MERGER ANTITRUST LAW

Unit 13: Staples/Office Depot

Class 19

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Georgetown University Law Center
Fall 2023

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Statement of the Federal Trade Commission
Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc.
FTC File No. 131-0104
November 1, 2013

The Commission has unanimously decided to close its seven-month investigation of Office Depot, Inc.'s proposed merger with OfficeMax, Inc., a transaction that aims to combine the country's second and third largest chains of office supply superstores (OSS).[1] Although sixteen years ago the Commission blocked a proposed merger between Staples, Inc. and Office Depot, the nation's two largest OSS, our current investigation has shown that the market for the sale of consumable office supplies has changed significantly in the intervening years. For the reasons discussed below, we conclude that Office Depot and OfficeMax should be permitted to move forward with their proposed transaction. In reaching this conclusion, we assessed the proposed merger's competitive effects in two distinct lines of commerce: the sale of office supplies to retail and contract customers. We discuss each in turn.

I. Retail Channel

In the 1997 *Staples* case,[2] the Commission successfully argued that the relevant product market was the sale of consumable office supplies through OSS and that the proposed merger of two of the three OSS would lead to competitive harm.[3] In finding an OSS-only market, the *Staples* court relied principally on qualitative and empirical evidence that OSS prices were set according to the number of competing OSS in a local area. Company documents revealed the merging parties' intense competitive focus on other OSS and general lack of concern with non-OSS rivals. The evidence also showed that the defendants grouped their stores into price zones specifically based on the number of nearby OSS, resulting in higher prices in local markets with fewer OSS, even if non-OSS competitors were present.

The current competitive dynamics are very different. The Commission's investigation shows that today's market for the sale of consumable office supplies is broader, due mainly to two significant developments. One is that customers now look beyond OSS for office supply products and rely more heavily on non-OSS brick-and-mortar retailers. Mass merchants like Wal-Mart and Target and club stores like Costco and Sam's Club have proliferated and expanded their product offerings and sales of office supplies. The result is that fewer consumers today shop OSS as a destination. Instead, consumers place a greater premium on convenience, preferring in many cases to purchase supplies at retailers that also offer other products that office supply customers purchase.

The other is the explosive growth of online commerce, which has had a major impact on this market. Online retailers stock a vast array of office supply products and can deliver them quickly anywhere in the country at nominal cost. Company documents show that OSS are

[1] The Attorneys General of several states joined in the Commission's investigation.

[2] *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

[3] "Consumable office supplies" refers to non-durable products that consumers use up, discard, and purchase on a recurrent basis. Examples included pens, paper, file folders, Post-it notes, and ink and toner cartridges. *Id.* at 1080.

acutely aware of, and feel threatened by, the continued growth of online competitors, most notably Amazon. OSS have lost, and continue to lose, substantial in-store sales to online competitors. This increased competition from online retailers has caused OSS to respond with new pricing practices and other strategies. For example, because online prices are often lower than in-store prices, and because many customers comparison shop in-store prices against online prices, OSS are often pressured to match these lower online prices in their stores. And, in-store and online channel boundaries are blurring as OSS seek to create a seamless customer experience by offering in-store pickup for online orders and using in-store Internet kiosks to order products online.

The merging parties' pricing policies and practices reflect these changes in customer behavior and now specifically factor in non-OSS competition. Price zones and retail pricing are no longer dictated by the number of local OSS. In fact, a majority of products sold by the merging parties are priced nationally, and the products priced locally take into account competition from non-OSS retailers. OSS closely monitor, and respond competitively to, other non-OSS retailers. This competitive interaction includes price-checking, price matching, and advertising and promotion designed specifically to compete effectively with non-OSS retailers.

The econometric analysis reflects the new competitive dynamics in the industry and shows that the proposed merger is unlikely to result in anticompetitive price effects. Commission staff replicated the type of econometric work performed in *Staples* and conducted an extensive amount of additional econometric analysis, including comparisons of prices in markets with varying numbers of OSS and "events studies" analyzing the impact of OSS store closings on the prices charged by remaining OSS in local areas. All of the econometrics, none of which assumed or depended on any particular definition of a relevant product or geographic market, indicate that the merger is unlikely to lead to anticompetitive price increases.

Altogether, the overwhelming evidence supports the conclusion that OSS today face significant competition and demonstrates that the proposed merger is unlikely to substantially lessen competition in the retail sale of consumable office supplies.

II. Contracting Channel

The Commission also examined the potential for competitive harm in the sale of consumable office supplies to businesses and other customers on a contract basis, a channel not at issue in *Staples*. Many businesses and public entities purchase office supplies under a contract. Unlike retail purchasers, contract customers typically receive discounted pricing based on actual or anticipated purchase volume. These contracts allow customers to order office products at previously negotiated prices. Because there are dozens, if not hundreds, of office suppliers that compete effectively to serve small and medium-sized businesses, the investigation focused on contracts for large multi-regional or national customers, which typically have the most demanding purchasing requirements and, as a result, fewer potential suppliers capable of meeting their needs.

A substantial body of evidence indicates that the merger is unlikely to substantially lessen competition or harm large contract customers. First, large customers use a variety of tools to ensure that they receive competitive pricing such as ordering certain products (like ink and toner) directly from manufacturers and sourcing (or threatening to source) certain categories of office supply products from multiple firms. Second, the merging parties' documents show that they are rarely each other's closest competitor for most large customers and that non-OSS competitors take business from the parties in a substantial number of contracting opportunities. Third, the parties will continue to face strong competition for such customers from Staples and a host of non-OSS competitors, such as W.B. Mason Co., Inc. Non-OSS competitors are growing in number and strength and have demonstrated the ability to win large multi-regional and national customer contracts. In particular, regional office supply competitors have developed and utilized various strategies to compete successfully for large national accounts, including working with office supply wholesalers and joining cooperatives of independent office supply dealers to create a distribution network capable of meeting the needs of large multi-regional and national customers. Finally, potential competitors in adjacent product categories, such as janitorial and industrial products, have existing contractual relationships with large office supply customers and can leverage those relationships to enter the office supply distribution market.

In light of the foregoing, there was little concern from contract customers about the proposed merger, and even the largest customers believe the merger would be either pro-competitive or competitively neutral. We therefore find that the proposed merger is unlikely to result in competitive harm in the contract channel.[4]

III. Conclusion

Analyzing the likely competitive effects of a proposed transaction is always a fact-specific exercise that must take into account the evolving nature of markets. Our decision highlights that yesterday's market dynamics may be very different from the market dynamics of today. In this case, significant developments in the market for consumable office supplies have led us to approve a merger when we had blocked a similar merger sixteen years ago. In so finding, we emphasize that our decision, including our view of the competitive interaction between brick-and-mortar retailers and Internet sellers, is limited to the facts before us in this particular matter.

[4] We also assessed the potential for coordinated effects, but found that market conditions, including the number and diversity of competing firms, the complexity of contract terms, and the lack of transparency into the identity of bidders and terms of contracts and bids, would render post-merger coordination or market allocation difficult.

Exhibit 99.1

Staples Media Contact:	Kirk Saville 508-253-8530
Staples Investor Contact:	Chris Powers 508-253-4632
Office Depot Media Contact:	Karen Denning 630-864-6050
Office Depot Investor Contact:	Mike Steele 561-438-3657

Staples, Inc. Announces Acquisition of Office Depot, Inc.

Combined Company Better Positioned to Serve the Changing Needs of Customers and Compete Against a Large and Diverse Set of Competitors

Strategic Combination Expected to Deliver at Least $1 Billion of Annualized Synergies by Third Full Fiscal Year Post-Closing

Cost Savings and Operational Efficiencies to Dramatically Accelerate Staples' Strategy of Driving Growth in Delivery Businesses and Categories Beyond Office Supplies

Provides Ability to Optimize Retail Footprint

Generates Significant Value for Shareholders; Accretive to EPS in First Year Post-Closing[1]

FRAMINGHAM, Mass. and BOCA RATON, Fla., February 4, 2015 – Staples, Inc. (Nasdaq: SPLS) and Office Depot, Inc. (Nasdaq: ODP) today announced that the companies have entered into a definitive agreement under which Staples will acquire all of the outstanding shares of Office Depot. Under the terms of the agreement, Office Depot shareholders will receive, for each Office Depot share, $7.25 in cash and 0.2188 of a share in Staples stock at closing. Based on Staples closing share price on February 2, 2015, the last trading day prior to initial media speculation around a possible transaction, the transaction values Office Depot at $11.00 per share. This represents a premium of 44 percent over the closing price of Office Depot shares as of February 2, 2015, and a premium of 65 percent over the 90-day average closing price of Office Depot shares as of February 2, 2015. The transaction values Office Depot at an equity value of $6.3 billion.

[1] Excluding one-time integration and restructuring costs and purchase accounting adjustments

Staples began discussions to acquire Office Depot in September 2014. The agreement has been unanimously approved by each company's Board of Directors. With the acquisition of Office Depot, Staples will have pro forma annual sales of approximately $39 billion.

"This is a transformational acquisition which enables Staples to provide more value to customers, and more effectively compete in a rapidly evolving competitive environment," said Ron Sargent, Staples' chairman and chief executive officer. "We expect to recognize at least $1 billion of synergies as we aggressively reduce global expenses and optimize our retail footprint. These savings will dramatically accelerate our strategic reinvention which is focused on driving growth in our delivery businesses and in categories beyond office supplies."

"This transaction delivers great value for our shareholders and creates a company ideally positioned to serve our customers and grow over the long term," said Roland Smith, chairman and chief executive officer for Office Depot, Inc. "It is also an endorsement of our many accomplishments and the tremendous success we've had integrating Office Depot and OfficeMax over the past year. We look forward to bringing our experience and knowledge to the new organization."

Staples expects to generate at least $1 billion of annualized cost synergies by the third full fiscal year post-closing. The majority of these synergies would be realized through headcount and general and administrative expense reductions, efficiencies in purchasing, marketing, and supply chain, retail store network optimization, as well as sharing of best practices. Staples estimates one-time costs of approximately $1 billion to achieve its synergy target.

Following the closing of the transaction, Staples' newly constituted Board of Directors will increase in size from 11 members to 13 members and include two Office Depot directors approved by Staples. Staples' corporate headquarters will remain in Framingham, Mass. and Sargent will continue to serve as Staples' Chairman and Chief Executive Officer.

In connection with the acquisition, Staples has obtained financing commitments from Barclays and BofA Merrill Lynch for a $3 billion ABL credit facility, and a $2.75 billion 6-year term loan. The closing of the transaction is not subject to financing conditions. Staples is committed to maintaining its current quarterly dividend of $0.12 per share and has temporarily suspended its share buyback program to focus on paying down transaction related debt. Staples is committed to a prudent capital structure that maximizes financial flexibility and supports a balanced and diverse cash deployment strategy, including the resumption of share buybacks over the longer term.

The transaction is subject to customary closing conditions, including antitrust regulatory approval and Office Depot shareholder approval, and is expected to close by the end of calendar year 2015. Staples will remain focused on its strategic reinvention plan, and Office Depot will remain focused on its integration of OfficeMax during this period.

Barclays is acting as exclusive financial advisor to Staples. Wilmer Cutler Pickering Hale and Dorr LLP and Weil, Gotshal & Manges LLP are acting as legal advisors to Staples. Peter J. Solomon Company is acting as exclusive financial advisor to Office Depot. Simpson Thacher & Bartlett LLP is acting as legal advisor to Office Depot.

Conference Call and Webcast Information

The management teams of Staples and Office Depot will hold a joint conference call and simultaneous webcast today, February 4, 2015 at 8:00 a.m. (ET) to discuss the transaction. Participants will include Ron Sargent, Staples' Chairman and Chief Executive Officer, Christine Komola, Staples' EVP and Chief Financial Officer, and Roland Smith, Office Depot's Chairman and Chief Executive Officer. To access the conference call, dial 617-399-5130. The passcode is 62894773. To access the webcast, visit the Investor Relations section of Staples' website at http://investor.staples.com. A replay of the webcast will be available online at http://investor.staples.com.

Important Additional Information will be Filed with the SEC

Staples plans to file with the SEC a Registration Statement on Form S-4 in connection with the transaction and Office Depot plans to file with the SEC and mail to its stockholders a Proxy Statement/Prospectus in connection with the transaction. The Registration Statement and the Proxy Statement/Prospectus will contain important information about Staples, Office Depot, the transaction and related matters. Investors and security holders are urged to read the Registration Statement and the Proxy Statement/Prospectus carefully when they are available.

Investors and security holders will be able to obtain free copies of the Registration Statement and the Proxy Statement/Prospectus and other documents filed with the SEC by Staples and Office Depot through the website maintained by the SEC at www.sec.gov.

In addition, investors and security holders will be able to obtain free copies of the Registration Statement and the Proxy Statement/Prospectus from Staples by contacting Staples' Investor Relations Department at 800-468-7751, or from Office Depot by contacting Office Depot's Investor Relations Department at 561-438-7878.

Staples and Office Depot, and their respective directors and executive officers, may be deemed to be participants in the solicitation of proxies in respect of the transactions contemplated by the Merger Agreement. Information regarding the Staples' directors and executive officers is contained in Staples' proxy statement dated April 11, 2014, which is filed with the SEC. Information regarding Office Depot's directors and executive officers is contained in Office Depot's proxy statement dated March 24, 2014, which is filed with the SEC. To the extent holdings of securities by such directors or executive officers have changed since the amounts printed in the 2014 proxy statements, such changes have been or will be reflected on Statements of Change in Ownership on Form 4 filed with the SEC. More detailed information regarding the identity of potential participants, and their direct or indirect interests, by security holdings or otherwise, will be set forth in the Proxy Statement/Prospectus to be filed by Office Depot in connection with the transaction.

Safe Harbor for Forward-Looking Statements

Statements in this press release regarding the proposed transaction between Staples and Office Depot, the expected timetable for completing the transaction, future financial and operating results, benefits and synergies of the transaction, future opportunities for the combined company, and any other statements about Staples' or Office Depot's managements' future expectations, beliefs, goals, plans or prospects constitute forward looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. Any statements that are not statements of historical fact (including statements containing "believes," "anticipates," "plans," "expects," "may," "will," "would," "intends," "estimates" and similar expressions) should also be considered to be forward looking statements. There are a number of important factors that could cause actual results or events to differ materially from those indicated by such forward looking statements, including: the ability to consummate the transaction; the risk that Office Depot's stockholders do not approve the merger; the risk that regulatory approvals required for the merger are not obtained or are obtained subject to conditions that are not anticipated; the risk that the financing required to fund the transaction is not obtained; the risk that the other conditions to the closing of the merger are not satisfied; potential adverse reactions or changes to business or employee relationships, including those resulting from the announcement or completion of the merger; uncertainties as to the timing of the merger; competitive responses to the proposed merger; response by activist shareholders to the merger; uncertainty of the expected financial performance of the combined company following completion of the proposed transaction; the ability to successfully integrate Staples' and Office Depot's operations and employees; the ability to realize anticipated synergies and cost savings; unexpected costs, charges or expenses resulting from the merger; litigation relating to the merger; the outcome of pending or potential litigation or governmental investigations; the inability to retain key personnel; any changes in general economic and/or industry specific conditions; and the other factors described in Staples' Annual Report on Form 10-K for the year ended February 1, 2014 and Office Depot's Annual Report on Form 10-K for the year ended December 28, 2013 and their most recent Quarterly Reports on Form 10-Q each filed with the SEC. Staples and Office Depot disclaim any intention or obligation to update any forward looking statements as a result of developments occurring after the date of this press release.

About Staples

Staples makes it easy to make more happen with more products and more ways to shop. Through its world-class retail, online and delivery capabilities, Staples lets customers shop however and whenever they want, whether it's in-store, online or on mobile devices. Staples offers more products than ever, such as technology, facilities and breakroom supplies, furniture, safety supplies, medical supplies, and Copy and Print services. Headquartered outside of Boston, Staples operates throughout North and South America, Europe, Asia, Australia and New Zealand. More information about Staples (SPLS) is available at www.staples.com.

About Office Depot

Formed by the merger of Office Depot and OfficeMax, Office Depot, Inc. is a leading global provider of products, services, and solutions for every workplace – whether your workplace is an office, home, school, or car.

Office Depot, Inc. is a resource and a catalyst to help customers work better. We are a single source for everything customers need to be more productive, including the latest technology, core office supplies, print and document services, business services, facilities products, furniture, and school essentials.

The company has combined pro forma annual sales of approximately $17 billion, employs more than 58,000 associates, and serves consumers and businesses in 57 countries with more than 2,000 retail stores, award-winning e-commerce sites and a dedicated business-to-business sales organization – all delivered through a global network of wholly owned operations, joint ventures, franchisees, licensees and alliance partners. The company operates under several banner brands including Office Depot, OfficeMax, OfficeMax Grand & Toy, Reliable and Viking. The company's portfolio of exclusive product brands include TUL, Foray, DiVOGA, Ativa, WorkPRO, Realspace and HighMark.

Office Depot, Inc.'s common stock is listed on the NASDAQ Global Select Market under the symbol ODP. Additional press information can be found at: http://news.officedepot.com.

Staples Announces Acquisition of Office Depot

February 4, 2015

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Important Additional Information to be Filed with the SEC

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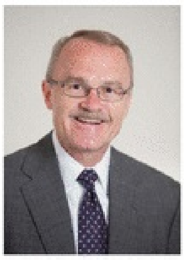
Forward-Looking Statements Safe Harbor

Statements in this presentation regarding the proposed transaction between Staples and Office Depot, the expected timetable for completing the transaction, future financial and operating results, benefits and synergies of the transaction, future opportunities for the combined company, and any other statements about Staples' or Office Depot's managements' future expectations, beliefs, goals, plans or prospects constitute forward looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. Any statements that are not statements of historical fact (including statements containing "believes," "anticipates," "plans," "expects," "may," "will," "would," "intends," "estimates" and similar expressions) should also be considered to be forward looking statements. There are a number of important factors that could cause actual results or events to differ materially from those indicated by such forward looking statements, including: the ability to consummate the transaction; the risk that Office Depot's stockholders do not approve the merger; the risk that regulatory approvals required for the merger are not obtained or are obtained subject to conditions that are not anticipated; the risk that the financing required to fund the transaction is not obtained; the risk that the other conditions to the closing of the merger are not satisfied; potential adverse reactions or changes to business or employee relationships, including those resulting from the announcement or completion of the merger; uncertainties as to the timing of the merger; competitive responses to the proposed merger; response by activist shareholders to the merger; uncertainty of the expected financial performance of the combined company following completion of the proposed transaction; the ability to successfully integrate Staples' and Office Depot's operations and employees; the ability to realize anticipated synergies and cost savings; unexpected costs, charges or expenses resulting from the merger; litigation relating to the merger; the outcome of pending or potential litigation or governmental investigations; the inability to retain key personnel; any changes in general economic and/or industry specific conditions; and the other factors described in Staples' Annual Report on Form 10-K for the year ended February 1, 2014 and Office Depot's Annual Report on Form 10-K for the year ended December 28, 2013 and their most recent Quarterly Reports on Form 10-Q each filed with the SEC. Staples and Office Depot disclaim any intention or obligation to update any forward looking statements as a result of developments occurring after the date of this presentation.

Participants



Ron Sargent
Staples
Chairman & CEO

Christine Komola
Staples
EVP & CFO

Roland Smith
Office Depot
Chairman & CEO

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Accelerating Staples Strategic Reinvention and Improving Customer Experience

Over the past two years, Staples' Board of Directors and management team have reinvented Staples to better meet the changing needs of customers

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Every product your business needs to succeed.

