UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, COMMONWEALTH OF PENNSYLVANIA, And THE DISTRICT OF COLUMBIA,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 15-2115 (EGS)**
STAPLES, INC. and OFFICE DEPOT, INC.	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS UNDER SECTION 16 OF THE CLAYTON ACT

The Commonwealth of Pennsylvania ("Pennsylvania" or "Commonwealth") and the District of Columbia ("District"), acting through their respective Offices of Attorney General, (collectively "Moving Plaintiffs") submit this memorandum in support of their joint Motion for Attorneys' Fees and Costs Under Section 16 of the Clayton Act for reasonable attorneys' fees, disbursement and other related fees and costs in connection with this action to be paid by the Defendants.

PROCEDURAL BACKGROUND

On February 4, 2015, Staples, Inc. ("Staples") and Office Depot ("Office Depot") entered into an agreement pursuant to which Staples would acquire Office Depot. Subsequently, Pennsylvania, the District and the Federal Trade Commission ("FTC") determined that this

proposed transaction would substantially lessen competition nationally for the provision of consumable office supplies to large Business-to-Business consumers.

On December 7, 2015, the FTC, Pennsylvania and the District filed a Complaint for Temporary Restraining Order and Preliminary Injunction pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. §53(b), and 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. The Moving Plaintiffs were authorized to join in the District Court litigation with the FTC pursuant to Section 16 of the Clayton Act, which provides that a "person" may sue for injunctive relief against "threatened loss or damage by a violation of the antitrust laws," including a violation of Section 7 of the Clayton Act. *See* 15 U.S.C. § 26. States, including the District and Pennsylvania, are "persons" for purposes of enforcing Section 16 of the Clayton Act. 15 U.S.C. § 15g; *See also, California v. American Stores*, 495 U.S. 271 (1990).

Prior to filing the Complaint, the FTC and Moving Plaintiffs were involved in the investigation of the proposed transaction. This investigation included document review, third party interviews, investigational hearings and consultation with experts to determine the potential impact of the proposed transaction on competition. During this period, the Defendants engaged in discussions with and presentations to the FTC and state Attorneys General regarding Defendants' plan to merge.

As co-Plaintiffs on the Complaint, the Moving Plaintiffs supported the litigation, including by participating in depositions, preparing discovery responses and producing documents, as well as by representing the Moving Plaintiffs at status conferences, a settlement conference, and the multi-week preliminary injunction hearing before the Court.

ARGUMENT

I. Entry of the Preliminary Injunction Caused the Moving Plaintiffs to Be Substantially Prevailing Parties

Generally, the prevailing party is not entitled to an award of reasonable attorneys' fees collected from the losing party. This is known as the "American Rule." Any departure from this rule must be authorized by the United States Congress. *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 247-64 (1975). In 1976, the United States Congress amended Section 16 of the Clayton Act and provided the necessary departure language. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, Title III, § 302 (3), 90 Stat. 1383, 1396 (codified as amended at 15 U.S.C. § 26 (1998)). Section 16 of the Clayton Act provides:

> In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee to such plaintiff.

Clayton Act § 16, 15 U.S.C. § 26 (1998).

A final judgment on the merits is not necessary in order to substantially prevail under Section 16 of the Clayton Act. *Grumman Corporation v. LTV Corporation, et al.*, 533 F. Supp. 1385, 1388 (E.D.N.Y. 1982). The applicable standard under Section 16 of the Clayton Act only requires a substantially prevailing Plaintiff to have vindicated itself by "thwarting 'threatened loss or damage by a violation of the antitrust laws' either through obtaining a final judgment or something which is its functional equivalent." *Id.* at 1387. [1] "A decision following a trial on the merits is not a condition precedent to a Section 16 attorney's fee award since the phrase

[1] This contrasts with the condition precedent for attorney's fees under Section 4 of the Clayton Act, which does not allow a fee award to a plaintiff who settles its claim with defendant or who does not recover treble damages. *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 468-69 (2d. Cir. 1974). The standard for recovering attorney's fees under Section 4 of the Clayton Act is not relevant to the Moving Plaintiffs' requests under Section 16 of the Clayton Act.

'substantially prevails' contemplates and is sensibly construed to accommodate something short of a final judgment on the merits." *Id.* at 1387. Once the Court has determined that the Plaintiff has substantially prevailed, a fee award under Section 16 of the Clayton Act is mandatory. *Id.* at 1388; 15 U.S.C. § 26.

