IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

DISTRICT OF COLUMBIA
441 4th Street, N.W., Suite 600 South
Washington, DC 20001

COMMONWEALTH OF PENNSYLVANIA
14th Floor Strawberry Square
Harrisburg, PA 17120

Plaintiffs,

v.

STAPLES, INC.
500 Staples Drive
Framingham, MA 01702

and

OFFICE DEPOT, INC.
6600 North Military Trail
Boca Raton, FL 33496

Defendants.

Civil Action No. 15-cv-02115

PUBLIC VERSION

COMPLAINT FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION PURSUANT TO
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiffs, the Federal Trade Commission ("FTC" or "Commission"), by its designated attorneys, and the District of Columbia and the Commonwealth of Pennsylvania, acting by and through their respective Office of Attorney General (collectively, "Plaintiff States"), petition this Court for a temporary restraining order and preliminary injunction enjoining Staples, Inc. ("Staples") from consummating its proposed merger (the "Merger") with Office Depot, Inc.

("Office Depot"). Plaintiffs seek this provisional relief pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26. Absent such provisional relief, Staples and Office Depot (collectively, "Defendants") would be free to consummate the Merger at 12:01 a.m. on December 9, 2015.

Plaintiffs require the aid of this Court to maintain the status quo during the pendency of an administrative proceeding on the merits. The Commission has already initiated that administrative proceeding pursuant to Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21, and Section 5 of the FTC Act, 15 U.S.C. § 45. That administrative proceeding is scheduled to begin on May 10, 2016. The administrative proceeding will determine the legality of the Merger and will provide all parties a full opportunity to conduct discovery and present testimony and other evidence regarding the likely competitive effects of the Merger.

NATURE OF THE CASE

1. This is an action to temporarily restrain and preliminarily enjoin the consummation of a Merger between Staples and Office Depot. Defendants are—by a wide margin—the two largest vendors of consumable office supplies to large "business-to-business" ("B-to-B") customers (i.e., business customers buying for their own end-use) in the United States.

2. Staples' and Office Depot's own documents state that they are the only participants in a "two player" national market. Defendants are the best options for most large B-to-B customers—and the only meaningful options for some large customers—particularly those with facilities in multiple regions of the country. And they are each other's closest competitors for such customers. As Staples explained at an internal Leadership Summit, "There are only two

real choices for customers," Staples and Office Depot. Office Depot similarly made clear to a customer that "[o]n a national scale, Office Depot's competition is Staples."

3. Direct head-to-head competition between Staples and Office Depot yields substantial benefits to large B-to-B customers in the form of lower prices and better service. If consummated, the Merger would eliminate that competition. Office Depot acknowledged this in April 2015—two months after the Merger was announced—encouraging a large B-to-B customer to accept its "best and final" offer promptly, stating "If and when [Staples'] purchase of Office Depot is approved, Staples will have no reason to make this offer."

4. By eliminating direct competition between Staples and Office Depot, the Merger threatens significant harm to a wide range of large B-to-B customers.

5. Office supplies vendors, such as Defendants, sell and distribute consumable office supplies (e.g., pens, staplers, notepads, folders, and copy paper) to all manner of businesses across the United States. Employees of these businesses use consumable office supplies in connection with their jobs. As a result, businesses depend on vendors to provide consistent and reliable delivery of consumable office supplies so that their employees have the products they need to work productively and on a cost-effective basis.

6. Large B-to-B customers typically require an office supplies vendor with experience and a strong reputation for providing consumable office supplies to large B-to-B customers. These requirements are especially important for customers seeking delivery on a multi-regional or national basis. Many large B-to-B customers require that their office supplies vendor provide a broad range of national-brand and private-label products, flexible and reliable delivery (including desktop delivery), high levels of customer service, customizable product catalogs, detailed utilization reporting, and sophisticated information technology ("IT")

interfaces for procurement and billing. Moreover, large B-to-B customers require those features and services to be part of the transaction, along with consumable office supplies at competitive prices.

7. Large businesses typically purchase consumable office supplies pursuant to contracts awarded through requests for proposal ("RFPs"), auctions, or bilateral negotiations. Defendants generally compete head-to-head in such proceedings. They are often the two finalists in RFPs or other contest because they can obtain the lowest cost of goods from office supplies manufacturers and they possess similar networks of distribution centers, salesforces, and other services and features, such as strong reputations and experience, high levels of customer service, sophisticated IT, and product utilization monitoring and tracking. Large B-to-B customers often use those similar offerings to play one Defendant off the other to obtain lower pricing, other financial incentives, better service, and improved contract terms. Indeed, Staples and Office Depot frequently lower prices, increase discounts, and offer other financial incentives to take business away from each other, and to avoid losing business to each other.

