DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Waste Management, Inc. and Deffenbaugh Disposal, Inc.; 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. Waste Management, Inc. and Deffenbaugh Disposal, Inc., Civil Action No. 1:15-cv-00366. On March 13, 2015, the United States filed a Complaint alleging that Waste Management, Inc.'s proposed acquisition of Deffenbaugh Disposal, Inc. would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The proposed Final Judgment, filed the same time as the Complaint, requires Waste Management, Inc. to divest small container commercial waste collection routes it acquired from Deffenbaugh Disposal, Inc. as follows: five specified routes in Springdale, Arkansas; two specified routes in the Van Buren/Fort Smith, Arkansas area; and four specified routes in Topeka, Kansas. Waste Management must also adhere to other requirements.

Copies of the Complaint, Stipulation, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202-514-2481), on the Department of Justice's website at http://www.usdoj.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 Department of Justice, Antitrust Division's internet website, filed with the Court and, under certain circumstances, published in the Federal Register. Comments should be directed to James J. Tierney, Chief, Networks and Technology Enforcement Section, Antitrust Division, Department of Justice, 450 Fifth Street, NW, Washington, DC 20530, (telephone:202-307-6200).

Patricia A. Brink,
Director of Civil Enforcement.

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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**UNITED STATES OF AMERICA,** )
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| **Plaintiff,** | ) | |
| **v.** | ) | **Civil Action No.: 1:15-cv-00366** |
| **WASTE MANAGEMENT, INC.** | ) | **Description: Antitrust** |
| **and** | ) | **Date Stamp: 3/13/2015** |
| **DEFFENBAUGH DISPOSAL, INC.,** | ) | |
| **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 Waste Management, Inc. ("WMI") of Defendant Deffenbaugh Disposal, Inc. ("DDI"). The United States alleges as follows:

## I. INTRODUCTION

1. Pursuant to the Agreement and Plan of Merger dated September 17, 2014, WMI proposes to acquire all of the outstanding securities of DDI. WMI and DDI compete to provide small container commercial waste collection service in certain geographic areas in the United States. They are two of only a few significant providers of small container commercial waste collection service in and around Springdale, Arkansas; Van Buren/Fort Smith, Arkansas; and Topeka, Kansas.

2. WMI and DDI have competed aggressively against one another for customers in these three areas, which has resulted in lower prices for small container commercial waste

collection service. Unless the transaction is enjoined, consumers of small container commercial waste collection services in these areas likely will pay higher prices and receive lower quality service as a consequence of eliminating the vigorous competition between WMI and DDI. Accordingly, WMI's acquisition of DDI likely would substantially lessen competition in the provision of small container commercial waste collection service in and around Springdale, Arkansas, Van Buren/Fort Smith, Arkansas, and Topeka, Kansas, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

## II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

3. This action is filed by the United States 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.

4. The 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 small container commercial waste collection businesses, WMI and DDI makes sales and purchases in interstate commerce, ship waste in the flow of interstate commerce, and engage in activities substantially affecting interstate commerce.

5. Defendant WMI transacts business in the District of Columbia, and WMI and DDI have consented to venue and personal jurisdiction in the District of Columbia. Venue is therefore 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

6. WMI is a Delaware corporation headquartered in Houston, Texas. WMI is the largest waste hauling and disposal company in the United States providing collection, transfer, recycling, and disposal services throughout the nation. For fiscal year 2014, WMI reported revenues of approximately $14 billion.

7. DDI is a Delaware corporation headquartered in Kansas City, Kansas. DDI provides waste collection, transfer, recycling and disposal services in Kansas, Missouri, Arkansas, Nebraska, and Iowa. DDI's revenues for 2013 were approximately $180 million.

8. On September 17, 2014, WMI and DDI entered into an Agreement and Plan of Merger by which WMI proposes to acquire all of the outstanding securities of DDI for approximately $405 million.

## IV. TRADE AND COMMERCE

### A. Relevant Service Market: Small Container Commercial Waste Collection

9. Waste collection firms, also referred to as "haulers," collect municipal solid waste ("MSW") from residential, commercial, and industrial establishments and transport the waste to a disposal site, such as a transfer station, landfill, or incinerator, for processing and disposal. Commercial customers typically contract directly with private waste collection firms, such as WMI and DDI, for the collection of MWS generated by their businesses. MSW generated by residential customers, on the other hand, often is collected either by local governments or by private waste collection firms pursuant to contracts, or franchises granted by, municipal authorities.

