**UNITED STATES DISTRICT COURT**
**DISTRICT OF MARYLAND**

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

**MEMORANDUM OF THE UNITED STATES IN SUPPORT OF MOTION FOR A FOURTEEN (14)-DAY INJUNCTION PURSUANT TO RULE 62 OF THE FEDERAL RULES OF CIVIL PROCEDURE**

This case concerns Defendants' looming merger that threatens to eliminate competition for a multi-year, $150 million national security contract for the National Security Agency (NSA) known as OPTIMAL DECISION. In its October 11, 2022 Memorandum and Order denying the United States' motion for preliminary injunction, the Court found that, for this important national security contract, "it is likely only Booz Allen and EverWatch will submit a bid." ECF 223, at 5, 21 n.31; *see also id.* at 10 n.5. This is a critical factual finding: Defendants are the only likely rivals in a relevant market for a unique contract.

That factual finding raises at least two substantial legal questions that could warrant the Court of Appeals' review: Whether it is proper to define a market around a substantial government contract, *see Brown Shoe Co. v. United States*, 370 U.S. 294, 325(1962) (allowing submarkets to be defined around "distinct customers"), and whether the likely elimination of all competition in this market gives rise to a presumption of anticompetitive effect, *see United States v. First Nat. Bank & Tr. Co. of Lexington*, 376 U.S. 665, 666, 672 (1964) ("Where, as here, the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act."). The decision also raises a third substantial question: whether irreparable harm should be presumed in a government antitrust enforcement action.

The United States therefore respectfully submits that the Court's denial of a preliminary injunction raises serious, substantial legal issues that may warrant review by the Court of Appeals. Accordingly, the United States moves pursuant to Rule 62(d), Fed. R. Civ. P., for (i) a 14-day injunction to permit the United States to evaluate whether to pursue an appeal and, if

so, to obtain the requisite authorization from the Solicitor General,[1] and (ii) if the United States pursues an appeal, an injunction pending appeal. If the merger closes before resolution of this motion, the United States requests an order directing Defendants to hold all assets separate. Absent temporary relief, Defendants could close their deal imminently,[2] increasing the risk of harm and difficulty of restoring competition if the United States decides to appeal.

## ARGUMENT

Although "[d]ifferent Rules of Procedure govern the powers of district courts and courts of appeals to start an order of appeal," the Supreme Court has made clear that "the factors regulating the issuance of the stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Par Pharms., Inc. v. TWi Pharms, Inc.*, 2014 WL 3956024, *6 (D. Md. Aug. 12, 2014) (Blake, J.) (granting injunction pending appeal).[3]

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[1] Only the Solicitor General can authorize a government appeal in this matter, 28 C.F.R. § 0.20(b).

[2] Counsel for the United States asked Defendants for their closing timing several times earlier this week, and also notified Defendants of the likelihood of this motion. On October 13, Defendants told the United States that they are "working towards closing," and earlier today said Defendants would be closing "imminently."

[3] Although Rule 62(d) provides that a court may grant an injunction "[w]hile an appeal is pending," the rule "permits the issuance of an injunction whenever there is reason to believe that an appeal will be taken, even before the actual notice of appeal has been filed," *Common Cause v. Judicial Ethics Comm.*, 473 F. Supp. 1251, 1254 (D.D.C. 1979); *see also Ctr. Int'l Envtl. Law v. Office U.S. Trade Representative*, 240 F. Supp. 2d 21, 24 (D.D.C. 2003) (granting injunction pending appeal before notice of appeal filed).

This Court's determination that a preliminary injunction pending a full trial on the merits is unwarranted, however, does not mean that a 14-day injunction is inappropriate. *See Goldstein v. Miller*, 488 F. Supp. 156 (D. Md. 1980) (granting plaintiff's motion for injunction pending appeal despite having denied injunctive relief and entered judgment for defendants), *aff'd*, 649 F.2d 863 (4th Cir. 1981); *cf. Par Pharms., Inc., supra* (granting plaintiff's motion for injunction pending appeal despite having found plaintiff's patent invalid); *Dairy King, Inc v. Kraft, Inc.*, 665 F. Supp. 1181, 1189 (D. Md. 1987) (granting defendant's motion for stay pending appeal after having ordered injunctive relief against defendant).[4]

