IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

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

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PRELIMINARY STATEMENT

Defendants Energy*Solutions*, Inc. ("ES"), Rockwell Holdco, Inc., Andrews County Holdings, Inc., and Waste Control Specialists LLC ("WCS") demonstrated in their moving papers the following critical facts: (1) both the Texas Commission on Environmental Quality ("TCEQ") and the State of Texas are directly involved in the facts of this case and have a significant interest in the transaction challenged in this lawsuit; (2) the Compact Waste Facility ("CWF") that is the principal asset at issue in this lawsuit is located in the Western District of Texas and is actually owned by the State of Texas; (3) the CWF and Federal Waste Disposal Facility ("FWF") landfills were financed by public bonds issued by Andrews County, Texas, which owns most of the land and facilities where WCS operates, including the Resource Conservation and Recovery Act ("RCRA") landfill; (4) critical third-party witnesses, including Government and customer witnesses, are located in or near the Western District of Texas; and (5) the transaction underlying this case has no meaningful nexus to Delaware. These facts are more than sufficient to outweigh any deference to the Government's choice of forum and the fact that Defendants are incorporated here. Because the Government's opposition either ignores – or in some instances confirms – these facts, and points to no other factors supporting Delaware as the proper forum, this Court should exercise its discretion to transfer this action to the Western District of Texas.[1]

ARGUMENT

The Third Circuit has held that, while "there is no definitive formula or list of the factors to consider," Section 1404(a) "was intended to vest district courts with broad discretion

[1] Defendants waive oral argument on this motion. As the Government's investigation has spanned a year, Defendants will be seeking a short pre-trial schedule. In fact, the parties are currently negotiating the terms of a proposed case management order that contemplates a trial date no later than early spring. For that reason, unless the Court prefers to hear argument, Defendants respectfully request that the Court reach a decision on the papers.

to determine, on an individualized, case-by-case basis, whether convenience and fairness considerations weigh in favor of transfer," and courts should consider both private and public factors. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879, 883 (3d Cir. 1995). As demonstrated below, other than the Government's choice of forum, all factors that are relevant in this case weigh in favor of transfer to the Western District of Texas, with multiple and significant public interests being of particular relevance in this case.

Given this case's attenuated connection to Delaware, the Government largely bases its Opposition on a fact that is not even relevant to the analysis. The Government argues that the Court should keep the case in Delaware because of the forum-selection and choice of law clauses in Defendants' merger agreement – where Defendants only agreed to litigate certain limited types of claims in Delaware courts under Delaware law. This argument fails for multiple reasons. As a threshold matter, because the forum-selection clause applies only to signatories of the merger agreement, it in no way obligates Defendants to litigate actions brought by a third party (here, the Government) in Delaware. *See, e.g.*, *Triple C Railcar Serv., Inc. v. City of Wilmington*, 630 A.2d 629, 633 (Del. 1993) (noting that a non-party to a contract may enforce a promise contained in the contract only "if the contract has been made for his benefit" (citing *Wilmington Hous. Auth. v. Fid. & Deposit Co. of Md.*, 47 A.2d 524, 529 (Del. 1946))). More significantly, the choice of law provision is limited to claims between Defendants that arise out of the merger agreement. As to other types of disputes, the merger agreement designates in Section 13.15(d) the Western District of Texas as the exclusive forum. (*See* Hauck Decl., Ex. A, Execute Purchase Agreement.) Indeed, that is where the "Prior Litigation" between the parties that the Government references in its Complaint, (Compl. ¶¶ 7, 10, 59), took place. And there is an obvious reason the agreement distinguishes between types of disputes. Much like

incorporation in Delaware, for instance, designation of Delaware for contractual merger disputes is routine given Delaware's body of corporate and merger law.[2] In contrast, antitrust actions are far broader in scope and require far more in the way of evidence. In fact, the considerations that compel transfer to the Western District of Texas here – the nature and location of the witnesses, the presence of TCEQ's significant regulatory oversight, and the substantial local and state interests in the dispute – would not be present in a simple breach of contract action between Defendants. Put simply, the forum-selection and choice of law clauses in Defendants' merger agreement are legal formalities that are immaterial to this matter, and thus do not impact the transfer analysis required in this case.

