UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and STATE OF NEW YORK, *Plaintiffs*, v. STERICYCLE, INC., SAMW ACQUISITION CORP., and HEALTHCARE WASTE SOLUTIONS, INC., *Defendants*.	CASE NO.: 1:11-cv-00689-BAH JUDGE: Beryl A. Howell DECK TYPE: Antitrust DATE STAMP:

PLAINTIFFS' MOTION AND MEMORANDUM
IN SUPPORT OF ENTRY OF FINAL JUDGMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), Plaintiffs the United States and the State of New York move for entry of the proposed Final Judgment filed in this civil antitrust case. The proposed Final Judgment (attached as Exhibit A) may be entered at this time without further hearing if the Court determines that entry is in the public interest.[1] The defendants have stipulated to entry of the proposed Final Judgment without further notice to any party or other proceedings. No party or member of the public has requested a hearing. The Competitive Impact Statement ("CIS"), filed by the United States on April 8, 2011, explains why entry of the proposed Final Judgment is in the public interest. The United States is filing with this motion a Certificate of Compliance

[1] The proposed Final Judgment attached to this Motion is the same as the one originally filed on April 8, 2011.

(attached as Exhibit B) setting forth the steps taken by the parties to comply with all applicable provisions of the APPA and certifying that the statutory waiting periods have expired.

I. BACKGROUND

On April 8, 2011, the United States and the State of New York filed the Complaint in this matter, alleging that Stericycle, Inc.'s proposed acquisition of Healthcare Waste Solutions ("HWS") violated Section 7 of the Clayton Act, 15 U.S.C. § 18. The United States and the State of New York concurrently filed a Hold Separate Stipulation and Order and a proposed Final Judgment designed to eliminate the anticompetitive effects of the transaction. In particular, the Complaint alleged that the acquisition would reduce competition in the market for the provision of infectious waste treatment services to customers in the New York City Metropolitan Area.

Regulated medical waste ("RMW") is waste generated in the diagnosis, treatment, or immunization of human beings or animals. Ninety percent of all RMW is so-called "infectious waste," which is waste that has come into contact with bodily fluids and "sharps" waste, such as syringes and scalpels. State-approved treatment facilities, mostly commonly autoclaves, must be used to render infectious waste non-infectious. However, obtaining approval for an infectious waste treatment facility in and around large urban areas, such as New York City, is difficult. Therefore, service providers often serve such areas by using local transfer stations. At a transfer station, containers of infectious waste are unloaded from daily route trucks and loaded onto tractor trailers for efficient shipment to more distant treatment facilities.

Defendants provide infectious waste treatment services to New York City Metropolitan Area customers using local transfer stations. Other infectious waste treatment service providers that operate treatment facilities more than 100 miles from the New York City Metropolitan Area

cannot cost-effectively compete to provide infectious waste treatment services without a local transfer station located in the New York City Metropolitan Area.

In the New York City Metropolitan Area, the proposed acquisition would reduce from three to two the number of competitors with local transfer stations. Stericycle and HWS would have approximately 90 percent of the infectious waste treatment market in the New York City Metropolitan Area. The third competitor is a relatively new firm that opened an autoclave treatment facility in Mount Vernon, New York, in 2010; it is unlikely to replace the competition lost as a result of the merger.

The proposed Final Judgment preserves competition in the market for the provision of infectious waste treatment services to customers in the New York City Metropolitan Area by requiring Stericycle to divest HWS's Bronx, New York transfer station to an acquirer approved by the United States, after consultation with the State of New York. In fact, Stericycle has complied with this requirement already; effective June 10, 2011, Stericycle sold the Bronx transfer station business to Daniels Smartsharp, Inc., an acquirer approved by the United States, after consultation with the State of New York. The divestiture of these assets according to the terms of the proposed Final Judgment will establish a new, independent, and economically viable competitor, thereby preserving competition in the provision of infectious waste treatment services to customers in the New York City Metropolitan Area.

Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. COMPLIANCE WITH THE APPA

The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. *See* 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the CIS on April 8, 2011; published the proposed Final Judgment and CIS in the *Federal Register* on April 14, 2011, *see* 76 Fed. Reg. 21,006 (2011); and caused a summary of the terms of the proposed Final Judgment to be published in *The Washington Post* for seven days from April 14, 2011 through April, 20, 2011. The 60-day period for public comments ended on June 19, 2011, and no comments were received. The Certificate of Compliance filed with this Motion recites that all the requirements of the APPA have now been satisfied. It is therefore appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Final Judgment.

III. STANDARD OF JUDICIAL REVIEW

Before entering the proposed Final Judgment, the Court is to determine whether the Judgment "is in the public interest." *See* 15 U.S.C. § 16(e). 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
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> 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 considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

As the United States Court of Appeals for the District of Columbia has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *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 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first

> instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[1] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer–Daniels–Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case); *United States v. Republic Serv., Inc.*, 2010-2 Trade Cas. (CCH) ¶ 77,097, 2010 U.S. Dist. LEXIS 70895, No. 08-2076 (RWR), at *160 (D.D.C. July 15, 2010) (finding that "[i]n light of the deferential review to which the government's proposed remedy is accorded, [amicus curiae's] argument that an alternative remedy may be comparably superior, even if true, is not a sufficient basis for finding that the proposed final judgment is not in the public interest.").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree

[1] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). Therefore, 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; *Republic Serv.*, 2010 U.S. Dist. LEXIS 70895, at *158 (entering final judgment "[b]ecause there is an adequate factual foundation upon which to conclude that the government's proposed divestitures will remedy the antitrust violations alleged in the complaint.").

Moreover, in its 2004 amendments to the Tunney Act,[2] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous 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). The language wrote into the statute what Congress intended when it 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 Senator Tunney). Rather, the procedure for the public interest

[2] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

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.[3]

Plaintiffs the United States and the State of New York alleged in the Complaint that the acquisition of HWS by Stericycle would substantially lessen competition in the provision of infectious waste treatment services to customers in the New York City Metropolitan Area. The remedy in the proposed Final Judgment resolves the anticompetitive harm alleged by requiring Stericycle to divest HWS's Bronx, New York transfer station business. Stericycle has divested these assets to a viable acquirer approved by the United States after consultation with the State of New York. The public, including affected competitors and customers, have had the opportunity to comment on the proposed Final Judgment as required by law. No comments were received. The proposed Final Judgment is within the range of settlements consistent with the public interest.

IV. CONCLUSION

For the reasons set forth in this Motion and Memorandum, the Court should find that the proposed Final Judgment is in the public interest and should enter the proposed Final Judgment without further hearing. Plaintiffs respectfully request that the proposed Final Judgment attached hereto be entered as soon as possible.

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[3] *See 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"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Dated: June 23, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lowell R. Stern, hereby certify that on June 23, 2011, I caused a copy of the foregoing Plaintiffs Motion and Memorandum In Support for Entry of Final Judgment to be served upon Defendants Stericycle, Inc., SAMW Acquisition Corp., and Healthcare Waste Solutions, Inc. by mailing the documents electronically to the duly authorized legal representatives of Defendants as follows:

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