8. Many large B-to-B customers contract with a single office supplies vendor for consumable office supplies. Doing so allows these customers to consolidate their purchases and leverage the bigger purchasing volume to negotiate lower prices and higher discounts, rebates, or other pricing concessions. In addition, contracting with a single office supplies vendor allows large businesses to track and monitor usage of office supplies through one vendor, rather than several different vendors, thereby lowering their costs and improving operational efficiency. Using a single office supplies vendor also provides large B-to-B customers with a single point of contact for problems or concerns, a single IT interface for ordering, and a single payee for administrative purposes. These features are important to many large B-to-B customers because

they enhance efficiency, ease of use, and administration, thereby lowering their costs of doing business.

9. For large B-to-B customers with locations across the United States or in multiple regions of the country, choosing a single office supplies vendor generally means using an office supplies vendor with national or multi-regional distribution capabilities. Staples and Office Depot are the only two office supplies vendors that can provide on their own the low prices, nationwide distribution, and combination of services and features that many large B-to-B customers require.

10. Once a large B-to-B customer contracts with an office supplies vendor, it attempts to ensure that the employees responsible for purchasing consumable office supplies purchase under the contract with its chosen office supplies vendor. Maximizing spend with its contracted office supplies vendor often allows a large B-to-B customers to earn the highest volume-based discounts, rebates, or other pricing incentives. It also minimizes the inefficiency of having to pay invoices from multiple vendors and accommodate multiple deliveries.

11. Other supply options have significant disadvantages for large B-to-B customers.

12. Local or regional vendors (including but not limited to W.B. Mason), local or regional consortia, and ad hoc region-by-region networks of suppliers have higher costs and thus higher prices, limited geographic footprints, and/or logistical and coordination challenges for large B-to-B customers. Because of these disadvantages, these other supply options have relatively small shares of sales to large B-to-B customers.

13. The Merger would combine the office supplies vendors that are—by far—the two top choices for a significant number of large B-to-B customers. It would eliminate beneficial

competition between the two largest, most significant, and most attractive alternatives for many large B-to-B customers.

14. The Merger also would create a firm with a dominant share of the relevant market and significantly increase market concentration. Post-Merger, Staples would control more than 70% of the relevant market. The next-largest competitor would possess less than 5% of the relevant market. Under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines"), a post-merger market-concentration level above 2500 points, as measured by the Herfindahl-Hirschman Index ("HHI"), and an increase in market concentration of more than 200 points renders a merger presumptively unlawful. Post-Merger market concentration would be more than 4900, and would increase HHIs in an already concentrated market by well over 200 points. Thus, the Merger is presumptively unlawful.

15. Other office supplies vendors, including but not limited to Amazon Business, regional vendors such as W.B. Mason, distribution consortia, and distributors of adjacency products, such as janitorial/sanitation products or breakroom supplies, cannot meaningfully constrain a post-Merger Staples. As a result, Staples could charge higher prices and would have a diminished incentive to maintain or improve quality for large B-to-B customers if it were allowed to acquire Office Depot.

16. Similarly, manufacturers of "core" consumable office products, such as pens, folders, and notepads, generally do not sell core office supplies directly to large B-to-B customers, particularly in the quantities that such customers would want. They generally sell to wholesalers or vendors such as Respondents. Nor would it be practicable for large B-to-B customers to buy office supplies from a large number of manufacturers. Wholesalers do not generally sell consumable office supplies directly to large B-to-B customers. Rather, they

generally sell to office supplies vendors, which then resell those products to large B-to-B customers.

17. Finally, buying at retail, whether from brick-and-mortar or online retailers, including Amazon Business, generally would be more expensive for large B-to-B customers than purchasing from an office supplies vendor, and generally would not provide the full combination of other benefits important to large B-to-B customers, such as desktop delivery, order tracking, electronic ordering, flexible payment terms, negotiated pricing, and consistency of product selection and availability.

