

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
STATE OF NEW YORK,	)	
COMMONWEALTH OF	)	Civil Action No.: CV 98-7168 (FB)
OF PENNSYLVANIA, and	)	
STATE OF FLORIDA,	)	
Plaintiffs,	)	
	)	Filed: 12/2/98
v.	)	
	)	
WASTE MANAGEMENT, INC.,	)	
OCHO ACQUISITION CORP., and	)	
EASTERN ENVIRONMENTAL	)	
SERVICES, INC.,	)	
Defendants.	)	

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

The United States of America, acting under the direction of the Attorney General of the United States, and the States of New York and Florida, and the Commonwealth of Pennsylvania, acting under the direction of their respective Attorneys General, bring this civil antitrust action to enjoin the acquisition of Eastern Environmental Services, Inc. ("Eastern") by Waste Management, Inc. ("Waste Management") and Ocho Acquisition Corporation ("Ocho") and to obtain equitable relief and other relief as is appropriate. Plaintiffs complain and allege as follows:

1. Waste Management, through its wholly owned subsidiary, Ocho, plans to acquire Eastern, pursuant to an Agreement and Plan of Merger entered into by defendants on August 16, 1998.

2. Eastern and Waste Management are vigorous competitors in numerous markets throughout the eastern United States for the disposal of municipal solid waste and/or the collection of commercial waste. In a significant number of markets, the combination of Eastern and Waste Management would eliminate one of only a few competitors. In those markets, the proposed acquisition would create a dominant firm, leaving few, or in some cases, no companies with the ability to compete effectively against the combined entity. Unless this acquisition is enjoined, consumers of waste collection and disposal services will likely face higher prices and reduced services as a result of the elimination of competition between Waste Management and Eastern.

3. The elimination of competition will be particularly severe in New York City. New York City is in the process of procuring a contract, with an estimated value of over \$6 billion, for the disposal of its residential waste for the next 20-30 years. Having reviewed proposals made by several firms in response to a Request for Proposals ("RFP"), the City is preparing to start contract negotiations with three firms. The defendants are two of only three firms in that negotiation. Because these three firms are the only firms likely to successfully perform the contract, unless the proposed acquisition is enjoined, the City will be faced with a drastic reduction in competition for this long-term procurement and its ability to negotiate competitive terms and prices for a critical municipal service will be severely impaired.

I. JURISDICTION AND VENUE

4. This action is filed by the United States of America under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain the violation by defendants of Section 7 of the Clayton Act, 15 U.S.C. § 18. The States of New York and Florida, and the Commonwealth of Pennsylvania bring this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain the violation by defendants of Section 7 of the Clayton Act, 15 U.S.C. § 18.

5. Defendants Eastern and Waste Management are located in and transact business in the Eastern District of New York. Venue is therefore proper in this district under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c).

6. Defendants Eastern and Waste Management collect solid waste from both residential and commercial customers, and they own and operate transfer stations, landfills and incinerators, which process and dispose of municipal solid waste. In their waste collection and waste disposal businesses, defendants make sales and purchases in interstate commerce, ship waste in the flow of interstate commerce and engage in activities substantially affecting interstate commerce. The Court has jurisdiction over this action and over the parties pursuant to 15 U.S.C. § 22 and 28 U.S.C. §§ 1331 and 1337.

II. DEFINITIONS

7. "MSW" means municipal solid waste, which includes garbage and most other types of household waste, as well as waste created by commercial establishments, and non-manufacturing activities in industrial facilities. MSW is a term defined by Pennsylvania statute and is comparable to the term "solid waste" used in New York statutes. MSW does not include

special handling waste (*e.g.*, waste from manufacturing processes, regulated medical waste, sewage, and sludge), hazardous waste, or waste generated by construction or demolition sites.

8. “RFP” means the Request For Proposals to Receive Solid Waste at a Marine Transfer Station Operated by the New York City Department of Sanitation and Dispose of the Solid Waste Received at an Out-of-City Facility, Procurement Identification No. 82797RR00104, dated June 16, 1997.

9. “Commercial waste collection” means the collection of solid waste generated by commercial establishments. Typical customers include office and apartment buildings and retail establishments (*e.g.*, stores and restaurants).

10. “Transfer station” means an intermediate disposal site, often used in more densely populated urban areas, for processing and temporary storage of solid waste before transfer, in bulk, to more distant disposal facilities for final disposal.

11. “Carlisle-Chambersburg market” means the counties of Adams, Franklin, and Cumberland, Pennsylvania, and all cities and towns therein.

12. “Miami-Ft. Lauderdale market” means the counties of Dade and Broward, Florida, including all cities and towns therein.