10. Small container commercial waste collection service is the business of collecting MSW from commercial and industrial accounts, usually in dumpsters (*i.e.*, a small container with

one to ten cubic yards of storage capacity), and transporting such waste to a disposal site by use of a front- or rear-end load truck. Typical small container commercial waste collection customers include office and apartment buildings and retail establishments (*e.g.*, stores and restaurants). Small container commercial waste collection does not include other types of waste collection services, such as residential collection service or the collection of roll-off containers.

11. Small container commercial waste collection service differs in many important respects from residential waste collection or other types of collection services. An individual commercial customer typically generates substantially more MSW than a residential customer. To handle this high volume of MSW efficiently, commercial customers are provided with small containers, also called dumpsters, for storing the waste. Commercial accounts are organized into routes, and the MSW generated by these accounts is collected and transported in front-end load ("FEL") trucks uniquely well-suited for commercial waste collection. Less frequently, haulers may use more maneuverable, but less efficient, rear-end load ("REL") trucks, especially in those areas in which a collection route includes narrow alleyways or streets which are difficult to navigate with FEL trucks. Because FEL trucks are unable to navigate narrow passageways easily they cannot efficiently collect the waste located in them.

12. On a typical small container commercial waste collection route, an operator drives a FEL truck to the customer's container, engages a mechanism that grasps and lifts the container over the front of the truck, and empties the container into the truck's storage section where the waste is compacted and stored. The operator continues along the route, collecting MSW from each of the commercial accounts, until the vehicle is full. The operator then drives the truck to a disposal facility, such as a transfer station, landfill or incinerator, and empties the content of the

truck. Depending on the number of locations and the amount of waste collected on that route, the operator may make one or more trips to the disposal facility during the servicing of the route.

13. In contrast to a small container commercial waste collection route, a residential waste collection route is significantly more labor-intensive. The customer's MSW is stored in much smaller containers (*e.g.*, garbage bags or trash cans) and, instead of FEL trucks, waste collection firms routinely use REL trucks or side-load trucks manned by larger crews (usually, two- or three-person teams). On residential routes, crews generally hand-load the customer's MSW, typically by tossing garbage bags and emptying trash cans into the vehicle's storage section. Because of the differences in the collection processes, residential customers and commercial customers usually are organized into separate routes.

14. Other types of collection activities, such as the use of roll-off containers (typically used for construction debris) and the collection of liquid or hazardous waste, also are rarely combined with small container commercial waste collection. This is due to differences in the hauling equipment required, the volume of waste collected, health and safety concerns, government regulations, and the ultimate disposal option used.

15. The differences in the types and volume of MSW collected and in the equipment used in collection services distinguish small container commercial waste collection from all other types of waste collection activities. Absent competition from other small container commercial waste collection firms, a small container commercial waste collection service provider profitably could increase its charges without losing significant sales or revenues to firms engaged in the provision of other types of waste collection services. Thus, small container commercial waste collection is a line of commerce, or relevant service, for purposes of analyzing the effects of the

acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18.

### B. Relevant Geographic Markets

16. Small container commercial waste collection service is generally provided in highly localized areas because a firm must have sufficient density (*i.e.*, a large number of commercial accounts that are reasonably close together) in its small container commercial waste collection operations to operate efficiently and profitably. If a hauler has to drive significant distances between customers, it earns less money for the time the truck is operating.

17. Accounts must also be near an operator's base of operations. Firms with operations concentrated in a distant area cannot effectively compete against firms whose routes and customers are locally based. It is economically impractical for a small container commercial waste collection firm to service areas from a distant base, which requires that the FEL truck travel long distances just to arrive at its route. Local waste collection firms have significant cost advantages over other more-distant firms, and can profitably increase their charges to local customers without losing significant sales to firms outside the area. Waste collection firms, therefore, generally operate from garages and related facilities within each of the local areas they serve.

