IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 08-CV-2043 (RMC)

FILED UNDER SEAL

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CCC HOLDINGS INC.

and

AURORA EQUITY PARTNERS III L.P.,

Defendants.

PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

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

DAVID SHONKA
Acting General Counsel
Federal Trade Commission

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

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

Attorneys for Plaintiff

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SUMMARY OF CONCLUSIONS OF LAW

- Section 13(b) of the FTC Act provides that a preliminary injunction may be granted "upon a proper showing 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. § 13(b)(2). Under that standard, this Court should: (1) determine the likelihood that the Commission will ultimately succeed on the merits in its case under Section 7 of the Clayton Act, and (2) balance the equities. *Heinz*, 246 F.3d at 714; *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1080 (D.C. Cir. 1981); *Cardinal Health*, 12 F. Supp. 2d at 44.
- The merger of CCC and Mitchell would bring together two of only three significant suppliers of estimatics and total loss, in markets with high entry barriers – an outcome "no court has ever approved." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716-17 (D.C. Cir. 2001).
- "The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices." 246 F.3d at 725.
- "Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.D.C. 1986).

I. NATURE OF THE ACTION, JURISDICTION, AND VENUE

1. This Court has jurisdiction over the subject matter of this action, seeking preliminary injunctive relief pending administrative adjudication of the underlying merits of whether the acquisition violates the Clayton Act § 7, 15 U.S.C. § 18, or Federal Trade Commission Act ("FTC Act") § 5, 15 U.S.C. § 45. *See* 15 U.S.C. § 53(b).

2. The FTC is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act. Clayton Act § 11(a), 15 U.S.C. § 21(a); Aurora Ans. ¶ 8. Section

13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to seek a preliminary injunction in order to enforce Section 7 of the Clayton Act.

3. Venue is proper in this district under Section 13(b) of the FTC Act and 28 U.S.C. § 1391(c).

4. The acquisition is a transaction subject to Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45 (Clayton Act § 7 applies to acquisition of any part of assets of another person, if its *effect* is that acquisition may substantially lessen competition).

5. This Court has jurisdiction to issue a preliminary injunction against the consummation of the acquisition by Defendants pending adjudication by the FTC. 15 U.S.C. § 53(b).

II. THE 13(b) STANDARD FOR A PRELIMINARY INJUNCTION

6. Section 13(b) of the FTC Act provides that a preliminary injunction may be granted "upon a proper showing 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. § 13(b)(2). Under that standard, this Court should: (1) determine the likelihood that the Commission will ultimately succeed on the merits in its case under Section 7 of the Clayton Act, and (2) balance the equities. *Heinz*, 246 F.3d at 714; *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1080 (D.C. Cir. 1981); *Cardinal Health*, 12 F. Supp. 2d at 44.

7. The Court's "task is not to make a final determination on whether the proposed [acquisition] violates section 7, but rather to make only a preliminary assessment of the [acquisition]'s impact on competition." *Heinz*, 246 F.3d at 714 (citing *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217-18 (11th Cir. 1991)); *FTC v. Warner Communic., Inc.*, 742 F.2d 1156,

1162 (9th Cir. 1984); *see also FTC v. Swedish Match N. Am.. Inc.*, 131 F. Supp. 2d 151, 156 (D.D.C. 2000); *Cardinal Health*, 12 F. Supp. 2d at 45; *Staples*, 970 F. Supp. at 1070-71.

8. The Court need not resolve all conflicts of evidence or analyze extensively all antitrust issues; that is the role of the administrative proceeding. *Whole Foods*. 548 F.3d at 1042, 1047 (Tatel, J., concurring in result) (the district court's job is not to pick between two expert theories, for when it does so, it "trench[es] on the FTC's role when [the court] chose[s] between plausible, well-supported expert studies."); *Warner Communic.*, 742 F.2d at 1164, ("the issue in this action for preliminary relief is a narrow one, we do not resolve the conflicts in the evidence, compare concentration ratios and effects on competition in other cases, or undertake an extensive analysis of the antitrust issues. We hold only that the Commission has met its burden of showing a likelihood of success on the merits."); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1094, 1096 (S.D.N.Y. 1977) ("Surely, we are not required, on a Section 13(b) application, to examine the economic characteristics of the entire [market] or to try the case. As a practical matter, a district court can hardly do more at so early a stage of antitrust litigation than to make a considered estimate of the FTC's apparent chances of success based upon what must necessarily be an imperfect, incomplete and fragile factual basis.").

9. The FTC satisfies its burden to show likelihood of success if it "raise[s] questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the Commission in the first instance and ultimately by the Court of Appeals." *Heinz*, 246 F.3d at 714-15; *University Health*, 938 F.2d at 1218; *Warner Communications*, 742 F.2d at 1162; *Cardinal Health*, 12 F. Supp. 2d at 45; *Staples*, 970 F. Supp. at 1071. The FTC "must show a reasonable probability that the proposed transaction would substantially lessen competition in the future." *University Health*, 938 F.2d at 1218; *Cardinal Health*, 12 F. Supp. 2d at 45; *Staples*, 970 F. Supp. at 1072.

10. The FTC "need not prove that the proposed merger would in fact violate Section 7 of the Clayton Act. 'The determination of whether the acquisition actually violates the antitrust laws is reserved for the Commission and is, therefore, not before this Court.'" *Cardinal Health*, 12 F. Supp. 2d at 45 (quoting *Staples*, 970 F. Supp. at 1070); *accord, e.g., FTC v. Alliant Techsystems, Inc.*, 808 F. Supp. 9, 19 (D.D.C. 1992); *FTC v. Whole Foods Market Inc.*, 548 F.3d 1028 at 1035, 1042 (D.C. Cir. 2008); *Heinz*, 246 F.3d at 713 (The "FTC is not required to establish that the proposed merger would in fact violate section 7 of the Clayton Act" citing *Staples*, 970 F. Supp. att 1071); *accord FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976) ("The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance."); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.) ("One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act . . . .". It is not relevant that a court "might have come up with a different answer.")

11. The Court may presume that the public interest will be served by an injunction from the Commission's showing of a likelihood of success on the ultimate merits. *Weyerhaeuser*, 665 F.2d at 1082; *Heinz*, 246 F.3d at 714-15; *PPG*, 798 F.2d at 1501; *Whole Foods*, 548 F.3d at 1042.

12. "[T]he public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting the provision." *Heinz*, 246 F.3d at 726; *see Weyerhaeuser*, 665 F.2d at 1083; *Staples*, 970 F. Supp. at 1091. Congress enacted

Section 13(b) to preserve the status quo until the Commission can perform its statutory responsibility: determining whether, in fact, the effect of the transaction at issue "may be substantially to lessen competition" in violation of the antitrust laws. *Heinz*, 246 F.3d at 713. "Section 13(b) itself embodies congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case." *Id.* at 726.