I. PUBLIC FACTORS WEIGH HEAVILY IN FAVOR OF TRANSFER.

This District has found that the involvement of a local government agency in the conduct underlying a case weighs in favor of transfer. *See, e.g.*, *Downing v. Globe Direct LLC*, C.A. No. 09-693 (JAP), 2010 WL 2560054, at *4 (D. Del. June 18, 2010) ("Although the RMV is not a party, this case nevertheless concerns, even if indirectly, the conduct of that Massachusetts government agency, and therefore the case has the potential to impact the public policy of as well as, to some extent, the taxpayers of Massachusetts."). The Government's

[2] Delaware courts have construed similar forum-selection and choice of law provisions to mean that, absent specific language to the contrary, the contracting parties intended "to incorporate the law of Delaware, *which primarily would concern its common law, to decide questions concerning the interpretation and enforceability of a contract*." *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 855 (Del. Ch. 2016) (emphasis added), *aff'd sub nom. A&R Logistics Holdings, Inc.*, No. 117, 2016, 2016 WL 5845786 (Del. Sept. 30, 2016). In cases like *FdG Logistics LLC*, the Delaware courts have rejected the argument that standard choice of law and forum-selection provisions in transaction agreements – such as the provisions of the merger agreement at issue here – could be interpreted to implicate the Delaware Securities Act. *Id.* ("What [6 *Del. C.* § 2708] does not stand for, in my view, is a mechanism for the wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties."). The Government's attempt to invoke portions of Defendants' merger agreement as having relevance in an action under the federal antitrust laws is, if anything, even more dubious than the argument rejected by the court in *FdG Logistics LLC*.

opposition fails to address *Downing* and thus largely ignores what this case is about. The Government is trying to block ES from acquiring WCS's disposal facility, which is located in the Western District of Texas. One of the central issues in the case will be the impact of the transaction on prices; in fact, the Government's case hinges on proving that the acquisition would lead to higher prices. Critically, the TCEQ, Radiological Materials Division, headquartered in the Western District of Texas, acts as WCS's chief regulator – and one or more executives from this critical third party will almost certainly be critical witnesses at trial. The TCEQ not only provides WCS with the radioactive materials license required for WCS to operate, but also has regulatory oversight over WCS's contracts and rates, including the regulatory mandate to confirm that WCS's rates "conform to applicable antitrust statutes and regulations." (Mot. at 5.) The Government's Complaint admits that "[d]uring the first two years of WCS's operation, the TCEQ's pricing regulations hampered WCS's ability to compete effectively" for certain types of waste. (Compl. ¶ 28.) Defendants contend that the TCEQ's continued regulation of WCS's facility's prices post-merger would prevent the merger from having any anticompetitive effects.

In addition, the United States Congress authorized the Texas Low-Level Radioactive Waste Compact Commission ("TCC") to manage the export of low-level radioactive waste generated in Texas and Vermont and the import of all low-level radioactive waste from states outside the Texas Compact. (Declaration of Rodney Baltzer ("Baltzer Decl.") ¶ 3.) The TCC and their Executive Director are located in the Western District of Texas in Austin, Texas. There are eight total members, six of whom are located in Texas, including the Chairman, and are appointed by the Texas Governor. (*Id.*) Every significant generator of waste in Texas has petitioned the TCC to export their waste outside of the state. (Baltzer Decl. ¶ 4.) The TCC's

decisions on whether to grant the petitions made by Texas generators are generally made in the Western District of Texas, as most meetings of the TCC are held in Austin, Texas, with periodic meetings (not more often than annually) in Andrews, Texas or Vermont. (*Id.*) Every petition was granted because it is cheaper to ship out of state and have waste disposed of by ES than at the WCS disposal facility in Texas. (*Id.*) In total, approximately 18 generators of waste in Texas have exported over 115,000 cubic feet of dry waste in the last two years. (*Id.*) The TCC's decisions to grant or deny export petitions are directly relevant to whether WCS is a viable competitor, and thus may be discussed by numerous Texas witnesses at trial.

WCS also has a second facility at issue in the case, a RCRA landfill – which is also located in the Western District of Texas and which also operates pursuant to a license from the TCEQ. (Compl. ¶¶ 29, 49; Samford Decl. ¶ 4.) The Government alleges that an exemption provided by the TCEQ for disposal of a subset of Lower Activity LLRW in its RCRA landfill will allow WCS to overcome the pricing disadvantage stemming from TCEQ regulation of prices charged at its disposal facility. (Compl. ¶ 29.) Conversely, Defendants intend to prove that the willingness of the TCEQ to offer similar exemptions to owners of other RCRA sites in Texas will eliminate any purported anticompetitive effects relating to Lower Activity LLRW. Consequently, the TCEQ's role in this case goes well beyond the "indirect" interest in *Downing* that warranted transfer; the TCEQ's conduct, authority, and positions are right at the center of multiple issues that go to the very heart of this case.

The State of Texas also has a direct role in this case. The State of Texas takes title to – and thus accepts liability for – all of the nuclear waste disposed of at the WCS's CWF. (Samford Decl. ¶ 5.) The Government expressly alleges that the State of Texas's willingness to take title to waste at WCS's CWF facility is an element of competition at issue in the case.

