UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff,* v. CANON INC. and TOSHIBA CORPORATION *Defendants.*	Civil Action No. 1:19-cv-01680-TSC

MOTION AND MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ENTRY OF FINAL JUDGMENT

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), plaintiff United States of America ("United States") moves for entry of the proposed Final Judgment filed on June 10, 2019 (Document 1-3). The proposed Final Judgment may be entered at this time without further proceedings if the Court determines that entry is in the public interest. 15 U.S.C. § 16(e). The Competitive Impact Statement ("CIS") filed by the United States on June 10, 2019 (Document 1-4), explains why entry of the proposed Final Judgment is in the public interest. The United States is filing simultaneously with this Motion and Memorandum a Certificate of Compliance (attached as Exhibit 1) setting forth the steps taken by the parties to comply with the applicable provisions of the APPA and certifying that the sixty-day statutory public comment period has expired, and no public comments have been received.[1]

[1] The United States did receive two emails, one from one individual based in Yokohama, Japan regarding the

I. BACKGROUND

On June 10, 2019, the United States filed a Complaint against Defendants Canon Inc. (Canon") and Toshiba Corporation ("Toshiba") related to Canon's acquisition of Toshiba Medical Systems Corporation ("TMSC") from Toshiba.

The Complaint alleges that the 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 requires certain acquiring and acquired parties to file pre-acquisition Notification and Report Forms with the Department of Justice and the Federal Trade Commission (collectively, the "federal antitrust agencies" or "agencies") and to observe a statutorily mandated waiting period before consummating their acquisition.[2] A fundamental purpose of the notification and waiting period is to allow the agencies an opportunity to conduct an antitrust review of proposed transactions that meet the HSR Act's jurisdictional thresholds before they are consummated.

Compliance with the HSR Act is critical to the federal antitrust agencies' ability to investigate large acquisitions before they are consummated, prevent acquisitions determined to

language of the Final Judgment and one from one individual based in the Bay Area of California regarding California's Fifth Congressional District. *See* Exhibit 2. The email from the individual in Yokohama identified a typographical error related to an incorrect cross reference in Section VIII.D of the proposed Final Judgment. The United States has corrected this cross reference in the Final Judgment attached hereto as Exhibit 3 (replacing "Section VIII" with "Section IX"). Defendants do not object to this correction. Both of these emails are unrelated to the competitive concerns identified by the United States in the Complaint, and they are unrelated to the issue before this Court: whether the proposed Final Judgment is in the public interest. It is well-settled that comments that are unrelated to the concerns identified in the Complaint are beyond the scope of the court's Tunney Act review. *See, e.g., United States v. Apple*, Inc., 889 F. Supp. 2d 623, 642 (S.D.N.Y. 2012); *see also United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014) (quoting *Microsoft*, 56 F.3d at 1459).

[2] The HSR Act requires that "no person shall acquire, directly or indirectly, any voting securities of any person" exceeding certain thresholds until both have made premerger notification filings and the post-filing waiting period has expired. 15 U.S.C. § 18a(a). The post-filing waiting period is either 30 days after filing or, if the relevant federal antitrust agency requests additional information, 30 days after the parties comply with the agency's request. 15 U.S.C. § 18a(b). The agencies may grant early termination of the waiting period, 15 U.S.C. § 18a(b)(2), and often do so when an acquisition raises no competitive questions.

be unlawful under Section 7 of the Clayton Act, 15 U.S.C. §18, and design effective divestiture relief when appropriate. Before Congress enacted the HSR Act, the federal antitrust agencies often were forced to investigate anticompetitive acquisitions that had already been consummated without public notice. In those situations, the agencies' only recourse was to sue to unwind the parties' merger. The combined entity usually had the incentive to delay litigation, and years often passed before the case was adjudicated and relief was pursued or obtained. During this extended time, consumers were harmed by the reduction in competition between the merging parties and, even after the court's adjudication, effective relief was often impossible to achieve. Congress enacted the HSR Act to address these problems and to strengthen and improve antitrust enforcement by giving the agencies an opportunity to investigate certain large acquisitions before they are consummated.

As alleged in the Complaint, Defendants entered into a scheme to avoid the requirements of the HSR Act by causing the creation of a third party to hold the voting shares of TMSC until Defendant Canon could obtain clearance under the HSR Act to acquire the shares. The scheme allowed Defendant Toshiba to sell its entire interest in TMSC before its internal deadline of March 31, 2016, which would not have been possible had Defendants complied with the requirements of the HSR Act. Defendants' failure to comply undermined the statutory scheme and the purpose of the HSR Act by precluding the agencies' timely review of the transaction prior to Defendant Toshiba divesting all its interests in TMSC. The Complaint seeks an adjudication that Defendant Canon's acquisition of TMSC from Defendant Toshiba violated the HSR Act, and asks the Court to award an appropriate civil penalty and other equitable relief.

At the same time the Complaint was filed, the United States also filed a Stipulation and proposed Final Judgment. The terms of the proposed Final Judgment are designed to deter

Defendants' future HSR Act violations by imposing a civil penalty of $2,500,000 against each Defendant and requiring each Defendant to establish a compliance program to prevent future violations of the HSR Act.

Unless it is extended, the Final Judgment will remain in effect for three years from the date of its entry if each Defendant pays the civil penalty.

II. COMPLIANCE WITH THE APPA

The APPA requires a sixty-day period for the submission of written comments relating to the proposed Final Judgment, 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the proposed Final Judgment and CIS with the Court on June 10, 2019, and published the proposed Final Judgment and CIS in the *Federal Register* on June 26, 2019, *see* 84 Fed. Reg. 30234 (2019). Summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published in *The Washington Post* for seven days during the period from June 17, 2019, through June 23, 2019. The sixty-day period for public comments ended on August 26, 2019. The United States received no written comments relating to the proposed Final Judgment.

The Certificate of Compliance filed with this Motion and Memorandum states that all the requirements of the APPA have been satisfied. It is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Proposed Final Judgment.

III. STANDARD OF JUDICIAL REVIEW

Before entering the proposed Final Judgment, the APPA requires the Court to determine whether the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court shall consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B). In the CIS filed with the Court on June 10, 2019, the United States explained the meaning and proper application of the public interest standard under the APPA and now incorporates those portions of the CIS by reference.

IV. CONCLUSION

For the reasons set forth in this Motion and Memorandum and the CIS, the Court should find that the proposed Final Judgment is in the public interest and should enter the proposed Final Judgment without further proceedings. The United States respectfully requests that the Final Judgment, attached hereto as Exhibit 3, be entered at this time.

Dated: September 23, 2019

Respectfully Submitted,

/s/ Kenneth A. Libby
Kenneth A. Libby
Special Attorney