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.	Case No. 1:08-cv-2043-RMC **PUBLIC VERSION**

DEFENDANTS' POST-TRIAL BRIEF

John A. Herfort (admitted *pro hac vice*)
Stacey A. Mahoney (admitted *pro hac vice*)
Richard Falek (admitted *pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
(212) 351-3832 (Phone)
(212) 351-5258 (Facsimile)

John C. Millian (DC Bar #413721)
Thomas G. Hungar (DC Bar #447783)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 955-8500 (Phone)
(202) 467-0539 (Facsimile)

Attorneys for Defendant
CCC HOLDINGS INC.

Richard G. Parker (DC Bar #327544)
Michael E. Antalics (DC Bar #475218)
Darren S. Tucker (DC Bar #465576)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300 (Phone)
(202) 383-5414 (Facsimile)

Andrew J. Frackman (admitted *pro hac vice*)
Mark S. Germann (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
(212) 326-2000 (Phone)
(212) 326-2061 (Facsimile)

Attorneys for Defendant
AURORA EQUITY PARTNERS III, L.P.

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I. INTRODUCTION

The Court should deny the motion for a preliminary injunction. Overwhelming evidence from the parties, from Audatex, and from customers shows that these markets are highly competitive and will stay that way. Indeed, the merger is likely to increase competition by making the merged entity more efficient. It will also unleash a maverick (Web-Est), and open the Motor estimatics database to qualified companies already experienced in dealing with the customers and the relevant technologies. The FTC's case is based on little more than their HHIs, but such data is merely a "convenient starting point" for "a broader inquiry." *United States v. Baker Hughes,* 908 F.2d 981, 984 (D.C. Cir. 1990) (Thomas, J., joined by R.B. Ginsburg, J.). Mere HHIs do not justify any relief under Section 13(b). *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716-717, n.11 (D.C. Cir. 2001); *see also Baker Hughes,* 908 F.2d at 992 (HHIs "cannot guarantee litigation victories"). The FTC retains the "ultimate burden of persuasion." *Heinz*, 246 F.3d at 715 (quoting *Baker Hughes*, 908 F.2d at 983); *see also FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004).

Ultimately, the FTC must point with specificity to likely anticompetitive effects. 15 U.S.C. §§ 18, 53(b). After six hearing days, the evidence shows that unilateral or coordinated effects are not likely. This merger will benefit consumers. Perhaps that is why the only market participant really complaining here is Audatex, who does not want to compete with the more efficient merged entity. But as the Supreme Court has said again and again, the antitrust laws are concerned with "'the protection of *competition*, not *competitors*.'" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2724 (2007) (citation omitted; emphasis in original).

The FTC has failed to produce credible evidence of anticompetitive effects. Audatex's Mr. Schwinn admitted (in an internal email) that the merger would make the industry more price-competitive "[redacted]

[redacted]" (Defendants' Proposed Findings of Fact ("FOF") ¶ 122). Similarly, Audatex's SEC filing in May 2008, shortly following the merger's announcement, expressed concern that the merger "may enable [the merged entity] to implement further price reductions." (FOF ¶ 359).

Neither of the FTC's customer witnesses (The Hartford's Mr. Brandt and GMAC's Mr. Hall) could say that they were worried about the merger's effects or that it would harm competition. The remaining customer witnesses (Infinity's Mr. Dibble and Gerber's Mr. Cheskis) testified, without qualification, that the deal was positive for their companies and for consumers on several unrebutted grounds.

On unilateral effects, there are reams of evidence that Audatex—which undisputably lacks any capacity constraints, has a record of success in all customer segments, and is committed publicly to competing aggressively—would be a vigorous post-merger competitor. There is no evidence that Audatex is a "distant third" with ***any*** customer, let alone with a significant number of customers, or customers as a whole.

Dr. Hayes's two unilateral effects models lack factual grounding. His "auction" model for insurer sales rests critically on the false assumption that Audatex is a "distant third" for both estimatics and total loss valuations. That assumption finds no support in the record. Likewise, his Bertrand model for repair facility sales was based on the illogical premise that Audatex would not seek to gain market share post-merger. Worse, it rested on a sample of a handful of body shops, which provided no support for his "diversion ratios." There is simply no serious basis for believing that unilateral effects are likely or that the merged entity could get away with a price increase or a reduction in output or innovation without risking significant loss of business to Audatex.

The evidence also shows that there are no coordinated effects currently and that nothing will change post-merger. There is vigorous competition for both estimatics and total loss valuations, with the parties losing and winning customers with regularity. As in *Baker Hughes*, which rejected a DOJ challenge where the merged entity's market share was up to 76%, the markets for estimatics and total loss sales (including estimatics sales to repair facilities) are structured by sophisticated customers who "closely examine available options and typically insist on receiving multiple, confidential bids for each order." 908 F.2d at 986. Also as in *Baker Hughes*, customers demand long-term contracts, which "can exceed $1 million." *Id.*; *see also* Merger Guidelines § 2.12. Both today and post-merger there is no practical way to reach consensus on "terms of coordination," as required by the Merger Guidelines and the case law: the bids and product offerings are heterogeneous, pricing is complicated and unpredictable, and customer demands are simply too variable. Moreover, there is an undisputed history of non-transparent price competition for estimatics sales to repair facilities involving a variety of options, pricing schemes, and free goods and services. Dr. Hayes offered no model or estimate of price effects resulting from coordination, and did not even discuss the factors listed in the Guidelines.

Finally, the claim that this is a "3 to 2" merger turned out to be simplistic and inaccurate. For estimatics, not only will there be an undisputed third post-merger competitor offering large price cuts the minute the deal closes (namely, Web-Est), but also the live prospect of additional entry using the Motor database should prices rise post-merger. Certainly the FTC's static view of the world ignores reality, as new products are already emerging to threaten estimatics by offering alternative ways to value a repair job. As for total loss valuation (TLV) products, the uncontested evidence shows that insurance companies (including [redacted]

[redacted] internally generate a significant number of total-loss valuations as a substitute for total loss valuations sold by CCC, Audatex, and Mitchell. As Judge Huvelle recognized in *United States v. SunGard Data Systems Inc.*, such vertically integrated firms are considered part of the market. 172 F. Supp. 2d 172, 186 (D.D.C. 2001).

With strong evidence that there are no likely anticompetitive effects, this Court should not enjoin the merger. To do so would deprive customers of enhanced competition and innovative, high quality products, while benefiting only Audatex.

II. THE COMMISSION BEARS THE BURDEN OF SHOWING THAT A PRELIMINARY INJUNCTION IS WARRANTED.

The FTC bears a heavy burden in seeking to block a $1.5 billion merger with meaningful customer benefits. As the D.C. Circuit explained, "[t]he issuance of a preliminary injunction under Section 13(b) prior to a full trial on the merits is an extraordinary and drastic remedy." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (internal quotation marks omitted). And "[t]his is particularly true in the acquisition and merger context," because "the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated." *Id.*; *see also Mo. Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir. 1974) ("[T]he grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger . . . .").

The Court's Order sets forth the legal standards governing this case. (Order, Doc. no. 40, Dec. 17, 2008). The FTC's statutory burden in seeking injunctive relief under Section 13(b) is to "show[] that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b); *see FTC v. H.J. Heinz*

Co., 246 F.3d 708, 714 (D.C. Cir. 2001).[1] "Given the stakes, the FTC's burden is not insubstantial." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004). The FTC has the "burden on every element of their Section 7 challenge, and a failure of proof in any respect will mean the transaction should not be enjoined." *Id.* Merely showing a "*fair* or *tenable* chance of success on the merits will not suffice for injunctive relief.'" *Id.* (emphasis added). The FTC must establish both likelihood of success and equities favoring issuance of the injunction, and the court must "exercis[e] [its] independent judgment" concerning the need for preliminary injunctive relief. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981) (citation omitted).[2]

The purpose of this Court's evidentiary hearing has been to allow CCC and Mitchell to rebut the FTC's alleged HHI numbers—which, by themselves, cannot entitle the FTC to injunctive relief, *Heinz*, 246 F.3d at 716 n.11—and show that any harm to competition is unlikely, allowing the Court to "assess the merger's probable *actual*—not merely theoretical—effects." (Order at 6 (citing *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 322 n.38 (1962))). Defendants are entitled to rebut (and, as set forth below, have rebutted) the FTC's HHI allegations in a variety of ways: through evidence that entry and, if necessary, repositioning by

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[1] Although the D.C. Circuit has not squarely resolved the question, some courts have stated that the requisite likelihood of success may be established if the FTC has "raised 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. In *Heinz*, the court of appeals was careful not to decide the issue, noting only that the defendants had not objected to the standard. 246 F.3d at 715. Defendants in this case likewise do not object to the "serious, substantial, difficult and doubtful" standard, as long as it is properly construed to hold the FTC to its statutory burden of establishing its actual "likelihood of . . . success" on the merits, a phrase with a long-established judicial meaning. *See, e.g.*, *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008); *see also Field v. Mans*, 516 U.S. 59, 69 (1995) (statutes using terms with "accumulated settled meaning" at common law "incorporate the established meaning of these terms") (citations omitted).

[2] The FTC's reliance on *Whole Foods* is misplaced. No opinion commanded a majority of the panel in *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008). Because there was not even "implicit agreement" among a majority of judges in *Whole Foods*, the judgment "sets no precedent beyond the precise facts of the case." Order, No. 07-5276 (D.C. Cir. Nov. 21, 2008) (Ginsburg, J., joined by Sentelle, J., concurring in denial of rehearing en banc) (internal quotation omitted).

competitors is likely to defeat anticompetitive conduct by the merged entity, *see Baker Hughes*, 908 F.2d at 984–85; by pointing to particular characteristics of the market, such as sophisticated purchasers or sealed bid procedures resulting in an absence of price transparency, that make unilateral or coordinated price increases unlikely, *see Arch Coal*, 329 F. Supp. 2d at 158; by undermining the FTC's proposed market definition, *see FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1999); *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 54-55 (D.D.C. 1988), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988); or by demonstrating that the equities weigh in favor of the merger, *see Weyerhaeuser*, 665 F.2d at 1087. The FTC bears the burden of "producing additional evidence of anticompetitive effects," and it bears the ultimate burden of persuasion in this proceeding at all times. (Order at 4 (quoting *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990))).

III. UNILATERAL EFFECTS ARE UNLIKELY.

The FTC has centered its case on the unilateral effects theory for sales of both estimatics and total loss valuations. But the FTC failed—by a wide margin—to show a likelihood of unilateral price increases.

The conditions under which a merged entity might theoretically raise prices unilaterally are set forth in the Guidelines and summarized in *United States v. Oracle*, 331 F. Supp. 2d 1098, 1117-18 (N.D. Cal. 2004):

1. The products must be differentiated.
2. The products controlled by the merging firms must be close substitutes; i.e., "a substantial number of the customers of one firm would turn to the other in response to a price increase."
3. Other products must be "sufficiently different from the products controlled by the merging firms" that a price increase by the merged entity would not be thwarted by other competitors.

