UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, Plaintiff, v. BOOZ ALLEN HAMILTON HOLDING CORPORATION, *et al.*, Defendants.	**Case No. 1:22-cv-01603-CCB**

PLAINTIFF'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION

(REDACTED VERSION)[1]

[1] This Memorandum of Law is being publicly filed and has been redacted to remove information designated as Confidential under the Protective Order in this case. *See* ECF 71. An unredacted version will be filed under seal along with a motion to seal will be filed separately. As set forth in the United States' motion, the United States does not take the position that the information designated as Confidential by Defendants, as quoted in this Reply memorandum, satisfies the standard for sealing judicial documents.

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INTRODUCTION

This is a preliminary-injunction proceeding on a straightforward Sherman Act Section 1 claim related to bidding on a contract to provide services to the National Security Agency (NSA). Booz Allen, a large and established defense contractor has won three lucrative contracts to provide signals intelligence modeling and simulation services to the NSA for over two decades. For the NSA's upcoming competitive procurement for these services, under what it has named the OPTIMAL DECISION contract—valued at over $100 million—Booz Allen now faces a significant threat. EverWatch, a growing and innovative defense and intelligence contractor, has spent years building the capabilities and amassing the talent necessary to compete with Booz Allen for OPTIMAL DECISION. However, Defendants' March 15, 2022 Merger Agreement substantially reduces EverWatch's competitive threat to Booz Allen's dominance by reducing the Defendants' incentives to compete for OPTIMAL DECISION.

Rather than square directly with the plain antitrust problems generated by the Merger Agreement, Defendants' opposition employs hyperbole and straw arguments to shift the focus away from their anticompetitive agreement. What remains clear is that Booz Allen's agreement to purchase EverWatch will, and indeed already has, harmed competition in the relevant market for signals intelligence modeling and simulation services under the OPTIMAL DECISION contract. Defendants' predictions of pro-competitive effects are simply generic platitudes.

To be sure, there are unique procedural aspects to this case—created entirely by Defendants' decision to agree to merge on the cusp of bidding as the only two competitors for a critical national security project—that necessitated this lawsuit by the United States and the request for preliminary relief. Defendants' unsupported protestations notwithstanding, the United States is not pursuing a claim that suggests that all merger agreements between competitors are illegal, nor is the United States asking this Court to pursue some novel antitrust theory.

For all of the reasons set forth below and in the United States' opening brief, and as will be further demonstrated in the forthcoming hearing, the Court should grant the United States' motion for a preliminary injunction, pursuant to 15 U.S.C. § 4 and Federal Rule of Civil Procedure 65, and suspend[1] the Merger Agreement pending resolution following a full trial on the merits.

ARGUMENT

The United States has shown, and will further demonstrate at the hearing, that the four elements required for a preliminary injunction are met here: (1) the plaintiff is likely to succeed on the merits; (2) the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief;[2] (3) the balance of equities tips in the plaintiff's favor; and (4) an injunction is in the public interest. *See Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Pashby v. Delia*, 709 F.3d 307, 320–21 (4th Cir. 2013). As more specifically addressed below, nothing in Defendants' Opposition changes that conclusion.

I. The Proposed Preliminary Injunctive Relief Will Preserve the *Status Quo Ante*

The United States' motion for a preliminary injunction requests that the Court *temporarily suspend* the Merger Agreement pending a resolution after a trial on the merits—in other words, a temporary suspension. The interim remedy requested by the United States is not unusual. As noted in the United States' opening brief, suspending or setting aside an agreement pending a full trial has been recognized as a proper means of preliminary injunctive relief. *See* ECF 29, at 31 (citing *Authenticom, Inc. v. CDK Glob., LLC*, 874 F.3d 1019, 1026 (7th Cir. 2017). *See De Beers*

[1] Defendants quibble with the United States' use of the word "abrogate" and discuss at length why such a remedy is inappropriate here. For purposes of efficiency and clarity, the United States reaffirms what has been the case all along: the United States seeks an order suspending the Merger Agreement pending a full trial on the merits. As discussed *infra* at 2-4, such a result constitutes preliminary relief and is appropriate at this stage.

[2] As discussed *infra* at 17-18, there is a presumption of irreparable harm for claims brought under 15 U.S.C. § 1 ("Section 1") brought by the United States.

Consol. Mines v. United States, 325 U.S. 212, 220 (1945)). That is true also for preliminary injunctions enjoining mergers or joint ventures under Section 1.[3]

Defendants nonetheless claim that the United States seeks permanent relief and a mandatory injunction that would impose affirmative obligations on Defendants. *See* ECF 90, at 4, 12-13. This claim is incorrect. If Defendants successfully defend this merger at a full trial on the merits, they could choose to merge pursuant to their prior negotiated agreement. Nothing about the present procedural posture is permanent for any party. Further, it would make no difference if the United States' sought-after relief here were substantially the same as the relief the United States would seek after a trial on the merits. Although some courts in other circuits may disfavor preliminary injunctions that provide a movant with "substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits" (*see* ECF 90, at 12-13), the Fourth Circuit has considered and rejected that approach. *See Pashby*, 709 F.3d at 320.[4]

Moreover, the requested relief is plainly not a mandatory injunction because it does not impose affirmative obligations on Defendants. *See e.g.*, *Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 520 (4th Cir. 2003) (reversal of mandatory preliminary injunction that affirmatively required

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[3] *See United States v. Columbia Pictures Ind., Inc.*, 507 F. Supp. 412 (S.D.N.Y. 1980); *United States v. Chrysler Corp.*, 232 F. Supp. 651 (D.N.J. 1964); *United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989); *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir. 1990); *United States v. R. J. Reynolds Tobacco Co.*, 268 F. Supp. 769 (D.N.J. 1966). Tellingly, Defendants omit any reference or discussion of these cases, and instead cite to *Omnicare* and *NWA* for the proposition that courts have "rejected attempts to use Section 1 to challenge a merger agreement." ECF 90, at 20 n.19. Any language to that effect (which is questionable) in *NWA* is dicta. *Int'l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1397–98 (8th Cir. 1993). And in *Omnicare*, the district court denied a motion to dismiss the Section 1 claim, but ultimately granted the defendants' motion for summary judgment on an antitrust conspiracy claim. 594 F. Supp. 2d 945, 962 (N.D. Ill. Jan. 16, 2009).

