UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK *et al.*,

Plaintiffs,

v.

DEUTSCHE TELEKOM AG *et al.*,

Defendants.

Case No.: 1:19-cv-5434-VM-RWL

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I. Introduction

At its core, this is a simple case. There are only four national mobile wireless network operators in the United States: Sprint, T-Mobile, Verizon, and AT&T. Competition between these four rivals, and especially between Sprint and T-Mobile, has resulted in enormous benefits for consumers, including lower prices and innovative features like no-contract plans and unlimited data plans. Defendants now propose to combine two of these four rivals—Sprint and T-Mobile—and leave this industry with just three remaining players. Unsurprisingly, this "four to three" merger would dramatically increase market concentration in an already highly concentrated industry and, under well-established law, is presumptively illegal.

The presumption that this merger is anticompetitive is reinforced by significant evidence showing that Sprint and T-Mobile intensely compete with each other on prices, features, and quality. By extinguishing that competition, this merger will leave Sprint's and T-Mobile's current and prospective customers worse off. Instead of selecting between low cost and innovative offers from Sprint and T-Mobile, these consumers will face the combined entity, "New T-Mobile," which will not face aggressive competition from a scrappy rival.

This reduction in competition would not be limited to Sprint's and T-Mobile's customers. This merger would make it easier for the three remaining wireless companies, New T-Mobile, Verizon, and AT&T to coordinate their behavior. Rather than the fierce competition and rapid decline in prices that have characterized this industry, we are likely to see a more staid market with prices higher than they would otherwise be—billions of dollars higher in the aggregate—and less innovation. And these higher prices would fall hardest on the credit-challenged and low-income consumers who have benefitted the most from the competition between Sprint and T-Mobile.

Defendants claim that none of these harms will come to pass because, by combining Sprint and T-Mobile, they can generate substantial efficiencies that will ultimately benefit consumers. But Plaintiff States know of no litigated case where the merging parties have prevailed based on an argument that anticipated efficiencies offset anticompetitive harms. Nor should this case be the first. As the trial will show, Defendants' efficiencies are derived from enormously complex litigation-driven models. That complexity, however, cannot obscure the fact that these models are unreliable—based on unrealistic assumptions which in turn produce unrealistic results. And these models do not support Defendants' claim that the merger is necessary to launch "5G", the next generation of wireless telecommunications technology: Sprint and T-Mobile are racing to roll out 5G, with or without this merger. Sprint's and T-Mobile's substantial and independent efforts to launch 5G technology underscores these companies' competitive vitality as standalone firms.[1] With the models corrected and the complexity stripped away, Defendants' efficiencies argument falls flat, and they cannot defeat the presumption that this merger is anticompetitive.

Defendants' other primary argument is that their merger will enable DISH, a struggling satellite television firm with no mobile wireless business and no experience running such a business, to enter the market as a new fourth competitor. This remedy is patently insufficient to mitigate the merger's anticompetitive harm. Defendants would have the Court believe that their proposed divestitures to, and their related agreements with, DISH will suffice to create a new wireless operator that can replace Sprint. But Sprint is a company with tens of millions of

[1] To the extent the Defendants argue that this merger is necessary to ensure that the United States deploys 5G faster than China or some other country, this policy argument should be directed to Congress, not this Court. Under the Clayton Act, an anticompetitive merger "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963).

current customers, a long history in this industry, and a nationwide wireless network. DISH is a company with *no* current wireless customers, *no* history in this industry, and *no* retail wireless network. Even under DISH's rosy projections, it would not come close to addressing the loss of competition caused by the merger over the next few years.

The Court should not permit Defendants to proceed with an anticompetitive merger based on the *hope* that DISH will one day grow into a viable wireless company equal to a competitor that already exists today. If that hope proves unfounded, the cost of failure will not be borne by Defendants—who would stand to benefit from that failure—but by consumers who will be left with less competition and higher prices.

Ultimately, Defendants seek to replace the competitive environment that has worked so well in this industry with their own speculative promises to produce efficiencies or to create a new competitor to replace Sprint. The law, however, places its trust in competition—the system that most consistently yields lower prices and higher quality products for consumers. For the tens of millions of price-sensitive consumers who rely on mobile wireless service to stay connected with family, obtain employment, or access the internet to study for school, even small changes in price could have significant impacts. Plaintiff States bring this suit in their sovereign capacities to protect their citizens and their economies from these outcomes. Accordingly, we ask the Court to do what the evidence and the law compels: trust competition and stop this merger.

II. Key Principles

A. A Merger Is Illegal if It "May" Substantially Lessen Competition

A merger is illegal under Section 7 of the Clayton Act if its effect "*may be* substantially to lessen competition." 15 U.S.C. § 18 (emphasis added). Congress enacted this "expansive

definition of antitrust liability," *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990), because "its concern was with probabilities, not certainties," *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Thus, to prevail, Plaintiff States need only demonstrate that the merger creates a "reasonable probability of a substantial impairment of competition." *Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979); *see also St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 788 (9th Cir. 2015) ("All that is necessary is that the merger create an appreciable danger of [anticompetitive] consequences in the future.").

B. A Merger That May Substantially Lessen Competition in Any Market Is Illegal

Section 7 proscribes mergers that may substantially lessen competition in "any line of commerce ... in any section of the country." 15 U.S.C. § 18. In some instances, the relevant section of the country may "encompass the entire Nation" and in other instances it "may be as small as a single metropolitan area." *Brown Shoe*, 370 U.S. at 337. Where firms compete on "a local, regional, and national basis," there may be "more than one relevant geographic market." *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 621 (1974).

