

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN L. ROBERTS,

Defendant.

Civil Action No. 11 – cv - 02240

PLAINTIFF’S SUPPLEMENTAL MEMORANDUM

Pursuant to the Court’s December 20, 2011, Minute Order, Plaintiff, the United States of America, files this Supplemental Memorandum addressing why the entry of the Final Judgment is in the public interest.

The Hart-Scott-Rodino Act, 15 U.S.C. §18a, requires persons acquiring voting securities or assets valued in excess of statutorily set thresholds to file a notification with the Department of Justice and the Federal Trade Commission (“the antitrust enforcement agencies”). This notification requirement serves as an important antitrust enforcement tool by enabling the antitrust enforcement agencies to investigate before the parties consummate their transaction whether these larger acquisitions are likely to lessen competition and harm consumers. Because failure to notify the antitrust enforcement agencies takes away this important enforcement tool and may cause consumer harm that could have been prevented, the Hart-Scott-Rodino Act permits the United States to seek civil penalties for violation of the Act’s notification and

waiting requirements, pursuant to 15 U.S.C. 18a(g)(1).¹

The antitrust enforcement agencies have settled all prior Hart-Scott-Rodino civil penalty cases via consent decree. Although these settlements are always a matter to be negotiated, the antitrust enforcement agencies have sought — and we believe obtained in past cases and in the present case — penalties sufficient to address the seriousness of the particular violation and to deter the defendant and others from future violations. Violations of the Hart-Scott-Rodino Act can range from situations such as those in which the parties combine their businesses after having intentionally failed to file because they want to avoid premerger antitrust review, to situations involving an inadvertent failure to file. As such, the penalties sufficient to accomplish the Hart-Scott-Rodino Act’s public interest objectives vary, depending upon the particular facts of each matter.

We note that the investigation into the Defendant’s failure to file did not reveal any evidence of harm to competition and consumers, nor an intention to violate the Act. This case does not involve a merger of two entities that combined businesses after failing to notify the antitrust enforcement agencies. In addition, the Defendant self-reported the violation (see Complaint, Par. 37) and does not appear to have reaped any benefit from it. These factors demonstrate that the agreed upon \$500,000 civil penalty is appropriate for the Defendant here.

¹ In certain circumstances, the antitrust enforcement agencies have not sought civil penalties for violations. “When the parties inadvertently fail to file, the enforcement agencies generally do not seek penalties if the parties promptly make corrective filings after discovering the failure to file, submit an acceptable explanation of the their failure to file, and have not previously violated the Act.” Hart-Scott-Rodino Act Annual Report, Fiscal Year 2010 n. 12, available at <http://www.ftc.gov/os/2011/02/1101hsrreport.pdf>.

Although the antitrust enforcement agencies have obtained penalties in excess of \$5.6 million and up to 100% of the statutory maximum, the \$500,000 civil penalty agreed upon in this case (representing approximately 6% of the statutory maximum penalty) is consistent with or exceeds the civil penalty dollar amounts (and percentages of the maximum penalty) that the antitrust enforcement agencies obtained in cases such as *United States v. Scott R. Sacane*, 2005 WL 2649296, 2005-2 Trade Cas. (CCH) ¶ 74,946 (D.D.C. 2005) (\$350,000 civil penalty, 2% of the maximum); *United States v. Figgie Int'l, Inc.*, 1997 U.S. Dist. LEXIS 4653, 1997-1 CCH Trade Cas. (CCH) ¶ 71,766 (D.D.C. 1997) (\$75,000 civil penalty, 2% of the maximum); *United States v. Anova Holding AG*, 1993 U.S. Dist. LEXIS 19896, 1993-2 Trade Cas. (CCH) ¶ 70,383 (D.D.C. 1993) (\$414,650 civil penalty, 2% of the maximum); and *United States v. Roscoe Moss Corp.*, 1988 WL 101294, 1988-1 Trade Cas. (CCH) ¶ 68,040 (D.D.C. 1988) (\$500,000 civil penalty, 10% of the maximum).

This civil penalty serves as an appropriate punishment, given the facts and circumstances of this violation, and serves as a deterrent to others who might otherwise fail to comply with, or contemplate avoidance of, the notification requirements of the Hart-Scott-Rodino Act and, for these reasons, entry of the Final Judgment in this case is in the public interest.

Dated: December 23, 2011

Respectfully Submitted,

/s/

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