**A. The United States Is Likely To Succeed On the Merits.**

"The likelihood-of-success standard does not mean that the trial court needs to change its mind or develop serious doubts concerning the correctness of its decision in order to grant a stay pending appeal." *Goldstein*, 488 F. Supp. at 172. In this context, where we are asking for a brief, administrative injunction to preserve competition while the Government considers appeal, a "likelihood of success" need not mean more likely than not. *See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1077 (D.C. Cir. 1981) ("A temporary restraint pending an application to this court would have provided the breathing space warranted under the circumstances without implying that the district judge was insecure about the judgment he had made."); *cf. In re Revel AC*, 802 F.3d 558, 571 (3d Cir. 2015) ("better than negligible but not greater than 50%"). "To

[4] *See also Butamax Advanced Biofuels LLC v. Gevo, Inc.*, 2012 WL 2675232, *1 (D. Del. Jul. 6, 2012) (granting motion for injunction pending appeal after denying plaintiff's motion for preliminary injunction); *Chamber of Commerce of the U.S. v. Reich*, 897 F. Supp. 570, 584-85 (D.D.C. 1995) (granting injunction pending appeal despite having denied injunctive relief on the merits), *rev'd on other grounds*, 74 F.3d 1322 (D.C. Cir. 1996); *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1077 (D.C. Cir. 1981) ("temporary restraint . . . would have provided the breathing space warranted under the circumstances without implying that the district judge was insecure about the judgment he had made").

succeed, [plaintiff] thus does not need to demonstrate that it will certainly win on appeal or that there is a mathematical probability of success. … At a minimum, it must demonstrate a substantial case." *Par Pharms.*, 2014 WL 3956024, at *2 (Blake, J.); *see also id*. ("Although the court stands by its judgment, it recognizes that the case presents a close call."); *cf. Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (on motion for preliminary injunction, "plaintiffs need not show a certainty of success").

Moreover, legal issues that will be reviewed de novo on appeal weigh in favor of an injunction pending appeal. *See Par Pharms, supra*; *U.S. Home Corp. v. Settlers Crossing, LL***C**, - 2015 WL 3973071, *6 (D. Md. June 29, 2015). In this case, the United States respectfully submits that the Court's denial of the preliminary injunction raises at least two serious questions of law that may warrant review by the Court of Appeals. First, the Court should have applied the structural presumption set forth in longstanding Supreme Court precedent and held the merger unlawful. *See United States v. First Nat. Bank & Tr. Co. of Lexington*, 376 U.S. 665, 666, 672 (1964). Second, the Court should have concluded that the merger agreement creates an anticompetitive effect as a matter of law on the basis of the inherent loss of competition from combining what it acknowledged will be the only two likely rivals for the contract. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 461-62 (2009). The decision also raises the question of whether the Court should have applied a presumption of irreparable harm in this antitrust enforcement brought by the United States.

### *1. The Court's Legal Determination on Market Definition Is Inconsistent With Its Factual Findings.*

The Court found that "Booz Allen viewed EverWatch as its main competitor for OPTIMAL DECISION," and that "it is likely only Booz Allen and EverWatch will submit a bid." ECF 223, at 5, 21 n.31; *see also id.* at 10 n.5. Despite these critical factual findings, the

Court rejected the United States' definition of the relevant market as limited to that competition and in doing so erred in applying the law on market definition.[5]

The Court's factual finding that there are only two likely bidders (and necessarily, that the merger would reduce that competition) is legally significant. The whole purpose of market definition is to identify an arena of competition in which anticompetitive harm is threatened. *See Brown Shoe*, 370 U.S. at 320-21 (market definition about identifying "locus of competition" in which anticompetitive effects of merger to be evaluated). Accordingly, market definition is a tool to understanding anticompetitive effects, not an end in itself. *See Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988) ("Defining the market is not the aim of antitrust law; it merely aids the search for competitive injury."). The Court's finding that likely competition for OPTIMAL DECISION will be reduced from two bidders to one is enough to indicate, in the special context of this case where the entire government (through NSA) obtains SIGINT modeling and simulation services in one contract, that this bid is the locus of actual competition in which competition will be reduced. That is enough to justify the market the United States proposed. Requiring more only serves to obscure rather than illuminate competition and competitive effects. *See United States v. Continental Can Co.*, 378 U.S. 441, 453 (1964) (market definition should "not . . . be used to obscure competition but to 'recognize competition where, in fact, competition exists.") (quoting *Brown Shoe*, 370 U.S. at 326); *see also Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611 (1953) (no requirement to define market "by