[4] In any event, the final relief that the United States will seek is different than the preliminary relief sought here. The United States will seek final relief in the form of a permanent injunction enjoining Booz Allen from acquiring EverWatch (under the Merger Agreement or any other agreement), following a trial on the merits.

Microsoft to incorporate and distribute particular software with its operating system and web browser). Here, the relief sought by the United States is prohibitory—prohibiting Defendants from moving forward, in any way, with implementation of their Merger Agreement. *See, e.g.*, *id.* (affirming preliminary injunction prohibiting Microsoft from distributing certain products).

Defendants also mischaracterize the *status quo* that should be preserved with this preliminary injunction. To be clear, Defendants changed the *status quo* when they agreed to a merger to monopoly, as the only two bidders for an important national security contract. In any event, "[t]he *status quo* need not be the state of affairs immediately preceding litigation." *United States v. Rx Depot, Inc*, 290 F.Supp.2d 1238, 1246 (N.D. Okla. 2003). Courts have explained that "[t]he 'status quo' in preliminary injunction parlance is really a '*status quo ante*.'" *North American Soccer League, LLC v. United States Soccer Federation, Inc.*, 883 F.3d 32, 37 n.5 (2d Cir. 2018) (*quoting Holt v. Cont'l Grp., Inc.*, 708 F.2d 87, 90 (2d Cir. 1983) (referring to reinstatement of benefits as "restoration of the *status quo ante*"); *accord O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (en banc) (per curiam) ("requir[ing] a party who has recently disturbed the status quo to reverse its action…restores, rather than disturbs, the status quo ante, and is thus not an exception" to the ordinary standard for preliminary injunctions). Here, Defendants upended the *status quo ante* by entering into their illegal Merger Agreement that is reducing competition between Booz Allen and EverWatch for the OPTIMAL DECISION contract. The Court has no obligation to preserve a situation that benefits only Defendants. Instead, the Court should grant the United States' motion to return competition between Booz Allen and EverWatch to the *status quo ante*.

II. The United States Is Likely to Succeed on the Merits

The United States' Section 1 claim against Defendants, and the preliminary injunctive relief it is seeking thereunder, is by no means "imaginative," "overreaching," "extraordinary," or

"unprecedented." *See* ECF 90, at 2-4. Quite the opposite.

Mergers and similar "combinations" have been challenged (and invalidated) under Section 1 of the Sherman Act for over a century. *E.g.*, *United States v. First Nat. Bank & Tr. Co. of Lexington*, 376 U.S. 665, 666, 669-70 (1964) (merger that would result in one firm controlling "a large share of the relevant market" unreasonably restrained trade under Section 1); *see also United States v. Reading Co.*, 253 U.S. 26 (1920) (affirming dissolution of holding company that sought to control production and transportation of coal); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904) (holding company incorporated for purpose of acquiring stock in competing railways was a combination in restraint of trade under Section 1); *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1282-83 (7th Cir. 1990) (Posner, J.) (a merger that is likely to "'hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level" violates Section 1). *See also United States v. Carilion Health Sys.*, 1989 WL 157282, at *2 (4th Cir. Nov. 29, 1989) (providing framework for analyzing proposed merger under Section 1).

A. The Merger Agreement is an Unreasonable Restraint of Trade

The plainly anticompetitive nature of the agreement between Booz Allen and EverWatch merits "quick look" analysis. *See* ECF, at 16-17. Booz Allen and EverWatch have agreed to merge, even though they are only two bidders for the OPTIMAL DECISION contract. The reduced incentives to compete are evident. *See id*. As discussed in the United States' opening brief, the Merger Agreement is a *de facto* profit-pooling agreement, for which "quick look" is appropriate. *See id.*[5] None of Defendants' cited cases preclude application of a "quick look"

[5] Defendants suggest that profit-pooling agreements are no longer subject to "quick look," citing to *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137 (9th Cir. 2011). But in *Safeway*, the Ninth Circuit explicitly distinguished a profit-pooling agreement from the agreement in *Citizen Publishing*. The court did not apply "per se" or "quick look" analysis there, because, unlike *Citizen*

analysis here.[6] Unlike those cases, the facts and anticompetitive effects here of having one bidder for a government contract here are both simple and obvious. This is precisely the type of scenario for which a "quick look" is not only appropriate, but also appropriate and efficient.

But even if a "quick look" analysis were not applied, the Merger Agreement constitutes an unreasonable restraint of trade under the "rule of reason." *See* ECF 29, at 16-17. Under the rule of reason, a plaintiff can meet its burden of demonstrating Defendants' Merger Agreement unreasonably restrains competition substantially by *either* (1) direct "proof of actual detrimental effects," *or* (2) indirect evidence of market power, such as market share, "plus some evidence that the challenged restraint harms competition." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). The United States easily meets that burden here.

1. *The Relevant Market is signals intelligence modeling and simulation services under the OPTIMAL DECISION contract*

Defendants argue that the "Government's theory that a single transaction with a single purchaser at a single moment in time is a relevant market fails as a matter of law and fact." ECF 90, at 15. The law and the facts show otherwise.