4. Non-merging firms are "unlikely to introduce products sufficiently similar to [those of the merging firm] to eliminate any significant market price credit by the merger."

Id. at 1117–18; Guidelines § 2.12.

In this case, it appears that some customers in some bidding situations historically preferred CCC and Mitchell. But the relevant issue is whether Audatex is sufficiently capable of competing for these customers, or instead whether it is and will remain a "distant" competitor for a sizeable portion of the market. If it is a capable competitor, then unilateral effects resulting from the merger are unlikely. The Guidelines explain:

> In markets where it is costly for buyers to evaluate product quality, buyers who consider purchasing from both merging parties may limit the total number of sellers that they consider. *If either of the merging firms would be replaced in such buyers' consideration by an equally competitive seller not previously considered, then the merger is not likely to lead to a unilateral elevation of prices.*

Merger Guidelines § 2.12 (emphasis added). This is a commonsense proposition: if another competitor can replace the competition previously provided by the second merging firm, then there is little likelihood that the merged firm can increase prices post-merger. To conclude otherwise would mean that any merger in which some fraction of customers select the merging companies as finalists violates § 7 of the Clayton Act, 15 U.S.C. § 18, regardless of the original number or competitiveness of the other bidders.

Audatex is an astonishingly aggressive competitor, as this Court recognized, whose products stand up against those of CCC and Mitchell in all respects. No witness testified that Audatex's products are inferior; Mr. Brandt said that Audatex did "very well" in its most recent bid on a multi-product bundle and when The Hartford was negotiating contract terms in 2008 with CCC, it told CCC, "If we can't get the terms with you, we can bring Audatex in." (FOF ¶ 45). There is no evidence that Audatex is a distant third for a sizeable fraction of customers, and no evidence that there is a properly defined antitrust market consisting of customers who would not seriously consider using Audatex post-merger. Accordingly, "the merger is not likely to lead to a unilateral elevation of prices." Guidelines § 2.12.

A. Audatex Is A Strong Current And Future Competitor.

Audatex competes aggressively against CCC and Mitchell and will "certainly still compete as aggressively as [it] can" following the merger. (FOF ¶ 69). Dr. Hayes's market share calculations have Audatex ranked Number 1 for estimatics sales to insurers and independent appraisers, with a 38.5 percent share (FOF ¶ 58), and Number 2 (far ahead of Mitchell) for TLV sales to insurers. Solera, its parent company, is the largest estimatics and TLV company in the world and the only global provider of software and services to the automobile insurance claims processing industry. (FOF ¶ 52). Solera is twice the size of its nearest competitor worldwide. (FOF ¶ 56). It sells to more than 900 automobile insurance companies, including nine of the ten largest in North America (including Allstate, State Farm, American Family, and Liberty Mutual), and over 33,000 collision facilities around the world, approximately 10,700 of which are in the United States (FOF ¶ 57). Because of its size, it spends 50 percent more on product development than its nearest competitor. (FOF ¶ 64). Audatex believes its products are at least as good as, if not better than, those of CCC and Mitchell, and does not consider itself a "distant third" in the United States. (FOF ¶ 90). The market confirms that view. Audatex has the largest share of estimatics sales to insurers and is equal to Mitchell in overall estimatics sales. (FOF ¶ 58). And it has eight times Mitchell's share of the U.S. TLV business. *Id.*

Audatex's win of American Family from Mitchell underscores its strength. This was Mitchell's largest loss over many years. (FOF ¶ 67). As a result, Audatex stripped from Mitchell a "great majority" of the 1,000 facilities in American Family's DRP, as well as cross-selling opportunities. *Id.* Audatex has many other major insurer wins (including Allstate for estimatics and total loss, State Farm for estimatics, and Liberty Mutual for estimatics and total loss (FOF ¶ 68)), as reflected in its hefty share. Its penetration of all parts of the insurer customer segment as well as the repair shops shows that Audatex is regarded as an effective competitor across the board and is not confined to a few niches. (FOF ¶ 118).

Mr. Aquila told Solera's board that Audatex will continue competing effectively and aggressively post-merger. In light of the pending CCC/Mitchell merger, Audatex would be [redacted]" (FOF ¶ 70).

In short, just as with respect to SAP in *Oracle*, "[Audatex] is not a 'disadvantaged' and 'troubled' competitor in the United States." 331 F. Supp. 2d at 1167. Audatex's high market share and regular winning record prove just the opposite.

B. Audatex Is Not A Distant Third For Estimatics Or TLV Sales To Insurance Companies.

Unless Audatex is a "distant" third, the FTC's expert admitted, "the merger would have no effect." (FOF ¶ 80). Yet nothing in the record shows that Audatex is a distant third; at most, the evidence shows only that a few customers prefer Mitchell and CCC. With respect to the insurers relied on by Dr. Hayes, nothing was proffered to show that there was a significant and likely durable gap between Audatex, on the one hand, and CCC and Mitchell, on the other. Indeed, Dr. Hayes couldn't measure the purported gap: he was unable to calibrate or explain the extent of any gap between Audatex and the others for any customers or how it would affect a future bid.[3] (FOF ¶ 84). As Professor Ordover explained, "the fact that [insurers] down-select to

[3] *See also* Hayes, Tr. (Jan. 21, 2009) at 53:7-12:
THE COURT: So you're [talking] about anecdotal sort of subjective thing. The gap, the distance you're talking about isn't identifiable as a number, it's just anecdotal?
THE WITNESS: I can't put a number based on the information data that I have from those firms [i.e., GMAC, The Hartford, AIG, GEICO, and AAA from North California]. I can't put a number on those rankings, no.

two tells me nothing as whether or not the third player is so high cost . . . as to be truly irrelevant or not possibly a contender." (FOF ¶ 89).

There is no principled reason to extrapolate from the mild preferences of a few customers to customers generally or even a large segment of customers. *See Oracle*, 331 F. Supp. 2d at 1167 ("Drawing generalized conclusions about an extremely heterogeneous customer market based upon testimony from a small sample is not only unreliable, it is nearly impossible."); *see also SunGard*, 172 F. Supp. 2d at 182–83. Dr. Hayes did not talk to a single customer that he believed regarded Audatex as "third," and there was no basis for determining how "distant" Audatex was for any of them, or whether that position would persist at the time of a new bid. To have a reliable basis for inferring unilateral effects requires that the FTC identify the characteristics of a substantial group of customers for whom Audatex cannot and is not likely to be able to compete. Yet, as Professor Ordover explained, "as far as I can tell, one cannot identify a group of customers by some characteristic that the merging companies know, that Audatex knows, that will say to the merging parties . . . Audatex is out of contention, even before they get the RFP." (Ordover, Tr. (Jan. 23, 2009) at 103:16-24). Dr. Hayes pointed to no such "node," to use the *Oracle* court's language, or "vertical," to use Professor Ordover's terminology.[4] As Prof. Ordover summarized,

> [i]n order to prove something along the lines that [Hayes] needs to, he would have to point to some features of the products or the features of the customers that would say that for a large number of customers, the lack of certain features, if such lack existed, is enough to explain the assumption of the distant third. And obviously, there is no such evidence, as far as I know. And as the Court pointed out, Audatex is doing quite well, thank you very much, in the sale of estimatics [and] TLV, as well as products to RFs.

[4] For example, in total loss, Dr. Hayes could not identify anything about Audatex, besides one vague reference to possible past higher valuations, that would make Audatex a distant third relative to CCC and Mitchell for a sizeable fraction of insurers. (FOF ¶ 100).

(Ordover, Tr. (Jan. 23. 2009) at 104:18-105:2). With respect to TLV, where Mitchell (not Audatex) is far behind in market share, Dr. Hayes testified, "I do not have information that would allow me to measure or quantify . . . the gap between Audatex when it's the third choice of a customer as compared to CCC and Mitchell." (FOF ¶ 84). Significantly, Mr. Conway, a lead FTC witness, never identified a group of customers for which Audatex believed it was appreciably competitively disadvantaged. (FOF ¶ 90).[5]

In any event, the ultimate test is what customers do in the marketplace. *Oracle*, 331 F. Supp. 2d at 1167. Audatex's high share of estimatics sales to insurers, including its strong record with some of the largest and most sophisticated purchasers (such as Allstate, American Family, Liberty Mutual, and State Farm), refutes any suggestion that it is a distant third. (FOF ¶ 91). And the notion that Audatex is a distant third in TLV, where it has six times the share of Mitchell, strains credulity. (FOF ¶ 98) (Ordover: "the assumption that Audatex is a distant third [in TLV] . . . is even more problematic than estimatics because in TLV, Audatex is certainly the second largest after CCC and it's Mitchell that is at this point really the third player in that marketplace.").[6]

[5] The limited customer testimony offered by the FTC on customer preferences for CCC and Mitchell over Audatex and supposed concern about a possible price increase does not enable the Court to infer that the merger may result in higher prices. The FTC's few customers do not provide underlying facts to support the necessary finding that Audatex sells an inferior product that could not replace either CCC's or Mitchell's product or that prices are likely to be higher. In *Oracle*, the court found that the very strong customer opposition in that case—much stronger than exists here—was insufficient because the customers did not explain the underlying facts as to why a price increase might result from the deal. They provided no analysis of what they could or could not do to avoid a post-merger price increase and why alternatives to the merging firms' products were unacceptable. In the court's words, "unsubstantiated customer apprehensions do not substitute for hard evidence." 331 F. Supp. 2d 1098 at 1131. Similarly, in *Arch Coal*, the court rejected the "subjective" opinions of customers that prices would increase as nothing more than "a truism of economics: a decrease in the number of suppliers *may* lead to a decrease in the level of competition" and noted that none of the customers had attempted to "state what *will* happen in the . . . market." 329 F. Supp. 2d 109 at 145–46. Thus, customer concerns were deemed "not persuasive." *Id.*

[6] Hayes' other work to support his TLV opinions is similarly deficient, but clearly secondary to his application of the auction model.

The weakness of the FTC's case is underscored by Dr. Hayes's admission that he premised his auction model on vague (and contradictory) evidence from six insurers, but talked to only one insurer (Allstate, which used Audatex), and neglected to talk to other major and sophisticated insurers. (FOF ¶ 99). The FTC's hand-picked insurers barely support a mild preference for the merging parties and certainly do not support an inference that Audatex is a distant third.

- Eric Brandt of The Hartford did *not* testify that Audatex was a distant third or that it lacked some required competitive feature. On the contrary, The Hartford was "impressed" with Audatex's offerings. (FOF ¶ 46). The Hartford also disavowed that Audatex was inferior. (FOF ¶ 88) ("Q: You're not suggesting [Audatex is] an inferior product are you? A: Oh, no.").

- George Hall of GMAC said that he did not "know anything about Audatex" and therefore could not say that it was an inferior product. (FOF ¶ 88).