13. “Scranton market” means the counties of Luzerne and Lackawanna, Pennsylvania and all cities and towns therein.

14. “Hillsborough market” means those portions of Hillsborough County, Florida that were unincorporated as of June 10, 1983 pursuant to Chapter 83-415 of the Laws of Florida.

III. DEFENDANTS

15. Eastern is a Delaware corporation with its principal office in Mt. Laurel, New Jersey. Eastern is engaged in providing waste collection and disposal services throughout the eastern United States. In 1997, Eastern reported total revenues of \$96 million. Eastern Waste of New York, a wholly owned subsidiary of Eastern, is headquartered at 1281 Metropolitan Avenue, Brooklyn, New York.

16. Waste Management is a Delaware corporation with its principal office in Houston, Texas. Waste Management is the largest international and national provider of comprehensive waste management services, including waste collection and disposal services throughout the United States. In 1997, companies now part of Waste Management had revenues of about \$12 billion. Through its subsidiaries, Waste Management operates transfer stations at various locations in Brooklyn, including one located at 221 Varick Avenue, Brooklyn, New York.

17. Ocho is a wholly owned subsidiary of Waste Management. Pursuant to the August 16, 1998 Agreement and Plan of Merger, Ocho will be merged with and into Eastern, and the surviving corporation, Eastern, will be a wholly owned subsidiary of Waste Management.

IV. TRADE AND COMMERCE

A. The RFP for the Disposal of New York City Residential Waste

18. New York City generates about three million tons of residential solid waste a year. This waste is collected by the City's Department of Sanitation ("DOS"), and delivered to

seven City-owned transfer stations from which it is barged to the City-owned Fresh Kills Landfill, the only landfill located in New York City. In 1996, the State of New York, for environmental reasons, enacted a law mandating the closure of Fresh Kills by the end of December, 2001. In response, the City of New York has devised a plan to contract with private firms to transport and dispose of New York City residential solid waste at out-of-city disposal sites.

19. The RFP issued by DOS on June 16, 1997, solicited proposals from firms to purchase and operate a fleet of marine barges that would transport up to 12,000 tons a day of residential solid waste to one or more new, privately-owned and operated enclosed marine barge unloading facilities (“EBUFs”). The EBUFs would process the residential waste and ship it to an out-of-city final disposal site. The RFP anticipates that DOS will enter into 20 to 30 year contracts with one or more firms to dispose of residential solid waste generated in New York City. The contract(s) to be awarded have an estimated value of over \$6 billion, or more than \$200 million annually, making the procurement the largest in the history of New York City.

20. The RFP seeks proposals from responsible firms for the construction, operation and management of facilities to receive, process, transport and dispose of New York City’s residential waste. Proposals submitted in response to the RFP are separate and distinct from other products and New York City’s requirements are separate and distinct from other geographic areas. In addition, firms submitting proposals in response to the RFP can price discriminate -- in other words, they can charge different prices to New York City than are charged to other cities in the United States. New York City residential solid waste disposal

services required by the RFP is a line of commerce, or relevant product market, and New York City is an area of the country, or relevant geographic market under Section 7 of the Clayton Act.

21. Thirteen firms responded to the RFP. The proposals were carefully evaluated by DOS in several stages. Initially, DOS examined the proposals for completeness and responsiveness to the published specifications. Six firms were then selected by DOS and interviewed at length. As a result of the interviews and careful evaluation, DOS considered proposals from the four firms having the necessary technical requirements and qualifications to be worthy of further consideration. Those four proposals, submitted by Waste Management, Eastern, USA Waste Services, Inc. (“USA Waste”) and Browning-Ferris Industries, Inc. (“BFI”) were closely examined and written questions were posed to the firms. The final stage, which is scheduled to begin shortly, is the negotiation of final contract awards with the three firms to be named as finalists. Prior to the beginning of this final stage, Waste Management and USA Waste merged, reducing the number of finalists to three.

22. Only Waste Management, Eastern and BFI are capable of successfully performing under the RFP. The proposed merger combines two of the three finalists.

23. Aside from the three firms that New York City plans to negotiate with, there are no good alternatives for the permanent disposal of the City’s residential solid waste. Entry by another firm is unlikely because neither expanding the number of firms in the negotiation nor reissuing the RFP is a viable option for New York City to pursue. The City’s only realistic alternative is to negotiate with and choose among the only three firms that are capable of successfully performing the contract.