Plaintiff States will show that the proposed merger may substantially lessen competition in a nationwide market, as well as in many local markets in which Sprint and T-Mobile compete. Proof that the merger may substantially lessen competition in *any one* of these markets suffices to show that the merger violates Section 7. *See United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966) (plaintiff may show violation of § 7 by "show[ing] that as a result of a merger competition may be substantially lessened throughout the country, or ... that competition may be substantially lessened only in one or more sections of the country").[2]

[2] At the initial conference in this matter, the Court asked whether anticompetitive effects in one market can be offset by competitive gains in other markets. As noted above, a merger that is

C. The Burden-Shifting Framework Applicable Under Clayton Act Section 7

The question whether a horizontal merger violates Section 7 involves a well-established three-step, burden-shifting framework that originated with *Philadelphia National Bank*, 374 U.S. 321.[3] First, a plaintiff can establish a presumption of illegality by relying on market share and market concentration information. *Anthem*, 855 F.3d at 349. If a merger will result in the combined entity "controlling an undue percentage share of the relevant market" and "in a significant increase in the concentration of firms in that market," it is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Philadelphia Nat'l Bank*, 374 U.S. at 364; *see also R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 107–08 (2d Cir. 1989). As described below, *see infra* Part IV, Plaintiff States will establish that the proposed merger easily meets the market share and concentration thresholds at which it is presumptively illegal.

Once the prima facie case is made, the burden shifts to defendants to rebut the presumption. *See St. Alphonsus*, 778 F.3d at 783. "The more compelling the prima facie case,

anticompetitive in any market is illegal. And competitive gains in some markets cannot be used to offset the loss of competition in others. *See Philadelphia National Bank*, 374 U.S. at 370 (rejecting the notion that "anticompetitive effects in one market could be justified by procompetitive consequences in another"); *St. Alphonsus*, 778 F.3d at 789 (noting that the Ninth Circuit had previously rejected "an argument that the merger would allow the defendant to compete more efficiently *outside* the relevant market"); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 94 (D.D.C. 2017) (defendant must show that a merger's efficiencies benefit "the customers in the challenged markets").

[3] *See, e.g.*, *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337–38 (3d Cir. 2016); *St. Alphonsus*, 778 F.3d at 783; *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 565, 571 (6th Cir. 2014); *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1214 & n.4 (11th Cir. 2012); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008).

the more evidence the defendant must present to rebut it successfully." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990).

As discussed in more detail below, *see infra* Part IV, because Plaintiff States will establish a presumption of illegality, *Defendants* have the burden to substantiate their key defenses in this case—(1) that the "efficiencies" generated by the merger overcome its anticompetitive character, (2) that, despite its millions of customers and significant spectrum holdings, Sprint will not be a viable competitor in the future, and (3) that Defendants' proposed remedies will eliminate the risk that this merger may substantially lessen competition. If Defendants are able to muster the evidence necessary to make this showing, "the burden of production shifts back to the [plaintiff] and merges with the ultimate burden of persuasion, which is incumbent on the [plaintiff] at all times." *St. Alphonsus*, 778 F.3d at 783.

D. The USDOJ's and FCC's Decisions

The United States Department of Justice ("USDOJ") and the Federal Communications Commission ("FCC") have each declined to block this merger, albeit for different reasons. In a three-to-two vote of its Commissioners, the FCC declined to block Defendants' transaction under its broad authority to approve transactions that "serve the public interest, convenience, and necessity." Memorandum Order ¶ 39, *In re Applications of T-Mobile US, Inc. and Sprint Corp.*, WT Docket No. 18-197 (Nov. 5, 2019) ("FCC Memorandum Order"), https://docs.fcc.gov/public/attachments/FCC-19-103A1.pdf. The FCC's approval was based on Defendants' commitments to the FCC, including their commitment to divest Boost, Sprint's pre-paid brand, and their commitment not to raise retail prices for three years. *Id*. ¶¶ 84-94.

USDOJ did not accept the FCC's remedies as sufficient. Instead, it concluded that Defendants' merger would "substantially lessen competition for retail mobile wireless service,"

by eliminating Sprint as an independent competitor and making it "easier" for New T-Mobile, Verizon, and AT&T to "coordinate their pricing, promotions, and service offerings." Complaint ¶¶ 3-6, *United States et al. v. Deutsche Telekom AG et al.*, No. 1:19-cv-002232, ECF No. 1 (D.D.C. July 26, 2019). USDOJ concluded that the "result would be increased prices and less attractive service offerings for American consumers," *id.* ¶ 5, and that any "efficiencies generated by this merger are unlikely to be sufficient to offset the likely anticompetitive effects on American consumers," *id.* ¶ 24. USDOJ declined to challenge the transaction only after Defendants agreed to take various steps designed to prop up DISH as a new fourth competitor. *See* [Proposed] Final Judgment, *United States v. Deutsche Telekom AG et al.*, No. 1:19-cv-002232, ECF No. 2-2 (D.D.C. July 26, 2019). These steps include providing DISH access to New T-Mobile's network for a period of seven years while DISH purportedly builds its own new consumer wireless network and divesting Sprint's pre-paid business to DISH.

Plaintiff States agree with USDOJ, and the evidence will show at trial, that this merger as initially proposed and as conditioned by the FCC would likely substantially reduce competition and that Defendants' efficiencies defense does not resolve the merger's anticompetitive effects. Where Plaintiff States part ways with USDOJ is on the question whether the remedies imposed are truly sufficient to protect competition. As Plaintiff States will demonstrate, entry by DISH is highly unlikely to restore the competition that this merger would eliminate.

In any event, this Court should not defer to USDOJ's (or the FCC's) decision. USDOJ does not have exclusive jurisdiction to enforce the Clayton Act, and the FCC has no such authority at all. To the contrary, the law gives parties, including the States, the right to enforce the Clayton Act in court, and this enforcement right "was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition." *Am. Stores*, 495 U.S. at 284.

Accordingly, "[c]ourts do not generally defer to an agency's decision not to challenge a merger." *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999); *see also* 15 U.S.C. § 18a(i)(1) ("Any action taken by [Antitrust Division of the Department of Justice] or any failure of the [Division] to take any action under this section shall not bar any proceeding or any action with respect to such acquisition.").

Moreover, unlike this Court, the FCC and USDOJ are free to make their decisions based on policy, prosecutorial, or political interests; they are not required to evaluate the merger solely under the requirements of the Clayton Act. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors."); FCC Memorandum Order ¶¶ 39-40 (FCC applies a broad "public interest, convenience and necessity" test, and, under that standard, the FCC's review of antitrust issues is not "limited to[] traditional antitrust principles").