- Shawn Burklin of GEICO conceded in his deposition that the FTC had drafted his declaration and admitted that he was not competent to testify about the quality of the Audatex products because he did not "consider himself an expert in the field." (FOF ¶ 88).[7] And most of Mr. Burklin's declaration has now been precluded as inadmissible hearsay.

- Mercury Insurance and AAA of Northern California did not offer any testimony in this case at trial, by deposition, or by declaration. The Mercury evidence is nothing more than Dr. Hayes' opinion that "CCC and Mitchell were the finalists" for an estimatics contract. As for AAA of Northern California, there is only a single second-hand report in a Mitchell email. There is no suggestion that Audatex is a distant third for either customer. (FOF ¶ 88).

The FTC's evidence is particularly unimpressive considering that there are approximately 300 automobile insurers in the United States as compared to those five or six cited by Dr. Hayes. There is no evidence that Audatex is a distant third—or even third at all—for Allstate,

[7] Hayes also relied on a declaration from AIG. But, rather than submit AIG to deposition, the FTC withdrew that declaration. Accordingly, any reliance on it is completely improper. It is worth noting, however, that the RFP referred to in the AIG declaration was from 2005, before the purchase of Audatex by Solera and before the Solera IPO. The IPO has resulted in Audatex being astonishingly aggressive, meaning the declaration is therefore woefully out of date.

Nationwide, State Farm, Progressive, Liberty Mutual, Travelers, American Family, Farmers, MetLife, Erie, Safeco, or USAA, some of the largest insurers. (FOF ¶ 91).

Without a reason to believe Audatex is currently a distant third and will remain a distant competitor, in Dr. Hayes's own words, the "basic auction approach would indicate that the merger would have no effect." (FOF ¶ 80). In short, the FTC's models are not probative and their conclusions meaningless.[8]

C. The FTC Has Not Shown a Likelihood of Unilateral Effects for Repair Facilities.

Dr. Hayes's use of the Bertrand model to measure unilateral effects for estimatics sales to repair facilities is as flawed as the auction model discussed above. In neither case did he base his analysis on reliable inputs.

The Bertrand model is an attempt to measure whether Audatex and the merged companies' products are reasonably close substitutes such that Audatex might replace any competition lost by the merger. If they are close substitutes, then there is no likelihood of unilateral effects. Like the auction model, an important weakness of the Bertrand model is that it *always* predicts some price increase (before taking into account efficiencies and the impact of entry). (FOF ¶ 107). Even Dr. Hayes admits that its value is only "directional." (FOF ¶ 107; Hayes, Tr. (Jan. 21, 2009) at 161:24). The key input for the Bertrand model in this case is the assumed diversion ratios. If the diversion ratios are unreliable, then the output of the model will be unreliable. (FOF ¶ 116).

Here, the diversion ratios assumed by Dr. Hayes are utterly unreliable. As Professor Ordover succinctly put it, "the diversion ratios that [Hayes] is putting into his model are not

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[8] Because of this fatal flaw, there is no need to deal with the anomalies in the numbers Dr. Hayes projected. (*See* FOF ¶ 85).

robust, I don't think they're sound, I don't understand them, and I don't believe that they necessarily match up with the economic realities of the repair facilities in the marketplace." (Ordover, Tr. (Jan. 23, 2009) at 151:20-25).

Dr. Hayes did not undertake a meaningful statistical analysis to measure actual substitution among the relevant products in response to a price increase. Having sought no data regarding Audatex's or Mitchell's lost customers and *their* diversion, he relied solely on a two-year old survey of a tiny fraction of CCC's former customers, notwithstanding that the study on its face warned that the results "***[c]annot be projected to the population as a whole due to limited number of completes.***" (FOF ¶ 112). The warning is apt. The CCC study is nowhere close to a statistically reliable sampling:

1. It was not conducted with any assurances of reliability that normally accompany surveys admissible in court.

2. It represented less than 0.2% of CCC's repair facility (RF) customers: 29 out of over 20,000. (FOF ¶ 113).[9]

3. It commingled communicating and non-communicating versions, thereby potentially understating the influence of insurers and overstating the ease of switching. (The non-communicating version is sold as an independent estimating product and therefore switching is easier for the RFs than with communicating products.) (FOF ¶ 114).

4. It failed to take into account the impact of DRPs. Half of the RFs in the survey are not part of any DRP program. (1/23/09 Tr. 152:5-12.) A reliable model would have to consider the power of insurers to constrain pricing to RFs in their DRP programs. (FOF ¶ 116).

5. It included only one multi-service operator (MSO) and therefore did not account for the fact that some portion of the RFs using communicating products have more than one system. The action of MSOs in response to a price change would likely be different from that of an RF that was dependent on its only estimatics system. (Ordover, Tr. (Jan. 23, 2009) at 156:9-25 & 157:3-11).

6. It did not even make clear whether the customers that left CCC actually switched to Mitchell or Audatex, instead of simply relying on a estimatics supplier already

[9] Dr. Hayes reduced the original survey size of 31 events to 29 events. (FOF ¶ 110).

on their systems. (FOF ¶ 116). In the absence of actual switching, there is no "diversion," and the calculation cannot be made.

7. Dr. Hayes did not consider the real-world possibility that post-merger, there would be a greater diversion in favor of Audatex in the event of a price increase by the merged entity than Dr. Hayes' model calculated based on a 29-customer sample from late 2006, before Solera went public. (FOF ¶ 116).

In short, the CCC report on 29 (out of 45,000) RFs is not a basis to derive a reliable diversion ratio to be input into a Bertrand model. At the same time, there is overwhelming evidence that Audatex is an aggressive competitor with a strong estimatics product offering to repair facilities. (FOF ¶ 118–119). As just one example, a 2006 Collision Week survey of repair facilities found Audatex superior to CCC and Mitchell in 8 of 8 categories for estimatics. (FOF ¶ 37).

In contrast, Professor Ordover gave an example of the type of market and data to which the Bertrand model can be reliably applied: a consumer products market, where there are tens of thousands of reliable data points. (Ordover, Tr. (Jan. 23, 2009) at 154:12-155:7). Simply put, as was the case with his auction model, Dr. Hayes's Bertrand model used unreliable inputs to create unreliable results.

IV. POST-MERGER COORDINATION IS UNLIKELY.

The question whether a merger will make coordinated interaction more likely depends "on whether market conditions, on the whole, are conducive to reaching terms of coordination and detecting and punishing deviations from those terms." Merger Guidelines. § 2.1. HHI measures do not control, as *Baker Hughes* and *Heinz* establish. The estimatics and TLV markets provide a perfect example of the HHI's failure to measure anticompetitive effects. Indeed, the FTC's own past merger enforcement statistics demonstrate that in many cases of high HHIs with evidence of high entry barriers, the agency did not bring an enforcement action because entry is easy or there was a lack of persuasive evidence of effects, including coordinated effects. Horizontal Merger Investigation Data, Fiscal Years 1996-2007, issued by the Federal Trade

Commission, December 1, 2008, at 16. Despite the high HHI numbers alleged by the FTC, it is undisputed—customers, competitors, and the FTC all agree—that these markets are highly competitive today and there is no evidence of coordination. (FOF ¶¶ 16, 40-43).

These markets are simply not conducive to coordinated conduct. The undisputed market realities here present a perfect storm of factors that impede coordination. Those factors, which are recognized by the Merger Guidelines and courts, include: (1) product heterogeneity; (2) lack of price transparency; (3) complexity and lack of standardization with respect to pricing and products; (4) firm heterogeneity; (5) large, infrequent contracts; and (6) high fixed costs relative to variable costs; and (7) the presence of sophisticated buyers. None of those factors will change after the merger. (FOF ¶¶ 40, 171). The FTC has produced no evidence to show otherwise. The weakness of the FTC's case is demonstrated by Dr. Hayes's remarkably brief and "perfunctory" testimony on coordinated effects, which covers just 24 lines in the transcript. (FOF ¶ 168). Indeed, Dr. Hayes failed to discuss any of the Guidelines factors. (FOF ¶¶ 169-70).

A. Conditions In The Alleged Markets Are Not Conducive To Reaching Terms Of Coordination.

"Successful coordinated interaction entails reaching terms of coordination that are profitable to the firms involved." Merger Guidelines § 2.1. Several factors in the alleged estimatics and TLV markets directly inhibit, and render highly unlikely, any attempt to reach terms of coordination.

1. *Product and Price Heterogeneity and Lack of Standardization Make Coordination Unlikely.*

"[R]eaching terms of coordination may be limited or impeded by product heterogeneity." Merger Guidelines § 2.11; *see, e.g., Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986)("[C]ollusion is more difficult the more heterogeneous the output of the colluding firms."); *see also Oracle*, 331 F.Supp. 2d at 1113. The products here are incontrovertibly heterogeneous, making it difficult, if not impossible, for the competitors to agree on price. Professor Ordover, who has analyzed numerous markets both in and out of government, opined that on a scale of one to ten, these products are closer to a ten in terms of heterogeneity. (FOF ¶ 130). The FTC's expert did not offer a contrary opinion.

Numerous factors drive product heterogeneity, including: the multitude of products sought on bids; the variation in features that are designed to meet specific training, implementation and integration needs; and the sophistication and buying practices of the insurers. Through a request for proposal ("RFP") process, insurers define needs and suppliers offer customized products that fit those needs. (FOF ¶¶ 131-32, 135-36). This heterogeneity is confirmed by the fact that insurers spend from \$3,000 to \$15 million a year for auto physical damage products, with monthly subscriptions for estimatics (when priced on a per-seat basis) ranging from \$200 to \$900. (FOF ¶ 131). Some insurers require that bidders commit to spending \$500,000 to \$600,000 per year—to develop software that is unique to that customer.[10] (*Id.*).

Similarly, the estimatics products sold to repair facilities also vary. (FOF ¶¶ 132-33). For example, Audatex offers [redacted] different variations of its estimatics product, and an additional [redacted] different "add-on products." (FOF ¶ 133). Mitchell offers repair facilities at least [redacted] estimatics options along with [redacted] add-on products. (FOF ¶ 13). CCC offers [redacted] estimatics bundles, more than [redacted] add-ons, as well as varying prices for installation, service, training

[10] That the insurers have enough sophistication and buying power to force CCC, Audatex, and Mitchell to produce customized products is another factor that cuts against the likelihood of coordination. *See Baker Hughes*, 908 F.2d at 986 (concluding that merging sellers could not coordinate prices because sophisticated "buyers closely examine available options and typically insist on receiving multiple, confidential bids for each order"); *FTC v. Elders Grain, Inc.* 868 F.2d 901, 908 (11th Cir. 1989) ("A concentrated and knowledgeable buying side makes collusion by sellers more difficult."); *FTC v. RR Donnelley & Sons Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,239, at 64,885 (D.D.C. 1990) ("[T]he sophistication and bargaining power of buyers plays a significant role in assessing the effects of a proposed transaction.").

and integration. (FOF ¶ 132). Each combination creates a new, unique estimatics product on which competitors would have to come to terms to engage in coordination. (FOF ¶ 134).