Onward to online and boldly to BO$$

#1 Online B2B player	#1 Commercial player	World's broadest B2B assortment	Turbocharge print

Reshape and improve our businesses

Optimize our retail footprint	Fund the future	Evolve our supply chain	Fix and grow international

Build enablers of our execution

Talent & culture	Evolve brand	Price perception	Technology	Big data and analytics

- Building scale and credibility in new categories
- Accelerating growth in delivery businesses
- Enhancing multi-channel Copy and Print business
- Optimizing retail store network
- Building a stronger connection between retail and online
- Stabilizing sales and earnings in Europe
- Reducing expenses to fund investments in growth priorities

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Background of the Transaction

- Staples' Board of Directors' top priority is to create value for shareholders
- In the summer of 2014 as part of long-range plan, Staples' Board and management team analyzed the opportunity to accelerate strategic reinvention through the acquisition of Office Depot
- Staples and Office Depot began discussions to evaluate a potential combination in September of 2014
- Both Staples and Office Depot have independently analyzed the regulatory considerations related to this transaction
- Agreement unanimously approved by Boards of Staples and Office Depot

Compelling Strategic and Financial Rationale

- Combined company better positioned to provide more value to customers and compete against a large and diverse set of competitors
- Strategic combination expected to deliver at least $1 billion of synergies by third full fiscal year post-closing
- Operational efficiencies and cost savings used to dramatically accelerate Staples' strategic reinvention
- Provides ability to optimize retail footprint, minimize redundancy, and reduce costs
- Accretive to EPS in first year post-closing after excluding one-time integration and restructuring costs and purchase accounting adjustments

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Transaction Overview

- $7.25 per share in cash and 0.2188 of a Staples share for each Office Depot share
- Represents $11.00 per Office Depot share based on Staples closing price as of February 2, 2015, the last trading day prior to initial media speculation around a possible transaction
- Based on Staples closing price as of February 2, 2015, transaction values Office Depot at an equity value of $6.3 billion and EV/EBITDA multiple of approximately 8.5x (1), or approximately 3.5x including minimum estimated run-rate synergies (2)
- Subject to customary closing conditions, antitrust regulatory approval, and Office Depot shareholder approval
- Staples is not required to close transaction if antitrust authorities require divestiture of assets that deliver more than $1.25 billion of Office Depot's 2014 revenues in the United States or if a requirement of the antitrust authorities has a material adverse effect on Office Depot's operations outside of the United States
- Staples to pay a $250 million termination fee to Office Depot if agreement is terminated due to antitrust requirements
- Closing of transaction not subject to financing conditions
- Expected to close by the end of calendar year 2015

1. *Reflects Office Depot's fiscal 2014 guidance provided on 11/4/2014 for adjusted operating income and depreciation and amortization, and approximately $140 million of synergies achieved but not realized by Office Depot in fiscal 2014 related to its acquisition of OfficeMax. Excludes non-recourse debt.*
2. *Reflects Staples' guidance of at least $1 billion of pre-tax run-rate synergies.*

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Governance and Leadership

- Following closing of transaction newly constituted Staples Board of directors will increase from 11 members to 13 members
- Board of directors will include two Office Depot directors approved by Staples
- Ron Sargent will continue to serve as Staples' Chairman and Chief Executive Officer following the closing of the transaction
- Staples is planning for its corporate headquarters in Framingham, MA to serve as the combined company's headquarters following the closing of the transaction
- Staples plans to evaluate maintaining a presence in Boca Raton, FL

Creating a $39 Billion Distributor of Products and Services

	Staples		Office Depot / OfficeMax		Post-acquisition Staples	
LTM Revenue $B (1)	▪ North America	$18.8	▪ North America	$12.7	▪ North America	$31.5
	▪ International	$3.9	▪ International	$3.5	▪ International	$7.4
	▪ **Total**	**$22.7**	▪ **Total**	**$16.2**	▪ **Total**	**$38.9**
Distribution Facilities (2)	▪ North America	69	▪ North America	91	▪ North America	160
	▪ International	47	▪ International	36	▪ International	83
	▪ **Total**	**116**	▪ **Total**	**127**	▪ **Total**	**243**
Store Count (3)	▪ North America	1,721	▪ North America	1,851	▪ North America	3,572
	▪ International	303	▪ International	145	▪ International	448
	▪ **Total**	**2,024**	▪ **Total**	**1,996**	▪ **Total**	**4,020**

1. *LTM Revenue as of 11/1/2014 and 9/27/2014 for Staples and Office Depot, respectively, Office Depot revenue pro forma for merger with OfficeMax and excludes revenue generated by the former OfficeMax business in Mexico.*
2. *As of fiscal year ended 2/1/2014 and 12/28/2013 for Staples and Office Depot, respectively, Office Depot data includes cross docks.*
3. *As of 11/1/2014 and 9/27/2014 for Staples and Office Depot, respectively.*

Providing Significant Value to Office Depot Shareholders

- Endorsement of success integrating Office Depot and OfficeMax over the past year
- Tremendous opportunities for growth while creating increased value and convenience for customers
- Office Depot shareholders have the opportunity to participate in combined company
- Transaction value represents a premium of 44 percent over closing price of Office Depot shares as of February 2, 2015
- Transaction value represents a premium of 65 percent over 90-day average closing price of Office Depot shares as of February 2, 2015
- Office Depot shareholders to own approximately 16 percent of combined company

Annualized Synergies Building to at Least $1 Billion Over Three Year Integration Period

The acquisition presents a unique and exciting opportunity to reduce costs and improve service in a way that neither company could achieve on its own

	Year 1	Year 2	Year 3
Key Synergy Opportunities	▪ Headcount and G&A Expense Reductions ▪ Procurement ▪ Advertising and Marketing ▪ Retail Network Optimization	▪ Headcount and G&A Expense Reductions ▪ Procurement ▪ Advertising and Marketing ▪ Retail Network Optimization ▪ Supply Chain	▪ Headcount and G&A Expense Reductions ▪ Supply Chain ▪ Retail Network Optimization
Cumulative Annualized Synergies	Building to at least $1 billion by 3rd fiscal year post-closing		
Cumulative Costs to Achieve Synergies	One-time costs of approximately $1 billion to achieve synergies		
	Expanded product and service offering drives revenue synergies		

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Transaction Funding Sources & Uses

Sources of Funds ($B)	
Excess Cash	$0.5
Rolled Debt & Capital Leases	$0.5
New Debt	$4.3
Staples Equity Issued to Office Depot	$2.1
Total Sources	$7.3

Uses of Funds ($B)	
Purchase Office Depot Equity	$6.3
Rolled Debt & Capital Leases	$0.5
Refinance Office Depot Debt	$0.3
Transaction Fees, Expenses and Breakage Costs	$0.4
Total	$7.3

- Obtained $3 billion ABL credit facility, plan for $1.5 billion drawn at closing
- Obtained $2.75 billion 6-year Term Loan
- Utilized $2.1 billion of Staples' equity
- Utilized $0.5 billion of cash from balance sheet
- Rolled over $0.5 billion of Office Depot debt and capital leases

Note: Figures may not sum to total due to rounding.

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Commitment to Return Excess Cash to Shareholders

- Committed to maintaining current quarterly dividend of $0.12 per share
- Temporarily suspending share repurchase program to focus on paying down transaction related debt
- Committed to prudent capital structure that maximizes financial flexibility and supports a balanced and diverse cash deployment strategy, including the resumption of share buybacks over the longer term

Key Takeaways

- Creates significant value for Staples and Office Depot shareholders
- Enables Staples to provide more value to customers and compete against a large and diverse set of competitors
- Accelerates Staples' strategy of driving growth in delivery businesses and categories beyond office supplies
- Provides ability to optimize retail footprint and reduce costs
- Delivers at least $1 billion of expected synergies over three year integration period
- Generates EPS accretion in first year post-closing excluding one-time integration and restructuring costs and purchase accounting adjustments

Q&A

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THOMSON REUTERS STREETEVENTS

EDITED TRANSCRIPT

SPLS - Staples Inc Announces Acquisition of Office Depot Inc M&A Call

EVENT DATE/TIME: FEBRUARY 04, 2015 / 1:00PM GMT

OVERVIEW:

SPLS announced that it has entered into definitive agreement to acquire Office Depot.

THOMSON REUTERS

CORPORATE PARTICIPANTS

Chris Powers *Staples Inc - VP of IR*

Ronald - Ron Sargent *Staples Inc - Chairman and CEO*

Roland Smith *Office Depot, Inc. - Chairman and CEO*

Christine Komola *Staples Inc - CFO*

CONFERENCE CALL PARTICIPANTS

Aram Rubinson *Wolfe Research - Analyst*

Seth Sigman *Credit Suisse - Analyst*

Dan Binder *Jefferies & Co. - Analyst*

Michael Lasser *UBS - Analyst*

Oliver Wintermantel *Evercore ISI - Analyst*

Alan Rifkin *Barclays Capital - Analyst*

Christopher Horvers *JPMorgan - Analyst*

Brad Thomas *KeyBanc Capital Markets - Analyst*

David Strasser *Janney Montgomery Scott - Analyst*

Matthew Fassler *Goldman Sachs - Analyst*

Simeon Gutman *Morgan Stanley - Analyst*

PRESENTATION

Operator

Good day, ladies and gentlemen, and welcome to the Staples Inc. announces acquisition of Office Depot Inc. conference call. My name is Dave, and I will be your operator for today.

(Operator Instructions)

As a reminder, this call is being recorded for replay purposes.

I would now like to turn the call over to Mr. Chris Powers, Vice President of Investor Relations. Please proceed, sir.

Chris Powers - *Staples Inc - VP of IR*

Thanks, Dave. Good morning, everyone, and thanks for joining us to discuss Staples acquisition of Office Depot.

During today's call certain information we will discuss regarding the acquisition constitutes forward-looking statements for the purposes of the Safe Harbor provisions of the Private Securities Litigation Reform Act of 1995. Actual results may differ materially from those indicated by such forward-looking statements as a result of various factors, including those discussed or referenced in Staples most recent Form 10-Q and other documents on file with the SEC.

On the call with us this morning are Ron Sargent, Chairman and Chief Executive Officer of Staples, Christine Komola, Chief Financial Officer of Staples, and from Boca Raton, Roland Smith, Chairman and Chief Executive Officer of Office Depot.

With that, I'll turn the call over to Ron.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Well, thank you, Chris, and good morning, everybody. Thanks for joining us on short notice.

This morning I am very excited to announce Staples acquisition of Office Depot. This transaction will bring together two strong and complementary companies, and create tremendous value for Staples, as well as Office Depot shareholders.

First, let me give you some context. Customer needs and expectations are changing rapidly. Paper-based office supplies are being replaced by technology. Customer demand continues to shift online. We are going up against a wider set of retail and online competition, and customers of all sizes are looking for increased value, sharper pricing, and improved service across all categories.

To respond to these trends in the marketplace, two years ago Staples Board of Directors and management team launched a strategic reinvention plan to better meet the changing needs of customers, and position the Company to generate long-term shareholder value. Our reinvention is working. We are building scale, credibility in new categories, and today nearly half of Staples sales are in categories beyond office supplies. We're accelerating growth in Staples.com, and in North American contract.

We have enhanced our copy and print offering. We are ahead of schedule, optimizing our retail store network. We are building a stronger connection between our online and retail businesses.

We've stabilized Europe. We are right on track with our global cost reduction plan, and we're using these savings to fund investments in our key growth initiatives.

The success we've had and the investments we've made to reposition our Company have put us in a position to create tremendous value for shareholders with the acquisition of Office Depot. This acquisition will dramatically accelerate our strategic reinvention.

Let me give you a little background on today's announcements. The top priority of our Board is to create value for shareholders. As part of our long-range plan, last summer our management team and our Board analyzed the opportunity to accelerate our strategic reinvention through the acquisition of Office Depot. Staples and Office Depot began discussions to evaluate a potential combination in September 2014. Both Staples and Office Depot have independently analyzed the regulatory considerations related to this transaction, and the Boards of both companies unanimously support the acquisition.

The strategic and financial benefits of Staples acquisition of Office Depot are compelling. The combined Company is better positioned to provide value to customers, and compete against a large and diverse set of competitors. We expect to deliver at least $1 billion of annualized synergies by the third fiscal year post-closing. The operational efficiencies and cost savings will be used to dramatically accelerate Staples strategic reinvention.

The combined Company will be better equipped to optimize our retail footprint, minimize redundancy, and reduce costs. And in the first year post closing, we expect the acquisition to be accretive to EPS after excluding one-time integration and restructuring costs and purchase accounting adjustments.

Now I would like to take a minute to give you a quick overview of the terms of the acquisition. For each share of Office Depot stock, shareholders will receive $7.25 in cash, and 0.2188 of a share in Staples stock at closing. Based on Staples closing share price on February 2, the last trading day prior to initial media speculation about a possible transaction, the transaction values Office Depot at $11 per share, or an equity value of $6.3 billion.

Based on the full-year 2014 guidance that Office Depot gave us -- gave on its Q3 earnings call and Staples closing share price on February 2, the transaction values the Company at approximately 8.5 times 2014 EBITDA, or approximately 3.5 times 2014 EBITDA, after including a minimum of $1 billion of synergies that we plan to achieve. The acquisition is subject to customary closing conditions, anti-trust regulatory approval, and Office Depot shareholder approval.

The merger agreement contains a provision whereby Staples is not required to close the transaction if antitrust authorities require divestiture of assets that deliver more than $1.25 billion of Office Depot's 2014 revenues in the United States. Additionally, Staples is not required to close the transaction if a requirements of the antitrust authorities has a material adverse effect on Office Depot operations outside the United States.

Staples is required to pay a $250 million termination fee to Office Depot, if the merger agreement is terminated due to antitrust requirements. Both companies have agreed to vigorously contest any potential challenges to the transaction by antitrust authorities. The closing of the transaction is not subject to financing conditions, and we expect to close on the deal by the end of calendar year 2015.

Turning to governance and leadership, following the close of the transaction, Staples' newly constituted Board of Directors will increase in size from 11 to 13 members, and include two Office Depot directors approved by Staples. We are planning for Staples corporate headquarters in Framingham, Massachusetts to serve as the combined company's headquarters following the close of the transaction. We also plan to evaluate maintaining a presence in Boca Raton, Florida.

Staples acquisition of Office Depot will create a $39 billion distributor of products of services for businesses of all sizes, as well as for consumers. The combined company currently operates 243 distribution facilities, and 4,020 stores worldwide.

Before I turn the call over to Roland, I would like to congratulate him for a job well done on the integration of Office Depot and OfficeMax. I continue to be impressed by the Office Depot leadership team, and the early work that they have done to develop a unique selling proposition.

They are a strong and highly motivated organization, and we look forward to working together as we build and execute on our integration plans. Office Depot will make Staples bigger, and more importantly, we also believe that Office Depot will make Staples better.

And with that, I'll turn it over to Roland.

Roland Smith - *Office Depot, Inc. - Chairman and CEO*

Thank you, Ron, and good morning, everyone.

I would like to start by congratulating Ron and his management team, the Staples Board of Directors, and thank them for their collaboration and commitment to getting us here today. This transaction is an endorsement of our many accomplishments and the outstanding success we have had integrating Office Depot and OfficeMax over the past year.

It's a testament to the hard work and dedication of Office Depot associates. The combination is highly compelling, as it creates tremendous opportunities for growth while creating increased value and convenience for our customers. Importantly, this merger delivers value to Office Depot shareholders, and provides them the opportunity to participate in the future success of the combined company.

Based on the terms of the agreement, the transaction value represents a 65% premium over the 90-day average closing price of Office Depot shares. Office Depot shareholders will own approximately 16% of Staples when the deal closes.

Given the excellent progress we've made on our integration and the relationships I've built with our associates around the world, it will not be easy to cede control of a great company like Office Depot. That said, I believe the value that this transaction will create for our shareholders and customers is the best path forward for Office Depot, and we look forward to bringing all of our experience and knowledge to the new organization. As we work through the regulatory approval process, Ron and his team will continue to focus on Staples strategic reinvention plan, and my team and I will continue to focus on our critical priorities including the integration of Office Depot and OfficeMax.

Thank you. And I will now turn the call back over to Ron.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thanks, Roland.

It's been a pleasure working with you and your team over the last several months. Christine will now discuss synergies and the financial implications of the deal. Christine?

Christine Komola - *Staples Inc - CFO*

Thanks, Ron. Good morning, everyone.

As Ron mentioned at the beginning of the call, Staples acquisition of Office Depot will generate at least $1 billion of synergies. Our organizations are highly complementary, and we have a great opportunity to realize significant savings while investing in our key growth priorities to dramatically accelerate our reinvention. The acquisition presents a unique and exciting opportunity to reduce costs and improve service in a way that neither company could have achieved on its own.

We expect synergies from headcount and other G&A expense reductions, as well as network -- retail network optimization to ramp steadily throughout the three-year integration period. Savings from advertising and marketing, as well as better buying will be more front-end loaded, while synergies related to our more complex integration work in areas like supply chain will be realized in the second and third years of integration. We also expect to achieve revenue synergies from our expanded product and service offerings throughout the integration. To achieve our synergy target, we estimate that we will incur about $1 billion of one-time costs.

Turning to sources and uses of funding, we plan to utilize a combined $7.3 billion of debt financing, equity and cash to acquire Office Depot. This includes $1.5 billion drawn on a new $3 billion asset-based revolver at closing, as well as a new $2.75 billion six-year term loan. We plan to utilize $2.1 billion of Staples equity, based on Staples closing stock price on February 2.

We will also utilize about $500 million of cash on our balance sheet, and have approximately $450 million of rolled debt and capital leases. These funds will be used to purchase Office Depot equity for approximately $6.3 billion based on Staples closing stock price on February 2. We plan to refinance about $250 million of Office Depot debt, and estimate transaction fees, expenses, and breakage costs of approximately $400 million.

Turning to cash deployment, we remain committed to maintaining our current quarterly dividend of $0.12 per share. We're temporally suspending our share repurchase program to focus on paying down transaction-related debt. Over the long-term, Staples remains committed to a prudent capital structure that maximizes our financial flexibility, and supports a balanced and a diverse cash deployment strategy. We do expect to resume our share buybacks over the longer-term.

I would now like to turn it back over to Ron for closing remarks.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thanks, Christine.

Two years ago, our Board and our management team launched this strategic reinvention plan to take our Company in new directions. I think we've made great progress on many fronts. I believe our acquisition of Office Depot will dramatically accelerate our progress, as we pursue our vision to become the product destination for business.

So in closing, let me recap the key takeaways from today's announcement. First, this transaction creates significant value for Staples and Office Depot shareholders. Second, it enhances our ability to provide value to customers and compete against a large and diverse set of competitors. Third, it accelerates our reinvention plans to drive growth in our delivery businesses and in categories beyond office supplies.

Fourth, the acquisition gives us the ability to optimize our retail footprints. Fifth, we plan to deliver at least $1 billion of annualized synergies over the three-year integration plan. And finally, the acquisition is accretive to EPS in year one post closing.

I'll now turn it back over to our conference call moderator for Q&A.

QUESTIONS AND ANSWERS

Operator

(Operator Instructions)

Aram Rubinson, Wolfe Research.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good morning, Aram.

Aram Rubinson - *Wolfe Research - Analyst*

Hey guys, good morning, and congratulations on a deal we've been waiting -- I don't know -- 15 years for, so good luck with it

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Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thank you.

Aram Rubinson - *Wolfe Research - Analyst*

Question, on two things. One is, can you help us understand a little bit about the guts of the business? You are underwriting the risk of the ODP and OMX integration that is still underway. Can you talk to us about what is still left to be done there, to tie the systems and distribution network together. And then, what layering your network on top of theirs might look like, and how you expect to tackle that?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Yes, I think, Aram, it is way too early to talk about specific integration plans. We still have got a lot to do. I can tell you that here at Staples, we did a lot of due diligence about what Roland and his team have accomplished already, and plan to accomplish in the coming years with the integration of Office Depot and OfficeMax. We were very comfortable that they were well on their way to doing just a terrific integration job. Roland, anything you would like to add?

Roland Smith - *Office Depot, Inc. - Chairman and CEO*

No, I don't think so. I think that covers it Ron.

Aram Rubinson - *Wolfe Research - Analyst*

Thanks. And then the follow-up, if we can just talk little bit about the potential regulatory hurdle. On the B2B side, just want to get a little comment about your confidence on there? And then also the $1.25 billion I think you cited as a kind of hurdle. I think that's about 10% of Office Depot North America sales, if I am not mistaken. I am just wondering, why that threshold, why that level, and what we might expect going forward there?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Well, first of all on the FTC, let me say that both Staples and Office Depot have really carefully considered the antitrust risk associated with the deal, in concert with our respective legal advisors. It's really not our place, nor could we even possibly handicap what the FTC might say. But we do agree with the public statement following the closure of the Depot and Max investigation in 2013. And I think that their comments were, the market for the sale of consumable office supplies has changed significantly since 1997. But at this point, really this is not something that we can comment on, because frankly we know very little of. In terms of the $1.25 billion of Office Depot 2014 revenues. I think you're right, I think that is about 10% of Office Depot's US sales. And that was basically a negotiated amount that we went back and forth a little bit on, but we feel it provides protection to our shareholders, and also provides protection to Office Depot shareholders.

Aram Rubinson - *Wolfe Research - Analyst*

Best of luck with it. Thank you.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thanks, Aram.

Operator

Seth Sigman, Credit Suisse.

Seth Sigman - *Credit Suisse - Analyst*

Okay, great. Thanks very much. And I would like to --

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good morning, Seth.

Seth Sigman - *Credit Suisse - Analyst*

Add my congratulations as well.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thank you.

Seth Sigman - *Credit Suisse - Analyst*

First, ask a question on the real estate front. Both companies have had some plans to close stores or have been closing stores. Does that process pause for some period of time, as the Company reevaluates some of the opportunities for the combined entity? Like how are you thinking about that at this point?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Well, I think obviously where we are is, Office Depot will run as a completely separate independent company, and Staples will do the same. I can't speak for Office Depot, but I can tell you that our priorities don't change a bit. We've got a lot to do, because even though synergies are great in this transaction, ultimately synergies run out. We've got to position the company for growth, and that's what we will be working very hard on over the next year and beyond. In terms of our store closure plans, they will not change as a result of this transaction. And Roland, maybe if you could comment on Office Depot?

Roland Smith - *Office Depot, Inc. - Chairman and CEO*

Yes, thanks, Ron. I would totally agree. During the process, while the FTC does the review, we will manage our company exactly as we've been managing it. We will focus on our critical priorities. We have 13 new ones that we have already began to work on for 2015, which includes integration synergies and efficiencies that we continue to deliver to the bottom line, and we would expect to deliver to the bottom line this year. Specifically to your question, we have 135 stores that we have contemplated closing in 2015, and we will continue our plans to close those stores in due course.

Seth Sigman - *Credit Suisse - Analyst*

Okay, thanks for that. That is very helpful. On a separate topic, on Europe, what are the plans to integrate those businesses, and do you anticipate any potential regulatory issues there? How are you thinking about that?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Well, I think we will go through the same process in Europe, that we would in North America. We think there is a great synergy there. I don't think we're counting on the bulk of the synergies coming from Europe, but we think they will be significant, and we will be going through the same process with EU regulatory authorities like we are in the North America. So again, it's probably not appropriate to comment at this point, but we do think there is some great opportunities to combine the businesses in Europe as well.

Seth Sigman - *Credit Suisse - Analyst*

Okay, thanks a lot guys, and best of luck.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thank you, Seth.

Operator

Dan Binder, Jefferies.

Dan Binder - *Jefferies & Co. - Analyst*

Hi, good morning, and congrats.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Hi, Dan.