III. The Relevant Markets Are Local and National Markets for Retail Mobile Wireless Telecommunications Services

"Merger analysis starts with defining the relevant market." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 24 (D.D.C. 2015). "Congress prescribed a pragmatic, factual approach [for this inquiry,] not a formal, legalistic one." *Brown Shoe*, 370 U.S. at 336; *see also United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 193 (D.D.C. 2017). The "relevant market" is composed of both a "'relevant product market,' which identifies the products and services with which the defendants' products compete," and a "relevant geographic market," which "identifies the geographic area in which the defendant competes in marketing its products or service." *Sysco*, 113 F. Supp. 3d at 24.

A. Relevant Product Market: Retail Mobile Wireless Telecommunications Services

A relevant product market "is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). Products are "reasonably interchangeable if consumers treat them as acceptable substitutes." *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002) (per curiam). For example, "Chevrolets and Fords might be interchangeable in this sense, but Chevrolets and Lamborghinis are probably not." *ProMedica*, 749 F.3d at 565.[4]

A common way to evaluate whether a proposed market is properly defined is to apply the "hypothetical monopolist test," which asks "whether a hypothetical monopolist"—a hypothetical firm that controlled the supply of all products in the proposed market—"would be substantially constrained from increasing prices by the ability of customers to switch to other producers." *United States v. Am. Express Co.*, 838 F.3d 179, 198 (2d Cir. 2016), *aff'd sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (internal quotation marks and alterations omitted). A court "implements the [hypothetical monopolist test] by imagining that a hypothetical monopolist has imposed a small but significant non-transitory increase in price ('SSNIP') within the proposed market. If the hypothetical monopolist can impose this SSNIP without losing so many sales to other products as to render the SSNIP unprofitable, then the proposed market is the relevant market." *Am. Express*, 838 F.3d at 199.

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[4] Similarly, while "all methods of tax preparation are, to some degree, in competition," digital do-it-yourself tax preparation software is not reasonably interchangeable with manual tax preparation or professionally-assisted tax preparation. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 54 (D.D.C. 2011). "As compared to manual and assisted methods, [digital do-it-yourself] products involve different technology, price, convenience level, time investment, mental effort and type of interaction by the consumer." *Id.*

Plaintiff States will establish through documentary evidence, fact witness testimony, and expert testimony from Professor Carl Shapiro[5] that the market for retail mobile wireless telecommunications services is a relevant market for analyzing this merger. Other telecommunications products, like fixed in-home broadband, differ significantly in features, technology, price, and convenience, such that they are not "reasonably interchangeable" with mobile wireless telecommunications and are therefore not part of the same market. As Professor Shapiro will testify, Plaintiff States' proposed market satisfies the hypothetical monopolist test.

Defendants have not defined any alternative market. Instead, they offer a few half-hearted objections to Plaintiff States' market definition. For instance, Defendants have suggested that "corporate-liable enterprise products"—products that a large corporation or government entity purchases on behalf of its employees—should be included in the relevant market. But, as common sense suggests, the evidence will show that retail consumers do not find corporate plans negotiated by large institutions to be a reasonable substitute for retail services available to consumers at large. Indeed, in 2011, Sprint cogently explained to the FCC why retail sales and corporate sales are in "separate product markets."[6]

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[5] Professor Shapiro is an economist and Professor of the Graduate School at the Haas School of Business and the Department of Economics at the University of California at Berkeley, where he has been on the faculty since 1990. Professor Shapiro served as the Deputy Assistant Attorney General for Economics in the Antitrust Division of USDOJ from 1995-1996 and 2009-2011, and on the President's Council of Economic Advisors from 2011-2012.

[6] Petition to Deny of Sprint Nextel Corporation at 15, *In re App. of AT&T Inc. and Deutsche Telekom AG*, WT Docket No. 11-65 (May 31, 2011) ("Corporate and government customers do not buy plans and handsets in retail stores or via the Internet like many consumers. Instead, corporate and government buyers typically ask for bids, often through a formal request for proposals ('RFPs') for services and devices for multiple lines for their employees. These customers secure pricing different than that available to retail customers, and price changes in the retail and corporate markets do not necessarily affect each other.").

B. Relevant Geographic Markets

Plaintiff States will show that Sprint and T-Mobile compete, and hence the anticompetitive effects of the Proposed Merger will be felt, both in a national market as well as in a number of local markets.

1. National Market

Plaintiff States and Defendants appear to agree that the United States is a relevant geographic market for purposes of analyzing the anticompetitive effects of the merger. Sprint, T-Mobile, Verizon and AT&T all compete to offer national service and offer the same or similar service plans nationwide.[7]

2. Local Markets

Plaintiff States will demonstrate that local markets, in the form of the FCC's Cellular Market Areas ("CMAs"), are also appropriate geographic markets in which to analyze the competitive effects of this transaction. CMAs are the geographic regions in which the FCC initially granted spectrum licenses for cellular services.[8]

Plaintiff States will present documentary and testimonial evidence showing that the carriers compete intensely in local markets across the country, including by targeting each other in local geographic areas, tracking competition on a local level, and investing in and promoting their networks on a local level. And while Defendants generally offer plans that are uniformly priced across the United States, they can and do offer local promotions and localized offers.

T-Mobile and Sprint have both previously acknowledged that wireless carriers compete at the local level. In 2011, in connection with the FCC's review of the proposed AT&T/T-Mobile

[7] *See* Answer of Defendants T-Mobile US, Inc. and Deutsche Telekom AG at 5, ECF No. 221 (Oct. 2, 2019) ("[W]ireless carriers compete nationwide . . . .").