[5] The Court's market definition analysis primarily relies on the defense expert's comments that other modeling and simulation government contracts exist—even though the defense expert did not render an opinion on market definition and did not have any actual knowledge of those other government contracts. Sept. 16 p.m. Hr'g Tr. at 68:6-9; 71:17-21. In any event, whether other IT providers could in theory provide services required by the NSA is beside the point, given the factual finding that there are only two likely bidders for the OPTIMAL DECISION services.

metes and bounds"); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 193 (D.D.C. 2017) (same); *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 202 (D.D.C. 2018) ("The Supreme Court has wisely recognized there is 'some artificiality' in any boundaries, but that 'such fuzziness' is inherent in bounding any market.") (citations omitted).

Relatedly, the Court reasoned that "[a]dding qualifiers like "signals intelligence" to whittle a relevant market down to a *single contract* gives too much weight to one customer's preference." ECF 223, at 20. Although it is true that "[a]ntitrust law generally does not cater to the preferences of a single consumer," ECF 223, at 22-24, the Fourth Circuit has already recognized that markets may be defined around specific customer groups, *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 444 (4th Cir. 2011), including where those customers may be targeted with price discrimination, *id.* at 447-48.[6] Indeed, the Supreme Court has recognized "distinct customers" as a factor justifying a relevant submarket. *Brown Shoe*, 370 U.S. at 325. And, particularly in the government-contract context, courts have recognized that particular needs, and particular competitions for those needs, justify defining markets around the competitions for such government contracts. *See, e.g.*, *Grumman Corp. v. LTV Corp.*, 527 F. Supp. 86, 89-90 (E.D.N.Y. 1981) (granting preliminary injunction enjoining merger and recognizing relevant market for "carrier-based aircraft sold to the United States Navy," and

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[6] *Queen City Pizza, Inc. v. Domino's Pizza, Inc.* does not involve a government contract; there, the plaintiff alleged a "single brand" market for Domino's pizza ingredients. 124 F.3d 430, 438 (3d Cir. 1997). Likewise, *Global Disc. Travel Servs., LLC v. Trans World Airlines, Inc.* was a "single brand" product case. 960 F. Supp. 701, 705 (S.D.N.Y. 1997). Here, there was no question as to whether a "single brand" could constitute a relevant market; there are two "brands" in this market—Booz Allen and EverWatch.

*City of New York v. Grp. Health Inc.* is also inapposite. That case involved the city's purchase of health insurance plans—which the judge had previously noted that the health insurance products at issue there were "same, whether they're offered to the City or they're offered to a private large employer." 2010 WL 2132246, at *6 (S.D.N.Y. May 11, 2010).

noting that the "most significant" fact for defining that market was the *Navy's* own perception of "competent producers" for carrier-based aircraft), *aff'd*, 665 F.2d 10 (2d Cir. 1981); *see also Tower Air, Inc. v. Fed. Exp. Corp.*, 956 F. Supp. 270, 281 (E.D.N.Y. 1996); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1055 (9th Cir. 1983).

### 2. *The Likely Reduction of Competition Is Itself an Adverse Effect or Warrants a Presumption of Adverse Effects.*

This Court's findings that Booz Allen viewed EverWatch as its main competitor and that the Defendants are the only likely bidders also lead to only one conclusion on competitive effects: that the merger, if allowed to close, will likely reduce competition for the OPTIMAL DECISION contract. *See* ECF 223, at 5, 21 n.31; *id.* at 10 n.5. That finding alone—the likely elimination of competition for an approximately $150 million governmental procurement—is sufficient evidence of likely substantial adverse effects. It thwarts NSA's belief that its interests—and the American public's—were best served by a competitive-bidding process with separate and independent bidders. *Cf. FTC v. Fed'n of Dentists*, 476 U.S. 447, 461-62 (2009) ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price- setting mechanism of the market that it may be condemned *even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence*.") (emphasis added); *Nat'l Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 691 (1978) ("[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.").