Dan Binder - *Jefferies & Co. - Analyst*

Just a few questions, and if you could clarify a couple of things. The -- at least $1 billion in synergies does not include the roughly $440 million I think that Office Depot and OfficeMax have yet to achieve, correct?

Christine Komola - *Staples Inc - CFO*

Correct. Yes, that would be -- we will have the $1 billion on top of that.

Dan Binder - *Jefferies & Co. - Analyst*

So okay, so again a lot closer to $1.5 billion or there about. Okay. The second question was on the integration. I think one of the -- a lot of folks speculating about a possible combination. One of the positive points in doing something now while Office Depot is in the middle of their integration was to be able to better strategize the reduction of stores, the rationalization of supply chain. I know you just said that both companies would continue to go on as if this deal was not happening essentially. But I was just curious why wouldn't you want just put things on pause, and all the benefits of being able to have that bigger view, not enough to wait a bit?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Yes, we certainly don't know the timing of the FTC's decision on this merger today. And I think frankly, Roland and his team have a lot to do on their integration plan. We have a lot to do on our reinvention plan. I don't think that moving forward slows us down or speed us up after the fact.

We think it certainly better positions both companies to serve the changing needs of business customers. I think as you look at the increasing number of competitors out there, we think it better positions us there. We will be able to invest in pricing, service, product assortment, e-commerce capability, because these companies as I said earlier are very complementary companies. And we think there's a lot of opportunity in combining the two.

But I think you're right about, in terms of

Dan Binder - *Jefferies & Co. - Analyst*

Okay. And then the transfer rates on the store closures. I think you had -- both companies had been able to get the sales transfer rates up. Do you think that would still remain around 30% in your assumptions?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

I think -- obviously when we close a store, we get to around -- we [pick] up 30% of those store sales. Obviously, when Office Depot closes a store, it's much less. But I can tell you that when you look at the two companies, there's a -- a lot of these stores are within 5 miles. I think it's about half of our combined network are within 5 miles of each other I believe is the number.

Christine Komola - *Staples Inc - CFO*

But Dan, I would also add that the retail component is not the biggest driver of these synergies. So I think to Ron's point and to Roland's, continuing to execute against our plan, and continuing our store closures is critical to the overall synergies. But our $1 billion is not contingent on just the retail footprint.

Dan Binder - *Jefferies & Co. - Analyst*

That was actually my -- (Multiple Speakers).

Christine Komola - *Staples Inc - CFO*

-- a smaller part. Yes, it is actually a smaller part.

Dan Binder - *Jefferies & Co. - Analyst*

Okay. Actually, that was my next question. I was wondering if you can give us any additional color on the breakdown of the synergies, either by major categories or channel?

Christine Komola - *Staples Inc - CFO*

Sure. So we haven't -- I am not ready to give out channel level views of it. But really, as the major categories are G&A type of expenses, G&A related costs. Buying efficiencies is important component of it, marketing, operational savings, those are things we expect to get early on in the integration plan. And then, when you look at some of the longer-terms, it is the supply chain network plan, and it is actually around a lot of the work that you would do in Europe. So that, we expect it to be phased over the three years, with those as the major buckets.

Dan Binder - *Jefferies & Co. - Analyst*

Thanks.

Christine Komola - *Staples Inc - CFO*

Thank you.

Operator

Michael Lasser, UBS.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good morning, Michael.

Michael Lasser - *UBS - Analyst*

Good morning, Ron. Good morning, everybody. Thanks a lot for taking my questions and congratulations. Two things, first Ron, when you think about the synergies, how do you view the need to reinvest a portion of those savings back in, improving the experience for your customers, lowering prices? That's been a big part of your transformation plan up until now. So I would suspect that there is going to be a portion of that as you move forward.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Yes, Michael. I think this is a historic opportunity to do the reset on a lot of the areas of the business. I said earlier, I mean, synergies run out. But I think it is going to give us this one time opportunity to accelerate all the things we're doing, and we've been investing in lowering prices over the last two years. I think we still have a ways to go, to become even more competitive, particularly among some of the online competitors.

Obviously, the synergies will be -- continue to -- we will use some of those for building our capabilities beyond office supplies, because we think that's our future. I think this year, I think 46% of our sales -- our 2014 was -- 46% were beyond office supplies. This year, I think we are budgeting like 48% of our sales will be beyond office supplies. Obviously, next year, we will be pushing to -- over 50% of our sales are not office supplies anymore.

So reinventing a company in this industry is really, really hard. But I think we will have some negative synergies. And whether that's in pricing, or talent, or expanding into new categories, or investing in marketing to build awareness that Staples is more than office supplies. I think this is a wonderful opportunity to reset, and position us with a much stronger foundation for long-term sales and earnings growth.

Michael Lasser - *UBS - Analyst*

That's helpful. My second question is, when you look at competitive bidding situations within your contract business particularly on the large enterprise side, what percentage of the time are the Staples and Office Depot the only bidders for the business? And maybe you could just give us a ballpark estimate?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Yes, I -- frankly, I have no idea. I have no way of even knowing that information, because our large customers don't share that. But I think when you look at the world, and the way the world has changed. I mean, there are really strong regional players who bid on contracts all the time, and have been very, very successful. I think Amazon just launched a business-to-business office products initiative. So I am sure they're in there, knocking on the door. And certainly, Office Depot and even local players win a lot of contracts

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Michael Lasser - *UBS - Analyst*

Okay. So maybe another way to say it is, do you have a sense of what your market share is within the Fortune 500 per se?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

No, I am not sure I have done that calculation. I am just not sure. I don't know.

Michael Lasser - *UBS - Analyst*

Okay. Well, congrats again, and thank you so much.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thank you, Michael.

Operator

Oliver Wintermantel, Evercore ISI.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Hey, Oliver.

Oliver Wintermantel - *Evercore ISI - Analyst*

Hey, good morning, guys. Congratulations also from our side. I had a question on the one-time costs. So can you maybe tell us what's included in the one-time costs, and how much of the one-time costs are cash versus non-cash?

Christine Komola - *Staples Inc - CFO*

Sure. So the one-time costs are primarily banking-related commitments up front related to the ABL, and the term loans that we will be doing, as well as obviously the bankers and the legal fees. Most of these probably are cash. At this point, we haven't gone through all of the month by month cash flow projections, but that's the high level view of it.

Oliver Wintermantel - *Evercore ISI - Analyst*

Yes, thanks. And then my follow-up is from three different banners that you run, how do you expect to manage these like on a store level, and then also on -- at the commercial side?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

I think it's a little early to talk about our long-term brand strategy, because we haven't put any integration plan together along those lines. But I think over time, and I can't commit to a particular day, but we do expect to consolidate the Office Depot and OfficeMax brand names, and get to one global brand of Staples.

Oliver Wintermantel - *Evercore ISI - Analyst*

Yes. Thanks very much.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thank you, Oliver.

Operator

Alan Rifkin, Barclays.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good morning, Alan.

Alan Rifkin - *Barclays Capital - Analyst*

Good morning. How are you, Ron?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good.

Alan Rifkin - *Barclays Capital - Analyst*

In an effort to measure your success prior to year three, are you at liberty to tell us what synergy goals are for year one and year two?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Christine?

Christine Komola - *Staples Inc - CFO*

At this point, we haven't -- I am not ready to go through year by year. But I think you know the kind of major buckets as I said would be, starting with the G&A piece, starting with costs like marketing and operational costs, and buying efficiencies. That's where we will start, and then we will then build from there.

Alan Rifkin - *Barclays Capital - Analyst*

Okay. And with the Office Depot and OfficeMax team having such great success in the early days of their merger, how much involvement will that team have in the ultimate merger of all three companies?

Christine Komola - *Staples Inc - CFO*

They really have had a great success. So I would expect they would be very, very involved, and their recent experience has been -- their ability to execute as quickly as they have been, as Ron said, has definitely been a learning for us, and anxious kind of just to get into that.

Alan Rifkin - *Barclays Capital - Analyst*

Okay. And one last question if I may. What is the overlap on the B2B side between the account bases of the two companies? (Multiple Speakers). -- synergies would be realized very quickly?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

I am not sure I understand the question. But obviously, we don't know what our overlap is, because Office Depot doesn't know anything about Staples current customer, nor the other way around. I am not sure I can answer that.

Alan Rifkin - *Barclays Capital - Analyst*

Okay. Thank you very much. I appreciate it.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

All right. Thanks, Alan.

Operator

Chris Horvers, JPMorgan.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good morning, Chris.

Christopher Horvers - *JPMorgan - Analyst*

Good morning. Congratulations, everybody.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thank you.

Christopher Horvers - *JPMorgan - Analyst*

Yes. So I think we have a sense of what North America might look like in three to five years time. But I think everyone's sense on Europe and the international footprint is much more nebulous. So do you -- can you talk about how complementary the businesses are internationally retail versus the B2B side? And does this give you an opportunity to further rationalize the store base internationally?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Yes, I think so. But and again, we haven't spent any time at all on integration plans. But I know that we have been doing a pretty significant restructuring plan in Europe. And I Roland has talked to me about the fact that they are doing same in Europe. But obviously, we compete across the continent, and we are probably in 15 or 16 countries, and I think probably Office Depot is in a few more. But we compete in many different channels, in the contract arena, the online dot com business, as well as retail.

In terms of overlap on retail stores, I can't think of any country where we overlap on retail stores, and I think there is probably several countries where we do overlap in -- on the contract side. But even there, in some cases we have a very strong contract presence, and the Office Depot contract presence is smaller, and then vice versa as well. For example, our online business is very small in the UK, and Office Depot has a very large online presence in the UK called the Viking. So yes, I think it's a little early to know how the pieces fit together. But I am confident with the senior leadership from both sides, we will be able to sort that out, and obviously we have the regulatory authorities to look at it as well.

Christopher Horvers - *JPMorgan - Analyst*

So are there any -- specifically on the contract side, are there any companies, France, Germany that there is a similar -- a much more similar business? Because it sounds like you're saying, in a lot of these countries, you are showing contracts that might be stronger in retail and vice versa. So are there any particular countries where there is a much more head-to-head large contract competition?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Yes, there may be one or two. I just -- I am not informed enough at this point to really be able to give you a great answer. So we just need to do some work on that issue.

Christopher Horvers - *JPMorgan - Analyst*

Okay. And then, Ron, you spent five years integrating Corporate Express and that took a long time. Roland, you are 14 months into the Depot OfficeMax integration. So where do you see the biggest risks and the hardest parts of the integration based on the experiences that you had?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Well, let me start, and I will ask Roland, who is much more the expert than I at this point. Obviously, the biggest risk are always customers and associates. I think the reason that our integration of Corporate Express was successful, and I think the success you are seeing at Depot and Max, is because they retained a lot of the top talent. They looked at best practices. They were extremely careful to minimize customer direction. And I think managing integration risk is something that Roland and his team have done a terrific job over the last couple of years. So maybe Roland, I will let -- ask you to comment?

Roland Smith - *Office Depot, Inc. - Chairman and CEO*

Yes, sure. I think you've hit the nail on the head. Certainly, I think the real secret is to ensure that you have the right team in place, that you have a very clear structure and what people's responsibilities are, that you lay out your priorities so that they are achievable, but they are not so many that you begin to stumble over them, and then you execute with excellence.

And I think that, as I look back at the past 14 or 15 months, I can say that we have had a fantastic team in place, that have been focused on the right priorities. We've kept their nose to the grindstone. We have executed with excellence against each of our priorities, and we have done that at a pace that most people didn't think was possible. And I believe that if this happens again, in the integration of Office Depot and Staples, that the risk is actually relatively small, because I believe that these synergies clearly can be delivered.

Christopher Horvers - *JPMorgan - Analyst*

And then one final one for you, for Roland on, do you have any planned DC closures in 2015 that will remain on track for this year?

Roland Smith - *Office Depot, Inc. - Chairman and CEO*

As I mentioned earlier, we have a very clear plan that we have already put in place for the entire year of 2015 as it relates to our critical priorities. One of those continues to be the continued execution of our integration, so that we can continue to achieve our merger synergies and efficiencies. In that regard, we have a number of DC closures that are planned in the first quarter, and we expect that we will continue to execute against them exactly as our plan played out.

Christopher Horvers - *JPMorgan - Analyst*

Perfect. Thanks very much, guys.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thanks, Chris.

Operator

Brad Thomas, KeyBanc Capital Markets.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good morning, Brad.

Brad Thomas - *KeyBanc Capital Markets - Analyst*

Thanks, good morning, and let me add my congratulations to you all as well.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thank you.

Brad Thomas - *KeyBanc Capital Markets - Analyst*

I wanted to ask a follow-up about the synergies. I was hoping to just clarify if that $1 billion number is a gross or a net number? And then, I was hoping you could also talk about [that] level in context to what Office Depot and OfficeMax are sitting right now? And what Staples and Corporate Express saw a few years ago?

Christine Komola - *Staples Inc - CFO*

Sure, Brad. It's Christine. So in terms of whether it's a gross or net, we are not that precise at this point. But I think early on, we do believe that this will be accretive even with reinvestment happening. So I think we're confident that our goals will be accretive to EPS, and we can achieve the $1 billion, while investing in the areas that Ron just mentioned.

In terms of your second question, around our ability to achieve this, I think in regards as well as with the existing integration work going on, I think as they -- as we look at the plans for our business -- and we've spoken with Roland and his team, it's critical that we both achieve our goals and we learn from the experiences there. I think that the businesses are -- need to operate independently, but I think in the end they'll come together with a better business, because of what each company is actually doing. And I think that will help enhance our ability to execute against the synergies early in the three-year plan.

Roland Smith - *Office Depot, Inc. - Chairman and CEO*

Yes, Brad, I guess I would say that as it relates to the Office Depot and the OfficeMax synergies and efficiencies, as I think you are all aware, we have raised our targets every single quarter. And I would say that we have a very high probability of delivering our targets in the future.

Brad Thomas - *KeyBanc Capital Markets - Analyst*

Great. Thank you.

Operator

David Strasser, Janney Montgomery Scott.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good morning, David.

David Strasser - *Janney Montgomery Scott - Analyst*

Thank you, and my congratulations as well. When you talked about the $1 billion investment, or as you are looking at the two businesses, how do you look at pricing? Do think there is opportunities here to bring pricing down? In the past, you guys have been criticized collectively as a group on your relative pricing to people like Amazon and others and Costco. Do think this is opportunity where you become dollar for dollar competitive, or do you have -- not really an interest to do that?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

No, I think this is an opportunity. As I said earlier, I think this is a kind of a historic opportunity to reset pricing, given the synergies that we expect to garner between the two businesses. I would argue that certainly in the contract arena, our prices are unbelievably good. I think increasingly we've done a lot more in the area of online pricing, whether that's scraping on a multiple times a day, whether it's dynamic pricing mechanisms which we've been employing. So I think we are getting closer and closer and closer. And I think this is opportunity, particularly on the retail side to get much sharper on pricing, and give people a reason to shop at stores when it's convenient for them to do it, rather than feeling like they have to compare with an online competitor.

David Strasser - *Janney Montgomery Scott - Analyst*

And I guess, one follow-up to that would be regarding what -- you talked about going over 50% on office products. Roland, at Office Depot, I don't know if you keep as close statistics on that issue, but what is that mix for Office Depot and do you think can get to that number as well?

Roland Smith - *Office Depot, Inc. - Chairman and CEO*

I can't tell you, David, what that number is. We haven't looked at it in that regard. I can tell you that we regularly look at SKUs and products that we think that we can provide our customers, whether it's retail or whether it's contract, or whether it's online. And so, we will continue to expand our offering. What we had been focused on in 2014, we will continue to focus on in 2015 is the concept of our unique selling proposition. Which Ron mentioned this morning, which really goes after providing a group of customers that we think are much more interested in the concept of quality and service and experience, so that we can garner an additional share in that particular area.

David Strasser - *Janney Montgomery Scott - Analyst*

Great. Thank you. Good luck, and thanks a lot.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thank you, David.

Operator

Matthew Fassler, Goldman Sachs.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good morning, Matt.

Matthew Fassler - *Goldman Sachs - Analyst*

Thanks a lot. Good morning and Ron and Roland, congratulations on this deal. Two questions. The first is I think for Christine. On the $1 billion of costs associated with ultimately attaining the synergies, can you talk about how much of that is cash versus non-cash, and what the timing is for the cash portion?

Christine Komola - *Staples Inc - CFO*

So we haven't -- I don't have the precise breakout, but I think as you can imagine a lot of the cash is the upfront cash around severance, and divestments and expenses that you've got to start your integration. And then over time, as you plan for your DC consolidation that tends to be more capital intensive. And so therefore, it's a little bit later in the cycle. But as we pull together our specific integration plans, we will be able to match that out, and lay that out for you all.

Matthew Fassler - *Goldman Sachs - Analyst*

Putting timing aside, is this largely a cash number, or should there be write-downs and such beyond that associated -- or included within that $1 billion?

Christine Komola - *Staples Inc - CFO*

It will -- we are not quite ready to nail that down yet. But we will, once we get our integration plans more clearly laid out.

Matthew Fassler - *Goldman Sachs - Analyst*

Got it. That is helpful. And then secondly, Ron, and I think this was I think addressed perhaps a moment ago to some degree, Ron, you spoke about revenue synergy opportunities. If you could talk about businesses where one company has a successful or ongoing effort, and the other has less of a presence where we could think about the opportunity to layer revenue synergies onto each business, what would some of those be?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Well, I think there is a lot. I mean, obviously we talked about pricing earlier. But I think we have a very -- at Staples, we have a very well-developed copy and print operation that's getting better and stronger, and much more of an online way. We just recently did acquisition in that area, and that is going to prove to be very successful.

In terms of assortment expansion, we are now selling over 1 million SKUs through our online business. I think maybe that is an opportunity to expand that product assortment to Depot customers. I think we have invested very heavily in e-commerce over the last couple of years, as we try reposition the Company. I think when you look at Office Depot, there are probably similar opportunities. I know we have done some research. I think Office Depot has an incredibly loyal customer base, particularly where they have a strong [sit] store presence, and I think there is probably some things we can learn there.

And obviously, service in general, Office Depot scores incredibly highly on service dimensions in general, and we track that on a regular basis. I think maybe there are some things we can learn there. Obviously, in the next couple of years, we're -- probably the biggest opportunity is the Office Depot OfficeMax integration playbook, because we think they've done a fabulous job, and we expect to really rely on that heavily. And obviously, the talent, the best talent for both sides, I think is another opportunity to improve revenue synergy. Roland, I am probably missing some things. Anything you feel like we should also mention to Matt?

Roland Smith - *Office Depot, Inc. - Chairman and CEO*

I think you have hit the highlights, Ron. I do believe that our playbook will be very instrumental in helping the Staples team, along with the talent that you bring from here to ensure that these efficiencies and synergies get delivered quickly, and to the targets that have been established.

Just going to add a little more. We have a very strong furniture business, that I think we can probably provide some value in. And one that you didn't mention but we look at regularly, is Staples has a very strong Jan/San business that I think could be integrated into our organization, and add significant revenue as we go forward. So I think there are tons of opportunities, and we will find many more as we have the opportunity to actually begin to think about integration once this deal closes.

Matthew Fassler - *Goldman Sachs - Analyst*

Guys, thank you so much.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thank you, Matt.

Operator

Simeon Gutman, Morgan Stanley.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Good morning, Simeon.

Simeon Gutman - *Morgan Stanley - Analyst*

Good morning. Thanks, and congratulations. Just first, just to follow-up, this was asked in some form. So Office Depot OfficeMax, still had $400 million to $500 million of synergy to be realized. And it sounds like Roland has been very clear, that no plans to slow that down. And so the way we should think about it is, they will realize what they're going to realize during this year. And then, whatever is left to be realized, that still is in play, or still to be realized on top of the $1 billion post this deal closing?

Christine Komola - *Staples Inc - CFO*

Yes, that's correct, Simeon. This is Christine.

Simeon Gutman - *Morgan Stanley - Analyst*

And then to clarify another point, you suggested that there is going to be by channel, that retail is very opportunistic, but that there should be some additional opportunities, international and in commercial. On the retail side, I guess I was a little surprised because the store optimization piece seems like a massive opportunity in terms of transfer rates, and even in terms of rent reductions that could happen down the road. And so, in terms of ranking -- rank ordering them, Christina, I don't know if you could touch on it again, but retail should be -- not -- won't be as large as some of the other opportunities?

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

It's -- we're still -- it is a little bit in flux. A lot of those synergies are part of our -- both our synergy and work that Staples is doing, as well as Office Depot. So remember those -- a lot of that has started already happening. And then, we've got a big business worldwide. So that's why it does -- for us the rental component is not as big, just because there are so many other components between the G&A, between -- the marketing is a huge number that you can think about. You think about all of the buying of indirect and COGs is 80% of both of our businesses.

So those are big part of your business that you can affect pretty quickly, and have a pretty meaningful impact. That's part of the reason why the retail numbers is not -- I mean, it's part of it, but it's not as big of a driver as the other areas.

Simeon Gutman - *Morgan Stanley - Analyst*

Can you just remind us about the Staples individual store repositioning? How many have been done, and what type of rent reductions have you seen on average?

Christine Komola - *Staples Inc - CFO*

So we have got -- we have committed to 225. We've done about three-fourths of that, and we have another one-quarter to go in 2015. We been able to achieve our target -- remember, a lot of those stores now start to be -- not necessarily money-losing stores, but they have sales transfer dollars which migrate into the local network. So there is -- we will give guidance as we go forward, and as we close out the books in the next month or so. So you'll hear more about that.

Simeon Gutman - *Morgan Stanley - Analyst*

Okay. And then lastly, and I don't know if this is answerable, but regarding the timing, end of calendar 2015. How much cushion is built in, I mean, in other words, how -- could it close sooner if the FTC just has fewer comments?