[8] There are 734 CMAs in total in the United States. *See* FCC Memorandum Order ¶ 69.

merger, T-Mobile's Chief Operations Officer and Executive Vice President submitted a declaration to "support[] T-Mobile USA's view that wireless providers compete for customers on a local market basis."[9] Similarly, Sprint noted to the FCC in connection with that same review: "Our analysis indicates the existence of a national geographic market as well as local markets."[10]

There is no force to Defendants' anticipated argument here that, even if local markets exist, *CMAs*—as opposed to some other local geographic region—are inappropriate markets in which to analyze a wireless merger. That argument flatly contradicts T-Mobile's previous position, in connection with the AT&T/T-Mobile merger investigation.[11] And, as Professor Shapiro will testify, because CMAs satisfy the hypothetical monopolist test, there is no basis to reject CMAs as a relevant market even if some other geographical market would also be appropriate.[12] As the Supreme Court has noted, a plaintiff need not "delineat[e]…[each] section of the country [in which a merger will substantially lessen competition] by metes and bounds as a surveyor would lay off a plot of ground." *Pabst Brewing*, 384 U.S. at 549.

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[9] Declaration of James Alling in support of Joint Opposition at 1, *In re App. of AT&T Inc. and Deutsche Telekom AG*, WT Docket No. 11-65 (June 9, 2011).

[10] Joint Declaration in support of Petition to Deny of Sprint Nextel Corporation ¶ 9, *In re App. of AT&T Inc. and Deutsche Telekom AG*, WT Docket No. 11-65 (May 31, 2011).

[11] Opening Brief of New Cingular Wireless PCS, LLC and T-Mobile West Corporation d/b/a T-Mobile on Relevant Market Definitions, Order Instituting Investigation on the Commission's Own Motion Into the Planned Purchase and Acquisition by AT&T Inc. of T-Mobile USA, Inc. and its Effect on California Ratepayers and the California Economy, at 19, Investigation 11-06-009 (June 9, 2011), http://docs.cpuc.ca.gov/PublishedDocs/EFILE/BRIEF/141367.PDF (Last visited Nov. 25, 2019).

[12] If a hypothetical monopolist that controlled all of the facilities necessary to provide retail wireless telecommunications within a given CMA were to increase prices, it is highly unlikely that consumers who live within that CMA would switch to carriers that provide wireless service only outside of that CMA. As the FCC found when analyzing this merger, "in the event of a price increase (or service quality decrease) that is limited to one CMA, that has the effect of raising the quality-adjusted price in that locality, too few buyers would switch to purchasing mobile wireless services for service providers operating in another area to make that quality-adjusted price increase unprofitable." FCC Memorandum Order ¶ 68.

IV. The Proposed Merger Is Presumptively Unlawful

As discussed above, under Section 7's burden-shifting framework, a plaintiff can establish a presumption of illegality by relying on market share and market concentration information. Courts have relied on two metrics to assess whether a proposed merger is presumptively anticompetitive: (1) the market share that will be controlled by the consolidated entity; and (2) the Herfindahl-Hirschman Index ("HHI") set forth in the *Horizontal Merger Guidelines* promulgated by USDOJ and the Federal Trade Commission.[13]

In *Philadelphia National Bank*, the Supreme Court did not attempt "to specify the smallest market share which would still be considered to threaten undue concentration," but held that it was "*clear that 30% presents that threat*." 374 U.S. at 364 (emphasis added); *see also Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 260 (2d Cir. 1989) ("That percentage [of 32.3%] is above the 30% held by the Supreme Court to trigger a presumption of illegality in *Philadelphia Nat'l Bank*.").

Alternatively, a plaintiff can establish that a merger is presumptively unlawful by relying on HHIs.[14] Markets with an HHI above 2500 are considered "highly concentrated," and mergers "resulting in highly concentrated markets that involve an increase in the HHI of more than 200

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[13] "Although the merger guidelines are not binding on courts, they are often used as persuasive authority." *St. Alphonsus*, 778 F.3d at 784 n.9.

[14] *See, e.g.*, *St. Alphonsus*, 778 F.3d at 788 ("The extremely high HHI on its own establishes the prima facie case."); *FTC v. HJ Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive."); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 346–47 (3d Cir. 2016) (noting that a plaintiff can "establish a prima facie case simply by showing a high market concentration based on HHI numbers"). The HHI is calculated by "summing the squares of the individual firms' market shares." *Merger Guidelines* § 5.3. For example, if the four firms in a market have a 30%, 30%, 20%, and 20% market share, the HHI would be 2,600. (HHI = $30^2 + 30^2 + 20^2 + 20^2$).

points will be presumed to be likely to enhance market power." *ProMedica*, 749 F.3d at 568 (quoting *Merger Guidelines* § 5.3).

A. Concentration in the National Market

As Professor Shapiro will testify at trial, following the merger, New T-Mobile will control more than ███ of the national market for retail wireless mobile telecommunications services. Similarly, Professor Shapiro's testimony will establish that the merger will result in an HHI of over ████ in the national market, with an increase of over ███ points—well in excess of the thresholds that trigger the presumption of illegality.[15]

B. Concentration in Local Markets

Plaintiff States will also show that, in hundreds of CMAs across the country, the merger will result in a post-merger HHI in excess of 2,500 along with an increase in HHI of more than 200 points. In some CMAs, this increase in concentration will significantly exceed these thresholds. For example, in the urban area CMA 1 (NY/NJ), Sprint and T-Mobile's combined market share will be more than ████ and HHI will increase by more than ████ points to over ████. Similarly, in the more rural CMA 342 (Imperial County, California), Sprint and T-

[15] Professor Shapiro will testify that, in calculating market share and the HHI figures, he considered how to properly allocate the subscribers of Mobile Virtual Network Operators ("MVNOs")—companies that buy network access from the national carriers on a wholesale basis and re-sell that access to their customers. Professor Shapiro will explain that MVNOs are best understood as resellers of the national carriers' services and distribution channels for the national carriers. MVNOs have little to no control over the quality of the telecommunications services offered to their customers and limited control over the price offered to their customers. Professor Shapiro will testify that it is appropriate to allocate MVNO subscribers to the national carrier actually providing the underlying service when calculating the market shares of Sprint, T-Mobile, AT&T and Verizon. Professor Shapiro's approach is consistent with both "widespread industry practice[]" and market realities. FCC Annual Report: Federal Communications Commission, "20th Mobile Wireless Competition Report" at p. 21, n.99 (Report FCC 17-126, Sept. 27, 2017). Indeed, when assessing this merger the FCC "consider[ed] only facilities-based entities" and "exclude[d] MVNOs from consideration" when "computing initial concentration measures." FCC Memorandum Order ¶ 78.