18. Defendants cannot show that new entry or expansion by existing vendors would be timely, likely, or sufficient to counteract the anticompetitive effects of the Merger. Significant barriers to entry into office supplies distribution to large B-to-B customers—particularly national and multi-regional customers—exist, making entry or expansion difficult and incapable of constraining the merged entity.

19. Defendants cannot show cognizable efficiencies that would offset the likely and substantial competitive harm from the Merger.

20. On December 7, 2015, by a 4-0 vote, the Commission found reason to believe that the Merger would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially reducing competition.

21. A temporary restraining order enjoining the Merger is necessary to preserve the Court's ability to afford full and effective relief after considering the Commission's application for a preliminary injunction. Preliminary injunctive relief is similarly necessary to preserve the status quo and protect competition during the Commission's ongoing administrative proceeding. Allowing the Merger to proceed would harm consumers and undermine the Commission's ability

to remedy the anticompetitive effects of the Merger if it is found unlawful after a full trial on the merits and any subsequent appeals.

JURISDICTION AND VENUE

22. This Court's jurisdiction arises under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); and 28 U.S.C. §§ 1331, 1337, and 1345. This is a civil action arising under Acts of Congress protecting trade and commerce against restraints and monopolies, and is brought by an agency of the United States authorized by an Act of Congress to bring this action.

23. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

> Whenever the Commission has reason to believe –
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public – the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . . .

24. In conjunction with the Commission, the Plaintiff States bring this action for a preliminary injunction under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain Staples and Office Depot from violating Section 7 of the Clayton Act, 15 U.S.C. § 18, pending the Commission's administrative proceeding. The Plaintiff States have the requisite

standing to bring this action because the Merger would cause antitrust injury in the markets for the sale and distribution of consumable office supplies to large B-to-B customers in their states.

25. Defendants are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12. Defendants also are, and at all relevant times have been, engaged in commerce in each of the Plaintiff States.

26. Defendants transact substantial business in the District of Columbia and are subject to personal jurisdiction therein. Venue, therefore, is proper in this district under 28 U.S.C. § 1391(b) and (c) and 15 U.S.C. § 53(b).

THE PARTIES AND THE PROPOSED MERGER

27. Plaintiff, the Federal Trade Commission, is an administrative agency of the United States government, established, organized, and existing pursuant to the FTC Act, 15 U.S.C. §§ 41 et seq., with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C § 45.

28. The Plaintiff States bring this action pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26 in their sovereign or quasi-sovereign capacities as *parens patriae* on behalf of the citizens, general welfare, and economy of each of their states.

29. Defendant Staples is a publicly traded corporation organized under the laws of Delaware with headquarters in Framingham, Massachusetts. In fiscal year 2014, Staples generated $22.5 billion in sales, with 54.8% of that coming from office supplies. Staples operates three business segments: North American Stores & Online, North American

Commercial, and International Operations. In fiscal year 2013, 34.8% of Staples' total sales came from the North American Commercial segment. Staples is the country's largest vendor of consumable office supplies to B-to-B customers.

30. Defendant Office Depot is a publicly traded corporation organized under the laws of Delaware with headquarters in Boca Raton, Florida. In fiscal year 2014, Office Depot had $16.1 billion in revenue, with 47.2% of that coming from sales of office supplies. Office Depot operates through three divisions: North American Retail Division, North American Business Solutions Division, and International Division. In fiscal year 2014, 37.4% of Office Depot's sales came from the North American Business Solutions Division. Office Depot is the country's second-largest vendor of consumable office supplies to B-to-B customers.

31. In November 2013, Office Depot acquired OfficeMax, Inc., which was then the third-largest vendor of office supplies and services in the United States.

32. On February 4, 2015, Staples and Office Depot entered into an Agreement and Plan of Merger ("Merger Agreement"), pursuant to which each share of Office Depot stock would be converted into the right to receive $7.25 in cash, plus approximately 0.2 shares of Staples' common stock. As of the market's close on February 3, 2015, these terms of the Merger Agreement equated to a value of Office Depot of $6.3 billion. Either party may terminate the Merger Agreement if it is not consummated by February 4, 2016.

33. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, and a timing agreement between Defendants and Commission staff, unless temporarily restrained and preliminarily enjoined by this Court, Defendants would be free to consummate the Merger at 12:01 am on December 9, 2015.

