UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ENERGY SOLUTIONS, INC., ROCKWELL HOLDCO, INC., ANDREWS COUNTY HOLDINGS, INC.,

and

WASTE CONTROL SPECIALISTS LLC,

Defendants.

Civil Action No.: 1:16-cv-01056-GMS

UNITED STATES' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER

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NATURE AND STAGE OF THE PROCEEDINGS

On November 16, 2016, the United States filed this antitrust action for injunctive relief to prevent Energy Solutions ("ES"), a wholly owned subsidiary of Rockwell Holdco, Inc., from acquiring Waste Control Specialists LLC ("WCS"), a wholly owned subsidiary of Andrews County Holdings, Inc. As alleged in the Complaint, this merger would violate Section 7 of the Clayton Act, because it would: combine the only two licensed commercial low-level radioactive waste ("LLRW") disposal facilities for 36 states (including Delaware), Puerto Rico and the District of Columbia; eliminate the most significant competitor ES has ever had to face; and would likely lead to higher prices and reduced innovation. Compl. ¶ 1, D.I. 1.[1] On November 23, 2016, Defendants filed a Motion to Transfer to the Western District of Texas. At the Defendants' request, the United States agreed to an expedited briefing schedule.

SUMMARY OF ARGUMENT

1. Although not discussed anywhere in their papers, Defendants – all of whom are Delaware entities – chose Delaware in their merger agreement and its amendments as the preferred forum for litigating disputes relating to this merger. Despite their prior agreement that Delaware is a convenient and proper forum, Defendants now seek a transfer to the Western District of Texas, a District in which none of the Defendants maintain corporate headquarters and where little, if any, of the corporate decision-making that led up to the merger occurred.

2. It is well-settled that defendants seeking to transfer a case face a "heavy" burden. *TSMC Tech., Inc. v. Zond, LLC*, No. 14-721-LPS-CJB, 2015 WL 328334, at *1 (D. Del. Jan. 26, 2015). Notably, this burden is heightened where, as here, the United States brings an antitrust

[1] Section 7 of the Clayton Act prohibits acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (2012).

enforcement action because the United States' choice of forum is given "heightened respect." *United States v. Brown Univ.*, 772 F. Supp. 241, 242 (E.D. Pa. 1991) (listing cases). In deciding whether a defendant has satisfied its heavy burden of showing that transfer is appropriate, courts in this Circuit apply the familiar multi-factor test set forth in *Jumara v. State Farm Insurance Co.*, 55 F.3d 873, 879-80 (3d Cir. 1995).

3. With respect to the *Jumara* private interest factors, the United States' decision to file this action in this District is afforded "substantial weight" because it has legitimate and rational reasons for choosing to enjoin Defendants' merger in Delaware. *TSMC*, 2015 WL 328334, at *1. Defendants will not suffer any undue hardship if required to litigate this action in the District where they voluntarily chose to incorporate. In fact, Defendants expressly agreed to litigate their merger-related disputes in Delaware, and agreed to waive any objections on the grounds that Delaware is an inconvenient forum. Moreover, the act that will formally consummate Defendants' presumptively unlawful merger – the filing of the merged firm's certificate of incorporation – would take place in this District. Because Congress has provided for nationwide service of process in antitrust enforcement actions, Defendants cannot show that any potential witnesses would be unavailable in Delaware.

4. The *Jumara* public interest factors also favor keeping this case in Delaware. The Defendants fail to consider the ways in which transfer to the Western District of Texas would impose a significant burden on third parties and the United States, almost none of which are known to be located in that District. Contrary to Defendants' assertion, this case does not raise issues that are uniquely important to the State of Texas. Indeed, the Complaint expressly alleges that customers in Delaware – as well as 35 other states, Puerto Rico, and the District of Columbia – will likely be harmed if Defendants' merger is consummated.

