IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Plaintiff, v. CCC HOLDINGS, INC. and AURORA EQUITY PARTNERS III L.P. Defendants.	)))))))))))))	 Civil No. 08-CV-2043 (RMC) PUBLIC VERSION

PLAINTIFF'S POST HEARING BRIEF

DAVID P. WALES
Acting Director
NORMAN ARMSTRONG, JR.
Acting Deputy Director
Bureau of Competition

DAVID SHONKA
Acting General Counsel
Federal Trade Commission

CATHARINE M. MOSCATELLI
Assistant Director
ROBERT S. TOVSKY
MORRIS A. BLOOM
Deputy Assistant Directors
Bureau of Competition
Mergers II Division

J. ROBERT ROBERTSON
D.C. Bar No. 501873
CASEY R. TRIGGS
ERIC M. SPRAGUE
DONALD R. GORDON
DAVID E. MORRIS
KYLE E. CHADWICK
VICTORIA L. LIPPINCOTT
SEAN D. HUGHTO
CECELIA WALDECK
ANGELIKE ANDRINOPOULOS MINA
KYLE ANDEER
ABIGAIL SLATER
Attorneys
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2008

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INTRODUCTION

The FTC has established that there are "questions" in this case "going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation" by the Commission, and thus it is entitled to a preliminary injunction to maintain the status quo pending an administrative trial. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (Brown, J.), 1041 (Tatel, J.) (D.C. Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001). This is a 3-to-2 merger with high barriers to entry that will result in a company with monopoly or near-monopoly power. "This creates, by a wide margin, a presumption that the merger will lessen competition." *Heinz,* 246 F.3d at 716. As the Court in *Heinz* determined, "no court has ever approved a merger to duopoly under similar circumstances." *Id.* at 717 (Enjoining the merger of two companies with a combined, 32.8% market share).[1]

By issuing the complaint, the Commission determined that it had reason to believe that the imminent merger of CCC, the market leader in both Estimatics and Total Loss Valuation ("TLV"), and Mitchell, one of only two other significant competitors in these markets, may be anticompetitive and should thus be enjoined pending adjudication by the FTC. Since then, the evidence against the merger has become even stronger.

The CCC-Mitchell merger will create a dominant firm with shares of approximately { } in the Estimatics market and { } in the TLV market. The defendants failed to seriously challenge the structure of these markets. Defendants' own expert, Dr. Ordover admits that, as a result of

[1] Small competitors in *Heinz* had a 2.2% market share, { }. *Id.*

the structure of the market, the merger violates the Guidelines "by an obvious mark." 1/23 Tr. 202.

Defendants sought to rebut this wide presumption by arguing that efficiencies, new entry by Web-Est, and the supposed, unique characteristics of these markets prevent the exercise of market power. Defendants' arguments have not wholly rebutted the "serious, substantial" questions to counter the FTC's case. Considering the high market shares in a 3-to-2 merger with significant barriers to entry, defendants' evidence was weak and on many issues simply non-existent. Moreover, section 13(b) merely requires the court to determine whether the parties' evidence raises "serious, substantial" questions that should be addressed in the administrative trial on the merits. After defendants' rhetoric and the FTC's voluminous evidence, "serious, substantial" questions remain, and this Court should thus enter an injunction as a matter of law.

Defendants' first attempt to counter the FTC's case was a claimed efficiencies defense. But, as the D.C. Circuit explained, no court has accepted efficiencies as a defense when the merger "would generate undue market share and increased concentration."[2] Yet, despite this high threshold for high-concentration cases, defendants cannot meet even the bare requirements that their proposed efficiencies are not speculative, are merger-specific, or that they will actually result in lower prices to customers. *See, e.g., FTC v. University Health*, 938 F.2d 1206, 1223 (11th Cir. 1991) (rejecting the defense in a 5-4 merger and requiring "significant economies and that these economies ultimately would benefit competition and, hence, consumers"). Indeed, defendants admitted that they do not even plan to achieve any net efficiencies for at least {

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[2] *Heinz*, 246 F.3d at 721-22 (rejecting defense when the merged company would achieve a 32.8% market share); *see also FTC v. Staples*, Inc., 970 F. Supp. 1066, at 1088-89 (D.D.C. 1997) (rejecting defense when defendants could not show they would pass through the claimed $6.5 billion of efficiencies); *FTC v. Swedish Match*, 131 F. Supp. 2d. 151, 171-72 (rejecting defense with "undue market share" of 60%);

} and cannot speculate what the dollars would be after that. 1/8 Tr. 92-93, 1/9 Tr. 35, 37-39 (Sun); PX 486 at 34, PX 493, PX 1823. In short, defendants simply do not have any efficiencies evidence that could wholly rebut the FTC's presumption.

Defendants' other arguments are also insufficient to rebut the FTC's strong, prima facie case. For example, defendants claimed during the initial status conference that a merger to only two major competitors is lawful because this industry is somehow "unique" in that all the prices to customers are "secret." (Scheduling Conf. 12/03/08 at 11) If that were true, it would still not rebut the structural case, because CCC-Mitchell will have a dominant market share and can unilaterally reduce competition. In addition, the undisputed evidence is that defendants' secrecy claim is absolutely baseless.[3] As numerous documents and the testimony reveal, this industry is no more unique than any other one in which vendors compete for business. It is simply too difficult for 45,000 customers to keep prices secret. Presently, competition between three competitors benefits customers by reducing prices. Defendants' claim that "two are enough" depends on the good will of the post-merger company to be generous with their prices with even less competition. As the *Heinz* court recognized, that is not how businesses operate. *Heinz*, 246 F.3d at 725.

The FTC does not have to show that these companies can fix prices. Instead, to overcome the presumption of anticompetitive effects, it is defendants' burden to show that there are structural barriers that prevent them from even stabilizing prices or following each other's lead. *See id.* (Absent evidence of "structural market barriers to collusion" that are "unique," the "creation of a durable duopoly affords both the opportunity and incentive for both firms to

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Merger Guidelines § 4 ("Efficiencies almost never justify a merger to . . .near monopoly").

coordinate to increase prices"). Defendants cannot prove that coordination is impossible or even unlikely. Indeed, the evidence demonstrates that customers tell CCC, Mitchell and Audatex what each other's prices are or coach these suppliers if they need to go further down in price to meet the competition. The Court saw numerous examples in which one competitor discovered the prices of the other or was coached by a customer to move a price, which it often did. 1/8 Tr. 53-75, 1/9 Tr. 76, 82-83 (Sun); PXs 701, 595, 716, 715.[4] The evidence reveals that defendants believe they can signal to their competitors to "stop putting cheap offers in the market."[5]

Even absent implicit coordination, however, the post-merger CCC-Mitchell will have substantial market power and can limit competition unilaterally. First, a company with over { } market share is clearly presumed to have a dominant market power.[6] Numerous documents from the defendants confirm that CCC is already dominant. PX 1927 at 2; PX 230 at 9 (CCC has reached the { }); PX 163 at 2; PX 668 at 49 ({ }). Thus, the substantial acquisition of market share through this merger will enhance CCC's dominance even more. Second, in these two markets, these companies differentiate themselves with their varied, bundled products, so that a significant number of customers have selected CCC and Mitchell as their first and second choices. The merger of these two will reduce that competition and give the post-merger CCC leverage not to compete as vigorously at it would

[3] *See, e.g.,* PXs 551, 542, 695, 697, 703, 506, 624, 696, 707, 717, 701, 699; Sun Dep. 12-49, 59-72 (detailing numerous instances in which Mitchell collected price information from many sources).

[4] Although Dr. Ordover claims that Audatex and CCC-Mitchell will not coordinate, he admitted that Audatex could follow a price up from CCC-Mitchell and that coordination between these two remaining estimatics and TLV firms would be profitable. 1/23 Tr. 182; 184 (Ordover). He also admitted that coordination is possible with imperfect information. 1/23 Tr. 183-184 (Ordover).

[5] PX 1956 at 1; PX 591 (both discussing signaling between Mitchell and Audatex).

[6] *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.,* 7 F.3d 986, 999 (11th Cir. 1993) (60 or 65% market share is sufficiently large to create a genuine issue of material fact as to monopoly power); *Rome Ambulatory Surgical Center, LLC v. Rome Mem'l Hosp., Inc.,* 349 F. Supp. 2d 389, 417 (N.D. N.Y. 2004.) (70% share is generally accepted as an indication of monopoly power).

have if Mitchell were still beating on its customers' doors.

Under the law, the FTC need not show that, after the merger, prices will not be as competitive, but there is ample evidence that this is the case here. Even defendants' expert could not get his own model to show anything less than a { } price increase for { } of the market where CCC and Mitchell are the incumbents, and he chose not to attempt to run the downstream Bertrand model with his own diversion ratios. Dr. Hayes did so and found that the likely price increase for collision shops, post-merger, was still substantial. And despite our claim at opening statement that CCC-Mitchell is going to raise Estimatics prices downstream to collision shops, defendants did not even attempt to offer evidence to the contrary. PX 632 at 35; PX 1431 at 4; PX 1432 ({ }). Indeed, Mr. Sun admitted that they intended to increase prices to collision shops by adding features to their bundles of products. 1/8 Tr. 78.

Against this backdrop of high concentration, reduced competition, and higher prices, defendants claim that Web-Est, a 12-person company, will be able to compete at the same level against a $1.4 billion, post-merger CCC-Mitchell, with its over 2,000 employees, and restrain CCC-Mitchell's market power. Yet, to be a sufficient entrant, Web-Est must have the same competitive power as a pre-merger Mitchell on day one to be a sufficient "fix." *Chicago Bridge & Iron, Co. v. FTC,* 534 F.3d 410, 430 (5th Cir. 2008) (Rejecting defendant's entry argument because "potential entrants would not be of a sufficient scale to compete on the same playing field as CB&I and thus would be unable to constrain the likely anti-competitive effects" of the acquisition). There is simply no evidence that Web-Est will completely "restore the competition lost from the merger." *In re Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 2005 LEXIS 215 at 19. The evidence is that Web-Est cannot compete at that level anytime soon or ever. Indeed, there is no likelihood that Web-Est will actually overcome serious barriers to entry that defendants' own documents detail repeatedly or that it can fare better than the many companies that have failed in the past. Moreover, Web-Est has no plans to compete in Estimatics for large insurance companies for years and has no current plans to compete in TLV. That defendants have no answer to the loss of competition in TLV independently warrants injunctive relief.

