one subsidiary, Subsidiary X (Subsidiary X and, together with the Company, the "Acquired Companies"). Immediately prior to and in contemplation of the sale of the Company's membership interests, the Company will purchase from an affiliate, Real Estate LLC, the real estate at which the Company's headquarters is located (the "Property"), so the Company will own the Property when its membership interests are sold to the Buyer. The purchase price for the sale of the membership interests of the Company to the Buyer is \$80.5 million, subject to a working capital adjustment.

Our question to the Premerger Notification Office ("PNO") relates to the calculation of the purchase price with respect to the above-described purchase of membership interests for purposes of determining compliance under the size of the transaction test. Specifically, we would be interested in knowing if you agree with our analysis as set forth below which takes into account certain debt attributable to the Acquired Companies which will be paid off at the closing and hence may reduce the acquisition price solely for purposes of calculating the size of the transaction.

[REDACTED]

[REDACTED]

Debt

The debt of the Company and its subsidiaries and relevant affiliates consists of the following:

1. A Secured Revolving Loan and Term Loan originated by two banks and payable on a joint and several basis by the Acquired Companies and three indirect wholly-owned subsidiaries of the Seller that Buyer will not acquire in connection with the transaction (the "Affiliate Borrowers"). These loans funded acquisitions of the Seller and continue to fund the operations of the Acquired Companies and Affiliate Borrowers. The loans are secured by a first priority security interest in all of the assets of the Acquired Companies and the Affiliate Borrowers as well as a lien on the membership interests of the Acquired Companies and Affiliate Borrowers. The estimated aggregate outstanding debt under these loans as of the expected closing date is \$33.5 million, of which approximately \$20 million will be paid at closing out of the purchase price. The \$20 million to be paid at closing represents the estimated portion of the loan attributable to the operations and assets of the Acquired Companies.

2. An Unsecured Mezzanine Loan originated by a group of unaffiliated mezzanine financiers (collectively, the "Mezzanine Lenders") and payable by the Acquired Companies and the Affiliate Borrowers. The Mezzanine Lenders are not affiliated with the Seller, the Acquired Companies, or the Affiliate Borrowers. The purpose of the loan was to fund acquisitions of the Seller. The estimated outstanding debt under this loan as of the expected closing date is \$19.3 million, all of which will be paid at closing out of the purchase price. Of the amount repaid, \$11.6 million represents the estimated portion of the loan attributable to the operations and assets of the Acquired Companies.

3. A Secured Loan originated by First Bank and payable by Real Estate LLC. This loan funded the purchase of the Property and is secured by a first priority lien on the Property. The estimated outstanding debt under this loan as of the expected closing date is \$2.3 million, all of which will be paid at closing out of the purchase price. However, because the Property is being conveyed to the Seller immediately prior to and in anticipation of closing in order to accommodate this transaction, we are not requesting that any portion of this repaid debt be subtracted from the purchase price for purposes of determining compliance with the size of the transaction test.

The Acquired Companies and the Affiliate Borrowers under the Secured Revolving Loan and Term Loan as well as the Unsecured Mezzanine Loan are jointly and severally liable under both of these loans.

The Membership Interest Purchase Agreement currently contemplates that (a) the Buyer will direct approximately \$39.3 million of the purchase price (as described in paragraphs 1 and 2 above) directly to the above mentioned lenders in accordance with instructions contained in payoff letters issued by those lenders to repay the debt as described above and (b) upon receipt of such payment, all liens on the assets and membership interests of the Acquired Companies related to such debt will be released so that such assets and membership interests of the Acquired

Companies will be conveyed free and clear of such liens when the Buyer acquires the membership interests.

As noted above, only the limited liability interests of the Acquired Companies are being acquired by the Buyer. In calculating the amount of repaid debt related to the business of the Acquired Companies versus the amount of repaid debt related to the business of the Affiliate Borrowers, as described in the preceding paragraphs, we are advised that the relative EBITDA of each business for the last twelve months is a reasonable, good faith allocation method. The ratio of the EBITDA for the business of the Acquired Companies compared to the EBITDA for the business of the Affiliate Borrowers is 3:2, resulting in an allocation of 60% of the repaid debt to the business of the Acquired Companies.

We also considered the aggregate amount of debt that the Affiliate Borrowers estimate they could likely take on post-closing as another reasonable, good faith method of determining which portion of the repaid debt relates to the Affiliate Borrowers' business. Using this method, we are advised that approximately \$30.3 million of the repaid debt would be allocated to the Acquired Companies. The difference between the results of these two methods does not impact the analysis as either method of debt allocation ultimately results in an adjusted purchase price under the current threshold of \$63.4 million; but this approach confirms the first method.

In both Informal Interpretation Nos. 88 and 91, appearing in the ABA Section of Antitrust Laws' Premerger Notification Practice Manual (4th Edition, 2007), the PNO has indicated that any portion of the purchase price used to pay off or satisfy third-party debt should not be included in the calculation of the purchase price for purposes of determining compliance under the size of the transaction test. In addition, the staff of the PNO agreed that, in connection with the acquisition of membership interests, amounts allocated to pay off third party debt would not be counted when determining compliance with the size of the transaction test (see Informal Staff Opinion No. 0809010 dated September 23, 2008). In this transaction a total of approximately \$31.6¹ million in debt related to the business of the Acquired Companies is being repaid out of the purchase price payable to the Seller in connection with the sale of the Company's membership interests, all of which we believe should be subtracted from the purchase price for purposes of the size of transaction test.

Informal Interpretation No. 88 also states that any debt of a seller that is being paid off that is not related to the acquired entity will not reduce the purchase price. Approximately \$7.7 million in debt unrelated to the business of the Acquired Companies is being repaid out of the purchase price payable to the Seller in connection with the sale of the Company's membership interests. We are not requesting that debt unrelated to the Acquired Companies be subtracted from the calculation of the purchase price.

¹ The \$31.6 million in debt that is being extinguished and which relates to the business of the Acquired Companies consists of \$20 million attributable to the Secured Revolving Loan and Term Loan and \$11.6 million attributable to the Unsecured Mezzanine Loan.

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Mr. B. Michael Verne

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For the purposes of this E-mail please assume that all parties meet their applicable size of the person tests.

Conclusion and Request

Based upon the above information and analysis, we believe that for purposes of determining compliance under the size of the transaction test under the HSR Act, the amount of debt related to the Acquired Companies' business being paid out of the purchase price at the closing of the purchase of the membership interests should be deducted from the purchase price. Specifically, we believe that the purchase price used for purposes of determining the size of the transaction should be \$48.9 million after the deduction of the approximate \$31.6 million in debt from the \$80.5 million purchase price specified in the Membership Interest Purchase Agreement. As a result, we believe that the size of the transaction will be less than \$63.4 million and that the transaction is not reportable under the HSR Act.

Based upon our description of the facts and circumstances as described above, do you agree with our view that this transaction does not meet the size of the transaction test?

Please do not hesitate to contact me at the above number if you have any questions regarding the foregoing or require additional information. On behalf of our client we thank you for your time and assistance.

Very truly yours,

cc: [REDACTED]

[REDACTED]

AGREE
BJ
5/11/10

[REDACTED]