U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216

Reply to the Attention of:
Dan O'Neil
(202)523-8368

OPINION NO. 82-36A
Sec. 414(c)(2), 414(c)(3)

JUL 28 1982

Mr. Michael I. Lew
Coopers & Lybrand
222 South Riverside Plaza
Chicago, Illinois 60606

Re: Helene Curtis Industries, Inc.
Identification Number: F-2157

Dear Mr. Lew:

This is in reply to your letters of October 28, 1981, and March 5, 1982, as well as telephone conversations of February 22 and March 31, 1982, requesting, on behalf of Helene Curtis Industries, Inc. (HCI), and the Helene Curtis Industries, Inc. Employees' Profit Sharing Retirement Plan (the Plan), an advisory opinion or, in the alternative, a prohibited transaction exemption under the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that the trustees of the Plan are the holders of record of all of the issued and outstanding stock (100 shares) of Empro Intangibles, Inc. (Empro). The trustees created the corporation for the purpose of effectuating the purchase in 1956 of various trademarks, together with other assets that were immediately sold. You further state that Empro's sole assets consist of these various trademarks acquired in 1956. Empro is used only as a vehicle to hold the trademarks and has never been treated as a separate economic entity for any purpose.

Pursuant to agreements executed in 1956, the trademarks were licensed to HCI and Helene Curtis, Ltd. (HCI Canada), a wholly-owned affiliate of HCI. The licensing agreements were all signed by the Plan trustees and Empro as the sole owners of the trademarks. These licenses remain in effect currently. Trademark royalties under the licensing agreements are paid by HCI and its affiliate either to the trustees directly or to Empro. When paid to Empro, the royalties are immediately distributed to the trustees.

Under an agreement signed by HCI, HCI Canada, Empro and the trustees of the Plan, the Plan now proposes to sell to HCI the stock of Empro and the Plan's remaining interest in the various

trademarks for $25,000. This amount is represented to be in excess of fair market value as of October 20, 1981, the effective date of the proposed sale. You state that a law firm was engaged to value the trademarks and to negotiate the sale on behalf of the Plan. This law firm has a sizable trademark practice and is knowledgeable in the principles and methods of valuing this kind of property. It is the intent of the sales agreement to transfer to HCI the Plan's entire interest in the trademarks. You further state that Empro has no outstanding liabilities. On this basis, you represent that the sale of the Empro stock adds no economic substance to the transaction other than to facilitate the transfer of the trademarks to HCI.

The Plan and HCI request an advisory opinion to the effect that:

> (1) The proposed sale of the trademarks and stock of Empro is a transaction described in section 414(c)(3) of ERISA and, therefore, is exempt from the prohibited transaction provisions of sections 406 and 407 of ERISA and section 4975 of the Internal Revenue Code of 1954 (the Code).
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> (2) The procedure outlined above of engaging a law firm to value the assets and negotiate the transaction on behalf of the Plan is an acceptable method for determining the fair market value of the assets in question and for effecting the transaction.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978, the authority of the Secretary of the Treasury to issue rulings under section 2003(c) of ERISA has been, with certain exceptions not here relevant, transferred to the Secretary of Labor and the Secretary of the Treasury is bound by the rulings issued by the Secretary of Labor pursuant to such authority. Therefore, this letter is issued solely by the Department of Labor (the Department).

Section 406(a)(1)(A) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he or she knows or should know that the transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between a plan and a party in interest.

Section 3(14) of ERISA defines the term "party in interest" to include an employer any of whose employees are covered by a plan. Accordingly, since HCI is a party in interest with respect to the Plan, the proposed sale of the Empro stock and the plan's retained interest in the trademarks to HCI would constitute prohibited transactions in the absence of a statutory or administrative exemption.

Section 414(c)(2) of ERISA provides that sections 406 and 407(a) of ERISA shall not apply until June 30, 1984, to a lease or joint use of property involving the plan and a party in interest pursuant to a binding contract in effect on July 1, 1974 (or pursuant to renewals of the contract), if the lease or joint use remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be and if the execution of the contract was not, at the time of the

execution, a prohibited transaction within the meaning of section 503(b) of the Code or the corresponding provisions of prior law. Further, section 414(c)(3) of ERISA provides, in pertinent part, that sections 406 and 407(a) of ERISA shall not apply until June 30, 1984, to the sale, exchange or other disposition of property described in section 414(c)(2) between a plan and a party in interest if, in the case of a sale, exchange or other disposition of the property by the plan to the party in interest, the plan receives an amount which is not less than the fair market value of the property at the time of the disposition.

For purposes of section 414(c)(2) of ERISA, the licensing agreement described in your submission under which HCI pays royalties to the Plan for the use of the trademarks is a "lease or joint use of property." Furthermore, under section 414(c)(3) of ERISA, a lease or joint use of property by a corporation and a party in interest, under circumstances where the plan owns a controlling interest in the stock of the corporation, will be treated as the lease or joint use of property described in section 414(c)(2) of ERISA by the plan and a party in interest. Therefore, on the basis of the information submitted, it is our opinion that the sale of the Plan's interest in the stock of Empro, whose only assets are subject to a license with HCI, would have the same economic effect as the sale of the underlying assets. Accordingly, it is the Department's opinion that the relief provided by section 414(c)(3) of ERISA would also be applicable to the sale by the Plan to HCI of all of the outstanding stock of Empro if the conditions of section 414(c)(3) are otherwise met. Additionally, the sale of the Plan's retained interest in the trademarks will also be subject to the relief provided by section 414(c)(3), provided that all the conditions of that section are satisfied with respect to this aspect of the proposed transaction.

Section 5.02(a) of ERISA Procedure 76-1 (41 FR 36281, August 27, 1976) states that the Department ordinarily will not issue advisory opinions with regard to questions which are inherently factual in nature. For that reason, the Department will offer no opinion as to whether the method used to determine "fair market value" and to negotiate the sale of the trademarks is in fact an acceptable method of making this type of determination. We do note, however, that the selling price must be not less than the fair market value of the stock and trademarks at the time the sale is consummated.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly this letter is issued subject to the provisions of the procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs

cc: John E. Hurley