

801.1 (C)

[REDACTED]

with reference to November 23, 1992
the confidentiality provision of
Section 7a (b) of the Clayton Act
which restricts release under the
Freedom of Information Act

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FEDERAL TRADE COMMISSION
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VIA FACSIMILE

Richard Smith, Esq.
Premerger Notification Office
Federal Trade Commission
Washington, D.C. 20580

Re: HSR filing requirements in sale-lease back transaction

Dear Mr. Smith:

We spoke last week concerning a proposed transaction wherein title to [REDACTED] will be transferred from three special purpose trusts, which presently hold title to the vessels, to our client [REDACTED]. [REDACTED] presently operates the [REDACTED] under 25 year leases (so-called [REDACTED]) and has done so since the [REDACTED] were built and commissioned ten years ago. The [REDACTED] is the trustee of the trusts, and [REDACTED] and [REDACTED] are the trustor-beneficiaries of the trusts. These relationships are more fully explained below.

In the late 1970's, [REDACTED] contracted with [REDACTED] to build three new [REDACTED] to modernize [REDACTED]. The [REDACTED] were designed by [REDACTED] and built to its specifications for the particular needs of its [REDACTED] operations. [REDACTED] paid all progress payments due to the [REDACTED] except for the final delivery payment, which was financed by [REDACTED] and [REDACTED] as explained below. In 1982, the first of these [REDACTED] was completed and commissioned the [REDACTED]. Later in 1982 and in 1983, the [REDACTED] were completed and commissioned. Immediately prior to delivery, [REDACTED] assigned the construction contracts to special purpose trusts. Upon completion, the [REDACTED] were "delivered" to the trusts by transfer of title from the [REDACTED] and immediately leased back to [REDACTED] for 25 years (the statutory

[REDACTED]

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economic life of the [redacted] with renewal options. Since their commissioning, the [redacted] have been in [redacted] sole possession, and it has had complete control over the deployment of the [redacted] which it has used continuously in its own [redacted] operations.

In the early 1980's, the most economical way for [redacted] to acquire the three [redacted] for its [redacted] was to finance them through tax advantaged leveraged lease transactions which were popular at the time. In such transactions, financial intermediaries (such as [redacted] and [redacted]) financed the acquisition of the [redacted]. These transactions allowed [redacted]

financial institutions to employ the tax advantages attributable to being the "titled owner" of the assets. An additional factor here is that the bonds issued to finance the acquisition are

by [redacted]

lessee, is responsible for all maintenance, manning and insurance costs of any kind associated with the ownership and operation of the [redacted]. Furthermore [redacted] is obliged to pay

to assure the stream of cash necessary to repay the financing. The owner-lessee has no responsibilities other than to collect

consider the lessors to be the taxable owners of the [redacted] for purposes of receiving the tax benefits associated with the

The leases in question extend for a period of 25 years from delivery of the [redacted]. This period coincides with the statutory life of the [redacted] for purposes of the [redacted] accounts for the [redacted] as capital assets owned by [redacted] on its financial reports and depreciates them accordingly for accounting purposes on its books.

The operational control of the [redacted] here has always

to [redacted] is exempt from the HSR filing requirements

because [redacted] has always held "beneficial ownership" of the [redacted] and because the technical passage of title is in the ordinary course of business and exempt under section 802.1(b) of the FTC's Rules (16 CFR § 802.1(b)).

Set forth below is a more detailed description of the pertinent facts which support the conclusion that no HSR filing

1. The [redacted] were built under contracts between [redacted] and [redacted] according to [redacted] design and specifications.

supervised by [redacted] and it was solely responsible for payments under those contracts.

2. When the [redacted] were completed satisfactorily, physical possession of the [redacted] was "delivered" to [redacted] pursuant to long-term leases of the [redacted].

3. Upon delivery, title to the [redacted] was passed to [redacted] trust(s), which were a series of trusts.

beneficiaries of the trusts. The tax deductions result in lower lease hire rates being charged to [redacted] for its operation of the [redacted]. In order to achieve the tax benefits, title to the [redacted] must be held by the trusts, with [redacted] and [redacted] considered the trustor-beneficiaries under the trust agreement and the tax code. Once a [redacted] is sold or otherwise disposed of, the trusts are dissolved.

4. Under the trust structure, the [redacted] serves as the trustee. It has no interest in the corpus of the [redacted] trust itself but acts as a fiduciary, receiving payments from [redacted].

LEASING AGREEMENTS

no [redacted] letter to Mr. Sipple, dated November 21, 1990, which we obtained through a FOIA request, the Premerger Notification Office concluded that a filing was not required in connection with a sale lease back transaction. The facts relating to this transaction parallel those set forth in that letter very closely.

[redacted]

5. [redacted] and [redacted] are in the business of financing the construction and acquisition of durable goods such as [redacted] that require substantial capital outlays. They have no interest in possessing or operating those assets. In reliance on [redacted] credit, [redacted] and [redacted] put

the rest was financed by Government guaranteed bonds under a program administered by [redacted]. The bonds are secured exclusively by the guarantee of the U.S. Government. The Government's interest is secured by a mortgage on the [redacted] an assignment of [redacted] obligations under the leases, and [redacted] general credit.

