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LAW OFFICE

August 21, 2013

From The Desk of  
Lee Thomason, Esq.\*

Hon. Donald S. Clark, Office of the Secretary  
Federal Trade Commission  
Room H-113 (Annex D)  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

RE: IMO Solera Holdings Inc., FTC file no. 121-0165

Dear Secretary Clark,

The comments in this letter represent a citizen's interest in the appropriate exercise of the great powers that Congress entrusted to the Federal Trade Commission.<sup>1</sup>

The commentary expressed in this letter is personal to the author, and does not and is not intended to reflect the opinions of any party to the proposed Consent Order, anyone with an interest in the FTC File No. 121-0165, any client of the undersigned, or any university.

Introduction.

Provisions in the proposed Consent Order should be reconsidered, modified or dispensed with, based on the present record as well as the following.

A. The relevant product market definition should be reconsidered, and the administrative record expanded to include details of the multiple, previous divestitures in the larger market for auto parts databases managed with application software.

B. Mandating divestiture, based on a categorical presumption of anticompetitiveness, should be reconsidered and evaluated according to the standards for equitable relief set out in *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006).

I. THE ADMINISTRATIVE RECORD SHOULD INCLUDE PAST, RELATED ACTIONS OVER COMBINATIONS IN THE 'PARTS' SOFTWARE MARKET.

This proposed Consent Order requires divestitures in a product market as narrow as 'parts' software for auto recycling yards, or as broad as application software combined with a database of auto parts and repair data. The product, required to be divested, operates practically the same whether the 'parts' database and software are used by an auto recycler, a car dealer, a repair estimator, or just an individual seeking a specific part for a specific vehicle. The software application searches the inventory database, and provides the location and pricing information for the part/s desired by the searcher. The other segment of the customer market serves those with auto parts to sell, who upload 'parts' information to the database, and too, those who want to ascertain or compare the going market price for certain parts.

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<sup>1</sup> "The great purpose of both statutes [FTC Act and Clayton Act] was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain." *F.T.C. v. Sinclair Refining Co.*, 261 U.S. 463, 476 (1923).

The FTC has initiated many actions to address merger activity among providers of auto ‘parts management’ software. This commenter requests that those prior matters be included in the administrative record related to the currently proposed Consent Order to divest one version of “yard management” software. The previous actions are pertinent to the market definition and to the broader question of what makes for a competitive atmosphere in the relevant market.<sup>2</sup>

A. The Forced Divestiture from ADP of AutoInfo.

Previous actions were directed at the ‘parts’ software market in the late 1990s. A complaint in FTC docket no. 9282 alleged that allowing ADP to merge in AutoInfo might be anticompetitive, and the matter ended with a consent order requiring divestiture of AutoInfo. 62 FR 34293-01, 1997 WL 344672 (June 25, 1997).<sup>3</sup> There, the FTC defined “five product markets” for software with a suite of functions usable by customers that included one for “computerized automotive salvage yard management systems.” Before the FTC acted to require ADP to divest AutoInfo to Cooperative Computing, a private suit was filed challenging the ADP/AutoInfo combination, and the plaintiffs included salvage yard operators.<sup>4</sup> Pre-merger news reports indicated that ADP paid over \$30 million “to acquire [the] computerization operations servicing the auto-salvage industry from AutoInfo Inc.” 2/2/95 Wall Street Journal Abstracts, 1995 WLNR 1839478 (see too, 4/4/95 Standard & Poor’s Daily News, 1995 WLNR 597028). Upon information and belief, the FTC’s approved acquirer, Cooperative Computing Inc., paid a price much less than ADP’s acquisition price for the AutoInfo assets.<sup>5</sup>

Here, the proposed consent Order deals with an acquisition for a mere \$8.7 million (Complaint, ¶4).

ADP transitioned to another ‘parts’ software business in 1998, acquiring Audatex, then a leading provider of auto claims estimating software. After the forced divestiture of AutoInfo, and the acquisition of Audatex, the 10K for ADP stated its “remaining business was renamed ADP Hollander,” and it remarked about “market acceptance of the EDEN™ (Electronic Data Exchange Network), ADP Hollander’s electronic parts locating product for recyclers, [having] reached an all-time high with more than 2,350 units in place.” Later, ADP Hollander introduced Powerlink, described in its May 7, 2002 press release as “the next generation of its highly regarded business management system that streamlines operations and dramatically increases business performance for automotive recyclers.”

