IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, Plaintiffs, v. ENERGY*SOLUTIONS*, INC., ROCKWELL HOLDCO, INC., ANDREWS COUNTY HOLDINGS, INC., AND WASTE CONTROL SPECIALISTS LLC, Defendants.	§	Case No. 1:16-cv-01056-GMS

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER VENUE

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PRELIMINARY STATEMENT

Defendants Energy*Solutions*, Inc. ("ES"), Rockwell Holdco, Inc., Andrews County Holdings, Inc., and Waste Control Specialists LLC ("WCS") respectfully submit this memorandum of law in support of their motion to transfer this action to the Western District of Texas pursuant to 28 U.S.C. § 1404(a). This case concerns plaintiff United States of America's ("the Government") challenge to ES' acquisition of WCS as a violation of the Clayton Act. WCS operates facilities in the Western District of Texas for the disposal of low-level radioactive waste ("LLRW"). The Government brought this case in Delaware even though the connections between the case and the State of Texas, and specifically the Western District of Texas, are overwhelming and the Defendants' connection to Delaware is virtually non-existent. Texas is central to the defense. State regulation of prices and contracts has affected the ability of WCS—whose sole operations are in Texas—to compete. Moreover, WCS has been in financial distress for many years. Without the acquisition by ES, the future of WCS would be in doubt and the nuclear waste industry would suffer. In fact, should WCS fail, the State of Texas would lose a substantial sum of revenue it currently collects from WCS' disposal fees. Contrary to the Government's allegations, the evidence will show that the transaction should not be blocked because it is procompetitive for the nuclear waste industry (and thus lawful under the Clayton Act).

At this time, however, the issue before this Court is whether this case should be heard in Delaware. Delaware has no connection to the underlying dispute. It was apparently chosen by the Government because the Defendants are incorporated in Delaware. Contrast Delaware with Texas, where negotiations for the underlying merger agreement occurred; where WCS' principal place of business and executive offices are located; and where public bonds were

issued by Andrews County, Texas, for the construction of WCS' disposal facility (which is actually owned mostly by Andrews County and leased to WCS). Moreover, numerous important third-party witnesses who will be deposed and likely will testify at trial are located in the Western District of Texas, including customers of the Defendants and also the Texas Commission on Environmental Quality ("TCEQ"), the state agency that heavily regulates the nuclear waste industry and WCS' prices. The TCEQ is expected to be a material witness given its role in heavily regulating both the operation of WCS' facility and terms of service between WCS and its customers, including confirming that WCS' pricing conforms with federal and Texas antitrust laws. Further, pursuant to WCS' license issued by the TCEQ, when waste is accepted for disposal at WCS' facility, title to the waste is transferred to the State of Texas.

For these reasons and as demonstrated below, both the public and private factors governing the consideration of transfer motions pursuant to 28 U.S.C. § 1404(a), weigh heavily in favor of transferring this action to the Western District of Texas.

BACKGROUND

The parties to the challenged transaction are companies that provide processing and disposal services for LLRW. ES owns and operates LLRW processing and/or disposal facilities in Utah and Tennessee and also operates a disposal facility that is owned by (and located in) the State of South Carolina. WCS operates a LLRW facility in Texas that predominantly offers disposal services. None of the Defendants has any employees or assets in Delaware.

On November 19, 2015, ES announced it had signed a definitive agreement to acquire WCS ("the Transaction"). After a year-long investigation, the Government filed this action to enjoin the Transaction on the grounds that it violates the Clayton Act. For the reasons

that follow, Defendants now move to transfer venue to the Western District of Texas pursuant to 28 U.S.C. § 1404(a).

ARGUMENT

I. THIS ACTION SHOULD BE TRANSFERRED TO THE WESTERN DISTRICT OF TEXAS.

Pursuant to Section 1404(a), it is firmly within a district court's discretion to transfer venue according to an "individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (citation omitted); *see also Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 883 (3d Cir. 1995) ("[S]ection 1404(a) was intended to vest district courts with broad discretion to determine, on an individualized, case-by-case basis, whether convenience and fairness considerations weigh in favor of transfer."). Cases may be transferred "to any other district or division where [the case] might have been brought." 28 U.S.C. § 1404(a). Courts in the Third Circuit consider a host of private and public factors when deciding whether to transfer an action. *See Jumara*, 55 F.3d at 879. The private factors are (1) plaintiff's venue preference, (2) defendant's venue preference, (3) the location where the claim arose, (4) the convenience of the parties, (5) the convenience of the witnesses, and (6) the location of evidence. *Id.* The public factors are (1) the enforceability of the judgment; (2) practical considerations that can make the trial easy, expeditious, or inexpensive, (3) court congestion in the two proposed forums; (4) the local interest in deciding local disputes at home; and (5) the public policies of the respective forums. *Id.*

