MERGER ANTITRUST LAW

Unit 1: Merger Antitrust Settlements: Supplemental Case Studies

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Merger Antitrust Law
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Case Studies

Iron Mountain/Recall
DOJ Consent Settlement

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, March 31, 2016

Iron Mountain and Recall Holdings Agree to Divest Records Management Assets as a Condition to Proceed with Transaction

Divesture Protects Competition and Consumers in 15 Metropolitan Areas

The Department of Justice's Antitrust Division announced today that it will require Iron Mountain Inc. to divest records management assets in 15 metropolitan areas in order to proceed with its $2.6 billion acquisition of Recall Holdings Ltd. The Antitrust Division filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia to block the proposed acquisition and simultaneously filed a proposed settlement that, if approved by the court, would resolve the competitive harm alleged in the lawsuit.

Iron Mountain and Recall both offer records management services – storing, protecting and organizing large volumes of hard-copy records at secure, off-site locations – in many cities across the United States. To address the division's competitive concerns, the parties will divest records management assets in the following 15 metropolitan areas where they are two of the three largest providers of these services and there are few, if any, significant remaining competitors: Detroit; Kansas City, Missouri; Charlotte, North Carolina; Durham, North Carolina; Raleigh, North Carolina; Buffalo, New York; Tulsa, Oklahoma; Pittsburgh; Greenville/Spartanburg, South Carolina; Nashville, Tennessee; San Antonio, Texas; Richmond, Virginia; San Diego; Atlanta; and Seattle.

"Iron Mountain's proposed acquisition of Recall would have harmed records management customers in 15 metropolitan areas by dramatically reducing competition in these markets," said Assistant Attorney General Bill Baer of the Justice Department's Antitrust Division. "As a result of today's settlement, these customers will continue to enjoy the fruits of competition – lower prices and higher quality services."

The transaction is also being reviewed by the Australian Competition and Consumer Commission, the United Kingdom's Competition & Markets Authority and the Canadian Competition Bureau. The department cooperated closely with them throughout the course of its investigation, with frequent contact between the agencies.

Iron Mountain is a Delaware corporation headquartered in Boston. Iron Mountain is the largest records management company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

Recall is an Australian company headquartered in Norcross, Georgia. As the second-largest records management company in the United States, Recall provides document storage and related services throughout the nation. Recall's worldwide revenues for fiscal year 2014 were approximately $836.1 million.

As required by the Tunney Act, the proposed settlement, along with the department's competitive impact statement, will be published in the *Federal Register*. Any person may submit written comments concerning

the proposed settlement during a 60-day comment period to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 450 5th Street, N.W., Suite 8700, Washington, D.C. 20530. At the conclusion of the 60-day comment period, the U.S. District Court for the District of Columbia may enter the proposed final judgment upon finding that it serves the public interest.

Attachment(s):
Download Iron Mountain Complaint
Download Iron Mountain Explanation
Download Iron Mountain CIS

Topic(s):
Antitrust

Component(s):
Antitrust Division

Press Release Number:
16-387

Updated March 31, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

Plaintiff,

v.

IRON MOUNTAIN INC.,
One Federal Street
Boston, MA 02110

and

RECALL HOLDINGS LTD.
697 Gardeners Road
Alexandria, Sydney
Australia

Defendants.

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the proposed acquisition by Defendant Iron Mountain Incorporated ("Iron Mountain") of Defendant Recall Holdings Limited ("Recall"). The United States alleges as follows:

I. NATURE OF THE ACTION

1. Iron Mountain and Recall are the two largest providers of hard-copy records management services ("RMS") in the United States and compete directly to serve RMS

customers in numerous geographic areas. RMS are utilized by a wide array of businesses that for legal, business, or other reasons have a need to store and manage substantial volumes of hard copy records for significant periods of time.

2. In 15 metropolitan areas located throughout the United States, Iron Mountain and Recall are either the only significant providers of RMS, or two of only a few significant providers. In these 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—Iron Mountain and Recall have competed aggressively against one another for customers, resulting in lower prices for RMS and higher quality service. Iron Mountain's acquisition of Recall would eliminate this vigorous competition and the benefits it has delivered to RMS customers in each of these metropolitan areas.

3. Accordingly, Iron Mountain's acquisition of Recall likely would substantially lessen competition in the provision of RMS in these 15 metropolitan areas in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

4. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, as amended, to prevent and restrain the violation by Defendants of Section 7 of the Clayton Act, 15 U.S.C. § 18.

5. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345. In their RMS

businesses, Iron Mountain and Recall each make sales and purchases in interstate commerce, ship records in the flow of interstate commerce, and engage in activities substantially affecting interstate commerce.

6. Defendants Iron Mountain and Recall transact business in the District of Columbia and have consented to venue and personal jurisdiction in this District. This Court has personal jurisdiction over each Defendant and venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c).

III. THE DEFENDANTS AND THE TRANSACTION

7. Iron Mountain is a Delaware corporation headquartered in Boston, Massachusetts. Iron Mountain is the largest RMS company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

8. Recall is an Australian company headquartered in Norcross, Georgia. Recall is the second-largest RMS company in the United States and provides document storage and related services throughout the nation. Recall's worldwide revenues for 2014 were approximately $836.1 million.

9. On June 8, 2015, Iron Mountain and Recall entered into a Scheme Implementation Deed by which Iron Mountain proposes to acquire Recall for approximately $2.6 billion in cash and stock, subject to adjustments.

IV. TRADE AND COMMERCE

A. Relevant Service Market: Records Management Services

10. For a variety of legal and business reasons, companies must often retain 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.

11. RMS vendors pick up records from customers and bring them to a secure off-site facility, where they then index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for their 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 no longer is required.

12. Customers that purchase RMS range from Fortune 500 companies to small firms that have a need to manage and store records. Customers include corporations with business records maintenance requirements, healthcare providers with patient records, and other companies that may wish to manage and store other types of records, such as case files, employee records, and other information.

13. RMS procurements are typically made by competitive bid. Contracts usually specify fees for each service provided (*e.g.,* pickup, monthly storage, retrieval, delivery, and transportation). Most customers purchase RMS in only one city. Some customers with operations in multiple cities prefer to purchase RMS from a single vendor pursuant to a single contract; other multi-city customers disaggregate their contracts and purchase RMS from different vendors in different cities.

14. For companies with a significant volume of records, in-house storage is generally not a viable substitute for RMS. For a company to manage its records in-house, it must have a substantial amount of unused space, racking equipment, security features, and one or more dedicated employees. Similarly, entirely replacing RMS with digital records management services is generally not feasible. To switch from physical to electronic records, a customer would need to fundamentally shift its method of creating, using, and storing records and adapt to an entirely paperless system. For many customers, the time, expense, and other burdens associated with doing so are prohibitive.

15. For these reasons, a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significant non-transitory amount. Accordingly, RMS constitutes a relevant product market and line of commerce for purposes of analyzing the likely competitive effects of the proposed acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

B. Relevant Geographic Markets

16. The geographic market for RMS consists of a metropolitan area or 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 customer's location. 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 radius a customer is willing to consider is usually measured in time, rather than miles, as the retrieval of records may be a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

17. RMS vendors in the following 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—could profitably increase prices to local customers without losing significant sales to more distant competitors. As a result, a hypothetical monopolist of RMS in each of these 15 metropolitan areas could profitably increase its prices by at least a small but significant non-transitory amount. Accordingly, each of these areas is a relevant geographic market for the purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

C. Anticompetitive Effects of the Proposed Acquisition

18. Iron Mountain and Recall are the two largest RMS providers in the United States and directly compete to provide RMS in each relevant geographic market. Each relevant geographic market for the provision of RMS is highly concentrated. In each of the relevant geographic markets, Iron Mountain is the largest RMS provider and Recall is either the second or third-largest competitor, while few, if any, other significant competitors exist. Iron Mountain and Recall compete very closely for accounts, target one another's customers, and, in most of the relevant geographic markets, view one another as the other's most formidable competitor. The resulting significant increase in concentration in each metropolitan area and loss of head-to-head competition between Iron Mountain and Recall likely will result in higher prices and lower quality service for RMS customers in each relevant geographic market.

D. Entry into the Market for RMS

19. It is unlikely that entry or expansion into the provision of RMS in the relevant geographic markets alleged herein would be timely, likely, or sufficient to defeat the likely anticompetitive effects of the proposed acquisition.

20. Any new RMS entrant would be required to expend significant time and capital to successfully enter any of the relevant geographic markets. RMS entry into a new geographic market generally requires a secure facility, racking equipment, delivery trucks, tracking software, and employees. In addition, a new entrant would have to expend substantial effort to build a reputation for dependable service, which is important to RMS customers who demand quick and reliable pickup of and access to their stored records.

21. In order to recoup the costs of entry, an RMS vendor must fill a substantial amount of its facility's capacity. However, acquiring customers from existing RMS vendors in order to fill this capacity is often complicated by provisions in the customers' contracts requiring payment of permanent withdrawal fees if the customer permanently removes a box or record from storage. Customers will sometimes pay these withdrawal fees themselves, but more commonly, the new vendor will have to offer to pay the fees to induce the customer to switch. The vendor must then recoup the cost of the fees by imposing its own permanent withdrawal fees, amortizing the cost over a longer contract, or charging higher prices while still charging a competitive price for its services. Customer contracts also often impose a cap on the number of boxes per month that a customer may permanently remove from a RMS vendor's facility, such that a switch to a new RMS vendor may take several months to complete. Taken together,

permanent withdrawal fees and other withdrawal restrictions make it difficult for a new RMS entrant to win customers away from existing RMS vendors.

22. Likewise the permanent withdrawal fees and other withdrawal restrictions also make it more difficult for an RMS vendor already in a market to win enough customers away from competitors to expand significantly.

V. VIOLATION ALLEGED

23. The United States hereby incorporates paragraphs 1 through 22 above.

24. The proposed acquisition of Recall by Iron Mountain likely would substantially lessen competition for RMS in the 15 relevant geographic markets identified above in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects relating to RMS in the relevant geographic markets, among others:

(a) actual and potential competition between Iron Mountain and Recall for RMS in each relevant geographic market will be eliminated;

(b) competition generally for RMS in each relevant geographic market will be substantially lessened; and

(c) prices for RMS will likely increase and the quality of service will likely decrease in each relevant geographic market.

VI. REQUESTED RELIEF

25. The United States requests that this Court:

(a) adjudge and decree that Iron Mountain's acquisition of Recall would be unlawful and violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

(b) permanently enjoin and restrain Defendants and all persons acting on their behalf from consummating the proposed acquisition of Recall by Iron Mountain, or from entering into or carrying out any other contract, agreement, plan or understanding, the effect of which would be to combine Iron Mountain with Recall;

(c) award the United States the cost for this action; and

(d) award the United States such other and further relief as the Court deems just and proper.

Dated: March 31, 2016

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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CLOSED,TYPE-A

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:16-cv-00595-APM

UNITED STATES OF AMERICA v. IRON MOUNTAIN INC. et al
Assigned to: Judge Amit P. Mehta
Cause: 15:1 Antitrust Litigation

Date Filed: 03/31/2016
Date Terminated: 11/14/2016
Jury Demand: None
Nature of Suit: 410 Anti-Trust
Jurisdiction: U.S. Government Plaintiff

Plaintiff

UNITED STATES OF AMERICA represented by **Soyoung Choe**
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ATTORNEY TO BE NOTICED

V.

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Defendant

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Date Filed	#	Docket Text
03/31/2016	1	COMPLAINT against All Defendants (Fee Status:Filing Fee Waived) filed by UNITED STATES OF AMERICA. (Attachments: # 1 Civil Cover Sheet Civil Cover Sheet)(Choe, Soyoung) (Entered: 03/31/2016)
03/31/2016	2	ENTERED IN ERROR....NOTICE OF TUNNEY ACT REQUIREMENTS by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit Proposed Final Judgment, # 2 Exhibit Hold Separate Stipulation and Order)(Choe, Soyoung) Modified on 4/1/2016 (jd). (Entered: 03/31/2016)
03/31/2016	3	COMPETITIVE IMPACT STATEMENT by UNITED STATES OF AMERICA. (Choe, Soyoung) (Entered: 03/31/2016)
03/31/2016		Case Assigned to Judge Amit P. Mehta. (jd) (Entered: 03/31/2016)
03/31/2016	4	NOTICE OF TUNNEY ACT REQUIREMENTS by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit Hold Separate and Stipulation Order, # 2 Exhibit Proposed Final Judgment Corrected to Include Attachments)(Choe, Soyoung) (Entered: 03/31/2016)
03/31/2016		SUMMONS Not Issued as to IRON MOUNTAIN INC., RECALL HOLDINGS LTD. (SUMMONS NOT FILED WITH COMPLAINT) (jd) (Entered: 03/31/2016)
04/01/2016	5	NOTICE of Appearance by Laura A. Wilkinson on behalf of IRON MOUNTAIN INC. (Wilkinson, Laura) (Entered: 04/01/2016)
04/01/2016	6	Corporate Disclosure Statement by IRON MOUNTAIN INC.. (Wilkinson, Laura) (Entered: 04/01/2016)
04/04/2016	7	NOTICE of Appearance by William Blumenthal on behalf of RECALL HOLDINGS LTD. (Blumenthal, William) (Entered: 04/04/2016)
04/04/2016	8	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by RECALL HOLDINGS LTD. (Blumenthal, William) (Entered: 04/04/2016)
04/07/2016	9	HOLD SEPARATE STIPULATION AND ORDER. Signed by Judge Amit P. Mehta on 04/06/2016. (Attachments: # 1 Exhibit Text of Proposed Final Judgment) (lcapm3) (Entered: 04/07/2016)
04/08/2016	10	NOTICE *of Written or Oral Communications Concerning the Proposed Final Judgment and Certification of Compliance under 15 U.S.C. 16(g)* by IRON MOUNTAIN INC. (Wilkinson, Laura) (Entered: 04/08/2016)
04/13/2016	11	NOTICE *Description Of Written Or Oral Communications Concerning The Proposed Final Judgment In This Action And Certification Of Compliance Under 15 U.S.C. § 16(G)* by RECALL HOLDINGS LTD. (Blumenthal, William) (Entered: 04/13/2016)
07/28/2016	12	NOTICE *of Extension of Time* by UNITED STATES OF AMERICA (Choe, Soyoung) (Entered: 07/28/2016)
08/29/2016	13	RESPONSE TO PUBLIC COMMENTS in Antitrust Case by UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit Comment by National Records Centers, Inc.)(Choe, Soyoung) (Entered: 08/29/2016)

08/30/2016	14	NOTICE *on Divestiture Timing* by UNITED STATES OF AMERICA (Choe, Soyoung) (Entered: 08/30/2016)
09/09/2016	15	MOTION for Entry of Final Judgment by UNITED STATES OF AMERICA (Attachments: # 1 Exhibit Proposed Final Judgment, # 2 Exhibit Certificate of Compliance)(Choe, Soyoung) (Entered: 09/09/2016)
09/09/2016	16	CERTIFICATE OF SERVICE by UNITED STATES OF AMERICA re 15 MOTION for Entry of Final Judgment . (Choe, Soyoung) (Entered: 09/09/2016)
11/11/2016	17	MEMORANDUM OPINION granting 15 Motion for Entry of Final Judgment. Please see the attached Memorandum Opinion for additional details. Signed by Judge Amit P. Mehta on 11/11/2016. (lcapm1) (Entered: 11/11/2016)
11/11/2016	18	ORDER entering Final Judgment for the reasons stated in the 17 Memorandum Opinion. Please see the attached Order for further details. Signed by Judge Amit P. Mehta on 11/11/2016. (lcapm1) (Entered: 11/11/2016)
11/15/2016	19	NOTICE *of Extension of Time* by UNITED STATES OF AMERICA (Choe, Soyoung) (Entered: 11/15/2016)
12/15/2016	20	NOTICE *of Extension of Time* by UNITED STATES OF AMERICA (Attachments: # 1 Certificate of Service Certificate of Service)(Choe, Soyoung) (Entered: 12/15/2016)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,

and

RECALL HOLDINGS LTD.

Defendants.

UNITED STATES' EXPLANATION OF CONSENT DECREE PROCEDURES

The United States submits this short memorandum summarizing the procedures regarding the Court's entry of the proposed Final Judgment. This Judgment would settle this case pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "APPA" or "Tunney Act"), which applies to civil antitrust cases brought and settled by the United States.

1. Today, the United States has filed a Complaint and, attached to this Explanation of Consent Decree Procedures, a proposed Final Judgment and a Hold Separate Stipulation and Order ("Hold Separate") between the parties by which they have agreed that the Court may enter the proposed Final Judgment after the United States has complied with the APPA. The United States has also filed a Competitive Impact Statement relating to the proposed Final Judgment.

2. The Hold Separate is a document that has been agreed to by both the United States and the Defendants. The United States and the Defendants ask that the Court sign this Order, which ensures that the Defendants preserve competition by complying with the provisions of the proposed Final Judgment and by maintaining any assets to be divested during the pendency of the proceedings required by the Tunney Act. *See* 15 U.S.C. § 16(b)-(h).

3. The APPA requires that the United States publish the proposed Final Judgment and the Competitive Impact Statement in the *Federal Register* and cause to be published a summary of the terms of the proposed Final Judgment and the Competitive Impact Statement in certain newspapers at least sixty (60) days prior to entry of the proposed Final Judgment. Defendants in this matter have agreed to arrange and bear the costs for the newspaper notices. The notice will inform members of the public that they may submit comments about the proposed Final Judgment to the United States Department of Justice, Antitrust Division, 15 U.S.C. § 16(b)-(c).

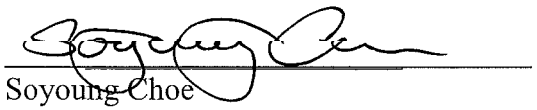
4. During the sixty-day period, the United States will consider, and at the close of that period respond to, any comments that it has received, and it will publish the comments and the United States' responses in the *Federal Register*.

5. After the expiration of the sixty-day period, the United States will file with the Court the comments and the United States' responses, and it may ask the Court to enter the proposed Final Judgment (unless the United States has decided to withdraw its consent to entry of the Final Judgment, as permitted by Section IV.A of the Hold Separate, *see* 15 U.S.C. § 16(d)).

6. If the United States requests that the Court enter the proposed Final Judgment after compliance with the APPA, 15 U.S.C. § 16(e)-(f), then the Court may enter the Final Judgment without a hearing, provided that it concludes that the Final Judgment is in the public interest.

Dated: March 31, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Soyoung Choe, hereby certify that on March 31, 2016, I caused a copy of the Complaint, Competitive Impact Statement, proposed Final Judgment, Hold Separate Stipulation and Order, and the foregoing Explanation of Consent Decree Procedures to be served on Defendants Iron Mountain Inc. and Recall Holdings Ltd. by mailing the documents electronically to the duly authorized legal representatives of the defendants, as follows:

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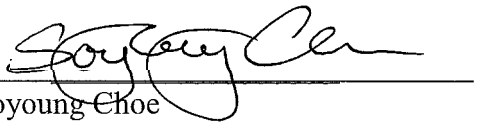

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,

and

RECALL HOLDINGS LTD.

Defendants.

HOLD SEPARATE STIPULATION AND ORDER

It is hereby stipulated and agreed by and between the undersigned parties, subject to approval and entry by the Court, that:

I. Definitions

As used in this Hold Separate Stipulation and Order:

A. "Acquirer" or "Acquirers" means the entity or entities to whom Defendants divest the Divestiture Assets.

B. "Iron Mountain" means Defendant Iron Mountain Incorporated, a Delaware corporation with its headquarters in Boston, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Recall" means Defendant Recall Holdings Limited, an Australian public company limited by shares and registered in New South Wales under Australian law, with its headquarters in Norcross, Georgia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Appendix A Divestiture Assets" means:

1. The Records Management facilities listed in Appendix A to the proposed Final Judgment ("Appendix A"); and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix A, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix A; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix A; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix A; all customer lists relating to the Records Management facilities listed in Appendix A; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix A (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix A; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix A, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix A.

E. "Appendix B Divestiture Assets" means:

1. The Records Management facilities listed in Appendix B to the proposed Final Judgment ("Appendix B"); and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix B, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix B; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix B; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix B; all customer lists relating to the

Records Management facilities listed in Appendix B; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix B (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix B; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix B, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix B.

F. "Divestiture Assets" means the Appendix A Divestiture Assets and Appendix B Divestiture Assets.

G. "Records Management" means the storage and management of physical records and the provision of services relating to physical records, such as transporting and indexing records.

H. "Split Multi-City Customer" means a Recall customer that, as of the date of divestiture of a Divestiture Records Management Facility, has records stored at both the Divestiture Records Management Facility and one or more other Recall Records Management

facilities that are to be retained by Defendants. A Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records.

II. Objectives

The Final Judgment filed in this case is meant to ensure Defendants' prompt divestitures of the Divestiture Assets for the purpose of establishing one or more viable competitors in the Records Management business in order to remedy the effects that the United States alleges would otherwise result from Iron Mountain's acquisition of Recall. This Hold Separate Stipulation and Order ensures, prior to such divestitures, that the Divestiture Assets remain independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by Iron Mountain, and that competition is maintained during the pendency of the ordered divestitures.

III. Jurisdiction and Venue

The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia. Defendants waive service of summons of the Complaint.

IV. Compliance With and Entry of Final Judgment

A. The parties stipulate that a Final Judgment in the form attached hereto as Exhibit A may be filed with and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on Defendants and by filing that notice with the Court. Defendants agree to arrange, at their expense, publication as quickly

as possible of the newspaper notice required by the APPA, which shall be drafted by the United States in its sole discretion. The publication shall be arranged no later than three (3) business days after Defendants' receipt from the United States of the text of the notice and the identity of the newspaper within which the publication shall be made. Defendants shall promptly send to the United States (1) confirmation that publication of the newspaper notice has been arranged, and (2) the certification of the publication prepared by the newspaper within which the notice was published.

B. Defendants shall abide by and comply with the provisions of the proposed Final Judgment, pending the Judgment's entry by the Court, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment. The United States shall have the full rights and enforcement powers in the proposed Final Judgment, including Section X, as though the same were in full force and effect as the Final order of the Court.

C. Defendants shall not consummate the transaction sought to be enjoined by the Complaint herein before the Court has signed this Hold Separate Stipulation and Order.

D. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

E. In the event (1) the United States has withdrawn its consent, as provided in Section IV(A) above, or (2) the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all

further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

F. Defendants represent that the divestitures ordered in the proposed Final Judgment can and will be made, and that Defendants will later raise no claim of mistake, hardship or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

V. Hold Separate Provisions

Until the divestitures required by the Final Judgment have been accomplished:

A. Defendants shall preserve, maintain, and continue to operate the Divestiture Assets as independent, ongoing, economically viable competitive businesses, with management, sales and operations of such assets held entirely separate, distinct and apart from those of Iron Mountain's other operations. Iron Mountain shall not coordinate its production, provision, marketing, or terms of sale of any products or services with those provided from, produced by or sold under any of the Divestiture Assets. Within twenty (20) days after the entry of the Hold Separate Stipulation and Order, Defendants will inform the United States of the steps Defendants have taken to comply with this Hold Separate Stipulation and Order.