In short, defendants simply cannot overcome the presumptions that the law gives the FTC. Thus, defendants repeatedly cited Project Churchill, FUD, and other colorful – if irrelevant – competitive rhetoric.[7] The simple fact is that there are complaining parties in nearly every significant government antitrust investigation.[8] Indeed, Dr. Ordover represented a competitor when he successfully lobbied the European Commission to challenge the merger of General Electric and Honeywell in 2001.[9] The FTC's case does not rest on Audatex. Their evidence is informative but it is hardly the linchpin of the case against this merger.[10]

The evidence in this case comes from a variety of sources – mostly from defendants. Like any case, the FTC collected and evaluated information from the parties, customers, suppliers, competitors, and other industry representatives before it reached an enforcement decision. The FTC recognizes that all of these stakeholders have their own interests and those interests are not always consistent with those of the public. For example, the executives from CCC and Mitchell are deeply invested in the success of this deal and are desperate to see it

[7] The term "FUD" was coined over thirty years ago by a former IBM executive and is used to refer to any kind of disinformation used as a competitive weapon. *See, e.g.*, *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295 (D. Utah 1999). Indeed, Mitchell sought to "inoculate all CCC FUD" in 2005. PX1764.
[8] For example, a number of software firms lobbied the government for years before the United States brought its monopolization case against *Microsoft*.
[9] Janusz Ordover & Robert J. Reynolds, *Archimedean Leveraging and the GE/Honeywell Transaction*, Antitrust L.J. (2002).
[10] Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 Antitrust L.J. 87 n.8 (2007) ("there are certainly reasons, including fear of welfare-reducing foreclosure or, perhaps, a desire to purchase the acquired firm themselves, why the interests of even competitors may, in theory, be consistent with those of final consumers."); *see also* 1/21 Tr. 27 (Dr. Hayes).

approved. Likewise, Mr. Seidel of Web-Est stands to earn a windfall from this deal as Mitchell is poised to simply forfeit its { } interest in Web-Est for absolutely nothing. The FTC did not take a poll to see whether a majority of stakeholders favored or opposed the deal. Antitrust analysis is not a popularity contest. Antitrust turns on the facts. The facts in this case overwhelming support a preliminary injunction against this merger.

And faced with such a strong structural case, defendants fail to show any extraordinary, countervailing equities. There are none. Balanced against both Congressional intent to protect the public from anticompetitive mergers and the complex and lengthy undoing of this merger that the FTC and this Court may have to face if an injunction is not entered (*see, e.g., FTC. v. Whole Foods Mkts., Inc.*, 2009 U.S. Dist. LEXIS 929 (D.D.C. Jan. 8, 2009) (discussing a post-acquisition remedy hearing), defendants claim that there are efficiencies and innovation that the Court should consider. Yet, there are admittedly ***no*** net efficiencies for the foreseeable future, nor is there any evidence that innovation cannot be achieved without the merger.

This Court should also ignore defendants' plea that the court should deny the injunction because they will give up their merger if the Court temporarily enjoins the merger. That was their deliberate choice. Defendants have been negotiating this deal intermittently since { }. Their private-equity argument, which is nothing more than proof that they would like to start making more money sooner, should carry little weight here. If this merger makes that much sense economically, they should let the FTC adjudicate the merger.

In sum, this case is about nothing more than two large companies trying to seize between { } of two markets, Estimatics and TLV, in order to make more money. Through voluminous evidence, FTC counsel has raised "serious, substantial questions" about this merger. Accordingly, we respectfully request that the Court temporarily enjoin the merger so that it can be reviewed by the FTC in the adjudicative proceeding on March 31, 2009 – just weeks away.

STATEMENT OF FACTS[11]

When a consumer has an automobile accident, insurers, appraisers, and repair facilities rely on the partial loss estimation software ("estimatics") products of CCC, Mitchell, and Audatex to quickly and accurately predict the cost of repair of the vehicle. These three companies also offer Total Loss Valuation ("TLV") software products that predict the cost of replacing a "totaled" vehicle. These products are critical to the automobile claims process.

The estimatics and total loss markets are dominated by three significant suppliers: CCC, Mitchell, and Audatex. The "Big 3" account for over { }of the estimatics market and 100% of the TLV market. The remaining less than { } of Estimatics is split between Crash-WriteR and Web-Est, two small vendors of estimatics products to low-end repair facilities. The market shares of the three established vendors are well known and have been relatively stable over the years. [PPFOF 206, 207, 210]

The dominant player in these markets is Chicago-based CCC, which has around 900 employees and generates over { } million in annual revenues. [PPFOF 4, 365, 357], (PX 529 at 4). Investcorp is the principal investor in CCC, is a global investment group. [PPFOF 4], (PX 529 at 3). Investcorp owns around $15 billion in assets. [PPFOF 4] When Investcorp bought CCC, it reported that { } and that the {

}." [PPFOF 280, 326], PX 1927 at 2.

Mitchell is a leading vendor of estimatics, TLV, and workflow products to insurance companies, collision repair shops, and independent appraisers. [PPFOF 5, 2] Mitchell, founded in the 1940's, is the oldest name in the business. Headquartered in San Diego, California, the company generates around { } million in revenues. [PPFOF 357], PX 573 at 2. Today, Mitchell is owned by Aurora Equity Partners III L.P. [PPFOF 5] Before acquiring Mitchell, Aurora concluded that the former exceeded these criteria since: {

} [PPFOF 168], PX 629 at 1.

Audatex is the third supplier of estimatics and TLV products to insurance companies, collision repair shops, and independent appraisers. PX 585 at 47; PX 629 at 4; PX 519 at 16, 29. Audatex generates revenues of around { } from sales of the relevant products in the United States. [PPFOF 368], PX 629 at 1.

There is substantial evidence from the defendants' own records and from numerous other sources, including experts from both the FTC and defendants, to support the relevant markets of estimatics and TLV for vehicles in the United States and that the only substantial competitors in these markets for years have been and continue to be CCC, Mitchell, and Audatex. [PPFOF 44-124] The relevant geographic market for both relevant products is the world. [PPFOF 125]

Substantial evidence from testimony and the defendants' own documents confirm that there are substantial barriers to entry into both relevant markets. [PPFOF 320-71], PX 537 at 35; PX 560 at 27; PX 571; PX 583 at 27-28; PX 607; PX 613 at 18; PX 629 at 2; 1/8 PM Tr. 11-21, 42-45, 85-86 (Sun) ({ }) PXs 537 at 35, 560 at 27, 571 at 1, 583 at 27, 607 at 59, 1419.

The merger of CCC and Mitchell would result in an HHI of { } with an increase of { } in the estimatics market.[12] The post-merger HHIs in the TLV market would be { } with an

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[11] This is a summary of facts that are set out in detail in Plaintiff's Proposed Findings of Fact ("PPFOF").
[12] PX 1020 at ¶ 60

increase of { }.[13] [PPFOF 26] That the merger will result in high HHIs is uncontested.

The claimed efficiencies from the merger will be {

} Mitchell is not able to predict how many dollars in efficiencies will accrue at that point. [PPFOF 433, 434, 441] Defendants offered no evidence that any efficiencies would result in lower prices to consumers or that the efficiencies are merger-specific or relevant market-specific. [PPFOF 435, 446, 449, 464, 465-469] Nor did defendants offer any evidence that any claimed innovations could not be achieved without the merger. [PPFOF 459]

Defendants offered no evidence that Web-Est, would replace completely the competition lost by the elimination of Mitchell immediately or within the foreseeable future. [PPFOF 470-506] Even if Web-Est performs as well as it hopes, the HHI increase as a result of the CCC-Mitchell merger would still be extraordinarily high – an increase of { } points from { } to { } HHI points. Numerous companies, including CCC and Mitchell, have failed in their attempts to enter markets with estimatics or TLV products. [PPFOF 397, 398] Defendants have not offered to transfer contracts, personnel, intellectual property, or anything but a bare data license to enable Web-Est to compete. [PPFOF 476] Web-Est's continuation in the market is at best tenuous, { }. [PPFOF 473]

The FTC presented substantial evidence that CCC, Mitchell, and Audatex follow each other's prices in the relevant markets through a combination or market intelligence, experience, and coaching by customers. [PPFOF 223-64] The market realities, together with the merger to a duopoly, increase the likelihood of coordination. [PPFOF 179, 180; 1/12 Tr. 168-69 (Dr.

[13] PX 1020 at ¶ 64; 1/12 Tr. 128-29 (Dr. Hayes). These TLV HHI numbers understate Mitchell's competitive significance{ }.

Hayes)]

CCC is already a dominant player, and the merger will make it even more dominant in the relevant markets. [PPFOF 279-90] The three competitors for estimatics and TLV differentiate their products, so that a significant number of customers regard CCC and Mitchell as their first and second choices. For these two independent reasons, unilateral effects resulting from the merger are likely. These effects were predicted by Dr. Hayes to include substantial price increases in both markets to both insurance companies and collision shops. [PPFOF 298] Defendants' expert, Dr. Ordover, calculated a lesser, though still positive, price increase to insurance companies resulting from the merger and did not attempt to determine the price effect to collision shops. [PPFOF 306] Defendants' testimony and documents also reveal that they plan on raising prices to collision shops. [PPFOF 304]

Defendants failed to offer evidence of substantial public equities to counter the FTC's structural case. Due to the complexity of the integration process, as explained by defendants, it would be extraordinarily difficult to unwind this merger years after the fact. [PPFOF 518-22]

CCC and Mitchell announced the merger on April 2, 2008. [PPFOF 1] On November 25, 2008, the Commission decided it had a "reason to believe" that the merger may substantially lessen competition in both the estimatics and total loss markets. The Commission authorized an administrative complaint and its staff to seek a preliminary injunction in federal district court under Section 13(b) of the FTC Act. The Administrative Law Judge has confirmed that the administrative trial is scheduled for March 31, 2009.

ARGUMENT

I. The FTC Has More Than Met The Standard For A Preliminary Injunction.

The FTC is entitled to an injunction in this case because it raises "questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation." *Heinz*, 246 F.3d at 714-15 ("Congress provided a mechanism whereby the FTC may seek preliminary injunctive relief . . . until the Commission has had an opportunity to investigate and, if necessary, adjudicate the matter"). By meeting this standard, the FTC "creates a presumption in favor of preliminary injunctive relief." *Id.* at 726. Defendants, however, may rebut that presumption, requiring the FTC to "demonstrate a greater likelihood of success, by showing equities weighing in favor of the merger." *Whole Foods*, 548 F.3d at 1035. However, absent "particularly strong equities" in "favor the merging parties," the FTC is entitled to an injunction. *Whole Foods*, 548 F.3d at 1035, *citing Heinz*, 246 F.3d at 727; *FTC v. Elders Grain, Inc*., 868 F.2d 901, 903 (7th Cir. 1989). "The equities will often weigh in favor of the FTC, since 'the public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting the provision.'" *Whole Foods*, 548 F.3d at 1035, *citing Heinz*, 246 F.3d at 726. In this case, the FTC has raised "serious, substantial" questions, and defendants have offered no evidence of strong equities favoring the merger. Thus, the FTC is entitled to an injunction as a matter of law.

