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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION

Plaintiff,

vs.

STAPLES, INC.

and

OFFICE DEPOT, INC.

Defendants.

Case No: 1:97CV00701
Judge: TFH

PLAINTIFF'S CORRECTED POST TRIAL BRIEF IN SUPPORT OF THE FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

DATED: June 2, 1997

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INTRODUCTION

The merger of Staples and Office Depot will harm competition and cause consumers to pay more for office supplies. The extensive record compiled in this case leaves unrefuted the key facts establishing that this merger is unlawful:

- Competition between office superstores, particularly between Staples and Office Depot, leads to lower prices; the merger eliminates that competition in some 42 areas of the country.

- Where that competition is lacking, Staples and Office Depot are able to charge significantly higher prices. The evidence on this point is overwhelming. Staples prices in non-competitive zones are 13 percent higher than in zones where Staples competes against Office Depot and OfficeMax; Staples prices in non-competitive zones are about 12 percent higher than in zones where Staples competes against Office Depot alone.

- Other sellers of office supplies, such as mass merchandisers, club stores, mail order, or contract stationers, do not constrain superstore prices.

- Staples and Office Depot are fast growing firms, poised to invade each others' markets and expand the competitive battlefield. The merger eliminates significant future competition between Staples and Office Depot and denies consumers in those markets lower prices that otherwise would have resulted.

- Staples' intention in pursuing this merger is to eliminate the pricing and profit margin threat posed by Office Depot -- both in markets where the firms compete today and in the many areas where Staples fears future competition with Office Depot.

- This merger will give the combined firm the ability to price above competitive levels.

This unrefuted -- and often unchallenged -- evidence demonstrates the risks this merger poses to competition. Under well-settled principles of antitrust jurisprudence, these facts compel granting the Commission's motion for a preliminary injunction.

The evidence of defendants' post-merger market power is firmly established by defendants' documents which lay out its pricing policies and competitive actions. This extensive documentary proof, marshaled in summary fashion in PX 2, 2A, 3, 3A, and 3B, provides a blueprint of how

competition works in the office superstore marketplace. Competition is fueled by the unique competitive relationship among the three office superstores, particularly between Office Depot and Staples. The rivalry between these firms forces them to price lower where they meet head-to-head. Where this competition is absent, both firms price significantly higher than in markets where they compete. The defendants' pricing approach, reflected in key business documents of both firms, deliberately seeks to exploit the opportunities provided by the absence of superstore competition.

The pricing history of both firms shows they each achieve the intended result. What defendants derided as a "nonsense correlation" in argument, they were required to admit in testimony. Each firm systematically charges higher prices in markets where it faces little or no superstore competition. "Non-competitive zones" -- the term that "everybody" at Staples and Office Depot uses to describe markets where they do not face each other or OfficeMax -- capture their view of the marketplace. PFF 17[1]. The defendants have offered no credible evidence to explain why consumers in non-competition zones pay on average 13% more for consumable office supplies than consumers in markets where Staples, Office Depot and OfficeMax compete and 12% more than in markets where the merging parties confront only each other. PFF 12.

While this competition has benefited consumers, it has caused Staples considerable discomfort. Faced with increased pressure on profit margins from Office Depot's lower prices and acutely aware that competition with Office Depot in new markets was inevitable, Staples confronted the unhappy prospect of an ongoing and expanding price war and continuing pressure on profits. PFF 147. It chose to avoid that competitive pressure by eliminating the source and acquiring Office Depot. Indeed, shortly after announcing the deal, Staples began reaping the benefits by quietly

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[1] PFF refers to plaintiff's findings of fact.

canceling a planned percent price cut intended to respond to the persistent competitive threat posed by Office Depot. PFF 159

At the time the merger was announced, long before the prospect of litigation surfaced, industry analysts lauded the proposed merger, not because it would produce efficiencies and lower prices, but because it would eliminate "the lingering fear of intensified competition in three-player markets," PFF 175; PX 3A at Tab A (maps showing the growing head-to-head competition), and create "considerable market power" in the hands of the two surviving office supply superstore firms.

The extensive record evidence of the fierce rivalry between Staples and Office Depot and their identical policies of charging higher prices in markets in which they do not compete demonstrates that this merger poses a significant threat of higher prices to consumers. In 42 metropolitan areas throughout the country, competition between Staples and Office Depot will be eliminated, leaving Staples as either the only superstore or one of only two superstores in the market. Moreover, since Staples anticipated that its competitive overlap with Office Depot would grow from 46% to of its stores by the end of the century, the threat to competition in the future is even greater. On these facts alone the Commission has demonstrated the need for a preliminary injunction.