In addition, there is no "standardization of pricing or product variables on which firms could compete." Merger Guidelines § 2.11. Not only are estimatics and TLV software frequently bundled with other products (for example, work flow, auditing tools, and business intelligence), but customers often want one price for the bundle, making it impossible to know the price for each product. (FOF ¶¶ 25, 30, 132-33, 139, 146). It is also undisputed that price metrics for estimatics and TLV, complicated to start with, vary from customer to customer—sometimes based on use (for example, a price per total-loss valuation), and at other times based on numbers of users, flat fees (including sometimes a single fee for estimatics and TLV software and other products when purchased together), minimum usage (whereby the customer pays an amount for a given number of usages, even though the actual usage is lower), per-unit price changes where usage exceeds a particular number, length of contract, level of support and training, needs for custom integration, and/or development credits. (FOF ¶¶ 133, 139, 147-49). Pricing to repair facilities is also variable and complex, with numerous factors coming into play depending on the customer (e.g., number of products bought, type of bundle, whether the shop is communicating or not, length and age of contract, and promotions and discounts, including free service and add-ons). (FOF ¶¶ 145, 150). Such complexity and variability precludes coordination. *In re Verizon Commc'n Inc. and MCI, Inc.*, Memorandum Opinion & Order, 20 F.C.C.R. 18,433, 18,490 ¶ 106 (2005) ("Because of the complexity and variety of the bundled local and long distance service offers, competitors will find it difficult to coordinate on prices.").

2. *Lack of Transparency Makes Coordination Unlikely.*

The Guidelines also recognize that "reaching terms of coordination may be limited or impeded by . . . firms having substantially incomplete information about the conditions and prospects of their rivals' businesses." Merger Guidelines § 2.11. Coming to a tacit agreement on price in the estimatics or TLV markets would be extremely difficult, because prices to insurance companies and repair facilities are confidential, significantly limiting the amount of information that is available. (FOF ¶¶ 140-143); *see Arch Coal*, 329 F. Supp. 2d at 144 (finding that the use of "sealed bids and confidentiality is an important aspect of the market structure and dynamics that would frustrate coordination among producers.").

The FTC points to documents containing price data. But such information is rare, and is not sufficiently comprehensive, routinely available, timely, or reliable to permit coordination. (FOF ¶¶ 144-154). Moreover, evidence that competitors get *some* pricing information on some occasions is beside the point. The question is not whether all pricing information is secret, but whether meaningful pricing information is "available routinely," and sufficiently transparent to facilitate a tacit agreement on terms of coordination. *Arch Coal*, 329 F. Supp. 2d at 141 ("It is true that industry publications make some market information available among producers. However, the information published in those sources is limited, imperfect, and largely unreliable and untimely."); *compare In re High Fructose Corn Syrup*, 295 F.3d 651,656-57 (7th Cir. 2002) (Detection of deviations was feasible in non-merger case involving highly standardized product where there was a history of prior anticompetitive behavior and producers consistently published their prices in advance of their becoming effective). Clearly, the pricing information available today has not allowed the parties to coordinate, and there is no reason for these conditions to change post-merger.

The predominant effect of the so-called "competitive intelligence" that exists is, in fact, to drive prices down. (FOF ¶ 162). In most cases, pricing information comes from customers who use it to their advantage. (FOF ¶¶ 152-54, 162). Thus, even when pricing information is available, it is not reliable because sellers know that customers may be providing misinformation in an effort to extract a lower bid. (FOF ¶¶ 104, 152, 154). Indeed, Audatex's Mr. Conway "expect[s]" that customers have provided inaccurate information on occasion. (FOF ¶ 154).

In short, as Prof. Ordover explained, the pricing information is "shrouded:" "There are bits and pieces of information floating through but it's not of the precision and validity that . . . would be relevant if one were to gauge whether or not coordination is likely to be successful in the future." (FOF ¶ 137; Ordover, Tr. 1/23, 88). Accordingly, the absence of both homogeneity and transparency precludes a finding that coordinated effects are likely. *Oracle*, 331 F. Supp. 2d at 1166 ("Without homogeneity or transparency, the market conditions are not conducive to coordinated effects, either tacit or express.").

3. *Firm Heterogeneity Makes Coordination Unlikely.*

The Guidelines also recognize that "reaching terms of coordination may be limited or impeded by firm heterogeneity" such as "the production of another product that tends to be used together with the relevant product." Merger Guidelines § 2.11. Here the sale of add-ons and other products in conjunction with estimatics and TLV software is an increasingly important area of focus and source of revenue growth for competitors in the industry. (FOF ¶¶ 22-24). For example, the merged firm will have (and will develop) unique add-ons such as Mitchell's medical-bill-review services and related offerings that it will seek to sell to estimatics and TLV customers. (FOF ¶¶ 5, 20-24, 305-06). The merged firm's unique interest in enhancing sales of such related offerings further impedes any interest in coordinated interaction for estimatics or TLV software that could undermine opportunities for increased sales of these separate products..

B. The Markets Are Not Conducive to Detecting And Punishing Deviations.

"Successful coordinated interaction" also requires "an ability to detect and punish deviations that would undermine the coordinated interaction." Merger Guidelines §2.1. That ability is absent here.

1. *Key Competitive Information Is Not "Routinely" Available.*

Detecting cheating is possible when "key information about specific transactions or individual price or output levels is *available routinely* to competitors" Merger Guidelines § 2.12 (emphasis added). Without such information, "detection or punishment is likely to be slow, . . . and coordinated interaction is unlikely to be successful." *Id.*

Crucial information about "specific transactions" and "individual price . . . levels" is not "available routinely" to sellers in the alleged estimatics and TLV markets. To the contrary, price lists and RFP bids are confidential, access to competitive information is infrequent and sketchy, and the sources of such information (self-interested customers) are unreliable. (FOF ¶¶ 140-43, 152-54). In addition, a wide range of factors affects the prices paid by customers, making pricing unpredictable and difficult to quantify and compare. (FOF ¶¶ 131-36, 144-50).

The firms' various product offerings, bundles, add-ons, fees, development credits, and discounts, discussed above, are mind-numbingly complex and almost infinitely variable, with different pricing applicable to each different combination or bundle. (*Id.*). The FTC has never explained how cheating on estimatics or TLV pricing, given their complexity and variation from customer to customer, could ever be detected, or how the parties would be sure that what they learned constituted cheating. Coordination requires a mechanism to deter deviations and cannot be effective without means of detection. *In re Verizon Commc'n, Inc*, 20 F.C.C.R. at 18,490 ¶ 106 n.321 ("The difficulties in coordinating actions may be exacerbated . . . by the offering of discounts to consumers that purchase additional services from the providers."). Here, unlike

FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 64-66 (D.D.C. 1998), the FTC offered no evidence of successful efforts by the parties to achieve coordination in their pricing on specific transactions or through a general scheme to reduce incentives to compete.

2. *Sellers Would Have Strong Incentives To Deviate From Any Terms Of Coordination.*

The overwhelming incentive in this industry is to compete hard, not to coordinate. Insurer contracts for estimatics and TLV software are very large and typically last from three to five years. (FOF ¶¶ 18-20, 22-23). As the Guidelines recognize, such long-term, lucrative contracts enhance the incentive to compete aggressively rather than adhere to a tacit agreement. Merger Guidelines § 2.12 ("Where large buyers likely would engage in long-term contracting, so that the sale covered by such contracts can be large relative to the total output of a firm in the market, firms may have the incentive to deviate."); *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1416, 1423 (S.D. Iowa 1991) (finding coordination unlikely where transactions in the market were "relatively large" and "infrequent"). Moreover, contracts with insurers often carry with them the potential for substantial pull-through revenues from sales to repair facilities (FOF ¶¶ 27-30), enhancing the incentives to compete rather than coordinate. And the incentives are still further increased by because most contracts cover bundles of additional products, such as workflow, [redacted] (FOF ¶¶ 23-25). [redacted] (FOF ¶ 22).

Cost structure is also important. Estimatics and TLV products have high fixed costs relative to variable costs, creating an incentive to seek volume, which is "highly detrimental to any kind of coordination or even incentive to raise prices post merger." (FOF ¶ 31-33, 158); *Archer Daniels*, 781 F. Supp. at 1423 (recognizing the economic reality that when fixed costs are high relative to variable costs there is a "strong economic incentive[] to produce at full capacity" that "works against the likelihood of any collusive price raising scheme"). Simply put, because the incentive to cheat is so high, and the ability to detect cheating so low given the numerous factors that govern pricing, coordination is unlikely ever to be attempted, and would be doomed to failure if tried.

3. ***DRP Programs Reduce the Incentive and Ability to Coordinate Prices to Repair Facilities.***

Powerful, sophisticated insurance companies also impede coordination with respect to sales to repair facilities. (FOF ¶ 39). DRPs are designed to reduce insurer claim costs. It is in the insurers' interest for their repair facilities to control costs. (*Id.*). So insurers use their leverage as powerful buyers to keep estimatics prices low for repair facilities participating in their DRP programs. (*Id.*). [redacted] (*Id.*). In addition, as Dr. Ordover explained, in this two-sided market the merged firm has an incentive to compete aggressively for repair facility business so that it can gain insurance business and vice versa. (FOF ¶ 38). Thus, the fierce competition for insurance business would also preclude coordination with respect to repair facilities.

4. ***The Merger Will Create A New, Low-Cost Competitor, Making Price Coordination More Unlikely.***

The Merger Guidelines recognize that a "maverick" (i.e., a firm that has "a greater economic incentive to deviate from the terms of coordination than do most of their rivals") can prevent coordinated interaction. Merger Guidelines § 2.12. The concern in most merger challenges is that a maverick will be eliminated. Here one will be created, Web-Est, as described in Section V, *infra*. For that reason as well, post-merger coordination is highly unlikely.

V. NEW ENTRANTS AND EXPANSION BY EXISTING COMPETITORS WILL CONSTRAIN POST-MERGER PRICING.

The lack of significant barriers to entry by new competitors, or expansion by existing competitors, demonstrates that a merger will not substantially lessen competition, even in a highly concentrated market. *Baker Hughes Inc.*, 908 F.2d at 984; *see United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 981 (2d Cir. 1984). In *Baker Hughes*, market concentration statistics established a *prima facie* case that the challenged merger would have anticompetitive effects (merging firms had a 76% market share, and HHI rose from 2878 to 4303), but the district court nonetheless denied the government's request for an injunction, and the D.C. Circuit affirmed. 908 F.2d at 983-84. The court of appeals explained that ease of entry is frequently a "crucial consideration[] in a rebuttal analysis" because "[i]n the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time." *Id.* at 987.