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<sup>2</sup> It is established that “only examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anticompetitive effects of the merger.” *U.S. v. General Dynamics*, 415 U.S. 486, at 498 (1974).

<sup>3</sup> In addition to the divestiture, ADP was prohibited for ten years from restricting its customers’ access to parts inventory data, and it had to allow the acquirer or its licensees to interface with ADP’s products.

<sup>4</sup> See, *A.O.K. Auto Parts, et al v. Automatic Data Processing, Inc.*, 2:97-cv-02085-CRW (E.D. Pa.) alleged that ADP/Hollander unlawfully acquired Auto Info in 1996, after it had acquired Hollander in 1992. The proposed class of plaintiffs included salvage yards, parts distributors and repair shops.

<sup>5</sup> ADP’s 10K reflects a non-recurring charge of nearly \$19 million associated with the divestiture. “A non-recurring pre-tax charge of \$17.8 million was recorded in the fourth quarter of fiscal '97 reflecting the Company's settlement with the Federal Trade Commission, under which the Company will divest certain non-material assets. In the fourth quarter of fiscal 1997, the Company reached a settlement with the Federal Trade Commission resulting in a pretax loss of approximately \$18 million.”

B. The Forced Divestiture of Triad software assets from Cooperative Computing.

FTC's next target in the 'parts' software market arose when, the acquirer of the AutoInfo assets, Cooperative Computing announced its plan to acquire Triad. FTC alleged in docket C-3757 that Cooperative offered "a portfolio of software products that assist auto parts distributors and retailers to track their parts inventory" and that it had "developed and markets with its software a proprietary database of auto parts." 123 F.T.C. 1777. It alleged that the intended merger party, Triad, "develops and markets management information system software for the automotive aftermarket," and too, "develops and sells a proprietary database of auto parts." 123 F.T.C. 1706, 1997 WL 33483282 (June 20, 1997). FTC's action ended with a 1997 Consent Order, which required that Cooperative Computing divest software assets to MacDonald Computer Systems.<sup>6</sup> FTC file no. 971-0013, Mar. 7, 1997 - 62 FR 10564.

Also relevant to the product market assessment in the current matter are two past, private civil matters in the 'parts' database and software business. In *Universal Computer Systems, Inc. v. Volvo Cars of North America, Inc.*, 1998 WL 1297399 (S.D. Tex. 1998), the court detailed a market for software that aids in the operation of ... the business office, accounting, the parts department, parts inventory control, parts sales, ordering parts, vehicle inventory, service, service invoicing, various service functions, [etc.]" Further it noted that plaintiff's "major competitors" in this market were "Reynolds & Reynolds ['R & R'] and Automatic Data Processing ("ADP")."

The record should note that in 2006, the FTC did not act in regard to the merger of Universal Computer into Reynolds and Reynolds. (Reynolds and Reynolds, 8K, Sept. 19, 2006).

In the other private suit that detailed a market for an auto 'parts' database accessed by application software, the plaintiff ChoiceParts wanted to "engage in the business of creating and operating an Internet and network-based marketplace for the purchase and distribution of OEM Parts, Non-OEM Parts and Salvaged Parts." See, *ChoiceParts, LLC v. General Motors Corp.*, 203 F.Supp.2d 905 (N.D. Ill. 2002) (alleging "that Defendants' refusal to provide parts data constitutes a conspiracy that unreasonably restrains trade), see too, *Choiceparts, LLC v. General Motors Corp.*, 2005 WL 736021 (N.D. Ill. 2005) (alleged an "agreement among the defendants to withhold automotive parts data that CP needs to develop and operate its internet-based parts locator service").

These earlier FTC merger challenges and the private civil matters evidence an industry's recognition of indicia that suggests a broader product market for licensed access to auto 'parts' database and application software to manage access to 'parts' information on the database.