Christine Komola - *Staples Inc - CFO*

Really, the FTC will really have to dictate how fast we go, and we will work very closely with them. I think all of us, between Office Depot and Staples are committed to working with the FTC as quickly as we can so, but they will dictate the time lines.

Simeon Gutman - *Morgan Stanley - Analyst*

Okay, thanks.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Thanks, Simeon. That was last question Mike?

Christine Komola - *Staples Inc - CFO*

Dave.

Operator

Yes, it was indeed. As such, I would like to hand the call back to Mr. Ron Sargent for closing remarks. Thank you.

Ronald - Ron Sargent - *Staples Inc - Chairman and CEO*

Well, thanks again, everybody. I appreciate you joining us for the call this morning on short notice. We look forward to speaking with all of you again very soon.

Operator

Thank you for your participation in today's conference. This concludes the presentation. You may now disconnect. Good day.

IMPORTANT ADDITIONAL INFORMATION WILL BE FILED WITH THE SEC

Staples, Inc. (the "Company") plans to file with the SEC a Registration Statement on Form S-4 in connection with the transaction and Office Depot, Inc. ("Office Depot") plans to file with the SEC and mail to its stockholders a Proxy Statement/Prospectus in connection with the transaction. The Registration Statement and the Proxy Statement/Prospectus will contain important information about the Company, Office Depot, the transaction and related matters. Investors and security holders are urged to read the Registration Statement and the Proxy Statement/Prospectus carefully when they are available.

Investors and security holders will be able to obtain free copies of the Registration Statement and the Proxy Statement/Prospectus and other documents filed with the SEC by the Company and Office Depot through the web site maintained by the SEC at www.sec.gov.

In addition, investors and security holders will be able to obtain free copies of the Registration Statement and the Proxy Statement/Prospectus from the Company by contacting the Company's Investor Relations Department at 800-468-7751 or from Office Depot by contacting Office Depot's Investor Relations Department at 561-438-7878.

The Company and Office Depot, and their respective directors and executive officers, may be deemed to be participants in the solicitation of proxies in respect of the transactions contemplated by the Merger Agreement. Information regarding the Company's directors and executive officers is contained in the Company's proxy statement dated April 11, 2014, which is filed with the SEC. Information regarding Office Depot's directors and executive officers is contained in Office Depot's proxy statement dated March 24, 2014, which is filed with the SEC. To the extent holdings of securities by such directors or executive officers have changed since the amounts printed in the 2014 proxy statements, such changes have been or will be reflected on Statements of Change in Ownership on Form 4 filed with the SEC. More detailed information regarding the identity of potential participants, and their direct or indirect interests, by security holdings or otherwise, will be set forth in the Proxy Statement/Prospectus to be filed by Office Depot in connection with the transaction.

SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS

Statements in this document regarding the proposed transaction between the Company and Office Depot, the expected timetable for completing the transaction, future financial and operating results, benefits and synergies of the transaction, future opportunities for the combined company and any other statements about the Company or Office Depot managements' future expectations, beliefs, goals, plans or prospects constitute forward looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. Any statements that are not statements of historical fact (including statements containing “believes,” “anticipates,” “plans,” “expects,” “may,” “will,” “would,” “intends,” “estimates” and similar expressions) should also be considered to be forward looking statements. There are a number of important factors that could cause actual results or events to differ materially from those indicated by such forward looking statements, including: the ability to consummate the transaction; the risk that Office Depot’s stockholders do not approve the Merger; the risk that regulatory approvals required for the merger are not obtained or are obtained subject to conditions that are not anticipated; the risk that the financing required to fund the transaction is not obtained; the risk that the other conditions to the closing of the merger are not satisfied; potential adverse reactions or changes to business or employee relationships, including those resulting from the announcement or completion of the Merger; uncertainties as to the timing of the Merger; competitive responses to the proposed Merger; response by activist shareholders to the Merger; uncertainty of the expected financial performance of the combined company following completion of the proposed transaction; the ability to successfully integrate the Company’s and Office Depot’s operations and employees; the ability to realize anticipated synergies and cost savings; unexpected costs, charges or expenses resulting from the Merger; litigation relating to the Merger; the outcome of pending or potential litigation or governmental investigations; the inability to retain key personnel; any changes in general economic and/or industry specific conditions; and the other factors described in the Company’s Annual Report on Form 10-K for the year ended February 1, 2014 and Office Depot’s Annual Report on Form 10-K for the year ended December 28, 2013 and their most recent Quarterly Reports on Form 10-Q each filed with the SEC. The Company and Office Depot disclaim any intention or obligation to update any forward looking statements as a result of developments occurring after the date of this document.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC Challenges Proposed Merger of Staples, Inc. and Office Depot, Inc.

Agency Charges Merger Would Harm Competition in U.S. Market for Consumable Office Supplies Sold to Large Businesses

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FOR RELEASE

December 7, 2015

TAGS: Bureau of Competition | Competition | Merger

The Federal Trade Commission today filed an administrative complaint charging that Staples, Inc.'s proposed $6.3 billion acquisition of Office Depot, Inc. would violate the antitrust laws by significantly reducing competition nationwide in the market for "consumable" office supplies sold to large business customers for their own use.

Framingham, Mass.-based Staples – the world's largest seller of office products and services – and Boca Raton, Fla.-based Office Depot are each other's closest competitors in the sale of consumable office supplies to large business customers, according to the complaint.

"The Commission has reason to believe that the proposed merger between Staples and Office Depot is likely to eliminate beneficial competition that large companies rely on to reduce the costs of office supplies," said FTC Chairwoman Edith Ramirez. "The FTC's complaint alleges that Staples and Office Depot are often the top two bidders for large business customers."

According to the complaint, many large business customers buy consumable office supplies for their own use under a contract. In addition to a wide range of office supplies at competitive prices, the vendor provides them with fast and reliable nationwide delivery, dedicated customer service, customized online catalogs, integration of procurement systems, and detailed utilization reports. That business-to-business market is distinct from the more competitive retail markets for office supplies sold to consumers.

Consumable office supplies include items such as pens, pencils, notepads, sticky notes, file folders, paper clips, and paper used for printers and copy machines.

The complaint alleges that, in competing for contracts, both Staples and Office Depot can provide the low prices, nationwide distribution and combination of services and features that many large business customers require. The complaint further alleges that, by eliminating the competition between Staples and Office Depot, the transaction would lead to higher prices and reduced quality. The complaint also asserts that entry or expansion into the market – by other office supplies vendors, manufacturers, wholesalers, or online retailers – would not be timely, likely, or sufficient to counteract the anticompetitive effects of the merger. Finally, the complaint asserts that purported efficiencies would not offset the likely competitive harm.

The FTC has authorized staff to seek in federal court a temporary restraining order and a preliminary injunction to prevent the parties from consummating the merger and to maintain the status quo pending the administrative proceeding.

Throughout the investigation, Commission staff cooperated with staff of the antitrust agencies in Australia, Canada, and the European Union. The Canadian Competition Bureau also filed an application to block the transaction with Canada's Competition Tribunal earlier today. The FTC acknowledges the exemplary work done by all agencies.

The Commission votes to issue the administrative complaint and to authorize staff to seek a temporary restraining order and preliminary injunction in federal court were both 4-0. The administrative trial is scheduled to begin on May 10, 2016.

NOTE: The Commission files a complaint when it has "reason to believe" that the law has been or is being violated and it appears to the Commission that a proceeding is in the public interest. The issuance of the administrative complaint marks the beginning of a proceeding in which the allegations will be tried in a formal hearing before an administrative law judge.

The FTC's Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive mergers and business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular mergers or business practices, call 202-326-3300, send an e-mail to antitrust{at}ftc{dot}gov, or write to the Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., NW, Room CC-5422, Washington, DC 20580. To learn more about the Bureau of Competition, read Competition Counts. Like the FTC on Facebook, follow us on Twitter, and subscribe to press releases for the latest FTC news and resources.

PRESS RELEASE REFERENCE:
After Staples and Office Depot Abandon Proposed Merger FTC Dismisses Case from Administrative Trial Process

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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.

Dated: December 7, 2015

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION, *et al.*, Plaintiffs, v. **STAPLES, INC.** and **OFFICE DEPOT, INC.**, Defendants.	Civil Action No. 1:15 -cv- 02115

~~[PROPOSED]~~ TEMPORARY RESTRAINING ORDER

WHEREAS, Plaintiff, the Federal Trade Commission (the "Commission"), filed its Complaint in this matter on December 7, 2015, seeking, among other relief, a temporary restraining order and preliminary injunction enjoining Staples, Inc. from acquiring Office Depot, Inc. (the "Proposed Merger"); and

WHEREAS, in the absence of temporary relief, Defendant Staples, Inc. would be free to consummate the proposed acquisition as of 12:01 a.m. on December 9, 2015; and

WHEREAS, the parties have agreed that Defendants will not consummate the proposed merger until four business days after the Court rules on the Commission's motion for a preliminary injunction, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b);

NOW, THEREFORE, IT IS

ORDERED, that Staples, Inc. and Office Depot, Inc. shall not consummate the Proposed Merger, or otherwise effect a combination of Staples, Inc. and Office Depot, Inc., until four business days after the Court rules on the Commission's motion for a preliminary injunction, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b); and it is further

ORDERED, that in connection with the paragraph immediately above, Staples, Inc. and Office Depot, Inc. shall take any and all necessary steps to prevent any of their officers, directors, domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, any such merger, or otherwise effecting any combination between Staples, Inc. and Office Depot, Inc.; and it is further

ORDERED, that the parties shall appear before this Court at Courtroom No. 24A, on the 17 day of December, 2015, at 10:00 a.m./p.m. for a status conference.

ISSUED this 8 day of December, 2015, at 5:35 a.m./p.m.

SO ORDERED, this 8 day of ~~December, 2015.~~

12/8/15

United States District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter comes before the Court on the Federal Trade Commission, the Commonwealth of Pennsylvania, and the District of Columbia's (collectively "Plaintiffs") motion to enjoin the proposed merger of Defendant Staples, Inc. ("Staples") with Defendant Office Depot, Inc. ("Office Depot") (collectively "Defendants"), under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b). After considering the extensive record and the parties' legal arguments, the Court finds that Plaintiffs have met their burden of showing that there is a reasonable probability that the proposed merger will substantially impair competition in the sale and distribution of consumable office supplies to large Business-to-Business customers. Plaintiffs have also carried their burden of showing that a preliminary injunction of Defendants' proposed merger is in the public interest and that the equities weigh in favor of injunctive relief. The Court's reasoning is set forth in a Memorandum Opinion, which will be published under seal to the parties on Wednesday, May 11, 2016.[1]

Accordingly it is hereby **ORDERED** that:

1. Plaintiffs' motion for a preliminary injunction enjoining the merger between Staples and Office Depot is **GRANTED;**

2. Staples and Office Depot are hereby enjoined and restrained, under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), from completing the proposed merger, or otherwise effecting a combination of Staples and Office Depot until the completion of the administrative proceedings evaluating the proposed transaction now pending before the FTC;

3. Defendants shall take any and all necessary steps to prevent any of their officers, directors, domestic or foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures from consummating, directly or indirectly, any such merger, or otherwise effectuate any combination between Defendant Staples and Defendant Office Depot;

[1] Because the Memorandum Opinion contains competitively sensitive information of Defendants and third parties, the Court will issue the Memorandum Opinion under seal to allow the parties to propose redactions. The parties shall meet and confer and present to the Court proposed redactions to the Memorandum Opinion no later than 12:00 p.m. Monday, May 16, 2016. After considering the proposed redactions, the Court will issue a public version of the Memorandum Opinion.

4. Defendants are directed to maintain the status quo until (1) the completion of all legal proceedings by the FTC challenging the transaction, including all appeals, or (2) further order of the COURT, including upon the request of the FTC, before completion of such legal proceedings;

5. This Court shall retain jurisdiction of this matter for all purposes and for the full duration of this Order, as provided in the previous paragraph.

SO ORDERED.

Signed: **Emmet G. Sullivan**
United States District Judge
May 10, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OPINION

I. Introduction

Drawing an analogy to the fate of penguins whose destinies appear doomed in the face of uncertain environmental changes, Defendant Staples Inc. ("Staples") and Defendant Office Depot, Inc. ("Office Depot") (collectively "Defendants") argue they are like "penguins on a melting iceberg," struggling to survive in an increasingly digitized world and an office-supply industry soon to be revolutionized by new entrants like Amazon Business. Prelim. Inj. Hrg Tr. ("Hrg Tr.") 60:15 (Opening Statement of Diane Sullivan, Esq.). Charged with enforcing antitrust laws for the benefit of American consumers, the Federal Trade Commission ("FTC") and its co-plaintiffs, the Commonwealth of Pennsylvania and the District of Columbia, commenced this action in an effort to block Defendants' proposed merger and alleged that the merger would "eliminat[e] direct competition between Staples and Office Depot" resulting in "significant harm" to large businesses that purchase office supplies for their own use. Compl., Docket No. 3 at ¶ 4. The survival of Staples' proposed acquisition of Office Depot hinges on two critical issues: (1) the reliability of Plaintiffs' market definition and market share analysis; and (2) the likelihood that the competition resulting from new market entrants like Amazon Business will be timely and sufficient to restore competition lost as a result of the merger.

Subsequent to Defendants' announcement in February 2015 of their intent to merge, the FTC began an approximate year-long investigation into the $6.3 billion merger and its likely effects on competition. Defs.' Proposed Findings of Fact and Conclusions of Law ("Defs.' FOF") ¶ 58. On December 7, 2015, by a unanimous vote, the FTC Commissioners found reason to believe that the proposed merger would substantially reduce competition in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Compl. ¶ 34. That same day, Plaintiffs commenced this action seeking a preliminary injunction pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53 (b) to enjoin the proposed merger until the FTC's administrative proceedings are complete. Pls.' Mot. Prelim. Inj., Docket No. 5 at 1.

This antitrust case involved an extraordinary amount of work. As a result of the FTC's investigation and seven weeks of discovery, more than fifteen million pages of documents were produced, more than seventy depositions around the country were taken, and five expert reports were completed. Defs.' FOF ¶ 60. The Court presided over an evidentiary hearing and heard testimony from ten witnesses from March 21, 2016 to April 5, 2016. *Id.* Nearly 4,000 exhibits were admitted into evidence. *Id.* ¶ 61. Despite onerous time constraints created by the nature of this unique litigation, lawyers for the parties and non-parties completed this work with civility and professionalism while demonstrating the highest level of sophistication and competency in their written and oral advocacy.[1] The Court commends the lawyers and the paralegals for their outstanding work.[2]

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[1] Defendants requested an expedited decision by no later than a date certain so that financing could be secured to hold their deal together. December 17, 2015 Tr., Docket 107 at 39. The Court committed to ruling on the merits of this controversy by no later than May 10, 2016. *Id.*

[2] As the Court stated during the hearing: "Let me extend my appreciation to [the paralegals]. They're the unsung heroes and never get the credit that they deserve. I know how hard you work to make us look good, I know that. So on behalf of everyone, thank you very much." Hrg Tr. 158:8-13.

At the conclusion of Plaintiffs' case, Defendants chose not to present any fact or expert witnesses, arguing that Plaintiffs failed to establish their *prima facie* case. Hrg Tr. 2889:20-25 (Ms. Sullivan: "It's going to be the defendants' position that we're going to rest on the record as it exists, so there'll be no need for additional evidence or rebuttal."). And, although entitled to a trial on the merits before an Administrative Law Judge at the FTC, Defendants indicated that they will not proceed with the merger if Plaintiffs' motion is granted. Hrg Tr. at 3034:18-22; Defs.' FOF ¶ 17.[3]

Upon consideration of the evidence presented during the hearing, the parties' proposed findings of fact and conclusions of law, and the relevant legal authority, the Court concludes that the Plaintiffs have established their *prima facie* case by demonstrating that Defendants' proposed merger is likely to reduce competition in the Business to Business ("B-to-B") contract space for office supplies. Defendants' response relies

[3] As the Court expressed many times during these proceedings, the lack of meaningful appellate review on the merits is an unfortunate reality of antitrust statutes. Because the administrative process before the FTC is so time consuming, most corporations, like Defendants in this case, cannot secure financing to keep the deal together pending the administrative trial on the merits. *See, e.g. FTC v. Sysco Corporation*, 113 F. Supp. 3d 1, 15 (2015) (noting that the Defendants announced that they will not proceed with the merger if the Court grants the requested injunction.)

in large part on the prospect that Amazon Business will replace any competition lost because of the merger. Although Amazon Business may transform how some businesses purchase office supplies, the evidence presented during the hearing fell short of establishing that Amazon Business is likely to restore lost competition in the B-to-B space in a timely and sufficient manner. For the reasons discussed in Section IV *infra*, Plaintiffs' Motion for Preliminary Injunction is **GRANTED**.[4]

In Section II of this Memorandum Opinion, the Court sets forth important background information, including many critical findings of fact underpinning the Court's analysis. Section III establishes the relevant legal standard pursuant to the Clayton Act. The Court's analysis in Section IV proceeds as follows: (A) legal principles considered when defining a relevant market; (B) application of legal principles to Plaintiffs' market definition; (C) Defendants' arguments in opposition to Plaintiffs' alleged market; (D) conclusions regarding the relevant market; (E) analysis of the Plaintiffs' arguments

[4] The Court appreciates the tremendous amount of time, money and effort Defendants put into this case, and understands that they genuinely believe this merger would be best for their companies, the industry and the public. While the Court's decision is surely a great disappointment to Defendants, the Court is optimistic that Defendants will find ways to innovate, evolve and remain relevant in the rapidly changing office supply industry.

relating to the probable effects on competition based on market share calculations; (F) Defendants' arguments in opposition to Plaintiffs' market share calculations; (G) conclusions regarding Plaintiffs' market share; (H) Plaintiffs' evidence of additional harm; (I) Defendants' response to Plaintiffs' *prima facie* case; and (J) weighing the equities. In Section V, the Court concludes that the proposed merger must be enjoined due to the likelihood of anticompetitive effects that would result were the merger to be consummated.

II. Background

A. Overview

Every day millions of employees throughout the United States utilize office supplies in the course of their daily work. To sustain employees' use of pens, Post-it notes and paperclips, large companies purchase more than two billion dollars of office supplies from Defendants annually. Hrg Tr. 10:23-24, (Opening Statement of Tara Reinhart, Esq.). Companies that purchase office supplies for their own use operate in what the industry refers to as the B-to-B space. B-to-B customers prefer to work with one vendor that can meet all of the companies' office supply needs. Hrg Tr. at 204:1-20 (Gregg O'Neill, Category Manager for Workplace Services at American Electric Power ("AEP") testifying that because the company spends two million dollars on office supplies, its leverage with one vendor is greater than it would be if it utilized twenty vendors); *Id.* at 1617:1-1618:4 (Leo J. Meehan, III, CEO of WB Mason testifying about the benefits of utilizing one primary vendor, including lower prices, growth rebates, assistance with controlling leakage, etc.).

To establish a primary vendor relationship, companies in the B-to-B space request proposals from national suppliers like Staples and Office Depot. *See e.g.*, Hrg Tr. (AEP) 194: 10-195:16. The request for proposal ("RFP") process typically results in a multi-year contract with a primary vendor that guarantees prices for specific items, includes an upfront lump-sum rebate, and a host of other services. Pls.' Proposed Findings of Fact and Conclusions of Law ("Pls.' FOF") ¶¶ 41-46. Because the office supplies consumed by large companies are voluminous, such companies typically pay only half the price for basic supplies as compared to the average retail consumer. Plaintiffs' Exhibit ("PX") 06100, Pls.' Expert Dr. Carl Shapiro's Report ("Shapiro Report") at 019.[5]

[5] Dr. Shapiro, Plaintiffs' expert economist, is a Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley. Shapiro Expert Report ("Shapiro Report"), PX06100-003. In addition to teaching, Dr. Shapiro has served in government in various capacities during his professional career, including as a member of the President's Council of Economic Advisers from 2011 to 2012, and as an advisor at the Department of Justice from 1995 to 1996 and again from 2009 to 2011. *Id.* Dr. Shapiro testifies for Plaintiffs and Defendants in antitrust matters. *Id.*

B. Defendants Staples and Office Depot

Established as big-box retail stores in the 1980s, Defendants are the primary B-to-B office supply vendors in the United States today. Hrg Tr. 59. Plaintiffs allege that Defendants sell and distribute upwards of seventy-nine percent of office supplies in the B-to-B space. Hrg Tr. 20-21. Since the 2013 merger of Office Depot and Office Max, Defendants consistently engage in head-to-head competition with each other for B-to-B contracts. *See, e.g.*, PX04322 Staples ("SPLS") 001 (identifying only Office Depot as "Key Competitor[]").

Staples and Office Depot are publicly traded corporations. Compl. ¶¶ 29 and 30. Staples is the largest office supplier of consumable office supplies to large B-to-B customers in the United States and operates in three business segments: (1) North American stores and online sales; (2) North American commercial; and (3) international operations. *Id.* ¶ 29. In fiscal year 2014, Staples generated $22.5 billion in sales, with more than half of all sales coming from office supplies. *Id.* In fiscal year 2013, 34.8 percent of Staples' total revenue came from the North American commercial segment. *Id.*

Office Depot is the second largest office supplier of consumable office supplies to large B-to-B customers in the Unites States. *Id.* ¶ 30. Like Staples, Office Depot operates in similar business segments: (1) North America retail; (2) North

American business solutions; and (3) an international division. *Id.* In fiscal year 2014, Office Depot made $16.1 billion in revenue, with nearly half of those sales coming from office supplies and 37.4 percent of overall sales from B-to-B business. *Id.*

Staples' "commercial" and Office Depot's "business solutions" segments focus on the B-to-B contracts at issue in this case. While both companies serve businesses of all sizes, this case focuses on large B-to-B customers, defined by Plaintiffs as those that spend $500,000 or more per year on office supplies. Hrg Tr. 30:4-6. Approximately 1200 corporations in the United States are included in this alleged relevant market. Hrg Tr. 2473:17-18.

