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U.S. DISTRICT COURT

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.

SCOTT R. SACANE
20 Marshall Street
Suite320
South Norwalk, CT 06854,
Defendant.

CASE NUMBER 1:05CV01897
JUDGE: Paul L. Friedman
DECK TYPE: Antitrust
DATE STAMP: 09/26/2005

COMPLAINT

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 Scott R. Sacane ("Sacane"), alleging as follows:

I. NATURE OF THE ACTION

1. Sacane violated the notice and waiting requirements of the Hart-Scott-Rodino Act by failing to file notification with the Federal Trade Commission and the Department of Justice before making certain acquisitions of voting securities through an investment fund that he controlled. Sacane exceeded the Act's $50 million threshold with respect to his holdings of Aksys, Ltd. ("Aksys") and ultimately held more than 50% of its voting securities without

complying with the Act. Sacane also exceeded the Act's $50 million threshold with respect to his holdings of Esperion Therapeutics, Inc. ("Esperion") and ultimately held more than $100 million of its voting securities without complying with the Act.

II. 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 by the Defendant of the Act.

3. This Court has jurisdiction over the Defendant and over the subject matter of this action pursuant to 15 U.S.C. § 18a(g) and 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.

III. THE DEFENDANT AND RELATED ENTITIES

5. Scott R. Sacane, a natural person, is made the Defendant herein. Sacane is the Managing Director of Durus Capital Management (N.A.), LLC ("Management"), which is the managing member of Durus Life Sciences Fund, LLC ("Durus"). At all times relevant to this complaint, Sacane was entitled to more than 50% of the profits of Management. At all times relevant to this complaint, Sacane controlled Management and Durus Life Science Master Fund Ltd. ("Master Fund") within the meaning of § 801.1(b) of the Premerger Notification Rules, 16 C.F.R. § 801.1(b), and was an "ultimate parent entity" of Management and Master Fund as that term is defined in 16 C.F.R. § 801.1(a)(3). At all times relevant to this complaint, Sacane 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, Sacane had total assets in excess of $100 million.

6. Management, formerly known as Highline Management (N.A.), LLC, is a limited liability company organized under the laws of Delaware. At all times relevant to this complaint, Management had the contractual power to designate a majority of the board of directors of Master Fund and controlled Master Fund within the meaning of 16 C.F.R. § 801.1(b).

7. Durus is a limited liability company organized under the laws of Delaware. Durus is an investment company that conducts all of its investment and trading activities through, and invests substantially all of its assets in, Master Fund. At all times relevant to this complaint, Durus held over 50% of the voting securities of Master Fund. At all times relevant to this complaint, Durus controlled Master Fund within the meaning of 16 C.F.R. § 801.1(b) of the Premerger Notification Rules, and was an ultimate parent entity of Master Fund.

8. Master Fund, previously known as Highline Life Sciences Master Fund Ltd., is an investment fund organized under the laws of the Cayman Islands for the purpose of investing in securities, with its principal place of business in the Cayman Islands. At all times relevant to this complaint, Master Fund had two ultimate parent entities, Durus and Sacane.

IV. OTHER ENTITIES

9. Aksys is a corporation organized under the laws of Delaware with its principal place of business in Lincolnshire, IL. At all times relevant to this complaint, Aksys 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, Aksys had total assets in excess of $10 million.

10. Esperion, at all times relevant to this complaint, was a corporation organized under the laws of Delaware, with its principal office and place of business in Ann Arbor, MI. At all times relevant to this complaint, Esperion 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, Esperion had total assets in excess of $10 million.

V. THE HART-SCOTT-RODINO ACT AND RULES

11. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notifications with the Federal Trade Commission and the Department of Justice ("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). The notification and waiting period are intended to give the federal antitrust agencies prior notice of, and information about, certain proposed transactions. The waiting period is also intended to provide the federal antitrust agencies with an opportunity to investigate proposed transactions and to determine whether to seek an injunction to prevent the consummation of transactions that may violate the antitrust laws.

12. Pursuant to Section (d)(2) of the HSR Act, 15 U.S.C. § 18a(d)(2), the federal antitrust agencies promulgated Rules to carry out the purposes of the HSR Act. These Rules, among other things, define terms contained in the HSR Act.

13. Section 801.1(a)(1) of the Rules, 16 C.F.R. § 801.1(a)(1), defines "person" to mean "an ultimate parent entity and all entities which it controls directly or indirectly."

14. Section 801.1(a)(3) of the Rules, 16 C.F.R. § 801.1(a)(3), defines "ultimate parent entity" to mean "any entity which is not controlled by any other entity."

15. Section 801.1(b) of the Rules, 16 C.F.R. §801.1(b) defines "control."

16. An acquiring entity may have more than one ultimate parent entity. Each such ultimate parent entity is an acquiring person and must file notifications with the federal antitrust agencies if the acquisition is reportable under the Act.

17. An acquiring person making an acquisition of voting securities must indicate in its Notification and Report Form a notification threshold for which such notification is being filed. Those notification thresholds are set forth in Section 801.1(h) of the Rules, 16 C.F.R. § 801.1(h). An acquiring person who identified the lowest threshold, $50 million of voting securities, and crossed that threshold after the waiting period expired, would have to comply with the Act's notice and waiting period requirements again before crossing a higher threshold, such as the threshold of $100 million of voting securities or the threshold of 50% of voting securities. An acquiring person who believes that it may within one year of the expiration of its waiting period cross a notification threshold higher than the $50 million threshold can avoid the need to observe the Act's requirements a second time by indicating in its Form the highest threshold that it believes it may cross. (The dollar thresholds stated in this paragraph were the thresholds in effect at all times relevant to this Complaint.)

