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PLR-125807-08

Date:

October 07, 2008

LEGEND:

Company =

Entity A =

Entity A1 =

Entity A2 =

Entity B =

Entity B1 =

Entity C =

Entity C1 =

Entity D =

Entity D1 =

Entity D2 =

Entity E =

Entity E1 =

Entity E2 =

Entity F =

Entity F1 =

Entity F2 =

Entity G =

Entity G1 =

Entity H =

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Petition Date =

Effective Date =

Type 1 =

PLR-125807-08

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Dear :

This letter responds to your June 5, 2008, letter requesting rulings as to Company's ability to rely on information contained in a series of Securities and Exchange Commission ("SEC") filings for purposes of determining shifts in ownership under § 382 of the Internal Revenue Code. The information submitted in that request and in subsequent correspondence is summarized below.

Summary of Facts

Company, a publicly traded corporation, is the common parent of an affiliated group of corporations which files a consolidated federal income tax return. Company is also a loss corporation within the meaning of § 382(k)(1) of the Code and § 1.382-2(a)(1) of the Income Tax Regulations.

On the Petition Date, the former parent of Company and a of its domestic subsidiaries (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code. From the Petition Date until the Debtors emerged from bankruptcy on the Effective Date, the Debtors operated their businesses as debtors-in-possession in accordance with the Bankruptcy Code.

As of the Effective Date and pursuant to the Debtors' plan of reorganization (the "Plan"), Company's former parent issued b shares of common equity to Company which was a wholly-owned subsidiary at the time. All other equity interests in the former parent of Company were cancelled as of the Effective Date, and Company became the new parent of the former parent and group. Company then issued new common stock to the various creditor constituencies as required by the Plan.

On the Effective Date and pursuant to the Plan, Company issued approximately c shares of common stock to its creditors (other than Type 1 creditors) and employees. In satisfaction of the Type 1 creditor claims, Company issued d shares of common stock to a trust (the "Trust") which qualified under § 524(g) of the Bankruptcy Code. The Trust received its shares on Date 1 (a date after the Effective Date), after a contingency was resolved in its favor.

On Date 2, Company's former parent and Securities Firm executed an equity commitment agreement (the "Equity Commitment Agreement") that contemplated a rights offering in which holders of certain claims against the Debtors would be offered the right to purchase, on the Effective Date, up to their pro rata share of e shares of Company common stock at a purchase price of \$f per share. The Equity Commitment Agreement provided for the purchase by Securities Firm of a number of shares of Company common stock equal to e less the number of shares of Company common stock purchased pursuant to a rights offering (the "Rights Offering"). Securities Firm, in turn, entered into a syndication agreement (the "Syndication Agreement") with certain parties pursuant to which those parties were obligated to purchase their pro rata share of Company common stock that Securities Firm was obligated to purchase pursuant to the Equity Commitment Agreement. No shares of Company common stock were acquired in the Rights Offering but some were acquired pursuant to the Syndication Agreement, as described below.

As of the Effective Date and after the issuance of Company common stock to its creditors and the exercise of rights and obligations under the Equity Commitment Agreement and Syndication Agreement described above, Company had g (c + e) shares of common stock outstanding. Company also issued warrants to acquire Company common stock to certain creditors at various strike prices.

Shortly after the Debtors' emergence from bankruptcy, six entities filed Schedules 13D and 13G with the SEC reporting ownership of Company stock as of the Effective Date.

Ownership of Company Common Stock as of the Effective Date

Facts related to the entities and their SEC filings are set forth below. For this purpose, a "5-percent shareholder" generally means any person holding 5 percent or more of the stock of a loss corporation at any time during the testing period. See § 382(k)(7) and § 1.382-2T(g).

Entity A Schedule 13D. Entity A filed a Schedule 13D, effective as of the Effective Date, which reported that beneficial ownership of h shares of Company stock belonged to two entities for which Entity A acted as investment adviser— Entity A1 and Entity A2. The Entity A Schedule 13D did not affirm the existence of a "group" within the meaning of § 13(d)(3) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78a et seq.

Entity A1 reported ownership of i shares of Company stock, which reflects a combination of the following: (1) Company stock acquired by Entity A1 directly in exchange for its debt in Company; (2) a purchase by Entity A1 of Company stock pursuant to the Syndication Agreement; (3) warrants to purchase Company stock that became exercisable on the Effective Date and expire on Date 3 but none of which have yet been exercised; and (4) shares that could have been (but were not) purchased pursuant to a collar arrangement. Entity A1's reported ownership of i shares of

Company stock represents ownership of more than 5 percent of Company common stock outstanding as of the Effective Date.