34. On December 7, 2015, by a 4-0 vote, the Commission found reason to believe that the Merger would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C § 45. On December 7, 2015, the Commission commenced an administrative proceeding on the antitrust merits of the Merger before an Administrative Law Judge, with the merits trial scheduled to begin on May 10, 2016. The ongoing administrative proceeding provides a forum for all parties to conduct discovery, followed by a merits trial with up to 210 hours of live testimony. *See* 16 C.F.R. § 3.41 (2014). The decision of the Administrative Law Judge is subject to appeal to the full Commission, which, in turn, is subject to judicial review by a United States Court of Appeals.

35. In authorizing the filing of this complaint, the Commission has determined that (1) it has reason to believe the Merger would violate the Clayton Act and the FTC Act by substantially lessening competition in one or more lines of commerce, and (2) an injunction of the Merger pending the resolution of the Commission's administrative proceedings and any appeals will promote the public interest, so as to minimize the potential harm to customers and preserve the Commission's ability to order an adequate remedy if it concludes, after the administrative proceeding, that the Merger is unlawful.

RELEVANT MARKET

36. The relevant market is the sale and distribution of consumable office supplies to large B-to-B customers in the United States. Large B-to-B customers are particularly vulnerable to the proposed Merger because many have nationwide or multi-regional operations and require an office supplies vendor that can provide low pricing, high levels of service, and delivery across all of their operations. For such customers, Staples and Office Depot are the two best options.

A. Relevant Product Market

37. Consumable office supplies consist of an assortment of office supplies, such as pens, paper clips, notepads, and copy paper, that are used and replenished frequently. It is appropriate to evaluate the Merger's likely effects through an analysis of the assortment of consumable office supplies because each of the products in the assortment is offered under similar competitive conditions. Thus, grouping the hundreds of individual consumable office supplies into an assortment for analytical convenience enables the efficient evaluation of competitive effects with no loss of analytic power.

38. B-to-B customers buy consumable office supplies for their own end-use (i.e., for their employees to use in the course of performing their job duties), rather than for resale.

39. Consumable office supplies do not include ink and toner for printers and copiers. Many B-to-B customers, particularly large B-to-B customers, buy ink and toner directly from ink and toner manufacturers, or as part of a package of "managed print services," in which vendors bundle ink and toner sales with leases of copier and printers, repair services, and/or copy and printer maintenance services. As a result, large B-to-B customers often purchase ink and toner from different vendors, under different contracts, than those from whom they purchase consumable office supplies.

40. Consumable office supplies do not include other office-related products, such as janitorial or break-room products. Janitorial or break-room products are sold under substantially different competitive conditions than consumable offices supplies.

41. Large B-to-B customers include, but are not limited to, those that buy at least $1 million annually of consumable office supplies for their own end-use.

42. The sale and distribution of consumable office supplies to large B-to-B customers, many of whom have multi-regional or national operations, entails the warehousing, sale, and

distribution of a wide range of such office supplies, along with high levels of customer service and value-added services.

43. The sale and distribution of consumable office supplies to large B-to-B customers is distinct from the sale and distribution of consumable office supplies to other customers, including individual consumers or small- and medium-sized businesses. Large B-to-B customers generally require, and the sale and distribution of consumable office supplies to large B-to-B customers is distinguished by, a number of key attributes, including but not limited to:

a. Procurement Processes: Large B-to-B customers generally procure consumable office supplies on contracts awarded through formal RFPs, auctions, or direct negotiations, often obtaining lower prices than other customers.

b. National or Multi-Regional Distribution: Many large B-to-B customers have operations in multiple regions of the United States. As a result, to increase efficiency and reduce transaction costs, large B-to-B customers often require a single vendor with a broad geographic footprint that can distribute consumable office supplies to all their locations in multiple regions of the country.

c. Next-Day Desktop Delivery: Many large B-to-B customers require next-day and desktop delivery—that is, delivery to one or more desks or drop-off points within an office building—to reduce customers' storage costs.

d. High Levels of Service: Large B-to-B customers require that their office supplies vendors provide high levels of customer service, including dedicated account representatives and/or customer service representatives to address any customer concerns or issues in a timely manner.

e. Valued-Added Services: Large B-to-B customers often require detailed utilization reporting to allow them to track and monitor on a regular basis their employees' uses of and needs for office products. They also often require the creation of customizable catalogs to encourage their employees to order and use products for which they have already negotiated the lowest prices.

f. Sophisticated IT Systems: Large B-to-B customers generally require their office supplies vendor to have sophisticated IT capabilities that interface directly with their e-procurement and billing systems.

g. Reputation and Financial Stability: Large B-to-B customers generally require an office supplies vendor with experience and a strong reputation for supplying large B-to-B customers with office supplies, as well as financial stability.