5. For these reasons, as well as those discussed below, Defendants' motion for transfer should be denied.

STATEMENT OF FACTS

ES and, its parent, Rockwell Holdco, Inc., are both incorporated in Delaware. *See* Compl. ¶ 81, D.I. 1. ES is a global vertically integrated nuclear services company with headquarters in Salt Lake City, Utah, and operations throughout the United States and abroad. *See* Bhagat Decl., Ex. 1, ES Homepage, at 2.[2] ES owns and operates a licensed LLRW disposal facility in Utah and operates another LLRW disposal facility in South Carolina. *See* Bhagat Decl., Ex. 2, ES Locations. ES also operates processing facilities in Tennessee. *Id*. ES has no known facilities, offices or employees in Texas. *Id.* ES earns roughly $112 million annually from LLRW disposal services in the United States and has total revenues of approximately $1 billion. *See* Compl. ¶ 12, D.I. 1.

WCS is a wholly owned subsidiary of Andrews County Holdings, a Delaware corporation. Andrews County Holdings is a holding company with no employees or operations. *See* Samford Decl. ¶¶ 3,6, D.I. 20; Compl. ¶ 13, D.I. 1. WCS is a Delaware limited liability company with corporate headquarters in Dallas, Texas, which is located in the Northern District of Texas. Samford Decl. ¶¶ 4, 6, D.I. 20. Defendants have not sought to transfer this action to the Northern District of Texas. *See* Defs' Br., D.I. 18. WCS provides LLRW disposal services to LLRW generators located throughout the United States. *See* Compl. ¶ 13, D.I. 1. In 2015, WCS earned revenues of approximately $45 million. *See id*.

[2] All exhibits named with numbers are attached to the Bhagat Declaration.

On November 18, 2015, Defendants entered into the merger agreement that is the subject matter of this litigation. *See* Hauck Decl., Ex. A, Executed Purchase Agreement.[3] The drafting, negotiation, and execution of this agreement appeared to involve executives and lawyers in New York, New York; Los Angeles, California; Dallas, Texas; Salt Lake City, Utah; and Short Hills, New Jersey -- none of whom are located in the Western District of Texas. *See* Hauck Decl., Ex. B, Negotiation.

The merger agreement requires that the "Amended Certificate of Incorporation" for the merged firm be "filed with and certified by the Secretary of State of the State of Delaware." Hauck Decl., Ex. A § 8.06. The merger agreement provides that "any claim, action, dispute or remedy arising from or relating to this Agreement shall be governed by, and construed in accordance with, the applicable laws of the state of Delaware," and that "any such Action, Claim, dispute or remedy may be heard and determined in such Delaware court or, to the extent permitted by Applicable Law, in such federal court." *Id.* §§ 13.14, 13.15(a).[4] The merger agreement also provides that "[e]ach Party irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so . . . any objection that it may now or hereafter have to the laying of venue of any Action arising out of or relating to this Agreement or any related matter in any Delaware state or federal court." *Id.* § 13.15(b).

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[3] All exhibits named with letters are attached to the Hauck Declaration.

A publicly available version of the Purchase Agreement contains the relevant provisions of the executed Purchase Agreement but under different section headings. The publicly available version of the Purchase Agreement can be found in Exhibit 2-1 of Valhi, Inc.'s 8-K dated November 19, 2015, available at http://www.valhi.net/phoenix.zhtml?c=103380&p=irol-sec. For the sake of completeness, the United States has provided the executed version of the Purchase Agreement for the Court. *See* Hauck Decl., Ex. A.

[4] The merger agreement also contains a separate Venue Agreement governing certain other matters. *See* Hauck Decl., Ex. C. The Venue Agreement appears to be moot as a result of the Fourth Amendment to Purchase Agreement. *See* Bhagat Decl., Ex. 3, ¶ 7.

On November 16, 2016, the United States filed the instant action seeking to enjoin Defendants from consummating their proposed merger and delivering their amended certificate of incorporation to the Secretary of State of Delaware. Nearly contemporaneously with the filing of this case, Defendants executed a Fourth Amendment to the merger agreement, which, among other things, memorializes each Defendant's financial obligations with respect to the defense of this litigation. Defendants expressly reaffirmed that this amendment to the merger agreement "shall be governed by, and construed in accordance with, the applicable laws of the State of Delaware applicable to contracts made and to be performed in that state without giving effect to choice of law rules that would require the application of the law of another jurisdiction." *See* Bhagat Decl., Ex. 3, Fourth Amendment to Purchase Agreement, ¶ 11.