C. Termination of the Merger of CCC Information Systems and Mitchell International.

A later FTC enforcement action, in 2008, prevented a merger between the parent of CCC Information Systems and Mitchell International; see, FTC docket no. 9334.<sup>7</sup> After some serious litigative activity, those parties abandoned their proposed merger.<sup>8</sup> The presence of CCC and Mitchell in the 'parts' software market was indicated in FTC's earlier complaint to undo ADP's

<sup>6</sup> That order required CCI to "divest ...through a perpetual, royalty-free, transferable, assignable, and exclusive license ...the CCI Products in the United States and Canada." *Id.*

<sup>7</sup> *IMO CCC Holdings, Inc. and Aurora Equity Partners II L.P.*, FTC Docket no. 9334, see, 2008 WL 5026665 (F.T.C. Nov 25, 2008) through *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 43 (D.D.C. 2009) ("For starters, the software products are complex, ...and the products are usually sold in complex bundles that may include both Estimatics and TLV or just one of these, as well as various other software products." *Id.* at 46).

<sup>8</sup> Order dismissing complaint is viewable at <http://ftc.gov/os/adjpro/d9334/090313cccorder.pdf>

acquisition of AutoInfo, such as in its ¶28 under the section heading “Salvage Yard Inventory Data for Estimate Market,” which noted the yards’ usage of “software products developed and sold by companies such as ADP, CCC Information Services and Mitchell International” that “can include a function that reveals the availability and price of salvage parts for use in the auto repair.” 124 F.T.C. 456, 462. Product market parameters suggested in the FTC’s action against CCC Information Systems should be, or were, part of the record considered here.

D. Expanding the Administrative Record Before Final Consideration of the Order.

Inclusion of the foregoing matters in the administrative record here, before final consideration of the proposed Consent Order requiring Solera Holdings divestiture of software assets and removal from the existing ‘parts’ software product market, is appropriate.<sup>9</sup>

It is respectfully suggested that the prior matters be included in the administrative record that is to be considered before final action is taken on the proposed Consent Order, and on the underlying product market definition and the perceived anticompetitive factors set forth there.<sup>10</sup>

The proposed Consent Order enforces a presumption that requiring more than a duopoly of small vendors, of niche software, suited to a narrowly segmented market is more competitive, innovative and efficient than permitting the growth of one or two larger vendors whose breadth of product lines enables them to be more innovative and financially secure.

The proposed Consent Order follows-form to many forced extirpations of acquisitions, which had resulted organically from opportunities in a free market.<sup>11</sup> Among the requirements in the proposed Consent Order are for the acquirer Solera to get out of the market in the U.S., grant a license to a newly-composed entity, and to spend time and money for a decade of monitoring.

Somewhat contemporaneous with the announcement that Solera would acquire Actual Systems, it was announced in a Jan. 25, 2013 press release that CCC Information Systems would partner with the United Recyclers Group (URG) to provide “a parts listing service within CCC ONE™ Estimating, using parts data gathered by URG, which works with more than 400 auto recyclers,” and so to “create opportunities for any auto recycler to present its parts and pricing.” The proposed Consent Order greatly underestimates how the URG<sup>12</sup> can influence which of the available ‘parts’ software that its members choose to use or not use, and how that factor impacts the agency’s conclusions about elasticity of product demand and product differentiation.<sup>13</sup>

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<sup>9</sup> Should the public “assume that the administrative decision-makers reached their conclusions [about Solera’s acquisition of Actual Systems] without reference to a variety of internal memoranda, guidelines, directives, and manuals, and without considering how arguments similar to [those here] were evaluated in prior decisions by the agency.” *Tenneco Oil Co. v. Department of Energy*, 475 F.Supp. 299, 317 (D. Del. 1979).

<sup>10</sup> “First and most basically, a complete administrative record should include all materials that ‘might have influenced the agency’s decision,’ and not merely those on which the agency relied in its final decision.” *Amfac Resorts, L.L.C. v. U.S. Dept. of the Interior*, 143 F.Supp.2d 7, 12 (D.D.C. 2001).

