File No.: CT-2011-008
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COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended.

AND IN THE MATTER of an Application by the Used Car Dealers Association of Ontario under section 75 of the *Competition Act*.

BETWEEN:

USED CAR DEALERS ASSOCIATION OF ONTARIO

Applicant

- and -

INSURANCE BUREAU OF CANADA

Respondent

REPLY SUBMISSIONS OF THE APPLICANT PURSUANT TO SECTION 39 OF THE *COMPETITION TRIBUNAL RULES*

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REPLY SUBMISSIONS OF THE APPLICANT
PURSUANT TO SECTION 39 OF THE *COMPETITION TRIBUNAL RULES*

I. Overview

1. UCDA submits this Reply to the Tribunal to respond to certain of the assertions made by IBC in its Response submissions and, in so doing, to focus and clarify the arguments before the Tribunal on this application.

2. The key theme of IBC's Response is that the Tribunal should not exercise its discretion to make an order under section 75 of the *Competition Act* because certain insurers have not consented to UCDA receiving access to the data which underlies IBC's Web Claims Search application, the product for which supply is sought in this case. As this Reply will demonstrate, that argument is fatally flawed as it:

   (a) ignores the fact that the legal agreements between the parties explicitly state that IBC owns the data in question, thereby negating the need for insurers' consents;

   (b) confuses use of the Web Claims Search application, the product at issue in this proceeding, with access to Automobile Statistical Plan ("ASP") data, a separate product not at issue in this proceeding;

   (c) ignores the fact that the data underlying the Web Claims Search application is provided by insurers pursuant to a statutory reporting obligation, and as such is not subject to their ongoing consent or control; and

   (d) overlooks the inherent power of the Tribunal to make orders affecting third parties in addition to the respondent in a proceeding.

3. IBC further suggests that an order to resume supply to UCDA should not issue as IBC's decision to terminate its longstanding relationship with UCDA was made with IBC's "best business judgment". However, a supplier's "business judgment" is **not** an element of section 75 of the *Act*, nor should it be — otherwise any anti-competitive refusal to deal could be justified on this highly subjective and self-serving basis.

4. IBC also argues that it has legal and reputational concerns that should preclude the granting of an order under section 75. These arguments are not relevant to the requisite analysis under section 75. In any event, they have been over-stated, and are fully addressed by UCDA in this Reply.

5. IBC suggests that flaws in the functionality of the Web Claims Search application should prevent the Tribunal from issuing a remedial order. These claims have also been overstated, particularly given that IBC continues to supply this product to numerous other parties. In more than 13 years and over two million Auto Check™ searches, UCDA has never received a dealer complaint regarding the quality or accuracy of the Auto Check™ service. Furthermore, prior to terminating UCDA's membership, IBC had never raised such concerns.

6. Finally, IBC also briefly contests UCDA's ability to satisfy the requisite elements of section 75 of the *Act*. As this Reply will also demonstrate, each element of section 75 is clearly made out in this case.

II. Responses To The Material Facts Cited By IBC In Its Response

7. UCDA denies the allegations set out in paragraphs 10, 13(b), 13(c), 13(d), 13(g), 15-16, 18, 21, 30, 35, 49, 54-55, 57-59, and 65-67 of IBC's Response.

8. UCDA has no knowledge of the allegations set out in paragraphs 13(a), 13(f), 17, 19-20, 22-29, 31-34, 36-38, 42-46, 50, 52, 61-64, and 68-69 of IBC's Response.

9. Importantly, IBC has dealt at length with matters that do not relate to the application before the Tribunal. In particular, UCDA notes that the allegations set out in paragraphs 13(d)-13(g), 30-38, 56-61, and 67-68 of IBC's Response relate exclusively to ASP data, a product not in issue in these proceedings.