ARGUMENT

I. Defendants Must Satisfy a Heavy Burden to Overcome the Substantial Deference Accorded to Plaintiff's Choice of Forum

In this Circuit, it "is black letter law that a plaintiff's choice of a proper forum . . . should not be lightly disturbed" and that transfer is "not to be liberally granted." *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970) (internal citations omitted). In accordance with *Jumara v. State Farm Insurance Co.*, district courts in this Circuit weigh a variety of public and private interest factors when making transfer determinations. 55 F.3d at 879-80. The private interest factors include the plaintiff's forum preference; the defendant's forum preference; whether the claim arose elsewhere; the convenience of the parties; and the convenience of the witnesses. *Id.* at 879.[5] The public interest factors include practical considerations that could make the trial easy, expeditious, or inexpensive; and the local interest in deciding local controversies at home.

[5] The "location of books and records" is a private interest factor. *See Jumara*, 55 F.3d at 879. Because Defendants' papers do not discuss this factor, this factor provides no support for transfer.

Id. at 879-880.[6] Defendants seeking to transfer an action properly brought in this District bear the burden of establishing that "the balance of convenience of the parties is *strongly* in favor [of transfer]." *Shutte*, 431 F.2d at 25 (emphasis added); *see also CNH Am. LLC v. Kinzenbaw,* No. 08–945 (GMS), 2009 WL 3737653, at *2 (D. Del. Nov. 9, 2009) (same). Notably, courts have repeatedly held that "the burden on [d]efendant[s] to justify transfer is always a heavy one." *TSMC*, 2015 WL 328334, at *1. Thus, if defendants fail to "establish[ ] a strong preponderance in favor of transfer," *Brown Univ.*, 772 F. Supp. at 242, "the plaintiff's choice of forum should prevail." *Shutte*, 431 F.2d at 25; *see also CNH*, 2009 WL 3737653, at *2 (same).

As detailed below, Defendants have failed to meet their heavy burden of establishing that the relevant private and public interest factors weigh strongly in favor of transfer to the Western District of Texas. *See Jumara*, 55 F.3d at 879-80.

II. The Private Interest Factors Weigh Against Transfer

A. The United States' Choice of Forum is Accorded Substantial Deference

Courts have long recognized that a plaintiff generally has "been 'accorded [the] privilege of bringing an action where he chooses.'" *Helicos Biosciences Corp. v. Illumina, Inc.*, 858 F. Supp. 2d 367, 371 (D. Del. 2012) (quoting *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955)). This is especially true in antitrust cases, where the United States' venue choice is given "heightened respect." *Brown Univ.*, 772 F. Supp. at 242, 244 (denying transfer of government antitrust enforcement action). In granting the United States heightened deference in antitrust enforcement actions, courts have pointed to the Clayton Act's liberal venue provisions. *Id.* Congress enacted Section 12 of the Clayton Act, 15 U.S.C. § 22 (2012), to broaden the general

[6] The "enforceability of the judgment," "administrative factors," "public policies of the fora," and the "familiarity of the trial judge with the applicable state law in diversity cases" are also public interest factors. *Jumara*, 55 F.3d at 879-80. Again, these factors were not discussed in Defendants' papers, and provide no support for transfer.

federal venue statute and make it easier for plaintiffs, including the United States, to obtain relief for violations of the antitrust laws. *See, e.g., United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 581-82 (1948). Section 12 "is a special venue provision tailored for corporate antitrust defendants, whose convenience Congress was not particularly solicitous of." *Lee v. Ply*Gem Indus., Inc.*, 593 F.2d 1266, 1272 (D.C. Cir. 1979).