Publishing, the agreement in *Safeway* was of "unknown duration," among only "some, but not all, of the competitors in the relevant market," and effects on incentives were "uncertain" due to those "unique" features. *Safeway*, 651 F.3d at 1135–37. The court also considered the fact that the agreement was entered into as part of a collective-bargaining process and the revenue-sharing provision became operable only as a result of a labor strike. *Id.* at 1135 (finding the "strike-induced nature of the agreement" weighed in favor of applying the full rule of reason analysis). Here, like *Citizen Publishing* and unlike *Safeway*, the agreement is for a known duration because profits would be pooled for the entirety of the five-year OPTIMAL DECISION contract, and the profit-sharing agreement is among all of the competitors in the relevant market. Thus, reduced incentives here are far from uncertain; rather, they are clear and "intuitively obvious." *Id.* at 1134

[6] *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) (rule of reason for vertical resale price maintenance agreements); *1-800 Contacts, Inc. v. FTC*, 1 F.4th 102, 117 (2d Cir. 2021) (rule of reason for trademark settlement agreements); *FTC v. Actavis*, 570 U.S. 136, 159 (2013) (rule of reason for reverse payment settlement agreements).

First, Defendants appear to conflate a single contract market with a "single brand market."[7] But the United States does not allege a single brand market, as contemplated by *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992). Instead, the United States alleges that there are *two* companies (i.e., two brands) that are competing to provide the relevant services under the forthcoming OPTIMAL DECISION procurement.

Second, Defendants argue, in effect, that a relevant market can never be limited to "one *customer* and one *contract*." *See* ECF 90, at 19. However, Defendants omit any discussion of a significant exception: products or services for which the United States government is the sole domestic purchaser. As summarized in the underlying motion—and as Defendants concede[8]—precedent recognizes that single procurements can qualify as a relevant market. *See* ECF 29, at 20-23 (citing, *e.g., Tower Air, Inc. v. Fed. Exp. Corp.*, 956 F. Supp. 270, 281 (E.D.N.Y. 1996); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1055 (9th Cir. 1983); *Grumman Corp. v. LTV Corp.*, 527 F. Supp. 86, 89-90 (E.D.N.Y. 1981)). Taking Defendants' argument at face value would mean, for example, that a procurement for an innovative stealth, nuclear warship for the Department of Defense could not be a relevant market. That simply cannot be the case.

Indeed, Defendants themselves have previously recognized that "[redacted]," that [redacted]

[7] *See* ECF 90, at 15-17 (citing, e.g., *Therapearl, LLC v. Rapid Aid Ltd.*, No. 13-cv-2792, 2014 WL 4794905 (D. Md. Sept. 25, 2014) (Blake, J.) (holding that plaintiff failed to plead a single-brand market for a private label of hot and cold packs); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997) (affirming dismissal for failure to allege a cognizable "single brand" product market for pizza ingredients approved for use by Domino's franchisees); *Global Discount Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701 (S.D.N.Y. 1997) (Sotomayor, J.) ("TWA airline tickets for travel between certain cities" was not a cognizable single brand product market); *Triple M Roofing Corp. v. Tremco, Inc.* 753 F.2d 242 (2d Cir. 1985)).

[8] *See* ECF 90, at 16 n.14 (conceding that the court in *Tower Air* "explained that a single government contract *could* be a relevant market," and that such a market was at issue in *Northrop*).

[redacted]" and [redacted] (ECF 90, Defs. Ex. A, at 11.) Unsurprisingly, the cases that Defendants rely on also make this clear. *See, e.g.*, *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 559 n.6 (7th Cir. 1980) ("a situation where a single purchaser represented the entire market for a commodity would be distinguishable, and that effect on such a market might in some circumstances be sufficient to meet the anticompetitive effect element of a Section 1 violation"); *Neptun Light, Inc. v. City of Chicago*, No. 17-cv-8343, 2018 WL 1794769, at *4 n.2 (N.D. Ill. Apr. 16, 2018) (exception where "a single purchaser represented the entire market for a commodity") (internal quotations omitted).[9]

The United States is the *sole* domestic purchaser of signals modeling and intelligence services. The NSA is the primary (if not only) customer of these specialized services. Moreover, the NSA has obtained these services through the MASON contracts and will continue to obtain these services through OPTIMAL DECISION. Other government agencies requiring such services typically obtain these services through the NSA. *See* ECF 29, at 5, 22, 30; ECF 29-3 (NSA Decl.) ¶¶ 3, 5, 11. Given these facts, it is appropriate that the relevant market can be narrowly described as signals intelligence modeling and simulation services under OPTIMAL DECISION, as no other customers for this product exist. *See* ECF 29, at 20-22.

Third, Defendants contend that the United States' relevant market "excludes reasonably

[9] *See also Lockheed Martin Corp. v. Boeing Co.*, 314 F. Supp. 2d 1198, 1228 (M.D. Fla. 2004) (product market not limited to government purchases because satellite launch services were marketable to both government and commercial purchasers of launch systems); *United States ex rel. Blaum v. Triad Isotopes, Inc.*, 104 F. Supp. 3d 901, 924-25 (N.D. Ill. 2015) (recognizing other contracts for radiopharmaceuticals in Chicago area); *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 368 (10th Cir. 1993) (consumer was "one of many" for product); *Int'l Logistics Grp., Ltd. v. Chrysler Corp.*, No. 85-cv-73005, 1988 WL 106905, at *7 (E.D. Mich. Apr. 8, 1988) (spare parts for Chrysler cars sold both commercially and to the government; noting that "if the consumer is significant enough, perhaps postulation of a separate market for that consumer would be appropriate"); *City of New York v. Grp. Health Inc.*, No. 06-cv-13122, 2010 WL 2132246, at *4-5 (S.D.N.Y. May 11, 2010) (New York City was not a single consumer of health insurance plans).

