

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
450 Fifth Street, NW
Washington, D.C. 20530;

Plaintiff,

v.

CANON INC.
30-2, Shimomaruko 3-chome
Ohta-Ku, Tokyo
Japan;

and

TOSHIBA CORPORATION
1-1, Shibaura 1-chome
Minato-ku, Tokyo
Japan;

Defendants.

**COMPLAINT FOR CIVIL PENALTIES FOR FAILURE TO COMPLY
WITH THE PREMERGER NOTIFICATION AND WAITING REQUIREMENTS
OF THE HART-SCOTT RODINO ACT**

1. In July 2015, Toshiba Corporation (“Toshiba”) revealed that it had overstated its profits by billions of dollars. In an effort to avoid the consequences of those financial irregularities, Toshiba implemented a scheme to sell a subsidiary to Canon Inc. (“Canon”), while evading the United States’ premerger-notification laws. In March 2016, Toshiba sold to Canon its subsidiary Toshiba Medical Systems Corporation (“TMSC”), and Canon paid Toshiba \$6.1 billion, all before United States antitrust authorities were notified of the transaction. Toshiba’s

sale of TMSC to Canon, prior to notifying antitrust authorities, violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (“HSR Act” or “Act”). Thus, 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 Canon and Toshiba (collectively, “Defendants”).

INTRODUCTION

2. The HSR Act is an essential part of modern antitrust enforcement. It requires the buyer and the seller of voting securities or assets in excess of a certain value to notify the Department of Justice and the Federal Trade Commission *prior* to consummating the acquisition, and to observe a waiting period after the notification is filed. Advance notification of significant transactions, and adherence to the waiting period, are the essential elements of the Act, providing the federal antitrust agencies with an opportunity to investigate and, when necessary, to seek an injunction to prevent the consummation of anticompetitive acquisitions.

3. In 2015, Toshiba had put itself into a precarious financial position. In July 2015, an independent investigation (triggered by an earlier investigation by financial regulators) publicly revealed long-running financial irregularities within Toshiba. Toshiba was forced to restate its earnings for several years, and to incur a significant accounting charge for fiscal year 2015. To shore up its financial statement, Toshiba decided to sell TMSC, a company that does substantial business in the United States.

4. In December 2015, Toshiba began the process of selling TMSC. Canon was one of the interested bidders. Toshiba’s desire to sell TMSC had a deadline: Toshiba needed to

recognize the proceeds from the sale before the end of its fiscal year on March 31, 2016. Yet despite the public disclosure of financial irregularities in July 2015, Toshiba failed to resolve the TMSC sales process as the end of its fiscal year approached. As a result, in early 2016 Toshiba faced a time frame that would make it difficult, if not impossible, to file premerger notifications and receive the necessary premerger clearances in several jurisdictions, including the United States. Eventually, in early March 2016, 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 filing the notification and observing the waiting period required by the HSR Act.

5. 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 premerger-notification law.

6. During March 15-17, 2016, in a multi-step process, Toshiba transferred ownership of TMSC to Canon, but in a way 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.

7. Canon and Toshiba implemented this scheme to avoid observing the waiting period required by the HSR Act. If Canon had purchased all of TMSC’s voting securities for

\$6.1 billion, it would have required filing notification and observing the 30-day HSR waiting period, which Toshiba feared it could not accomplish by March 31, 2016. Instead, MS Holding paid only nine hundred dollars for the voting shares in TMSC, a company valued by Canon at \$6.1 billion, while Canon nominally acquired only a non-voting share and options. Canon and Toshiba structured the transaction in such a way that, if these transactions were not part of a larger scheme, they would not require notification and observation of the HSR waiting period.

8. 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.

9. Defendants violated the HSR Act's notice and waiting requirements when Canon acquired ownership of TMSC on March 17, 2016. The court should assess each Defendant a civil penalty of at least \$6,360,000 for this scheme to avoid the HSR Act's requirements.

JURISDICTION AND VENUE

10. This Court has jurisdiction over the Defendants and over the subject matter of this action pursuant to Section 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), and 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355.

