[redacted]

August 4, 1988

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Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Dear Madam or Sir:

After having had conversations with Mr. Sharpe and, during his vacaction, with Mr. Kaplan of your office, we are following Mr. Kaplan's suggestion to put in writing the following request for advice on whether a Hart Scott Rodino filing need be made with regard to a transaction being negotiated by our client.

Our client is negotiating to purchase the assets of a chain of retail stores. Individual stores within the chain are owned, and have been for many years, by five separate corporations. Each of these corporations is an ultimate parent entity; that is, none of these corporations has a shareholder owning as much as 50% of its stock or with a right to exercise control. There is no attribution. In addition to the assets being purchased from the five corporations, our client would be purchasing from seven partnerships equipment used in the operations of the stores. Each of these partnerships is also an ultimate parent entity; that is, none of them has a partner entitled to as much as 50% of its profits or, in the event of dissolution, to as much as 50% of its assets.

None of the selling entities (corporations and partnerships) will be paid as much as $15 million for its assets, and the fair market value of the assets being acquired from each of the selling entities is less than $15 million. Concurrently with the purchase of the assets our client would enter agreements with four individuals, who are both stockholders in four of the five corporations and partners in the partnerships, and who have played principal roles in running the chain. For a year or two some of these individuals would be salaried employees or consultants to our client. For a five-year period, two of these individuals would act as developers of potential new sites for our client, and for seven years all four would agree not to compete with our client.

We understand that in some situations the FTC staff has taken the position that payments for non-competition agreements should be treated as though they were payments for assets in determining whether a filing is required. Given that none of the individuals (either directly or by attribution) "controls" any of the corporations or partnerships, is this one of those situations?

If you should conclude that it is, we would be faced with determining how to allocate the non-competition payments among the twelve selling corporate and partnership entities, since the non-competition payments, in reality, will go to individuals and not to the selling entities. Would it be permissible to allocate the non-competition payments equally among all of the selling entities?

Should equal allocation not be permissible, additional questions would arise. Since only one of the selling corporations is the owner of a valuable trade name (the others are licensees with no rights to sell, assign, or transfer) which will be acquired by the buyer, should all or a disproportionately large amount of the non-competition payments be allocated to that corporation? Also, and as noted above, since some of the stockholders who will receive the non-competition payments will also be parties to employment and consulting agreements, should some portion of the non-competition payments be allocated to those individuals and not to the corporations?

I greatly appreciate your assistance in responding to these questions. My direct line [redacted]

Sincerely yours,

[redacted]

[redacted] I informed the writer that the burden is on the acquiring person to determine the fair market value of the assets being acquired separately from each of the 12 persons and the unallocated value of the non-compete agreements means that no premerger fee has been established

Wayne Kaplan 8/5/88