6. As the guarantor of the bonds, the U.S. Government through [redacted] is the sole secured creditor. There are separate collateral and security arrangements (including UCC filings) between [redacted] and [redacted] regarding the vessels while they are operated by [redacted].

7. Immediately upon delivery of the [redacted] from the shipyard, [redacted] entered into a lease-back of the [redacted] with the trusts. The leases are for 25 years each, which is the statutory useful life of the [redacted] under [redacted] regulations.²

conditions.

8. [redacted] makes lease payments semi-annually. The lease payments cover the principal and interest payments on the bonds, the fee charged by the Government for its guarantee, a return on [redacted] and [redacted] equity in the [redacted], and the administrative costs and charges of the trustee.

9. As lessee of the [redacted] is free to use the [redacted] in its operations with virtually no limitations, other than [redacted] short of using the [redacted] in a [redacted] manner, or in a [redacted] or illegal activity. [redacted] is

² Under these laws, [redacted] is entitled to receive certain subsidies in connection with the operation of these [redacted] until such time as they reach 25 years of age. Because of this subsidy limitation, [redacted] has always disposed of its [redacted] on or before they reach the age of 25 years. Thus, as a practical matter, the 25 year lease term here is the full useful life of the [redacted] to [redacted].

10. [REDACTED] possesses all the indicia of the owner-operator of the [REDACTED] and must alone bear all the operating costs:

- (a) [REDACTED] named the [REDACTED]
- (b) [REDACTED] outfitted the [REDACTED] with the equipment it deems necessary (and may change the equipment as it wants).
- (c) [REDACTED] painted the [REDACTED] the colors it wanted.
- (d) [REDACTED] may modify the [REDACTED] as it sees fit (including major structural changes such as inserting an [REDACTED] so long as it does not reduce the value of the [REDACTED])
- (e) [REDACTED] is solely responsible for the [REDACTED] of the [REDACTED] and the costs thereof.
- (f) [REDACTED] must pay all documentation and inspection costs.
- (g) [REDACTED] must pay all maintenance and repair costs.

11. [REDACTED] is required to pay for all insurance on the [REDACTED] for loss or damage. The named insureds include the U.S. Government, the trust, [REDACTED] or [REDACTED] as the case may be, and [REDACTED] as the lessee [REDACTED]

to any of the other named insureds for any premium payments

other hand, any funds remaining from the insurance proceeds after the interests of the secured creditors were paid would go

12. Financial and other covenants normally imposed on the borrower in asset financing are imposed solely upon [REDACTED] so long

Discussion

1. Since their commissioning, [REDACTED] has controlled and operated the [REDACTED] and is responsible for all costs of operation [REDACTED]

sole operator and has complete control over how the [REDACTED] are going to be deployed in the competitive arena for the full statutory [REDACTED] life of 25 years or longer. It carries the [REDACTED] as assets on its financial statements and depreciates them for accounting and financial reporting purposes. The success or failure of the deployment of the [REDACTED] in the [REDACTED]

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competitive arena has always rested and continues to rest with [redacted] As long as the financing entities receive their payments [redacted] in the productive value or deployment of the [redacted] In taking title, [redacted] is merely buying out the intermediary financing [redacted]

2. There is little question that each step in the evolution of this transaction has been or will be in the ordinary course of business for each of the parties. When [redacted] bought the [redacted] from the [redacted] the transaction was in the ordinary course of business of the [redacted] under Rules section 802.1(b). The financing of the [redacted] was in the ordinary course of the business of [redacted] financing the acquisition of new capital goods is what they do.³ The technical passage of title is part and parcel of the financing requirements. It has nothing to do with control over the productive utilization of the assets in the competitive processes and should be considered exempt under Rules section 802.1(b).⁴

If there are any additional questions, please do not hesitate to call me at the above-noted telephone number. Time is of

3. Indeed, the revenues associated with the leases at issue

6159, Miscellaneous Business Credit Institutions, not any of the codes associated with [redacted]

4. If the financing of these [redacted] could have been accomplished without the passage of title, the substance of the transaction would not have changed and there would be no question that there would be no filing required. Both Rules sections 802.1 and 802.30 look to the substance of transactions in granting exclusions. The substance here is the technical

transfer of the economic or competitive value of the assets. Those values have always been held by [redacted]

Richard Smith

the essence here and we would greatly appreciate an early response.

Very truly yours,

[Redacted signature]

12-19-72. I understand that, under the particular facts of this situation,

the present lease, in view of the fact that, since the determination is based on the facts that: (1) the [redacted] were built to Lessee's design, (2) the 25 year lease term is for Lessee, the full useful life of the [redacted]

responsible for wear and tear on its books and depreciation thereon. [redacted] as capital assets on its books and depreciation thereon. [redacted] as long as their value is not reduced and [redacted] to the [redacted] [redacted] for financial reasons. As to the disposal [redacted]

in [redacted] the lease [redacted] [redacted] [redacted] [redacted]

each party will absorb the loss of use [redacted] will be resolved through negotiation [redacted] the lessor. These situations will be resolved through negotiation [redacted] the lessor and lessee.

[Redacted]