Courts have long recognized that a substantial combined market share creates a *presumption* of illegality. *See United States v. First Nat. Bank & Tr. Co. of Lexington*, 376 U.S.

665, 666, 672 (1964) ("Where, as here, the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act."); *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1282–83 (7th Cir. 1990) (proposed merger violated Section 1 where combined market between 64-72% created a "presumption of illegality"); *United States v. Visa USA, Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) (market power is the "power to control prices or exclude competition," and it "may be presumed if the defendant controls a large enough share of the relevant market"); *Jien v. Perdue Farms, Inc.*, 19-cv-2521 (SAG), 2020 WL 5544183, *12 (D. Md. Sept. 16, 2020) (allegations that defendants and co-conspirators controlled "more than 90% of the poultry processing jobs in the United States . . . is on its face a large enough market share to plausibly suggest that they could have suppressed compensation in the relevant market"). The Court's decision here did not address this legal presumption.

This Court was not persuaded that the Defendants would act on their merger-created incentives to raise prices and/or reduce quality. But it is the merger's significant enhancement of market power (in this case eliminating the only likely competitor, as the Court found), not what might be accomplished with that power, that represents the substantial adverse effect on the competitive process. *See United States v. Union Pac. R.R. Co.*, 226 U.S. 61, 88 (1912) ("Nor does it make any difference that rates for the time being may not be raised . . . It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act."); *N. Sec. Co. v. United States*, 193 U.S. 197, 327–28 (1904) ("The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect").

Moreover, the law is clear that courts should not disregard the implications of structural evidence (a substantial combined market share) on the basis of contrary evidence that is subject to the defendants' manipulation, such as their executives' hearing testimony about continuing business as usual after the merger agreement, that no anticompetitive actions were taken, and their firm and individual reputational interests. ECF 223 at 11, 13-14. *See, e.g.*, *FTC v. Consol. Foods Corp.*, 380 U.S. 592, 598 (1965) (if "post-acquisition evidence were given conclusive weight or allowed to override all probabilities, then acquisitions would go forward willy-nilly").[7]

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[7] *See also Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) (FTC properly disregarded evidence of improvement in competition that occurred "after the Commission began investigating Hospital Corporation's acquisition of Hospital Affiliates"); *Chicago Bridge & Iron Co. v. F.T.C.*, 534 F.3d 410 (5th Cir. 2008) ("If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a [Section 7 case], violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." (quoting *United States v. General Dynamics*, 415 U.S. 486, 504-05 (1974)); *id.* (noting that the defendant could "refuse to bid or negotiate with draconian terms in the immediate aftermath of the acquisition so as to permit entrants to win a few bids so as to bolster the market's appearance of competitiveness").

That these cases may concern a firm's actions post-merger, rather than after a merger was agreed to but before it was consummated, as is the case here,

> is a distinction without a difference. These cases embody the common-sense proposition that a firm's behavior undertaken with the aim of persuading a court or the government regarding the legality of a merger may not be predictive of how that firm will behave once the court or the government are no longer engaged. This holds true whether the actions in question are after the merger was announced or after it was consummated.

*United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 79–80 (D.D.C. 2017).

### 3. *The United States Is Entitled to a Presumption of Irreparable Harm In This Case.*

The United States is entitled to a presumption of irreparable harm in this case. Both the Sherman Act and the Clayton Act make clear that "the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." 15 U.S.C. § 4; 15 U.S.C. § 25. Although the Fourth Circuit has not yet squarely addressed the legal question of whether irreparable harm is presumed in antitrust cases brought by the United States, other courts have considered this question and concluded that it is. *See, e.g.*, *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) ("[O]nce the Government demonstrates a reasonable probability that § 7 has been violated, irreparable harm to the public should be presumed.") (citations omitted); *United States v. Ingersoll-Rand Co.,* 320 F.2d 509, 524 (3d Cir. 1963) (when moving for a preliminary injunction, "the United States is not required to prove public detriment from a merger which would violate the provisions of Section 7"), *disapproved on other grounds by United States v. FMC Corp.*, 84 S. Ct. 4 (1963) (Goldberg, J., in chambers).[8]