interchangeable services and personnel." ECF 90, at 18. But Defendants cannot clearly articulate what the substitute, interchangeable products would be, other than vaguely suggesting their hypothetical existence.[10] Rather, Defendants claim that the "NSA declarant still considered more than 100 companies to be capable of servicing OD." ECF 90, at 18. As an initial matter, that is not what the NSA declaration says. The NSA declarant stated that the NSA sent a market survey to over a hundred companies—and of that set, *only* two, Booz Allen and EverWatch, submitted letters of intent to bid for the OPTIMAL DECISION contract. *See* ECF 29-3 (NSA Decl.) ¶¶ 6-8.[11] Defendants suggest that this statement in the declaration shows that that skilled employees working on OPTIMAL DECISION could find employment elsewhere, and that this somehow inexplicably defeats the relevant market. Unsurprisingly, they cite no case law for that proposition.

Here, it makes sense that the relevant market is narrow. When determining the relevant market, the Court "must ultimately ascertain 'the *narrowest* market which is wide enough so that products. . . from other producers in the same area cannot compete on substantial parity with those included in the market.'" *In re Zetia (Ezetimibe) Antitrust Litig*., 2022 WL 595156, at *3 (E.D. Va. Feb. 24, 2022) (quoting *International Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 430 (4th

[10] To the extent that Defendants are implying that the market should be general "modeling and simulation" services (*see, e.g.*, ECF 90, at 7; EverWatch Answer ¶ 8), the NSA—as the primary customer—defines the relevant market as signals intelligence modeling and simulation services. *See Grumman Corp.*, 527 F. Supp. at 89-90 (the Navy, as the consumer of carrier-suitable aircraft, defines the relevant market for such). Simply put, "signals intelligence modeling and simulation services" and general "modeling and simulation services" are not services "reasonably interchangeable" by NSA "for the same purposes." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). *See also* ECF 29, at 20; Brown Shoe v. United States, 370 U.S. 294, 325 (1962) (product market may be determined by examining, *inter alia*, a product's "peculiar characteristics and uses," "distinct customers," and "specialized vendors").

[11] The United States does *not* concede that there are more than 100 companies currently capable of providing the services called for by OPTIMAL DECISION. At this point, only two companies have any realistic chance of submitting a competitive bid—Booz Allen and EverWatch. Even if other defense contractors *could have* put themselves in the running if they started to assemble a team and prepare for their bid years ago, that time has long since passed.

Cir. 1986) (emphasis added)). As described in the United States' opening brief, the relevant product market here is highly specialized, with only one primary customer and few specialized vendors. *See* ECF 29, at 20-22. Gaining the capabilities to submit a serious bid for the services required under OPTIMAL DECISION is neither easy nor quick. *See id.* Even putting aside that the NSA is the primary customer, the NSA's determination of what precise services are necessary to protect national security should not be lightly second-guessed.[12]

Fourth, Defendants' argument that the relevant market fails the "hypothetical monopolist test" also falls flat.[13] Defendants argue that federal acquisition regulations require the NSA to consider a bidder's "past performance" and "the prices at which same or similar items have previously been sold," and leap from there to the non-sequitur conclusion that Booz Allen's "prior contracts with NSA limit its pricing freedom in OD." ECF 90, at 18-19. But past performance is not a consideration for OPTIMAL DECISION—precisely to encourage competition.[14] And even if it were, it would be just *one* of many factors—such as cost, price, technical score, or oral presentations pertaining to an offeror's capability, work plans or approaches, staffing resources, transition plans, or sample task—that an agency may consider in determining which proposal would provide "best value." FAR § 15.101 (Best value continuum); *see also id.* § 15.102(c) (Oral

[12] *See*, *e.g.*, *Hegab v. Long*, 716 F.3d 790, 794 (4th Cir. 2013) ("'[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.'" (*quoting Department of Navy v. Egan*, 484 U.S. 518, 530 (1988)); *Center for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003) ("[I]t is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.").

[13] Under that test, "a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products ('hypothetical monopolist') likely would impose at least a small but significant and non-transitory increase in price ('SSNIP') on at least one product in the market, including at least one product sold by one of the merging firms." Merger Guidelines § 4.1.1.

[14] An agency can, under certain circumstances, decide to not consider past performance. *See, e.g.*, FAR §§ 15.101-2 & 15.304(c)(3)(iii).

Presentations). As the United States will also show at the hearing, Defendants have the ability to increase prices or costs—or diminish the quality of the product delivered—in their proposals. Such an increase would be non-transitory—the OPTIMAL DECISION contract is for five years.[15]

2. *The Merger Agreement would result in a merger to monopoly and has already caused anticompetitive effects in the relevant market*

An antitrust plaintiff can demonstrate substantial anticompetitive effects in either of two ways: either (1) indirect evidence of market power, such as market share, "plus some evidence that the challenged restraint harms competition," or (2) direct "proof of actual detrimental effects." ECF 29, at 17 (*quoting Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018)). The United States will be able to demonstrate anticompetitive effects under both methods.

First, regarding indirect evidence, Defendants do not dispute the United States' arguments concerning market power, market share, or barriers to entry. *See* ECF 29, at 26-28. Rather, Defendants argue that the United States' "incentives theory" is legally "unprecedented and baseless" on the law and factually "irreconcilable with the actual incentives." ECF 90, at 20-24. Defendants are wrong.

