IN 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**

PLAINTIFF FEDERAL TRADE COMMISSION'S REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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

WILLIAM BLUMENTHAL
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
SEAN HUGHTO
CECELIA WALDECK
ANGELIKE ANDRINOPOULOS MINA
KYLE ANDEER
Attorneys
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2008

Attorneys for Plaintiff

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The defendants concede that their merger is presumptively illegal.[1] They do not challenge the market share or concentration evidence in the Estimatics market. They quibble as to whether several fringe competitors should be included in the total loss valuation ("TLV") market.[2] However, that dispute has no material impact on the evidence of market shares or concentration.[3] As Aurora's counsel admitted at the initial status conference, the HHIs here are "very, very high."[4] The Court must determine whether the defendants have wholly rebutted the "serious, substantial" questions raised by the FTC's strong prima facie case in these two markets. The defendants have not.

The public interest standard of FTC Act Section 13(b) requires an assessment of both the FTC's likelihood of success on the merits in a plenary administrative trial, and the equities. As this Court recognized in its December 17, 2008 order, these factors are assessed on a sliding scale – thus, the stronger the FTC's initial case, the greater the burden on the defendants to show that the equities counter the presumption that the Court should enjoin the merger.[5] This merger would create a company with monopoly or near-monopoly power — between Redacted Redacted and Redacted Redacted of the Estimatics and TLV markets. "This creates, by a wide margin, a presumption that the merger will lessen competition." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2000).

Defendants counter that the Court should overlook their quest for market power, because they will make so much money as a result of the merger that the public will benefit from

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[1] Def. Mem. at 7, 11 (leading with affirmative defenses to concentration evidence).

[2] *Id.* at 30-34.

[3] PX 513 at 16; PX 548 at 7.

[4] Sched. Conf. Tr. 11.

[5] Dec. 17, 2008 Order at 2 (citing 15 U.S.C. § 53(b)). Aurora's counsel explicitly agreed that "the [13(b)] standard is clearly what it says in *Whole Foods*." Sched. Conf. Tr. 9 (Parker). Now the defendants appear to have shifted their position and suggest that the reliance by the FTC and this Court on that decision is "misplaced." Def. Mem. at 5 n.1; *but see id.* at 36. They cite a concurring statement to the *en banc* denial but do not address the correct statement of the law in Judge Kavanuagh's dissent in *Whole Foods*.

efficiencies.[6] This is incredible. As the D.C. Circuit has explained, although the Supreme Court has never sanctioned such a defense, no court has accepted efficiencies as a defense when, as here, the merger "would generate undue market share and increased concentration." *E.g., Heinz*, 246 F.3d at 721-22 (rejecting defense when the merged company would have 32.8% market share); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, at 1088-89 (D.D.C. 1997) (rejecting defense when defendants could not show they would pass through claimed efficiencies of $4.9 to $6.5 billion); *FTC v. Swedish Match N. Am., Inc.,* 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000) (rejecting defense in light of "undue market share" of 60%); 4A Phillip E. Areeda, et al., *Antitrust Law* ¶ 971f, at 44 (1998) (supporting defense but requiring "extraordinary" efficiencies where the "HHI is well above 1800 and the HHI increase is well above 100"); U.S. DOJ and FTC Horizontal Merger Guidelines § 4 (1992) ("Efficiencies almost never justify a merger to monopoly or near-monopoly.").

Parties "seeking to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers." *FTC v. University Health*, 938 F.2d 1206, 1223 (11th Cir. 1991) (rejecting defense in 5-4 merger); *see Heinz*, 246 F.3d at 721-22. Defendants cannot show that their proposed efficiencies are not speculative, are merger-specific, or will result in lower prices. Redacted Redacted Even when faced with more competition today than it would face after the merger, Redacted Redacted Redacted [7] No customers benefited. Nor

[6] Def. Mem .at 7-10.
[7] PX 412 at 30, 97.

are they likely to benefit when the merged firm has the lion's share of both markets and little incentive to compete harder than it does now. Most of the claimed efficiencies are, in any event, based solely on speculation that Redacted

Redacted [8]

Defendants' other arguments likewise fail to rebut the FTC's strong prima facie case. CCC and Mitchell have asserted since the initial status conference that a merger to only two major competitors in two markets is lawful because this industry is somehow "unique," in that all prices are "secret."[9] Undisputed evidence refutes this claim. As hundreds of documents, and sworn testimony, reveal, this industry is no different from any other in which vendors compete.[10] It is simply too hard for 45,000 repair shop customers and 350 insurance companies to keep prices secret. And it is certainly not hard for two large competitors (as would exist post-merger) to keep track of what one another are doing.