B. Iron Mountain shall take all steps necessary to ensure that (1) the Divestiture Assets will be maintained and operated as independent, ongoing, economically viable and active competitors in the Records Management business; (2) management of the Divestiture Assets will not be influenced by Iron Mountain (or Recall); and (3) the books, records, competitively sensitive sales, marketing and pricing information, and decision-making concerning production, provision, distribution or sales of products or services by or under any of the Divestiture Assets will be kept separate and apart from Iron Mountain's other operations.

C. Defendants shall use all reasonable efforts to maintain and increase the sales and revenues of the products or services produced by, provided from, or sold under Divestiture Assets, and shall maintain at 2016 or previously approved levels for 2017, whichever are higher, all promotional, advertising, sales, technical assistance, marketing and merchandising support for the Divestiture Assets.

D. Iron Mountain shall provide sufficient working capital and lines and sources of credit to continue to maintain the Divestiture Assets as economically viable and competitive, ongoing businesses, consistent with the requirements of Sections V(A) and (B).

E. Iron Mountain shall take all steps necessary to ensure that the Divestiture Assets are fully maintained in operable condition at no less than its current capacity and sales, and shall maintain and adhere to normal repair and maintenance schedules for the Divestiture Assets.

F. Defendants shall not, except as part of a divestiture approved by the United States in accordance with the terms of the proposed Final Judgment, remove, sell, lease, assign, transfer, pledge or otherwise dispose of any of the Divestiture Assets.

G. Defendants shall maintain, in accordance with sound accounting principles, separate, accurate and complete financial ledgers, books and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues and income of the Divestiture Assets.

H. Defendants shall take no action that would jeopardize, delay, or impede the sale of the Divestiture Assets.

I. Defendants' employees with primary responsibility for the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets shall not be transferred or reassigned to other areas within the

company except for transfer bids initiated by employees pursuant to Defendants' regular, established job posting policy. Defendant shall provide the United States with ten (10) calendar days notice of such transfer.

J. Defendants shall appoint, subject to the approval of the United States, a person or persons to oversee the Divestiture Assets, and who will be responsible for Defendants' compliance with this section. This person shall have complete managerial responsibility for the Divestiture Assets, subject to the provisions of this Final Judgment. In the event such person is unable to perform his duties, Defendants shall appoint, subject to the approval of the United States, a replacement within ten (10) working days. Should Defendants fail to appoint a replacement acceptable to the United States within this time period, the United States shall appoint a replacement.

K. Defendants shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestitures pursuant to the Final Judgment to an Acquirer or Acquirers acceptable to the United States.

VI. Duration of Hold Separate and Asset Preservation Obligations

Defendants' obligations under Section V of this Hold Separate Stipulation and Order shall remain in effect until (1) consummation of the divestitures required by the proposed Final Judgment or (2) until further order of the Court. If the United States voluntarily dismisses the Complaint in this matter, Defendants are released from all further obligations under this Hold Separate Stipulation and Order.

Dated: March 31, 2016

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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O R D E R

IT IS SO ORDERED by the Court, this ____ day of _____ 2016.

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,

and

RECALL HOLDINGS LTD.

Defendants.

FINAL JUDGMENT

WHEREAS, Plaintiff United States of America filed its Complaint on March 31, 2016, the United States and Defendants Iron Mountain Incorporated and Recall Holdings Limited, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. Definitions

As used in this Final Judgment:

A. "Acquirer" or "Acquirers" means the entity or entities to whom Defendants divest the Divestiture Assets.

B. "Acquirer of the Appendix A Divestiture Assets" means Access or another entity to which Defendants divest the Appendix A Divestiture Assets.

C. "Acquirer(s) of the Appendix B Divestiture Assets" means the entity or entities to which Defendants divest the Appendix B Divestiture Assets.

D. "Iron Mountain" means Defendant Iron Mountain Incorporated, a Delaware corporation with its headquarters in Boston, Massachusetts, its successors and assigns, and its

subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

E. "Recall" means Defendant Recall Holdings Limited, an Australian public company limited by shares and registered in New South Wales under Australian law, with its headquarters in Norcross, Georgia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

F. "Access" means Access CIG, LLC, a Delaware limited liability company headquartered in Livermore, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

G. "Appendix A Divestiture Assets" means:

1. The Records Management facilities listed in Appendix A; and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix A, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix A; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix A; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix A; all customer lists relating to the

Records Management facilities listed in Appendix A; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix A (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix A; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix A, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix A.

H. "Appendix B Divestiture Assets" means:

1. The Records Management facilities listed in Appendix B; and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix B, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in

Appendix B; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix B; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix B; all customer lists relating to the Records Management facilities listed in Appendix B; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix B (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix B; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix B, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix B.

I. "Divestiture Assets" means the Appendix A Divestiture Assets and Appendix B Divestiture Assets.

J. "Divestiture Records Management Facilities" means the Records Management facilities listed in Appendices A and B.

K. "Records Management" means the storage and management of physical records and the provision of services relating to physical records, such as transporting and indexing records.

L. "Split Multi-City Customer" means a Recall customer that, as of the date of divestiture of a Divestiture Records Management Facility, has records stored at both the Divestiture Records Management Facility and one or more other Recall Records Management facilities that are to be retained by Defendants. A Split Multi-City Customer does not include a Recall customer that has separate contracts for each Recall facility in which it stores records.

III. Applicability

A. This Final Judgment applies to Iron Mountain and Recall, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirers of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Defendants are ordered and directed, within 10 calendar days after consummation of the transaction sought to be enjoined by the Complaint, to divest the Appendix A Divestiture Assets in a manner consistent with this Final Judgment to Access or another Acquirer of the Appendix A Divestiture Assets acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Appendix A Divestiture Assets as expeditiously as possible.

B. Defendants are ordered and directed, within ninety (90) calendar days after consummation of the transaction sought to be enjoined by the Complaint, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Appendix B Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer or Acquirer(s) of the Appendix B Divestiture Assets acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Appendix B Divestiture Assets as expeditiously as possible.

C. In the event Defendants are attempting to divest the Appendix A Divestiture Assets to an Acquirer other than Access, and in accomplishing the divestiture of the Appendix B Divestiture Assets ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they

are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all qualified prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendants shall provide the Acquirer(s) and the United States information relating to the personnel involved in the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer(s) to employ any Defendant employee whose primary responsibility is the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets.

E. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. Defendants shall warrant to the Acquirer(s) that the Divestiture Assets will be operational on the date of sale.

G. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

H. Defendants shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning or other permits pertaining to the operation of the Divestiture Assets, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

I. At the option of the Acquirer(s), Defendants shall enter into a Transition Services Agreement for any services that are reasonably necessary for the Acquirer(s) to operate any of the Divestiture Records Management Facilities for a period of up to six (6) months. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional six (6) months. Defendants shall perform all duties and provide all services required of Defendants under the Transition Services Agreement. The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions. Any amendments, modifications or extensions of the Transition Services Agreement may only be entered into with the approval of the United States, in its sole discretion.

J. For a period of one (1) year from the date of the sale of any Divestiture Assets to an Acquirer, Defendants shall allow any Split Multi-City Customer to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer some or all of its records to that Acquirer without penalty or delay and shall not enforce any contractual provision providing for permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customer's records from a Recall Records Management facility to a facility operated by the Acquirer; except that if a Split Multi-City Customer requests that Defendants physically transport such records to the Acquirer, nothing in this Section IV.J prohibits Defendants from charging: (1) either the transportation fees listed in the Split Multi-City

Customer's contract with Recall or $.30 per carton, whichever is less; or (2) either the re-filing fees listed in the Split Multi-City Customer's contract with Recall or $.45 per carton, whichever is less, if the Split Multi-City Customer requests that Defendants handle the re-filing of the cartons at the Acquirer's facility.

K. Within five (5) business days of the date of the sale of the Divestiture Assets to an Acquirer, Defendants shall send a letter, in a form approved by the United States in its sole discretion, to all Split Multi-City Customers of the Divestiture Records Management Facilities acquired by that Acquirer notifying the recipients of the divestiture and providing a copy of this Final Judgment. Defendants shall provide the United States a copy of their letter at least five (5) business days before it is sent. The letter shall specifically advise customers of the rights provided under Section IV.J of this Final Judgment. The Acquirer shall have the option to include its own letter with Defendants' letter.

L. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by Divestiture Trustee appointed pursuant to Section V, of this Final Judgment, (1) shall include the entire Divestiture Assets (unless the United States in its sole discretion approves the divestiture of a subset of the Divestiture Assets), and (2) shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing Records Management business. Divestiture of the Divestiture Assets may be made to one or more Acquirers provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to an Acquirer(s) that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the records management business; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer(s) and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer(s) to compete effectively.

V. Appointment of Divestiture Trustee

A. If Defendants have not divested all of the Divestiture Assets within the time periods specified in Sections IV.A and IV.B, Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of any remaining Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the remaining Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V.D of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section VI.

D. The Divestiture Trustee shall serve at the cost and expense of Defendants pursuant to a written agreement, on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets to be sold by the Divestiture Trustee and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and Defendants are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within fourteen (14) calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or

agents, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such report~~s~~ contains information that the Divestiture Trustee deems confidential, such report~~s~~ shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who

offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the Divestiture Trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section V.C of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V.C, a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information

provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and

documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the

United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. Notification

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), Defendants, without providing advance notification to DOJ, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in any Records Management business located within a fifty (50) mile radius of any Iron Mountain Records Management facility in the metropolitan statistical areas associated with the cities listed in Appendix C during the term of this Final Judgment; provided that notification pursuant to this Section shall not be required where the assets or interest being acquired generated less than $1 million in revenue from Records Management services in the most recent completed calendar year.

B. Such notification shall be provided to the DOJ in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only about Records Management. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written

request for additional information, Defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XII. No Reacquisition

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any

comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

_____

United States District Judge

Appendix A

1. Recall's facility located at 1462 Corporate Center Drive, San Diego, California.
2. Recall's facility located at 17501 West 98th Street, #18-56, Lenexa, Kansas.
3. Recall's facility located at 41199 Van Born Road, Belleville, Michigan.
4. Recall's facility located at 8600 N.E. Underground Drive, Kansas City, Missouri.
5. Recall's facility located at 2863 Broadway Street, Cheektowaga, New York.
6. Recall's facility located at 9510 Rodney Street, Pineville, North Carolina.
7. Recall's facility located at 3835 South Alston Avenue, Durham, North Carolina.
8. Recall's facility located at 900 Aviation Parkway, Morrisville, North Carolina.
9. Recall's facility located at 7001 East 38th Street, Tulsa, Oklahoma.
10. Recall's facilities located at 1018 and 1103 Western Avenue, Pittsburgh, Pennsylvania.
11. Recall's facilities located at 923, 1003, 1004, 1009, and 1019 Bidwell Street, Pittsburgh, Pennsylvania.
12. Recall's facility located at 1101 West North Avenue, Pittsburgh, Pennsylvania.
13. Recall's facility located at 6543 Penn Avenue, Pittsburgh, Pennsylvania.
14. Recall's facility located at 1200 Allegheny Avenue, Pittsburgh, Pennsylvania.
15. Recall's facility located at 651 Mansfield Avenue, Green Tree, Pennsylvania.
16. Recall's facility located at 1605 Old Route 18, Wampum, Pennsylvania.
17. Recall's facility located at 209 Cove Run Road, East Brady, Pennsylvania.
18. Recall's facility located at 160-A Discovery Drive, Roebuck, South Carolina.
19. Recall's facility located at 3258 Ezell Pike, Nashville, Tennessee.

20. Recall's facility located at 611 N. Cherry Street, San Antonio, Texas.

21. Recall's facility located at 1790 Ruffin Mill Road, Colonial Heights, Virginia.

22. Recall's facilities located at 120 and 200 Giant Drive, Richmond, Virginia.

Appendix B

1. Recall's facility located at 6751 Discovery Boulevard, Mableton, Georgia.
2. Recall's facility located at 5945 Cabot Parkway, Suite 125, Alpharetta, Georgia.
3. Recall's facility located at 2148 American Industrial Way, Suite C&D, Chamblee, Georgia.
4. Recall's facility located at 3995 70th Avenue, Fife, Washington.

Appendix C

1. Phoenix, Arizona
2. San Diego, California
3. Denver, Colorado
4. Jacksonville, Florida
5. Miami, Florida
6. Orlando, Florida
7. Atlanta, Georgia
8. Detroit, Michigan
9. Minneapolis, Minnesota
10. Kansas City, Missouri
11. St. Louis, Missouri
12. Las Vegas, Nevada
13. Buffalo, New York
14. Charlotte, North Carolina
15. Durham, North Carolina
16. Raleigh, North Carolina
17. Cleveland, Ohio
18. Tulsa, Oklahoma
19. Portland, Oregon
20. Pittsburgh, Pennsylvania
21. Greenville/Spartanburg, South Carolina
22. Nashville, Tennessee

23. Dallas, Texas

24. Houston, Texas

25. San Antonio, Texas

26. Richmond, Virginia

27. Seattle, Washington

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,

and

RECALL HOLDINGS LTD.

Defendants.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On June 8, 2015, Iron Mountain Inc. ("Iron Mountain") reached an agreement to acquire all of the outstanding shares of Defendant Recall Holdings Ltd. ("Recall") in a transaction valued at approximately $2.6 billion. The United States filed a civil antitrust Complaint on March 31, 2016, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of the acquisition would be to lessen competition substantially for the provision of hard-copy records management services ("RMS") in violation of Section 7 of the Clayton Act, 15 U.S.C. §

18, in the following fifteen 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. This loss of competition likely would result in consumers paying higher prices for RMS and receiving inferior service in these areas.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest specified RMS assets in each of the 15 metropolitan areas of concern. Under the terms of the Hold Separate, Defendants will take certain steps to ensure that the assets are operated as competitively independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestitures.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. *The Defendants and the Proposed Transaction*

Iron Mountain is a Delaware corporation headquartered in Boston, Massachusetts. Iron Mountain is the largest RMS company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

Recall is an Australian company headquartered in Norcross, Georgia. Recall is the second-largest RMS company in the United States and provides document storage and related services throughout the nation. Recall's worldwide revenues for 2014 were approximately $836.1 million.

On June 8, 2015, Iron Mountain and Recall entered into an agreement pursuant to which Iron Mountain proposes to acquire Recall for approximately $2.6 billion in cash and stock, subject to adjustments.

The proposed transaction, as initially agreed to by Defendants, would lessen competition substantially in the provision of RMS in the relevant markets. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on March 31, 2016.

B. *The Competitive Effects of the Transaction*

1. The Relevant Service Market

The Complaint alleges that RMS constitute a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18. 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 then index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for their 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 of RMS include Fortune 500 firms, as well as local businesses throughout the United States. Customers often procure RMS by competitive bid and contracts usually specify fees for each service provided (*e.g.,* pickup, monthly storage, retrieval, delivery, and transportation). Most customers purchase RMS in only one city. Some customers with operations in multiple cities prefer to purchase RMS from a single vendor pursuant to a single contract; other multi-city customers disaggregate their contracts and purchase RMS from different vendors in different cities.

The Complaint alleges for companies with a significant volument of records, in-house storage is generally not a viable substitute for RMS. For a company to manage its records in-house, it must have a substantial amount of unused space, racking equipment, security features, and one or more dedicated employees. Similarly, entirely replacing RMS with digital records management services is generally not feasible. To switch from physical to electronic records, a customer would need to fundamentally shift its method of creating, using and storing records and adopt an entirely paperless system.

For these reasons, the Complaint alleges that a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significant non-transitory amount. In the event of a small but significant increase in price for RMS, customers would not switch to any other alternative. Thus, the Complaint alleges that the provision of RMS constitutes a relevant service market for purposes of analyzing the effects of the transaction.

2. Relevant Geographic Markets

The geographic market for RMS consists of a metropolitan area or 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 customer's location. 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 radius a customer is willing to consider is usually measured in time, rather than miles, as the retrieval of records may be a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

In each of the metropolitan areas identified in the Complaint, a hypothetical monopolist RMS firm could profitably increase prices to local customers without losing significant sales to more distant competitors. Accordingly, each of these metropolitan areas is a relevant geographic market for the purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

3. Anticompetitive Effects of the Proposed Acquisition

As alleged in the Complaint, Iron Mountain and Recall are the two largest RMS providers in the United States and the only significant RMS providers, or two of only a few

significant RMS providers, in each of the relevant geographic markets. In each of the geographic markets, Iron Mountain is the largest RMS provider, Recall is the second- or third-largest RMS competitor, and the market is highly concentrated. In each of these markets, Iron Mountain and Recall directly compete with one another to provide RMS, resulting in lower prices and better quality service for RMS customers. According to the Complaint, the significant increase in concentration and loss of head-to-head competition that will result from the proposed acquisition will likely cause prices for RMS to increase and the quality of RMS services to decline in each relevant market.

4. Difficulty of Entry

According to the Complaint, it is unlikely that entry or expansion into the provision of RMS in the relevant geographic markets would be timely, likely, or sufficient to defeat the likely anticompetitive effects of the proposed acquisition.

Any new RMS entrant would be required to expend significant time and capital to successfully enter any of the relevant markets. Entry into a new geographic market requires a secure facility, racking equipment, delivery trucks, tracking software, and employees. In addition, a new entrant would have to expend substantial effort to build a reputation for dependable service, which is important to RMS customers who demand quick and reliable pickup of and access to their stored records. In order to recoup the costs of entry, an RMS vendor must fill a substantial amount of its facility's capacity. However, acquiring customers from existing RMS vendors in order to fill this capacity is often complicated by provisions in the customers' contracts requiring payment of permanent withdrawal fees if the customer permanently removes a box or record from storage. Customers will sometimes pay these

withdrawal fees themselves, but more commonly, the new vendor will have to offer to pay the fees to induce the customer to switch. The vendor must then recoup the cost of the fees by amortizing the cost over a longer contract, or charging higher prices while still charging a competitive price for its services. Contracts often impose a cap on the number of boxes per month that a customer may permanently remove from a RMS vendor's facility, such that a switch to a new RMS vendor may take several months or more to complete. Taken together, permanent withdrawal fees and other withdrawal restrictions make it difficult for a new RMS entrant to win customers away from existing RMS vendors.

Such fees and withdrawal restrictions also make it more difficult for existing RMS vendors to expand significantly. For all of these reasons, the Complaint alleges that new entry or expansion by existing firms is unlikely to remedy the anticompetitive effects of the proposed acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. *Divestitures*

The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing independent and economically viable competitors in the provision of RMS in each of the relevant geographic markets.

The proposed Final Judgment requires Defendants to divest, as viable ongoing business concerns, Recall RMS assets in all fifteen geographic markets identified in the Complaint (collectively, the "Divestiture Assets"). The Divestiture Assets include specified Recall records management facilities in these areas along with all tangible and intangible assets used in the operation of the records management businesses associated with these facilities. In each of the

geographic markets other than Atlanta, Defendants are divesting all of Recall's RMS assets. In Atlanta, Defendants are divesting most, but not all, of Recall's RMS facilities because the facilities to be divested are sufficient to serve all of Recall's local customers in Atlanta and to compete for new business in the area.

Section IV.A of the proposed Final Judgment requires Defendants, within 10 calendar days after consummation of the transaction sought to be enjoined by the Complaint, to divest RMS assets in thirteen of the fifteen geographic markets to Access CIG, LLC ("Access"). Access is an established player in the RMS industry and is currently the third-largest RMS provider in the United States. In addition to preserving competition in each of the thirteen geographic markets, the divestitures, when combined with Access's existing operations, will enable Access to offer RMS in all of the metropolitan areas that Recall currently offers RMS. Access will be acquiring the Divestiture Assets in Detroit, Kansas City, Charlotte, Durham, Raleigh, Buffalo, Tulsa, Pittsburgh, Greenville/Spartanburg, Nashville, San Antonio, Richmond, and San Diego. If, for some reason, Defendants are unable to complete the divestitures to Access, they must sell the Divestiture Assets to an alternative purchaser approved by the United States.

Section IV.B of the proposed Final Judgment requires Defendants, within ninety days after consummation of the transaction sought to be enjoined by the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest specified RMS assets as viable ongoing businesses in the remaining two geographic markets. In these two geographic areas—Atlanta and Seattle—Access is already a significant RMS provider, and thus a divestiture to Access would not restore the competition lost through the proposed acquisition.

Pursuant to Section IV.L, Defendants must divest the Divestiture Assets in such a way as to satisfy the United States in its sole discretion 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. Defendants must take all reasonable steps necessary to accomplish the divestitures required by Sections IV.A and IV.B quickly and shall cooperate with prospective purchasers.

In the event that the Defendants do not accomplish all of the divestitures within the periods prescribed in the proposed Final Judgment, Section V provides that the Court will appoint a trustee selected by the United States to effect the divestiture of any remaining Divestiture Assets. If a trustee is appointed, Section V provides that Defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

C. *Other Divestiture-Related Provisions*

Section IV.I of the proposed Final Judgment gives the purchasers of the Divested Assets the right to require the Defendants to provide certain transition services pursuant to a transition services agreement. This provision is designed to ensure the smooth operation of the divested

assets during the first six months after the sale of the Divestiture Assets.

Section IV.J of the proposed Final Judgment is designed to help ensure that the purchasers of the Divestiture Assets can compete to provide RMS to customers that are served by both divested records management facilities and records management facilities that are being retained by Defendants. These customers are defined as Split Multi-City Customers in Section II.L. Section IV.J of the proposed Final Judgment requires Defendants to allow any Split Multi-City Customer to terminate or otherwise modify its contract with Defendants so as to enable the customer to transfer records to the purchaser(s) of the Divestiture Assets without paying permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customer's records from a Recall records management facility that would otherwise be required under the customer's contract with Defendants. If a Split Multi-City Customer chooses to exercise this provision, it will only be required to pay Defendants the costs associated with transporting the records from Defendants' RMS facilities to the new facility, and the costs associated with reshelving the records at the new facility, if such customer requests such services from the Defendants. All Split Multi-City Customers will be informed of their rights under Section IV.J by letter as specified in Section IV.K of the proposed Final Judgment.

D. *Notification of Future Acquisitions*

Section XI of the proposed Final Judgment requires Defendants to provide advance notification of certain future proposed acquisitions not otherwise subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a. Specifically, Defendants must provide at least thirty days advance written notice to the United States before Defendants acquire, directly or indirectly, any interest in any RMS business located within fifty miles of any

Iron Mountain RMS facility located in the geographic areas listed in Appendix C of the proposed Final Judgment where the business to be acquired generated at least $1 million in revenues from RMS in the most recent completed calendar year. Section XI then provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before acquisitions in these geographic areas can be consummated.