Applying these factors, courts in Delaware have found a plaintiff's choice of forum is not entitled to deference where, as here, the defendant has no employees, operations, or assets in Delaware and the conduct underlying the action occurred outside the state. *See Rudolph v. HR Specialist, Inc.*, 37 F. Supp. 3d 740, 745 (D. Del. 2014) (transferring venue because

plaintiff did not reside in Delaware and actions giving rise to the litigation occurred in other states). The Government does not allege a nexus between Defendants' business conduct generally—or the Transaction specifically—and the State of Delaware. Nor could it, as no events leading up to the consummation of the Transaction occurred in Delaware. (*See* Declaration of Amy A. Samford ("Samford Decl.") ¶ 7); (*see also* Declaration of Ken Robuck ("Robuck Decl.") ¶ 4.) The fact that the federal government is the plaintiff is immaterial to the analysis. *See FTC v. Cephalon, Inc*., 551 F. Supp. 2d 21, 26 (D.D.C. 2008) (transferring venue in government-brought antitrust case because there were "no meaningful ties" between the forum and the events giving rise to the action). Indeed, district courts routinely transfer antitrust cases to more suitable venues under Section 1404(a) when federal agencies attempt to engage in forum shopping. *See, e.g.*, *FTC v. Graco Inc.,* Civil Action No. 11-cv-02239 (RLW), 2012 WL 3584683, at *7 (D.D.C. Jan. 26, 2012) (holding that a "more appropriate forum" existed where all relevant acts occurred and the "evidence and sources of proof [were] located"); *United States v. Microsemi Corp.*, Civil Action No. 1:08-cv-1311, 2009 WL 577491, at *7-10 (E.D. Va. Mar. 4, 2009) (transferring merger challenge brought by DOJ in Virginia to California for the convenience of witnesses, noting that "deference has not been extended" to the government's choice of district "when the controversy itself had no meaningful ties to that forum").

In this case, consideration of the relevant private and public factors demonstrates that the Court should exercise its discretion to transfer this case to the Western District of Texas. First, the basis for the Government to file suit in Delaware is that ES and WCS are incorporated in the state. But courts have stated unequivocally that incorporation in Delaware—standing alone—is insufficient to defeat a transfer motion to a more convenient venue that has a more substantial connection to the dispute. *See In re Link_A_Media Devices Corp*., 662 F.3d 1221,

1223-24 (Fed. Cir. 2011) ("The court's heavy reliance on the fact that LAMD was incorporated in Delaware was similarly inappropriate…. It is certainly not a dispositive fact in the venue transfer analysis, as the district court in this case seemed to believe." (citations omitted)); *see also APV N. Am., Inc. v. Sig Simonazzi N. Am., Inc.,* 295 F. Supp. 2d 393, 398-99 (D. Del. 2002) ("Where an alternative forum is more convenient and has more substantial connections with the litigation 'incorporation in Delaware will not prevent transfer.'" (citations omitted)). And here, Defendants' state of incorporation has no relationship whatsoever to the operative facts giving rise to this dispute. *See Ricoh Co., Ltd. v. Aeroflex, Inc.,* 279 F. Supp. 2d 554, 558 (D. Del. 2003) (ordering transfer because "no party maintains any facilities, personnel, or documents in Delaware . . . [and] no relevant third-party witnesses . . . reside in Delaware").

