inMusic's Cross-Submission in Response to ATC's, Serato's, NERA's and Alan James Wilderland's Submissions in Response to the Statement of Issues

Executive Summary

1. inMusic Brands, Inc. and its subsidiaries and affiliates including inMusic New Zealand Limited (**inMusic**) welcome the opportunity to comment on the Responses to the Statement of Issues published by the New Zealand Commerce Commission (**Commission**) on 7 February 2024 in respect of the clearance application submitted by AlphaTheta Corporation (**ATC**) to acquire Serato Audio Research Limited (**Serato**) filed by ATC, Serato, NERA and Mr. Wilderland.

2. After six months and hundreds of pages of filings, neither ATC nor Serato answers the quintessential question: ***Why?*** Why would ATC pay over NZD $100 million in cash, in addition to undisclosed (but purportedly "a significant component of the purchase price") earn-out payments, for Serato—a company that both Serato and ATC spend scores of pages suggesting is poorly-positioned, and will likely struggle, to compete in the ever-changing DJ software market and may be overtaken in the next three to five years by new technology?

3. Of course, to any neutral observer of the DJ industry, the answer is clear: "As AlphaTheta already has an established DJ software platform for its own Pioneer DJ hardware, Rekordbox, **the purchase of Serato can only really be seen as a play to effectively control the majority of the DJ market, and to give the company a hold over all of Serato's partners**."[1] (Emphasis added).

4. Rather than acknowledge its aggressive power play or concoct a plausible alternative reason to spend lavishly on Serato, the parties ignore the question altogether. Instead, they spend page after page attempting to gaslight the Commission into doubting the anti-competitive reality of the proposed acquisition.

5. The primary problem that ATC and Serato face, however, is that when manufacturing a story, especially among multiple parties, it is difficult to keep it all coherent and consistent. Unsurprisingly, the parties have failed. The end result is a mishmash of half-baked theories and conflicting rhetoric that reveals their utter duplicity.

6. Take, for example, the parties' references to inMusic's Engine DJ. Serato states that a "broad range of DJ software providers" including Engine DJ "offer a compelling alternative to Serato and rekordbox, and will continue to constrain Serato and the merged entity following the proposed acquisition."[2] Serato goes on to note that the constraint from individual competitors such as Engine DJ "has been understated" and touts Engine DJ's innovative features.[3] Serato's co-founder and Director Mr. Wilderland contends, however, that embedded software (which he refers to as "home brand" software) such as Engine DJ "exists

[1] https://www.digitaldjtips.com/inmusic-fights-to-block-pioneers-serato-buyout/.
[2] Serato's Submission in Response to the Commission's Statement of Issues, dated 8 April 2024 ("Serato's Response") at [103].
[3] Serato's Response at [105].

in a different category to the offerings of pure software companies" such as Serato.[4] Mr. Wilderland further states, "When considering the competitive landscape for DJ software at Serato, I personally don't put manufacturer's home brand software in the same category as Serato DJ" and others in the industry because "none of the [home brand software] are trying to compete in the DJ software market."[5]

7. ATC's economic expert NERA seems to split the difference. NERA argues that embedded software "might" provide some constraint on DJ software providers.[6] However, it is clear that NERA believes that the merged entity will face direct constraint only from "closely-positioned" rivals, namely djay, Virtual DJ and Traktor, and that constraint from embedded DJ software such as Engine DJ, would require repositioning of current offerings.[7] ATC, for its part, calls embedded software "a close substitute" for DJ software "when used for performance" (as opposed to the full suite of features that desktop DJ software offers) but, unlike Serato, does not contend that embedded software currently constrains desktop DJ software.[8] Rather, ATC suggests that "it would be relatively easy to develop standalone DJ software based on embedded DJ software."[9]

8. This confusion among the parties and their proxies arises because they have failed to produce compelling evidence in support of the Application and have to rely instead on, at best, speculation and, at worst, fabrication. For example, in perhaps the most honest paragraph in all the filings, Serato gives away the game stating, "[t]he reality is that we do not know" the impact of mobile DJ app developer Algoriddim on Serato's business.[10] Serato made this statement in response to the Commission noting that it has "seen limited evidence to suggest that the rise in the sale of apps has materially affected sales of laptop applications."[11] Serato first wonders aloud, "what this evidence could ever be."[12] A truly staggering claim (and we submit fatal to the clearance case) given the onus is on the applicant to satisfy the Commission that an SLC is not likely (see paragraphs [9] below). Serato then criticizes the Commission for inferring that Serato's acknowledged sales growth in absolute terms means that mobile DJ apps had little impact on desktop DJ software and proclaims instead that the "only reasonable inference" is that the rise of mobile DJ apps *had* to come at least somewhat at the expense of existing desktop DJ software providers.[13] Of course, Serato's claim is self-serving and wrong. That is not the only reasonable inference; another reasonable inference is

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[4] Submission to NZ Commerce Commission in Response to Statement of Issues by Alan James Wilderland ("Wilderland Response") at [0.1.3].
[5] Wilderland Response at [3.7-3.8].
[6] NERA Report at [116].
[7] NERA Report at [83].
[8] Submission by AlphaTheta Corporation on the Statement of Issues, dated 8 April 2024 ("ATC Response") at [4.52].
[9] ATC Response at [4.53}; see also ATC Response at [6.12] (noting that certain software providers are "well-placed" to "**expand**" their operations…and aggressively compete with the merged entity" thereby implying a lack of current competition). [Emphasis added].
[10] Serato Response at [52].
[11] SOI at [28].
[12] Serato Response at [52].
[13] Serato Response at [52].

that mobile DJ apps are appealing to new customers. As the Commission noted, "the growth of apps may be reaching new customers rather than becoming a substitute for laptop applications."[14] Indeed, even ATC acknowledges that "the DJ industry has grown materially over the past decade."[15]

9. Crucially, the parties bear the burden of proof. In Serato's example above, it has the situation entirely backwards. By suggesting no evidence exists or could exist, Serato appears to imply this should weigh in favor of clearance, but the opposite is true. As a settled matter of New Zealand law, and as outlined in the Commission's Mergers and Acquisitions Guidelines, the Commission "must decline to clear the merger" if the Commission is not satisfied that "the merger would not be likely to substantially lessen competition in any market," including if the Commission is "left in doubt."[16]

10. ATC attempts to shift the burden to the Commission in numerous places, including when they say (at [1.6]) that "The Commission must be satisfied that there is '*a real and substantial risk*' the merged entity would engage in [foreclosure] conduct of this nature." [Emphasis in original]. That is not the correct test. Rather, ATC must satisfy the Commission there is no real and substantial risk that this would happen.

11. This point is especially relevant in the current case, where the parties and NERA are arguing that the market is dynamic and that the nature of competition and competitive constraints could change, in which case (they say) limited weight should be placed on the current market structure (including in relation to, for example, mobile apps). But this is wrong in the clearance context.

12. The Commission's comments (emphasis added) in *SKY/Vodafone*[17] are especially insightful in this regard and warrant setting out in some detail:

> 25. The Commission must make a reasonable enquiry into a clearance application. However, the **burden of proof ultimately lies with the Applicants to satisfy us on the balance of probabilities** that the proposed merger is not likely to have the effect of substantially lessening competition
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> 26. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market. **If we are not satisfied – including if we are left in doubt – we must decline** to clear the merger.
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> 27. In Commerce Commission v Woolworths, the Court of Appeal considered what it means to be left 'in doubt' as to whether a merger is likely to substantially lessen competition. It held that:
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> the existence of 'doubt' corresponds to a failure to exclude a real chance of a substantial lessening of competition.
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> 28. If, after considering all the evidence, we are left in doubt – that is, we have been unable to exclude a real chance of a substantial lessening of competition – we must decline to clear the merger.

[14] SOI at [28.2].
[15] ATC Response at [4.44].
[16] Mergers and Acquisition Guidelines at [2.42].
[17] 2017-NZCC-1-and-2-Vodafone-Europe-B.V.-and-Sky-Network-Television-Limited-Clearance-determination-22-February-2017.pdf (comcom.govt.nz), footnotes omitted.

> 29. **The source of doubt is irrelevant**. There is no significant difference between uncertainty associated with deficiencies in the evidence and **uncertainty associated with the impracticality of predicting future events – in either case, the Commission must decline** the clearance application.
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> …
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> 39. **Ultimately, the uncertain nature of the matters relevant to our assessment of the merger made it challenging for us to be positively satisfied, one way or the other**, about how the proposed merger would impact each of the relevant broadband and mobile services markets, and the timeframe over which these effects would take place.
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> 40. **We therefore applied the decision framework set out by the Court of Appeal in Woolworths** when assessing the position of doubt. **We asked: are we able to exclude a real chance of a substantial lessening of competition? We concluded that we could not**.

13. Make no mistake, there is significant evidence to show that the proposed acquisition ***is*** likely to substantially lessen competition in the DJ software and DJ hardware markets. The Statement of Issues is well-supported, and the Commission's analysis is correct on all counts. Moreover, inMusic and others have presented even more evidence not expressly relied upon in the Statement of Issues that nevertheless supports the Commission's view. Even if, some or all evidence relied upon by the Commission were undermined by the parties' attacks on it (which, to be clear, it is not), it would not change the overall calculus of clearance because the parties have not offered their own evidence in support of clearance. Instead, ATC and Serato are combating an alleged lack of evidence with rank speculation and misdirection. This raises more questions, not fewer, and is the epitome of "doubt" that requires the Commission to decline clearance.

