UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,

Plaintiff,

v.

BOOZ ALLEN HAMILTON HOLDING CORPORATION, *et al.*,

Defendants.

Case No. 1:22-cv-01603-CCB

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION

(REDACTED VERSION)[1]

[1] This Memorandum of Law is being publicly filed and has been redacted to remove sensitive information. A motion to seal the unredacted Memorandum of Law will be filed separately; the unredacted Memorandum of Law will be filed as an attachment to that motion and will be filed under seal.

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INTRODUCTION

Competitive contracting for an important national security contract is imminently at risk because Defendants plan to combine rather than compete. If the United States cannot obtain strong interim relief, NSA will be forced to go forward with a compromised bidding process for an important signals intelligence contract. Defendants—knowing that they were the only two companies who had engaged in the preparatory work needed to enable them to bid for the contract—nonetheless signed a merger agreement shortly before the bidding process was to begin. Defendants' merger agreement set up a "heads we win, tails the American taxpayer loses" situation. Only prompt action by this Court can stop Defendants' scheme.

The United States therefore moves for a preliminary injunction, pursuant to 15 U.S.C. § 4 and Federal Rule of Civil Procedure 65, abrogating the Stock Purchase Agreement dated March 15, 2022 (the "Merger Agreement") between or among Booz Allen Hamilton Holding Corporation, Booz Allen Hamilton Inc. (together, "Booz Allen"), EverWatch Corp. ("EverWatch"), EC Defense Holdings, LLC ("EC Holdings"), and Analysis, Computing and Engineering Solutions, Inc. ("ACES") (collectively, "Defendants"), pending resolution following a full trial on the merits, and enjoining Defendants from taking any action to proceed with their planned merger.

Booz Allen and EverWatch are the only potential bidders for the National Security Agency's ("NSA's") OPTIMAL DECISION contract, as evidenced by Defendants' own internal documents and non-party testimony, including the NSA. (*See* Ex. A, NSA Decl. ¶¶ 3, 8.)[2]

[2] Certain exhibits are being filed under seal or with redactions to protect competitively sensitive information, which will be fully set forth in Plaintiff's motion to seal that will follow this filing. The United States will provide these exhibits to Defendants upon entry of a protective order providing for Attorneys' Eyes Only designations. The parties are meeting and conferring regarding a stipulated proposed protective order.

OPTIMAL DECISION is a five-year project to provide signals intelligence modeling and simulation support services—the relevant services—that the companies value at approximately $[redacted] million. The signals intelligence modeling and simulation services to be provided under the OPTIMAL DECISION contract are critical for the national security mission of NSA, a component organization of the Department of Defense.

The OPTIMAL DECISION contract is the latest in a series of NSA contracts for signals intelligence modeling and simulation services. All of the previous contracts were awarded to Booz Allen, but EverWatch has been preparing to challenge Booz Allen for the OPTIMAL DECISION contract for several years. Both Booz Allen and EverWatch have spent years assembling teams of over twenty subcontractors each in anticipation of NSA's release of the request for proposals ("RFP") for the project.

Well aware that EverWatch was its only competitor for the OPTIMAL DECISION contract, Booz Allen nevertheless decided in March 2022 to acquire EverWatch from EC Holdings, shortly before the RFP was to be released. The merger would eliminate competition between Booz Allen and EverWatch in response to the OPTIMAL DECISION RFP, and it would result in Booz Allen controlling 100 percent of the market for signals intelligence services under the OPTIMAL DECISION contract.

Defendants' Merger Agreement itself has—even before the merger is effectuated—unreasonably restrained competition in this market: it reduced the incentives of both Booz Allen and EverWatch to compete vigorously for the OPTIMAL DECISION contract. This reduced incentive has already intruded on competition for OPTIMAL DECISION: one day after the Merger Agreement was announced, an EverWatch manager working on the OPTIMAL DECISION bid recommended to one of EverWatch's subcontractors to [redacted]

[redacted][3] The Merger Agreement has that effect because no matter which company is awarded the contract, Booz Allen will ultimately gain the profits.

In addition, the Merger Agreement provided by the Defendants to the United States actually provides Booz Allen the power to prevent EverWatch from even submitting a proposal to NSA for OPTIMAL DECISION, as it requires EverWatch to seek Booz Allen's approval before entering into any contract with a value of $500,000 or greater.

Booz Allen could even decide, with EverWatch, to overtly squelch the OPTIMAL DECISION contract competition entirely. This is not a hypothetical concern: Booz Allen's Executive Vice President ("EVP") wrote to EverWatch, through an intermediary, [redacted][4] An EverWatch board director responded that EverWatch would discuss [redacted] with Booz Allen, but that such discussion was [redacted] This audacious proposal reflects, among other things, Defendants' recognition of the power they have over competition and the bidding process. The ominous suggestion involving [redacted] and [redacted] discussions might be more subtle than a [redacted] proposal among competitors, but represents yet another threat to the competitive process. This conduct underscores the need for quick relief.

In any case, and as both companies are aware, if the merger is completed Booz Allen could submit only one proposal or, if two proposals had already been submitted, Booz Allen could revoke whichever bid would be less profitable. Although the companies may engage in a sham competition in which both submit proposals to NSA with inflated margins or diminished quality (such as deploying less qualified personnel), neither company is likely to compete

[3] Ex. B, EW-CID-0000421.
[4] Ex. C, EW-CID-0000450.

vigorously because such competition would only reduce the profits of the merged firm.

Accordingly, the United States has filed a complaint challenging (1) the Merger Agreement as a violation of Section 1 of the Sherman Act, because Defendants' Merger Agreement constitutes an unreasonable restraint of competition for OPTIMAL DECISION, and (2) Booz Allen's proposed acquisition as a violation of Section 7 of the Clayton Act, because the acquisition would be likely to substantially lessen competition, or tend to create a monopoly. 15 U.S.C. §§ 1, 18.[5]

To prevent the elimination of competition for the OPTIMAL DECISION contract between Booz Allen and EverWatch, the United States moves this Court for a preliminary injunction pursuant to 15 U.S.C. § 4 and Federal Rule of Civil Procedure 65, abrogating Defendants' Merger Agreement pending resolution following a full trial on the merits, enjoining Defendants from taking any action to proceed with their planned merger, and enjoining them from engaging in any bid manipulation or attempting any bid manipulation. Without such an order, Defendants' Merger Agreement will continue to sharply reduce their incentives to prepare competitive bids for OPTIMAL DECISION, and Defendants may continue their attempt to avoid antitrust scrutiny and corrupt the bidding process by agreeing to a common approach to the

[5] The United States is not moving for preliminary relief on its Clayton Act Section 7 claim at this time. The Section 7 claim arises from the proposed *merger* itself—not the Merger Agreement—and the anticompetitive effects that would later result if the merger were to close. The Section 7 claim does not address anticompetitive effects that are resulting *now* as a result of the Merger Agreement. Further, under the Hart-Scott-Rodino Act, Defendants cannot close the transaction until 30 days after they comply with information requests that were issued by the Department of Justice. *See* 15 U.S.C. § 18a; 16 CFR §§ 803.6 & 803.20. Defendants have not complied, and thus, they are unable to close the transaction at this time.

The United States has requested on three separate occasions—on July 1, July 5, and July 6—that Defendants commit to not consummate the transaction during the pendency of the litigation. If Defendants will not make that commitment, the United States reserves all rights to amend its motion for a Preliminary Injunction to include preliminary relief on its Section 7 claim.

upcoming RFP. That reduction in competition puts at risk an essential project for NSA. Therefore, to restore incentives *now*, the United States moves for preliminary relief on its Section 1 claim.