Entity A2 reported ownership of j shares of Company stock. According to Entity A's Schedule 13D, Entity A2 purchased j shares of Company common stock pursuant to the Syndication Agreement on the Effective Date. Entity A2's reported ownership of j shares of Company stock represents ownership of k percent (less than 5 percent) of Company common stock outstanding as of the Effective Date.

Entity B. Entity B, certain investment funds managed by it and its owners filed a Schedule 13G, effective as of the Effective Date, which reported collective ownership of l shares of Company stock. Of the l shares, m shares were reported as owned by Entity B1. The Entity B Schedule 13G did not provide additional details regarding the reported share ownership, but it did not affirm the existence of a "group" within the meaning of § 13(d)(3) of the Exchange Act. Through its due diligence procedures, however, Company determined that the number of shares reported as owned by Entity B1 on the Schedule 13G reflected n shares of Company common stock and o warrants to acquire Company common stock. The n shares actually owned represent ownership of more than 5 percent of Company common stock outstanding as of the Effective Date.

Entity C. Entity C, certain investment funds managed by it and its owners filed a Schedule 13G, effective as of the Effective Date, which reported collective ownership of p shares of Company stock. The Entity C Schedule 13G did not affirm the existence of a "group" within the meaning of § 13(d)(3) of the Exchange Act. Through its due diligence procedures, Company determined that Entity C1 owned q of the shares reported as owned by Entity C on the Schedule 13G and that the remaining shares were owned by certain of Entity C's affiliated funds. The shares owned by Entity C1 represent ownership of more than 5 percent of Company common stock outstanding as of the Effective Date.

Entity D. Entity D and its owners filed a Schedule 13G, effective as of the Effective Date, which reported collective ownership of r shares of Company stock. The Entity D Schedule 13G did not affirm the existence of a "group" within the meaning of § 13(d)(3) of the Exchange Act. Through its due diligence procedures, Company determined that Entity D1 owned s of the shares reported as owned by Entity D on the Schedule 13G and that the remaining shares were owned by Entity D2. The shares owned by Entity D1 and Entity D2, when viewed separately, represent ownership of less than 5 percent of Company common stock outstanding as of the Effective Date.

Entity E. Entity E, certain investment funds managed by it and its owners filed a Schedule 13D, effective as of the Effective Date, which reported ownership of t shares of Company stock by Entity E1 and Entity E2, investment funds advised by Entity E or its affiliates. The Entity E Schedule 13D did not affirm the existence of a "group" within the meaning of § 13(d)(3) of the Exchange Act. According to Entity E's Schedule 13D, on the Effective Date, Entity E1 and Entity E2 collectively acquired an additional u

shares of Company common stock through the Syndication Agreement.¹ Through its due diligence procedures, Company determined that Entity E1 beneficially owned at least y shares, which represents more than 5 percent of Company common stock outstanding as of the Effective Date. Also through its due diligence procedures, Company determined that Entity E2 beneficially owned at least w shares, which represents less than 5 percent of Company common stock outstanding as of the Effective Date.

Entity F. Entity F, certain investment funds managed by it and its affiliates and owners filed a Schedule 13G, effective as of the Effective Date, which reported collective ownership of x shares of Company stock. The Entity F Schedule 13G did not affirm the existence of a “group” within the meaning of § 13(d)(3) of the Exchange Act.

According to Entity F’s Schedule 13G, included in its reported share ownership are options to acquire y shares of Company common stock. Specifically, Entity F1, a domestic investment fund managed by an Entity F affiliate, owns z shares of Company stock and options to acquire aa shares of Company common stock. Entity F2, an offshore investment fund managed by Entity F, owns bb shares of Company common stock and holds options to acquire cc shares of Company common stock.

After reducing their reported ownership by the number of options held, and whether viewed separately or in the aggregate, Entity F1 and Entity F2’s shares of Company stock represent ownership of less than 5 percent of Company common stock outstanding as of the Effective Date.

Ownership of Company Common Stock after the Effective Date

The above-named filers of Schedules 13D and 13G made subsequent amendments and other filings with the SEC that are not material for purposes of this letter ruling. Certain other entities filed their initial Schedules 13D and 13G with respect to Company common stock after the Effective Date.

Type 1 Creditor Trust. The Type 1 creditor trust (the “Trust”) filed a Schedule 13D reporting ownership of d shares of Company common stock. The d shares were issued to the trust on Date 1, and as of that date and after the issuance of shares to the trust, Company had dd shares outstanding. The shares held by the Trust represent ownership of more than 5 percent of Company common stock outstanding as of Date 1.