The geographic areas listed in Appendix C include the fifteen geographic markets subject to divestitures as well as certain other metropolitan areas where Iron Mountain and Recall both provided RMS prior to the proposed acquisition. Although the United States did not believe that divestitures in these geographic areas were necessary, given the consolidation trends in the RMS industry, the United States sought to ensure that the Division had the opportunity to review future acquisitions in these areas so that it can seek effective relief, if necessary. The additional metropolitan areas covered by Section XI are: Phoenix, Arizona; Denver, Colorado; Jacksonville, Florida; Miami, Florida; Orlando, Florida; Minneapolis, Minnesota; St. Louis, Missouri; Las Vegas, Nevada; Cleveland, Ohio; Portland, Oregon; Dallas, Texas; and Houston, Texas.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent

private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Maribeth Petrizzi, Chief
Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 8700
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the proposed acquisition. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of RMS in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day 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)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the

[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).

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) (quoting *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

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

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom*. *Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft*, 56 F.3d at 1461); *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). To meet this standard, 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.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends

entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, 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 Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977)

A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: March 31, 2016

Respectfully submitted,

Soyoung Choe
U.S. Department of Justice, Antitrust Division
Networks & Technology Enforcement Section
450 Fifth Street, N.W., Suite 7100
Washington, D.C. 20530
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("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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

HOLD SEPARATE STIPULATION AND ORDER

It is hereby stipulated and agreed by and between the undersigned parties, subject to approval and entry by the Court, that:

I. Definitions

As used in this Hold Separate Stipulation and Order:

A. "Acquirer" or "Acquirers" means the entity or entities to whom Defendants divest the Divestiture Assets.

B. "Iron Mountain" means Defendant Iron Mountain Incorporated, a Delaware corporation with its headquarters in Boston, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

[Pages 2-9 of the Order are identical to the corresponding pages in the proposed order and are omitted]

Dated: March 31, 2016

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

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Networks & Technology Enforcement
Section
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FOR DEFENDANT
IRON MOUNTAIN INC.

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FOR DEFENDANT
RECALL HOLDINGS LTD.

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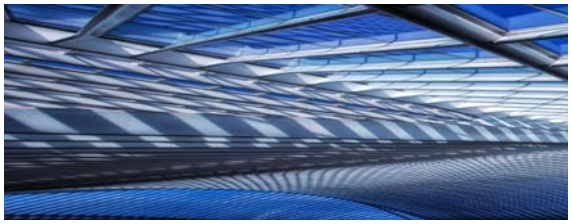
Facsimile: (202) 736-8711
Email: kglazer@sidley.com

O R D E R

IT IS SO ORDERED by the Court, this 6th day of April 2016.

United States District Judge

PRESS RELEASES



IRON MOUNTAIN COMPLETES ACQUISITION OF RECALL

Acquisition strengthens global footprint, opens up new markets and enhances service delivery

BOSTON, MA - MAY 2ND, 2016
Iron Mountain Incorporated (http://www.ironmountain.com/)(NYSE: IRM), the global leader in storage and information management services, today announced the completion of its acquisition of Recall Holdings Limited as a primarily stock transaction for approximately $2 billion (US). With the acquisition, Iron Mountain acquires the entirety of Recall's global operations, including all facilities, vehicles, employees and customer assets and excluding operations to be divested in accordance with regulatory agreements in the United States, Canada and Australia; the acquisition of the Recall business in the UK remains subject to regulatory review. Additionally, Iron Mountain appointed Recall directors Neil Chatfield and Wendy Murdock to its Board of Directors, who are included among director nominees standing for election at the company's upcoming Annual Meeting of Stockholders on June 17, 2016.

Increasing regulations, ongoing security threats, and the need to turn data into business value has elevated both the complexity and priority of managing information and assets. From business records to data to valuable items like art, the stakes have never been higher for organizations of all sizes to ensure their most critical assets are protected while able to be accessed immediately. They require a partner located where they are with the right combination of trust and security to protect what matters most, while also providing expertise and product and services designed to get the most out of those assets. And they need to be sure that as their business matures and changes, their partner can scale with them – supporting their growth across geographies and into new industries.

"Today marks an important milestone for Iron Mountain, and we welcome our new colleagues from Recall as well as their customers and shareholders into our company," said William L. Meaney, president and CEO of Iron Mountain. "This acquisition significantly boosts our vision to serve as the trusted guardians of our customers' most important assets, as it expands both our services and footprint

for better assisting them with their storage and information management needs. That trust is a cornerstone of our business, whether it's securing the strategic value of information and assets or continuing to develop innovative products and services that give customers improved access, control and value from those assets. We're now strongly positioned to deliver on our strategic and financial goals, drawing on the combined capabilities and expertise of both companies to ensure a superior customer experience across the globe."

For more on Iron Mountain's acquisition of Recall, please visit www.ironmountain.com/Iron-Mountain-Recall-Acquisition.aspx.

ABOUT IRON MOUNTAIN

Iron Mountain Incorporated (NYSE: IRM) is the global leader for storage and information management services. Trusted by more than 220,000 organizations around the world, Iron Mountain's real estate network comprises more than 85 million square feet across more than 1,400 facilities in 45 countries dedicated to protecting and preserving what matters most for its customers. Iron Mountain's solutions portfolio includes records management , data management , document management , data centers, art storage and logistics, and secure shredding, helping organizations to lower storage costs, comply with regulations, recover from disaster, and better use their information. Founded in 1951, Iron Mountain stores and protects billions of information assets, including critical business documents, electronic information, medical data and cultural and historical artifacts. Visit www.ironmountain.com (http://www.ironmountain.com/) for more information.

ADDITIONAL NEWS & EVENTS

SEPTEMBER 22ND, 2018

AHIMA 2018 (//www.ironmountain.com/about-us/news-events/events/2018/september/ahima-2018)

OCTOBER 16TH, 2018

Iron Mountain Concert Series: John Waite (//www.ironmountain.com/about-us/news-events/events/2018/october/iron-mountain-concert-series-john-waite)

SEPTEMBER 5TH, 2018

Register for Gartner IT Sourcing, Procurement, Vendor & Asset Management S... (//www.ironmountain.com/about-us/news-events/events/2018/september/register-for-gartner-it-sourcing-procurement-vendor-asset-management-summit)

JULY 27TH, 2018

Iron Mountain Reports Second Quarter 2018 Results (//www.ironmountain.com/about-us/news-events/news-categories/press-releases/2018/iron-mountain-reports-second-quarter-2018-results)

Careers (http://www.ironmountain.com/about-us/careers)

Certifications and Awards (http://www.ironmountain.com/about-us/certifications-and-awards)

Corporate Social Responsibility (http://www.ironmountain.com/about-us/corporate-social-responsibility)

Customer Success Stories (http://www.ironmountain.com/resources/customer-success-stories)

History (http://www.ironmountain.com/about-us/history)

Investors (http://investors.ironmountain.com/company/for-investors/investors-overview/default.aspx)

Leadership Team (http://www.ironmountain.com/about-us/leadership)

News and Events (http://www.ironmountain.com/about-us/news-events)

Digital Transformation (http://www.ironmountain.com/digital-transformation)

Information Management (http://www.ironmountain.com/information-management)

Secure Destruction (http://www.ironmountain.com/secure-destruction)

Secure Storage (http://www.ironmountain.com/secure-storage)

Banking (http://www.ironmountain.com/industries/banking)

Energy (http://www.ironmountain.com/industries/energy)

Entertainment (http://www.ironmountain.com/industries/entertainment)

Federal Government (http://www.ironmountain.com/industries/federal-government)

Healthcare (http://www.ironmountain.com/industries/healthcare-services)

Insurance (http://www.ironmountain.com/industries/insurance-companies)

Legal (http://www.ironmountain.com/industries/law-firms)

Library (http://www.ironmountain.com/industries/library)

Life Sciences (http://www.ironmountain.com/industries/life-sciences)

Retail (http://www.ironmountain.com/industries/retail)

Small Business (http://www.ironmountain.com/industries/small-business-solutions)

Login (https://www.ironmountain.com/login)

Pay a Bill Online (https://www.ironmountain.com/login#paymybill)

Sales (https://www.ironmountain.com/contact/contact-form)

Support (http://www.ironmountain.com/support)

Worldwide

IRON MOUNTAIN®

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(https://www.linkedin.com/company/iron-mountain)

(http://www.youtube.com/user/ironmountain)

(http://twitter.com/ironmountain)

CHAT LIVE

IN THE 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

DESCRIPTION OF WRITTEN OR ORAL COMMUNICATIONS CONCERNING THE PROPOSED FINAL JUDGMENT IN THIS ACTION AND CERTIFICATION OF COMPLIANCE UNDER 15 U.S.C. § 16(G) BY IRON MOUNTAIN INCORPORATED

Under Section 2(g) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(g), defendant Iron Mountain Incorporated ("Iron Mountain"), by its attorney, submits this description of all written or oral communications by or on behalf of Iron Mountain with any officer or employee of the United States concerning the proposed Final Judgment filed in this action on March 31, 2016. In accordance with Section 2(g), this description excludes any communications "made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone." 15 U.S.C. § 16(g).

To the best of Iron Mountain's knowledge, after appropriate inquiry, there have been no written or oral communications by or on behalf of Iron Mountain with any officer or employee of the United States concerning the proposed Final Judgment, except for communications between counsel of record for Iron Mountain and employees of the Department of Justice

Antitrust Division. Iron Mountain therefore certifies that the requirements of Section 2(g) have been complied with and that this description of communications by or on behalf of Iron Mountain and required to be reported under Section 2(g) is true and complete.

Dated: April 8, 2016

/s/ Laura A. Wilkinson
Laura A. Wilkinson, Esq.
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Counsel for Defendant
Iron Mountain Incorporated

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2016, the foregoing Description of Written or Oral Communications Concerning the Proposed Final Judgement in this Action and Certification of Compliance under 15 U.S.C. § 16(g) by Iron Mountain Incorporated was filed using the Court's CM/ECF system, which shall send notice to all counsel of record.

/s/ Laura A. Wilkinson
Laura A. Wilkinson, Esq.

Counsel for Defendant
Iron Mountain Incorporated

[Note: A corresponding document was filed by Recall Holding s on April 13, 2016]

11. *Project Development Costs and Economic Analysis:* Estimate the costs of development, including the cost of studies to determine feasibility, environmental compliance, project design, construction, financing, and the amortized annual cost of the investment. Estimate annual operation, maintenance, and replacement expenses, annual payments to the United States that are potentially associated with the Boise Project. Estimate costs associated with any anticipated additional transmission or wheeling services. Identify proposed methods of financing the project. Estimate the anticipated return on investment and present an economic analysis that compares the present worth of all benefits and the costs of the project.

12. *Performance Guarantee and Assumption of Liability:* Describe plans for (1) providing the government with performance bonds or other guarantee covering completion of the proposed project; (2) assuming liability for damage to the operational and structural integrity of the Anderson Ranch Dam and Reservoir facilities or other aspects of the Boise Project caused by construction, commissioning, operation, and/or maintenance of the pumped-storage hydropower power development; and (3) obtaining general liability insurance.

13. *Other Information:* (This final paragraph is provided for the applicant to include additional information considered relevant to Reclamation's selection process in this matter.)

Selection of Lessee

Reclamation will evaluate proposals received in response to this published notice. Proposals will be ranked according to response to the factors described in Fundamental Considerations and Requirements and Proposal Content Guidelines sections provided in this notice. In general, Reclamation will give more favorable consideration to proposals that (1) are well adapted to developing, conserving, and utilizing the water resource and protecting natural resources; (2) clearly demonstrate that the offeror is qualified to develop the hydropower facility and provide for long-term operation and maintenance; and (3) best share the economic benefits of the pumped-storage hydroelectric power development among parties to the LOPP. A proposal will be deemed unacceptable if it is inconsistent with Boise Project purposes, as determined by Reclamation.

Reclamation will give preference to those entities that qualify as preference entities (as defined under Proposal Content Guidelines, item (1.), of this notice) provided that the preference entity is well qualified and their proposal is at least as well adapted to developing, conserving, and utilizing the water and natural resources as other submitted proposals. Preference entities will be allowed 90 days to improve their proposals, if necessary, to be made at least equal to a proposal(s) that may have been submitted by a non-preference entity.

Notice and Time Period To Enter Into LOPP

Reclamation will notify, in writing, all entities submitting proposals of Reclamation's decision regarding selection of the potential lessee. The selected potential lessee will have three years from the date of such notification to accomplish NEPA compliance and enter into a LOPP for the proposed development of pumped-storage hydroelectric power at Anderson Ranch Reservoir. The lessee will then have up to three years from the date of execution of the lease to complete the designs and specifications and an additional two years to secure financing and to begin construction. Such timeframes may be adjusted for just cause resulting from actions and/or circumstances that are beyond the control of the lessee.

Dated: January 25, 2016.

Lorri J. Lee,

Regional Director, Pacific Northwest Region.

[FR Doc. 2016–08237 Filed 4–8–16; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–770–773 and 775 (Third Review)]

Stainless Steel Wire Rod From Italy, Japan, Korea, Spain, and Taiwan; Revised Schedule for the Subject Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

DATES: *Effective Date:* April 4, 2016.

FOR FURTHER INFORMATION CONTACT: Fred Ruggles (202–205–3187), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: Effective January 6, 2016, the Commission established a schedule for the conduct of the final phase of the subject reviews (81 FR 1642, January 13, 2016). The Commission is revising its schedule by changing the time of the hearing.

The Commission's new schedule for the hearing in these reviews is as follows: The hearing will be held at the U.S. International Trade Commission Building at 10:00 a.m. on May 18, 2016. All other aspects of the schedule remain unchanged.

For further information concerning these reviews see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: April 6, 2016.

By order of the Commission.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–08216 Filed 4–8–16; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Iron Mountain Inc. and Recall Holdings Ltd.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Iron Mountain Inc. and Recall Holdings Ltd.,* Civil Action No. 1:16–cv–00595. On March 31, 2016, the United States filed a Complaint alleging that Iron Mountain's proposed acquisition of Recall would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed

Final Judgment, filed at the same time as the Complaint, requires Iron Mountain to divest Recall records management assets in fifteen metropolitan areas.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's Web site at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's Web site, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 450 5th Street NW., Suite 8700, Washington, DC 20530 (telephone: (202) 307–0924).

Patricia A. Brink,

Director of Civil Enforcement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7100
Washington, DC 20530

Plaintiff,

v.

IRON MOUNTAIN INC.,
One Federal Street
Boston, MA 02110

and

RECALL HOLDINGS LTD.
697 Gardeners Road
Alexandria, Sydney
Australia

Defendants.

CASE NO.: 1:16–cv–00595
JUDGE: Amit P. Mehta
FILED: 03/31/2016

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the proposed acquisition by Defendant Iron Mountain Incorporated (''Iron Mountain'') of Defendant Recall Holdings Limited (''Recall''). The United States alleges as follows:

I. NATURE OF THE ACTION

1. Iron Mountain and Recall are the two largest providers of hard-copy records management services (''RMS'') in the United States and compete directly to serve RMS customers in numerous geographic areas. RMS are utilized by a wide array of businesses that for legal, business, or other reasons have a need to store and manage substantial volumes of hard copy records for significant periods of time.

2. In 15 metropolitan areas located throughout the United States, Iron Mountain and Recall are either the only significant providers of RMS, or two of only a few significant providers. In these 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—Iron Mountain and Recall have competed aggressively against one another for customers, resulting in lower prices for RMS and higher quality service. Iron Mountain's acquisition of Recall would eliminate this vigorous competition and the benefits it has delivered to RMS customers in each of these metropolitan areas.

3. Accordingly, Iron Mountain's acquisition of Recall likely would substantially lessen competition in the provision of RMS in these 15 metropolitan areas in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and should be enjoined.

II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

4. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. 25, as amended, to prevent and restrain the violation by Defendants of Section 7 of the Clayton Act, 15 U.S.C. 18.

5. This Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345. In their RMS businesses, Iron Mountain and Recall each make sales and purchases in interstate commerce, ship records in the flow of interstate commerce, and engage in activities substantially affecting interstate commerce.

6. Defendants Iron Mountain and Recall transact business in the District of Columbia and have consented to venue and personal jurisdiction in this District. This Court has personal jurisdiction over each Defendant and venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391(c).

III. THE DEFENDANTS AND THE TRANSACTION

7. Iron Mountain is a Delaware corporation headquartered in Boston, Massachusetts. Iron Mountain is the largest RMS company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

8. Recall is an Australian company headquartered in Norcross, Georgia. Recall is the second-largest RMS company in the United States and provides document storage and related services throughout the nation. Recall's worldwide revenues for 2014 were approximately $836.1 million.

9. On June 8, 2015, Iron Mountain and Recall entered into a Scheme Implementation Deed by which Iron Mountain proposes to acquire Recall for approximately $2.6 billion in cash and stock, subject to adjustments.

IV. TRADE AND COMMERCE

A. Relevant Service Market: Records Management Services

10. For a variety of legal and business reasons, companies must often retain 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.

11. RMS vendors pick up records from customers and bring them to a secure off-site facility, where they then index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for their 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 no longer is required.

12. Customers that purchase RMS range from Fortune 500 companies to small firms that have a need to manage and store records. Customers include corporations with business records maintenance requirements, healthcare providers with patient records, and other companies that may wish to manage and store other types of records, such as case files, employee records, and other information.

13. RMS procurements are typically made by competitive bid. Contracts usually specify fees for each service provided (*e.g.,* pickup, monthly storage, retrieval, delivery, and transportation).

Most customers purchase RMS in only one city. Some customers with operations in multiple cities prefer to purchase RMS from a single vendor pursuant to a single contract; other multi-city customers disaggregate their contracts and purchase RMS from different vendors in different cities.

14. For companies with a significant volume of records, in-house storage is generally not a viable substitute for RMS. For a company to manage its records in-house, it must have a substantial amount of unused space, racking equipment, security features, and one or more dedicated employees. Similarly, entirely replacing RMS with digital records management services is generally not feasible. To switch from physical to electronic records, a customer would need to fundamentally shift its method of creating, using, and storing records and adapt to an entirely paperless system. For many customers, the time, expense, and other burdens associated with doing so are prohibitive.

15. For these reasons, a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significant non-transitory amount. Accordingly, RMS constitutes a relevant product market and line of commerce for purposes of analyzing the likely competitive effects of the proposed acquisition under Section 7 of the Clayton Act, 15 U.S.C. 18.

B. Relevant Geographic Markets

16. The geographic market for RMS consists of a metropolitan area or 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 customer's location. 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 radius a customer is willing to consider is usually measured in time, rather than miles, as the retrieval of records may be a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

17. RMS vendors in the following 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—could profitably increase prices to local customers without losing significant sales to more distant competitors. As a result, a hypothetical monopolist of RMS in each of these 15 metropolitan areas could profitably increase its prices by at least a small but significant non-transitory amount. Accordingly, each of these areas is a relevant geographic market for the purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. 18.

C. Anticompetitive Effects of the Proposed Acquisition

18. Iron Mountain and Recall are the two largest RMS providers in the United States and directly compete to provide RMS in each relevant geographic market. Each relevant geographic market for the provision of RMS is highly concentrated. In each of the relevant geographic markets, Iron Mountain is the largest RMS provider and Recall is either the second or third-largest competitor, while few, if any, other significant competitors exist. Iron Mountain and Recall compete very closely for accounts, target one another's customers, and, in most of the relevant geographic markets, view one another as the other's most formidable competitor. The resulting significant increase in concentration in each metropolitan area and loss of head-to-head competition between Iron Mountain and Recall likely will result in higher prices and lower quality service for RMS customers in each relevant geographic market.

D. Entry Into the Market for RMS

19. It is unlikely that entry or expansion into the provision of RMS in the relevant geographic markets alleged herein would be timely, likely, or sufficient to defeat the likely anticompetitive effects of the proposed acquisition.

20. Any new RMS entrant would be required to expend significant time and capital to successfully enter any of the relevant geographic markets. RMS entry into a new geographic market generally requires a secure facility, racking equipment, delivery trucks, tracking software, and employees. In addition, a new entrant would have to expend substantial effort to build a reputation for dependable service, which is important to RMS customers who demand quick and reliable pickup of and access to their stored records.

21. In order to recoup the costs of entry, an RMS vendor must fill a substantial amount of its facility's capacity. However, acquiring customers from existing RMS vendors in order to fill this capacity is often complicated by provisions in the customers' contracts requiring payment of permanent withdrawal fees if the customer permanently removes a box or record from storage. Customers will sometimes pay these withdrawal fees themselves, but more commonly, the new vendor will have to offer to pay the fees to induce the customer to switch. The vendor must then recoup the cost of the fees by imposing its own permanent withdrawal fees, amortizing the cost over a longer contract, or charging higher prices while still charging a competitive price for its services. Customer contracts also often impose a cap on the number of boxes per month that a customer may permanently remove from a RMS vendor's facility, such that a switch to a new RMS vendor may take several months to complete. Taken together, permanent withdrawal fees and other withdrawal restrictions make it difficult for a new RMS entrant to win customers away from existing RMS vendors.

22. Likewise the permanent withdrawal fees and other withdrawal restrictions also make it more difficult for an RMS vendor already in a market to win enough customers away from competitors to expand significantly.

V. VIOLATION ALLEGED

23. The United States hereby incorporates paragraphs 1 through 22 above.

24. The proposed acquisition of Recall by Iron Mountain likely would substantially lessen competition for RMS in the 15 relevant geographic markets identified above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects relating to RMS in the relevant geographic markets, among others:

(a) actual and potential competition between Iron Mountain and Recall for RMS in each relevant geographic market will be eliminated;

(b) competition generally for RMS in each relevant geographic market will be substantially lessened; and

(c) prices for RMS will likely increase and the quality of service will likely decrease in each relevant geographic market.

VI. REQUESTED RELIEF

25. The United States requests that this Court:

(a) adjudge and decree that Iron Mountain's acquisition of Recall would be unlawful and violate Section 7 of the Clayton Act, 15 U.S.C. 18;

(b) permanently enjoin and restrain Defendants and all persons acting on their behalf from consummating the proposed acquisition of Recall by Iron

Mountain, or from entering into or carrying out any other contract, agreement, plan or understanding, the effect of which would be to combine Iron Mountain with Recall;

(c) award the United States the cost for this action; and

(d) award the United States such other and further relief as the Court deems just and proper.

Dated: March 31, 2016

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
IRON MOUNTAIN INC.,
and
RECALL HOLDINGS LTD.
Defendants.

CASE NO.: 1:16–cv–00595
JUDGE: Amit P. Mehta
FILED: 03/31/2016

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On June 8, 2015, Iron Mountain Inc. (''Iron Mountain'') reached an agreement to acquire all of the outstanding shares of Defendant Recall Holdings Ltd. (''Recall'') in a transaction valued at approximately $2.6 billion. The United States filed a civil antitrust Complaint on March 31, 2016, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of the acquisition would be to lessen competition substantially for the provision of hard-copy records management services (''RMS'') in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, in the following fifteen 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. This loss of competition likely would result in consumers paying higher prices for RMS and receiving inferior service in these areas.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (''Hold Separate'') and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest specified RMS assets in each of the 15 metropolitan areas of concern. Under the terms of the Hold Separate, Defendants will take certain steps to ensure that the assets are operated as competitively independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestitures.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Iron Mountain is a Delaware corporation headquartered in Boston, Massachusetts. Iron Mountain is the largest RMS company in the United States, providing document storage and related services throughout the nation. For fiscal year 2014, Iron Mountain reported worldwide revenues of approximately $3.1 billion.

