UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. IRON MOUNTAIN INC., and RECALL HOLDINGS LTD., *Defendants.*	Civil Action No. 1:16-cv-00595-APM Judge Amit P. Mehta

RESPONSE OF THE UNITED STATES TO
PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to a single public comment received regarding the proposed Final Judgment in this case. After consideration of the submitted comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this Response have been published in the *Federal Register* pursuant to 15 U.S.C. § 16(d).

I. BACKGROUND

On March 31, 2016, the United States filed the Complaint in this matter, alleging that defendant Iron Mountain Inc.'s ("Iron Mountain") acquisition of defendant Recall Holdings Ltd.

("Recall") likely would substantially lessen competition in the provision of hard-copy records management services in several markets in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint further alleged that, as a result of the acquisition as originally proposed, prices for these services likely would have increased and customers would have received services of lower quality.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment, a Hold Separate Stipulation and Order, and a Competitive Impact Statement ("CIS") that explains how the proposed Final Judgment is designed to remedy the likely anticompetitive effects of the proposed acquisition. As required by the Tunney Act, the United States published the proposed Final Judgment and CIS in the *Federal Register* on April 11, 2016. *See* 81 Fed. Reg. 21,383 (Apr. 11, 2016). In addition, the United States ensured that a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments, were published in *The Washington Post* on seven different days during the period of April 4, 2016, to April 10, 2016. *See* 15 U.S.C. §16(c). The 60-day waiting period for public comments ended on June 10, 2016. One comment was received and is described below and attached as Exhibit 1.

II. THE INVESTIGATION AND PROPOSED RESOLUTION

After Iron Mountain and Recall announced their plans to merge, the United States conducted an investigation into the competitive effects of the proposed transaction. The United States considered the potential competitive effects of the transaction on hard-copy records management services ("RMS") in a number of geographic areas. As a part of this investigation, the United States obtained documents and information from the merging parties and others and

conducted more than 160 interviews with customers, competitors, and other individuals knowledgeable about the industry.

RMS involves the off-site storage of records and the provision of services related to records storage. For a variety of legal and business reasons, companies frequently must keep hard-copy records for significant periods of time. Given the physical space required to store any substantial volume of records and the effort required to manage stored records, many customers contract with RMS vendors such as Iron Mountain and Recall to provide these services. RMS vendors typically pick up records from customers and bring them to a secure off-site facility, where they index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for customers upon request and often perform other services related to the storage, tracking, and shipping of records. For example, they sometimes destroy stored records on behalf of the customer once preservation is no longer required.

Customers often procure RMS through competitive bidding and have contracts that usually specify fees for each service provided (*e.g.*, pick-up, monthly storage, retrieval, delivery, and transportation). Most customers purchase RMS in only one city. Customers with operations in multiple cities sometimes purchase RMS from a single vendor pursuant to a single contract. But, other multi-city customers purchase RMS under separate contracts for each city, often using different vendors in different cities.

The provision of RMS generally occurs in localized markets in a radius around a metropolitan area. Customers generally require a potential RMS vendor to have a storage facility located within a certain proximity to the customers' locations. Customers generally will not consider vendors located outside a particular radius, because the vendor will not be able to retrieve and deliver records on a timely basis. The travel radius a customer is willing to consider

is usually measured in time, rather than miles, as retrieval of records is often a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

After its investigation, the United States concluded that the proposed transaction likely would substantially lessen competition in the provision of RMS in 15 metropolitan areas: Detroit, Michigan; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh, Pennsylvania; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego, California; Atlanta, Georgia; and Seattle, Washington. In each of these geographic areas, Iron Mountain and Recall are two of only a few significant firms providing RMS. As explained more fully in the Complaint and the CIS, in each of these areas, the resulting substantial increase in concentration and loss of head-to-head competition between Iron Mountain and Recall likely would result in higher prices and lower quality service for RMS customers in each of the relevant metropolitan areas. Complaint ¶ 18; CIS § II(B).