C. FTC Investigation

On February 4, 2015, Defendants entered into a merger agreement in which Staples would acquire Office Depot for a combination of cash and Staples' stock. Compl. ¶ 32. Shortly after the merger was announced, the FTC launched an investigation into the competitive effects of the proposed merger. Defs.' FOF ¶ 58. Ultimately, the FTC commissioners filed an administrative complaint before an FTC Administrative Law Judge ("ALJ") and also authorized the Plaintiffs to seek a preliminary injunction to prevent the Defendants from consummating the merger to maintain the status quo pending a full hearing on the merits. Compl. ¶ 34. Plaintiffs filed this suit the same day. Pls.' Mot. Prelim. Inj.

D. Regional and local vendors

Regional and local office supply vendors exist throughout the country. Hrg Tr. 84:2. However, they typically do not bid for large B-to-B contracts. Hrg Tr. 907:7-14 (James Moise, Senior Vice President and Chief Sourcing Officer for Fifth Third Bank testifying that regional suppliers Office Essentials and WB Mason declined to bid on their RFP); Hrg Tr. 1941:18-20 (Leonard Allen Wright, Vice President of Strategic Sourcing for Health Trust Purchasing Group ("HPG") noting that neither WB Mason nor MyOfficeProducts could meet HPG's needs nationwide). When regional office supply vendors compete for large RFPs, they are rarely awarded the contract. PX02138 (Sears (Realogy) Dep. 156: 15-21, 191:6-17) (". . . I was concerned about [WB Mason's] ability to service the entire country . . . .").

WB Mason is a regional supplier that targets its business to thirteen northeastern states plus the District of Columbia (known in the industry as "Masonville"). *Id.* WB Mason "ranks a distant third" behind Staples and Office Depot. PX03021-002, Meehan Decl. ¶ 6. In fiscal year 2015, WB Mason generated approximately $1.4 billion in total revenue. *Id.* WB Mason has no customers in the Fortune 100 and only nine in the Fortune 1000. Hrg Tr. 1611:21-1611:24. According to WB Mason's CEO, Leo

Meehan, "Staples and Office Depot are the only consumable office supplies vendors that meet the needs of most large B2B customer[s] across the entire country, or even most of it." Meehan Decl. ¶ 19.

WB Mason recently abandoned a plan to expand nationwide. Hrg Tr. 1672 (Mr. Meehan: "And then I just got cold feet about it [redacted].") When asked during the hearing if WB Mason would accept a divestiture of cash assets from the Defendants to cover the expenses of nationwide expansion, Mr. Meehan would not commit to accepting such a proposal. *Id.* 1790 (Mr. Meehan: "I don't know if I would. That's a big challenge.").

E. Amazon Business

Amazon.com Inc.'s ("Amazon") effort to compete in the office supply industry, including the B-to-B space, is Amazon Business. Amazon began exploring how to target companies' procurement of office supplies more than fourteen years ago. PX02166, Mendelson Dep. 178:24-179:7; Hrg Tr. 525:10-526:10. In 2002, Amazon launched an "office product store at Amazon.com," a cooperative effort with Office Depot. Mendelson Dep. 178:24-179:7. In 2007, Amazon launched the All Business Center. *Id.* 175:18-176:21. In April 2012, Amazon launched Amazon Supply, a marketplace for selling a variety of products, including office supplies to business customers. Hrg Tr. 524:3-4.

Amazon Business was launched just over one year ago, in April 2015. Amazon Business is a "top priority" for Amazon, Hrg Tr. 659:17-20, and a "must win" opportunity. *Id.* 660:8-14. In 2016, Amazon Business forecasts making $[redacted] profit. Defendants' Exhibit ("DX") 05038. By 2020, Amazon Business's forecasts estimate $[redacted] revenue, [redacted] percent ($[redacted]) coming from the sale of basic office supplies. Hrg Tr. 719:25 - 720:3, 856: 5-16. [redacted] Hrg Tr. 573:3-574:24.

Although in its infancy, Amazon's vision is for Amazon Business to be the "preferred marketplace for all professional, business and institutional customers worldwide." DX00030 at 1. Amazon Business has several undisputed strengths: tremendous brand recognition, a user-friendly marketplace, cutting edge technological innovation, and global reach.[6] Hrg Tr. 663:13 (Vice President of Amazon Business, Prentis Wilson: "We actually don't

[6] Amazon's marketplace is an online shopping experience where customers can browse for items and make online purchases. Hrg Tr. 552. Amazon makes approximately half of all sales through the marketplace. *Id.* Millions of other companies—"third-party sellers,"—make the remaining sales through the marketplace. *Id.*

worry a lot about our competitors. Our focus has been on serving our customers.”). Amazon Business also has several weaknesses with regard to its entry into the B-to-B space. One weakness is that Amazon Business is inexperienced in the RFP process. Amazon Business has not bid on many RFPs and has yet to win a primary vendor contract. Hrg Tr. 551:11-13 (“Q: Has Amazon Business ever won an RFP for the role as primary supplier of office supplies? A: No.”). Amazon Business’ marketplace model is also at odds with the B-to-B industry because half of the sales made through the marketplace are from independent third-party sellers over whom Amazon Business has no control. Hrg Tr. 843: 7-9 (“Q: You have no plans to force the third parties to offer particular prices? A: No, we’ll never do that. No.”).

III. Legal Standards

A. The Clayton Act

Section 7 of the Clayton Act prohibits mergers or acquisitions “the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly,” in any “line of commerce or in any activity affecting commerce in any section of the country.” 15 U.S.C. § 18. When the FTC has “reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act,” it may seek a preliminary injunction under Section 13(b) of the FTC Act to “prevent a merger pending the Commission’s administrative adjudication of the merger's legality." *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1070 (D.D.C. 1997) (citing 15 U.S.C. § 53(b)); *see also Brown Shoe v. U.S.*, 370 U.S. 294, 317 (1962) ("Congress saw the process of concentration in American business as a dynamic force; it sought to ensure the Federal Trade Commission and the courts the power to brake this force . . . before it gathered momentum.") "Section 13(b) provides for the grant of a preliminary injunction where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *FTC v. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (citing 15 U.S.C. § 53(b)).

B. Section 13(b) Standard for Preliminary Injunction

The standard for a preliminary injunction under Section 13(b) requires plaintiffs to show: (1) a likelihood of success on the merits; and (2) that the equities tip in favor of injunctive relief. *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 44 (D.D.C. 1998).[7] To establish a likelihood of success on the merits, the government must show that "there is a reasonable probability that the challenged transaction will substantially impair

[7] In contrast, the typical preliminary injunction standard requires a plaintiff to show: (1) irreparable harm; (2) probability of success on the merits; and (3) a balance of equities favoring the plaintiff. *FTC v. Sysco Corporation*, 113 F. Supp. 3d 1, 22 (2015) (citing *Heinz*, 246 F.3d at 714)).

competition." *Staples*, 970 F. Supp. at 1072 (citation omitted) (internal quotation marks omitted). "Proof of actual anticompetitive effects is not required; instead, the FTC must show an appreciable danger of future coordinated interaction based on predictive judgment." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004) (internal quotations omitted).

The Court's task, therefore, is to "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger 'may be substantially to lessen competition, or tend to create a monopoly' in violation of Section 7 of the Clayton Act.'" *Heinz*, 246 F.3d at 714 (quoting 15 U.S.C. § 18). This standard is satisfied if the FTC raises questions going to the merits "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Id.* at 714-15 (citations omitted) (internal quotation marks omitted). As reflected by this standard, Congress' concern regarding potentially anticompetitive mergers was with "probabilities, not certainties." *Brown Shoe Co.*, 370 U.S. at 323 (other citations omitted).

In sum, the Court "must balance the likelihood of the FTC's success against the equities, under a sliding scale." *F.T.C. v.*

Whole Foods Market, Inc., 548 F.3d 1028, 1035 (D.C. Cir. 2008). The equities or "public interest" in the antitrust context include: "(1) the public interest in effectively enforcing antitrust laws, and (2) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial." *Sysco*, 113 F. Supp. 3d at 86.

Nevertheless, "[t]he issuance of a preliminary injunction prior to a full trial on the merits is an extraordinary and drastic remedy." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980)(citations omitted) (internal quotation marks omitted). The government must come forward with rigorous proof to block a proposed merger because "the issuance of a preliminary injunction blocking an acquisition or merger may prevent the transaction from ever being consummated." *Id.*

C. *Baker Hughes* Burden-Shifting Framework

In *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990), the U.S. Court of Appeals for the D.C. Circuit established a burden-shifting framework for evaluating the FTC's likelihood of success on the merits. *See Heinz*, 246 F.3d at 715. The government bears the initial burden of showing the merger would result in "undue concentration in the market for a particular product in a particular geographic area." *Baker Hughes*, 908 F.2d at 982. Showing that the merger would result in a single entity controlling such a large percentage of the relevant market so as to significantly increase the concentration of firms in that market entitles the government to a presumption that the merger will substantially lessen competition. *Id.*

The burden then shifts to the defendants to rebut the presumption by offering proof that "the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86 (1975) (alterations in original)). "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Baker Hughes*, 908 F.2d at 991. "A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Id.*

"If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times." *Id.* at 983. "[A] failure of proof in any respect will mean the transaction should not be enjoined." *Arch Coal*, 329 F. Supp. 2d at 116. The court must also weigh the equities, but if the FTC is unable to demonstrate a likelihood of success on the merits, the equities alone cannot justify an injunction. *Id.*

IV. Discussion

The Court's analysis proceeds as follows: (A) legal principles considered when defining a relevant market; (B) application of legal principles to Plaintiffs' market definition; (C) Defendants' arguments in opposition to Plaintiffs' alleged market; (D) conclusions regarding the relevant market; (E) analysis of the Plaintiffs' arguments relating to the probable effects on competition based on market share calculations; (F) Defendants' arguments in opposition to Plaintiffs' market share calculations; (G) conclusions regarding Plaintiffs' market share; (H) Plaintiffs' evidence of additional harm; (I) Defendants' response to Plaintiffs' *prima facie* case; and (J) weighing the equities.

A. Legal principles considered when defining a relevant market

As discussed *supra*, the burden is on the Plaintiffs to show that the merger would result in a single entity controlling such a large percentage of the relevant market that concentration is significantly increased and competition is lessened. *See e.g. Baker Hughes*, 908 F.2d at 982. To consider whether the proposed merger may have anticompetitive effects, the Court must first define the relevant market based on evidence proffered at the evidentiary hearing. *See United States v. Marine Bancorp.*, 418

U.S. 602, 618 (1974) (Market definition is a "'necessary predicate' to deciding whether a merger contravenes the Clayton Act."). Examination of the particular market, including its structure, history and probable future, is necessary to "provide the appropriate setting for judging the probable anticompetitive effects of the merger." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d at 116 (quoting *Brown Shoe* at 322 n. 28); *see also United States v. General Dynamic*, 415 U.S. 486, 498 (1974). "Defining the relevant market is critical in an antitrust case because the legality of the proposed merger [] in question almost always depends on the market power of the parties involved." *Cardinal Health, Inc.*, 12 F. Supp. 2d at 45.

Two components are considered when defining a relevant market: (1) the geographic area where Defendants compete; and (2) the products and services with which the defendants' products compete. *Arch Coal, Inc.*, 329 F. Supp. 2d. at 119. The parties agree that the United States is the relevant geographic market. Hrg Tr. (Shapiro) 2151:23-2152:4; *see also* Orszag Dep. 155:15-19.[8] The parties vigorously disagree, however, about how the relevant product market should be defined.

[8] Defendants' economic expert, Johnathan Orszag, produced several expert reports for Defendants but was not called to testify.

The Supreme Court in *Brown Shoe* established the basic rule for defining a product market: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. In other words, a product market includes all goods that are reasonable substitutes, even where the products are not entirely the same. Two factors contribute to an analysis of whether goods are "reasonable substitutes": (1) functional interchangeability; and (2) cross-elasticity of demand. *See e.g.*, *Sysco*, 113 F. Supp. 3d at 25-26.

As the following discussion demonstrates, the concepts of cluster and targeted markets are critical to defining the market in this case.

a. Consumable office supplies as cluster market

Cluster markets allow items that are not substitutes for each other to be clustered together in one antitrust market for analytical convenience. Shapiro Report at 007 (noting that cluster markets are "commonly used by antitrust economists.") The Supreme Court has made clear that "[w]e see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966).

Here, Plaintiffs allege that items such as pens, file folders, Post-it notes, binder clips, and paper for copiers and printers are included in this cluster market. Compl. ¶¶ 36-37. Although a pen is not a functional substitute for a paperclip, it is possible to cluster consumable office supplies into one market for analytical convenience. *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565-68 (6th Cir. 2014). Defining the market as a cluster market is justified in this case because "market shares and competitive conditions are likely to be similar for the distribution of pens to large customers and the distribution of binder clips to large customers." Shapiro Report at 007; *see also* PX02167 (Orszag Dep. 91:11-15) ("So, for example, pens may not often be substitutes for notebooks in the context of this case, but a cluster market would be the aggregation of those two and then the analysis of those together for, as we talked about earlier, analytical simplicity.").

b. Large B-to-B customers as target market

Another legal principle relevant to market definition in this case is the concept of a "targeted" or "price discrimination" market. According to the Merger Guidelines:

> When examining possible adverse competitive effects from a merger, the Agencies consider whether those effects vary significantly for different customers purchasing the same or similar products. Such differential impacts are possible when sellers can discriminate, e.g., by profitably raising price to certain targeted customers but not to others. [...]

> When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers. A price increase for targeted customers may be profitable even if a price increase for all customers would not be profitable because too many other customers would substitute away.

U.S. Dep't of Justice & FTC Horizontal Merger Guidelines §3 (2010) (hereinafter Merger Guidelines).[9]

Defining a market around a targeted consumer, therefore, requires finding that sellers could "profitably target a subset of customers for price increases . . . ." *See Sysco*, 113 F. Supp. 3d at 38 (citing Merger Guidelines Section 4.1.4.). This means that there must be differentiated pricing and limited arbitrage. Dr. Shapiro concluded that arbitrage is limited here because "it is not practical or attractive for a large customer to purchase indirectly from or through smaller customers." *Id.*

B. Application of relevant legal principles to Plaintiffs' market definition

The concepts of cluster and targeted markets inform the Court's critical consideration when defining the market in this case: the products and services with which the Defendants' products compete. *Arch Coal, Inc.*, 329 F. Supp. 2d. at 119. The

[9] Although the Merger Guidelines are not binding on this Court, the D.C. Circuit has relied on them for guidance in other merger cases. *Sysco*, 113 F. Supp. 3d at 38 (citing *Heinz*, 246 F.3d at 716 n.9).

parties vigorously disagree on how the market should be defined. As noted *supra*, Plaintiffs argue that the relevant market is a cluster market of "consumable office supplies" which consists of "an assortment of office supplies, such as pens, paper clips, notepads and copy paper, that are used and replenished frequently." Compl. ¶¶ 36-37. Plaintiffs' alleged relevant market is also a targeted market, limited to B-to-B customers, specifically large B-to-B customers who spend $500,000 or more on office supplies annually. Hrg Tr. 30:4-6.[10]

Defendants, on the other hand, argue that Plaintiffs' alleged market definition is wrong because it is a "gerrymandered and artificially narrow product market limited to *some*, but not all, consumable office supplies sold to only the most powerful companies in the world." Defs.' FOF ¶ 4 (emphasis in original). In particular, Defendants insist that ink and toner must be included in a proper definition of the relevant product market. *Id.* ¶ 101. Defendants also argue that no

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[10] In Plaintiffs' complaint, they alleged that the relevant market was limited to large B-to-B customers, including, but not limited to "those that buy $1 million annually of consumable office supplies for their own use." Id. ¶¶ 41, 45. For analytical purposes, Dr. Shapiro drew the line at large B-to-B's that spend $500,000 or more on office supplies. Hrg Tr. 2154:16-2155:14(Dr. Shapiro noting that 90 percent of Enterprise customers spend at least $500,000 on office supplies and that there is no "magic place that's the right place" to draw the line, but necessary for practical analytical purposes).

evidence supports finding sales to large B-to-B customers as a distinct market. *Id.* ¶ 77.

1. *Brown Shoe* "Practical Indicia"

The *Brown Shoe* practical indicia support Plaintiffs' definition of the relevant product market. The *Brown Shoe* "practical indicia" include: (1) industry or public recognition of the market as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes; and (7) specialized vendors. *Brown Shoe*, 370 U.S. at 325. Courts routinely rely on the *Brown Shoe* factors to define the relevant product market. *See, e.g. Staples*, 970 F. Supp. at 1075-80; *Cardinal Health*, 12 F. Supp. 2d at 46-48; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 159-64 (D.D.C. 2000); *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 39-44 (D.D.C. 2009); *United States v. H & R Block*, 833 F. Supp. 2d 36, 51-60 (D.D.C. 2011).[11]

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[11] The Court is aware of the academic observation that "the rationale for market definition in *Brown Shoe* was very different from and at odds with the rationale for market definition in horizontal merger cases today." Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION at 237 (CCH, Inc. 2015).

> Today the concern is that the post-merger firm might be able to raise prices without causing too much output to be lost to its rivals. In contrast, the *Brown Shoe* concern was that by reducing its price (or improving quality at the same price), the post-merger firm could

The most relevant *Brown Shoe* indicia in this case are: (a) industry or public recognition of the market as a separate economic entity; (b) distinct prices and sensitivity to price changes; and (c) distinct customers that require specialized vendors that offer value-added services, including: (i) sophisticated information technology (IT) services; (ii) high quality customer service; and (iii) expedited delivery.

a. Industry or public recognition of the alleged market as a separate economic entity

Vendors in the office supply industry identify customers according to how much they spend annually and recognize B-to-B customers as a distinct group. Shapiro Report 006-008. For example, Staples defines "Enterprise" customers as those who spend over $1 million per year, "Commercial" customers as those who spend between $100,000 and $1 million per year, and "mid-market" customers as those who spend between $6,000 and $100,000 per year. PX04062 (SPLS) at 009; PX04088 (SPLS) at 23. Office Depot maintains similar categories. PX02002 (Calkins, Office Depot ("ODP") IH 85:16-86:7). According to Staples, the $500,000

> deprive rivals of output, thus forcing them out altogether or relegating them to niche markets.

Id. at 240. Nevertheless, the Court finds the *Brown Shoe* factors a useful analytical tool, and as Judge Amit P. Mehta recognized in *Sysco*, "*Brown Shoe* remains the law, and this court cannot ignore its dictates." *Sysco*, 113 F. Supp. 3d at n 2.

spend mark is a "threshold" that requires "closer attention" be paid to the customer. PX02153 (Mutschler (SPLS) Dep. 56:11-20).

These examples demonstrate that the industry recognizes large B-to-B customers as a separate economic entity.

b. Distinct prices and a high sensitivity to price changes

Large B-to-B customers solicit RFPs, requests for information ("RFI"), requests for quote ("RFQ"), or similar processes to select their primary office supply vendor. *See e.g.*, Hrg Tr. (AEP) 194:10-195:16; Hrg Tr. (HPG) 1883, 1915:13-1916:18. Through these competitive processes, large B-to-B customers enter into multi-year contracts that typically last for three to five years. Hrg Tr. at 70, 92. Large B-to-B customers generally request prices for all items on their core list of office supplies, particularly those purchased in high volume. Hrg Tr. (AEP) 207:19-208:10; (Select Medical) 1012:18-25; 1112:14-18. The volume of consumable office supplies purchased by large B-to-B customers allows them to purchase office supplies for half the price paid by the average retail consumer. Shapiro Report at 019.

Multi-year contracts with a primary office supply vendor allow large B-to-B customers to avoid regional price differences and to lock in prices on core items for several years. Hrg Tr. (Select Medical) 1023:3-7; (HPG) 1929:8-1931:19. B-to-B contracts are not exclusive, which means that B-to-B customers can buy office supplies off contract at any time without penalty. *See e.g.* Hrg Tr. at 411:7-20; 412:9-12; 919:20-25; 1898:24-1900:23. B-to-B customers may seek to amend the items on their core list and re-negotiate the price for those items. PX02100 (Heisroth (SPLS) Dep. 92:1-16). B-to-B customers typically receive a flat percentage discount off published prices for non-core items. Pls.' FOF ¶ 52. Upfront payments and volume discounts also reduce costs for large B-to-B customers. Hrg Tr. (AEP) 173:1-23; (Meester (Best Buy)) 1320:4-10.

In addition to price, other services are also evaluated, including delivery and information technology capabilities, customer service, and more. Hrg Tr. (AEP) 208:12-22; (HPG) 1914:15-1915:10. After evaluating all proposals and selecting finalists, intense competition between the top two or three bidders ensues. Hrg Tr. (AEP) 209:17-210:3. Vendors naturally seek to charge B-to-B customers the highest price possible, while the B-to-B customers' interest in obtaining the lowest possible price is served by the head-to-head competition among vendors. PX02002 (Calkins (ODP) IH 305:7-306:8). Large B-to-B customers possess a tremendous amount of bargaining power. *See e.g.* Hrg Tr. 404:3-16; 940:20-941:12.

