

**Statement of
Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and
Commissioner Christine S. Wilson
Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc.
FTC File No. 181-0180**

Staples, Inc. (“Staples”), now owned by the private equity fund Sycamore Partners (“Sycamore”), proposes to merge with Essendant, Inc. (“Essendant”). Staples is the world’s largest retailer of office products and related services. In addition to sales in other channels, Staples sells office supplies directly to mid-sized businesses. Essendant is a wholesale distributor of office products and sells to independent commercial dealers/resellers and others in the upstream office supply distribution market. The independent dealers that are customers of Essendant compete with Staples for downstream sales to mid-sized business customers. Thus, for the most part, Staples and Essendant do not compete with each other; rather, Staples competes with Essendant’s customers.

Following a staff investigation that considered several possible vertical and horizontal theories of competitive harm, the Commission has voted 3-2 to issue a complaint and accept a settlement, which would resolve the only competitive concern arising out of this transaction that is supported by the evidence. Specifically, the Commission found that, without adequate safeguards post-merger, Staples would gain access to the competitively sensitive information of Essendant’s dealer customers and the customers of those dealers, which could enable Staples to engage in anticompetitive conduct. To resolve this issue, the Commission’s proposed order imposes firewalls and other safeguards to protect the competitively sensitive information of Essendant’s dealer customers, as well as the sensitive information of the customers of those dealers.

The structure of this market and the competitive questions about the proposed transaction required an in-depth, careful investigation and analysis. That is exactly what the staff conducted. They interviewed more than a hundred market participants, analyzed party and third-party data, reviewed full document productions by the merging parties that included millions of documents, and conducted sophisticated economic analyses using the best economic tools available. Staff thoroughly investigated every theory of anticompetitive harm that might reasonably be applicable to this case. Based on that investigation, staff found that the evidence did not support any claims of likely anticompetitive harm other than the one for which a remedy has been obtained. We agree.¹

The primary theory of harm that was considered and rejected involves Staples potentially raising Essendant’s prices. This hypothetical conduct potentially would force Essendant’s independent dealer customers to raise prices to their customers—the mid-sized businesses—some of whom would presumably look for other suppliers. Staples would lose money from whatever sales Essendant lost due to its higher prices. But if enough businesses that switched sales away from the independent dealers decided to buy from Staples, in theory, the overall strategy could be profitable. The evidence, however, did not support this theory.

¹ Commissioner Chopra’s dissent suggests that the Commission is “jumping to conclusions” and that “an independent fact-finder or Court” would likely reach different conclusions. But the Commission is basing its conclusions on, as we describe above, staff’s extremely thorough investigation conducted in this matter. The notion that the Commission is relying on an “insufficiently developed record” is simply untenable.

First, the evidence showed that rather than absorbing price increases from Essendant, many independent dealers would switch to Essendant's largest competitor, S.P. Richards. The evidence demonstrated that S.P. Richards offers comparable products and services and is viewed as a strong substitute for Essendant. Staff closely scrutinized the strengths and weaknesses of S.P. Richards relative to Essendant, including geographically, and the evidence showed that S.P. Richards is a viable substitute for Essendant. Although there are some transaction costs to switching wholesalers, the evidence showed that a substantial number of independent dealers have switched their wholesaler in the past, use both wholesalers today, and reported that they would be willing to shift their business in the face of a price increase from Staples.² Further, the evidence showed that many independent dealers could take other actions to counter any attempt by Staples to increase prices or degrade services, including buying directly from office supply manufacturers or from other sources. Thus, the evidence did not support the theory that Staples could profitably raise the prices that Essendant charges its customers in the first place.

The record further showed that even if Staples raised Essendant's prices and in turn independent dealers that used Essendant as their primary wholesaler raised prices, the customers those dealers would lose would not likely switch to Staples. Staples' share in the downstream market for mid-sized businesses is small. And even that small share likely overstates Staples' competitive significance, because Staples is not presently a particularly close substitute for mid-sized end customers who currently purchase from Essendant dealers. The evidence indicated that Staples' niche of this market is focused on customers who are less reliant on high-touch services. In contrast, the customers of Essendant's dealers typically value service, such as optimized delivery, personalized customer service, and inventory services, and, accordingly, find Staples unattractive. Even if Essendant's dealer customers stuck with Essendant in the face of a price increase, the downstream customers that those dealers would lose from the resulting higher prices would not switch to Staples; they would likely switch to dealers buying from S.P. Richards or other sources of supply. Thus, there was insufficient evidence to support the theory that Staples would engage in any kind of post-merger cost-increasing or "foreclosure" strategy aimed at Essendant and its customers.