<sup>11</sup> It “is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs.” *F.T.C. v. Sinclair Refining Co.*, 261 U.S. 463, 476 (1923).

<sup>12</sup> See generally, [www.u-r-g.com](http://www.u-r-g.com), and the history of its role in supporting the Pinnacle software suite and ‘parts’ database used by URG members.

<sup>13</sup> See, 2006 Press Release: “United Recyclers Group, LLC is a partnership of over 330 industry leading auto recyclers that work together to improve and modernize the .industry. Changes they have made include developing their own inventory management system, Pinnacle.”

In retrospect, prior actions leading to divestitures and the forced disassembly of arms-length, structural growth in markets for auto parts management software may more resemble market manipulation than service to the statutory goals of stimulating competitiveness in a free enterprise system. To create some form of perfect market for niche software, in a small market segment, may or might not “substantially [promote] competition.” *Cf.* Clayton Act §7.<sup>14</sup>

## II. SUMMARY OF THE COMPLAINT AND PROPOSED CONSENT ORDER.

Solera, the owner of Hollander, announced the acquisition of Actual Systems (ASA), owner of the Pinnacle suite of software. The indicated price was only \$8.7 million, which in M&A dollars might be deemed paltry.<sup>15</sup> The cudgel of the presumption arising from FTC’s “merger to duopoly” theory easily urges reasonable businesspeople to submit to the requirement of a divestiture, rather than devote untold resources to preserving an \$8.7 million deal.

The proposed Consent Order mandates the creation of a new entity, and excises from an \$8.7M deal perhaps the asset of greatest value – the market for “Yard Management System Business” in North America.

The revival of Actual Systems and its recapture of the North American market for “Yard Management” software, are unlike conditions in prior FTC consent decrees in the ‘parts’ software area. However, requiring Solera to “grant a royalty-free, fully-paid-up, irrevocable, perpetual exclusive license ...with rights to sublicense” is not dissimilar to the license required in the ADP divestiture order, *fn.6 supra*, except that license was “assignable” and “transferable.”

One other wrinkle between the divestiture Order proposed here and the earlier FTC Consent Orders, is the limited permission for Solera to create “similar products to the Actual Systems Products” and to sell, etc., such similar product offerings, apparently in competition with the revived Actual Systems entity. See, Solera proposed Consent Decree, ¶3.

Might it be asked how the acquisition of Actual Systems, and its perceived impact on competition in the relevant market, would be evaluated if that product market was not the result of prior, forced divestitures. It is fair inquiry into the proposed Consent Order and its probable effects to ask whether the consequences of the history of forced unwinding of ‘parts’ software deals were (1) that the ‘parts’ software market and innovations in YMS were suppressed, or (2) that suits fostered competition and engendered more vendors in the relevant market. Should that

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<sup>14</sup> The Supreme Court has agreed that restoring competition is the "key to the whole question of an antitrust remedy." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). That proposition gets a mere mention in the proposed Consent Order; see, ¶ II.F.(3).

<sup>15</sup> Section 201 of the Hart–Scott–Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2006), titled “Premerger notification and waiting period,” states in relevant part:

(a) Filing

[N]o person shall acquire, directly or indirectly, any ... assets of any other person, unless both persons ... file notification pursuant to rules under subsection (d)(1) of this section and the waiting period described in subsection (b)(1) of this section has expired, if

(2) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the ... assets of the acquired person—

....

(B)(i) in excess of \$50,000,000 (as so adjusted and published) ....

inquiry devolve wholly upon presumptions, probabilities, or require a broader perspective from the position of a seller or a buyer in the market, or an overseer of a market.

III. THE RELEVANT PRODUCT MARKET BOUNDARIES SHOULD BE RECAST OR RECONSIDERED BEFORE ASSESSING HOW THE REQUIRED DIVESTITURE WILL IMPACT COMPETITION AND INNOVATION.

The proposed Consent Order described Pinnacle IP as “yard management” “point of sale” systems used by “recyclers.” The relevant product market should not be narrowed, mistakenly, to “recycled” auto parts and management software for a database of those parts. As the recycler’s ad below suggests, competing vendors offer recycled, remanufactured, surplus and aftermarket parts. The purchasers in the relevant product market can search databases of each, some, or all of these types of parts, and competition is not limited just to a marketplace of “recyclers.”