Concerning the law, Defendants make the incredible claim that there must be an "agreement *to* restrain trade" to state a Section 1 violation, rather than an agreement *that* restrains trade. ECF 90, at 20 (emphasis added). The Merger Agreement is clearly a "contract" or "combination" contemplated by Section 1. *See* ECF 29, at 16; 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

[15] Relatedly, Defendants argue that the relevant market is not cognizable because it is limited to a "snapshot in time" for the "final bidding stage," and points to the fact that fourteen companies indicated initial interest in bidding for the prime contract. ECF 90, at 7-8, 16, 19. But the evidence will show that OPTIMAL DECISION is a five-year contract, there are only two credible bidders for OPTIMAL DECISION, and that the time necessary to launch a credible bid effectively precludes any additional serious bidder other than EverWatch and Booz Allen.

among the several States, or with foreign nations, is declared to be illegal."); *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948) ("If such acquisition results in *or* is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act." (emphasis added)); *Robertson v. Sea Pines Real Est. Companies, Inc.*, 679 F.3d 278, 285 (4th Cir. 2012) (Section 1 requires a showing of "(1) a contract, combination, *or* conspiracy; (2) *that* imposed an unreasonable restraint of trade") (internal quotation marks omitted; emphases added).

Contrary to Defendants' assertion, the law does not require that there be a "conscious commitment to a common scheme designed to achieve an unlawful objective" to state a Section 1 claim based on a "contract" or "combination." *See* ECF 90, at 2 (*quoting Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).[16] That rule applies to proof of a "conspiracy," not a contract. *See Monsanto*, 465 U.S. at 768 (Section 1 conspiracy case); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) (same). Defendants have not offered and cannot offer any basis to upend decades of antitrust law on this point.

Defendants also contend that the United States cites no case where Section 1 has been used to suspend a merger agreement between competitors pre-closing because of "incentives" alone. ECF 90, at 20. As demonstrated in its opening brief, the United States is not relying on incentives "alone." *See* ECF 29, at 23-27. Defendants' reduced incentives are evidence that—in conjunction with Defendants' 100% market share and other factors, such as barriers to entry—the United States can and will prove a Section 1 violation. *See id.* & n.43 (citing cases considering economic incentives as anticompetitive effects); *e.g.*, *Discovision Assocs. v. Disc Mfg., Inc.*, 1997 WL

[16] *See also supra* at 5 (citing *Northern Sec. Co., Reading Co.*, *Lexington Bank*, and *Rockford*). Relatedly, Defendants suggest that the United States' theory of this case is that Booz Allen agreed to acquire EverWatch as part of a "scheme . . . to eliminate competition for a single, forthcoming procurement." ECF 90, at 1. That is not what the United States argues.

309499, *4-5 (D. Del. Apr. 3 1997) (plaintiff stated Section 1 claim by alleging that an agreement "eliminated any incentive to innovate" and "thereby harmed and foreclosed significant competition in the market by reducing output"); *United States v. Union Pac. R. Co.*, 226 U.S. 61, 88 (1912) ("It is the scope of such combinations and their *power* to suppress or stifle competition or create monopoly which determines the applicability of the [Sherman] [A]ct." (emphasis added)).

Nor does the ability of the United States to assert a separate claim for "gun-jumping" affect the claims asserted in this case. "Gun-jumping" involves coordinated conduct after a merger agreement is announced. Here, the United States' Section 1 claim is based on unilateral effects resulting from the Merger Agreement—reduced incentives for each individual company to compete for OPTIMAL DECISION, which could lead to unilateral increases in price or reductions in quality. Although Defendants include a laundry list of cursory reasons claiming why they are each individually incentivized to "provide NSA with the best offer possible" due to reputational concerns, *see* ECF 90, at 22-24, the key incentive in competition is profit, and Defendants' Merger Agreement has changed *that* incentive for them. Relatedly, Defendants' statement that "NSA exclusively controls the price and profit on OPTIMAL DECISION" because this is a "cost plus award fee" contract is factually wrong. ECF 90, at 8; *see also id.* 23. As the United States will demonstrate at the hearing, Defendants have considerable control over price, costs (both direct and indirect), and profit, notwithstanding the form of this particular contract.

Second, turning to direct evidence, Defendants contend that the United States cannot show "actual detrimental effects," such as reduced output, increased prices, or decreased quality in the relevant market. ECF 90, at 24. In furtherance of this argument, Defendants attempt to minimize EverWatch's instructions to a teammate to [redacted] by identifying a subsequent email exchange between EverWatch and that teammate. ECF 90, at 25. But Defendants selectively

quote from that later exchange, in which an EverWatch manager states: "[redacted]" *Id.*; ECF 90, Defs. Ex. G (emphasis added). That statement implicitly recognizes that, if the deal were to close, EverWatch would not "[redacted]" Defendants also suggest that a Booz Allen executive's suggestion to "[redacted]" OPTIMAL DECISION was a "good-faith effort[] at compromise" (ECF 90, at 25)—even though, obviously, such a purported "good-faith compromise" would eliminate *all* bids for this important national security contract.[17] Defendants' arguments should be recognized for what they are—*post hoc* rationalizations of behavior that is direct evidence of the very effects that are likely to result from this transaction.