13. Private equities are entitled to little weight under Section 13(b). *Weyerhaeuser*, 665 F.2d at 1083. "[W]e must afford such concerns little weight, lest we undermine section 13(b)'s purpose of protecting the 'public-at-large, rather than the individual private competitors.'" *Heinz*, 246 F.3d at 727 n.25 (quoting *University Health*, 938 F.2d at 1225). If the benefits of a merger are available after the Commission's proceeding, they do not constitute public equities weighing against a preliminary injunction. *Id.* at 726 ("If the merger makes economic sense now, the appellees have offered no reason why it would not do so later.")

14. Where defendants cannot demonstrate that public equities favor the consummation of the merger, that in turn "necessarily lightens the burden on the FTC to show likelihood of success on the merits. . . ." *Heinz*, 246 F.3d at 727.

III. CLAYTON ACT SECTION 7 STANDARDS

15. Section 7 of the Clayton Act, as amended, bars acquisitions "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. "Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

16. Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant

market which, as a reasonable probability, appear at the time of suit likely to result at the time of the acquisition by one corporation of all or any part of the stock of any other corporation. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

17. Congress used the words "may be" to "indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323-24 (1962). Thus, the Supreme Court reaffirmed in 1990 that because Section 7 "creates a relatively expansive definition of antitrust liability," a "plaintiff need only prove that [the acquisition's] effect 'may be substantially to lessen competition.'" *California v. American Stores Co.*, 495 U.S. 271, 284 (1990).

18. Section 7 "does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of [such consequences] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for." *Heinz*, 246 F.3d at 719; *see id.* at 713-14 (discussing legislative history); *Hospital Corp.*, 807 F.2d at 1389 (citing *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963)); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989). "[D]oubts are to be resolved against the transaction." *Id.* To satisfy Section 7, the government need only show "a reasonable probability that the proposed transaction would substantially lessen competition in the future." *University Health*, 938 F.2d at 1218.

19. The Clayton Act was "intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act." *Brown Shoe*, 370 U.S. at 318 n.32. The object of the Act was to prevent acquisitions or mergers *before* they created competitive harm. "The intent . . . [was] to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." *Brown Shoe*, 370 U.S. at 318 n.32

(quoting S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5); *see* 15 U.S.C. § 18; *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 & n.8 (D.D.C. 1986) (citing cases); *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987) (Section 7 of the Clayton Act designed as a "prophylactic measure, intended primarily to arrest apprehended consequences of intercorporate relationships before those relationships can work their evil"); *Elders Grain*, 868 F.2d at 905 (reduction of the number of competitors from 6 to 5 "will make it easier for leading members of the industry to collude on price and output without committing a detectable violation of section 1 of the Sherman Act"); *Cardinal Health*, 12 F. Supp. 2d at 45 n.8; *PPG*, 628 F. Supp. at 885 n.9 (D.D.C.), *aff'd in pertinent part, rev'd in part*, 798 F.2d 1500 (D.C. Cir. 1986); *cf.* U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 2.1 (revised 1997) ("*Merger Guidelines*") (coordinated interaction which raises competitive problems "includes tacit or express collusion, and may or may not be lawful in and of itself").

20. Section 7 condemns mergers that facilitate or enhance the likelihood of tacit coordination. *Heinz*, 246 F.3d at 724 n.23 ("In an oligopolistic market characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests with respect to price and output decisions." citing *Brooke Group.*, 509 U.S. at 227); 4 Areeda, *Antitrust Law* ¶ 901b2, at 9.

21. A *prima facie* violation of Section 7: (1) the "line of commerce" or product market; (2) the "section of the country" or geographic market; and (3) the transaction's probable effect on concentration in the product and geographic markets. *Heinz*, 246 F.3d at 713; *University Health*, 938 F.2d at 1218; *Baker Hughes, Inc.*, 908 F.2d at 982-83; *Warner Communications*, 742 F.2d at 1160; *Swedish Match*, 131 F. Supp. 2d at 156; *Cardinal Health*, 12 F. Supp. 2d at 52.

22. High levels of concentration establish a strong *prima facie* case. "[T]he more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725 (quoting *Baker Hughes*, 908 F.2d at 991). In *Philadelphia National Bank* the Supreme Court held that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in the market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S. at 363.

23. Once "market share statistics" have "Made out a prima facie case of a violation of § 7," it is "incumbent upon [the defendant] to show that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975). See *Heinz* , 246 F.3d at 715; *Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993); Baker Hughes Inc., 908 F.2d at 982-83; *Swedish Match*, 131 F. Supp. 2d at 167 ("[t]o meet this burden, the defendants must show that the market-share statistics 'give an inaccurate prediction of the proposed acquisition's probable effect on competition.")

24. If the defendant comes forward with evidence sufficient to rebut the presumption, the burden of producing further evidence of anticompetitive effect shifts to the government, which retains the burden of proof at all times. *Baker Hughes*, 908 F.2d at 982-83; *Cardinal Health*, 12 F. Supp. 2d at 54; *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1420-21 (W.D. Mich. 1989).

A. ESTIMATICS AND TOTAL LOSS VALUATION SOFTWARE ARE RELEVANT PRODUCT MARKETS

25. "Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition, within which the anticompetitive effects of a merger were to be judged." *Brown Shoe*, 370 U.S. at 320-21.

26. "A 'market' is any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel, would have market power in dealing with any group of buyers." *Rebel Oil Co. v. Atlantic Richfield Co*, 51 F.3d 1421, 1434 (9th Cir. 1995). See also *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996); *Olin Corp.*, 986 F.2d at 1299-1300. The "hypothetical monopolist" test is derived from Supreme Court precedent - *see E.I. duPont de Nemours*, 351 U.S. at 391-92, 400-01 - and has been refined and made operational by government guidelines. U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1, reprinted in 4 Trade. Reg. Rep. (CCH) ¶ 13,104 (1992, rev'd 1997) ("Merger Guidelines").

27. Reasonable interchangeability alone, *i.e.*, the fact that some products may superficially (or even on careful examination) appear to be similar in use, or have similar "attributes," does not warrant including a purportedly interchangeable substitute in the product market. "Functional interchangeability," *i.e.*, whether products are similar in character and use, defines the outer bounds of the product market, not the product market itself. "[T]he Supreme Court did not stop after finding a high degree of functional interchangeability" in *du Pont*, 351 U.S. at 400, and this Court did not stop with functional interchangeability in *Staples*, even though identical office supplies could be purchased through vendors other than the merging chains. *Staples*, 970 F. Supp. at 1074 (quoting *du Pont*, 351 U.S. at 400).

