

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

*In the Matter of Sycamore Partners II, L.P., Staples, Inc.,
and Essendant Inc., File No. 181-0180, Docket No. C-4667*

I. INTRODUCTION AND BACKGROUND

The Federal Trade Commission (“Commission”) has accepted an Agreement Containing Consent Order (“Consent Agreement”) from Sycamore Partners II, L.P. (“Sycamore”), Staples, Inc. (“Staples”), and Essendant Inc. (“Essendant”) (collectively, “Respondents”) to remedy the anticompetitive effects that otherwise would result from Staples’ acquisition of all of the outstanding shares of common stock of one of its wholesalers, Essendant (the “Acquisition”). The proposed Consent Agreement, among other things, limits the persons within Sycamore and Staples who have access to certain commercially sensitive information.

On September 14, 2018, Staples and its affiliates agreed to acquire all of the outstanding shares of common stock of Essendant. The Complaint alleges that Sycamore’s and Staples’ access to certain commercially sensitive information (“CSI”), without adequate safeguards to ensure that Sycamore and Staples will not misuse the information, could lead to anticompetitive conduct. The proposed Consent Agreement remedies this concern by limiting Sycamore’s and Staples’ access to: (1) CSI of Essendant’s resellers; (2) CSI of end customers of Essendant’s resellers; and (3) Essendant’s CSI that includes, uses, or incorporates CSI of Essendant’s resellers or CSI of end customers of Essendant’s resellers.

On January 25, 2019, by a vote of 3-2 -- with Chairman Simons, Commissioner Phillips and Commissioner Wilson voting in the affirmative, and Commissioner Chopra and Commissioner Slaughter dissenting -- the Commission issued an Administrative Complaint, and accepted for public comment an Agreement Containing Consent Order, resolving allegations in the Complaint that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct and substantial competition between Staples’ and Essendant’s reseller customers in the market for the sale and distribution of office products to midmarket business-to-business customers. The elimination of this competition could result in higher prices for midmarket end customers. The proposed Consent Agreement would remedy the alleged violations by limiting Sycamore’s and Staples’ access to CSI as described above.

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. The Commission issued the accompanying Decision and Order (“Order”) as final prior to seeking public comment, as provided in Section 2.34(c) of the Commission’s Rules. This will allow the Commission to enforce the Order if there are any violations of its provisions during the public comment period. Comments received during this period will become part of the public record. After 30 days, the Commission again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw from the Consent Agreement, or modify the accompanying Order.

II. THE PARTIES

Sycamore is a private equity firm specializing in retail and consumer investments. Sycamore acquired Staples in September 2017. Headquartered in Framingham, Massachusetts, Staples is the largest vertically integrated reseller of office products in the United States, selling office products to consumers through its e-commerce website and retail stores and to corporate and government end customers through its North American Delivery business. Before Sycamore acquired Staples, Staples reported sales of \$18.2 billion, which includes revenues from its U.S. and foreign operations.

Essendant is the largest wholesale distributor of office products in the United States, with net sales of over \$5 billion in 2017. Headquartered in Deerfield, Illinois, Essendant sells and distributes office products to thousands of commercial resellers through its extensive network of more than 60 U.S. distribution centers. Essendant also provides value-added services to its reseller customers, such as digitized product content and marketing tools. Essendant's broad base of reseller customers includes large national accounts (such as Staples, Office Depot, and Costco), independent dealers, and online retailers. Essendant does not offer its products directly to end customers, i.e. customers buying office products for their own use.

III. THE PRODUCTS AND STRUCTURE OF THE MARKETS

Staples and Essendant both provide a broad and deep assortment of office products across a number of product categories—including traditional office supplies, copy paper, ink and toner, janitorial and sanitation supplies, breakroom supplies, and technology products—but do so at different levels of the supply chain. Staples sells office products directly into all end customer segments—including individual consumers, small/home office, midmarket (small-and-medium businesses or “SMB”), and enterprise (large organizations such as Fortune 100 companies or the federal government).

Essendant and S.P. Richards Company (“SPR”) are the only two U.S. wholesalers supplying a wide assortment of office products as well as value-added services to commercial resellers, including thousands of independently owned and operated dealers (also known as the independent dealer channel, “IDC” or, collectively, “IDCs”), throughout the United States. The IDCs, which predominately serve midmarket end customers in their local communities, excel at providing high-touch service and customizing their programs and services to fit the needs of their customers. The IDCs compete directly with Staples to sell office products to these midmarket customers.