11. Venue is proper in this District under 28 U.S.C. §§ 1391(b)(1), (b)(2), (b)(3),

(c)(2), (c)(3), and 15 U.S.C. § 22. A substantial part of the omission or events giving rise to the claim occurred within this District; to the extent that Canon Inc. and Toshiba Corporation are alien corporations they may be properly sued in this District; and Defendants and other parties to the transaction (including at least Canon U.S.A., Inc.) can be found or transact business in this District.

THE DEFENDANTS

12. Defendant Canon is a corporation organized under the laws of Japan, with its principal office and place of business at 30-2, Shimomaruku 3-chome, Ohta-Ku, Tokyo, Japan.

13. Defendant Toshiba is a corporation organized under the laws of Japan, with its principal office and place of business at 1-1, Shibaura 1-chome, Minato-ku, Tokyo, Japan.

14. Defendants are 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).

OTHER ENTITIES

15. Toshiba Medical Systems Corporation (“TMSC”) is a corporation organized under the laws of Japan, with its principal office and place of business at 1385, Shimoishigami, Otawara-shi, Tochigi 324-8550, Japan. TMSC is 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). Prior to March 17, 2016, TMSC was a wholly-owned subsidiary of Toshiba. At all times relevant to this complaint, TMSC had sales in or into the United States of approximately \$280 million.

16. MS Holding Corporation (“MS Holding”) is a corporation organized under the

laws of Japan, with its principal office and place of business at 6-10-1 Roppongi, Minato-ku, Tokyo, Japan. Defendants Canon and Toshiba directed their law firms to have MS Holding created for the specific purpose of acquiring and holding certain of TMSC's shares pending antitrust clearance for Canon's proposed acquisition of TMSC.

17. Canon U.S.A., Inc. is a wholly-owned subsidiary of Canon with its headquarters in Melville, New York. Canon U.S.A., Inc. conducts sales and marketing of Canon products in the Americas, including the District of Columbia. Canon U.S.A., Inc. participated in the transaction at issue by receiving from Toshiba a minority share of the options to acquire TMSC voting securities, which were used as part of the scheme to transfer TMSC to Canon, and committing to pay Toshiba for such options.

BACKGROUND

A. The Hart-Scott-Rodino Antitrust Improvements Act and Rules

18. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired both to file notifications with the federal antitrust agencies and to observe a waiting period before consummating certain acquisitions. *See* 15 U.S.C. § 18a(a). The required notifications to the federal antitrust agencies must be delivered to the District of Columbia offices of each agency. These notification and waiting period requirements apply to acquisitions that meet the HSR Act's dollar-value thresholds, which are adjusted annually. At all times relevant to this complaint, the HSR Act's notification and waiting period requirements applied to qualifying transactions involving foreign companies which made more than \$78.2 million of sales in or into the United States. TMSC made at least \$280 million of sales in or into the United States during its 2015 fiscal year.

19. Pursuant to Section (d)(2) of the HSR Act, 15 U.S.C. § 18a(d)(2), the Federal Trade Commission promulgated rules to carry out the purpose of the HSR Act. 16 C.F.R. §§ 801-803 (“HSR Rules”).

20. Parties may not structure transactions for the purpose of avoiding the HSR Act. Section 801.90 of the HSR Rules, 16 C.F.R. § 801.90, provides that “[a]ny transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction.”

21. Section 801.2(a) of the HSR Rules, 16 C.F.R. § 801.2(a), defines an acquiring person: “Any person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person, is an acquiring person.”

22. Section 801.1(c) of the HSR Rules, 16 C.F.R. § 801.1(c), provides that one holds voting securities if she has beneficial ownership: “the term *hold* (as used in the terms *hold(s)*, *holding*, *holder* and *held*) means beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means.” (emphasis in original). “[T]he existence of beneficial ownership is to be determined in the context of particular cases with reference to the person or persons that enjoy the indicia of beneficial ownership.” 43 Fed. Reg. 33,458 (July 31, 1978). These indicia include (1) the right to any increase in value or dividends, (2) the risk of loss of value, (3) the right to vote or determine who may vote the stock, and (4) investment discretion, including the power to dispose of the stock. *Id.*

23. In summary, under the HSR Rules, (a) if parties structure a transaction “for the

purpose of avoiding” the HSR Act’s requirements, then determining whether an HSR notification should have been filed, and by whom, is based on an analysis of the “substance of the transaction,” as opposed to the form of the avoidance scheme; and (b) in carrying out this notification analysis, identifying the acquiring person (with the associated HSR notification and waiting period obligations) involves an assessment of who, upon completion of the transaction, “enjoy[ed] the indicia of beneficial ownership.”