A presumption of irreparable harm follows from the general proposition that the government suffers irreparable injury when it is enjoined from "effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted); *accord, e.g.*, *Dist. 4 Lodge of the Int'l Ass'n of*

[8] *Accord United States v. Kasz Enterprises, Inc.*, 855 F. Supp. 534, 543 (D.R.I. 1994) ("when seeking a preliminary injunction, the government need not show that irreparable injury will result in the absence of injunctive relief; such injury is to be presumed."); *United States v. Trib. Publ'g Co.*, 2016 WL 2989488, *5 (C.D. Cal. Mar. 18, 2016) (same); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1429 (W.D. Mich. 1989) (same); *see also FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1214 (9th Cir. 2019) (Ninth Circuit precedent "eliminating the traditional showing of irreparable harm in cases of statutory enforcement, where the applicable statute authorizes injunctive relief, remains intact").

*Machinists & Aerospace Workers Loc. Lodge 207 v. Raimondo*, 18 F.4th 38, 47 (1st Cir. 2021); *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020); *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam); *see also California v. American Stores Co.*, 495 U.S. 271, 295-96 (1990) ("In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief."). Presuming such harm is especially appropriate in this case because the antitrust laws "rest[] on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *see also Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. Antitrust violations interfere with these competitive forces and suppress their benefits.

We believe this would be a question of first impression in the Fourth Circuit.

**B. Absent Injunctive Relief, the United States will be Irreparably Injured.**

The United States will be irreparably harmed absent a temporary injunction. Defendants could consummate their transaction immediately. Most serious, if the transaction closes while the United States considers an appeal, or during an appeal, NSA would likely lose out on certain benefits of competition between Defendants for the OPTIMAL DECISION bid. Consummation of the transaction also would enable Booz Allen immediately to learn EverWatch's competitively-sensitive information; once this information is shared, it cannot be unlearned.[9]

[9] Defendants' July 12 letter (ECF 49-1) committed them not to take certain merger-related actions before October 9, but those commitments appear to be subject to the condition that the Court has not yet denied the United States' request for a preliminary injunction. On October 5, Defendants committed to extend this period to October 14, but reserved the right to close "without delay" if the Court denied the request for a preliminary injunction.

Moreover, if Defendants consummate the transaction, the only remaining remedy available to the United States would entail an untangling of the merged entities—an unscrambling of the eggs. But, as many courts have recognized, unwinding a merger to restore competition can be extremely difficult. *See, e.g.*, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 352-53 (3d Cir. 2016) ("since it is extraordinarily difficult to unscramble the egg, it will be too late to preserve competition if no . . . injunction has issued"); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 904 (7th Cir. 1989); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508-09 (D.C. Cir. 1986); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984).[10]

**C. A 14-Day Injunction Will Not Cause Substantial Injury.**

Given that Booz Allen and EverWatch began discussing their potential merger nearly one year ago, an additional 14-day delay now will not substantially harm Defendants. An injunction merely would maintain the status quo, and Defendants would continue to operate as separate businesses as they have done for several years. "If the merger makes economic sense now, [Defendants] have offered no reason why it would not do so later." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). If the United States decides to appeal, it is amenable to an expedited briefing schedule that would mitigate any putative harm to Defendants.

The Court's Memorandum seemed to give significant weight to the Defendants' interest in merging and EverWatch employees' concerns about their jobs. ECF 223 at 26. But as this

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[10] Once likelihood of success on the merits of the case is established, irreparable harm should be presumed. *See supra* Argument A.3. Preliminarily enjoining under Section 1 a likely anticompetitive joint venture among competitors that would likely have irreparably altered the market, the court in *United States v. Columbia Pictures Inds., Inc.*, 507 F. Supp. 412 (S.D.N.Y. 1980) ruled: "Far more important than the interests of either the defendants or the existing industry, however, is the public's interest in enforcement of the antitrust laws and in the preservation of competition." *Id*. at 434 (citations omitted).