14. Although the parties' submissions are rife with misleading, speculative and/or outright incorrect conclusions, for the sake of succinctness and timing, inMusic will focus on the most egregious examples in this cross-submission. The fact that inMusic may not refute every point in the parties' nearly 200 pages of materials is not an endorsement of anything the parties have said.

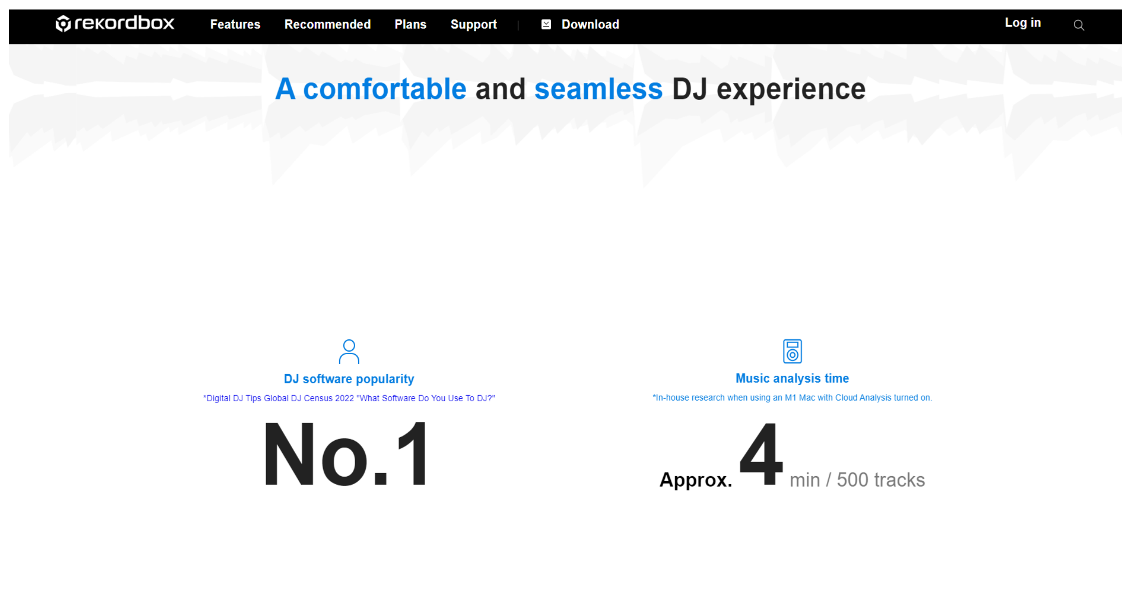
The Global DJ Census Is Reliable And The Parties Have Provided Insufficient Alternative Data

15. Digital DJ Tips has existed since 2010 and is the biggest DJ website in world.[18] For over a decade, Digital DJ Tips has conducted its survey, with tens of thousands of DJs participating. As many as over 32,000 DJs have participated in this survey.[19] The 2023 edition garnered 20,000 respondents.[20] According to the 2023 Global DJ Census, rekordbox and Serato are far and away the top two DJ software products on the market, being used by a combined 60+% of consumers, while mobile apps are used by less than 2% of respondents.[21]

[18] https://www.digitaldjtips.com/about-us/.
[19] https://www.digitaldjtips.com/global-dj-census-2021-results/.
[20] https://www.digitaldjtips.com/here-are-the-results-from-our-2023-census-the-biggest-dj-survey-in-the-world/.
[21] https://www.digitaldjtips.com/here-are-the-results-from-our-2023-census-the-biggest-dj-survey-in-the-world/. The 2024 edition has been released since the Application was filed, but the results are not materially different from 2023. Therefore, for the sake of consistency, inMusic will continue to reference the 2023 edition as it did in its filings.

16. Not only is the Global DJ Census the best, most comprehensive data there is concerning DJ software market share, but it is also the *only* public data that has been presented.[22] While ATC and Serato criticize its validity (which is unfounded as discussed below), neither has suggested an alternative source. Indeed, ATC acknowledged in the Application that there was not "any other reliable data source."[23] Most significantly, ***ATC's own expert***, NERA, relied on the Global DJ Census ***without qualification***.[24]

17. NERA's reliance on the Global DJ Census while ATC criticizes it is no surprise since ATC has a history of touting the data when it supports ATC while condemning it when it does not. Apparently realizing the evidence shows ATC playing both sides of the Global DJ Census, ATC tries to thread the needle by acknowledging that it uses the data but in a limited way: "ATC itself has relied on DJ Census data in its board documents to track the popularity of its DJ software with more experienced DJs."[25] ATC is not presenting the full story. ATC fails to mention it is a sponsor of the Global DJ Census. [REDACTED].[26] ATC also cited the 2022 Global DJ Census on its rekordbox website to claim that rekordbox is the most popular DJ software in the world.[27] Neither of these references include the qualification that the Global DJ Census is only relevant with respect to "more experienced DJs":



[22] While the parties refer to a subscription website for data, inMusic has never seen this directly, and neither NERA nor the parties argue that such data materially differs from the Global DJ Census.
[23] Application at [6.9(a)]. ATC mildly criticized the data in the Application, but its new broadside against the Global DJ Census (now that the Commission relied on it, in part, for its conclusions) is more substantial but no more frivolous.
[24] NERA Report at [Table 2.1].
[25] ATC Response at [4.43].
[26] See inMusic's Submission on AlphaTheta Corporation's Clearance Application to Acquire Serato Audio Research Limited ("inMusic's Response to the Application") at [II.m.].
[27] https://rekordbox.com/en/. The website was conspicuously updated after inMusic first pointed out ATC's reliance on the Global DJ Census. inMusic attests that the above screen shot was from the website as of November, 2023.

18. Even within its latest filing, ATC tries to have it both ways. It contends that "[t]he Digital DJ Tips 2024 Census results support ATC's submission that experienced DJs are increasingly using music production software to edit/manipulate tracks."[28] ATC further states that "only 30.27% of respondents to the 2024 DJ Census stated that they use Serato, meaning that almost 70% of respondents use alternative DJ software."[29] Despite citing the Global DJ Census favorably on these points, ATC still repeatedly calls it unreliable and not representative. Serato similarly criticizes the Global DJ Census while also relying on it to support its views.[30]

19. In addition to their glaring hypocrisy, the Commission should also disregard ATC's and Serato's criticism of the Global DJ Census on its face. Both note that survey respondents tend to be older and more experienced and are therefore not representative of the DJ software market.[31] They contend that, because younger generations are more likely to use mobile apps and the Global DJ Census skews older, it must underrepresent the use of mobile DJ apps.[32] Their reasoning is flawed in several respects:

    a. Mobile devices are not new technology. The first iPhone was released in 2007. Of course, that was not even the first smartphone but certainly is understood to be the first truly mass-market consumer smartphone. The iPad was released in 2010. As of 2023, exactly the same percentage of individuals aged 18-29 and 30-49 own smartphones: 97%.[33] Even looking at the 50-64 age range, 89% of individuals own smartphones, and 76% of individuals 65+ own smartphones.[34] The notion that survey respondents in the upper age brackets are not using apps because they are not experienced with mobile devices is absurd.

    b. Serato's only examples of professional DJs using mobile devices show that age and experience are not a hindrance to using mobile devices to DJ.[35] Again, Serato's inconsistency is on display. It touts these performers as evidence that mobile apps are not just for beginners, but then claims the Global DJ Census is unreliable because older, more experienced DJs are resistant to using mobile devices. All but one of the artists that Serato mentions is aged 40 or over.[36]

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[28] ATC Response at [5.9].
[29] ATC Response at [7.51(a)].
[30] See Serato Response at [58, 73, 128.1].
[31] Serato Response at [3.2, 45]; ATC Response at [4.39].
[32] Serato Response at [46].
[33] https://www.pewresearch.org/internet/fact-sheet/mobile/?tabId=tab-5b319c90-7363-4881-8e6f-f98925683a2f.
[34] https://www.pewresearch.org/internet/fact-sheet/mobile/?tabId=tab-5b319c90-7363-4881-8e6f-f98925683a2f.
[35] As inMusic has demonstrated previously (see inMusic's Response to Serato Audio Research Limited's Submission in Support of AlphaTheta Corporation's Clearance Application to Acquire Serato at [IV.d.ii]), with respect to these exact same DJs, a few anecdotal examples of famous DJs using mobile devices does not establish widespread use. Most of these examples are DJs who have commercial relationships with Algoriddim or use mobile devices occasionally for the novelty of doing so.
[36] https://en.wikipedia.org/wiki/Laidback_Luke (47 years); https://en.wikipedia.org/wiki/Invisibl_Skratch_Piklz (a group of DJs in their 40s and 50s); https://www.djangelo.co.uk/.

c. Although ATC points out that over 50% of Global DJ Census respondents have been DJ'ing for over 10 years,[37] it ignores that nearly 30% have only been DJ'ing for three years or less—i.e., since 2020 as of the 2023 census.[38] The parties also ignore that over 26% of respondents were under 35 years old. Even if the Commission were to accept ATC's contention that it "makes sense that the vast majority of respondents [i.e., those with over 10 years experience] prefer a DJ application and controller set up as this is what they learned to DJ with,"[39] the Commission cannot ignore that ***even beginner and young DJs*** (i.e., the 30% with three years or less experience and 26% under 35 years old) overwhelmingly still choose setups that do not include mobile apps and devices. Otherwise, the percentage of respondents who use mobile devices (approximately 1.5%) and mobile apps (approximately 2-5%) should be much higher.

d. Finally, even if true that the Global DJ Census skews older and more experienced, this would make it a better indicator of market share because, intuitively, these demographics are more likely to possess, and be willing to spend, money on DJ software and hardware. The importance of revenue to the analysis will be discussed further below, but for purposes of the Global DJ Census, the demographics support, rather than undermine, its reliability.