44. Defendants recognize the particular needs of large B-to-B customers and tailor their products and services to meet those needs. Both Defendants categorize B-to-B customers by size, with groups of employees dedicated to serving different groups of customers.

45. Thus, the sale and distribution of consumable office supplies to large B-to-B customers is the relevant product market in which to analyze the Merger's likely effects.

B. Relevant Geographic Market

46. Defendants compete for the sale and distribution of consumable office supplies across the United States. Many large B-to-B customers operate nationally or in multiple regions

of the country. Accordingly, it is appropriate to analyze the competitive effects of the Merger in the United States.

47. Defendants' own documents acknowledge the existence of a national market for the sale and distribution of consumable office supplies to large B-to-B customers, referring to themselves as the only two players in a "national market."

48. Defendants compete to provide the sale and distribution of consumable office supplies to large B-to-B customers through their respective networks of warehouses and distribution centers located around the United States.

49. Many large businesses have a number of locations dispersed nationwide or across multiple regions of the United States. A substantial number of large B-to-B customers choose a single office supplies vendor with a geographically dispersed network of distribution centers to serve their facilities. These customers do so because consolidating their purchases with a single vendor gives them the ability to get lower prices, or increased discounts, rebates or other pricing incentives, from that vendor. In addition, choosing a single nationwide office supplies vendor provides large B-to-B customers with centralized and consistent services and terms across their facilities, including: (1) centralized contracting, (2) a single point of contact, (3) a single reporting/auditing function, (4) a single IT interface for users, and (5) ease of administration of the distribution contract.

50. Additionally, many large B-to-B customers enter into contracts for nationwide distribution, with nationwide pricing terms, and consider the vendor's ability to provide nationwide distribution and service in the selection process. Many large B-to-B customers with operations in multiple regions of the country, as opposed to nationwide, similarly want one

vendor that can provide consistent pricing, service, and delivery across all their locations, and therefore often require a vendor with national capabilities.

51. Therefore, for consumable office supplies sold and distributed to large B-to-B customers, the United States is the relevant geographic market.

MARKET STRUCTURE AND THE MERGER'S PRESUMPTIVE ILLEGALITY

52. Staples and Office Depot are by far the two largest vendors of consumable office supplies to large B-to-B customers. When large B-to-B customers issue RFPs for the sale and distribution of office supplies, Staples and Office Depot (including the legacy OfficeMax business) are usually the two finalists for the business. In fact, Defendants are often the only two companies that submit a proposal to supply a broad range of consumable office supplies on a nationwide basis.

53. The Merger Guidelines and courts measure concentration using the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power—and is presumptively illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

54. The market for the sale and distribution of consumable office supplies to large B-to-B customers is highly concentrated, and the parties control the majority of sales. Post-Merger, the market would be substantially more highly concentrated than it is today. Post-Merger, Staples would control more than 70% of this relevant market. The next largest competitor would possess less than 5% of the relevant market. The Merger would result in a post-Merger HHI of well over 2,500, and an increase in concentration of well over 200 points. Post-Merger market concentration would be more than 4900, and would increase HHIs in an already concentrated

market by well over 200 points. Thus, the Merger would result in concentration above the amount necessary to establish a presumption of competitive harm.

55. The Merger is presumptively unlawful under relevant case law and the Merger Guidelines.

ANTICOMPETITIVE EFFECTS: THE MERGER WOULD ELIMINATE VITAL HEAD-TO-HEAD COMPETITION BETWEEN STAPLES AND OFFICE DEPOT

56. Defendants are each other's closest competitors. They are the two largest vendors of consumable office supplies to large B-to-B customers in the United States. The scale and capabilities of Staples and Office Depot are similarly matched, and are much larger and more robust than those of the next-largest vendor of consumable office supplies to large B-to-B customers (a regional office supplies vendor, W.B. Mason).

