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

AMENDED PRETRIAL BRIEF OF CCC HOLDINGS INC. AND AURORA EQUITY PARTNERS III, L.P. IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION[1]

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Dated: January 6, 2009

[1] This brief contains corrections to the citations of certain exhibits, including those for which rough transcripts have now been replaced with final transcripts, as well as some minor corrections to the Table of Authorities.

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Defendants CCC Holdings Inc. and Aurora Equity Partners III submit this Pretrial Brief in opposition to the motion by the Federal Trade Commission ("FTC") for a preliminary injunction against the proposed merger between CCC Information Services Inc. ("CCC") and Mitchell International, Inc. ("Mitchell").

I. INTRODUCTION

The FTC premises its case for a preliminary injunction almost entirely on its assertion that only two significant competitors will exist in the relevant markets for estimatics and total loss valuation ("TLV") software if CCC and Mitchell merge, and thus price increases will purportedly follow automatically. The FTC ignores the commitments made by CCC and Mitchell that will enable new entrants to use two of the three established estimatics databases for entry and expansion, making the merger at least a "3 to 3" and possibly a "3 to 4" or greater. The FTC also gerrymanders the total loss market to exclude suppliers that currently compete for the same customers. Entirely absent are characteristics that the courts and antitrust agencies have identified as supporting anticompetitive unilateral and coordinated effects. The agency also disregards the merger's pro-competitive effects, including significant cost savings for customers and greater investment in product research and development.

In the alleged estimatics market, the FTC has ignored critical evidence concerning the effect of the merger on barriers to entry. The FTC contends that the cost and complexity of developing a new database from scratch, along with reputational concerns, act as barriers to entry. (FTC Mem. 19-20.) This is a straw man. No new database is required for entry. As a condition of the merger, CCC has agreed to relinquish its exclusive license to the Hearst's "Motor" database, allowing any competitor or entrant the opportunity to obtain immediate access to a comprehensive, fully updated database of parts and services. Nothing prevents anyone from reaching an arrangement to use precisely the same "Motor" database owned by Hearst that CCC uses for its own estimatics offering. In addition, Mitchell has opened up its own database, which the FTC concedes is fully competitive with the "Motor" database. It has agreed to eliminate licensing restrictions on the use of its own database in order to allow Web-Est—already a viable competitor for certain repair-shop customers and a licensee of Mitchell—to compete directly for business from insurance companies and high-end repair facilities, as well as the other hundreds of repair facilities to which it currently sells. Those changes foreclose the FTC's claim that there are high barriers to entry. New entrants and existing competitors will now have ready access to proven, market-tested products. Strikingly, the FTC does not even discuss these changes.

As for TLV software, the FTC insists that electronic and web-based offerings by the "book" providers, like NADA Appraisal Guides and the Kelley Blue Book, are not reasonably interchangeable with the products offered by CCC and Mitchell. However, many insurers, *including the three largest* (State Farm, Allstate, and Progressive), use books. And other insurers supply their own TLV estimates or rely on service bureaus like AutoBid and Vehicle Valuation Services. The FTC's assertion that *some* insurance companies consider the books and other offerings "inferior," even if true, says nothing about whether other customers (following the lead of State Farm, Allstate, and Progressive) could defeat an anticompetitive price increase by turning to those products as substitutes for CCC's and Mitchell's total loss products.

The FTC's case also falls short because distinctive characteristics of the estimatics and TLV industries will prevent the merger from substantially reducing competition. This is a bid market with individualized offerings and heterogeneous products purchased by insurers as part of complex requests for proposals. Prices are not transparent. There is no public price list; the goods are not baby food displayed on grocery shelves as in *Heinz*. There is no history of past coordination and no elimination of a maverick.

Nor could the merged firm unilaterally increase prices, because Audatex is a fierce competitor and CCC and Mitchell historically have competed more closely with Audatex than with one another. Unilateral effects are also highly unlikely because insurance companies often buy estimatics and TLV software as part of a "bundle" or "suite" that includes other high-margin products that would generate key revenue for the merged firm. As sophisticated customers, insurers would punish the merged firm for any unilateral price increase by turning to other sellers for those highly profitable companion products.

Remarkably, the FTC's claims of competitive injury rely heavily on the testimony of witnesses from Audatex, the principal competitor of the combined firm. Courts generally give "little, if any, weight" to competitors' statements opposing a merger because such testimony is self-serving. *See United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 192 n.23 (D.D.C. 2001) (denying preliminary injunction against merger). In fact, as the FTC has previously explained, "[o]pposition to a merger from a competitor often indicates that the transaction will increase—rather than decrease—competition" because competitors stand to benefit from a merger that would actually lead to higher prices. Statement of FTC Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc, FTC No. 021-0041. Even the FTC's expert, Dr. Hayes, agrees that such opposition must be viewed with skepticism. (DX0001 at 228-29.) Audatex's opposition to this proposed merger is particularly unworthy of credence because Audatex does not want to compete with the new products that this merger will create. Audatex also has a case of sour grapes: it unsuccessfully attempted to acquire both CCC and Mitchell in the last couple of years, and saw no antitrust obstacle to those acquisitions. It is only since CCC and Mitchell announced their intention to merge, and thereby to become more competitive through significant efficiencies, that Audatex's executives have expressed concern about market concentration. (DX0057 at 1033[redacted]) Yet the FTC has chosen to make other Audatex testimony the centerpiece of its case.

The FTC's remaining evidence lacks credibility as well. Dr. Hayes, the FTC's economist, had access to only four repair shops out of 45,000 and even that sample was gerrymandered. He admits that the FTC never shared with him (and he never bothered to ask for) the declarations of repair facilities that favor the merger because of the customer benefits it will provide. (DX0001 at 19-20, 27-28.) He also admits that, in concluding that the "books" do not form part of the total loss market, he relied on interviews with Audatex executives and had a limited discussion with one insurer. (*Id.* at 78-79.) He was only generally aware of Audatex's past attempts to acquire CCC and Mitchell. (*Id.* at 86-87.) And Dr. Hayes did not interview State Farm or Progressive, which rely on the books for total loss valuation, despite the fact that those companies had provided declarations to the FTC and had previously appeared on its witness list. (*Id.* at 97-98.) An expert who knows little about the actual industry—and permits his client to spoon-feed him artfully chosen tidbits of information and avoids access to countervailing facts (*e.g.*, *id.* at 19-20, 43-44, 312-14)—is no substitute for evidence. *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."). The FTC has not only presented self-serving declarations—many of them consisting of conclusory statements obviously drafted by lawyers—from a carefully selected, non-representative group of customers, but has sought to prevent those witnesses from being cross-examined, even in deposition. This is not a credible evidentiary record on which to block a merger.

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 huge customer benefits. As the D.C. Circuit has explained, "[t]he issuance of a preliminary injunction 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 . . . ."). These principals have not been overruled. In determining whether the FTC has carried its burden of "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. § 53(b); *see FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001), this 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) (quoting H.R. Rep. No. 624, *supra*, at 31).[2]

Section 7 of the Clayton Act is violated only when the effect of the merger may be "substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18, a

[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.*, No. 07-5276, 2008 WL 5101226 (D.C. Cir. Nov. 21, 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." *Whole Foods*, 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).

predictive assessment that requires the Court to analyze the totality of the circumstances, "weighing a variety of factors to determine the effects of particular transactions on competition." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990); *see also Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) (Section 7 requires a "reasonable probability" that the merger will substantially lessen competition). Statistics concerning market share and concentration are an initial consideration in that inquiry, but are "not conclusive indicators of anticompetitive effects," *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974), and "simply provide[] a convenient starting point for a broader inquiry into future competitiveness," *Baker Hughes*, 908 F.2d at 984 *see also FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 130 (D.D.C. 2004) ("Indeed, this circuit has cautioned against relying too heavily on a statistical case of market concentration alone, and that instead a broad analysis of the market to determine any effects on competition is required.").