The FTC has no burden under the law to prove that the merger will lessen competition -- even at the merits trial. Under Section 7 of the Clayton Act, all the FTC need show at the merits trial is that the effect of the merger "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18; *see United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 323, n.39 (1962) (The reason Congress used the words, "may be" was because the Act was designed to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints . . . A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.'") (Citation omitted).

Faced with this low standard of proof at the merits trial, here under 13(b), the FTC has even a lower burden of proof at the preliminary injunction stage under the "serious, substantial" question standard. *Heinz*, 246 F.3d at 714-15. This "serious, substantial question" standard is not new. It was coined by Judge Jerome Frank in a private merger challenge in 1953. *Hamilton Watch Co. v. Benrus Watch Co*., 206 F.2d 738 (2d Cir. 1953). In that case, and in the dozens of cases that followed the standard, courts have refused to require that the plaintiff prove a violation of Section 7 in order to obtain an injunction. Indeed, the Federal Court of Appeals for the D.C. Circuit has made it clear that the "FTC is not required to establish that the proposed merger would in fact violate section 7 of the Clayton Act." *Heinz*, 246 F.3d at 714, *citing Staples*, 970 F.Supp. at 1071; *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976) ("The district court is not authorized to determine whether the antitrust laws have been or are about to be violated."). As Judge Tatel reiterated in *Whole Foods*, "[c]ritically, the district court's task is not 'to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *Whole Foods*, 548 F.3d at 1042 (Tatel, J.); at 1035 (Brown, J.). Judge Richard Posner explained:

> One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act....

Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986). The "only purpose of a proceeding under § 13 is to preserve the status quo until F.T.C. can perform its function." *Food Town*, 539 F.2d at 1342; *accord Whole Foods*, 548 F.3d at 1042 (Tatel, J.), 1035 (Brown, J.).

It is also clear from all of these cases that defendants cannot avoid an injunction merely by creating factual disputes – that is what "serious, substantial" questions are. For example, there were significant disputes between the FTC and defendants in *Whole Foods, Heinz, Food Town, Warner*, *Lancaster Colony,* and *Staples*, yet the Court of Appeals in the first four and the district courts in the latter two still found that the FTC had established "serious, substantial" questions for the FTC to decide.

For example, in *Warner,* the 9th Circuit explained that it did "not ignore the evidence presented by the defendants which conflicts with the Commission's evidence," but because

> the issue in this action for preliminary relief is a narrow one, we do not resolve the conflicts in the evidence, compare concentration ratios and effects on competition in other cases, or undertake an extensive analysis of the antitrust issues. We hold only that the Commission has met its burden of showing a likelihood of success on the merits.

FTC v. Warner Communications, Inc., 742 F.2d 1156, 1164 (9th Cir. 1984). The court in *Lancaster Colony* explained:

> Surely, we are not required, on a Section 13(b) application, to examine the economic characteristics of the entire [market] or to try the case. As a practical matter, a district court can hardly do more at so early a stage of antitrust litigation than to make a considered estimate of the FTC's apparent chances of success based upon what must necessarily be an imperfect, incomplete and fragile factual basis.

FTC v. Lancaster Colony Corp., Inc., et al., 434 F. Supp. 1088, 1091 (S.D. N.Y. 1977) (evidence that the merging parties would have 19% of the market established a "presumptively illegal" merger).

If there were any doubt whether it is the district court's function under 13(b) to decide between competing views of what the price effects could be from a merger, that was put to rest with *Whole Foods*. Indeed, one of the disputed issues between the dissent and the other two opinions was whether the price effect (*e.g.*, 5%, as the FTC claimed in an example, or .5% as defendant's expert claimed) was sufficient to block a merger. That is exactly the kind of dispute that we have seen in this case. As Judge Tatel explained, however, "at this preliminary, pre-hearing stage, the pricing evidence here, together with the other evidence described above, is certainly enough to raise 'serious, substantial' questions that are 'fair ground for thorough investigation, study, deliberation, and determination by the FTC.'" *Whole Foods*, 548 F.3d at 1047 (*quoting Heinz,* 246 F.3d at 714-15). Indeed, Judge Tatel said that a judge should not attempt to pick between two competing expert theories, for if the district court does so, it "trench[es] on the FTC's role when [the court] choose[s] between plausible, well-supported expert studies." *Id.* at 1048; *see, e.g., Heinz,* 246 F.3d at 725 ("post-hearing, the FTC may accept the rebuttal arguments proffered by the appellees, including their efficiencies defense, and permit the merger to proceed," but at this point "we conclude that the FTC succeeded in raising questions . . . so serious [and] substantial").

Of course, defendants can attempt to counter the FTC's case by ***proving*** "that the merger is not likely to have . . . anticompetitive effects." *Food Town,* 539 F.2d at 1345, (*quoting, Philadelphia Nat'l Bank*, 374 U.S. at 363). But defendants here have made no such showing. Instead, they raise three claims: (1) efficiencies; (2) entry by Web-Est will supposedly replace the competition lost by the elimination of Mitchell; and (3) coordination is allegedly difficult. These defenses are not supported by the evidence and, at best, demonstrate that there are indeed "serious, substantial" questions that entitle the FTC to an injunction to preserve the status quo pending a trial on the merits. Moreover, under the sliding scale between "serious, substantial" questions and the equities, the FTC would clearly be entitled to an injunction due to the strong equities in favor of an injunction. *Whole Foods*, 548 F.3d at 1035.

II. The FTC Has Established Serious, Substantial Questions That Warrant An

Injunction To Maintain The Status Quo Pending An Administrative Trial.

With overwhelming evidence of high HHIs and high barriers to entry, with no countervailing, strong public equities, the FTC is entitled to an injunction.

A. The Merger of CCC and Mitchell is Presumptively Illegal.

1. The Merger Will Lead To Extraordinarily High HHIs in Estimatics and TLV.

The defendants acknowledge the HHIs in this case are "very, very, high." Scheduling Conf. Tr. at 10-11. Indeed, there is no serious challenge to the market definition, market shares or concentration evidence in the Estimatics market. The merged entity, with a { } market share, will be twice the size of its only other significant competitor. As for the other two vendors that sell low-end Estimatics solutions, they have less than { } of the market. Dr. Hayes testified that estimatics is a properly defined product market. 1/12 Tr. 84-85 (Dr. Hayes); PX 1020 ¶¶ 26-32. Dr. Ordover agrees with Dr. Hayes that core estimatics is a relevant product market and that, with respect to insurers, and that the only three competitors are CCC, Mitchell, and Audatex. 1/23 Tr. 204-205 (Dr. Ordover). Indeed, the parties' own documents and admissions and third-party witnesses demonstrate that Estimatics is a market in which the only significant competitors are CCC, Mitchell and Audatex.[14] Customers, including the parties' own witnesses, have consistently testified that they would not switch from estimatics to alternatives, even if prices go up.[15] Insurers have also uniformly testified that they would not substitute their own product for

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[14] *See, e.g.,* 1/8 PM Tr. 10-11, 20-21, 22-24, 28-29, 41 (Sun); (PXs 537 at 34, 560 at 27, 46, 607 at 2, 59, 235 at 26, 206 at 10, 109 at 5, 1420 at 7); *Swedish Match*, 131 F. Supp. 2d at 161-62 (customer and competitor testimony, and defendants' business documents, found to be more persuasive than expert testimony).

[15] Mello Dep. at 99 ({ }); PX 28 at ¶ 8 (Wilson. Decl.); 1/23 Tr. 40 (Dibble).

the estimatics products offered by CCC, Mitchell, and Audatex.[16]

Dr. Hayes calculated market shares for the relevant markets:

Company	**Estimatics**[17]	**Total Loss**[18]
CCC	{ }	{ }
Mitchell	{ }	{ }
Audatex	{ }	{ }
CrashWriteR	{ }	N/A
Web-Est	{ }	N/A

The combined Mitchell-CCC will have approximately { } of the estimatics market[19] and { } of the TLV market.[20] The shares likely overstate Audatex's competitive significance in today's marketplace. Audatex has lost several large estimatics and total loss accounts recently and has been losing share. 1/23 Tr. 201-2 (Dr. Ordover); 1/22 Tr. 35-36 (Ramamurthy); PX 52 at 3. Defendants do not seriously challenge Dr. Hayes' calculations, and they never proffered alternative calculations. Indeed, Dr. Hayes' calculations are consistent with the defendants' internal estimates of market shares. For example:

[16] Danford Dep. 77-78; Daly Dep. 65.
[17] PX 1020 at 39 (Exhibit 2 to Preliminary Expert Report of John B. Hayes, Nov. 24, 2008).
[18] PX 1020 at 39 (Exhibit 2 to Preliminary Expert Report of John B. Hayes, Nov. 24, 2008).
[19] PX 1417; PX 1020 at 39.
[20] PX 1418; PX 1014; PX 1020 ¶ 63; 1/12 Tr. 128 (Dr. Hayes).

Mitchell's Estimatics Market Shares Estimates[21]	**CCC**	**Mitchell**	**Audatex**
Insurers (Units/2007) Repair Facilities (Units/2007)	{ } { }	{ } { }	{ } { }
Insurers (Units/2006) Repair Facilities (Units/2006)	{ } { }	{ } { }	{ } { }
Insurers (Units/2003) Repair Facilities (Units/2003)	{ } { }	{ } { }	{ } { }

These market shares are not affected by the { } of the market that Web-Est may have. Crash-WriteR with its { } also does not matter. Indeed, CCC-Mitchell plans { }. PX 1428 at 1. Neither product, with a { } charge has made any dent on the { } that the big three can and do easily charge.

In short, the merger of CCC and Mitchell violates the structural thresholds in the Guidelines and the case law by an wide margin. Market concentration is an established indicator of the likely potential competitive effect of a merger. See Horizontal Merger Guidelines 1.51. The Herfindahl-Hirschman Index (HHI) – the sum of the squares of the individual market shares of each firm in the market – is the standard measure of market concentration. 1/12 Tr. 123 (Dr. Hayes) ("[T]he HHI is a calculation or a statistic that comes out of economic theory and economic research into actual mergers which has found that as markets become more concentrated, prices tend to go up; prices are higher. So there's economic research there that indicates that at certain levels of concentration, there's a high probability of elevated prices.").

