UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM F. FARLEY, Defendant.	Civil Action No. 92 C 1071 Judge Brian Barnett Duff

PLAINTIFF'S STATEMENT OF LEGAL THEORY

The United States, the plaintiff in this action for civil penalties under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, codified as Section 7A of the Clayton Act, 15 U.S.C. § 18a (the "Hart-Scott-Rodino Act" or "HSR Act"), against William F. Farley ("Farley"), files this Statement of Legal Theory pursuant to a May 9, 1994 Stipulation of the parties and Order of the Court.

Background

The United States filed its complaint against Farley in February 1992, alleging that Farley failed to notify either the Department of Justice Antitrust Division ("DOJ") or the Federal Trade Commission ("FTC") in March 1988, when his purchases of the stock of West Point-Pepperell, Inc. ("West Point") exceeded $15 million, at which point the reporting requirements of the Hart-Scott-Rodino Act contained in 15 U.S.C. § 18a(a)(3)(B) were triggered.

Those notification requirements are "intended to give the antitrust enforcement agencies an opportunity to identify

transactions that might violate Section 7 of the Clayton Act, 15 U.S.C. § 18a," which prohibits mergers and acquisitions the effect of which may be substantially to lessen competition or to tend to create a monopoly. United States v. Farley, 11 F.3d 1385, 1387 (7th Cir. 1993). The complaint alleges that the HSR Act violation extended for 91 days, and seeks civil penalties of $910,000 in accordance with 15 U.S.C. § 18a(g)(1), which provides for civil penalties of $10,000 per day.

In 1988, Farley was the majority stockholder and chief executive officer of Farley Inc., a holding company then engaged, inter alia, in the textile, apparel, and hosiery businesses. Farley was the "ultimate parent entity" of Farley Inc., as defined in the HSR Act's implementing rules and was the person responsible for the required notifications. 16 C.F.R. § 801.1(a)(3).

The Government's prosecution of this action has been delayed by Defendant's efforts to obtain discovery of matters found by the Seventh Circuit to be "clearly covered by the deliberative process and work product privileges" and "as a matter of law not relevant to the present controversy." United States v. Farley, 11 F.3d at 1391. Discovery now appears to be proceeding in a more orderly manner. Depositions are scheduled and the parties expect that discovery can be completed by October 1994. Both parties believe that, depending upon the outcome of discovery, motions for summary judgment may be appropriate. See Second Joint Status Report at 2 (April 6, 1994).

At an April 11, 1994, Rule 16 Conference, counsel for the Defendant raised a question with regard to the legal theory under which the Plaintiff seeks to hold Defendant liable. This Court suggested that the Defendant could make a motion to ask Plaintiff to explain its legal theory more fully. See Rule 16 Conference (notes submitted by Catherine R. Fuller pursuant to the Court's instruction) (April 12, 1994). Sometime thereafter, the Defendant moved the Court for an order requiring the Plaintiff to submit a statement of its legal theory. See Defendant Farley's Motion for Statement of Plaintiff's Theory ("Defendant's Motion"). In response, the Plaintiff suggested and the Defendant agreed to stipulate that "the United States [would] provide a statement of its legal theory and [would] file that statement with this Court within 30 days." Stipulation As to Filing of Plaintiff's Statement of Legal Theory ("Stipulation") (May 9, 1994).[1]

Plaintiff's Prima Facie Case

The Defendant has admitted each element of the Government's prima facie case: (1) the Defendant was the "ultimate parent entity" responsible for complying with the notification and waiting requirements of the HSR Act; (2) the Defendant and West

[1] Ordinarily, of course, a plaintiff would explain its case in detail only in response to a motion to dismiss by the defendant in which the defendant articulates its theory or in a motion for summary judgment following discovery. Plaintiff has not completed its discovery and agreed to provide this Statement in an effort to facilitate the disposition of this action. Plaintiff reserves the right, following completion of discovery, to further refine its legal theory.

Point met the threshold "size of person" requirements of the HSR Act; and (3) the Defendant exceeded the "size of transaction" limits of the HSR Act without complying with the Act's notification and waiting requirements.