The United States Supreme Court has interpreted the scope of the term "prevail" in the context of a resolution less than that of a final judgment. The Supreme Court found legislative history instructive to interpret the term, finding that "[P]arties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Mahr v. Gagne*, 448 U.S. 122, 129 (1980) (quoting S. Rep. No. 94-1011, p. 5 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5912)). Courts have applied the test of "prevailing party" under the Clayton Act in the same way as it has been applied under Section 1988 of the Civil Rights Attorneys' Fees Awards Act. *See, e.g., Southwest Marine, Inc. v. Campbell Industries*, 732 F.2d 744, 746 (9th Cir.), *cert. denied*, 469 U.S. 1072, 105 S. Ct. 564, 83 L.Ed.2d 505 (1984); *F & M Schaefer Corp. V. C. Schmidt & Sons, Inc.*, 476 F. Supp. 203, 205-06 (S.D.N.Y. 1979); *Grumman Corp. v. LTV Corp.*, 533 F. Supp. 1385, 1387-88 (E.D.N.Y. 1982).

The Moving Plaintiffs have substantially prevailed under Section 16 by obtaining the preliminary injunction, which is the functional equivalent of a final judgment in this matter. The FTC and the Moving Plaintiffs sought only a preliminary injunction enjoining the Staples/Office Depot transaction, and thus all Plaintiffs achieved all the relief they sought. The entry of the preliminary injunction "thwart[ed]" the" 'threatened loss or damage" to competition from the merger. Indeed, following the entry of the Court's Order on May 10, 2016, the Defendants

announced that they were abandoning the transaction. Entry of the preliminary injunction establishes that the Moving Plaintiffs have substantially prevailed in the litigation.

II. The Moving Plaintiffs Are Entitled to Recovery of Reasonable Attorney's Fees and Costs

To determine whether a Plaintiff has substantially prevailed, the court is to consider:

> a) the situation immediately prior to the commencement of suit, and b) the situation today and the role, if any, played by the litigation in effecting any changes between the two.

F & M Schaefer Corporation, et al. v. C. Schmidt & Sons, Inc. et al., 476 F. Supp. 203, 206 (S.D.N.Y. 1979); *Grumman Corporation v. LTV Corporation, et al.*, 533 F. Supp. at 1390.

Before the action was filed, Staples was poised to acquire Office Depot. The acquisition would have had the likely effect of substantially lessening competition nationally for the provision of consumable office supplies to large Business-to-Business consumers.

Today, these competitive concerns have been alleviated as Staples has abandoned their proposed acquisition of Office Depot, as a direct result of the FTC's and Moving Plaintiffs' success in securing the preliminary injunction against the Defendants.

Thus, the Defendants are no longer in a position to substantially lessen competition in the relevant markets. This result would not have transpired were it not for the preliminary injunction sought, and obtained, by the FTC and the Moving Plaintiffs. The threatened violations have been thwarted. The action of the FTC and Moving Plaintiffs was *the* substantial factor in preventing and restraining the Defendants from consummating a transaction that would have substantially lessened competition in violation of Section 7 of the Clayton Act.

Pennsylvania and the District also seek to recover all fees and costs to file this motion and to recover the fees and costs which are the subject of this Motion. *See Grumman* at 1390 (Grumman was afforded reasonable attorneys' fees in connection with the entire fee application process).

III. The Moving Plaintiffs Seek Reasonable Attorneys' Fees and Costs

The Moving Plaintiffs seek fees based on their identified time spent on substantive actions taken in direct support of this litigation, including pre-suit investigation when applicable. In order to support the reasonableness of the requested attorney's fees, "[a] fee applicant may satisfy its burden of demonstrating that its time was reasonably spent by submitting 'sufficiently detailed information about the hours logged and the work done' that permits the district court to 'make an independent determination whether or not the hours claimed are justified.'" *Carmel & Carmel PC v. Dellis Const., Ltd.*, 858 F. Supp. 2d 43, 47 (D.D.C. 2012) (*quoting Cobell v. Norton,* 231 F.Supp.2d 295, 306 (D.D.C.2002) and *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.,* 675 F.2d 1319, 1327 (D.C.Cir.1982)). The lack of contemporaneous billing records for each task is not fatal to a fee request. *New York v. Microsoft Corp.*, 297 F. Supp. 2d 15, 42-43 (D.D.C. 2003). Here, the Moving Plaintiffs have supplied affidavits or declarations from the associated timekeepers along with summaries of time spent with descriptions of the services performed.