Entity G. Entity G and its owner filed a Schedule 13G reporting ownership, as of Date 4, of ee shares of Company common stock by Entity G1, a wholly-owned subsidiary of Entity G and an investment adviser registered under the Investment Company Act of 1940. The shares reported as owned by Entity G1 represent more

¹ These shares were placed in escrow pending regulatory approval of the transaction. Citing Prop. Treas. Reg. § 1.468B-8, Company treated Entity E1 and Entity E2 as the tax owner of their respective amount of shares acquired through the syndication agreement as of the Effective Date. No ruling has been requested or given regarding the federal income tax treatment of this transaction.

than 5 percent of Company common stock outstanding as of Date 4. According to the Schedule 13G, however, no one person (including Entity G1) is the beneficial owner of more than 5 percent of Company common stock. Specifically, according to Item 6 of the Schedule 13G, “[v]arious persons have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, [Company common stock]. No one person’s interest in the [Company common stock] is more than 5 percent of the total outstanding [Company common stock].” The Entity G1 Schedule 13G did not affirm the existence of a “group” within the meaning of § 13(d)(3) of the Exchange Act.

Entity H. Entity H filed a Schedule 13G reporting ownership, as of Date 4, of ff shares of Company common stock. The shares reported as owned by Entity H represent more than 5 percent of Company common stock outstanding as of Date 4. According to the Schedule 13G, however, the shares are not actually owned by Entity H but by “one or more open-end investment companies or other managed accounts which, pursuant to investment management contracts, are managed by [Entity H].” Through its due diligence procedures, Company determined that approximately gg investment companies managed by Entity H beneficially own the reported shares, and that no single investment company’s ownership represents ownership of more than 5 percent of Company common stock outstanding as of Date 4. The Entity H Schedule 13G did not affirm the existence of a “group” within the meaning of § 13(d)(3) of the Exchange Act.

Company’s Due Diligence Procedures

Company uses a stock surveillance company to help it identify persons who control large blocks of Company common stock. The stock surveillance company uses a variety of techniques to identify persons holding large blocks of Company common stock including, but not limited to: (i) tracing large trades of Company common stock to the stock deposit corporation custodial accounts for which the stock surveillance company knows from past experience the identity of the persons who control those accounts; (ii) direct contact with large institutional investors; and (iii) a review of Schedule 13F portfolio lists filed with the SEC by institutional investors.

The stock surveillance company attempts to identify the persons who have voting authority on Company common stock, regardless of whether such persons are the true or economic owners of the stock. The information obtained by the stock surveillance company does not identify all of the owners of Company common stock, and because the stock surveillance company makes certain assumptions regarding the identity of the persons who control the custodial accounts, the information is not 100 percent reliable. Additionally, if persons desired to acquire Company common stock without being detected by the stock surveillance company, they may be able to do so.

In addition to engaging a stock surveillance company, Company has one of its employees dedicated to tracking ownership of its common stock and also has engaged a law firm to track Schedule 13D, 13G, and other SEC filings with respect to its common stock. Finally, ownership questionnaires are sent to the significant shareholders of

Company's common stock for purposes of including shareholder ownership information in Company's SEC filings.

Representations

The following representations have been made with respect to this request for letter ruling:

(a) Company has had only one class (common) of stock outstanding since the Effective Date, and its common stock is publicly traded.

(b) Company is a loss corporation as defined in § 382(k)(1).

(c) Company emerged from protection under Chapter 11 of the U.S. Bankruptcy Code with a net operating loss carryforward.

(d) As a result of the implementation of the Plan, Company's emergence from protection under Chapter 11 of the U.S. Bankruptcy Code resulted in Company experiencing an ownership change (within the meaning of § 382(g)(1)) on the Effective Date.

(e) Except as noted herein, Company has no knowledge of: (1) the ownership of 5 percent or more of the outstanding Company stock by specific fund clients of any investment advisers filing Schedules 13D or 13G with respect to Company stock; (2) the existence of any group of persons who have or had a formal or informal understanding amongst themselves to make a coordinated acquisition of Company stock using investments made by or through any investment advisers filing Schedules 13D or 13G with respect to Company stock and their fund clients; (3) any SEC filings affirming that any investment advisers' fund clients filing Schedules 13D or 13G with respect to Company stock should be treated as a group; (4) an entity or individual (through application of the attribution rules of § 318 as modified by § 382(l)) that owns 5 percent or more (by vote or value) of Company stock when such individual or entity's direct ownership of Company stock is combined with its ownership of Company stock acquired by or through any investment advisers filing Schedules 13D or 13G with respect to Company stock and their fund clients; or (5) any activities performed by any investment advisers filing Schedules 13D or 13G with respect to Company stock that would be outside the scope of an investment adviser.

(f) Company will continue to retain the same or a similar stock surveillance service as that described herein, or will utilize such other surveillance service or methods as may become available that is reasonably expected to provide at least the same level of stock ownership information as would be available if, instead, Company retained the service currently used.

