EXHIBIT 2-A

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Plaintiff's Statement of Issues of Fact and Law Which Remain to be Litigated

1. Whether Plaintiff has alleged proper Relevant Product Markets under the Clayton Act.
    a. Section 7 of the Clayton Act prohibits a merger "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18.
    b. "Section 7 claims are typically assessed under a 'burden-shifting framework.'" *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015). Under that framework, "the Government must establish a prima facie case that the merger is anticompetitive." *FTC. v. Penn State Hershey*, 838 F.3d 327, 337 (3rd Cir. 2016). "To establish a prima facie case, the Government must (1) propose [a] proper relevant market and (2) show that the effect of the merger in that market is likely to be anticompetitive." *Id.* at 337–38. "Once the Government has established a prima facie case that the merger may substantially lessen competition, the burden shifts to the [defendants] to rebut the Government's prima facie case." *Id.* at 347. If the defendants "successfully rebut the Government's prima facie case, 'the burden of production shifts back to the Government and merges with the ultimate burden of persuasion, which is incumbent on the Government at all times.'" *Id*. at 337 (quoting *St. Alphonsus*, 778 F.3d at 783).

c. Whether (i) commercial disposal of Lower Activity Operational LLRW; (ii) commercial disposal of Lower Activity Decommissioning LLRW; (iii) commercial dispositioning of Higher Activity Operational LLRW; or (iv) commercial dispositioning of Higher Activity Decommissioning LLRW, as each is defined in the Complaint, each constitutes a relevant product market is an issue remaining to be litigated.

   i. A relevant product market "is composed of products that have reasonable interchangeability for the purposes for which they are produced." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956); *Allen-Myland, Inc. v. Int'l Bus. Machs. Corp.*, 33 F.3d 194, 206 (3d Cir. 1994). The relevant market need include only "reasonable substitutes." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015); *accord Allen-Myland*, 33 F.3d at 207 (considering whether "peripherals and software are reasonable substitutes for mainframes"). So "the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." *Sysco*, 113 F. Supp. 3d at 26 (quoting *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997) (*Staples I*)). Factors for finding reasonable interchangeability "include price, use, and qualities." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997).

ii. Another means to define a relevant product market is the hypothetical monopolist test described in the Merger Guidelines. *E.g., United States v. Anthem, Inc.*, No. CV 16-1493 (ABJ), 2017 WL 685563, at *14, *17 (D.D.C. Feb. 21, 2017); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 51–52 (D.D.C. 2011); Dep't of Justice and Federal Trade Commission Horizontal Merger Guidelines § 4.1.1 (2010) (hereinafter "Merger Guidelines").

iii. The hypothetical monopolist test asks "whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products." *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 121 (D.D.C. 2016) (*Staples II*). Specifically, the test asks whether a profit-maximizing hypothetical monopolist over all products in a candidate market would impose a small but significant and non-transitory increase in price ("SSNIP")—typically five or ten percent—on one of or all those products. Merger Guidelines §§ 4.1.1–.2. The profitability of a SSNIP turns on whether higher prices "would drive consumers to an alternative product" or to forego purchases altogether. *FTC v. Whole Foods*, 548 F.3d 1028, 1038 (D.D.C. 2008). If not enough customers would switch to an alternative, that set of products constitutes an appropriate product market for antitrust analysis. Merger Guidelines § 4.1.1.

iv. "The key question for the Court is whether . . . products are sufficiently close substitutes to constrain any anticompetitive . . . pricing after the proposed merger." *H & R Block*, 833 F. Supp. 2d at 55. Only products that prevent a hypothetical monopolist from significantly increasing prices should be included in the relevant market. *See id*. at 51–52.

d. As Defendants have acknowledged, the Relevant States, as identified in the Complaint, constitute a relevant geographic market for each of the product markets identified above.

i. "The relevant geographic market 'is that area in which a potential buyer may rationally look for the goods or services he seeks.'" *Penn State Hershey*, 838 F.3d at 338 (quoting *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 212 (3d Cir. 2005)). In other words, the relevant geographic market is the area "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 357 (1963).

ii. "An element of fuzziness" is inherent in defining a geographic market. *United States v. Conn. Nat'l Bank*, 418 U.S. 656, 669 (1974). Accordingly, a geographic market need not be defined "with scientific precision," *id*., or "by metes and bounds as a surveyor would lay off a plot of ground," *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). *Accord Joseph Ciccone &*

Sons, Inc. v. E. Indus., Inc., 559 F. Supp. 671, 674 (E.D. Pa. 1983). Indeed, nothing requires a plaintiff's relevant geographic market to include all potential customers or participants. *See, e.g., Penn State Hershey*, 838 F.3d at 338–46 (finding a geographic market definition correct even though 43.5% of a hospital's patients came from outside the market).

iii. "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Brown Shoe v. United States*, 370 U.S. 294, 336 (1962). The geographic market must "'correspond to the commercial realities of the industry,'" which are "[d]etermined within the specific context of each case." *Penn State Hershey*, 838 F.3d at 338 (quoting *Brown Shoe*, 370 U.S. at 336).

iv. As in product markets, the hypothetical monopolist test is another method for defining a relevant geographic market. *Penn State Hershey*, 838 F.3d at 338 ("A common method employed by courts and the [government] to determine the relevant geographic market is the hypothetical monopolist test."); Merger Guidelines § 4.2. Under the test, "if a hypothetical monopolist could impose [a SSNIP] in the proposed market, the market is properly defined. If, however, consumers would respond to a SSNIP by purchasing the product from outside the proposed market, thereby making the SSNIP unprofitable, the proposed market definition is too narrow."

