IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
c/o Department of Justice
Washington, D.C. 20530,
Plaintiff,

v.

JOHN C. MALONE
c/o Liberty Media Corporation
12300 Liberty Boulevard
Englewood, CO 80112,

Defendant.

Case: 1:09-cv-01147
Assigned To : Kennedy, Henry H.
Assign. Date : 6/23/2009
Description: Antitrust

COMPLAINT FOR CIVIL PENALTIES FOR FAILURE TO COMPLY WITH THE PREMERGER REPORTING AND WAITING REQUIREMENTS OF THE HART-SCOTT-RODINO ACT

The United States of America, Plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States and at the request of the Federal Trade Commission, brings this civil antitrust action to obtain monetary relief in the form of civil penalties against Defendant John C. Malone ("Malone"), alleging as follows:

NATURE OF THE ACTION

1. Malone violated the notice and waiting requirements of the Hart-Scott-Rodino Act with respect to acquisitions of voting securities of Discovery Holding Company ("Discovery"). In August of 2005, Malone failed to file the required notification with the Federal Trade Commission and Department of Justice before acquiring Discovery voting securities, and he continued to acquire Discovery voting securities through the beginning of April of 2008. On

June 12, 2008, Malone made a corrective filing for the acquisitions of Discovery voting securities that he had made in violation of the Act. He stated in a letter accompanying the 2008 filing that he had relied on a 2001 Federal Trade Commission Premerger Notification Office ("Premerger Office") informal interpretation in determining not to file previously and was not then aware that a subsequent February 2005 Premerger Office informal interpretation had disavowed that 2001 interpretation. Malone's corrective filing triggered a waiting period that expired July 14, 2008. Before the expiration of that waiting period, on June 14, 2008, Malone made additional acquisitions of Discovery voting securities when he exercised two options. Malone exercised these options using an escrow arrangement, but the escrow arrangement did not prevent beneficial ownership of the voting securities from passing to Malone in violation of the Act.

JURISDICTION AND VENUE

2. This Complaint is filed and these proceedings are instituted under Section 7A of the Clayton Act, 15 U.S.C. § 18a ("HSR Act" or "Act"), added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, to recover civil penalties for violations of that section.

3. This Court has jurisdiction over the Defendant and over the subject matter of this action pursuant to Section 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), and pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.

4. Venue is properly based in this District by virtue of Defendant's consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

THE DEFENDANT

5. Defendant Malone is a natural person with his principal office and place of business care of Liberty Media Corporation, 12300 Liberty Boulevard, Englewood, CO 80112. Malone is Chairman of the Board of Liberty Media Corporation ("Liberty"), and Chief Executive Officer and Chairman of the Board of Discovery. Malone is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1). At all times relevant to this complaint, Malone had total assets in excess of $126.2 million.

OTHER ENTITIES

6. Discovery is a corporation organized under the laws of Delaware with its principal place of business at 12300 Liberty Boulevard, Englewood, CO 80112. Discovery is a leading provider of non-fiction television entertainment. At all times relevant to this complaint, Discovery was engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1). At all times relevant to this complaint, Discovery had total assets in excess of $126.2 million.

7. Liberty is a corporation organized under the laws of Delaware with its principal place of business at 12300 Liberty Boulevard, Englewood, CO 80112. Liberty owns interests in a broad range of electronic retailing, media, communications and entertainment businesses. At all times relevant to this complaint, Liberty was engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section

7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1). At all times relevant to this complaint, Liberty had total assets in excess of $126.2 million.

THE HART-SCOTT-RODINO ACT AND RULES

8. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notifications with the federal antitrust agencies and to observe a waiting period before consummating certain acquisitions of voting securities or assets. 15 U.S.C. § 18a(a) and (b). These notification and waiting period requirements apply to direct or indirect acquisitions that meet the HSR Act's thresholds. In 2005, the HSR Act's reporting and waiting period requirements applied to some transactions that would result in the acquiring person holding more than $53.1 million, and all transactions where the acquiring person would hold more than $212.3 million of the acquired person's voting securities and/or assets, except for certain exempted transactions. In 2008, the HSR Act's reporting and waiting period requirements applied to some transactions that would result in the acquiring person holding more than $63.1 million, and all transactions where the acquiring person would hold more than $252.3 million of the acquired person's voting securities and/or assets, except for certain exempted transactions.