The court in *Baker Hughes* affirmed a finding that entry barriers "were not high enough to impede future entry." *Id.* at 988-89. In part, the court relied on two recent entrants that, despite having a small share of the relevant market, were "poised for future expansion." *Id.* As the Merger Guidelines recognize, "'[e]ntry' may occur . . . as fringe firms currently in the market greatly expand their current capacity." *Id.* 989 n.8 (quoting then-Merger Guidelines § 3.3). The court also noted that firms competing in adjacent markets in other countries "could be expected to [enter] if [the merger] led to higher prices," and that those firms "would exert competitive pressure . . . even if they never actually entered." *Id.* at 989. Even though some of those firms had "already tried, but failed, to penetrate the [relevant] market," the court found the possibility of post-merger entry significant because "if prices reach supracompetitive levels, a company that has failed to enter in the past could become competitive." *Id.* at 989 n.9. Although the court acknowledged "some facts suggesting difficulty of entry," including high switching costs, it concluded that those facts "do not negate [the] ultimate finding to the contrary." *Id.* at 989.

The factors that drove the decision in *Baker Hughes* are equally present here. Recent entrants, especially Web-Est, are poised for future expansion as price cutters, offering innovative products that are already transforming the market (Part V.A below). Other firms with demonstrated expertise in auto-repair processing software can be expected to enter as well, in the event the merged firm attempts to charge supracompetitive prices, because the terms of the merger eliminate CCC's exclusive license of the comprehensive, fully updated, and market-tested Motor database (Part V.B). The modest constraints identified by the FTC do not negate the clear evidence that the threat of new entry and existing competitors will keep estimatics prices in check following the merger.

A. Web-Est And Other Recent Entrants Are Poised For Future Expansion.

The FTC repeatedly has characterized this case as a "3 to 2." That is incorrect. The hearing evidence shows that Web-Est and a host of other new entrants offer innovative products that can transform the estimatics market. Web-Est is also entering with a TLV product. (FOF ¶ 220). So this is a "many to many" merger with no reasonable chance of lessening competition.

Web-Est, a recent market entrant founded in March 2008, licenses Mitchell's database and offers advanced but non-communicating web-based estimating and claims management systems to low-end repair shops. (FOF ¶¶ 176-77). Although Web-Est's license agreement forbids it from selling any estimatics products to the top 50 insurance companies and from selling communicating estimatics products to insurance companies or repair facilities (FOF ¶ 180), it has grown substantially. Web-Est already has an 11% market share among the customers it is contractually permitted to serve (FOF ¶ 178), and that share is expected to increase to 15% in the next few months. (FOF ¶ 179).

Web-Est's license restrictions disappear when the merger closes. (FOF ¶¶ 182-84). Web-Est also has guaranteed access to the Mitchell database for ten years, and Mitchell will have no ownership interest and no purchase option in Web-Est. (FOF ¶¶ 185, 187). Web-Est's CEO, Eric Seidel, has experience in the claims management market. In four years, he grew the revenues of his previous startup firm, eAutoclaims, from less than $1 million annually to more than $34 million annually. (FOF ¶ 181). Freed from his current licensing restrictions, Mr. Seidel will pursue an aggressive marketing plan backed by a significant capital infusion. (*See* FOF ¶¶ 199-201). Seidel projects that more than [redacted] repair shop customers and [redacted] insurance customers will generate revenues of more than [redacted] for Web-Est in the next five years (FOF ¶ 201), roughly one-third of Mitchell's current estimatics revenue (FTC Reply Br. 16).[11]

Web-Est's rapid growth can be expected to benefit consumers because it will charge [redacted] than its competitors. (FOF ¶ 207). Like the small entrants in *Baker Hughes* who were "poised for expansion," 908 F.2d at 988-89, Web-Est will keep pressure on the merged firm and hold down prices. *See Arch Coal*, 329 F. Supp. 2d at 148; *United States v. Gillette Co.*, 828 F. Supp. 78, 85 n.11 (D.D.C. 1993).

The FTC dismisses Web-Est (Reply Br. 15-16) as "picayune" and "focused on the low-end of the repair shop segment" of the market. But Web-Est has already received significant interest from tier 1 insurers, and has pilot product development agreements in the works with two top 25 carriers. (FOF ¶¶ 200, 208-212). One of those insurers, [redacted] is a very large and well

[11] The D.C. Circuit has never adopted the wooden two-year cutoff proposed by the FTC (Reply Br. 14), and the FTC makes no effort to defend that rule in the context of this market. The question is whether "entry into the market would likely avert the anticompetitive effects from the acquisition," *Baker Hughes*, 908 F.2d at 989, and the

known company. (FOF ¶ 200). Web-Est's present product selection is an artifact of its license agreement with Mitchell, but the merger will free Web-Est immediately to expand its offerings and to sell to all insurers and repair facilities. (FOF ¶ 184). Web-Est has a communicating estimatics product it can roll out immediately, and a full range of add-on products in development. (FOF ¶¶ 198, 216-221). This evidence of a rapidly-growing competitor makes it unlikely that defendants could sustain supracompetitive prices post-merger. *See United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 679 (D. Minn. 1990) ("The government's assertion that entry by distant dairies is speculative and unlikely is unpersuasive given . . . the declarations by distant dairies that they could and would profitably enter the market in response to appropriate offers by milk purchasers.").

It is true that Web-Est lacks the heft of Audatex, CCC, or Mitchell. But Web-Est has no intention of replicating the business model of "brick and mortar" estimatics firms. It sees itself as a "game changer" (FOF ¶ 222)—and it is not alone. Traditional "thick client" estimatics products require that customers manually update their systems using a CD or DVD that arrives in the mail every month. (FOF ¶ 189). Alternative web-based offerings like Web-Est and Audatex's ADXE estimatics product have gained traction among insurers and repair shops because they broke with that approach, offering continuously updated pricing information, less hassle, and integrated online billing and payment. (FOF ¶¶ 188, 190-97). As to reputation and internal contacts, Seidel has relationships with many insurers (FOF ¶ 181), and [redacted] (FOF ¶¶ 200-01).

FTC's bright-line rule is inconsistent with the broad inquiry into future competitiveness contemplated by *Baker Hughes*.

Numerous other companies have developed or are developing new products that compete in the auto-physical damages space, including estimatics. (FOF ¶ 233-34). For example, Scene Genesis, is marketing a low-cost "e-Bay approach" to damage estimation, being piloted by insurers now.[12] (FOF ¶ 235-236). And Injury Sciences, is marketing a "predictive analytics" product that estimates damages based on crash data. (FOF ¶ 237). These transformative products are poised to shake up the estimatics market in the same way that Netflix displaced the brick-and-mortar Blockbuster model for video rental. (FOF ¶ 223). Because "this industry is ripe" for such dramatic change (FOF ¶ 223), it is highly unlikely that the merged firm could simply sit back and charge supracompetitive prices. *See Cardinal Health*, 12 F. Supp. 2d at 58 (noting that "it is critical to maintain a dynamic view of the relevant market" and criticizing the FTC for "t[aking] a more static view of the market, emphasizing the past history of no new entry and little expansion by the fringe firms").

B. None Of The Factors Identified By The FTC Stands As A Barrier.

The FTC contends that entry barriers are high because of the cost of developing the database of automotive parts prices and repair labor times needed for an estimatics product. (FTC Opening Br. 19). But the FTC is fighting the last war. As a condition of the merger, CCC will surrender its exclusive license to the Motor database. (FOF ¶¶ 226-27). That database, maintained by third-party provider Hearst, has a strong market reputation, having served as the basis for CCC's estimatics products for many years. (FOF ¶¶ 225, 230). The record identifies several companies that presently offer workflow or other auto physical damage products that could license the Motor database. (FOF ¶ 229). Other companies such as Guidewire, APU,

[12] Scene Genesis recently announced that it has already sold and deployed a product to Fidelity Insurance that allows Fidelity to post a picture of a damaged vehicle along with an estimate to the web, in response to which repair facilities offer competing bids based on "turnaround time and service." *Fidelity National to Offer Scene Exchange for* Claims, INSURANCE NETWORKING NEWS, Jan. 2009.

Sebal, and Fiserv have successfully broken into the auto physical damage software business in recent years. (FOF ¶ 233). These companies are of necessity familiar with estimatics because their own products must work alongside of it. (*See* FOF ¶ 17, 19). In conjunction with Mitchell's commitment to make its own database fully available to Web-Est, the release of the Motor database means that, on the database side, this is at least a "3 to 3" merger, and the number of companies offering access to those three databases will likely increase. *Cf. FTC v. Occidental Petroleum Corp.*, 1986 U.S. Dist. LEXIS 26138 (D.D.C. Apr. 29, 1986) (holding that entry through existing or idle facilities could be more timely than de novo construction). That change eliminates the "primary barrier" on which the FTC and its expert witness rely. (FOF ¶¶ 220-21; *see* FTC Br. 19).

Even leaving aside the Motor database, a new entrant could generate its own database in two years, for a cost of less than $5 million. (FOF ¶¶ 241, 245). Financial barriers of that magnitude do not preclude new entry. *See Cardinal Health*, 12 F. Supp. 2d at 56 (holding that "capital requirements are not a major barrier to entry in the wholesale market" and noting that the government's expert conceded that "'raw capital' [is] not a 'big issue in terms of barriers'").

The FTC contends that no new entrant could develop a new database, or profitably license the Motor database, because past attempts to enter the estimatics market have failed. That contention misstates the history of entry in this market, which includes several recent entries (FOF ¶¶ 178 (Web-Est in 2008, Focus Write in 2005), 225 (Comp-Est in the early 1990s)) and several firms that have successfully licensed the Motor database (FOF ¶ 225). Regardless, the D.C. Circuit rejected the FTC's reasoning in *Baker Hughes,* noting that "failed entry in the past does not necessarily imply failed entry in the future." 908 F.2d at 989 n.9. The question is whether new entry would be possible "if prices reach supracompetitive levels," and in those circumstances "a company that has failed to enter in the past could become competitive." *Id.*; *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) (once the merged firms "begin to charge supracompetitive prices . . . the barriers that existed during competitive conditions might well prove insignificant"). Thus, the FTC's argument that the present return on investment in the estimatics market is poor (FTC Opening Br. 21-22) misses the point. The business case for entry would fundamentally change in the face of significant and sustained supracompetitive pricing by the merged firm.

The parties' agreement to free up the Motor database also answers the FTC's concern about reputational barriers by making a reliable, market-tested database available to all comers, including financially stable and well-regarded firms in adjacent and foreign markets. (FOF ¶ 246). The evidence shows, moreover, that concerns about reputation, switching costs, and network effects have declined in the estimatics market. (FOF ¶ 248 (vendor track record is "not as important as that used to be," and "there's a lot of new companies that are very viable")). Insurers are willing to "pilot" or "beta test" new products before purchasing, allowing them to try out new products at minimal risk. (FOF ¶¶ 174, 235, 250). There is ample evidence of customer willingness to leave current suppliers for new ones. (FOF ¶ 119).

The FTC also makes no effort to address the well-documented insurance industry shift toward open standards. (FOF ¶ 232). That shift counteracts any arguable network effects that makes success with repair facilities dependent on success with insurers and the need to offer a complete product portfolio by allowing any estimatics product to "plug in" to a customer's existing systems, without compromising interoperability. Tellingly, the FTC's discussion of these factors focuses exclusively on insurers. (FTC Opening Br. 20-21.) It makes no claim that comparable barriers would face new entrants targeting repair shops. (*See* FOF ¶ 290-92).