10. UCDA admits the facts set out in paragraphs 8, 9, 11, 12, 39, 40, 41, 47, 51, and 53 of IBC's Response.

III. Responses To The Grounds On Which IBC Opposes The Application

11. In addition to its arguments on the test to be met under section 75 of the *Act*, IBC raises several additional issues intended to sway the Tribunal from ordering a continuation of the 13-year supply relationship between the parties. For greater clarity, UCDA has organized and will respond to these arguments as follows:

- Insurer consents are not relevant to the relief sought in this application.
- Even if such consents were relevant, the underlying data is collected by IBC only as agent for the province of Ontario and the insurers do not own or control the data.
- Even if insurer consents were relevant, the Tribunal has the power to make orders affecting the rights of third parties, and has frequently done so.
- Any references to IBC's "business judgment" are self-serving and superfluous to the required analysis under section 75.
- There are no legal and reputational concerns risks to IBC as it is merely a compiler of data, and the ultimate product at issue is marketed and provided by UCDA — not IBC — to its motor vehicle dealer members.
- The functionality issues raised by IBC in respect of the Web Claims Search application have been overstated, particularly in respect of a product that IBC continues to market, and in any event are irrelevant to this application.

(a) Insurer Consents Are Not Relevant To The Relief Sought In This Application

12. In the first paragraph of its Response, IBC suggests that the Tribunal cannot issue a remedial order in this case as "IBC does not own the data that UCDA seeks to access." Yet both of the two principal documents defining the relationship between UCDA and IBC — the 1997 *Associate Member Vehicle Information Agreement* (at paragraph 2(f)) and the 2006 *Access Agreement* (at paragraph 2.2) — explicitly state that IBC has title to the vehicle accident history information sought by UCDA. IBC's present assertions that it cannot be the subject of a Tribunal order as it is not the owner of the underlying data strike UCDA as entirely self-serving given the contrary provisions of these documents, both of which were drafted by IBC.

13. In any event, UCDA submits that insurer consents are entirely irrelevant as this application concerns the Web Claims Search application. IBC acknowledges in numerous places in its Response that insurer consents have not been required in respect of the Web Claims Search

application and **only relate to ASP data** (see, *e.g.*, paragraphs 2(b), 13(g), 32, 48, 50, 51, 54, 56, 59, and 71(c)). This is consistent with the trade terms throughout the 13-year course of dealings between the parties: at no time during the supply relationship did IBC ever require any insurer consents for UCDA to use the Web Claims Search application.

14. By raising the consent issue on this application, which seeks only reinstatement of supply of the Web Claims Search application, IBC continues to invoke the "straw man" fallacy and substitute arguments that may relate to another product (*i.e.*, ASP data) not in issue in this proceeding. UCDA submits that the issue of insurer consents is entirely irrelevant to the issues before the Tribunal on this application.

(b) Even If Insurer Consents Were Relevant To This Application, Insurers Have No Rights Over The Underlying Data At Issue In This Case

15. Even if the subject of insurer consents were relevant to this application (which is denied for the reasons set out in Part (a) above), no such consents would be required. Such data has been disclosed pursuant to a statutory reporting obligation under the Ontario *Insurance Act*, and is not owned or controlled by the insurers.

16. As admitted by IBC, in paragraph 13(g) of its Response, IBC only holds the vehicle accident history data that is obtained through its Web Claims Search application in its role as a contractual service provider to the General Insurance Statistical Agency ("GISA"). GISA, in turn, received the data as an "agency […] designated to compile the data" on behalf of the Financial Services Commission of Ontario ("FSCO") under section 101(2) of the *Insurance Act*. The data was originally provided to FSCO by insurers carrying on business in Ontario pursuant to a statutory obligation to do so, under section 101.1 of the *Insurance Act*.

17. Section 101.1 of the *Insurance Act* stipulates that "[e]very **insurer shall provide the Superintendent** or an **agency designated by the Superintendent** with information prescribed by the regulations about applications for insurance and **claims made to the insurer** at such times and subject to such conditions as are prescribed by the regulations." (emphasis added) Once such data is provided, it is controlled by FSCO.