Indeed, insurance customers tell CCC, Mitchell, and Audatex generally what the competitors' prices are, and what they need to do to win business. Insurers typically deal with the three competitors in round one; in round two, customers narrow the field to two, and then to one.[11] In the repair facility segment of the Estimatics market, the three firms hand out list prices to customers. It is this competition that CCC and Mitchell believe should be reduced because we can trust the merged company to be generous with its increased profits.

Moreover, the merged firm will have substantial market power to limit competition unilaterally. In both markets, these companies differentiate themselves with their varied,

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[8] PX 411 at 53-54.
[9] Sched. Conf. Tr. 11.
[10] *See,* PX 239 at 23; PX 241 at 9; PX 411 at 12-49, 59-72; PXs 551, 542, 695, 697, 703, 506, 624, 696, 707, 717, 701, 699.
[11] PX 411 at 71-73.

bundled products, so that a significant number of customers have selected CCC and Mitchell as their first and second choices. The merger of these two will reduce that competition and give the post-merger CCC leverage to raise prices or refuse to compete for lower prices.

Against this backdrop of high concentration and reduced competition, defendants claim that Web-Est, a 10 to 12 person company, will expand to compete against a $1.4 billion, post-merger CCC-Mitchell, with more than 2,000 employees, and restrain its market power. Web-Est cannot possibly do so anytime soon, or ever. It took Mitchell, a huge company by comparison, many years and two failed attempts to gain just Redacted market share in TLV. There is no likelihood that Web-Est has some miraculous way to overcome serious barriers to entry and expansion that defendants' own documents repeatedly detail.

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Redacted That defendants have no answer to the loss of competition in TLV independently warrants injunctive relief.

The Court should ignore the defendants' threat to give up and walk away from the deal if the Court preliminarily enjoins the merger. Defendants have ready access to capital and have been negotiating this deal intermittently since Redacted.[12] Their purely private equity argument – which amounts to nothing more than a desire to start making more money, sooner – should carry "little weight." *Heinz*, 246 F.3d at 727 n.25.

Finally, defendants claim this case is built around Audatex, a competitor.[13] That is untrue. Redacted

Redacted

[12] PX 411 at 102.

[13] Def. Mem. at 3.

Redacted

Thus, the Court will hear testimony from all three firms that defendants' documents identify as the only significant players in the Estimatics and TLV markets. Redacted

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In reality, this case is about two large companies trying to seize Redacted to Redacted of two markets, to make more money by reducing competition. As *Heinz* emphasized, "no court has ever approved a merger to duopoly under similar circumstances." 246 F.3d at 717. Accordingly, we respectfully request that the Court enjoin the merger until it can be reviewed by the FTC in the administrative proceeding that is set to begin in March 2009.

ARGUMENT

I. The FTC Is Likely To Succeed on the Merits

The Commission demonstrates a likelihood of success on the merits if the evidence "has raised 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; *FTC v. Whole Foods Market, Inc.*, __ F.3d __, No. 07-5726, concurrence slip op. at 2 (D.C. Cir. Nov. 21, 2008) (Tatel, J., concurring).

This Court's December 17th order adopted the analytical framework set forth in *United States v. Baker Hughes*, 908 F.2d 981 (1990). Under the *Baker Hughes* burden-shifting framework, the FTC bears the burden of proof to demonstrate that the proposed merger would lead to "undue concentration in the market." *Id.* at 982. In this case, the defendants appear to concede the FTC has met its initial burden with respect to the Estimatics market. The question that now confronts this Court pursuant to *Baker Hughes* is whether defendants can rebut the presumption of illegality arising from the prima facie case. *Id.*

Unlike in *Baker Hughes*, the FTC disputes each and every element of the defendants' rebuttal case. *Cf. FTC v. Olin Corp.*, 986 F.2d 1295, 1305 (9th Cir. 1993) ("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."). Defendants make bald assertions that lack evidentiary support and that contradict both their contemporaneous documents and statements by their executives. Those assertions are also inconsistent with the testimony of insurers, repair facilities, former Mitchell employees, and others, and with the economic evidence. Defendants' conclusory statements and hyperbole are no substitute for evidence.

Ultimately, however, this Court need not resolve the merits of defendants' rebuttal case. As the Court has stated, it need only assess whether the FTC has raised "serious, substantial" questions, in light of the FTC's compelling prima facie case and the evidence presented by both sides on the defendants' rebuttal arguments. Dec. 17, 2008 Order at 3.