Staff also investigated a number of other theories of harm. They considered whether there would be a loss of potential competition in which either Staples or Essendant would move into the distribution space currently occupied by its merger partner. The investigation found insufficient evidence to support such a theory of competitive harm. Staff also considered whether the combined entity could exercise increased market power on the "buy side"—*i.e.*, in purchasing supplies from manufacturers or other suppliers—that Staples could then exploit against its suppliers. A significant portion of the procompetitive efficiencies expected to arise from the merger would indeed flow from lowering purchasing costs. However, while the record reflects that such cost savings are likely to be achieved, the evidence did not support the theory that those cost savings would result from an increase in Staples' buyer market power. Such cost savings are only anticompetitive when they result from an exercise of market power by the buyer, which requires that the buyer possesses the ability to reduce *overall* market demand and price by reducing its own purchases. This conduct inflicts a welfare loss under well-recognized monopsony models—but that welfare loss does not occur when, for example, a buyer obtains a

² Although Commissioner Slaughter argues that "some qualitative evidence indicates that switching from Essendant to SPR is costly for independent resellers," as discussed, the strong weight of the evidence rejects Commissioner Slaughter's hypothesis.

reduced price from suppliers by offering to buy *more* of their output, or by reducing the suppliers' transactions costs.³ The evidence here did not support any monopsony theory, and instead was consistent with procompetitive cost reductions.

In their dissenting statements, Commissioners Slaughter and Chopra raise a number of issues concerning this transaction. We address each below.

Both dissents question the parties' efficiency claims, arguing in particular that the merged firm's proffered ability to buy office supplies at lower prices should not be fully credited as an efficiency because it could instead constitute evidence of an increase in monopsony power. However, as we discuss above, this issue was carefully considered and the record did not support this concern based on the facts of this case. In any event, our decision does not rest on efficiencies, but rather on the absence of evidence that this acquisition will result in anticompetitive harm outside of the specific area addressed in our order.

Commissioner Chopra argues that, post-merger, Sycamore "will have a strong incentive to rapidly increase margins to make a clear case to a potential future acquirer,"⁴ on the grounds that private equity firms "generally take controlling equity stakes in firms with the hope of realizing significant gains through sale to a buyer or an exit through public markets"⁵ and likely "will operate assets much differently" than an independent Staples would.⁶ Commissioner Chopra has repeatedly stated his negative view of private equity,⁷ but the application of that general view to the facts of this case does not raise a cognizable antitrust concern. The antitrust laws focus on curbing harm to the competitive process. This concern has nothing to do with the competitive process; it would exist regardless of whether Sycamore owned Staples, did not own Staples, or started a brand new private equity fund and made its first acquisition the purchase of Essendant.⁸ The Commission does not dwell on motives that have no relevance to how the acquiring company would use the acquired business to harm the competitive process.

Commissioner Slaughter's dissent raises concerns that de novo entry is unlikely. The staff and the majority do not rest any part of their analysis on a likelihood of de novo entry. We assume it will not occur, and so do not rely on it for our conclusions.

³ Roger D. Blair & Jeffrey L. Harrison, *Monopsony: Antitrust Law and Economics* 45-48 (2d ed. 2011).

⁴ Statement of Commissioner Chopra, *Sycamore Partners, Staples, and Essendant* (Jan. 28, 2018) at 3 (hereinafter "Chopra Statement").

⁵ Chopra Statement at 3 n.9.

⁶ Chopra Statement at 4.

⁷ See, e.g., Pallavi Guniganti, FTC Commissioner hits out at private equity, GCR (Sept. 28, 2018), <https://globalcompetitionreview.com/article/usa/1174735/ftc-commissioner-hits-out-at-private-equity>; Statement of Commissioner Rohit Chopra, *Linde AG, Praxair, Inc. and Linde PLC* (Oct. 22, 2018) at 2-3, https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

⁸ Commissioner Chopra also expressed concerns that the firewall remedy is potentially penetrable, and thus he would allow independent resellers to freely port customer data to another wholesaler. But the Commission has employed firewalls in past vertical merger cases, and the integrity of those firewalls was robust. Fed. Trade Comm'n, *The FTC's Merger Remedies 2006-2012: A Report of the Bureau of Competition and Economics* at 17 n.34 (Jan. 2017) ("All vertical merger orders were judged successful."), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureau-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf. Also, many independent resellers already use both Essendant and S.P. Richards. As a result, such an addition to the Order would not change competitive conditions much, but would impose an undue burden on the merging parties. And finally, independent resellers did not request this remedy during our investigation.