The HHIs in this case are off the charts. The merger of CCC and Mitchell would result in an HHI of { } with an increase of { } in the estimatics market.[22] The HHIs in the total loss

[21] PX 519 at 15; PX 607 at 15; PX 537 at 33; *see also* PX 99 at 28.
[22] PX 1020 at ¶ 60.

market would be { } with an increase of { }.[23] The market shares and concentration measurements establish a strong *prima facie* case that the merger is anticompetitive. *See Heinz*, 246 F.3d at 725, (*quoting United States v. Baker Hughes*, 908 F.2d 989, 991 (D.D.C. 1990)).[24] Defendants agree that the HHIs in this case are "very, very, high."[25]

As for the prima facie case in the total loss valuation ("TLV") systems market, the only challenge mounted by the defendants is a quibble over whether vendors of "books" should be included in the market, but it does not matter to the HHIs.[26] Def. Pre-trial Brief at 30-37. The defendants' own documents reflect the fact that over { } of insurers use total loss software sold by one of these three companies. PX 513 at 16. The argument that "book" vendors should be included is inconsistent with the parties' own documents, the testimony of the insurers, and the testimony of other market participants. Indeed, the "book" vendors do not consider themselves competitors of CCC, Mitchell, or Audatex.[27] Dr. Hayes testified that TLV is a properly defined product market. 1/12 Tr. 84-85 (Dr. Hayes); PX 1020 ¶¶ 26, 42-48. He conducted a critical-loss analysis to support his contention that TLV is a relevant product market. PX 1020 ¶ 26, 42-48. Neither book valuations nor primary research provides substantial competitive constraints on TLV software. PX 1020 ¶¶ 33-39, 48. Even Dr. Ordover did not reach a conclusion as to

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[23] PX 1020 at ¶ 64. 1/12 Tr. 128-129 (Dr. Hayes). These TLV market share and HHI numbers may actually understate Mitchell's competitive significance in that market. { }.

[24] *See, e.g., FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 53 (D.D.C. 1998) (mergers increasing HHIs from 1648 to 2450 and from 1648 to 2277; increasing market shares from 25% to 37% and from 22% to 40%); *Elders Grain*, 868 F.2d at 902 (acquisition increased market shares of largest firm from 23% to 32%); *Hosp. Corp. of America*, 807 F.2d at 1384 (acquisition increased market share of second largest firm from 14% to 26%); *Warner*, 742 F.2d at 1163 (acquisition increased market share of second largest firm from 19% to 26%; four-firm concentration ratio of 75%).

[25] Scheduling Conf. (12/3/08) Tr. 10-11.

[26] As Judge Posner has observed that "[i]t is always possible to take pot shots at a market definition." *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990).

[27] Stanton Decl. ¶ 7; Heffinger Decl. ¶ 9; Fournier Decl. ¶ 5; Cross Decl. ¶ 8.

whether books are part of the TLV market. 1/23 Tr. 205 (Dr. Ordover).

The evidence by the parties' own admission suggests that "books" are a complement, rather than a substitute for TLV systems.[28] Indeed, CCC and Mitchell offer access to NADA as an add-on to their own TLV products.[29] Mitchell conducted a competitive analysis of TLV providers, focusing just on ADP (Audatex) and CCC while referring to NADA and Red Book simply as ancillary databases.[30] To be sure, there may be a handful of insurers that continue to use books in those states that still allow their use in total loss valuations. However, there is no evidence that "book" vendors are a competitive constraint on the software products of CCC, Mitchell or Audatex, nor could they be.

Guide books do not provide the current, accurate, and detailed valuations provided by TLV Systems. CCC, Mitchell, and Audatex use a consistent methodology across all vehicles that includes recent sales of comparable vehicles.[31] Insurers, including some of the defendants' own witnesses,[32] consistently testified that they would not switch from TLV products to guide books.[33] Guide books do not provide the current, accurate and rich data provided by TLV products. Mitchell, CCC, and Audatex use a consistent methodology across all vehicles that includes recent sales of comparable vehicles in a number of ways including: year, make, model, body style, engine, mileage etc. and include numerous databases.[34] For example, CCC's product contains data "complied by surveying over { } car dealerships in more than { } markets { }

[28] Brungger IH 135-36.
[29] PX 241 at 23; PX 643 at 11
[30] PX 643 at 11
[31] PX 1964 at 10; PX 1958 at 34-36
[32] 1/23 Tr. 39 (Dibble) (Testified that he would not switch to books if CCC raised prices).
[33] Adamson Dep. 31-32, 40-41; Rollins Dep. 71-72; PX 11 at ¶ 7 (Brown Decl.); 1/8 AM Tr. 79-81 (Hall).
[34] PX 1964 at 6, 10 ({ }).

each month and through { } publications/subscriptions."[35] Mitchell's database contains over { } electronic records including the PIN network data received from JD Power and Associates.[36] Mitchell conducted a competitive analysis of TLV providers, focusing just on ADP (Audatex) and CCC while referring to NADA and Red Book as ancillary databases.

Defendants simply do not price their TLV products, which cost { }, against books. [37] By contrast, the guide books charge around { }.[38] For example, { }. PX 682 at 9. The defendants have not cited a single competition where they responded to pricing by "book" vendors. Indeed, their own documents only mention CCC, Mitchell, and Audatex as competitors. *See, e.g.*, PX 241 at 9[39]

The evidence supports a TLV market. The HHI post-merger would increase by { } to { } – numbers that exceed those found by the D.C. Circuit to "create, by a wide margin, a presumption that the merger w[ould] lessen competition." *Heinz*, 246 F.3d at 716 (the Heinz merger would have given the new company 32.2% of the market and increased the HHI by { } to { }); *compare FTC v. Arch Coal, Inc*, 329 F. Supp. 2d 109, 158 (2004) (the court found that an increase in HHI of 49 to 2103 was "*far* from compelling" and thus its prima facie case was "fairly weak."). In any case, the defendants' dispute over books has no effect on the high HHIs, which would still be extraordinarily high if books were included. *See* PX 513 at 16; PX 548 at 7.

For both relevant markets, the defendants have not disputed Dr. Hayes' conclusion that the geographic market is worldwide for vehicles that are used in the United States.

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[35] PX 99 at 20
[36] PX 643 at 11; PX 541 at 24
[37] PX 548 at 7
[38] Stanton Dep. 101-3; Adamson Dep. 36; Fournier Decl. at ¶ 2.

2. There are Considerable Barriers to Entry and Expansion in the Estimatics and Total Loss Valuation Markets.

The near-monopoly created by the merger of CCC and Mitchell will be sheltered from new competition by significant barriers to entry. *See Heinz*, 246 F.3d at 717 (high entry barriers eliminate the possibility that the competition lost from the merger will be mitigated by new entry); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 342 (S.D. N.Y. 2001) ("The higher the barriers to entry . . . the less likely it is that potential entrants would be able to enter the market in a timely, likely, and sufficient scale to deter or counteract any anticompetitive restraints."), *aff'd*, 344 F.3d 229 (2d Cir. 2003).

CCC and Mitchell have repeatedly touted { }.[40] Both Investcorp and Aurora { }.[41] Indeed in September 2008, shortly before they crossed this Court's threshold, Messrs. Sun and Ramamurthy { }."[42] That presentation { }.[43] Mr. Sun, Mitchell's CEO, outlined the challenges that would confront any new entrant: product development (the database and software), marketplace acceptance, customer network,

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[39] *U.S. v. Aluminum Co. of America*, 377 U.S. 271, 276-277 (1964) ("here where insulated aluminum conductor price wise stands so distinctly apart, to ignore the price in determining the relevant line of commerce is to ignore the single most, practical factor of the business").

[40] PX 537 at 35; PX 560 at 27; PX 571 at 1-2; PX 583 at 27-28; PX 607 at 59; PX 613 at 18; PX 629 at 2. { }. 1/8 PM Tr. 11-21, 42-45, 85-86 (Sun), PXs 537 at 35, 560 at 27, 571 at 1, 583 at 27, 607 at 59, 1419 at 2

[41] PX 161 at 23.

[42] 1/8 PM Tr. 45 (Sun); 1/8 PM Tr. 45, 86 (Sun); *see* PX 1420 at 24 ({ }); PX562-35 ({ }).

[43] PX 493 at 1

customer relationships, and industry experience.[44] Mr. Sun even confirmed that, in the past, "numerous companies have tried to penetrate" the markets but "none have emerged as a competitive challenger." 1/8 PM Tr. 19 (Sun). These past failures are sufficient to show that future entry is not likely to restrain prices.[45]

These barriers are far more than just obtaining a database. Product development, as Mr. Sun and others have explained, is only the first of many challenges facing an entrant. The most recent failed attempt was made by Focus Write (which was subsequently reorganized as Web-Est). Mitchell itself failed with several of its own products. 1/8 Tr. 27 (Sun). Also, the reputation and expertise of a vendor is critically important. *Chicago Bridge,* 534 F.3d at 437-38, 437 n.17 (Reputation was a barrier to entry because it represented "industry-specific traits," such as "expertise"); *Cardinal Health, Inc.*, 12 F. Supp. 2d at 57; *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1075 (D. Del. 1991). For example, Mitchell has a "60 year history of providing estimating solutions [and] an established and extensive network [] of thousands of insurance staff and collision repair facility users that would be difficult to replicate." PX 574 at 2; *see also* 1/8 PM Tr. 13 (Sun). Thus, Web-Est or any other new entrant would have to establish marketplace credibility. { } In addition, CCC's patent on estimatics compare features may forestall competition as well.[46]

Insurers consistently testified that they would only consider an estimatics or TLV product

[44] 1/8 PM Tr. 12-14 (Sun); PX 537 at 35

[45] "The only truly reliable evidence of low barriers is repeated past entry." 2A Phillip E. Areeda, et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 420b, at 60 (2d ed. 2002). *See also Cardinal Health, Inc.*, 12 F. Supp. 2d at 56 ("[T]he history of entry into the relevant market is a central factor in assessing the likelihood of entry."); *Chicago Bridge*, 534 F.3d at 427 ("history of entry as evidence . . .whether future entry would be able to counteract a merger's anti-competitive effects").

[46] *See, e.g., Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1999) ("Common entry barriers include: patents"); *CCC Info. Servs. v. Mitchell Int'l, Inc.*, 2006 U.S. Dist. LEXIS 21643

with a proven and verifiable track record and experience in the marketplace. These customers are unwilling to roll the dice on a new product that is critical to their business.[47] Insurers also require multiple years of audited financial statements showing financial stability. Another barrier to entry is the portfolio of integrated products offered by the current vendors. PX 1420 at 24. The time and effort Mitchell invested in the development of its TLV product reflects this pressure. Mitchell { }.[48]

In short, as defendants explained to the Court and { }, there are substantial barriers to entry in these markets. As the *Heinz* court stated, "no court has ever approved a merger to duopoly under similar circumstances." 246 F.3d at 717.