The relevant line of commerce in which to analyze the effects of the Acquisition is the sale and distribution of office products to midmarket business-to-business customers. The sale and distribution of office products to midmarket business-to-business customers entails selling office products and related services to customers who purchase those products and services for consumption, not for resale. The relevant geographic markets in which to analyze the effects of the Acquisition on this market are local. Most midmarket customers have one or only a few locations in the same local area. Likewise, most of the IDCs who serve these midmarket

customers compete in one or a small handful of local markets. These relevant markets contain many resellers—including Staples, Office Depot, independent resellers (including Essendant’s resellers and SPR’s resellers), Amazon, and others—with Essendant’s reseller customers accounting for a substantial share of the market. Entry into these markets would not be timely, likely, or sufficient to mitigate the anticompetitive effects of the Acquisition, which are described below.

IV. THE EFFECTS OF THE ACQUISITION

To carry out the distribution activities currently undertaken by Essendant under its “Wrap and Label” and “Drop-ship” programs, Essendant’s reseller customers must regularly provide Essendant with CSI about their end customers.

Under the Wrap and Label program, Essendant’s resellers furnish detailed information about each end customer’s orders so that Essendant can deliver products to the reseller pre-packed for the end customer. This saves a reseller the time necessary to sort through multiple unlabeled pallets and compile each end customer’s orders for the day. Similarly, under the Drop-ship program, Essendant delivers products directly to a reseller’s end customer on behalf of the reseller when the end customer’s location is outside of the reseller’s local delivery area. This allows an Essendant reseller to serve end-customer locations outside of the reseller’s delivery area on a next-day basis seamlessly. To take advantage of these programs, Essendant’s resellers must regularly furnish CSI such as end-customer names, locations, purchasing history, and product and service preferences.

Absent a remedy, the Acquisition would give Staples access to information it previously could not obtain relating to Essendant’s resellers’ (i.e., Staples’ competitors’) end customers. The Commission’s Complaint alleges that this detailed end-customer information, together with Staples’ access to Essendant’s resellers’ costs of goods, could enable Staples to offer higher prices than it otherwise would when bidding for an end customer’s business against one of Essendant’s resellers. Accordingly, access to this CSI may substantially lessen competition in the market for the sale and distribution of office products to midmarket business-to-business customers by eliminating direct and substantial competition between Staples and Essendant’s resellers, which could result in higher prices to midmarket end customers.

V. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the likely anticompetitive effects of the Acquisition by limiting Sycamore’s and Staples’ access to (1) CSI of Essendant’s resellers; (2) CSI of end customers of Essendant’s resellers; and (3) Essendant’s CSI that includes, uses, or incorporates CSI of Essendant’s resellers or CSI of end customers of Essendant’s resellers (hereinafter, “Protected Commercially Sensitive Information”). Specifically, the proposed Consent Agreement requires Sycamore and Staples to create a firewall separating Staples’ business-to-business end customer selling functions from Essendant’s wholesale selling function.

The firewalled employees will have responsibilities for performing Essendant's former wholesale functions for Essendant's resellers. Sycamore and Staples will be required to take all actions necessary to prevent access to, or the disclosure or use of, Protected Commercially Sensitive Information. After the Acquisition, only those Staples employees performing wholesale, legal and regulatory, or shared services functions or members of a prescribed management oversight group will have access to the Protected Commercially Sensitive Information, and only to the extent necessary to perform their assigned functions.

The proposed Consent Agreement also provides for the appointment of a monitor for ten years to assure Sycamore's and Staples' compliance with the Consent Agreement. Further, the proposed Consent Agreement contains appropriate reporting requirements.

Finally, the proposed Consent Agreement contains a prior notice provision for subsequent acquisitions by Sycamore or Staples resulting in total holdings of an ownership interest of more than ten percent of any company meeting specific criteria related to office products sales (a "Notifiable Acquisition"). Under the proposed Consent Agreement, for the next ten years, Sycamore and Staples will be required to give the Commission thirty days' advanced notice of any Notifiable Acquisition that is not subject to the Hart-Scott-Rodino Act. Sycamore and Staples must also provide the Commission with information about and documents relating to the to-be-acquired company. If 30 days expire without Commission action, Sycamore and Staples will be permitted to consummate the Notifiable Acquisition.

The Consent Agreement will have a term of ten years.

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The sole purpose of this analysis is to facilitate public comment on the proposed Consent Agreement. This analysis does not constitute an official interpretation of the proposed Consent Agreement or modify its terms in any way.