BACKGROUND

A. Signals intelligence modeling and simulation support services are critical for the U.S. Government's intelligence gathering and national security missions.

Signals intelligence is intelligence derived from electronic signals and emissions in communications systems. (Ex. A, NSA Decl. ¶ 3.) Government agencies, including NSA, use signals intelligence to gather information about international terrorists and foreign powers, organizations, or persons, which is then provided to U.S. government officials in the Executive Branch or military who have an official need for the information. (*Id.*) Signals intelligence plays a vital role in our national security by providing America's leaders with critical information they need to defend our country, save lives, and advance U.S. goals and alliances globally. (*See id.*)

Critical to this mission are signals intelligence modeling and simulation support services, which support accessing, using, and analyzing signals intelligence. NSA is the primary customer for these services. (*Id.* ¶ 5.) Other government agencies requiring such services typically obtain them through NSA. (*Id.*) The company selected to provide this service applies its knowledge of signals intelligence and computing to solve problems related to the efficient movement of signals intelligence between collection points, processing platforms, and end use.

Over the past two decades, NSA has purchased these services from Booz Allen through a series of contracts known as MASON. (*Id.* ¶ 4.) NSA's current MASON III contract with Booz Allen is expected to expire in March 2023, and it is imperative that the NSA issue the RFP with sufficient time before the contract expires. NSA expects to award the OPTIMAL DECISION

contract approximately six to nine months after the receipt of the proposals, and the NSA cannot go without these essential services for even a short period of time and is unable to perform this type of work in house. (Ex. A, NSA Decl. ¶¶ 9, 12.) Thus, time is of the essence.

NSA plans to issue an RFP for the successor contract, OPTIMAL DECISION, in the immediate future. (*Id.* ¶ 9.) Defendants value the OPTIMAL DECISION contract at approximately $[redacted] million over five years.[6] Any delay in the award of OPTIMAL DECISION will accrue to benefit of Booz Allen (due to the extension of the current MASON III contract) and will risk loss of key personnel. (*See id.* ¶ 10.)

B. Booz Allen and EverWatch are the only competitors for NSA's OPTIMAL DECISION contract.

Projects like OPTIMAL DECISION require a wide variety of skills, so companies pursuing prime contracts for those projects commonly assemble a group of subcontracting firms serving as teammates with specialized capabilities. Each of the teammates have subcontract "teaming agreements" with the prime contractor that set the prices for services provided by skilled engineers and technologists, and for the cost of materials and other services.[7] The prime contractor generally provides some skilled labor from its own workforce as well, and applies a markup to the customer on the sum of all of the labor rates, material costs, and other services.[8] Companies compete for prime service contracts by offering lower markups on labor rates, less overhead, or more-talented personnel.

NSA contracts for signals intelligence modeling and simulation support services approximately once every five to seven years. NSA issued RFPs for the MASON contracts in 2002, 2007, and 2014. In each of those three procurement cycles, Booz Allen competed with

[6] Ex. D, Booz Allen 4(c)-11 at 19, 21.
[7] *See* Ex. K, [redacted] Dep. Tr. at 36:24-39:13.
[8] *See* Ex. K, [redacted] Dep. Tr. at 36:24-39:13; 72:22-73:16.

only one other company. Booz Allen won every time.

Booz Allen is a management and information technology consulting firm headquartered in McLean, Virginia, with over 80 other offices around the globe.[9] The company provides consulting, analysis, and engineering services to public and private sector organizations and nonprofits. It is a major support contractor to U.S. government agencies, particularly in the intelligence community. Its revenues were approximately $7.9 billion in the 2021 fiscal year.[10]

After Booz Allen won the MASON III contract in 2014, the only firm that had competed against it exited the market. That company no longer provides or has the capability to provide signals intelligence modeling and simulation services; the personnel who could support these services retired or moved to other projects. That company is not a competitor for OPTIMAL DECISION, and after it exited, Booz Allen appeared to have a lock on NSA's business.

But EverWatch began to establish itself as a serious competitor for providing intelligence support services and for building and operating classified platforms to defend against cyber threats. Founded in 2017, EverWatch consolidated several companies, including BrainTrust and ACES, which have won several contracts to provide intelligence services to U.S. government agencies.[11] In 2021, EverWatch's estimated revenues were approximately $[redacted] million, and it forecasts revenues of $[redacted] million this year.[12]

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[9] Booz Allen, *Careers in the United States*, https://careers.boozallen.com/locations/us (last visited July 6, 2022).
[10] Booz Allen, *Booz Allen to Acquire EverWatch*, https://www.boozallen.com/menu/media-center/q4-2022/booz-allen-to-acquire-everwatch.html (last visited July 6, 2022).
[11] *See* Ex. D, Booz Allen 4(c)-11, at 6. Under the Hart-Scott-Rodino Act, Booz Allen and EverWatch were required to provide a premerger notification and submit documents prepared by or for officers or directors used to analyze the acquisition with respect to market shares, competition, competitors, or markets, among other documents. Some of those documents occasionally refer to EverWatch as "Ghost."
[12] Ex. E, EverWatch 4(d)-1, at 1, 32.

Since its founding five years ago, EverWatch has positioned itself as the "premier analytics capability developer for the Intelligence Community"[13] and focuses its business strategy on unseating incumbent prime contractors for signals intelligence-related products and services. At a meeting with Booz Allen executives on December 14, 2021, EverWatch leaders advised Booz Allen that it had overthrown CACI Technologies as prime contractor on a major U.S. Navy contract because of the "unique tech" of EverWatch.[14] They also told Booz Allen that the company was aggressively targeting "[o]ther primes," including [redacted] in 2022.[15]

EverWatch also prides itself on "no bloat" staffing.[16] Indeed, during its due diligence for the purchase of EverWatch, Booz Allen executives recognized that the company was so much more efficient than Booz Allen that, in an internal Booz Allen presentation, they warned not to "Booz Allen-ize" EverWatch following the merger.[17] EverWatch can also staff the OPTIMAL DECISION project because [redacted] percent of its employees have some level of clearance, with [redacted] percent holding top secret clearance.[18] The clearance process can take up to a year.

Booz Allen and EverWatch are the only two competitors for the OPTIMAL DECISION contract. In October 2020, NSA analyzed its database of contractors and identified 178 companies that might be interested in working on OPTIMAL DECISION as either prime or subcontractors. (Ex. A, NSA Decl. ¶ 6.) NSA surveyed those companies, and 14 respondents stated that they might be interested in being the prime contractor for the project. (*Id.*) But when

[13] Ex. F, Booz Allen 4(d)-1, at 18.
[14] Ex. G, Booz Allen 4(c)-3, at 2.
[15] Ex. G, Booz Allen 4(c)-3, at 10 (under "Integration"), *see also* Ex. F, Booz Allen 4(d)-1, at 14 (EverWatch "Uniquely Positioned for Game-Changing Opportunities.").
[16] Ex. F, Booz Allen 4(d)-1, at 14.
[17] Ex. H, Booz Allen 4(c)-13, at 3.
[18] Ex. E, EverWatch 4(d)-1, at 1, 10.

NSA followed up with those companies in October 2021, only two submitted letters of intent to pursue the prime contract: Booz Allen and EverWatch. (*Id.*)

In April 2022, after Defendants publicly announced their proposed merger, NSA again contacted each of the 14 companies that it had previously identified and again sought letters of intent to bid. (*Id.* ¶ 7.) Despite NSA's efforts to identify additional competitors for the prime contract, NSA again received only two letters of intent—one from Booz Allen and one from EverWatch. (*Id.*) NSA does not expect to receive other bids for OPTIMAL DECISION. (*Id.* ¶ 8.)