18. GISA's own policies acknowledge this. In its *Policy on Access to Information and Protection of Privacy*, GISA states (at page 1):

> The data collected by GISA or its service provider for its participating jurisdictions, and including without limitation any and all Exhibits, Standard Reports, Ad Hoc Reports, information and documents derived from such data (collectively, the "Member Owned Information"), **are the respective property of GISA's participating jurisdictions**. The Member Owned Information of each participating jurisdiction is **subject to the provincial laws of such jurisdiction** including any freedom of information and privacy legislation of such province. (emphasis added)

19. Ontario is a "participating jurisdiction", and has appointed GISA as its statistical agent. IBC is the "service provider" to GISA. GISA's policy on access to information clearly states that any data collected by GISA, or by IBC on behalf of GISA, for a province is "the respective property" of that province and subject to provincial laws. Thus, in the present case the underlying data held by IBC is not controlled by insurers. IBC cannot therefore claim that it is prevented from continuing to disclose this data to UCDA, as it has consistently done since 1998, due to the objections of insurers.

(c) Even If Insurer Consents Were Relevant, The Tribunal May Make Orders Affecting The Rights Of Third Parties, And Has Done So

20. Finally, even if insurer consents were relevant to this application (which is denied for the reasons set out above), the Tribunal's remedial powers include the ability to order a resumption of supply without such consents. For example, in *Canada (Director of Investigation & Research)* v. *Southam Inc*., the Tribunal stated that "**[c]onsiderations of harm or inconvenience to** the respondents or **third parties** or other factors **are not relevant in assessing the effectiveness of a proposed remedy**."[1] The Tribunal expressed similar views in the *Gemini* litigation.[2] Therefore, any theoretical harm or inconvenience to third party insurers — which as demonstrated above would not occur in any case — should not be accorded any weight in this case.

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[1] (1992), 47 C.P.R. (3d) 240 at 246 (emphasis added).

[2] *See Canada (Director of Investigation & Research)* v. *Air Canada (Reasons for Order Varying Consent Order)* (1993), 51 C.P.R. (3d) 143 at 149, 153-159; and *Canada (Director of Investigation & Research)* v. *Air Canada (Reasons for Order Varying Consent Order) v. Air Canada (Reasons and Order)*, (1993), 49 C.P.R. (3d) 7 at 65.

(d) References To IBC's "Business Judgment" Are Self-Serving And Superfluous To The Section 75 Analysis

21. At various points, beginning at paragraph 4 of its Response, IBC argues that the Tribunal should not grant UCDA's application for relief because doing so would contravene IBC's "best business judgment". Accepting this argument would set a highly subjective standard, found nowhere in the language of section 75, by which all future refusals to deal could be justified by the simple assertion that the supplier had exercised "good judgment".

22. In any event, UCDA submits that IBC's conduct does not exemplify "good judgment". As set out in the Beattie Affidavit, IBC terminated UCDA's longstanding Associate Membership in the IBC in a high-handed manner, without providing reasons, and did so immediately following UCDA's reasonable request to acquire additional data regarding the dollar-value of claims.

23. IBC further attempts to justify its behaviour by repeatedly claiming that UCDA is the only third party commercial user of Web Claims. This contention is flawed for several reasons. First, the number of users of a product or service is irrelevant to the analysis under section 75 of the *Act*. Second, even if it were relevant, IBC admits at paragraph 17 of its Response that other commercial users of the Web Claims Search application do exist, such as private investigative agencies and independent insurance adjusters. Effectively, IBC's real argument appears to be that UCDA should be denied supply because it uses the Web Claims Search application for a different end-use application than others (*i.e.*, as a basis for used vehicle accident history searches). However, this is no basis for justifying an anti-competitive refusal to deal: UCDA's use of the Web Claims Search application differs from that of others because UCDA is an industry association for used motor vehicle dealers in Ontario. Its 4,600 member dealers account for more than 70% of the used vehicles sold in Ontario, and create a significant demand for the Auto Check™ service.