20. Ultimately, the Global DJ Census contains data points that are the best indicator of market share that the parties have. The Commission notes "it is unclear if the results of this census are a representative sample of DJ preferences" but "that the results give some indication of the popularity of the various DJ software products on offer in the market."[40] Importantly, it is not the only evidence it considered—specifically, the Commission relied on the 2022 revenues[41] for the DJ software market, as provided by the market participants—and neither ATC nor Serato has provided any reliable alternative data.

21. Serato does, however, make the astonishing (and entirely unsupported[42]) claim that MAU is a better measure of market share than revenue.[43] A software provider cannot compensate its engineers with MAUs, nor can it pay rent, buy advertising or afford any other ordinary business expenses with MAUs. inMusic does not mean to be glib, since this is such a serious matter, but arguing that MAU—the only metric that remotely (but not strongly) supports the Application—is a more relevant measure of market share than revenue shows desperation

[37] ATC Response at [4.42].
[38] https://www.digitaldjtips.com/here-are-the-results-from-our-2023-census-the-biggest-dj-survey-in-the-world/.
[39] ATC Response at [4.42].
[40] SOI at [61].
[41] inMusic cannot comment on revenue market share because it has not seen the data, but the Commission—unsurprisingly based on inMusic's general knowledge of the market—found that the merged entity would have a high market share based on revenue.
[42] inMusic made an earnest attempt to find any commentator endorsing this view and could not find any. There were plenty who said the opposite. See, e.g., https://baremetrics.com/academy/startups-know-monthly-active-users ("The best thing to measure the growth rate of [sic] is revenue. The next best, for ***start-ups that aren't charging initially***, is active users.") [Emphasis added]. As discussed, the top two apps according to ATC and Serato are not startups, and both charge for their apps.
[43] Notably, even ATC does not join in this argument.

and is, frankly, preposterous. ATC is trying to buy Serato for over NZD $100 million based on Serato's NZD $40 million annual turnover, not its MAUs. In fact, although inMusic has not seen the earn out language, it would be shocking if the earn out depended on MAUs and not direct financial targets. The Commission should not credit this outlandish proposition.

22. Even putting aside Serato's argument, on its own, MAU is not useful to the analysis. MAU is a disfavored metric with limited value precisely because, among other things, it is not standardized, open to manipulation and does not measure user behavior or user quality.[44] As the Commission noted, "MAU may pick up a large number of customers who are trialing products, revenues may better reflect the number of customers that are actually willing to pay for the product. These are the customers that are of most value to DJ software providers."[45] While true that MAU may be a useful *internal* measure for early-stage software companies to assist with user base expansion[46], the two products that ATC and Serato contend are the largest in the market (edjing mix and djay) were released in 2012 and 2006 respectively. It is absurd to suggest that MVM and Algoriddim are still prioritizing user base expansion over revenue 12 and 18 years after launch.

23. Finally, turning to revenue measures of market share, Serato has it backwards with respect to the licence fees it receives from DJ hardware manufacturers.[47] The fact that Serato earns revenue even when a user never activates Serato and instead uses a competitor—and Serato is the ***only*** DJ software provider in the industry with this arrangement—shows its overwhelming market strength. As inMusic has stated repeatedly, bundling Serato with its hardware, especially for its RANE brand, is crucial for sales. ATC recognizes this too because Serato is ostensibly the only third-party software it licences for its products. For this reason, the Commission should not exclude this revenue from market share calculations as Serato argues.

24. In sum, the Global DJ Census is the most reliable market share information that exists, and additionally, the Commission determined that the merged entity would have a "high market share based on revenue."[48] MAUs, on the other hand, are a weak measure of market share and should be disregarded. Neither ATC nor Serato has presented evidence that supports any other measure of market share. Even if the Commission's metrics were insufficient, ATC's and Serato's attacks only raise doubt, instead of providing the requisite evidence to "satisfy" the Commission as the Commerce Act requires.

[44] https://www.vox.com/2015/2/9/11558810/the-monthly-active-user-metric-should-be-retired-but-what-takes-its; https://cmlabs.co/en-id/seo-terms/monthly-active-user#:~:text=The%20lack%20of%20industry%20standardization,the%20standard%20for%20their%20success; https://medium.com/@pubscale/what-is-monthly-active-users-mau-and-how-to-increase-it-8f7c67860b5b; https://corporatefinanceinstitute.com/resources/valuation/monthly-active-users-mau/; https://www.storyly.io/glossary/monthly-active-users-mau.
[45] SOI at [59].
[46] See Serato Response at [109.1].
[47] See Serato Response at [109.3].
[48] SOI at [59].

ATC Misstates the Law

25. ATC contends that the OECD has "recognised that innovation merger cases require a counterfactual that predicts whether and to what degree future innovation will impact the future market and a proper counterfactual in such cases should consider both internal and external forces on innovation."[49] Not only is this largely irrelevant to the statutory test the Commission must apply, it is also not true. The OECD is an international organization that advises on policy-making, encourages development of international standards and brings global policymakers together to exchange ideas.[50] The fact that ATC relies on OECD literature when the legal framework the Commission must apply is well-defined and straightforward to apply in this case should be treated very skeptically. Indeed, a deeper dive into the cited OECD materials reveals that ATC has it backwards. Although ATC does not define an "innovation merger," the literature that ATC cites makes clear that innovation is a theory of harm and therefore a basis to *deny* a merger.[51] It is not an affirmative analysis that the Commission must undertake simply because the parties say it is an "innovation merger case."[52] While true that the Commission should take into account future innovation, it should only do so as part of the overall mix of factors the Commission needs to form a view on when defining future factuals and counterfactuals. The implication by ATC that the OECD imposes on the Commission a specific burden, as a standalone test, to predict whether future innovation will constrain the merged entity[53] is not accurate.

26. As noted earlier, ATC similarly misstates the legal standard in nitpicking the Commission's choice of words with respect to vertical foreclosure in the DJ hardware market. In fact, the

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[49] ATC Response at [2.1].

[50] https://www.oecd.org/about/. Notably, the OECD is not an enforcement body, and its recommendations are not binding law on any member organization.

[51] https://one.oecd.org/document/DAF/COMP/WD(2023)100/en/pdf at [3] (Specifically, the BIAC states, "Competition agencies play a role in preserving innovation competition in several areas, including in merger enforcement, behavioral and antitrust cases. The broad scope of enforcement cases make clear that harm to innovation competition is a fully legitimized basis for enforcement under current competition laws, on equal footing with harm to price or output competition").

[52] Going further, the material ATC cites notes, "Innovation theories of harm are particularly challenging because they require agencies to discern and distinguish between probabilities, possibilities, and conjecture. In many cases, reasonable minds can differ on what innovation may result, when it will occur, and the impact it may have. ***Indeed, the innovating parties themselves are often unable to make these predictions or to get them right, with a common theme being a high degree of (over) optimism***." See https://one.oecd.org/document/DAF/COMP/WD(2023)100/en/pdf at [6] [Emphasis added]. Further, enforcement agencies "must evaluate not only whether future competition is probable but also whether that competition is likely to be effective. Otherwise, ephemeral possibilities will overtake competitive realities." https://one.oecd.org/document/DAF/COMP/WD(2023)100/en/pdf at [39]. In this case, "ephemeral possibilities" is all ATC and Serato offer. Mobile DJ apps have been on the market for many years and have not even made a dent in ATC's and Serato's business. Although nothing ATC cites concerning innovation mergers is relevant or binding on the Commission, even if it were, with proper context and a full understanding, the BIAC note does not help ATC's case anyway. inMusic will not analyze these materials further because ATC has not bothered to present a reasoned analysis, instead misleadingly citing small snippets of a large thoughtful body of work that reaches no firm conclusion on the standards that should apply to innovation theories of harm as though these out-of-context and incomplete statements bind the Commission. ATC's lazy research on the subject warrants no further response, and the Commission should reject out of hand any obligation to consider speculative future possibilities.

[53] ATC Response at [2.1].

comments above in relation to the difficulties of predicting future events only serves to make it less likely the Commission will properly be able to be "satisfied" an SLC is not likely to occur.