B. The Defendants Cannot Rebut the Presumption of Illegality Flowing from the FTC's Prima Facie Showing.

Market share and concentration statistics establish a presumption of harm and shift the burden of proof to the defendants to demonstrate that the presumption flowing from those statistics is incorrect. *Baker Hughes*, 731 F. Supp. at 11. The task that confronts the defendants in this case is daunting. The strength of the FTC's prima facie case in the Estimatics and TLV markets places a heavy evidentiary burden on the defendants. *Heinz*, 246 F.3d at 725; *Baker Hughes*, 908 F.2d at 991 ("[t]he more compelling the prima facie case, the more evidence the defendant must present"). None of defendants' three arguments – efficiencies, Web-Est as a replacement for Mitchell, or secret bidding is supported by the evidence.

Nevertheless, this Court does not have to decide which side has the stronger of the three

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(N.D. Ill. 2006) (CCC accused Mitchell of infringing a patent covering CCC's Pathways' estimatics product).

[47] 1/9 Tr. 16-17, 75 (Sun); PX 116 at 7, 8, 14; PX 118 at 21; PX 688 at 25; PX 686 at 27; PX 687 at 7-8; PX 681 at 3; PX 117 at 23

[48] PX 513 at 16

arguments. In the end, Section 13(b) merely requires the court to make a judgment about whether the evidence raises "serious, substantial" questions that should be address in the administrative trial on the merits. The FTC has easily met this standard.

Defendants fell well short of what the law requires in this court. See *Heinz*, 246 F.3d at 725; *Baker Hughes*, 908 F.2d at 991 ("[t]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully."). There is little evidence to support any of their three rebuttal arguments. Instead, they spent much of the hearing reinforcing that there are indeed "serious, substantial" questions here. In the end, "serious, substantial" questions remain, and the FTC is entitled to an injunction.

1. Defendants Speculative "Efficiency" Claims are Legally and Factually Unsupported

Defendants' flagship rebuttal argument prior to the hearing was efficiencies. The defendants promised their merger would result in "massive" cost savings and enhance the firms' ability to develop new products. The evidence fell well short of the rhetoric. As a matter of law, however, this court should reject the defense as a matter of law given the strength of the FTC's prima facie case. Courts have consistently held that defense is inappropriate when a merger results in a highly concentrated market. *FTC v. Swedish Match N. Am.*, 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000); *Heinz*, 246 F.3d at 720; *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1084-85 (D. Del. 1991). The defense is particularly inappropriate here. This is a motion for a preliminary injunction under Section 13(b). The "serious, substantial" questions raised by the overwhelming *prima facie* case are not eliminated by alleged efficiencies.

A bedrock principle underlying the antitrust laws is that it is competition that usually spurs firms to offer new products and lower prices – not the good intentions of a dominant merged company. Yet while the agencies may consider efficiencies in their investigations, it is not universally recognized by the courts.[49] Courts that have rejected the defense note that the Supreme Court has questioned the viability of the defense. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 597-98 (1967); *see also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963). The defense has generally been discussed in this Circuit although the only court ever to rely on it to deny an injunction was the district court in *Heinz* – a decision that was subsequently reversed by the court of appeals. *FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000) *rev'd* 246 F.3d 708 (D.C. Cir. 2001).

In this case, defendants must prove that their efficiencies are "extraordinary," because "[e]fficiencies almost never justify a merger to monopoly or near monopoly." Merger Guidelines, § 4. The defendants' claims fail to satisfy this standard.

a. The Defendants' Alleged Cost Savings are Speculative and Overstated.

Defendants have repeatedly touted the claim that their merger would result in "massive cost savings of at { }."[50] However, Defendants failed to prove that their alleged efficiencies are: (1) verifiable, *see Staples*, 970 F. Supp at 1089; *University Health*, 938 F.2d at 1222-23; (2) not attributable to reduced output or quality, *see United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1290 (N.D. Ill. 1989); (3) merger specific, *see Cardinal Health*, 12 F. Supp. 2d at 62-63; or (4) greater than the transaction's substantial anticompetitive effects. *See id.* at 63. The evidence shows that the companies have no current plans to implement the cost

[49] *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1141 (D.D.C. 1986); *FTC v. Alliant Techsystems, Inc.*, 808 F. Supp. 9, 23 (D.D.C. 1992 (a merger is not beneficial based "on some ultimate reckoning of social or economic debits and credits"); *RSR Corp. v. FTC*, 602 F.2d 1317, 1325 (9th Cir. 1979).

savings and that there will be no net cost savings for years.

{ }.[51] { }. As the defendant's executives readily admit, that is no sure thing. Alex Sun, Mitchell's CEO, told his team, { }"[52] *Cf. Merger Guidelines* § 4 n.37 ("Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict.").

Second, { } the merger.[53] { }.[54] These costs are likely understated because { } 1/8 PM Tr. 92 (Sun). Integration costs must be assessed in any efficiencies accounting. *See, e.g.*, Horizontal Merger Guidelines § 4 ("Cognizable efficiencies are merger-specific efficiencies that have been verified" and "are assessed net of costs produced by the merger or incurred in achieving those efficiencies.").

Moreover, insurance and repair facility customers will incur costs if the merged firm consolidates around a single platform. Those customers using the "other" platform will incur significant costs to switch to the new platform.[55] For example, savings that might accrue to a small number of repair facility customers who currently use both CCC and Mitchell Estimatics

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[50] Def. Mem. at 7 (emphasis in original).
[51] DX 27 at 11.
[52] PX 411 at 54; *see also* PX 755; PX 756 ({ }); PX 411 at 119 ({ }) (Sun).
[53] 1/8 PM Tr. 83-85 (Sun); PX 1823

will be swamped by the costs of switching to the surviving platform. {

}.[56] On the other hand, {

} would incur significant one-time costs as they were forced to migrate to a new platform.[57]

Third, there is no guarantee that cost savings, if they are ever realized, will accrue to the benefit of consumers. *Cf. University Health*, 938 F.2d at 1222-23 (defendant asserting efficiency defense "must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers"); *American Medical Int'l.*, 104 F.T.C. 1, 498-514 (1984) (efficiencies defense failed because "AMI does not establish that they will necessarily inure to the benefit of consumers"). Mr. Ramamurthy, CCC's CEO, admits that CCC will give its shareholders (*i.e.*, Investcorp and Mr. Ramamurthy, among others) much of any savings.[58] The defendants plan to borrow more than {} to finance their merger. PX 486. { }.[59] Indeed, the more debt that is retired, the greater the payoff for CCC-Mitchell's owners – and not for customers.

b. The Merger Will Not Enhance the Firms' Ability to Innovate

The defendants' promise to increase funding of research and development if they are allowed to merge. They suggest that a merger, rather than competition, will spur new innovation in these markets. Yet, innovation claims require verification and merger specificity. *See Heinz*,

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[54] PX 1823; 1/9 Tr. 37 (Sun); PX 405 at 74-75
[55] Rollins Dep. at 84:10-19 (Safeco).
[56] PX 516 at 6
[57] PX 635 at 18
[58] CCC (Ramamurthy IH) at 74-75.

246 F.3d at 723 ("In the absence of reliable and significant evidence that the merger will permit innovation that otherwise could not be accomplished, the district court had no basis to conclude that the FTC's showing was rebutted by an innovation defense."); Horizontal Merger Guidelines § 4.0 ("Other efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification and may be the result of anticompetitive output reductions"); 4A Phillip E. Areeda, et al., *Antitrust Law*, ¶ 975g ("[W]hen the two firms are already among the largest in the market, there is no empirical basis for thinking that even larger firms would produce more R & D."). Defendants' innovation claims are little more than vague promises without any back-up documents or analyses relating to how much it will cost, when it will be ready for market or why the merger is important to its development. The claims fail for two reasons.

First, the defendants have not identified any improvements that would be made to the relevant products at issue in this case. Instead, they argue that the merger would allow the new firm to create new products. *See Philadelphia Nat'l Bank*, 374 U.S. at 370-71 (stating "anticompetitive consequences in [the relevant market] cannot be justified by procompetitive consequences in another"). Yet in most instances, one of the two companies is already working on the product. Indeed, Mr. Sun testified that each company's new product developments were "compelling on their own." 1/9 Tr. 33 (Sun).

Second, the defendants failed to demonstrate that these promises of increased innovation are merger-specific. One of the two firms is already working on many of the new products identified by the defendants. For example, Mr. Ramamurthy mentioned subrogation as one idea,

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[59] PX 160 at 7 (CCC Consolidated Earning Statement); CCC (Ramamurthy) Deposition Tr. at 94, December 19, 2008.

but we then heard from Mr. Dibble, a customer, that CCC was already marketing the product.[60] Mr. Sun testified that Mitchell was already development a fraud product. 1/9 Tr. 7-8 (Sun). In short, defendants have failed to explain why this merger is necessary to make these ideas a reality. Indeed, CCC's Chief Financial Officer, Andrew Balbier { }[61] The demands of the shareholders are likely only to increase as the new company { }.

c. The Defendants Efficiency Claims Fail to Rebut the Overwhelming Prima Facie Case

The defendants have done little to substantiate their outlandish efficiency claims. Defendants cannot overcome the presumption of illegality based solely on speculative, self-serving assertions. *University Health*, 938 F.2d at 1223. More is required. defendants cost saving claims are woefully insufficient.[62] *Staples,* 970 F. Supp. at 1089 (Verification of cost savings requires the defendant to provide "backup [and], source[s]" and "explain the methods used to calculate" the numbers.). In *Staples,* the court rejected the defendants' alleged huge cost savings ($6.5 billion) in their entirety, in part because they were in "large part unverified, or at least the defendants failed to produce the necessary documentation for verification" and there was little proof that they would be passed on to consumers. *Id.* at 1089. The defendants failed to call a single witness { } to substantiate their claims. Nor did they introduce any expert testimony on the issue. Parties to a merger often promise the moon but in the real world those promises are rarely realized.[63] As Mitchell observed, {

[60] 1/22 Tr. 111 (Ramamurthy); 1/23 Tr. 66 (Dibble); PX 1430 at 23.
[61] CCC (Balbirer) IH Tr. at 198:13-17.
[62] Richard Posner, Antitrust Law 33 ("If the merger has not yet been consummated, the realization of cost savings lies in the future and is thus a matter of speculation flavored by hope.").
[63] *See*, *e.g.*, David Henry, Mergers: Why Most Big Deals Don't Pay Off, Business Week (Oct. 14, 2002),

}. PX 519 at 31.