C. Aware EverWatch was its only competitor for OPTIMAL DECISION, Booz Allen agreed to acquire EverWatch.

Shortly after submitting their initial letters of intent to serve as prime contractor for OPTIMAL DECISION—and unknown to NSA at the time—Booz Allen and EverWatch "agreed to engage on a potential preemptive sale process" in November 2021.[19]

Both companies know that they are the only competitors for OPTIMAL DECISION. During the due diligence process preceding the Merger Agreement, Booz Allen's corporate development staff told its consulting firm that "[t]here are only 2 bidders – Booz and [EverWatch]."[20] EverWatch told the same consulting firm that "mgmt. projects having a pWin given only one other competitor in the mix (Booz Allen)."[21] EverWatch shared those same predictions directly with Booz Allen. But Booz Allen's management believed that EverWatch's predictions were too optimistic given the dominance of Booz Allen itself. Even so, Booz Allen

[19] *See* Ex. I, Booz Allen 4(c)-1, at 1-2.
[20] *See* Ex. J, USDOJ-003-00000001, Dec. 30, 2021 4:12 p.m. email from Booz Allen.
[21] *See* Ex. D, Booz Allen's 4(c)-11, at 19; *id.* at 21 (EverWatch "Mgmt pWin of % reflects confidence in positioning against sole competitor (i.e., Booz Allen Hamilton)").

evaluated EverWatch's win probability at [redacted] percent, versus its own at [redacted] percent.[22] In other words, Booz Allen acknowledges that the sum of Booz Allen and EverWatch's win probabilities is 100%, meaning there are no other competitors for the OPTIMAL DECISION contract.

Even early in the procurement process, an EverWatch manager referred to Booz Allen as "*the* competition."[23] Nor is it a secret in the industry that Booz Allen and EverWatch will be the only bidders. To submit competitive bids for the contract, Booz Allen and EverWatch have assembled teams of over 20 subcontractors each to support their bids. One EverWatch teammate noted "we have team meetings and we discuss are there any competitors, you know, try to collect market information. I haven't heard any data from anyone that anyone else is bidding it."[24]

NSA did not learn about the proposed merger until after Booz Allen announced that it had entered into a stock purchase agreement to acquire all of the issued and outstanding shares of EverWatch for $[redacted] million.

D. The Merger Agreement has reduced the incentives of Booz Allen and EverWatch to compete for the OPTIMAL DECISION contract.

The Merger Agreement—and the planned merger it embodies—are likely to continue irreparably and immediately harming competition for the OPTIMAL DECISION contract.

After NSA issues the RFP, proposals will be due within 45 days. (Ex. A, NSA Decl. ¶ 9.) This is the critical time period for competition. (*Id.*) During this period, the bidders and their subcontractors will study the scope of work described in the RFP, determine the best technical approaches to meeting NSA's requirements, finalize the teams of highly skilled

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[22] *See* Ex. D, Booz Allen's 4(c)-11, at 21 ("Base case discount reflects Booz Allen team's assertion that [EverWatch] is not as well-positioned as portrayed; discounted to [redacted]% pWin to reflect Booz Allen's [redacted]% pWin"); *id.* at 8 ("discounts applied to OPTIMAL DECISION ([redacted]% to [redacted]% pWin) given Booz's position").

[23] Ex. K, [redacted] Dep. Tr. at 25:12-26:11 (emphasis added).

[24] Ex. K, [redacted] Dep. Tr. at 26:12-27:2.

individuals who will perform the work, and determine the price to be proposed. (*Id.*) NSA expects to award the contract within a few months of receiving proposals. (*Id.*)

Like any customer, NSA gets the best value when there are multiple competitors for its contracts, and NSA would lose the benefits of competition for OPTIMAL DECISION as a result of the Merger Agreement and planned merger. (*See id.* ¶ 13.)

No other company has indicated interest in the OPTIMAL DECISION contract, and Booz Allen and EverWatch know they are competing only against each other. *See supra* 8-9. As long as the planned acquisition is on the table, Booz Allen and EverWatch have reduced incentives to competitively bid because no matter which of them wins the contract, it would ultimately be held by the combined company. Even if both companies submit proposals, the companies could increase profits of the merged firm with elevated markups for the prime contractor, inflated labor rates, or less-qualified personnel.

Further, under the Merger Agreement provided to the United States, Defendants have agreed on several significant conditions to closing, which likewise reduce their incentives to competitively bid and which effectively give Booz Allen total control of pricing and quality for the OPTIMAL DECISION contract. One critical condition is that EverWatch will not enter into any contract with the government worth over $500,000 without Booz Allen's consent. Specifically, it provides:

> [T]o the extent the Buyer shall otherwise consent in writing (which consent shall not be unreasonably withheld, conditioned or delayed), from the date of this Agreement until the Closing, [EverWatch] shall not, and shall not permit any [EverWatch] Subsidiary to, nor shall [EC Holdings], with respect to [EverWatch] or any [EverWatch] Subsidiary, do any of the following. . .
>
> (l) other than terminations or modifications in the ordinary course of business consistent with past practice and in accordance with the current terms of such Contracts. . . enter into any new agreement or Contract or

> other binding obligation of the Company or any Company Subsidiary containing any provision of the type described in Section 4.16 or that would constitute a Specified Government Contract. . .

Ex. L (Merger Agreement § 7.01(l)). Under the Merger Agreement, a "Specified Government Contract" is defined as "any Current Government Contract with a value in excess of Five Hundred Thousand Dollars ($500,000)." (Ex. L, Merger Agreement, at A-15.)

In other words, assuming that the Merger Agreement provided to the Department of Justice by Booz Allen and EverWatch accurately reflects their agreement, Defendants have agreed that Booz Allen can veto any new government contract with EverWatch valued at over $500,000—including OPTIMAL DECISION—even while the merger remains pending. In effect, under the Merger Agreement, Booz Allen has had control over the final results of any EverWatch bid for the OPTIMAL DECISION contract since the date the Merger Agreement was signed.

Of course, Booz Allen's control over the outcome of the OPTIMAL DECISION bid would continue if its merger was completed: Booz Allen could withdraw the less-profitable bid.

E. After the Department of Justice opened an investigation, Booz Allen and EverWatch attempt to avoid antitrust scrutiny.

After the Department of Justice opened an investigation into the merger, senior executives at EverWatch and Booz Allen made separate attempts to insulate the deal from antitrust scrutiny that either diminished competition between Booz Allen and EverWatch, or attempted to do so. EverWatch attempted to abandon its long-held role as the prime contractor for its team of subcontractors in favor of a small teammate, [redacted]; and Booz Allen attempted to coordinate with EverWatch to [redacted] OPTIMAL DECISION.