27. For its part, Serato is wrong to suggest that the Commission misapplied the standard for substitutability.[54] Serato claims that the Commission has adopted an unduly narrow market definition.[55] To the contrary, the Commission has correctly applied the law as it stands in New Zealand in relation to market definition and competitive constraints.

28. Contrary to Serato's submission, mobile apps (for example) do not meet any legal test for inclusion in the relevant market (whether as a matter of 'fact or commercial common sense', or as a result of applying the SSNIP test), nor do they impose any relevant competitive constraint from outside of the market. Put simply, the weight of evidence on the record is that the parties are each other's closest competitors, and mobile apps impose next to no relevant competitive constraint on rekordbox or Serato.

Neither Mobile DJ Apps Nor Music Production Software Are Part of the Relevant Market (and nor do they impose any relevant constraint from outside the market)

29. Neither Serato nor ATC presents any new evidence to suggest that mobile DJ apps or music production software should be included within the relevant market definition. Instead, they largely repeat prior arguments, apparently believing that increased stridency alone will win the day.

30. In the context of market definition, it's worth reiterating that its purpose is to identify the extent to which there are (or are not) alternatives to the merging parties such that the Commission can be satisfied that:

    a. there are sufficient constraints to avoid an SLC in relation to software; **and**

    b. there are alternatives to Serato for a company such as inMusic (ATC's closest and most important hardware competitor) sufficient to allow it to continue to compete in relation to hardware.

31. Turning to the substance of the issue, the fact is that no one knows what the future holds, but the parties cannot even fully explain what is happening now. The Commission made three key findings in determining that mobile DJ apps are not sufficient substitutes for laptop DJ software: (a) apps are targeted to different consumers (i.e., beginners); (b) there is limited evidence that the rise in apps has materially affected the sales of laptop DJ software; and (c) there is unlikely to be strong supply side substitution between app and laptop software.[56]

32. On the first point, even ATC's own expert NERA concluded that "mobile apps tend to be cheaper, targeted at beginners, and include less functionality than desktop software (while still including most essential features)" and that "all else equal, we would expect the merged

[54] See Serato Response at [11-14].
[55] Serato Response at [13].
[56] SOI at [27-28].

entity's desktop products to face more competitive constraints from other desktop developers than from mobile-only developers."[57] ATC contradicts this now but is undermined by its own prior strategic decision to grossly overstate the DJ software market in the hopes of confusing the Commission into defining the market broadly. In the Application, ATC names 34 "competitors" in the DJ software market,[58] which includes many mobile apps that inMusic (and likely most in the industry) has never heard of. Based on ATC's proposed market definition, it was entirely reasonable for the Commission to determine that apps generally are targeted at beginners. Now, apparently realizing the folly of attempting to overstate the market, ATC focuses on just three mobile DJ apps and argues that they each possess advanced functionality targeted to more experienced DJs.[59] Even if true that these few mobile apps provide an enhanced experienced for more advanced users, it does not mean that their primary audience is not beginners, and in any event, these three apps are still a small minority of mobile DJ apps that exist, which even ATC admits. Referring back to Table 1 in the Application, ATC concedes DJ apps other than the three mentioned "cater largely to users interested in trying out DJing and who have no or limited prior experience."[60]

33. Serato mildly attempts to rescue ATC by arguing that the presence of many more basic apps should not impact the alleged restraint that mobile apps like djay Pro and edjing Mix provide,[61] but Serato is just trying to smuggle in uncompetitive products with ones that may compete. Including djay Pro and edjing Mix alone likely would not change market shares that much and would not alter the fact that the merged entity would still enjoy an overwhelming market position (i.e., well over 50%) and would still be a critical input for the likes of inMusic. Simply including these two, however, is not what the parties are suggesting. The parties want **all** mobile apps included in the market definition because that is the only way it may (although this is unclear) make a difference to market share. In other words, although the overwhelming majority of mobile apps are, in fact—based on ATC's and Serato's own admissions—targeted to beginners, the parties argue that the presence of a couple more advanced mobile apps should elevate the entire category of mobile apps into competitors. This does not logically follow and should be rejected.

34. As to the Commission's second finding, both Serato and ATC acknowledge that they do not know how apps have impacted the sales of laptop DJ software. As quoted above, Serato admits, "[t]he reality is that we do not know" the impact of mobile DJ app developer Algoriddim on Serato's business.[62] ATC similarly concedes, "ATC does not have quantitative switching data to demonstrate the number of users of DJ application software diverting to DJ Apps (and vice versa)."[63] ATC and Serato are at odds, however, concerning the manner in which mobile DJ apps have impacted the industry. While Serato contends that

[57] NERA Report at [108].
[58] Application at [Table 1].
[59] ATC Response at [4.17].
[60] ATC Response at [4.19].
[61] Serato Response at [24].
[62] Serato Response at [52].
[63] ATC Response at [4.44].

the "only" reasonable inference is that the rise of apps *must have* impacted Serato's sales,[64] ATC offers an alternative inference (i.e., the DJ industry has "grown materially")[65] that undercuts Serato's claim that DJ apps necessarily had to impact DJ software sales. Ultimately, it does not matter who is correct. The fact that both ATC and Serato acknowledge that they do not possess evidence to support the proposition that mobile DJ apps are viable alternatives to laptop DJ software, and they have different theories concerning how the rise in apps has affected the industry, raises the precise "doubt" that requires the Commission to deny clearance.

35. It also cannot be ignored that djay has been around since 2006, Cross DJ since 2008 and edjing Mix since 2012. This is not software made by neophyte developers producing new, untested products; they are mature and stable and have had many years of iterative development. The facts that: (a) Serato and ATC cannot quantify the effect these apps have had on their business; (b) Serato does not have a mobile app in active development; (c) ATC has agreed to buy Serato for over NZD $100 million despite Serato not having an app; and (d) ATC is only now focusing heavily on mobile app development strongly suggest the impact on ATC and Serato has been minimal. If revenue had been materially affected, neither ATC nor Serato would ignore the competitive pressure. Not to mention, if ATC is to be believed that its internal resourcing decisions are increasingly focused on mobile apps,[66] this makes it less likely, not more likely, that mobile apps will provide competitive restraint on the merged entity going forward. ATC launched its DJ performance version of rekordbox a mere nine years ago in 2015.[67] At that time, Serato, Traktor and Virtual DJ had all been on the market for a decade or more. By 2017, rekordbox already had approximately 15% of the market but lagged behind the top three.[68] By 2019, rekordbox had already surpassed Virtual DJ and Traktor to hold second place with over 20% of the market, just behind Serato.[69] Since 2021, rekordbox and Serato have been virtually tied at the top of the market, flip flopping places with each other but never losing market share to any other DJ software competitors. While ATC and Serato speculate endlessly that mobile apps will constrain them in the future, they utterly ignore that they are well-positioned to aggressively respond to such market shifts. The merged entity would have massive resources and brand recognition to recapture any minimal market share they may lose (although any loss is highly doubtful) and continue to grow their dominance.

36. Finally, neither ATC nor Serato meaningfully addresses supply side substitution. The Commission noted that laptop software and mobile apps are written to different operating systems and therefore producing one or the other would mean starting afresh.[70] Serato does not appear to address this at all, and ATC simply lists developers who produce both laptop

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[64] Serato Response at [52].
[65] ATC Response at [4.44].
[66] ATC Response at [4.11].
[67] ATC Response at [1.18].
[68] https://www.digitaldjtips.com/2017-dj-census/.
[69] https://www.digitaldjtips.com/final-results-are-in-for-the-worlds-biggest-digital-dj-survey/#:~:text=Our%20latest%20Global%20Digital%20DJ,the%20current%20state%20of%20DJing.
[70] SOI at [29].

software and mobile apps.[71] This sidesteps the issue. The Commission does not state that it is impossible for one company to create both; only that there is "limited technology cross-over" between the two, which even ATC's Application acknowledges, and thus development requires two different codebases to maintain. ATC either misperceives the Commission's argument or ignores it. Regardless, since neither party offers a rebuttal or evidence to support supply side substitution, the Commission should disregard ATC's contention that it exists.

37. Turning to music production software, devoting very little briefing to half-hearted arguments, the parties seem to have tacitly conceded that music production software should not be included in the market definition with DJ software. Mr. Wilderland notably ignores music production software in his submission. ATC largely repeats prior arguments but produces no new evidence, relying instead on the Global DJ Census, which it elsewhere criticizes, for the minor point that experienced DJs are "increasingly" using music production software to edit/manipulate tracks.[72] But, the question is not whether DJs are using music production software as a *complement* to DJ software or separately using music production software to produce tracks that can then be used in a DJ performance.[73] It is whether music production software is a close enough substitute for DJ software to constrain the merged entity.[74] The answer to that is an unquestionable "no," and the parties provide no support to suggest otherwise.[75]

38. The parties have failed to offer compelling evidence to support an expansive view of the DJ software market to include mobile DJ apps and/or music production software. The Commission correctly assessed the competitive landscape for Serato and rekordbox, and the parties' attempts to refute the Commission's analysis should be rejected.