18. In each of the following areas a small container commercial waste collection firm could profitably increase prices to local customers without losing significant sales to more distant competitors: Springdale, Arkansas Area; Van Buren/Fort Smith, Arkansas Area; and Topeka, Kansas Area. Accordingly, each of these areas is a section of the country, or 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

19. Defendants WMI and DDI directly compete in small container commercial waste collection service in each of the relevant geographic markets defined in paragraph 18. The acquisition of DDI by WMI would remove a significant competitor in small container commercial waste collection in these already highly concentrated and difficult-to-enter markets.

20. In the Springdale, Arkansas Area, the market for small container commercial waste collection services is highly concentrated and would become substantially more concentrated as a result of the proposed transaction. By the parties own estimates, WMI has approximately 48% of the market and DDI has approximately 18% of the market. The remaining 36% is split between only two other competitors. Thus, in the Springdale, Arkansas Area, the proposed acquisition would reduce from four to three the number of competitors in the collection of small container commercial waste.

21. In the Van Buren/Fort Smith, Arkansas Area, the market for small container commercial waste collection services is highly concentrated and would become substantially more concentrated as a result of the proposed transaction. By the defendants' own estimates, WMI has approximately 33% of the market and DDI has approximately 33% of the market. The remaining 34% belongs to a third competitor. Thus, in the Van Buren/Fort Smith, Arkansas Area, the proposed acquisition would reduce from three to two the number of competitors in the collection of small container commercial waste.

22. In addition, in both the Springdale, Arkansas Area and the Van Buren/Fort Smith, Arkansas Area, DDI is often the low-price leader, and customers in these areas frequently switch between the existing competitors in order to take advantage of lower prices. In both of these areas, WMI and DDI are also among the few small container commercial waste firms that can reliably service larger accounts.

23. In the Topeka, Kansas Area, the market for small container commercial waste collection services is highly concentrated and would become substantially more concentrated as a result of the proposed transaction. By the defendants' own estimates, WMI has approximately 35% of the market and DDI has approximately 32% of the market. The remaining 33% belongs to a third competitor. Thus, in the Topeka, Kansas Area, the proposed acquisition would reduce from three to two the number of competitors in the collection of small container commercial waste. And for many of the larger small container commercial waste customers in the Topeka, Kansas Area, WMI and DDI are currently the only two options. These customers would be left with only one option as a result of the acquisition.

24. In each of these markets, the resulting significant increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry likely will result in higher prices and lower quality service for the collection of small container commercial waste.

**D. Entry into Small Container Commercial Waste Collection**

25. Significant new entry into small container commercial waste collection is difficult and time-consuming, including in the Springdale, Arkansas Area; the Van Buren/Fort Smith, Arkansas Area; and the Topeka, Kansas Area.

26. In order to obtain a comparable operating efficiency, a new firm must achieve route densities similar to those of firms already competing in the market. However, the incumbent's ability to engage in price discrimination and to enter into long-term contracts with collection customers is often effective in preventing new entrants from winning a large enough base of customers to achieve efficient routes in sufficient time to constrain the post-acquisition firm from significantly raising prices.

27. Incumbent firms also frequently use three- to five-year contracts, which may automatically renew or contain large liquidated damages provisions for contract termination. Such contracts make it more difficult for a customer to switch to a new firm in order to obtain lower prices for its collection service.

28. By making it more difficult for new firms to obtain customers, these practices increase the cost and time required by an entrant to form an efficient route, reducing the likelihood that an entrant ultimately will be successful.

## V. VIOLATIONS ALLEGED

29. The proposed acquisition likely would lessen competition substantially for small container commercial waste collection services in the Springdale, Arkansas Area; the Van Buren/Fort Smith, Arkansas Area; and the Topeka, Kansas Area, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

30. Unless enjoined, the proposed acquisition likely would have the following anticompetitive effects relating to small container commercial waste collection services in the Springdale, Arkansas Area; the Van Buren/Fort Smith, Arkansas Area; and the Topeka, Kansas Area, among others:

(a) actual and potential competition between WMI and DDI would be eliminated;

(b) competition generally would be substantially lessened; and

(c) prices would increase and the quality of service would decrease.

## VI. REQUESTED RELIEF

31. Plaintiff requests that this Court:

(a) adjudge and decree that WMI's acquisition of DDI 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 DDI by WMI, or from entering into or carrying out any other contract, agreement, plan or understanding, the effect of which would be to combine WMI with DDI;

(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.