28. Reliance on functional interchangeability alone can result in significant market definition error, *e.g.*, including all modes of transportation (cars, bicycles, feet) when evaluating a merger of Ford and GM. *See Allen-Myland, Inc. v. International Bus. Mach. Corp.*, 33 F.3d 194, 206 (3d Cir. 1994) ("The key test for determining whether one product is a substitute for another is whether there is a cross-elasticity of demand between them: in other words, whether the demand for the second good would respond to changes in the price of the first.").

29. Products that are "reasonably interchangeable" may be in different antitrust markets because of the price disparity between the two products. *United States v. Aluminum Co. of America*, 377 U.S. 271, 276-77 (1964) (*Alcoa*) ("Here, where insulated aluminum conductor pricewise stands so distinctly apart, to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor of the business.").

30. It is insufficient that another product is in some sense an alternative, if the product is not one that consumers would turn to in response to price changes – and therefore not one that would constrain price increases following the merger. The relevant product market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 613 n.31 (1953); *Merger Guidelines* § 1.11 ("the Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at least a 'small but significant and nontransitory' increase in price," adding products only until such a price increase would be profitable).

31. The court in *Swedish Match*, 131 F. Supp. 2d at 164, found that "[m]oist snuff competes with loose leaf [chewing tobacco] to a limited degree," but nonetheless *excluded* loose leaf from the product market:

> But there is ultimately an insufficient amount of evidence to convince the Court that moist snuff induces an adequate level of substitution *to constrain* loose leaf prices. To the contrary, the weight of the evidence demonstrates that moist snuff *is incapable of inducing substitution sufficient enough to render loose leaf price increases unprofitable* and cannot, therefore, be included in the relevant market on this basis.

Swedish Match, 131 F. Supp. 2d at 164 (emphasis added); *see generally* 4 Areeda, *Antitrust Law* 127-33 (discussing market definition examples of electric vs. electric and hand saws, and personal computers vs. PCs and workstations).

32. "[I]t is ordinarily quite difficult to measure cross-elasticities of supply and demand accurately. Therefore, it is usually necessary to consider other factors that can serve as useful surrogates for cross-elasticity data." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993) (quoting *International Tel. & Tel. Co.*, 104 F.T.C. 280, 409 (1984)). Given this difficulty, there is no burden on the government to measure cross-elasticities. *See Swedish Match*, 131 F. Supp. 2d at 162-63.

33. Markets need not be defined with scientific precision. *See Blue Cross & Blue Shield United* v. *Marshfield Clinic,* 65 F.3d 1406, 1411 (7th Cir. 1995); *Rockford Mem'l*, 898 F.2d at 1285 (Posner, J.) ("It is always possible to take pot shots at a market definition.").

34. Courts also have relied on "practical indicia" to define markets such as "industry or public recognition of the submarket [or market] as a separate economic entity, the product's particular characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe*, 370 U.S. at 325; *see also Cardinal Health,* 12 F. Supp. 2d at 46; *Staples,* 970 F. Supp. at 1075; *Coca-Cola*, 641 F. Supp. at 1133 (citing cases).

35. Markets may be defined by customers' perceptions of the marketplace, the defendants' documents reflecting the "business reality" of "how the market is perceived by those who strive for profit in it," and industry or public perception of separate markets. *Coca-Cola*,

641 F. Supp. at 1132, *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987); *see Swedish Match*, 131 F. Supp. 2d at 161-62 (finding customer and competitor testimony, and defendants' documents, more persuasive than expert testimony); *Cardinal Health*, 12 F. Supp. 2d at 49, 63-64; *Staples*, 970 F. Supp. at 1089; *Olin Corp. v. FTC*, 986 F.2d 1295, 1299 (9th Cir. 1993); *Rothery*, 792 F.2d at 218 n.4 ("'[I]ndustry or public recognition of the submarket as a separate economic unit' matters because we assume that economic actors usually have accurate perceptions of economic realities.").

36. In defining markets, courts look at all available evidence, including, the ordinary course of business documents of the merging parties, *e.g.*, *Warner*, 742 F.2d at 1163 ("record company documents"); *Cardinal Health*, 12 F. Supp. 2d at 49; *Staples*, 970 F. Supp. at 1076; *Olin Corp.*, 113 F.T.C. 400, 597 (1990), *aff'd sub nom. Olin Corp. v. FTC*, 986 F.2d 1295 (9th Cir. 1993); and on the testimony of competitors and customers. *E.g.*, *PPG*, 798 F.2d at 1504 ("buyers' and sellers' perceptions"); *Borden*, 674 F.2d at 507-08 ("buyers for large supermarket chains and representatives of processed lemon juice companies").

37. Estimatics and total loss valuation software constitute relevant product markets under the antitrust laws and a "line of commerce" within the meaning of Clayton Act § 7.

B. THE RELEVANT GEOGRAPHIC MARKET IS WORLDWIDE

38. The relevant geographic market within which to analyze the competitive effect of the proposed acquisition is the supply of estimatics and total loss valuation software worldwide since, theoretically, software can be produced anywhere. That said, the competitors, CCC, Mitchell, and Audatex compete to supply estimatics and total loss valuation software to customers in the United States and do not consider foreign suppliers when assessing competition. Pl. PFF ¶¶ 66, 127-132. Imports do not provide significant competition to U.S.

estimatics and total loss valuation software vendors today, and are unlikely to do so in the future. Pl. PFF ¶¶ 125-126, 338-350, 409-416.

39. Section 7 of the Clayton Act prohibits acquisitions that are likely to lessen competition in "any section of the country," otherwise known as a geographic market. *Philadelphia Nat'l Bank*, 374 U.S. at 357 n.1.

40. The boundaries of a relevant geographic market do not need to be defined "by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966); *see United States.* v. *General Dynamics Corp.*, 415 U.S. 486, 521 (1974); *Cardinal Health*, 12 F. Supp. 2d at 49 (citing *United States v. Connecticut National Bank*, 418 U.S. 656, 669 (1966)).

C. CONCENTRATION MEASURES AND THE *PHILADELPHIA BANK* PRESUMPTION.

41. "Merger law 'rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and [raise prices].'" *Heinz*, 246 F.3d at 715 (quoting *PPG*, 798 F.2d at 1503). A merger that results in a significant increase in concentration, and produces a firm that has an undue percentage share of the market, is so inherently likely to lessen competition substantially that it "must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Swedish Match*, 131 F. Supp. 2d at 166 (quoting *Philadelphia Nat'l Bank*, 374 U.S. at 363); *accord Heinz*, 246 F.3d at 715; *Baker Hughes*, 908 F.2d at 982; see *Swedish Match*, 131 F. Supp. 2d at 168 (describing the "anticompetitive behavior already exhibited within the market" and concluding "this pattern of anticompetitive behavior stems from high concentration in the market, and the defendants have not adequately demonstrated that competition will be facilitated by increasing that concentration.").