Mobile's combined market share will be more than [redacted], and HHI will increase by more than [redacted] points to approximately [redacted]. These are exceptionally large increases in concentration in already concentrated markets. *See ProMedica*, 749 F.3d at 568 (noting that a merger increasing "HHI by 1,078 ... to a total number of 4,391" blew through the HHI thresholds "in spectacular fashion").

V. Anticompetitive Effects Are Substantial

Although Defendants' merger is presumptively unlawful, Plaintiff States need not and do not rest their case solely on this presumption. Instead, Plaintiff States will present additional evidence that the effect of the proposed merger may be substantially to lessen competition. A merger is likely to substantially lessen competition if it will: (1) "enhanc[e] the likelihood of coordinated interaction by competitors"; and/or (2) "plac[e] the acquiring company in a position to unilaterally raise and maintain prices at supracompetitive levels." *State of N.Y. v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 359 (S.D.N.Y. 1995); *Anthem*, 236 F. Supp. 3d at 215–16. Plaintiff States will show that both circumstances are present here.

A. Coordinated Interaction

Coordinated interaction can include a "range of conduct," including "explicit negotiation of a common understanding" among rivals, a tacit understanding among rivals, and "parallel accommodating conduct." *Merger Guidelines* § 7. Plaintiff States will show at trial that the proposed merger will enhance the likelihood of coordinated interaction.

First, the evidence will show that the relevant markets are already vulnerable to coordination. There are only four national wireless providers that can compete using their own facilities, and this limited number of rivals increases the market's susceptibility to coordination. *See Heinz*, 246 F.3d at 715 ("Merger law rests upon the theory that, where rivals are few, firms

will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."). In addition, the evidence will show that pricing in this industry is public and transparent, which increases the risk of coordination by allowing each firm to closely monitor its rivals' prices. *See Merger Guidelines* § 7.2. And the documentary evidence reveals that, [redacted]

Second, the merger will make it easier for the remaining firms to coordinate their behavior. For instance, by reducing the number of national rivals from four to three and dramatically increasing market concentration, this merger "raises a likelihood of interdependent [i.e. coordinated] anticompetitive conduct." *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009) (internal alterations and quotation marks omitted). Moreover, this merger will eliminate both Sprint and T-Mobile as independent competitors. This loss will be felt particularly acutely because both Sprint and T-Mobile have been uniquely aggressive competitors in this market and have taken the lead with low cost and innovative offers to customers. *See H & R Block*, 833 F. Supp. 2d at 79 (noting the increased risk of coordination arising from "the elimination of a particularly aggressive competitor in a highly concentrated market").[16]

[16] At trial, Professor Shapiro will provide an economic analysis of the factors that make this market susceptible to coordination and how those factors are affected by the proposed merger.

B. Unilateral Effects

"Unilateral effects refer[] to a merger's elimination of competition between the two merging companies, which 'may alone constitute a substantial lessening of competition.'" *Anthem*, 236 F. Supp. 3d at 216 (quoting *Merger Guidelines* § 6). A merger "is likely to have unilateral anticompetitive effect 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.

"Relevant evidence of a merger's potential unilateral effects include[s] the merging companies' ordinary course of business documents, testimony of industry participants, and the history of head-to-head competition between the two merging parties." *Anthem*, 236 F. Supp. 3d at 216. When analyzing unilateral effects, "[t]he extent of direct competition between the products sold by the merging parties is central," because the analysis focuses on the effects of *eliminating* the direct competition between the merging firms. *Merger Guidelines* § 6.1. Here, the evidence will show significant and sustained head-to-head competition between Sprint and T-Mobile—competition that this merger would eliminate.

In addition, Plaintiff States will provide a quantitative assessment of the probable unilateral effects of this merger from Professor Shapiro. Professor Shapiro's analysis will show that, by extinguishing the current competition between Sprint and T-Mobile, the merger will give the combined entity the incentive to charge higher prices that, in the aggregate, will cost consumers billions of dollars.[17]

[17] In this context, "higher prices" are prices that are higher than what would occur absent the merger. For example, if an industry is experiencing falling prices and, absent the merger, prices would drop from $10 to $8, a merger that prevented prices from falling to $8 would result in higher prices for consumers than what would occur without the merger.

VI. Defendants Will Be Unable to Rebut the Presumption That This Merger Is Illegal

A. Defendants' Efficiencies Defense

Defendants' primary defense is their claim that combining Sprint and T-Mobile will generate significant benefits for consumers. Specifically, Defendants contend that they can: (1) reduce their future network deployment costs (and therefore charge consumers less); and (2) provide consumers with a higher quality network in the future. This defense is critical to Defendants' case [REDACTED] But, as discussed below, Defendants will be unable to establish this defense. Indeed, Plaintiff States are unaware of any case in which a court has concluded that the benefits generated by a merger are sufficient to overcome the presumption of illegality. *Cf. St. Alphonsus*, 778 F.3d at 789 ("[N]one of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense.").

1. The Efficiencies Defense Is Narrow and Disfavored

The Supreme Court has held that the benefits that may be generated by a merger cannot be used to offset the loss of competition that may be caused by the merger. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."). "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets." *Brown Shoe*, 370 U.S. at 344. "It resolved these competing considerations in favor of decentralization." *Id.* Therefore, under Section 7, "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate

reckoning of social or economic debits and credits, it may be deemed beneficial." *Philadelphia Nat'l Bank*, 374 U.S. at 371.