57. Staples' and Office Depot's size allows them to obtain products from manufacturers at lower prices than other vendors generally can. Both also offer a collection of distribution services that no other vendor of consumable office supplies can match: a national footprint with an extensive array of warehouses and distribution centers located across the country; correspondingly large salesforces; product breadth and depth, including private-label products; a single point of contact across all of a customer's locations; a single user interface for all of a customer's employees to use that connects to the customer's procurement and billing systems; and other significant value-added offerings, such as order tracking, utilization reporting, and customizable catalogs.

58. Defendants acknowledge that they are each other's closest competitors. One of Office Depot's own documents indicates that "[o]n a national scale, Office Depot's competition

is Staples." Staples refers to itself as operating in a "2 player national market" and notes that "[t]here are only two real choices for customers."

59. Defendants are often the first and second choices for large B-to-B customers of consumable office supplies. Defendants predominantly win large B-to-B customers from, and lose large B-to-B customers to, each other.

60. Defendants compete aggressively with each other on price and non-price terms to win and retain the business of large B-to-B customers. Staples and Office Depot frequently must compete with each other by lowering prices, increasing discounts or rebates, and providing significant cash incentives to win or keep large B-to-B customer accounts.

61. Large B-to-B customers benefit from the competition between Defendants. Among other things, that competition enables customers to pit Staples and Office Depot against each other to obtain lower prices and better contract terms. Large B-to-B customers switch, or threaten to switch, their business from Staples to Office Depot, and vice versa, to obtain better prices, discounts, cash incentives, and other beneficial terms.

62. The following are examples of direct price competition between Staples and Office Depot for large B-to-B customers:

- In November 2014, Office Depot offered a [redacted] payment [redacted] to secure the business of [redacted]. It lost out to Staples, who offered [redacted].
- In March 2014, [redacted], a Fortune 500 company, informed its current supplier, Office Depot, that it was putting its business out for bid. [redacted] and Office Depot discussed the fact that [redacted]
- In late 2013, [redacted] a Fortune 100 company, decided to benchmark Staples' prices against Office Depot's prices. To avoid losing [redacted] business to Office Depot, Staples [redacted]

- In the fall of 2013, [redacted] a Fortune 100 company, informed Office Depot that it was switching its business to Staples unless [redacted] An internal Office Depot email explains that [redacted]
- In 2013, with its contract with Staples expiring, [redacted] a Fortune 500 company, informed Staples that it was considering Office Depot and OfficeMax as potential suppliers. Staples [redacted] to keep the business.
- In the fall of 2012, [redacted] a Fortune 100 healthcare services provider, ran a reverse auction for office products. Although Staples was the incumbent, [redacted] was prepared to switch to Office Depot if there was not [redacted]. To keep the business, Staples [redacted].

63. The Merger would eliminate this intense head-to-head price competition for large B-to-B customers. Post-Merger, Staples would face less meaningful competition than it does today. Consequently, Staples would not need to compete as aggressively on price to win the business of many large B-to-B customers, and it would be able to price at higher levels.

64. Staples and Office Depot also compete aggressively on non-price terms to win large B-to-B customers by offering high-quality services. Defendants currently risk losing business to each other if large B-to-B customers perceive one Defendant's service inferior or lacking. After the Merger, Staples would face substantially less competition for large B-to-B customers, and would have less incentive to improve, or even maintain, its current level of service to win or keep business.

65. Retail stores and internet websites directed at retail consumers are not viable alternatives for most large B-to-B customers. Such retailers cannot provide the level of pricing

or service that office supplies vendors such as Respondents provide and that large B-to-B customers require.

66. Wholesale suppliers of office supplies are not meaningful alternatives for most large B-to-B customers because wholesalers generally sell only for resale, not to businesses for their own use. Even when wholesalers work with independent vendors to distribute to customers, those wholesaler-vendor partnerships cannot provide the level of pricing or service that office supplies vendors like Respondents provide and that large B-to-B customers require.

67. Manufacturers of consumable office supplies are not a viable distribution option for most large B-to-B customers' consumable office supplies needs. Given the breadth of office supplies large B-to-B customers buy, such customers would have to purchase from a large number of different manufacturers to cover their employees' needs. Such purchasing would be highly inefficient, costly, and not practicable for most large customers. Moreover, manufacturers of consumable office supplies generally sell only in very large quantities, generally far larger than a B-to-B customer would purchase for its own use. As a result, manufacturers of consumable office supplies generally do not sell their products directly to customers buying for their own end-use and not for resale.