In argument, defendants have disputed just about every element of the Commission's case. But disputing evidence is a far cry from disproving it. Since defendants are unable to attack the heart of the Commission's pricing case, they instead rely on the hope that the Court will fundamentally rewrite antitrust law on the basis of three unsupported or largely irrelevant propositions: other firms that have never constrained office superstore prices will somehow do so in the future; the "productivity loop" commits Staples to low prices regardless of its size or the presence of

competition; and cost savings will dwarf any adverse price effect. None of these propositions is proven. None supports overriding well-settled precedent.

Statements from others who sell some office supplies and who say they "compete" in the sale of office supplies merely state the obvious. These statements offer defendants no support on the critical question in a merger case: whether these other firms *constrain* office superstore pricing. While these firms understandably assert that they "compete" with everyone else who sells a common product, these alleged competitors have never exercised a significant constraining influence on office superstore pricing. If they did, office supply prices in Fredericksburg, Virginia, Leesburg, Florida, and Bangor, Maine, would not be dramatically higher than prices in Charlottesville, Virginia, Orlando, Florida, and Boston, Massachusetts. Since mass merchandisers and warehouse club stores do not constrain Staples and Office Depot prices in markets where prices are elevated, there is no basis to assume they will be able to constrain the much larger merged firm. We need not rest on assumption. Firms the defendants fervently claim are effective competitors say just the opposite -- Wal-Mart, Kmart, Sam's, BJ's and others have all testified they can not constrain the pricing of the merged firm.

Nor can defendants' so-called "productivity loop" defense save their transaction. Defendants have asked the Court to approve an otherwise illegal merger, even though it will give them the power to keep prices higher than competitive levels, because the "productivity loop mandates that they [decrease prices]." Defendants' Opening Statement 5/19 Tr at 56.[2] There is no dispute that the

[2] The defendants argue that they have a history of lower prices, and prices therefore will be lower in the future. A downward trend in prices is not dispositive in a merger review. As United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974) teaches, the anticompetitive effect of a merger should be judged on its "history, structure and probable future." The fact that prices may be decreasing does not end the Section 7 inquiry. Rather, the law requires an inquiry into whether prices will fall as rapidly as would be the case if the merger did not occur. Here the
(continued...)

defendants have grown and thrived by generating higher sales volume through lower prices. But they have also acted like every profit maximizing firm: when the opportunity has arisen because superstore competition is lacking, prices are higher than in competitive markets. In the words of Mr. Stemberg, both firms realize that there is nothing to be gained by pricing "lower than necessary" where there do not face superstore competition. PFF 26.

Moreover, the "productivity loop" defense stands antitrust on its head by declaring size and market dominance a virtue that guarantees the consumer a good deal. Defendants' argument proves too much: it would permit the post-merger Staples to acquire OfficeMax, permit Giant to acquire Safeway, allow Wal-Mart to acquire Kmart, and allow Coke to acquire Pepsi. The fact that a firm historically grows through low prices does not mean that it can not or will not exercise market power when its principal competition is removed. No court has ever approved a merger on this basis, and uch an argument is flatly inconsistent with Congress' objectives in enacting the antitrust laws.

Defendants contend finally that alleged cost savings, which they claim will inevitably be passed on to consumers, are the "silver bullet" saving their deal. This argument fails because the law requires that these claims be verifiable, merger-specific, and sufficient to outweigh the anticompetitive effects of the merger. The Commission's expert, Mr. Painter, testified without effective challenge that defendants' claims are based on a host of questionable and unverified assumptions which bias the result. Projected cost savings are neither fairly attributed to the merger nor consistent with the history of these firms. In short, defendants cost savings claims, which have grown almost five fold during the pendency of the investigation, simply are not credible.

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[2](...continued)
evidence is clear that prices have fallen more rapidly in markets where there is more superstore competition. DX 6033, 6034, 6035.

Crucial to defendants' argument, moreover, is that the merged firm will pass on most of these alleged cost savings to consumers in the form of lower prices. But defendants' projected rate of pass-through is far more generous than their historical experience. The uncontroverted evidence is that Staples' has historically only passed through 15%-17% of firm specific cost savings in lower prices to consumers. PFF 300. Indeed, without the disciplining force of Office Depot, there is simply no reason why Staples must lower prices when its costs fall. Even Staple's CEO could not deny that it is competition that compels the firm to pass on cost savings. Stemberg, 5/22 Tr. at 305.

The FTC has presented compelling evidence that this acquisition poses a significant competitive threat to competition and the consumers of office products. Injunctive relief is necessary to preserve the status quo pending a full trial on the merits in an administrative proceeding. Preliminary relief is justified both to prevent the serious harm to consumers that the transaction is likely to produce in the interim, and to avoid the difficulty of obtaining adequate relief in the future if the merger were allowed to take place. Absent preliminary relief the parties will consolidate their distribution systems, eliminate the Office Depot network and invariably lose key personnel. Restoring Office Depot as an effective competitor after the administrative proceeding will be highly unlikely. None of the equities offered by defendants comes close to counterbalancing the public's interest in effective enforcement of the antitrust laws.