42. There is "by a wide margin, a presumption that [a 3-2] merger will lessen competition." *Heinz*, 246 F.3d at 721-22; *PPG*, 798 F.2d at 1503; *Swedish Match*, 131 F. Supp. 2d at 151; *Cardinal Health*, 12 F. Supp. 2d at 52.

43. "The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices." *Heinz*, 246 F.3d at 725; *see United States v. Visa*, 344 F.3d 229, 240 (2d Cir. 2003) ("As a result then, of the challenged policies, only two rival networks are effectively able to compete for the business of issuer banks. . . With only two viable competitors, however, such price and product competition is necessarily limited.").

44. "Market shares which companies may control by merging is one of the most important factors to be considered" when analyzing the likely effects of a merger. *Brown Shoe*, 370 U.S. at 343; *see Cardinal Health*, 12 F. Supp. 2d at 52. A merger that significantly increases market shares and market concentration beyond already high levels is so inherently likely to lessen competition substantially that it is presumptively unlawful under Section 7 of the Clayton Act. *Philadelphia Nat'l Bank*, 374 U.S. at 363; *Baker Hughes*, 908 F.2d at 982-83; *PPG*, 798 F.2d at 1502-03; *Cardinal Health*, 12 F. Supp. 2d at 52 ("under Section 7 of the Clayton Act, a prima facie case can be made if the government establishes that the merged entities will have a significant percentage of the relevant market - enabling them to raise prices above competitive levels").

45. Market concentration can be measured using the Herfindahl-Hirschman Index ("HHI"), as adopted by the antitrust enforcement agencies. *Merger Guidelines § 1.5*. Courts have likewise adopted and relied on the HHI as a measure of market concentration. *E.g., PPG*, 798 F.2d at 1503; *University Health*, 938 F.2d at 1211 n.12 (HHI is "most prominent method" of measuring market concentration); *Staples*, 970 F. Supp. at 1081-82; *Cardinal Health*, 12 F. Supp. 2d at 53-54; *Ivaco*, 704 F. Supp. at 1419. The HHI is calculated by summing the squares

of the market shares of all firms in the market. An HHI over 1800 (post-merger) indicates a highly concentrated market, and an HHI increase of more than 100 is a sufficiently significant increase in concentration to give rise to the *Philadelphia National Bank* presumption. *Merger Guidelines* § 1.51(c).

46. Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive." *Heinz*, 246 F.3d at 716 (citing *Philadelphia Nat'l Bank*, 374 U.S. at 363); *Baker Hughes*, 908 F.2d at 982.

47. Post-merger concentration levels of the magnitude found in this case are presumptively unlawful, *Heinz*, 246 F.3d at 715 (citing *Philadelphia Nat'l Bank*, 374 U.S. at 364); *PPG*, 798 F.2d at 1502-03, and the combined firm's post-merger market share would be more than double the share that the Supreme Court found to give rise to a presumption of illegality. *Philadelphia Nat'l Bank*, 374 U.S. at 364 ("without attempting to specify the smallest market share which would be considered to threaten undue concentration, we are clear that 30% presents that threat"); *Coca-Cola*, 641 F. Supp. at 1139 (combined market share of 42% held presumptively unlawful). Commenting on the presumption of illegality based on concentration levels, this Court held in *Swedish Match* that

> [a]lthough the Supreme Court has established no fixed threshold at which an increase in market concentration triggers the antitrust laws . . . this case does not present a close call. The pre-merger loose leaf market is 3,219, which is highly concentrated. The post-merger HHI would increase to 4,733, which represents an increase of 1,514 points and is well beyond the fifty points designated as a concern under the Merger Guidelines.

131 F. Supp. 2d at 167.

48. Courts have barred mergers resulting in substantially lower concentration levels. *Elders Grain*, 868 F.2d at 902 (acquisition increased market shares of largest firm from 23% to 32%); *Hospital Corp.*, 807 F.2d at 1384, 1392 (acquisition increased market share of second largest firm from 14% to 26%); *Warner Communic.*, 742 F.2d at 1163 (acquisition increased

market share of second largest firm from 19% to 26%; four-firm concentration ratio of 75%); *Cardinal Health*, 12 F. Supp. 2d at 52-53 (mergers increasing HHIs from 1648 to 2450 and from 1648 to 2277; increasing market shares from 25% to 37% and from 22% to 40%); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1069-70 (D. Del. 1991) (merger between second and third largest firms in 3-firm market with 13% and 27% of sales, increasing the HHI from 3940 to 4640, held presumptively unlawful); *FTC v. Bass Bros. Enterps., Inc.*, 1984-1 Trade Cas. (CCH) ¶ 66,041, at 68,609-10 (N.D. Ohio 1984) (acquisition increased market share of second largest firm from 20% to 29%, increasing HHI from 1,802 to 2,320); *FTC v. Lancaster Colony Corp., Inc.*, 434. F. Supp. 1088 (S.D. N.Y. 1977) (merger found presumptively illegal when the merging parties would together control only 19% of the market).

49. A merger that produces a firm that is significantly larger than its closest competitors the merger increases the likelihood that the firm will be able to exercise market power. *See United States v. Rockford Mem'l Hosp.*, 717 F. Supp. 1251, 1279 (N.D. Ill.), *aff'd*, 898 F.2d 1278 (7th Cir. 1989); *PPG*, 798 F.2d at 1503 ("an entity with a combined market share two and one half times larger than that of the nearest competitor and rais[ing] the HHI to 3295," far lower than the concentration levels found here, left "no doubt that the pre- and post-acquisition HHIs and market shares found in this case entitle the Commission to some preliminary relief."); *Coca-Cola*, 641 F. Supp. at 1134 ("The already commanding position that Coca-Cola holds in this concentrated market raises an almost absolute prohibition to further enhancement of that position by acquisition.").

50. "No court has ever approved" a merger to duopoly in two markets with substantial barriers to entry. *Heinz*, 246 F.3d at 717; *see, e.g.*, *Swedish Match.*, 131 F. Supp. 2d 151 (preliminarily enjoining merger after which top two loose leaf tobacco firms would have controlled 90 percent of market); *Cardinal Health*, 12 F. Supp. 2d 34 (preliminarily enjoining

two mergers that would have reduced number of wholesale prescription drug companies from four to two); *Staples*, 970 F. Supp. 1066 (preliminarily enjoining three-to-two merger of office supply superstores); *United Tote, Inc.*, 768 F. Supp. 1064 (permanently enjoining three-to-two merger of parimutuel firms).