The bargaining power of large B-to-B customers is enhanced by their ability to pit Defendants against each other. For example, in 2015, Staples was in "a dog fight" with Office Depot for [redacted]'s business, so it offered an additional 1.5 percent volume rebate. PX04064. In November 2014, Staples offered a $[redacted] upfront payment to win a contract with [redacted], beating Office Depot's offer of $[redacted]. PX04034 (SPLS) at 001. In 2014, Office Depot offered [redacted] a retention incentive of $[redacted] per year for three years. PX05266 (ODP) at 001. These examples demonstrate that large B-to-B customers are extremely price sensitive.

c. Large B-to-B customers are distinct

In addition to wanting the best price, large B-to-B customers also want the best service. PX02003 (Ringel (SPLS) IH 127:9-11) ("It's not always about the company wanting the lowest price, they want the best service, they want the best services, they want a competitive price, and they want good representation."). This includes sophisticated IT capabilities, personalized customer service, and expedited delivery capabilities. *See e.g.* Hrg Tr. (HPG) 1914:15-1915:10; PX02119 (O'Neill (AEP) Dep.) 262:16-263:5; PX 07006 ([redacted]) at 012.

i. Sophisticated IT capabilities

Sophisticated IT capabilities include customizable product catalogs, electronic procurement systems, and punch-out sites. *See e.g.*, Hrg Tr. (McDonalds) 375:25-376:13; (PDME) 1391:7-23.

Customized catalogs allow large B-to-B customers to limit the products their employees can purchase in accordance with the specific high-volume items for which they have negotiated the lowest price from their vendor. *See e.g.*, Hrg Tr. (Select Medical) 1067:16-25; 1069:3-1070:4. The "punch out" IT interface enables companies to control ordering, approval, payment and invoicing. Hrg Tr. (WB Mason) 1624:3-1625:20. Such IT capabilities are expensive and are therefore offered by only a select few nationwide vendors. PX03032 (Pfizer Decl. ¶ 9). These capabilities are critical, however, to invoicing in such a way that reduces the administrative burden of processing a high volume of invoices. Hrg Tr. 1624.

In addition to detailed invoicing, large B-to-B customers require utilization reports. *See e.g.*, Hrg Tr. (AEP) 182:1-9; (McDonalds) 376:14-377:9. These reports include data on the products ordered by employees (whether they are core or non-core), the quantity, unit price and delivery location. *Id.* (Best Buy) 1237:7-1238:4. The reports also identify the product purchased by employees at the stock keeping unit ("SKU") level. *Id.* This detailed reporting allows B-to-B customers to track spending and make necessary adjustments in order to decrease off-contract spend and save money. *Id.*

ii. Personalized, high quality customer service

Dedicated customer service experts are another unique feature demanded by large B-to-B contract customers. *See e.g.*, (WB Mason) 1631:18-1633:9. Large B-to-B customers demand an office supply vendor that provides a dedicated account manager. *Id.* (BestBuy) Hrg 1241:14-18; (HPG) 1938:7-13. Account managers for large B-to-B customers are expected to understand the customers' office supply needs. *Id.* (AEP) 187:19-18:14. According to Staples' CEO Ron Sargent, large B-to-B customers require "more high-touch hand holding" from dedicated sales experts. PX02012.

iii. Next day and desktop delivery

The sale and distribution of consumable office supplies to large B-to-B customers, many of whom have locations nationwide, requires the warehousing, sale, and distribution of a wide range of office supplies. Hrg Tr. (HPG) 1907:24-25. Nationwide delivery to dispersed geographic locations is critical for large B-to-B customers. *See e.g.*, Hrg Tr. (Fifth Third Bank) 895:24-896:13. Large B-to-B customers require reliable next-day delivery because they have limited storage space for office supplies. *Id.* (Select Medical) 1082:1-1083:24. Large B-to-B customers also prefer a vendor with the ability to make desktop deliveries because such a service eliminates the need to hire employees to make internal deliveries. Hrg Tr. (Fifth Third

Bank) 982:25-983:10, 983:17-984:12. Defendants are the only two office supply vendors that provide nation-wide desktop delivery. *Id.* (WB Mason) 1695:25-1696:5. Defendants tout their nationwide distribution capabilities to differentiate themselves among other office supply vendors. PX 02002 (Calkins (ODP) IH 118:21 - 119:2); PX04321 (SPLS) at 001; PX04469 (SPLS) at 014; PX05380 (ODP) at 044; PX04320 (SPLS) at 001; PX04338 (SPLS) at 004.

In sum, the evidence shows that the *Brown Shoe* factors support Plaintiffs' alleged market definition because there is: (a) industry or public recognition of the market as a separate economic entity; (b) B-to-B customers demand distinct prices and demonstrate a high sensitivity to price changes; and (c) B-to-B customers require specialized vendors that offer value-added services, including: (i) sophisticated information technology (IT) services; (ii) high quality customer service; and (iii) expedited delivery. These factors support viewing large B-to-B customers as a target market.

2. Expert testimony of Dr. Carl Shapiro and the Hypothetical Monopolist Test

In addition to the *Brown Shoe* factors, the Court must consider the expert testimony offered by Plaintiffs in this case. The parties agree that the main test used by economists to determine a product market is the hypothetical monopolist test. ("HMT"). Shapiro Report at 014; *see* Orszag Dep. at 89:6-8. This test queries whether a hypothetical monopolist who has control over the products in an alleged market could profitably raise prices on those products. Defs.' FOF ¶ 31 ("The key question is whether a hypothetical monopolist in the alleged market profitably could impose a small but significant and non-transitory increase in price ("SSNIP")") (citing *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 at 1111-12 (N.D. Cal. 2004). If so, the products may comprise a relevant product market. *See H & R Block*, 833 F. Supp. 2d at 51-52. The HMT is explained in the Merger Guidelines.

> [T]he test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products … likely would impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market, including at least one product sold by one of the merging firms.

Merger Guidelines § 4.1.1 The SSNIP is generally assumed to be "five percent of the price paid by customers for the products or services to which the merging firms contribute value." Merger Guidelines § 4.1.2.

Dr. Shapiro's HMT analysis emphasizes that the proposed or "candidate" market consisting of the sale and distribution of consumable office supplies includes *all* methods of procuring office supplies by large companies, i.e. procurement through a primary vendor relationship, off contract purchases, online and retail buys. Shapiro Report at 014. "Since the hypothetical monopolist, by definition, controls all sources of supply to large customers, it would not have to worry that raising prices would cause large customers to switch to other suppliers of consumable office supplies: by definition, there are none." *Id.*

Dr. Shapiro also points out that Staples and Office Depot's head-to-head competition "tells us that a *monopoly* provider of consumable office supplies would charge significantly more to large customers than Staples and Office Depot today charge these same customers." *Id.* Dr. Shapiro also highlights the record evidence that demonstrates Defendants compete "fiercely" for business in the large B-to-B space. *Id.* Dr. Shapiro concludes that such competition implies that "the elimination of competition would lead to a significant price increase to large customers, which in turn implies that the HMT is satisfied." *Id.*

Dr. Shapiro's conclusions are supported by the testimony presented during the hearing. For example, Mr. O'Neill, who testified on behalf of AEP, noted that the company was able to get a lower price because of competition between Staples and Office Depot. Hrg Tr. 340. Mr. Jason Cervone, Sourcing Manager of indirect procurement at McDonalds, acknowledged the same. *Id.* at 492 ("So in our definition of what we need in terms of vendor in this space [with Staples and Office Depot] you have more chance of lowering prices or maintaining pricing than you would with just one player there."); *see also* Hrg Tr. 1890:15-24 (Mr.

Wright for HPG: "Without competition, we can't secure best-in-class price and best-in-class terms for our members and that's really part of our operating model.").

In sum, Dr. Shapiro's expert report and testimony, as well as the testimony of the corporate representatives, supports Plaintiffs' definition of the relevant market as the sale and distribution of consumable office supplies to large B-to-B customers.

C. Defendants' arguments in opposition to Plaintiffs' alleged market

Defendants make two primary arguments in response to Plaintiffs' alleged market. First, although Defendants do not explicitly discuss the *Brown Shoe* practical indicia, they argue that exclusion of ink and toner, as well as "beyond office supplies" or "BOSS" products from the alleged market, is error. Defs.' FOF ¶¶ 6 and 72. Second, Defendants argue that no evidence supports Plaintiffs' contention that large B-to-B customers should be treated as a separate market. Defs.' FOF ¶ 77.

1. Exclusion of ink, toner and BOSS from alleged market is proper

Defendants' principal challenge to Plaintiffs' alleged market centers on the exclusion of ink, toner and BOSS from the alleged relevant market. Defendants advance three arguments, none of which are persuasive. First, Defendants argue that exclusion of these products from the alleged market is a "made for litigation market," that is inconsistent with commercial realties. Defs.' FOF ¶ 6. Second, Defendants argue that Plaintiffs' market definition is inconsistent with the one used by the FTC in 1997 and 2013. *Id.* Finally, Defendants seize on Dr. Shapiro's admission that the FTC made the decision to exclude ink and toner from the proposed market prior to his independent determination that doing so was proper. *Id.* These arguments are addressed in turn.

a. Defendants' argument for inclusion of ink and toner fails because they are not subject to the same competitive conditions as general office supplies

Defendants' fundamental legal argument for inclusion of ink, toner and BOSS products in the alleged market is that "a well-defined product market must correspond to the commercial realties of the industry and be economically significant." Defs.' FOF ¶ 32 (citing *Brown Shoe*, 370 U.S. at 336-37). Defendants argue that the dispositive "commercial reality" is that many large B-to-B customers include ink, toner and other BOSS products in the bundle of goods they contract for with their primary vendor. Defs.' FOF ¶ 74. Many large businesses include these adjacent items in their primary vendor bundle. Hrg Tr. 2641:3-9 (Professor Shapiro agreed that BOSS products are included in customer contracts and RFPs "the overwhelming majority of the time."); *see also id.* at 235:19-236:25; 342:13-

343:1; 351:10-13; 353:8-14 (AEP testifying that "office supplies" includes pens, pencils, paper, binder clips, folders, ink and toner, [janitorial and sanitation "jan/san"] materials, break room supplies, furniture, and technology); *see also id*, at 397:11-398:22 (McDonald's testifying that "office supplies" includes traditional office supplies, toner, and copy paper, as well as break room supplies and some technology items). However, Defendants do not address the critical question that must be answered when determining whether a particular product should be included in a cluster market: are the items subject to the same competitive conditions? *ProMedica Health*, 749 F.3d at 566 (holding that "the competitive conditions across the markets for primary and secondary services are similar enough to justify clustering of those markets when analyzing the merger's competitive effects."); *see also* Hrg Tr. (Shapiro) 2123:3-2124:21, 2313:19-2314:8.

Competition for the sale of ink and toner has increased due to the "recent and rapid" rise of Managed Print Services ("MPS"). Pls.' FOF ¶ 26. MPS vendors like Xerox, Hewlett-Packard, Lexmark, and Ricoh provide a bundle of services that includes sale of ink and toner in addition to service and maintenance of printers and copiers. *See e.g.*, Hrg Tr. (Select Medical) 1018:18-1019:3; (WB Mason) 1604:14-20. There is ample record evidence to show that ink, toner, and other adjacent BOSS items are properly excluded from the relevant market because they are subject to distinct competitive conditions. For example, some large companies are shifting all of their ink and toner business to an MPS. *See e.g.*, Hrg Tr. 357-358; 503 (McDonalds noting that in November 2015 it changed from Office Depot to an MPS to procure its ink and toner and that the number of companies capable of providing ink and toner is larger than those that provide office supplies). Other large companies are disaggregating ink and toner purchases between their primary vendor and an MPS. *Id.* (AEP) 236 (noting that AEP buys some ink and toner from Office Depot and some from Xerox). Many companies hold separate sourcing events for ink and toner. *See e.g.,* Hrg Tr. 166-170 (AEP confirming that it runs a separate sourcing event for office furniture, jan/san and ink and toner); *id.* at 1019:13-1020:3 (Select Medical noting five vendors submitted bids during its 2013 RFP for MPS. Select Medical ultimately contracted with MPS Total Print); *id.* at 1316-18 (Best Buy confirming purchases of BOSS items from Kimberly-Clark and ink and toner through MPS contract with Hewlett-Packard). The same is true of other BOSS items. Hrg Tr. 168 (AEP: ". . . most of our commercial, if not all of our commercial jan san is part of a janitorial contract that also provides labor.").

Moreover, the authority relied on by Defendants is readily distinguished. Defendants rely on *Brown Shoe* to support a focus on the "commercial realities of the industry." However, Defendants rely on *Brown Shoe's* discussion of the proper geographic boundaries of a market, which is distinct from *Brown Shoe's* discussion of the relevant product market. *Brown Shoe* 370 U.S. at 336-37 ("The geographic market selected must, therefore both 'correspond to the commercial realities of the industry' and be economically significant."). To the extent that the "commercial realities of the industry" are important in this case, the Court agrees with Plaintiffs that the commercial realities are "that Defendants are the largest and second-largest office supplies vendors in the country; they are each other's closest competitor for large business customers; bid data show that they lose bids most often to each other; and large customers currently benefit greatly from their head-to-head competition." Pls.' FOF ¶ 288.

Defendants also rely on *PepsiCo, Inc. v. Coca Cola Co.*, a case brought by PepsiCo under Section 2 of the Sherman Act alleging that Coca Cola had monopolized, or attempted to monopolize, the market of fountain syrup distributed by independent food service entities. 114 F. Supp. 2d 243 (S.D.N.Y. 2000). *PepsiCo* is distinguishable for a number of reasons. First, the critical question before the Court in *PepsiCo* was whether the evidence supported a finding that the distribution channel of fountain syrup through independent foodservice distributors should be recognized as a relevant market. *Id.* at 249-50. The Court rejected *PepsiCo*'s proposed relevant market because the evidence showed that "while customers view fountain syrup delivered through independent foodservice distributors as preferential and advantageous, they view fountain syrup delivered through other means as acceptable." *Id.*

Here, the record evidence shows that large B-to-B customers do not view any alternative sources for bulk procurement of basic office supplies that would retain the current competitive conditions of the market. Hrg Tr. 349 (AEP) ("I think our team would be very good at finding alternatives to provide pens and pencils; however, they cannot create competition."); *Id.* 486 (McDonalds)("We would attempt to look for alternatives. We find ourselves, though, back to a situation where we don't have another national player that has a retail footprint nationwide that stocks everything we need . . .") In contrast, large B-to-B customers not only view alternative vendors for ink, toner and BOSS as adequate, they increasingly contract with MPS, furniture, and janitorial companies for their primary purchase of these distinct products. *See e.g.*, Hrg Tr. 1019 (Select Medial) (after considering MPS bids in 2013 from Office Depot, OfficeMax, Staples, Total Print and Weaver, Select Medical entered into a contract with Total Print for its MPS needs). In light of these distinctions, *PepsiCo* does not support a finding that Plaintiffs' alleged market is in error.

In sum, inclusion of ink, toner and BOSS items by large companies in the bundle of goods they want to have the **option** of purchasing through their primary vendor does not mean that those goods are subject to the same competitive conditions.

b. Consideration of ink and toner during 1997 and 2013 investigations

Next, Defendants argue that the Plaintiffs' alleged market is inconsistent with how the FTC defined the market during its investigation of the Staples and Office Depot proposed merger in 1997 and the Office Depot and Office Max merger in 2013. Defs.' FOF ¶ 113-116.

In 1997, the proposed merger between Staples and Office Depot was enjoined by this Court. *FTC v. Staples*, 970 F. Supp. 1066, 1070 (D.D.C. 1997) (J. Hogan). At that time, FTC included ink and toner in its definition of consumable office supplies. *Id.* at 1080. However, scant precedential value can be gleaned from comparing the defined market in that case and the Plaintiffs' alleged market in this case. The 1997 case is nearly twenty years old, and the office supply market has changed dramatically since that time. For example, as discussed in Section IV.B.1.a. *supra*, the rise of MPS services as a competitive force has occurred in the last several years.

Moreover, the 1997 Staples case was a retail case that focused on how the proposed merger would affect the average consumer. The case before the Court today is a contract channel case focused on large B-to-B customers.

In 2013, after a seven month investigation, the FTC did not challenge Office Depot's proposed acquisition of Office Max. *See* FTC's Closing Statement ("2013 Closing Statement"), https://www.ftc.gov/system/files/documents/public_statements/statement-commission/131101officedepotofficemaxstatement.pdf. Because the Commission cited to the definition of consumable office supplies from *Staples* in its Closing Statement, Defendants argue that ink and toner should be included in the relevant market because Plaintiffs "presented no evidence whatsoever that the 'competitive conditions' are different in any way from November 2013." Defs.' FOF ¶ 116.

The Court rejects this argument. In the 2013 Closing Statement, one of the rationales for allowing the proposed merger to proceed was because:

> large customers use a variety of tools to ensure that they receive competitive pricing such as ordering certain products (like ink and toner) directly from manufacturers and sourcing (or threatening to source) certain categories of office supply products from multiple firms.

2013 Closing Statement at 3. The FTC's decision recognized that "yesterday's market dynamics may be very different from market dynamics of today." *Id.* Plaintiffs' decision to not include ink and toner in their proposed relevant market in this case is therefore entirely consistent with the 2013 decision to not challenge the Office Depot and Office Max merger. *See also*, Hrg Tr. 3593 (Plaintiffs' closing argument noting that the 2013 decision is "wholly consistent with what we're doing here. It's exactly the same thing. We did not see a reason to challenge ink and toner based on the evidence that was developed in the investigation.").

c. Dr. Shapiro and the FTC worked collaboratively to determine that ink and toner should be excluded

Finally, Defendants challenge the propriety of excluding ink and toner from the alleged cluster market based on Dr. Shapiro's testimony indicating that the decision to exclude ink and toner resulted from a collaborative process with the FTC and that he did not perform a market share analysis including ink and toner. Defs.' FOF ¶ 121-124. The Court is not persuaded by Defendants' argument. First, the fact that the FTC works collaboratively with its experts to determine what products should be included in an antitrust market is not problematic. The FTC's own economists contribute to the FTC's decision regarding the relevant market prior to the time the expert witness for trial is retained. *See e.g.* Hrg Tr. 2907 (Ms.

Reinhart: "The amount of work that went into this investigation is huge. And these staff attorneys, they're experts themselves. They know the antitrust laws, they know the antitrust economics . . . .").

Further, Defendants take Dr. Shapiro's testimony regarding market shares of Defendants for ink and toner out of context. Defs.' FOF ¶ 124. Defendants' highlight Dr. Shapiro's statement that if one were to calculate market shares for ink and toner, Defendants' share would be significantly smaller. *Id.* Defendants seek to imply that Dr. Shapiro agrees that Defendants' market shares in the alleged market would be smaller if ink and toner were included. However, Dr. Shapiro's comment was referring to his earlier statement that:

> I think that both the FTC and Staples and Office Depot agree, as far as I can tell, that if you took Staples and Office Depot's market share in ink and toner, it would be significantly lower than it is in core office supplies and paper. To me that is confirmation that it's correct not to include ink and toner in the cluster.

Hrg Tr. 2783. In other words, because there are more companies that sell ink and toner, Defendants' market share in an ink and toner market would be lower than they are in the alleged market.

All of the above arguments are advanced by Defendants to bolster their assertion that the Plaintiffs have "gerrymandered the market" to inflate Defendants' market share. Defs.' FOF ¶ 4. As discussed *supra*, voluminous record evidence supports excluding ink, toner and BOSS products from the relevant cluster market. To the extent Defendants sought to show that exclusion of ink and toner radically altered Defendants' market share, Defendants could have presented expert testimony to support that proposition.

2. Antitrust laws exist to protect competition, not a particular set of consumers

Defendants' second primary argument in opposition to Plaintiffs' proposed relevant market is that "there is no evidence to support Plaintiffs' claim that large B-to-Bs should be treated as a separate market." Defs' FOF ¶ 77. Defendants maintain that Plaintiffs' attempt to protect "mega companies" is misplaced because the merger "indisputably will benefit all retail customers, and more than 99 percent of business customers." Defs.' FOF ¶ 1.

Antitrust laws exist to protect competition, even for a targeted group that represents a relatively small part of an overall market. *See* Merger Guidelines § 3 ("When price discrimination is feasible, adverse competitive effects on targeted customers can arise, even if such effects will not arise for other customers."). Indeed, the Supreme Court has recognized that within a broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co.*, 370 U.S. at 325, (1962); *Cardinal Health, Inc.*, 12 F. Supp. 2d at 47 (concluding that "the services provided by wholesalers in fact comprise a distinct submarket within the larger market of drug delivery."); *See e.g. Sysco*, 113 F. Supp. 3d at 40 (holding that "the ordinary factors that courts consider in defining a market—the Brown Shoe practical indicia and the Merger Guidelines' SSNIP test—support a finding that broadline distribution to national customers is a relevant product market."); *see also United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 360 (1970) ("[I]t is the cluster of products and services ... that as a matter of trade reality makes commercial banking a distinct" market).

As discussed in Section IV.A.2.a-c *supra*, the nature of how large B-to-B customers operate, including the services they demand, supports a finding that they are a targeted customer market for procurement of consumable office supplies. There is overwhelming evidence in this case that large B-to-B customers constitute a market that Defendants could target for price increases if they are allowed to merge. Significantly, Defendants themselves used the proposed merger to pressure B-to-B customers to lock in prices based on the expectation that they would lose negotiating leverage if the merger were approved. *See* *e.g.*, PX05236 (ODP) at 001 ("This offer is time sensitive. If and when the purchase of Office Depot is approved, Staples will have no reason to make this offer."); PX05249 (ODP) at 001 ("[The merger] will remove your ability to evaluate your program with two competitors. There will only be one."); PX05514 (ODP) at 003 ("Today, the FTC announced 45 days for its final decision. You still have time! You would be able to leverage the competition, gain an agreement that is grandfathered in and drive down expenses!").