Commissioner Slaughter also is concerned that switching between Essendant and its primary direct competitor in wholesaling, S.P. Richards, is costly and unlikely. As discussed above, the evidence does not support this concern. We know that independent resellers are not locked in to either Essendant or S.P. Richards; indeed, many independent resellers use both. Staff's investigation, involving hundreds of interviews, also showed that switching wholesalers was not an insurmountable hurdle for independent resellers; in fact, many of them can and do switch or credibly leverage one wholesaler off the other in negotiations. Moreover, while the dissent speculates that there may be geographic areas in which switching would be more difficult, as noted above, staff investigated this issue and concluded that the evidence did not support this concern.

As we also discuss above, this concern only would rise to the level of an antitrust problem if the customers of Essendant's dealers were likely to switch to Staples to a sufficient degree to provide Staples with an incentive to raise prices to Essendant's customers. But the evidence did not support this hypothesis; rather, it showed that sufficient switching to Staples is unlikely because of Staples' low share in this particular downstream market, and the differentiation between the services Staples and the wholesalers provide. As a law enforcement agency, our fidelity must be to the facts—not speculation.

Commissioner Slaughter asserts that staff concluded significant price effects would arise as a part of a raising rivals' cost strategy by Staples. This mischaracterizes the staff's analysis. Staff specifically concluded that a raising rivals' cost strategy would not be profitable for Staples. Overall, Commissioner Slaughter is substituting hypotheses for the informed conclusions drawn from the staff's thorough investigation.

Commissioner Chopra, on the other hand, claims we put too much faith in economic models. Not so. As in any case, we considered staff's recommendation based on their investigation of documents, interviews, data, and economic analysis. In this case, none of those items supported taking any action other than the remedies we have imposed.

In addition to commenting on this specific transaction, Commissioner Slaughter's dissent raises a series of generalized concerns about merger enforcement, and in particular, vertical merger enforcement. Although a detailed discussion of the many and complex issues implicated by a general critique of vertical merger enforcement is beyond the scope of this statement, a few points are worth noting.

First, the dissent seems to suggest that our decision in this case is part of a decades-long, bipartisan pattern of faulty analysis, improper assumptions, unreliable predictions, underweighting evidence of anticompetitive effect, and overweighting evidence of efficiencies. But there is a vigorous debate over whether that assertion has any merit, and the sources cited in the dissent have been subject to substantial criticism for both methodological flaws and irrelevance to competition policy.⁹ Consistent with our long-standing tradition of self-

⁹ See, e.g., Joshua D. Wright et al., "Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," Sept. 14, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524; Joshua D. Wright, "Market Concentration," Note submitted to the Hearing on Market Concentration, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, OECD (June 7, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf); Greg Werden & Luke Froeb, "Don't Panic: A Guide to Claims of Increasing Concentration" (Apr. 16, 2018),

evaluation, learning, and evidence-based policy-making, the Commission has instituted a series of public hearings, in part, to determine whether the evidence supports the concerns raised by our dissenting colleagues. In this process, we hope our colleagues are willing to subject the sources on which they rely to the same scrutiny they apply to those that have garnered widespread acceptance in the past.

Second, while the dissent tries to carve a sharp distinction between the Commission’s approach to vertical mergers and the dissent’s preferred approach, this is a false dichotomy. There is no disagreement that vertical mergers can be pro- or anticompetitive; that as the economy generates increased merger activity, there may be more mergers—and more problematic mergers—that should be reviewed carefully; that Section 7 of the Clayton Act is an incipency statute; and that we should seek to enjoin or otherwise remedy anticompetitive transactions before they are consummated. There is no dispute that vertical mergers can harm competition in several ways, which have been well-known at least since the seminal article on vertical foreclosure theory was published in the *Yale Law Journal* in 1986.¹⁰ Likewise, we fully agree with the dissent’s view that we should investigate all potential theories of harm in vertical mergers—just as the staff did in this matter. We also agree that under the Horizontal Merger Guidelines, claimed efficiencies must be verified, cognizable, merger-specific, and passed through¹¹, and we recognize that it is not a rarity for merging parties to overstate efficiencies or fail to support them properly.¹² And, we agree that where there is credible evidence, the Commission should obtain relief that will eliminate the relevant harm, and that structural remedies are usually preferred but not always essential. The decision in this case embodies that view.

So with what aspect of the Commission’s vertical enforcement philosophy does the dissent disagree? One point appears to be a simple misapplication of particular facts—the dissent’s claim that the Commission challenges few vertical mergers. But the Commission has blocked or obtained relief in numerous vertical transactions in that period. In fact, in the two years that our current Chairman served as Bureau Director and Commissioner Wilson served as Chief of Staff under then-Chairman Timothy J. Muris, the Commission voted to block one vertical transaction, which the parties abandoned as the result of the Commission vote to seek to enjoin it, and

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912; Carl Shapiro, *Antitrust in a Time of Populism*, (Oct. 24, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345.

¹⁰ See Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power Over Price*, 96 *YALE L.J.* 209 (1986).