For purposes of Section 13(b), if the FTC "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation," then there may be a presumption in favor of a preliminary injunction against the merger. *Heinz*, 246 F.3d at 714-15. But the defendants may defeat that presumption in a variety of ways: through evidence that entry and repositioning by 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); by making a sufficient showing that the merger would produce pro-competitive efficiencies, *Heinz*, 246 F.3d at 720; *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1301-02 (W.D. Mich. 1996); or by demonstrating that the equities weigh in favor of the merger, *see Weyerhaeuser*, 665 F.2d at 1087.

III. THE TRANSACTION WILL RESULT IN SUBSTANTIAL, MERGER-SPECIFIC COST SAVINGS AND CUSTOMER BENEFITS

The FTC's motion papers fail to acknowledge the substantial efficiencies that the merger will produce, even though CCC and Mitchell provided ample evidence to demonstrate them during the lengthy investigation leading up to this litigation. CCC and Mitchell have conducted internal analyses and retained outside consultants to review the likely efficiency gains from the merger. (DX0027; DX0028; DX0002 at 26-27, 31-32, 48-51.) Those analyses identify massive cost savings of at least $48 to $55 million *per year* that likely would result from the elimination of redundant or overlapping functions and the consolidation of product lines (DX0027 at 7-21; DX0028 at 4-13; DX0002 at 26-27, 50-51), even leaving aside other probable but hard-to-quantify savings. (DX0002 at 118, 180-81.) These cost savings exceed 20% of the companies' combined cost base—a much higher than the norm for a merger. *See Butterworth Health*, 946, F. Supp. at 1301 (referring to 16% cost savings as "significant" and "by any account, a substantial amount").

The resulting benefits to customers likewise will be substantial.[3] First, the post-merger integration of the parties' estimatics systems will improve connectivity by providing seamless

[3] The FTC badly mischaracterizes the record in contending that none of the merger-produced efficiencies will be passed on to consumers. (FTC Mem. 25.) In deposing a CCC witness, FTC counsel asked "where does [the merger-produced efficiency gain] go" "*if you don't* invest it back" into new products and the like. (DX0002 at 51 (Balbirer Tr.) (emphasis added).) Only in response to that *hypothetical* did the witness state the truism that cost savings "would add to the profits of the company" *if* not invested in improvements. (*Id.*) He never testified that all cost savings "would be retained by the merged firm." (FTC Mem. 25.)

access to a broader array of insurers than is now available for repair facilities that use only one system (either CCC's or Mitchell's). Second, some 1,500 repair facilities that now purchase both CCC's and Mitchell's estimatics products will save $7-8 million per year by purchasing only one improved product from the combined entity. (DX0003 at 38-39; DX0004 at 242-44; DX0005 at 86-91; DX0012 at 89-94; DX0024 ¶ 8; DX0025 ¶¶ 10-12, 15.) In short, all current repair facility customers of either CCC or Mitchell, or both, are likely to receive a quality-adjusted price decrease as a result of the proposed merger. Repair facilities also will benefit from the elimination of training and processes and potential reduction of manpower expenses presently needed to accommodate two different estimating systems. (DX0012 at 90-94; DX0058 at 157-58; DX0005 at 35, 63, 72-75, 84-86.) Indeed, multiple customers will testify that the transaction will benefit them.

As a result of the cost savings generated by the merger, the merged entity will spend considerably more on new product research and development than the amount the two companies spend individually. (DX0028 at 2-3; DX0004 at 50-51, 82-83.) Thus, the merger likely will enable more new and better products to be developed more quickly than would otherwise have occurred, further benefiting consumers. (DX0004 at 50-52; *see also* DX0058 at 175; DX0007 at 32-33, 36-37; DX0003 at 29-30.) Such innovative improvements will likely include the delivery of industry insights through benchmarking and enhanced insurance fraud detection, in each case as a result of the more comprehensive data warehouse resulting from the merger. (DX0007 at 36-37, 40; DX0004 at 52-58; DX0008 at 57-58.)

The FTC has no real answer to the facts establishing these enormous efficiencies. So they ask the Court to pretend they do not exist. In the first instance, the FTC suggests that

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Moreover, there is no basis for the FTC's assumption that efficiencies are irrelevant if not passed on to consumers in the form of price reductions. The agency's own guidelines explicitly recognize that "efficiencies may result in benefits even when price is not immediately and directly affected." Merger Guidelines § 4.

efficiencies are not a valid defense to a Section 7 claim. (FTC Mem. 24 (quoting *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967).) But the D.C. Circuit has recognized that "the trend among lower courts is to recognize the [efficiencies] defense," and *Proctor & Gamble* does not foreclose it. *Heinz*, 246 F.3d at 720 & n.18.[4] Indeed, the FTC's own Merger Guidelines acknowledge that mergers should proceed "if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive." Merger Guidelines§ 4. And even when merger-related efficiencies do not in themselves fully justify a proposed merger, "such evidence is relevant to the competitive effects analysis." *Arch Coal*, 329 F. Supp. 2d at 151. The FTC's own expert acknowledges that efficiencies flowing from the merger will "create incentives to reduce prices." (DX0013 ¶¶ 75-76, 83.)

The FTC's "Plan B" is to assert that only "extraordinarily great" efficiencies can justify the merger. (FTC Mem. 24.) That standard applies when a merger involves "particularly large" adverse competitive effects (Merger Guidelines § 4), but the FTC has failed to demonstrate effects of such magnitude here, given the fiercely competitive market that will exist in the post-merger world. *Heinz* is not to the contrary; in that case, unlike here, the merger would have eliminated *all* competition at the wholesale level, and "high barriers to market entry" made entry by new competitors "'difficult and improbable.'" 246 F.3d at 717.

The FTC also asserts that the efficiencies are "speculative" because defendants do not identify precisely which employees, products, or data sources they would eliminate. As the FTC certainly understands, antitrust law limits the companies' ability to exchange information pre-

[4] *See, e.g.*, *Arch Coal, Inc.*, 329 F. Supp. 2d at 150; *Long Island Jewish Med. Ctr.*, 983 F. Supp. at 146-147 ("The courts have recognized that 'in certain circumstances, a defendant may rebut the government's *prima facie* case with evidence showing that the intended merger would create significant efficiencies in the relevant market.'") (quoting *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991)); *see also Baker Hughes*, 908 F.2d at 985 ("a variety of factors other than ease of entry can rebut a prima facie [section 7] case," including "prospect of efficiencies from merger") (dictum).

merger, and there is no requirement that merger proponents offer such absurdly specific details about projected efficiencies. *See Long Island Jewish Med. Ctr.*, 983 F. Supp. at 147-48, 152-55 (accepting far less specific efficiencies evidence). Even the agency's own Guidelines require only "reasonable means" of verification (Merger Guidelines § 4), and the detailed and careful analyses performed by defendants and their consulting firms over a period of many months provide itemized lists of the duplicative or overlapping functions that would be pared down in the merged entity. (DX0027 at 7-21; DX0028 at 4-13.) As the Bain Report demonstrates, moreover, the projected efficiency gains are entirely realistic when compared with analogous past merger experience. (DX0028 at 5-6.)

The FTC lacks any basis for its suggestions that the enhanced product innovation efforts identified by the parties would occur absent the merger, or that the merger will reduce incentives to innovate. The merger will free up resources now expended on duplicative activities, enabling additional product development not likely to occur otherwise. (DX0004 at 49-51; DX0002 at 197-98, 202.) Powerful incentives to innovate will exist post-merger to take advantage of the new unified product platform, retain customers forced to migrate to that platform, meet the demands of sophisticated customers for additional functionality, and compete effectively against Audatex, Web-Est, and other market players including new entrants. (DX0002 at 28-29; DX0058 at 159-60, 172-74; DX0004 at 50-52, 63, 84.)