D. Conclusions regarding the definition of the relevant market

The "practical indicia" set forth by the Supreme Court in *Brown Shoe* and Dr. Shapiro's expert testimony support the conclusion that Plaintiffs' alleged market of consumable office supplies (a cluster market) sold and distributed by Defendants to large B-to-B customers (a targeted market) is a relevant market for antitrust purposes. The *Brown Shoe* factors support Plaintiffs' argument that the sale and distribution of consumable office supplies to large B-to-B customers is a proper antitrust market because the evidence supports the conclusion that: (1) there is industry or public recognition of the market as a separate economic entity; (2) B-to-B customers demand distinct prices and demonstrate a high sensitivity to price changes; and (3) B-to-B customers require specialized vendors that offer value-added services. Dr. Shapiro's unrebutted testimony also supports Plaintiffs' alleged market definition because, in his opinion, "the elimination of competition would lead to a significant price increase to large customers," which implies the HMT is satisfied. Finally, for the reasons discussed in detail in Section IV.C *supra*, Defendants arguments against Plaintiffs' market definition fail.

E. Analysis of the Plaintiffs' arguments relating to probable effects on competition based on market share calculations

Having concluded that Plaintiffs have carried their burden of establishing that the sale and distribution of consumable office supplies to large B-to-B customers in the United States is the relevant market, the Court now turns to an analysis of the likely effects of the proposed merger on competition within the relevant market. "If the FTC can make a *prima facie* showing that the acquisition in this case will result in a significant market share and an undue increase in concentration" in the relevant market, then "a presumption is established that [the merger] will substantially lessen competition." *Swedish Match,* 131 F. Supp. 2d at 166. The burden is on the government to show that the merger would "produce a firm controlling an undue percentage share of the relevant market" that would result in a "significant increase in the concentration of firms in that market." *Heinz*, 246 F.3d at 715.

The Plaintiffs can establish their *prima facie* case by showing that the merger will result in an increase in market concentration above certain levels. *Id.* "Market concentration is a function of the number of firms in a market and their respective market shares." *Arch Coal*, 329 F. Supp. 2d at 123. The Herfindahl-Hirschmann Index ("HHI") is a tool used by economists to measure changes in market concentration. Merger Guidelines § 5.3. HHI is calculated by "summing the squares of the individual firms' market shares," a calculation that "gives proportionately greater weight to the larger market shares." *Id.* An HHI above 2,500 is considered "highly concentrated"; a market with an HHI between 1,500 and 2,500 is considered "moderately concentrated"; and a market with an HHI below 1,500 is considered "unconcentrated". *Id.* A merger that results in a highly concentrated market that involves an increase of 200 points will be presumed to be likely to enhance market power." *Id.; see also Heinz*, 246 F.3d at 716-17.

1. Concentration in the sale and distribution of consumable office supplies to large B-to-B customers

Dr. Shapiro estimated Defendants' market shares by using data collected from Fortune 100 companies ("Fortune 100 sample" or "Fortune 100"). Shapiro Report at 017. During the data collecting process, 81 of the Fortune 100 companies responded with enough detail to be used in Dr. Shapiro's sample. *Id.; see* *also* Hrg Tr. 2294:3-19. The critical data provided by the companies was fiscal year 2014 information on: (1) their overall spend on consumable office supplies; (2) the amount spent on consumable office supplies from Staples; and (3) the amount spent on consumable office supplies from Office Depot. Shapiro Report, Exhibit 5A. Some Fortune 100 companies have an established primary vendor relationship with Staples or Office Depot. *Id.* For example, Staples has 100 percent of the market share relating to [redacted].'s spend on consumable office supplies and Office Depot has 100 percent of the market share relating to [redacted]'s spend on consumable office supplies. *Id.* Other Fortune 100 customers purchase office supplies from a mix of vendors. For example, Staples accounted for twenty-seven percent of [redacted]'s spend on consumable office supplies in 2014 and Office Depot accounted for twenty-one percent. *Id.*

Defendants' market share of the Fortune 100 sample as a whole is striking: Staples captures 47.3 percent and Office Depot captures 31.6 percent, for a total of 79 percent market share. Shapiro Report at 017 and Ex. 5B. The pre-merger HHI is already highly concentrated in this market, resting at 3,270. *Id.* at 021. Put another way, Staples and Office Depot currently operate in the relevant market as a "duopoly with a competitive fringe." *Id.* If allowed to merge, the HHI would increase nearly

3,000 points, from 3,270 to 6,265. *Id.* This market structure would constitute one dominant firm with a competitive fringe. *Id.* Staples' proposed acquisition of Office Depot is therefore presumptively illegal because the HHI increases more than 200 points and the post-merger HHI is greater than 2,500. Shapiro Report at 021; *see also Heinz*, 246 F.3d at 716 (noting that the pre-merger HHI for baby food was 4775, "indicative of a highly concentrated industry" and the 500 point post-merger HHI increase "creates, by a wide margin, a presumption that the merger will lessen competition in the domestic jarred baby food market.")

F. Defendants' arguments in opposition to Plaintiffs' Market Share Calculations

Defendants make several arguments in opposition to Dr. Shapiro's market share methodology and calculation. *See* Defs.' FOF ¶¶ 125-131. Defendants argue that: (1) the Fortune 100 sample overstates Defendants' actual market share; (2) treatment of Tier 1 diversity suppliers and paper manufacturers was error;[12] and (3) Dr. Shapiro underestimates leakage, inflating Defendants' market shares. *Id.* However, despite significant time spent cross-examining Dr. Shapiro with regard to his

[12] Tier 1 diversity suppliers are minority or veteran owned businesses that are regional in nature and generally rely on large nationwide office supply companies like Staples and Office Depot to service their customers. Hrg Tr. 1379 (PDME).

methodology, Defendants produced no expert evidence during the hearing to rebut that methodology. Moreover, it is significant that Defendants' final 100-page brief devotes only seven paragraphs to challenging Dr. Shapiro's market share calculations. *Id.*

1. The Fortune 100 is a trustworthy sample to calculate Defendants' market shares

Defendants' first argument in opposition to Dr. Shapiro's focus on the Fortune 100 is that his failure to take a sample of the other approximate 1100 companies in the relevant market is error because it results in "dramatically inflated market shares." *Id.* ¶ 126. Dr. Shapiro conceded that the data he analyzed is imperfect because it does not include all large B-to-B customers. Shapiro Report at 017. However, Dr. Shapiro was confident that "there is no reason to believe [the market shares] are biased when it comes to estimating the market shares of Staples and Office Depot." *Id.* To test whether his analysis of the Fortune 100 might have overstated Defendants' market shares because the Fortune 100 companies are especially large, Dr. Shapiro measured the market share of the top half of his sample separate from the bottom half. *Id.* at 018. The range of spending on consumable office supplies among the companies analyzed in Dr. Shapiro's analysis is vast: from less than $200,000 per year on the low end, to more than $33 million per year on the high end. *Id.*, Ex. 5A. The combined market share for Defendants is seventy-nine percent among the top half of the Fortune 100 and eighty-nine percent among the bottom half. *Id.* at 018. Thus, Dr. Shapiro states that he is "confiden[t] that the market shares for Staple[s] and Office Depot reported in Exhibit 5B are not overstated." *Id.*

Defendants' second challenge relating to the Fortune 100 sample focuses on the fact that only eighty-one of the 100 companies responded with enough data to be included in Dr. Shapiro's analysis. Defendants argue that the nineteen omitted "are the most likely to purchase supplies from vendors other than Staples and Office Depot." *Id.* ¶ 125. Defendants highlight Costco as an example, a company that charges each department with procuring its own office supplies, whether from Costco or other vendors. *Id.* The fact that Costco is able to purchase office supplies from Costco itself makes that company's procurement of office supplies an anomaly. Because Defendants did not present a case, they do not provide the Court with an analysis of the nineteen Fortune 100 companies excluded from Dr. Shapiro's analysis to show that their exclusion skewed Defendants' market shares in a way favorable to Plaintiffs. Antitrust economists rely on data from third parties through surveys, and therefore the measure of market shares is "normally imperfect." *Id.*, fn 43. Perhaps Judge Mehta said it best: "The

FTC need not present market shares and HHI estimates with the precision of a NASA scientist." *Sysco*, 113 F. Supp. 3d at 54; *see also H & R Block*, 833 F. Supp. 2d at 72 (stating that a "reliable, reasonable, close approximation of relevant market share data is sufficient."). For all of these reasons, and in view of the absence of expert testimony offered by the Defendants, the Court is persuaded that Dr. Shapiro's analysis of the Fortune 100 represents a reasonable and reliable approximation of the Defendants' market share.

2. Dr. Shapiro's treatment of Tier 1 diversity suppliers and paper manufacturers who rely on Defendants is consistent with commercial realities

Next, Defendants challenge the manner in which Dr. Shapiro dealt with Tier 1 diversity suppliers and paper manufacturers. Defs.' FOF ¶ 127. Defendants contend that the sales made by Tier 1 diversity suppliers and paper manufacturers are improperly attributed to Defendants. *Id.*

In the normal course, Defendants treat accounts served by Tier 1 diversity partners toward their own revenue. Pls.' FOF 102. Moreover, Tier 1 diversity suppliers cannot serve large B-to-B customers without partnering with Defendants. *Id.* For these reasons, Dr. Shapiro attributed Tier 1 revenues to Defendants. Hrg Tr. 2309:11-2310:6; 2795:2-2796:3; *See also* Hrg Tr. 379 (McDonalds) ("Our understanding is that Tier 1s are generally regional players and may not have the size or scale to handle large geographically-distributed business.")

With regard to paper manufacturers, some large companies purchase paper through Defendants and others purchase directly from a manufacturer. *Id.* 2305-06. Dr. Shapiro included sales of paper that are made through Defendants toward Defendants' revenue. *Id.* In these situations, Staples or Office Depot distributes the paper. *Id.* at 2306. "In cases where the paper manufacturer directly sells and delivers the paper to the customer," Dr. Shapiro "attribute[d] the sales to the paper manufacturer." *Id.* Thus, the Court is satisfied that Dr. Shapiro's treatment of Tier 1 diversity suppliers and some paper manufacturer's revenue is consistent with commercial realities and does not overstate Defendants' market shares.

3. Dr. Shapiro accounted for leakage in his analysis

Finally, Defendants contend that Dr. Shapiro did not adequately account for "leakage" in his market share analysis. *Id.* ¶ 129. Leakage refers to unreported discretionary employee purchases of office supplies. Shapiro Report at 018. Dr. Shapiro requested an estimate of leakage from the Fortune 100. Shapiro Report at 019. Of the eighty-one companies included in his market-share analysis, twenty-six reported on leakage. *Id.* Appendix E. Twelve of the twenty-six indicated that leakage spend was "*de minimis*" or "immaterial". PX06300, Ex. RC2. In these cases, Dr. Shapiro assumed that one percent of the companies' spend on office supplies was leakage. Defs.' FOF ¶ 129.

Testimony from fact witnesses during the hearing made it clear that even the largest companies in the world are either not concerned enough about leakage to track it or do not have a reliable way of tracking it. *See e.g.* Hrg Tr. 344:2-4 (AEP: "We have a methodology [to track leakage] which is an audit process which is ran [sic] on a monthly basis. We choose not to include office supplies every month."); 464-65 (McDonalds became aware of how to track leakage through "P-card" spend during communications with the FTC in this case; and "data for the P-cards really wasn't available to procurement, at least we weren't aware of that.").[13] These same companies have tremendous incentive to ensure that their employees spend on contract. Purchases made by employees online or from a brick and mortar store are [redacted] to [redacted] percent higher than the contract price paid by large companies. Shapiro Report at 019. Most companies with a primary-vendor contract have an official policy that requires employees to purchase office supplies

[13] "P-Cards" or "procurement cards" are the equivalent of company credit cards that allow goods to be purchased without using a traditional purchasing process.

through the contract. *See e.g.*, Hrg Tr. 464-65 (McDonalds' policy is that corporate stores must purchase on contract through Office Depot). Best Buy produced a video to educate employees about the benefits of buying on contract. *Id.* 1212-1214.

For all of these reasons, the Court is confident that Dr. Shapiro accounted for any impact leakage has on Defendants' market shares in this case.

G. Conclusion regarding Plaintiffs' market share analysis

Plaintiffs have met their burden of showing that the merger would result in "undue concentration" in the relevant market of the sale and distribution of consumable office supplies to large B-to-B customers in the United States. The relevant HHI would increase nearly 3,000 points, from 3270 to 6265. These HHI numbers far exceed the 200 point increase and post-merger concentration level of 2500 necessary to entitle Plaintiffs to a presumption that the merger is illegal. The Court rejects Defendants' arguments in opposition to Dr. Shapiro's market analysis for the reasons discussed in detail in Section IV.F *supra*. Nevertheless, to strengthen their *prima facie* case, Plaintiffs presented additional evidence of harm, which the Court analyzes next.

H. Plaintiffs' evidence of additional harm

Sole reliance on HHI calculations cannot guarantee litigation victories. *Baker Hughes*, 908 F.2d at 992. Plaintiffs therefore highlight additional evidence, including bidding data ("bid data"), ordinary course documents, and fact-witness testimony. This additional evidence substantiates Plaintiffs' claim that this merger, if consummated, would result in a lessening of competition.

Mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition. *See* Merger Guidelines § 6 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."); *see also Heinz*, 246 F.3d at 717-19; *Swedish Match*, 131 F. Supp. 2d at 169; *Staples*, 970 F. Supp. at 1083. Plaintiffs' evidence supports the conclusion that Defendants compete head-to-head for large B-to-B customers.

1. Bidding Data

Dr. Shapiro analyzed five sets of bid data including: (1) Defendants' win-loss data; (2) data on Defendants' top wins and top losses; and (3) Fortune 100 bid data. Pls.' FOF ¶ 109. Defendants often bid against each other for large B-to-B contracts. *See, e.g.*, PX05028 (ODP) at 001 (of five bids for [redacted]'s RFP, Staples and Office Depot had the best bids); PX05255 (ODP) at 001 ("It is down to OD and Staples"); PX02167 (Orszag Dep. 173:11-18, 194:23-195:10) ("We do observe in the data that [Staples and Office Depot] are often the last two bidding against each other for the – for large customers as well.”).

The bid data also shows that Defendants win large B-to-B customer bids more frequently than other bidders. Hrg Tr. 2334:10-21. The B-to-B contract market accounts for approximately thirty-five percent of Defendants' sales. Compl. ¶¶ 29 and 30. According to Dr. Shapiro, the sale of consumable office supplies accounts for about [redacted] percent of Defendants' B-to-B customer revenues. Shapiro Report at 006. Staples CEO Mr. Sargent describes the B-to-B contract business as a “cornerstone” of Staples' business. PX04023 (SPLS) at 005 (“This year, [B-to-B sales] will account for almost 40% of company sales . . .”); PX 04630 (SPLS) at 007 (for B-to-B, Staples is the “clear industry leader and gaining share”) (emphasis in original). In fact, seventy-eight percent of Office Depot bid losses are to Staples. PX06500 (Shapiro Demonstrative) at 048. Similarly, eighty-one percent of Staples' bid losses were to Office Depot. *Id.* at 049. Defendants compete aggressively for the others' business, exemplified by Staples' 2014 “Operation Take Share,” a campaign that sought to capture some of Office Depot's market share. PX04432 (SPLS) at 003.

2. Ordinary Course Documents

Defendants' own documents created in the ordinary course of their business show that Defendants view themselves as the most viable office supply vendors for large businesses in the United States. *See, e.g.* PX04082 (SPLS) at 029 ("[T]here are only two real choices for them. Us or Them."); PX04042 (SPLS) at 024; PX05311 (ODP) at 001. Not surprisingly, Defendants view themselves as each other's fiercest competition. *See, e.g.*, PX04322 (SPLS) at 001 (identifying only Office Depot as "Key Competitor[]"); PX04414 (SPLS) at 008 ("For core office supplies we often compare ourselves to our most direct competitor, ODP"); PX05229 (ODP) at 149 (stating that Staples is Office Depot's "[t]oughest and most aggressively priced national competitor.").

Defendants consistently compete head-to-head with each other to win large B-to-B contracts. For example, in early 2015, HPG began negotiations with Staples. Hrg Tr. 1896:9-1898:14, 1901:2-16. Staples' initial price reduction was retracted until Office Depot was invited to bid. *Id.* Pitting Defendants against each other, HPG received substantial price concessions from both. *Id.* In November 2014, Staples increased its up-front payment to [redacted] to $[redacted] to prevent [redacted] from switching to Office Depot. PX04034 (SPLS) at 001. In March 2014, [redacted] engaged the Defendants in multiple rounds of bidding. PX05234 (ODP) at 001). Ultimately, Office

Depot could not meet the six percent core list savings necessary to win the contract from Staples. *Id.*

3. Fact Witness Testimony

Large B-to-B customers view Defendants as their best option for nationwide sale and delivery of consumable office supplies. *See e.g.* Hrg Tr. 225:25-226:5 (AEP: "Q: And after Office Depot and Staples, what's the -- what's the next best option after that? A: Then we're in trouble. We don't have a good - I don't think we have a good option after that."); 1205:17-20 (Best Buy "Q: So today Best Buy has a contract with Office Depot. Who does Best Buy consider to be its next best option for general office supplies and copy paper? A: Staples."); 1938:14-1939:18 (HPG "There's two nationally capable office supply vendors, from our perspective. One is Staples and one is Depot. And they control, roughly -- when I say control, they own 80 percent of the market in terms of revenue."); 361:2-21, 373:9-15; 492:3-7 (McDonalds' noting its consideration of Staples and Office Depot, but ultimately did not invite Staples to submit an RFP because the company was able to "recognize immediate savings" by not going through an expensive bid process.); 1018:1-13 (Select Medical, a company that contracts with Office Depot, testified that it has concerns about the merger going through because "I believe it's important to have that competition to be able to properly service our national footprint, our national presence, and to also be able to provide the best possible pricing.”). This testimony shows that absent Office Depot, large B-to-B customers would lose tremendous leverage and likely have to pay higher prices for consumable office supplies. Shapiro Report at 009-10.

This additional evidence strengthens Plaintiffs’ claim that harm will result in the form of loss of competition if Staples is permitted to acquire Office Depot.

I. Defendants’ response to Plaintiffs’ *prima facie* case

Defendants’ sole argument in response to Plaintiffs’ *prima facie* case is that the merger will not have anti-competitive effects because Amazon Business, as well as the existing patchwork of local and regional office supply companies, will expand and provide large B-to-B customers with competitive alternatives to the merged entity. Defs.’ FOF ¶¶ 132-203. Plaintiffs argue that there is no evidence that Amazon or existing regional players will expand in a timely and sufficient manner so as to eliminate the anticompetitive harm that will result from the merger. Pls.’ FOF ¶¶ 152-207. For the reasons discussed below, Defendants’ argument that Amazon Business and other local and regional office supply companies will restore the competition lost from Office Depot is inadequate as a matter of law.

“The prospect of entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers." Merger Guidelines § 9. Even in highly concentrated markets, Plaintiffs' *prima facie* case may be rebutted if there is ease of entry or expansion such that other firms would be able to counter any discriminatory pricing practices. *Cardinal Health*, 12 F. Supp. 2d at 54-55. Defendants carry the burden of showing that the entry or expansion of competitors will be "timely, likely and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *H&R Block*, 833 F. Supp. 2d at 73. The relevant time frame for consideration in this forward looking exercise is two to three years. Hrg Tr. 2660-2662 (Dr. Shapiro confirming that two to three years is the relevant temporal scope for the Court to consider the effects of new entrants or expansion of existing competitors).

1. Amazon Business

Defendants seize on Amazon's lofty vision for Amazon Business to be the "preferred marketplace for all professional, business and institutional customers worldwide" to support their contention that Amazon not only wants to take over the office supply industry, but desires to "take over the world." Hrg Tr. 3010 (Ms. Sullivan's Closing Argument). Amazon Business may eventually transform the B-to-B office supply space. *See e.g.*

DX05284 at 43 (Mr. Wilson's 2016 presentation in Baltimore: "It's still Day One." Amazon Business plans to "improve with: more selection; an increasing number of produce and business products [sic]; better personalization; a purchasing experience even better tailored for businesses."); Hrg Tr. 2662: 9-14. The Court's unenviable task is to assess the likelihood that Amazon Business will, within the next three years, replace the competition lost from Office Depot in the B-to-B space as a result of the proposed merger.

Amazon Business has a number of impressive strengths. For example, Amazon Business already enjoys great brand recognition and its consumer marketplace has a reputation as user-friendly, innovative and reliable. Amazon Business' strategy documents also reveal a number of priorities that, if successful, may revolutionize office supply procurement for large companies. For example, [redacted] DX05033 at 4. [redacted] Hrg Tr. 710:22-23. Amazon is also working [redacted]

[redacted], among other innovative technologies. Hrg Tr. 567:23-568:2; 724:11-25; 744:1-23.

However, several significant institutional and structural challenges face Amazon Business. Plaintiffs point to a long list of what they view as Amazon Business' deficiencies, including, but not limited to: (1) lack of RFP experience; (2) no commitment to guaranteed pricing [redacted]; (3) lack of ability to control third-party price and delivery; (4) inability to provide customer-specific pricing; (5) a lack of dedicated customer service agents dedicated to the B-to-B space; (6) no desktop delivery; (7) no proven ability to provide detailed utilization and invoice reports; and (8) lack of product variety and breadth. Pls.' FOF ¶ 191. Although Amazon Business may successfully address some of these alleged weaknesses in the short term, the evidence produced during the evidentiary hearing does not support the conclusion that Amazon Business will be in a position to restore competition lost by the proposed merger within three years.