Some courts of appeals have considered whether there is a narrow exception to the general rule that the benefits of a merger are irrelevant. Specifically, these courts have considered whether the benefits of a merger can be examined not as offsets to the anticompetitive effects of the merger, but as evidence that the "merger is not, despite the existence of a prima facie case, anticompetitive." *St. Alphonsus*, 778 F.3d at 791; *see also Anthem*, 855 F.3d at 354. While some courts have cautiously recognized the possibility of this defense, it appears that no court has ever concluded that a presumptively illegal merger is saved by potential efficiencies. *St. Alphonsus*, 778 F.3d at 789.

Even where it is acknowledged, this narrow efficiencies defense is highly disfavored. *Anthem*, 855 F.3d at 353 ("[I]t is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7."); *St. Alphonsus*, 778 F.3d at 791 ("It is difficult enough in § 7 cases to predict whether a merger will have future anticompetitive effects without also adding to the judicial balance a prediction of future efficiencies."). To the extent this defense exists, the defendant "must clearly demonstrate that the proposed merger enhances rather than hinders competition." *Id.* at 791 (internal quotation marks omitted).

Accordingly, the courts that have permitted parties to advance an efficiencies defense have required that the merging parties demonstrate that: (1) the claimed efficiencies are "verifiable, not merely speculative," *St. Alphonsus*, 778 F.3d at 790; (2) the efficiencies are "merger-specific ... which is to say that the efficiencies cannot readily be achieved without the concomitant loss of a competitor," *id*. at 790-91; and (3) the claimed efficiencies will benefit customers, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991).

Where, as here, "the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive." *Merger Guidelines* § 10; *see also St. Alphonsus*, 778 F.3d at 790 (claimed efficiencies must be "extraordinary); *Anthem*, 855 F.3d at 354 (same); *Heinz*, 246 F.3d at 720 (same).

2. Defendants Will Be Unable to Establish This Defense

At trial, Defendants will be unable to meet the demanding standards of any potential efficiencies defense. Defendants' proposed efficiencies are based on flawed, self-serving models generated for this litigation. Moreover, these models are built on assumptions that are fundamentally at odds with reality.

"Projections of efficiencies may be viewed with skepticism, particularly when generated outside the usual business planning process." *Merger Guidelines* § 10. But at trial, Defendants will offer just that—an array of efficiencies claims and models that bear little resemblance to what either company considered, evaluated, or calculated in the normal course of business before they agreed to merge.

The evidence will show, and Professor Fiona Scott Morton[18] will further explain, that the litigation-driven efficiencies now advanced by Defendants are speculative, unverifiable, and not merger specific. In order to prove cognizable efficiencies, Defendants must analyze the future with the merger and compare it to the "but for world" without the merger. Here, Defendants have constructed an elaborate model that showcases a theoretical performance by the merged firm, while artificially hamstringing the future performance of the standalone firms in the but-for

[18] Professor Scott Morton is currently the Theodore Nierenberg Professor at the Yale University School of Management and formerly served as the Deputy Assistant Attorney General for Economics at the Antitrust Division of USDOJ.

world. Only with an inflated New T-Mobile and weakened standalone Sprint and T-Mobile can the Defendants show that the world with the merger is better than the world without. For instance, Defendants' model assumes that standalone Sprint and standalone T-Mobile will not be able to acquire *any* additional spectrum from any source—an assumption that is radically inconsistent with the history of this industry.[19]

Similarly, as Plaintiff States' expert Dr. Paul Kolodzy[20] will testify, the model makes no effort to account for ongoing technological refinements that would permit standalone Sprint and standalone T-Mobile to make more efficient use of their existing spectrum assets. Because the projected network deployment costs in Defendants' model are driven by the amount of spectrum available and the efficiency with which that spectrum can be used, these spectrum-related assumptions have a dramatic effect on Defendants' projections of network capacity and cost. The limitations that Defendants place on the standalone firms are critical to their models because without them their own models show that the efficiencies are dramatically less (or nonexistent) and are unable to overcome the anticompetitive effects of the transaction.

B. Sprint's Competitive Significance

Defendants have suggested that Sprint is declining in competitive significance and that, as a result, Plaintiff States have overestimated the extent to which Sprint will continue to be a robust competitor. This argument is often referred to as a "weakened competitor" or "flailing

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[19] For example, in connection with this merger review the FCC detailed its "efforts to make available a significant amount of additional spectrum across a range of frequencies" in recent years and its intent to continue in these efforts, including auctioning additional spectrum in 2020." FCC Memorandum Order ¶ 78.

[20] Dr. Kolodzy is currently an independent telecommunications consultant and was formerly a senior spectrum policy advisor with the FCC.

firm" defense.[21] Dubbed "the Hail-Mary pass of presumptively doomed mergers," *ProMedica*, 749 F.3d at 572, a flailing firm defense is "probably the weakest ground of all for justifying a merger," *Univ. Health*, 938 F.2d at 1221. "Courts credit such a defense only in rare cases, when the acquiring firm makes a substantial showing that the acquired firm's weakness, which cannot be resolved by any competitive means, would cause that firm's market share to reduce to a level that would undermine the [plaintiff's] prima facie case." *ProMedica*, 749 F.3d at 572 (internal quotation marks and alterations omitted).

To successfully undermine Plaintiff States' prima face case, Defendants would need to show that, absent the merger, Sprint is likely to experience a dramatic decline in its market share. But evidence at trial will show that although Sprint has challenges ahead, there is no basis to conclude that it will rapidly decline into competitive irrelevance absent the merger. Indeed, Defendants' economist has not even attempted to translate his theory of Sprint's shrinking economic significance into any particular market share in the future. That omission is not surprising: Sprint's ordinary-course documents, financial statements, and public statements belie any claim that it will be unable to compete in the future. Sprint's own documents shows that the company has been, and intends to be, a competitive force that continues to serve tens of millions of customers for many years to come.