FOR PLAINTIFF UNITED STATES OF AMERICA:

_____/s/_____
WILLIAM J. BAER (D.C. BAR #324723)
Assistant Attorney General for Antitrust

_____/s/_____
IAN D. HOFFMAN
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_____/s/_____
PATRICIA A. BRINK
Director of Civil Enforcement

_____/s/_____
JAMES J. TIERNEY (D.C. Bar # 434610)
Chief
NETWORKS AND TECHNOLOGY SECTION

_____/s/_____
AARON D. HOAG
Assistant Chief
NETWORKS AND TECHNOLOGY SECTION

Dated: March 13, 2015

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **UNITED STATES OF AMERICA,** | |
| **Plaintiff,** | |
| **v.** | **Civil Action No.: 1:15-cv-00366** |
| **WASTE MANAGEMENT, INC.** | **Description: Antitrust** |
| **and** | **Date Stamp: 3/13/2015** |
| **DEFFENBAUGH DISPOSAL, INC.,** | |
| **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 Final Judgment submitted for entry in this civil antitrust proceeding.

## I. NATURE AND PURPOSE OF THE PROCEEDING

Pursuant to an Agreement and Plan of Merger dated September 17, 2014, Waste Management, Inc. ("WMI") proposes to acquire all of the outstanding shares of common stock of Deffenbaugh Disposal, Inc. ("DDI") in a transaction valued at approximately $405 million.

The United States filed a civil antitrust Complaint on March 13, 2015, seeking to enjoin the proposed acquisition. The Complaint alleges that the proposed acquisition likely would

substantially lessen competition for small container commercial waste collection service in the area of Topeka, Kansas, and in two areas in Northwestern Arkansas – Van Buren/Fort Smith, and Springdale – in violation of Section 7 of the Clayton Act. This loss of competition would result in consumers paying higher prices and receiving inferior services for small container commercial waste collection service in those areas.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order 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 small container commercial waste collection assets. Under the terms of the Hold Separate Stipulation and Order, WMI and DDI are required to take certain steps to ensure that the assets to be divested will be preserved and held separate from other assets and businesses.

The United States and the 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 Final Judgment and to punish violations thereof.

## II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS

### A. The Defendants

WMI is a Delaware corporation with its headquarters in Houston, Texas. WMI provides collection, transfer, recycling, and disposal services throughout the United States. In 2014, WMI had estimated total revenue of $14 billion.

DDI is a Delaware corporation, with its headquarters in Kansas City, Kansas. DDI offers collection, transfer, recycling, and disposal services in Kansas, Missouri, Arkansas, Nebraska, and Iowa. In 2013 DDI had estimated total revenue of approximately $180 million.

## B. The Competitive Effects of the Transaction on Small Container Commercial Waste Collection in Topeka, Kansas, and Van Buren/Fort Smith and Springdale, Arkansas

Municipal solid waste ("MSW) is solid, putrescible waste generated by households and commercial establishments. Waste collection firms, or haulers, contract to collect MSW from residential and commercial customers and transport the waste to private and public MSW disposal facilities (*e.g.*, transfer stations and landfills), which, for a fee, process and legally dispose of the waste. Small container commercial waste collection is one component of MSW collection, which also includes residential and other waste collection. WMI and DDI compete in the collection of small container commercial waste.

Small container commercial waste collection service is the collection of MSW from commercial businesses (*e.g.*, office and apartment buildings) and retail establishments (*e.g.*, stores and restaurants) for shipment to, and disposal at, an approved disposal facility. Because of the type and volume of waste generated by commercial accounts and the frequency of service required, haulers organize commercial accounts into routes, and generally use specialized equipment to store, collect, and transport MSW from these accounts to approved MSW disposal sites. This equipment (*e.g.*, one to ten-cubic-yard containers for MSW storage, and front-end load vehicles commonly used for collection and transportation of MSW) is uniquely well-suited for providing small container commercial waste collection service. Providers of other types of waste collection services (*e.g.*, residential and roll-off services) are not good substitutes for small

container commercial waste collection firms. In these types of waste collection efforts, firms use different waste storage equipment (*e.g.*, garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.*, rear-load, side-load, or roll-off trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect, or transport MSW generated by commercial accounts and, hence, are rarely used on small container commercial waste collection routes. In the event of a small but significant increase in price for small container commercial waste collection services, customers would not switch to any other alternative. Thus, the Complaint alleges that the provision of small container commercial waste collection services constitutes a line of commerce, or relevant service, for purposes of analyzing the effects of the transaction.