B. Canon and Toshiba’s HSR Avoidance Scheme

24. In late February 2016, Toshiba and Canon were actively negotiating the sale of TMSC. Rather than complete their negotiations in time to allow compliance with regulatory requirements, the firms decided instead to devise a way to allow Toshiba to recognize the profits from its sale of TMSC by its fiscal year end on March 31, 2016 without complying with HSR requirements. Toshiba and Canon jointly decided to restructure TMSC’s securities and to sell TMSC to Canon through the device of MS Holding, a newly-formed special purpose vehicle which they had created specifically for this transaction. This scheme allowed Toshiba to relinquish all ownership rights in TMSC and recognize the entire proceeds of the TMSC sale prior to March 31, 2016 and delayed Canon’s filing of premerger notification for its acquisition of TMSC.

25. By early March 2016, Toshiba and Canon agreed to the following transaction structure, which they ultimately executed:

- a. Toshiba and Canon directed their law firms to have a third law firm form MS Holding, a special purpose vehicle created solely to hold temporarily the voting shares of TMSC, pending antitrust clearance of Canon’s acquisition of TMSC;

b. Toshiba revised the corporate ownership structure of TMSC (its wholly-owned subsidiary) in a way that would permit ownership rights of TMSC to be split.

After the revision, Toshiba owned:

- 1) 20 Class A voting shares of TMSC;
- 2) 1 Class B non-voting share of TMSC; and
- 3) 100 options to acquire 134,980,000 TMSC “ordinary shares” (which remained unissued until step “e” below);

c. MS Holding paid Toshiba approximately nine hundred dollars for the 20 Class A voting shares. MS Holding thus nominally gained temporary ownership of a business valued by Canon at approximately \$6.1 billion;

d. Canon and Canon U.S.A., Inc., paid Toshiba approximately \$6.1 billion for the 1 Class B non-voting share and for the 100 options to acquire 134,980,000 TMSC’s “ordinary shares” that it intended to exercise once the TMSC sale had cleared antitrust review in the necessary jurisdictions. The exercise price on each option was ¥1, for a total of ¥100, or approximately one dollar, to be paid to TMSC upon exercise of the options. The “ordinary shares” remained unissued until Canon and Canon U.S.A. exercised their options; and

e. Later, after HSR notification had been made and the waiting period had passed, Canon and Canon U.S.A., Inc., exercised their options (for a total exercise price of about one dollar) and so acquired the 134,980,000 TMSC “ordinary shares”;

f. After Canon and Canon U.S.A., Inc., exercised their options, TMSC bought out MS Holding’s 20 Class A shares at a fixed price that did not vary depending

on the financial performance of TMSC during the period MS Holding held the Class A shares.

26. While the motive of selling TMSC was to shore up Toshiba's financial statement, the purpose of the unusual transaction structure selected by Canon and Toshiba was to avoid the HSR Act's waiting period and complete the sale of TMSC prior to March 31, 2016. By their own admission, Canon and Toshiba believed that Canon could not acquire TMSC outright because "it simply was not possible to complete a significant acquisition of TMSC voting securities before the end of Toshiba's fiscal year due to the review periods under various merger control laws."

C. Canon—not MS Holding—Acquired Beneficial Ownership of TMSC from Toshiba

27. Because Canon and Toshiba chose to structure the sale of TMSC as an HSR avoidance scheme, determining the proper acquiring person for HSR notification purposes requires an analysis of the substance of the transaction to identify to whom passed beneficial ownership of TMSC.