The defendants argue that they could not offer more evidence because antitrust laws supposedly prevent the sharing of information between the merging parties that would have allowed them to substantiate their claims. This is not true. Merging parties routinely adopt appropriate safeguards to enable them to collect the information necessary to substantiate their efficiency claims.[64] In sum, the defendants' efficiencies claims in this case, like those rejected by the D.C. Circuit in *Heinz*, are nothing more than "mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721.

2. Defendants' Promises of Speculative New Entry and Expansion are Unsubstantiated.

The history of entry in the estimatics and TLV markets is bleak.[65] Crash-WriteR, Comp-Est, and Focus-Write/Web-Est all sought to enter these markets but none have found traction in the marketplace. These firms never overcame the significant barriers to entry to move beyond the fringes of the repair facility segment of the estimatics. Mitchell failed with two prior TLV products and a web-based estimatics product. It also failed in Brazil, and CCC failed in Europe – and these companies are huge and experienced. Indeed, numerous companies have tried and failed to enter these markets. 1/8 PM Tr. 19 (Sun) Is there any evidence that Web-Est will reverse the trend? There is not.

Undaunted by this track record of failure, defendants suggest that their merger will usher in a new era of competition because of their promises to lift the restrictions on the Mitchell and

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available at http://www.businessweek.com/magazine/content/02_41/b3803001.htm.

[64] Commentary on the Horizontal Merger Guidelines, *available at* http://www.usdoj.gov/atr/public/guidelines/215247.htm#46.

Hearst databases. In their hypothetical, the mere fact that these databases will be available to Web-Est or other unnamed, new entrants will transform the competitive landscape. These promises do not ensure that entry or expansion will occur, much less that it will relieve the transaction's anticompetitive effects. *See Baker Hughes,* 908 F. 2d. at 987. Indeed, before 1998, the Motor database was available to all comers, and yet the market was still dominated by the big three. *See* PX 166 at 2. The overwhelming evidence in the record demonstrates that new entry or expansion will not be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" of the merger. *Merger Guidelines* § 3.0; *Chicago Bridge & Iron,* 534 F.3d at 427-29; *see also Cardinal Health*, 12 F. Supp. 2d at 55-58.

The question of entry is not limited to whether it *could* happen – although even with access to a database the technical possibility is a challenge here. That is only the first step. Defendants must also show that entry likely *would* happen, meaning that it is both technically possible and economically sensible. *See Cardinal Health,* 12 F. Supp. 2d at 56 (quoting *Merger Guidelines* § 3.3). Finally, they must show that the entry will be sufficient to *replace* the competition that existed prior to the merger. *Cardinal Health*, 12 F. Supp 2d at 58 (emphasis added); *see generally United States v. UPM-Kymmene OYJ, et al*, 2003-2 Trade Cas. (CCH) P74,101, at *25 ("fringe competitors" are unable to constrain dominant competitors). But there is simply no evidence that any new entry will replace the competition lost by the elimination of Mitchell – that is the standard the Court must apply here. *In re Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1067 (2005) *aff'd Chicago Bridge & Iron Co. N.V. v. FTC,* 515 F.3d 447 (5th Cir. 2008). The market realities in this case suggest that the prospect of future entry in these markets

[65] 2A Areeda, et al., 2A *Antitrust Law*, supra, ¶ 420b, at 60. *See also Cardinal Health*, 12 F. Supp. 2d at 56 ("[T]he history of entry into the relevant market is a central factor in assessing the likelihood of entry

will not be any different than the past.

Defendants have positioned Web-Est as the solution to the antitrust problems posed by their merger. Mitchell promises to license its database to Web-Est without restrictions, but this will not make Web-Est an equal player in the market. There is little in the record to suggest that Web-Est will be the first to fulfill this destiny. In the courtroom, the defendants portray Web-Est as a potential competitive juggernaut. In the boardrooms of CCC and Mitchell, Web-Est warrants nary a footnote. There are no contemporaneous business documents from either defendant that warns of the coming competitive threat from Web-Est – or any other entrant for that matter. Indeed what little support there is for defendants' courtroom tale of Web-Est comes from a Web-Est business plan in October 2008 { }.[66] A closer examination of the "market realities" suggests that the Web-Est business plan is heavier on "hope" than reality.[67] Indeed, Web-Est's in-court, surprise contract with an insurance company makes the point: DX 204 and DX 205 were Web-Est's { } – not estimatics and not the typical multi-million dollar contract for which CCC and Mitchell compete. Web-Est is not in the same league.

Web-Est is no Mitchell. Nor is it CCC or Audatex. Not today, not tomorrow, and not five years from now. Web-Est is, by all accounts, a tiny company.[68] It sells only a basic estimating product to the fringe of the repair facility segment of the estimatics marketplace. It has fewer { }repair facility customers. It lacks the recognition and reputation for reliability and accuracy. Most insurers and repair facilities testified that they have

into the future.")

[66] 1/22 Tr. 216-17 (Seidel)

[67] 1/23 Tr. 176 (Dr. Ordover)

[68] 1/8 PM Tr. 24 (Sun); PX 1003 at 33-34; DX 30 at 33-34.

never heard of, or have heard very little about, Web-Est.[69]

Web-Est lacks critical financial and business attributes to be a credible competitive threat to CCC, Mitchell, or Audatex. It has twelve employees and { } revenues.[70] Web-Est operated { }. { }.[71] At this point it is unclear whether Web-Est { }.[72] { }.

Defendants ask this court to imagine the possibilities of a new Web-Est based on an optimistic business plan developed by Mr. Seidel and Mitchell shortly before the complaint was filed in this case. For example, Web-Est *hopes* to have { } customers by the end of 2009.[73] Web-Est *hopes* to have at { }.[74] Web-Est *hopes* to become a { }.[75] In the end, the reality is that Web-Est is at best a poor substitute for the loss of competition from the merger of CCC and Mitchell. *Chicago Bridge*, 138 F.T.C. at 1071 ("the mere fact that new entrants and fringe firms have an intent to compete does not necessarily mean that those firms are significant competitors capable of replacing lost competition.").

Signally, this merger would still be a serious problem even if Web-Est's hopes for 2013

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[69] *See* Burklin Dep. at 53; Brown Dep. at 45; Licause Dep. at 51; Anderson Dep. at 35; Lukens Dep. at 43-44. Those who have, question its ability to be a viable supplier. *See* Kostakis Dep. at 77 ({ }).

[70] 1/22 Tr. 9-10, 196 (Seidel); DX 30

[71] 1/22 Tr. 214 (Seidel); PX 1003 at 35; DX 30 at 35.

[72] DX 30 at 35 ({ }).

[73] 1/22 Tr. 184 (Siedel)

[74] PX 1003 at 6 (Web-Est Business Plan, October, 2008); DX 30 at 6.

[75] { }. 1/22 Tr. 198; 203 (Seidel)

were realized. Indeed, even if Web-Est competed today at the level it hopes to compete ***five*** years from now, the HHIs in the estimatics market would still increase a whopping { } points from { } to { } HHI points. Defendants, however, ask this court to bless this merger based on little more than a lick and a promise that Web-Est will develop into a competitive force as strong as Mitchell was – but there is no evidence to support this contention. *Chicago Bridge*, 138 F.T.C. at 1139 ("Section 7 of the Clayton Act would be meaningless if a weak showing of entry sufficed to rebut a prima facie case.")

Web-Est also cannot be considered a truly independent actor as Mitchell is deeply involved in all facets of Web-Est's business. Mr. Seidel founded Web-Est with Mitchell's financial backing shortly before the announcement of the CCC-Mitchell merger. Mitchell owns a 19.9% equity stake in Web-Est, licenses its database to Web-Est, and provides other support to the company.[76] Without Mitchell's support there would be no Web-Est.

Web-Est will be only nominally less dependent on Mitchell if this merger is allowed to close. Web-Est will continue to rely on Mitchell for its estimatics database. The proposed { } licensing agreement should be a cold-comfort for this court. For example, CCC/Mitchell will have the right {

}[77] Indeed, after the merger, Mitchell's incentives to deal with its licensees will change. It is { } after the merger is closed.[78] As for the TLV market, Web-Est would merely be a reseller of Mitchell's TLV product.[79] Web-Est's

[76] PX 1003 at 34: DX 30 at 34.
[77] 1/22 Tr. 206 (Seidel)
[78] PX 1428 at 1
[79] DX 423 at 21

late-breaking plans for possible partnerships with others is wholly speculative.[80]

Post-merger, Web-Est will still be financially dependent on Mitchell. Mitchell will be { }.[81] Mitchell's ongoing role in Web-Est's business if this merger closes poses some serious concerns. *White Consolidated Industries. v. Whirlpool Corp.*, 781 F.2d 1224, 1228 (6th Cir. 1986) ("curative divestitures" must be to a new competitor that is "in fact . . . a willing, *independent* competitor capable of effective production in the . . . market."); *Chemetron Corp. v. Crane Co.*, 1977-2 Trade Cas. ¶ 61,717 at 72,930 (N.D. Ill. 1977).

Mitchell's own counsel has observed that it is a "problem" to allow

> continuing relationships between the seller and buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior.[82]

This Court and the FTC would have no continuing oversight over the licensing agreement – the lifeblood of Web-Est's future.[83]

If Web-Est were a real "fix," to replace competition lost by the merger, as in *Chicago Bridge*, this Court would have to see the same kinds of significant, structural changes in the market that gave the new entrant there the ability to compete at the same scale and level as CB&I: In addition to appointing a receiver for two years, the Commission, as affirmed by the

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[80] 1/22 Tr. 188, 189 (Seidel) Mr. Seidel noted until his testimony that a TLV product was really a "nicety" and not so necessary. 1/22 Tr. 222 (Seidel) { }.

[81] PX 1003 at 35, ({ }). DX 30 at 35.

[82] Richard G. Parker, and David A. Balto, Evolving Approach to Merger Remedies, Antitrust Report, (May 2000) *available at* http://www.ftc.gov/speeches/other/remedies.shtm (citing Federal Trade Comm'n, A Study of the Commission's Divestiture Process (1999), available at http://www.ftc.gov/os/1999/08/divestiture.pdf). *See also*, FTC Frequently Asked Questions concerning Remedy at Question 32 (http://www.ftc.gov/bc/mergerfaq.shtm).

[83] 1/22 Tr. 208-9 (Seidel).