The proposed Final Judgment is designed to address competitive concerns in each of these 15 metropolitan areas. The proposed Final Judgment contemplates divesting Recall assets in 13 metropolitan areas to Access CIG, LLC ("Access") and Recall assets in the remaining two metropolitan areas (Atlanta and Seattle) to Acquirers who will be identified to and approved by the United States in the future. Divestiture of the assets to independent, economically viable competitors will ensure that customers of these services will continue to receive the benefits of competition.

The proposed Final Judgment requires the divestiture of over 26 Recall facilities, together with associated assets, including customer contracts. With respect to customer contracts, the

proposed Final Judgment addresses the situation in which a Recall customer has records stored in more than one metropolitan area, which are covered by the same contract, and as a result of the divestitures, a portion of their records will be stored by Defendants and another portion will be stored by an Acquirer. Section II.L of the proposed Final Judgment defines these customers as "Split Multi-City Customers." To protect the interests of Split Multi-City Customers, Section IV.J of the proposed Final Judgment allows Split Multi-City Customers to terminate or otherwise modify their existing Recall contracts to enable them to transfer their records from an RMS facility retained by Defendants to a facility owned by an Acquirer without paying permanent withdrawal fees, retrieval fees, or other fees required under their contracts with Recall. This will ensure that the Acquirer of the Divestiture Assets can compete to provide RMS to customers that are served by both divested RMS facilities and RMS facilities retained by Defendants.

III. STANDARD OF JUDICIAL REVIEW

The Tunney Act requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day public comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1). 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 also United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 10-11 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, No. 08-cv-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (discussing nature of review of consent judgment under the Tunney Act; inquiry is limited to "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").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the Complaint, whether the decree is sufficiently clear, whether the 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)). Instead, 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).

In determining whether a proposed settlement is in the public interest, "the court 'must accord deference to the government's predictions about the efficacy of its remedies.'" *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014) (quoting *SBC Commc'ns*, 489 F. Supp. 2d at 17); *see also Microsoft*, 56 F.3d at 1461 (noting that the government is entitled to deference as to its "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 the proposed remedies, its perception of the market structure, and its views of the nature of the case"); *United States v. Morgan Stanley*, 881 F. Supp. 2d 563, 567-68 (S.D.N.Y. 2012) (explaining that the government is entitled to deference in choice of remedies).

Courts "may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17. Rather, the ultimate question is 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.'" *Microsoft*, 56 F.3d at 1461. Accordingly, 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; *see also United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012). And a "proposed decree 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 the public interest." *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations and internal quotations omitted); *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).

In its 2004 amendments to the Tunney Act,[1] Congress made clear its intent to preserve the practical benefits of using 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 procedure for the public-interest 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 the Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11; *see also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) ("[T]he Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to public comments alone."); *US Airways*, 38 F. Supp. 3d at 76 (same).

IV. SUMMARY OF PUBLIC COMMENT AND THE RESPONSE OF THE UNITED STATES

A. Summary of NRC's Comment

During the 60-day public comment period, the United States received one comment from National Records Centers, Inc. ("NRC"). NRC is a nationwide RMS provider that competes with the Defendants and Access in multiple metropolitan areas. NRC asserts that the "proposed acquisition will have an anticompetitive effect and a detrimental impact on the customers of Iron Mountain, Recall, and Access throughout the United States" and urges the United States to "re-think the Iron Mountain/Recall merger in its totality," and block the merger.

In the alternative, NRC urges modification of the proposed Final Judgment to allow all Recall customers affected by the merger to transfer their records to any RMS provider without

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to 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).

penalty. NRC believes the proposed Final Judgment limits customer choice by forcing customers to switch to Access as the divestiture buyer (or to another approved Acquirer). NRC argues that, in lieu of requiring divestitures to Access (or to another Acquirer), the United States "should just simply allow those customers affected by the merger out of their contracts, without penalty, should they choose to do so" such that customers could select their RMS vendor instead of "staying with [Defendants] or going to [Access or another Acquirer]."

