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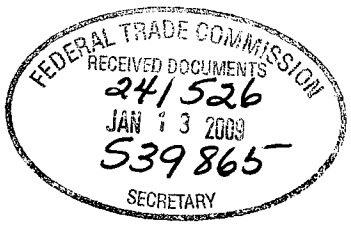

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of CCC HOLDINGS INC. and AURORA EQUITY PARTNERS III L.P., Respondents.	Docket No. 9334 PUBLIC

RESPONDENTS' MOTION FOR STAY OF ADMINISTRATIVE PROCEEDINGS

Pursuant to Rule 3.51(a), 16 C.F.R. § 3.51(a), Respondents CCC Holdings Inc. and Aurora Equity Partners III L.P. hereby move for a stay of administrative proceedings until February 20, 2009. Rule 3.51(a) provides that "[t]he ALJ may stay the administrative proceeding until resolution of the collateral federal court proceeding." A brief stay of Part 3 proceedings during the pendency of the Commission's motion for a preliminary injunction in federal court is warranted because the resolution of that motion will substantially affect the outcome of these proceedings.

The Federal Trade Commission has filed a motion in the United States District Court for the District of Columbia seeking a preliminary injunction under Section 13(b) of the FTC Act against the proposed merger between CCC Information Services Inc. ("CCC") and Mitchell International, Inc. ("Mitchell").[1] On December 5, 2008, the District Court entered a scheduling

[1] Mitchell is owned principally by Respondent Aurora Equity Partners III L.P.

order providing for expedited discovery, opening statements on January 5, 2009, and a six-day evidentiary hearing commencing on January 8, 2009, continuing on January 8, 9, 12, 21, 22, and concluding on January 23, 2009. Judge Collyer explained that the evidentiary hearing is necessary to conduct "an individualized analysis of these particular markets to determine whether the presumption of illegality that accompanies a merger in a highly concentrated market is likely to hold true in this case." Dec. 17, 2008 Order, at 6 (dkt. #40), No. 08-cv-2043 (copy attached as Exh. A).

A stay of administrative proceedings is warranted during the pendency of the motion for a preliminary injunction and the resolution of any motions for a stay or other emergency relief in the D.C. Circuit following the District Court's ruling. A brief delay in these Part 3 proceedings makes sense under the circumstances because, regardless of the outcome, the District Court's decision and the outcome of any emergency applications in the D.C. Circuit will strongly affect the outcome of this matter. And a stay until February 20 would not materially delay Part 3 proceedings because the substantial discovery and the already scheduled evidentiary hearing in the District Court will enable the parties to move swiftly after that date.

If there is a preliminary injunction in the federal courts, Respondents will be forced to abandon the merger. This is a case, like many in "in the acquisition and merger context," in which preliminary injunctive relief will "prevent the transaction from ever being consummated." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980). Even under "fast track" procedures, the Commission may not make a final decision for 13 months, and CCC and Mitchell simply cannot hold the transaction together that long. As Mitchell's President and CEO, Alex Sun, has explained in deposition, if the Commission were unable to make a final decision approving the merger before "September or October" of 2009, "[w]e would not be able to keep the company

together that long". (12/16 Sun Tr. 134.) That position is hardly unusual. In the 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." 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, *available at* http://www.abanet.org/antitrust/at-source/08/12/Dec08-Jones12-22F.pdf (Dec. 2008).

If, on the other hand, the District Court denies the FTC's motion for a preliminary injunction, then Complaint Counsel will wish to carefully consider the court's reasoning before proceeding before the ALJ and the Commission. It can be assumed that the basis for the court's decision may cause Complaint Counsel to significantly modify its approach or elect to withdraw the complaint. Indeed, it is very rare if ever in recent years that the FTC has proceeded with a Part 3 proceeding where it has lost a merger challenge under Section 13(b) in federal court, such recent cases as *Arch Coal* and *Western Refining* being prime examples. It is true that, in the *Whole Foods* case, the Commission appealed from a denial of a preliminary injunction by the district court, and obtained a remand to consider the equities and what if any relief should be ordered in the circumstances. *See FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008). But even in that case, the Part 3 proceedings were put off for more than a year during the pendency of the preliminary injunction hearing in district court. *See* Order of Aug. 7, 2007, *Whole Foods*, No. 9324, at 1 ("In light of the pendency of the federal court proceedings, the Commission, as a matter of discretion, has determined to stay these proceedings pursuant to Rule 3.51, 16 C.F.R § 3.51."); order of Aug. 8, 2008, *Whole Foods*, No. 9324, at 1 (lifting stay).