24. Thus, IBC's warning at paragraph 1(b) that "[i]f this Tribunal orders that IBC supply access to Web Claims Search to UCDA, then IBC will be compelled to provide such access to the

only remaining third party commercial user" of the Web Claims Search application rings hollow. In any event, the "compulsion" that IBC warns of is no more than the resumption of a pre-existing supply relationship that lasted more than a decade.

25. Finally, in a similar vein IBC argues that its conduct is beyond review because the termination of UCDA was "not motivated by any competitive concerns". In fact, section 75(1)(e) focuses on anti-competitive **effects**, not anti-competitive **intent**. IBC's submission also ignores the basic design of section 75 of the *Act*, which governs the vertical relationship between supplier and customer. Given this vertical relationship, refusals to deal will often not be motivated by "competitive concerns". Nevertheless, UCDA has, using the limited information available to it prior to discovery, detailed various links between IBC and UCDA's competitor, CarProof, in the Beattie Affidavit. The Tribunal has taken note, at paragraphs 59-61 of its decision granting leave in this matter, of these links and concluded that "it is possible that the Termination occurred as a result of IBC's wish to support CarProof's business objectives […]."

(e) There Are No Legal Or Reputational Risks To IBC In Continuing Its Longstanding Supply Of The Web Claims Search Application To UCDA

26. IBC repeatedly suggests that a supply order under section 75 could subject it to legal or reputational risks since, by sourcing data from the Web Claims Search application, UCDA's Auto Check™ business "possibly misrepresents vehicle accident claims history information to potential purchasers of used vehicles". Among the numerous flaws with this argument, UCDA would highlight that:

(i) The Auto Check™ service has provided used vehicle accident histories for 13 years. During that time, UCDA members have conducted over two million Auto Check™ searches, and UCDA has not received a single complaint from a dealer regarding the quality or accuracy of the Auto Check™ service. Any concerns about the quality of the Web Claims Search application are belied by the fact that IBC never raised such concerns prior to terminating supply to UCDA, and that IBC continues to supply the Web Claims Search application to users through the IBC web portal.

(ii) Furthermore, IBC faces no risk, reputational or otherwise, in respect of purchasers of used vehicle accident histories or purchasers of used vehicles. It is merely a compiler of data. It has no relationship with purchasers of used vehicle accident histories or of used vehicles.

(iii) The Auto Check™ service is available only to motor vehicle dealers that are members of the UCDA. UCDA's members are sophisticated entities, well aware of their legal obligations as participants in a regulated industry, and are aware that an Auto Check™ search may not necessarily provide a complete accident claims history of a used vehicle.

(iv) Moreover, in the extremely unlikely event of a claim against IBC, the 2006 *Access Agreement* governing IBC's relationship with UCDA provides IBC with "bulletproof" protection. Drafted by IBC, the agreement contains an express limitation clause (at paragraph 7.3(a)), stipulating that:

> IBC makes no Warranties with respect to the Information, including any Warranties that the Information will be **accurate, complete or up-to-date, or free of errors or omissions, in whole or in part, or that the Information will be fit for any purpose**. (emphasis added)

(v) The *Access Agreement* also disclaims any liability of IBC in respect of the data provided, and requires UCDA to indemnify IBC for any claim made against IBC in connection with the provision of the data.

(vi) The predecessor agreement between IBC and UCDA, dating from 1997, contained similarly thorough protections for IBC's benefit.

27. IBC has also suggested, at paragraphs 5, 16, and 76, that privacy law considerations militate against granting UCDA's application. IBC contends that complying with a remedial supply order would force it to "violate established principles" of privacy law. It is telling that IBC has not cited or specified any legislation in support of this assertion for, as IBC is well aware, UCDA has never had access to any information protected by privacy laws through the Web Claims Search application. At paragraph 18 of its Response, IBC admits that UCDA can only search the Web Claims Search application by VIN or license plate number. (In fact,

UCDA can only search the Web Claims Search application by VIN.) Any suggestion that the Tribunal's remedial powers are constrained by the application of privacy laws in this case is simply inaccurate. Furthermore, IBC itself admits (for example, at paragraph 40 of its Response) that the 2006 *Access Agreement* which IBC drafted contains "robust provisions relating to privacy", which would address any theoretical privacy concern.