24. A merger of two of the only three finalists competing for the RFP would substantially increase concentration. This increase in concentration and reduction in the number of competitors will likely substantially reduce competition and adversely impact the ability of New York City to negotiate price and terms. In negotiating final contracts under the RFP, the elimination of Eastern will have an especially adverse impact on competition. The remaining firms, Waste Management and one other company, know that DOS has a strong preference to split the award among at least two firms. Absent the merger, each of the three finalists faces the risk that it will lose out entirely because the DOS could split the award between the other two finalists. Therefore, each has an incentive to compete aggressively by, for example, lowering its price to DOS. After the merger, the two remaining finalists will know that both firms likely will be awarded a contract for a substantial portion of New York City's residential waste, and there will be little incentive to compete aggressively.

B. Pennsylvania Municipal Solid Waste Disposal Markets

25. MSW disposal services in the Commonwealth of Pennsylvania are regulated and the requirements imposed by Pennsylvania law limit the means by which MSW can properly be disposed.

26. The Pennsylvania Solid Waste Management Act ("Solid Waste Act"), 35 P.S. § 6018.101 *et seq.*, is intended to protect the public by setting forth requirements for the proper disposal of solid waste in the Commonwealth of Pennsylvania. The statute authorizes the Pennsylvania Department of Environmental Protection to oversee the storage, collection, transportation, processing, treatment and disposal of non-hazardous solid waste including MSW,

through, among other things, a comprehensive system of permits and regulations governing Pennsylvania landfills.

27. Under the Solid Waste Act, MSW is routinely disposed of in landfills permitted under and regulated by the Commonwealth of Pennsylvania. MSW is hauled to landfill sites containing excavated cells designed, constructed and monitored to avoid damage to the environment. Pennsylvania requires that landfill operators submit detailed operational plans for controlling soil erosion and sedimentation and for covering the landfill on a daily basis. The Solid Waste Act also requires that new landfills and cells be properly lined and further equipped to monitor gas and water quality in the landfill area on a periodic basis. Finally, Pennsylvania landfill operators must meet financial stability criteria, acquire performance bonds and maintain a trust fund to cover the closure costs applicable to the landfill.

28. In Pennsylvania, MSW is a separate and distinct waste product. The statutes and regulations of the Commonwealth of Pennsylvania which regulate MSW and the physical characteristics of MSW result in MSW being stored, handled, hauled, and disposed of differently from other types of waste. Pennsylvania MSW disposal services is thus a line of commerce, or relevant product market, under Section 7 of the Clayton Act.

Effects on Competition in the Relevant Pennsylvania Geographic Markets

29. MSW is generally transported by collection trucks to landfills or transfer stations, and the availability of disposal sites close to a hauler's MSW routes is a major element that determines a hauler's competitiveness and profitability. The cost of transporting MSW to a disposal site is a substantial component of the cost of disposal. Although, where available,

MSW can be transported to distant landfills through transfer stations using large transfer trailer trucks, the use of transfer stations adds substantial additional fixed, transportation and processing costs. The cost advantages of local landfills limits the areas where MSW can be economically transported and disposed by haulers and creates localized markets for MSW disposal services.

Allegheny County

30. Due to the high costs of transporting MSW, and the substantial travel time to other landfills based on distance, natural barriers and congested roadways, haulers of MSW generated in Allegheny County are limited to landfills located in Allegheny County and in central Washington County, western Westmoreland County and Butler County (hereinafter the "greater Pittsburgh area"). Virtually all of the MSW generated in Allegheny County is disposed of exclusively in landfills in the greater Pittsburgh area. In addition, landfills in the greater Pittsburgh area price discriminate -- in other words, they charge higher prices to haulers of MSW generated in Allegheny County than they charge to other haulers outside of Allegheny County where more MSW disposal facilities are available to them. In the event of a small but significant price increase by landfills in the greater Pittsburgh area, haulers of MSW generated in Allegheny County would not turn to disposal facilities outside the greater Pittsburgh area.

31. Allegheny County is thus a section of the country, or relevant geographic market, within the meaning of the Clayton Act because landfills in the greater Pittsburgh area can identify and price differently to haulers of MSW generated in Allegheny County, and these haulers are unable to defeat a price increase by switching to landfills located outside the greater Pittsburgh area.

32. Waste Management and Eastern compete with each other and with other companies to provide disposal services to haulers of MSW generated in Allegheny County. Waste Management owns and operates several landfills in the greater Pittsburgh area, including the Monroeville Landfill in Monroeville, the South Hills Landfill in Library, the Valley Landfill in Irwin, the Arden Landfill in Washington and the Northwest Landfill in West Sunbury. Eastern owns and operates the Kelly Run Landfill in Elizabeth, Pennsylvania. Eastern purchased the Kelly Run Landfill in 1998 from USA Waste Services, Inc., a predecessor company of Waste Management, pursuant to a Final Judgment in the case United States v. USA Waste Services Inc., Civil No. 97-1524, (CCH) ¶ 71, 692 (W.D. Pa.,1997). The proposed re-purchase of the Kelly Run Landfill by Waste Management violates the Final Judgment in that case.