In particular, Sprint's claim that it will be unable to compete in the future is contradicted by its efforts to roll out next-generation 5G services. Sprint is a leader in the race to 5G. Indeed, as one of its employees testified under penalty of perjury in litigation before a court in *this district* earlier *this year*: "Given Sprint's unique strategic position regarding its spectrum

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[21] While Defendants have not formally asserted the weakened competitor defense, they are arguing the defense in all but name.

holdings and 5G deployment approach, Sprint has a 'once-in-a-lifetime' opportunity to 'leap-frog' its competitors, including AT&T, to be the first to offer a true mobile 5G experience broadly in many of the largest metropolitan markets in the US and, as a result, alter consumer perception of its capabilities."[22] Sprint's claim that it is on the verge of competitive irrelevance cannot be reconciled with its current progress in 5G and its public statements about the company's plans to be a leader in that technology.

C. Defendants' Commitments to the FCC And USDOJ Do Not Resolve the Competitive Concerns Raised by This Transaction

As discussed above, *see supra* Part II.D, the FCC and USDOJ have each approved Defendants' merger, subject to the partially overlapping commitments made by Defendants to each agency. To the extent Defendants seek to rely on these or any other commitments at trial, they bear the burden of "showing that [these] proposed remed[ies] would negate any anticompetitive effects of the merger." *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 137 n.15 (D.D.C. 2016); *see also Sysco*, 113 F. Supp. 3d at 72; *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 60 (D.D.C. 2017). Defendants will be unable to meet this burden.

1. The FCC Commitments

Defendants made several commitments to the FCC, the two most relevant here being: (1) not to raise prices for a period of three years; and (2) to build a nationwide 5G network and achieve certain interim milestones. Neither commitment negates the anticompetitive aspects of this merger.

A commitment not to raise prices for three years obviously fails to address any of the structural changes caused by the merger. After three years, the price commitment will evaporate,

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[22] Declaration of Bryan Fries ¶ 24, *Sprint Spectrum L.P. et al. v. AT&T Mobility LLC*, No. 19-cv-1215, ECF No. 88 (S.D.N.Y. Apr. 5, 2019).

but Sprint will be gone forever as an independent competitor. More fundamentally, a commitment not to *raise* prices for three years is worth very little when prices for wireless services have consistently *fallen* and will likely continue to do so absent the merger.

Similarly, it is unclear how Defendants' commitment to build a 5G network would preserve competition, especially when the evidence shows that both Sprint and T-Mobile are already aggressively implementing their own plans to build 5G. And in any event, as discussed above, Defendants will be unable to show that the purported efficiencies generated by their merger—including any efficiencies from deploying a 5G network—are sufficient to overcome the presumption that this merger is anticompetitive.

2. The USDOJ Commitments

USDOJ did not clear this transaction based on Defendants' commitments to the FCC. To the contrary, and as discussed above, *see supra* Part II.D, USDOJ found that the merger, absent additional remedies imposed by USDOJ, was anticompetitive. In particular, USDOJ required the parties to agree to certain commitments that are aimed at allowing DISH, a satellite TV provider, to enter the market as a new fourth retail wireless competitor. Those commitments include, among other things: (1) Defendants' commitment to divest Sprint's pre-paid business and customers along with certain other assets to DISH; and (2) Defendants' commitment to offer DISH wholesale access to New T-Mobile's network for seven years, while DISH purportedly fulfills other commitments it has proposed to the FCC to build out its own new consumer wireless network.

Defendants must show that DISH's entry into the marketplace will "restore [the] competition lost by the merger [thereby] counteracting the anticompetitive effects of the merger." *Aetna Inc.*, 240 F. Supp. 3d at 60 (quotation marks omitted); *see also Sysco*, 113 F.

Supp. 3d at 80–81 (noting that Defendants "bear the burden of demonstrating the ability of other [entities] to 'fill the competitive void' that will result from the proposed merger"). To establish that entry into the market will resolve the competitive risks of the merger, the entry or expansion must be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern." *Merger Guidelines* § 9. The relevant time frame for "this forward looking exercise is two to three years." *Staples*, 190 F. Supp. at 100; *see also CCC Holdings Inc*., 605 F. Supp. 2d at 59.[23]

"Determining whether there is ease of entry [or expansion] hinges upon an analysis of barriers to new firms entering the market or existing firms expanding into new regions of the market." *CCC Holdings*, 605 F. Supp. 2d at 47. "Barriers to entry are factors, such as regulatory requirements, high capital costs, or technological obstacles that prevent new competition from entering a market." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007); *see also Sysco*, 113 F. Supp. 3d at 80–81. There is no serious question that the barriers to entry in this industry are very high and that overcoming them requires significant capital expenditures, access to spectrum licenses, acquisition of network facilities, and deployment of retail distribution networks. In fact, no new carrier has successfully entered this market in at least the last decade. *See United States v. Visa U.S.A.*, 163 F. Supp. 2d 322, 341–42 (S.D.N.Y. 2001) (considering history of entry in evaluating barriers to entry). Defendants will be unable to show

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[23] To the extent that Defendants attempt to show at trial that resellers of wireless service (MVNOs) or other entities will emerge to replace the competitive intensity lost by Sprint's merger with T-Mobile, the same test applies. As Plaintiff States will show at trial, however, because MVNOs are essentially "resellers" of the wireless operators' (MNOs') network services they are not a true competitive restraint in the retail mobile wireless telecommunications services market. *See* FCC Memorandum Order ¶ 201 ("The Commission typically has seen MVNOs as limited in their ability to constrain the prices of facilities-based service providers because they rely on those facilities-based providers for network access.").

that DISH will be able to overcome these barriers and replace the competitive intensity that will be lost if this merger is approved in a timely, likely or sufficient manner.

First, as T-Mobile itself has repeatedly reminded the FCC, for years, DISH has failed to live up to its regulatory commitments to build a wireless network.[24]

Second, even accepting DISH's optimistic projections, there is no chance that DISH will replace Sprint as a competitor in the next two to three years. Today, Sprint has tens of millions of customers and its network covers 93% of Americans. DISH, by contrast, has no retail wireless customers and no retail wireless network. Though DISH predicts that it will make progress toward closing this gap over the course of the next six years, even DISH does not pretend that it will be able to replace Sprint within the two- to three-year timeframe contemplated in the relevant case law. And [REDACTED] Moreover, DISH has not committed that it will *ever* cover as broad a swath of the U.S. population as Sprint does now. Under the proposed new DISH build-out deadlines, DISH need only cover 20% of Americans by 2022 and at most 75% of Americans by 2025 to retain its spectrum licenses. The prospect that DISH may someday, many years in the future, establish itself as a fourth competitor that is vaguely comparable to the fourth competitor that already exists today is a wholly insufficient defense for an otherwise anticompetitive merger.