D. EVIDENCE PRESENTED BY DEFENDANTS DOES NOT REBUT THE PRESUMPTION OF LIKELY ANTICOMPETITIVE EFFECTS OF THE MERGER

51. Proof that the acquisition will increase concentration in one or more relevant markets with significant barriers to entry establishes a *prima facie* case that a merger is anticompetitive. *Heinz*, 246 F.3d at 716 (likelihood of success demonstrated by showing that market concentration would increase substantially). The burden of production and proof shifts to the defendants to rebut this presumption of anticompetitive harm. *Marine Bancorporation*, 418 U.S. at 631; *Heinz*, 246 F.3d at 715; *Baker Hughes*, 908 F.2d at 982-83. "The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725 (quoting *Baker Hughes*, 908 F.2d at 991).

52. Once the government makes out a *prima facie* case of market concentration, "the burden was then upon [defendants] to show that the concentration ratios . . . did not accurately depict the economic characteristics of the . . . market." *Marine Bancorporation*, 418 U.S. at 631. "To meet their burden, the defendants must show that the market-share statistics . . . 'give an inaccurate prediction of the proposed acquisition's probable effect on competition.'" *Cardinal Health*, 12 F. Supp. 2d at 54 (quoting *Staples*, 970 F. Supp. at 1083); *see Baker Hughes*, 908 F.2d at 991. Here, unlike in *Baker Hughes*, the FTC disputes every element of Defendants' case. *Cf. Olin*, 986 F.2d at 1305 ("The clearest reason why *Baker Hughes* does not control here is that the Commission responded to the Company's rebuttal, whereas in *Baker Hughes* the Government did not.").

53. The presumption is not automatically rebutted by the presentation of *any* evidence by defendants, however scant. *Baker Hughes*, 908 F.2d at 988 ("if the totality of a defendant's evidence suggests that entry will be slow and ineffective, then the district court is unlikely to find the prima facie case rebutted");[1] *Cardinal Health*, 12 F. Supp. 2d at 58 (The Court carefully considered defendants' evidence on entry, among other defenses, determined that the evidence was insufficient to demonstrate that entry would be sufficient to restore competition, and concluded that the "record developed at trial is not strong enough for the Court to conclude that the Defendants' claim of entry and expansion is sufficient to rebut the Government's prima facie case."); *accord Ivaco*, 704 F. Supp. at 1423-29 (reviewing and rejecting defendants' arguments that the market would continue to be competitive).

54. The Court need not determine that competition will in fact be diminished, *Heinz*, 246 F.3d at 719, but direct evidence of a loss of competition should negate any attempt to rebut the FTC's *prima facie* case. *Cf. Toys 'R Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (proof of market effects makes "elaborate market analysis" unnecessary).

1. Entry into the Relevant Markets is Unlikely and Therefore Does Not Rebut the Presumption of Anticompetitive Effects of the Acquisition

57. For entry to rebut the presumption of anticompetitive effects, the evidence must show not merely that a firm might enter, but that "entry into the market would likely avert anticompetitive effects from [the] acquisition." *Staples*, 970 F. Supp. at 1086 (quoting *Baker Hughes*, 908 F.2d at 989); *accord Swedish Match*, 131 F. Supp. 2d at 170; *Cardinal Health*, 12 F. Supp. 2d at 55. Entry is insufficiently easy if "potential entrants would not be of a sufficient

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[1] The Court of Appeals recognized that the Supreme Court has described the presumption from concentration as heavy, and requiring a clear showing to rebut. *Baker Hughes*, 908 F.2d at 989-90. The Court of Appeals nonetheless concluded that a "clear" showing is unnecessary, even while recognizing that the Supreme Court has not overruled its precedents. *Id.* at 990-91.

scale to compete on the same *level playing field . . . .*" *Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 430 (5th Cir. 2008).* Where entry is "difficult and improbable," that fact "largely eliminates the possibility that the reduced competition caused by the merger will be ameliorated by new competition from outsiders and further strengthens the FTC's case." *Heinz*, 246 F.3d at 717.

58. Entry must be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" of a proposed transaction. *Merger Guidelines* § 3.0; *Chicago Bridge*, 534 F.3d at, 427-29; *see also Cardinal Health*, 12 F. Supp. 2d at 55-58 (adopting "timely, likely, and sufficient" test). Defendants must show both that entry is *likely* – meaning both technically possible and economically sensible – and that it will *replace* the competition that existed prior to the merger. *See Cardinal Health*, 12 F. Supp. 2d at 56 (quoting *Merger Guidelines* § 3.3); *Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1067 (2005) (noting "new entrants and fringe competitors" might not replace lost competition), *aff'd sub nom. Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *see also United Tote*, 768 F. Supp. at 1082 ("entry . . . would not constrain anti-competitive price increases by incumbents").

59. "Evidence of frequent entry, but on a small scale without significant expansion by fringe firms, may also suggest the existence of barriers to [entry on a] large scale." 768 F. Supp. at 1081.

60. The higher the barriers to entry, the less likely it is that the "timely, likely, and sufficient" test can be met. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229, 240 (2d Cir. 2003).

61. Reputation is a barrier to entry. *Chicago Bridge*, 534 F.3d at 437-38 & n. 17 (reputation was a barrier to entry because it represented "industry-specific traits," such as

"expertise" and "experience"); *Cardinal Health*, 12 F. Supp. 2d at 57; *United Tote*, 768 F. Supp. at 1072-1073, 1075, 1076-1078 (noting both technical and reputational barriers to entry, finding high technical barriers to a market that required only approximately several million dollars and 18 to 24 months to enter and reputational barriers to entry based on a history of failed entry and a high retention rate).

62. The history of entry is relevant to the analysis. *See* 2A Phillip E. Areeda, Herbert Hovenkamp & John Solow, *Antitrust Law* ¶ 420b, at 60 (2d ed. 2002); *Chicago Bridge*, 534 F.3d at 427; *Cardinal Health*, 12 F. Supp. 2d at 56.

2. Anticompetitive Harm Posed By this Merger is More Likely Because the Customers' Markets are Unconcentrated and Highly Fragmented

63. Customer buyer power has been given little weight by courts. *University Health*, 938 F.2d at 1213 n.13 (granting preliminary injunction "given the FTC's strong showing that the proposed acquisition is likely to lessen competition substantially . . . we think that the existence of these sophisticated purchasers in the relevant market, which may inhibit collusion, is insufficient to overcome the FTC's case); *see also Cardinal Health*, 12 F. Supp. 2d at 61 (buyer power "alone cannot rebut the government's prima facie case."); *United Tote*, 768 F. Supp. at 1085 (buyers consisted of a handful of sophisticated buyers and "at least one hundred nine facilities unprotected"); *Allied Signal*, 183 F.3d at 574-75 (rejecting defendants' "power buyer" argument); *Alliant Techsystems*, 808 F. Supp. 9 (granting preliminary injunction even though there was only one buyer the Department of Defense in the market and that buyer was not opposed to the merger).