The centerpieces of the FTC's case for entry barriers are documents that the FTC calls "admissions" by Alex Sun, the CEO of Mitchell, and Githesh Ramamurthy, the CEO of CCC. (*See* PX571, PX161-023 (*reprinted in* FTC Opening Br.)). Both testified about the meaning and context of those documents. Sun explained that his references to "barriers to entry" in documents like PX571 did not carry any specialized antitrust meaning, but instead referred only to the fact that "one couldn't immediately off the street with no knowledge of collision repair or insurance just start a business that would compete against us." (FOF ¶ 251) Ramamurthy was not involved in the creation of PX161. (*Id.*). He did not write it, he did not agree with it, and in his view it did not accurately describe the state of the industry at the time it was prepared. (*Id.*). He also testified at length—and was corroborated by Mr. Dibble among others—to the changes in the industry conditions that facilitate new entry for sales to insurers as well as to repair facilities. (FOF ¶ 174, 231-32). None of the "admissions" cited by the FTC goes to the relevant question: whether new entry would be thwarted even if, in the wake of this merger, prices were to rise significantly above competitive levels for a sustained period. The evidence offered by Sun, Ramamurthy, and a host of other witnesses indicates that entry or expansion likely would occur in those circumstances.[13]

VI. THE FTC HAS NOT ESTABLISHED A PRIMA FACIE CASE FOR TOTAL LOSS PRODUCTS.

The FTC must prove that the merger will cause an undue concentration in a properly defined market to establish a prima facie case. *Baker Hughes*, 908 F.2d at 982-83. For total loss, the FTC does not even get past this initial hurdle, because the alleged product market—

[13] This case therefore differs from *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 438-39 (5th Cir. 2008), where high regulatory barriers to the construction of very expensive storage tanks, the need for scarce technical expertise, and control of a limited and specialized labor force combined to give the merging parties significant advantages over potential entrants. None of those elements, much less their cumulative impact, exists for potential entrants here.

TLV software—is inconsistent with marketplace reality. Insurance companies can, *and already do*, use a variety of other solutions for their total loss needs. (FOF ¶¶ 255-78). But the FTC's market concentration numbers, which are simply based on dollar sales by CCC, Mitchell, and Audatex alone, do not account for the valuations that are calculated in-house by insurers, using books. Indeed, the FTC's expert was totally unaware that several insurance companies produced their own total-loss valuations. (FOF ¶ 272). And Dr. Hayes admitted that he did not "have data that would allow" him to take into account such valuations that were performed internally. (*Id;* Hayes, Tr. 1/21, at 150). Yet it is clear that these numbers are significant. For example, [redacted] calculates roughly [redacted] total-loss valuations in-house each year using NADA. (FOF ¶ 264). Because the FTC has not established that the merger would create an undue concentration *in a properly defined market*, it has not established a prima facie case. *See SunGard,* 172 F. Supp. 2d at 193 n.25 (D.D.C. 2001).

A. The FTC Has Not Shown That TLV Software Produced by CCC, Mitchell, and Audatex is a Relevant Antitrust Market.

To determine the relevant product market, courts assess whether products are reasonably interchangeable—i.e., "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for another." *Arch Coal,* 329 F. Supp. 2d at 120. Two products are substitutes—for purposes of market definition—if "buyers would respond to a significant increase in the price of *A* by so shifting to product *B* as to make that price increase unprofitable." IIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 562a, at 304 (2d ed. 2002); *see* Merger Guidelines § 1.11. In this case, the FTC not only excludes alternatives that would be likely substitutes given a post-merger price increase—it also excludes alternative methods that insurers ***currently*** use to calculate total-loss valuations.

For example, [redacted] all use NADA or other books providers to perform some or all of their total-loss valuations in-house. (FOF ¶¶ 268-269). [redacted] (*Id.*) The FTC cannot explain why its market definition excludes products that regularly compete with and take away business from products in the purported market. *Arch Coal*, 329 F. Supp. 2d at 119 ("Relevant markets will generally include producers who, given product similarity, have the ability to take significant business from each other."); IIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 562a, at 304 (2d ed. 2002) ("[A]ctual shifts between two products in response to—or even without—changes in their relative prices indicate a single market.").

The FTC made three main arguments in support of its "market": (1) the books and TLV software valuations substantially differ in price; (2) customers will not switch to using books; and (3) some of CCC's and Mitchell's internal documents do not list the book providers as competitors. None of these arguments holds water.

The FTC's reliance on the price difference between books and TLV software is misplaced. "[P]roducts competing against one another in a differentiated product market may have widely different prices." *Oracle*, 331 F. Supp. 2d at 1121; *see also AD/SAT v. AP*, 181 F.3d 216, 228 (2d Cir. 1999) (noting that "significant price differences do not always indicate distinct markets"); IIA Areeda & Hovenkamp, *Antitrust Law*, ¶ 562c, at 308 (2d ed. 2002) ("Products can be near-perfect substitutes even when their prices or qualities differ."); Merger Guidelines

§ 1.11. More importantly, the FTC's focus on the costs of the books alone is myopic. Book valuations are not the final report given to insureds to provide the total-loss valuation; they are simply an input. (FOF ¶ 262). Insurance companies must incur additional costs by employing their own personnel and software to use book valuations to prepare the report. (*Id.*). That the resulting valuations might be better described as self-supplied "in-house" valuations does not change the market-definition analysis. As Judge Huvelle stated in *SunGard*, "when a customer can replace the services of [an external product] with an internally-created [] system, this 'captive output' (i.e. the self-production of all or part of the relevant product) should be included in the same market." 172 F. Supp. at 186 (alternations in original) (quoting *Cardinal Health*, 12 F. Supp. 2d at 48). *Accord* Merger Guidelines § 1.31 (vertically integrated firms included in market "to the extent that such inclusion accurately reflects their competitive significance in the relevant market").

The FTC's claim that many customers will not switch from TLV software to books is simply wrong. Numerous insurers continue to use (or have switched to using) books to help generate their total-loss valuations. "The issue is not what solutions the customers would *like or prefer* for their [total-loss valuation] needs; the issue is what they *could* do in the event of an anticompetitive price increase." *Oracle*, 331 F. Supp. 2d at 1131 (emphasis in original); *see also R.R. Donnelley & Sons*, 1990 WL 193674, at *2 ("[P]ointing out the personal preferences of a distinct group of consumers does not suffice for defining a separate product market."). The FTC must provide concrete evidence regarding the costs of using alternatives. *Oracle*, 331 F. Supp. 2d at 1131 ("Unsubstantiated customer apprehensions do not substitute for hard evidence."). This is particularly true since the evidence shows that customers can, and will, use books to help generate their own total-loss valuations. (FOF ¶¶ 264-69).

Dr. Hayes's testimony on this point should be given no weight. He asserted that internally-generated total loss valuations are not an adequate substitute for TLV software, because insurance companies lack the scale economies of CCC, Audatex, and Mitchell. (Hayes, Tr., 1/21 155-56). But Dr. Hayes provided no evidence of actual costs, was apparently unaware that some insurers find books to be a cost-effective alternative (FOF ¶ 272), and admitted that he did not even know how insurers like [redacted] actually go about producing valuation reports using books. (*Id.*). Indeed, he was unaware that various insurers already use the books to generate total-loss valuations internally. (*Id.*). Clearly, economies of scale are not a problem for companies like [redacted] which do vast numbers of their total-loss valuations in-house using NADA as one of their data sources. (FOF ¶¶ 264-65). And even [redacted] has found that it is cost effective, at current prices, to internally-calculate valuations [redacted] by using NADA and other means. (FOF ¶ 260). Obviously, if the price of TLV software significantly increases, additional insurers may well find it cost effective to calculate more valuations in-house.[14] In response to a small but significant price increase, these insurers can quickly switch some or all of their business, because they are often charged on some sort of per-valuation basis—in other words, the insurers do not have substantial sunk costs to consider. (FOF ¶¶ 133, 148-49).

In any event, it is not meaningful if *some* insurance companies would not switch in response to a significant price increase. "[I]t is possible for only a few customers who switch to alternatives to make the price increase unprofitable." *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997). The FTC must show that the "captive group is substantial

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[14] Even if prices do not increase, more insurers may switch to books as the quality of the product increases and less in-house resources are needed. For example, NADA will soon offer a version of its product with more localized data, with geographic information being available "right down to a zip code" in some cases and Black Book is now updating its data daily. (FOF ¶ 258).

enough that a hypothetical monopolist would find it profitable to impose [a small, but significant] increase in price." *SunGard.*, 172 F. Supp. 2d at 191-92. As in *SunGard*, the FTC has not met this burden.

Finally, the FTC has pointed to CCC's and Mitchell's internal documents that list only CCC, Audatex, and Mitchell as competitors for total-loss products. This evidence lacks probative value. When the question is whether two categories of producers (A and B) compete in the same market, "separate markets ***are not indicated*** by documents within A firms that are preoccupied with other A firms," because "a given producer of A cannot charge more than other A firms and thus may focus entirely on them even though a hypothetical monopolist of product A would focus entirely on the price of a close substitute B." IIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 562a, at 305 (2d ed. 2002) (emphasis added). In any event, other internal CCC documents show that it considers the book providers to be "pervasive" competitors in the total loss market. (FOF ¶¶ 270-71). Because many insurers clearly use books to generate their own in-house total loss valuations, this description cannot be denied.

B. The FTC Has Not Shown Undue Concentration in a Properly Defined Market.

Defining a relevant market is critical to the entire competitive effects analysis. *SunGard*, 172 F. Supp. 2d at 181. The FTC's failure to do so is more than just a "quibble." (FTC Reply Mem. 7). Failure to show an undue concentration in a properly defined market ends the inquiry. *SunGard*, 172 F. Supp. 2d at 193 n.25. The FTC argued in its pre-hearing reply brief that market definition was irrelevant, because the total loss market is concentrated no matter how it is defined. (FTC Reply Mem. 7). But the FTC has not provided evidence to establish that proposition—and that "gap in the evidence is a flaw in plaintiff's case—not defendants'." *SunGard*, 172 F. Supp. 2d at 185.

Dr. Hayes calculated HHI numbers using the total-loss revenues of CCC, Audatex, and Mitchell. (PX 1020, Exh. 4). But market concentration figures must be based on the total number of *valuations*, not revenue, because it is undisputed that a significant number of valuations are done in-house, thus making revenue data an incomplete and inaccurate measure. Dr. Hayes conceded that "I don't have data that would allow me to" take into account the number of valuations that were performed internally by insurers. (FOF ¶ 273; Hayes, Tr. 1/21, at 150). Without accurate evidence of concentration, the FTC has failed to meet its burden to establish a prima facie case for total loss.