33. Waste Management and Eastern are the first and third largest disposers of MSW generated in Allegheny County. During the first six months of 1998, Waste Management accounted for approximately 50 percent of the market for disposal of MSW generated in Allegheny County and Eastern accounted for approximately 8 percent. Post-merger the acquisition would give Waste Management over 58 percent of the market and two firms would control over 90 percent of the market for disposal of MSW generated in Allegheny County. Using a measure of concentration called the Herfindahl-Hirschman Index ("HHI"), which is defined and explained in Appendix A, the post-merger HHI, based on the amount of MSW that was generated in Allegheny County and disposed of in the first six months of 1998, would be approximately 4500, an increase of in excess of 800 points over the pre-acquisition HHI. Thus, the acquisition by Waste Management of the Kelly Run Landfill owned by Eastern would substantially increase concentration in the market.

34. The substantial increase in concentration in the market for disposal of MSW generated in Allegheny County caused by the acquisition by Waste Management of Eastern's Kelly Run Landfill would likely understate the impact of the acquisition on competition. Downtown Pittsburgh and other heavily populated areas of Allegheny County are located on the southern side of the Ohio and Allegheny Rivers. Travel from north to south in the county is time-consuming because of the need to use bridges and tunnels. These physical constraints on travel result in three firms, Waste Management, Eastern and BFI, having substantial locational advantages in serving Pittsburgh and its close-in suburbs. After the acquisition, Waste Management will control four of the five landfills that are within 20 miles of downtown Pittsburgh and in the area of highest population in Allegheny County. More distant landfills in the greater Pittsburgh area, such as those located in Butler County, would not be realistic competitive alternatives south of the Allegheny and Ohio Rivers in the event of a small but significant price increase by landfills in that area.

35. Should Waste Management acquire the Kelly Run Landfill from Eastern, the substantial increase in concentration in the greater Pittsburgh area and the elimination of one of only three firms located within 20 miles of Pittsburgh will significantly increase the likelihood that consumers will face higher prices and poorer quality service for the disposal of MSW generated in Allegheny County.

36. Waste Management is also engaged in the collection and hauling of MSW in southern Allegheny County, where it is the dominant hauler. Post-acquisition, Waste Management would have an increased incentive to raise landfill rates to rival haulers in Allegheny County, to create a substantial barrier for entry to new haulers, or selectively to raise

prices to punish or impede independent haulers who attempt to compete with it in Allegheny County.

Carlisle-Chambersburg Market

37. Due to the high costs of transporting MSW, and the substantial travel time to other landfills based on distance, natural barriers and congested roadways, haulers of MSW generated in the Carlisle-Chambersburg market are limited to disposal sites located in Adams, Franklin and Cumberland Counties, and in western Dauphin County and northwestern York County (hereinafter the "greater Carlisle-Chambersburg area"). Virtually all of the MSW generated in the Carlisle-Chambersburg market is disposed of in disposal sites in the greater Carlisle-Chambersburg area. In addition, landfills in the greater Carlisle-Chambersburg area can price discriminate. In the event of a small but significant price increase by disposal sites in the greater Carlisle-Chambersburg area, haulers of MSW generated in the Carlisle-Chambersburg market would not turn to more distant disposal facilities.

38. The Carlisle-Chambersburg market is thus a section of the country, or relevant geographic market, within the meaning of the Clayton Act because disposal sites in the greater Carlisle-Chambersburg area can identify and price differently to haulers of MSW generated in the Carlisle-Chambersburg market, and these haulers are unable to defeat a price increase by switching to more distant disposal sites.

39. Waste Management and Eastern compete with each other and with other companies to provide disposal services to haulers of MSW generated in the Carlisle-Chambersburg market. Waste Management owns and operates the Mountain View Landfill in

Greencastle, Pennsylvania and the Dauphin Meadows Landfill in Millersburg, Pennsylvania and Eastern owns and operates the R&A Bender Landfill in Pleasant Hall, Pennsylvania. Waste Management and Eastern are the first and second largest disposers of MSW generated in the Carlisle-Chambersburg market. During the first six months of 1998, Waste Management accounted for approximately 35 percent of the market and Eastern accounted for approximately 29 percent. The acquisition would give Waste Management almost 64 percent of the market. The post-merger HHI, based on the amount of MSW that was generated in the Carlisle-Chambersburg market and disposed of in the first six months of 1998, would be at least 4300, an increase of approximately 2000 over the pre-acquisition HHI.