IV. NEW ENTRANTS AND EXPANSION BY EXISTING COMPETITORS WILL CONSTRAIN POST-MERGER PRICING FOR ESTIMATICS

The FTC repeatedly asserts that this case involves a "3-to-2 merger" with "high barriers to entry" and a "huge market share" (FTC Mem. 1, 3, 10), as if mere repetition of those phrases entitles the government to an injunction. The evidence will instead show that low barriers undermine the significance of market shares (Section IV.A below), that this is not a "3 to 2" merger (IV.B), and that entry barriers are, indeed, low (IV.C).

A. Ease of Entry Trumps Market Shares

Low barriers to entry trump high market shares in a Section 7 case. *Baker Hughes*, 908 F.2d at 984; *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) ("We conclude, therefore, that entry by potential competitors may be considered in appraising whether a merger will 'substantially lessen competition.'"); *see also* Merger Guidelines § 3.0 ("A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels."). As then-Judge Thomas, joined by then-Judge Ginsburg, wrote in *Baker Hughes*: "It is a foundation of section 7 doctrine, disputed by no authority cited by the government, that evidence on a variety of factors can rebut a prima facie case. These factors include, but are not limited to, the absence of significant entry barriers in the relevant market." 908 F.2d at 984. The reasoning for this prescription is straightforward: "In the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time." *Id.* at 987. The *Baker Hughes* court also rejected the government's rigid requirement that entry be "quick and effective" because it "would improperly narrow the section 7 inquiry, channeling what should be an overall analysis of competitiveness into a determination of whether a defendant has shown particular facts." *Id.* at 988. Ultimately, the court denied the government's petition to enjoin the merger. *Id.* at 992.[5]

[5] There are many examples of courts permitting mergers to proceed in spite of extremely high concentration numbers due to the ease of entry. *See, e.g.*, *Baker Hughes*, 908 F.2d 981 (finding merger lawful due to low entry barriers even though the combined firm would have had a 76% market share in a recent year and post-merger HHI for the market would be 4,303); *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990) (stating that acquisitions leading to 93% of box office receipts in relevant market were not anticompetitive because of ease of entry); *Waste Mgmt.*, 743 F.2d at 981 (holding that 49% post-merger market share was not anticompetitive because entry was easy); *United States v. Calmar Inc.*, 612 F. Supp. 1298 (D.N.J. 1985) (finding post-merger HHI of 3,040

Baker Hughes applies here because entry barriers are not as the government contends. As set forth below, Web-Est, a new entrant in estimatics, is poised to gain share as a price cutter selling a particularly compelling product. Further, the availability of the Motor database, freed from the exclusivity provisions of its license to CCC, is likely to generate additional new entry.

B. Web-Est's Expansion Trumps Market Shares

This is not a "3 to 2" merger because Web-Est already competes in part of the estimatics market and, as a result of the merger and Mitchell's modification of the license, it will be able to compete effectively for all customers.[6] Web-Est today offers an advanced Web-based estimating system to low-end repair facilities.[7] The evidence will show that Web-Est has achieved considerable success even though its license agreement with Mitchell effectively precludes it from selling to insurance companies or repair facilities in direct repair programs ("DRPs"). Immediately upon the closing of this transaction, Mitchell will end these restrictions, permitting Web-Est to compete for all estimatics customers. Web-Est also will become entitled to re-sell Mitchell's total loss product so it can provide complementary products to customers.[8]

Released from these restrictions, Web-Est's CEO, Eric Seidel, plans an aggressive price-cutting strategy and forecasts sales to DRPs and insurers within the first year and annual

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was not anticompetitive in market with low barriers to entry). *See also* Fed. Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996-2007, Table 3.1 (2008) (from 1996 to 2007 the FTC has closed without action 100 merger investigations where the post-merger HHIs would have exceeded 3,000), *available at* http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf.

[6] Web-Est has a license to use Mitchell's database for its estimating system, but at present the license prohibits Web-Est from selling to insurance companies and from selling communicating estimatics to repair facilities. (DX0059.) Mitchell's use of such restrictions is direct market evidence that Mitchell considers Web-Est to be a competitive threat in the communicating segment of the business.

[7] Web-based estimating systems offer significant advantages both to suppliers and customer. [redacted]

[8] The FTC and its expert make no mention of the Web-Est license modification and Web-Est's ability to compete. This comes as a surprise because the Web-Est "fix" was a major negotiating point between the parties prior to this litigation, and the FTC took the deposition of Web-Est's CEO, Eric Seidel, in November, prior to commencing this action. The FTC initially included but then dropped Mr. Seidel from its witness list. Defendants will present him at trial.

[redacted] (DX0030 at 6, 7, 50; DX0009 at 87-90, 135.) Seidel is an industry veteran with a long history of success. The ability of current competitors to expand and reposition, of course, is functionally equivalent to new entry. *See Arch Coal*, 329 F. Supp. 2d at 148 ("Defendants have shown that the post-merger fringe capacity in the [market] would be more than sufficient to absorb any increase in demand caused by any production lag coordinated by the 'big three' producers . . . ."); *United States v. Gillette Co.*, 828 F. Supp. 78, 85 n.11 (D.D.C. 1993). Web-Est has immediate plans for developing new functionality for its products and anticipates adding 5,000 customers within five years, including three insurance carriers within the next year. (DX0009 at 21, 82; DX0030 at 5, 28.) *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.") Web-Est will continue to use the well-regarded Mitchell database (DX0009 at 93) and is in the process of developing standard estimatics add-on products (*id.* at 82-83), eliminating the reputational and product portfolio "barriers" asserted by the FTC. (FTC Mem. 20-21.)

C. Entry Barriers Are Low

Two elements are required to offer an estimatics product: (1) a software estimating tool and (2) an electronic database of automotive parts prices and repair labor times. The software application can readily be developed, and the FTC does not contend otherwise. But the FTC greatly exaggerates the requirements and costs of creating and maintaining an electronic estimating database that is supposedly the main barrier here. The FTC ignores (i) the availability of the Motor database, up-to-date and fully functioning, for all comers to license; and (ii) a database can be developed from scratch in less than two years for less than $5 million.

1. The Motor Database

CCC does not have its own estimatics database, but relies on an exclusive license for data from the Motor database owned by the Hearst Corporation. Upon the closing of this transaction, CCC will relinquish its exclusivity, thereby removing the principal estimatics "barrier" identified by the FTC: development of a competitive database. New entrants, insurers, and existing competitors will have immediate access to a well-established estimating database. *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). Thus, Hayes' extensive reliance on the expense of replicating the database from scratch (DX0013 ¶¶ 99-107) is completely off the mark. A new entrant will *not* have to build a new database.

The FTC argues that new entrants are unlikely to succeed because they will not have the credibility of Audatex, CCC, or Mitchell. But new competitors will have access to the market-tested and proven Motor database, substantially diminishing any reputational concerns. Moreover, many companies serving insurers in adjacent industries have ample skill and reputation and could enter with a database license. In any event, courts are skeptical that reputation is even a cognizable barrier to entry, particularly in commercial markets. *Waste Mgmt., Inc.*, 743 F.2d at 984 ("We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition."); *United States v. Consol. Foods Corp.*, 455 F. Supp. 108, 119 (E.D. Pa. 1978) ("Particularly in selling to institutional customers brand names are not significant.").

The FTC's claim that no entrant can afford to license the Motor database is belied by history. When it first licensed the Motor database, CCC was just a fraction of its current size.

