UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **STATE OF CALIFORNIA,** **STATE OF INDIANA,** **COMMONWEALTH OF KENTUCKY,** **STATE OF MICHIGAN,** **STATE OF NORTH CAROLINA,** **STATE OF OHIO,** **COMMONWEALTH OF PENNSYLVANIA, and** **STATE OF TEXAS,** ***Plaintiffs*,** **v.** **REPUBLIC SERVICES, INC., and** **ALLIED WASTE INDUSTRIES, INC.,** ***Defendants*.**	**CASE NO.: 1:08-cv-02076 (RWR)** **JUDGE: Richard W. Roberts** **DECK TYPE: Antitrust** **DATE STAMP:**

RESPONSE OF PLAINTIFF UNITED STATES TO THE
AMICUS BRIEF OF CENTER FOR A COMPETITIVE WASTE INDUSTRY

The United States respectfully submits this response to the amicus brief of the Center For A Competitive Waste Industry ("CCWI"), filed on December 10, 2009 in this Tunney Act (the "Act") proceeding. Under the Act, 15 U.S.C. § 16(b)-(h), the Court must determine whether entry of the proposed Final Judgment is in the public interest. Courts typically make this determination on the basis of the information, including public comments, that the Act requires the United States to file with the Court. In this case, the CCWI submitted an extensive public comment, to which the United States responded fully. In its amicus brief, CCWI ignores the standard of review applicable in this proceeding, and argues that the United States should have obtained different remedies than those provided in the proposed Final Judgment. In particular, CCWI repeats its

claim that the United States should compel the defendants to sell landfill airspace to CCWI's own members, independent waste haulers, a remedy completely unrelated to any violation alleged in the Complaint. In short, CCWI's amicus brief provides the Court with no additional factual or legal information to aid the Court in its decision to enter the proposed Final Judgment. The Court should find that the proposed Final Judgment is in the public interest and enter the proposed Final Judgment forthwith.

BACKGROUND

I. The Tunney Act

The Court must find that the proposed Final Judgment is in the public interest before entering the Final Judgment. 15 U.S.C. § 16(e). The Act, which governs the Court's public interest determination, sets forth a public comment process requiring that the United States (1) publish notices in newspapers and the *Federal Register*; (2) file and publish a Competitive Impact Statement describing, among other things, the antitrust violation and the proposed decree; and (3) file with the Court and publish in the *Federal Register* any public comments received and the United States's response to those comments. *Id.* § 16(b)-(d). The public comment process gives the Court, as well as the United States, the benefit of views of interested nonparties prior to making its public interest determination. The Act enumerates factors the Court must consider in making its public interest determination. *Id.* § 16(e)(1). The Court may make its determination based on the information provided by the Complaint, proposed Final Judgment, Competitive Impact Statement, public comments, and the government's response to comments.

II. Proceedings

On December 3, 2008, the United States and eight Plaintiff States filed a Complaint alleging that the merger of Republic Services, Inc. ("Republic") and Allied Waste, Inc. ("Allied") violated Section 7 of the Clayton Act, 15 U.S.C. § 18. At the same time, the United States and Plaintiff States filed a proposed Final Judgment, to which the defendants had consented, requiring Republic to divest nine landfills, 10 transfer stations and 87 small container hauling routes (and ancillary assets) in 15 separate geographic markets to remedy the competitive harms alleged in the Complaint. *See* 15 U.S.C. § 16(b)-(h). The Plaintiffs filed the Complaint and proposed Final Judgment based on an extensive investigation of the merger, which entailed the review and analysis of thousands of documents and interviews with over 600 customers and competitors of the merging parties. *See* Response of the United States to Public Comments at 3 (Docket No. 12, filed 5/14/09). Also on December 3, 2008, the United States filed its Competitive Impact Statement, *see* 15 U.S.C. § 16(b), analyzing the violation alleged in the Complaint and the remedies in the proposed Final Judgment. The United States received five comments from the public, including a detailed comment from CCWI. The United States filed a Response to Public Comments on May 14, 2009. Having satisfied all the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C.§ 16(b)–(h), the United States and Plaintiff States filed their Motion and Memorandum for Entry of Final Judgment on July 16, 2009 (Docket No. 16). *See also* Certificate of Compliance (Docket No. 16, Ex. 1).

The defendants filed two joint status reports describing the implementation of the divestitures required by the proposed Final Judgment (Docket Nos. 10, 18). As of September 1, 2009, Republic had completed the sale of the divestiture assets in all 15 markets. In each market,

the United States reviewed and approved the acquirer of the divestiture assets upon concluding that each acquirer would be a long-term, viable competitor capable of preserving competition in the relevant markets that would otherwise have been lost as a result of the merger.

ARGUMENT

I. CCWI Relies on Flawed Understanding of the Tunney Act.

In this Tunney Act proceeding, the only question before the Court is whether the proposed Final Judgment – which provides carefully crafted remedies to cure specific antitrust violations alleged in each of 15 separate market areas – is in the public interest. 15 U.S.C. § 16(e). The proposed Final Judgment, which imposes structural relief requiring divestiture of tangible assets in well-defined "overlap" markets, is consistent with both long-standing policy and precedent with respect to mergers, generally, and in the waste industry in particular. Moreover, each divestiture in the proposed Final Judgment is custom-fit to match the specific facts and circumstances of each market based on extensive investigation by the United States and the Plaintiff States. The divestitures required by the proposed Final Judgment reflect the best judgment of the United States, based on its substantial experience in resolving antitrust violations in the waste industry. As such, the proposed remedies are entitled to substantial deference. *See United States v. InBev, N.V.*, No. 08-1965, Mem. Order (D.D.C. Aug. 11, 2009) (Docket No. 41) ("The government's predictions as to the effect of the proposed remedies are given deference, and are reviewed primarily for whether they have a factual basis and are reasonable.") (citing *SBC Commc'ns*, 489 F. Supp. 2d 15-16; *United States v. Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995)) (internal quotations omitted).