The Commission asks this Court to provide temporary and preliminary relief under the express standards of Section 13(b) of the FTC Act, which authorizes a preliminary injunction "upon the court's determination, after 'weighing the equities and considering the Commission's likelihood of ultimate success,' that such relief 'would be in the public interest.'" FTC v. PPG Indus., 798 F.2d 1500, 1501-02 (D.C. Cir. 1986) (citing 15 U.S.C. § 53(b)); FTC v. Exxon Corp., 1979-2 Trade Cas.

(CCH) ¶ 62,763 (D.D.C. 1979) (granting TRO). The Commission's burden respecting likely success is satisfied if it 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." FTC v. University Health, 938 F.2d 1206, 1218 (11th Cir. 1991). Moreover, the equities in this case, primarily the loss of competition and the inability to obtain meaningful post-closing relief, strongly counsel for the entry of an injunction. The Commission easily satisfies the criteria for preliminary injunctive relief in this case.

I. SECTION 7 OF THE CLAYTON ACT ESTABLISHES AN EXPANSIVE STANDARD OF LIABILITY.

The Supreme Court has instructed that Section 7 of the Clayton Act "creates a relatively expansive definition of antitrust liability," by requiring a showing that the merger's effect "may be substantially to lessen competition." California v. American Stores Co., 495 U.S. 271, 284 (1990) (emphasis in original). Section 7 does not require a certainty, or even a high probability, that a merger will substantially lessen competition. FTC v. Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989). All that is required is a reasonable probability, and all "doubts are to be resolved against the transaction." Id. Accordingly, to establish a violation, the FTC need show only a reasonable probability, not a certainty, that the proscribed anticompetitive activity may occur. As Judge Posner has explained, "[a]ll that is necessary is that the merger create an appreciable danger of [anticompetitive] consequences in the future." Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987).

The lawfulness of a merger turns upon the transaction's potential for creating, enhancing, or facilitating the exercise of market power -- that is, the ability of a firm, unilaterally or in coordination with others, to raise prices above competitive levels for a significant period of time. United States v. Archer-Daniels-Midland Co., 866 F.2d 242, 246 (8th Cir. 1988), cert. denied, 493 U.S. 809 (1989); United States Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 at § 0.1 (Apr. 1992) (hereinafter "Merger Guidelines"). Hence, the ultimate question in any Section 7 case is whether the transaction creates an "appreciable danger" of anticompetitive effects. Hospital Corp. of America, 807 F.2d at 1386. The answer to this question depends upon (1) the "line of commerce," or product market, affected by the transaction; (2) the "section of the country," or geographic market, in which the transaction will have an effect, and (3) the transaction's probable effect on competition in the relevant market. FTC opening brief at 14.

A. The Relevant Product Market Is the Sale of Consumable Office Supplies Through Office Superstores

The purpose of defining a relevant market is to determine whether the merged firm will possess the *ability* to exercise market power -- that is to raise prices or decrease output -- after the merger. Both parties agree that defining the relevant market is not an end in itself, but rather a tool for determining the existence of market power. The tools for defining a product market "help evaluate the extent [to which] competition constrains market power and are, therefore, indirect measurements of a firm's market power." Archer-Daniels-Midland Co., 866 F.2d at 244-45.

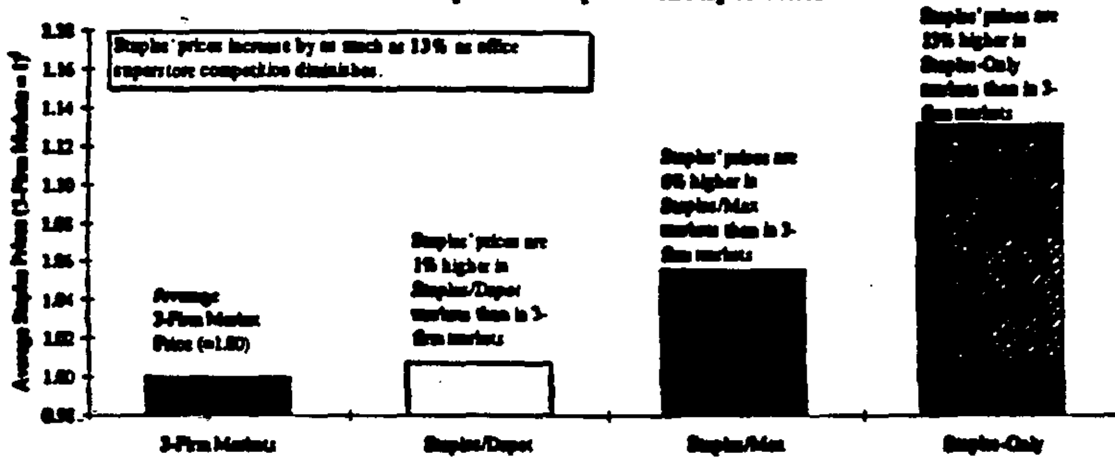
The Supreme Court has instructed that the relevant product market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number

of buyers will turn . . . ." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 612 n.31 (1953); see United States v. Aluminum Co. of America, 377 U.S. 271, 275 (1964); United States v. Gillette Co., 828 F. Supp. 78, 81 (D.D.C. 1993). As we noted in our opening brief, the relevant market determination focuses on the "the reasonable interchangeability of use or the cross-elasticity of demand" between the product itself and possible substitutes for it. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); see Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 218 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