3. *There are no significant countervailing procompetitive effects*

Defendants argue that, even if the Merger Agreement causes anticompetitive effects, the merger would provide offsetting procompetitive effects like "improving competition, enhancing service, and stimulating innovation." ECF 90, 26-27. Defendants point to "complementary skills" that will purportedly allow the merged company to provide services more effectively under existing contracts, and compete against entrenched holders of other contracts—thus increasing competition in markets far beyond that which might exist for OPTIMAL DECISION. *Id.*[18] There

[17] Defendants further attempt to immunize their conduct under the *Noerr-Pennington* doctrine *See* ECF 90, at 25 n.26. But Defendants undertook their actions unilaterally and not as part of settlement discussions with the Department of Justice. Similarly, Defendants argue that because they executed a waiver of Section 7.01(l) of the Merger Agreement—which they did only after the United States filed its motion—it is irrelevant that Booz Allen previously had veto rights over any award of OPTIMAL DECISION to EverWatch. *See* ECF 90, at 26. Defendants' post-Complaint actions were likely an attempt to insulate them from liability. More importantly, the veto provision was just one of the Merger Agreement's many anticompetitive effects. ECF 29, at 23-26.

[18] Defendants also disingenuously state that the United States' "own investigative file shows[ ] Booz Allen agreed to buy EverWatch because, together, the companies can better compete for more than *a dozen government contracts* potentially worth *billions of dollars*. . . " ECF 90, at 1 (emphases in original). Those documents in the United States' investigation file are simply Defendants' own documents, including an advocacy white paper.

are two problems with Defendants' argument: (1) Defendants cite no evidence supporting procompetitive effects from the Merger Agreement, *i.e.*, they are not verifiable, *see NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021) (burden on "defendant to show a procompetitive rationale for the [challenged] restraint"); and (2) even if such efficiencies would come from the transaction envisioned by the Merger Agreement, they are not merger-specific, *i.e.*, they can be achieved through less anticompetitive means. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

First, Defendants provide no concrete evidence supporting the purported procompetitive effects they claim would result from the proposed merger. Defendants generically state that, by acquiring a startup, Booz Allen will enhance its ability to "acquire and develop nimble and innovative solutions," and the merged company can more effectively compete against even bigger companies. ECF 90, at 27. In support, Defendants have not identified anything specific and verifiable. *See*, *e.g.*, *F.T.C. v. H.J. Heinz Co.,* 246 F.3d 708, 721 (D.C. Cir. 2001) ("[G]iven the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."); U.S. Dep't of Justice and Fed. Trade Comm'n Horizontal Merger Guidelines § 10 (2010) ("Merger Guidelines"). The need for something specific and verifiable is heightened in this proposed merger to monopoly. As stated by the D.C. Circuit Court of Appeals, "[e]fficiencies almost never justify a merger to monopoly or near monopoly." *H.J. Heinz Co*., 246 F.3d at 720 (quoting Merger Guidelines § 10). If anything, the combined firm is likely to operate less efficiently on balance. As noted in the United States' opening brief, EverWatch prides itself on operating very efficiently, and with "no bloat" staffing. *See* ECF 29, at 8. To the extent that EverWatch becomes "Booz Allen-ize[d]"—a phrase and concern BAH articulated when considering this acquisition (*see id.*)—the proposed merger appears

likely to result in significant inefficiencies, the exact opposite of what Defendants are claiming.

Second, even if Booz Allen were able to make a showing of procompetitive effects from the Merger Agreement, Defendants state no merger-specific efficiencies, and any such efficiencies clearly could be reasonably achieved through less anticompetitive means. *See American Express Co.*, 138 S. Ct. at 2284. Defendants' vague and conclusory statement that the "benefits are unique to the Proposed Transaction" is not enough. *See* ECF 90, at 27; Merger Guidelines § 10 (2010). Defendants fail to make any showing how the only way Booz Allen can obtain the size, capabilities, and expertise they argue is purportedly necessary to compete for other government contracts is to consummate a merger to monopoly with EverWatch. And they point to no unique feature of EverWatch that is so essential to Booz Allen that the companies should be allowed to monopolize the relevant market. It defies belief that the *only* way Booz Allen can improve and expand on its current competitive capabilities (*see* ECF 90, Ex. A, at 3) is to acquire EverWatch.

Booz Allen is not a mom-and-pop shop without the resources to invest in itself—it had revenues of approximately $7.9 billion in the 2021 fiscal year.[19] If Booz Allen wants to be nimbler and more innovative, it can invest in research and development. If Booz Allen wants to acquire some particular expertise possessed by EverWatch, it can invest in training its own employees or hire relevant talent away from EverWatch by offering aggressive compensation packages. If Booz Allen wants to be bigger to compete with Lockheed Martin and Raytheon for larger government contracts, it can acquire another company with similar expertise or grow organically. Even if Booz

[19] Booz Allen contends that buying EverWatch—a company with approximately $[redacted] million in revenues in 2021, *see* ECF 29, at 7—is necessary for Booz Allen to take on the goliaths of Lockheed Martin and Raytheon. But Booz Allen does not explain how buying a small company whose 2021 annual revenues were less than [redacted] percent of its own would be the thing that would make it possible to take on companies that Booz Allen itself estimates are four to six times larger than itself. *Cf.* ECF 90, at 4, 27.

Allen wants to use EverWatch specifically, it can enter into a teaming agreement with EverWatch for other contracts. Booz Allen may be disappointed if it had to acquire another company [20] or achieve its goals in a different manner. But Booz Allen's preference to buy EverWatch is not a procompetitive rationale that can justify this merger to monopoly.

III. The United States Would be Irreparably Harmed Absent a Preliminary Injunction

Contrary to Defendants' assertions (ECF 90. 28), the United States does not request application of a standard different than the *Winter* test for preliminary relief. The statutory language of 15 U.S.C. § 4 and supporting case law makes clear that the United States is afforded a presumption for one of the *Winter* factors—irreparable harm—when seeking a preliminary injunction under the federal antitrust laws.