Moreover, "[t]he deference afforded plaintiff's choice of forum will apply *as long as* plaintiff has selected the forum for some legitimate reason." *Smart Audio Techs., LLC v. Apple, Inc.*, 910 F. Supp. 2d 718, 727 (D. Del. 2012) (citation omitted). Where a plaintiff's choice of forum is "legitimate and rational," this choice is given "substantial weight in the [transfer] analysis." *TSMC*, 2015 WL 328334, at *1. The United States' decision to file the instant action in this District is both legitimate and rational. All four of the Defendants are Delaware entities governed by Delaware law. Thus, this Court has personal jurisdiction over Defendants under the Clayton Act because each is an "inhabitant" of Delaware. 15 U.S.C. § 22. These facts alone are "legitimate and rational reasons for suing in Delaware." *Intellectual Ventures I LLC v. Altera Corp.*, 842 F. Supp. 2d 744, 754 (D. Del. 2012). Defendants have also availed themselves of the "rights, benefits, and obligations afforded by Delaware law," *Merck Sharp & Dohme Corp. v. Teva Pharm. USA, Inc.*, No. 14-874-SLR-SRF, 2015 WL 4036951, at * 3 (D. Del. Jul. 1, 2015), and "having received the benefits of Delaware incorporation, should not now complain that [plaintiff] has chosen to sue [them] here." *McKee v. PetSmart, Inc.*, No. 12-1117-SLR-MPT, 2013 WL 1163770, at *2 (D. Del. Mar. 20, 2013); *see also Carl Zeiss Meditec, Inc. v. Optovue, Inc.*, No. 10-084-GMS, 2011 WL 1419714, at *3 (D. Del. Apr. 13, 2011) (same).[7]

[7] Defendants cite *In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1223-24 (Fed. Cir. 2011), for the proposition that a company's incorporation in Delaware is not a dispositive factor in defeating a transfer motion. Defendants' reliance on *In re Link_A_Media* – a patent case that is

B. Defendants' Choice of Forum Warrants Only Limited Weight

"Under Third Circuit law, Defendants' preference for an alternative forum is not given the same weight as Plaintiff's preference." *Altera Corp.*, 842 F. Supp. 2d at 755; *see also Ithaca Ventures k.s. v. Nintendo of Am. Inc.*, No. 13-824-GMS, 2014 WL 4829027, at *3 (D. Del. Sept. 25, 2014) (finding this factor to be "only given limited weight" even though the proposed transferee forum was the forum where the defendant is headquartered and operates its principal place of business). As a result, Defendants' forum preference "is not sufficient to displace the [United States'] own choice of venue." *CNH Am. LLC*, 2009 WL 3737653, at *2.

This principle applies with even greater force here. Defendants' proposed forum – the Western District of Texas – conflicts with Defendants' prior choice of Delaware as their preferred forum for litigating disputes arising out of their merger agreement. Moreover, none of the four Defendants maintain corporate headquarters in the Western District of Texas. ES, Rockwell, and Andrews County Holdings do not have any facilities or known employees in the Western District of Texas. In fact, Defendants' only connection to the Western District of Texas is that WCS's disposal facility is located there. Because Defendants do not have compelling reasons for choosing the Western District of Texas over Delaware – a forum they have designated for litigating their merger-related disputes – Defendants' proposed choice of forum is entitled to minimal, if any, deference.

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not binding on this Court – is misplaced. In that case, the defendant's incorporation in Delaware was the sole connection to this District. *Id.* In contrast, the United States has alleged that customers in Delaware – specifically, commercial generators of LLRW – are among the customers that will be harmed by Defendants' presumptively unlawful merger. *See* Compl. ¶¶ 1-2, 11, 60, 67, 72, 81, 83-84. In addition, Defendants' merger agreement – the document giving rise to this litigation – is governed by Delaware law and contains a venue provision whereby Defendants expressly agreed to litigate any litigation related to their merger in Delaware courts. Moreover, the act that will formally consummate Defendants' presumptively unlawful merger – the filing of the merged firm's certificate of incorporation – would take place in Delaware.

C. This Antitrust Enforcement Action Did Not Arise in the Western District of Texas and Has Ties to the District of Delaware

In determining whether a claim under Section 7 of the Clayton Act arises in a particular district, courts evaluate, among other things, where the corporate decisions leading up to the transaction took place. *See, e.g.*, *FTC v. Graco Inc*., No. 11-cv-02239, 2012 WL 3584683, at *5 (D.D.C. Jan. 26, 2012). In assessing the location of corporate decision-making, courts consider a variety of facts, including where the negotiations took place and the location of the companies' headquarters. *Id.* (noting that the negotiations took place in Minnesota and the headquarters of both the merging firms were located in the Midwest); *see also United States v. Microsemi Corp*., No. 1:08CV1311 AJT/JFA, 2009 WL 577491, at *6-7 (E.D. Va. Mar. 4, 2009) (noting that headquarters of both merging firms were in California). Here, the corporate headquarters of the merging firms are located in different regions of the country: WCS's corporate headquarters are in the Northern District of Texas and ES's corporate headquarters are in District of Utah.