A. Defendants Concede Their Merger Is Presumptively Illegal

The defendants acknowledge the HHIs in this case are "very, very high."[14] Indeed, there is *no* challenge to the market definition, market shares, or concentration evidence in the Estimatics market. The merged entity, with a Redacted market share, will be Redacted the size of its only significant competitor. The two vendors that sell low-end Estimatics solutions to small repair facilities would have less than Redacted of that market. The post-merger HHI in the Estimatics market is off the charts – the merger would increase the HHI in Estimatics by Redacted to Redacted In

[14] Sched. Conf. Tr. 10-11.

light of this uncontested evidence, the merger is presumptively illegal. *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321 (1963); *FTC v. Cardinal Health, Inc.,* 12 F. Supp. 2d 34 (D.D.C. 1998).

As for the prima facie case in the TLV systems market, the only challenge mounted by the defendants is a quibble as to whether sellers of valuation "books" (which are not always in paper format) should be included in that market.[15] The argument for including "book" vendors conflicts with the parties' own documents, and with the testimony of insurers and other market participants. Indeed, the "book" vendors do not consider themselves competitors of CCC, Mitchell, or Audatex.[16] But more importantly, this quibbling over "books" is irrelevant.

Defendants' own documents show that more than Redacted of insurers use total loss software sold by one of the three companies.[17] This evidence, by the parties' own admission, suggests the "books" are a complement to, rather than a substitute for, TLV systems.[18] Indeed, CCC offers access to NADA data as an add-on to its TLV product.[19] To be sure, a handful of insurers may continue to use "books" in states that allow or encourage their use. But there is no evidence that "books" are a *competitive constraint* on the software products of CCC, Mitchell, or Audatex.

The evidence shows that the prices of TLV systems bear no relationship to the prices of valuation "books," and vice versa. Defendants' brief cites not a single competition in which they responded to prices offered by "book" vendors. CCC, Mitchell, and Audatex simply do not account for "books" in setting their prices. Redacted

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[15] Def. Mem. at 30-37.
[16] PX 17 ¶ 7; PX 15 ¶9; PX 19 ¶5; PX 29 ¶8.
[17] PX 513 at 16.
[18] PX 404 at 135-136.
[19] PX241 at 23.

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Redacted ”[21]

All of this evidence supports the FTC's TLV market definition. And the prima facie case for illegality in TLV, while not as overwhelming as in Estimatics, is nonetheless compelling. The HHI would increase by Redacted to Redacted — numbers that exceed those found by the D.C. Circuit to "create[], by a wide margin, a presumption that the merger w[ould] lessen competition." *Heinz*, 246 F.3d at 716 (merger would have given the new company 32.2% of the market and increased HHI by 510 to 4,775); *cf. FTC v. Arch Coal, Inc*, 329 F. Supp. 2d 109, 158 (2004) (HHI increase of 49 to 2,103 was "far from compelling," thus the prima facie case was "fairly weak."). The dispute over the TLV market definition has no practical impact. Including "book" vendors in the market has a *de minimis* effect on the enormous market shares and HHI.[22]

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

The Court can and, in our view, should grant a preliminary injunction based upon the FTC's overwhelming prima facie case alone, given defendants' failure to mount any *meaningful* challenge to the market definitions, market shares, or concentration statistics. The FTC knows of no instance in which a court has denied a preliminary injunction under Section 13(b) of the FTC Act in these circumstances. The cases cited by the defendants are all permanent injunction decisions entered after full trials on the merits.[23] The FTC is at the same time, however, prepared to contest all of defendants' rebuttal arguments.

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[20] PX 682 at 9.

[21] PX 548 at 7.

[22] *See* PX 513 at 16; PX 548 at 7.

[23] Def. Mem. at 11 n.4.

Market share and concentration statistics establish a presumption of harm and shift the burden of proof to the defendants to demonstrate that the presumption flowing from those statistics is somehow misleading or incorrect. *Baker Hughes*, 731 F. Supp. at 11. The strength of the FTC's prima facie case in the Estimatics and TLV markets makes defendants' burden especially heavy. *See Heinz*, 246 F.3d at 725; *Baker Hughes*, 908 F.2d at 991.

Defendants' flagship rebuttal argument is that the efficiencies resulting from this merger are "substantial" and "enormous."[24] They urge the Court to be the first to allow a presumptively unlawful merger based on a claim of efficiencies – and on a preliminary injunction record, no less. Their second rebuttal argument is that the merger will facilitate entry. Acknowledging that there is at least one significant barrier to entry today, the parties promise to facilitate new competition if allowed to merge.[25] Third, they ask the Court to ignore the presumption of illegality flowing from the compelling prima facie case in these two markets and find that two primary competitors is simply enough.[26]

The FTC is prepared to refute every point raised by defendants' rebuttal. Indeed, many of those points are refuted by their own contemporaneous business documents. The picture painted by the documents is corroborated by testimony from customers, market participants, former employees of the companies, and the FTC's expert economist, Dr. Hayes. This evidence confirms that the agency is likely to succeed on the merits in administrative proceedings and has gone far beyond raising "serious, substantial" questions.