The Defendant admits that he, or entities under his control, controlled Farley Inc. and that he was the ultimate parent entity of Farley Inc., within the meaning of 16 C.F.R. § 801.1. See Defendant's Answer and Affirmative Defenses to Complaint ("Answer") ¶¶ 6-7 (March 12, 1992).

The Defendant also admits the threshold "size of person" requirements of the HSR Act, 15 U.S.C. § 18a(a). At the time relevant to the Complaint, Farley -- who, through Fruit of the Loom, Inc., was in the business of manufacturing and selling hosiery and other textile products -- had annual net sales or total assets of $10 million or more. Answer ¶¶ 4-5, 8-10, 19. During the same time period, the Defendant's acquisition target, West Point-Pepperell, Inc. -- which, like the Defendant, was also in the business of manufacturing and selling hosiery and other textile products -- had annual net sales or total assets of $100 million or more. Answer ¶¶ 11-13, 19.

The Defendant further admits to having exceeded the "size of transaction" threshold of the HSR Act. Farley acquired an aggregate amount of the voting securities of West Point in excess of $15 million, see 15 U.S.C. § 18a(a), without observing the notification and waiting provisions of the Act, 15 U.S.C. § 18a(b). Answer ¶¶ 20-24, 26.

There is and can be no dispute. The Government's prima facie case is uncontested.

The Defendant's Investment-Only Affirmative Defense

The Defendant denies liability on the grounds that the Hart-Scott-Rodino Act exempts certain acquisitions "solely for the purpose of investment" from the filing requirements of the Act. Answer ¶¶ 14-15, 22, 25-27. Defendant specifically asserts as an affirmative defense:

> Farley was not required to file a notification under the Hart-Scott-Rodino Act because the acquisitions of West Point voting securities between March 24 and April 11, 1988 were exempt pursuant to Section 7A(c)(9) of the Hart Scott Rodino Act (15 U.S.C. § 18a(c)(9)) and Regulation 802.9 (16 C.F.R. § 802.9) because the acquisitions were made solely for the purpose of investment and Farley Inc. held less than ten percent of West Point's voting securities as a result of those acquisitions.

Answer at 11-12 (Third Affirmative Defense).

The Defendant now accuses the United States of failing to provide a clear articulation of how the United States intends to rebut this affirmative defense. Defendant argued in his Motion for Statement of Plaintiff's Theory:

> Farley has previously requested that plaintiff identify the specific legal theory upon which plaintiff bases its position that Farley was not entitled to the investment-only exemption in connection with Farley Inc.'s March and April 1988 purchases. Plaintiff has, however, failed to come forth with a clear statement of its legal theory, and in fact, has provided various, inconsistent theories.

Defendant's Motion ¶ 5.

Farley contends that the following statements by the Plaintiff are inconsistent:

(a) "during the time period from March 24, 1988, through April 11, 1988, the Defendant considered that in the future it might seek to acquire control of West Point" [Plaintiff's Answers To First Set Of Interrogatories To Plaintiff, Answer to Interrogatory 3];

(b) "during the time period from March 24, 1988, through April 11, 1988, the Defendant intended either conditionally or unconditionally to acquire control of West Point" [Id.];[2]

(c) "during March and April 1988 (1) Defendant was evaluating and analyzing West Point as a possible acquisition candidate; and (2) Defendant was considering acquiring control of West Point at some future date" [Joint Status Report, Exhibit 1 at 7]; and

(d) at the April 11, 1994 Rule 16 conference, counsel for the Plaintiff stated that, during the relevant time period, the Defendant was considering the possibility of seeking to acquire control of West Point.

See Defendant's Motion ¶ 5.