64. The courts in *Cardinal Health*, *University Health*, *United Tote*, and *Alliant* granted the government's preliminary injunction motion even though defendants alleged the

presence of 1-255 "power buyers" accounting for up to $5 billion in purchases and up to 90 percent of the markets. In this case, with hundreds of insurance customers and thousands of repair facility customers, the customers' markets are unconcentrated and highly fragmented.

3. An efficiencies defense is inappropriate in a highly concentrated market

65. Defendants thus face a heavy burden and must prove that the asserted efficiencies are (1) verifiable, (2) not attributable to reduced output or quality, (3) merger-specific, and (4) greater than the transaction's anticompetitive effects. *See Heinz*, 246 F.3d at 721 (evidence cannot be "mere speculation and promises"); *University Health*, 938 F.2d at 1223 ("defendant [cannot] overcome a presumption of illegality based solely on speculative, self-serving assertions"); *Staples*, 970 F. Supp. at 1089. Furthermore, before crediting any efficiencies, Defendants must demonstrate and the court must find "that these economies ultimately would benefit competition and, hence, consumers." *Heinz*, 246 F.3d at 720 (quoting *University Health*, 938 F.2d at 1223); *accord Staples*, 970 F. Supp. at 1089-90 (finding defendants had failed to prove the portion of their cost savings (estimated at between $4.9 to $6.5 billion) that would be passed on to customers as lower prices).

66. Efficiencies that are not proven to benefit consumers are not cognizable. *See American Med. Int'l*, 104 F.T.C. 1, 213-20 (1984).

67. "Delayed benefits from efficiencies . . . will be given less weight . . . ." *Merger Guidelines* § 4 n.37.

68. Efficiencies cannot be credited when they are the result of reduced output or quality. *See Rockford Mem'l*, 717 F. Supp. at 1290.

69. "Experience teaches that without worthy rivals ready to exploit lapses in competitive intensity, incentives to develop better products, to keep prices at a minimum, and to provide efficient service over the long term are all diminished to the detriment of consumers." *PPG*, 628 F. Supp. at 885; *see also United States v. Western Elec. Co.*, 592 F. Supp. 846, 874 n.118 (D.D.C. 1984) (noting competition results in "lowest prices, the highest quality, and the greatest material progress"), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985).

70. Courts have treated claims that a merger will facilitate new innovation and product development with a great deal of skepticism. *See Heinz, 246* F.3d at 722; 4A Areeda, *Antitrust Law* ¶ 975g ("[W]hen the two firms are already among the largest in the market, there is no empirical basis for thinking that even larger firms would produce more R&D. We would therefore limit this defense to instances in which the two merging firms can show that their size forces them to accept higher per-unit costs for research and development than larger firms in their market must pay, and that the merger will enable them to achieve some figure closer to parity.").

4. The Acquisition Will Result in a Significant Lessening of Competition

72. In a market with few players and no significant likelihood of entry, a merger that eliminates one of a small number of players is a matter of great concern. In *Coca-Cola*, this Court enjoined Coca-Cola's proposed merger of Dr Pepper, which had only a 4.6% market share because "if the proposed acquisition is consummated there will be one less independent factor in the market to challenge the dominance of Coca-Cola Company." 641 F. Supp. at 1138.

73. A highly concentrated market presents the risk that the two firms would be able to coordinate pricing and bidding after the acquisition, in a manner that will reduce competition. *See Brooke Group*, 509 U.S. at 227; *Heinz*, 246 F.3d at 724 ("a recipe for coordination"). The

Merger Guidelines explain that "[a] merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers. . . . This behavior includes tacit or express collusion, and may or may not be lawful in and of itself." *Merger Guidelines* § 2.1. Courts recognize that "significant market concentration makes it 'easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.'" *University Health*, 938 F.2d at 1218 n.24. This Court has held that "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *PPG*, 798 F.2d at 1503; *see also Cardinal Health*, 12 F. Supp. 2d at 45 n.8. As the Supreme Court has observed, as concentration increases, "greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *Alcoa*, 377 U.S. at 280. Finally, as this Court noted in *Heinz*, "[t]he creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices." 246 F.3d at 725.

74. Tacit coordination is particularly a concern where entry barriers are significant, as in this case. Where entry into a market is slow, "colluding sellers need not fear that any attempt to restrict output in order to drive up price will be promptly nullified by new production." *Elders Grain*, 868 F.2d at 905; *Warner Communications*, 742 F.2d at 1162-63; *United States Steel Corp. v. FTC*, 426 F.2d 592, 604 (6th Cir. 1970). High entry barriers protect "the market power of existing firms and intensif[y] their ability to wield oligopolistic and anticompetitive practices with relative impunity." *Id.*; *see also Fruehauf Corp. v. FTC*, 603 F.2d 345, 357 (2d Cir. 1979) (high entry barriers may be a signal that a particular merger carries a potential for impairing competition).

75. Courts have found violations based on concerns over coordination where the decrease in the number of competitors was less significant than in this case. *See Elders Grain*, 868 F.2d at 902 (reduction from 6 to 5 competitors); *Hospital Corp.*, 807 F.2d at 1387 (reduction from 11 to 7); *Bass Bros.*, 1984-1 Trade Cas. ¶ 66,041, at 68,609-10 (reduction from 7 to 5).

76. In a two firm market with high entry barriers, the identity of the competitor, together with the substance and form of its RFP responses and bids, will be even more obvious. *American Hosp. Supply Corp. v. Hosp. Prods. Ltd.*, 780 F.2d 589, 602 (7th Cir. 1986) ("[I]t is easier for two firms to collude without being detected than for three to do so."); *cf. In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 656 (7th Cir. 2002) ("[T]he list price is usually the starting point for the bargaining and the higher it is (within reason) the higher the ultimately bargained price is likely to be.").