<u>Serato and rekordbox Are Close Competitors</u>

39. The parties' inconsistency and inability to keep their story straight is significantly on display with respect to this issue. Relying largely on ***the parties' own internal documents***, the Commission determined that ATC and Serato "appear to compete closely for customers" and "impose a significant degree of constraint on one another."[76] Moreover, the Commission cited ATC's own expert to find that "Serato DJ and rekordbox are closely-positioned as they have a similar pricing structure and both appear to be positioned as 'premium' products."[77] ATC tries to cleverly skirt the issue. ATC's section heading between paragraphs 6.5 and 6.6 states that rekordbox and Serato are not each other's "closest competitors," but that is not

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[71] ATC Response at [4.49].
[72] ATC Response at [5.9].
[73] It is not surprising at all that DJs also produce music. In the same way that some subset of guitar players may play piano or a drummer may also use beat machines, DJs and music producers often share talents for editing and mixing.
[74] SOI at [33].
[75] Indeed, Serato even admits that "not all music production software meets the functional needs for DJing." Serato Response at [60]. While Serato goes on to state it is nevertheless used by a "competitively significant subset [sic] DJs to perform DJ sets," it presents no evidence to support this baseless claim.
[76] SOI at [52].
[77] SOI at [55].

argued or expressed in the body of the section.[78] The section suggests just the opposite, in fact. ATC essentially concedes that rekordbox and Serato "compete closely" when it acknowledges that they "offer many of the same features and are substitutable."[79] Further, ATC notes that the SPA requires them to "continue to compete."[80] Although ATC nevertheless argues that the "profile" of their respective users are different—specifically the music genre they play[81]–ATC never suggests that this means they don't "compete closely." Even if ATC implies this argument, it is highly disingenuous in light of the fact that ATC spends much of its filing arguing that mobile DJ apps (which ATC contends are preferred by "younger" DJs) and music production software (with many different features) compete closely enough with rekordbox and Serato that they should be included in the relevant market for DJ software.

40. Serato attempts a more robust defense of the proposition that Serato and rekordbox are not "strong" competitors of each other, none of which is compelling as it relies on nitpicky differences such as pricing structure—Serato also ignores NERA's conclusions to the contrary—but it is equally doomed by requiring an extraordinary amount of cognitive dissonance for it to make sense. Directly after weakly arguing that Serato and rekordbox do not strongly compete, Serato contends that "other providers," including for example Engine DJ (which shares far fewer characteristics with Serato than rekordbox) does and will continue to provide "strong competition" to constrain Serato.[82] This is on top of Serato arguing, as ATC does, that DJ apps and music production software should be considered part of the DJ software market.

41. Mr. Wilderland takes an entirely different tact, arguing that Serato and rekordbox do not "closely compete" because rekordbox is "home brand" software that comes only with ATC hardware, and there will always be users who simply use the default software such as rekordbox.[83] He makes no mention of feature set or other factors but also contends that mobile apps compete with Serato and rekordbox sufficient to constrain them even though they do not compete closely with each other.

42. At bottom, nothing that ATC, Serato or Mr. Wilderland states should change the Commission's analysis. Even if their end users have individual preferences based on music genre they play, overwhelmingly, Serato and rekordbox have very similar feature sets and clearly compete closely as the top two DJ software providers by far. It is staggering and disingenuous for the parties to argue otherwise, especially given how broadly they are trying to stretch the relevant market.

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[78] Interestingly, although ATC denies they are each other's closest competitors, ATC never offers an alternative "closest competitor."
[79] ATC Response at [6.7].
[80] ATC Response at [6.9]
[81] ATC Response at [6.7].
[82] See Serato Response at [103] and preceding heading.
[83] Wilderland Response at [3.10].

Barriers to Entry and Expansion in the DJ Software Market are High

43. More than anything else, the extraordinary brand loyalty that Serato and ATC enjoy creates a nearly insurmountable barrier to entry and expansion. Mr. Wilderland understands the issue well:

> "There's not that much that's unique about the Serato DJ software, you've no doubt seen extensive feature comparisons. Serato DJ is far from being the most feature complete product out there, and though many DJs regard it as 'the original and the best', ***that's not due to some magical feature that others can't replicate, that is due to our tireless efforts to support and celebrate our community, and our commitment to stability***."[84] [Emphasis added].

Continuing further, he notes,

> "Our marketing department has a large contingent of dedicated artist relations people, and the content we produce is made in conjunction with (and for) our community. We work hard to stay relevant and connected to our user base. And very importantly, software stability is paramount to our developers. These are values and they can be replicated. Luckily for us, not all other software makers have figured this out yet. So, I say that Serato maintains a loyal following due to our excellent customer service and commitment to delivering quality software. Maintaining a fair price is a big part of that customer centric approach to business, and there is absolutely no evidence to suggest that the alternative software offerings such as Traktor, Virtual DJ and djay Pro are missing anything that a Serato or RekordBox user requires. ***Serato has maintained a strong market position because we work very hard to look after the customers we have, and we invest in community building***."[85] [Emphasis added].

Serato similarly says of ATC's rekordbox: "ATC was able to invest in ***marketing*** to leverage its existing strengths into a customer base for its DJ software product and overcome any customer stickiness."[86] [Emphasis added].

44. Notwithstanding that ATC, Serato and Mr. Wilderland all understand and acknowledge that Serato and rekordbox have developed market leads for reasons *other than* making the best product, they nevertheless pretend the analysis comes down to a simple math problem—that monetary investment and time in building competing DJ software would be enough to eventually constrain the merged entity.[87] For example, Serato presents a "report" from ClearPoint, which ostensibly has never developed a DJ software application. ClearPoint concludes that a rival software provider could develop a product that competes with Serato

[84] Wilderland Response at [1.3].
[85] Wilderland Response at [1.4-1.6].
[86] Serato Response at [118].
[87] See Wilderland Response at [5.1-5.7] (focusing entirely on cost and time without mentioning market factors); ATC Response at [6.26] (Although ATC understatedly confesses there are "some difficulties" getting DJs to switch software providers, it dismisses the concern with unbridled optimism, claiming the "next generation" of DJs will ostensibly not be as loyal); Serato Response at [119] (Serato helpfully points to ATC's success gaining market share for rekordbox as though that should give comfort to the Commission that it is easy to do).

DJ Pro and Virtual DJ Pro, including a mobile app, in 12-18 months. Putting aside the extraordinary optimism of such timeline, which assumes, among other things, that the software developer already operates in the industry, has ready access to 30 to 36 team members with capacity, and has secured all open source and commercial components necessary to create the product without any hiccups, there are many obstacles to getting to market and being successful that are utterly ignored. The build budget that ClearPoint estimates (NZD $7M to $9M) includes staff, contractors and third-party software licensing and components. It expressly excludes, however, a sales team and executive leadership salaries. It also appears to exclude marketing and after sales/technical support, among other things. Even if ClearPoint is assuming that, because the developer already exists in the industry, it could leverage existing business infrastructure (which ClearPoint does not say), there is still a cost associated with these items that has not been quantified.

45. ClearPoint's report, such as it is with glaring deficiencies, does not matter in any event. Whether it is ***technically*** feasible to create a viable competitive software is irrelevant. The parties ignore that there is a significant difference between creating a competing product and being able to compete effectively. Virtual DJ and Traktor have existed for over 20 years. djay has existed for 18 years. inMusic has invested over $50 million in New Zealand[88] over the last five years, [REDACTED].[89] None of these products or any others ***currently*** compete successfully with Serato or rekordbox, yet the parties will have the Commission believe that, suddenly, with a little additional investment, all or some will compete and constrain the merged entity—which will notably possess the combined talent and resources of Serato and ATC. [90]

46. inMusic will say again that it is proud of the efforts of its developers and the iterations they have released of Engine DJ.[91] Each update of Engine DJ has received progressively better reviews from the community. Nevertheless, Engine DJ's development, and customer acceptance of it, remain a work in progress. In this regard, Mr. Wilderland inadvertently supports inMusic's position when he thinks he is refuting it. He calls inMusic's effort "tepid" and criticizes Engine DJ's quality,[92] seemingly to imply that inMusic has not spent enough or done enough to compete. Mr. Wilderland's criticisms are not entirely inaccurate because building high-quality DJ software is ***really hard***. It takes time to build stability and work out kinks. It has even been said about rekordbox (nine years after launch) that it "still has to play catchup with the stability and feature set of Serato DJ."[93] Serato has 20 years of experience,

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[88] inMusic also employs a contingent of DJ software developers in Germany.
[89] [REDACTED].
[90] ATC is wrong to suggest that inMusic is "nearly twice as large as ATC." The inMusic revenue number that ATC cites includes all inMusic subsidiaries and affiliates. If ATC's corporate group is similarly included, ATC is bigger by a fair margin. Additionally, ATC's DJ business is roughly five times larger than inMusic's DJ business.
[91] The parties' suggestion that inMusic's MixMeister product could be used to compete with Serato and rekordbox is wrong. MixMeister is built on an entirely different codebase than Engine DJ and could not simply be combined with Engine DJ. More to the point, MixMeister is not intended for performing DJs. It is targeted to fitness studios, bars, restaurants and podcasters for creating continuous music mixes. MixMeister lacks many of the core features of laptop DJ software.
[92] Wilderland Response at [1.7].
[93] https://www.digitaldjtips.com/head-to-head-serato-dj-vs-rekordbox-dj/.

and in Mr. Wilderland's own words, they "work very hard to look after the customers [they] have." With all due respect, Mr. Wilderland seems to forget what it's like to start afresh. inMusic has expended substantial resources and worked very hard as well. It takes *time* to build customer goodwill and a reputation for quality and reliability, and unlike when Serato began developing DJ software in a new, burgeoning category, inMusic faces the uphill battle of trying to unseat long-term participants, who are not sitting still. As the Commission noted, "securing sufficient scale (ie, sufficient customers switching from Serato's DJ software or other software providers) to justify the investment" in establishing a DJ software product may be difficult,[94] and inMusic can attest this is true. Serato and ATC downplay this, but the evidence is clear from the market share data that overcoming the cult-like following that Serato and ATC enjoy has proved impossible for even long-time incumbents such as Virtual DJ and djay. There is no evidence to suggest they, inMusic or anyone else will be successful in expanding or entering into the market and constraining the merged entity in the future.