1. *EverWatch's Attempt to Transfer the Prime Contractor Role to* [redacted]

On June 3, 2022, EverWatch and [redacted] entered into a Memorandum of

Understanding ("MOU") stating that EverWatch has "concluded it wishes to no longer serve in the Prime role," and that, "[e]ffective immediately, EverWatch shall transfer the Prime role to [redacted] to serve in the Prime role in the OD bid opportunity."[25]

[redacted] is approximately one-tenth the size of EverWatch, in terms of both personnel and revenue.[26] The largest prime contract managed by [redacted] to date is worth $[redacted] million and is staffed by [redacted] employees.[27] EverWatch's largest prime contract, in contrast, is worth nearly $[redacted] million and employs [redacted] people,[28] making it larger than OPTIMAL DECISION, which Defendants value at [redacted] million and expect to employ approximately [redacted] people.[29]

Without the full support of EverWatch, the team would not be able to submit a proposal on NSA's schedule for the OPTIMAL DECISION project.[30] At most, [redacted] could only serve as a shadow prime contractor for EverWatch, because it does not have EverWatch's data, work product, knowledge base on OPTIMAL DECISION, investments in trying to win the OPTIMAL DECISION contract, and teaming agreements with its 25 other subcontractors. A senior manager at [redacted] admitted as much.[31] And, as the senior manager acknowledged, those 25 team members might not be interested in working on the project without EverWatch in the prime role or with [redacted] in the lead.[32] The senior manager also told EverWatch that there are "quite a few things [they] would need to be able to follow through with priming and

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[25] Ex. M, Memorandum of Understanding, at 1.
[26] Ex. K, [redacted] Dep. Tr. at 18:6-11 [redacted] employees and [redacted] million); Ex. E, EverWatch 4(d)-1, at 1, 32 [redacted] employees and $[redacted] million).
[27] Ex. K, [redacted] Dep. Tr. at 19:13-24.
[28] Ex. D, Booz Allen 4(c)-11 at 13.
[29] Ex. D, Booz Allen 4(c)-11 at 19, 21.
[30] *See, e.g.*, Ex. K, [redacted] Dep. Tr. at 64:8-13 (Q: If the RFP came out today and EverWatch dropped off the team, at the same time, would the team be able to submit a competitive proposal? A: I don't believe so, no.").
[31] Ex. K, [redacted] Dep. Tr. at 54:11-17; 64:18-25.
[32] Ex. K, [redacted] Dep. Tr. at 65:20-67:1.

representing the team for a compelling and successful OD bid," including teaming agreements with subcontractors, revalidation of rates submitted and negotiated with teammates, access to "all of the collected information, data calls, etc from all of the teammates," access to "all of the proposal response information created to date," and, significantly, the "continued support of [EverWatch's] technical team to further prepare the response."[33] The senior manager noted that [redacted] "would need [EverWatch] to continue to be an active member of the team and continue with the proposal investments," and it "would also need some things from the Government"—including a "delay in the release of the final RFP of at least 3 months" and the "opportunity to ask additional questions."[34]

This shell game does nothing to restore competition for the NSA project, as [redacted] would be completely reliant on EverWatch to continue the work that EverWatch has been doing as the team leader. Without the full support of EverWatch—support that EverWatch may give on its own terms and which would necessarily reflect the Merger Agreement and planned merger's perverse competitive incentives—the team would be unable to challenge Booz Allen. Rather, this attempt to substitute [redacted] is an attempt to diminish competition between Booz Allen and [redacted], and it demonstrates that competition has already been reduced.

2. *Booz Allen's Attempt to Coordinate a* [redacted] *Outcome*

After Booz Allen learned that [redacted] Booz Allen's EVP reached out, through an intermediary, to a director on EverWatch's board. The Booz Allen EVP was [redacted][35] The EverWatch director responded that they

[33] Ex. N, EW-CID-0000440.
[34] Ex. N, EW-CID-0000440.
[35] Ex. C, EW-CID-0000450.

can [redacted] but that such discussion was [redacted][36] This, too, demonstrates the power Defendants have over the bidding process and the need to act quickly, among other things.

ARGUMENT

If not preliminarily enjoined, the Merger Agreement would eliminate competition for an important national security contract for NSA—as well as the ability of the United States and the Court to rectify the loss of that competition.

Congress has authorized preliminary relief in antitrust cases by including in the Sherman Act a provision stating 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. "Consequently, it is the duty of the District Court before which an antitrust suit is pending to pass on the desirability of temporary relief in order to avoid later problems of 'unscrambling.'" *California v. Fed. Power Comm'n*, 369 U.S. 482, 495 (1962) (Harlan, J., dissenting). Only a preliminary injunction abrogating Defendants' Merger Agreement pending resolution following a full trial on the merits, enjoining Booz Allen from acquiring EverWatch, and enjoining Defendants from taking any action to proceed with their planned merger will restore the incentives of the companies to compete against each other for OPTIMAL DECISION.

The United States' motion for a preliminary injunction asks the Court to make four findings: 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); *Pashby v. Delia*, 709 F.3d 307, 320-21 (4th Cir. 2013)

[36] Ex. C, EW-CID-0000450.

(affirming grant of preliminary injunction under *Winter* test). Here, all four conditions are met and support the preliminary relief requested by the United States.

I. The United States Is Likely to Succeed on the Merits

A. The Merger Agreement Itself Unreasonably Restrains Trade in Violation of Section 1

Section 1 of the Sherman Act declares that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § To establish a Section 1 violation, a plaintiff must demonstrate: "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *Robertson v. Sea Pines Real Est. Companies, Inc.*, 679 F.3d 278, 284 (4th Cir. 2012) (internal quotation marks omitted).

1. *The Merger Agreement is a "Contract"*

The clear, explicit contractual agreement between Defendants satisfies the first element of Section 1. On March 15, 2022, Booz Allen entered into a stock purchase agreement to acquire all of the issued and outstanding shares of EverWatch Corp. A civil antitrust plaintiff "need not prove intent to control prices or destroy competition to demonstrate the element of an agreement . . . among two or more entities." *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1153-54 (9th Cir. 2003) (internal quotation marks omitted). *See also United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948) ("If such acquisition results in *or* is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act." (emphasis added)).

2. *The Merger Agreement is an Unreasonable Restraint of Trade*

The Merger Agreement is an unreasonable restraint of trade, under either a "quick look" or a full "rule of reason" analysis. Under a "quick look" analysis, if an "observer with even a rudimentary understanding of economics could conclude that the arrangements in question

would have an anticompetitive effect on customers and markets," courts are not required to perform an "elaborate industry analysis" to determine whether an agreement "would have an anticompetitive effect on customers and markets."[37] *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 770 (1999). As discussed further below, the Merger Agreement at issue here—because of its timing so close to the OPTIMAL DECISION bids—is a *de facto* profit-pooling agreement that plainly changes economic incentives of Defendants. *See, e.g.*, *Citizen Publishing Co. v. United States*, 394 U.S. 131, 135 (1969). As such, it should be enjoined as an unreasonable restraint of trade under a quick look analysis.

Even if the Court applies a full rule of reason analysis, the Merger Agreement is an unreasonable restraint of trade. Under the full rule of reason, the United States has the initial burden of demonstrating that Defendants' behavior adversely affected competition to show a substantial anticompetitive effect that harms consumers. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). *See also Chicago Bd. of Trade v. United States,* 246 U.S. 231, 238 (1918) (courts are to consider "the nature of the restraint and its effect, actual or probable"). The United States may meet this standard by *either* (1) "proof of actual detrimental effects," *or* (2) evidence of market power, such as market share, "plus some evidence that the challenged restraint harms competition." *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018).

a. The Merger Agreement Has Caused Actual Detrimental Effects.