(f) The Functionality Issues Raised By IBC Regarding The Web Claims Search Application Have Been Overstated, And Are Irrelevant To This Application

28. IBC attempts to make much of the fact that the Web Claims Search application is, in its own words, an "antiquated and outdated" application and may produce "false negative" results. However, despite these allegedly fatal flaws, the Web Claims Search application continues to be marketed and supplied to users through the IBC website, at <https://apps.ibc.ca/ibc.site/menu>.

29. In fact, quite to the contrary, UCDA and its member dealers have consistently found that the data from the Web Claims Search application, when integrated into UCDA's Auto Check™ business, serves a valuable purpose. As IBC admits at paragraph 29 of its Response, the Web Claims Search application is "a helpful tool" for investigators and underwriters. It serves a similar purpose for automobile dealers, as one of numerous tools available to them for learning about the history of a used vehicle. There is an obvious demand for the Auto Check™ service — over the past 13 years, UCDA's member dealers have conducted over two million Auto Check™ searches. Furthermore, despite this vast number of searches, UCDA has never received a complaint from a dealer regarding the quality or accuracy of the Auto Check™ service.

30. Finally, as pointed out at paragraph 57 of its Response, prior to July 2010, IBC never expressed any concerns about the reliability of the Web Claims Search application, and after that time continued to supply UCDA on condition that UCDA "inform its members that the fact a particular VIN does not register a 'hit' on the database must not be taken as proof that the vehicle associated with that VIN had not been involved in a collision resulting in costly repairs." UCDA has complied with this request. In summary, no basis exists for IBC to

attempt to justify its refusal to deal on the grounds of the functionality of the Web Claims Search application.

IV. All Of The Legal Elements Of Refusal To Deal Have Been Established In This Case

31. Section 75(1) of the *Competition Act* sets out a five-part test that an applicant must meet in order to obtain a remedial order from the Tribunal. Unlike arguments relating to insurer consents, business judgment and reputational harm — to which IBC has devoted the bulk of its Response, and which UCDA has refuted above — the five elements of section 75 are the relevant issues for the Tribunal's consideration. Each of these elements exists in the present case.

(a) Section 75(1)(a): UCDA Has Been Substantially Affected By IBC's Refusal To Deal

32. IBC's termination of its longstanding supply of the Web Claims Search application has deprived the Auto Check™ business of an essential input, forcing UCDA to suspend this service. The provision of vehicle accident history searches based on Web Claims data generated 100% of Auto Check™'s revenues and profits. Auto Check™, in turn, accounted for more than half of UCDA's net income. As one of the most important benefits that UCDA offers to its members, the elimination of the Auto Check™ business also has caused significant damage UCDA's credibility and reputational harm among existing and prospective dealer members.

33. IBC's Response does not address the Section 75(1)(a) criterion in any meaningful way, apart from the bare assertion that "IBC denies that UCDA has been substantially affected in its business".

(b) Section 75(1)(b): UCDA Is Unable To Obtain Adequate Supply Of The Web Claims Search Application Because Of Inadequate Competition Among Suppliers In The Market

34. IBC is the only source of integrated industry-wide vehicle claims data, and is refusing to deal with UCDA. The present case is the very definition of "inadequate competition among suppliers" — there is no other supplier to whom UCDA can turn. IBC attempts to respond to this argument in two ways, neither of which is persuasive. First, it claims that its own

subjective business rationale is a sufficient for refusing to deal; UCDA has dealt with this point in Parts III(d) and III(e) above. Second, it makes the incredible suggestion that UCDA should instead attempt to purchase vehicle insurance claims data from its competitors in the downstream market, CarProof and Carfax. In no prior case has the Tribunal ever interpreted section 75 as requiring a terminated customer to seek supply from its competitors. Indeed, as Justice Simpson noted in her decision granting leave in this case, section 75 does not require UCDA "to purchase the data it needs from Auto Check's competitors."[3]

(c) Section 75(1)(c): UCDA Is — And Always Has Been — Willing And Able To Meet IBC's Usual Trade Terms For The Web Claims Search Application

36. IBC suggests that the lack of consents from certain insurers means that UCDA has not met IBC's usual trade terms for the Web Claims Search application. This argument is flawed for several reasons.