5th Circuit, required substantial divestitures to the new entrant – a company with 3,200 employees and $731 million in revenues, to make the new company as competitive as PDM was pre-acquisition. The list to make the entrant competitive included CB&I's:

> "transferring employees and backlog and selling assets, technologies, support services, and capabilities to [the new entrant] so as to put [the entrant] on a par with CB&I in the design, engineering and construction of cryogenic tanks in the United States. Specifically, CB&I is conveying engineering, construction, and fabrication (means, methods and techniques) capabilities. technologies. know-how, office space, equipment, and employees to [the entrant] as well as work under contract with customers to further enhance [the entrant's] capabilities and reputation in" the relevant markets.[84]

In other words, a "fix" has to fix everything to ensure that the new entrant is as competitive on day one as the acquired company would have been but for the merger. No court has let a merger go by on the mere promise that a new entrant might have a shot at fixing the problem. At a minimum, the question of Web-Est's future raises serious, substantial questions that need to be considered in a full administrative trial on the merits before the FTC.

3. A Merger of CCC and Mitchell is Likely to Increase the Likelihood of Coordinated and Unilateral Effects.

The merger of CCC and Mitchell will create a dominant firm with near-monopoly shares of both the estimatics and total loss markets. There is no evidence to the contrary. Defendants have suggested, however, that the FTC must also prove that the merger will harm competition. That is not the law. Once the FTC establishes a *prima facie* showing of harm through the structural case, the burden is on the defendants in the first instance to demonstrate that the presumption of harm is incorrect. *Heinz*, 246 F.3d. at 715.

There are two basic analytical frameworks for analyzing the competitive effects of a

[84] Proposed Divestiture, and Commission Letter Approving the Divestiture (November 28, 2008), *available at* http://www.ftc.gov/os/adjpro/d9300/index.shtm.

merger: coordinated effects and unilateral effects. The two frameworks are not mutually exclusive and the distinction has more significance in the law than it does in economics. *See* 1/12 Tr. 139 (Dr. Hayes) (describing the distinction between coordinated and unilateral effects as "artificial"); Horizontal Merger Commentary at 17. The FTC has introduced evidence and expert testimony to support both theories of harm.

Defendants' rebuttal, at its essence, rests on the assumption that two are enough in a highly concentrated market with significant barriers to entry. In defendants telling, Audatex is somehow able and willing to replace all the competition lost due to the merger. But the evidence does not support defendant's rhetoric. First, the argument that "two is enough" to ensure competition in a highly concentrated market with significant barriers to entry is inconsistent with the law, public policy and more importantly the evidence in this case. Second, the picture of Audatex painted by defendants in the courtroom is inconsistent with the real world. Indeed, CCC appears much more concerned with Mitchell than Audatex, a company it feels has an {

}.[85]

Audatex is at best a second in a three-horse race in the United States. Indeed the market share calculations in this case likely overstate Audatex's significance given that the numbers were based on 2007 revenues. Audatex has lost ground in the estimatics and total loss markets in recent years. 1/23 Tr. 201-2 (Dr. Ordover); 1/22 Tr. 36-37 (Ramamurthy). Audatex has lost estimatics and total loss business {

}.[86] Defendants cited only one example, American Family, of Audatex taking business from either CCC or Mitchell. Mitchell lost that account in 2006 but by Mitchell's own

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[85] PX 73 at 22; PX 206 at 10; *see also* PX 668
[86] PX 1430 at 23; PX 107 at 3

admission that loss was due to "extraordinary" circumstances rather than aggressive competition from Audatex.[87]

Defendants suggest that Audatex's clumsy efforts to meddle with this merger demonstrate that Audatex will undermine any effort post-merger to increase prices or otherwise lessen competition. Yet, Audatex is presumably doing everything it can today to win accounts and its track record over the last two years is poor. The suggestion that Audatex will lower prices even further post-merger in a desperate effort to win share is inconsistent with their economic incentives. *Heinz*, 246 F.3d at 725 (duopolists have an incentive to raise – not lower – prices). The cost structures of CCC/Mitchell and Audatex are not expected to change for years after the merger. That means Audatex and CCC/Mitchell will have the same ability to decrease prices – in other words, there is no price that Audatex could set that CCC/Mitchell could not meet. Audatex would realize that a dramatic price decrease would provoke a response from CCC/Mitchell. That strategy would be a race to a bottom – a race that would almost inevitably be won by the incumbent provider because of the high customer switching costs in these markets. Thus, Audatex would have little incentive to spark a price war that it would be near certain to lose. At the same time, it would have the incentive to follow price increases. *See, id.*

[87] PX 574 at 16 ({
}.)

a. The Defendants have not Demonstrated that Coordinated Effects are Unlikely.

Defendants argue that the "FTC must prove" that the merger will result in coordination.[88] This is wrong on two counts. First, it ignores the preliminary injunction context of this case and the fact that this Court does not need to find a Section 7 violation *at all*. Second, the law does not require proof that a merger will inevitably result in coordination even if this was a full trial on the merits of the FTC's Section 7 claim. It only asks whether a merger increases the *likelihood* of coordination. *FTC v. Elders Grain, Inc.* 868 F.2d 901, 905 (7th Cir. 1989); *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988).

A major goal of the merger laws is to prevent markets from consolidating sufficiently to create or enhance the conditions that permit firms to engage in coordinated interaction. Areeda, et al., 4 *Antitrust Law*, supra ¶ 901b2 at 9 Coordinated interaction harms consumers because competitors are collectively able to charge supracompetitive prices, reduce product quality, or slow the rate of innovation. Defendants embrace a very narrow view of coordination that sounds like overt price fixing. Indeed, Dr. Ordover's testimony sounds nearly identical to that given by Dr. Jonathan Baker, another former government economist and co-author of the guidelines, whose testimony was rejected by the Court of Appeals in *Heinz* as contrary to established law and economics. 246 F.3d at 724 n.23.

Even actual price fixing is much more expansive than defendants suggest: it includes a mere stabilization of prices. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1950). Coordinated interaction is much less than that. Dr. Ordover opined that he believed that coordination was "quite, quite difficult" absent an agreement between competitors. 1/22 Tr.

[88] Def. Prehearing Brief at 24.

82-83 (Dr. Ordover). While that may be one economist's opinion, it is not the law. A merger that increases the likelihood of cartel behavior such as price fixing or supply manipulation among the remaining market participants is *one* concern. It is not the *only* concern. A more common concern is the likelihood that a merger will facilitate tacit collusion. *Heinz,* 246 F.3d at 725 (antitrust policy seeks particularly to inhibit "the creation or reinforcement by merger of . . . oligopolistic market structures in which tacit coordination can occur."); Sen. Rep. No. 1775, 81st Cong., 2d Sess. (1950) pp. 4-5 (as cited in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 741, n.5 (2nd Cir. 1953). (The Senate Report to the Clayton Act's amendment in 1950 adopted the FTC's concern that "when few firms dominate a market (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interest of its rival."). The evidence suggests that this merger will likely substantially lessen competition by increasing the likelihood of coordination.

A market is conducive to tacit coordination where producers recognize their "shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group v. Brown & Williams,* 509 U.S. 209, 227 (1993).[89] There is no "checklist" of requirements to assess the likelihood of coordination. However, the strength of the structural case matters. The more highly concentrated the market, the greater the change in concentration caused by the merger, the greater the likelihood of coordination. See *Heinz,* 246 F.3d at 715-16; *FTC v. PPG Industries,* 798 F.2d 1500, 1503 (D.C. Cir. 1986) ("Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."); *American Hosp. Supply Corp.*

v. Hospital Prods. Ltd., 780 F.2d 589, 602 (7th Cir. 1986) ("[I]t is easier for two firms to collude without being detected than for three to do so.").

CCC, Mitchell, and Audatex have squared off against each other – and only each other – for nearly a decade.[90] The stability of the estimatics and TLV markets and the presence of significant barriers of entry reinforce the likelihood of coordination.[91] Most strands of oligopoly theory indicate that a market with only two sellers and high barriers to entry would be likely to result in a non-competitive outcome: a higher price and lower output than would be true if complete price competition were to prevail. Theories of "cooperative" behavior predict that the two would be aware of each other's presence and of the consequences of aggressive actions and would mutually try to monitor and police each other's actions, resulting in a non-competitive outcome.

The challenges to coordination are greatly diminished in a duopoly market with high barriers to entry. See *Heinz*, 246 F.3d at 724 ("[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination."). There are few mysteries in a two-firm market and over time the chances that the firms will recognize their "shared economic interests" increase dramatically. The small number of firms, the ability to collect and verify pricing information, the movement of employees back and forth between the three firms all mean there are few secrets in this business.

CCC, Mitchell, and Audatex know who the incumbent is at any given opportunity and

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[89] E.H. Chamberlin, *The Theory of Monopolistic Competition*, 48 (1933) ("when there are only 2 sellers" the "result of a cut [in price by either player] is inevitable to decrease his own profit"; thus "no one will cut" prices on average).
[90] PX 629 at 4.
[91] 1/12 Tr. 168 (Hayes) ("[C]oordination is more likely as a result of the merger. This market, from the evidence that I've seen, been able to review, is a market where the firms are very familiar with each other.

likely knows the incumbent's pricing at the account. The three firms already obtain RFP responses, price lists, and other detailed pricing information from both of its competitors. 1/8 PM Tr. 53-58, 92-93, 1/9 Tr. 26-28, 35, 37-39, 55-57, 75-77 (Sun) (PX 85 at 59, 486 at 34, PX 493, PX 623, PX 696 at 2, PX 717, PX 1823). The information is important in setting prices.[92] The merger will eliminate what uncertainty exists in these markets. In the insurer segment of the market, the two firms will know exactly who the competition is at any particular account. They will likely know what the pricing is at the account and have detailed information about the competitor's pricing in the past. The increased transparency not only increases the likelihood that the two firms will find it in their shared economic interests to compete less aggressively but it will also allow them to closely monitor their rival's prices.

The familiarity between the firms creates a fertile ground for the likelihood of coordination. There is still some uncertainty in the market about the forces driving a competitor's prices. For example, a price cut spurs a discussion of { }.[93] The back and forth becomes much easier and more predictable when there are only two competitors in the marketplace. CCC/Mitchell and Audatex will have greater insight into each other's pricing and competitive playbook. The two companies will face off against each other at each and every competitive opportunity. That kind of familiarity increases the likelihood of coordination. It also gets easier to punish the other firm for being too aggressive. A decision by Audatex to price aggressively at a CCC/Mitchell account might earn them a win in the short term but it risks a response at an Audatex account in

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It's a stable market, stable in the sense that the shares are fairly stable over time, the products are quite stable, well-known to the firms.").