The Merger Agreement has already had actual detrimental effects within the meaning of *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 477, 460 (1986). The reduced incentive to

[37] Some courts do not apply "quick look" analysis to "ancillary" restraints—*i.e.*, restraints that are reasonably necessary to a separate, legitimate transaction. *See, e.g.*, *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 338, 340 n.11 (2d Cir. 2008) (Sotomayor, J., concurring). Here, the Merger Agreement is not ancillary to the merger because (1) the merger is to monopoly and therefore not a legitimate transaction; and (2) entering into *this* Merger Agreement, on the eve of bidding, is not reasonably necessary to accomplish a future merger.

compete, which is current and is understandable without an "elaborate industry analysis," is the actual detrimental effect. And its existence can be seen both from the terms of the agreement and from evidence from Defendants.

One day after the Merger Agreement was announced, an EverWatch manager working on the OPTIMAL DECISION bid recommended that one of EverWatch's subcontractors [redacted] [38] As this manager realized, vigorous competition by either Booz Allen or EverWatch for the contract would be undesirable for the firms because it would serve only to reduce the profit margin of the merged firm, so he actively took steps consistent with EverWatch's reduced incentive to compete aggressively with Booz Allen. *See, e.g.*, *Indiana Fed'n of Dentists*, 476 U.S. at 459 ("an agreement limiting consumer choice by impeding the ordinary give and take of the market place cannot be sustained under the Rule of Reason" (internal quotation marks and citation omitted)); *id.* at 461–62 (agreement that was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market . . . may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher prices services, than would occur in its absence."). Similarly, EverWatch's statement, in connection with its [redacted] scheme, that EverWatch has "concluded it wishes to no longer serve in the Prime role" for an OPTIMAL DECISION bid, is another admission that EverWatch's incentive to compete for the bid is diminished—so much so that it no longer wishes to be the prime contractor.[39] Moreover, EverWatch's attempts to replace itself with [redacted] also constitute actual detrimental effects. As described above, [redacted] does not have

[38] Ex. B, EW-CID-0000421.

[39] Counsel for EverWatch subsequently represented to the United States that EverWatch may not move forward with this plan. Whether or not EverWatch still intends to do so is irrelevant. EverWatch could easily change course yet again, and, in any event, EverWatch's conduct demonstrates that actual anticompetitive effects have already occurred.

EverWatch's data, work product, knowledge base on OPTIMAL DECISION, investments in trying to win the OPTIMAL DECISION contract, and teaming agreements with its 25 other subcontractors. Even if the MOU between EverWatch and [redacted] is never formalized, EverWatch's attempts to evade antitrust scrutiny have thrust this smaller and less capable competitor into the untenable situation of potentially acting as the prime contractor on a project for which it is not qualified, which has had the predictable effect of distracting [redacted] and EverWatch, and likely the entire team, from preparing for the imminent release of the RFP.

In addition, the contract provision that apparently allows Booz Allen to block EverWatch from contracting is an actual, direct restraint of competition—giving one competitor a veto over the other's competition. (*See* Ex. L (Merger Agreement § 7.01(l).) Any of these actual detrimental effects is sufficient to find that the Merger Agreement is an unreasonable restraint of trade within the meaning of Section 1.

b. Market Power and Other Evidence Demonstrate the Merger Agreement is an Unreasonable Restraint of Trade.

Even if the Court does not find actual detrimental effects, the United States will also show evidence of market power, "plus some evidence that the challenged restraint harms competition." *American Express Co.*, 138 S. Ct. at 2284. The sale of signals intelligence simulation and modeling services under OPTIMAL DECISION is a relevant market, the parties' changed incentives are anticompetitive effects of the Merger Agreement, and the combined firm's complete domination of the market share presumes additional adverse effects. When the evidence shows—like here—that the merger would eliminate significant competition and result in one firm controlling "a large share of the relevant market," it constitutes a *prima facie* unreasonable restraint of trade. *See United States v. First Nat. Bank & Tr. Co. of Lexington*, 376 U.S. 665, 669-70, 672 (1964). *See also Indiana Fed'n of Dentists*, 476 U.S. at 460–61 ("[Market

power] is but a 'surrogate for detrimental effects.'").[40]

i. The Sale of Signals Intelligence Modeling and Simulation Services under OPTIMAL DECISION Is a Relevant Product Market.

The Merger Agreement has already harmed competition in the relevant product market for the sale of signals intelligence modeling and simulation support services to NSA through the OPTIMAL DECISION contract.

The relevant product market establishes the boundaries within which competition meaningfully exists. Those "commodities reasonably interchangeable by consumers for the same purposes" constitute a product market for antitrust purposes. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). As the Supreme Court has recognized, the market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953).

The boundaries of a product market "may be determined by examining such practical indicia as industry or public recognition of the [market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962). Courts have also recognized that a relevant market can exist

[40] "[T]he purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." *Id.*; *see also* Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 1503 ("to determine whether that harm is not only possible but likely and significant . . . ordinarily requires examination of the market circumstances," such as market share or the "nature of the agreement itself"); *Robertson*, 679 F.3d at 290 ("Under the rule of reason, 'the reasonableness of a restraint is evaluated based on its impact on competition as a whole within the relevant market.'"); *Jien v. Perdue Farms, Inc.*, 19-cv-2521 (SAG), 2020 WL 5544183, at *12 (D. Md. Sept. 16, 2020) (same).

under a "single government contract," and that "the contract itself can be the relevant market." *Tower Air, Inc. v. Fed. Exp. Corp.*, 956 F. Supp. 270, 281 (E.D.N.Y. 1996). In *Tower*, for instance, the Court recognized that the relevant market could be based on a single RFP issued by the Department of Defense seeking bids for a contract to provide civilian air support to the Military Air Command in times of national emergency. *Id.* at 273-74. *See also Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1037, 1055 (9th Cir. 1983) (recognizing relevant market was the "F-18 weapons system," where "F-18" meant the winning design of a proposed fighter plane for a competitive Navy contract), *cert. denied*, 464 U.S. 849 (1983); *Compact v. Metro. Gov't of Nashville & Davidson Cty.*, 594 F. Supp. 1567, 1571 (M.D. Tenn. 1984) (minority business set-aside shares on public contracts for architectural services constituted a relevant submarket). This is especially true where the government of the United States is the "sole domestic purchaser." *Northrop Corp.*, 705 F.2d at 1055. *See also 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 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 Brown Shoe*, 370 U.S. at 325 ("distinct customers" are a factor for determining a relevant market).

Here, signals intelligence modeling and simulation services provided under the OPTIMAL DECISION contract constitute a line of commerce and a relevant product market within the meaning of Section 1 of the Sherman Act. The services NSA seeks to purchase through the OPTIMAL DECISION contract are not reasonably interchangeable with other general-purpose computing or communications support services and cannot be replaced with

other services. The provision of these services under OPTIMAL DECISION requires very specialized knowledge of signals intelligence collection and data, and the personnel providing these services need high-level security clearances. (*See* NSA Decl. ¶¶ 3, 11.) *See Brown Shoe*, 370 U.S. at 325 (a product's "peculiar characteristics and uses," "unique production facilities," and "specialized vendors" are relevant factors for determining a product market). NSA is the primary customer for this highly specialized service that is critical for national security and NSA's mission, and no other services are an alternative. (*See* NSA Decl. ¶¶ 3, 5, 11.) *See Brown Shoe*, 370 U.S. at 325 ("distinct customers" are a factor for determining a relevant market). Further, any other firm that has the capability to provide signals intelligence modeling and simulations services has a market share of *zero* because it currently does not offer such services to the NSA and would be unable to submit a successful bid given the significant lead time that is necessary for assembling teammates, resources, and work product for the OPTIMAL DECISION project.[41]

Because no other service is "reasonably interchangeable" with signals intelligence modeling and simulation services provided under the OPTIMAL DECISION contract, these services are a relevant product market within the meaning of Section 1 of the Sherman Act.

ii. The United States is a Relevant Geographic Market.