Both the Sherman and Clayton Acts provide that when the United States is the plaintiff, "the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." 15 U.S.C. §§ 4, 25. In contrast, the Clayton Act provides that in lawsuits initiated by *private* plaintiffs, a preliminary injunction may issue only upon a "showing that the danger of irreparable loss or damage is immediate." 15 U.S.C. § 26. Courts throughout the country have explained that this statutory distinction reflects the Congressional intent for a *presumption* of irreparable harm in federal antitrust cases brought by the United States.[21] If Congress did not

[20] When arguing that the combination of the firms would not be a merger to monopoly, Defendants suggest that there are over a hundred companies that could provide the services called for by OPTIMAL DECISION. *See* Opp'n 18. Paradoxically, however, when it comes to acquiring complementary expertise and assets, apparently only EverWatch will do. *Id*. 27.

[21] *See United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1074 n.21 (S.D.N.Y. 1969) ("The failure of Congress to require that the Government show irreparable loss on the application for a preliminary injunction in a Section 7 action, as is the case with a private plaintiff, 15 U.S.C. § 26, indicates the Congressional desire to lighten the burden generally imposed on an applicant for preliminary injunctive relief."), *aff'd sub nom, Bartlett v. United States*, 401 U.S. 986 (1971); *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 544 (W.D. Pa. 1963); *United States v. Trib. Publ'g Co.*, 2016 WL 2989488, at *5 (C.D. Cal. Mar. 18, 2016); *California v. Am. Stores Co.*, 495

intend to create a presumption of irreparable harm, it could have included the same, but missing, statutory language for lawsuits brought by the United States, under 15 U.S.C. § 4, that it included for private-plaintiff lawsuits in 15 U.S.C. § 26. None of Defendants' arguments compel a different conclusion. For instance, Defendants claim that the United States' argument is "inconsistent with Supreme Court precedent"—apparently alluding to *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). But in *Weinberger*, the Supreme Court held that a provision in the Federal Water Pollution Control Act did not indicate congressional intent to impose a duty on a court to order injunctive relief. *Id.* at 313.[22] And neither *De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945), nor *Appalachian Coals v. United States*, 288 U.S. 344 (1933), the other cases cited by Defendants, address irreparable harm.

In any event, for all of the reasons set forth in its opening brief, the United States would be irreparably harmed in the absence of a preliminary injunction. *See* ECF 29, at 29-33. This harm is more than mere speculation (*see* ECF 90, at 29); it is likely (*see* ECF 29, at 29-33). The Merger Agreement has already and—if not preliminarily enjoined—will continue to reduce Defendants' competitive incentives. *See id.*; *e.g.*, *See Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 (2d Cir. 1989) (irreparable harm where merged firm would likely "dominate" the market and the acquired firms "would cease to be viable competitors in the market"). Further, Defendants recently represented that, if the Court rules in their favor following the hearing, they may close

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U.S. 271, 295 (1990) ("In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief.").

[22] Defendants attempt to limit the holding of *In re Sanctuary Belize Litig.*, 409 F. Supp. 3d 380, 396, 419 (D. Md. 2019), to preliminary injunctions sought by the FTC pursuant to the FTC Act, 15 U.S.C. § 53(b). But *Belize* is not so limited. There, the court explained that, upon showing a likelihood of success on the merits, irreparable harm is presumed where a motion is brought "pursuant to a statute that authorizes injunctive relief." *Id.* at 396. And, as Defendants acknowledge, in *United States v. Microsoft Corp.*, the discussion of whether irreparable harm is presumed is dictum. 147 F.3d 935, 943 (D.C. Cir. 1998).

shortly thereafter and without waiting for a trial on the merits. *See* Ex. O.[23]

IV. The Balance of Equities and Public Interest Favor a Preliminary Injunction

Defendants argue that equity does not favor an injunction because the United States' requested relief—suspension of the Merger Agreement pending trial—would be akin to "permanent" relief that cannot be undone. Defendants are wrong.

As an initial matter, although Defendants spend many words defining the term "abrogate" (*see* ECF 90, at 30), Defendants do not appear to take issue with the proposition that a court can suspend a contract under its equitable powers. Because a "preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally," a temporary suspension of the Merger Agreement is fully appropriate here. *De Beers*, 325 U.S. at 220; *see also* supra 2-4 & n.1; ECF 29, at 31.

In addition, contrary to Defendants' assertions otherwise, a temporary suspension of the Merger Agreement is necessary to restore competitive incentives. *See* ECF 29, at 29-34. Although after the United States filed its motion for a preliminary injunction, Defendants executed a series of measures that they claim will remedy any concern (*see* ECF 90, at 31), those measures do not fully restore competitive incentives, especially because Defendants have also made clear that if the preliminary injunction is denied, they may close on the deal immediately and without waiting for a trial on the merits. *See* Ex. O. Defendants point to *Nat'l Credit Reporting Ass'n, Inc. v. Equifax, Inc.*, 2008 WL 4457781, at *2 (D. Md. Sept. 30, 2008), noting that, there, a preliminary injunction was denied "*because the defendant had agreed to suspend the relevant agreement."*

[23] Defendants also state—without any explanation—that the United States' claimed harm is "fundamentally monetary." ECF 90, at 29, n.29. But OPTIMAL DECISION is a "best value" contract for which price is only one consideration. As the United States will demonstrate at the hearing, reduced competition is likely to result in reduced quality. Thus, the harm to the United States, the NSA, and the public is much more significant than money: it is a likely reduction in quality for an important national security contract.

