

competitor is registered with holding the US  
as a person creator. An [redacted] is determined  
of [redacted] filing.

[redacted]

[redacted]

January 10, 1992

VIA FEDERAL EXPRESS

Victor Cohen, Esq.  
Federal Trade Commission  
Premerger Notification Office  
Washington, D.C. 20580

Re: [redacted]  
Transaction Identification Number [redacted]

Dear Mr. Cohen:

On behalf of [redacted]  
(the "Company"), we hereby respectfully request that the  
Federal Trade Commission (the "Commission"), pursuant to  
Section 7A(c)(9) of the Clayton Act, 15 U.S.C. 18a (the  
"Act") and § 802.9 of the Rules, Regulations, Statements  
and Interpretations under the Hart-Scott-Rodino Antitrust  
Improvements Act of 1976 (the "Rules"), reimburse the Company  
for the \$20,000 acquiring person filing fee (the "Fee") paid  
by the Company in connection with the above-referenced trans-  
action (the "Transaction"). Section 7A(c)(9) of the Act and  
§ 802.9 of the Rules are collectively referred to herein as  
the "Exemption." The Company believes that, based exclusive-  
ly upon the particular facts of the Transaction, the acquisi-  
tion by the Company of the voting securities of [redacted]  
[redacted] is exempt under the Act pursuant  
to the Exemption and that, accordingly, the Company is en-  
titled to a reimbursement of the Fee.

A. The Facts

Pursuant to a Purchase Agreement dated [redacted]  
[redacted] (the "Agreement") among [redacted] (an

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indirect wholly-owned subsidiary of the Company which is referred to herein as the "Seller"), [REDACTED] and two subsidiaries of [REDACTED] the Seller agreed to sell the license held by it to operate [REDACTED] (together with related operating assets) to one of the [REDACTED] subsidiaries in exchange for the following consideration: (i) [REDACTED] shares of the publicly registered common stock of [REDACTED] and (ii) either [REDACTED] in cash or additional publicly registered shares of [REDACTED] valued at such amount (shares of [REDACTED] were, in fact, delivered in lieu of cash). As a result of the potential coverage of § 801.2(e) of the Rules to the Company's and the Seller's receipt of such shares of common stock of [REDACTED] a Premerger Notification filing was made by the Company. (In respect of the primary acquisition by [REDACTED] of the Seller's [REDACTED] and related assets, a Premerger Notification filing was made, the Identification Number of which was [REDACTED]. Early termination of the waiting period under the Act and Rules was granted for both acquisitions on [REDACTED].

In this firm's transmittal letter for the Company's Premerger Notification Form, we requested on behalf of the Company that the Commission reimburse the Fee based upon the particular facts of the Transaction which were outlined briefly in such letter.

The following sets forth in greater detail the pertinent facts of the Transaction:

1. The Company has, and at the time of the Transaction had, a senior bank loan outstanding (the "Loan"). The lenders under the Loan hold a first security interest in all of the assets of the Company's operating subsidiary, [REDACTED] (which is the borrower under the Loan and is referred to herein as [REDACTED], including all of the assets of the Seller (the Seller is a wholly owned subsidiary of [REDACTED]). In accordance with the terms of the Loan and in order for the Company and the Seller to secure a release of all liens on the assets being sold pursuant to the Transaction, [REDACTED] and the Seller were required by such lenders to apply 100% of the proceeds received in the Transaction to pay down the Loan. The Commission is directed to Exhibit A hereto which are excerpts from the Loan. As indicated by paragraphs 1.9.4.1, 1.9.4.2 and 1.9.4.3 of Exhibit A, all proceeds from the Transaction (as well as proceeds from all future sales of assets) must be used to reduce the outstanding balance of the Loan.

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2. Furthermore, due to the fact that the consideration in the Transaction was securities of [REDACTED] in order to effect the pay down of the Loan, the Seller was required to promptly liquidate the [REDACTED] common stock in order to obtain cash proceeds with which to so pay down the Loan. The Commission is directed to Exhibit B hereto, which is a Bank Inducement Letter Agreement executed concurrently with the Agreement. The Joinder to this agreement states that "[REDACTED] . . . hereby covenants with the banks . . . to apply such funds which it receives . . . to repay [the] Loan."