40. The substantial increase in concentration in the market for disposal of MSW generated in the Carlisle-Chambersburg market caused by the acquisition by Waste Management of Eastern's R&A Bender Landfill would likely understate the impact of the acquisition on competition. Waste Management's Mountain View Landfill and Eastern's R&A Bender Landfill are the only landfills located in Franklin County. The only nearby landfill, the Cumberland Landfill in western Cumberland County, has very limited remaining capacity. These three landfills currently receive all of the MSW generated in Franklin County. More distant landfills in western Dauphin County or western York County would not be realistic competitive alternatives in Franklin County or the western portions of Cumberland and Adams Counties in the event of a small but significant price increase by landfills in that area.

41. Should Waste Management acquire the R&A Bender Landfill from Eastern, the substantial increase in concentration in the greater Carlisle-Chambersburg area will significantly

increase the likelihood that consumers will face higher prices and poorer quality service for the disposal of MSW generated in the Carlisle-Chambersburg market.

42. Waste Management is also engaged in the collection and hauling of MSW in the Carlisle-Chambersburg market, where it is the dominant hauler. Post-acquisition, Waste Management would have an increased incentive to raise landfill rates to rival haulers, to create a substantial barrier for entry to new haulers, or selectively to raise prices to punish or impede independent haulers who attempt to compete with it.

Bethlehem/Allentown Market

43. Due to the high costs of transporting MSW, and the substantial travel time to other landfills based on distance, natural barriers and congested roadways, and the limited availability of transfer stations not owned by the merging parties, haulers of MSW generated in Lehigh and Northampton Counties, Pennsylvania are limited to landfills and transfer stations located in Northampton County and landfills in Berks and Schuylkill Counties, Pennsylvania (hereinafter the "greater Bethlehem area"). Approximately 85 percent of the MSW generated in Lehigh and Northampton Counties is disposed of in landfills in the greater Bethlehem area. In addition, landfills in the greater Bethlehem area can price discriminate against haulers from Lehigh and Northampton Counties. In the event of a small but significant price increase by landfills in the greater Bethlehem area, haulers of MSW generated in Lehigh and Northampton Counties would not turn to more distant disposal facilities.

44. Lehigh and Northampton Counties is thus a section of the country, or relevant geographic market, within the meaning of the Clayton Act because landfills in the greater

Bethlehem area can identify and price differently to haulers of MSW generated in the counties, and these haulers are unable to defeat a price increase by switching to landfills located outside the greater Bethlehem area.

45. Waste Management and Eastern compete with each other and with other companies to provide disposal services to haulers of MSW generated in Lehigh and Northampton Counties. Waste Management owns and operates the Grand Central Landfill in Pen Argyl, Pennsylvania and Eastern owns and operates the Bethlehem Landfill in Bethlehem, Pennsylvania. Both the Grand Central Landfill and the Bethlehem Landfill are located in Northampton County. Waste Management and Eastern are the first and second largest disposers of MSW generated in Lehigh and Northampton Counties. During the first six months of 1998, Waste Management accounted for over 38 percent of the market and Eastern accounted for over 31 percent. The acquisition would give Waste Management almost 70 percent of the market and three firms would control over 95 percent of the market for disposal of MSW generated in Lehigh and Northampton Counties. The post-merger HHI, based on the amount of MSW that was generated in Lehigh and Northampton Counties and disposed of in the first six months of 1998, would be approximately 5214, an increase of approximately 2410 over the pre-acquisition HHI.

46. The substantial increase in concentration in the market for disposal of MSW generated in Lehigh and Northampton Counties caused by the acquisition by Waste Management of Eastern's Bethlehem Landfill would likely understate the impact of the acquisition on competition because Waste Management is a dominant hauler and would have an increased incentive to raise landfill rates to rival haulers to create a substantial barrier for entry to new

haulers, or selectively to raise prices to punish or impede independent haulers who attempt to compete with it.

47. Should Waste Management acquire the Bethlehem Landfill from Eastern, the substantial increase in concentration in the greater Bethlehem area and the elimination of one of only three firms will significantly increase the likelihood that consumers will face higher prices and poorer quality service for the disposal of MSW generated in Lehigh and Northampton Counties.