C. "Book" Products Impose Competitive Constraints on TLV Software Pricing.

The evidence compels the conclusion that competition from NADA and others will impose real constraints on the merged entity's pricing of TLV software. "'[I]f products 'out' of the market have significant cross-elasticity with the merging products, their competitive significance may well be understated by their exclusion.'" IV P. Areeda and H. Hovenkamp *Antitrust Law* ¶ 913a, at 64 (2d ed. 2006) (quoting Carl Shapiro, *Mergers with Differentiated Products*, 10 Antitrust 23, 28 (Spring 1996)). For this reason, "the Guidelines recognize that market boundaries are not precise and that to a certain extent sales defined as inside the market may nevertheless 'compete' with sales defined as outside the market." *Id.* ¶ 929d2, at 147 (commenting on Merger Guidelines § 1.522). Thus, regardless of market definition, the FTC errs in ignoring the competitive significance of the valuations created in-house using books and the other data. Since numerous insurers use books and other means to internally create their own total-loss valuations as a substitute for those sold by CCC, Audatex, and Mitchell, and since [redacted] it is clear that books and other in-house solutions will constrain TLV prices, regardless of how the market is defined. *See Gillette*, 828 F. Supp. at 84 (finding that even competition with products outside the market would make a post-merger price increase unprofitable).

VII. THE FTC PRESENTED UNRELIABLE EVIDENCE.

As demonstrated in court and as explained above, the focus of the FTC's case—and its greatest weakness—has been its effects arguments, which are essential to carrying its ultimate burden. But the FTC has attempted to meet its burden through the use of unreliable evidence. The very fact that the only significant opposition to the merger comes from a competitor simply confirms that the merger is likely to be pro-competitive.

A. The FTC Proceeded On The Basis Of Unreliable And Unrepresentative Evidence.

As demonstrated above, the FTC has not come close to shouldering its burden of showing likely anticompetitive effects. At a more fundamental level, three fatal defects in the FTC's case also bear mentioning, because they ultimately infect all aspects of the case.

First, the FTC relied heavily on incomplete and self-serving evidence from Audatex, a competitor with a clear motive for shading the facts. Significantly, Audatex did not share with the FTC or Hayes its bona fide views of competition in the marketplace. (FOF ¶ 372). Audatex did not disclose that it intended to and would compete vigorously against the new company and that it thought it was well-positioned to compete and take advantage of the opportunities that the merger presented to it. (*Id.*). Nor was Dr. Hayes informed that Audatex was engaged in a concerted campaign, Project Churchill, which sought, among other things, to stimulate the regulators to oppose the merger, thereby delaying completion and distracting the parties, permitting Audatex to take advantage of the "fear, uncertainty, and doubt" ("FUD") in the interim. (*Id.*). Finally, it did not disclose to the FTC the substantial favorable views of the many customers whom it had approached as part of Project Churchill in a failed campaign to generate customer opposition to the merger. (FOF ¶¶ 363, 366–67, 371).

The FTC and Dr. Hayes appear to have relied without verification on a few biased Audatex witnesses, including telephonic interviews with and unsworn declarations of Schwinn and Conway, rather than probing the reactions and insights of customers. Dr. Hayes cites to Audatex witnesses more than to any other individual source of information in his expert reports. (FOF ¶ 324). But the record does not reflect any diligent effort to verify what the FTC should have known was unreliable material. For instance, Conway's inadmissible, unsworn declaration was based almost entirely on hearsay or double hearsay. And his statements about TLV pricing, on which Dr. Hayes relied, are false, as demonstrated by the actual contracts themselves. (FOF ¶ 325). Dr. Hayes also blindly relied on Schwinn's unsworn, inadmissible declaration, even though Schwinn's deposition proved that he had little first-hand basis for the broad opinions in his declaration, which is packed with inadmissible double and triple hearsay. *Id.*

Second, the FTC cherry-picked documents presented to Dr. Hayes to support its position while ignoring evidence that undermined it. Thus, the FTC interviewed numerous insurers and repair shops (FOF ¶¶ 361–62), yet it presented only the views of those who opposed the merger to this Court and to Dr. Hayes. For instance, William Dibble of Infinity Insurance testified that he informed the FTC that he supported the merger during a phone conversation last summer. (FOF ¶ 285). Other insurers and repair shops expressed similar views, yet their opinions were not presented to Dr. Hayes or to this Court. (FOF ¶¶ 363, 366–67).

Third, the FTC has relied heavily on scattered snippets in the parties' internal documents as its principal evidence. When courts have ruled for the Commission in the past, however, the parties' internal documents were significant only if they reinforced other clear evidence demonstrating that the acquisition would lead to higher prices, or at least that the parties' intent was to eliminate competition and increase prices.

FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997), and *FTC v. Whole Foods Markets, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) (Brown, J.), are good examples. In *Staples*, the Commission used internal company documents merely to corroborate its own independently obtained pricing data, which showed that Staples' prices were 13 percent higher in geographic markets in which Staples faced no competition from any other superstore. 970 F. Supp. at 1075–76. In *Whole Foods*, the documents evidenced a plan to raise prices post-merger. 548 F.3d at 1032, 1040. *See also Cardinal Health*, 12 F. Supp. 2d at 63–66 (relying on internal documents specifically evidencing intent to raise prices post-merger).

Here, by contrast, the FTC relies upon internal documents showing, at best, anecdotal evidence that the parties may have gleaned scattered and extremely high level information about market prices. These documents, drawn from the over one million pages produced, do not represent the level of highly detailed information needed to satisfy the Guidelines' standard of routinely available "key information about specific transactions or individual price . . . levels." Merger Guidelines § 2.12. Indeed, the documents are much more similar to those in *Arch Coal*, where RFPs, sealed bids, and confidentiality agreements frustrated any attempts by the parties to coordinate in any level of detail on prices. 329 F. Supp. 2d at 144. Thus, the FTC's case totally lacks depth and, once the evidence was admitted and tested in open court, is exposed as a house of cards.

B. Audatex's Opposition Shows That The Merger Is Pro-Competitive.

This case is a paradigmatic example of the reality that a competitor's opposition to a merger often indicates that the merger will increase competition. As then-Assistant Attorney General William F. Baxter, one of the most famous names in antitrust history (FOF ¶ 322), said in 1981: "the most useful thing we can know about a merger is what the competitors think . . . ." If competitors are opposed, "my instinctive reaction is to approve the merger." Testimony of Assistant Attorney General William F. Baxter to Subcommittee on Productivity and Competition of the Senate Committee on Small Business, reported in Antitrust and Trade Reg. Rep. (BNA) at A-11 (Dec. 3, 1981). The opposition of Audatex here supports Baxter's "instinctive reaction."

Audatex is strongly opposed to this merger because it will face increased competition from a more vigorous and efficient competitor. As Professor Ordover stated: "[i]f the quality of the adjusted [post-merger] prices fall because of this transaction as I think they might – they will – in many respects, then Audatex will have to fight by improving its product or lowering its price to maintain the share." (FOF ¶ 358).

Audatex's documents reflect its fear that it will face increased competition post-merger. In May 2008, CEO Tony Aquila advised his Board that [redacted] (FOF ¶ 70). Solera identified intensified competition from the merger – including "substantial price competition" – as a risk factor in its SEC filings. (FOF ¶ 360).[15] John Schwinn, an Audatex Senior Vice President, wrote that [redacted]. *Id.* All of that, of course, is good for customers, but bad for competitors. Hence, Project Churchill.

[15] Solera Holdings Form 10-K filed on October 16, 2008 states that "[a]s a result of consolidation, our competitors may be able to adapt more quickly to new technologies and customer needs, devote greater resources to promoting or selling their products and services, *initiate and withstand substantial price competition*, expand into new markets, hire away our key employees, . . . and develop and expand their product and service offerings more quickly than we can." (FOF ¶ 360 (emphasis added)).

Envy also motivates Audatex. Audatex knows the huge cost savings potential of this transaction. Not long before the CCC-Mitchell merger was announced, Audatex approached both Mitchell and CCC about merging but was rebuffed.[16]

In sum, Audatex's informed and active opposition to the merger is strong, additional evidence that the merger is pro-competitive. As Professor Ordover testified:

> [T]he fact that Audatex is heard complaining about this transaction, to me has certain relevance to my overall assessment. And the relevance stems from the fact that if Audatex thought that this deal is going to make life easy for them, is going to raise prices, is going to stabilize their place in the marketplace, I think economic logic and other kinds of logic would suggest that they would be more likely to sit quiet on the sidelines and look towards enhanced profits. That's not what they are doing. So it's a very important piece of information . . . . (FOF ¶ 321).

VIII. THE MERGER WILL BENEFIT CONSUMERS, AND THE EQUITIES SUPPORT ITS CONSUMMATION.

A. The Merger Will Create Significant, Merger-Specific Benefits For Consumers.

Section 4 of the Merger Guidelines permits a merger "if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market." That standard is clearly satisfied here. Defendants have introduced detailed evidence proving that (1) the merger will produce massive cost savings – over $48 million annually – for the merged company and render it a more effective and aggressive competitor, (2) much of the savings will be utilized to develop new products that will directly benefit insurer and repair shop customers, and (3) additional benefits resulting from consolidation of the companies' products will inure to customers. *See United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121,

[16] The notion that the real reason for Audatex's opposition is fear of dominance by the merged firm, as opposed to increased competition, has no support in the record. There is no support for any so-called tipping-point theory in Audatex's internal and public documents, a theory that is so far-fetched the FTC's own expert disavowed it, saying: "I do not credit the strength of the network effects being sufficient to undermine Audatex. I think that the number of effects here are present not sufficiently large, that I gave that argument a lot of weight." (FOF ¶ 124).

146–49 (E.D.N.Y. 1997) (acknowledging evidence of efficiencies despite vigorous dispute amongst the experts in regards to the efficiencies' precise amount). Defendants also have demonstrated that these efficiencies are verifiable, merger specific, and unrelated to any reduction in output or quality.

Defendants have presented detailed reports from two reputable firms, PricewaterhouseCoopers and Bain & Company, demonstrating that the merger will produce cost savings of approximately $48–55 million per year, not including savings from moving to one estimatics database. (FOF ¶¶ 309–10). Though these savings will be partially offset, not surprisingly, by one-time merger-related expenses in the first three years, the merged firm will enjoy these savings continuously thereafter.[17] (FOF ¶¶ 312, 319). Such savings exceed 20% of the companies' combined cost base (FOF ¶ 311), which is very high. *See FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1301 (W.D. Mich. 1996) (referring to 16% savings as "significant" and "a substantial amount"). The merged firm would enjoy additional savings related to database consolidation and increased efficiency in procurement and facility usage. (FOF ¶ 310).