3. Moreover, following receipt of the shares of [REDACTED] common stock, neither the Company, Seller nor [REDACTED] was permitted to control the disposition of the [REDACTED] shares other than to sell such shares. The Commission is directed to Exhibit C hereto, which is a Letter of Instruction and Agreement among the lenders under the Loan, the Seller, [REDACTED] and [REDACTED]. Pursuant to this agreement, all shares of [REDACTED] common stock received by Seller were transferred, on the closing date of the Transaction, to [REDACTED] solely for purposes of resale. As described in paragraph 2 of this agreement, all shares of [REDACTED] common stock were held exclusively for sale for the Seller's account; as described in paragraph 9, all proceeds therefrom were for the account of the lenders under the Loan (other than as provided in paragraph 10).

4. In point of fact, all [REDACTED] shares of [REDACTED] common stock delivered to Seller on the signing of the Agreement and all [REDACTED] shares delivered on the consummation of the Transaction were in each case sold by [REDACTED] within 24 hours of the respective deliveries of such shares.

#### B. Discussion

In order to satisfy the Exemption (under both the Act and the Rules), an acquisition of voting securities must be "solely for the purpose of investment." In the July 31, 1978 Statement of Basis and Purpose (43 Fed. Reg. 33,450-33,556) (the "Release"), it is stated that the Exemption "provides that so long as a person does not intend to participate in the formulation of the basic business decisions of an issuer, that person holds or acquires the issuer's voting securities 'solely for the purpose of investment.'" See the Release at 33,465.

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On behalf of the Company, it is unconditionally affirmed to the Commission that the Company never had an intent to participate in the business decisions of [REDACTED]. Rather, [REDACTED] happens to be in the enviable position of being able to pay for assets it acquires with its publicly registered stock instead of cash. The Company and the Seller were willing to accept such stock in lieu of cash only because the Seller was able to, and in fact did, immediately sell the [REDACTED] stock in the open market.

Moreover, due to the fact that the Company and the Seller were required by the lenders under the Loan and under the terms of the Agreement to sell the [REDACTED] common stock, other than by breaching the Loan and the Agreement, neither the Company nor the Seller was permitted to own the [REDACTED] common stock for a meaningful period of time, thereby rendering it impossible for either the Company or the Seller to participate in [REDACTED] basic business decisions. The fact that the Seller disposed of all shares of [REDACTED] common stock within 24 hours of receipt thereof only serves to confirm the Company's and the Seller's intentions regarding the [REDACTED] voting securities.

The Release, however, continues (also at 33,465) by stating that "certain types of conduct could be . . . viewed" as inconsistent with investment purpose. Of the six enumerated types of conduct, five (numbers (1), (2), (3), (4) and (6)) manifestly are inapplicable to the facts of the Transaction or the Company's or Seller's actions in respect of the [REDACTED] common stock. The Company does acknowledge that item (5) of this paragraph of the Release at least on its face - "being a competitor of the issuer" - is factually accurate in this case since both [REDACTED] and the Company are engaged in the [REDACTED] industry.

The attention of the Commission, though, is directed at the very next sentence of the Release wherein it is stated that "The facts and circumstances of each case will be evaluated whenever any of these actions have been taken by a person claiming that voting securities are held or acquired solely for the purpose of investment and thus not subject to the act's requirements" (emphasis added). First, the facts and circumstances of the Transaction are clear that the Company's investment in [REDACTED] was completely passive in nature and, in fact, lasted less than 24 hours. In addition, we respectfully suggest to the Commission that, under the particular facts of the Transaction and the Company's and

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Seller's receipt of the [REDACTED] common stock, the mere fact that the Company and [REDACTED] may be competitors is not relevant: Even in light of the Commission's policy to generally deny the Exemption to the acquisition of a competitor's voting securities, in this case there never could have been any antitrust implications to the Company's acquisition since the Company was not permitted by contract to keep these securities.

We believe that the facts delineated above are sui generis so that a determination by the Commission to grant the Company the Exemption and reimburse the Fee will not be antagonistic to the Commission's general position of denying the Exemption to the acquisition of a competitor's voting securities. The fact that the Company and [REDACTED] happen to be competitors is, we believe, simply not determinative of the existence of investment purpose in a situation where the acquiring party must immediately sell the acquired voting securities due to contractual obligations to its senior bank lenders.

Based upon the foregoing, and on behalf of the Company, we request that the Commission determine that the Seller's [REDACTED] and the Company's acquisition of the voting securities of [REDACTED] satisfies the Exemption and, accordingly, reimburse the Fee to the Company.

Very truly yours,

[REDACTED]