Recall is an Australian company headquartered in Norcross, Georgia. Recall is the second-largest RMS company in the United States and provides document storage and related services throughout the nation. Recall's worldwide revenues for 2014 were approximately $836.1 million.

On June 8, 2015, Iron Mountain and Recall entered into an agreement pursuant to which Iron Mountain proposes to acquire Recall for approximately $2.6 billion in cash and stock, subject to adjustments.

The proposed transaction, as initially agreed to by Defendants, would lessen competition substantially in the provision of RMS in the relevant markets. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on March 31, 2016.

B. The Competitive Effects of the Transaction

1. The Relevant Service Market

The Complaint alleges that RMS constitute a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18. 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 then index the records to allow their customers to keep track of them. RMS vendors retrieve stored records for their 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 of RMS include Fortune 500 firms, as well as local businesses throughout the United States. Customers often procure RMS by competitive bid and contracts usually specify fees for each service provided (*e.g.,* pickup, monthly storage, retrieval, delivery, and transportation). Most customers purchase RMS in only one city. Some customers with operations in multiple cities prefer to purchase RMS from a single vendor pursuant to a single contract; other multi-city customers disaggregate their contracts and purchase RMS from different vendors in different cities.

The Complaint alleges for companies with a significant volument of records, in-house storage is generally not a viable substitute for RMS. For a company to manage its records in-house, it must have a substantial amount of unused space, racking equipment, security features, and one or more dedicated employees. Similarly, entirely replacing RMS with digital records management services is generally not feasible. To switch from physical to electronic records, a customer would need to fundamentally shift its method of creating, using and storing records and adopt an entirely paperless system.

For these reasons, the Complaint alleges that a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significant non-transitory amount. In the event of a small but significant increase in price for RMS, customers would not switch to any other alternative. Thus, the Complaint alleges that the provision of RMS constitutes a relevant service market for purposes of analyzing the effects of the transaction.

2. Relevant Geographic Markets

The geographic market for RMS consists of a metropolitan area or 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 customer's location. 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 radius a customer is willing to consider is usually measured in time, rather than miles, as the retrieval of records may be a time-sensitive matter. Transportation costs also likely render a distant RMS vendor uncompetitive with vendors located closer to the customer.

In each of the metropolitan areas identified in the Complaint, a hypothetical monopolist RMS firm could profitably increase prices to local customers without losing significant sales to more distant competitors. Accordingly, each of these metropolitan areas is a relevant geographic market for the purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 15 U.S.C. 18.

3. Anticompetitive Effects of the Proposed Acquisition

As alleged in the Complaint, Iron Mountain and Recall are the two largest RMS providers in the United States and the only significant RMS providers, or two of only a few significant RMS providers, in each of the relevant geographic markets. In each of the geographic markets, Iron Mountain is the largest RMS provider, Recall is the second- or third-largest RMS competitor, and the market is highly concentrated. In each of these markets, Iron Mountain and Recall directly compete with one another to provide RMS, resulting in lower prices and better quality service for RMS customers. According to the Complaint, the significant increase in concentration and loss of head-to-head competition that will result from the proposed acquisition will likely cause prices for RMS to increase and the quality of RMS services to decline in each relevant market.

4. Difficulty of Entry

According to the Complaint, it is unlikely that entry or expansion into the provision of RMS in the relevant geographic markets would be timely, likely, or sufficient to defeat the likely anticompetitive effects of the proposed acquisition.

Any new RMS entrant would be required to expend significant time and capital to successfully enter any of the relevant markets. Entry into a new geographic market requires a secure facility, racking equipment, delivery trucks, tracking software, and employees. In addition, a new entrant would have to expend substantial effort to build a reputation for dependable service, which is important to RMS customers who demand quick and reliable pickup of and access to their stored records. In order to recoup the costs of entry, an RMS vendor must fill a substantial amount of its facility's capacity. However, acquiring customers from existing RMS vendors in order to fill this capacity is often complicated by provisions in the customers' contracts requiring payment of permanent withdrawal fees if the customer permanently removes a box or record from storage. Customers will sometimes pay these withdrawal fees themselves, but more commonly, the new vendor will have to offer to pay the fees to induce the customer to switch. The vendor must then recoup the cost of the fees by amortizing the cost over a longer contract, or charging higher prices while still charging a competitive price for its services. Contracts often impose a cap on the number of boxes per month that a customer may permanently remove from a RMS vendor's facility, such that a switch to a new RMS vendor may take several months or more to complete. Taken together, permanent withdrawal fees and other withdrawal restrictions make it difficult for a new RMS entrant to win customers away from existing RMS vendors.

Such fees and withdrawal restrictions also make it more difficult for existing RMS vendors to expand significantly. For all of these reasons, the Complaint alleges that new entry or expansion by existing firms is unlikely to remedy the anticompetitive effects of the proposed acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestitures

The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing independent and economically viable competitors in the provision of RMS in each of the relevant geographic markets.

The proposed Final Judgment requires Defendants to divest, as viable ongoing business concerns, Recall RMS assets in all fifteen geographic markets identified in the Complaint (collectively, the ''Divestiture Assets''). The Divestiture Assets include specified Recall records management facilities in these areas along with all tangible and intangible assets used in the operation of the records management businesses associated with these facilities. In each of the geographic markets other than Atlanta, Defendants are divesting all of Recall's RMS assets. In Atlanta, Defendants are divesting most, but not all, of Recall's RMS facilities because the facilities to be divested are sufficient to serve all of Recall's local customers in Atlanta and to compete for new business in the area.

Section IV.A of the proposed Final Judgment requires Defendants, within 10 calendar days after consummation of the transaction sought to be enjoined by the Complaint, to divest RMS assets in thirteen of the fifteen geographic

markets to Access CIG, LLC (''Access''). Access is an established player in the RMS industry and is currently the third-largest RMS provider in the United States. In addition to preserving competition in each of the thirteen geographic markets, the divestitures, when combined with Access's existing operations, will enable Access to offer RMS in all of the metropolitan areas that Recall currently offers RMS. Access will be acquiring the Divestiture Assets in Detroit, Kansas City, Charlotte, Durham, Raleigh, Buffalo, Tulsa, Pittsburgh, Greenville/Spartanburg, Nashville, San Antonio, Richmond, and San Diego. If, for some reason, Defendants are unable to complete the divestitures to Access, they must sell the Divestiture Assets to an alternative purchaser approved by the United States.

Section IV.B of the proposed Final Judgment requires Defendants, within ninety days after consummation of the transaction sought to be enjoined by the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest specified RMS assets as viable ongoing businesses in the remaining two geographic markets. In these two geographic areas—Atlanta and Seattle—Access is already a significant RMS provider, and thus a divestiture to Access would not restore the competition lost through the proposed acquisition.

Pursuant to Section IV.L, Defendants must divest the Divestiture Assets in such a way as to satisfy the United States in its sole discretion 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. Defendants must take all reasonable steps necessary to accomplish the divestitures required by Sections IV.A and IV.B quickly and shall cooperate with prospective purchasers.

In the event that the Defendants do not accomplish all of the divestitures within the periods prescribed in the proposed Final Judgment, Section V provides that the Court will appoint a trustee selected by the United States to effect the divestiture of any remaining Divestiture Assets. If a trustee is appointed, Section V provides that Defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestitures have not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

C. Other Divestiture-Related Provisions

Section IV.I of the proposed Final Judgment gives the purchasers of the Divested Assets the right to require the Defendants to provide certain transition services pursuant to a transition services agreement. This provision is designed to ensure the smooth operation of the divested assets during the first six months after the sale of the Divestiture Assets.

Section IV.J of the proposed Final Judgment is designed to help ensure that the purchasers of the Divestiture Assets can compete to provide RMS to customers that are served by both divested records management facilities and records management facilities that are being retained by Defendants. These customers are defined as Split Multi-City Customers in Section II.L. Section IV.J of the proposed Final Judgment requires Defendants to allow any Split Multi-City Customer to terminate or otherwise modify its contract with Defendants so as to enable the customer to transfer records to the purchaser(s) of the Divestiture Assets without paying permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customer's records from a Recall records management facility that would otherwise be required under the customer's contract with Defendants. If a Split Multi-City Customer chooses to exercise this provision, it will only be required to pay Defendants the costs associated with transporting the records from Defendants' RMS facilities to the new facility, and the costs associated with reshelving the records at the new facility, if such customer requests such services from the Defendants. All Split Multi-City Customers will be informed of their rights under Section IV.J by letter as specified in Section IV.K of the proposed Final Judgment.

D. Notification of Future Acquisitions

Section XI of the proposed Final Judgment requires Defendants to provide advance notification of certain future proposed acquisitions not otherwise subject to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a. Specifically, Defendants must provide at least thirty days advance written notice to the United States before Defendants acquire, directly or indirectly, any interest in any RMS business located within fifty miles of any Iron Mountain RMS facility located in the geographic areas listed in Appendix C of the proposed Final Judgment where the business to be acquired generated at least $1 million in revenues from RMS in the most recent completed calendar year. Section XI then provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before acquisitions in these geographic areas can be consummated.

The geographic areas listed in Appendix C include the fifteen geographic markets subject to divestitures as well as certain other metropolitan areas where Iron Mountain and Recall both provided RMS prior to the proposed acquisition. Although the United States did not believe that divestitures in these geographic areas were necessary, given the consolidation trends in the RMS industry, the United States sought to ensure that the Division had the opportunity to review future acquisitions in these areas so that it can seek effective relief, if necessary. The additional metropolitan areas covered by Section XI are: Phoenix, Arizona; Denver, Colorado; Jacksonville, Florida; Miami, Florida; Orlando, Florida; Minneapolis, Minnesota; St. Louis, Missouri; Las Vegas, Nevada; Cleveland, Ohio; Portland, Oregon; Dallas, Texas; and Houston, Texas.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United

States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site and, under certain circumstances, published in the **Federal Register**.

Written comments should be submitted to:

Maribeth Petrizzi, Chief
Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW., Suite 8700
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the proposed acquisition. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of RMS in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day 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)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.'').[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.''* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not

[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).

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

require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also U.S. Airways,* 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements) (citing *Microsoft,* 56 F.3d at 1461); *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). To meet this standard, 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.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also U.S. Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, 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 Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways,* 38 F. Supp. 3d at 76.

[3] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: March 31, 2016

Respectfully submitted,

_____/s/_____

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IRON MOUNTAIN INC.,
and
RECALL HOLDINGS LTD.

Defendants.

CASE NO.: 1:16–cv–00595
JUDGE: Amit P. Mehta
FILED: 03/31/2016

FINAL JUDGMENT

WHEREAS, Plaintiff United States of America filed its Complaint on March 31, 2016, the United States and Defendants Iron Mountain Incorporated and Recall Holdings Limited, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will

be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II. Definitions

As used in this Final Judgment:

A. ''Acquirer'' or ''Acquirers'' means the entity or entities to whom Defendants divest the Divestiture Assets.

B. ''Acquirer of the Appendix A Divestiture Assets'' means Access or another entity to which Defendants divest the Appendix A Divestiture Assets.

C. ''Acquirer(s) of the Appendix B Divestiture Assets'' means the entity or entities to which Defendants divest the Appendix B Divestiture Assets.

D. ''Iron Mountain'' means Defendant Iron Mountain Incorporated, a Delaware corporation with its headquarters in Boston, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

E. ''Recall'' means Defendant Recall Holdings Limited, an Australian public company limited by shares and registered in New South Wales under Australian law, with its headquarters in Norcross, Georgia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

F. ''Access'' means Access CIG, LLC, a Delaware limited liability company headquartered in Livermore, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

G. ''Appendix A Divestiture Assets'' means:

1. The Records Management facilities listed in Appendix A; and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix A, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix A; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix A; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix A; all customer lists relating to the Records Management facilities listed in Appendix A; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix A (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix A; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix A, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix A.

H. ''Appendix B Divestiture Assets'' means:

1. The Records Management facilities listed in Appendix B; and

2. All tangible and intangible assets used in the operation of the Records Management businesses associated with the Records Management facilities listed in Appendix B, including, but not limited to:

a. All tangible assets, including fixed assets, vehicles, garages, capital equipment, personal property, inventory, office furniture, materials, supplies, and other tangible property, and all assets used in connection with the Records Management facilities listed in Appendix B; all licenses, permits and authorizations issued by any governmental organization relating to the Records Management facilities listed in Appendix B; all contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings relating to the Records Management facilities listed in Appendix B; all customer lists relating to the Records Management facilities listed in Appendix B; all customer contracts, accounts, and credit records relating to the Records Management facilities listed in Appendix B (other than for Split Multi-City Customers who choose to remain with Defendants); and all repair and performance records and all other records relating to the Records Management facilities listed in Appendix B; and

b. All intangible assets used in the development, production, servicing and sale of the Records Management services associated with the Records Management facilities listed in Appendix B, including all patents, licenses and sublicenses, intellectual property, copyrights, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees relating to the Records Management facilities listed in Appendix B.

I. ''Divestiture Assets'' means the Appendix A Divestiture Assets and Appendix B Divestiture Assets.

J. ''Divestiture Records Management Facilities'' means the Records Management facilities listed in Appendices A and B.

K. ''Records Management'' means the storage and management of physical records and the provision of services relating to physical records, such as transporting and indexing records.

L. ''Split Multi-City Customer'' means a Recall customer that, as of the date of divestiture of a Divestiture Records Management Facility, has records stored at both the Divestiture Records Management Facility and one or more other Recall Records Management facilities that are to be retained by Defendants. A Split Multi-City Customer does not include a Recall customer that has separate contracts for

each Recall facility in which it stores records.

III. Applicability

A. This Final Judgment applies to Iron Mountain and Recall, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Sections IV and V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirers of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Defendants are ordered and directed, within 10 calendar days after consummation of the transaction sought to be enjoined by the Complaint, to divest the Appendix A Divestiture Assets in a manner consistent with this Final Judgment to Access or another Acquirer of the Appendix A Divestiture Assets acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Appendix A Divestiture Assets as expeditiously as possible.

B. Defendants are ordered and directed, within ninety (90) calendar days after consummation of the transaction sought to be enjoined by the Complaint, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Appendix B Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer or Acquirer(s) of the Appendix B Divestiture Assets acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Appendix B Divestiture Assets as expeditiously as possible.

C. In the event Defendants are attempting to divest the Appendix A Divestiture Assets to an Acquirer other than Access, and in accomplishing the divestiture of the Appendix B Divestiture Assets ordered by this Final Judgment, Defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all qualified prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendants shall provide the Acquirer(s) and the United States information relating to the personnel involved in the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer(s) to employ any Defendant employee whose primary responsibility is the operation and management of the Divestiture Assets or the sale of Records Management services provided from the Divestiture Assets.

E. Defendants shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. Defendants shall warrant to the Acquirer(s) that the Divestiture Assets will be operational on the date of sale.

G. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

H. Defendants shall warrant to the Acquirer(s) that there are no material defects in the environmental, zoning or other permits pertaining to the operation of the Divestiture Assets, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

I. At the option of the Acquirer(s), Defendants shall enter into a Transition Services Agreement for any services that are reasonably necessary for the Acquirer(s) to operate any of the Divestiture Records Management Facilities for a period of up to six (6) months. The United States, in its sole discretion, may approve one or more extensions of this agreement for a total of up to an additional six (6) months. Defendants shall perform all duties and provide all services required of Defendants under the Transition Services Agreement. The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions. Any amendments, modifications or extensions of the Transition Services Agreement may only be entered into with the approval of the United States, in its sole discretion.

J. For a period of one (1) year from the date of the sale of any Divestiture Assets to an Acquirer, Defendants shall allow any Split Multi-City Customer to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer some or all of its records to that Acquirer without penalty or delay and shall not enforce any contractual provision providing for permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customer's records from a Recall Records Management facility to a facility operated by the Acquirer; except that if a Split Multi-City Customer requests that Defendants physically transport such records to the Acquirer, nothing in this Section IV.J prohibits Defendants from charging: (1) Either the transportation fees listed in the Split Multi-City Customer's contract with Recall or $.30 per carton, whichever is less; or (2) either the re-filing fees listed in the Split Multi-City Customer's contract with Recall or $.45 per carton, whichever is less, if the Split Multi-City Customer requests that Defendants handle the re-filing of the cartons at the Acquirer's facility.

K. Within five (5) business days of the date of the sale of the Divestiture Assets to an Acquirer, Defendants shall send a letter, in a form approved by the United States in its sole discretion, to all Split Multi-City Customers of the Divestiture Records Management Facilities acquired by that Acquirer notifying the recipients of the divestiture and providing a copy of this Final Judgment. Defendants shall provide the United States a copy of their letter at least five (5) business days

before it is sent. The letter shall specifically advise customers of the rights provided under Section IV.J of this Final Judgment. The Acquirer shall have the option to include its own letter with Defendants' letter.

L. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by Divestiture Trustee appointed pursuant to Section V, of this Final Judgment, (1) shall include the entire Divestiture Assets (unless the United States in its sole discretion approves the divestiture of a subset of the Divestiture Assets), and (2) shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing Records Management business. Divestiture of the Divestiture Assets may be made to one or more Acquirers provided that in each instance it is demonstrated to the sole satisfaction of the United States that the Divestiture Assets will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to an Acquirer(s) that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the records management business; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer(s) and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer(s) to compete effectively.

V. Appointment of Divestiture Trustee

A. If Defendants have not divested all of the Divestiture Assets within the time periods specified in Sections IV.A and IV.B, Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of any remaining Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the remaining Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V.D of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section VI.

D. The Divestiture Trustee shall serve at the cost and expense of Defendants pursuant to a written agreement, on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets to be sold by the Divestiture Trustee and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and Defendants are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within fourteen (14) calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such reports contains information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. The Divestiture Trustee shall at

the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the Divestiture Trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants and the Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section V.C of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V.C, a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) Access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States,

except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. Notification

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''), Defendants, without providing advance notification to DOJ, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity or management interest, in any Records Management business located within a fifty (50) mile radius of any Iron Mountain Records Management facility in the metropolitan statistical areas associated with the cities listed in Appendix C during the term of this Final Judgment; provided that notification pursuant to this Section shall not be required where the assets or interest being acquired generated less than $1 million in revenue from Records Management services in the most recent completed calendar year.

B. Such notification shall be provided to the DOJ in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only about Records Management. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, Defendants shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

XII. No Reacquisition

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XIII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

XV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

_____

United States District Judge

[FR Doc. 2016–08210 Filed 4–8–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

[OMB Number 1121–NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Census of State and Local Law Enforcement Agencies Serving Tribal Lands (CSLLEASTL)

AGENCY: Bureau of Justice Statistics, Department of Justice.

ACTION: 30-Day notice.

SUMMARY: The Department of Justice (DOJ), Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register** at 81 FR 6295, February 5, 2016, allowing for a 60 day comment period.

DATES: Comments are encouraged and will be accepted for an additional 30 days until May 11, 2016.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Suzanne Strong, Statistician, Bureau of Justice Statistics, 810 Seventh Street NW., Washington, DC 20531 (email: *Suzanne.M.Strong@ojp.usdoj.gov;* telephone: 202–616–3666). Written comments and/or suggestions can also be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to *OIRA_submissions@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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May 31, 2016

Via Federal Express
United States Department of Justice
450 Fifth Street
Suite 7100
Washington, D.C 20530

Attn: Maribeth Petrizzi
Chief Litigation II Section
Antitrust Division

Dear Sirs/Madam:

Please accept these public comments from Robert S. Moran, Jr., the undersigned, a partner of the law firm of McBreen & Kopko in connection with the pending matter captioned United States vs. Iron Mountain Inc. ("Iron Mountain") and Recall Holdings Ltd. ("Recall"); Proposed Final Judgment and Competitive Impact Statement Civil Action No. 1-16-cv-00595. Please be advised that the undersigned represents National Records Centers, Inc. ("NRC") a nationwide provider of records management services ("RMS") throughout the United States. NRC competes directly with Iron Mountain, Recall and Access CIG, LLC ("Access") in many markets.

It is our position 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. NRC urges the Department of Justice to completely re-think the Iron Mountain/Recall merger in its totality. Combining the number one company in the industry with the number two company is unfair and anticompetitive by its very nature. Approving such an anticompetitive combination of businesses by merely causing business number two to shed some of its business is clearly not enough to result in open and fair competition. Forcing divestiture of this business to

the number three company in the industry makes no sense at all. Instead of forcing this divestiture to a huge and growing company, the Department of Justice should just simply allow those customers affected by the merger out of their contracts, without penalty, should they chose to do so. Then those customers could pick their service provider by price and service and not be forced with the unhappy choice of staying with company two or going to company three. Customers are much better served with choices. The foundation of our pro-competition philosophy is choice. The Department of Justice should not engineer a Proposed Final Judgment that serves to limit customer choices.

It is our further position that the Proposed Final Judgment requires changes, at a minimum, to make it more equitable and to address our anti-competitive concerns.

First, we see no reason why any customer of Recall (not just a "Split-City Customer") should not have the right to terminate its contract with Recall without penalty. This is fair and reasonable.

Second, the definition for "Split Multi-City Customer" is overly restrictive. The definition used in the Proposed Final Judgment contains the qualification 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". It is our belief that this qualifying statement should be deleted from the Split Multi-City Customer definition.

In the Proposed Final Judgment Section IV "Divestitures", subparagraph J it is provided that for a period of one (1) year from the date of the sale of any Divestiture Assets to an Acquirer, defendant shall allow any Split Multi-City Customer to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer some or all of its records to that Acquirer without penalty or delay and shall not enforce any contractual provision providing for permanent withdrawal fees, retrieval fees, or other fees associated with transferring such customers' records from a Recall Management Facility to a facility operated by Acquirer".

We see no reason why provision J does not allow that any Split Multi-City Customer can have the discretion to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer some or all of its records to any other person or entity engaged in the records management business and not solely to Access. In this way fair and open competition for the business of any Split Multi-City Customer would occur allowing either Access or any other service provider to win the business. The substantial benefit to any Split Multi-City Customer is obvious. To restrict the discretion of these Split Multi-City Customers so that they have to do business with Access is unfair and inequitable. Also the qualification to the definition of Split Multi-City Customer further has anti-competitive affects and restricts open and fair competition.