What Respondents seek here is a brief postponement of the Part 3 proceedings, including implementation of the proposed scheduling order, for approximately a month and two weeks so

that the parties may stop, look and listen to the results of the district court litigation and determine whether further action is genuinely necessary—and in the case of the FTC, in the public interest—or whether it makes better sense, given what the district court has determined, to call a halt to the matter.

A stay of proceedings until February 20, 2009, would not materially delay Part 3 proceedings. That is because the parties already will have completed significant discovery and an evidentiary hearing in the district court, and that work likely will be usable to a significant extent in the Part 3 proceedings. For example, many of the tasks set for January and February 2009 in the draft scheduling order—exchanging witness lists, issuing document requests, and filing expert witness reports—already have been completed in the district court. Because both parties can draw upon that work, in the event they elect to move forward after the district court proceedings, they will be able to accommodate an expeditious schedule after February 20.

In short, although it is critical to see where matters stand after the resolution of the case in the federal district court and any emergency proceedings in the D.C. Circuit, it appears reasonably likely that in the event that Part 3 proceedings had to occur (which we doubt, whether or not Respondents win or lose in the federal court proceeding), the work contemplated in the draft Scheduling Order could be accomplished no later six or seven weeks after the dates utilized in that draft. That is not a significant delay, particularly compared with the delay of more than a year in *Whole Foods*. There is no basis for concluding that it will prejudice the FTC; indeed, in a time of tight budgets which we all must recognize, it will save both the Government and Respondents significant expenses—a factor that, given the relatively brief postponement sought, further counsels in favor of Respondents' proposal.

Respectfully submitted,

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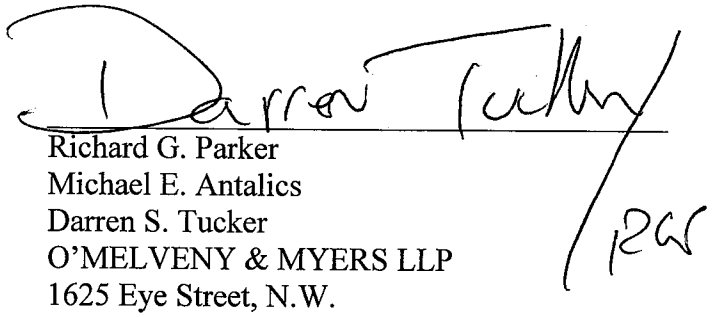

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AURORA EQUITY PARTNERS III, L.P.

Dated: January 2, 2009

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of CCC HOLDINGS INC. and AURORA EQUITY PARTNERS III L.P., Respondents.	)	Docket No. 9334

(PROPOSED) ORDER STAYING ADMINISTRATIVE PROCEEDINGS

On November 25, 2008, the Commission issued the complaint in this administrative action. On November 28, 2008, the Commission filed a complaint and motions for a temporary restraining order and a preliminary injunction against Respondents in the United States District Court for the District of Columbia. On December 5, 2008, the District Court entered a scheduling order providing for expedited discovery and an evidentiary hearing in January 2009.

In light of the pendency of the federal court proceedings, the Administrative Law Judge has determined to stay these proceedings pursuant to Rule 3.51(a), 16 C.F.R § 3.51(a).

Accordingly,

IT IS ORDERED THAT this administrative proceeding is stayed until February 20, 2009, pending proceedings in the collateral federal district court case (Case Number 08-cv-2043-RMC).

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: _____

CERTIFICATION

Pursuant to Rule 4.2(c)(3), 16 C.F.R. § 4.2(c)(3), I hereby certify that the electronic version of this motion is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by first-class mail.

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Dated: January 2, 2009

CERTIFICATE OF SERVICE

Pursuant to Rule 4.4(c), 16 C.F.R. § 4.4(c), I hereby certify that on January 2, 2009, I filed an original and two paper copies of the foregoing Respondents' Motion for Stay of Administrative Proceedings with the Office of the Secretary of the Federal Trade Commission, Room H-135, 600 Pennsylvania Avenue, NW, Washington, DC 20580, emailed a copy of the foregoing to secretary@ftc.gov, and served paper copies on the following individuals by first-class mail:

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Secretary of the Commission
Federal Trade Commission
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Room H-172
Washington, D.C. 20580

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
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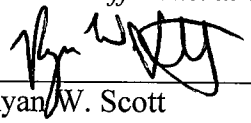