68. Other office supplies vendors, such as Amazon Business, regional vendors such as W.B. Mason, distribution consortia, and distributors of adjacency products, such as janitorial/sanitation products or breakroom supplies, generally have some combination of higher costs and thus higher prices, limited geographic footprints, and/or logistical and coordination challenges for large B-to-B customers. As a result, they do not meaningfully constrain Defendants exercise of market power Post-Merger.

LACK OF COUNTERVAILING FACTORS

69. Defendants cannot demonstrate that new entry or expansion by existing firms would be timely, likely, or sufficient to offset the anticompetitive effects of the Merger.

70. A firm seeking to enter or expand in the market for the sale and distribution of consumable office supplies to large B-to-B customers, many of whom operate nationally or in multiple regions of the country, would face significant barriers to success.

71. One key obstacle to expansion by regional firms or consortia is having the geographic footprint to serve large B-to-B customers, many of which operate nationally or in multiple regions of the country. Creating a national distribution network anywhere close to that offered by Staples or Office Depot would be time and resource intensive.

72. The next-largest vendor of consumable office supplies after the Defendants, W.B. Mason, operates only in 13 states, primarily in the Northeast. [redacted]

73. Other vendors of consumable office supplies are many years and significant capital investments away from being in a position to replace the competition that Office Depot currently provides to Staples, even assuming those other vendors were likely to expand their geographic footprints.

74. Additionally, entrants must develop sophisticated IT systems that large B-to-B customers expect, to allow customized ordering systems that interface with the customer's procurement, billing, and utilization tracking systems. Such systems are costly to develop and maintain.

75. Large B-to-B customers also value having a relationship with an experienced sales representative that understands their particular needs. Thus, vendors seeking to enter or expand must recruit and hire a competent and experienced salesforce that can serve customers in

multiple regions of the country. To hire enough sales representative to enter or expand on a sufficient scale to constrain the merged firm in multiple regions or nationally would take a significant amount of time and effort, particularly in light of non-competition and non-solicitation agreements that incumbent vendors have with their employees.

76. Entrants also must overcome reputational barriers to entry and Defendants' strong incumbency advantage. A significant percentage of RFPs are won by incumbent vendors—and often one of the Defendants.

77. Defendants cannot demonstrate cognizable efficiencies that would be sufficient to rebut the strong presumption and evidence that the Merger likely would substantially lessen competition in the relevant market.

LIKELIHOOD OF SUCCESS ON THE MERITS, BALANCE OF EQUITIES, AND NEED FOR RELIEF

78. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission, whenever it has reason to believe that a proposed merger is unlawful, to seek preliminary injunctive relief to prevent consummation of a merger until the Commission has had an opportunity to adjudicate the merger's legality in an administrative proceeding. In deciding whether to grant relief, the Court must balance the likelihood of the Commission's ultimate success on the merits against the public equities. The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws. Private equities affecting only Defendants' interest cannot defeat a preliminary injunction.

79. The Commission is likely to succeed in proving that the effect of the Merger may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of

the Clayton Act, 15 U.S.C. § 18, or Section 5 of the FTC Act, 15 U.S.C § 45. In particular, the Commission is likely to succeed in demonstrating, among other things, that:

a. The Merger would have anticompetitive effects in the market for the sale of consumable office supplies to large B-to-B customers;

b. Substantial and effective entry or expansion in these markets is difficult and would not be timely, likely, or sufficient to offset the anticompetitive effects of the Merger; and

c. The efficiencies asserted by Defendants are insufficient as a matter of law to justify the Merger.

80. Preliminary relief is warranted and necessary. Should the Commission rule, after the full administrative trial, that the Merger is unlawful, reestablishing the status quo ante of vigorous competition between Staples and Office Depot would be difficult, if not impossible, if the Merger has already occurred in the absence of preliminary relief. Moreover, in the absence of relief from this Court, substantial harm to competition would likely occur in the interim, even if suitable divestiture remedies were obtained later.

81. Accordingly, the equitable relief requested here is in the public interest.

Wherefore, the Commission respectfully requests that the Court:

1. Temporarily restrain and preliminarily enjoin Defendants from taking any further steps to consummate the Merger, or any other acquisition of stock, assets, or other interests of one another, either directly or indirectly;

2. Retain jurisdiction and maintain the status quo until the administrative proceeding that the Commission has initiated is concluded; and

3. Award such other and further relief as the Court may determine is appropriate, just, and proper.

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