Contrary to the Defendant's argument, as explained further below, each of the Plaintiff's previous statements are entirely consistent with each other and with the Government's legal theory. The Hart-Scott-Rodino Act exempts from the statute's filing requirements certain "acquisitions, solely for the purpose of investment, of voting securities." 15 U.S.C. § 18a(c)(9) (emphasis added). The exemption applies only to purchasers who intend to hold voting securities as purely passive investors. Thus, an investment does not fall within the "solely for the purpose of investment" exemption if the purchase is made with a

[2] Plaintiff has explained that "one intends 'conditionally' to do an act when the intention of doing it is conditional or contingent on another event or events, and one intends 'unconditionally' to do an act when the intention of doing it is not conditional or contingent on another event or events." Plaintiff's Response to Defendant's Second Set of Interrogatories to Plaintiff, Answer to Interrogatory 1(b).

purpose that includes the possibility of acquiring control. Any intent in addition to or inconsistent with a passive investment purpose takes an acquisition of voting securities outside the exemption. Actively considering the possibility of seeking to acquire control is clearly inconsistent with the statutory exemption.

The Defendant has consistently misstated the Plaintiff's theory. At the April 11, 1994, Rule 16 Conference, counsel for Farley characterized the Plaintiff as contending that the "solely for the purpose of investment" exemption is not applicable unless the Defendant can establish the "impossibility" of his ever seeking to acquire control of West Point. Earlier, Defendant stated that he "understands the FTC's position is that the investment exemption is not available if there is a 'possibility' that sometime in the future the issuer may be acquired" and attacks that position as requiring "an absolute subjective evaluation of the acquiring person's mind." See Joint Status Report, Exhibit 2, "Farley's Position -- An Overview," at 9-10 (May 29, 1992).

In so arguing, the Defendant has attempted to set up a straw man. The Plaintiff does not never contend that the Defendant must prove that it was impossible for him to acquire control of West Point or that the existence of a mere possibility, in some metaphysical sense, of Farley some day acquiring control is sufficient to establish liability. Moreover, while subjective intent may be sufficient to take an acquirer outside the

exemption, the statute does not require the Government to engage in an evaluation of the acquiring person's mind.

Instead, the Plaintiff has stated that objective evidence that Defendant was analyzing or evaluating West Point as an acquisition candidate and was considering the possibility of seeking to acquire control of West Point is inconsistent with his contention that he was acting "solely for the purpose of investment." Only a passive investor can act "solely for the purpose of investment" within the meaning of the HSR Act, 15 U.S.C. § 18a(c)(9), and the HSR Rules, 16 C.F.R. § 802.9.

Farley was not a passive investor in West Point. The evidence in this case will show that the Defendant was actively considering the possibility of seeking to acquire control of West Point when he made the purchases of voting securities alleged to have been in violation of the HSR Act.

In February 1988, Farley Inc. borrowed $500 million through Drexel Burnham Lambert, Incorporated. Of this sum, $200 million was to pay off existing debt and the balance was to be invested in, inter alia, equity securities and possible acquisition candidates. The prospectus for this "blind pool" revealed, "Management anticipates that the Company may invest certain of its funds in equity securities of publicly-held companies believed to be attractive investments and possible acquisition candidates." Farley Inc. Subordinated Debenture Prospectus (Feb. 9, 1988).

On or about March 9, 1988, Farley began purchasing West Point stock, using the proceeds of the blind pool. He exceeded

the HSR threshold on March 24, 1988 and by April 11 held about $50 million worth of West Point stock, exceeding the HSR reporting threshold by approximately $35 million. A few months later, Farley commenced a hostile tender offer for all of West Point's outstanding shares and acquired a controlling interest in West Point.[3]

The evidence will demonstrate, inter alia, that on March 2-3, 1988, Farley met with Bankers Trust, a New York investment bank, and discussed the possibility of taking over West Point. In fact, on March 2, 1988, Bankers Trust undertook a conflict-of-interests analysis for a possible hostile acquisition by Farley of West Point. Following the meeting with Bankers Trust, Farley decided to review the possibility of acquiring West Point, either singly or in combination with J.P. Stevens.[4]

The evidence will further reveal that Farley Inc. employees undertook analyses of an acquisition of West Point that were inconsistent with a passive investment purpose in March and April

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[3] Farley did eventually make an HSR filing in May 1988. Delying the HSR filing would have allowed Farley to purchase additional stock of a hostile target without notifying the target which might have allowed the target to engage in defensive measures, and without the market becoming aware of his interest, thereby reducing stock acquisition costs. This purpose is suggested by the fact that prior to Farley's acquisitions exceeding the HSR thresholds, Farley's counsel analyzed "the propriety of filing multiple premerger notifications simultaneously, which might have less of an impact on the market than a single filing." Memorandum from Joel G. Chefitz and Danal F. Abrams to Herbert S. Wander and Howard S. Lanznar "Re: Hart-Scott-Rodino/Farley Inc.," (March 15, 1988) at K008492.