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[24] Def. Mem. at 7-8.
[25] *Id.* at 12.
[26] *Id.* at 24-28.

1. Defendants' Efficiencies Claims Fail

The efficiencies defense, assuming it has any viability in a preliminary injunction setting, is wholly inappropriate here, given the "very, very high" concentration levels. *Swedish Match*, 131 F. Supp. 2d at 171; *Heinz*, 246 F.3d at 720; *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1084-85 (D. Del. 1990) (rejecting efficiency defense in merger to duopoly; because "there are no guarantees that these savings would be passed on to the consuming public") At a minimum, the Court must subject defendants' efficiencies claims to "rigorous analysis" and reject "mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721.

However, while defendants seek to be the first ever to prevail with this defense, and they tout "substantial" and "enormous" efficiencies,[27] there is nothing extraordinary or unprecedented about their claims or the facts. The case law is rife with similar failed claims of cost savings and efficiencies. *See, e.g., United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); *Staples,* 970 F. Supp. at 1089. Hyperbole aside, defendants fail to prove that their alleged efficiencies are: (1) verifiable, *see Staples,* 970 F. Supp at 1089; *University Health,* 938 F.2d at 1223; (2) not attributable to reduced output or quality, *see United States v. Rockford Mem'l Corp.*, 717 F. Supp. 251, 1290 (N.D. Ill. 1989); 4A Areeda et al., *Antitrust Law*, ¶ 974b3, at 64 (personnel cuts resulting from reduction in output are not efficiencies); (3) merger specific, *see Cardinal Health,* 12 F. Supp. 2d at 62-63; or (4) greater than the transaction's substantial anticompetitive effects. *See id.* at 63. Nor can they demonstrate that, with about Redacted of the market, they would be compelled to give up their cost savings to customers.

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[27] *Id.* at 8.

a. Cost Savings

Defendants' assertion that the merger will allow them to realize Redacted

Redacted is speculative at best.[28] Redacted

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Redacted[30] *Cf. Merger Guidelines* § 4 n. 37 ("Delayed benefits from efficiencies (due to delay in the achievement of, or the realization of customer benefits from, the efficiencies) will be given less weight because they are less proximate and more difficult to predict.").

It is an open question whether eliminating a product line (an output reduction) should be considered an "efficiency." Most economists would say no. But here, no one even knows when or if this will happen. Redacted

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[28] Def. Mem. at 7 (emphasis in original).

[29] DX 27 at 11; PX 39 at 61:14-62:5; 64:14-19.

[30] PX 411 at 54; *see* PX 755; PX 756 (Mitchell's Scott Kozak told The Hartford that any estimates of when defendants' combined platform would be available are "just best guesses" and that based on his experience in the industry "an initiative like this would take 5+ years from the requirements gathering phase to when the solution would be able to be implemented to users at a top carrier like the Hartford.").

[31] PX 411 at 119.

Platform consolidation and workforce reductions would not, moreover, be costless to the merged company or its customers. And Dr. Hayes's analysis shows that any savings that might accrue to a small number of repair facility customers who currently use both CCC and Mitchell Estimatics, and who might in the future need only one of those products, will be swamped by the costs of switching to the surviving platform.[32] Fewer than one in 30 repair facilities stand to realize any costs savings by licensing one fewer program.[33] On the other hand, at least a quarter of all repair facilities – 11,000 or more – would incur one-time switching costs if they were forced to migrate to a new platform.[34] A substantial number of insurance companies would likewise incur switching costs, which Mitchell estimates to be Redacted per insurance user.[35]

There is no guarantee that cost savings, if they are ever realized, will accrue to the benefit of consumers. *Cf. University Health*, 938 F.2d at 1222-23. Redacted
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Redacted [36] Indeed, there would be many interests vying for any cost savings post-merger. The merged company would be saddled with considerable debt, perhaps as much as Redacted. The more debt that is retired, the greater the payoff for Investcorp, Aurora Capital, Goldman Sachs, and Mr. Ramamurthy when the company is sold. History indicates that management will face considerable pressure to pay off that debt. Redacted Redacted
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Redacted [37]

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[32] PX1020 ¶ 11.
[33] PX 516 at 6.
[34] PX 635 at 18.
[35] PX 405 at 74-75.
[36] PX 405 at 74-75.
[37] PX 160 at 7 (CCC Consolidated Earning Statement); PX 412 at 94.

b. Innovation Claims

Courts have treated claims that a merger will facilitate new innovation and product development with a great deal of skepticism. *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 the 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."). Redacted

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Redacted [12] Reducing competition will diminish the incentive to innovate.

