801.10(b)

[redacted]

[redacted]

This material may be subject to the confidentiality provisions of Section 7A(h) of the Clayton Act which restricts release under the Freedom of Information Act.

April 5, 1994

BY FAX and MAIL

Richard B. Smith, Esq.
Senior Attorney
Premerger Notification Office
Federal Trade Commission
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Dick:

Further to our telephone conversation last Thursday, I am writing to confirm your opinion that the transaction described [redacted]

In considering the transaction, please assume that the size-of-person test is satisfied.

1. Description of Proposed Acquisition -- The proposed [redacted] would be [redacted] moved to the Buyer's premises. Accounts receivable would not be transferred.

2. Transition Period -- In order to maintain the customer base during the period when [redacted] would be moved from the Seller's premises to the Buyer's premises, [redacted] from the time of Closing until th[redacted] have been moved to the Buyer's plant and started up, it shall be necessary for the Seller to continue to operate the [redacted] which have not yet been moved in order to supply the market with its products and prevent the erosion of its customer base until the Buyer has the capability of supplying the customers itself. Therefore, at the Closing, the parties will enter into a Sales Agency Agreement [redacted]

[redacted]

[redacted]

its products, and the Buyer will become the Seller's sales agent for such products with responsibility for sales and related customer service functions. The Sales Agency Agreement will specify the types, quantities, and prices of products to be manufactured by the Seller and made available for the Buyer to [illegible]

customers, and for any rebates offered to customers, in exchange for which the Buyer will earn a sales commission [illegible]

[redacted]

produce the quantities set forth in a mutually agreed-upon market forecast. Seller's ability to supply product after Closing will be hampered by the fact that its employees will know that their jobs with the Seller will be ending within a few months. Despite this environment, Seller will have to increase the production on each [redacted] in service (since some [redacted] will be out of service) in order to fulfill the market forecast. If the Seller fails to deliver the quantity of product required in the forecast, there shall be liquidated damages which shall be deducted from the escrow account (as well as from the purchase price for the business).

The Buyer shall use its best efforts to sell all of the

[redacted]

product set forth in the forecast, including giving preference to [illegible] product in the forecast. However, if during the Transition Period the Buyer displaces any of Seller's existing business with Buyer's own product and fails to sell all of the Seller's product in the forecast, then the Buyer shall owe Seller, as liquidated damages, the amount which the Seller would have received if there had been no such shortfall.

3. <u>Acquisition Price</u> -- The proposed purchase price is $13,000,000 for all of the assets described above except for a nominal amount of raw materials inventory at the end of the Sales Agency Agreement (estimated to be less than $750,000). $2,000,000 (of the $13,000,000) would be paid at Closing. Because of the uncertainties in Seller's ability to fulfill all [illegible]

[redacted]

[redacted]

[redacted]

Richard B. Smith, Esq.
April 5, 1994
Page 3

transferred to Buyer. If during the Transition Period sales achieve certain milestones, Seller can receive a $500,000 bonus.

4. Terms of Sales Agency Agreement -- Buyer will be paid a sales commission at or above market rates. If the Seller fulfills 100% of its obligations under the Sales Agency Agreement, the Seller can earn a bonus of $500,000. Seller may also be paid liquidated damages by Buyer if Buyer displaces any of Seller's existing business with Buyer's own product during the Transition Period and fails to sell all of the product in the forecast; and conversely, Seller may pay liquidated damages to Buyer if Seller fails to produce product in accordance with the forecast. The precise terms of the Sales Agency Agreement have not yet been negotiated, but the potential liquidated damages could be several million dollars.

5. Conclusion -- It is our conclusion that the [redacted] be less than $15 million (under paragraph 3 above), and the Buyer has concluded under Section 801.10(c) of the Regulations that the fair market value of the assets is less than $15 million. The only issue of significance, therefore, is the treatment of the sales agency arrangement. We believe it is a bona fide sales agency arrangement -- with the Seller having title to the goods and the Buyer earning a sales commission for its effort, which will be at or above market rates -- and therefore the sales agency arrangement should not be deemed an acquisition of assets and thereby somehow aggregated with purchase of the [redacted] and [redacted]

I understood from our conversation on Thursday that you agreed with this conclusion. Because my client would like to move forward quickly with this transaction, I would appreciate hearing from you as soon as practicable as to whether you continue to agree that the transaction is not reportable.

Sincerely,

[redacted]

[redacted] 11/12/94 - Advised [illegible] that PMN Office [redacted]

agreed [illegible] need not be considered in determining the acquisition price; RBSmith