[4] West Point was seeking to acquire J.P. Stevens at the time, and did acquire Stevens prior to Farley's tender offer for West Point.

1988, when the HSR thresholds were first exceeded. A March 21, 1988, memorandum to William Farley, for instance, analyzes the effects of an acquisition of control of West Point on Farley's companies. Most of the memorandum is a detailed analysis of West Point's and J.P. Stevens' product lines. It is clear that the analysis was not done solely for the purpose of investment. The memorandum states:

> Both companies [J.P. Stevens and West Point] obviously consume a large amount of cotton. Any acquisition would place heavy dependency of Farley companies on the cotton market.

Memorandum to Bill Farley from Andy Nussbaum Re: Review of STN and WPM Competitive Positions (March 21, 1988) ("Nussbaum Memorandum"). Thus the memorandum contemplated, analyzed, and evaluated control by Farley of West Point. In fact, the Nussbaum Memorandum was submitted to the DOJ and FTC when Farley did eventually file under the HSR Act, indicating that the memorandum was prepared for officers and/or directors of Farley "for the purpose of evaluating or analyzing the acquisition" of West Point reported in the filing. See William F. Farley, HSR Notification and Report Form, Item 4(c)-1 (May 23, 1988).[5]

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[5] Item 4(c) of the HSR Notification and Report form requires the filer to submit "all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case or unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, the name and title of each individual who prepared each such document." Antitrust Improvements Act Notification and Report (continued...)

By April 26, 1988, Bankers Trust had conducted a thorough analysis and completed a 32-page memorandum re "Farley's potential acquisition of Army [West Point], subsequent to its acquisition of Navy [J.P. Stevens]," "[t]he purpose of [which was] to brief the reader on the background of the companies and industries involved in the potential transaction." The memorandum is clear: "A client of BTCo.-Midwest, Farley Inc. is interested in purchasing Army, after Army has finished its purchase of Navy."

Farley Inc.'s own Board of Directors minutes substantiate the fact that Farley was actively considering an acquisition of West Point in early 1988. The company's minutes state:

> Mr. Wander reviewed the following history with which the directors were familiar and with which the directors concurred:
>
> In early 1988, the Company began monitoring West Point-Pepperell, Inc. a Georgia corporation ("West Point"), as a possible candidate for acquisition based on preliminary data and analysis. On March 25, 1988, West Point mad[e] a tender offer for J.P. Stevens & Co., Inc., a Delaware corporation ("J.P. Stevens"). The Company believed that the outcome of this bid would determine in large part whether it would have any further interest in West Point. Consequently, the Company pursued further study and analysis of West Point and monitored West Point's bid for J.P. Stevens.

Farley Inc., Minutes of Board of Directors Meeting (Oct. 22, 1988) (emphasis added). The Minutes confirm that the Defendant was actively evaluating West Point as an acquisition candidate

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[5](...continued)
Form for Certain Mergers and Acquisitions, Item 4(c), 16 C.F.R. Part 803, Appendix.

and was not a mere passive investor during the time relevant to the Complaint.

Publicly-Articulated Policy Concerning the "Solely for the Purpose of Investment" Exemption

The Seventh Circuit has provided some guidance for this Court as it faces the task of ruling on Farley's defense. In addition to the statute and regulations, the Court may look to official agency interpretations in determining the meaning of statutory provisions such as the "solely for the purpose of investment" exemption to the notification and waiting requirements of the HSR Act. The Seventh Circuit explained that the defense:

> requires only that the district court interpret the statutory exemption and determine whether Farley's purchases were within the scope of that exemption. The suppositions of FTC staff members expressed in internal memoranda as to requirements of the Act are not pertinent to this task. In its attempt to decipher the meaning of a statute a court may rely on various tools, including official agency interpretations. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 864-866. Courts may not, however, rely on unpublished opinions of agency staff. International Paper Co. v. Federal Power Comm'n, 438 F.2d 1349, 1358-1359 (2d Cir. 1971), certiorari denied, 404 U.S. 827 ('[V]iews of individual members of the [agency's] staff are not legally germane.').