In its brief, CCWI does not address any specific market defined in the Complaint, let alone suggest how the proposed remedy in a particular market, is not reasonably related to the antitrust violation alleged in the Complaint. Instead, CCWI argues for a different remedy – one that seeks to gain landfill airspace for its own members. CCWI's argument for a remedy different than the one obtained by the United States renders its brief unhelpful to the Court's task of determining whether entry of the Final Judgment is with the reaches of the public interest. *United States v. Abitibi-Consolidated, Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008) (citing *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 15-16 (D.D.C. 2007)). Instead, the "relevant inquiry is whether there is a factual foundation for the government's decision such that its conclusions regarding the proposed settlement are reasonable." *Id.*; *see also United States v. AT&T*, 541 F. Supp. 2d 2, 6-7 (D.D.C. 2008) (same); *United States v. Enova*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (court may not reject a remedy simply because it may not be, in the court's view, the "best" remedy available).

II. CCWI's Arguments Are Unfounded.

A. The proposed Final Judgment requires divestitures because they are the most effective means to remedy the alleged violations.

The proposed Final Judgment imposes structural relief through the divestiture of tangible assets to an acquirer that will preserve competition in each market area. Structural relief is the preferred remedy in all merger cases, because it is "relatively clean and certain, and generally avoids costly government entanglement in the market." Antitrust Division Policy Guide on Merger Remedies ("Remedies Guide") at 8 (Oct. 2004). "A carefully crafted divestiture decree is 'simple, relatively, easy to administer, and sure' to preserve competition." *Id*. (*quoting United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961)). *See generally California v. American*

Stores Co., 495 U.S. 271, 280-81 (1990) ("[I]n Government actions, divestiture is the preferred remedy for an illegal merger or acquisition."). By contrast, conduct remedies – such as those proposed by CCWI – are disfavored in merger cases because they tend to "entangle the [Antitrust] Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies avoid." Remedies Guide at 18.[1] CCWI purposely misreads the Response to Public Comments to argue that United States has used "improper" criteria in choosing the structural remedy.[2] CCWI claims without any basis that the United States chose the divestiture remedy for administrative convenience and that this is an improper criterion. In fact, the Supreme Court and the antitrust agencies have long recognized that divestiture is the most effective remedy to cure any antitrust harm, in part because it is the easiest for the agencies and the court to administer and enforce. *See, e.g., du Pont*, 366 U.S. at 331. To suggest that the United States (and by implication, the Plaintiff States) acted improperly in this case is wholly without basis in law or fact.

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[1] Limited conduct relief, such as the transitional air-space agreements in the Philadelphia and Northwest Indiana market areas, is useful to help perfect the structural relief provided in the proposed Final Judgment, *i.e.*, the divestiture of certain waste transfer stations. *See* Remedies Guides at 18. Similarly, the air-space disposal agreement in the Houston market is not a stand-alone remedy; it is an adjunct to the structural remedy to assist the acquirer of the Houston assets, at the acquirer's option, to compete effectively. *See* Competitive Impact Statement at 29.

[2] CCWI elsewhere recognizes that the "traditional remedy" requires the merging firms to divest assets where they overlap "to restore concentration to the pre-merger levels." CCWI Brief at 3.

B. CCWI makes other unsubstantiated and irrelevant allegations regarding acquirers.

The United States must approve any proposed acquirer of divestiture assets. *See* Proposed Final Judgment ¶ IV(A). The United States reviews proposed acquirers to: (1) ensure that the sale to the acquirer is not anticompetitive, and (2) ensure that the acquirer will use the assets to compete effectively in the relevant market. *See* Remedies Guide at 30-32. Here, CCWI claims that the United States should not approve the sale of divestiture assets to any member of an alleged waste "oligopoly" because the United States objected to the divestiture of certain assets to Allied/BFI in another waste industry merger ten years ago. This is wrong as a matter of policy and simple logic. Each case is analyzed individually, and each acquirer is reviewed independently. A decision of the United States to reject a proposed acquirer of specific assets in specific markets case ten years ago does not (and should not) control the judgment of the United States in this entirely different case, with respect to different markets and different purchasers.

Moreover, CCWI's objection is based on speculative allegations about the existence of a waste "oligopoly," the members of which are known only to CCWI. In this case, the United States approved the acquirers of the divestiture assets based on its own fact-intensive determination that the acquisitions would not be anticompetitive and that each acquirer of divestiture assets would use those assets to preserve competition in each of the 15 separate markets. CCWI has not provided any specific, well-grounded objection to any of the acquirers approved by the United States in this case. The Court should ignore CCWI's unfounded allegations.

CONCLUSION

CCWI's amicus brief is duplicative of its public comments and, in any event, raises spurious matters outside the scope of the Court's Tunney Act review. For the reasons stated above, and for the reasons stated in the Motion and Memorandum for Entry of Final Judgment, entry of the proposed Final Judgment is in the public interest, and the Court should enter the Final Judgment.

Dated: December 30, 2009

Respectfully submitted,

__/s/_ Lowell Stern_____
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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2009, I sent by electronic mail a copy of the foregoing Response of Plaintiff United States to Amicus Brief of Center For A Competitive Waste Industry to:

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