Nor is there any evidence that these promises of increased funding are merger-specific.

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[38] Def. Mem. at 8.
[39] PX 35 at 75:15-19.
[40] PX 405 at 70-71.
[41] Def. Mem. at 8.
[42] PX 405 at 233-37.

Redacted,[43] The demands of the shareholders are likely only to increase as the new, merged company takes on nearly $1 billion in debt.

2. Entry in the Estimatics Market Will Not be Timely, Likely, or Sufficient

Under the law, meaningful entry into Estimatics or TLV would require a vendor comparable in size and strength to the current competitors. Entry or expansion must be "timely, likely, and [of a] sufficient scale to deter or counteract" the concerns raised by a prima facie case. *FTC v. Chicago Bridge & Iron Co.*, 534 F.3d 410, 427-29 (5th Cir. 2008); *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 55 (D.D.C. 1998); *Chicago Bridge*, 534 F.3d at 429; *United States v. Visa USA, Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001); *Merger Guidelines* § 3.0 (entry must be "timely [within two years], likely, and sufficient in its magnitude, character and scope to deter or counteract the [anti]competitive effects of concern."). Thus, the defendants must show not only that entry *could* happen—although technical feasibility is a huge challenge here — but also that it probably *would* happen within two years, *and* at a sufficient scale, in response to a post-merger price increase. *See Cardinal Health,* 12 F. Supp. 2d at 56.

The defendants do not address that legal standard, much less apply it. Redacted

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Redacted These promises fall well short of the standards embraced by the courts and the Merger Guidelines.

An Estimatics database is *one* barrier to entry today. Redacted

Redacted

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[43] PX 39 at 198:13-17.

[44] Def. Mem. at 12.

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They suggest that post-merger, the parties will face a more competitive environment than they do today as one, two, or even more entrants flock to the Estimatics and total loss markets.[46] These claims are long on rhetoric but short on evidence. Redacted

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The poster child for the defendants' entry story is Web-Est. Defendants claim that Web-Est has already achieved "considerable success" and is poised to "compete effectively for all customers" after the merger of CCC and Mitchell.[48] This is just incorrect. Eric Seidel founded Web-Est with Mitchell's financial backing around the same time CCC and Mitchell announced their merger. Mitchell holds Redacted of Web-Est.[49] Web-Est represents an effort by Mitchell and Mr. Seidel to salvage an earlier investment in a failed Estimatics entrant, Focus-Write. Redacted

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Redacted The former assets of Focus Write – about Redacted repair facility customers[51] and Redacte employees[52] – form the core

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[45] *Id.* at 12, 14.

[46] The number appears to be growing. At the initial conference, CCC's counsel seemed less confident. "This may be a three to three merger. It may be a three to 2.8 merger." Sched. Conf. Tr. 24:2-24:3 (Herfort).

[47] PX 580-1.

[48] Def. Mem. at 12.

[49] PX 406 at 125.

[50] PX 1028 at 4.

[51] PX 1003 at 5.

[52] *Id.* at 33.

of Web-Est, which, like Focus-Write, is focused on the low-end of the repair shop segment of the Estimatics market.[53]

This is the little company that defendants claim "trumps" the established presumption of illegality. Defendants forecast that Web-Est will reach Redacted million in revenues in Redacted years.[54] Yet, CCC reported Redacted million in Estimatics revenues in 2007 alone; Mitchell reported Redacted million. Web-Est is simply not a credible threat today. Nor is it likely to be one five years from now, much less in two years, or at a sufficient scale, as required by the Merger Guidelines and current law. *See Chicago Bridge*, 534 F.3d at 29; *Merger Guidelines* § 3.0. Indeed, if Web-Est were an actual competitive threat, it would call into question the entire rationale of this merger: Why merge – or even try to retain more than 2,000 employees – if all that is needed to compete in the Estimatics market is a handful of employees, a million dollars, and a business plan?