United States v. Farley, 11 F.3d at 1390-1391.

This statutory interpretation task here is not a difficult one. In construing a statute, one first looks to the words of the statute. Absent evidence of a clearly expressed legislative intention to the contrary, the language of the statute must ordinarily be regarded as conclusive. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

In this case, the language of the statute is clear, precise and easily understood. The Hart-Scott-Rodino Act provides an exception to the requirement that notification be provided for acquisitions exceeding the statutory thresholds, for certain acquisitions of voting securities only if those acquisitions are "solely for the purpose of investment." 15 U.S.C. § 18a(c)(9) (emphasis added).[6] The word "solely" is defined and commonly understood to mean "to the exclusion of alternate or competing things (as purposes, duties)," Webster's Third New International Dictionary of the English Language Unabridged 2168 (1966), and "only, exclusively, merely, or altogether," Webster's New World Dictionary 1355 (Second College Edition 1984).[7] Thus, contemplating the acquisition of control, or any activity at all inconsistent with a purely passive investment purpose, takes an acquisition of voting securities outside the statutory exemption. The Act does not permit the exemption to be invoked if the purchaser's principal or predominant intent is investment. On the contrary, the Act requires that an exempt purchase be made solely for the purpose of investment.

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[6] The Act exempts such acquisitions only "if as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer." 15 U.S.C. § 18a(c)(9).

[7] Nothing in the statutory language or the legislative history indicates that these terms were to mean anything other than their ordinarily accepted usage. See Board of Governors of the Federal Reserve System v. Dimensional Financial Corp., 474 U.S. 361, 373-374 (1986).

The language of the applicable regulations tracks the statute. 15 C.F.R. § 802.9 provides:

> An acquisition of voting securities shall be exempt from the requirements of the act pursuant to section 7A(c)(9) if made solely for the purpose of investment and if, as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer, regardless of the dollar value of the voting securities so acquired or held.

The rules note that "voting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. § 801.1(i)(1) (emphasis added). The rule, like the Act, is unqualified. It states that the exemption is available only if the purchaser has no intention.

At the time that the HSR Rules were promulgated, the FTC issued a Statement of Basis and Purpose which explained that "the rule merely interprets the exemption conferred by section 7A(c)(9)." 43 Fed. Reg. 33,450, 33,490 (July 31, 1978). Whether or not the requisite intention exists will depend largely on the facts surrounding an acquisition and must be determined on a case-by-case basis. See 42 Fed. Reg. at 33,465; 6 Trade Reg. Rep. (CCH) ¶ 42,475 at 42,603.

The Statement of Basis and Purpose, discussed certain types of evidence that could be used to establish that an acquisition was not solely for the purpose of investment. While noting that merely voting acquired stock would not be considered inconsistent

with an investment purpose, the statement identified various types of conduct that could be so viewed. These include but are expressly not limited to:

> (1) nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer, or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer.

43 Fed. Reg. at 33,465 (emphasis added). As noted earlier, Farley was a competitor of West Point. West Point and Farley, through Fruit of the Loom, were both in the textile and apparel industries and competed in the purchase of cotton. In fact, both manufactured and sold hosiery and specifically competed in men's and boy's hosiery sold through both department stores and mass merchants. Answer ¶¶ 7, 10, 12.[8]

The Government has consistently articulated the position that the "solely for the purpose of investment" exemption applies only to passive investors. For example, the FTC Bureau of Compe-