It is our sincere hope that the acquisition of Recall by Iron Mountain not go forward. If it were to go forward then Recall customers in the affected markets should be free (without penalty) to choose any new service provider. Should the Department of Justice move forward with this Proposed Final Judgment, NRC strongly encourages the Department of Justice to modify the proposed Final Judgment in two ways. First, to delete the qualification to the

definition of Split Multi-City Customer and second, to modify Provision IV Subsection J to enlarge the period from one (1) year to three (3) years and to allow any Split Multi-City Customer to terminate or otherwise modify its contract with Recall so as to enable the Split Multi-City Customer to transfer its records without penalty or delay to any records storage provider and not only to Access.

The foregoing is submitted respectfully and in the interest of fair and open competition to enhance the opportunity for any records storage company to obtain the business that is being divested as part of this proposed Final Judgment.

Thank you.

Very truly yours,

Robert S. Moran, Jr.

RSM:km

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
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Facsimile: (202) 514-9033
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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
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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

MOTION AND MEMORANDUM OF THE
UNITED STATES IN SUPPORT OF ENTRY OF FINAL JUDGMENT

Pursuant to Sections 2(b)-(h) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h)("APPA" or "Tunney Act"), Plaintiff, the United States of America ("United States"), moves for entry of the proposed Final Judgment ("PFJ") (attached hereto as Exhibit A), filed in this civil antitrust proceeding. The PFJ may be entered at this time without further hearing if the Court determines that entry is in the public interest. The Competitive Impact Statement ("CIS") filed in this matter on March 31, 2016, discusses the provisions of the PFJ and explains why its entry would be in the public interest. ECF No. 3. The United States is also filing a Certificate of Compliance With Provisions of the Antitrust Procedures and Penalties Act ("Certificate of Compliance"), attached hereto as Exhibit B, which demonstrates that the requirements of the APPA have been met.

I. BACKGROUND

On March 31, 2016, the United States filed a civil antitrust Complaint alleging that the proposed acquisition by Defendant Iron Mountain Inc. ("Iron Mountain") of Defendant Recall Holdings Ltd. ("Recall"), pursuant to an agreement entered into on June 8, 2015, would be likely to substantially lessen competition in the provision of hard-copy records management services ("RMS") in a number of 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 in the United States would likely have increased and customers would have received services of lower quality.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate Order"); a PFJ; and a CIS, that describes how the PFJ is designed to remedy the likely anticompetitive effects of the proposed acquisition. The Hold Separate Order, which was signed by the Court on April 6, 2016, provides that the PFJ may be entered by the Court after the satisfaction of the applicable requirements of the APPA. ECF No. 9. As demonstrated by the Certificate of Compliance, the parties have complied with those requirements. Entry of the PFJ would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

II. COMPLAINCE WITH THE APPA

The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. *See* 15 U.S.C. § 16(b). In compliance with this provision of the APPA, the United States filed the CIS on March 31, 2016, and published the PFJ and CIS in the

Federal Register on April 11, 2016.[1] In addition, the United States ensured that a summary of the terms of the PFJ, together with directions for the submission of written comments relating to the PFJ, 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 sixty-day public comment period commenced on April 11, 2016 and terminated on June 10, 2016. During this period, the United States received one comment, dated May 31, 2016. The United States filed its response with the Court on August 29, 2016 and published the comment and response in the *Federal Register* on September 6, 2016.[2] Since, as set forth in the Certificate of Compliance, all the requirements of the APPA have been satisfied, it is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e).

III. ENTRY OF THE PROPOSED FINAL JUDGMENT IS IN THE PUBLIC INTEREST

In its CIS and Response to Public Comment, the United States set forth the legal standards for determining the public interest under the APPA and now incorporates those statements by reference. ECF Nos. 3, 13. As indicated above, the United States alleged in its Complaint that the proposed acquisition of Recall by Iron Mountain would be likely to substantially lessen competition in hard-copy records management services in 15 geographic areas in the United States. As explained in the CIS, the PFJ is designed to eliminate the likely anticompetitive effects of this acquisition. It requires Iron Mountain, among other things, to divest RMS related assets in the 13 of the 15 geographic areas to Access CIG, LLC ("Access")

[1] *See* 81 Fed. Reg. 21,383 (Apr. 11, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-04-11/pdf/2016-08210.pdf.
[2] *See* 81 Fed. Reg. 61,244 (Sept. 6, 2016), *available at* https://federalregister.gov/a/2016-21287.

and the RMS related assets in the remaining two geographic areas to a buyer approved by the United States who will be an effective, long-term RMS competitor.

As explained in the CIS and Response to Public Comment, the public, including affected competitors and customers, has had the opportunity to comment on the PFJ as required by the APPA. Moreover, there has been no allegation that the proposed settlement constitutes an abuse of the United States' discretion or that it is not within the zone of settlements consistent with the public interest.

IV. CONCLUSION

For the reasons set forth in this Motion and Memorandum and in the CIS, the Court should find that the PFJ is in the public interest and should enter the Final Judgment without further hearings. Accordingly, the United States respectfully requests that the Final Judgment, attached as Exhibit A, be entered as soon as possible.

Plaintiff is authorized by counsel for Defendants to state that Defendants join in this request.

Dated: September 9, 2016

Respectfully submitted,

/s/ Soyoung Choe

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Exhibit A

Civil Action No. 1:16-cv-00595-APM

Proposed Final Judgment

Omitted: Identical to orignally proposed Final Judgment]

Exhibit B

Civil Action No. 1:16-cv-00595-APM

Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act

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

CERTIFICATE OF COMPLIANCE WITH PROVISIONS
OF THE ANTITRUST PROCEDURES AND PENALTIES ACT

Plaintiff, United States of America, hereby certifies that it has compliance with the provisions of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), the following procedures have been followed in preparation for the entry of the Final Judgment in this matter:

1. The Complaint, proposed Final Judgment, and Hold Separate Stipulation and Order, by which the parties have agreed to the Court's entry of the Final Judgment, following compliance with the APPA, were filed with the Court on March 31, 2016. The United States also filed its Competitive Impact Statement with the Court on March 31, 2016;

2. Pursuant to 15 U.S.C. § 16(b), the proposed Final Judgment and Competitive Impact Statement were published in the *Federal Register* on April 11, 2016, 81 Fed. Reg. 21,383;

3. Pursuant to 15 U.S.C. § 16(c), copies of the proposed Final Judgment and Competitive Impact Statement were furnished to all persons requesting them and made available on the Department of Justice, Antitrust Division's Internet site, as were the Complaint and Hold Separate Stipulation and Order.

4. Pursuant to 15 U.S.C. § 16(c), a summary of the terms of the proposed Final Judgment was published in *The Washington Post*, a newspaper of general circulation in the District of Columbia, for seven days beginning on April 4, 2016 and ending on April 10, 2016.

5. There were no determinative materials or documents within the meaning of 15 U.S.C. § 16(b) that were considered by the United States in formulating the proposed Final Judgment, so none was furnished to any person pursuant to 15 U.S.C. § 16(b) or listed pursuant to 15 U.S.C. § 16(c).

6. As required by 15 U.S.C. § 16(g), on April 8, 2016 and April 13, 2016, Defendants Iron Mountain Inc. and Recall Holdings Ltd., filed with the Court descriptions of written or oral communications by or on behalf of each defendant, or any other person, with any officer or employee of the United States concerning the proposed Final Judgment.

7. The sixty-day comment period prescribed by 15 U.S.C. §§ 16(b) and (d) for the receipt and consideration of written comments, during which the proposed Final Judgment could not be entered, commenced on April 11, 2016 and terminated on June 10, 2016.

8. During the comment period, the United States received one comment, dated May 31, 2016. The United States filed its response with the Court on August 29, 2016 and published the comment and response in the *Federal Register* on September 6, 2016, 81 Fed. Reg. 61,244.

9. The parties have satisfied all the requirements of the APPA, 15 U.S.C. §§ 16(b)-(h), that are conditions for entering the proposed Final Judgment. The Court may now enter the Final Judgment if the Court determines, pursuant to 15 U.S.C. § 16(e), that entry of the Final Judgment is in the public interest.

Dated: September 9, 2016.

Respectfully submitted,

/s/ Soyoung Choe
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	)	
Plaintiff,	)	
v.	)	**Civil No. 16-cv-00595 (APM)**
Iron Mountain, Inc., *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

I. INTRODUCTION

The United States filed this action against Iron Mountain, Inc. ("Iron Mountain"), and Recall Holdings Ltd. ("Recall") (collectively "Defendants"), alleging that Iron Mountain's proposed acquisition of Recall would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Compl., ECF No. 1, ¶¶ 3, 25. The United States filed with its Complaint a Hold Separate Stipulation and Order, ECF No. 4-1, which the court executed, ECF No. 9; a proposed Final Judgment, ECF No. 4-2; and a Competitive Impact Statement, ECF No. 3 [hereinafter CIS]. Thereafter, as required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "Tunney Act"), the United States published and subjected the proposed Final Judgment to a 60-day public comment period, which expired on May 25, 2015, *see* Mot. and Mem. of the United States, ECF No. 15 [hereinafter U.S. Mot.], at 3. The public comment period elicited a single response—from National Records Center, Inc.—to which the United States responded and published the comment and response in the *Federal Register*. *See* Resp. of the United States to Public Comment, ECF No. 13 [hereinafter U.S. Resp.]. The United States now asks the court to

enter the agreed-upon Final Judgment, which would permit Iron Mountain and Recall to complete the proposed transaction subject to conditions intended to remedy the violations identified in the Complaint. *See* U.S. Mot.

II. BACKGROUND

A. Factual Background

1. Relevant Product and Geographic Markets

Iron Mountain is the largest hard-copy records management services ("RMS") provider in the United States, with reported worldwide revenues of approximately $3.1 billion in 2014. CIS at 3. Recall is the country's second-largest RMS provider, with worldwide revenues of $836.1 million in 2014. *Id.* The relevant product market—RMS—involves the off-site storage of records and the provision of related services, such as indexing, transporting, and destroying records. *Id.* at 3–4. "[T]he Complaint alleges that a hypothetical monopolist of RMS could profitably increase its prices by at least a small but significantly non-transitory amount . . . [and] customers would not switch to any other alternative." *Id.* at 5.

RMS customers include companies throughout the United States, ranging from Fortune 500 companies to small local businesses. *Id.* at 4. The relevant geographic market, however, is a metropolitan area or a radius around such area. *Id.* at 5. That is because customers typically require a RMS vendor to have a storage facility located within a certain proximity of the customer's location. *Id.* Vendors outside a particular radius are not competitive with closer-in vendors because longer-distance "vendor[s] will not be able to retrieve and deliver records on a timely basis" and because such vendors are likely to incur higher transportation costs, rendering them a more costly alternative. *Id.* The Complaint identifies 15 metropolitan areas—the relevant

geographic markets—in which RMS vendors "could profitably increase prices to local customers without losing significant sales to more distant competitors." *Id.*; Compl. ¶ 17.

2. Proposed Merger between Iron Mountain and Recall

On June 8, 2015, Iron Mountain reach an agreement to acquire all the outstanding shares of Recall, a transaction valued at $2.6 billion. CIS at 1. After the proposed merger's announcement, the United States, through the Department of Justice, conducted an investigation into the potential anti-competitive effects of the proposed transaction on RMS consumers in various geographic areas. U.S. Resp. at 2. "As 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 persons with knowledge of the [RMS] industry." *Id.* at 2–3.

Following its investigation, the United States concluded that the proposed merger likely would lessen competition in 15 metropolitan areas. *Id.* at 4; Compl. ¶ 17. "In each of these geographic areas, Iron Mountain and Recall are two of only a few significant firms providing RMS." U.S. Resp. at 4. Furthermore, in each of those areas, the United States found, the merger would result in a "substantial increase in concentration and loss of head-to-head competition between Iron Mountain and Recall" and "likely would result in higher prices and lower quality services for RMS customers." *Id.*

To address these competitive concerns, the United States required, as a condition of approving the merger, a divestiture of Recall's assets. In 13 metropolitan areas, Recall will be required to sell its assets to a third-party, Access CIG, LLC ("Access"), and in two metropolitan areas, Recall will be required to sell its assets to a to-be-determined buyer acceptable to the United States. *Id.* The required divestiture will include the sale of 26 Recall storage facilities, along with

associated assets, such as customer contracts. *Id.* According to the United States, the "[d]ivestiture of the assets to independent, economically viable competitors will ensure that customers of [RMS] will continue to receive the benefits of competition." *Id.*

B. Procedural Background

The United States filed this action against Iron Mountain and Recall, alleging that the proposed merger would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Compl. ¶¶ 3, 25. The United States filed with its Complaint a Hold Separate Stipulation and Order, which the court entered on April 7, 2016, ECF No. 9. The purpose of that Stipulation and Order was to "ensure[], prior to [the] divestitures, that the Divestiture Assets remain independent [and] economically viable[,] . . . [that] ongoing business concerns . . . remain independent and uninfluenced by Iron Mountain, and that competition is maintained during the pendency of the ordered divestitures." *Id.* at 5. With its Complaint, the United States also filed a proposed Final Judgment and a Competitive Impact Statement. *See* Final Judgment, ECF No. 4-2; CIS.

Thereafter, as required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "Tunney Act"), the United States published and subjected the proposed Final Judgment to a 60-day public comment period, which expired on May 25, 2015, *see* U.S. Mot. at 3. The public comment period elicited a single comment from a competitor in the RMS industry, National Records Centers, Inc. ("NRC"). U.S. Resp. at 8. The United States published NRC's comment and the United States' response in the *Federal Register*. *See id.* at 13. Now before the court is the United States' Motion for Entry of Final Judgment. *See generally* U.S. Mot.

III. LEGAL STANDARD

The Tunney Act requires courts, "[b]efore entering any consent judgment proposed by the United States," to "determine that the entry of such judgment is in the public interest." 15 U.S.C.

§ 16(e). The parameters of the Tunney Act's "public interest" standard are well defined by statute, *see* 15 U.S.C. § 16(e)(1), and case law, *see, e.g.*, *United States v. Newpage Holdings, Inc.*, No. 14-cv-2216, 2015 WL 9982691, at *4–5 (D.D.C. Dec. 11, 2015). The court, therefore, need not provide a fulsome recitation of the applicable standards. It suffices for present purposes to note that the government enjoys "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). And, although a court may not simply "rubber stamp" the government's proposal and is required to "make an independent determination" as to the public interest, *id.* at 1458 (internal quotation marks omitted), it "is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable," *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 15 (D.D.C. 2007). Indeed, the court is required to be "deferential to the government's predictions as to the effect of the proposed remedies." *Microsoft Corp.*, 56 F.3d at 1461. In short, "the relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlement are reasonable." *SBC Commc'ns, Inc.*, 489 F. Supp. 2d at 15–16.

IV. DISCUSSION

A. The Public Interest Inquiry

The court has carefully reviewed the United States' Complaint, as well as its proposed Final Judgment, Competitive Impact Statement, and Response to NRC's comment, and finds that the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In reaching that conclusion, the court has considered, in particular, the clarity of the proposed Final Judgment, the sufficiency of its enforcement mechanisms, and the competitive impact on third parties. *See Microsoft*, 56 F.3d at 1458–62. The court briefly discusses each of those factors.

A "district judge who must preside over the implementation of the decree is certainly entitled to insist on that degree of precision concerning the resolution of known issues as to make his task, in resolving subsequent disputes, reasonably manageable." *Id.* at 1461–62. On that score, the Final Judgment is satisfactory. The Final Judgment turns largely on the proposed divestiture of Recall's assets and provides a detailed framework by which such divestiture is to occur. Proposed Final Judgment, ECF No. 15-1, at 7–11. The Final Judgment, among other things, outlines the geographic markets and assets located in those markets subject to the divestiture, *id.* at 7 & apps. A, B; the timing of the divestiture, *id.* at 7; the mechanism for publicizing the sale of assets if not divested to Access, *id.* at 7–8; the method for transitioning Recall employees to the acquiring company, *id.* at 8; and the availability of a transition services agreement by an acquiring company, *id.* at 9. The Final Judgment also addresses the situation of Recall customers—defined as "Split Multi-City Customers"—who presently contract for RMS both from Recall's records management facilities subject to the divestiture *and* from its facilities that are to be retained by the post-merger entity. *Id.* at 6, 9–10. To enable such customers to consolidate their RMS needs with an acquiring company, the Final Judgment permits them to terminate or modify existing contracts with Recall without paying a permanent withdrawal fee, retrieval fees, or other fees associated with transferring records. *Id.* at 9–10. In short, the court is satisfied that the Final Judgment reflects the "degree of precision" necessary for the court to resolve any subsequent disputes that might arise concerning the Final Judgment's implementation.

Next, the Final Judgment contains sufficient enforcement mechanisms to ensure that its remedies are implemented, even if Iron Mountain and Recall fail to meet their divestiture obligations. Specifically, in the event that Defendants do not accomplish the required divestitures within the periods prescribed, the court must appoint a Trustee selected by the United States and

approved by the court to carry out the divestiture of any remaining assets. *Id.* at 11–12. The Trustee shall have the power to sell any remaining assets to a buyer acceptable to the United States, and the Defendants may not object to such sale except for Trustee malfeasance. *Id.* The Trustee will be required to file monthly reports with the court, and Defendants will be responsible for all costs and expenses of the Trustee. *Id.* Based on the foregoing, the court is satisfied that the Final Judgment contains a sufficient enforcement mechanism to ensure a complete sale of Recall's assets subject to divestiture. *Cf. Newpage Holdings*, 2015 WL 9982691, at *6 (finding similar enforcement provisions "adequate").

Finally, the court finds that the planned divestiture will likely mitigate any anti-competitive effects of the merger. As discussed, the United States conducted an extensive investigation of the merger's potential anti-competitive effects, *see* U.S. Resp. at 2–3, and it concluded that such effects would be eliminated by Recall's divestiture of assets in 15 geographic markets, *see* CIS at 7 ("The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by establishing independent and economically viable competitors in the provision of RMS in each of the relevant geographic markets."). Because "[t]he United States' predictions are entitled to deference," particularly as they relate to the effect of proposed remedies, *Newpage Holdings*, 2015 WL 9982691, at *5; *Microsoft Corp.*, 56 F.3d at 1461, the court finds that the planned divestiture will likely neutralize the merger's anti-competitive impacts.

Accordingly, the court finds that, under the limited standard of review required by the Tunney Act, the proposed Final Judgment is in the public interest.

B. National Records Centers, Inc.'s Comment

During the Tunney Act's 60-day public comment period, National Records Centers, Inc. ("NRC")—a competitor in multiple markets—submitted a three-page letter objecting to the

proposed approval of the merger. U.S. Resp., Ex. 1, ECF No. 13-1 [hereinafter NRC Letter]. NRC complained that "[c]ombining the number one company in the industry with the number two company is unfair and anticompetitive by its very nature" and urged the Department of Justice to "re-think" the merger "in its totality." *Id.* at 1. Alternatively, NRC suggested that *all* customers affected by the merger should be permitted to switch their RMS provider without penalty, not just those specified in the Final Judgment. *Id.* at 1–2. Finally, NRC recommended two less drastic changes to the Final Judgment: (1) that Split Multi-City Customers be permitted to terminate their contracts with Defendants without penalty so as to allow transfer to *any* RMS provider, not just an acquiring company, and that the period to make such a move be extended from one to three years; and (2) that the Final Judgment's definition of "Spilt 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." *Id.* at 2–3.

"In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that '[t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'" *Newpage Holdings*, 2015 WL 9982691, at *7 (quoting *United States v. Abitibi-Consol, Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008)). Accordingly, the court's role is limited to "evaluating whether the Proposed Final Judgment provides a reasonably adequate remedy for the harms alleged in the Complaint, and the court will defer to the United States' predictions regarding the effect of its proposed remedies." *Id.*

Here, the United States has provided a sufficient factual basis that its proposed remedy—the divestiture of certain of Recall's assets—is adequate to remedy the alleged harms. Again,

following a substantial investigation, the United States identified anti-competitive effects in 15 local markets as the potential harm arising from the merger. U.S. Resp. at 4. "The proposed Final Judgment is designed to address the competitive concerns in each of these 15 metropolitan markets." *Id.* The United States' proposed solution to remedy that harm is to require Recall to divest its assets, including customer contracts, in 13 of those markets to Access and in two of those markets to another acquirer approved by the United States. *Id.* As to NRC's demand that the Department of Justice "re-think" the merger "in its totality," NRC Letter at 1, the United States has adequately explained that requiring divestitures in those 15 local markets "is sufficient to protect competition," U.S. Resp. at 10. It also has offered facts that enable the court to conclude that Access is an appropriate divestiture partner. CIS at 8 ("Access is an established player in the RMS industry and is currently the third-largest RMS provider in the United States."). The court must defer to that assessment. *See Microsoft Corp.*, 56 F.3d at 1461.

The same holds true with respect to NRC's complaint that *all* customers affected by the merger should be able to switch providers without incurring any fees. NRC Letter at 1–2. As the United States has explained, the harm it sought to remedy was limited to 15 geographical markets. U.S. Resp. at 11–12. Therefore, NRC's proposal to allow *all* customers—regardless of their location—to switch customers without incurring a penalty "would far exceed what is necessary to remedy the harm found by the United States and alleged in the Complaint." *Id.* at 12 (citing *Microsoft Corp.*, 56 F.3d at 1459–60). Again, the court defers to the United States' determination as to the appropriate scope of the remedy. *See Microsoft Corp.*, 56 F.3d at 1461.

Lastly, as to NRC's final two criticisms—both of which concern the treatment of Split Multi-City Customers, NRC Letter at 2–3—the United States has explained that the "Final Judgment is designed to allow customers with a 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." U.S. Resp. at 12. The court must defer to the United States' determination that the definition of "Split Multi-City Customers" is sufficient to satisfy that objective. Likewise, as to NRC's suggestion that time period for a transfer be increased from one year to three years, the court accepts the United States' explanation that the shorter time period is preferable because "it is in the best interest of the industry and competition that any period of disruption or uncertainty in the relevant markets be minimized." *Id.*

In summary, none of NRC's comments alter the court's determination that the proposed Final Judgment satisfies the "public interest" standard.

V. CONCLUSION

For the foregoing reasons, the court is satisfied that the United States has complied with the requirements of the Tunney Act and that entry of the proposed Final Judgment is in the public interest. Accordingly, the court grants the United States' Motion for Entry of Final Judgment. The Final Judgment will issue separately.

Dated: November 11, 2016

Amit P. Mehta
United States District Judge

Utica Hospitals New York AG Settlement

Dated: December 11, 2013 **Español**

A.G. Schneiderman Announces Settlement With Utica Hospitals To Address Competitive Concerns

Settlement Ensures Continued Patient Access To Key Health Care Services At Competitive Prices After Hospitals' Merger

NEW YORK – Attorney General Eric T. Schneiderman today announced a settlement with the two general acute care hospitals in the city of Utica, resolving concerns that the hospitals' proposed affiliation would adversely affect competition in the healthcare market in Utica. The settlement allows the two financially troubled hospitals, Faxton-St. Luke's Healthcare and St. Elizabeth Medical Center, to combine their operations to reduce costs and enhance the quality and availability of key healthcare services for patients in the greater Utica area. The settlement's provisions ensure that the hospitals will use their combination for the benefit of patients and not as a platform for exerting market power and imposing higher health care costs on patients. The settlement also ensures continued patient access to key reproductive health services.