Court has reaffirmed, "[i]n balancing the public and private equities associated with deciding to impose a preliminary injunction, the public interest is given greater weight." *In re Sanctuary Belize Litig.*, 409 F. Supp. 3d 380, 396 (D. Md. 2019). In this case, simply put, private interests Defendants may point to "do not outweigh effective enforcement of the antitrust laws." *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981) (Ruth Ginsburg, J.). *See also Penn State Hershey Med. Ctr.*, 838 F.3d at 352 (private equities "are not to be afforded great weight"); *H.J. Heinz Co.*, 246 F.3d at 727 n.25 (same); *Siemens Corp.*, 621 F.2d at 506 ("private interests must be subordinated to public ones"); *Ivaco, Inc.*, 704 F. Supp. at 1403 ("This private, financial harm must, however, yield to the public interest in maintaining effective competition."); *cf. FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1346 (4th Cir. 1976) ("All of these reasons go to the private injury which may result from an injunction . . . . [T]hey are not proper considerations for granting or withholding injunctive relief[.]").

**D. A 14-Day Injunction is in the Public Interest.**

In this case the public interest lies in enabling the NSA to obtain the services it needs to carry out its national security mission. *See Winter v. NRDC*, 555 U.S. 7, 32 (2008) (discussing importance of "national security" in analyzing last two factors, "the balance of equities and consideration of the public interest"). NSA chose to procure modeling and simulation services through a competitive bid rather than a sole-source bid or a contract set-aside for disadvantaged businesses, and witnesses testified that NSA modified the RFP to further encourage competition in the bidding and that some of those changes were requested by EverWatch. Prelim. Inj. Hr'ing Tr. Sept. 15 a.m. 54:4-55:4 (Dunshee); Sept. 16 a.m. 60:15-21 (Cooper). NSA thus believed that its interests—and the American public's—were best served by a competitive-bidding process

with separate and independent bidders.[11] Moreover, as the Supreme Court has recognized, there is a strong public interest in enforcement of the antitrust laws. *See United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 323 (1961) ("The proper disposition of antitrust cases is obviously of great public importance. . . . 'A public interest served by [government antitrust suits] is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints.'").

Defendants may claim that injunctive relief would deprive the public of the supposed longer-term benefits of the merger. A 14-day injunction would hardly do that. In any event, the issue on a motion for temporary injunctive relief is how the injunction would affect the public interest, not the eventual effects of the merger. *Cf. Penn State Hershey Med. Ctr.*, 838 F.3d at 353 ("in order to decide whether granting the injunction would be in the public interest . . . we consider whether the *injunction*, not the *merger*, would be in the public interest") (emphasis in original). All of Defendants' claimed public benefits of the merger still would occur well after the short time period envisioned by this injunction and would be available upon consummation of the merger if Defendants prevail on appeal.

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[11] Defendants' commitment to submit separate bids even after merging is insufficient. As the Fourth Circuit explained in *Steves and Sons, Inc v. Jen-Weld*, 988 F.3d 690 (4th Cir. 2021):

> if courts were required to choose the remedy least burdensome to the defendant—rather than the one that best promotes competition—conduct remedies would be the norm because they generally burden defendants less. But that would go against Congress's policy judgment that divestiture is the remedy best suited to redress the ills of an anticompetitive merger, . . . as well as the principle that conduct remedies are disfavored because they risk excessive government entanglement in the market.

*Id*. at 720 (quotations and citations omitted).

## CONCLUSION

The Court should (i) enjoin Defendants from taking any action to proceed with their planned merger for 14 days to allow the United States to consider whether to pursue an appeal and obtain Solicitor General authorization, and (ii) if the United States pursues an appeal, issue an injunction pending appeal. If the merger has closed before resolution of this motion, the Court should order Defendants to hold all assets separate. We will promptly notify the Court if the United States decides not to appeal so that the injunction can then be dissolved.

October 14, 2022

Respectfully submitted,

/s/ Jay Owen

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## CERTIFICATE OF SERVICE

I certify that this 14th day of October, 2022, I caused a true and correct copy of the foregoing Motion and Memorandum to be served upon all counsel of record via ECF.

/s/Jay Owen

Jay Owen (special admission)
*Attorney for the United States*