37. First, it is entirely irrelevant to the legal test to be applied under section 75(1)(c): as the Tribunal has previously determined, the phrase "usual trade terms" means "the trade terms which have thus far applied" to the dealings between the customer and the supplier.[4] Insurer consents have never formed part of the trade terms between IBC and UCDA for the Web Claims Search application, and IBC never suggested that they were relevant to the supply of that product prior to the commencement of this litigation. IBC claims, for instance, that its agreement with GISA precludes it from sharing data with third parties such as UCDA, but that agreement was signed in 2006 (as noted at paragraph 50 of IBC's Response), and no consents were ever required for UCDA to access the Web Claims Search application in the following five-year period.

38. Second, even if insurer consents had formed part of the usual trade terms for supply of the Web Claims Search application — which they clearly did not — UCDA has dealt at length in Parts III(a)-III(c) above with the inaccurate suggestion that insurers own and control the

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[3] *Used Car Dealers Association of Ontario* v. *Insurance Bureau of Canada*, CT-2011-006, decision of September 9, 2011 at para 35.

[4] *B-Filer Inc.* v. *The Bank of Nova Scotia*, 2005 Comp. Trib. 38 at paras. 56-57 [hereinafter *B-Filer*].

underlying data that is reported to FSCO pursuant to a statutory mandate and held by IBC as agent for FSCO.

39. Finally, IBC's submissions **do not cite a single instance** where UCDA failed to make timely payments for the Web Claims Search application, failed to observe its obligations under the agreements between the parties, or otherwise failed to comply with any of the usual trade terms for supply of the Web Claims Search application.

(d) Section 75(1)(d): The Web Claims Search Application Is In Ample Supply

40. IBC reiterates its insurer consent argument in an attempt to suggest that the Web Claims Search application is not a product or service that is "in ample supply". In so doing, it claims that the Tribunal's decision in *Deeley* stands for the proposition that "actions taken by an upstream supplier that affect the availability of the product may determine whether it can be said to be in ample supply". In fact, the *Deeley* case stated that section 75 is intended "to deal with situations in which the product is readily available and unencumbered **in the sense that it has not been sold or promised to another purchaser**."[5] In *Deeley*, the Tribunal confronted the issue of trying to fashion a remedial supply order when only limited quantities of a specific brand of motorcycles was available, and those products available had already been assigned to dealers other than the applicant. In this case, in contrast, there is no question of the relevant product — the Web Claims Search application — being unavailable because it has been "sold or promised to another purchaser". It is a data-based service made available to an unlimited number of users through IBC's website. Supplying output from the Web Claims Search application to any particular user, such as UCDA, does not render it unavailable for supply to others.

(e) Section 75(1)(e): The Refusal Is Likely To Have An Adverse Effect On Competition In A Market

41. IBC attempts to rebut the clear adverse effect on competition caused by its elimination of Auto Check™, the low-price supplier in the market, with a speculative discussion of hypothetical separate product markets: Market A (the market for Auto Check™ search

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[5] *Quinlan's of Huntsville Inc.* v. *Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28 at para. 19 [hereinafter *Deeley*] (emphasis added).

reports) and Market B (the market for CarProof and Carfax search reports). However, there is clear evidence that UCDA, Carproof and Carfax do compete, including the following:

(i) the services supplied by all three competitors are used vehicle accident search histories;

(ii) the primary purchasers of all of these services are used car dealers;

(iii) most used car dealers in Ontario are members of UCDA;

(iv) the price differential between Auto Check™, Carfax and CarProof did not change after the January 2010 amendments to the *Motor Vehicle Dealers Act, 2002*; and

(v) CarProof's aggressive and misleading advertising activities targeted at UCDA, and its multiple attempts to propose an arrangement in which it would replace Auto Check™ as the source of vehicle accident history searches for UCDA members, clearly indicate that CarProof views UCDA's Auto Check™ business as a direct competitor.