Booz Allen's proposed acquisition of EverWatch harms competition in the relevant geographic market of the United States. A relevant geographic market is an "area in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 (1963) (internal quotation marks and emphasis omitted). If consumers in a given geographic area do not consider products from outside that area to be

[41] *See, e.g.*, Ex. K, [redacted] Dep. Tr. at 54:11-17; 64:18-25.

reasonable, practical alternatives, then that geographic area is a relevant geographic market.

NSA, the OPTIMAL DECISION customer, is located in the United States. Further, the only suppliers of these services are in the United States. Accordingly, the United States is a relevant geographic market.

iii. The Merger Agreement Is Anticompetitive and Will Continue to Harm Competition

Agreements that reduce companies' incentives to compete with each other may violate the Sherman Act. For example, in *Citizen Publishing Co. v. United States*, the Supreme Court held that an agreement by two newspaper companies to pool profits "reduce[d] incentives to compete for circulation and advertising revenues," and affirmed the lower court's determination that the pooling arrangement constituted a *per se* price-fixing Section 1 violation. 394 U.S. at 135. *See also New York ex rel. Spitzer v. Saint Francis Hosp.*, 94 F. Supp. 2d 399, 412 (S.D.N.Y. 2000) ("[T]he per se ban on price fixing is not limited to an express horizontal agreement setting a uniform price for a product or service. Rather, Supreme Court jurisprudence . . . teaches that the courts must look at the challenged horizontal agreement's practical effect on price and competition.").

Here the Merger Agreement between Booz Allen and EverWatch is effectively an agreement to pool the profits from OPTIMAL DECISION that is appropriately analyzed under the quick look standard.[42] *See, e.g.*, *California Dental Ass'n*, 526 U.S. at 770 ("quick look" analysis is appropriate if an "observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"). When Defendants agreed to merge, their incentives to bid

[42] Because the Merger Agreement does not include an express revenue-sharing provision, the United States has not elected to challenge the Merger Agreement under a *per se* theory.

competitively against each other for OPTIMAL DECISION were sharply reduced because they knew that regardless of which of the two firms wins, the merged company will hold the five-year contract. Before the Merger Agreement, both companies were incentivized to offer competitive proposals to win the contract and the profits it would bring. But once Defendants agreed to merge, they were incentivized only to maximize the profits of the post-merger company. In this "win-win" situation, both companies ultimately will benefit from submitting proposals with higher markups, inflated labor rates, and less-talented personnel for the OPTIMAL DECISION contract, thereby harming customers, the U.S. Government, and competition itself.

Other courts have similarly found that agreements that suppress incentives may violate Section 1.[43] In *United States v. Dentsply Int'l, Inc.*, for example, the Third Circuit Court of Appeals held that at-will exclusive dealing arrangements created "strong economic incentive[s]" for dealers to carry only one company's product, and were thus anticompetitive effects that supported a Sherman Act violation. 399 F.3d 181, 195 (3d Cir. 2005). *See also ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 287 (3d Cir. 2012) (under full rule of reason, considering "strong economic incentive[s]" from *de facto* long-term dealing agreement); *Discovision Assocs.*

[43] Contracts that grant defendants the incentive and ability to suppress competition violate Section 1 even if their effects have not yet occurred. *See United States v. Union Pac. R. Co.*, 226 U.S. 61, 88 (1912) ("Nor does it make any difference that rates for the time being may not be raised and much money may be spent in improvements after the combination is effected. It is the scope of such combinations and their *power* to suppress or stifle competition or create monopoly which determines the applicability of the [Sherman] [A]ct." (emphasis added)); *Associated Press v. United States*, 326 U.S. 1, 12 (1945) (condemning a joint venture's restraints under Section 1 "without regard to their past effect" because "[c]ombinations are no less unlawful because they have not as yet resulted in restraint"); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1385 (5th Cir. 1980) (condemning an association's bylaws even though it "ha[d] never applied" them because "the antitrust laws do not require that we wait until the restraint is accomplished before we hold invalid a rule which gives an association power to produce unjustified anticompetitive effects; the Sherman Act is offended by the power as well as the deed"); 15 U.S.C. § 4 ("[I]t shall be the duty of the several United States attorneys . . . to institute proceedings in equity to *prevent* and restrain such violations . . ." (emphasis added)).

v. Disc Mfg., Inc., No. Civ. A-95-21, 1997 WL 309499, at *4-5 (D. Del. Apr. 3 1997) (plaintiff stated Section 1 claim where plaintiff alleged that a tying agreement "essentially eliminated any incentive to innovate" and "thereby harmed and foreclosed significant competition in the market by reducing output").

Fundamental economic principles dictate that the Merger Agreement restricted competition by reducing Defendants' incentives to compete for the OPTIMAL DECISION contract. *Cf. United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 220 (1940) ("[I]t is indisputable that that competition was restricted through the removal by respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets."); *F.T.C. v. Alliant Techsystems, Inc.*, 808 F. Supp. 9, 16 (D.D.C. 1992) ("Neither party disputes that a competitive bid would result in lower prices for the 1994 training ammunition contract than the letting of the contract to the single source the merger would create. Because sole source contractors lack competitors, and because their profits are based on a percentage of costs, they have few incentives to lower costs."). Defendants' changed incentives demonstrate that the Merger Agreement has anticompetitive effects under either a "quick look" or a full rule of reason analysis.

In addition to changing incentives, under the Merger Agreement, Booz Allen has power to control prices and even whether any bids are submitted. For instance, after the Department of Justice began its investigation, Booz Allen's EVP wrote to EverWatch, through an intermediary, [redacted][44] Whatever the intent of that jarring statement, it reflects the reality that Booz Allen is not afraid to propose to use its power to control the situation.

[44] Ex. C, EW-CID-0000450.

Further, under the Merger Agreement provided to the United States, Booz Allen has the contractual right to veto any new government contract with EverWatch valued at over $500,000—which would include OPTIMAL DECISION. (Ex. L (Merger Agreement § 7.01(l).) This provision further reduces Booz Allen's incentives to vigorously compete for OPTIMAL DECISION and explicitly demonstrates Booz Allen's ability to control prices and exclude competition by vetoing the only competing bid.

iv. Defendants Have Sufficient Market Power to Cause an Adverse Effect on Competition

The United States will also establish that Defendants have sufficient market power to cause an adverse effect on competition, such that it should be presumed. 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." *United States v. Visa USA, Inc.*, 344 F.3d 229, 239 (2d Cir. 2003) (internal quotation marks omitted).

The market share of the firms is "strong evidence" of their market power to adversely affect competition. Booz Allen and EverWatch are the only two competitors for OPTIMAL DECISION, and they have 100 percent share of the relevant market as recognized by Defendants themselves.[45] This market share clearly demonstrates the market power of the combined firm. *See Visa U.S.A.*, 344 F.3d at 240 (affirming finding of market power where one defendant held 47% share and another held 26% share); *Perdue Farms*, 2020 WL 5544183, at *12 (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

[45] For example, Booz Allen's corporate staff told its consulting firm that "[t]here are only 2 bidders – Booz and [EverWatch]." *See* Ex. J, USDOJ-003-00000001, Dec. 30, 2021 4:12 p.m. email from Booz Allen. And EverWatch told its subcontracting team that Booz Allen was "*the* competition." *See* Ex. K, [redacted] Dep. Tr., at 25:12-26:11.

could have suppressed compensation in the relevant market"); *see also 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). Given their total market share, if Defendants act on their incentives, it will result in a restraint of trade and impact competition.[46] Accordingly, the United States will establish a *prima facie* violation of Section 1.