9. The HSR Act's notification and waiting period are intended to give the federal antitrust agencies prior notice of, and information about, proposed transactions. The waiting period is also intended to provide the federal antitrust agencies with an opportunity to investigate a proposed transaction and to determine whether to seek an injunction to prevent the consummation of a transaction that may violate the antitrust laws.

10. Pursuant to Section (d)(2) of the HSR Act, 15 U.S.C. § 18a(d)(2), rules were promulgated to carry out the purposes of the HSR Act. 16 C.F.R. §§ 801-803 ("HSR Rules"). The HSR Rules, among other things, define terms contained in the HSR Act.

11. Pursuant to section 801.13(a)(1) of the HSR Rules, 16 C.F.R. § 801.13(a)(1), all voting securities of an issuer that will be held after an acquisition – – including any held before the acquisition – – are deemed held "as a result of" the acquisition at issue.

12. Section 801.1(c)(1) of the HSR Rules, 16 C.F.R. § 801.1(c)(1), states that "hold" means beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means.

13. Section 802.21(a) of the HSR Rules, 16 C.F.R. § 802.21(a), provides generally that where a person acquired voting securities of an issuer after filing under HSR and observing the waiting period, additional acquisitions of voting securities of the same issuer are exempt from the reporting requirements for a period of five years from the expiration of the waiting period, so long as the further acquisitions do not exceed a notification threshold greater than the greatest notification threshold covered by the earlier filing.

14. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), provides that any person, or any officer, director, or partner thereof, who fails to comply with any provision of the HSR Act is liable to the United States for a civil penalty for each day during which such person is in violation. For violations occurring before February 10, 2009, the maximum amount of civil penalty is $11,000 per day, pursuant to the Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996); 74 Fed. Reg. 857 (Jan. 9, 2009).

15. The Federal Trade Commission ("Commission" or "FTC") has established the Premerger Office to administer the HSR Act. Among other things, the Premerger Office drafts proposed changes to the HSR Rules, drafts proposed formal interpretations of the HSR Rules, and checks all filings made for compliance with the requirements of the HSR Act and Rules.

16. In addition to its other duties, the Premerger Office provides informal advice in response to questions about the applicability of the HSR Act and HSR Rules to particular factual situations. Frequently, the inquiry is made by telephone on a hypothetical basis, where the caller does not mention the identity of the parties involved in the transaction. The Premerger Office also receives such inquiries by email. In some instances, the recipient of the informal advice will send a confirming letter or email to the Premerger Office, outlining the question and the response.

17. The confirming letters and emails received by the Premerger Office, redacted for any personal identifying information, together with any notations made thereon by Premerger Office staff, are available as part of a searchable database on the Commission's website, at http://www.ftc.gov/bc/hsr/informal/index.shtm.

18. The introduction to the database includes a specific disclaimer which states that "the FTC does not warrant or represent that . . . the letters and emails represent the current views of the [Premerger Office] staff." http://www.ftc.gov/bc/hsr/informal/index.shtm.

DEFENDANT'S PRIOR VIOLATION OF THE HSR ACT

19. On May 9, 1991, Malone made a corrective filing under the HSR Act for an acquisition of voting securities of Tele-Communications, Inc. made in 1985, which had been consummated without filing and observing the waiting period in violation of the HSR Act. In a letter accompanying that corrective filing, Malone asserted that the violation was inadvertent.

20. On July 2, 1991, the Premerger Office notified Malone that it would not recommend seeking civil penalties for the acquisition of Tele-Communications, Inc. voting securities.