Applied Computer Resources, which the FTC derides as "picayune," used to license the Motor database for its Crash-writeR product. Furthermore, by using a per user royalty license for a recognized database, a company seeking to enter and expand in estimatics faces only the minimal upfront capital costs of developing the software tool, which the FTC does not even claim to be a problem. Financial barriers to entry matter only when capital costs are drastically higher than here. *See FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 56 (D.D.C. 1998) (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.'").[9]

The FTC also contends that the parties' offer to relinquish exclusivity is unavailing because lack of earlier entry suggests that no one will license the database and enter the market. (FTC Mem. 18-19.) Again, history proves the FTC wrong. This is an industry with several recent examples of successful entry:[10]

- Comp-Est—Founded in 1990 and grew to more than 5,000 customers by the time it was purchased by CCC in 2003 (which still offers the product today);
- Focus-Write LLC—Started in 2005 by the founder of Comp-Est and quickly grew to 1,500 customers but then floundered due to management issues;
- Web-Est LLC—Founded in March 2008; purchased the assets of Focus-Write; has already doubled its customer base;
- Applied Computer Resources—Began offering Crash-writeR in 1993; currently has 600 customers and sells four products to the automotive repair industry.

Successful recent entry is highly probative that there are low entry barriers. *Syufy*, 903 F.2d at 699 (stating that "we need not rely on theory alone in rejecting the government's

[9] *See also* Compl. ¶¶ 19-20, *In re Digital Equip. Corp.*, FTC Docket No. C-3818 (1998) (finding financial entry barrier with costs for developing a high-performance microprocessor likely in excess of $250 million, and developing, building, and equipping a semiconductor fabrication facility of approximately $1.6 billion); *In re Pfizer Inc.*, FTC Docket No. C-4075 (analysis of proposed consent order to aid public comment) (2003) (finding de novo entry "estimated to take at least eight years and cost upwards of $375 million").

[10] Likewise, in the total loss area, Mitchell is an example of a recent entrant, although its success has been modest.

argument" when evidence of actual entry is available); *Waste Mgmt.*, 743 F.2d at 988-89 (discussing recent entry in the relevant market).

2. Developing a Database

Setting aside the option of simply leasing Motor, the evidence will show that a brand new entrant could create its own estimatics database in less than two years for less than $5 million. Foreign estimatics providers could enter the market even faster and with lower upfront costs because of the significant overlap in vehicles sold in the United States and abroad. Indeed, most of the largest automobile manufacturers produce vehicles built from global platforms. (DX0004 at 93-94.) Therefore, foreign suppliers of estimating software already have much of the data needed to create a U.S. product. Mitchell's and Audatex's success in taking their estimating experience overseas are good examples of the ease with which a foreign provider can enter a new market. By leveraging its U.S. database, Mitchell entered Latin America in just one year. (DX0010 at 19; DX0007 at 131.) Since 2006, Audatex has expanded into sixteen new countries.[11] And at least one European company has considered entering the United States.[12]

V. THE TRANSACTION WILL NOT RESULT IN ADVERSE UNILATERAL EFFECTS

The FTC's expert asserts that the proposed merger will have "unilateral effects," (DX0013 ¶¶ 67-94), meaning that the merged firm would be able to raise prices "simply by virtue of the fact that the merger will eliminate direct competition between the two merging firms, even if all other firms in the market continue to compete independently." *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1113 (N.D. Cal. 2004). The FTC nearly ignores this assertion in its motion, for good reason: the doctrine is inapplicable here. There can be no

[11] http://www.internetautoguide.com/auto-news/25-int/33769/index.html

[redacted]

unilateral effects when the two merging firms are not consumers' first and second choice, or where another substantial firm is competing robustly in the same market.

The unilateral-effects theory posits that a merger may lead to a substantial price increase when, *inter alia*, customers prefer the two merging firms' products to those of any other potential substitutes, competing products are sufficiently different that a price increase would be profitable for the merged company, and it is unlikely that other firms (either existing competitors or potential entrants) will be able to reposition to offer closer substitutes. See *id.* at 1117. Thus, the likelihood of a unilateral post-merger price increase depends in part on: (1) customers' demonstrated preference for the merged firm's products, and (2) the ability of other firms to compete effectively for the merged firm's customers after the merger. *See In re Evanston Nw. Healthcare Corp.*, No. 9315, 2007 WL 2286195 (F.T.C. Aug. 6, 2007) (Section V.3.).

Whatever its merit elsewhere, the unilateral-effects theory has no application to the CCC-Mitchell merger. The merged firm will have no incentive to raise prices for estimatics or TLV, because such price increases would lead to lost sales in other, more lucrative, markets. Indeed, estimatics and TLV bear *none* of the characteristics of markets susceptible to unilateral price increases: (1) CCC and Mitchell are not the closest competitors in either estimatics or total loss, and (2) Audatex is already an aggressive competitor in both products.

A. Price Increases in Estimatics and TLV Will Cause the Merged Firm to Lose Sales in Other Markets.

There are at least two marketplace dynamics that will prevent the merged firm from raising prices on estimatics or TLV products. First, insurers do not buy these products in isolation, but use a bid process to acquire an array of products in a bundle. An increase in the price of estimatics or total loss products would jeopardize potentially more lucrative sales of other products. Second, insurers often encourage repair facilities to use specific estimatics or

TLV products. As a consequence, lost sales to insurers would result in lost sales to repair facilities as well.

1. Risk of Lost Sales of Bundled Products

Estimatics and TLV are declining markets. [redacted] That trend is expected to continue.

Tools to manage workflow, worker's compensation, and dispatch are highly profitable. Mitchell sells tools for workflow management, customer satisfaction, auto replacement glass products, marine estimating, and medical products. CCC sells workflow and information/business intelligence products. Many of these products are offered by multiple firms in addition to the merged entity. As CCC's and Mitchell's chief competitor, Audatex, has stated to its investors, "selling new products and services are our key growth drivers . . . .". (DX0031.)

It is a fact of life in the industry that insurers purchase somewhat disparate software packages in bundles, and can punish an increase in the price of one product by rejecting some or all products from that supplier. (DX0008 at 147-48 ("[I]f you do something to Pathways that will upset them, . . . they'll say I'm pulling the whole bundle."))

Therefore, the merged firm will have no incentive to increase prices for the declining estimatics and TLV products because it would reduce revenue from other, high-margin growth products. In these circumstances, no adverse unilateral effects can occur.

2. Failure to Bid Aggressively on Insurance Business Would Place Repair Facility Business at Risk

Winning a contract to sell estimatics to an insurer gives the supplier an advantage in selling to facilities belonging to the insurer's direct repair program, which are often encouraged or required to use the same estimatics platform as the insurer. (DX0013 ¶ 25; DX0005 at 37, 39-40; DX0025 ¶ 10; DX0024 ¶ 7.) As a result, not bidding aggressively for an insurer's business carries a substantial opportunity cost in the form of lost sales to repair facilities. For example, when Mitchell lost the American Family contract to Audatex, Mitchell's CEO analyzed the financial impact to Mitchell in terms of the lost revenue from both American Family and its DRP repair facilities. (DX0032.) Any post-merger attempt to increase estimatics prices to insurers thus would be economically irrational.

B. CCC and Mitchell Are Not Consumers' First and Second Choices

To prove its case under the Merger Guidelines, the government must show that consumers regard CCC and Mitchell "as their first and second choices." Merger Guidelines § 2.21. The FTC's expert admits that his economic model results in a price increase only for insurers for whom Audatex is a distant third choice.[13] (DX0001 at 337-339.) But the FTC cannot establish that essential fact. Audatex is a leading—if not the leading—choice of consumers. This alone defeats any contention that unilateral effects will result from the CCC-Mitchell merger. Furthermore, Dr. Hayes admission that there is no price effect when Audatex is the insurer's first or second choice undermines any claim of coordinated interaction.