Entry in the Pennsylvania MSW Disposal Markets

48. Obtaining regulatory approval to open a new landfill or incinerator in Pennsylvania is a difficult, risky, time consuming, and costly process that can take years. Commonwealth of Pennsylvania Executive Order 1996-5, Municipal Waste Facilities Review Program, August 29, 1996, which expands community input into the permitting process, creates additional obstacles for firms seeking disposal permits. Entry by a new disposal site would not be timely, likely or sufficient to prevent substantial harm to competition.

C. The Disposal of Commercial Solid Waste in New York City

49. New York City is a densely populated urban area. The only landfill in New York City, the City-owned Fresh Kills Landfill, takes virtually no commercial solid waste and there are no incinerators for solid waste in New York City. In addition, New York City-owned transfer stations used by the DOS to process and ship residential solid waste do not accept commercial solid waste. Commercial haulers must, therefore, rely on privately-owned New

York City transfer stations to dispose of commercial solid waste or transport it directly to transfer stations or incinerators in Northern New Jersey, or Westchester or Nassau Counties, NY. These out-of-city sites are too far away for direct shipments except for solid waste collected in outlying areas of the City.

50. The New York State Environmental Conservation Law sets forth requirements for the proper disposal of solid waste in the State of New York. The statute authorizes the New York State Department of Environmental Conservation to oversee the storage, collection, transportation, processing, treatment and disposal of non-hazardous solid waste through, among other things, a comprehensive system of permits and regulations governing transfer stations.

51. Under the New York State Environmental Conservation Law, transfer station operators submit detailed operational plans which indicate their full compliance with local solid waste management plans. Transfer station operators also must meet financial criteria and acquire performance bonds. In New York City, transfer stations are regulated pursuant to Local Law 42, by the Trade Waste Commission to ensure that operators meet standards of “good character, honesty, and integrity.”

52. In New York City, solid waste is a separate and distinct waste product. The statutes and regulations of the State of New York which regulate solid waste and the physical characteristics of solid waste result in solid waste being stored, handled, hauled, and disposed of differently from other types of waste. Since commercial solid waste haulers cannot use City-owned facilities, New York City commercial solid waste disposal services is a line of commerce, or relevant product market, under Section 7 of the Clayton Act.

53. Due to the high costs of transporting solid waste, and the substantial travel time to other disposal sites based on distance, bridges and congested roadways, commercial haulers of solid waste generated in most areas of New York City are limited to transfer stations within the City limits. Commercial solid waste haulers in New York City transport in excess of 8000 tons a day of commercial solid waste to privately-owned transfer stations located in New York City. These transfer stations are located in the boroughs of the Bronx, Brooklyn and Queens.

54. Commercial solid waste haulers in Brooklyn and lower Manhattan are generally limited by travel time and congested roadways to the use of transfer stations located in Brooklyn. Accordingly, a monopolist in Brooklyn, or in New York City generally, would be able to raise prices to local haulers with no practical alternatives, both in Brooklyn and City-wide. In the event of a small but significant price increase by transfer stations in Brooklyn or throughout New York City, haulers of commercial solid waste would not be able to defeat a price increase by turning to disposal facilities outside of Brooklyn or New York City respectively.

55. New York City and Brooklyn are thus each sections of the country, or relevant geographic markets, within the meaning of the Clayton Act because haulers of commercial solid waste generated in Brooklyn and throughout New York City are unable to defeat a price increase by switching to disposal facilities located outside of Brooklyn or New York City respectively. In addition, a number of transfer stations or incinerators close to New York City are owned by either Waste Management or Eastern.

56. Waste Management is the dominant owner of transfer stations in New York City today and has almost completed its construction of a new, large transfer station in the Bronx at the Harlem River Yard. The merger would eliminate Waste Management's largest competitor

for the disposal of commercial solid waste in Brooklyn. Waste Management currently controls approximately 51 percent of disposal capacity for commercial solid waste in Brooklyn and approximately 45 percent City-wide. Eastern controls one transfer station in Brooklyn and the only private putrescible solid waste transfer station in Nassau County. It also is permitting a large transfer station in Brooklyn at 222 Morgan Avenue that is likely to be open within two years. Currently, Eastern controls almost 15 percent of the transfer station capacity in Brooklyn and over six percent throughout the City. After the proposed merger, Waste Management would control over 65 percent of disposal capacity for commercial solid waste in Brooklyn and over 50 percent City-wide, even excluding the major transfer station site likely to be permitted by Eastern in the near future. The permitting of this site would raise Waste Management's post-merger share of capacity to 67 percent in Brooklyn and 54 percent city-wide. The post-merger HHI would be approximately 4700 in Brooklyn, an increase of about 1500 points. City-wide the post-merger HHI would be approximately 3000, an increase of approximately 600 points.

