UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. CANON INC. and TOSHIBA CORPORATION Defendants.	Civil Action No.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On June 10, 2019, the United States filed a Complaint against Defendants Canon Inc. ("Canon") and Toshiba Corporation ("Toshiba") related to the acquisition of Toshiba Medical Systems Corporation ("TMSC") by Canon from Toshiba on March 17, 2016 for approximately $6.1 billion. The Complaint alleges that Canon and Toshiba (collectively, "Defendants") violated Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The HSR Act provides that "no person shall acquire, directly or indirectly, any voting securities or assets of any person"

exceeding certain thresholds until that person has filed pre-acquisition notification and report forms with the Department of Justice and the Federal Trade Commission (collectively, the "federal antitrust agencies" or "agencies") and the post-filing waiting period has expired. 15 U.S.C. § 18a(a). A key purpose of the notification and waiting period requirements is to protect consumers and competition from potentially anticompetitive transactions by providing the agencies an opportunity to conduct an antitrust review of proposed transactions before they are consummated.

The Complaint alleges that Defendant Canon acquired beneficial ownership of TMSC from Defendant Toshiba without making the required pre-acquisition HSR Act filings with the agencies and without observing the waiting period. The Complaint alleges that the price paid by Canon to Toshiba exceeded the then-existing threshold of $312.6 million for filing notification.

At the same time the Complaint was filed in the present action, the United States also filed a Stipulation and proposed Final Judgment that eliminates the need for a trial in this case. The proposed Final Eseeiminap(s)-1 (i)-2 (s)-12 (o pr)3 (ot)d(a)4 (nd w)a]TJ 0/4 (d.)]TJ EMCai ase.Í nctH

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

Canon is a Japanese corporation that sells a variety of products in or into the United States, including printing products, cameras, and medical imaging equipment. Toshiba is also a Japanese corporation that sells a variety of products and services in or into the United States. TMSC was a wholly owned subsidiary of Toshiba that manufactured and sold medical imaging equipment worldwide, including into the United States.

As a result of accounting irregularities causing it to restate several years' worth of earnings, Toshiba needed to improve its balance sheet prior to the end of its fiscal year on March 31, 2016. Accordingly, Toshiba decided to sell TMSC. In December 2015, Toshiba started the process to sell TMSC. Canon was one of the buyers interested in TMSC. By the beginning of March 2016, Canon and Toshiba were actively negotiating the terms of the possible sale of TMSC to Canon. At this point, Canon and Toshiba did not believe that they could file under the HSR Act and observe the waiting period and have the sale of TMSC close by March 31. Toshiba and Canon devised a scheme to enable Canon to acquire TMSC, allow Toshiba to recognize the proceeds from the sale by the close of its fiscal year, and avoid observing the waiting period required by the HSR Act.

Pursuant to this scheme, Toshiba and Canon caused the creation of a special purpose company, MS Holding Corporation ("MS Holding"). MS Holding was the device that Toshiba and Canon used to evade the HSR Act. During March 15-17, 2016, in a multi-step process, Toshiba transferred ownership of TMSC to Canon in a manner designed to evade notification requirements. First, Toshiba rearranged the corporate ownership structure of TMSC to make the scheme possible: it created new classes of voting shares, a single non-voting share with rights custom-made for Canon, and options convertible to ordinary shares. Second, Toshiba sold Canon

TMSC's special non-voting share and the newly-created options in exchange for $6.1 billion, and at the same time transferred the voting shares of TMSC (a $6.1 billion company) to MS Holding in exchange for a nominal payment of nine hundred dollars. Later—in December 2016—Canon exercised its options and obtained formal control of TMSC's voting shares. This scheme masked the true nature of the acquisition. When Toshiba sold its interests in TMSC, while nominal voting-share ownership was divested by Toshiba and passed to MS Holding, true beneficial ownership passed to Canon. MS Holding bore no risk of loss, and no meaningful benefit of gain, for any decrease or increase in TMSC's value. Rather, it was Canon which bore that risk or would realize any potential gain from TMSC's operations. MS Holding merely served to temporarily hold TMSC voting securities for Canon's benefit. Therefore, Canon became the owner of TMSC in March 2016 when it paid Toshiba the $6.1 billion purchase price for the company.

The transactions described above were subject to the notification and waiting periods of the HSR Act. The HSR Act and the thresholds in effect during the time period relevant to this proceeding required that each Defendant file a notification and report form with the Department of Justice and the Federal Trade Commission and observe a waiting period before Canon acquired TMSC.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment imposes a $2.5 million civil penalty against each Defendant (a total of $5 million) and an injunction designed to address the violation alleged in the Complaint and deter Defendants and others from violating the HSR Act. The United States adjusted the penalty downward from the maximum permitted under the HSR Act because Defendants are

The relief will have a beneficial effect on competition because the agencies will be properly

be submitted to:

Kenneth A. Libby
Special Attorney, United States
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The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States is satisfied, however, that the proposed relief is an appropriate remedy in this matter. Given the facts of this case, including Defendants' willingness to settle this matter, the United States is satisfied that the proposed civil penalty and injunction are sufficient to address the violation alleged in the Complaint and to deter violations by similarly situated entities in the future, without the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged

evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40

remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990)). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not

instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11. A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76. *See also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); S. Rep. No. 93-298

Date: June 10, 2019