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[8] Farley has made much of the fact that the antitrust enforcement agencies never issued requests for additional information to investigate Farley's acquisition of West Point to determine if it violated Section 7 of the Clayton Act. See, e.g., Joint Status Report, Exhibit 2 at 8 (May 29, 1992); Memorandum of Law in Opposition to Motion to Strike Defendant's Affirmative Defenses at 4 (April 16, 1992). But the antitrust enforcement agencies issue such requests in on a handful of the thousands of transactions reported under the HSR Act each year. The HSR Act provides notice of transactions that might violate Section 7 of the Clayton Act, rather than transactions that do violate Section 7. United States v. Farley, 11 F.3d at 1387. It is not a defense to an HSR reporting violation that the antitrust enforcement agencies did not challenge the merger.

tition explained in a letter subsequently provided by the Commission in a public report to Congress:

> The Bureau construes the term "solely for the purpose of investment," as used in the Act and in the premerger rules, to apply only to purchasers who intend to hold the voting securities as passive investors. If an acquiring person purchases voting securities with the intention of influencing the basic business decisions of the issuer, or with the intention of participating in the management of the issuer, the exemption is not available.

Letter to Michael N. Sohn (Aug. 19, 1982) at 1, reprinted in FTC, Sixth Annual Report to Congress on the HSR Act, Exhibit D (July 26, 1983) (emphasis added).[9]

In another public letter, the Government has made it clear that considering the possibility of acquiring control is inconsistent with a passive investment purpose:

> The Bureau construes the term "solely for the purpose of investment," as that term is used in the Act and in the premerger rules, to apply only to purchases of voting securities made with the intention to hold the stock as a passive investment. The Bureau's investigation of Coastal's purchases of HNG [Houston Natural Gas] stock indicates that at the time of Coastal's January 19th purchases, Coastal's intent included that possibility of acquiring control of HNG.

Letter Agreement between the FTC and Coastal Corp. (Feb. 10, 1984) ("Coastal Letter"), reprinted in United States v. Coastal Corp., Proposed Final Judgment and Competitive Impact Statement, 49 Fed. Reg. 36,454, 36,457 (Sept. 17, 1984) (emphasis added).[10]

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[9] Congress is thus aware of the Government's interpretation and has not sought to change that interpretation through legislation.

[10] The Coastal letter agreement was attached to the DOJ complaint in United States v. Coastal Corp., Civ. Action No. 84-2675 (D.D.C.) as Attachment 2, was filed along with the

(continued...)

Just as Coastal Corporation had been considering the possibility of acquiring control of HNG, the Defendant was actively considering the possibility of acquiring control of West Point at the time relevant to the Complaint.

Farley has argued that his claim to passive investor status is somehow supported by the HSR Rules, which recognize that one's purpose can change from a purely passive purpose to one that is not purely passive. The rules provide that if a passive investor holding more than $15 million of the voting securities of an issuer decides to participate in the management of that issuer, then that investor -- no longer passive -- would not qualify for the "solely for the purpose of investment" exemption in purchasing additional voting securities. See HSR Rules, §§ 801.1(i)(1) (Example) and 802.9 (Example 3), 16 C.F.R. §§ 801.1(i)(1), 802.9. Farley takes the position that this rule

> unequivocally establishes that a person can acquire stock "solely for the purpose of investment" and thereby be exempt from the premerger notification requirements even if the acquiring person subsequently decides to "participate in the management" of the issuer.

Defendant's Motion ¶ 4. However, the case of a passive investor with a change of purpose does not apply to the Defendant, because the Defendant was considering the possibility of acquiring

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[10](...continued)
Competitive Impact Statement accompanying the Proposed Final Judgment, and was published in the Federal Register.

control of West Point when he purchased West Point securities in excess of $15 million during March and April 1988.[11]

Nor can Farley argue that he was unaware of the Government's interpretations when he exceeded the HSR thresholds in March 1988. Farley had ample warning of how the investment-only exemption would be interpreted. The public letters quoted above, as well as the HSR Act and Rules, were relied on by Katten Muchin & Zavis attorneys in analyzing the Defendant's reporting obligations under the HSR Act and the HSR Rules immediately prior to Farley's purchases of West Point stock in violation of the HSR Act. In a March 15, 1988 memorandum "Re: Hart-Scott-Rodino/Farley Inc.," Farley's attorneys wrote:

> This memo responds to certain issues regarding the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Act) and the rules promulgated thereunder (Rules) to Farley Inc.'s anticipated purchases of the voting securities of certain companies it regards as future acquisition candidates.