77. The cost structure of the relevant markets may also make them susceptible to coordination. *See Rockford Mem'l*, 898 F.2d at 1285 ("[E]xcess capacity . . . is itself an incentive to collude."); *see also High Fructose Corn Syrup*, 295 F.3d at 657 ("Excess capacity . . . makes price competition more than usually risky and collusion more than usually attractive."). One way that excess capacity facilitates collusion is that it allows swift punishment for undercutting the elevated cartel price; it also raises the costs of a price war, making firms hesitate more before risking such grievous losses. *Id.* For similar reasons, excess capacity also deters entry by making the investments necessary to enter less attractive. *Id.*

78. Section 7 seeks to prevent market structure that enhances the ability to engage in both explicit and tacit collusion. As this Court has observed, "The relative lack of competitors eases coordination of actions, explicitly *or implicitly*, among the remaining few to approximate the performance of a monopolist." *PPG*, 628 F. Supp. at 885 n.9 (emphasis added); *see also*

Brooke Group, 509 U.S. at 229-30 ("In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits."); *Hospital Corp.*, 807 F.2d at 1386; 4 Areeda, *Antitrust Law* ¶ 916, at 85 (Section 7 "is concerned with far more than 'collusion' in the sense of an illegal conspiracy; it is very much concerned with 'collusion' in the sense of tacit coordination not amounting to conspiracy."); *see also Elders Grain*, 868 F.2d at 905.

79. Coordination need not be perfect to cause anticompetitive harm. Section 2.11 of the *Merger Guidelines* observes:

> Terms of coordination need not perfectly achieve the monopoly outcome in order to be harmful to consumers. Instead, the terms of coordination may be imperfect and incomplete – inasmuch as they omit some market participants, omit some dimensions of competition, omit some customers, yield elevated prices short of monopoly levels, or lapse into episodic price wars – and still result in significant competitive harm.

80. The presence or absence of sealed bidding in a market does not preclude this Court from concluding that coordination is possible post acquisition. *See United States v. UPM-Kymmene OYJ*, 2003-2 Trade Cas (CCH) P 74,101, at 19, 2003 WL 21781902 (N.D. Ill. 2003) (finding Section 7 violation in a market in which allegedly "[p]ricing is not transparent, all deals are negotiated, and price breaks are given or refused without a lot of publicity"); *Ivaco*, 704 F. Supp. at 1424, 1428 n.18 (court finds Section 7 violation and possibility of collusion even though most sales are accomplished via sealed bids – "[W]ith only two firms in the market, the firms would be able to police cheating, or non-collusive pricing by their competitor. Assuming the products are close substitutes, the firms would know that they lost sales based on their competitor's price-cutting.").

81. Coordination is possible in differentiated product markets. *Ivaco*, 704 F. Supp. at 1424, 1428, 1428 n.18 (court finds Section 7 violation and possibility of collusion even though the relevant products were not homogeneous and most sales are accomplished via sealed bids); Sullivan and Grimes, *The Law of Antitrust: An Integrated Handbook* ch. 2 (2000) ("[T]he segmentation of a market itself could be the result of tacit interaction. Although homogeneity of products may make the creation and enforcement of a traditional cartel easier, tacit collusion may be easier when products are differentiated. When products are highly differentiated, direct competition between them is limited, in effect creating a smaller number of critical points for tacit interaction. . . . The result may be that highly segmented markets, such as cereals or tobacco, can sustain high profits more effectively than homogeneous markets, such as grain or milk. Because tacit interaction of players in a differentiated market will be difficult to attack under Section 1 of the Sherman Act, prophylactic merger enforcement may be the best defense against such anticompetitive conduct.").

82. In differentiated products markets, the combination of two significant competitors increases the ability of the merged firm to raise price on its own product, because sales that would have been lost to the acquired firm are now recaptured by the merged firm. *Merger Guidelines* § 2.21; *see* ABA Section of Antitrust Law, *Mergers and Acquisitions: Understanding the Antitrust Issues* 104-13 (2000); 4 Areeda, *Antitrust Law* ¶ 914; Baker, "Product Differentiation through Space and Time: Some Antitrust Policy Issues," 42 *Antitrust Bull.* 177 (1997); Shapiro, "Mergers with Differentiated Products," 10 *Antitrust* 23 (1996); Willig, "Merger Analysis, Industrial Organization Theory, and Merger Guidelines," *Brookings Papers on Economic Activity* 281, 299 n.43 (1991); *cf. United Tote*, 768 F. Supp. at 1071 (rejecting argument that merger would not reduce competition in light of finding that merging

firms were direct, significant competitors); *Ivaco,* 704 F. Supp. at 1419-20 (parties to joint venture were "especially" vigorous price competitors, viewing "each other as their primary competitor" in the relevant market).

83. Statements in parties' documents that they regard each other as major or significant competitors "are significant because the extent to which merging firms regard each other as their primary competition has been a consideration in recent Section 7 decisions. *United Tote*, 768 F. Supp. at 1071 (noting party documents that discuss the other two companies as "major competitors" indicate significant competition between the merging parties).

84. Mergers that result in shares of greater than 60% of markets with significant barriers to entry are within the range that courts have found to establish a prima facie showing of monopoly power. *See, e.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 167 (1948) (70% share sufficient); *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a prima facie case of market power."); *In re Educational Testing Servs.*, 429 F. Supp. 2d 752, 756 (E.D. La. 2005) ("The case law supports the conclusion that market share of more than 70 percent is generally sufficient to support an inference of market power."); *U.S. Anchor Mfg.*, 7 F.3d at 999 (60 or 65% share); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir 2005).

5. The Web-Est Licensing Arrangement is a "Fix" That is not Appropriately Considered in a Section 13(b) Proceeding

85. Late attempts "to improve defendants' litigating position have been rejected. "Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *Hospital Corp.*, 807 F.2d at 1384 (Commission was not required to take account of a post-acquisition transaction, a contract that was cancelled after the Commission

began investigating the acquisition, that may have been made to improve defendant's litigating position); *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025, 1030-31, 1034 (W.D. Wis. 2000) (efforts to create a purported competitor through a short-term supply agreement and license were rejected as being "nothing more than insubstantial window dressing to conceal its monopolistic motives").

86. While the plaintiff has the burden of establishing that the underlying transaction violates Section 7, "defendants have the burden of proving their contention that because [of a proposed "fix"] the number of competitors will not change." *Franklin Electric*, 130 F. Supp. at 1033.[2]

87. Where defendants have attempted unilaterally to restructure transactions to cure antitrust concerns, the "curative divestitures" must be to a new competitor that is "in fact . . . a willing, *independent* competitor capable of effective production in the . . . market." *White Consol. Indus. v. Whirlpool Corp.*, 781 F.2d 1224, 1228 (6th Cir. 1986) (emphasis added); *Chemetron Corp. v. Crane Co.*, 1977-2 Trade Cas. ¶ 61,717 at 72,930, 1977 WL 1491 (N.D. Ill. 1977); Richard G. Parker & David A. Balto, *Evolving Approach to Merger Remedies*, Antitrust Rep. (May 2000) (it is a "problem" to allow "continuing relationships between the seller and the

[2] These cases were all decided under the Clayton Act, not Section 13(b) of the FTC Act, and therefore the Court (not the FTC) was the ultimate finder of fact. Here, the Court's ruling on the preliminary injunction must take account that the ultimate decision on both the facts and the remedy (if any) is the FTC's, not the Court's. *Heinz*, 246 F.3d at 714 (the Court's "task is not to make a final determination on whether the proposed [acquisition] violates Section 7, but rather to make only a preliminary assessment of the [acquisition]'s impact on competition") (citing *University Health*, 938 F.2d at 1217-18); *Warner Communications*, 742 F.2d at 1162. As described by the Court in *Heinz*, the Commission satisfies its burden under Section 13(b) if it "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Heinz*, 246 F.3d at 714-15.

buyer of divested assets after divestiture, such as a supply arrangement or technical assistance requirement, which may increase the buyer's vulnerability to the seller's behavior.").