"Residents of the greater Utica area, like all New Yorkers, deserve high quality health care at fair prices," said **Attorney General Schneiderman.** "This settlement allows Utica's two biggest hospitals to combine in order to survive in a challenging economic environment, while ensuring that the hospitals will fulfill their promise to use the partnership to improve patients' access to quality health care and not to increase prices."

Faxton-St. Luke's Healthcare and St. Elizabeth Medical Center operate in a challenging economic environment that includes an unusually high refugee population and some of the neediest patients in the state. The hospitals have suffered significant financial losses in recent years, and it is highly questionable that they can independently surmount these challenges without negatively impacting the availability of vital health care services in the Mohawk Valley. The hospitals directly compete with one another, but also face competition from nearby community hospitals and hospitals in nearby cities such as Cooperstown, Syracuse, and Albany. In addition, the scope of competition between the merging hospitals is limited – each hospital provides services that the other does not, and most of each hospital's patients are covered by Medicare or Medicaid, where rates are set by the federal government and not by competition between them.

The settlement allows the transaction to proceed but has various provisions to ensure that the hospitals will not abuse their new market position by foreclosing competing providers from the market or excessively increasing rates directly following the combination. For example:

- ***Prohibition on exclusionary conduct.*** The hospitals agree not to require independent physicians to work exclusively at the hospitals, or to require health plans to reimburse competing hospitals or health care providers at the same or lower rates than the health plans reimburse the hospitals.
- ***Temporary rate protection.*** The hospitals commit to negotiate in good faith with rate payers (including commercial insurers and governmental managed care insurers). If these payors believe that the hospitals are acting unfairly, the settlement gives the payors the right to continue their currently-existing relationships with the hospitals for five years at current prices, subjected to annual increases not to exceed historic levels.
- ***Continued monitoring.*** The settlement allows the Attorney General to ensure that the hospitals have implemented their promised efficiencies prior to termination of the rate-protection provisions.

Because the proposed affiliation agreement also involves the combination of a secular hospital (Faxton-St. Luke's Healthcare) with a Roman Catholic hospital, the settlement also takes steps to ensure that the secular hospital is able to continue its current level of reproductive health services after the transaction, and ensures that admitting privileges will continue to be available at Faxton-St. Luke's Healthcare for independent physicians and medical professionals providing reproductive health services outside of the hospitals.

This matter was handled by Assistant Attorneys General Amy McFarlane, Robert Hubbard and George Laevsky, under the supervision of Antitrust Bureau Chief Eric J. Stock and Executive Deputy Attorney General Karla G. Sanchez. Valuable assistance was also provided by Health Care Bureau Chief Lisa Landau, Civil Rights Bureau Chief Kristen Clarke and Assistant Attorney General Monica Iyer, and Charities Bureau Section Chief Paula Gellman.

Attorney General's Press Office: (212) 416-8060

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OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK

Assurance No. 13-489

In the Matter of the

Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of the Proposed Combination of Faxton-St. Luke's Healthcare and St. Elizabeth Medical Center.

ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW §63(15)

In January 2013, pursuant to Article 22 of the New York General Business Law, the Office of the Attorney General of the State of New York ("OAG") commenced an investigation concerning the competitive implications of the proposed affiliation, under a common active parent corporation, of Faxton-St. Luke's Healthcare ("FSL") and St. Elizabeth Medical Center ("SEMC") (collectively, the "Hospitals"). The OAG subsequently broadened the investigation to consider access to care issues pursuant to the New York Civil Rights Law. As part of its investigation, the OAG reviewed documentary evidence submitted by the Hospitals, conducted interviews of numerous commercial health insurers, and spoke with a number of other third parties potentially impacted by the affiliation (collectively, the activities discussed in this paragraph constitute the "Investigation").

This Assurance of Discontinuance ("Assurance") contains the OAG's findings and contentions, and the relief agreed to by the OAG and the Hospitals.

OAG'S FINDINGS

OVERVIEW

1. FSL is a New York not-for-profit corporation that operates general acute care hospitals at two campuses in Utica, New York; FSL is licensed to operate a total of 370 beds at these facilities. SEMC, a Catholic organization that pursues a "Catholic health care mission," is a New York not-for-profit general acute care hospital that is licensed to operate 201 beds in Utica. The Hospitals are the only general acute care hospitals in the city of Utica.

2. On June 15, 2012, it was announced that the Hospitals would each receive $7,135,500 in grants funded through the New York State Health Care Efficiency and Affordability Law ("HEAL"). Grants funded by these programs are intended to right-size and restructure health care delivery systems, and are allocated through the New York State Department of Health ("DOH") and the Dormitory Authority of the State of New York. New York State conditioned receipt of the HEAL grant monies on FSL and SEMC reaching agreement to affiliate under a common active parent corporation.

3. The DOH has stated that neither FSL nor SEMC, by itself, currently has sufficient licensed inpatient beds to accommodate the needs of the patient population in the greater Utica area.

4. On December 6, 2012, the Hospitals entered into a Memorandum of Understanding (the "MOU"), pursuant to which they agreed to affiliate under a common active parent corporation, Mohawk Valley Network, Inc. as reconstituted to become Mohawk Valley Health System (the "Combined Entity"). The OAG thereafter commenced its Investigation to assess the impact on competition of the transaction contemplated by the MOU (the

"Transaction").

THE HOSPITALS' FINANCIAL DIFFICULTIES

5. Each of the Hospitals has experienced significantly negative financial trends in recent years, which have accelerated throughout 2013. The many reasons for these negative financial trends include especially: (a) a shift in the Hospitals' patient mix away from commercially-insured patients towards Medicaid and self-pay (uninsured) patients; and (b) reductions in Medicare and Medicaid reimbursements provided to the Hospitals.

6. These severe financial trends are exacerbated by special circumstances in the greater Utica area that create an especially challenging financial and operating environment for the Hospitals. For example, FSL and SEMC are located within a geographic area that has a significantly lower wage index than most other hospitals in the region, resulting in FSL and SEMC receiving significantly lower reimbursement rates from Medicare than are received by hospitals in neighboring regions for the same services.

7. In addition, according to the Hospitals, Utica has one of the highest per-capita refugee populations in the country – almost 25% of its population. As a result, each Hospital serves a highly vulnerable and linguistically diverse patient population, including patients who may have received limited health care in their countries of origin. These patients frequently face significant health care issues, and the Hospitals incur significant costs for providing translation services to these patients – costs that are not always adequately reimbursed by payors.

8. The competitive environment in the greater Utica area has also seen the rise of physician-based clinics and ambulatory surgery centers, which draw commercially insured patients to their facilities. As a result of this competition, the Hospitals serve a patient population with an

increasingly high proportion of the more vulnerable, higher cost, and uninsured or government-pay patients.

9. Both Hospitals have recently been threatened with the loss of their directors and officers liability insurance coverage as a result of the ever worsening financial condition at each Hospital.

10. The Hospitals contend that they cannot independently surmount these negative financial trends and remain in operation.

POTENTIAL EFFICIENCIES FROM THE TRANSACTION

11. Both FSL and SEMC have, individually, undertaken steps over the last three years to cut significant expenses, including, but not limited to, undertaking lay-offs and eliminating positions. But the Hospitals contend that they are increasingly unable to make these cuts without eliminating or inappropriately compromising safety net services. The Hospitals contend that the Transaction will allow the Combined Entity to realize significant efficiencies and cost reductions, thereby improving the financial condition of the Hospitals without eliminating or compromising safety net services.

12. The Hospitals contend that they will be able to achieve cost efficiencies pursuant to the Transaction. They assert that service rationalization and clinical program coordination will provide the Hospitals with opportunities for enhanced operational efficiency. They further contend that the close physical proximity of the two Hospitals will allow them to achieve significant clinical and operational efficiencies that would not be available if the Hospitals sought instead to affiliate with two different hospital systems.

13. In a region where the number of physicians is limited, the Transaction is also

expected to enhance the Hospitals' ability to ensure patient access to qualified specialists in a timely manner. FSL and SEMC have had difficulty in recruiting specialists and sub-specialists to their service area due, among other things, to the economic environment in Utica, and the relatively small size of their specialty departments. As a result, there are days when certain specialty and sub-specialty services are available at both Hospitals and days when those same specialty and sub-specialty services are not available at either Hospital. One potential efficiency from the Transaction is that the Combined Entity will be able to establish a combined call coverage schedule, expanding the period during which the full range of specialty and sub-specialty services are available in the community and increasing the access to these services for the population served by the Combined Entity.

HEALTH CARE COMPETITION IN THE GREATER UTICA AREA

14. FSL and SEMC compete to provide basic acute care inpatient services in the greater Utica area. Following the Transaction, all other acute care hospitals in the greater Utica area will have significantly fewer beds than the Combined Entity. Entry of a new hospital into the greater Utica area is unlikely given current market conditions. The Combined Entity will accordingly have a very large share of inpatient hospital services in Utica.

15. Nonetheless, the effect on competition appears to be limited. The Hospitals will continue to face important competition from hospitals in nearby cities such as Cooperstown, Syracuse, and Albany, as well as from nearby community hospitals, such as Rome Memorial Hospital. The Hospitals will similarly continue to face significant competition from numerous local clinics and outpatient facilities.

16. Moreover, the scope of competition between the two Hospitals is currently

limited. The operating licenses issued by the Department of Health to the Hospitals limit the services available at each Hospital. Each of the Hospitals involved in the Transaction is licensed to provide a number of services that the other Hospital is not licensed to provide, thereby limiting the number of services in which the two Hospitals directly compete with one another. For example, only one of the Hospitals is currently licensed to provide obstetric services, only one Hospital has a state-designated inpatient stroke center, and only one Hospital has a state-designated Level II trauma center. Given the high rate of government-pay patients served by the two Hospitals and that neither Hospital is licensed to offer the full range of inpatient services needed to serve the greater Utica community, only a very limited portion of the each Hospital's revenue is derived from payments from commercial insurers for inpatient services that could be provided by either Hospital.

17. The Hospitals both contract with third-party payors offering commercial or governmental managed care insurance ("Health Plans") to furnish inpatient and outpatient health care services to Health Plan members.

18. Despite the mitigating factors noted above, the OAG remains concerned that the Transaction may substantially lessen competition in one or more relevant health services markets, especially with respect to competition in certain acute care inpatient services markets. The OAG is concerned that the Health Plans offering an insurance product to customers in the greater Utica area will need to include the Combined Entity in their provider network, and that the Transaction will therefore allow the Hospitals to gain leverage to demand higher reimbursement rates from Health Plans following the Transaction. Health Plan payment of higher reimbursement rates would ultimately harm New York State businesses and consumers, as the Health Plans are likely

to pass on those costs to customers in the form of higher insurance premium rates or deductibles.

19. The Hospitals contend that the efficiencies that will be generated by the proposed Transaction outweigh any potential anticompetitive effects. In evaluating the overall impact of the proposed Transaction, only efficiencies that are likely to be implemented and achieved by the Hospitals should be weighed against the Transaction's potential anticompetitive effects.

ACCESS TO REPRODUCTIVE HEALTH SERVICES

20. SEMC is a Catholic organization that provides services in accordance with the Ethical and Religious Directives for Catholic Healthcare Services (the "ERDs"). FSL is a secular organization without religious affiliation that currently provides health care services that are proscribed by the ERDs. The OAG therefore has also considered that the Transaction may result in the restrictions contained in the ERDs being imposed on FSL, thereby reducing the types of services that may be offered by FSL. The OAG is concerned that the Transaction may thereby harm residents of the greater Utica area by limiting their access to certain types of healthcare services, especially those that relate to reproductive health.

THIS ASSURANCE

21. The OAG has raised the aforementioned concerns with representatives of the Hospitals. To resolve those concerns, the Hospitals have agreed to abide by the stipulations set forth below. The OAG finds the agreements contained in the Assurance appropriate and in the public interest, and is therefore willing to accept this Assurance in lieu of continuing its Investigation into the matters detailed herein.

AGREEMENT

WHEREAS, the Hospitals admit the OAG's Findings (1)-(20) above;

WHEREAS, OAG is willing to accept the terms of this Assurance pursuant to New York Executive Law § 63(15) and to discontinue its Investigation; and

WHEREAS, the Hospitals and the OAG each believe that the obligations imposed by this Assurance are prudent and appropriate;

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Hospitals and the OAG, that:

22. This Assurance shall apply to FSL, SEMC, the Combined Entity, and any of their successor entities doing business in New York State, whether acting through their principals, directors, officers, shareholders, employees, representatives, agents, assigns, successors, parents, subsidiaries, affiliates, or other business entities, whose acts, practices, or policies are directed, in part or in whole, by either of the Hospitals or any successor combinations. This Assurance specifically governs the conduct of the Hospitals and their successors upon closing of the Transaction ("Closing"). By signing this Assurance, the Hospitals stipulate that they forego any legal defenses to, or assertions against, the enforceability of this Assurance.

RATE PROTECTION PERIOD

23. After the date of the Closing, the Combined Entity shall negotiate in good faith any and all reimbursement contracts it has with the Health Plans, including contracts covering reimbursements for both inpatient and outpatient services provided by the Combined Entity through any of its affiliates.

24. A "Commercial and Managed Care Rate Protection Period" shall be defined as the later of the following dates: (i) five (5) years following the Closing of the Transaction; or (ii) the date the Combined Entity secures the Certification described in paragraph 27 below. Following

the Closing, the Combined Entity may jointly negotiate reimbursement contracts, including the rates of payment included in such reimbursement contracts, with the Health Plans. If the Combined Entity is unable to reach agreement with any Health Plan on the reimbursement rates to be included in any such jointly negotiated reimbursement contract at any time during the Commercial and Managed Care Rate Protection Period, then within ninety (90) days prior to the expiration of the then current contract, the Combined Entity shall offer to the Health Plan to enter into separate reimbursement contracts for each of FSL and those entities affiliated with FSL prior to the Closing, and SEMC and those entities affiliated with SEMC prior to the Closing. The terms of each of these separate agreements may be jointly negotiated subject to the requirements of paragraph 23 above, provided that the rates of reimbursement negotiated for inclusion in any such separate contract shall not exceed the rate of reimbursement contained in that facility's reimbursement agreement with such Health Plan on the date that this Assurance is signed, plus a compounded annual increase equal to: (a) if the Health Plan has had a reimbursement contract with that facility for at least four years prior to the date on which this Assurance is signed, the average percentage rate increase over the four (4) contract years prior to the date that this Assurance is signed or, (b) if the Health Plan has not had a reimbursement contract with that facility for at least four (4) years prior to the date that this Assurance is signed, the average percentage rate increase over the number of years for which there has been an agreement with the Health Plan prior to the date that this Assurance is signed. The Health Plan must elect such rate extension within sixty (60) days of the Combined Entity's offer and each of the FSL and SEMC facilities must accept such rates if this offer is accepted. The Combined Entity shall maintain independent business identifiers for the legacy FSL and SEMC facilities to the extent necessary to

permit FSL and SEMC facilities to enter into independent contracts with the Health Plans. Notwithstanding the foregoing, to the extent that any current reimbursement contract with a Health Plan contains an automatic renewal provision and/or a provision requiring written notice of non-renewal effective at the end of the contract term, the applicable Hospitals shall be entitled to issue a written notice of non-renewal in accordance with the terms of such contract; any termination or non-renewal of any existing agreement either facility has with a Health Plan must be in compliance with Article 44 of the Public Health Law. If, after the issuance of such notice of non-renewal, the Combined Entity is unable to reach agreement with a Health Plan on reimbursement rates to be included in a jointly negotiated reimbursement contract and the Health Plan elects not to accept separate contracts with FSL and SEMC including the rates determined in accordance with this Paragraph 24, then the notice of non-renewal shall become effective as contemplated in the current contract. On each year by January 30, from the date of the Closing until the Commercial and Managed Care Rate Protection Period has concluded, the Combined Entity will provide the OAG with a sworn statement confirming that it has complied with this Paragraph.

25. The Combined Entity shall not unreasonably or without cause terminate any Health Plan's contract prior to the end of the term in effect as of the date of this Assurance or, with respect to any separate reimbursement contract entered into in accordance with Paragraph 24, during any term thereof.

CONFIRMATION OF IMPLEMENTATION OF EFFICIENCIES

26. FSL and SEMC have agreed to a process and timeline for the development of a statement of the proposed activities and goals of the Combined Entity (the "Statement of

Proposed Activities"), which is attached as Exhibit A. After Closing, the Combined Entity shall develop the Statement of Proposed Activities in accordance with the goals and timeline set forth in Exhibit A. Once completed, the Statement of Proposed Activities shall be submitted to the OAG which shall, in consultation with the DOH, review and either (a) approve such Statement of Proposed Activities or (b) provide notice to the Combined Entity of the deficiencies in the Statement of Proposed Activities and work with the Combined Entity to correct such deficiencies. The OAG shall not unreasonably withhold approval of the Statement of Proposed Activities, provided that any deficiencies identified by the OAG are corrected by the parties. The Statement of Proposed Activities shall include: (a) descriptions of proposed clinical integration; (b) proposed quality goals, including quantitative benchmarks that may be used to assess whether those quality goals have been met; (c) population health goals, including quantitative benchmarks that may be used to assess whether those goals have been met; (d) proposed measures by which the Combined Entity will prevent unwarranted price increases, achieve savings, and realize transactional efficiencies, including any anticipated participation by the Combined Entity in shared-risk arrangements with Health Plans; (e) proposed implementation of payment methodologies that control excess utilization and costs, while improving outcomes; and (f) a proposed timeline for implementation of the plan contained in the Statement of Proposed Activities.

27. The Combined Entity shall report each year by January 30 to the OAG, with a copy to the DOH, on implementation of the Statement of Proposed Activities. Once the Combined Entity believes it has substantially achieved the integration and other efficiencies set forth in the Statement of Proposed Activities, the Combined Entity shall, at the Combined Entity's

expense, retain an independent healthcare consultant to assess whether the Combined Entity has substantially achieved the integration and other efficiencies set forth in the Statement of Proposed Activities. The consultant shall report his or her findings to the OAG with a copy to DOH. Prior to retention of such independent healthcare consultant, the Combined Entity shall identify the consultant to the OAG, for OAG approval, and the OAG shall approve such consultant if the consultant is qualified and independent. After receiving the report and consulting with the DOH, the OAG may certify that the Combined Entity has substantially achieved the integration and other efficiencies set forth in the Statement of Proposed Activities (the "Certification"). If the Certification has not been issued five (5) years following the Closing of the Transaction, the Commercial and Managed Care Rate Protection Period, as set forth in Paragraph 24, will be extended until such date as the Certification is issued.

28. If, at any time during the implementation of the Statement of Proposed Activities, the Combined Entity believes a material modification to the Statement of Proposed Activities is needed or desirable, the Combined Entity shall submit the proposed material modification to the OAG, with a copy to the DOH, together with an explanation of the reasons that such modification is deemed to be necessary or desirable. The OAG, in consultation with the DOH, shall review the proposed modification and the reason expressed therefor and shall either (a) issue a letter accepting the modification, or (b) notify the Combined Entity that the modification has not been accepted and indicating the reasons for the rejection. Thereafter, the Combined Entity shall be free to submit a revised proposed material modification to the Statement of Proposed Activities that attempts to address the concerns expressed by the OAG in the letter of rejection.

PROHIBITION OF EXCLUSIONARY CONDUCT

29. If the Combined Entity does not reach agreement with a Health Plan during the Commercial and Managed Care Rate Protection Period, the Combined Entity shall not require, as a condition of entering into separate reimbursement contracts with the FSL or SEMC facilities in accordance with Paragraph 24 of this Assurance, that the Health Plan have a contract with the FSL or the SEMC facility for all services offered by the facility or its affiliated entities, including but not limited to skilled nursing facilities, laboratories, physicians, or physician networks.

30. The Combined Entity shall not enter into any agreement with any Health Plan that includes a most favored nation clause ("MFN") in favor of the Hospitals. The Combined Entity may not renew or extend any agreement that currently contains an MFN without abandoning any term or provision that constitutes an MFN.

31. The Combined Entity shall not enter into any exclusive contracts with any health care provider by which it requires that provider to render services only at a facility owned or affiliated with the Combined Entity; provided, however, that nothing shall preclude the Combined Entity or any of its affiliates from: (a) requiring employees who are employed at a level of 80% of a full-time equivalent or greater to work exclusively for the Combined Entity or its affiliates or (b) entering into any exclusive hospital-based service contract that requires the contracted group of providers to work exclusively for the Combined Entity or its affiliates, provided that such exclusivity is necessary for the Combined Entity to ensure adequate coverage of the services to be provided under the contract.

ACCESS TO REPRODUCTIVE SERVICES

32. FSL, SEMC, and the OAG acknowledge and agree that FSL currently provides

health care services that are proscribed by the Catholic ERDs, including sterilization procedures, such as tubal litigations and vasectomies. FSL, SEMC, and the OAG further acknowledge and agree that, if complications arise during the course of an abortion, or during the course of another service being performed on a pregnant woman, at another facility, FSL currently provides emergency care services, which services might include the performance of an abortion if necessary to preserve the health or life of the woman. All parties agree that, after Closing, the legacy FSL facilities may continue to perform such services, regardless of whether such service is proscribed by the Catholic ERDs.

33. The Combined Entity shall not prohibit, or otherwise restrict or limit, legacy FSL facilities from providing admitting privileges to medical professionals or physicians who perform abortions at other facilities within the demographic areas served by the Combined Entity, provided that they meet the credentialing criteria established by FSL or such legacy FSL facility. Prior to Closing, FSL shall inform in writing all medical professionals or physicians employed by or affiliated with the Utica Center of Planned Parenthood Federation of America, Inc. who currently have admitting privileges at FSL that those privileges shall continue without interruption after the Closing, provided such medical professionals or physicians continue to meet the credentialing criteria established by FSL or the applicable legacy FSL facility.

34. If, on a permanent basis, no other qualified, New York State licensed facility provides abortions within the geographic areas served by the Combined Entity, then FSL has and will reserve the right to withdraw from the Combined Entity for purposes of being able to provide abortions and SEMC agrees to reasonably cooperate with such withdrawal. If FSL does not exercise its right to withdraw from the Combined Entity in order to perform abortions, then FSL

will use commercially reasonable efforts to arrange for such services to be available through another provider located in the geographic area served by the Combined Entity.

OTHER PROVISIONS

35. Nothing contained herein shall be construed to alter, change, modify, or enhance any existing legal rights of any consumer or to deprive any person or entity of any existing private right under the law. Nothing in this Assurance shall in any way affect, restrict, or otherwise govern any rights of recourse the Hospitals or the Combined Entity may have or seek to assert against any third party.

36. Nothing contained herein shall be construed as relieving the Hospitals or their successor entities of the obligation to comply with all state and federal laws, regulations, or rules, nor shall any of the provisions of this Assurance be deemed permission to engage in any act or practice prohibited by such law, regulation, or rule.

