UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO EXPEDITED BRIEFING AND SCHEDULING

Defendants' request to consolidate Plaintiff's preliminary injunction hearing with a full trial on the merits should be denied. Defendants' proposal mischaracterizes the facts, prejudices the United States, will not result in efficiencies warranting consolidation, and relies on irrelevant precedents. For the reasons below, the Court should adopt Plaintiff's proposed schedule for expedited briefing and schedule only a preliminary injunction hearing at this stage.

I. Background

On June 29, 2022, the United States filed a complaint against Defendants alleging that their proposed merger violates Section 7 of the Clayton Act and the Merger Agreement violates Section 1 of the Sherman Act. As alleged in the Complaint, the proposed merger violates Section 7 of the Clayton Act because it would eliminate Booz Allen's only competition for NSA's OPTIMAL DECISION contract, *and* it would result in Booz Allen controlling 100 percent of the market for signals intelligence modeling and simulation services under the OPTIMAL DECISION contract, as well as eliminate significant future head-to-head competition between Booz Allen and EverWatch. Complaint ¶ 48, 62. In addition, Defendants' Merger Agreement

violates Section 1 of the Sherman Act because it is currently and already unreasonably has restrained competition by reducing Defendants' incentive to compete vigorously for the OPTIMAL DECISION contract—and it will continue to do so until relief is granted. Accordingly, on July 8, 2022, the United States filed a motion for a preliminary injunction to mitigate the immediate and ongoing anticompetitive harm stemming from the Merger Agreement. ECF No. 29. The only way to restore and maintain competition for the forthcoming OPTIMAL DECISION contract—lost once Defendants signed the Merger Agreement—is an expedited preliminary injunction schedule and hearing. But the format of that hearing should not prejudice the United States' ability to separately and fully pursue its case to block Defendants' anticompetitive Merger Agreement and merger. Defendants' efforts to force unreasonably rushed discovery for a full trial on the merits in September on either or both claims are impractical and would unfairly deprive the United States of its ability to discover relevant evidence in support of its merger case. Because the procedural schedule, associated discovery, and proposed relief under either hearing format are separate and distinct, the Court should not consolidate a preliminary injunction hearing with a full trial on the merits.

II. The Court Should Adopt Plaintiff's Schedule for a Preliminary Injunction Hearing

A. An expedited and consolidated September trial on the merits is impractical and would prejudice the United States.

The Court should grant Plaintiff's request for a hearing on its motion for a preliminary injunction at this stage, with a separate trial on the merits to be scheduled at a later date. Defendants' Merger Agreement creates ongoing, irreparable harm to competition for OPTIMAL DECISION. A preliminary injunction mitigates this injury and provides more time for both parties to conduct full discovery on the parties' claims and defenses that would be required for a

trial on the merits.

Preliminary relief would immediately and substantially mitigate much of the ongoing, irreparable harm to competition for OPTIMAL DECISION created by Defendants' Merger Agreement. The competitive harm is happening now, and the United States cannot wait until the end of full-blown discovery and a trial on the merits to prevent it. That is why preliminary injunctions are permitted – to prevent injury pending a full trial on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). A preliminary injunction stops the injury now and allows for a full trial to proceed at a later date.[1]

Instead, Defendants propose to rush discovery for a full trial on the merits in September. Defendants' proposal for an expedited and consolidated trial is not practical and would prejudice the United States. The immediate threat to competition posed by Defendants' Merger Agreement forced the United States to move quickly and file its complaint and motion for a preliminary injunction on a Section 1 claim. Due in part to that filing, Defendants *have not produced a single document* in response to the DOJ's Second Request to the parties, depriving the United States of key documents pertinent to its claims that Defendants' Merger Agreement violates Section 1 of the Sherman Act and the resulting merger would violate Section 7 of the Clayton Act. While the United States is prepared to proceed to a preliminary injunction hearing with very little

[1] *See, e.g., In re Sanctuary Belize Litig.*, 482 F. Supp. 3d 373, 388 (D. Md. 2020) ("From March 11, 2019 to March 22, 2019, the Court held an extensive evidentiary hearing on the FTC's request for a Preliminary Injunction and, on August 2, 2019, issued a Preliminary Injunction []. From January 21, 2020 to February 12, 2020, the Court held a bench trial on the FTC's request for a Permanent Injunction and other relief including restitution, and on the FTC's three contempt motions (the "Merits trial").").

additional discovery,[2] proceeding to a full trial on the merits would require the production of hundreds of thousands of documents and involve dozens of third parties, as described below.