1. Estimatics

Audatex competes directly against CCC and Mitchell in the estimatics market. Indeed, Audatex is invited to bid in nearly every auto physical damage tender. Of 22 reviewed estimatics competitions in which CCC participated from 2003 to 2007, Audatex bid in 18, compared to 16 for Mitchell. From 2003 to 2007, CCC won 11 competitions that included

[13] Implicit under this effects model is that Audatex would willingly not reposition post-merger to close the "gap" that Hayes assumes exists between CCC/Mitchell and Audatex for certain customers.

estimatics. Audatex was the runner-up six times; Mitchell, four times; and the runner-up was unknown in one competition.

Both CCC and Mitchell lose far more estimatics business to Audatex than to each other. From January 2006 to June 2008, Mitchell captured 30 percent of CCC's lost insurer estimatics business, while Audatex captured **70** percent. During the same time, CCC captured only 2 percent of Mitchell's lost insurer estimatics business, while Audatex captured **98** percent. Robust win/loss data are not available for repair shop sales, but industry studies and publications consistently find that shops using two estimating systems most frequently use Audatex and CCC, and repair facilities familiar with all three systems rank CCC and Audatex as their top two choices. (DX0033 at 00064042; DX0013 Exhibit 5.)

In an apparent attempt to show that Mitchell and CCC are each other's closest competitors, the FTC points to two "recent competitions" that somehow are "revealing" of the market. (FTC Mem. 7.) In the first, Mitchell won a contract against CCC to supply GMAC "with a suite of applications including both estimatics and TLV systems." In the second, CCC won the AIG account from Mitchell. (*Id.*) By the government's own admission, these are two of approximately 100 contracts up for competition and renewal each year.

What is "revealing" about the GMAC transaction is that it is atypical. In *ten* other contracts bid in the same time period as GMAC, Audatex won in contests with CCC or Mitchell. These include: MAACO, Progressive, American Farmers & Ranches, Cincinnati Insurance Co., State Farm Great West I, State Farm Texas, State Farm Florida, Safeway, Liberty Mutual, ACSC, and the Automobile Club of Southern California (ACSC).[14] While the FTC points to *one*

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[14] **MAACO** – DX0034 (press release documenting an Oct. 2008 Audatex win of a multi-year contract for "estimating and other complementary Audatex software" across all 475 MAACO franchised centers);

Progressive – DX0035 (in July 2008 Audatex won a total loss renewal for Progressive where Mitchell and CCC were also bidding);

competition between CCC and Mitchell, we can point to *nine* competitions in which Audatex not only competed but won. Moreover, Audatex itself identifies several recent instances when Audatex won different insurers' contracts away from CCC or Mitchell. (DX0015 ¶ 9, 10, 12.)

Indeed, the FTC's argument that Audatex is a "distant third" competitor of CCC and Mitchell is based on a tiny, non-representative sample of customers and is refuted by Audatex';s own statements in this case that [redacted] and that [redacted] (DX0016 ¶ 45, 53; *see also id.* ¶ 60 [redacted] Although Hayes wrote that a "sizeable fraction" of insurance companies view Audatex as a "distant third" competitor, (DX0013 ¶ 84), he could point only to GMAC, The Hartford, and AIG to support his conclusion and could not name a single other insurer that had this view of Audatex.[15] (DX0001 at 175-76, 177-78.) The FTC spoke with [redacted]—and none of the seven provided a declaration ranking Audatex as a number three, much less a distant number three, in estimatics. (*Id.* at 184.)

American Farmers & Ranches – DX0036 (July 9, 2008 Audatex Press Release announcing the win of an "exclusive, multi-year contract" where American Farmers and Ranchers will "use Audatex's full suite of auto physical damage solutions.");

Cincinnati Insurance Co. – DX0037 (Jan. 7, 2008 Solera press release with statement by Cincinnati VP: "After conducting an extensive review of the available automotive estimating technologies, we selected Audatex as it proved to be the solution that best serves our policyholders.");

State Farm Great West I – DX0035 (Dec. 2007 total loss win for a 36 month contract, where CCC and Mitchell were also bidding);

State Farm Texas – DX0035 (July 2007 total loss win by Audatex where both Mitchell and CCC were competing);

State Farm Florida – DX0035 (Mar. 2008 total loss win by Audatex for a 12 month contract);

Safeway – DX0038 (Mar. 26, 2007 Audatex Press Release describing estimating and total loss takeaway in March 2007);

Liberty Mutual – DX0035 (2007 total loss renewal for an additional 13 months);

Automobile Club of Southern California - DX0035 (2006 total loss win by Audatex where ACSC had received bids from "2 other competitors").

[15] In fact, only one of these three insurance customers [redacted] even arguably supports his conclusion. The [redacted] declaration was withdrawn from this litigation by the FTC, and therefore the substance of that declaration cannot be put into evidence indirectly through their expert. Fed. R. Civ. P. 703. [redacted] declaration offers no opinion as to its current view of Audatex's estimatics product. (DX0026.)

Hayes's sample of repair facilities was even smaller: he interviewed only three repair facilities out of 45,000 in the United States. (*Id.* at 43.) He admitted that the FTC did not share with him any of the statements from repair facility representatives who favor the merger, including [redacted]—all of which the FTC had in its possession—not did Hayes ask to see any such information. (*Id.* at 19-20, 27-28.) In fact, even the three that he spoke with do not support this important assumption in his report. (*Id.* at 36-38.) In short, Hayes's analysis of buyer preferences, by his own admission, was based on a tiny, biased sample.

Setting aside the two anomalous declarations that Hayes points to, evidence will show that Audatex is a strong competitor. Recent Audatex internal planning documents describe a company that is gearing up for battle with the merged company:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

Audatex already sells estimatics product to four of the top ten U.S. insurance carriers, including the top two. It sells its total loss product to at least four of the top ten insurance carriers, including the top three. Audatex's most recent Form 10-K boasts that the company now serves "nine of the ten largest automobile insurance companies in North America" with estimating and other products. (DX0042 at 1.) A leading industry publication in 2006 found that Audatex's system was the favorite among repair facilities. (DX0043 at 1-2.)

2. Total Loss Valuation

CCC and Audatex have successful TLV software products, while Mitchell's TLV product has only a negligible portion of sales, as even Hayes admits. The Mitchell product is high cost and has not been a meaningful constraint on CCC (or anyone else). (DX0060 at 46-48.) CCC loses more total loss business to Audatex than to Mitchell.

As was the case with the estimatics market, Hayes's investigation of consumer preferences in the TLV market was wholly inadequate. Hayes had no view as to what such significant insurers such as State Farm, Allstate, Nationwide, GEICO, Liberty Mutual, Farmers Ins., Travelers, Safeco, Met Life, AutoClub, or Hanover, among others, thought about Audatex, and therefore could not opine that any of them *in fact* viewed Audatex as a distant third. When questioned about 14 of the largest insurers in the U.S., representing "a large chunk" of the automobile insurers in the U.S., Hayes conceded that he had no "specific evidence" as to how they rank Audatex relative to CCC or Mitchell in TLV. (DX0001 at 133-34.)

In addition to this faulty analysis of consumer preferences, Hayes suggests that "TLV prices have declined following Mitchell's successful re-entry" into the TLV market. (DX0013 ¶ 92.) Presumably, the FTC relies on this assertion to support its claim that three competitors are better than two. But this "natural experiment," as Hayes terms it (*id.* ¶ 94), is fundamentally flawed. He examined prices only *after* Mitchell reentered the market: 2005-07 and first half of 2008. (*Id.* ¶ 92.) Had he examined the period *before* Mitchell's re-entry, he would have discovered that the market price had been steadily declining over a number of years beforehand: Mitchell's entry was a blip on the screen that did not change what already was occurring.