VIOLATIONS

Acquisitions Made in Violation of the HSR Act Without Filing

21. In May 2005, Malone, who already held voting securities of Liberty, filed under the HSR Act to acquire additional Liberty voting securities. At that time, Discovery was a subsidiary of Liberty, which was Discovery's "Ultimate Parent Entity" within the meaning of the HSR Rules. The waiting period for that filing expired without action by the antitrust agencies.

22. On July 21, 2005, Discovery was spun off from Liberty and became its own Ultimate Parent Entity. In connection with the spin-off, Malone received voting securities of Discovery. No HSR filing was required by Malone prior to receiving the voting securities of Discovery as part of the spin-off because the voting securities were distributed pro-rata to the holders of Liberty voting securities.

23. Discovery is not the same issuer as Liberty, within the meaning of the exemption contained in section 802.21(a) of the HSR Rules, 16 C.F.R. § 802.21(a), described in Paragraph 13 above.

24. On August 9, 2005, Malone acquired 400,000 shares of Discovery Series A voting securities on the open market. As a result of this acquisition, Malone held 1,981,398 Discovery Series A voting securities and 10,719,505 Discovery Series B voting securities, valued under the HSR Rules in excess of the $53.1 million threshold then in effect at approximately $185.8 million and representing approximately 28.06% of the voting securities of Discovery.

25. Although he was required to do so, Malone did not file under the HSR Act prior to making the August 9, 2005, acquisition of Discovery voting securities.

26. After August 9, 2005, Malone acquired more than 1.6 million Discovery Series A voting securities and more than 1.4 million Discovery Series B voting securities in additional acquisitions through the beginning of April 2008. The exemption contained in section 802.21(a) of the HSR Rules, 16 C.F.R. § 802.21(a), did not apply to Malone's acquisitions of Discovery voting securities between August 9, 2005, and April, 2008, because Malone had not previously filed and observed the waiting period to acquire voting securities of Discovery. Pursuant to section 801.13(a)(1) of the HSR Rules, 16 C.F.R. § 801.13(a)(1), each acquisition of Discovery voting securities between August 9, 2005, and April, 2008, resulted in Malone holding a reportable amount of Discovery voting securities.

27. On June 12, 2008, Malone made a corrective filing for the acquisitions of Discovery voting securities he had made in violation of the HSR Act. As required by the Commission's procedures for submitting post-consummation filings, found at http://www.ftc.gov/bc/hsr/postconsumfilings.shtm, Malone also submitted a letter explaining the reason for the violation.

28. Malone's letter accompanying his June 12, 2008, corrective filing stated that in August 2005, when he acquired voting securities of Discovery, he relied on a 2001 informal

interpretation of the Premerger Office that indicated that a filing to acquire voting securities of a parent corporation would also cover acquisitions of voting securities of a subsidiary of that parent corporation. See http://www.ftc.gov/opinions/0102008.htm.

29. Malone stated that neither he nor his counsel was aware that in February 2005, the Premerger Office gave a new informal interpretation that disavowed the 2001 informal interpretation and stated that acquisitions of voting securities of a subsidiary would require a separate filing. See http://www.ftc.gov/opinions/0502006.htm.

30. Malone stated that neither Malone nor his counsel on his behalf checked the database of informal interpretations prior to making the August 9, 2005, acquisition of Discovery voting securities or prior to making any of the acquisitions of Discovery voting securities between August 9, 2005, and April, 2008.

31. Malone stated that neither Malone nor his counsel on his behalf contacted the Premerger Office to ask whether the 2001 interpretation was still the policy of the Premerger Office, or otherwise to ask whether a filing for a parent corporation covered acquisitions of a subsequently-divested subsidiary, prior to making the August 9, 2005, acquisition of Discovery voting securities or prior to making any of the acquisitions of Discovery voting securities between August 9, 2005, and April, 2008.

32. Malone stated that his counsel learned of the March 2005 informal interpretation on or about May 30, 2008, in connection with another matter. Malone made the corrective filing on June 12, 2008, and the waiting period on the filing expired on July 14, 2008.