The hours identified by the Moving Plaintiffs must then be charged at a reasonable hourly rate. "The reasonable hourly rate of lawyers in purely commercial law firms is presumed to be the rate such lawyers charge paying clients for similar services, within certain parameters." *Covington v. D.C.*, 839 F. Supp. 894, 896 (D.D.C. 1993), *aff'd,* 57 F.3d 1101 (D.C. Cir. 1995)

(referring generally to *Laffey v. Northwest Airlines, Inc.,* 746 F.2d 4, 24–25 (D.C.Cir.1984) (*overruled in part on other grounds*) and *Save Our Cumberland Mountains, Inc. v. Hodel,* 857 F.2d 1516, 1520 (D.C.Cir.1988) (*en banc*)). Government attorneys, such as those representing the Moving Plaintiffs, "do not receive fees for their legal work and thus necessarily lack any billing history that could serve as their presumptively reasonable rate; for them, a district court must determine the 'prevailing market rates in the relevant community,' and award counsel that as the reasonable hourly rate." *Covington v. D.C.*, 839 F. Supp. 894, 896 (D.D.C. 1993), *aff'd,* 57 F.3d 1101 (D.C. Cir. 1995) (citing *Blum v. Stenson,* 465 U.S. 886, 895, 104 S. Ct. 1541, 1547(2010)).

Here, the fees requested are based on the hourly rates specified on the Department of Justice's USAO Attorney's Fees Matrix 2015-2016[2] for each billing attorney. These rates are generally applied to "complex federal litigation" of the type handled by the US Attorney's Office, which includes antitrust litigation, which is a sub-market recognized by the *Covington* decision as a "lucrative sub-market" that "commands high fees." *Covington v. D.C.*, 839 F. Supp. 894, 899 (D.D.C. 1993), *aff'd,* 57 F.3d 1101 (D.C. Cir. 1995). The billing attorneys are all experienced litigators, with experience in antitrust and other complex litigation that is commensurate with their years of experience. The Moving Plaintiffs, therefore, seek the full hourly fee amounts specified in the USAO Attorney's Fees Matrix, as their work was precisely of the nature the USAO Attorney's Fees Matrix was designed to address. Furthermore, the Moving Plaintiffs seek fees to be paid at the current rate, "[t]o compensate for the delay in the payment of their attorney's fees" rather than at the rate that prevailed in the market at the time the work was performed. *Covington v. D.C.*, 839 F. Supp. 894, 902 (D.D.C. 1993), *aff'd,* 57 F.3d 1101 (D.C. Cir. 1995).

[2] Available at https://www.justice.gov/usao-dc/file/796471/download and attached hereto as Exhibit A.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion for Fees and Costs Under Section 16 of the Clayton Act and award the Commonwealth of Pennsylvania attorneys' fees and related fees in the amount of $137,550.30 and costs in connection with this action in the amount of $4,997.82 and award the District of Columbia attorneys' fees in the amount of $33,547.32.

Dated: May 24, 2016

Respectfully submitted,

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EXHIBIT A TO THE MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

USAO ATTORNEY'S FEES MATRIX – 2015 – 2016

Revised Methodology starting with 2015-2016 Year

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16
31+ years	568
21-30 years	530
16-20 years	504
11-15 years	455
8-10 years	386
6-7 years	332
4-5 years	325
2-3 years	315
Less than 2 years	284
Paralegals & Law Clerks	154

Explanatory Notes

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.,* 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).

2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at www.bls.gov/ppi/#data. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multiple screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).

3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-Legal Services index measures. Although it is a national index, and not a local one, *cf. Eley v. District of Columbia,*

793 F.3d 97, 102 (D.C. Cir. 2015) (noting criticism of national inflation index), the PPI-OL index has historically been generous relative to other possibly applicable inflation indexes, and so its use should eliminate disputes about whether the inflator is sufficient.

4. The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc.* 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore (DC-MD-VA-WV) area. Because the USAO rates for the years 2014-15 and earlier have been generally accepted as reasonable by courts in the District of Columbia, see note 9 below, the USAO rates for those years will remain the same as previously published on the USAO's public website. That is, the USAO rates for years prior to and including 2014-15 remain based on the prior methodology, *i.e.*, the original *Laffey* Matrix updated by the CPI-U for the Washington-Baltimore area. *See Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, --- F. Supp. 3d ---, 2015 WL 6529371 (D.D.C. 2015) and Declaration of Dr. Laura A. Malowane filed therein on Sept. 22, 2015 (Civ. Action No. 12-1491, ECF No. 46-1) (confirming that the USAO rates for 2014-15 computed using prior methodology are reasonable).