C. Audatex Already Competes Aggressively in the Same Areas

For a valid unilateral effects case, in addition to proving that the merging firms are the first and second choice competitors for an appreciable number of customers, "plaintiff must demonstrate that the non-merging firms are unlikely to introduce products sufficiently similar to the products controlled by the merging firms to eliminate any significant market power created by the merger." *Oracle*, 331 F. Supp. 2d at 1118 (citing Areeda, Hovenkamp & Solow, 4 *Antitrust Law* ¶ 914f at 68-69.) The FTC cannot possibly make this showing. Audatex *already* competes directly against both firms in both markets.

Audatex, the only publicly traded company of the three firms, is far larger than a combination of CCC and Mitchell would be. It is more than capable, as its CEO touts, of spending 50 percent more on R&D than any of its competitors, including CCC and Mitchell, on product improvement. (DX0044.) It has publicly affirmed its intent to compete against the merged firm, with its CEO Tony Aquila commenting that the merger would result in "opportunities that hadn't been around for us." (DX0045.) It recently raised $150 million—no small feat in the current financial environment—as part of its growth strategy. (DX0046.) And there is no constraint on capacity: the incremental cost of each new customer is negligible relative to the fixed cost of developing a database.

In short, the conditions for unilateral effects are absent. The merged entity will not be able to raise price unilaterally. Audatex's presence is formidable and none of the conditions to unilateral effects are anywhere present.

VI. THERE IS NO REASONABLE PROBABILITY OF POST-MERGER COORDINATION

The FTC must prove that this merger will produce a result never seen before in this market: competitors agreeing tacitly to pull their competitive punches so as to achieve price increases in estimatics and total loss.[16] The FTC suggests that the merged entity and Audatex will "each find it profitable to refrain from competing aggressively." (FTC Mem. 15.) That would be a sea change, since everyone agrees that the marketplace has had a "long history of fierce competition." (*Id.* at 3.) The history of competitiveness in this market is itself important, because past industry coordination has been significant in other cases where future collusion was a concern. *See, e.g., FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) ("there is a history of efforts to fix prices in the industry"); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1388 (7th Cir. 1986) ("there is a tradition . . . of cooperation between competing hospitals in Chattanooga"). Here there is no such history, as the FTC concedes.

A. Market Dynamics Preclude Coordination

Insurance carriers typically purchase automobile physical damage products through formal RFPs. RFPs and bids involve varying pricing metrics for upwards of a dozen products, in addition to varying levels of installation, implementation, training, and service. The process is confidential, with prices, volumes, and other economically significant terms not regularly revealed to those who lost the bid.[17] Such a bidding process is antithetical to coordination. *See United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991) ("Secrecy is the antithesis of successful collusion.").

[16] Successful coordination "entails reaching terms of coordination that are profitable to the firms involved and an ability to detect and punish deviations." Merger Guidelines § 2.1; *see also Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1388 (7th Cir. 1986). Various industry conditions facilitate coordination, including most prominently the availability of "information concerning transactions" and "pricing" in the marketplace. Merger Guidelines § 2.1.

[17] The FTC asserts that "the competitors in these markets have deep intelligence into each other's prices and services" (FTC Mem. 3), yet cannot cite to a single business document showing that either party had actual knowledge of a competitor's price for a particular customer, the details of a competitor's bid, or another competitor's bidding or pricing strategy. Instead, the FTC cites to documents providing unverified estimates of a competitor's prices or overall product revenue. (*Id.* at 15-16 nn.46-48.)

Confidential bidding procedures imposed by sophisticated insurers[18] are a huge impediment to coordination for the obvious reason that coordination cannot occur without knowledge of a competitor's actual prices. *See Baker Hughes*, 908 F.2d at 986 (coordination inhibited by use of "multiple, confidential bids for each order"); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 168 n.13 (D.D.C. 2000) ("the merger will only increase the likelihood of coordinated action because...the monitoring of prices is easy"). As a result of the confidential bidding process, bidders do not know who else is bidding and do not learn the prices offered by other bidders. (DX0006 at 17-18, 47-48.) Because there are multiple suppliers of non-estimatics products, the number and identity of bidders cannot be easily predicted or discerned. Thus, as Judge Bates found in *Arch Coal*, customers' use of "sealed bids and confidentiality is an important aspect of the market structure and dynamics that would frustrate coordination among producers." 329 F. Supp. 2d at 144.

Pricing to repair facilities also is opaque. Estimatics suppliers frequently offer undetectable price concessions such as free add-ons and free initial months of service. (DX0005 at 56, 71-72.) Even Hayes admits this is the case. (DX0001 at 319, 327-28.) [redacted] these discounts are often significant. These differing types of concessions provide many ways to engage in undetectable cheating on any supposed coordinated effort because they can be so readily concealed.

The products sold to insurers are not easily comparable across customers. Companies compete on features and customize products for particular customers. This also precludes price

[18] The presence of sophisticated insurance customers—as evidenced by their use of sealed bidding procedures and long-term contracting—makes coordinated interaction much more difficult. *See Baker Hughes*, 908 F.2d at 986 ("buyers closely examine available options and typically insist on receiving multiple, confidential bids for each order"); *Elders Grain*, 868 F.2d at 908 ("A concentrated and knowledgeable buying side makes collusion by sellers more difficult."); *FTC v. R.R. Donnelley & Sons Co.*, 1990 WL 193674, at *4, 1990-2 Trade Cas. (CCH) ¶ 69,239, at 64,885 (D.D.C. Aug. 27, 1990) ("[T]he sophistication and bargaining power of buyers plays a significant role in assessing the effects of a proposed transaction.").

coordination because firms offering different products at different prices face major obstacles in reaching terms of coordination that those selling commodity products do not face. *Hosp. Corp.*, 807 F.2d at 1390 ("[C]ollusion is more difficult the more heterogeneous the output of the colluding firms."); Merger Guidelines §2.11 ("reaching terms of coordination may be impaired by product heterogeneity"). As the FTC's expert acknowledges, "suppliers respond [to RFPs] with detailed, custom 'bids' that…may include price quotes for multiple products and services, in addition to partial loss software, and they may involve custom modifications to the supplier's standard estimatics software." (DX0013 ¶ 68.) In addition, pricing metrics, (*e.g.* individual, bundled, per user, per location, minimum volumes, etc.) can vary greatly from RFP to RFP, and even for different products within the same RFP. It is impossible to predict with any confidence what prices a rival will offer on an upcoming bid.

There is also significant product heterogeneity for repair facilities. Mitchell, as an example, has five different core estimatics products, half a dozen estimatics add-on products, a variety of training and installation options, and different pricing scales based on the number of users. The wide variety of estimating products, plus the additional products, such as shop management, offered with them, leads to hundreds of possible product and pricing bundles.[19] Adding to the difficulty of coordinating estimatics sales to repair facilities (or raising prices unilaterally) is the likelihood of adverse action by insurers. Repair facilities are not shy about complaining about conditions that concern them and insurance companies, in turn, are not shy about preserving their repair networks. (DX0012 at 103-04; DX0025 ¶ 18.) Indeed, at the

[19] Mitchell's August 2007 price list for repair facilities is 31 pages long, consisting of almost 400 product and pricing options encompassing six categories of products: estimating, performance management, scheduling, shop management, reference tools, and other publications. (DX0047.) Not surprisingly, a CCC witness testified that "we have a very hard time understanding pricing in the marketplace." (DX0006 at 48-50.)

insistence of insurers such as [redacted] CCC has pre-existing concessions built into its estimatics pricing for certain DRP shops.

The lack of transparency and the distinctiveness of each sale mean no clear set of terms for a coordinated consensus among vendors can exist. *Oracle*, 331 F. Supp. 2d at 1166 ("Without homogeneity or transparency, the market conditions are not conducive to coordinated effects, either tacit or express."). Likewise, the use of multi-product bidding and bundled prices makes detection of cheating very difficult. If Audatex, for instance, won a bid for an insurer who had previously contracted with CCC-Mitchell, it would be impossible to know whether that victory was due to aggressive pricing on estimatics or on other products for which there are a large number of competitors.