28. Toshiba and Canon, acting at times through their respective law firms, implemented their scheme for the sale of TMSC as follows:

a. On March 5, 2016, Toshiba and Canon jointly approached TMI Associates ("TMI"), a Japanese law firm, to consult on the formation of the special purpose vehicle (which became MS Holding upon its creation);

b. On March 6, 2016, Toshiba and Canon met with TMI regarding the formation of the special purpose vehicle (which became MS Holding) to consist of three principals/shareholders: a business leader, an attorney, and an accountant;

c. On or about March 6, 2016, advisors for Canon and Toshiba put together a list of possible accountants to be one of the other principals of MS Holding. The list included Mr. Motoharu Yokose, who became a principal of MS Holding;

d. On March 7, 2016, Toshiba and Canon cleared Mr. Shuichi Yoshikai, a lawyer at TMI, as a shareholder and principal of MS Holding;

e. On March 8, 2016, Toshiba and Canon approved the formation documents of MS Holding, having previously provided comments and suggested changes to the drafts of the formation documents;

f. On March 8, 2016, Toshiba and Canon both participated in briefing Mr. Kenji Miyahara who became an MS Holding principal on March 11, 2016;

g. On March 8, 2016, Toshiba and Canon both participated in briefing Mr. Yokose who became an MS Holding principal on March 11, 2016;

h. On March 8, 2016, MS Holding was incorporated with three shares and a total capital of approximately three hundred dollars;

i. On March 15, 2016, Toshiba formally changed the corporate ownership structure of TMSC, with the agreement of Canon. Prior to the transaction, TMSC had authorized a single class of 134,980,060 common (voting) shares, all of which was held by Toshiba. In order to facilitate the transaction, Toshiba caused TMSC to authorize 20 Class A voting shares, 1 Class B non-voting share, 134,980,000 "ordinary" shares, and 134,980,060 "Class C" shares. Toshiba converted its 134,980,060 common shares into "Class C" shares, and transferred all such Class C shares to TMSC in exchange for (i) the 20 Class A shares; (ii) the single Class B non-voting share; and (iii) 100 options to

acquire 134,980,000 “ordinary” shares. The change in corporate ownership structure thus resulted in TMSC holding 134,980,060 of its own Class C shares, and 134,980,000 of its own “ordinary” shares, while Toshiba held 20 Class A shares, the single Class B non-voting share, and 100 options to acquire the 134,980,000 “ordinary” shares.

j. On March 17, 2016, Toshiba and Canon executed the agreement (“acquisition agreement”) pursuant to which Canon and Canon U.S.A., Inc., agreed to pay Toshiba approximately \$6.1 billion to acquire TMSC’s single Class B non-voting share and 100 options to acquire 134,980,000 “ordinary” voting shares. According to the terms of the acquisition agreement, Canon and Canon U.S.A., Inc.’s payment of \$6.1 billion was non-refundable, even if Canon and Canon U.S.A., Inc.’s exercise of the TMSC options was later blocked as a result of antitrust review;

k. On the same day, March 17, 2016, Toshiba and MS Holding executed an agreement whereby MS Holding acquired the 20 Class A voting shares for approximately nine hundred dollars. Prior to this, Canon had provided comments to the drafts of the agreement between Toshiba and MS Holding;

l. On or about December 19, 2016, after obtaining the necessary antitrust clearances, Canon exercised its options to acquire the “ordinary” shares; and

m. On or about December 21, 2016, TMSC acquired the 20 Class A shares from MS Holding, and MS Holding had no further ownership interest in or involvement with TMSC.

29. As of March 17, 2016, Toshiba no longer had any interest in, ownership rights in, or control over TMSC. Canon and Canon U.S.A., Inc.’s payment of \$6.1 billion and MS

Holding's payment of nine hundred dollars was all the proceeds it would receive for its interests in TMSC. Toshiba would not benefit in any way from the financial performance of TMSC after March 17, 2016. That same day, Canon issued a press release stating that it had concluded a share transfer agreement with Toshiba concerning the acquisition of TMSC shares "to make TMSC a Canon subsidiary."

30. The true substance of the transactions described in Paragraph 28 was Canon's acquisition of beneficial ownership of TMSC on March 17, 2016 for \$6.1 billion.