88. Undefined proposals should not be considered during a preliminary injunction hearing. *Chemetron*, 1977-2 Trade Cas. at 72,930 (curative divestiture offer made during preliminary injunction hearing should not be considered at time of hearing). A curative proposal might be considered post-hearing but, "only if it appears that the divested business will continue as an independent entity whose competitive position in the newly structured market is *comparable to or better* than its predivestiture position." *Id.* (emphasis added). A curative divestiture must leave a willing, independent, competitor capable of effective production in the relevant market. *White Consol.*, 781 F.2d at 1228.

III. THE EQUITIES FAVOR A PRELIMINARY INJUNCTION

89. The strong presumption in favor of a preliminary injunction can be overcome only if significant equities compel that the transaction be permitted litigation. *See PPG*, 798 F.2d at 1506-07; *Heinz*, 246 F.3d at 726; *Staples*, 970 F. Supp. at 1091.

90. In a preliminary injunction action under the FTC Act § 13(b), the FTC is not required to show irreparable harm. *See Heinz*, 246 F.3d at 714; *Elders Grain*, 868 F.2d at 903; *Warner Communications*, 742 F.2d at 1159.

91. Once a court concludes that a proposed consolidation would substantially lessen competition, a decision not to issue a preliminary injunction would frustrate the FTC's ability to protect the public from anticompetitive behavior. *See PPG*, 798 F.2d at 1506-07; *University Health*, 938 F.2d at 1225.

92. The inherent deficiencies of divestiture have long been recognized by the courts and constitute a primary reason for the enactment of Section 13(b) of the FTC Act. *See, e.g.*,

Lancaster Colony, 434 F. Supp. at 1096 ("At best, divestiture is a slow, cumbersome, difficult, disruptive and complex remedy.").

93. A full-stop injunction is the appropriate relief in all but extraordinary circumstances. Even the lesser relief of a "very stringent" hold-separate order is disfavored, and may be granted only upon a showing that "significant equities favor the transaction, *and* the less drastic restraint of a hold separate order realistically can be expected (a) to safeguard adequate eventual relief if the merger is ultimately found unlawful, and (b) to check interim anticompetitive harm." *PPG*, 798 F.2d at 1506-07 (quoting *Weyerhaeuser*, 665 F.2d at 1085).

94. *Weyerhaeuser* identified several reasons why hold separate orders might be insufficient: they risk transfer of confidential information; they "may be ineffective if unique management personnel serve the acquired company," since "a talented entrepreneur may not remain at the helm of the business once it is placed under the aegis of another company." *Id.* at 1086. And the Court may not compel them to remain at the helm, so long as the Thirteenth Amendment is part of the Constitution); and a hold separate order will not "preserve divestiture as an effective ultimate remedy if the held separate assets are not sufficiently attractive to interest a buyer or if the only likely disposition of the assets is a sale that would itself lessen competition." *Id.*

95. In balancing the equities, the principal public equity is the effective enforcement of the antitrust laws. *Heinz*, 246 F.3d at 726. Without a preliminary injunction, the government often cannot restore competition via divestiture, to the public's detriment. *Id.*; *Weyerhaeuser*, 665 F.2d at 1086 n.31. Section 13(b) enables the Commission to protect that interest by preventing businesses from being acquired so that competition will continue in the marketplace until the legality of the proposed acquisition is finally determined. Indeed, "Section 13(b) itself

embodies congressional recognition of the fact that divestiture is an inadequate and unsatisfactory remedy in a merger case . . . ." *Heinz*, 246 F.3d at 726 (citing legislative history); *see PPG*, 798 F.2d at 1508; *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 787, 790 (N.D. Ill. 1978).

96. "[T]the whole point of a preliminary injunction is to avoid the need for intrusive relief later, since even with the considerable flexibility of equitable relief, the difficulty of 'unscrambl[ing] merged assets' often precludes 'an effective order of divestiture.'" 548 F.3d at 1034 (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n. 5(1966)); *see also Lancaster Colony*, 434 F. Supp. at 1097 ("At best, divestiture is a slow, cumbersome, difficult, disruptive and complex remedy. The legislative history of Section 13(b) reveals congressional concern with the FTC's historic inability to effectuate a remedy" before a merger). *Chicago Bridge* is the FTC's most recent example. There, after numerous appeals to the Commission and two opinions by the Fifth Circuit, the illegal acquisition is just now being pulled apart – eight years after the fact.[3]

97. Private gain from a merger is not a private equity entitled to any weight, *PPG*, 798 F.2d at 1507 (quoting *Weyerhaeuser*, 665 F.2d at 1083 n.26), and even *valid* private equities are given little weight when balanced against the significant public equity, embodied in Section 13(b) itself, of effective enforcement of the antitrust laws. *Whole Foods*, slip. op. at 20 (Brown, J.) ("A 'risk that the transaction will not occur at all,' by itself, is a private consideration that cannot alone defeat the preliminary injunction.").

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[3] *See* FTC Letter Approving Proposed Divestiture (Nov. 28, 2008), available at http://www.ftc.gov/os/adjpro/d9300/index.shtm.

98. "[T]he high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies," *Heinz*, 246 F.3d at 720, and those efficiency claims must be tested in "a rigorous analysis . . . in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *Id.* at 721. No court has accepted efficiencies as a defense when, as here, the merger would generate undue market share and increased concentration. *Heinz*, 246 F.3d at 715. Indeed, this Court held in *Swedish Match* "[e]ven assuming that it is a viable defense in some cases, however, the Court finds that the defense is inappropriate in this particular case, in which the acquisition would generate undue market share and increased concentration as discussed above." 131 F. Supp. 2d at 171. In *Swedish Match*, the post-merger HHI was only 4,733 with a 1,514 delta, lower than in this case. 131 F. Supp. 2d at 167.

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Respectfully submitted,

By: ______________________

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

Attorneys for Plaintiff

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

DAVID SHONKA
Acting General Counsel
Federal Trade Commission

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