In addition, Defendants have failed to provide any evidence showing that the merger was negotiated in the Western District of Texas. As shown by Defendants' contemporaneous business documents, the negotiations for the transaction appear to have taken place among executives in three different locations: Dallas, Texas; Short Hills, New Jersey; and Salt Lake City, Utah. *See* Hauck Decl., Ex. B. None of these places is located within the Western District of Texas. Tellingly, Defendants do not assert that any of the most significant events leading up to their proposed merger – the decision to merge by the companies' executives or the negotiation, drafting and execution of the merger agreement and any amendments thereto – occurred in the Western District of Texas. By contrast, this merger involves the combination of two Delaware corporations who expressly selected Delaware law to govern their merger

agreement and voluntarily designated Delaware as their preferred forum for adjudicating their merger-related disputes.

In determining where a claim arose, courts also look to where the harm occurs. *See United States v. H&R Block, Inc.*, 789 F. Supp. 2d 74, 77-80 (D.D.C. 2011) (denying transfer even though corporate headquarters were located outside the government's chosen forum in light of the "national market implicated by this case"). Third-party witnesses are unlikely to be located in the Western District because few, if any, of the Defendants' largest merging firms' top 20 customers appear to be headquartered there. Bhagat Decl. ¶10. To the contrary, the harm will be felt by customers in all 36 states, including Delaware, which rely on the merging firms for their commercial LLRW disposal needs. *See* Compl. ¶¶ 1, 59-60.

D. The Convenience of the Parties Does Not Favor Transfer

This Court need only turn to Defendants' merger agreement to conclude that Delaware is a convenient forum for litigating this action. In that document, Defendants agreed to litigate any disputes arising out of their merger agreement in Delaware and unequivocally waived any objections to litigating such disputes in Delaware. *See* Hauck Decl., Ex. A §§ 13.14 -13.15. The Third Circuit has held that such "a forum selection clause is treated as a manifestation of the parties' preferences as to a convenient forum." *Jumara*, 55 F.3d at 880; *see also H&R Block*, 789 F. Supp. 2d at 81 (relying on defendants' Delaware forum selection clause to deny transfer motion).

Notably, Defendants have offered no reason as to why Delaware is a convenient forum for litigating merger-related disputes between themselves but not against the United States. This failure is not surprising because Defendants – which are sophisticated companies that transact business throughout the country – have ample resources to litigate in this District. *See Jumara*

55 F. 3d at 873 (noting that courts should consider a party's "relative physical and financial condition" when assessing the convenience of litigating in a forum). ES will "control and direct the defense" in this case, and, as a result, incur the majority of costs associated with litigating this case. *See* Bhagat Decl., Ex. 3 ¶ 2a. With over $1 billion in revenue, Defendant ES will face little hardship in litigating this matter in Delaware. *See Graphics Props. Holdings Inc. v. Asus Comput. Int'l, Inc.*, 964 F. Supp. 2d 320, 328-29 (D. Del. 2013) (noting that in situations where a corporation has revenues exceeding $1 billion "litigating in Delaware will not impose an undue financial burden"); *Intellectual Ventures I LLC v. Checkpoint Software Techs. Ltd.*, 797 F. Supp. 2d 472, 481 (D. Del. 2011) (rejecting assertion that litigating a case "across the country from where the [defendants] are located" would cause an undue financial burden and disrupt defendants' operations because defendants were large corporations with significant resources). Any suggestion that litigating in Delaware would impose an undue burden in light of WCS's anticipated "failing firm" defense is also without merit. If the United States successfully blocks this merger, WCS's parent (not WCS) will reimburse ES up to $6 million dollars for the costs associated with litigating this case to trial. Bhagat Decl., Ex. 3 ¶ 3. With over $1 billion dollars in revenue, WCS's parent entity has ample resources to litigate in this District. *See* Bhagat Decl., Ex. 4, Valhi 10K Annual Report, at 33. Thus, this factor weighs against transfer.