57. Post-acquisition, Waste Management will be able unilaterally to raise prices for haulers in Brooklyn, or in New York City generally, because of its dominant share, its superior transfer station locations, its ability to price discriminate, and the likelihood that some diverted waste would go to other disposal sites owned by the merged company.

D. Commercial MSW Collection Markets

58. Waste collection firms, or "haulers," collect MSW from residential, commercial and industrial establishments, and transport the waste to a disposal site, such as a transfer station, sanitary landfill or incinerator, for processing and disposal. Private waste haulers typically

contract directly with customers for the collection of MSW generated by commercial accounts. MSW generated by residential customers, on the other hand, is often collected by either local governments or by private haulers pursuant to contracts bid by, or franchises granted by, municipal authorities.

59. Commercial MSW collection differs in many important respects from collection of residential or other types of waste. An individual commercial customer typically generates substantially more MSW than a residential customer. To efficiently handle this high volume of MSW, haulers provide commercial customers with dumpsters -- small containers (1-10 cubic yards) for the storage of waste. Haulers organize commercial accounts into routes, and collect and generally transport MSW using vehicles uniquely well suited for commercial waste collection, such as front-end loader ("FEL") trucks.

60. On a typical commercial MSW collection route, an FEL truck collects waste from several businesses' dumpsters. At each stop, the MSW is compacted and stored inside the FEL truck. The driver continues along the route, collecting MSW until the truck is full. The FEL truck driver then deposits the truck's contents at a disposal facility, usually a transfer station, landfill or incinerator.

61. Residential MSW collection is significantly more labor intensive than commercial MSW collection. Residential MSW is stored in much smaller containers (*e.g.*, garbage bags or trash cans) and instead of FEL trucks, haulers generally use rear-end load or sideload trucks, manned by larger crews, usually, two-to-three-man teams. On residential routes, the crews must hand-load the MSW, tossing garbage bags and emptying trash cans into the truck's storage section. The different collection methods cause haulers to organize residential and commercial

MSW customers into separate routes. Furthermore, collection of other types of commercial waste cannot be easily collected on a commercial MSW route. For example, collection of construction and demolition debris (“C&D” waste) is done with roll-off trucks. In addition, C&D waste must be taken to different disposal sites than MSW. Similarly, liquid waste and hazardous waste require different equipment and different disposal than MSW.

62. The differences in the types and volume of waste collected and in equipment used in their collection activities distinguish commercial MSW collection from all other types of waste collection. Commercial MSW hauling customers faced with a price increase could not switch to a firm that collects a different type of waste. Thus, commercial MSW collection firms could profitably increase prices for commercial MSW collection without losing sales to firms that collect other types of waste. Commercial MSW collection is a line of commerce, or relevant product market, for purposes of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

63. Commercial MSW collection services are generally provided in very localized areas because to operate efficiently and profitably, a hauler must have sufficient density in its commercial MSW collection operations, *i.e.*, a large number of commercial accounts that are reasonably close together. In addition, it is not economically efficient for front-end loader vehicles to travel long distances without collecting significant amounts of MSW, making it impractical for a hauler to serve major metropolitan areas from a distant base.

64. Customers of commercial MSW collection firms in the Carlisle-Chambersburg and Scranton, Pennsylvania markets, and the Hillsborough County and Miami - Ft. Lauderdale markets in Florida, have no alternatives if the commercial MSW haulers in these markets raised

prices, because more distant MSW haulers could not profitably take their waste. Each of these areas is a relevant market for the purpose of analyzing the effects of the acquisition under Section 7 of the Clayton Act.

Carlisle-Chambersburg, Pennsylvania

65. In the Carlisle-Chambersburg market, the proposed merger would reduce from four to three the number of significant firms that compete in commercial MSW collection. Waste Management would control in excess of 50 percent of total market revenues of over \$7 million annually. The post-merger HHI would be over 3500, an increase in excess of 1000 points.

Scranton, Pennsylvania

66. In the Scranton market, the proposed merger would reduce from three to two the number of significant firms that compete in commercial MSW collection. Waste Management would control in excess of 50 percent of total market revenues of over \$20 million annually. The post-merger HHI would be over 3000, an increase in excess of 900 points.

Hillsborough County, Florida

67. In the Hillsborough market, the proposed merger would reduce from three to two the number of firms that compete in commercial MSW collection. Waste Management would control in excess of 80 percent of total market revenues of over \$20 million annually. The post-merger HHI would be over 6500, an increase in excess of 3000 points.