The analytical framework set forth in the Merger Guidelines and adopted by the courts approaches this inquiry by asking whether a "hypothetical monopolist . . . would profitably impose at least a 'small but significant and nontransitory' [price] increase." Merger Guidelines, at § 1.11. The Merger Guidelines use five percent as the usual approximation of a "small but significant and non-transitory" price increase. Merger Guidelines, § 1.11.[3] The key question is whether, in the face of a price increase, enough customers will continue to buy from the monopolist to offset any sales lost to other sellers. So long as the additional profit from the price increase exceeds the profits lost from those consumers who turned to substitutes, the price increase would be profitable overall and the particular grouping of products constitutes a separate market for antitrust purposes. U.S. Anchor Mfg. v. Rule Indus., 7 F.3d 986, 997 n.21 (11th Cir. 1993), cert. denied, 114 S. Ct. 2710 (1994).

[3] Commentators have noted that, for retail markets characterized by high volume of sales but low profit margin per dollar of sales, a hypothetical price increase lower than 5% is appropriate to define the market. Harris & Jorde, Market Definition in the Merger Guidelines: Implications for Antitrust Enforcement, 71 Calif. L. Rev. 464, 482 (1983) ("In the high-volume grocery business . . . net income typically represents 0.5% of sales, so a 5% increase in price would represent a 1000% increase in profit"). Here, as we will show, the office superstore market is supported even by a 5% test.

Figure 1
Effect of Office Superstore Competition on Staples' Prices



[a] Averages are based on Staples' January 1997 price indices for a Staples-chosen basket of office supplies accounting for 90% of Staples' retail sales. Data source: PX 117.

1. Pricing evidence establishes a market for the sale of consumable office supplies through office superstores

Here the answer to the question of whether a hypothetical superstore monopolist can raise prices on consumable office supplies requires no guesswork: the unrefuted evidence is that Staples and Office Depot can and do raise prices well above 5% where they are the only office superstore. This much is beyond dispute. See Figure 1 on facing page. In markets where Staples faces no office superstore competition at all, prices are 13% higher than in markets where it competes with Office Depot and OfficeMax. This fact taken alone is enough to establish the sale of consumable office supplies through office superstores as a separate market. PFF III.A.

The product market is appropriately limited to consumable office supplies. This is a well accepted industry term describing non-durable office supplies that consumers purchase on an on-going basis. Examples include pens, pads, file folders, and copy paper. PFF 14. The term "consumable office supplies" or "general office" supplies are used throughout the industry and are found in defendants' documents. Id. The product market excludes the capital goods sold by office superstores, such as computers and business furniture because the nature of competition in consumable office supplies is quite distinct from competition to sell software and capital goods. Defendants testified, and their documents confirm, that competition from other vendors for the sale of these capital goods precludes them from raising prices significantly even where they do not face superstore competition. This is in sharp contrast with consumable office supplies, where the defendants affirm that they not only are able to raise prices unconstrained where they face no

superstore competitor, but take advantage of this ability to reap extraordinary profits in cities where they face no superstore rival.[4]

The fact that office supply prices are higher where there is no superstore competition is not surprising; it is intended. Both companies unabashedly set prices based primarily on the level of office superstore competition they face in each local market.

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The record is replete with examples of both Staples and Office Depot moving stores from higher priced "non-competitive" zones to lower priced zones because of the entry of an office superstore competitor, and the defendants' documents confirm that they focus on each other as their critical rival. For example:

- Staples dropped prices in response to Office Depot entry in Cincinnati, OH. PFF 31.
- When Office Depot entered Long Island, Staples created a new lower price zone. PFF 33.
- When Office Depot entered a Staples non-competitive zone in Visalia, California, Staples dropped prices by 9 to 11 percent. PFF 36.

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[4] For example, as both Mr. Stemberg and Professor Hausman testified, Staples cannot increase its prices and profit margin on computers due to the presence of effective competition (including mail order companies, such as 1-800-GATEWAY), even in non-competitive markets. Therefore it pursues higher margins through higher prices on office supplies. PFF 16. In other words, while the company is competitively constrained from increasing its margins on computers, no such constraints prevent it from obtaining higher margins and higher prices on office supplies.

- Office Depot dropped prices and margins fell significantly in Greensboro, NC, after Staples and OfficeMax entered. PFF 32.