B. The Incentives Are to Compete, Not Collude

Not only are market conditions not conducive to coordination, competitors in this industry will be incentivized to cheat on any such tacit "deal." The overwhelming incentive is to compete because the contracts are too lucrative to let pass.

Here is why: Insurer contracts typically last from three to five years. That means the winning bidder sells estimatics to the insurer over an extended period and is likely to sell the product to repair facilities allied with that insurer. Moreover, insurer long-term contracts often cover bundles of products (as described above). The evidence will show that the profitability of the merged entity and Audatex depends on the sale of additional products such as workflow, medical estimation, workers' compensation estimation, and dispatch. *In re Owens-Illinois, Inc.*, 115 F.T.C. 179, 326-27 (1992) ("As buyer concentration within a product market increases, the benefits from cheating to capture a customer's business increase...."); 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.").

Lucrative, long-term contracts increase the incentive to compete and reduce any incentive to coordinate. (DX0013 ¶ 69 ("contract values range from hundreds of thousands to multiple millions of dollars").) The evidence will show that the potential revenue gain from colluding on estimatics and total loss is overwhelmed by the additional revenue for other products to be gained by competing. The simple mathematics underlying this conclusion create an overwhelming incentive not to collude in the first place, or to deviate from the terms in the second. Hence, collusion is highly improbable, and would be exceedingly difficult to establish or maintain in these businesses.

C. The Transaction Does Not Eliminate a Maverick

A merger can facilitate coordination if, by the merger, a "maverick" is eliminated. A maverick is a discounter whose presence consistently pushes prices downward. "An important consideration when analyzing possible anticompetitive effects is whether the acquisition would result in the elimination of a particularly aggressive competitor." *Arch Coal*, 329 F. Supp. 2d at 146 (quoting *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 47 (D.D.C. 2002) and *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1083 (D.D.C. 1997)). In contrast, "[t]he loss of a firm that does not behave as a maverick is unlikely to lead to increased coordination." *Id.*[20]

Here, the FTC does not even contend that CCC or Mitchell is a maverick. Certainly there is no evidence supporting such a claim. In fact, this proposed transaction may *create* one or more mavericks. As described in Section III above, the transaction will reduce the merged

[20] *See also* William J. Kolasky, Deputy Ass't Att'y Gen., Antitrust Div., Coordinated Effects in Merger Review: From Dead Frenchmen to Beautiful Minds and Mavericks, Remarks Before the ABA Section of Antitrust Law Spring Meeting (Apr. 24, 2002), *available at* www.usdoj.gov/atr/public/speeches/11050.htm; Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects under the Antitrust Laws*, 77 N.Y.U. L. Rev. 135 (2002).

company's overall cost base by over 20%, giving it a strong incentive to expand sales. *See Archer-Daniels-Midland*, 781 F. Supp. at 1423 ("The record reflects that there are significant differences in production costs…among firms in the industry," which "would make agreement on a single collusive price difficult to achieve"). And the transaction will enable Web-Est to compete for all customers at rates potentially 25-30% below those presently offered by the parties or Audatex.

D. Entry Precludes Coordination

As described in Section IV, the parties have eliminated the only arguable barrier to entry—the development of an estimating database—by relinquishing exclusivity on the Motor database and eliminating the restrictions on the Web-Est license. New entrants, especially a price-cutter like Web-Est, disrupt the usual competitive process, making coordinated interaction far more difficult. *Compare Occidental Petroleum*, 1986-1 Trade Cas. (CCH) ¶ 67,071, at 62,513 (where entry is easy, "collusive behavior will not be possible"), *with Elders Grain*, 868 F.2d at 905 ("[S]ince it takes three to nine years to design, build, and start operating a new mill . . . colluding sellers need not fear that any attempt to restrict output in order to drive up price will be promptly nullified by new production.").

VII. THE FTC HAS FAILED TO ESTABLISH A PROPER RELEVANT MARKET FOR TOTAL LOSS PRODUCTS AND IMPROPERLY IGNORES THE PRICE-CONSTRAINING EFFECTS OF "BOOKS"

To establish a prima facie case, the FTC has the burden to prove that the merger will cause an undue concentration in a properly defined market. *Baker Hughes*, 908 F.2d at 982-83; *Arch Coal*, 329 F. Supp. 2d at 119 ("The definition of the relevant market is necessary to identify that area of trade within which a defendant allegedly has acquired or will acquire an illegal monopolistic or oligopolistic position."). The FTC has not met its burden. The alleged product market—TLV software—is gerrymandered and inconsistent with marketplace reality. Customers have other practical solutions for total loss.

A. Insurance Companies Use a Variety of Products and Methods to Determine the Total Loss Value of a Vehicle

When an automobile is damaged, the insurance company decides whether to pay to repair the vehicle (a "partial loss") or compensate the owner for the vehicle's loss (a "total loss"). In the latter case, the insurer must compensate the policyholder for the total loss. The process for determining the vehicle's total loss value varies from insurer to insurer, and multiple methodologies and/or tools may be employed at any given time by each insurer.

Many insurers use the familiar "book" providers—NADA Appraisal Guides ("NADA"), the Kelley Blue Book, the Red Book, and the Black Book—whose reports are based on local or regional values. (DX0010 at 121-22; DX0003 at 43, 46; DX0008 at 29-30.) Despite the "book" nomenclature, these products are no longer limited to hard copy. They are available in several electronic formats, including online, and are updated frequently—daily in at least one case. (DX0003 at 43.)[21] Some insurers use total loss valuation (TLV) software products that are provided by firms such as CCC, Audatex, and Mitchell. These products analyze information regarding vehicles for sale in the local market to provide valuations. Insurers also may use a myriad of other providers, including service bureau organizations and research groups such as Autobid and VVS. Some insurers self-supply some or all of their total loss valuations by calling local used car dealers, reviewing local classified ads, or supplementing book valuations. (DX0008 at 97-98; DX0017 ¶ 13.)

Of the various methods used for calculating total loss value, insurance companies use the book products for a large percentage of claims. (DX0010 at 165; DX0008 at 95; DX0003 at 46.)

[21] DX0048 ("Black Book now publishes daily updates of our used vehicle valuation products.").

Indeed, "most insurance total losses are settled by book" (DX0003 at 46), yet the FTC excludes these products from the alleged relevant market. (Compl. ¶ 15; FTC Mem. 6, 12.)

B. The FTC Has Not Met Its Burden to Show That TLV Software 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. Substitution may occur even if the products have different features or "widely different prices." *Oracle Corp.*, 331 F. Supp. 2d at 1121. In this case, the FTC excludes products that are currently competing with both CCC and Mitchell.

For example, State Farm, the largest auto insurer in the country, uses NADA for much of its total loss business—with some regions of State Farm using NADA exclusively. (DX0010 at 126, 129; DX0049; DX0050.) Some of NADA's State Farm business actually came at the expense of CCC. (DX0008 at 118.) [redacted] Progressive, the third largest auto insurer, also uses book valuations, sometimes self-supplying additional research. [redacted] (DX0051; *see also* DX0018 ¶ 7; DX0010 at 126; DX0008 at 97-98, 245-46.) Likewise, Allstate (the second largest carrier) and American Family (the eleventh largest carrier) rely on the books for total loss valuations. (DX0060 at 29-30, 32-34.) The FTC fails to explain, as it must, 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 Areeda, *supra*, ¶ 562a, at 304 ("[A]ctual shifts between two products in response to—or even without—changes in their relative prices indicate a single market.").