Penn State Hershey, 838 F.3d at 338 (citing Merger Guidelines § 4).

2. Whether the transaction is presumptively illegal because it would substantially increase market concentration in any of the four relevant markets is an issue remaining to be litigated.

   a. A merger is unlawful under Section 7 if it is likely to result in a substantial lessening of competition in "any line of commerce" in "any section of the country." 15 U.S.C. § 18. Thus, "if anticompetitive effects of a merger are probable in 'any' significant market," the merger violates Section 7. *Brown Shoe*, 370 U.S. at 337 (quoting 15 U.S.C. § 18). Accordingly, proof that the merger will likely harm any relevant market alleged in the Complaint is proof that the merger violates Section 7. *Pabst Brewing Co.*, 384 U.S. at 549 ("The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened through the country, or on the other hand it may prove that competition may be substantially lessened only in one or more sections of the country. In either event a violation of § 7 would be proved.").

   b. "'Market concentration is a function of the number of firms in a market and their respective market shares.'" *Staples II*, 190 F. Supp. 3d at 128 (quoting *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 123 (D.D.C. 2004)). While there is no fixed threshold for high market concentration, the Supreme Court has specifically held that a post-merger market share of 30 percent triggered the presumption of illegality. *Phila. Nat'l Bank*, 374

U.S. at 364 ("Without attempting to specify the smallest [resulting] market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

c. Courts also look to market-concentration thresholds set in the Merger Guidelines to determine whether the merger will result in high market concentration. *E.g.*, *Penn State Hershey*, 838 F.3d at 346–47. The Merger Guidelines measure market concentration by the Herfindahl–Hirschmann Index (HHI), which is "calculated by summing the squares of the individual firms' market shares." Merger Guidelines § 5.3. "The Government can establish a prima facie case simply by showing a high market concentration based on HHI numbers." *Penn State Hershey*, 838 F.3d at 347.

3. Whether there is sufficient actual evidence of competition between the Defendants in any market to show that the transaction is illegal regardless of the presumption of illegality is an issue remaining to be litigated.

a. Demonstrating high market concentration "does not exhaust the possible ways to prove a § 7 violation on the merits." *Whole Foods*, 548 F.3d at 1036; *accord Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 433 (5th Cir. 2008) ("Even excluding the HHIs, the Government's other evidence independently suffices to establish a prima facie case . . . ."); *see also Penn State Hershey*, 838 F.3d at 346 (describing market concentration as a "useful indicator," but not as the only indicator, "of the likely competitive, or anticompetitive, effects of a merger"). Regardless of market concentration, "[t]he elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition." Merger Guidelines § 6.

b. Particularly in a "highly concentrated market," the loss of "significant head-to-head competition" is "certainly an important consideration when analyzing possible anti-competitive effects," *Staples I*, 970 F. Supp. at 1083, because the loss of such a competitive constraint may allow the merged firm to raise prices, restrict output, or otherwise exercise market power. Accordingly, "[m]ergers that eliminate head-to-head competition between close competitors often result in a lessening of competition." *Staples II*, 190 F. Supp. 3d at 131 (citing Merger Guidelines § 6); *accord FTC v. Heinz*, 246 F.3d 708, 716–17 (D.D.C. 2001) (holding that the Government's prima facie case was "bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties"). This type of anticompetitive effect, known as a "unilateral effect," is likely "if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." *H & R Block*, 833 F. Supp. 2d at 81. Moreover, a firm's ability to target particular customers for price increases is also relevant to unilateral effects analysis. "[W]hen the merging sellers are likely to know which buyers they are best and second best placed to serve, any anticompetitive unilateral effects are apt to be targeted at those buyers." Merger Guidelines § 6.2. "When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers. A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away." Merger Guidelines § 3.

c. In addition, the elimination of head-to-head competition is particularly likely to lead to unilateral effects if the products of the merging firms are close substitutes for a significant number of consumers. *See FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 47–48 (D.D.C. 2002); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000) ("[T]he weight of the evidence demonstrates that a unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors.").

4. Whether Defendants can prove any countervailing factors or affirmative defenses exist and are sufficient to counteract the alleged competitive harm in each of the markets is an issue remaining to be litigated.

5. Whether enjoining the transaction is the appropriate remedy given the harm that would be caused by the Transaction is an issue remaining to be litigated.

a. Once the government establishes that a merger violates Section 7, "all doubts as to the remedy are to be resolved in its favor." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). Accordingly, the preferred remedy for a merger violating Section 7 is for the court to issue a "full stop injunction" preventing the parties from completing their unlawful merger. PPG Indus, 798 F.2d at 1506–07; *see also Phila. Nat'l Bank*, 374 U.S. at 363 (stating that if the government establishes a prima facie case and the defendants fail to clearly rebut that case, the merger "must be enjoined").