E. Defendants Have Not Shown That Any Witness Is Unavailable In This District

Defendants assert that it will be inconvenient for witnesses to travel to Delaware, but they fail to substantiate that assertion. As an initial matter, "[p]arty witnesses or witnesses who are employed by a party carry no weight in the 'balance of convenience' analysis since each party is able, indeed, obligated to procure the attendance of its own employees for trial." *Affymetrix, Inc.*

v. Synteni, Inc., 28 F. Supp. 2d 192, 203 (D. Del. 1998); *see also Altera*, 842 F. Supp. 2d at 756-57 (citing *Affymetrix* standard); *McKee*, 2013 WL 1163770, at *4 (same).

Moreover, the convenience of a forum for third-party witnesses is relevant "only to the extent that the witnesses may actually be unavailable for trial in one of the fora." *Jumara*, 55 F.3d at 879. "'It is the defendant's burden to show both the unavailability of a particular witness and that witness' importance to the defendant's case.'" *Smart Audio*, 910 F. Supp. 2d at 732 (quoting *Tessera, Inc. v. Sony Electronics Inc.*, No. 10–838, 2012 WL 1107706, at *6 (D. Del. March 30, 2012)). To meet this burden, "the movant must provide specificity as to: (1) the particular witness to whom the movant is referring; (2) what that person's testimony might have to do with a trial in this case; and (3) what reason there is to think that the person will 'actually' be unavailable for trial (as opposed to the proffer of a guess or speculation on that front)." *Elm 3DS Innovations LLC v. SK Hynix Inc.*, No. 14–1432, at *8 (D. Del. Aug. 20, 2015). Defendants have failed to establish any of these necessary elements.

Defendants' failure to establish that any witnesses important to their defense will be unavailable for trial in this District is not surprising because Congress has provided for nationwide service of trial subpoenas in antitrust enforcement actions brought by the United States. *See* 15 U.S.C. § 23 (2012) (providing that subpoenas "may run into any other district"). Such nationwide service of trial subpoenas ensures that third-party witnesses will be as available for trial in this District as they would be in the Western District of Texas.

III. The Public Interest Factors Weigh Also Against Transfer

A. Practical Considerations Favor Keeping this Case in Delaware

In evaluating the "practical considerations that could make the trial easy, expeditious, or inexpensive," *Jumara*, 55 F.3d at 879, courts typically consider the relative expense and ease for

each party of litigating in this District as compared to the transferee forum. *See, e.g.*, *FastVDO LLC v. Paramount Pictures Corp.*, 947 F. Supp. 2d 460, 463 (D. Del. 2013). In assessing whether a merger will result in higher prices or reduced innovation, courts typically evaluate evidence from executives at the merging firms, executives at competitor firms, customers that purchase the product at issue, and economic experts hired by the litigating parties.

As discussed above in Part II.D, Defendants would not be subjected to any undue burden if they are required to litigate this action in this District because Defendants are Delaware-incorporated entities with access to ample financial resources. Indeed, Defendants would not have voluntarily elected to have all their merger-related disputes litigated under Delaware law and in Delaware courts if the practical considerations of litigating here posed any real problem for them. ES, the party charged with controlling and directing the defense of this case, has over 23 locations across the United States but no office, facility or known employee in Texas. *See* Bhagat Decl., Ex. 2. Most of WCS's highest ranking executives do not appear to reside or work in the Western District of Texas. *See* Samford Decl. ¶ 4, D.I. 20. Moreover, because ES's corporate headquarters and primary LLRW facilities are located in Utah, Tennessee, and South Carolina, ES's executives should find it no less convenient to travel to Delaware than to the Western District of Texas.

In contrast, the transfer of this action to the Western District of Texas would impose higher travel costs on both the United States and third parties. The Antitrust Division is located in Washington, D.C. Moreover, Defendants are simply wrong that "numerous important third-party witnesses who will be deposed and likely will testify at trial are located in the Western District of Texas." Defs' Brief at 2. Third-party witnesses are unlikely to be located in the Western District of Texas because almost none of the merging companies' top 20 customers

appear to be headquartered there. Bhagat Decl. ¶ 10. Indeed, a majority of the largest customer witnesses for LLRW disposal services are likely to be located in the Midwest and on the East Coast. All of the significant decommissioning customers are located on the East Coast and in the Midwest. *See* Bhagat Decl., Ex. 7, NRC Map – Decommissioning. In addition, Texas is home to only four operating nuclear power reactors, none of which are located in the Western District of Texas. *See* Bhagat Decl., Ex. 8, NRC Map – Nuclear Power Reactor Sites. Furthermore, none of Defendants' competitors – who may testify about general competitive conditions in the LLRW industry and their ability to counteract the proposed transaction's likely anticompetitive effects – appear to be located in the Western District of Texas. *See* Compl. ¶¶ 62, 63, D.I. 1.