The Complaint alleges that the provision of small container commercial waste collection service takes place in compact, highly-localized geographic markets. It is expensive to transport MSW long distances between collection customers or to disposal sites. To minimize transportation costs and maximize the scale, density, and efficiency of their MSW collection operations, small container commercial waste collection firms concentrate their customers and collection routes in small areas. Firms with operations concentrated in a distant area cannot effectively compete against firms whose routes and customers are locally based. Distance may significantly limit a remote firm's ability to provide commercial waste collection service as frequently or conveniently as that offered by local firms with nearby routes. Also, local small container commercial waste firms have significant cost advantages over other firms, and can profitably increase their charges to local small container commercial waste collection customers without losing significant sales to firms outside the area.

Applying this analysis, the Complaint alleges that in the Topeka, Kansas Area, the Van Buren/Fort Smith, Arkansas Area, and the Springdale, Arkansas Area, a local small container commercial waste collection monopolist could profitably increase charges to local customers without losing significant sales to more distant competitors. Accordingly, the Topeka Area, and the Van Buren/Fort Smith and Springdale Areas of Northwest Arkansas, are sections of the country or relevant geographic markets for the purpose of assessing the competitive effects of a combination of WMI and DDI in the provision of small container commercial waste collection services.

There are significant entry barriers to small container commercial waste collection. A new entrant must achieve a minimum efficient scale and operating efficiencies comparable to those of existing firms in order to provide a significant competitive constraint on the prices charged by market incumbents. In order to obtain comparable operating efficiencies, a new firm must achieve route density similar to existing firms. However, an incumbent's ability to price discriminate and to enter into long-term contracts with existing small container commercial waste customers can leave too few customers available to the entrant to create an efficient route in a sufficiently confined geographic area. An incumbent firm can selectively and temporarily charge an unbeatably low price to specified customers targeted by new entrants. Because of these factors, a new entrant may find it difficult to compete by offering its services at pre-entry price levels comparable to the incumbent and may find an increase in the cost and time required to form an efficient route, thereby limiting a new entrant's ability to build an efficient route and reducing the likelihood that the entrant will ultimately succeed.

The need for route density and the ability of existing firms to price discriminate raise significant barriers to entry by new firms, which likely will be forced to compete at lower than pre-entry price levels. Based on the prior experience of the Department of Justice, Antitrust Division, such barriers have made entry and expansion difficult by new or smaller-sized competitors in small container commercial waste collection markets.

In the Topeka, Kansas and the Van Buren/Fort Smith, Arkansas Areas, the proposed acquisition would reduce from three to two the number of significant competitors in the collection of small container commercial waste. Moreover, in Topeka, for many of the largest small container commercial waste customers WMI and DDI are currently the only two options. These customers would be left with only one option as a result of the acquisition.

In the Springdale, Arkansas Area, the proposed acquisition would reduce the number of competitors in the collection of small container commercial waste from four to three. Moreover, in both areas in Arkansas, DDI is often the low-price leader, and customers in these areas frequently switch between existing competitors in order to take advantage of lower prices. In addition, in both of the areas in Arkansas, WMI and DDI are among the few small container commercial waste firms that can reliably service larger accounts.

In all three markets, according to the defendants' estimates, after the acquisition the combined WMI-DDI entity would service between 64 and 67% of each market.

The complaint alleges that the combination of WMI and DDI in those areas would remove a significant competitor for small container commercial waste service. In each of these markets, the resulting increase in concentration, loss of competition, and absence of any

reasonable prospect of new entry by smaller competitors likely will result in higher prices and reduced quality of small container commercial waste service.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirements of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection service in the Topeka, Kansas Area, the Van Buren/Fort Smith, Arkansas Area, and the Springdale, Arkansas Area. The proposed Final Judgment will remove small container commercial waste collection assets from the merged firm's control and place them in the hands of one or more independent firms that are capable of preserving the competition that otherwise would have been lost as a result of the acquisition.