37. Acceptance of this Assurance by the OAG shall not be deemed approval by the OAG of any of the Hospitals' business practices, and the Hospitals shall make no representation to the contrary.

38. This Assurance is contingent upon and relies on the truthfulness and accuracy of all representations made by the Hospitals during the Investigation. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

39. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by the Hospitals in agreeing to this Assurance.

40. FSL and SEMC represent and warrant, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized. The Hospitals shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects the Hospitals' (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which OAG is not a party. This Assurance is not intended for use by any third party in any other proceeding and is not intended, and should not be construed, as an admission of liability by the Hospitals.

41. This Assurance may not be amended except by an instrument in writing signed on behalf of all the parties to this Assurance.

42. This Assurance shall be binding on and inure to the benefit of the parties to this Assurance and their respective agents, representatives, employees, successors and assigns, including any corporation, subsidiary or division through which they act or hereafter act, provided that no party, other than OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of OAG.

43. If any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, the OAG may decide, in its sole discretion, that such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

44. To the extent not already provided under this Assurance, the Hospitals shall, upon request by OAG, provide all documentation and information necessary for OAG to verify

compliance with this Assurance.

45. All notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing, and all notices directed to the OAG should be sent to the Antitrust Bureau Chief at 120 Broadway, 26th Floor, New York, NY 10271-0332.

46. Pursuant to Executive Law § 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of violation of the applicable law in any action or proceeding thereafter commenced by OAG.

47. If a court of competent jurisdiction determines that the Combined Entity has breached this Assurance, the Combined Entity shall pay to OAG the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

48. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

IN WITNESS WHEREOF, this Assurance is executed by the parties hereto on December 11, 2013.

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: _____
Eric Stock, Esq.
Chief, Antitrust Bureau

ST. ELIZABETH MEDICAL CENTER

By: _____
Richard Ketcham
President and Chief Executive Officer

By: _____
Traci Boris, Esq.
General Counsel

FAXTON-ST. LUKE'S HEALTHCARE

By: _____
Scott Perra
President and Chief Executive Officer

By: _____
Thomas Soja, Esq.
General Counsel

ERIC T. SCHNEIDERMAN
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By: _____
Traci Boris, Esq.
General Counsel

FAXTON-ST. LUKE'S HEALTHCARE

By: _____
Scott Perra
President and Chief Executive Officer

By: _____
Thomas Soja, Esq.
General Counsel

Exhibit A
Process and Timeline for Development of Statement of Proposed Activities

FSL and SEMC have agreed to a process and timeline for the development of a statement of proposed activities and goals of the Combined Entity (the "Statement of Proposed Activities"). The parties shall undertake the following activities within the timeframes designated.

Time Period: Date of Transaction to 6 months Post-Transaction

During the six months following the closing of the transaction, the Combined Entity will necessarily be focused on the development of its initial strategic plan and the implementation of the Business Plan of Operational Efficiencies ("BPOE"). Beginning the process of implementing the BPOE promptly following the closing will provide the opportunity for the Combined Entity to begin to realize the cost efficiencies necessary to stabilize its finances. Additionally, it is necessary for the board, management, and the medical staff to collaborate in the development of the Combined Entity's initial strategic plan to attain organizational commitment to that plan.

Time Period: 6 Months to 24 Months Post-Transaction

- The Combined Entity will continue the refinement and implementation of the inaugural strategic plan for Mohawk Valley Health System.
- The Combined Entity will initiate a process to develop the Statement of Proposed Activities. The Statement of Proposed Activities will be constructed to best position MVHS for population health management and will include:
  - Detailed descriptions of clinical integration models and approaches
  - Quality goals, including quantitative benchmarks to be used to assess achievement of quality goals
  - Population health goals, including quantitative benchmarks to be used to assess achievement of population health goals
  - Measures to prevent unwarranted price increases, achieve savings and realize transactional efficiencies, including identification of potential shared risk arrangements
  - Potential payment methodologies that control excess utilization and costs while improving outcomes

Exhibit A
Process and Timeline for Development of Statement of Proposed Activities

- Goals and objectives for clinical integration in alignment with the corporate mission and vision set forth in the initial strategic plan
- An evaluation of the Combined Entity's service offerings, redundant services and service gaps
- Possible provider alignment models that best serve the needs of the community, the Combined Entity, and local/regional medical staff
- Potential clinical programmatic alignment plans for the Combined Entity in preparation for population health management
- An information technology plan for the Combined Entity that aims to securely manage and transfer patient information in a manner that allows for optimal patient care, including the study and recommendation of a common electronic medical record platform and related information technology systems to serve the health system and physician practices
- Timeline for implementation, including milestones for tracking implementation progress

- To develop the Statement of Proposed Activities, the Combined Entity will create a committee consisting of representatives of the Board of Directors, senior management, and medical staff leaders. This committee will be tasked with identifying and consulting with community stakeholders and other individuals from inside and outside of the Combined Entity on the development of the specific elements to be included in the Statement of Proposed Activities. Upon completion, the Statement of Proposed Activities will be submitted to the President and Chief Executive Officer of the Combined Entity for approval. Upon approval of the President and Chief Executive Officer, the Statement of Proposed Activities will be recommended to the Board of Directors of the Combined Entity for adoption. Following adoption by the Board of Directors of the Combined Entity, the Statement of Proposed Activities will be submitted to the Office of the Attorney General for review and approval in accordance with the Assurance to which this Exhibit A is attached.

Exhibit A
Process and Timeline for Development of Statement of Proposed Activities

- Ongoing implementation of the BPOE for the Combined Entity including achievement of previously identified opportunities, as well as the identification, quantification, and achievement of additional opportunities.

24 Months to 36, 48 and 60 Months Post-Transaction

- Continued implementation of the initial strategic plan
- Continued implementation of Statement of Proposed Activities
- Continued implementation of the plan of operational efficiencies

CVS/Aetna

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, ET AL.,	)	
	)	CV No. 18-2340
Plaintiffs,	)	
	)	Washington, D.C.
vs.	)	November 29, 2018
	)	12:39 p.m.
CVS HEALTH CORPORATION, ET AL.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE RICHARD J. LEON
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription

P R O C E E D I N G S

DEPUTY CLERK: All rise. The United States District Court for the District of Columbia is now in session, the Honorable Richard J. Leon presiding. God save the United States and this Honorable Court. Please be seated and come to order.

Your Honor, this afternoon we have Civil Case No. 18-2340, the United States of America, et al., versus CVS Health Corporation, et al.

Will counsel for the parties please approach the lectern and identify yourself for the record and name the party or parties that you represent, please.

MR. OWEN: Good afternoon, Your Honor.

Jay Owen representing the United States.

Also, I'd like to note that we have with us in the room Julie Myers Wood of Guidepost Solutions, our candidate for monitoring trustee.

THE COURT: Who's this here?

Come on up.

MR. MUCCHETTI: Good afternoon, Your Honor. I'm Peter Mucchetti, counsel for the United States.

THE COURT: Are you in the Antitrust Division?

MR. MUCCHETTI: Yes, Your Honor, I'm with the Antitrust Division.

THE COURT: All right.

Welcome.

MR. HABASH: Good morning, Your Honor. Rani Habash from Dechert on behalf of CVS Health.

THE COURT: Welcome.

MR. HABASH: Thank you.

MR. SOLOMON: Good morning, Your Honor. I'm Jesse Solomon from Davis Polk for Aetna.

THE COURT: Welcome.

MR. SOLOMON: Thank you.

MR. SHELANSKI: Hello, Your Honor. I'm Howard Shelanski of Davis Polk, Counsel for Aetna.

THE COURT: Welcome.

Mr. Owen.

So I was reviewing your motion, which, of course, is not opposed.

MR. OWEN: Yes, Your Honor.

THE COURT: Not surprising.

And I kind of got this uneasy feeling that I was being kept in the dark, kind of like a mushroom.

So I've got some questions for you about this --

MR. OWEN: Yes, Your Honor.

THE COURT: -- allegedly imminent transaction.

What's the practical consequences of the merger that you say is going to be consummated in the next few weeks going forward?

MR. OWEN: The merger between CVS and Aetna?

THE COURT: Uh-huh.

MR. OWEN: Well, one thing I'd like to bring to the attention of the Court: The merger between CVS and Aetna actually consummated yesterday morning. The parties finished that.

THE COURT: Thanks for telling me.

MR. OWEN: I apologize, Your Honor. We'll make sure that you're aware of future developments.

THE COURT: Like I said, I'm like a mushroom being kept in the dark. Just keep shoveling.

What's the practical consequences?

MR. OWEN: Of the closure of the merger between CVS and Aetna?

THE COURT: Uh-huh.

Is that just a paper transaction?

MR. OWEN: No. The two companies, as I understand it, will -- have closed their merger and will begin to integrate their operations.

THE COURT: Well, that's where the rubber is going to hit the road, Mr. Owen.

Are you familiar with the *AT&T* case?

MR. OWEN: Yes, sir, I am.

THE COURT: Are you familiar with the arrangement that was worked out in that case pending appeal?

MR. OWEN: No, Your Honor, I'm not.

THE COURT: You're not.

You need to talk to your colleagues more frequently, Mr. Owen.

CVS and Aetna know.

The deal closed pending my ruling, but the parties agreed that the companies wouldn't be integrated until after the appeal was resolved by the D.C. Circuit. They know that, and I can't believe you don't.

What are you, a mushroom yourself over in the Antitrust Division?

Mr. Owen, do you know why that agreement was made?

MR. OWEN: No, Your Honor.

THE COURT: Do you want to take a guess?

Take a guess. Come on now.

MR. OWEN: To allow for --

THE COURT: How long have you been in the Antitrust Division, Mr. Owen?

MR. OWEN: I've been at the Division for 11 years.

THE COURT: Look at that.

Then you should be able to take a really educated guess.

Go ahead.

MR. OWEN: My guess would be to allow for the Court to review that decision.

THE COURT: No, that's not a good guess.

Do you want to try again?

Why would you wait for the Court of Appeals's decision?

MR. OWEN: I'm sorry, Your Honor, I don't know.

THE COURT: Well, how about I help you.

What if the merger has to be unwound? Will it not be easier to unwind it if the companies haven't been integrated?

What do you think?

I'm not hearing you.

MR. OWEN: Yes, Your Honor.

THE COURT: Yes, of course.

Common sense, Mr. Owen.

Now, we have a situation here where we haven't even heard the public's comments.

The reporting period has still got two or three weeks to go, does it not, December 18th, does it not?

MR. OWEN: Yes, Your Honor.

THE COURT: There you go.

And then when those comments come in, you, on behalf of the Department of Justice, have to respond to all of them, do you not?

MR. OWEN: Yes, Your Honor.

THE COURT: Yes, you do.

And then I'm going to get copies of all that, the responses and the comments, right?

MR. OWEN: Yes, Your Honor.

THE COURT: And we know already, at least I know already, because it's public record, that organizations such as the AMA, not exactly an insignificant organization, has published a 140-page opposition to this merger.

MR. OWEN: Yes, Your Honor.

THE COURT: Even with the divestiture, right?

MR. OWEN: Yes, Your Honor, I've reviewed the AMA's --

THE COURT: And the Court, under the Tunny Act, has to take into consideration, in order to protect fairness for the public, all of the comments, hold hearings, take evidence, if necessary, before entering a final judgment, right?

MR. OWEN: Yes, Your Honor, that's correct.

THE COURT: Yes.

So let's make it clear, Mr. Owen. This Court is not a rubber stamp.

MR. OWEN: No, Your Honor, I don't believe this Court is a rubber stamp.

THE COURT: Yeah, I understand you don't.

God knows if the Antitrust Division has learned anything, they know that this Court is not a rubber stamp.

But these folks over here need to understand that too, because it's their clients who think I am a rubber stamp, and that's not going to be tolerated.

Now, you need to figure out a way, now that your merger is closed, that the parties stay unintegrated. And do you know why?

MR. OWEN: Why, Your Honor?

THE COURT: Use your common sense.

What if I were to conclude, after reading all the comments, taking evidence, that I wouldn't enter the final judgment, because it would be unfair to the public to do so. How do we unwind it then?

MR. OWEN: Yes, Your Honor, I understand.

THE COURT: Yeah.

That's a practical problem, isn't it? A very practical problem.

And I'm very concerned, very concerned, that you all are proceeding on a rubber-stamp approach to this; that the Court is -- we don't even have the comments in yet -- that you are going to start integrating these companies -- which, by the way, will have immediate reaction within the marketplace, immediate consequences in the marketplace, immediate.

How do I unwind those consequences in the marketplace, if it should come to pass? And the word "if"

is in there, and it's an important word. If it should come to pass that the Court concludes it is not fair to the public to allow this.

And, by the way, this company that you're selling off, what are the provisions in the sales agreement that the company will be returned to Aetna in the event that the Court doesn't enter final judgment? Is that provided for?

MR. OWEN: No, Your Honor.

THE COURT: It's not.

Isn't that wonderful?

So what happens then?

What happens if this Court doesn't enter final judgment in favor of the deal? For whatever reason.

Obviously, you could appeal it. I could be upheld. Theoretically if that were to happen; I'm talking now all hypothetical.

You haven't made any arrangements so that it can be resold back to Aetna if there's no deal?

MR. OWEN: Your Honor, that is a business risk that CVS and Aetna -- or Aetna is bearing. If the divestiture assets are sold to WellCare, that transaction will be completed.

And if Your Honor does not approve the proposed final judgment and does not enter that, that is a risk that the parties are bearing in this situation.

THE COURT: It's a pretty expensive risk.

What was the sales price?

Don't tell me you don't know.

Don't tell me you don't know, Mr. Owen. Come on, this is your case; you're the lead lawyer.

What was the amount of the sale?

MR. OWEN: The sales price was a significant sales price, Your Honor.

THE COURT: You didn't answer my question.

MR. OWEN: I believe --

THE COURT: What was the amount of the sales price?

MR. OWEN: The sales price is -- it's actually hard to articulate the exact price because it is based on a per-member fee that will be determined.

THE COURT: Well, give me a ballpark.

MR. OWEN: I believe a ballpark would be around -- between 50 and $100 million.

THE COURT: 350- and 100 million?

MR. OWEN: 50 and 100 million.

THE COURT: 50 and 100 million?

MR. OWEN: Yes, sir.

THE COURT: That's not an insignificant number.

MR. OWEN: No, Your Honor.

THE COURT: Even though the merger is a much

larger number --

MR. OWEN: Yes, Your Honor.

THE COURT: -- to say the least.

That's my problem, and I need you and them to sit down and talk it through. They need to talk to their clients first.

But I'm not just signing off on this motion that you filed until I get some input from you all as to what you're going to do about this integration issue.

At a point in time -- it's going to take months; you understand that, right?

We're going to have a briefing schedule.

You know how this works.

Eleven years, you know how this works.

MR. OWEN: Yes, Your Honor.

THE COURT: You could spit it out right now.

I'm not going to get the comments, with your responses to them, until January, roughly, sometime in January, maybe February because of the holidays, but, say, February or January.

MR. OWEN: Correct, Your Honor.

THE COURT: And then each side is going to have briefings as to why the deal should go forward, notwithstanding the comments, right?

And then I'm going to review the briefings and

I'm going to review all the comments and your responses to them.

And then I have to decide to hold hearings or not.

Well, I have to hold a hearing. Excuse me. I at least have to hold one hearing under the Tunney Act, right?

But I have to decide whether to take evidence, and taking evidence might take days or weeks.

And then I have to issue an opinion, and that takes at least weeks.

I mean, I did a 172-page opinion in *AT&T* in six weeks, so that gives you some idea of what can be done. But, believe me, that wasn't exactly an ideal set of circumstances, but I did it because of the penalty that AT&T was facing, which was $500 million. You know that much --

MR. OWEN: Yes, Your Honor.

THE COURT: -- even though you weren't on that case.

It's going to be next summer, at the earliest, before I can rule on your motion, which you have to file, for the entry of a final judgment.

That means if this entity is merged in the next month or so, it's going to be six, seven months into that merged entity before I'm in a position to rule.

And if I rule against it, how do you untangle seven months of integration? Very difficult. Maybe

impossible.

And how do you recoup the impact that that merged entity has on the public? How do you even calculate it? How difficult would that be to do?

Now, the solution, as far as I can see right now is -- and this is what you two need to talk about, meaning both sides -- is you've got your merger closed -- thanks for at least reminding me or telling me about that -- but you haven't started integrating yet.

MR. OWEN: No, Your Honor, I don't believe so.

THE COURT: And you need to discuss that with them, just the way AT&T and Time Warner discussed it with the Antitrust Division in regards to the pending appeal in that case.

Who knows where this is going? No one knows.

But you all are treating this like this is some rubber-stamp operation, and that's not what this is. God knows you should have known that from before this case even started.

MR. OWEN: Yes, Your Honor.

If I may?

THE COURT: Go right ahead.

MR. OWEN: I would just like to point out that, even with the closed merger, this Court still has the complete discretion and opportunity to review the proposed

final judgment during the Tunney Act period. Your ability to find that that proposed final judgment is in the public interest is not impacted by the closure. You still maintain the ability to accept or reject that order.

And if you reject the proposed final judgment, the United States, the plaintiff states and the parties, would, of course, consider your reasons for rejecting that order and would re-negotiate or consider re-negotiating in a way such that you could find that the proposed final judgment is in the public's interest.

THE COURT: Well, the problem right now is, you're putting the risk -- just like you're doing in that divestiture deal, you're putting the risk on the parties.

The problem I have is, you are ineffectively, if you integrate this merger, putting the risk on the public, and it's my job to make sure the public doesn't bear that risk.

That's not -- that's -- I'm here to ensure that this is a fair proceeding and in the public interest, right, under the Tunney Act, that's my job.

MR. OWEN: Yes, Your Honor.

THE COURT: Of course. That's my job.

And if these two companies are integrated and it's seven months from now when I issue that decision, if it should come out the other way, the problem, the risk is on

the public that I can unwind it and that we can recoup whatever negative consequences there were on the public in that interim seven months, and that's going to be a big problem for me, if it should come out that way.

Now, I have cause right now already to at least be concerned as to how this is all going to play out, at a minimum, because of the AMA situation. We'll see what they say in their commentaries there's three weeks left to put on the record, and you all are going -- you guys are all going to respond to them, I understand that.

MR. OWEN: Right.

THE COURT: I understand you think it's still a good deal anyway.

MR. OWEN: If I may?

THE COURT: So I'll tell you what. I'm going to set a hearing for Monday, and I'm going to give you between now and Monday to talk among yourselves.

I'm hoping that there will be some good judgment on both sides and you'll decide to hold off on the integration. If not, then I'll have to decide what my options are.

But between now and Monday, I'm not ruling on your motion, I'm not ruling on it.

You need to slow this down. You're like a freight train out of control. And you're operating as if this is

just some rubber-stamp operation. It is not, and it will not be.

And the parties need to think this through with their clients, and you need to think it through with your leadership.

Do you read me?

MR. OWEN: Yes, Your Honor.

If I may?

THE COURT: I'll set a time Monday, I haven't picked a time yet, but you'll be getting a notice of it from Mr. Haley.

MR. OWEN: If I may on one additional point, Your Honor?

THE COURT: Yes. What is it?

MR. OWEN: I would just like to raise that, regardless of the integration between the parties, I would ask Your Honor to consider the motion to appoint the monitoring trustee.

Right now, there is a plan to divest the assets to WellCare in the very near future. Such a divestiture would not impact the parties' integration plans but would allow the remedy to --

THE COURT: You're going to divest -- my understanding is you're going to divest it under circumstances where there isn't even a provision for it to

be re-provided to Aetna in the event that the Court denies the motion to enter final judgment, right? That's my understanding.

MR. OWEN: Yes, Your Honor.

THE COURT: You need to think about that as well, frankly.

See you Monday. We'll stand in recess.

DEPUTY CLERK: All rise.

This Honorable Court will stand in recess until the return of court.

(Proceedings concluded at 12:57 p.m.)

C E R T I F I C A T E

I, William P. Zaremba, RMR, CRR, certify that the foregoing is a correct transcript from the record of proceedings in the above-titled matter.

Date: November 29, 2018_____ /S/__William P. Zaremba_____

William P. Zaremba, RMR, CRR

A Coda

UNITED STATES OF AMERICA
Federal Trade Commission

Prepared Remarks

DISPARATE IMPACT: WINNERS AND LOSERS FROM THE NEW M&A POLICY

Commissioner Noah Joshua Phillips
Federal Trade Commission

Eighth Annual Berkeley Spring Forum on M&A and the Boardroom
San Francisco, CA
Wednesday, April 27, 2022

Thanks, Jan, for the kind introduction, and our hosts, Berkeley Law's Center for Law and Business and Freshfields, for the invitation to be here. My last work trip before the pandemic was to the Bay Area, and it's good to be back.

This year's Berkeley Forum comes at a critical time, just over one year into an administration as hostile to mergers and acquisitions (M&A) as any in my lifetime. This is perhaps a good place to remind all of you that my remarks are my own and do not necessarily reflect the view of the Federal Trade Commission (FTC) or my fellow commissioners.

But back to M&A policy. The traditional view of M&A (to which I subscribe) is that it is part of the way that companies grow (or shrink) and evolve, as assets move to the users that value them most highly. This market, which Henry Manne dubbed the "market for corporate control", also disciplines management and encourages competition.[1] Under this framework, the role of the antitrust enforcer is to determine which deals present threats to

[1] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965); Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Competing for Companies: How M&A Drives Competition and Consumer Welfare, Opening Keynote at The Global Antitrust Economics Conference (May 31, 2019), https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf.

competition, block or remedy them, and—in keeping with Ronald Coase[2]—otherwise reduce transaction costs and minimize distortions to the market.

But to the new leadership at the antitrust agencies and their fellow travelers, that view is anathema. Their view of M&A boils down to three ideas. *First*, M&A generally produces little social value and a great deal of social cost.[3] *Second*, the costs include a wide swath of ills including lessened competition but also disadvantaged labor,[4] inflation,[5] and undermined democracy.[6] You name the problem, and there's a good chance some prominent

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[2] R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[3] *See*, *e.g.*, Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks Regarding the Request for Information on Merger Enforcement 2 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf ("While the current merger boom has delivered massive fees for investment banks, evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation."); U.S. Dep't of Justice & Fed. Trade Comm'n, Request for Information on Merger Enforcement 2 (Jan. 18, 2022), https://www.regulations.gov/document/FTC-2022-0003-0001 ("Finally, the agencies seek specific examples of mergers that have harmed competition, with descriptions of how the merger harmed competition, including how those mergers made it more difficult for customers, workers, or suppliers to work with the merged firm or competitors of the merged firm or made it more difficult for rivals to compete with the merged firm."); Sandeep Vaheesan, *Merger Policy for a Fair Economy*, LPE PROJECT BLOG (Apr. 5, 2022), https://lpeproject.org/blog/merger-policy-for-a-fair-economy/; Sanjukta Paul, *A Democratic Vision for Antitrust*, DISSENT (Winter 2022), https://www.dissentmagazine.org/article/a-democratic-vision-for-antitrust.