Home About Us Parts New Arrival Damage Codes Cut Sheets News OEM Surplus Contact

### New OE Surplus Parts

B Auto Parts carries a wide variety of new OE Surplus Parts straight from the manufacturer. Sheet metal parts such as fenders, hoods, doors, truck beds, tailgates and decklids are in stock and ready to go. A wide range of headlamps, taillights, front bumper covers and rear bumper covers are also in stock. Most of these parts come in color and are offered at a fraction of the list price.

[Read More](#)

#### New OEM Takeoff Parts

#### Refinished Wheels

#### Remanufactured Products

#### Recycled Parts

#### Aftermarket Parts

### B AUTO PARTS

B Auto Parts was established in 1953 as a small corner lot scrap yard in the shadows of several steel mills and the St. Louis skyline. After a few years, founder Steve Barzoff moved the business south to its current location at 500 Madison Road. B Auto Parts mainly operated as a scrap, recycling and towing operation until Steve's son, Charlie, took the helm in 1976. The "scrap yard" then became a true

Team PRP Premium Recycled Parts

Team PRP Premium Recycled Parts

Quality & Service  
URG Auto Parts  
The Brand To Trust

A. The Marketplace for ‘Parts’ Databases and Software.

The proposed Consent Order appears to gloss over product differentiation between auto ‘parts’ software suites, which enable selling efforts to aftermarket buyers of parts. On the record available for public comment, it is difficult to compare the how one version of software for accessing a database of ‘parts’ from auto recyclers is the same or different from software and

databases available in the markets described in this and prior matters (the ADP-AutoInfo, Cooperative Computing-Triad, or CCC Information-Mitchell matters cited above). On final review of the proposed Consent Order, further consideration should be given to the relevant product market boundaries and to obvious similarities between various ‘parts’ software suites, as well as what might differentiate one product from another within the market.

On final consideration of the proposed Consent Order, it should be asked whether the relevant product market is mis-defined as unitary with the YMS software required to be divested (hereinafter the “divested YMS”); or, is the divested YMS one segment among a plurality of ‘parts’ software in a larger product market, which might be relevant to assessing competitiveness and efficiencies; or; does the proposed Consent Order presume a market delineated by the functions that the divested software delivers to its customers, or by the relative fractions of YMS’ customers’ demand for one or another YMS software package offered in that market segment.<sup>16</sup> These questions come before what should be asked about product interchangeability and cross-elasticity of demand. There is not enough in the available record to comment meaningfully about those matters.<sup>17</sup>

The proposed Consent Order seems forged largely on a ‘merger to duopoly’ presumption of anticompetitiveness against the Solera acquisition of Actual Systems (see, FTC’s Analysis of Proposed Agreement Containing Consent Order To Aid Public Comment).<sup>18</sup> That presumption necessarily redounds to threshold questions about whether the relevant product market was appropriately delineated before the presumption of anticompetitiveness attached. Taken together, the market as defined in the proposed Consent Order triggers a presumption that 3>>2 vendors is anticompetitive. Reassessment of the product market definition, which provokes this presumption requires more than is found the materials on which public comment was invited.

#### B. Competitive Forces and Perceived Barriers to Entry.

The analysis behind some conclusions in the proposed Consent Order do not seem to account for, or give much weight to market factors that impact product availability and elasticity of demand for available products in the relevant market. A primary factor is URG, the trade organization that counts many, if not most, of the significant “recyclers” as members.

Reflecting back to ADP’s acquisition of AutoInfo, it is fair to conclude that URG’s reaction to that led to the creation of Actual Systems, as detailed below. Now, in reaction

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<sup>16</sup> Product characteristics that are too vague do not meet section 7’s requirement that the relevant market be “well-defined.” *United States v. Oracle Corp.*, 331 F.Supp.2d 1098, 1121 (N.D.Cal. 2004), *subs. history omitted*.

