



April 17, 1985

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FEDERAL EXPRESS

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FEDERAL RESERVE
NOTIFICATION
OFFICE

Re: Acquisition of Certain Assets and Securities from the Estate of [REDACTED]

Dear Mr. Abrahamsen:

I am writing to seek the Staff's guidance on the implications under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") of the recent purchase by [REDACTED] of certain assets and securities from the Estate of [REDACTED]

We believe that this transaction involves transfers in the ordinary course of business and does not involve "substantially all" of [REDACTED] assets, since the assets and securities sold account for only approximately 80% of [REDACTED] assets.

In this transaction, [REDACTED] Inc purchased certain assets of [REDACTED] a horse business and [REDACTED] 100% holding of [REDACTED]

[REDACTED]

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the voting securities of [REDACTED]. The sole asset of [REDACTED] is the land on which [REDACTED] horse business is based. [REDACTED] horse business is carried on under the assumed name [REDACTED]. The remainder of [REDACTED] assets are unrelated to the horse business and apparently account for approximately 20% of [REDACTED] total value.

The purchase price was [REDACTED], of which approximately \$3,000,000 was allocated to the purchase of the voting securities of [REDACTED] Inc. and of which approximately \$38,000,000 was allocated to the purchase of horses and stallion shares of [REDACTED].

[REDACTED] is wholly-owned by [REDACTED]. Among [REDACTED] assets and lines of business, either directly or indirectly, are horses. In the course of doing business involving horses [REDACTED] buys and sells horses and the equipment and materials necessary to deal with horses.

Based on information forwarded to us by [REDACTED] [REDACTED]'s business under [REDACTED] appears to have been comprised substantially of regular sales of yearlings, weanlings, brood mares, racing stock and stallion shares in the ordinary course of business. In both 1983 and 1984, sales of horses and stallion shares accounted for over 50% of [REDACTED]'s revenues. The frequency of weanling and yearling sales was comparable to that of sales of brood mares, racing stock and stallion shares. We believe, therefore, that the acquisition here, insofar as it involves the acquisition of horses and stallion shares, is an acquisition entirely of inventory, so that 15 U.S.C. §18a(c)(1) should apply to exempt this transaction from Premerger Notification.

We suggest that the exception to the exemption, in 16 C.F.R. § 802.1(b), does not apply to require Notification here. This is because the transaction makes no mention of any transfer of good will or employment arrangements. In the horse business, the most important factor (next to horses) is good will, including the specially trained personnel involved.

The Commission has indicated in a formal interpretation that accounts receivable are considered assets for

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purposes of the HSR Act. The Staff has indicated that transfers of leasehold interests are considered transfers of assets. Therefore, it would appear that intangibles such as employment arrangements may be considered assets for purposes of the HSR Act. Good will, which is frequently included on balance sheets as an asset, would also appear to be an asset for purposes of the HSR Act. See, Statement of Basis and Purpose, 43 Fed. Reg. 33,450, 33,472 (1978).

Here, no good will was transferred (beyond the [REDACTED] name which was transferred), and all current employees of [REDACTED] had the right to resign immediately on the transfer from [REDACTED], and are free to leave at any time. Indeed, almost a third of [REDACTED] staff left within a month of the transaction, and the key personnel, the day-to-day manager, was immediately replaced. Moreover, some of the [REDACTED] staff remains in [REDACTED] employ. There was no covenant by [REDACTED] that its specialized personnel would not compete with the purchaser.

A comparison of [REDACTED] payroll listing dated December 11, 1984 for [REDACTED] with [REDACTED] payroll listing dated February 5, 1985 shows a significant change in personnel since the purchase, reflecting the fact that employment arrangements were not included in the transaction. Payroll and personnel costs represented by far the largest single expense category of [REDACTED] in 1984.

The daily operations of [REDACTED] are now supervised by an employee who joined [REDACTED] after the transaction. The highest paid employee at [REDACTED] before the purchase, who supervised [REDACTED] immediately after the purchase. In the horse business, it is common knowledge that the success of any operation depends primarily on the person directing day-to-day activities.

Of the 63 persons on [REDACTED] payroll for [REDACTED] or one-third, were not kept on by [REDACTED]. A study of the payroll dollars yields similar results. (The two payrolls were adjusted to eliminate overtime pay, to achieve a comparison of base payroll on a 40 hour work week.) The employees who remained with [REDACTED] through the transac-

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tion account for 67% of the dollars on [REDACTED]'s payroll and only 64% of [REDACTED]

In light of the substantial impact good will and specialized personnel have upon the value of a business involved with horses, we submit that a significant portion of the assets of [REDACTED] (i.e., good will and employment arrangements) have not been transferred to [REDACTED]

Therefore, we submit, "all or substantially all of the assets of [REDACTED] were not transferred to [REDACTED] and the "ordinary course of business" exemption to the Premerger Notification requirement applies to this transaction.

If, however, the Staff concludes that a Premerger Notification is appropriate, both [REDACTED] will of course file Notifications immediately. In that event, we respectfully submit that, in light of the facts that the omission was entirely inadvertent, the issue was not free from doubt and that it is highly unlikely that any anticompetitive consequence will flow from this transaction, no sanctions should be sought against the parties to this transaction.

Sincerely,
[REDACTED]