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

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| UNITED STATES OF AMERICA,<br>*Plaintiff*,<br>vs.<br>BOOZ ALLEN HAMILTON HOLDING CORPORATION, *et al.*,<br>*Defendants*. | Case No. 1:22-cv-01603-CCB<br><br>**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR EXPEDITED BRIEFING** |

Defendants Booz Allen Hamilton Holding Corp., Booz Allen Hamilton Inc., EverWatch Corp., EC Defense Holdings, LLC, and Analysis, Computing & Engineering Solutions, Inc., hereby respond to the Government's motion for expedited briefing and scheduling of a hearing. For the reasons below, this motion should be denied.

## I. Background

On March 15, 2022, Booz Allen entered into a Stock Purchase Agreement (the "Agreement") to acquire EverWatch (the "Transaction"). The purpose of the Transaction is to combine the complementary skills and assets of the parties so that they can challenge entrenched incumbents across *multiple* government-related opportunities. The Government does not deny that the Transaction will enhance competition in those opportunities or that it will yield procompetitive benefits. Instead, it has focused myopically on a single procurement—the upcoming bid for the National Security Agency's ("NSA") OPTIMAL DECISION ("OD") program.[1]

The Government makes the unprecedented claim that the Agreement itself is an antitrust violation because it allegedly creates psychological incentives for Defendants to compete less vigorously for the fleeting period between the issuance of the forthcoming OD Request for

[1] Indeed, the Government told Defendants' counsel during a recent meet-and-confer that it had no issue with the Transaction other than the OD procurement.

Proposal ("RFP") and its award date. The Government mislabels this isolated concern as harm in a "relevant market." Compl. ¶ 37, ECF No. 1 ("Compl."); Mot. for Prelim. Inj. at 19, ECF No. 29-1 ("PI Mot."). It makes this claim even though Defendants (1) remain separate companies unless and until the Transaction closes, (2) are complying with all the customary rules and laws regarding operating independently pre-closing, and (3) are highly incentivized to compete—separately and aggressively—to win the OD bid.

On July 8, the Government filed a motion for a preliminary injunction ("PI"). PI Mot. Two days later, the Government filed a motion to expedite the briefing schedule and hearing for the PI, which is the motion at issue here (the "Motion"). ECF No. 36 ("Mot."). The Motion asks the Court to require a PI response from Defendants by July 22, a reply from the Government by August 4, and a hearing by August 5. *Id.* The Government's sole basis for this extremely compressed schedule is the claim that Defendants will not compete aggressively for the forthcoming OD procurement because of the Agreement's existence. *See* PI Mot. at 30.

One day before the Government filed its PI motion, however, Defendants discussed the Government's concerns and told the Government they are prepared to take significant additional steps to alleviate any possible concerns, including some reflected in the proposed PI. Ex. A. Unfortunately, the Government abruptly cut off those discussions through its filing. *Id.*

Nevertheless, Defendants have since made clear to the Government that, in addition to all the customary steps merging parties normally undertake to ensure independence pre-closing, Defendants are (1) delaying closing for 90 days (unless the Court rules sooner); (2) ceasing all joint integration activities under the Agreement; (3) continuing to ensure the parties' respective and separate procurement teams do not have access to each other's OD-related information; (4) eliminating access to the "data room"; and (5) committing not to withdraw either of the parties'

separate bids for the forthcoming OD procurement at any time, even after closing. *Id.* In addition, Booz Allen has formally relinquished its contractual right to approve certain EverWatch agreements—a key feature of the Government's PI request.[2] *Id.* These steps more than alleviate any possible competitive concern.

## II. The Court should deny the Motion.

The Court should deny the Motion for three reasons.

***First,*** although Defendants are prepared to move quickly, the Government's proposed schedule is unreasonable and would deny Defendants basic due process. The Government concedes that it will need discovery before the PI hearing. PI Mot. at 35. Defendants understand that the Government will, at a minimum, seek four depositions and request documents from Defendants, including electronically stored information and data.

Of course, Defendants will need discovery too—even more so than the Government. The Government has already begun developing its case through compulsory process in the investigative phase. For example, its PI motion relies on documentary evidence and deposition testimony from third parties. PI Mot. at 6–10. Defendants do not yet have access to the Government's "investigative file."[3] Once turned over, Defendants will need time to review that file, develop their own discovery requests, and then obtain discovery to test, challenge, and impeach the Government's position.

[2] In its PI motion, the Government complains that "Booz Allen has the contractual right to veto any new government contract with EverWatch valued at over $500,000—which would include OPTIMAL DECISION" and argues that this is anticompetitive. PI Mot. at 26. This provision is neither out of the ordinary nor anticompetitive. *See Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 594 F. Supp. 2d 945, 964 (N.D. Ill. 2009) ("The commonly-adopted provision requiring the acquirer's approval of certain transactions therefore cannot provide the basis to conclude that a conspiracy in restraint of trade existed."). Still, in the interest of compromise, Booz Allen has relinquished its relevant rights.

[3] In fact, Defendants just received an unredacted copy of the Complaint yesterday.