31. At all times relevant to this complaint, MS Holding was not an entity independent of Canon. Canon exercised direction and control over MS Holding during its formation. Canon caused the creation of MS Holding; it participated in the selection of the principals of MS Holding; it briefed the proposed principals of MS Holding about the transaction; it participated in the drafting of the formation documents of MS Holding; it commented on the appropriateness of the name MS Holding; it reviewed, commented on, and approved the share transfer agreement between MS Holding and Toshiba; and it commented on draft questions and answers regarding MS Holding.

32. MS Holding had no meaningful risk of loss or benefit of gain in connection with its ownership of the Class A shares. It was to be paid a fixed amount that did not go up or down depending on the financial performance of TMSC.

33. MS Holding did not act as an independent owner of TMSC during the period it nominally controlled TMSC through its ownership of the Class A shares. Because it existed precisely to be bought out after Canon exercised its options for the "ordinary" voting shares at a fixed price, MS Holding had no incentive to maintain the long term viability of TMSC.

Accordingly, if MS Holding had been a truly independent owner of TMSC, its economic self-interest would have been to take as much of the proceeds out of TMSC as it could prior to Canon exercising the options for the “ordinary” shares. Despite this economic self-interest, MS Holding made no efforts to sell any of TMSC’s assets and declared dividends that amounted to only a small fraction of the profits earned by TMSC during the period of its nominal control.

34. Neither the Defendants nor the principals of MS Holding expected MS Holding to be involved in the operation of TMSC during the period that MS Holding nominally controlled the Class A shares. Indeed, Canon itself has admitted that “TMSC’s management board ran TMSC’s day-to-day business during the time MS Holding” controlled the Class A shares. This was consistent with Defendants’ choice of a corporate form for MS Holding, as “under Japanese law for the type of stock company in which MS Holding was formed, TMSC’s shareholders are not expected or required to be involved in the operation of TMSC’s day-to-day business.”

VIOLATION ALLEGED

35. Plaintiff alleges and incorporates paragraphs 1 through 34 as if set forth fully herein.

36. Canon’s acquisition of TMSC from Toshiba on March 17, 2016, was subject to the notification and waiting period requirements of the HSR Act and the regulations promulgated thereunder. 16 C.F.R. § 800 *et. seq.*

37. Defendants did not comply with the notification and waiting period requirements of the HSR Act and regulations. Although Defendant Canon and MS Holding both filed HSR Act notifications on April 26, 2016 for the exercise of the options to acquire the TMSC “ordinary” shares, these filings were not timely or effective because the transfer of beneficial

ownership to Canon from Toshiba had occurred in March 2016. Moreover, Toshiba did not make a filing in connection with the April 26, 2016 notifications, and thus failed to provide information that it had relevant to the transaction.

38. On July 22, 2016, Canon and Toshiba each amended, under protest, the original HSR filings made by Canon and MS Holding to substitute Toshiba as the acquired person in the sale of TMSC. The waiting period on the amended filings expired on August 22, 2016.

39. The Defendants were each in violation of the HSR Act each day during the period beginning on March 17, 2016, and ending on August 22, 2016.

40. 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. For violations occurring on or after November 2, 2015 and assessed after August 1, 2016, the maximum amount of civil penalty is \$40,000 per day, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, § 701 (further 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, 81 Fed. Reg. 42,476 (June 30, 2016). As of February 14, 2019, the penalty was further increased to \$42,530 per day for civil penalties assessed after that date. 84 Fed. Reg. 3980 (Feb. 14, 2019).

REQUEST FOR RELIEF

Wherefore, the Plaintiff requests:

1. That the Court adjudge and decree that Defendants violated the HSR Act, 15 U.S.C. § 18a, and that Defendants were in violation of the Act on each day of the period from

March 17, 2016, through August 22, 2016;

2. That the Court order each Defendant to pay to the United States at least \$6,360,000, or the maximum civil penalty as provided by the HSR Act, 15 U.S.C. § 18a(g)(1), the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, § 701 (further amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 84 Fed. Reg. 3980 (Feb. 14, 2019);

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

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

Dated: _____

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:



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