<sup>17</sup> Cf.. 15 U.S.C. § 16(b). For proposed consent decrees in antitrust enforcement actions, the public has access to the proposed decree together with “any other materials and documents which the United States considered determinative in formulating such proposal.”

<sup>18</sup> Oddly, the “Aid” to “Public Comment” twice mentions “two of only three meaningful providers of YMS” and being “two of only three significant competitors in this market,” but neither FTC’s Complaint nor its proposed Consent Decree, titled Decision and Order, ever mention the “two of only three” concern.

(perhaps) to Solera's acquisition of Actual Systems, URG partners up with CCC Information Systems (noted above in I.D). URG's recommendation of 'parts' software to its membership influences their choices, which in legal terms means that influences elasticity of demand.

After ADP merged in AutoInfo, the members of URG provided substantial funds, perhaps @\$6M, and joined in a venture to produce a 'parts' software suite with Actual Systems that could provide what they felt might be lost in the ADP-AutoInfo merger. URG exerted some control over the development and adoption of the Actual Systems software programs. A dispute over rights to the software did end URG's direct connection with the product, but those members that had adopted it appeared to have remained loyal to using the Actual Systems software.

Now, in reaction, perhaps, to Solera's announced acquisition of Actual Systems, the URG apparently acted again for the benefit of its membership. The degree that a trade group might influence its members to adopt or not adopt a particular suite of 'parts' software is an example of how this market reacts to keep things competitive, and to do so without forced divestitures or a mandate to re-establish a company that was ready to get out of the market.

Next, the proposed Consent Decree, or at least the FTC's "Aid" to public comment document suggests that there are "substantial" barriers to entry of new competition into the YMS market. In the absence of barriers to entry, an acquisition cannot violate Section 7. *IMO The Coca-Cola Bottling Co. of the Southwest*, 118 F.T.C. 452, 527, Docket No. 9215 (August 31, 1994), later decision at *Coca-Cola Bottling Co. of the Southwest v. F.T.C.*, 85 F.3d 1139, 64 USLW 2802, 1996-1 Trade Cases P 71,437 (5th Cir. Jun 10, 1996), citing, *B.F. Goodrich Co.*, 110 FTC 207, 296 (1988), citing cases at fn. 63.

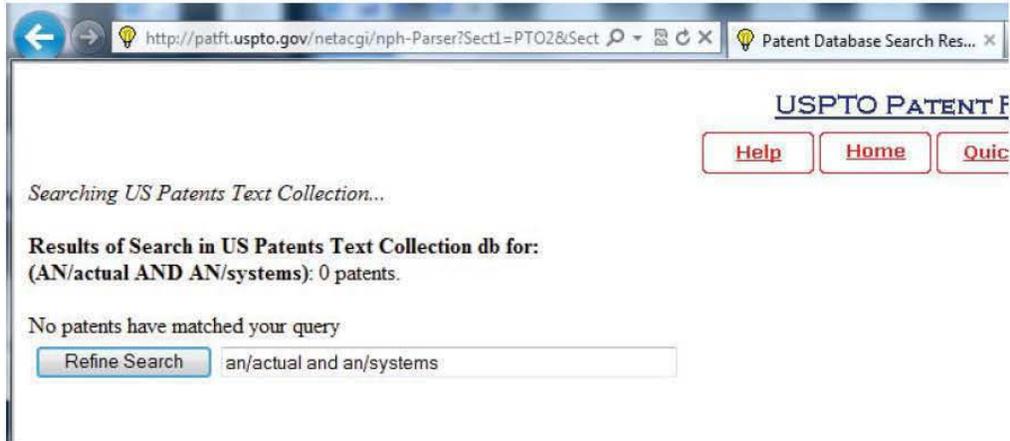
The acquisition price of only \$8.7 million strongly indicates how inexpensively a company could enter this market. The FTC requirements that a new entity be set up, and granted a license to the Hollander exchange, with non-exclusive rights to the Actual Systems software, is a sense enumerate all that it takes to get into this market. Basically, it is licensed access to the Hollander Interchange, plus (presumably) application software for 'parts' adapted from "adjacent markets."<sup>19</sup> Are these barriers to entry "substantial"?