The proposed Final Judgment requires defendants, within ninety days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest: small container commercial waste collection assets (routes, trucks, containers, garages and offices, leasehold rights, permits, and intangible assets such as customer lists and contracts) in the Topeka, Kansas Area, the Van Buren/Fort Smith, Arkansas Area, and the Springdale, Arkansas Area. To eliminate the anticompetitive effects of the acquisition in the market for small container commercial waste in the Topeka Area, defendants must divest DDI's small container commercial waste routes T501, T502, T503, and T504, and, at the acquirer's option, DDI's Topeka small container commercial waste collection facility. In the Van Buren/Fort Smith Area, defendants must divest DDI's small container commercial waste routes V501 and V502, and, at the acquirer's option, assign or offer to sublease DDI's Van Buren small container commercial waste collection facility. In the Springdale Area, defendants must divest

DDI's small container commercial waste routes B501, B502, B503, B504, and B505, and, at the acquirer's option, must lease to the acquirer for up to 10 years (length at the election of the acquirer) DDI's Bethel Heights small container commercial waste collection facility, or WMI's Springdale small container commercial waste collection facility.

In addition, in the Springdale market, the proposed Final Judgment requires WMI to enter into a disposal agreement providing the acquirer with the right to dispose of MSW at its Eco Vista landfill in Springdale, Arkansas. The disposal agreement must be for a period of no less than three years from the date of the divestiture, with the acquirer(s) of the divestiture assets having the option of seven one-year renewals, under reasonable terms. The disposal agreement shall also provide the acquirer access to gates, side houses, and disposal areas under terms and conditions that are no less favorable than provided to WMI's own vehicles. WMI and the acquirer shall negotiate the price for disposal rights and access to the Eco Visa landfill subject to approval of the United States. This provision is intended to prevent WMI from using its acquisition of DDI and DDI's nearby transfer station as a means to prevent the acquirer of DDI's divested routes from establishing itself in the Springdale market due to an inability to find an economically viable location to dispose of MSW collected in this market.

The proposed Final Judgment provides that sale of the divestiture assets may be made to one or more acquirers, so long as the Topeka, Kansas Area, the Van Buren/Fort Smith, Arkansas Area and the Springdale, Arkansas Area disposal assets are divested to a single acquirer for each area. This provision is intended to ensure the continued operation of an efficient competitor whose participation in each market will closely replicate the competition existing prior to the acquisition.

The assets must be divested to purchasers approved by the United States and in such a way as to satisfy the United States that they can and will be operated by the purchaser as part of a viable, ongoing business or businesses that can compete effectively in each relevant market. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestitures within the period prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment 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 the trustee's appointment becomes effective, the trustee will file monthly reports with the Court and the United States, setting forth the trustee's efforts to accomplish the divestitures. 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.

## 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:

James J. Tierney
Chief, Networks and Technology Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 7700
Washington, D.C. 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 preventing WMI's acquisition of DDI. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition for small container commercial waste collection service in the Topeka, Kansas Area, the Van Buren/Fort Smith, Arkansas Area, and the Springdale, Arkansas Area. 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.*, No. 13-cv-1236 (CKK), 2014-1 Trade Cas. (CCH) ¶ 78, 748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *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) (citing *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

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[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court 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'").

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 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's 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*, 2014 U.S. Dist. LEXIS 57801, at *8 (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*, 2014 U.S. Dist. LEXIS 57801, at *9 (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 recently 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*, 2014 U.S. Dist. LEXIS 57801, at *9 (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*, 2014 U.S. Dist. LEXIS 57801, at *9.

[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 13, 2015

Respectfully submitted,

_____/s/_____

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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **UNITED STATES OF AMERICA,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**WASTE MANAGEMENT, INC.**<br><br>**and**<br><br>**DEFFENBAUGH DISPOSAL, INC.,**<br><br>**Defendants.** | **Civil Action No.: 1:15-cv-00366**<br><br>**Description: Antitrust**<br><br>**Date Stamp: 3/13/2015** |

## PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on March 13, 2015, the United States and defendants, Waste Management, Inc., and Deffenbaugh Disposal, Inc., 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. "WMI" means defendant Waste Management, Inc., a Delaware corporation with its headquarters in Houston, Texas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "DDI" means defendant Deffenbaugh Disposal, Inc., a Delaware corporation with its headquarters in Kansas City, Kansas, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Disposal Agreement" means an agreement between WMI and the Acquirer(s) of the Springdale Arkansas Area Divestiture Assets allowing the Acquirer(s) to dispose of MSW at WMI's Eco Vista Landfill located at 2210 Waste Management Drive, Springdale, Arkansas.