¹¹ The Commission’s hearings that addressed vertical mergers considered whether the Commission should promulgate vertical merger guidelines. One question that may be considered is whether the standards for efficiency claims in vertical mergers should parallel the standards for horizontal mergers.

¹² We do not, however, share Commissioner Slaughter’s apparent view that the staff does not test efficiency claims. The staff rigorously, and often skeptically, examine any and all efficiency claims. Indeed, staff has declined to credit the parties’ proffered efficiencies in so many litigated cases that many antitrust lawyers and economists have argued that efficiencies are ineffective as a defense in court. See, e.g., Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 *GEO. MASON L. REV.* 703, 704 (2017) (“Few areas of merger law are more controversial than the treatment of such efficiency claims, which are often raised but almost never found to justify a merger that has been shown to be prima facie unlawful.”); Timothy J. Muris & Bilal Sayyed, *Three Key Principles for Revising the Horizontal Merger Guidelines*, *The Antitrust Source* at 7 (Apr. 2010) (“In our experience, agency leaders do not apply different levels of proof, but some (not all) investigating attorneys appear more skeptical of efficiency claims than they do of potential anticompetitive effect claims.”).

obtained a divestiture of the acquired, offending asset in another case.¹³ The fact that the parties chose not to litigate does not negate the Commission's willingness to challenge these deals. And of course, of the 1,500 to 2,000 or so HSR filings we receive annually, the overwhelming majority are universally recognized as presenting no anticompetitive concerns at all. Thus, the fact that most of them were not remedied means nothing.

More broadly, the dissent seems to take issue with the Commission's emphasis on bringing cases where theories are supported by facts. But the incipency standard under Section 7 imposes meaningful obligations on the government before allowing it to block a transaction. Specifically, it requires us to establish more than a theoretical concern—it must be probable (not certain) and substantial. Simply theorizing a harm that might arise out of a merger is not enough. We must be able to explain and to prove with facts how a given vertical merger is likely to cause harm in the *case at hand*. We must provide evidence.

Finally, the dissent appears to suggest that the Commission commit to a retrospective review of every transaction that raises antitrust concerns, but where the Commission does not challenge the transaction because the evidence available at the time indicates that those concerns are unlikely to be realized. That suggestion is interesting in theory and given unlimited resources, we might well support it. Also interesting would be retrospectives on vertical mergers we chose not to challenge, and retrospectives on assumptions we have made about how markets likely would develop in cases where we brought enforcement actions (*e.g.*, a finding of high entry barriers in the challenged market). But the practical reality is that we do not have remotely enough resources to institute such a program, even if the data were available (which may not be true in many cases). Consider, for instance, some of our recent enforcement numbers. In FY 2017, the FTC issued 33 second requests and brought 21 merger enforcement actions.¹⁴ One could easily claim that each transaction subject to a second request was a close call. Thus, to do a retrospective for every merger subject to a second request but that did not result in an enforcement action would have required us to do 12 retrospectives. Commissioner Slaughter also would commit us to do retrospectives on transactions where relief was obtained. Her approach would likely commit us to doing on the order of five times or more the number we have done in most years, which is not possible with our current resources.

The issue of retrospectives is a critical one for the Commission and merger enforcement more generally. This is why expanding our merger retrospective program has been a priority of the Chairman and Commissioner Wilson since before confirmation, and why it is one of the issues being explored in our Hearings.¹⁵ The Commission has a record of conducting retrospectives and, after the Hearings conclude, we will synthesize what we have learned and develop an approach or approaches for additional retrospectives that make sense. We are likely to consider how to best use our existing resources, which may militate in favor of one approach, and also what would be a more optimal approach assuming access to more resources. But we cannot

¹⁴ FTC & DOJ, Hart-Scott-Rodino Annual Report FY 2017, <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>.

¹⁴ FTC & DOJ, Hart-Scott-Rodino Annual Report FY 2017, <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>.

¹⁵ See Fed. Trade Comm'n, *Hearings on Competition and Consumer Protection in the 21st Century*, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>.

commit to a program that is unsustainable with our current resources and may in many cases be impossible to implement even with unlimited resources.

In closing, we emphasize one overarching point: as a law enforcement agency, we are constrained by the parameters of our authorizing statute and the facts of the case in front of us. That constraint is critical to the rule of law and the effective functioning of markets. Even in the context of a merger review, which, as both dissents emphasize, is a forward-looking exercise, we must base our predictions on facts supporting a cognizable theory under Section 7 of the Clayton Act. The dissents highlight a number of concerns, but all of those concerns were either investigated assiduously and ruled out by staff or speak to potential injuries that fall outside the scope of antitrust law. For these reasons, we decline to take broader action and vote to accept the consent decree as currently formulated.