NRC also proposes two modifications to the proposed Final Judgment and contends the proposed definition of Split Multi-City Customer is overly restrictive. First, NRC argues that Split Multi-City Customers should be allowed to terminate their contracts with Defendants without penalty under Section IV.J and switch to NRC or some other RMS vendor. NRC would also extend the period for a customer to elect to move its records without penalty under Section IV.J from one to three years. Second, NRC proposes that the definition of Split Multi-City Customer be broadened by deleting the following from Section II.L: "A Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records."

B. Response of the United States to NRC's Comment

1. Divestitures in the 15 Relevant Geographic Markets are Sufficient to Preserve Competition

NRC complains that limiting divestitures to 15 geographic areas is not enough to protect competition. However, because competition for the provision of RMS generally occurs in localized markets in a radius around a metropolitan area, requiring divestitures in those local geographic areas in which the transaction would result in substantial increase in concentration and loss of head-to-head competition between Iron Mountain and Recall is appropriate to preserve competition.

As described in Section II above, because of a strong customer desire for timely pick-up and delivery of records, customers typically procure services from RMS vendors located within the same metropolitan area as the customer. RMS vendors located outside a given local geographic area generally are considered by customers to be located too far away to be a viable RMS vendor. Further, RMS vendors located outside the local geographic area generally are unable to compete effectively as the distance from the customer's locations to the RMS vendor's facilities render the RMS vendor uncompetitive on price as well as service. Even large customers that choose one vendor across multiple local geographic areas generally require the single RMS vendor to be present in all of the local geographic areas where the customer is located. Accordingly, the United States focused on the potential competitive impact of the transaction on the local geographic level.

Over the course of its investigation, the United States determined that the proposed acquisition likely would lessen competition in 15 local geographic markets that are identified in the Complaint. The United States did not identify a competitive problem in any other geographic markets where Iron Mountain and Recall compete. Because Defendants agreed to a divestiture remedy to address the competitive issues in the 15 relevant geographic markets, the United States determined that blocking the merger was not necessary and that requiring divestitures in the affected 15 relevant geographic markets is sufficient to protect competition.

2. Access is an Appropriate Buyer for the Divested Assets

NRC complains that Access is not an appropriate buyer for the Divestiture Assets. Access is a multi-city RMS vendor and the third-largest RMS vendor nationally, but it lacks RMS facilities in the 13 metropolitan areas where it is acquiring RMS facilities from the Defendants. Because Access lacked RMS facilities in these areas, it was not a viable

competitive alternative to Iron Mountain or Recall to serve customer locations in these areas. The divestiture of Recall's RMS assets to Access in these areas establishes Access as a viable competitor in those areas and, thus, maintains existing competition that would otherwise be lost. The proposed Final Judgment does not direct Defendants to sell divestiture assets in the remaining two areas—Seattle and Atlanta—to Access, as Access is a significant competitor in these areas.

While the identity of the Acquirer or Acquirers of the assets in Seattle and Atlanta has yet to be determined, any proposed Acquirer will be subject to the United States' approval under Section IV of the proposed Final Judgment. Pursuant to Section IV.L, Defendants must divest the Divestiture Assets in such a way as to satisfy the United States that the assets can and will be operated by the purchasers as viable, ongoing records management businesses that can compete effectively in the relevant markets. Because Access (and other Acquirers) will effectively replace the lost competition, the proposed Final Judgment is in the public interest. *See Microsoft*, 56 F.3d at 1459-61 (noting that the government has discretion to settle "within the reaches of the public interest").