The defendants' emphasis on the Estimatics database should not obscure the other barriers to entry in both Estimatics and TLV.[55] Redacted

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Redacted They simply note that courts in *other* cases have found ease of entry sufficient to ease competitive

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[53] Def. Mem. at 12.
[54] *Id.* at 12-13.
[55] *See* FTC Mem. at 19-22.
[56] PX 161 at 11, 23; PX 0583 at 27-28; PX 411 at 105-07; PX 560 at 27; PX 1029 at 1754 Redacted ; PX 1030 at 1819.
[57] PX 161 at 7; PX 573 at 9; PX 574 at 1. PX0607-12.

concerns. However, the Estimatics and TLV markets are very different from movie theaters in Nevada, *see United States v. Syufy Enterps.*, 903 F.2d 659 (9th Cir. 1990), or trash disposal in Texas. *See United States v. Waste Mgmt., Inc.*, 743 F.2d 976 (2d Cir. 1984).

Defendants acknowledge that the history of entry is significant.[58] However, their reading of history is very different from ours. The defendants take some liberty with the historical record when they identify "four" recent examples of "successful entry."[59] This assertion highlights their misunderstanding of the law, as it implies that the mere fact that a firm has sold Estimatics to someone, somewhere, makes it a successful entrant. That is erroneous.

Web-Est and Applied Computer Resources are the only two entrants identified by the defendants that still exist today. All "four" of the supposedly "successful entrants" were on the fringe of the Estimatics market and focused on small, independent repair facilities that have traditionally been underserved by the likes of CCC, Mitchell, and Audatex.[60] These smaller, cost-conscious customers do not require connectivity to the insurers or the other bells and whistles offered by the large vendors. This is distinction is reflected in the relative prices. For example, Crash-writeR, the Estimatics product sold by Applied Computer Resources, retails for $135 a month,[61] while Pathways, CCC's Estimatics product, is listed at about $350 a month per user.[62] Crash-writeR is used by fewer than 600 repair facilities; Pathways alone is used by more than 15,000.[63] These products are simply not competitive with one another.

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[58] Def. Mem. at 15; *see* FTC Mem. at 18.
[59] Web-Est and Focus-Write, two of the defendants "successful" entrants, are essentially the same company. The other two "recent" entrants have been selling Estimatics software to small, independent repair facilities since the early 1990s.
[60] PX 759.
[61] PX 760.
[62] PX 1407.
[63] PX 406; Def. Mem. at 15; PX 99 at 18.

Finally, the defendants suggest that examples of successful entry in other countries are probative.[64] However, anecdotes about entry in Brazil and elsewhere do little to inform the analysis here. In sum, the evidence on entry suggests that entry or expansion by fringe players is unlikely to exert any sort of competitive constraint in these markets. The defendants' evidence on entry falls well short of eliminating the presumption that flows from the FTC's compelling prima facie case in both Estimatics and TLV.

C. Defendants Cannot Show that Anticompetitive Effects Are Unlikely

The law, economic theory, the evidence, and common sense all suggest that "market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power." *Merger Guidelines* § 2.0. Supracompetitive pricing at monopolistic levels is a danger in a market with only two significant competitors. *Heinz,* 246 F.3d at 724 n. 23. Defendants must explain why this presumption of harm should not apply to either of these two markets. That inquiry is necessarily fact intensive and unsuited to resolution in an expedited proceeding such as this. This is particularly true, in that defendants' own documents – in addition to testimony from other market participants – contradict their contentions.[65]

1. The Likelihood of Coordination Is Significant in a Market with Only Two Significant Competitors

Tacit coordination "is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such

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[64] Def. Mem.at 16.

[65] *Compare* Def. Mem. at 23 Redacted
Redacted .") *with* PX 206 at 10Redacted
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oligopolistic market structures in which tacit coordination can occur." *Heinz*, 246 F.3d 725 (quoting 4 Areeda, *Antitrust Law* ¶ 901b2, at 9). 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 achieve profits above competitive levels." *Heinz*, 246 F.3d at 715 (citing *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986)); *see Brooke Group Ltd. v. Brown & Williamson*, 509 U.S. 209, 227 (1993); *University Health,* 938 F.2d at 1218 n.24 (high 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"). Concern regarding coordination is greatly heightened in a two-firm market. *See Heinz*, 246 F.3d at 725; *FTC v. PPG Indus., Inc.*, 628 F. Supp. 881, 885 & n.9 (D.D.C. 1986) (duopoly provides "a fertile medium for interdependent anticompetitive conduct").

Defendants assert that "the FTC must prove" that this merger will result in tacit coordination.[66] This is wrong on two counts. First, it misstates the law on coordination. The FTC cannot say, of course, that coordinated interaction *will* occur. The law asks whether the merger "will make it easier" to coordinate, *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989), and, thus, has the "potential for creating, enhancing, or facilitating the exercise of market power." *United States v. Archer-Daniels-Midland Co.,* 866 F.2d 242, 246 (8th Cir. 1988).