Defendants also understand that the Government is contemplating expert testimony. That is not surprising. Economic experts regularly testify on a fundamental issue here: a properly defined, relevant economic market. But exchanging expert affidavits after fact discovery, and then deposing those experts, takes time. There is simply no way that fact and expert discovery can be done within the 24 days between now and the hearing date proposed by the Government (August 5), at least without stacking the deck immensely in the Government's favor. *See* Order, *PPE Casino Resorts Md. LLC v. MGM Resorts Int'l, Inc.*, No. 16-cv-02654 (D. Md. Sept. 15, 2016) (Blake, J.), ECF No. 52 (entering preliminary-injunction scheduling order that set the hearing 165 days out).

***Second***, as the Government's own proposed PI order makes clear, there is no need to have a separate PI hearing and final trial on the merits. As part of the PI process, the Government is asking the Court to resolve two critical legal issues: the relevant market and whether "the Defendants' Merger Agreement substantially reduced their incentives to compete against each other for the" OD procurement. Pl.'s Proposed Order ¶ 1 ECF No. 29-17 (proposed findings within the Government's proposed PI Order). Those are the same issues the Court would need to resolve at trial.

Moreover, the Government incredibly is asking the Court to "abrogate" the parties' Agreement *through the proposed PI*. *Id.* at 2 (proposed order: "IT IS FURTHER ORDRED Defendants' Merger Agreement is abrogated pending resolution following of a full trial on the merits"). Such affirmative relief is not appropriate for a PI as it would not maintain the *status quo* for trial. Rather, if the Court abrogates the Agreement, the Agreement will no longer exist and there will be nothing left to try.

The better, fairer course is to consolidate the PI hearing and trial on the merits. *See* Fed. R. Civ. P. 65(a)(2). "It long has been recognized that an accelerated trial on the merits often is appropriate when a preliminary injunction has been requested." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2950 (3d ed.). And courts have often consolidated the PI hearing with the trial in merger cases like this one. *See, e.g.*, *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 179 (D.D.C. 2001); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 125 (E.D.N.Y. 1997); *United States v. Consolidated Foods Corp.*, 455 F. Supp. 142, 143 (E.D. Pa. 1978); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001) (monopolization case).[4]

Whereas the Government's proposal of an August 5 hearing is unrealistic and unfair, Defendants are submitting to the Government a proposed schedule that would get to a full trial in mid-September 2022. If the Government does not stipulate to it, Defendants will ask this Court to adopt it as part of their forthcoming motion to consolidate the PI hearing and trial on the merits.

***Third***, there is no need to have any hearing before September. The Government insists that "preliminary relief is needed before" Defendants submit bids for the OD contract. PI Mot. at 30. But, by the Government's own admission, those bids are not due until 45 days from NSA's RFP, PI Mot. at 30, which the NSA has not yet issued. Although the Government vaguely claims that the NSA will issue the RFP "imminently," it refuses to provide a date. Mot. at 2. And, considering that the Government has been describing the RFP as "imminent" for nearly three weeks now, *see* Compl. ¶ 29 (June 29, 2022), that generic characterization has lost any potency.[5] At bottom, the

[4] "Generally, the DOJ agrees with the parties to combine (or consolidate) proceedings for both a preliminary injunction and a permanent injunction." Report & Recommendations at 138–39, Antitrust Modernization Comm'n (Apr. 2007), *available at* https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[5] Not to mention, the Government has been inconsistent. *Compare* Compl. ¶ 3 ("[O]n March 15, 2022, just *a few months* before NSA was scheduled to release [the RFP]." (emphasis added)) *with id.* ¶ 14 ("On March 15, 2022, *only weeks* before NSA planned to release an RFP." (emphasis added)).

bids may not be offered for some time, and the Government has offered no concrete reason why the PI process must be put on the extraordinary timeframe it proposes.

Moreover, as described above, Defendants have already undertaken additional steps (beyond the customary steps parties take to ensure independence pre-closing) to address any reasonable concern related to competition for the one-time, OD-procurement bidding event. These steps include delaying closing for 90 days,[6] pausing integration activity under the Agreement, ensuring against information exchange, and committing not to withdraw bids the parties separately submit. These additional steps, which mirror several of the requests in the Government's proposed PI order, belie the Government's false sense of urgency.

## III. Conclusion

The Government asks the Court to order the parties to take fact and expert discovery, brief various legal and factual issues, and then have a hearing that will effectively resolve this case in 24 days. That is impossible and unfair to Defendants, who have yet to even receive the Government's investigative file giving rise to this action. The Court should deny the Government's Motion.

*/s/ Todd M. Stenerson*

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[6] *See Nat'l Credit Reporting Ass'n, Inc. v. Equifax, Inc.*, No., 08-cv-2322, 2008 WL 4457781, at *2 (D. Md. Sept. 30, 2008) (denying preliminary injunctive relief in an antitrust merger case in part because the defendant had agreed to suspend the challenged agreement's implementation for 90 days).

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 12, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and served one copy, by ECF to counsel of record in this matter.

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