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[11] A passive investor who may change his mind is not the same as an acquisition-minded investor, such as Farley, who has not yet made the final decision to commence a hostile tender offer. Courts have interpreted the Williams Act, 15 U.S.C. § 78m(d), in analogous situations. The Williams Act requires a purchaser in excess of five percent of an issuer's outstanding stock to declare whether its purchases are for the purpose of investment or acquisition. In such cases, courts have rejcted the position that intent to acquire the issuer is the same as a final desicion: "The Court may accept that the final decision was not made until [the day before the tender offer] but final decision and intent in this connection are surely distinguishable. The totality of the evidence before the Court substantiates the plaintiff's contention that the defendant long contemplated control. . . ." Riggs National Bank v. Allbritton, 516 F.Supp 164, 175 (D.D.C. 1981).

Memorandum from Joel G. Chefitz and Danal F. Abrams to Herbert S. Wander and Howard S. Lanznar "Re: Hart-Scott-Rodino/Farley Inc.," (March 15, 1988) at 1. The memorandum reaches the conclusion:

> The Federal Trade Commission (FTC) generally interprets the investment purpose exemption more narrowly than simply avoiding the above factors [set forth in the Statement of Basis and Purpose, 43 Fed. Reg. 33,450, 33,465 (1978)]. The FTC has, for example, stated the following:
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> > The Bureau construes the term "solely for the purpose of investment," as used in the Act and in the premerger rules, to apply only to purchasers who intend to hold the voting securities as passive investors. If an acquiring person purchases voting securities with the intention of influencing the basic business decisions of the issuer or with the intention of participating in the management of the issuer, the exemption is not available.

Id. at 2 (emphasis in original). The Katten Muchin analysis also discussed the Coastal matter, noting,

> the FTC prevailed in its enforcement action, claiming that the purchase of the 75,000 shares by Coastal did not fall within the 'solely for the purpose of investment' exemption because, in part, the purchase 'was made with an intent that included the possibility of acquiring control of [Houston].'

Id. at 3 (emphasis added).

The leading treatise on the HSR Act, relying on the publicly articulated policy available at the time, similarly noted "[t]he FTC's narrow construction of the term 'solely for the purpose of investment,' and particularly the word 'solely.'" According to the treatise,

> Under the FTC's current interpretation, it is possible that even if 99% of the evidence indicates that the acquisition was made as an investment, but 1% suggests that control was contemplated, the exemption would not apply. If the FTC were to interpret the word "solely" more broadly, then such evidence could be evaluated on a sliding scale: That is, the Commission could balance the evidence to determine the

> primary purpose, rather than the sole purpose, of the acquisition.

Axinn, Fogg, and Stoll, Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act (Rev. ed., 1988) at 6-62, n. 6.

The enforcement agencies' interpretation was clearly articulated and reasonable. Even if the statutory language were less than clear, the enforcement agencies' interpretations described above would be entitled to deference under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 864-866 (1984). See United States v. Farley, 11 F.3d at 1390-1391 (citing Chevron); Condo v. Sysco Corp., 1 F.3d 599, 603-604 (7th Cir. 1993) (cert. denied, ___ U.S. ___, 114 S.Ct. 1051 (1994)).

Conclusion

The "solely for the purpose of investment" exemption to the HSR notification and waiting requirements applies only to passive investors. If a person is considering the possibility of seeking to acquire control of an issuer of voting securities, then that person cannot be acting "solely for the purpose of investment" with regard to purchases of the voting securities of that issuer.

The evidence in this case will show that the Defendant was considering the possibility of seeking to acquire control of West Point at the time of the purchases that the Defendant claims were made "solely for the purpose of investment." Such evidence is

sufficient to rebut the Defendant's "solely for the purpose of investment" affirmative defense.

Respectfully submitted,

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