B. Affirmative Defenses to the Merger Agreement Are Unlikely to be Persuasive

Once the United States makes out a *prima facie* violation of the rule of reason, the burden shifts to the defendants to "show a procompetitive rationale for the restraint" under Section 1. *American Express Co.*, 138 S. Ct. at 2284. "If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*

Defendants, however, will be unable to provide sufficient evidence rebutting the United States' *prima facie* case under Section 1. And even if Defendants were to make a showing of a procompetitive rationale, any procompetitive efficiencies could be reasonably achieved through less anticompetitive means—such as Booz Allen acquiring a different startup (one that is not its only competitor for OPTIMAL DECISION) or developing any claimed capacity itself.

For instance, while entry by new firms or expansion by existing firms can in some circumstances defeat an acquisition's anticompetitive effects, it only does so when the entry or

[46] Courts have also recognized "an important consideration when analyzing possible anti-competitive effects is whether the acquisition would result in the elimination of a particularly aggressive competitor in a highly concentrated market." *F.T.C.* v. *Libbey, Inc.,* 211 F. Supp. 2d 34, 47 (D.D.C. 2002) (internal quotation marks omitted). The elimination of EverWatch removes a potentially aggressive competitor for the OPTIMAL DECISION contract. EverWatch is an agile competitor with innovative staffing capabilities. If not for the Merger Agreement, it would bring those capabilities to bear on the OPTIMAL DECISION contract, forcing Booz Allen to respond and try to offer an even better value to NSA.

expansion will "fill the competitive void that will result if defendants are permitted to purchase their acquisition target." *United States v. H&R Block Inc.*, 833 F. Supp. 2d 36, 73 (D.D.C. 2011) (internal quotation marks and alterations omitted). Here, there are high barriers to entry to this market, making it unlikely that, even if NSA were to delay issuing the RFP,[47] any other potential competitors could submit a competitive bid for the OPTIMAL DECISION contract. EverWatch spent years assembling its team and developing its proposal, and no new competitor would have sufficient time to assemble a team, negotiate subcontract terms, develop a draft proposal, and prepare for oral examinations in time to meet NSA's schedule. Further, any entry into this market would require significant time due to NSA's requirement that contractors have security clearances (which can take up to a year to obtain) and pass polygraph tests. Taking all these factors into account, entry into the market for signals intelligence modeling and simulation services under the OPTIMAL DECISION contract would not be timely, likely, or sufficient to prevent the harm to competition resulting from Booz Allen's acquisition of EverWatch.

Further, EverWatch's supposed "solution" to the competitive harm created by the Merger Agreement is no solution at all.[48] Trading places with [redacted] is not an adequate remedy, as such a switch would be in name only. As a senior manager at [redacted] stated:

> Q: If the RFP came out today and EverWatch dropped off the team at the same time, would the team be able to submit a competitive proposal?
> A: I don't believe so, no.[49]

Simply put, [redacted]—whose largest prime contract to date is valued at $[redacted] million—does not

[47] That delay itself—which maintains Booz Allen's incumbency—may be an additional anticompetitive consequence of the Merger Agreement.
[48] Defendants may have begun to back off their [redacted] scheme once the United States' investigation began to reveal its gaping flaws, but the mere fact of beginning the scheme shows recognition of Defendants' antitrust problem and their indifference to the negative effect on competition that was threatened by this scheme.
[49] Ex. K, [redacted] Dep. Tr., at 64:9-13.

have EverWatch's data, work product, knowledge base to be a program manager, investments in the program, and teaming agreements with its 25 other subcontractors.[50] Moreover, those 25 team members might not be interested in working on this project without EverWatch in the prime role.[51] Without the full support of EverWatch, the team would not be able to submit a proposal on NSA's schedule for the OPTIMAL DECISION project.

II. The Public is Likely to Suffer Irreparable Harm Without Preliminary Relief

Irreparable harm to the public is presumed in cases brought by the United States pursuant to statutes permitting injunctive relief. *See In re Sanctuary Belize Litig.*, 409 F. Supp. 3d 380, 396, 419 (D. Md. 2019) (noting that the FTC has a "less stringent" burden than in a "traditional preliminary injunction proceeding," and the likelihood of irreparable harm is presumed where a motion is brought "pursuant to a statute that authorizes injunctive relief"). In other words, "[i]n a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief." *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990).

A presumption of irreparable harm is appropriate here because the Sherman Act expressly provides 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; *see, e.g.*, *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 544 (W.D. Pa. 1963) (similar provision in Clayton Act "embodies the irreparable injury of violations of its provisions."); *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1061, 1074 n.21 (S.D.N.Y. 1969) ("The failure of Congress to require that the Government show irreparable loss on the application for a preliminary injunction in a Section 7 action, as is the case with a private plaintiff, 15 U.S.C. § 26, indicates the Congressional desire to lighten the burden generally imposed on an applicant for preliminary

[50] *See* Ex. K, [redacted] Dep. Tr., at 53:14-55:2; 62:11-63:12.
[51] *See* Ex. K, [redacted] Dep. Tr., at 65:20-67:1.

injunctive relief."), *aff'd sub nom, Bartlett v. United States*, 401 U.S. 986 (1971).

Even if irreparable injury were not presumed, serious and permanent harm to competition will immediately occur if Booz Allen's Merger Agreement with EverWatch is not abrogated. Responses to the OPTIMAL DECISION RFP will be due 45 days after NSA issues it, and preliminary relief is needed before then. As described above, the primary customer of this service—NSA, an agency that defends our nation—is likely suffering ongoing harm due to the reduction in incentives to compete between Booz Allen and EverWatch.

Most importantly, providing relief later on would not restore Defendants' incentives *now*, while they are preparing bids to submit for OPTIMAL DECISION. The actions that Booz Allen and EverWatch are taking *today* to prepare their bids necessarily impact the final bid that they submit to NSA. As long as the Merger Agreement is enforceable, and the merger is on the table, both companies will remain incentivized to minimize their investment in preparing for the project and to submit proposals with inflated prices, thereby harming the United States' interests in competition and national security. *See Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 (2d Cir. 1989) (irreparable harm established where merged firm would "dominate" the market and the acquired firms "would cease to be viable competitors in the market"); *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1091 (D.D.C. 1997) ("Without an injunction, consumers in the . . . markets where . . . competition would be eliminated or significantly reduced face the prospect of higher prices than they would have absent the merger."). And, as long as the Merger Agreement is in effect, there is nothing to prevent Booz Allen from vetoing an award of the OPTIMAL DECISION contract to EverWatch, assuming that the Merger Agreement provided to the Department of Justice accurately reflects Defendants' agreement.

Thus, without an injunction now, full relief is impossible. *See, e.g.*, *Christian Schmidt*

Brewing Co. v. G. Heileman Brewing Co., 600 F. Supp. 1326, 1332 (E.D. Mich. 1985) ("If preliminary relief is not awarded and the merger is subsequently found to be unlawful, it would be extremely difficult, if at all possible, to remedy effectively the unlawful merger."); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1429 (W.D. Mich. 1989) (other possible remedy of divestiture "is typically rejected by the courts as ineffective"); *Consol. Gold Fields, PLC v. Anglo Am. Corp. of S. Afr. Ltd.*, 698 F. Supp. 487, 503 (S.D.N.Y. 1988) ("Once a [merger] has been consummated, it becomes virtually impossible to unscramble the eggs." (internal quotation marks omitted)), *aff'd in part, rev'd in part on other grounds*, 871 F.2d 252, 261 (2d Cir. 1989).

