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OFFICE OF CHIEF COUNSEL
CORPORATION FINANCE

Mr. Peter J. Romeo
Chief Counsel
Division of Corporation Finance
Securities and Exchange Commission
Washington, DC 20549

Dear Mr. Romeo:

We represent Tokyu Building, Inc. ("Tokyu"), a Hawaii corporation with its principal offices located in Honolulu, Hawaii. In a telephone conversation on Oct. 28, 1980 with Mr. Hamilton of the Chief Counsel's Office, it was suggested that we seek an interpretive ruling with respect to the time of commencement of the two year holding period required under Rule 144(d)(1). It is our opinion that restricted securities which are bona fide pledged by an issuer as security for its obligations, may be sold by the pledgee following the expiration of two years from the date the pledgee advances sufficient funds to cover the market value of the pledged stock.

Tokyu is contemplating a construction loan to Maxwell's International, Inc. ("Maxwell"), repayable over seven years, in the amount of three million (\$3,000,000) dollars. Tokyu intends to make these funds available to Maxwell for a period of six months, during which time Maxwell intends to draw serially upon such funds to construct a restaurant in San Francisco, California. The loan is to be guaranteed by Hardwicke Companies Incorporated ("Hardwicke"), the parent of Maxwell. Hardwicke has agreed to pledge 76,000 shares of its common stock with a current market value of about \$760,000 as security for its obligation as guarantor. Although the common stock of Hardwicke is publicly traded pursuant to currently effective registration statements, these particular 76,000 shares are "restricted securities" as the term is defined in Rule 144. Tokyu, the pledgee, wants to be able to sell these pledged securities pursuant to Rule 144 should such a sale become necessary. Tokyu is aware that the pledgor of the pledged stock is the "issuer" as the term is defined in Section 2(4) of the 1933 Act, and, thus, the tacking provision of subdivision (d)(4)(D) of Rule 144 does not apply. Tokyu wishes to determine when its two year holding period under the general rule of 144(d)(1) will begin to run.

Mr. Peter J. Romeo
December 8, 1980

Page Two

Paragraph (d)(1) of Rule 144 states: "The person for whose account the securities are sold shall have been the beneficial owner of the securities for a period of at least two years prior to the sale and, if the securities were purchased, the full purchase price or other consideration shall have been paid or given at least two years prior to the sale."

As noted in the preliminary note to Rule 144, the Rule is designed to permit the public sale of limited amounts of restricted securities where adequate current information concerning the issuer is available to the public. The primary purpose of the Rule is to establish objective conditions under which a person will not be deemed to be engaged in the distribution or underwriting of an issuer's unregistered securities. To this end, Rule 144(d)(1) establishes a two-year holding period to ensure that the seller did not originally purchase the securities with a view to their distribution. The Commission realized that when a debtor bona fide pledged securities as collateral for an obligation, the pledgee was not accepting the securities with a view to its distribution. Consequently, the Commission made it easier for a pledgee to realize on his collateral by adopting 144(d)(4)(d), which provides that when restricted securities are pledged by any person other than the issuer, the pledgee may include within his holding period the period during which such shares were held by the pledgor. We believe that when restricted securities are pledged by the issuer, the pledgee should be given similar deference with regard to the commencement of his holding period under 144(d)(1).

In Release No. 33-6099 Item 23 relating to Rule 144, the Commission addressed the question of when the holding period of restricted securities that are issued pursuant to a written agreement should commence. In its answer, the Release states: "The answer to this question depends on when the person who will receive the securities is deemed to have paid for the securities and thereby assumed the full risk of economic loss with respect to them. If that risk is assumed as of the date of the agreement, then the holding period starts on that date, even though actual delivery of the securities may not occur until later." There is no doubt that Tokyu has assumed the full risk of economic loss when it advances funds under the loan. At that point,

Mr. Peter J. Romeo
December 8, 1980

Page Three

Tokyu has put its position in jeopardy and has paid the full consideration that is due on the stock. We are, therefore, of the opinion that Tokyu's holding period begins not later than the date when it advances funds under the loan agreement which are sufficient in amount to cover the market value of the pledged stock at the date of the loan agreement. Inasmuch as the stock has been bona fide pledged to a creditor in the ordinary course of business, Tokyu is deemed the beneficial owner upon advancing the full consideration of the securities. Should Tokyu wish to publicly sell the securities after the pledgor has defaulted on its loan obligation two years hence, "the full purchase price or other consideration [would] have been paid or given at least two years prior to the sale."

It is submitted that the above interpretation of Rule 144(d)(1) is correct both from a literal reading of the Rule and from the policy considerations of the Rule. Release No. 5223 under the '33 Act states: "Securities sold in reliance upon the rule must have been beneficially owned and fully paid for by the seller for a holding period of at least two years prior to his sale as specified below. This condition is designed to assure that the registration provisions of the Act are not circumvented by persons acting, directly or indirectly, as conduits for an issuer in connection with resales of restricted securities." Certainly, the policy considerations expressed in Release No. 5223 would not in any way be subverted by allowing Tokyu to sell the pledged securities after waiting two years from the date of the loan. At that point, it cannot be said that Tokyu has accepted the pledged securities with a view to their distribution and is acting, directly or indirectly, as a conduit for Hardwicke in connection with the resale of restricted securities. It is believed that to require Tokyu under these facts, to commence its holding period as of the time of default would be both harsh and not in furtherance of Rule 144. As noted above, the rule is designed to permit the public sale of limited amounts of restricted securities. Considering that in our circumstance default can occur seven years after the loan has been advanced, it would serve no useful purpose to require Tokyo to hold the pledged stock for an additional two years after such default before being allowed to publicly sell it.

We are aware of your opinion letter available

Mr. Peter J. Romeo
December 8, 1980

Page Four

October 16, 1972 entitled Reclamation Systems, Inc. in which you were confronted with similar issues. There, the staff took the position that for purposes of determining the commencement of the holding period pursuant to Rule 144(d)(1), the pledgee would be considered to have held the shares from the date when demand for payment was made (i.e. date of default). However, it should be noted that that case involved a short term-bridge financing loan for a restaurant operation. The petitioner was primarily inquiring about the availability of 144(d)(1) as it related to the pledgee bank. The petitioner was not concerned about when the pledgee's holding period commenced as default on the loan had occurred only three (3) months after the loan. In fact, as of the date of the staff's reply (Sept. 14, 1972) the petitioner had already completed its two year holding period, even if computed from the date of default. In our situation, the loan will be repaid over a seven year period. Default can occur at any time during this period. Waiting an additional two years after such default before permitting Tokyu to foreclose on the pledged collateral would serve none of the policy objectives of Rule 144 and would merely jeopardize the value of the security. In contrast, by permitting the foreclosure sale to occur two years after the loan, Tokyu will be able to realize on its collateral at an earlier date and at the same time will be fulfilling all of the policy objectives of Rule 144.

We respectfully request your concurrence in our interpretation of Rule 144(d)(1). If you have any questions or need any additional information please contact the undersigned.

Very truly yours,



Arthur S. Friedman