3. Limiting the Right to Terminate Recall Contracts to Customers in the 15 Relevant Geographic Markets is Sufficient to Preserve Competition

NRC proposes a modification to Section IV.J to grant all Recall customers, wherever they are located, the right to terminate their contracts with Recall without penalty in order to switch to NRC or some other RMS vendor. The proposed Final Judgment is not designed to assist NRC or other RMS vendors to obtain Recall customers. The purpose of the proposed Final Judgment is to ensure that the Acquirers of the Divested Assets will be viable, ongoing RMS businesses that can compete effectively in the 15 relevant geographic markets. Because the United States determined that the transaction would likely lead to competitive harm in 15

local geographic areas, the proposed Final Judgment is designed only to address competitive harm to customers who are served in some capacity by Defendants' RMS facilities located in the 15 relevant geographic markets alleged in the Complaint. NRC's proposal would expand the scope of the decree beyond the 15 relevant geographic markets alleged in the Complaint. Including all Recall customers outside the 15 markets would far exceed what is necessary to remedy the harm found by the United States and alleged in the Complaint. *See Microsoft*, 56 F.3d at 1459-60 (discussing nature of review of consent decrees as limited to the allegations made).

4. The Definition of Split Multi-City Customers is Appropriate for the Preservation of Competition

NRC proposes that the last sentence of Section II.L of the proposed Final Judgment, which states that "[a] Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records," be struck. The proposed Final Judgment is designed to allow customers with the preference for a single vendor pursuant to a single contract to transfer their records such that the records will not be stored at facilities managed by different vendors (*i.e.*, Iron Mountain and an Acquirer of the Divestiture Assets). As noted above, some customers prefer to use a single vendor pursuant to a single contract for all their RMS needs, while other customers use separate contracts for different metropolitan areas. The proposed Final Judgment limits this right to customers who have expressed this preference by having a single contract with a single vendor. The proposed Final Judgment does not include customers who have chosen to disaggregate their RMS business with separate contracts for each metropolitan area in which they store records. The contracts for disaggregated customers will either be divested or retained by Defendants, as appropriate, depending on whether each contract covers services in one of the 15 relevant geographic markets where harm is alleged. For that

reason, the definition of Split Multi-City Customers is an effective and appropriate remedy for the antitrust violations alleged in the Complaint. *See Microsoft*, 56 F.3d at 1459-61 (discussing government's "broad discretion to settle with the defendant within the reaches of the public interest").

5. Allowing Split Multi-City Customers One Year to Transfer Records is Appropriate for the Preservation of Competition

NRC proposes that Split Multi-City Customers be allowed to transfer their records to any RMS provider for a period of three years rather than the one-year period allowed under Section IV.J. The goal of the divestitures is to allow for the divested assets to be operated as viable, ongoing businesses that can compete effectively in the relevant markets. It is in the best interest of the industry and competition that any period of disruption or uncertainty in the relevant markets be minimized. For these reasons, limiting to a one-year period the right of Split Multi-City Customers to transfer their records provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint. *See Microsoft*, 56 F.3d at 1459-61 (discussing government's "broad discretion to settle with the defendant within the reaches of the public interest").

V. CONCLUSION

After reviewing the one public comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is in the public interest. The United States will move this Court to enter the Final Judgment soon after the comment and this Response are published in the *Federal Register*.

Dated: August 29, 2016

Respectfully submitted,

/s/

Soyoung Choe
U.S. Department of Justice, Antitrust Division
Networks & Technology Enforcement Section
450 Fifth Street NW, Suite 7100
Washington, DC 20530
Telephone: (202) 598-2436
Facsimile: (202) 514-9033
Email: soyoung.choe@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2016, the foregoing Notice of Extension of Time was filed using the Court's CM/ECF system, which shall send notice to all counsel of record.

/s/

Soyoung Choe
U.S. Department of Justice, Antitrust Division
Networks & Technology Enforcement Section
450 Fifth Street NW, Suite 7100
Washington, DC 20530
Telephone: (202) 598-2436
Facsimile: (202) 514-9033
Email: soyoung.choe@usdoj.gov