42. IBC makes much of the price difference between the Auto Check™ search reports and those of CarProof and Carfax, but this conveniently ignores the fact that Auto Check™'s prices are lower because the UCDA is a not-for-profit corporation, and operates the Auto Check™ business on a lower-margin basis than its for-profit competitors as a benefit to its members.

43. IBC's refusal to continue supplying its Web Claims Search application has resulted in the exit of the Auto Check™ business from the market for used vehicle accident histories. As a result, used car dealers in Ontario have lost an important product choice and the lowest-priced option for conducting a vehicle accident history search. This will clearly have an adverse effect on competition and facilitate the preservation and enhancement of CarProof's market leadership and market power.

44. Alternatively, even if the Auto Check™ vehicle accident history search reports were to constitute a separate market from the CarProof and Carfax vehicle accident history search

reports, IBC's refusal to deal with UCDA has resulted in the elimination of the sole supplier in that hypothetical market. This would clearly constitute an adverse effect on competition and on the customers in that market.

V. The Tribunal Should Issue An Order Restoring Competition In The Market For Used Vehicle Accident Histories

45. IBC's termination of supply of the Web Claims Search Application would force Auto Check™, the low-price supplier, from the market for used vehicle accident histories. As a result, UCDA's 4,600 dealer members, who account for over 70% of the used vehicles sold in Ontario, would have no option but to purchase used vehicle accident histories from CarProof or Carfax at vastly higher prices.

46. IBC's Response gives short shrift to the legal analysis required under section 75 of the *Competition Act*, choosing instead to focus on issues not addressed in the *Act*. UCDA has addressed each of these arguments at Part III above.

47. In asking the Tribunal to exercise its discretion to not issue a remedial order in this case, IBC also attempts to cast itself in the role of the "honest broker" in respect of data access issues. This is simply not the case. For example, at paragraph 90 of its submission, IBC claims that "[w]hen UCDA failed in its attempt to secure consents from insurers, it brought this Application to the Tribunal." This statement is false — UCDA initiated this application **twelve days after IBC terminated its supply of the Web Claims Application** to UCDA. This application only seeks access to the Web Claims Search application, a product whose usual trade terms have never included insurer consent.

48. In fact, IBC's conduct falls far short of the image it attempts to project. At paragraph 57 of its Response, IBC claims that out of "good faith" it agreed to continue supply of the Web Claims search application following its initial attempt at terminating UCDA in 2010. However, IBC ignored UCDA's initial requests for a reasonable notice period, and only agreed to continue supply after UCDA retained external counsel and sent several letters to IBC drawing its attention to section 75 of the *Competition Act*. Similarly, UCDA provided IBC with 41 insurer consents on October 7, 2010 in order to obtain ASP data, yet, as admitted at paragraph 60 of its Response, IBC only "commenced supplying ASP data to

UCDA" on May 16, 2011. Thus, despite UCDA complying, at considerable time and expense to UCDA, with IBC's request for individual insurer consents in order for UCDA to obtain ASP data, IBC still delayed providing this data for **more than seven months** due to "various legal and technological issues", all of which were issues were raised by IBC.

49. In summary, UCDA submits that each of the elements of section 75 have been clearly established in this case. UCDA therefore submits that this is an appropriate case for relief under section 75 of the *Competition Act*, and requests that the Tribunal issue a remedial supply order to prevent the elimination of Auto Check™, the low-price supplier, from the used vehicle accident histories market.

All of which is respectfully submitted.

DATED at Toronto, this 14th day of November, 2011.

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