The SPA is Not Adequate to Protect Non-Party Market Participants

47. ATC, Serato, Mr. Wilderland and NERA spend many pages trying to convince the Commission to abandon its own merger clearance regime. If the parties could simply agree between themselves that the merged entity will behave and the Commission accepted this approach, every merger where competition issues are likely to be raised will be structured this way. The Commission is not permitted to accept behavioural undertakings as part of a clearance decision, yet this is precisely what the parties seek but worse: if the Commission were to accept this approach, ***not even the Commission could enforce the SPA***. It would be left exclusively to the seller(s) to enforce. Putting aside the incentive to do so (as will be discussed further below), the Commerce Act plainly was not intended to work this way. As inMusic pointed out previously[95], this is not a situation where the contract in question is relatively minor to the transaction, the breach is easy to detect, and the party harmed has standing to sue and a clear remedy (e.g., a third-party lease agreement). Here, ATC and Serato urge the Commission to ignore numerous anti-competitive actions that ATC could take post-merger and clear the merger based solely on Mr. Wilderland's (and/or other sellers') professed willingness and ability to enforce relatively vague, and time-limited, provisions of the SPA. Quite apart from the fact that, viewed objectively, the SPA does not provide the protection the parties claim, the Commission should reject this novel, legally unsupported and dangerous attempt to drive a truck straight through New Zealand's regulatory scheme.[96]

[94] SOI at [86].
[95] inMusic Submission on the Statement of Issues at [6].
[96] The Commission should also be very wary of ATC's and Serato's Responses considering how they are flaunting the regulatory scheme and refusing to answer critical questions. Specifically, although the parties expend considerable effort addressing the Commission's concerns expressed at paragraph 108.1, they utterly ignore the Commission's next question at paragraph 108.2: "the options available to hardware manufacturers to ensure ATC continues to offer them the integration of Serato software products." This is an important evasion because inMusic's (and the Commission's) issue with the SPA is that it allows the parties to privately police their conduct. With the one opportunity that the Commission gives the parties to convince it to trust them that rival hardware manufacturers have options to ensure Serato integration, they completely dodge the question, which speaks volumes.

48. Even if the Commission were inclined to allow self-interested private parties to write their own behavioural undertakings in circumvention of meaningful merger enforcement by the Commission, the cited language of the SPA is nevertheless grossly insufficient to prevent the merged entity from undertaking activity that substantially lessens competition in the DJ software and hardware markets in several respects:

    a. ATC's obligation under the SPA hinges entirely on it acting in "good faith." "Good faith" is a highly subjective standard that can be challenging to prove and rests on the premise that the party with the good-faith obligation must act with commercial best intentions. Where the ultimate result is failure (otherwise there would not be litigation over it), the aggrieved party is tasked with establishing that the failure was due to the accused party acting improperly. In this case, ATC is required "to act in good faith and, using all reasonable endeavours, support the growth of and operate and manage [Serato] with a view of maximising the [relevant profit metric]."[97] ATC is not required to, ***<u>in fact</u>***, maximise the relevant profit metric; it simply has to not do anything expressly underhanded and come up with a plausible explanation why it failed.[98] Therefore, ironically, ATC's and Serato's arguments undermine their own case. They spend reams of paper contending that mobile DJ apps will entirely upend the balance of power in the next three to five years. Serato does not sell a mobile DJ app and ostensibly does not have one in active development. Is it "good faith" to continue to fail to produce a Serato app and fall further behind? Or is it "good faith" to invest heavily in a mobile DJ app to keep up. Either way, profit will arguably (if the parties are to be believed) be impacted, and Serato's hardware partners may be impacted by the choice, but as long as it justifies its choice adequately to the sellers, ATC cannot lose. This cannot be a meaningful restraint on the merged entity's power.

    b. The baseline for comparison of future activity is the 12 months prior to Completion of the acquisition.[99] Should clearance be granted at the next decision date (currently 8 May 2024) or after, the 12-month baseline will include the ten months or longer since the deal was announced. [REDACTED]. inMusic has outlined much of this previously[100] and in the footnote to the prior point. Given that [REDACTED], the baseline will likely be lower than historical norms.

    c. The parties could renegotiate the terms of the SPA. In fact, it appears to be contemplated by the language.[101] The Commission has already raised the specter of this and expressed concern that such a modification would not be readily discernible by the industry.[102] The parties do not even bother to address this valid and highly likely concern. NERA provides the math to deny that this situation will occur, but its

[97] ATC Response at [7.19(a)].
[98] [REDACTED].
[99] ATC Response at [7.19(b)].
[100] See inMusic's 23 January 2024 letter to the Commission [REDACTED].
[101] See ATC Response at [7.19(c)] (noting that the "nature and scope" of Serato's business may be changed upon "prior written consent of the Sellers' Representative")
[102] SOI at [43.2].

focus is too narrow. It assumes that "the sellers would only agree to amend the SPA if they were compensated for the lost value they would otherwise expect in the absence of a foreclosure strategy."[103] NERA cites no evidence in support of this proposition, and ***even Mr. Wilderland never says this***. Indeed, there are numerous scenarios that could cause the parties to renegotiate. As discussed above, "good faith" is not easy to prove. Faced with the time and cost of litigation, the sellers could compromise for a lower amount. Alternatively, ATC could later provide a different way for the sellers to earn income. For example, it is public knowledge that ATC is pivoting to branding new products with "AlphaTheta." ATC has not announced why it is deemphasizing the iconic "Pioneer DJ" name, but speculation has it that ATC no longer has the trademark rights.[104] The only brand name in the DJ industry that even approaches the stature of "Pioneer DJ" is "Serato." It would be entirely rational (and in inMusic's view highly likely as a matter of good business sense) for ATC to use the iconic Serato brand name on at least some DJ hardware. At a minimum, it carries far more brand recognition than AlphaTheta at this point. ATC could enter into an intracompany licence with Serato to use "Serato" on new hardware (or have Serato itself sell DJ hardware). Either way, it would provide a revenue source that does not currently exist for Serato to make up for lost revenue from hardware partner licence fees, yet could decimate its hardware partners' business.[105] The sellers would have little to no incentive to resist such a change, and even if they did and ATC proceeded anyway, the challenge of proving monetary harm where revenue did not decrease would make litigation entirely irrational. This is the precise scenario the Commission has already identified: what may be commercially sensible between the parties (and thus there is no opponent to stop it) may nevertheless be devastating to the industry.

d. Expanding further on the prior point, relying entirely on the SPA to constrain ATC from acting anti-competitively would only work for scenarios that have been dreamt up, considered and addressed. For inMusic, it evokes the concept of "known unknowns and unknown unknowns."[106] In short, in complex situations, there are things we know we don't know, and things we don't know we don't know. Here, the "known unknowns" are the already identified ways (with unclear outcomes) that ATC could act anti-competitively, while the "unknown unknowns" are the multitude of activities that have not been identified and therefore it cannot be predicted how they will play out. ATC attempts to distract from the "unknown unknowns" by purporting to address the "known unknowns." The Commission determined that "there are a number of ways ATC could act against the interests of rival hardware manufacturers,

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[103] NERA Response to SOI at [4].
[104] https://djtechtools.com/2024/01/23/pioneer-dj-to-alphatheta-8-theories-behind-this-huge-brand-name-change/.
[105] As the Commission has noted, customers already ask for a "Serato controller" rather than, for instance, a Pioneer DJ or Roland controller. SOI at [71.3]. The parties self-servingly deny this, but in inMusic's experience in discussions with its retail partners, the Commission's finding is accurate.
[106] While inMusic appreciates that the phrasing originates from the American political realm and may not be readily recognizable (see https://en.wikipedia.org/wiki/There_are_unknown_unknowns), it is in fact an old psychology concept that has spread into areas of business and is applicable here.