Despite the evidence of direct competition, the FTC claims that book providers are not part of the relevant market because customers "generally" consider the books to be "inferior." (FTC Mem. 12.) This is obviously not true of State Farm, Progressive, Allstate, and American Family, which are four of the largest auto insurers. But simply because some customers may prefer one product over another does not mean the products are in separate antitrust markets. *See 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."). As demonstrated above, there are recent examples of insurers who switched from TLV software to book products.

Of the hundreds of insurance companies that purchase TLV software, the FTC offers generalized opinions from a handful that say they will not switch to books if the price of TLV software increased by a significant amount. (FTC Mem. 12 nn.34, 36.) But the existence of *some* customers who might not switch is beside the point. "[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); *see also SunGard*, 172 F. Supp. 2d at 191-92 (finding that the government had not met its burden to define a relevant market where it provided evidence that some customers would not switch, but failed to "to show whether this captive group [was] substantial enough"). Indeed, during its eight-month investigation the FTC contacted far more insurance companies than the handful it now relies on. The FTC's highly selective "cherry picking" of the few companies that support its market definition—like its miniscule sample of insurers regarding Audatex as a distant third-place supplier—proves little to nothing. *See SunGard*, 172 F. Supp. 2d at 192 ("The sampling of customer statements before the Court is minuscule when compared with the entire universe of defendants'. . . customers").

Moreover, rote recitations that a company will or may not switch are not enough to meet the FTC's burden; it 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."). The FTC also cites Dr. Hayes' report, which says that customers "prefer" TLV software over the books because the software enables "less costly" claims settlements. (DX0013 ¶ 36.) But Hayes relies on the same generic declarations, which provide no evidence of actual costs. (*Id.* ¶ 36 n.75.)[22] And more importantly, Hayes reversed course in his deposition, admitting that the insurance companies that use books may do so because books actually *reduce* the cost of settling claims. (DX0001 at 100-01.)[23] Of course, if Hayes had bothered to interview State Farm or Progressive, he would not need to speculate on why they made the decision to use books. (*Id.* at 92.)

Given the direct evidence of considerable actual competition and substitution between TLV software and book products, the declarations cited by the FTC from representatives of the book companies, who obviously would not want to have a more efficient competitor, are also unpersuasive. These declarations should be considered in light of pre-merger evidence showing that CCC considered the book providers to be "pervasive" competitors in the total loss market.

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[22] Hayes also says that TLV software is preferable because some states do not permit the use of books. (DX0013 ¶ 36.) But the majority of the FTC's state declarations specifically list book products, as well as service bureaus, as accepted resources for total loss valuations. (DX0019 ¶¶ 3-4; DX0020 ¶¶ 2-3; DX0021 ¶¶ 3-4; DX0052; DX0022 Exhibit C; DX0023.) And, even if the FTC were able to provide substantiation for its expert's claim, that evidence suggests only that insurance carriers may not be able to switch *all* of their total-loss business to books in response to a price increase of TLV software. It is the FTC's burden to show that this category "is substantial enough that a hypothetical monopolist would find it profitable to impose [a significant] increase in price." *SunGard*, 172 F. Supp. 2d at 192. Neither the FTC nor its expert has provided such evidence. In addition, the FTC does not allege, nor can it, that there is some kind of "submarket" for the few states with such regulations. CCC's and Mitchell's customers are national insurance carriers, and thus price discrimination is not a viable option. *See* IIA Areeda, *supra*, ¶ 533d, at 204.

[23] Indeed, this statement is consistent with other evidence suggesting that the cost of settling claims is no greater with NADA and very possibly less than with TLV software. (DX0054 ("nada is easy to settle with").)

(DX0055; DX0056.) *See* IIA Areeda, *supra*, ¶ 562a, at 305 ("[A] broad-market finding gains some support from *long-standing* documents indicating that *A* or *B* producers regard the other product as a close competitor." (emphasis added)).

C. Even Leaving Market Definition Aside, "Book" Products Impose Competitive Constraints on TLV Software Pricing

Even if the FTC could establish (which it cannot) that books are outside the relevant market, the evidence would nonetheless compel 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 Areeda, *supra*, ¶ 913a, at 64 (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 cannot avoid the competitive significance of the book products. The fact that State Farm and Progressive—two of the ten largest auto insurers in the country—use books in lieu of TLV software, and that CCC lost the State Farm contract to NADA, demonstrates that books are close substitutes and will constrain TLV prices, regardless of what market label the FTC attaches to them. *See Gillette*, 828 F. Supp. at 84 (finding that even competition with products outside the market would make a post-merger price increase unprofitable).

VIII. THE EQUITIES STRONGLY WEIGH IN FAVOR OF ALLOWING THE PROPOSED MERGER TO PROCEED

Because the FTC cannot make a sufficient showing of a likelihood of success on the merits, there is no presumption in favor of a preliminary injunction. Under such circumstances, "[e]quities alone would not justify the issuance of a preliminary injunction." *Owens-Illinois*, 681 F. Supp. at 52; *see also Arch Coal*, 329 F. Supp. 2d at 159; *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C. Cir. 1986).

In any case, the equities under these circumstances justify the denial of a preliminary injunction. For purposes of Section 13(b), only "public equities" that benefit consumers, rather than the private equities benefiting the parties themselves, can override the FTC's showing of serious questions on the merits. *Whole Foods*, 2008 WL 5101226, at *3 (opinion of Brown, J.). As noted above, *supra* Part III, the proposed merger in this case would result in truly extraordinary efficiencies that would significantly benefit consumers. Twenty percent cost reductions are virtually unprecedented in merger jurisprudence. More importantly, the merger will allow the parties to *double* the sum spent on product development. That obviously benefits customers and weighs heavily in favor of the merger.

A preliminary injunction, however, would doom the merger and deprive consumers of those benefits. For a variety of reasons, the parties would be forced to abandon the proposed merger if the FTC's motion is granted. Even on the most optimistic assumptions about the FTC's "fast track" procedures, administrative proceedings before the ALJ and the Commission could drag out for 13 months, and the parties simply cannot hold the transaction together that long. (12/16 Sun Tr. 134 (if the FTC did not reach an approval decision until "September or October" 2009, "[w]e would not be able to keep the company together that long".))[24] In the

[24] *Cf. 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"); *Exxon Corp.*, 636 F.2d at 1343 ("[T]he issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated.").

thirty years since Congress enacted Section 13(b), "no firm has continued to litigate a merger against the FTC after losing the preliminary injunction motion and its appeal, if any."[25]

The equities cutting in favor of a preliminary injunction, on the other hand, are modest. *See Arch Coal*, 329 F. Supp. 2d at 160 (expressing skepticism that "much harm would be incurred by denying the preliminary injunction" in part because of "the brief period (presumably less than a year) before FTC proceedings are completed"). Because the pro-competitive benefits to consumers would be lost permanently if it is enjoined, the equities weigh strongly in favor of allowing the merger to proceed.

IX. CONCLUSION

The FTC's case is premised largely on testimony from a biased competitor (Audatex) and a tiny, unrepresentative set of statements, much of it equivocal, from just two insurers (out of hundreds) and just three body shops (out of 45,000), statements that are contradicted by substantial evidence from insurers and repair shops demonstrating that the transaction will be pro-competitive. Indeed, even Audatex's own documents reveal that the transaction will be pro-competitive. The FTC shielded its economic expert from exposure to evidence from consumers who would have explained why the deal is pro-competitive, and Dr. Hayes did not seek it out, instead producing an analysis that rests on the slimmest of stacked decks. It ignores critical evidence concerning the effect of the merger on barriers to entry, proffers economic theories without factual support, and blatantly disregards the substantial cost savings available to the merging parties and customers. The markets at issue have been and will remain intensely competitive. The extraordinary relief sought by the FTC in its motion should be denied.

[25] 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, http://www.abanet.org/antitrust/source (forthcoming Dec. 2008).

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Dated: January 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2009, I electronically filed the foregoing pretrial 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:

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