Miami - Ft. Lauderdale, Florida

68. In the Miami-Ft. Lauderdale market, the proposed merger would reduce from four to three the number of significant firms that compete in commercial MSW collection. Waste

Management would control about 55 percent of total market revenues of over \$150 million annually. The post-merger HHI would be about 4000, an increase of about 700 points.

69. Significant new entry into commercial MSW collection is difficult and time-consuming in the Carlisle-Chambersburg, Scranton, Hillsborough and Miami - Ft. Lauderdale markets. A new entrant into commercial MSW collection cannot provide a significant competitive constraint on the prices charged by market incumbents until it achieves minimum efficient scale and operating efficiencies comparable to existing firms. In order to obtain comparable operating efficiency, a new firm must achieve route density comparable to existing firms. However, the incumbents' use of price discrimination and long-term contracts prevents new entrants from winning a large enough base of customers to achieve efficient routes in a short period of time or at pre-entry prices. In addition, in the Hillsborough market, entry into commercial MSW collection is limited to firms with residential collection franchises. In the Hillsborough market, these legal restrictions prevent entry altogether.

70. In each of the markets listed above, Waste Management's acquisition of Eastern would remove a significant competitor in commercial MSW collection in already highly concentrated and difficult-to-enter markets. In each of these markets, the resulting substantial increase in concentration, loss of competition, and absence of reasonable prospects for significant new entry make it likely that consumers will pay substantially higher prices for collection of commercial waste following the acquisition.

V. VIOLATION ALLEGED

71. On or about August 16, 1998, defendants entered into a letter of intent pursuant to which Waste Management would acquire all of the outstanding voting securities of Eastern. The purchase price is approximately \$1.2 billion. The likely effect of the acquisition is to substantially lessen competition -- and in some markets, to tend to create a monopoly -- in interstate trade and commerce in violation of Section 7 of the Clayton Act.

72. The transaction likely will have the following effects, among others:

- a. competition for the award of the RFP for New York City residential solid waste disposal will be lessened significantly, from three competitors to two;
- b. actual competition between Eastern and Waste Management for the RFP award will be eliminated;
- c. prices charged to New York City under the RFP will likely increase;
- d. competition generally by private transfer stations for the disposal of commercial solid waste in New York City will be lessened significantly;
- e. actual and potential competition between Eastern and Waste Management in the disposal of commercial solid waste in New York City will be lessened significantly;
- f. prices charged by transfer stations in New York City will likely increase;
- g. competition generally in disposal of MSW in the Allegheny County, Allentown-Bethlehem, and the Carlisle-Chambersburg markets in Pennsylvania will be lessened substantially;

- h. actual and potential competition between Eastern and Waste Management in the disposal of MSW in the Allegheny County, Allentown-Bethlehem, and Carlisle-Chambersburg markets in Pennsylvania will be eliminated;
- i. prices for disposal of MSW in the Allegheny County, Allentown-Bethlehem, and the Carlisle-Chambersburg markets in Pennsylvania likely will increase;
- j. competition generally in commercial MSW hauling in the Carlisle-Chambersburg, Scranton, Hillsborough and Miami - Ft. Lauderdale markets will be substantially lessened;
- k. actual and potential competition between Eastern and Waste Management in commercial MSW hauling in the Carlisle-Chambersburg, Scranton, Hillsborough and Miami - Ft. Lauderdale markets will be eliminated; and
- l. prices charged by commercial MSW collection firms in the Carlisle-Chambersburg, Scranton, Hillsborough and Miami - Ft. Lauderdale markets will likely increase.

VI. REQUESTED RELIEF

Plaintiffs request:

- 1. That Waste Management's proposed acquisition of Eastern be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act;
- 2. That defendants be preliminarily and permanently enjoined from carrying out their Agreement and Plan of Merger dated August 16, 1998, or from entering into or carrying out

any agreement, understanding or plan, the effect of which would be to combine the businesses or assets of defendants;

3. That all officers, employees, directors or agents of Waste Management who received any confidential business information relating to Eastern's proposal in response to the New York City RFP be enjoined from participating in final negotiations for the RFP or from communicating any such confidential information to any person except as authorized by any protective order entered in this case;

4. That all officers, employees, directors or agents of Eastern who received any confidential business information relating to Waste Management's proposal in response to the New York City RFP be enjoined from participating in final negotiations for the RFP or from communicating any such confidential information to any person except as authorized by any protective order entered in this case;

5. That plaintiffs have such other and further relief as the case requires and the Court deems proper; and

6. That plaintiffs recover the costs of this action.

Dated: December 1, 1998

Respectfully submitted,

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APPENDIX A

HERFINDAHL-HIRSCHMAN INDEX CALCULATIONS

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. See *Merger Guidelines* §1.51.