2. Other retailers can not effectively constrain office superstore prices

Unable to meet the market definition test set out in the Guidelines and the cases, defendants conveniently ignore it. Instead they assert that others who sell office supplies "compete" and therefore should be included in the product market. But market definition is not an exercise in applying a label to firms. Rather, it is an attempt to identify those firms that constrain the merging firm's price. Thus, their "evidence" -- consisting largely of excerpts of affidavits and testimony from retailers and defendant's retail expert saying that others sell some of the same products -- does not address the relevant legal issue. The right question is whether in areas with only a single superstore, enough customers switch to these other sources to force prices down to the competitive levels found in geographic areas where all three superstore chains compete. The evidence in this record tells a compelling story. First, the pricing histories of both firms show that they can sustain higher prices in markets with little or no superstore competition regardless of "who else" is present in the market. Customers of Staples and Office Depot do not switch in sufficient numbers to other sources of office supplies to defeat the supracompetitive pricing that exists today in many different markets. Prices do sometimes drop, but only, as noted above, when other superstores enter the market. This evidence establishes that office superstores constitute a relevant product market distinct from these other sellers of office supplies. PFF III.G.[5]

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[5] For similar reasons the defendants' sporadic, anecdotal price checking cannot support their broad claim that these other alternatives effectively constrain the pricing of office superstores. In a 63-binder evidentiary submission not characterized by restraint, the defendants could muster only a handful of price checking documents, several of which were generated only after the FTC investigation began. And most importantly, they have failed to provide significant evidence that they were forced to change prices because of competition from non-superstore alternatives.

Defendants rely heavily on affidavits they secured from some FTC witnesses to support their claim that these other retailers are in the market. But upon close examination, these affidavits do not support the defendants' effort to broaden the market because the witnesses have not altered their sworn testimony that they do not *constrain* office superstores prices.

- Wal-Mart testifies that "The merged Staples and Office Depot will be able to raise prices on thousands of office supply items or SKUs. In addition, Wal-Mart cannot prevent the merged firm from raising prices on many of the same SKUs that Wal-Mart also carries." PFF 69.

- Sam's Club says that the "combined firm could raise prices on many of the thousands of office supply items or SKUs that each firm carries because they no longer will be directly competing against each other. In addition, Sam's Club cannot prevent the merged Staples and Office Depot from raising prices." PFF 80.

- BJ's testifies that "[A]ny decisions by Staples to raise prices or change prices in any way will not be affected by whether or not BJ's, or another club store, also raises its prices for consumable office supplies. As described above, I believe BJ's prices for consumable office supplies do not affect price changes by Staples for such products." PFF 80.

- Best Buy states that "In my opinion, even if the office supply superstores raised their prices on traditional office supplies by 5-10% or if we lowered our prices by the same amount, we would see little, if any, corresponding increase in the sales of these items." PFF 98.

- Kmart states that "I would not expect to see [a] sales increase 'in Kmart's office supplies in response to a price increase by the merged firm'" PFF 69.

These firms speak from experience: Since they currently do not constrain office superstore prices, even in cases where there is a significant price difference, there is no reason to assume they could constrain in the future. Even defendants' retail expert Mr. Segall, grudgingly conceded that Wal-Mart could not prevent the office superstores from exercising market power.

> Q: And Wal-Mart's existence will prevent in your opinion the superstores from exercising any market power; isn't that right?
> A: No.
>
> Q: So they won't prevent . . .
> A: No.

PFF 70, Segall 5/22 Tr. at 59.

Mr. Stemberg also did not consider Wal-Mart to be a competitive threat, at least prior to this litigation. Less than three weeks before the merger with Office Depot was announced, he flatly stated, "In our industry, Wal-Mart has never been a factor." PFF 64 (emphasis in original).

Neither Staples nor Office Depot considers these other retailers to be a significant influence on their pricing. For example, Staples has a separate price zone for club stores but its prices are less than 2% below its "no competition" zone and 14.6% above the lowest priced competitive zone. PFF 27. Moreover, Staples' pricing policy

Finally, when entering a new market, both Staples and Office Depot prefer to locate *near* mass merchandisers, club stores and computer superstores, all of which carry a limited range of office supply products, because those businesses increase traffic in office superstores. PFF 89.[6]

Beyond the pricing evidence, an analysis of the characteristics of the market and its participants demonstrates that the sale of consumable office supplies through office superstores is a relevant

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[6] In addition, the evidence of significant price differences between superstores and other retail alternatives supports limiting the market to superstores. Courts repeatedly emphasize that evidence of price differences over time demonstrates that not enough consumers will switch from the outlets in question to defeat an anticompetitive price increase and thus signifies the existence of a separate product market or submarket. Reynolds Metals Co. v. FTC, 309 F.2d 223, 229 (D.C. Cir. 1962) ("price differentials have an important if not decisive bearing"); Gillette Co., 828 F. Supp. at 82 (finding separate product market for writing instruments in the $50 to $400 range based on evidence that consumers would not switch, in the event of a price increase, to cheaper instruments); see United States v. Alcoa, 377 U.S. at 271, 276 (1964) (price differential "single, most important practical factor" in finding that insulated aluminum was a market separate from insulated copper conductor); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 356-57 (1963) (excluding loan companies from cluster market of loans and other financial services offered by commercial banks because, inter alia, loan companies' rates were generally higher).