Third, significant aspects of this package of remedies require future action by the FCC. For example, DISH currently faces different pre-existing FCC buildout deadlines, and this

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[24] Letter from Nancy J. Victory, Counsel for T-Mobile, to Marlene Dortch, Secretary, Federal Communications Commission at 1 n.3, WT Docket No. 18-197 (Mar. 11, 2019) ("DISH has a track record of … failing to meet FCC-imposed deadlines to construct the facilities required to deliver wireless services to the public.").

package of remedies is contingent on the FCC agreeing to modify those deadlines. Similarly, the network access agreement between DISH and New T-Mobile is not yet executed and depends on further FCC action. Neither Defendants nor this Court can predict with certainty how the FCC will ultimately resolve these issues. Accordingly, Defendants cannot show, at this time, that this package of remedies and related divestitures "will actually occur." *Aetna*, 240 F. Supp. 3d at 60 (noting that "[o]bviously, defendants cannot produce evidence showing that the divestiture would create an effective competitor unless they first produce evidence that the divestiture is likely to occur").[25]

Finally, in order for a divestiture remedy to restore lost competition, divestiture must be to an "independent competitor capable of effective production." *Sysco*, 113 F. Supp. 3d at 77. But unless and until DISH actually builds a nationwide network, it will be dependent on and tied to New T-Mobile's network.

VII. Plaintiff States Are Entitled to an Injunction

If Plaintiff States demonstrate that this merger violates Section 7 because it may substantially lessen competition, the Court should enjoin the merger. "[A] plaintiff seeking a permanent injunction . . . must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

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[25] Additionally, the package of remedies proposes other spectrum divestitures and licenses that the FCC has also yet to approve. FCC Memorandum ¶ 366.

A. Irreparable Injury and Adequate Remedy At Law

Where, as here, a plaintiff can show that a transaction "threatens to reduce competition in the [relevant] market" and thereby impose an "ongoing harm" on consumers, it has satisfied the first two equitable factors. *See New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660–62 (2d Cir. 2015); *see also Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1023 (9th Cir. 2016) ("A lessening of competition constitutes an irreparable injury under our case law.").

B. The Public Interest

In a Clayton Act merger challenge, the public interest analysis must be tethered to the purposes of the Act. "Where a valid law speaks to the proper level of deference to a particular public interest, it controls." *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 946 (9th Cir. 2013); *see also Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 788 (11th Cir. 1984) ("Congressional intent and statutory purpose can be taken as a statement of public interest" when analyzing the propriety of an injunction). Accordingly, when considering the public interest factor, a court's "equitable powers to make an independent assessment of the equities and public interest are circumscribed to the extent Congress has already made such assessments with respect to the type of case before the court." *Sanders v. Mountain Am. Fed. Credit Union*, 689 F.3d 1138, 1144 (10th Cir. 2012) (internal citations and alterations omitted).

"By enacting Section 7, Congress declared that the preservation of competition is always in the public interest." *United States v. Tribune Publ'g Co.*, No. CV 16-01822-AB (PJW), 2016 WL 2989488, at *5 (C.D. Cal. Mar. 18, 2016); *see also Boardman*, 822 F.3d at 1023–24 (holding that where plaintiffs had "demonstrated a reasonable likelihood that Pacific Seafood's acquisition of Ocean Gold could substantially lessen competition in relevant input markets … the district court did not abuse its discretion in finding that a preliminary injunction is in the public

interest”); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) (“[T]he central purpose of the antitrust laws, state and federal, is to preserve competition. It is competition . . . that these statutes recognize as vital to the public interest.”); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000) (“There is a strong public interest in effective enforcement of the antitrust laws . . . . ”).

As such, in analyzing the public interest in this case, the Court must focus on the proposed transaction’s effect on *competition*, and not on “some ultimate reckoning of social or economic debits and credits.” *Philadelphia Nat’l Bank*, 374 U.S. at 371. The issue before this Court is whether the merger between Sprint and T-Mobile poses a significant threat to competition. As Plaintiff States will show at trial, it does.

C. Balance of Hardships

As discussed above, and as Plaintiff States will demonstrate at trial, this merger will likely result in consumers paying higher prices for wireless services than they would without the merger. This harm will have a profound impact on the welfare of Plaintiff States’ residents, millions of whom will be forced to pay higher prices, month after month, year after year, in perpetuity, and will have a particularly acute effect on vulnerable consumers who have benefited from aggressive competition between Sprint and T-Mobile.

By contrast, Defendants will be unable to show any remotely comparable hardship from the blocking of this anticompetitive merger. An injunction will merely require Defendants to continue to compete with each other, which is something they have been doing for years. Moreover, “[h]aving to compete with other firms in the market is what the antitrust laws require, not a cognizable harm.” *New York v. Actavis, PLC*, No. 14 Civ. 7473, 2014 WL 7015198, at *45

(S.D.N.Y. Dec. 11, 2014), *aff'd* 787 F.3d 638 (2d Cir. 2015); 787 F.3d at 662 n.38 ("[C]ourts do not consider the harm a party suffers from being prevented from violating the law.").

Dated: November 26, 2019.

Respectfully submitted,

FOR PLAINTIFF STATE OF NEW YORK:

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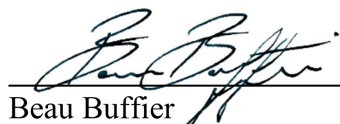
Economic Justice Division
(pro hac vice forthcoming)



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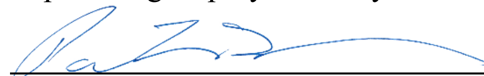

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