These massive savings will greatly enhance the merged firm's ability to compete against Audatex, Web-Est, any entity that licenses the Motor database, other entities that are developing new-technology substitutes for traditional estimatics, NADA and other "book" providers, and any new entrants in the post-merger context. (FOF ¶ 301). The merged firm will have ample

[17] The one-time costs will average approximately $27.5 million per year for the first three years, leading to a net cost savings of some $20–27 million per year during that time period. (FOF ¶ 319). Thereafter, the merged firm will enjoy cost savings of $48–55 million per year in perpetuity. (FOF ¶ 312). The FTC implies that net efficiencies will be negative in the first three years, but it relies on a cash flow projection that includes as "costs" certain expenditures that actually constitute or lead to efficiency gains. (FOF ¶ 317). In particular, that document categorizes as "costs" the investment of resources in developing new products and technology. (*Id.*). Similarly, the document lists various expenses related to integrating the two firms, such as migrating to single general ledger, human resources, and telecommunication systems, but does not quantify the benefits that will arise from those developments. (FOF ¶ 318).

incentive to compete vigorously, because virtually all of its growth will come from new products (FOF ¶ 22), and it therefore must remain competitive in estimatics and TLV pricing to avoid alienating customers and to achieve new business. (FOF ¶¶ 23–24). Indeed, even the FTC's expert, Dr. Hayes, acknowledged that the merged firm may exploit the cost-savings by reducing price and capturing increased market share. (FOF ¶¶ 281–82). Similarly, Audatex acknowledged internally that the [redacted] (FOF ¶¶ 353–55, 357–60, 368, 372).

The FTC dismisses the efficiencies as "speculative." (FTC Reply Br. 11). That assertion ignores reality: cost savings were critical to the companies' decision to merge. (FOF ¶ 309). The senior executives analyzed the financial viability of the merger and verified their work with PricewaterhouseCoopers before announcing the merger, and then substantiated their work with Bain & Company. (*Id.*). The latter process took five to six months and involved the efforts of approximately 80 people. (*Id.*). Those studies resulted in highly detailed reports that provide itemized lists of duplicate or overlapping functions that the merged entity will eliminate, yielding the projected cost savings. (FOF ¶ 310).

This level of detail is more than enough. *Staples*, 970 F. Supp. at 1089 (noting that "it is impossible to quantify precisely the efficiencies that [a merger] will generate" "where . . . the merger has not yet been consummated"); Merger Guidelines § 4 (requiring only "reasonable means" of verification of efficiencies). Courts have accepted far less detailed evidence of efficiencies. *See Long Island Jewish Med. Ctr.*, 983 F. Supp. at 146–149.

There is ample unrebutted proof that the merger-created savings will enable the merged firm to add value to customers through innovation and product development. (FOF ¶¶ 301–07). Indeed, CCC and Mitchell finalized their merger plans only after interviewing customers and receiving favorable reactions. (FOF ¶ 283). Defendants commissioned a study that concluded that the merged firm could spend 50% more on new product development than the sum of what both firms would otherwise spend absent the merger. (FOF ¶ 304). And defendants are committed to increasing product development spending to such levels if the merger proceeds. (FOF ¶¶ 301–07).

Moreover, defendants have identified specific product improvements that could be made possible by increased research and development spending facilitated by the cost savings, [redacted] (FOF ¶¶ 305–07). Each could save the industry billions of dollars. (FOF ¶¶ 306–07). Greater specificity is not required, and indeed the companies would have run afoul of the antitrust laws, which limit competing parties' ability to exchange competitively sensitive information prior to a merger, had they produced more concrete new product plans in such a merger-of-equals situation. *See* Commentary on the Horizontal Merger Guidelines 59 (2006).

The cost savings produced by the merger and the new product development it will facilitate are clearly merger specific. The cost savings arise from the elimination of redundant systems and activities that CCC and Mitchell would maintain in the absence of the merger. (FOF ¶¶ 310, 315). Similarly, the 50% increase in research and development spending results from the merged firm's decreased need to maintain existing products, products that would have to be maintained absent a merger. (FOF ¶¶ 304, 308). Accordingly, neither firm alone could achieve those cost savings or obtain the resulting extra funds for additional product development projects.

Finally, the benefits that will inure to the customers are not outweighed by any anticompetitive effects. Indeed, as noted above (Sections III and IV), the FTC has failed to establish that there are likely to be any significant anticompetitive effects as a result of the merger. Nor is there any reason to fear that the claimed efficiencies will be "attributable to reduced output or quality," as the FTC has asserted. (*See* FTC Reply Br. 10). The future executives of the merged firm have expressed their commitment to invest considerable resources in improving existing products and developing new ones, and their reputations are at stake with their customers and their boards. (FOF ¶¶ 301–07). To the extent that the FTC characterizes the consolidation of the parties' platforms as an "output reduction" (FTC Reply Br. 11), it ignores the merged entity's incentive to increase output in this high-fixed-cost, low-variable-cost industry. (FOF ¶¶ 31–32, 355). The combined system will retain the best features of CCC and Mitchell's separate products (FOF ¶ 303) and will eliminate only redundant features (FOF ¶ 293–98). *See Long Island Jewish Med. Ctr.*, 983 F. Supp. at 147–49 (recognizing elimination of redundant efforts and services as an efficiency).

The FTC alleges that the merged firm will use the cost savings to compensate shareholders or pay down debt. (FTC Reply Br. 12). But defendants' senior executives testified that substantial portions of the cost savings will be invested in new products in order to serve customers better. (FOF ¶¶ 301–07). The companies' documents and consultant assessments confirm those plans. (FOF ¶¶ 304).

Customers will enjoy other benefits as well. For instance, the 1,540 repair shops that use both CCC and Mitchell systems will eliminate one of the systems. (FOF ¶ 293). This will save individual repair shops at least $4,000–5,300 per year in product costs, and up to $7,000–9,000 per year when diminished training and IT expenes are considered. (FOF ¶¶ 293–95). The total savings for all repair shops is roughly $7–8 million.[18] (FOF ¶ 293). Further, repair shops using

[18] The FTC asserts that any such customer savings will be "swamped" or undercut by the costs of switching to the unified software platform (FTC Reply Br. 12), but there is no evidence to support those speculative assertions.

only CCC or Mitchell will enjoy access to more insurers by virtue of the merged firm's unified platform. (FOF ¶ 299). Finally, all customers will benefit from the merged firm's ability to bundle CCC and Mitchell proprietary products, allowing more and better product choices than previously existed. (FOF ¶ 300). These benefits are all merger specific because they arise from the consolidation of the companies' systems, which would not occur absent the merger. Unsurprisingly, numerous insurers and repair shops have expressed support for the merger. (FOF ¶¶ 283–85, 289–90).

B. The Equities Support The Merger.

The Court is to consider both public and private equities. *Weyerhaeuser*, 665 F.2d at 1082 (private equities merit consideration). Public equities benefit the broader public, whereas private equities include results from a merger that benefit the merging firms and their shareholders. *Id.*

The efficiencies identified in Section VIII.A create substantial public equities because they will benefit insurers, repair shops, and insureds. These include: (1) cost savings that will make the merged firm more competitive (FOF ¶¶ 281–82, 301, 380); (2) a 50% increase in combined research and development spending (FOF ¶¶ 304, 375–79); (3) savings inuring to repair shops from eliminating a duplicative estimatics system (FOF ¶¶ 293–98, 378); (4) broader repair shop access to insurers through the unified platform (FOF ¶¶ 299, 378); and (5) a wider array of product options and bundles available for customers (FOF ¶¶ 300, 378). Mr. Dibble and Mr. Cheskis made it crystal clear that customers and consumers will genuinely benefit from this deal (FOF ¶¶ 285, 290, 294), and the FTC's own customer witnesses conspicuously refused to complain about it in court (FOF ¶ 286).

Indeed, the FTC points to no basis for assuming that the merged firm will not implement the unified platform in a way that makes the transition virtually seamless, minimizing any switching costs.

This Court has recognized cost savings accruing to a merged firm as a legitimate private equity. *Arch Coal*, 329 F. Supp. 2d at 160. Here, as discussed, the cost savings to the merged firm would be substantial. On the other side of the equity ledger is the fact that enjoining this merger would confer upon Audatex a substantial and unwarranted private benefit. Issuance of an injunction would serve only to protect Audatex from increased competition. And, of course, the public would pay the price. Granting the injunction in this case would not be a neutral or *status quo*-preserving act; it would give Audatex what it has been lobbying for since the merger was first announced.

The substantial public and private equities arising from the merger will never be realized if the merger is enjoined. Alex Sun, Mitchell's CEO, testified unequivocally that Mitchell would abandon the merger if issuance of a preliminary injunction delayed a decision on going forward until September or October. (FOF ¶ 382). *See Arch Coal*, 329 F. Supp. 2d at 160 (concluding that the equities did not favor a preliminary injunction based, in part, on the fact that the parties "will abandon the transaction rather than undergo an administrative proceeding").[19] The testimony is unrebutted that delay is highly prejudicial to the companies: Mitchell's employees are being raided, there is uncertainty in how to proceed with new programs, and customers are waiting to move ahead. (FOF ¶¶ 77, 382). Thus, given the substantial benefits that will accrue from the merger and the *de minimis* demonstration of any harm it may cause, the balance of the equities strongly favors denial of a preliminary injunction.

[19] *See also* Robert C. Jones & Aimee E. DeFilippo, *FTC Hospital Merger Challenges: Is a "Fast Track" Administrative Trial the Answer to the FTC's Federal Court Woes?*, Antitrust Source, Dec. 2008, http://www.abanet.org/antitrust/at-source/08/12/Dec08-Jones12-22F.pdf (finding that "no firm has continued to litigate a merger against the FTC after losing the preliminary injunction motion and its appeal, if any").

IX. CONCLUSION

The FTC has failed to demonstrate any likely harm to competition. This Court should recognize that unilateral and cooperative effects are unlikely, even leaving aside the fact that new entrants and expansion would further constrain any attempt to raise prices. The merger is overwhelmingly in the public interest. Accordingly, the Court should allow it to proceed.

Respectfully submitted,

J. Herfort / RWP

John A. Herfort (admitted *pro hac vice*)
Stacey A. Mahoney (admitted *pro hac vice*)
Richard Falek (admitted *pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
(212) 351-3832 (Phone)
(212) 351-5258 (Facsimile)

John C. Millian (DC Bar #413721)
Thomas G. Hungar (DC Bar #447783)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 955-8500 (Phone)
(202) 467-0539 (Facsimile)

Attorneys for Defendant
CCC HOLDINGS INC.

Richard G. Parker (DC Bar #327544)
Michael E. Antalics (DC Bar #475218)
Darren S. Tucker (DC Bar #465576)
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300 (Phone)
(202) 383-5414 (Facsimile)

Andrew J. Frackman (admitted *pro hac vice*)
Mark S. Germann (admitted *pro hac vice*)
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
(212) 326-2000 (Phone)
(212) 326-2061 (Facsimile)

Attorneys for Defendant
AURORA EQUITY PARTNERS III, L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2009, I electronically filed the foregoing brief with the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record in this matter registered on the CM/ECF:

J. Robert Robertson, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Counsel for Plaintiff Federal Trade Commission

/s/ Darren S. Tucker
Darren S. Tucker