[92] 1/8 Tr. 55-69 (Sun) (describing how the information is used to set prices).

[93] PX 552.

the future. That may spur a short-term price war – the lesson from that sort of event is that both firms will lose out in the long term with aggressive pricing. See, e.g., *Rockford Mem'l Corp.*, 898 F.2d at 1285 ("excess capacity . . . is itself an incentive to collude."); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 657 (7th Cir. 2002) ("excess capacity . . . makes price competition more than usually risky and collusion more than usually attractive. One way that excess capacity facilitates collusion is that it allows swift punishment for undercutting the elevated cartel price; it also raises the costs of a price war, making firms hesitate more before risking such grievous losses.").

Defendants failed to establish any structural barriers to coordination in these markets. They argue that coordination is difficult in these markets because pricing is made opaque by "secret" bidding and "complex" RFPs. However, CCC, Mitchell and Audatex appear to have little trouble quickly breaking these RFPs down and then gain an understanding of their competitor's positioning in the real world. The record is rife with examples of these three firms collecting price information and other competitive intelligence. Defendants argue that this information is not the "right sort" of information to facilitate coordination. 1/23 Tr. at 88-89 (Dr. Ordover). They would limit the law on tacit coordination to the mergers of gas stations in isolated pockets of the country.[94] That is not the law. Merger Guidelines § 2.11 ("The terms of coordination may be imperfect and incomplete in as much as they omit some market participants, omit some dimensions of competition, omit some customers, yield elevated prices short of monopoly levels or lapse into episodic price wars and still result in significant competitive harm."); *U.S v. UPM-Kymmene OYJ*, 2003-2 Trade Cas. (CCH) ¶ 74, 101, 2003 U.S. Dist.

[94] 1/5 Tr. 71-73 (Opening Statement); 1/23 Tr. 80 (Dr. Ordover).

LEXIS 12820 at *19 (finding Section 7 violation in a market in which defendants argued "[p]ricing is not transparent, all deals are negotiated, and price breaks are given or refused without a lot of publicity"); *see also* 1/12 Tr. 144-45 (Dr. Hayes).

b. Defendants have not Demonstrated that Unilateral Effects are Unlikely.

CCC is the leading player in both the estimatics and total loss markets.[95] Its merger with Mitchell will make it a dominant player with market shares that approach, if not cross, the monopoly threshold. The evidence supports two theories of unilateral effects in this case: dominant firm and effects with differentiated products. Unilateral effects describes the likelihood a merger would result in a monopoly or enable the combined firm to act "unilaterally" to harm competition in a market niche. 1/12 Tr. 139-40 (Dr. Hayes). The common thread running through these theories is that the effect of the merger is to eliminate significant head-to-head competition and eliminating that competition really matters. *Staples*, 970 F.2d at 1082-83, *Swedish Match* 131 F. Supp. 2d. at 169.

The unambiguous text of Section 7 condemns a merger or acquisition that tends "to create a monopoly." 15 U.S.C. §17 (2008). The shares of the merged company would be well within the range that courts have found to establish a prima facie showing of monopoly power.[96] CCC and Mitchell have significant shares of the estimatics market and the new company will have over { } share. 1/12 Tr. 128 (Dr. Hayes). In the total loss market, the merger will enhance

[95] PX 1927 at 2; PX 668 at 45, 49; PX 99 at 11;

[96] *See, e.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 167 (1948) (70% market share sufficient to establish monopoly power); *Image Technical Servs. V. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a prima facie case of market power."); *In re Educational Serv.*, 429 F. Supp. 2d. 752, 756 (E.D. La. 2005) ("The case law supports the conclusion that market share of more than 70 percent is generally sufficient to support an inference of market power."); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 999 (11th Cir.1993) (65% market share is sufficient).

CCC's already dominant position in the total loss market and eliminate Mitchell as an emerging competitive threat to CCC.[97] As discussed above, the near monopoly created by the merger of CCC and Mitchell will be sheltered from new competition by significant barriers to entry. [98]

The evidence and economic testimony also supports a differentiated product theory of unilateral effects. The theory applies to markets where the products sold by different participants in the market are not perfect substitutes for one another. The estimatics and total loss products sold by CCC, Mitchell, and Audatex are not identical – there are differences between them.[99] In differentiated product markets competition may be localized, meaning individual sellers compete more directly with those competitors selling close substitutes. Indeed the Merger Guidelines explain that there is a presumption that a "significant share of customers" prefer the merger parties as their first and second choices if the merged company has at least at 35% market share. § 2.21. Thus the merger of CCC and Mitchell may give it the ability to increase prices to certain customers. *Id*. This is simply to say that CCC-Mitchell may not be able to increase prices to its entire installed base (nearly { } of the market) but it could raise prices at a significant percentage of those customers for whom CCC and Mitchell are the top two choices.

Dr. Hayes modeled both the insurer and the repair facility segments of these two markets to predict the likely effects of the merger. Dr. Hayes used an auction model in his merger simulation of the total loss and insurer segment of the estimatics market. 1/12 Tr. 146-47 (Dr. Hayes). He used a Bertrand model in his simulation of the repair facility segment. *Id.* Dr. Hayes' simulation of the repair facility segment takes into account market shares, diversion

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[97] 1/12 Tr. 167 (Dr. Hayes); *see also* PX 73 at 22; PX 206 at 10

[98] *See supra* text at note 40-46.

ratios, and costs and in the end predicts a potential average price increase of about thirty percent post-merger. 1/12 Tr. 153-55 (Dr. Hayes). Dr. Hayes simulation of the insurer segment predicts an average estimatics price increase of { } and average total loss increase of { } 1/12 Tr. 161, 167 (Dr. Hayes).

The defendants did not attempt to offer their own economic analysis. Dr. Hayes' choice of models was unchallenged. Defendants' expert altered Dr. Hayes' model to reflect his criticisms but could not get his work to show anything less than a { } price increase for { } of the insurer market where CCC and Mitchell are the incumbents, and he chose not to attempt to run the downstream Bertrand model with his own diversion ratios. 1/23/09 (Dr. Ordover) Tr. at 191. Dr. Hayes did, however, and found that the likely price increase for collision shops, post-merger, was still substantial. 1/21/2009 (Dr. Hayes) Tr. at 215. Defendants expert was unwilling to testify that there would be no price effect from the loss of competition promised by this merger, rather he simply quibbled over the size of that price effect.

The case against this merger is not built on Dr. Hayes' merger simulations alone. Dr. Hayes' expert testimony simply confirmed the prima facie case – the merger of CCC and Mitchell will likely substantially lessen competition in both the estimatics and total loss markets. Thus, it is no surprise that CCC-Mitchell is discussing {

}. PX 632 at 35; PX 1431 at 4; PX 1432 ({

}); PX 1426; 1/8 Tr. 78 (Sun).

The defendants suggest that despite its dominant share of the market that they will be unable to unilaterally exercise market power after the merger. The evidence simply does not support these claims.

[99] 1/12 Tr. 190 (Dr. Hayes); 1/23 Tr. 86 (Dr. Ordover).

III. The Equities Favor the FTC

Section 13(b) also requires a weighing of the equities. The stronger the equities in favor of an injunction, the less the FTC need offer in the way of "serious, substantial" questions. *Whole Foods*, 548 F.3d at 1041. The effective enforcement of the antitrust laws was Congress's specific public equity consideration in enacting Section 13(b). *Heinz*, 246 F.3d at 726; *see FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981). Private equities are entitled to little weight. *Weyerhaeuser*, 665 F.2d at 1083.

Defendants have not raised any credible evidence of public equities in its favor. On the other hand, the FTC has the inherent public equity of the public's interest in enforcing the Clayton Act. *Id.* There is another significant equity that the Court should consider: It would be extraordinarily difficult to break up a CCC-Mitchell post-merger.

This Court need not image the difficulties that can lead from a court's allowing such a merger to go forward. In *Whole Foods*, the district court is now grappling with the problem of unraveling an already merged company. S*ee, e.g., FTC. v. Whole Foods Mkt., Inc.,* --- F.Supp.2d ----, 2009 U.S. Dist. LEXIS 929 (D.D.C. Jan. 8, 2009) (discussing a post-acquisition remedy hearing on remand). As Judge Brown explained: "the whole point of a preliminary injunction is to avoid the need for intrusive relief later, since even with the considerable flexibility of equitable relief, the difficulty of 'unscrambl[ing] merged assets" often precludes "an effective order of divestiture,'" *Whole Foods*, 548 F.3d at 1034 (quoting *FTC v. Dean Foods Co*., 384 U.S. 597, 607 n.5 (1966)); *see also Lancaster Colony*, 434 F. Supp. at 1096 ("At best, divestiture is a slow, cumbersome, difficult, disruptive and complex remedy. The legislative history of Section 13(b) reveals congressional concern with the FTC's historic inability to effectuate a remedy" before a merger). Chicago Bridge is the FTC's most recent example. There, after numerous appeals to the Commission and two opinions by the Fifth Circuit, the illegal acquisition is just now being pulled apart – ***eight years after the fact***.[100] For these reasons, this merger should be temporarily enjoined.

CONCLUSION

The FTC has established that there are "questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation" by the Commission and thus is entitled to a preliminary injunction to maintain the status quo pending an administrative trial. *Whole Foods*, 548 F.3d at 1035 (Brown, J.), 1041 (Tatel, J.); *Heinz,* 246 F.3d at 714-15. Defendants have failed to offer public equities that wholly outweigh this conclusion, and, indeed, the public equities favor injunctive relief. Thus, counsel for the FTC respectfully suggests that the Commission is entitled to an injunction as a matter of law. *Id.*

February 2, 2009

Respectfully submitted,

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J. ROBERT ROBERTSON
D.C. Bar No. 501873
Attorney for
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2008

CERTIFICATE OF SERVICE

[100] *See* Commission Letter Approving the Proposed Divestiture (November 28, 2008), available at http://www.ftc.gov/os/adjpro/d9300/index.shtm.

I HEREBY CERTIFY that on the 2nd day of February, 2009, I filed the attached document with the clerk of the court.

I FURTHER CERTIFY that on such date I served the attached on the following counsel by electronic mail (PDF) and courier:

John A. Herfort
c/o Oleh Vretsona
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Jherfort@gibsondunn.com

Counsel for Defendant CCC Holdings, Inc.

Richard G. Parker
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
Rparker@omm.com

Counsel for Defendant Aurora Equity Partners, III L.P.

____
J. Robert Robertson
Counsel for Plaintiff
Federal Trade Commission