Second, and more fundamentally, defendants miscast the burden of proof. Under *Baker Hughes* and *Heinz*, the presumption of illegality shifts the burden to the defendants to prove that coordination is impossible, or at least unlikely, in a two-firm market. That burden is especially heavy in this preliminary setting. The defendants must demonstrate "structural barriers," unique

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[66] Def. Mem. at 24.

to these two markets, that are sufficient to defeat the "ordinary presumption of collusion in a merger to duopoly." *Heinz*, 246 F.3d at 725.

The defendants continue to insist that the pricing in these markets is "secret" and "opaque."[67] Indeed, this is the crux of their rebuttal on coordination. Defendants maintain that tacit coordination would, as a result, be impossible. They are wrong, both as a matter of fact and as a matter of law.[68] Factually, the claims of secrecy and opacity are contradicted by the evidence. The three vendors have faced each other for a number of years Redacted

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The defendants claim that "the number and identity of bidders cannot be easily predicted or discerned."[73] In a two-firm market, however, the identity of the competitor will be obvious. Indeed, vendors can obtain good information in a three-firm market. Any uncertainties on this score will be eliminated by this merger. Redacted

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[67] Def. Mem. at 25-26; Sched. Conf. Tr. 11-12.

[68] The defendants' reliance on *United States v. Archer-Daniels-Midland Co.,* 781 F.Supp. 1400, 1422 (S.D. Iowa 1991) for the proposition that "secrecy is the antithesis of successful collusion" is particularly ironic. Archer-Daniels-Midland ("ADM") settled claims that it had *fixed prices* for high fructose corn syrup ("HFCS"), the very product at issue in the case cited by the defendants, for $400 million. The HFCS market was the subject of a landmark ruling by Judge Posner holding that the price fixing claims should proceed to trial. *In re High Fructose Corn Syrup*, 295 F.3d 651 (7th Cir. 2002).

[69] *See, e.g.*, PX 404 at 123-24; PX 411 at 6, 74-75.

[70] *See, e.g.*, PX 411 at 13-14.

[71] See, e.g., PX 411 at 10 -11; PX 624.

[72] PX 411 at 10 -11.

[73] Def. Mem. at 26.

handful of competitive opportunities each year in the insurance segment. Redacted

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Nor does any evidence support defendants' claim that pricing in the repair facility segment of the Estimatics market is secret or opaque. All three vendors distribute price lists and price their products similarly.[76] *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.").

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Contrary to the defendants' assertions, post-merger coordination is not only possible but likely. *See Merger Guidelines* § 2.12 ("[I]f key information about specific transactions or individual price or output levels is available routinely to competitors, it may be difficult for a firm to deviate secretly."); *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 602 (7th Cir. 1986) ("[I]t is easier for two firms to collude without being detected than for three to do so."). The defendants imply that coordination requires *perfect* information. But the established law is to the contrary. The "terms of coordination may be imperfect and incomplete

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[74] PX 595; PX 701; PX 705; PX 706 PX071; PX 715; PX 695; PX 404 at 223.
[75] PX 716, PX 717.
[76] PX 411 at 49.
[77] PX 697, PX 703; PX 713.
[78] PX 742 at 8.

[and may] omit some market participants, omit some dimensions of competition, [or] omit some customers." *Merger Guidelines* §2.11. CCC-Mitchell and Audatex could, for example, reach an understanding based on "mutual trust and forbearance," to stop calling on each other's accounts. *Hospital Corp. of Am. v FTC,* 807 F.2d 1381, 1391 (7th Cir. 1986).

2. The Merged Firm Will Have Market Power To Raise Prices Unilaterally

"Unilateral effects" describes a the market power that can be exerted by a powerful firm, such as the post-merger CCC. Different unilateral effects theories apply depending on the nature of the competitive process. What all have in common is that the merged firm finds it in its unilateral self-interest to raise price, reduce output, or otherwise act anticompetitively. The leading antitrust treatise endorses four distinct unilateral effects theories:

> (a) creating a monopoly or dominant firm; (b) perpetuating a monopoly or dominant firm by eliminating a nascent rival; (c) giving one firm more secure control of its "niche" in a product-differentiated market; or (d) strengthening a firm's power to make noncompetitive bids that buyers will be unable to refuse.