First, despite entering the office supply business fourteen years ago, large B-to-B customers still do not view Amazon Business as a viable alternative to Staples and Office Depot. PX07518 (Amazon) at 001 ("Our customers tell us that [redacted]."). Moreover, Amazon

Business' participation in RFPs has been "limited." Hrg Tr. 546:18-547:4; *see also* 1943:14-1947:9 (HPG)(noting that HPG's membership and advisory board would require proof of Amazon Business' demonstrated success in serving large B-to-B customers before considering Amazon Business as a primary vendor). Signficantly, Amazon Business also has yet to successfully bid to be a large B-to-B customer's primary vendor. Hrg Tr. 551:11-13; *see also* Hrg Tr. 206-207 (AEP)(testifying that Amazon Business did not have all services required to be its primary vendor when it was considered by AEP in 2015). When Amazon Business has participated in RFPs, [redacted]. *Id.* 551:11-552:5; 851:21-852:8; McDevitt Dep. 186:6-16 (Amazon's prices to [redacted] were [redacted]% higher than lowest bid).

The Court has considered whether Amazon Business' newly energized focus on the B-to-B space could transform the office supply industry for B-to-B customers in such a dramatic way that the RFP process may be "what dinosaurs do" in the future. Hrg Tr. 2693:19-2694:9 (Ms. Sullivan's cross of Dr. Shapiro: "You know Dr. Shapiro, [Amazon Business] intends to make the RFP process obsolete.). However, during Mr. Wilson's deposition, he testified that Amazon Business does not seek to change the RFP process. PX02125 (Wilson Dep. 193:10-194:1). During cross-examination, Defendants addressed this point with Mr. Wilson directly:

> **Ms. Sullivan:** And anybody that's been watching what's been going on in the world understands that the way the old companies are doing things, running around, trying to get RFPs and a contract is kind of the old world. The new world is going to be procurement officers sitting at their desks using platforms like the one you're developing?
>
> **Mr. Wilson:** I don't know -- I mean, that's maybe one vision of what may happen. We'll see how the technology sort of evolves and where things land.
>
> **Ms. Sullivan:** But that's your plan, that that's going to be the new world?
>
> **Mr. Wilson:** Well, our plan is to bring Amazon Business shopping experience to customers. And we would like for them to be able to -- to leverage it, and we would like to create a solution that they like.

Hrg Tr. 692:11-25. Mr. Wilson's testimony does not support the conclusion that Amazon Business seeks to make the RFP process obsolete. Defendants did not offer testimony from other industry experts or offer any other credible evidence that the RFP process will become obsolete within the next three years. The evidence before the Court simply does not support a finding that Amazon Business will, within the next three years, either compete for large RFPs in the same way that Office Depot does now, or so transform the industry as to make the RFP process obsolete.

Second, Amazon Business' marketplace model is at odds with the large B-to-B industry. Similar to Amazon's consumer marketplace, half of all sales on Amazon Business are serviced by Amazon directly, while the other half are serviced by third-party sellers. Hrg Tr. 552. Amazon does not control the price or delivery offered by third-party sellers. *Id.* 842:14. Mr. Wilson confirmed that this will not change. *Id.* 843: 7-9 ("Q: You have no plans to force the third parties to offer particular prices? A: No, we'll never do that. No."). Amazon Business' lack of control over the price offered by third-party sellers contributes to Amazon Business' inability to offer guaranteed pricing. Mr. Wilson also testified that Amazon Business will not [redacted]. Hrg Tr. 849:9-12 [redacted]). The evidence thus shows that Amazon Business' [redacted], guaranteed pricing is not feasible at this time, and [redacted]. Absent these features, which are fundamental to the current office supply industry for large B-to-B customers, the record is devoid of evidence to support the proposition that large business would shift their entire office supply spend to Amazon Business in the next three years.

Finally, although Amazon Business' 2020 revenue projection is an impressive $[redacted], only [redacted] percent of that is forecast to come from the sale of office supplies. Hrg Tr. 856:5-16; PX 06300 (Shapiro Reply) at 028. This level of revenue for office supplies would give Amazon Business only a very small share in the relevant market. Shapiro Hrg Tr. 2432:11-19; 2436:15-19 (Dr. Shapiro: "So, in the end, no, I don't think over the next two years or so that they will - are likely to step in and provide sufficient additional competition to protect large customers . . . ."). Further, Amazon Business' 2020 forecast [redacted], in part because [redacted] Hrg Tr. 579:15-581:4; 719:25-720:3; 720:22-721:24, 856:5-13. Even the launch of [redacted] is uncertain due to [redacted]. Park Dep. [redacted]; Hrg 731:17-732:1 (testifying that [redacted]).

At the conclusion of Mr. Wilson's testimony, the Court asked whether, [redacted] Hrg Tr. 859:10-16. Mr. Wilson answered "[redacted]" *Id.* at 859:22-23. Similarly, during

Mr. Wilson's testimony about Amazon Business' ability to compete for RFPs, the Court engaged in this exchange:

> **THE COURT:** So, if one were to predict -- if a vice president were to predict five years from now, you'd be in a much better position to respond, just predicting?
>
> **THE WITNESS:** That's our point, yes.
>
> **THE COURT:** Right. And that -- the strength of that prediction is based upon what?
>
> **THE WITNESS:** Investment in resources.
>
> **THE COURT:** Right. And that's something that, I guess from a business point of view, you plan to do?
>
> **THE WITNESS:** I plan to request the resources.
>
> **THE COURT:** Right. Because you want to be as successful as you possibly can and compete, right?
>
> **THE WITNESS:** Absolutely.

Hrg Tr. 553:1-17.

Critically, however, when the Court asked whether Mr. Wilson [redacted] *Id.* at 860 1-3. This answer, considered in light of Amazon Business' lack of demonstrated ability to compete for RFPs and the structural and institutional challenges of its marketplace model, leads the Court to conclude that Amazon Business will not be in a position to compete in the B-to-B space on par with the proposed merged entity within three years. Just as it would be "pure speculation" for an Amazon Business employee to give a date certain for [redacted], it would be sheer speculation, based on the evidence, for the Court to conclude otherwise. If Amazon Business was more developed and Mr. Wilson [redacted], the outcome of this case very well may have been different.[14]

2. WB Mason and other competitors

Brief discussion is necessary with regard to the ability of existing competitors to fill the competition gap that would be left in the wake of this merger. WB Mason is the third largest office supply company in the U.S., but is a distant third behind Defendants, retaining less than one percent market share in the relevant market. PX03021 (WB Mason Decl.) ¶ 6. WB Mason has nine customers in the Fortune 1000. Hrg Tr. 1611:21-1611:24. WB Mason and other regional and local office supply vendors are at a

[14] Throughout the hearing Defendants argued that the FTC's declaration drafting process, especially as it pertained to Mr. Wilson, was "wrong." Hrg Tr. 3016:11-14. As is routine in antitrust cases, the FTC began drafting declarations based on the interviews that were conducted. The companies and the FTC then engaged in a back-and-forth process of edits. Some companies found the FTC's drafts to be accurate, others, like Amazon, sought significant edits. Although the Court expressed its concern about this process at various times during the hearing, no evidence of an improper motive on the part of the FTC was ever presented. Hrg Tr. 3016-3018.

competitive disadvantage because they do not have the resources to serve large customers nationwide. *Id.* at 1601: 3-8, 1687:13-22, 1697:2-8. Although WB Mason is confident in its ability to compete with Staples in Masonville, it does not bid on large RFPs outside of Masonville. Hrg Tr. (Meehan "We'll respond to RFPs that are inside of Masonville, that are headquartered in Masonville, that the majority of the business is inside of Masonville.").

It is significant that WB Mason does not have the desire or the ability to compete with the merged entity outside of Masonville. Pls.' FOF ¶ 44. As WB Mason's CEO Mr. Meehan testified, "we don't have any plans to expand [outside of Masonville] . . . We're going to focus on Masonville." Hrg Tr. Meehan, 1671. After establishing that it would take [redacted] for WB Mason to expand nationwide, the Court asked Mr. Meehan "If [Defendants] gave you $[redacted], would you accept it to be competitive with them?" He answered "I don't know if I would. That's a big challenge. I mean, that's if I even want to do this, right? Become this. I - no, I would definitely think about it, Your Honor." *Id.* 1790.

Like WB Mason, other regional and local office supply companies also face the structural disadvantage of purchasing from wholesalers instead of manufacturers. *Id.* Hrg Tr. 1584:23-1585:2. This means their costs are higher than those of

Defendants. Further, because their overall volumes are lower, they cannot offer the deep discounts that Defendants are able to offer. Pls.' FOF ¶ 168. There was simply no other evidence presented during the hearing that supports Defendants' assertion that utilizing a collection of regional or local office supply companies would meet the needs of large B-to-B customers.

J. Weighing the Equities

Although Plaintiffs are entitled to a presumption in favor of injunctive relief for the reasons discussed, Section 13(b)'s "public interest" standard still requires the Court to weigh the public and private equities of enjoining the merger. *Heinz*, 246 F. 3d at 726. The public interests to be considered include: (1) the public interest in effectively enforcing antitrust laws; and (2) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial. *See e.g. Sysco*, 113 F. Supp. 3d at 86. Both factors weigh in favor of granting Plaintiffs' Motion for Preliminary Injunction.

First, the "principle public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in the effective enforcement of the antitrust laws." *Swedish Match*, 131 F. Supp. 2d at 173. Because the law is clear that this merger is likely to lessen competition in the relevant market, it is in the public's interest for the merger to be enjoined. Second, preserving the FTC's ability to order effective relief after the administrative hearing also weighs in favor of enjoining the proposed merger. As discussed at some length during the parties' summations, it is "impossible to recreate pre-merger competition" if the parties are allowed to merge pending the administrative hearing. *Sysco*, 113 F. Supp. 3d at 87 (quoting *Swedish Match*, 131 F. Supp. 2d at 173); *see also* Hrg Tr. (Ms. Reinhart: "There's no doubt about it, the eggs would be scrambled. Once that happens, it's very difficult to get the companies apart."). Thus, the second public interest consideration also weighs in favor of enjoining the merger.

Defendants argue that the equities favor allowing the merger to proceed because "it is undisputed that the overwhelming majority (more than 99%) of B2B customers and *all* retail customers will benefit—or at least not be harmed—from this merger." Defs.' FOF ¶ 297. This argument is the same as Defendants' argument in opposition to Plaintiffs' alleged relevant market, for which Defendants cite no persuasive authority. The Court rejects the argument for the same reasons discussed in Section IV.C.2. *supra*.

Because Defendants have not made a showing of public equities that favor allowing the merger to proceed immediately, the Court should go no further because "[w]hen the Commission demonstrates a likelihood of ultimate success, a counter showing of private equities alone [does] not suffice to justify denial of a preliminary injunction barring the merger." *F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1050 (D.C. Cir. 2008) (quoting FTC v. *Weyerhaeuser,* 665 F. 2d 1071, 1083 (D.C. Cir. 1981). [15]

V. Conclusion

As Judge Mehta observed in *Sysco*, "There can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market." 113 F. Supp. 3d at 88 (quoting J. Tatel in *Whole Foods*, 548 F.3d at 1043). The Court concludes that Plaintiffs have met their burden of showing by a "reasonable probability" that Staples' acquisition of Office Depot would lessen competition in the sale and distribution of consumable office supplies in the large B-to-B market in the United States. The evidence offered by Defendants to rebut Plaintiffs' showing of likely harm was inadequate as a matter of law. Plaintiffs have therefore carried their ultimate burden of showing that they are likely to succeed in proving, after a full administrative hearing on the merits, that the proposed merger "may be

[15] Defendants bear the burden of showing that any proposed remedy would negate any anticompetitive effects of the merger and that their claimed efficiencies are: (1) merger specific; and (2) reasonably verifiable by an independent party. *H&R Block*, 833 F. Supp. 2d at 89. Because Defendants rested at the close of Plaintiffs' case-in-chief and called no witnesses to support their arguments related to remedies or efficiencies, they have not met their burden.

substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act.

For the reasons discussed herein, Plaintiffs' Motion for Preliminary Injunction is GRANTED. A separate order accompanies this Memorandum Opinion.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
May 10, 2016

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News Release

Staples and Office Depot to Terminate Merger Agreement

Staples Announces Strategic Plan to Enhance Value:

- Increasing Focus on Mid-Market Customers in North America

- Exploring Strategic Alternatives for European Operations

- Initiating New $300 Million Cost Reduction Plan

- Continuing to Return Cash to Shareholders

FRAMINGHAM, Mass.--(BUSINESS WIRE)--May 10, 2016-- Staples, Inc. (Nasdaq: SPLS) today announced that on May 16, 2016, the company and Office Depot, Inc. plan to terminate their merger agreement following U.S. District Court for the District of Columbia's recent ruling granting the Federal Trade Commission's request for a preliminary injunction to block the acquisition. Under the terms of the merger agreement, Staples will pay Office Depot a $250 million break-up fee. Staples also plans to terminate its agreement to sell more than $550 million in large corporate contract business and related assets to Essendant in connection with the termination of the Office Depot merger agreement.

"We are extremely disappointed that the FTC's request for preliminary injunction was granted despite the fact that it failed to define the relevant market correctly, and fell woefully short of proving its case," said Ron Sargent, Staples' chairman and chief executive officer. "We believe that it is in the best interest of our shareholders, customers, and associates to forego appealing this decision, terminate the merger agreement, and move on with our strategic plan to drive shareholder value. We are positioning Staples for the future by reshaping our business, while increasing our focus on mid-market customers in North America and categories beyond office supplies."

The company announced a strategic plan to enhance long-term value including the following actions:

Winning in the Mid-Market with Products and Services
Staples is building on its success serving the needs of mid-market business customers with 10 – 200 employees. The company is focused on increasing its share of wallet with existing customers and acquiring new customers. The company is increasing its offering of products and services beyond office supplies. Staples also plans to pursue market share gains in core categories like office supplies, ink, toner and paper. To support its growth plans, the company will invest in lower prices and improved supply chain capabilities and add more than 1,000 associates to its mid-market sales force. The company will simplify the customer experience with its world-class digital selling tools and capabilities. Staples will also pursue acquisitions of business-to-business service providers and companies specializing in categories beyond office supplies to build scale and credibility and accelerate growth in these areas.

Reshaping Staples to Reduce Risk and Preserve Profitability
Staples plans to explore strategic alternatives for its European operations. This will allow the company to sharpen its focus and more aggressively pursue its mid-market growth strategy in North America. Staples has closed more than 300 of its stores in North America since 2011. The company remains committed to increasing productivity and preserving profitability in its North American retail stores by increasing customer conversion, increasing the mix of services, reducing fixed costs, and closing underperforming stores. The company plans to close at least 50 stores in North America in 2016.

Reducing Costs to Drive Efficiency and Fund Growth Investments
The company generated approximately $750 million of annualized pre-tax cost savings from 2013-2015 by evolving business processes, increasing productivity, and developing more efficient ways to serve customers. Staples is initiating a new multi-year cost savings plan which is expected to generate approximately $300 million of annualized pre-tax cost savings by the end of 2018. The company will primarily focus on reducing product costs, optimizing promotions, increasing the mix of Staples Brand products, and reducing operating expenses.

Continuing to Return Cash to Shareholders
Staples will continue to return excess cash to shareholders. The company remains committed to its dividend program. Staples plans to resume repurchasing its common stock through open-market purchases during the second quarter of 2016. The company expects share repurchases of approximately $100 million in 2016.

Staples Q1 2016 Earnings Call
Staples, Inc. will hold its quarterly conference call to discuss first quarter 2016 results and its strategic plan on Wednesday, May 18, 2016 at 8:00 a.m. Eastern Time. To listen to the conference call via webcast, please visit Staples' Investor Relations website at http://investor.staples.com.

About Staples, Inc.
Staples retail stores and staples.com help small business customers make more happen by providing a broad assortment of products, expanded business services and easy ways to shop, all backed with a lowest price guarantee. Staples offers businesses the convenience to shop and buy how and when they want - in store, online, via mobile or though social apps. Staples.com customers can either buy online and pick-up in store or ship for free from staples.com with Staples Rewards minimum purchase. Expanded services also make it easy for businesses to succeed with in-store Business Centers featuring shipping services and products, copying, scanning, faxing and computer work stations, Tech Services, full-service Print & Marketing Services, Staples Merchant Services, small business lending and credit services.

Staples Business Advantage, the business-to-business division of Staples, Inc., helps mid-market, commercial and enterprise-sized customers make more happen by offering a curated assortment of products and services combined with deep expertise, best-in-class customer service, competitive pricing and state-of-the-art ecommerce site. Staples Business Advantage is the one-source solution for all things businesses need to succeed, including office supplies, facilities cleaning and maintenance, breakroom snacks and beverages, technology, furniture, interior design and Print & Marketing Services. Headquartered outside of Boston, Staples, Inc. operates throughout North and South America, Europe, Asia, Australia and New Zealand. More information about Staples (NASDAQ: SPLS) is available at www.staples.com.

Safe Harbor for Forward-Looking Statements
Certain information contained in this news release constitutes forward-looking statements for purposes of the safe harbor provisions of The Private Securities Litigation Reform Act of 1995. Any statements contained in this news release that are not statements of historical fact should be considered forward-looking statements. You can identify forward-looking statements by the use of the words "believes", "expects", "anticipates", "plans", "may", "will", "would", "intends", "estimates", and other similar expressions, whether in the negative or affirmative, although not all forward-looking statements include such words. Forward-looking statements are based on a series of expectations, assumptions, estimates and projections which involve substantial uncertainty and risk, including the review of our assessments by our outside auditor and changes in management's assumptions and projections. Actual results or events may differ materially from those indicated by such forward-looking statements as a result of risks, uncertainties and other important factors, including but not limited to factors discussed or referenced in our annual report on Form 10-K filed on March 4, 2016 with the SEC, under the heading "Risk Factors" and elsewhere, and any subsequent periodic or current reports filed by us with the SEC. In addition, any forward-looking statements represent our estimates only as of the date such statements are made (unless another date is indicated) and

should not be relied upon as representing our estimates as of any subsequent date. While we may elect to update forward-looking statements at some point in the future, we specifically disclaim any obligation to do so, even if our estimates change.

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Source: Staples, Inc.

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News Release

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Office Depot Responds to District Court's Ruling on Merger with Staples

BOCA RATON, Fla.--(BUSINESS WIRE)--May 10, 2016-- Office Depot, Inc. (NASDAQ: ODP) today issued the following statement from Chairman and Chief Executive Officer Roland Smith after the U.S. District Court in the District of Columbia granted the Federal Trade Commission's (FTC) request for a preliminary injunction to block the proposed merger of Staples, Inc. (NASDAQ: SPLS) and Office Depot.

Smith commented:

"While we are respectful of the Court's decision to grant the FTC's request for a preliminary injunction to prevent our merger with Staples, we are disappointed by this outcome and strongly believe that a merger would have benefitted all of our customers in the long term. We do not intend to appeal the Court's decision and the two companies plan to terminate the merger agreement effective May 16, 2016.

"As the Staples merger process comes to an end, we look forward to re-energizing our business. We remain committed to delivering our 2016 Critical Priorities and realizing the remaining synergies and efficiencies that come from the integration of Office Depot and OfficeMax. Once the Staples merger agreement is formally terminated, we plan to host an investor conference call on May 16 to discuss next steps in our go-forward strategy."

About Office Depot, Inc.

Office Depot, Inc. is a leading global provider of products, services, and solutions for every workplace – whether your workplace is an office, home, school or car.

Office Depot, Inc. is a resource and a catalyst to help customers work better. We are a single source for everything customers need to be more productive, including the latest technology, core office supplies, print and document services, business services, facilities products, furniture, and school essentials.

The Company has annual sales of approximately $14 billion, employs approximately 49,000 associates, and serves consumers and businesses in 59 countries with approximately 1,800 retail stores, award-winning e-commerce sites and a dedicated business-to-business sales organization – all delivered through a global network of wholly owned operations, franchisees, licensees and alliance partners. The Company operates under several banner brands including Office Depot, OfficeMax, Grand & Toy, and Viking. The company's portfolio of exclusive product brands include TUL, Foray, Brenton Studio, Ativa, WorkPro, Realspace and HighMark.

Office Depot, Inc.'s common stock is listed on the NASDAQ Global Select Market under the symbol "ODP". Additional press information can be found at: *http://news.officedepot.com*.

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Source: Office Depot, Inc.

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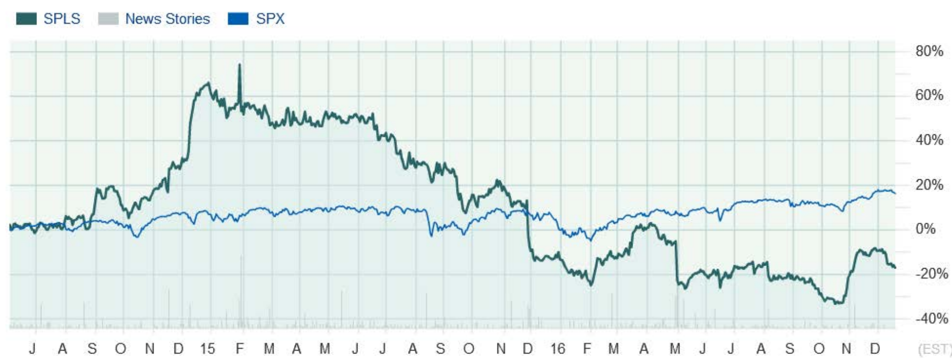
Staples, Inc. (SPLS): June 1, 2015 – December 31, 2016
(compared to the S&P 500 Index)



Office Depot, Inc. (ODP): June 1, 2015 – December 31, 2016
(compared to the S&P 500 Index)