5. Although the USAO will not issue recalculated *Laffey* Matrices for past years using the new methodology, it will not oppose the use of that methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods prior to June 2015, provided that methodology is used consistently to calculate the entire fee amount. Similarly, although the USAO will no longer issue an updated *Laffey* Matrix computed using the prior methodology, it will not oppose the use of the prior methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods after May 2015, provided that methodology is used consistently to calculate the entire fee amount.

6. The various "brackets" in the column headed "Experience" refer to the attorney's years of experience practicing law. Normally, an attorney's experience will be calculated starting from the attorney's graduation from law school. Thus, the "Less than 2 years" bracket is generally applicable to attorneys in their first and second years after graduation from law school, and the "2-3 years" bracket generally becomes applicable on the second anniversary of the attorney's graduation (*i.e.*, at the beginning of the third year following law school). *See Laffey* 572 F. Supp. at 371. An adjustment may be necessary, however, if the attorney's admission to the bar was significantly delayed or the attorney did not otherwise follow a typical career progression. *See, e.g., EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate); *EPIC v. Dep't of Homeland Sec.*, 982 F. Supp. 2d 56, 60-61 (D.D.C. 2013) (same). The various experience levels were selected by relying on the levels in the ALM Legal Intelligence 2011 survey data. Although finer gradations in experience level might yield different estimates of market rates, it is important to have statistically sufficient sample sizes for each experience level. The experience categories in the current USAO Matrix are based on statistically significant sample sizes for each experience level.

7. ALM Legal Intelligence's 2011 survey data does not include rates for paralegals and law clerks. Unless and until reliable survey data about actual paralegal/law clerk rates in the D.C. metropolitan area become available, the USAO will compute the hourly rate for Paralegals & Law Clerks using the most recent historical rate from the USAO's former *Laffey* Matrix (*i.e.*, $150 for 2014-15) updated with the PPI-OL index. The formula is $150 multiplied by the PPI-OL index for May in the year of the update, divided by 194.3 (the PPI-OL index for May 2014), and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).

8. The USAO anticipates periodically revising the above matrix if more recent reliable survey data becomes available, especially data specific to the D.C. market, and in the interim years updating the most recent survey data with the PPI-OL index, or a comparable index for the District of Columbia if such a locality-specific index becomes available.

9. Use of an updated *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the USAO as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. *See Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Most lower federal courts in the District of Columbia have relied on the USAO Matrix, rather than the so-called "*Salazar* Matrix" (also known as the "LSI Matrix" or the

"Enhanced *Laffey* Matrix"), as the "benchmark for reasonable fees" in this jurisdiction. *Miller v. Holzmann*, 575 F. Supp. 2d 2, 18 n.29 (D.D.C. 2008) (quoting *Pleasants v. Ridge*, 424 F. Supp. 2d 67, 71 n.2 (D.D.C. 2006)); *see, e.g., CREW v. U.S. Dep't of Justice*, --- F.Supp.3d ---, 2015 WL 6529371 (D.D.C. 2015); *McAllister v. District of Columbia*, 21 F. Supp. 3d 94 (D.D.C. 2014); *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 297 F.R.D. 4, 15 (D.D.C. 2013); *Berke v. Bureau of Prisons*, 942 F. Supp. 2d 71, 77 (D.D.C. 2013); *Fisher v. Friendship Public Charter School*, 880 F. Supp. 2d 149, 154-55 (D.D.C. 2012); *Sykes v. District of Columbia*, 870 F. Supp. 2d 86, 93-96 (D.D.C. 2012); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 40-49 (D.D.C. 2011); *Hayes v. D.C. Public Schools*, 815 F. Supp. 2d 134, 142-43 (D.D.C. 2011); *Queen Anne's Conservation Ass'n v. Dep't of State*, 800 F. Supp. 2d 195, 200-01 (D.D.C. 2011); *Woodland v. Viacom, Inc.*, 255 F.R.D. 278, 279-80 (D.D.C. 2008); *American Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 148-50 (D.D.C. 2007). *But see, e.g., Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 13-15 (D.D.C. 2000). The USAO contends that the *Salazar* Matrix is fundamentally flawed, does not use the *Salazar* Matrix to determine whether fee awards under fee-shifting statutes are reasonable, and will not consent to pay hourly rates calculated with the methodology on which that matrix is based.