antitrust market. First, the unique characteristics of office superstores are obvious to even the casual observer. No one visiting a Staples would mistake it for a Kmart. Warren-Boulton, Tr. at 48-50. Second, the record is replete with testimony that office superstores offer a combination of one-stop shopping and competitive prices that no one else can match. While numerous retailers offer office supplies, only office superstores serve as a destination point for consumers seeking out one stop for all their office supply needs. PFF 54-56, 60. Mr. Stemberg has characterized office superstores as "supermarket[s] for office supplies." PFF 55. No other type of retail format offers the breadth of product line, wide selection, inventory on hand, and convenience that office superstore customers require. Indeed, the testimony of the major mass merchandisers in the United States -- including Wal-Mart, Target, Kmart, Best Buy, Computer City, Sam's Club, BJ's Warehouse and independent retailers -- confirm the defendants' own assessment that superstores offer a unique combination of office products and services. PFF 56.

The sale of consumable office supplies by office superstores is the type of "cluster market" recognized by the courts. Numerous courts have held that a "cluster" of products and services may be a relevant product market, based on the benefit to consumers accruing from the convenience of purchasing complementary products from a single supplier. Supermarkets, department stores and commercial banks are but three examples. Philadelphia Nat'l Bank, 374 U.S. at 356 (banking services); Bon-Ton Stores v. May Dep't Stores Co., 881 F. Supp. 860, 869 (W.D.N.Y. 1994) (department stores); Calif. v. American Stores, 697 F. Supp. 1125, 1129 (C.D. Cal. 1988) (supermarkets), aff'd in part and rev'd on other grounds, 872 F.2d 837 (9th Cir. 1989), rev'd on other grounds, 495 U.S. 271 (1990). FTC opening brief at 19.

3. Mail order and contract stationers cannot effectively constrain office superstore prices

Defendants also argue for an even broader market that would include mail order and contract stationers. But defendants' effort to include mail order and contract stationers is not supported by the evidence, which shows that not enough office superstore customers will turn to these alternatives to defeat an anticompetitive price increase. Nor is it supported by the defendants own business practices which recognize that contract and mail order is a different business from retail. That is why both defendants have created their own delivery and contract divisions, rather than using their retail operations to compete for that business.

The evidence shows that contract stationers' customer base is different. It almost exclusively comprises medium and large-sized businesses that are not the primary customers of the office superstores. PFF 131-132. In sharp contrast, over 85% the customers of office superstores consists of small businesses with fewer than 20 employees and consumers with home offices. PFF 132. Contract stationers also provide a broader range of services including inventory control and supply all needs on a contracted basis. They cannot afford to fill individual retail orders. PFF 129.

Mail order is significantly higher priced and decidedly less convenient for office superstore customers. PFF 115, 117, 120. testified at his deposition that mail order catalogues like are significantly higher priced than office superstores. Office superstores would have to increase prices by more than 10% before would see its sales increase. PFF 118. mail order is an inferior alternative for many customers who want to inspect products and need products immediately.

told Staples' lawyers to delete from his draft affidavit the statement they wished him to make that Staples/Office Depot could not raise prices post-merger because such a statement would not be

factually true. Moreover, Staples own documents show that mail order is not a competitive constraint. Prices in Staples' highest-priced zones are between 8 percent and 45 percent below the prices of two large mail order houses, Quill and Viking. PFF 117. Since many mail order firms have uniform national pricing, superstore prices would also be uniform across the country if mail order were in fact a constraint.[7]

4. **Office superstores are a relevant submarket in a broader market of retail sales of office supplies**

Although persuasive evidence supports defining the relevant market as the sale of office supplies through office superstores, including these other retailers in the market would not change the conclusion that the merger will permit Staples to exercise market power. The FTC alleged of a broader market which includes other retailers of office supplies. Under this market definition, the court is invited to include any other retailers that it deems, alone, or in combination, to offer a sufficiently attractive array of the office products purchased by office superstore customers to be a competitive constraint to the office superstores. PFF IV.[8] The FTC has provided in PX 159 market share tables which include such vendors incrementally. As PX 159 shows, even if all these alternatives are included in the relevant market, the merger still results in a presumptively illegal level of concentration. FTC v. PPG Indus., 798 F.2d 1500, 1503 (D.C. Cir. 1986).

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[7] For example, Mr. Stemberg testified that because consumers can order computers through mail order, he would be unable to raise computer prices in noncompetitive markets. See note 4, supra. The same does not apply to office supplies, whose prices may vary dramatically depending upon local superstore competition.