(ECF 90, at 32.) But that's exactly what the United States seeks here—a suspension of the relevant agreement, the Merger Agreement—rather than the half-measures proposed by Defendants.[24]

As courts have recognized, "[p]rospective relief…is a more effective remedy for an unlawful merger than is retrospective relief.'" *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F. Supp. 1326, 1332 (E.D. Mich.), *aff'd,* 753 F.2d 1354 (6th Cir. 1985). And accordingly, courts throughout the country routinely enjoin mergers preliminarily in antitrust suits.[25] "Of all the forms of equitable relief a simple injunction prior to consummation of the merger transaction is the least disruptive to all concerned. Any competitive injuries that might result from the merger have not yet occurred." Areeda & Hovenkamp, ¶ 990.

Finally, the "public interest" benefits that Defendants assert are speculative and uncertain. *See* ECF 90, at 32. Rather, suspending the Merger Agreement will preserve competition and promote effective enforcement of the antitrust laws, and therefore is the best assurance of public-interest benefits. *See* ECF 29, at 35.

CONCLUSION

For the reasons set forth above, and in the United States' Motion for a Preliminary Injunction and Memorandum of Law in Support, the Court should issue a Preliminary Injunction temporarily suspending Defendants' Merger Agreement pending a final trial on the merits.

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[24] Even though the United States may have settled cases by entering into consent decrees with different remedies, those settlement agreements do not change the relief that the United States is entitled to in a lawsuit. *U.S. v. Microsoft Corp*., 56 F.3d 1448, 1460-61 (1995).

[25] *See, e.g.*, *Consol. Gold Fields, PLC v. Anglo Am. Corp. of S. Afr. Ltd.*, 698 F. Supp. 487, 503 (S.D.N.Y. 1988), *aff'd in part, rev'd in part on other grounds*, 871 F.2d 252, 261 (2d Cir. 1989) (preliminary injunction is the "remedy of choice" for an unlawful merger); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F. Supp. 1326, 1332 (E.D. Mich. 1985); *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1429 (W.D. Mich. 1989).

Dated this 12th day of August, 2022.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2022, I electronically filed the foregoing Reply in Support of the Motion for Preliminary Injunction (Redacted) using the CM/ECF system, and thereby served, via electronic filing, counsel of record for all parties.

_____/s/_____

Jay D. Owen (special admission)
Trial Attorney
United States Department of Justice
Antitrust Division

1:22-cv-01603-CCB United States of America v. Booz Allen Hamilton Inc. et al

Exhibits in Support of Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction

Exhibit Nos.	Description	Filing Status
O	August 5, 2022 email from Booz Allen to the United States RE: United States v. Booz Allen Hamilton Inc., Letter and Correspondence Regarding Second Request	Filed publicly on docket

EXHIBIT O

From:	Jacob Coate
To:	Owen, Jay (ATR); Susan Loeb; David Higbee; Ryan Shores; Adam Schwartz; Matt Modell; molly.barron@lw.com; amanda.reeves@lw.com; marguerite.sullivan@lw.com; anna.rathbun@lw.com; Chris.Brown@lw.com; charlie.beller@lw.com; al.pfeiffer@lw.com; kelly.fayne@lw.com; Todd Stenerson; PROJECTEVERWATCHUSANTITRUSTLITIGATION.LWTEAM@lw.com
Cc:	Quin, Kevin (ATR); Hayes, Natalie (ATR); Rudofsky, Benjamin (ATR); Markel, Arianna (ATR); Fairman, Elizabeth (ATR); Andresian, Alexander (ATR); Isaacs, Miranda (ATR); Kramer, Steven (ATR)
Subject:	[EXTERNAL] RE: United States v. Booz Allen Hamilton Inc., Letter and Correspondence Regarding Second Request
Date:	Friday, August 5, 2022 4:24:03 PM

Counsel,

In response to your August 4, 2022 letter and consistent with Defendants' July 12 commitments letter, Defendants are willing to delay closing the transaction until October 9, 2022. But if the Court denies DOJ's request for a preliminary and/or permanent injunction, Defendants reserve the right to close without delay.

Please let us know if you have any comments or would like to discuss.

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From: Owen, Jay (ATR) <Jay.Owen@usdoj.gov>
Sent: Thursday, August 4, 2022 8:25 PM
To: Susan Loeb <Susan.Loeb@Shearman.com>; David Higbee <David.Higbee@Shearman.com>; Ryan Shores <Ryan.Shores@Shearman.com>; Adam Schwartz <Adam.Schwartz@Shearman.com>; Matt Modell <Matt.Modell@Shearman.com>; Jacob Coate <Jacob.Coate@Shearman.com>; molly.barron@lw.com; amanda.reeves@lw.com; marguerite.sullivan@lw.com; anna.rathbun@lw.com; Chris.Brown@lw.com; charlie.beller@lw.com; al.pfeiffer@lw.com; kelly.fayne@lw.com; Todd Stenerson <Todd.Stenerson@Shearman.com>; PROJECTEVERWATCHUSANTITRUSTLITIGATION.LWTEAM@lw.com
Cc: Quin, Kevin (ATR) <Kevin.Quin@usdoj.gov>; Hayes, Natalie (ATR) <Natalie.Hayes@usdoj.gov>; Rudofsky, Benjamin (ATR) <Benjamin.Rudofsky@usdoj.gov>; Markel, Arianna (ATR) <Arianna.Markel@usdoj.gov>; Fairman, Elizabeth (ATR) <Elizabeth.Fairman@usdoj.gov>; Andresian, Alexander (ATR) <Alexander.Andresian@usdoj.gov>; Isaacs, Miranda (ATR) <Miranda.Isaacs@usdoj.gov>; Kramer, Steven (ATR) <Steven.Kramer@usdoj.gov>
Subject: United States v. Booz Allen Hamilton Inc., Letter and Correspondence Regarding Second Request

Counsel,

Please see attached correspondence.

Thanks.

Jay

Jay D. Owen (he/him)
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