[4] *See*, *e.g.*, Marshall Steinbaum, *A Missing Link: The Role of Antitrust Law in Rectifying Employer Power in Our High-Profit, Low-Wage Economy*, ROOSEVELT INST. (Apr. 16, 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Missing-Link-Monopsony-brief-201804.pdf; BARRY C. LYNN, ANTITRUST: A MISSING KEY TO PROSPERITY, OPPORTUNITY, AND DEMOCRACY 13 (New Am. Oct. 2, 2013), https://d1y8sb8igg2f8e.cloudfront.net/documents/Antitrust.pdf.

[5] *See*, *e.g.*, Elizabeth Warren (@SenWarren), TWITTER (Mar. 1, 2022, 9:47 PM), https://twitter.com/senwarren/status/1498852508487331850; Elizabeth Warren (@SenWarren), TWITTER (Jan. 3, 2022, 12:13 PM), https://twitter.com/SenWarren/status/1478051819255382022; *CNBC Transcript: Federal Trade Commission Chair Lina Khan Speaks Exclusively with Andrew Ross Sorkin and Kara Swisher Live from Washington, D.C. Today*, CNBC (Jan. 19, 2022, 12:30 PM), https://www.cnbc.com/2022/01/19/cnbc-transcript-federal-trade-commission-chair-lina-khan-speaks-exclusively-with-andrew-ross-sorkin-and-kara-swisher-live-from-washington-dc-today.html.

[6] *See*, *e.g.*, Zephyr Teachout, *Mega-mergers like AT&T and Time Warner crush American democracy*, GUARDIAN (Jun. 13, 2018, 6:00 AM EDT), https://www.theguardian.com/commentisfree/2018/jun/13/mega-mergers-att-time-warner-crush-american-democracy.

antitrust-reform Progressive has blamed it on M&A.[7] *Third*, M&A is a privilege granted to companies by the government, rather than a natural part of commerce.[8]

Much of the change to merger policy over the last fifteen months is taking place in the context of merger review under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976. If you share the hostile view of mergers to which antitrust reformers subscribe, then HSR—a process Congress designed to help agencies spot and address ahead of time deals that lessen competition—looks more like an opportunity to slow or stop M&A activity in general. And the latter, what I've called elsewhere the "repeal of Hart-Scott-Rodino,"[9] is exactly what we are seeing. Using HSR this way has several benefits:

> *First*, it allows you to talk about it, broadcasting hostility to M&A that has a positive branding effect for enforcers and may also have some deterrent effect for M&A;
>
> *Second*, you can sow uncertainty and run up the cost of getting deals done, taxing M&A and making the market for corporate control less efficient;
>
> *Third*, these strategies can be accomplished without courts; and
>
> *Fourth*, it shields enforcers from political accountability for enabling M&A.

These "features" explain the merger control policies adopted over the last fifteen months that together constitute the only real novelty thus far in the Biden Administration's approach to M&A. The changes are not particularly well-calibrated to make antitrust enforcement more efficient or effective, and indeed—as Jan's faithful reporting on Twitter of actual merger enforcement statistics shows—it has not been.[10]

Like all policy, the new M&A policies being deployed by the agencies include tradeoffs. And one such tradeoff, I think, deserves particular notice. *Contra* the professed

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[7] *See*, *e.g.*, Tim Wu, Opinion, *A Corporate Merger Cost Us Ventilators*, N.Y. TIMES, Apr. 12, 2020, at A23.

[8] *See*, *e.g.*, Sandeep Vaheesan, *Two-and-a-Half Cheers for 1960s Merger Policy*, HARV. L. SCH. ANTITRUST ASSOC. BLOG (Dec. 12, 2019), https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/.

[9] Noah Joshua Phillips, *The Repeal of Hart-Scott-Rodino*, GLOB. COMPETITION REV. (Oct. 6, 2021), https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/the-repeal-of-hart-scott-rodino.

[10] *See* Jan Rybnicek (@jmrybnicek), TWITTER (Apr. 22, 2022, 10:25 AM), https://twitter.com/jmrybnicek/status/1517509986787672065 (showing that the rate of merger challenges under the Biden Administration is the same as or lower than the rate under the Trump Administration); *see also* Noah J. Phillips (@FTCPhillips), TWITTER (Sep. 30, 2021, 3:00 PM), https://twitter.com/FTCPhillips/status/1443652046893223938 (showing the dramatic drop in merger enforcement after Biden Administration came into office).

goals of Progressive antitrust reformers, to rein in the biggest companies, the gratuitous taxes on M&A being imposed by the antitrust agencies are regressive, hitting smaller companies the hardest. Policies designed in the name of "anti-monopoly" are disproportionately taxing companies that few would consider monopolies, making it harder for them to compete.

Taxing M&A

How are the agencies taxing M&A? Antitrust enforcement over the last fifteen months has been anything but vigorous—indeed, it has been sclerotic. By that I mean not just fewer cases being brought, but a longer process with fewer decisions being made.[11]

The merger review process is already expensive. Merging parties typically end up paying hefty sums in attorney and consultant fees, not to mention the time spent internally to comply with agencies demands. One study estimated the median cost of Second Request compliance at $4.3 million.[12] That is separate and apart from the up-front expense of negotiating deals and conducting due diligence. Full-phase merger investigations can last from several months to a year or more. Unanticipated delays can impose costs beyond fees and distraction, like having to extend deal financing or losing key employees and customers—or even losing out on the deal.

While supporters of agency leadership cheer what they hope will be a deterrent to merging generally, these kinds of costs are felt more heavily by smaller firms. And that disadvantages them relative to larger ones, to whom the costs look more like a rounding error. The fact is that mergers are a way for smaller firms to join forces to compete more effectively and efficiently against larger rivals. Combining can put financially struggling firms on firmer footing, or improve the terms on which they can borrow to grow their business. Advisers to traditional retail grocers on M&A made a recent submission detailing how competition from the Amazons and Wal-Marts of the world was leading investors to

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[11] *Compare* DECHERT LLP, DAMITT Q1 2022: SIGNIFICANT MERGER INVESTIGATIONS FACE STEEPER HURDLES TO SETTLEMENT (Apr. 21, 2022), https://www.dechert.com/knowledge/publication/2022/4/damitt-q1-2022--significant-merger-investigations-face-steeper-h.html (reporting the average duration of significant U.S. antitrust merger investigations as 12.9 months in Q1 2022), *with* DECHERT LLP, DAMITT Q1 2020: NO COVID-19 IMPACT ON MERGER INVESTIGATIONS . . . YET (Apr. 21, 2020), https://www.dechert.com/knowledge/publication/2020/4/damitt-q1-2020--no-impact-from-covid-19---yet.html (average duration of 11.1 months in Q1 2020).

[12] Peter Boberg & Andrew Dick, *Findings From the Second Request Compliance Burden Survey*, THRESHOLD: NEWSLETTER OF THE MERGERS & ACQUISITIONS COMM. (Am. Bar Assoc. Section on Antitrust L.), Summer 2014, at 26, 33, https://media.crai.com/wp-content/uploads/2020/09/16164357/Threshold-Summer-2014-Issue.pdf. Granted, some of the deals in the sample were quite large, but even half the median—$2 million—is a big outlay for a small-to-medium-sized business. And the smaller you are, the harder it is to spend that kind of money.

flee traditional grocers, resulting in lessened investment, store closing, and bankruptcy.[13] While those hostile to M&A might discount this narrative, antitrust reformers have not been shy about basing their criticism of Amazon and Wal-Mart on the challenges faced by precisely these smaller kinds of companies.[14] If growth by M&A is deterred substantially, why would anyone believe that the giants would be the most hamstrung?

Beyond the drawn-out process, the Commission has adopted several policies openly taxing M&A in a way that does nothing for competition and also disparately impacts smaller players.

Early Termination

In the early days of the Biden Administration, FTC leadership suspended early termination ("ET") of the initial HSR waiting period. ET is reserved for transactions that raise no apparent competitive concerns. The FTC told the public that it expected the suspension to be "temporary" and "brief", and justified it by citing the change in administrations and an "unprecedented volume of HSR filings for the start of a fiscal year".[15] That didn't make sense then. The uptick in filings had started long before, and the agency had not only managed it but prosecuted—under Chair Joe Simons—the most prolific merger enforcement in decades.[16] And presidential transition was nothing new. The justifications make even less sense now, over a year since the "temporary" and "brief" termination began. The number of HSR filings had *already dropped* 70% from the 2020

[13] Letter from Scott Moses, Head of Grocery, Pharmacy & Rest. Inv. Banking, Solomon Partners, and Scott Sher, Member, Wilson Sonsini Goodrich & Rosati PC, to U.S. Dep't of Justice and Fed. Trade Comm'n 6-22 (Apr. 19, 2022) (on file with author).

[14] *See*, *e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 773-74, 780 (2017); Luke Gannon & Stacy Mitchell, *On Pitchfork Economics: How Walmart Gutted Communities*, INST. FOR LOCAL SELF-RELIANCE (Oct. 28, 2021), https://ilsr.org/monopolies-and-the-policies-that-favor-them-have-gutted-rural-and-urban-communities/.

[15] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

[16] *Reviving Competition Part 3: Strengthening the Laws to Address Monopoly Power Before the H. Subcomm. on Antitrust, Com., and Admin L.*, 117th Cong. 1 (Mar. 18, 2021) (prepared statement of Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/1588324/final_formatted_prepared_statement_of_ftc_commissioner_noah_joshua_phillips_march_18_2021_hearing.pdf.

peak when the suspension went into effect,[17] and the Administration came into office more than a year ago.

The suspension of ET continues to delay what are, *by definition*, competitively innocuous deals. It is using the HSR process not to protect competition but rather just to tax M&A. These deals can help Americans, even save lives. The day before announcing the suspension, the Commission granted ET to Thermo Fisher's acquisition of Mesa Biotech.[18] The small biotech company had developed an innovative rapid-PCR-testing platform for the novel coronavirus, and combining it with Thermo Fisher's resources, scale, and distribution would better meet then-exploding demand for testing.[19] With America and the world struggling through the pandemic, the grant of ET just 24 hours before the suspension took effect was good for the public—and awfully convenient for the FTC when one considers the negative PR from holding up a deal that stood to improve COVID screening. This incident not only belies the misguided assumption that M&A offers nothing of value, it demonstrates that those impacted by anti-M&A policies are not just giant monopolies, but often small companies . . . and people who need help.

Ending ET accomplishes nothing for competition and nothing good for M&A. But there is another thing worth noting. By never granting ET, we, as enforcers, cannot be accused of "permitting" the deal. More on that soon.

Prior Approval

Another example of gratuitously taxing M&A is the new Commission policy on prior approvals, adopted in October with the zombie vote of former Commissioner Rohit Chopra.[20] Under this policy, all consents require Commission prior approval for future

[17] Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations 1 (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[18] Fed. Trade Comm'n, Notice of Early Termination, 20210958: Thermo Fisher Scientific Inc.; Mesa Biotech, Inc. (Feb. 3, 2021), https://www.ftc.gov/legal-library/browse/early-termination-notices/20210958.

[19] Bruce Japsen, *Thermo Fisher To Buy Covid-19 Test Maker Mesa Biotech For $450 Million*, FORBES (Jan. 19, 2021, 8:52 AM), https://www.forbes.com/sites/brucejapsen/2021/01/19/thermo-fisher-to-buy-covid-19-test-maker-mesa-biotech-for-450-million/?sh=556735535d82; Joe C. Matthew, *COVID-19: Thermo Fisher to introduce point-of-care RT-PCR test in India*, BUSINESS TODAY (Jun. 15, 2021, 7:34 PM), https://www.businesstoday.in/latest/economy-politics/story/covid-19-thermo-fisher-to-introduce-point-of-care-rtpcr-test-in-india-298757-2021-06-15.

[20] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders 1 (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

transactions both by merging parties and divestiture buyers for 10 years. The Commission also threatens to impose restrictions for markets not at issue in the transaction.[21] The new policy warns merging parties that they are more likely to be slapped with prior approval provisions if they substantially comply with the FTC's compulsory requests in a full phase investigation. In marginally less ominous language, the Commission is saying: give up and don't make us investigate your merger, or we'll make you pay.[22] The Commission also holds out the prospect of pursuing prior approval remedies even after parties drop the offending deal, the precise embarrassing and wasteful conduct that led the agency to adopt a policy limiting prior approval requests in 1995.[23]

Giving the Commission a veto over future M&A and all the time it wants to render it imposes significant obligations on merging parties, and innocent divestiture buyers. It slows and chills future M&A activity whether it lessens competition or not. Perhaps those hostile to M&A rest easier now that Hikma Pharmaceuticals, a $2 billion generic drug manufacturer, cannot buy another injectable skin steroid without permission.[24] They are surely relieved that 30-employee XCL Energy cannot buy more land to drill in Utah without government approval.[25] But these two are hardly Pfizer and ExxonMobil. And say what you will, but requiring Price Chopper and Tops to obtain the FTC's permission before acquiring a supermarket in Vermont or upstate New York for the next 10 years is probably not keeping Amazon executives up at night.[26]

Meanwhile, after years of rhetoric claiming that antitrust enforcers are falling down on the job by insinuating that every large pharmaceutical deal or purchase by a large tech company must, somehow, be anticompetitive and unresolvable, are we not supposed to notice AstraZeneca's $39 billion acquisition of Alexion Pharmaceuticals,[27] Merck's $11.5

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[21] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[22] *Id.* at 2 ("This should signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter.")

[23] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips, *supra* note 20, at 4 n. 14.

[24] Decision & Order at 6, Hikma Pharmaceuticals/Custopharm, File No. 221-0001, Docket No. C-4762 (F.T.C. Apr. 18, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2210002C4762HikmaCustopharmOrder.pdf.

[25] Decision & Order at 19, EnCap/EP Energy, File No. 211-0158, Docket No. C-4760 (F.T.C. Mar. 25, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110158-encapep-energy-matter.

[26] Decision & Order at 19, Price Chopper/Tops Markets, File No. 211-0002, Docket No. C-4753 (F.T.C. Jan. 24, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0002-price-choppertops-markets-matter.

[27] Noah Higgins-Dunn, *AstraZeneca closes mega $39B Alexion buyout despite antitrust fears, making a splash in rare diseases*, FIERCE PHARMA (July 21, 2021), https://www.fiercepharma.com/pharma/astrazeneca-closes-mega-

billion acquisition of Acceleron Pharma,[28] and Facebook's $1 billion acquisition of Kustomer,[29] each of which went through without any prior approval or other kind of obligation?[30]

Smaller companies are more likely to accede to prior approval requirements because they have less leverage and often need the deal more, and with a prior approval obligation their ability to engage in M&A will be less than their larger competitors. That is a competitive disadvantage to larger rivals.

And let's not forget the divestiture buyers. We are punishing the companies (often smaller ones) that have done nothing but step up to help resolve a competitive concern. This is what Commissioner Wilson and I dubbed "bonkers crazy".[31]

Who does all of this help? One answer, as with the termination of ET, is agency heads who do not wish to be associated with "clearing" mergers. Prior approval requirements deter consents, not mergers. Among other things, they scare off better buyers of assets. Without a consent, there is nothing for enforcers to approve. Sure, this strategy probably will push a few otherwise settleable matters into expensive, uncertain litigation and force staff to review prior approval applications for transactions that would not otherwise merit investigation. Fine, companies will fix it first. And, yes, the agencies will be

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39b-alexion-buyout-despite-antitrust-fears-making-a-splash-rare; Charley Grant, *Post Covid-19, Don't Forget About Healthcare Stocks*, WALL ST. J. (Apr. 19, 2021), https://www.wsj.com/articles/post-covid-19-dont-forget-about-healthcare-stocks-11618830180 ("U.S. regulators gave the green light to drugmaker AstraZeneca's AZN 1.29% planned acquisition of Alexion Pharmaceuticals, which was earlier than investors had expected. Alexion shares shot higher in response.").

[28] CNBC, *Merck to buy Acceleron for about $11.5 billion in rare-disease drugs push* (Sept. 30, 2021), https://www.cnbc.com/2021/09/30/merck-to-buy-drugmaker-acceleron-for-about-11point5-billion.html ("Merck is buying Acceleron Pharma for about $11.5 billion, broadening its portfolio beyond aging cancer drug Keytruda with potential treatments that could bring in fresh revenue. The deal gives Merck access to Acceleron's rare disease drug candidate, sotatercept, which the company expects to be a multi-billion dollar peak sales opportunity, and comes as Keytruda moves toward the loss of market exclusivity in 2028."); Press Release, Merck & Co., Merck Completes Acquisition of Acceleron Pharma Inc. (Nov. 22, 2021), https://www.merck.com/news/merck-completes-acquisition-of-acceleron-pharma-inc/.

[29] Kurt Wagner, *Meta Closes $1 Billion Kustomer Deal After Regulatory Review*, BLOOMBERG (Feb. 15, 2022, 4:30 PM), https://www.bloomberg.com/news/articles/2022-02-15/meta-closes-1-billion-kustomer-deal-after-regulatory-review ("What followed was a lengthy review process, showing that Meta can still complete big acquisitions, just not quickly. The company passed an FTC review and a separate approval by antitrust authorities in the U.K.").

[30] I take no position on whether any of these deals warranted action by the antitrust agencies. I only note them to illustrate the gulf between the Progressives' strong words and their subsequent deeds.

[31] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips, *supra* note 20, at 6.

less effective and efficient as a result. But at least the leadership will be able to dodge some difficult and unpopular decisions. This is a political benefit, not a policy.

I am very concerned we are going to start seeing deals with divestitures but without consents. There are today murmurings in the private bar that the agencies are refusing to engage on remedies, and instead are conveying their competitive concerns and leaving it up to the merging parties to attempt a resolution. This is fixing it first with a wink and a nod—and no enforceable agreement with the government. As a result, the public loses out on the protections that a consent agreement provides—including, ironically, prior approval policy. Only agency heads, who get to avoid the appearance of blessing mergers, gain. Reading strident dissents about failed remedies for years, it never occurred to me that one solution might be neither blocking nor remediating deals at all.

Pre-Consummation Warning Letters

The final change to merger control I'll highlight is the promiscuous use of pre-consummation warning letters, sometimes called "close-at-your-own-peril letters". The point of HSR is to enable the antitrust agencies to review transactions, and block or remedy the anticompetitive ones, before they are consummated.[32] That is not always possible, of course. If the agencies do not expect to complete their review before the merging parties are free to consummate their deal, they will sometimes issue pre-consummation warning letters that typically inform the parties that the investigation is ongoing, may ultimately find that the merger is illegal, and the parties cannot avoid an enforcement action by consummating now.

When a merger presents legitimate competitive concerns and there is a good reason why the investigation will not be completed in time, I have no objection to issuing such letters. But last August, the Director of the FTC's Bureau of Competition announced a new practice of issuing these letters far more liberally.[33] By my count, of late, the FTC has sent warning letters in at least 60 investigations. Some of those are in matters where we haven't even begun to conduct an investigation. In others, the real investigation is over and we lack

[32] *See* PREMERGER NOTIFICATION OFF., FED. TRADE COMM'N, INTRODUCTORY GUIDE I: WHAT IS THE PREMERGER NOTIFICATION PROGRAM? 1 (Mar. 2009), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf.

[33] Holly Vedova, Dir., Bureau of Competition, *Adjusting merger review to deal with the surge in merger filings*, FED. TRADE COMM'N COMPETITION MATTERS BLOG (Aug. 3, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

a reasonable basis to conclude the merger violates the law. But the letters say we're still investigating.

There is a bad government aspect to this. For those matters where we've decided there isn't a competitive issue to address, one of two things must be true. Either we are wasting staff's time and taxpayer dollars on needless investigation, or we are misrepresenting to parties what is really happening.

But to parties trying to make and implement M&A decisions, the result—and, I fear, the goal—is to sow uncertainty about the future. Uncertainty, in turn, discourages post-merger integration and investment. This effect is particularly harmful for small companies, which are more likely than larger firms to need M&A to become more efficient and competitive, and which will have a harder time remaining viable should their merger be unwound. How is that a good thing? Once again, there is a critical benefit to agency heads: because investigations never end, we can never be seen as approving the deals we are investigating.

How is the M&A Tax Working?

If these various M&A taxes have borne fruit as strategies to stop more anticompetitive mergers, those fruit are not apparent. But the disproportionate burdens already are.

Are the big guys running scared? The New York Times' DealBook recently reported that while global M&A is down overall from last year—a natural and predictable corollary of plummeting equity values and rising interest rates—there has been a sharp *increase* in the value and volume of very large deals—i.e., $10 billion or more—"despite increased scrutiny from antitrust regulators and other factors that dampened enthusiasm for smaller deals".[34] If that was the goal in the first place, it is very different from the rhetoric.

Conclusion

Policy involves tradeoffs. In their zeal to tax M&A however they can, especially in ways that courts cannot police, those running the antitrust agencies and their supporters are already inviting perverse consequences. They are driving up costs and sowing uncertainty that disparately impact smaller players, putting them at a competitive

[34] Michael J. de la Merced, *Deal-making took a hit in the first quarter of 2022*, N.Y. TIMES (Apr. 15, 2022, 2:15 PM), https://www.nytimes.com/live/2022/04/01/business/economy-news-inflation-russia#deal-making-took-a-hit-in-the-first-quarter-of-2022.

disadvantage to the biggest companies. And, apart from press releases and avoiding political accountability, what's the payoff?

Everything I have described today involves the process for merger control. But substantive changes are surely coming, as the Antitrust Division of the Department of Justice ("DOJ") and FTC undertake revisions of the merger guidelines. I am not opposed to this project in principle, and I am open to exploring well-supported, administrable changes to the 2010 Guidelines.

But the hostile mentality about M&A responsible for recent process reforms is a bad place to start, and I am concerned that bias is already skewing the Guidelines revisions. The January 18 Request for Information issued jointly by the DOJ and FTC solicits "specific examples of mergers that have harmed competition" but not of mergers that benefited competition. Or consider the "listening forums" undertaken by FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter, with the ostensible purpose of "hear[ing] from those who have experienced firsthand the effects of mergers and acquisitions beyond antitrust experts." Public sessions are great, but there is no transparency to me or the public about how the presenters—who have uniformly negative things to say—are being selected. This stands in stark contrast to countless past public hearings, where commissioners besides the Chair got input into who would speak.

Even well-crafted policy has unintended consequences. The reforms to the merger process already in place are not well-crafted, so it's little surprise the consequences have not been good. They are doing little for competition, weakening small companies vis-à-vis larger competitors, and serving only to support personal branding and lack of accountability at the agencies. While the RFI process thus far has left much to be desired, the antitrust agencies still have a choice.

Prudence dictates that any new approach to merger enforcement should be warranted by developments in legal and economic analysis, and only after a thorough evaluation of both the administrability and likely impact of that new approach. The process should be transparent. I urge my colleagues and DOJ leadership to proceed with care, and I encourage the public to participate. We've seen too many mistakes already.

Thank you.