whilst still remaining in compliance with its obligations under the SPA."[107] The Commission then provides two examples[108] and ATC cites other examples from elsewhere in the Statement of Issues.[109] Together, ATC refers to these five ***examples*** as the entire universe of "Theoretical Conduct" that would run afoul of competition law. ATC then spends several paragraphs arguing that these examples will not materialize because they breach the SPA, promising not to do these specific five things and then providing arguments why it would not make sense to do them. inMusic will not even address those arguments because they don't matter. Nothing about the Commission's statement suggests it intended its language to be limiting—it says, "a number of ways," ***not*** "exactly five." For any five examples the Commission or others can think of, there are likely five more that we don't know at this point (i.e., the "unknown unknowns"), and those possibilities may even change over time. Allowing ATC to drive the conversation and limit the debate only to the examples mentioned grants it extraordinary privilege to draft its own behavioural undertaking and omit strategies no one else has previously raised (e.g., the Serato hardware example above).

e. The sellers' willingness to enforce the SPA is likely overstated. Mr. Wilderland states that he "would absolutely exercise [his] legal right" to "enforce the contract and seek damages" if ATC "forecloses on its rivals, that action immediately results in harm to the revenue, and profit of Serato."[110] He appears to choose his words very carefully to outline a specific scenario where ATC not only forecloses rivals but it also harms revenue. As outlined above, there is at least one scenario (i.e. Serato hardware) that would foreclose rivals but likely would not harm revenue.[111] Mr. Wilderland would presumably not enforce the SPA under that situation. Similarly, actions which drive Serato users from inMusic to Pioneer hardware – the central vertical issue in this case – would not harm Serato revenues and profit. Even giving Mr. Wilderland the benefit of the doubt that he would enforce any breach of the SPA for any reason, with all due respect to him, that is an easy statement to make in the present day when he wants the merger to be approved. inMusic (indeed, most sophisticated companies) has been party to several lawsuits of varying degree. Litigation is lengthy, costly, risky (especially given the challenge of proving lack of "good faith" as discussed above)

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[107] SOI at [106].
[108] SOI at [106.1-106.2]
[109] ATC Response at [7.17].
[110] Wilderland Response at [4.5].
[111] inMusic is certain there are many other creative ways ATC could harm rivals while not impacting Serato revenue. Although inMusic did not refute ATC's argument that it is prohibited by the SPA to engage in the Theoretical Conduct, inMusic nevertheless believes that the items identified as Theoretical Conduct provide fertile areas of opportunity for ATC to harm rivals while maintaining Serato revenue and skeptical that ATC is correct that the sellers would enforce the SPA in such circumstances. For example, raising Serato licence fees for non-ATC hardware or charging new non-recurring engineering fees is unlikely to reduce Serato revenue, and therefore, there would be no reason for the sellers to enforce the SPA (if this even constituted a breach). ATC dismisses this possibility of raising licence fees (see ATC Response at [7.24]), its argument is not compelling. Indeed, none of ATC's arguments for why it would not undertake the Theoretical Conduct is persuasive (not to mention self-serving and easy to deny at this stage).

and often psychologically and emotionally draining for the individuals at the center of it. While Mr. Wilderland may state at this time that he will enforce the SPA (and he may truly believe it), once the situation arises, especially if some time has passed from Completion, he may assess the situation and feel very different. Additionally, as inMusic previously argued,[112] the sellers may completely rationally privately settle any dispute without anyone outside the parties ever knowing or being provided relief.

f. Finally, there appears to be no remedy of specific performance in the SPA. The parties focus exclusively on money damages in their analyses and contend that the math does not suggest that ATC has the incentive to foreclose rivals. As discussed below, this is not true. ATC will have strong incentives to foreclose, whether completely or partially, and is likely to do so. Under such circumstances, even taking at face value Mr. Wilderland's claim that he will enforce the SPA, only the sellers will receive any remedy from the breach (in the form of money damages). ATC's foreclosed rivals will neither receive money damages nor be placed in the same position as prior to the breach. This is fundamentally why the parties cannot contract out of meaningful competition enforcement. While the Commission must consider the entire marketplace, the parties—entirely rationally—are only concerned with themselves.

49. ATC has strong incentives to breach the SPA. inMusic will state again: ATC is already an industry juggernaut owning over 70% of the DJ hardware market and at least 30% of the DJ software market. With Serato, ATC would own over 60% of the DJ software market. To pay over NZD $100 million for Serato and not intend to increase both its DJ hardware and DJ software market shares would be incredible. The parties would have the Commission believe that the answer is simply a math problem, and ATC submits a new NERA report to support its argument. NERA's view, however, is far too narrow because it ignores reality. inMusic submits the attached Oxera report in response. Regardless of what the present calculations show, it is a well-known and common strategy for monopolists to forego short-term profits in favor of long-term dominance. As inMusic previously mentioned, Amazon.com is the most prominent present-day example of this.[113]

50. ATC's self-serving denials that it has no incentive to breach the SPA and/or foreclose rivals are not compelling for various reasons.

a. inMusic cannot believe we are still talking about MIDI-mapping. It is not going to happen with any regularity or by large numbers of customers.[114] inMusic has performed in-person demonstrations, written extensively on this and challenged ATC and Serato to counter the argument. Finally, ATC addresses it and largely acknowledges inMusic's point. Noting that it "can be a labour-intensive exercise" if the user is doing it on their own, ATC contends that it is possible with the help of

[112] inMusic Submission on the Statement of Issues at [3b].
[113] See inMusic Cross-Submission on Statement of Preliminary Issues, dated 12 December 2023 at [III(d)(ii)].
[114] Certainly, tech-savvy users will do it for fun to show they can but not for their livelihood as a DJ.

people online, assuming someone has already undertaken the painstaking process.[115] ATC next acknowledges that some features of Serato "are more challenging to MIDI-map." According to Serato,[116] certain features are *impossible* to MIDI-map. ATC, however, presents YouTube video showing how to "hack" Serato, and in it, there is a disclaimer that Serato does not allow you to map the jogwheels, as well as an accompanying article link that tells the user that they are on their own if they break something.[117] Finally, ATC notes that users can map hardware that is not officially supported by Serato as long as they use a second device that is officially supported, although many of those devices are discontinued.[118] In short, ATC tells the Commission not to worry about it foreclosing rivals because with the help of random strangers on the internet and obsolete hardware purchased on secondary markets, *anyone* can MIDI-map/"hack" Serato, and surely they will do so in such numbers to restrain the merged entity from foreclosing rivals instead of just purchasing plug-and-play hardware from ATC. ATC was probably better off continuing to dodge the argument than advance such a silly one that reinforces inMusic's point.

b. Reputational damage is nebulous, impossible to predict and unlikely to be significant. ATC claims that it would not risk its publicly-traded parent company's, Serato's or its own reputations by pursuing foreclosure.[119] In inMusic's experience, most consumers do not care about the corporation selling the products as long as they receive the products they want. At least in the US, anti-corporate sentiment is generally high across industries. If ATC gave customers a seamless Serato/ATC experience after making Serato incompatible with other brands, while there will be some vocal opposition online, it is likely to be temporary and minor, and its parent corporation's shareholders will be nonetheless satisfied with the profits. Further, as noted elsewhere, foreclosure short of an outright refusal to deal would be effective and would attract far less public scrutiny.

c. It is not true that ATC has never tried to foreclose rivals. Although inMusic has not seen ATC's response to inMusic's statement that ATC refused to allow rekordbox to be sold with inMusic DJ hardware, inMusic stands by its position,[120] and its CEO John E. O'Donnell and inMusic New Zealand Managing Director Morgan Donoghue are willing to testify under oath consistent with inMusic's statements. Further, [REDACTED].

51. Finally, even if the SPA were a viable constraint in the short term, the parties acknowledge that all bets are off come December 31, 2028. Throughout its response, ATC notes that Serato and rekordbox will compete until at least then[121] but makes no promises beyond that

[115] ATC Response at [7.61].
[116] https://support.serato.com/hc/en-us/articles/209377487-MIDI-mapping-with-Serato-DJ-Pro.
[117] ATC Response at [7.62].
[118] ATC Response at [7.63].
[119] ATC Response at [7.44].
[120] inMusic's Cross-Submission on Statement of Preliminary Issues at [II(e)].
[121] See, e.g., ATC Response at [6.3, 6.9, 7.37, 10.11].

date even though the Commission expressed concern about the substantial lessening of competition after then.[122] It should be noted that this date is related solely to the earn out period under the SPA. To inMusic's knowledge, based on the SPA snippets that the parties have presented, there is not an express requirement that ATC maintain "competition" between rekordbox and Serato; simply, that ATC must in "good faith" not do anything to harm Serato's revenue and profitability. ATC and Serato are stretching this language to imply that it requires that ATC maintain competition between rekordbox and Serato. However, as discussed above, there are potential ways that ATC could maintain revenue and still harm competition, and even if ATC harms competition in a way that harms revenue, *only the sellers* can enforce the SPA and avail themselves of remedies.