[8] Defendants argue that the inclusion of the term "to small business and individuals with home offices" in the complaint requires a showing that firms can price discriminate against this group of customers. This is not at all what was intended. Rather, the term is merely meant to be descriptive of the type of offering that the retailer must carry in order to pose a constraint on the superstores. A department store that carries no office supplies other than $200 leather portfolio in its gift department may therefore not qualify as a retailer offering office supplies.

Second, even in a broader market consisting of all retail sales of consumable office supplies, office superstores would be a relevant submarket. For decades, courts have used the term "submarket," to refer to narrower relevant markets within broader markets. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962); Rothery Storage & Van Co., 792 F.2d at 218; Coca-Cola Co., 641 F. Supp. 1128, 1133 (D.D.C. 1986), vacated as moot, 829 F.2d 191 (D.C. Cir. 1987) (carbonated soft drinks); Reynolds Metals Co., 309 F.2d at 226-29 (florist foil). As shown above, industry perception, the pricing practices of office superstores, the significant differences between office superstores and other channels of distribution and the parties' own documents, provide direct and substantial proof that, even within a broader market, office superstores constitute significant and unique competition for one another. Thus, the sale of consumable office supplies through office superstores would be an appropriate submarket within which to analyze the competitive risks posed by this merger.

In fact, the similarities between Staples and Office Depot and the intense nature of their rivalry are reflected in the pricing behavior of the two firms, confirm that the two firms are "next closest substitutes" as defined in the Merger Guidelines, § 2.21. Where two firms are especially close rivals, their consolidation may permit the merged firm to unilaterally exercise market power. Here, the defendants' ability to exercise market power is shown not only by the firms overwhelming market share, but also by the unique competitive rivalry between Office Depot and Staples. PFF VI.B.1, 2. Thus, for those consumers who rely on this unique competitive rivalry, Staples will do what it has done consistently in the past -- maximize prices wherever it faces reduced superstore competition.

B. The Relevant Geographic Markets Are the Metropolitan Areas Where Office Depot and Staples Compete

The second area of inquiry is to identify the "section of the country," or geographic market(s), that may be affected by the proposed acquisition. In this case, there appears to be no dispute that the

relevant markets include 42 metropolitan areas where both Staples and Office Depot operate office superstores and the numerous metropolitan areas throughout the country where -- but for this merger -- Staples and Office Depot had planned to be competitors in the near future. PFF V; PX 3A at Tab A (listing cities at issue in the merger). The record is clear that the commercial reality of the office superstore market is similar to that of many other retail businesses: metropolitan areas are the sections of the country where the likely anticompetitive effects of the transaction will be most pronounced. FTC brief at 22-25. Price zones are established largely based on office superstore competition in a particular metropolitan area. PFF 135. The firms advertise primarily on a local basis, and advertised prices vary dramatically from city to city. Business realities, therefore, demonstrate that metropolitan areas are relevant geographic markets for the purposes of assessing the merger's likely effect on competition.

C. There Is A Substantial Likelihood The Acquisition May Lessen Competition In Violation Of Section 7

After the relevant product and geographic markets are established, the next step of the inquiry under Section 7 is evaluating the impact of the acquisition on competition: that is, determining whether the proposed merger may hurt consumers by permitting the exercise of market power. Here the evidence of likely competitive harm is overwhelming and largely unrebutted. The pricing history of Staples and Office Depot demonstrates that this merger will lead to higher office supply prices for consumers where competition between the two is eliminated.

The motivation for the merger reinforces the anticompetitive concerns. Staples wants the merger with Office Depot to stave off current and future price competition which would force Staples to lower prices and reduce margins. Those concerns are further reinforced by the concentration data showing that the merged firm would be dominant in scores of metropolitan markets. That fact alone

makes this transaction presumptively unlawful. Finally, the merger will harm future competition by eliminating the procompetitive effect of the likely entry of Staples and Office Depot into each others' markets.

1. Substantial Evidence Confirms That Post-Merger Staples Will Have the Power to Raise Price

The purpose of analyzing competitive effects is to determine whether competition will be greater and prices will be lower, ***but for*** the merger. Here the record is replete with evidence of the likely anticompetitive effects if Staples is permitted to acquire its chief rival. Both the Commission and the defendants agree that the elimination of Office Depot will give Staples greater pricing muscle after the merger. The only dispute is over the extent to which Staples will be able to price above competitive levels and whether alleged cost savings can reverse the anticompetitive effects.

This question, however, does not turn simply upon a battle between economists, econometricians, and their statistics. Unlike the defendants, who can only rely upon their own promises, litigation generated documents, and a suspect econometric model, our case, first and foremost, rests on undisputed real world facts and internal company records that this merger will harm competition:

- Staples has long recognized Office Depot as its chief competitive threat. In his book, *Staples for Success*, Mr. Stemberg described Office Depot as "our biggest competitor" our most powerful competitor," and as Staples' "biggest rival." At trial, Mr. Stemberg conceded that Staples' prices "are influenced very strongly by Office Depot." In his deposition, Mr. Stemberg described Office Depot as Staples' "best direct competitor." PFF 148.