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Dated: January 2, 2009

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 08-2043 (RMC)**
	)	
CCC HOLDINGS INC., *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

On November 26, 2008, the Federal Trade Commission filed a Complaint pursuant to section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and section 16 of the Clayton Act, 15 U.S.C. § 26, for a temporary restraining order and preliminary injunction enjoining Defendants CCC Holdings Inc. ("CCC Holdings") and Aurora Equity Partners III L.P. ("Aurora") from effecting a merger between their respective subsidiaries, CCC Information Services, Inc. ("CCC") and Mitchell International, Inc. ("Mitchell"), pending the outcome of an administrative proceeding with the FTC. CCC and Mitchell are two of the largest companies engaged in the sale of computer software used by automobile repair shops and insurance companies to estimate collision repair costs ("Estimatics") and total loss valuation ("TLV") for cars and trucks in the United States. According to the FTC, there is only one other significant competitor in these markets – Audatex. *See* Compl. [Dkt. # 1] ¶¶ 19-20. The FTC asserts that it has "reason to believe" that the proposed merger between CCC and Mitchell violates section 7 of the Clayton Act, 15 U.S.C. § 18, and section 5 of the FTC Act, 15 U.S.C. § 45, by substantially reducing competition in one or more lines of commerce. *See* Compl. ¶ 14. Section 7 of the Clayton Act prohibits mergers or acquisitions "the

effect of [which] may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." 15 U.S.C. § 18.

The question presently before the Court is whether the Court must hold an evidentiary hearing to determine whether it should issue a preliminary injunction enjoining the merger in order to preserve the *status quo* pending the outcome of the administrative proceeding that has been initiated by the FTC. Section 13(b) of the FTC Act provides that a court shall issue a temporary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). The Court must balance these considerations on a sliding scale. *FTC v. Whole Foods Market, Inc.*, No. 07-5276, slip op. at 7-8 (D.C. Cir. Nov. 21, 2008) (Brown, J.) (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001)); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989)). Thus, "[a] greater likelihood of the FTC's success will militate for a preliminary injunction unless particularly strong equities favor the merging parties." *Whole Foods*, slip op. at 8 (Brown, J.).

The equities will usually weigh in favor of the FTC because "'the public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting" section 13(b). *Id.* (quoting *Heinz*, 246 F.3d at 726). Therefore, the FTC will usually be able to obtain a preliminary injunction if it shows a likelihood of success on the merits. *Whole Foods*, slip op. at 8 (Brown, J.). If the FTC meets its burden of showing that it is likely to succeed on the merits, it "creates a presumption in favor of preliminary injunctive relief," *Heinz*, 246 F.3d at 726, which the merging parties may rebut by showing that, contrary to traditional antitrust theory, the public equities weigh in favor of the merger. *See Whole Foods*, slip op. at 8 (Brown, J.); *see also*

FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 160 (D.D.C. 2004); *cf. Heinz*, 246 F.3d at 727 n.25 (noting that private equities are afforded little weight in section 13(b) cases). If the merging parties are able to make such a showing, the FTC would be required to show a greater likelihood of success on the merits. *Whole Foods*, slip op. at 8 (Brown, J.) (citing *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1087 (D.C. Cir. 1981)).[1]

"The FTC is not required to establish that the proposed merger would in fact violate section 7 of the Clayton Act" in order to demonstrate a likelihood of success on the merits. *Heinz*, 246 F.3d at 714. Rather, the burden of showing likelihood of success on the merits is met if the Commission 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 (internal citations omitted); *see also Whole Foods*, slip op. at 2 (Brown, J); slip op. at 2, 16 (Tatel, J., concurring).

In *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990), the D.C. Circuit adopted an analytical approach to section 7 cases on the merits which has been followed in subsequent Section 13(b) cases. *See, e.g., Heinz*, 246 F.3d at 715; *Arch Coal*, 329 F. Supp. 2d at 116. First, to meet its initial burden, the government must show that the proposed merger would lead to "undue concentration in the market for a particular product in a particular geographic area." *Baker Hughes*, 908 F.2d at 982. Such a showing creates a "'presumption' that the merger will substantially

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[1] Because it appears that the testimony that would be proffered at the evidentiary hearing would primarily touch on the likelihood of success rather than the equities, the Court will focus its analysis here on whether the presentation of evidence and testimony will aid the Court in determining whether the FTC is likely to succeed on the merits.

lessen competition." *Id.* Upon such a showing, the burden shifts to the defendants to rebut this presumption with evidence that "'shows that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)) (alterations in original). If the defendants succeed in rebutting the presumption that the merger will lessen competition, "the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Baker Hughes*, 908 F.2d at 983.

