ORIGINAL

order providing for expedited discovery, opening statements on January 5, 2009, and a six-day

concluding on January 23, 2009. Judge Collyer explained that the evidentiary hearing is

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 district court preliminary injunction [redacted]

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

[redacted]

A stay of proceedings until February 20, 2000 [redacted]

[redacted]

proceedings. That is because the parties already will have completed significant discovery and

[redacted]

Respectfully submitted,

John A. Herfort
Stacey Anne Mahoney
[redacted]

Richard G. Parker
Michael E. Antalics

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

ORDERED:

[redacted]

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.

[redacted]

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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 [redacted] NW, Washington, DC 20580 [redacted]

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

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 [redacted]

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

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 [redacted] 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 [redacted] 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

lessen competition." *Id.* Upon such a showing, the burden shifts [illegible]

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 [redacted]

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.

probable *actual* — not merely theoretical — effects on these "particular market[s]." *Brown Shoe*