The Western District of Texas spans two time-zones and consists of seven Divisions.[8] Defendants fail to mention which of these seven Divisions is their preferred transferee Division. The costs imposed on the United States and third parties will be especially significant if this case is transferred to the Western District of Texas, Midland-Odessa Division.[9] There are no direct flights to Midland-Odessa from Washington, DC, Salt Lake City, Utah, or any city on the East Coast or in the Midwest. *See* Bhagat Decl., Ex. 5, Midland-Odessa Airport – List of Flights. In contrast, this Court is about 22 miles from Philadelphia International Airport – a large hub airport with 25 airlines and 524 daily departures. *See* Bhagat Decl., Ex. 6, Philadelphia Airport –

[8] These Divisions are Alpine, Austin, Del Rio, El Paso, Fort Hood, Midland-Odessa, Pecos, San Antonio and Waco. *See* Home | U.S. District Court, Western District of Texas, http://www.txwd.uscourts.gov/SitePages/Home.aspx. (last visited Dec. 1, 2016).

[9] WCS's disposal facility is located in the Midland-Odessa Division, and, for this reason, the United States believes that Defendants will likely seek intra-district assignment or transfer to that Division. Courts in the Western District of Texas appear to apply a 28 U.S.C. §1404 standard in assessing divisional transfer. *See ACL Combustion, Inc., et al. v. Edge Mfg. & Tech. LLC*, No. A-14-CA-1100-SS (W.D. Tex. Feb. 19, 2015), ECF No. 13 (Attachment 1).

Website. Moreover, Amtrak's Wilmington Station, which is located a mere mile from this Court, connects the entire Northeast corridor. For these reasons, the practical considerations weigh against transfer.

B. The Proposed Acquisition Concerns National -- Not Local -- Interests

Because this matter concerns national interests, this factor weighs against transfer. In deciding whether to transfer an antitrust enforcement case brought by the United States, courts have found the "local interest in deciding local controversies" factor to be irrelevant or neutral because such cases have "national economic significance and do[ ] not present an essentially local matter." *H&R Block*, 789 F. Supp. 2d at 83. Even one of the cases cited by Defendants holds that an antitrust enforcement action brought by the federal government does not present issues unique to any one district; in fact, "it is not a local issue at all," but one with "nationwide significance." *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 31 (D.D.C. 2008).

The interests presented by this case are essentially national in scope. The United States is seeking to enjoin this transaction because it will result in higher prices and reduced innovation for commercial customers in four LLRW product markets in 36 states, including Delaware. Moreover, any notion that this case involves merely local concerns because the Texas Commission on Environmental Quality ("TCEQ") regulates certain aspects of WCS's business fails to take into account the full regulatory framework. Defendants have not suggested that the outcome of this case would alter any aspect of the TCEQ's regulatory authority over the disposal facility located in Andrews County. The Atomic Energy Act of 1954 requires LLRW produced by commercial generators – such as nuclear power plants and medical and research institutions – to be disposed of in a facility licensed by either the Nuclear Regulatory Commission ("NRC") or by a state that has entered into an agreement with the NRC. *See* Compl. ¶16, D.I. 1. Because the

NRC regulates the disposal of LLRW at the federal level, with some delegation to the states, the idea that this case implicates purely local interests is not correct.

Further, Defendants' attempts to analyze the public interest factor by looking exclusively to the connections between WCS and Texas are misguided. *See Graco*, 2012 WL 3584683, at *6 (analyzing both the acquired and the acquiring firms' connection to the transferee forum); *Microsemi*, 2009 WL 577491, at *10 (same). In viewing the public interest factor exclusively through the lens of WCS, Defendants ignore that the acquiring firm (ES) has no connection to the Western District of Texas. ES has no known connections to Texas and thus this public interest factor does not support transfer.

CONCLUSION

For the foregoing reasons, Defendants have failed to meet their heavy burden to overcome the substantial deference due to the United States' choice of forum. Accordingly, their motion should be denied.

Respectfully Submitted,

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