A *prima facie* Section 7 case "rests on defining a market and showing undue concentration in that market." *Whole Foods*, slip op. at 11 (Brown, J.) (citing *Baker Hughes*, 908 F.2d at 982-83). The standard measure for market concentration is the Herfindahl-Hirschmann Index ("HHI"). *See Heinz*, 246 F.3d at 716. Under the Federal Trade Commission and U.S. Department of Justice Horizontal Merger Guidelines, a market with a post-merger HHI above 1800 is considered "highly concentrated," and mergers that increase the HHI in such a market by more than 100 points "are presumed . . . likely to create or enhance market power or facilitate its exercise." *Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines* § 1.51 (1992), *as revised* (1997). Although the Merger Guidelines are not binding on the Court, they provide a "useful illustration of the application of the HHI." *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986). Moreover, the D.C. Circuit explained in *Heinz* that a merger to duopoly which increased the premerger HHI of 4,775 by 510 points "create[d], by a wide margin, a presumption that the merger w[ould] lessen competition" in the relevant market.

The two markets affected by the proposed merger in this case are Estimatics and TLV

software products for domestic automobiles sold by U.S. companies.[2] According to the FTC, the premerger HHI currently exceeds 3,600 for the Estimatics market and 4,900 for the TLV market. It calculates that the merger would raise the HHI in the Estimatics market to 5,685 and in the TLV market to 5,460. As the D.C. Circuit has previously noted, "no court has ever approved a merger to duopoly under similar circumstances." *Heinz*, 246 F.3d at 717. Although Defendants do not necessarily agree with the FTC as to the precise HHI calculations, they concede that the post-merger HHIs for these markets would be very high. However, an extraordinarily high HHI that "is certain to establish a *prima facie* case" of a Section 7 violation does not complete the inquiry. *Heinz*, 246 F.3d at 717.

While "statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are . . . the primary index of market power[,] . . . only a further examination of the particular market — its structure, history and probable market — can provide the appropriate setting for judging the probable anticompetitive effect of [a] merger." *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 322 n.38 (1962). In order to adequately address these factors, "the merging parties are entitled to oppose a [Section 13(b)] preliminary injunction with their own evidence, and that evidence may force the FTC to respond with a more substantial showing" of the merger's probable anticompetitive effects. *Whole Foods*, slip op. at 9 (Brown, J.). To meet their burden of rebutting the likely presumption against the merger, the Defendants have advised the Court that, if permitted, they would present evidence that, *inter alia*, there are low barriers to entry into

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[2] The FTC argues that the relevant geographic market for Estimatics and TLV products is "the world, because, theoretically, software can be produced almost anywhere." Pl.'s Mot. for Temp. Restraining Order & Prelim. Inj. at 12. However, the FTC concedes that Defendants do not consider any foreign suppliers of Estimatics or TLV software when assessing their competition. *Id.*

these markets, the merger will create efficiencies, and the bidding process for Estimatics and TLV products prevents coordination among competitors. They argue that this evidence will overcome the presumption of illegality that would follow if the FTC's definition of the relevant markets is correct. The Defendants must be permitted to present their evidence so the Court may assess the merger's probable *actual* — not merely theoretical — effects on these "particular market[s]." *Brown Shoe*, 370 U.S. at 322 n.38; *see also Arch Coal*, 329 F. Supp. 2d at 116-17 (explaining that "antitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future"). This conclusion is bolstered by the fact that the courts in this Circuit have routinely held evidentiary hearings in Section 13(b) cases even when the HHI in the relevant market was significantly higher than 1800. *See, e.g.*, *Heinz*, 246 F.3d at 712, 716; *Arch Coal*, 329 F. Supp. 2d at 114, 128-29. That the HHIs in the Estimatics and TLV markets may be higher than in any previous merger to duopoly does not obviate the need for an individualized analysis of these particular markets to determine whether the presumption of illegality that accompanies a merger in a highly concentrated market is likely to hold true in this case. Accordingly, it is hereby

ORDERED that the evidentiary hearing currently scheduled to commence on January 8, 2009, shall proceed as scheduled. Opening statements shall be delivered on January 5, 2009 at 9:30 a.m.

SO ORDERED.

DATE: December 17, 2008

/s/
ROSEMARY M. COLLYER
United States District Judge