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Verne, B. Michael

From: [redacted]
Sent: Friday, May 30, 2008 10:35 AM
To: Verne, B. Michael
Subject: IP matter

Dear Mike,

I am writing to inquire about a transaction involving a sale of rights to intellectual property under certain agreements. I'd appreciate it if you would let me know your thoughts so I may determine reportability under HSR.

The transaction consists of 2 major steps:

(A) Sale of agreements related to intellectual property

In an asset sale, Company A (an Irish company) will sell to Company B (a Jersey, Channel Islands company) all of Company A's rights under 10 agreements related to certain intellectual property, and Company B will become party to these agreements as successor to Company A. The agreements cover rights to/under IP, royalties and co-publishing agreements. In most cases, the IP covers worldwide territory.

(B) License to and administration of IP rights by seller

In the second step of the transaction, Company B will issue a 10-year license back to Company A that permits Company A to exploit the IP held by Company B under the transferred agreements in certain ways -- by using it itself, or licensing it to third parties. In essence, though Company B will be the owner of the rights under the 10 agreements, Company A will continue to administer the agreements, including collecting royalties due and remitting them to Company B in return for a share of the royalties generated by such administration of the assets.

Company A will have the "exclusive" right to exploit Company B's rights under the 10 agreements - in other words, no other entity will be permitted to license Company B's rights or use Company B's rights without Company A's permission. However, in most cases the IP rights that will be held by Company B are fractional rights, meaning that another entity or entities holds or hold fractional shares in the same IP as held by Company B. This means that if a third party wishes to use some of this IP exclusively, that third party must get permission from both Company B (through its licensee Company A) and from the other fractional owner(s). Where it holds such fractional rights, Company B generally cannot permit use of the IP unilaterally, and cannot issue exclusive licenses.

Please let me know your thoughts on the issues below:

(1) Provided that the value of the rights under the 10 agreements is $63.1 million or more, as determined by the greater of acquisition price or fair market value, an HSR filing will be required. We may exclude non-US assets that, in the aggregate, did not generate sales in or into the US in the most recent fiscal year of $63.1 million or more.

(2) IP rights that are registered outside the US and cover ex-US territory are considered non-US assets for HSR purposes. IP rights registered in the US and covering US territory are considered US assets for HSR purposes. To the extent that the IP rights are worldwide, we should attempt to determine how much of an asset's value derives from its use in the US versus the amount it derives from use outside the US to determine the value of the US assets. For example, if a particular bit of IP derives 50% of its earnings from use in the US, it would be fair to value the IP as a US asset at 50% of the total value of the IP. If the non-US assets did not generate, in the aggregate, $63.1 million or more in US sales in the most recent fiscal year, these non-US assets will not be reportable under HSR.

(3) With respect to part B above, please let me know whether the 10-year license from Company B to Company A will be considered an asset for HSR purposes, if there are other fractional owners of most of the same IP, and all must agree in order for the IP to be used exclusively.

(4) If the 10-year license for use of and right to sub-license the fractional ownership in the IP granted by Company B to Company A will be considered an asset for HSR purposes, we must determine the value of the asset according to the greater of acquisition price if determined, or fair market value. If this value is less than $63.1 million, no filing will be required for the acquisition of this license by Company A.

(5) The grant of licenses by Company A on Company B's behalf to third parties could give rise to additional HSR filings if any such licenses are "exclusive" for a geographic area or field of use, and valued at $63.1 million or more.

(6) The guidance for valuing IP for HSR purposes is as follows: The gross amount of Company A's fees (a small percentage of the royalties generated) earned under the license agreement are used for valuation determination, and the future fees are not to be discounted to present day value. If the amount of future fees is too speculative to reasonably estimate, then the value of the license is the FMV of such a license for Company B's IP. FMV is determined in good faith by the acquiring party's board of directors or a person to whom the BOD delegates the task. There is no guidance as to how

precisely this FMV is to be determined, except that the goal is to determine what a licensee would pay at present in cash for the license granted, in an arm's length negotiation.

Please let me know if you have any questions or need additional information.

Best regards,

[redacted]

(1) Agree

(2) Agree

(3) Not an asset for HSR purposes

(4) Moot

(5) Agree

(6) Agree

5/30/08