(Compl. ¶ 69.) The State of Texas's direct involvement in the underlying facts alone would also warrant transferring this case to the Western District of Texas.

In addition to Texas's substantial involvement in the underlying issues in dispute, there are also public financial interests at stake. As the Government acknowledges, Defendants intend to prove that one reason the merger should be allowed is because otherwise WCS's disposal facility will ultimately fail. (Opp. at 11, citing "WCS's anticipated 'failing firm' defense.) What the Government fails to explain is that the failure of WCS would prejudice not just all of its customers, but also both Andrews County, Texas and the State of Texas. Andrews County actually *owns* the majority of WCS's land and facilities (the State of Texas owns the CWF), the construction of which was financed by a $75 million bond offering by Andrews County in 2009. (Samford Decl. ¶ 4.) Andrews County currently leases the facility back to WCS. (*Id.*) Andrews County and the State of Texas also each receive annual revenue streams from WCS. Together, Andrews County and the State of Texas have collected roughly $45 million in fees from WCS since 2012. (*Id.* ¶ 5.)

Tellingly, the Government neither disputes these direct and overwhelming connections, nor explains why this Court should disregard them. Instead, the Government suggests that the public interest in this case is in some sense "national" because this is an antitrust case. (Opp. at 15.) Of course, that would not favor Delaware any more than the Western District of Texas. The Government also ignores the numerous antitrust cases cited by Defendants in which the Government was the plaintiff, and which were transferred for a variety of reasons less compelling than those presented here. (Mot. at 4.) In sum, the public factors and public interest weigh so heavily in favor of the Western District of Texas that they alone warrant transferring this case to the Western District of Texas. *SEC v. Ernst & Young*, 775 F. Supp. 411,

414-16 (D.D.C. 1991) ("Texas is the site of nearly all of the facts underlying the filings here. Despite the presumption in favor of plaintiff's forum choice, that choice should not be allowed to stand where the forum chosen bears virtually no relation to the occurrences giving rise to the cause of action." (citations omitted)).

II. PRIVATE FACTORS ALSO WEIGH HEAVILY IN FAVOR OF TRANSFER.

The most relevant private factor in this case is the convenience of the witnesses. The Government mistakenly claims that the majority of the relevant witnesses are not located in or close to the Western District of Texas. As already explained, TCEQ's Radiological Materials Division – whose employees will provide merits-related testimony critical to the disposition of this case – is headquartered within the Western District of Texas. The Government attempts to minimize the connection by arguing that most of Defendants' largest customers do not "appear" to be headquartered in the Western District of Texas. (Opp. at 13-14.) But both ES and WCS have significant customers located in or near the Western District of Texas. (Reply Declaration of Ken Robuck ("Reply Robuck Decl.") ¶ 3; Baltzer Decl. ¶ 2.) Specifically, as for ES customers, TXU Generation Company is located in Glen Rose, Texas; the South Texas Project is located in Wadsworth, Texas; and Babcock & Wilcox Technical Services Pantex, LLC is located outside Amarillo, Texas. (Reply Robuck Decl. ¶ 3.) Collectively, these three customers have paid to ES millions of dollars in revenue since 2012. (*Id.*) And six of WCS's customers are located in or near the Western District; South Texas Project, Luminant, CB&I Federal Services LLC, CPS Energy, NSSI Sources & Services Inc., Veolia Shared Services Center are located in Wadsworth, Texas; Dallas, Texas; The Woodlands, Texas; Austin, Texas; Houston, Texas; and Beaumont, Texas, respectively. (Baltzer Decl. ¶ 2.) Defendants expect to call witnesses from these customers to support their justifications for the merger. While the subpoena power in this

case may be nationwide, there is no reason to litigate this case in a forum that would be inconvenient for so many critical third-party witnesses. *See Teleconference Sys. v. Procter & Gamble Pharm., Inc.*, 676 F. Supp. 2d 321, 334 (D. Del. 2009) (rejecting argument that "the Court should only consider the location of witnesses and evidence if they are unavailable or unable to be produced in plaintiff's chosen forum" and noting that "[w]hile some cases discuss this view, a close analysis of other cases demonstrates that in appropriate circumstances they are not as stringent" given the "broad" and "flexible" approach used in the Third Circuit); *APV N. Am., Inc. v. Sig Simonazzi N. Am., Inc.*, 295 F. Supp. 2d 393, 399 (D. Del. 2002) (transferring venue "because many of the relevant witnesses and documents are already available in Texas").