Second, unlike Delaware, the State of Texas has a clear and direct connection to—and, indeed, a clear interest in—the transaction underlying this case. Negotiations for the transaction took place in Texas. (*See* Samford Decl. ¶ 7); (*see also* Robuck Decl. ¶ 5.) Even more instructive, the TCEQ—which regulates both the operation of WCS' facility and terms of service between WCS and its customers, including confirming that WCS' pricing conforms with federal and Texas antitrust laws[1]—has unequivocal oversight over WCS. (*Id.* at ¶ 5.) In fact, WCS operates pursuant to a radioactive materials license issued by TCEQ; this license not only governs the terms of WCS' operations, but also is a requisite condition to WCS' ability to operate. (*Id.*) Thus, as a matter of public policy, the State of Texas has a substantial interest in the disposition of this lawsuit. *See, e.g., Downing v. Globe Direct LLC*, Civil Action No. 09-693 (JAP), 2010 WL 2560054, at *4 (D. Del. June 18, 2010) (transferring venue in part because the

[1] *See* Tex. Health & Safety Code Ann. § 401.2456(d)(2) (West 2016) (requiring TCEQ to confirm that WCS' contracts with out-of-compact waste generators are negotiated in good faith, "conform to applicable antitrust statutes and regulations," and are non-discriminatory).

case "concern[ed], even if indirectly, the conduct of that Massachusetts government agency, and therefore the case has the potential to impact the public policy of as well as, to some extent, the taxpayers of Massachusetts").

Further, in addition to the TCEQ's relationship to WCS and the Transaction, the State of Texas itself is substantially involved in WCS' operations. For example, Andrews County, Texas, not only helped finance construction of WCS' facility through a $75 million bond offering, but also is the actual owner of the most of the land and facilities where WCS operates; it leases the facilities it owns to WCS to operate. (*See* Samford Decl. ¶ 4.) Relatedly, the State of Texas takes title to the LLRW accepted for disposal at the WCS facility and thus accepts potential liability flowing from that waste. (*Id.* at ¶ 5.) The State of Texas also receives direct revenue from WCS, as statutory state fees apply to all of WCS' disposal contracts. (*Id.*) In fact, since 2012, the State of Texas has received roughly $45 million in fees from WCS. (*Id.*) In addition to these direct connections to and oversight by the State of Texas, WCS also employs approximately 200 radiation waste engineers and others within the state, thereby providing a substantial economic benefit to the State of Texas and its residents. (*Id.* at ¶ 4.)

In addition to the State of Texas' interest in the transaction at issue in this case, a number of other factors support the transfer of the case to the Western District of Texas. TCEQ, WCS, and nuclear utility and other customers of both ES and WCS situated in Texas will provide testimony essential to the disposition of this case. *See Cruise Control Tech. LLC v. Chrysler Grp. LLC*, Civil Action No. 12-1755-GMS, 2014 WL 1304820, at *4-5 (D. Del. Mar. 31, 2014) ("[E]ven regarding those Defendants who are incorporated in Delaware, the Eastern District of Michigan still has a stronger interest to this litigation because it is where the claims arose and where the employees and known material witnesses are located."); *see also APV N.*

Am., Inc., 295 F. Supp. 2d at 399 (transferring venue "because many of the relevant witnesses and documents are already available in Texas." (citations omitted)); *see also SEC v. Ernst & Young*, 775 F. Supp. 411, 414-16 (D.D.C. 1991) ("Texas is the site of nearly all of the facts underlying the filings here. Despite the presumption in favor of plaintiff's forum choice, that choice should not be allowed to stand where the forum chosen bears virtually no relation to the occurrences giving rise to the cause of action." (citations omitted)). Indeed, TCEQ employees will testify about the agency's regulatory role in the nuclear industry, including its authority to review WCS contracts and rates and provide industrial landfills with "exemptions" similar to the one it provided WCS' exempt cell. (*See* Samford Decl. ¶ 5.) This testimony alone could be sufficient to show that, because of TCEQ's oversight, the transaction will not impact prices for the disposal of LLRW. WCS and TCEQ are not the only entities in Texas whose testimony will be critical, as customers and other market participants in Texas also will provide testimony related to the merits of the case.

In sum, Defendants' decision to incorporate in Delaware does not outweigh the State of Texas' substantial interest in this case, the fact that the relevant events occurred in Texas, and the convenience and efficiency for both the parties and witnesses that would come with litigating this case in the Western District of Texas.

Finally, pursuant to Local Rule 7.1.1, Defendants have met and conferred with the Government regarding the relief requested in this Motion. The Government has informed Defendants that it opposes the Motion. The parties have agreed on an expedited briefing schedule for resolution of the Motion, with the Government filing opposition papers no later than December 2, 2016 and Defendants filing reply papers no later than December 6, 2016. The

parties have filed a proposed stipulated briefing schedule with this filing for the Court's approval.

CONCLUSION

For the foregoing reasons, this Court should exercise its authority to transfer this action to the Western District of Texas.

Respectfully submitted,

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