The preliminary injunction hearing, which applies different evidentiary standards than a full trial on the merits (and requires far less discovery), can be conducted in as little as one to two days. By contrast, discovery and trial preparation in antitrust cases—even Section 7 merger cases on an expedited timeline—typically takes several months.[3] Even this length of time does not consider the fact that the United States has received essentially no pre-complaint document production from Defendants—unlike in most merger challenges brought by the United States—meaning that these time periods are a floor for how long such discovery will take, not a ceiling. A multi-month discovery period in necessary to allow the parties to conduct full party and non-party discovery, expert discovery, and prepare for trial.

The discovery necessary for a full trial on the merits of both claims will be far greater than what is needed to establish irreparable harm arising from the Merger Agreement at a preliminary injunction hearing. The United States anticipates that extensive and expedited non-party discovery will be necessary for a full trial. For instance, Defendants have suggested that there may be dozens of third-parties relevant to the United States's challenge of Defendants' merger. *See* EverWatch's Memorandum In Support of Emergency Motion for Protective Order,

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[2] Recognizing the preliminary nature of such a hearing, the United States has proposed limiting discovery to five requests for production, seven depositions, and two expert affidavits per side.

[3] *See., e.g.*, Docket, *United States of America v. Visa Inc.*, No. 4:20CV07810 (N.D. Cal. 2021) at Entries 1, 64 (235 days from complaint to trial); Docket, *United States of America v. United Health Group Inc.*, No. 1:22CV00481 (D.D.C. 2022) at Entry 1 and Minute Order dated 3/17/2022 (158 days from complaint to trial); Docket, *United States of America v. Quad Graphics, Inc.*, No. 1:19CV04153 (N.D. Ill. 2019) at Entries 1, 44 (147 days from complaint to trial).

ECF No. 39-1 at 3-4.[4] The United States will also need to take discovery from many of Defendants' teaming partners to demonstrate that these partners and Defendants know they will be the only competitors for OPTIMAL DECISION.[5] If the consolidated trial were to take place in September, the parties would thus have less than two months to seek, obtain, and bring any disputes to the Court for discovery from potentially dozens of non-parties.

Furthermore, there are likely to be numerous privilege and other discovery disputes that may require relief from the Court. For instance, before a full trial on the merits, the United States will seek relevant discovery as to Defendants' claim that, because there is no guarantee that the transaction will close, both companies remain incentivized to compete aggressively and have abided by their obligations to remain separate and independent competitors and companies (and will continue to do so in the future). *See* Booz Allen and EverWatch Submission to DOJ dated June 24, 2022 at 4. The United States will similarly seek discovery into other actions by Defendants that may constitute "actual detrimental effects" within the meaning of Section 1 of the Sherman Act. *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986).

Accordingly, discovery for a consolidated trial on the merits will likely require dozens of party and third party depositions and document requests that would not be needed for the preliminary injunction hearing.[6] Similarly, a consolidated trial may require numerous expert

[4] While the United States disagrees with these numbers, it is relevant to Defendants' perception as to the scope of third-party discovery. Notably, none of this discovery is necessary for the preliminary injunction hearing.

[5] Booz Allen and EverWatch each have a long list of teaming partners for OPTIMAL DECISION, including 47 teaming partners in total. *See* Email from A. Reeves to K. Quin dated June 8, 2022 (listing EverWatch's team partners); Email from N. Armstrong to K. Quin dated June 8, 2022 (listing Booz Allen's team partners).