Anything less than fully abrogating the Merger Agreement, pending resolution following a full trial on the merits, will not suffice to stop the ongoing harm. The harm is caused by reduced incentives to compete because of the expectation that the merger may go forward. Only an order that the Merger Agreement is abrogated will go as far as possible to stop the ongoing harm. If, after a trial, the United States does not prevail, Defendants can renew their abrogated Merger Agreement if they so choose.

Defendants may claim that abrogation is permanent relief. But they are mistaken. "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. . ." *Authenticom, Inc. v. CDK Glob., LLC*, 874 F.3d 1019, 1026 (7th Cir. 2017). *See 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.").

An immediate injunction is the only way to end the continuing harm to competition created by the Merger Agreement. Failure to issue the requested injunction would not only cause

substantial harm to competition and fail to restore the Defendants incentives to compete, but it would undermine this Court's ability to order an adequate and effective remedy if the United States prevails on its claims. Without injunctive relief, Defendants are likely to continue integration planning, making offers of employment related to the merger, transferring funds or establishing escrow accounts, obtaining financing, and notifying subcontractors, vendors, suppliers, or customers, under the terms of the Merger Agreement. And under the Merger Agreement provided to the United States, Booz Allen retains control of any contract award to EverWatch valued at over $500,000.

NSA cannot delay the RFP to wait for other prime competitors, if any, to emerge and bid. (*See* Ex. A, NSA Decl. ¶¶ 10, 12.) The EverWatch and Booz Allen teams have been preparing for the OPTIMAL DECISION competition for years, and NSA has twice surveyed the industry and found no other firms interested in pursuing the prime contract. There is no secret team waiting in the wings to jump into this competition on short notice.

MASON III expires in March 2023, and it will take months to fully bring the winner of OPTIMAL DECISION on board, so it is critical for NSA to issue the RFP in the near future. Any lapse in these services would endanger NSA's ability to acquire signals intelligence modeling and simulation services under either OPTIMAL DECISION or MASON. In either circumstance, NSA will be negotiating with only Booz Allen, or a company that would imminently be acquired by Booz Allen. Under these circumstances, neither Booz Allen nor EverWatch has an incentive to compete aggressively for NSA's business. And extending MASON III would require NSA to renegotiate with the current contract holder, Booz Allen, which would have significantly reduced incentives to offer a competitive price for a contract extension. Consequently, both NSA and competition itself will be immediately and irreparably

harmed unless this Court issues a preliminary injunction.

A delay in issuing the RFP is likely to result in the loss of skilled individuals to other projects. (Ex. A, NSA Decl. ¶ 10.) Typically, employees staffing support services contracts for government customers are assigned by their employer to work on a specific contract. When that contract comes to an end, the employer moves the employee to another contract, and if no contract is available, the employee may be terminated. (*Id.*) Any delay in awarding OPTIMAL DECISION would add job uncertainty and risk to these contract employees, increasing the likelihood that they will opt for certainty and move to other projects. (*Id.*) Once skilled individuals are lost to other projects, they are difficult to replace. Few people possess the skills in signals intelligence modeling and simulation required for OPTIMAL DECISION. Even if other skilled individuals were located, it would take significant time to add them to the project, as they would require high-level security clearances. (*See id.*)

Any other remedies that Defendants may propose—such as enacting a firewall between the bidding teams of the two companies or providing personal bonus incentives to winning bid team members—are not structural remedies that could change incentives. The only remedy to preserve competition is abrogating the Merger Agreement and any actions by Defendants in furtherance of it—such as accessing the data room, exchanging confidential information, preparing for integration, negotiating or making offers of employment, transferring funds or preparing an escrow fund, obtaining financing in connection with the proposed merger.

III. Preliminary Relief Will Not Impose an Undue Hardship on Defendants, and the Balance of Equities Favors the United States

Neither company will suffer significant harm if the Merger Agreement is abrogated pending resolution at a full trial on the merits, other than whatever private benefits it could achieve through closing the agreement quickly. Such private financial harm, if any, "must . . .

yield to the public interest in maintaining effective competition." *Ivaco*, 704 F. Supp. at 1430. *See also United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412, 434 (S.D.N.Y. 1980) ("Far more important than the interests of either the defendants or the existing industry . . . is the public's interest in enforcement of the antitrust laws and in the preservation of competition. The public interest is not easily outweighed by private interests."); *cf. In re Sanctuary Belize Litig.*, 409 F. Supp. 3d at 396. (Fourth Circuit has suggested that, under FTC Act, "any potential private injuries that may be caused by granting a motion for preliminary injunction are not proper considerations for granting or withholding injunctive relief") (internal quotation marks omitted).

To be sure, Defendants may experience inconvenience and some financial setbacks. But they are the ones who decided to enter into a competition-ending Merger Agreement on the eve of an RFP for which they knew that they were the only two bidders. Any harms that Defendants experience are creations of their own choices.

IV. Preliminary Relief Advances the Public Interest

Preserving the status quo by maintaining Booz Allen and EverWatch as distinct and separate competitors, and thereby preserving competition in the relevant market, exemplifies preliminary relief that is in the public interest. "The public has an interest in enforcement of the antitrust laws and in the preservation of competition." *TrueEX, LLC v. MarkitSERV Ltd.*, 266 F. Supp. 3d 705, 726 (S.D.N.Y. 2017) (internal quotations omitted) (granting motion for preliminary injunction based on Sherman Act claims). *See also Glen Holly Ent., Inc. v. Tektronix Inc.*, 352 F.3d 367, 373 (9th Cir. 2003) ("[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."); *F.T.C. v. Swedish Match N. Am. Inc.*, 131 F. Supp. 2d 151, 173 (D.D.C. 2000) ("There is a strong public interest in effective enforcement of the antitrust laws.");

F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 726 (D.C. Cir. 2001) ("The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws"); *Marathon Oil Co. v. Mobil Corp.*, 530 F. Supp. 315, 320 (N.D. Ohio 1981) ("[T]he mere possibility that Marathon would be eliminated as an effective competitor from the marketplace is sufficient to satisfy the public interest criterion.").

"The public's interest in enforcement of the antitrust laws and in the preservation of competition . . . is not easily outweighed by private interests," and "[a]ny doubt concerning the necessity of the safeguarding of the public interest should be resolved by the granting of a preliminary injunction." *Columbia Pictures Indus., Inc.*, 507 F. Supp. at 434 (granting United States' motion for a preliminary injunction on Section 1 claim). Here, relief is necessary to protect the public interest in the enforcement of the antitrust laws and in preserving competition.

V. The United States Will Need Only Limited Discovery in Advance of a Preliminary Injunction Hearing

Given the urgency of the remedy sought here, the United States is prepared to litigate this hearing on an extremely expedited time frame. The United States respectfully requests that the Court schedule a preliminary injunction hearing by no later than August 5, 2022. The United States anticipates needing only limited discovery—four depositions and five requests for production each for Plaintiff and the collective Defendants—prior to a preliminary injunction hearing, and the United States intends to meet and confer with defense counsel forthwith regarding the United States' request for expedited discovery.

CONCLUSION

For the reasons set forth above, the United States respectfully requests a hearing, and that this Court issue a preliminary injunction abrogating Defendants' Merger Agreement, and enjoining Booz Allen from finalizing its acquisition of EverWatch.

Dated this 8th day of July, 2022.

Respectfully submitted,

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