E. "Divestiture Assets" means the small container commercial waste collection routes and other assets listed below:

1. Springdale, Arkansas Area
    a. DDI's small container commercial waste collection routes B501, B502, B503, B504, and B505;
    b. At the election of the Acquirer, a lease of up to 10 years (length at the election of the Acquirer) to either WMI's small container commercial waste facility located at 1041 Arbor Acres Rd., Springdale Arkansas 72762, or to DDI's small container commercial waste facility located at 848 Highway 264 E, Bethel Heights, Arkansas 72764; and
    c. At the election of the Acquirer(s), a Disposal Agreement.
2. Van Buren/Fort Smith, Arkansas Area
    a. DDI's small container commercial waste collection routes V501 and V502; and

b. At the election of the Acquirer, the assignment or sublease of DDI's current lease at the small container commercial waste facility located at 2598 S. 4th St., Van Buren, Arkansas 72956.

3. Topeka, Kansas Area

a. DDI's small container commercial waste collection routes T501, T502, T503, and T504; and

b. At the election of the Acquirer, DDI's small container commercial waste facility located at 711 NE Highway 24, Topeka, Kansas 66608.

F. "MSW" means municipal solid waste, a term of art used to describe solid putrescible waste generated by households and commercial establishments. Municipal solid waste does not include special handling waste (*e.g.*, waste from manufacturing processes, regulated medical waste, sewage and sludge), hazardous waste, or waste generated by construction or demolition sites.

G. "Route" means a group of customers receiving regularly scheduled small container commercial waste collection service and all tangible and intangible assets relating to the route, as of January 28, 2015, (except for *de minimis* changes, such as customers lost and gained in the ordinary course of business), including, but not limited to, capital equipment, trucks and other vehicles (those assigned to routes and a pro-rata share of spare vehicles); containers (at the customer location and a pro-rata share of spares); supplies (pro-rata share); customer lists, records, and credit records; customer and other contracts; leasehold interests; permits/licenses (to the extent transferable), and accounts receivable. The customers for each route as of January 28, 2015, are on file with the Department of Justice, Antitrust Division.

H. "Small container commercial waste collection" means the business of collecting MSW from commercial and industrial accounts, usually in metal bins (*i.e.*, a small container with one to ten cubic yards of storage capacity), and transporting or "hauling" such waste to a disposal site by use of a front- or rear-end loader truck.

## III. Applicability

A. This Final Judgment applies to WMI and DDI, 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 90 calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer or Acquirers 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 60 calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. At the election of the Acquirer, WMI and the Acquirer of the Springdale, Arkansas, Area Divesture Assets shall enter into a Disposal Agreement allowing the Acquirer to dispose of MSW at WMI's Eco Vista Landfill located at 2210 Waste Management Drive, Springdale, Arkansas. The Disposal Agreement shall run for a period of no less than 3 years from the date of the divestiture, with the Acquirer of the Springdale, Arkansas, Divestiture Assets having the option of seven 1-year renewals, under terms that are reasonable and nondiscriminatory. The Disposal Agreement shall require that WMI provide access to the Acquirer to gates, side houses, and disposal areas under terms and conditions (except with respect to rates) that are no less favorable than provided to WMI's own vehicles. WMI shall perform all duties and comply with all the terms of the Disposal Agreement. Any amendments, modifications, extensions or early termination of any Disposal Agreement may only be entered into with the approval of the United States.

C. In accomplishing the divestiture 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 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 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 or management of 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 each asset 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 each asset, 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. 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, shall include the entire Divestiture Assets, and 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 small container commercial waste collection business in each of the geographic areas identified in Section II.E. Divestiture of the Divestiture Assets may be made to one or more Acquirers (except that the Divestiture Assets serving any single geographic area identified in Section II.E must be sold to the same Acquirer, and) 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 small container commercial waste 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 the Divestiture Assets within the time period specified in Section IV(A), 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 the Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the 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 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 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 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. No Reacquisition

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

## XII. 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.

## XIII. Expiration of Final Judgment

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

## XIV. 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

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United States District Judge

[FR Doc. 2015-06810 Filed: 3/24/2015 08:45 am; Publication Date: 3/25/2015]