4 Areeda, *Antitrust Law* ¶ 910.

The Merger Guidelines explain: "Unilateral competitive effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood of unilateral competitive effects. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition." *Merger Guidelines* § 2.2. The Guidelines distinguish two broad categories of firms, and the one relevant in this case is that in which "products are differentiated" and "individual sellers compete more directly with those rivals selling closer substitutes." *Id.* § 2.21. In a footnote, the Guidelines mention markets such as these, in which firms "are primarily distinguished by their relative advantages in serving different buyers or groups of buyers, and buyers negotiate individually with sellers." *Id.* n.21.

The defendants argue that unilateral effects theory has "no application to the CCC-Mitchell merger."[79] They are mistaken. The strength of the FTC's prima facie case, the market shares, and the high switching costs in these markets all suggest the merged entity will have the incentive and ability to unilaterally raise prices.[80] Defendants have admitted that they differentiate their products through bundling and product differentiation.[81] As Dr. Hayes points out through his Bertrand model, which is consistent with the Guidelines, when products are differentiated and customers select the merging parties as their first and second choices, the merged entity can exert market power to raise prices. *See Merger Guidelines* §§ 2.21, 2.211. With Redacted of the market and significant customers who prefer CCC or Mitchell as their first and second choices, the post-merger CCC-Mitchell will hold significant market power.

II. The Equities Strongly Favor Interim Relief

The defendants do not challenge any of the equities favoring a preliminary injunction in this case. Instead, they simply assert that their efficiency claims "obviously benefits customers" and thus the equities "weigh[] heavily in favor of the merger."[82] This is a novel claim indeed. It is unsupported by the law or by the evidence.

As discussed above, the claimed efficiencies suffer from a number of inadequacies. Foremost among the errors is the suggestion that efficiencies will "obviously" benefit customers. It is unlikely that any efficiencies or cost savings will be passed through to consumers. The merged company would likely be highly leveraged and its private equity ownership would likely

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[79] Def. Mem. at 17.
[80] PX 107 at 3 Redacted Redacted.
[81] *See, e.g.*, PX 412 at 31.
[82] Def. Mem. at 36.

press the management – some of whom would be investors in the company – to pay down debt as quickly as possible.

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Redacted The balance weighs heavily in favor of the Commission and the public's right to a competitive market.

III. Conclusion

The defendants' brief fails to rebut the FTC's case. Indeed, it raises serious and substantial questions about their merger that are best left for a full plenary trial on the merits before the Commission, following the entry of a preliminary injunction by this Court.

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[83] PX 411 at 105 ("Q: Redacted

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January 7, 2009

Respectfully submitted,

By: /s/ J. Robert Robertson

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
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

WILLIAM BLUMENTHAL
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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 7th day of January, 2009, I filed the attached document via CM/ECF with the clerk of the court.

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

John A. Herfort
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166-0193
Jherfort@gibsondunn.com

Counsel for Defendant CCC Holdings, Inc.

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

Counsel for Defendant Aurora Equity Partners III L.P.

/s/ J. Robert Robertson
J.Robert Robertson
Counsel for Plaintiff
Federal Trade Commission

APPENDIX A

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PX0404	Mitchell (Brungger) Investigational Hearing Transcript			FTC
PX0405	CCC (Ramamurthy) Investigational Hearing Transcript			FTC
PX0406	Web Est (Seidel) Investigational Hearing Transcript			FTC
PX0411	Mitchell (Sun) Deposition Transcript			FTC
PX0412	CCC (Ramamurthy) DepositionTranscript			FTC
PX0506	9/29/06 Email from Brungger, Baird, Taylor, et.al., re: Emailing: collateral_estimate_check.pdf	00013538	00013538	Aurora Equity Partners III L.P.
PX0513	November 27, 2007, Mitchell, 2008 APD Outlook	00007791	00007815	Aurora Equity Partners III L.P.
PX0516	DRAFT! Mitchell - Auto Physical Damage, Key Merger Points, Aurora Advisory Board - New York, April 29, 2008	00003975	00003989	Aurora Equity Partners III L.P.
PX0542	04/21/08 Email from Sun to Lindner re: Hartford Update	00078234	00078234	Aurora Equity Partners III L.P.
PX0548	December 20, 2006, Joint JDPA/Mitchell meeting	00193126	00193149	Aurora Equity Partners III L.P.
PX0551	09/16/07 Email from Julius to Sun, Benson, Marc, et.al., re: Mid America Pricing Matrix Benson.xls	00053175	00053204	Aurora Equity Partners III L.P.
PX0560	Mitchell International, Inc. Confidental Information Memorandum, July 2004	00044585	00044643	Aurora Equity Partners III L.P.
PX0573	Mitchell Company Overview	00032128	00032147	Aurora Equity Partners III L.P.

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