Moreover, no IP barriers to entry were discovered after searching publicly-available databases. Even though the proposed Consent Order defines and requires transfers of intellectual property, there is no indication that Actual Systems has exclusivity over any of the software that Solera is forced to divest under the proposed Consent Order. The right to exclude others from the relevant product market, using patents or copyrights, can be a significant barrier to entry. If there are none, then no IP barrier exists,

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<sup>19</sup> These "adjacent markets," noted in Section IV of the "Aid" to public comment, presumably are the markets for 'parts' software described in the matters cited above in Section I.

No patents, and no copyrights held by the ASA/Pinnacle interests protect the software. Below are search results from the websites of the Patent Office and the Copyright Office.



### C. Pro-Competitive Effects.

Nothing in the documents available to the public enables informed comment on the pro-competitive effects of Solera acquiring Actual Systems software and its North American market. Mergers in software markets can produce savings through reducing costs, eliminating duplicate functions, or achieving economies of scale, and these merger-specific benefits might be passed on in the form of lower prices, improved products, and additional product choices. The public would take as given that the presumption that attaches to a 3 down to 2 merger overwhelms any need to inquire about the potential pro-competitive effects of this merger in the ‘parts’ software market.

### IV. AN EQUITABLE MANDATE TO DIVEST SHOULD NOT BE IMPOSED BASED ON A PRESUMPTION.

Divestiture is equivalent to a mandatory injunction. *California v. American Stores Co.*, 495 U.S. 271, 281 (1990). Here, that mandate rests largely on a presumption that reducing the number of competitors in the YMS market 3 to 2 will lead to anticompetitive effects. See, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963) (establishing that the illegality of a merger can be presumed; known as a principle of the Harvard School of economic theory); compare, *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (consonant with the Chicago School of economic theory, “evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness”).

More recent precedent has held that mandatory, equitable relief requires “discretion [that] must be exercised consistent with traditional principles of equity.” *eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006) (court “erred in its categorical grant of such relief”). That decision rejects “any categorical rule favoring” equitable mandatory remedies. See, e.g., Brief of Amicus Curiae Federal Trade Commission, pg. 7, in *Apple v. Motorola*, Dkt. no. 2012-1548 (Fed. Cir.).<sup>20</sup> Here then, it can be argued that instead of assessing competitiveness, the FTC required divestiture based on a presumption, which is “is contrary to traditional equitable principles.” *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 544 (1987). “No such thumb on the scales is warranted.” *Monsanto Co. v. Geertson Seed Farms*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2743, 177 L.Ed.2d 461, 78 USLW 4665 (2010), citing *MercExchange*. Reliance on a presumption of harm should not be the approach taken after *MercExchange*, and the cases that follow it. Any such “departure from the long tradition of equity practice should not be lightly implied.” *Weinberger v. Romero-Barcelo*, 456 U. S. 305, 320 (1982), *concurrency*.

Even if the reliance on a presumption is consonant with equity practice, it should provide only a “convenient starting place,” *Baker Hughes, id.*, not the final measure of “future competitiveness”. When the FTC’s assessment supports a presumption in favor of mandatory, equitable relief, the agency still should go further and present the public with the data appropriate to “weigh the equities in order to decide whether enjoining the merger would be in the public interest.” *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). The assessment, beyond the presumption, should be set forth in an administrative record that adequately enables the public to evaluate the FTC’s mandated remedy.

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<sup>20</sup> Viewable at <http://ftc.gov/os/2012/12/121205apple-motorolaamicusbrief.pdf>

CONCLUSION.

This opportunity to comment on the proposed Consent Order is appreciated. Some of the comments presented here had to be expressed on the basis of partial information, or because of the limited information that was made available about the matters discussed.

For the reasons set out above, as well as based on materials in, or that should be in the administrative record, it is suggested that the proposed Consent Order requiring divestiture should be reconsidered in its entirety, or modified or dispensed with. In addition, if the mandated divestiture is essentially the product of a presumption, rather than a more probing inquiry into future competitiveness, then that approach should be reexamined in light of the decision in *MercExchange*, and the cases that follow it.

Respectfully submitted,

Lee Thomason