18. 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. 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).

VI. ACQUISITIONS OF AKSYS AND ESPERION VOTING SECURITIES AND VIOLATIONS OF THE HART-SCOTT-RODINO ACT

The Aksys Acquisitions

19. Master Fund acquired 15,000 shares of Aksys on February 24, 2003. As a result of this acquisition, Master Fund held an aggregate total amount of Aksys voting securities of approximately $51.4 million, exceeding the Hart-Scott-Rodino Act's then $50 million threshold, but representing less than 50% of the outstanding voting securities of Aksys.

20. Master Fund continued acquiring additional shares of Aksys, and, on April 24, 2003, it acquired an additional 56,200 shares in Aksys. This acquisition brought the value of the Master Fund's holdings of Aksys to over $85 million, representing approximately 50.1% of the outstanding voting securities of Aksys, exceeding the Rules' 50% notification threshold.

21. As an ultimate parent entity of Master Fund, Sacane was required by the HSR Act to submit a notification and observe the Act's waiting period before Master Fund made the acquisitions described in paragraphs 19 and 20.

22. Sacane failed to file a premerger notification and report form with the federal antitrust agencies and failed to observe the statutory waiting period before the acquisitions of Aksys voting securities described in paragraphs 19 and 20.

23. On or about July 23, 2003, Sacane's outside counsel raised questions with Sacane concerning the HSR reportability of the Aksys acquisitions. On August 29, 2003, Sacane submitted two premerger notifications under the HSR Act for Durus, which was also an ultimate parent entity of Master Fund, notifying the federal antitrust agencies that Durus had crossed the $50 million and 50% notification thresholds in connection with Master Fund's acquisitions of Aksys shares.

24. After being informed by the FTC's Premerger Notification Office in January 2005 that Sacane was also an ultimate parent entity of Master Fund, Sacane filed two premerger notifications for himself as an acquiring person in connection with the same acquisitions on April 1, 2005.

25. Sacane was in continuous violation of the HSR Act with regard to the acquisitions of Aksys voting securities during the period beginning on February 24, 2003 through May 2, 2005.

The Esperion Acquisitions

26. Master Fund acquired 56,700 shares of Esperion on March 24, 2003. As a result of this acquisition, Master Fund held an aggregate total amount of Esperion voting securities of approximately $50.4 million, exceeding the Hart-Scott-Rodino Act's then $50 million reporting threshold.

27. Master Fund continued acquiring additional shares of Esperion, and, on June 3, 2003, it acquired an additional 49,700 shares of Esperion. This acquisition brought the value of the Master Fund's holdings of Esperion to approximately $102.3 million, exceeding the Rules' then $100 million notification threshold, but representing less than 50% of the outstanding voting securities of Esperion.

28. As an ultimate parent entity of Master Fund, Sacane was required by the HSR Act to submit a notification and observe the Act's waiting period before Master Fund made the acquisitions described in paragraphs 26 and 27.

29. Sacane failed to file a premerger notification and report form with the federal antitrust agencies and failed to observe the statutory waiting period before the acquisitions of Esperion voting securities described in paragraphs 26 and 27.

30. On or about July 23, 2003, Sacane's outside counsel raised questions with Sacane concerning the HSR reportability of the Esperion acquisitions. On August 29, 2003, Sacane submitted two premerger notifications under the HSR Act for Durus, which was also an ultimate parent entity of Master Fund, notifying the federal antitrust agencies that Durus had crossed the $50 million and $100 million notification thresholds in connection with Master Fund's acquisitions of Esperion shares.

31. After being informed by the FTC's Premerger Notification Office in January 2005 that Sacane was also an ultimate parent entity of Master Fund, Sacane submitted two premerger notifications for himself as an acquiring person in connection with the same acquisitions on April 1, 2005.

32. Sacane was in continuous violation of the HSR Act with regard to the acquisitions of Esperion voting securities during the period beginning on March 24, 2003 through May 2, 2005.

VII. PRAYER

WHEREFORE, Plaintiff prays:

1. That the Court adjudge and decree that the acquisitions made by Master Fund of voting securities of Aksys beginning on February 24, 2003, as a result of which Master Fund held voting

securities of Aksys valued in excess of $50 million, and ending on April 24, 2003, as a result of which Master Fund held greater than 50% of the voting securities of Aksys, were in violation of the HSR Act, 15 U.S.C. § 18a; and that Defendant Sacane, as ultimate parent entity of Master Fund, was in violation of the HSR Act each day from February 24, 2003, through May 2, 2005.

2. That the Court adjudge and decree that the acquisitions made by Master Fund of voting securities of Esperion beginning on March 24, 2003, as a result of which Master Fund held voting securities of Esperion valued in excess of $50 million, and ending on June 3, 2003, as a result of which Master Fund held voting securities of Esperion valued in excess of $100 million, were in violation of the HSR Act, 15 U.S.C. § 18a; and that Defendant Sacane, as ultimate parent entity of Master Fund, was in violation of the HSR Act each day from March 24, 2003, through May 2, 2005.

3. That the Court order Defendant Sacane to pay to the United States appropriate civil penalties 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).

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

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

Dated: 9/26, 2005.

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