[6] The United States has submitted they anticipate only four party depositions for the preliminary injunction hearing and minimal document requests. PI Mot. at 35.

reports—much more than the two affidavits currently contemplated for a preliminary injunction hearing—and discovery to focus on the anticompetitive effects of the merger and the Merger Agreement.[7] Forcing the United States to go to trial in September with extremely limited discovery is not practical and would unfairly stack the deck in Defendants' favor. The Defendants' decision to execute a Merger Agreement on the eve of the OPTIMAL DECISION RFP should not allow Defendants to hamstring the United States' ability to fully assess the impact of the merger and enjoin a violation of the antitrust laws.

B. The relief sought now is separate and unique.

Defendants' argument that there is no need to have a separate trial on the merits because the United States is seeking to "abrogate" the Merger Agreement is misplaced. Plaintiff's request for a preliminary injunction merely seeks a temporary suspension or setting aside of the Merger Agreement during the pendency of the litigation to ensure that separate, competitive bids are submitted for the OPTIMAL DECISION contract.[8] In other words, Plaintiff seeks a temporary separation, not a divorce. If the preliminary injunction is granted, and Defendants subsequently prevail following a full trial on the merits, the Merger Agreement can return into force.

The United States' request for a preliminary injunction will help ensure that Booz Allen and EverWatch remain separate competitive entities with independent economic incentives to

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[7] Because the legal standard and proposed relief at a preliminary injunction hearing is fundamentally different from a full trial on the merits, any expert reports and related discovery will naturally differ as well.

[8] *See Authenticom, Inc. v. CDK Glob., LLC*, 874 F.3d 1019, 1026 (7th Cir. 2017) ("The proper remedy for a section 1 violation based on an agreement to restrain trade is to set the offending agreement aside. From the standpoint of preliminary injunctive relief, that would mean ordering [defendants] not to implement their . . . agreements. . ."); *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945) ("A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.").

place competitive bids for the upcoming contract. Any relief that does not preserve the incentive to bid on OPTIMAL DECISION independently risks guaranteeing the very harm that the United States seeks to avoid in this matter.

In determining whether a preliminary injunction is warranted on Plaintiff's Sherman Act claim, the Court need only to determine whether that (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; (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). By contrast, a trial on the merits is much broader, as it will seek to determine whether Booz Allen's acquisition of EverWatch violates both Section 1 of the Sherman Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits mergers that are likely to substantially lessen competition or "tend to create a monopoly."

Defendants' cited cases in support of consolidation and an expedited full trial on the merits are irrelevant and misplaced. Defendants first rely on *United States v. Sungard Data Sys., Inc.*, a case in which the parties jointly agreed to consolidate plaintiff's motion for a preliminary injunction and its request for permanent injunctive relief, and to have a trial on the merits with an "expedited" discovery and briefing schedule under which "defendants answered the complaint five days after it was filed, all parties provided the reports of their experts one week after the filing of the complaint, fact discovery closed eleven days after the suit was instituted, and proposed findings of fact and conclusions of law were filed just two weeks after the filing of the complaint."[9] Defendants propose no such schedule here. As of this filing, Booz Allen and EverWatch oppose Plaintiff's expedited briefing and scheduling, have not responded to

[9] 172 F. Supp. 2d 172, 178–80 (D.D.C. 2001).

Plaintiff's motion for preliminary injunction, and have not answered the complaint. Discussing the *Sungard* schedule, Judge Huvelle later commented that it was a "backbreaking experience for everybody concerned" and noted:

> "Both parties agreed to that schedule. They asked for it. They wanted it. They moved together. And the Court brought into that schedule and committed itself to meeting the deadlines but it was certainly not something that anyone would consider the ordinary or desirable way for judicial proceeding to proceed."[10]

Defendants' other cited cases fare no better.[11] Here, the United States is seeking a one to two-day preliminary injunction hearing with minimal discovery. *See* PI Motion, ECF No. 29 at 35.