33. Malone was in continuous violation of the HSR Act during the period beginning on August 9, 2005, when he acquired Discovery voting securities that resulted in him holding

voting securities valued in excess of $53.1 million, and ending on July 14, 2008, when the waiting period expired.

Acquisitions Made in Violation of the HSR Act
During the Waiting Period Triggered by the Corrective Filing

34. On June 14, 2008, prior to the expiration of the waiting period on his June 12, 2008 corrective filing, Malone exercised an option to acquire 6,667 shares of Discovery Series A voting securities, and an option to acquire 60,000 shares of Discovery Series B voting securities.

35. The options were set to expire prior to the end of the waiting period on Malone's corrective filing.

36. The exercise price on each of the options was below the market price on the day Malone exercised the options.

37. Malone exercised the options through an escrow arrangement that he established. Malone designated the escrow agent for the escrow arrangement, and Malone established the terms and conditions of the escrow arrangement. Pursuant to the escrow arrangement established by Malone, Malone paid the full consideration for the voting securities and directed Discovery to deliver the voting securities to the escrow agent. Neither Malone nor the escrow agent could vote the voting securities during the escrow period. Upon expiration of the HSR waiting period, the escrow agent was required to deliver the voting securities to Malone. If the waiting period had not expired within 120 days, the escrow agent was required to sell the voting securities and all proceeds were to go to Malone. Any dividends paid on the voting securities were held for the benefit of Malone.

38. Pursuant to the escrow arrangement, Discovery received full payment for the voting securities on June 14, 2008, and was required to deliver the voting securities to the escrow agent

designated by Malone on that date. Thereafter, Discovery had no right to receive the voting securities back, no risk of loss or benefit of gain in the voting securities, no right to vote the voting securities or direct the voting of the voting securities, and no right to dispose of the voting securities.

39. In promulgating the HSR Rules, the FTC explicitly stated in the Statement of Basis and Purpose for the HSR Rules that an escrow agent does not become the beneficial owner of assets or voting securities held in escrow. 43 Fed. Reg. 33460 (July 31, 1978). The FTC further stated that an acquisition in escrow must be reported if beneficial ownership changes hands as a result of the acquisition.

40. When Malone exercised the options, beneficial ownership of the voting securities passed from Discovery because Discovery no longer had any of the indicia of beneficial ownership.

41. Malone obtained beneficial ownership of the voting securities upon exercise of the options.

42. Malone was required to, but did not, observe the waiting period triggered by his June 12, 2008 corrective filing before exercising the options for Discovery voting securities on June 14, 2008.

43. Malone stated that neither Malone nor his counsel on his behalf contacted the Premerger Office to ask whether it was permissible to exercise the options with an escrow arrangement prior to the expiration of the waiting period before Malone exercised the options on June 14, 2008.

44. Malone violated the HSR Act when he exercised the option to acquire 6,667 shares of Discovery Series A shares on June 14, 2008, and when he exercised the option to acquire

60,000 shares of Discovery Series B shares on June 14, 2008, and he was in continuous violation of the Act through July 14, 2008, the end of the waiting period.

PRAYER

WHEREFORE, Plaintiff prays:

1. That the Court adjudge and decree that Defendant Malone's acquisitions of Discovery voting securities beginning on August 9, 2005, and ending in April, 2008, and Malone's acquisitions of Discovery voting securities on June 14, 2008, were violation of the HSR Act, 15 U.S.C. § 18a; and that Defendant Malone was in violation of the HSR Act each day from August 9, 2005, through July 14, 2008.

2. That the Court order Defendant Malone to pay to the United States an appropriate civil penalty as provided by the HSR Act, 15 U.S.C. § 18a(g)(1), the Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996); 74 Fed. Reg. 857 (Jan. 9, 2009).

3. That the Court order such other and further relief as the Court may deem just and proper.

4. That the Court award the Plaintiff its costs of this suit.

Dated: June 23, 2009

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