52. Moreover, the parties act as though 2028 is a long way off. Even if the Commission were convinced that the SPA somehow preserves competition between Serato and rekordbox until the end of 2028, this gives rival manufacturers little time to pursue alternatives and the delay could in many ways work to ATC's advantage. As a practical matter, ATC could not cut off rival hardware manufacturers immediately at Completion anyway. It would likely be the subsequent development cycle for new products. By then, ATC would also have had the opportunity to meet with Serato developers and evaluate how best to allocate engineering resources between Serato and rekordbox and make decisions about how to differentiate the two products. All the while, DJ hardware providers such as inMusic will continue to supply Serato to its customers with its hardware. This means Serato will continue to collect customer data [REDACTED]. By the end of 2028, ATC will be more than prepared to launch its long-term, coordinated software plan for rekordbox and Serato fueled by years of customer data served to it by hardware end users of, among others, inMusic, as well as years of R&D and marketing planning. Even if ATC can be trusted to behave for four and a half years, nothing would restrain it afterwards, and the Commission should deny clearance on this basis. As the Commission stated in *Trade Me Ltd. and Limelight*,[123] "While we commonly assess competition effects over the short term (up to two years), the relevant timeframe for assessment depends on the circumstances. ***A longer timeframe will be appropriate if, on the evidence, competition effects are likely to arise or increase in later years***." [Emphasis added].

53. In addition, ATC's ownership of Serato (SPA clauses notwithstanding) has a direct and immediate impact on ATC's incentives to compete with Serato in relation to DJ software. How could it not? The result is that, even if the SPA clauses were some mitigant on the vertical foreclosure issues (which they are not) they in no way mitigate the direct and foreseeable horizontal issues resulting from a merger of the two largest DJ software competitors. In fairness to the parties, they do stay clear of engaging on this point, presumably recognizing how futile it would be. Countless Commission decision and

[122] SOI at [93].
[123] https://comcom.govt.nz/__data/assets/pdf_file/0030/91839/2018-NZCC-1-Trade-Me-Limited-and-Limelight-Software-Limited-clearance-determination-8-March-2018.pdf at [300] footnote omitted.

guidance makes clear that even partial ownership can have profound impacts on the incentives of the parties to compete.

54. In sum, relying on the SPA to curtail ATC's post-merger conduct would be a terrible outcome for the DJ industry. Not only is the SPA not a meaningful constraint on ATC but also it would set bad precedent for the Commission. Behavioural undertakings are not permitted. The parties cannot be allowed to circumvent the law.

The Proposed Confidentiality Protocols are Insufficient to Protect Serato's Partners

55. Serato contends that merged entity cannot foreclose rivals or engage in anti-competitive strategy "using competitors' sensitive information" because it would breach the "recently negotiated protocols" and, in any event, would be practically "ineffective" because hardware partners can choose to limit their sharing of confidential information with Serato.[124] Elaborating further, Serato points to other major corporations that compete while also collaborating and sharing confidential information.[125] Serato also proposes that hardware manufacturers could share prototypes only two months prior to launch,[126] and/or hardware manufacturers could announce the launch of new products before they becomes available for the purpose of: (1) increasing the reputational costs to Serato in not having software integration complete by launch; (2) protecting rival hardware manufacturers from having ATC claim credit for their innovations.[127] Or, Serato suggests, hardware partners can simply choose not to have Serato integration at launch while helpfully offering that, if such partners want a software integration at launch, they can partner with a different DJ software provider.[128]

56. ATC similarly touts that Serato's new confidentiality protocol will address all concerns, and ATC is additionally "currently in the process of offering to enter into agreements with hardware partners individually that any confidential information provided by them to Serato would be appropriately safeguarded within the Serato business (and without interference from ATC)."[129] ATC further adds that using rivals' confidential information would breach the SPA.[130] With respect to this last point, as discussed extensively above, the terms of the SPA are not sufficient to protect ATC's hardware rivals. As with the issue of maintaining competition between rekordbox and Serato, there is no express prohibition in the SPA concerning ATC using rivals' confidential information. ATC is simply arguing the same "good faith" language requires it not to misuse rivals' confidential information. This argument fails here for the same reasons it does above.

57. Further, it is news to inMusic that ATC has begun to offer to enter into agreements with Serato's hardware partners. inMusic has not been contacted by ATC. While it is

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[124] Serato Response at [3.12].
[125] Serato Response at [209].
[126] Serato Response at [211].
[127] Serato Response at [212].
[128] Serato Response at [212.2].
[129] ATC Response at [10.5].
[130] ATC Response at [10.6].

understandable that ATC would not want to communicate with inMusic during the pendency of the Application given inMusic's staunch opposition, it makes no sense that inMusic would not be the first Serato partner to be contacted. inMusic is [RDEACTED] ATC's closest DJ hardware competitor (even though far behind). All other Serato hardware partners likely represent less than 10% of the DJ hardware market and *combined* do not likely approach inMusic's market share. If ATC truly has contacted Serato hardware partners (other than inMusic), ATC likely did so expressly to tell the Commission this fact and get some credit for working on reaching agreements with Serato hardware partners. With all due respect to Serato's other partners, ATC's overtures are meaningless if they do not include inMusic [REDACTED].

58. Turning to Serato's arguments, none offer compelling reassurances that there are, or will be, the "sufficient safeguards in place" to prevent the sharing of sensitive information between Serato and ATC that the Commission found lacking.[131] As an initial matter, in stating that its protocol was "recently negotiated," Serato seems to imply that its hardware partner confidentiality protocol was the subject of a back-and-forth between Serato and its hardware partners and that hardware partners' input was acknowledged and addressed. It was not. [REDACTED].[132] [REDACTED]. For Serato to suggest that the protocol was the subject of negotiation is highly misleading.

59. As for the substance of the confidentiality protocol, there are a number of issues that inMusic explained to Serato. For example, [REDACTED].[133] [REDACTED].

60. By way of another example, [REDACTED].

61. Most importantly, the Commission and Serato's hardware partners, including inMusic, are left to review the protocol without any idea how ATC will control and communicate with Serato should this acquisition be cleared and therefore must guess at and imagine scenarios and try to negotiate modifications to the protocol accordingly. For example, [REDACTED]. Those are well understood and tangible data sources, but what about [REDACTED]. In short, Serato's proposed confidentiality protocol raises too many unanswered and unanswerable questions to be sufficient to assure the Commission that its hardware partners' confidential information will be adequately protected from disclosure to ATC.[134]

62. Serato's offered alternative to its confidentiality protocol is to have its hardware partners either not share confidential information at all or very late in the development process and

[131] SOI at [143].
[132] [REDACTED].
[133] See ATC Response at [8.3(a)] (stating the number of Serato subscribers who use Serato Lite).
[134] Serato's references to other relationships in the tech sector where competitors share confidential information barely warrants mention because they are not relevant for several reasons. Serato has presented none of their agreements, and therefore, the Commission has no basis to evaluate whether Serato's proposed protocol is similarly robust. Not to mention, these are all enormous multinational corporate behemoths. All have more than enough resources to set up facilities and processes to ensure secrecy, but even if not, none is going out of business if confidentiality is not preserved. That said, they all also have huge teams of lawyers to draft and enforce confidentiality agreements. Here, none of the market participants are in remotely the same stratosphere, and the threat of Serato hardware partners exiting the market is real and substantial.

close to launch. This is baffling. As inMusic previously explained,[135] the integration process between Serato and inMusic is deep and extensive, requiring many months of collaboration. inMusic's high-end RANE controllers in particular require substantial cooperation between inMusic and Serato. For Serato to suggest it could maintain the same high level of integration with less time and/or less confidential information[136] is not accurate. Even if inMusic were so inclined to pursue this new process, ATC will almost certainly not be changing its process. Therefore, Serato's alternative solution to its protocol is for its hardware partners to fall further behind ATC. Plainly, this is not a viable solution.

63. In sum, Serato's confidentiality protocol should not give the Commission any comfort that Serato's hardware partners' confidentiality will be adequately preserved and sensitive information shielded from ATC. There are far too many gaps in the document as it currently exists for it to represent sufficient protection. Serato's offered alternatives are worse because they further ensure ATC will continue to maintain an advantage over the DJ hardware market and should be rejected as well.

Conclusion

64. The filings of ATC, Serato, Mr. Wilderland and NERA, though substantial in physical weight, are light in substance and reflect little more than desperation. Rather than address directly the Commission's concerns as expressed in the Statement of Issues and rebut the substantial findings against clearance by offering lucid argument and credible evidence, they obfuscate, erect elaborate fantasies around, for example, market definition, and offer insufficient protections to preserve competition. They then seek to reverse the onus and thus reformulate the legal test. Most concerningly, however, is how much *trust* they ask the Commission to place in the sellers and the merged entity to police anti-competitive behavior. Even if the parties had not spent so much effort up to this point trying to convince the Commission not to believe what is obvious to everyone in the DJ industry—that this merger would destroy competition in both the DJ hardware and DJ software markets—the Commission should reject the parties' invitation to upend the merger clearance process by allowing merging entities to settle by private contract any competition issues. Not only should that be rejected as a matter of policy, even putting that to one side the SPA does not, in fact, achieve what the parties claim it achieves. The Commission got it entirely correct in the Statement of Issues, and nothing offered by the parties changes the analysis on any point. Accordingly, Clearance should not be granted.

[135] inMusic's Cross-Submission on the Statement of Preliminary Issues, dated 12 December 2023, at [II(d)(i)] (Note, in particular, the exhibits to this submission showing that Serato has told inMusic that it normally takes about a year from receipt of a prototype for Serato to complete the integration).
[136] See Serato Response at [215].