Rulings

Based solely on the information and representations set forth above, we rule as follows:

(1) A person who has the right to dividends and proceeds from the sale of stock (“Economic Ownership”) is the owner of Company stock for § 382 purposes (“Economic Owner”). Thus, an investment adviser that has the power to acquire, hold, vote and dispose of the stock; file Schedules 13D or 13G with respect to Company stock; communicate with Company management regarding Company’s operations, management, or capital structure; or communicate with adviser clients or prospective clients, but does not have Economic Ownership of the stock is not the Economic Owner of the stock.

(2) If the information reported on a Schedule 13D or 13G does not establish that a person is the Economic Owner of 5 percent or more of Company stock (within the meaning of § 1.382-2(a)(3)(i)] and § 1.382-2T(f)(18)), Company can rely on the schedule (and the absence of other Schedules 13D and 13G) to determine that no such person is the Economic Owner of 5 percent or more of Company stock unless Company has actual knowledge that an owner of the stock is an Economic Owner of 5 percent or more of Company stock. See § 1.382-2T(k)(1)(i).

(3) If Company has actual knowledge that all or a portion of the holdings of Company stock reported on a Schedule 13D or 13G are not in fact “stock” for purposes of § 382, Company may disregard the Schedule 13D or 13G characterization of the portion of such holdings that is not properly treated as stock for such purposes. See §§ 1.382-2(a)(3)(i), 1.382-4, and 1.382-2T(f)(18). For purposes of this ruling, actual knowledge may come from the contents of a Schedule 13D or 13G filing itself or from outside of such filing, such as knowledge based on information about a person as a result of research and information requests made by Company or its agents.

(4) If an investment adviser files a Schedule 13D or 13G that reports ownership on behalf of two or more Economic Owners of shares representing in the aggregate more than 5 percent of Company stock but does not affirm the existence of a “group” (within the meaning of § 13(d)(3) of the Exchange Act), and the Economic Owners do not individually file a Schedule 13D or 13G that affirms the existence of a group, Company can rely on the absence of the filing of a Schedule 13D or 13G by the Economic Owners to determine that the Economic Owners are not members of a group that constitutes an “entity” (within the meaning of § 1.382-3(a)(1)(i)) unless Company has actual knowledge that the Economic Owners constitute such an entity.

(5) Two or more Economic Owners of Company stock will not constitute an “entity” (within the meaning of § 1.382-3(a)(1)(i)) merely because: (a) one or more directors or employees of the investment adviser are also directors and/or employees of the Economic Owners, or (b) the investment adviser has authority to undertake any of the following activities with respect to Company stock owned by the Economic Owners:

- (i) voting the shares of Company stock;
- (ii) acquiring or disposing of the shares of stock, including batch trading of shares of the stock or cross trading involving the stock;
- (iii) using a common custodian to hold the stock;
- (iv) filing Schedules 13D or 13G with respect to the stock, unless a Schedule 13D or 13G filed with the SEC states that the Economic Owners are acting in concert or otherwise engaged in a coordinated acquisition of shares of Company stock;
- (v) communicating with Company's management regarding Company operations, management or capital structure;
- (vi) adhering to an investment adviser's general policies for voting securities such as voting in favor of cumulative voting, financially reasonable golden parachutes, one-share-one-vote, management cash incentives, and pre-emptive rights, and voting against greenmail, poison pills, supermajority voting, blank check preferred stock which leaves certain terms open to the board of director's approval without requiring shareholder vote, and super-dilutive stock options which cause a higher than usual dilutive effect on a company's stock; or,
- (vii) communications by an investment adviser with clients or prospective clients (A) relating to the employment of the investment adviser, (B) explaining the investment adviser's investment philosophy, (C) reporting on the investment adviser's investment performance, (D) analyzing the relative investment potential of securities, or (E) similar transactions.

(6) Company will not be deemed to know that any of the Economic Owners constitute an "entity" (within the meaning of § 1.382-3(a)(1)(i)) merely by reason of knowing that the investment adviser and one or more of the Economic Owners have overlapping directors or employees or that an investment adviser has undertaken or has the authority to undertake one or more of the activities described in Ruling 5 above with respect to Company stock owned by the Economic Owners.

Caveats

We express no opinion about the tax treatment of the transactions under other provisions of the Code and regulations or the tax treatment of any conditions existing at the time of, or effects resulting from, the transactions that are not specifically covered by the above rulings. The rulings contained in this letter are based on facts and

representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the materials submitted in the support of the request for rulings. Verification of the information, representations, and other data may be required as part of the audit process.

Procedural Statements

This ruling letter is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, any taxpayer filing its return electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of this letter ruling.

In accordance with the power of attorney on file in this office, a copy of this ruling letter will be sent to your authorized representative.

Sincerely,

Gerald B. Fleming
Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel (Corporate)