C. Defendants' proposed temporary relief is inadequate to preserve competition.

Defendants' proposed temporary relief fails to preserve competition and remedy the immediate ongoing harm caused by their anticompetitive Merger Agreement for three reasons: (i) Defendants' offered commitments[12] do not restore the harm caused by the Merger Agreement – indeed, Defendants make no argument in their letter or accompanying brief that the selected provisions would affect *incentives at all;* (ii) Defendants' offered commitments do not address the core concern of the United States and instead reflect a scattershot approach that only addresses cherry-picked portions of the Merger Agreement; and (iii) Defendants' offered commitments do not carry the force of law.

As explained in Plaintiff's motion for a preliminary injunction, the Defendants' Merger

[10] *United States of America, et al. v. Echostar Communications Corp., et al.*, Civil Action No. 02-2138 (D.D.C.), Nov. 11, 2002 Hr'g Tr. at 54.

[11] *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 125 (E.D.N.Y. 1997) (parties consented to consolidation); *United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001) (monopolization case and hearing that followed years of litigation).

[12] On July 12, Defendants provided a letter to the United States claiming that they "have already taken a number of additional steps" to alleviate Plaintiff's concerns.

Agreement has reduced the incentive for Booz Allen and EverWatch to bid competitively for OPTIMAL DECISION because no matter which company wins, the contract would ultimately be held by the combined company. PI Motion, ECF No. 29 at 11. Defendants' offered commitments do not remedy that harm. Indeed, Defendants' offered commitments fundamentally misunderstand the allegations in the complaint and the motion for a preliminary injunction. The United States alleges the *entire* Merger Agreement, taken as a whole, has reduced the incentives of Booz Allen and EverWatch to compete. The best interim remedy for that harm is to suspend or set aside the *entire* anticompetitive agreement pending trial.

Despite the fact that the *entire* Merger Agreement is what has harmed competition, Defendants propose that their offer to suspend a cherry-picked list of provisions is sufficient to preserve competition until a trial. It is not. Defendants have offered no justification for the provisions they selected nor have they explained how any of their commitments would impact competition. Instead, Defendants' approach would leave the Court to go line-by-line in an effort to determine how each and every provision will impact the incentives of the Booz Allen and EverWatch bidding teams. Thus, Defendants' offered commitments not only fail to remedy the significant harm to competition caused by the Merger Agreement, but also create unnecessary burden on the Court.

Finally, even if Defendants' proposal could remedy the competitive harm from the Merger Agreement (which it cannot) it is not legally binding. Although the Defendants may be taking the listed measures today, they are free to take different action tomorrow. An Order from this Court is the only guarantee that a specific action will be taken or not taken. Plaintiff seeks not only potentially fleeting promises from Defendants but a *Court-ordered* temporary

abrogation of the Merger Agreement.[13]

Thus, the Defendants' non-binding commitments of July 12 are inadequate to restore competition, unnecessarily complicate the issues before the Court by requiring a provision-by-provision review of the Merger Agreement, and could be changed freely by the Defendants absent an order from this Court.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court order Defendants to file any response to Plaintiff's Motion for Preliminary Injunction on or before Friday, July 22, 2022; require Plaintiff to file any reply on or before Friday, August 5, 2022; and schedule a hearing on Plaintiff's Motion for a Preliminary Injunction no later than Friday, September 16, 2022, with a trial on the merits to be scheduled separately at a later date.[14]

[13] While the United States's prayer for relief requests "abrogation of the Merger Agreement" the United States intended this language to mean a temporary suspension of the merger agreement, and therefore qualified the abrogation language by including "pending resolution following a full trial on the merits." PI Motion at 31.

[14] Changes in Plaintiff's request in this filing from its original motion reflect the allowance of reply memoranda within 14 days under the local rules and the Court's preference for a hearing date in September.

Dated this 15th day of July, 2022.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022, I electronically filed the foregoing Plaintiff's Reply Memorandum to Defendants' Opposition to Expedited Briefing and Scheduling, and served, via electronic filing, counsel of record for all parties.

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