Conversely, the Government does not cite a single witness who is located in Delaware or even on the East Coast. Instead, the Government simply assumes that WCS must have a customer in Delaware because Delaware is one of 36 states that can use WCS's facility under an import petition. (Opp. at 8.) But it does not identify a single such customer, much less explain how such a customer would have any involvement in the litigation whatsoever, and its speculation is entitled to no weight in the transfer analysis. *See Wacoh Co. v. Kionix, Inc.*, 845 F. Supp. 2d 597, 602 (D. Del. 2012) (transferring because "[n]o witnesses from Delaware have been identified, and it is unlikely that any such witnesses exist."); *see also Teleconference Sys.*, 676 F. Supp. 2d at 333 ("The fact that plaintiff has not identified a single material witness who resides in Delaware rather than California is telling and weighs in favor of transfer." (citations omitted)).

The convenience of the parties also favors the Western District of Texas. WCS's principal place of business and the vast majority of its employees are in the Western District of Texas. (Samford Decl. ¶ 4.) No party has any offices, employees, or operations in Delaware.

(Samford Decl. ¶ 6; Robuck Decl. ¶ 3.) The factors relating to Delaware are so non-existent that the Government instead trumpets WCS's connections to an adjacent district in Texas – pointing out that WCS's corporate headquarters is in the Northern District of Texas and that significant negotiations for the merger took place in Dallas. (Opp. at 9.) To the extent these factors are relevant here – such as the convenience of witnesses from WCS located in Dallas – they obviously weigh in favor of a transfer to the Western District of Texas.[3]

The only relevant factors that the Government cites in its Opposition that favor Delaware are that Defendants are incorporated there and it is the Government's choice of forum. But incorporation in Delaware matters less when the Delaware corporation is the defendant. *See Wacoh Co.*, 845 F. Supp. 2d at 604 ("[T]he corporation that has chosen Delaware is not a Delaware corporation, and the corporations that might want to claim the benefits of being a Delaware corporation do not want to do so in this case. Thus, I do not see this factor as having any weight in this case."). Further, the Government does not dispute that incorporation alone is of minimal relevance when other factors weigh heavily in favor of transfer. *See In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1223-24 (Fed. Cir. 2011) ("The court's heavy reliance on the fact that LAMD was incorporated in Delaware was similarly inappropriate…. It is certainly not a dispositive fact in the venue transfer analysis, as the district court in this case seemed to believe."); *see also APV N. Am., Inc.*, 295 F. Supp. 2d at 398-99 ("Where an alternative forum is more convenient and has more substantial connections with the litigation 'incorporation in Delaware will not prevent transfer.'" (citations omitted)).

As to the Government's choice of forum, the Government cites *Smart Audio Tech., LLC v. Apple, Inc.*, 910 F. Supp. 2d 718 (D. Del. 2012), for the proposition that the

[3] The parties, including the Government, all have the resources to litigate in either forum, and in terms of transportation hubs, Delaware is no more convenient than San Antonio or Austin.

Government's choice of forum should be given "substantial" deference. (Opp. at 7.) But that deference is unwarranted where, as here, the plaintiff chose not to sue in its home court – as the *Smart Audio* court clearly stated:

> It therefore appears that, while legitimate reasons underlying Smart Audio's forum selection do require that some additional deference be given to its choice, *those reasons do not carry the same weight as would a decision by Smart Audio to sue on its home turf*. This factor clearly weighs against transfer, but, for the reasons discussed above, the court will accord it *less than* the "substantial" or "paramount" weight than it would merit had Smart Audio filed suit in its home forum.

Id. at 730 (emphasis added).[4] In doing so, the court approvingly relied on *In re Link-A-Media*, 662 F.3d 1221 (Fed. Cir. 2011), for the proposition that courts should not place "too much weight … on plaintiff's choice of forum" when, outside of legal formalities like incorporation, that forum has limited connections to the parties or underlying dispute. *Smart Audio,* 910 F. Supp. 2d at 730. Again, the Government cannot dispute that courts have transferred numerous antitrust cases in which the Government is the plaintiff in circumstances similar to those present in this case – where the Government chose to sue where the defendants were incorporated, rather than in a forum with greater connections to the underlying facts and the witnesses likely to testify in the case. (Mot. at 4.)

CONCLUSION

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

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[4] The Government's reliance on *United States v. H&R Block, Inc*., 789 F. Supp. 2d 74 (D.D.C. 2011), is similarly misplaced. There, the court opted not to transfer out of the District of Columbia largely because defendants had formed a "public-private partnership" with the Internal Revenue Service that was critical to the issues in the case. *Id*. at 79. Given the existence of such a partnership, and the IRS's role in the tax industry, the court found that critical IRS employees "based in or near this district would likely be called to testify" in the action. *Id*. No such circumstances exist here for the Government; by contrast, TCEQ employees will be critical witnesses in this dispute, and they are located in the Western District of Texas.

Respectfully submitted,

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