- Staples' prices and are lowest in markets where it competes with Office Depot. Although Mr. Stemberg's concession on the witness stand that Office Depot "contributed about 1 to 2 percent price depression to our retail prices," understates the extent of the rivalry between the firms, it at least concedes the obvious fact that the two are vigorous competitors. PFF 157.

- Staples' strategic planning documents recognize that continued competition with Office Depot will force prices and margins lower. PFF 147.

- Staples has frequently cut its price in response to competition from Office Depot. Office Depot has reacted similarly to Staples' pricing in the marketplace. PFF 149.

- Competition with Office Depot has forced Staples to lower its costs and improve its level of customer service. PFF 161.

- Office Depot has been a particularly aggressive competitor, driving down costs and prices; in fact, competition between Staples and Office Depot often matters even more than the total number of competitors in the market. PFF 144-51.

- The pricing practices of the defendants show that Staples is able to price over 11% higher in markets where it does not face Office Depot. PFF 167.

- Staples decreases prices significantly in response to the entry of Office Depot. PFF 149.

- The purpose of the merger was to eliminate the aggressive competition between Staples and Office Depot that was leading to lower prices and decreased margins. PFF 147.

- Once the merger was announced Staples canceled an anticipated % price reduction. PFF 159.

- Staples' analysis of previously considered acquisitions confirms that Staples expects the elimination of superstore competition to lead to higher prices. PFF 171, 172.

Even though the merger has not happened, consumers already are suffering the consequences of the elimination of Office Depot as a rival. Just before the merger was negotiated, Staples conducted a comprehensive study that showed its office supply prices were on average more than % higher than Office Depot prices. PFF 159. Concern that this price differential would injure its reputation with consumers, and cause them to turn to Office Depot in increasing numbers -- not the so-called "productivity loop" -- compelled Staples last year to plan a % decrease in office supply prices. This price rollback would have saved consumers millions of dollars per year. However, Staples canceled these plans as soon as the merger was announced. Without competition from the price leader -- Office Depot -- Staples evidently concluded that neither OfficeMax nor any other retailer would force it to decrease prices.

Although defendants now vigorously deny that they would even consider the prospect of securing higher prices after the merger, this is exactly what they contemplated when evaluating recent proposed acquisitions of On both occasions, Staples estimated the price increase they would impose in markets where superstore competition would be diminished.

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The overwhelming weight of the evidence from the parties own files shows that Staples has the ability and the intent to price anticompetitively if the merger is allowed. This evidence is reinforced by the expert analysis and testimony of Dr. Warren-Boulton and Professor Ashenfelter. The FTC's econometric analysis confirms what the parties documents recite repeatedly: it is superstore competition that drives prices down. This analysis shows a significant price effect from the merger. PFF 204-11.

Finally, Dr. Warren-Boulton's study of the stock market's reaction to the announcement of the merger provides additional confirmation of the likely anticompetitive effect of the merger. PFF 177. His study demonstrates that OfficeMax's stock price increased significantly when prospects for the merger improved. The market correctly predicted that the merger would result in anticompetitive price increases which would accrue to the benefit of both OfficeMax and Staples and not achieve efficiencies benefiting only the merged firm. This conclusion squares with the contemporaneous predictions of stock market analysts who saw diminishing competition as benefitting OfficeMax. PFF 175.

All three types of evidence, the defendants' documents, the econometric study and the stock market analysis lead to the same conclusion:

> The documents, the econometric model, and the Event Study lead me to a remarkable extent approximately to the same predicted percentage price increase. Basically we are getting to a bottom line number through three completely different ways. We are getting there through the econometric estimates, and then making some allowance for efficiencies; we are getting there through the internal documents; and we are getting there through the Event Study. In all three, they get you to a conclusion that the expected effect on prices of consumer offices supplies because of this merger is somewhere on the order of 5 or 6 percent.

5/20 Tr. at 180-81 (Warren-Boulton).

Unable to rebut these real world facts and contemporaneous business records, the defendants have responded with questionable econometrics and unsubstantiated promises. Each of these is unavailing. Dr. Hausman's econometric analysis, predicts a price increase of about 1.3% based on prices and about 3% based on margins.[9] While Professor Hausman's conclusion that the merged firm will be able to raise prices anticompetitively is correct, he underestimates the amount of such a price increase by leaving out of his analysis many Staples stores, including those in hotly competitive California markets. He dismisses the extensive evidence of substantial price differences between markets where Office Depot and Staples compete and those where they do not. But he offers no affirmative evidence that other firms are in fact a constraining influence. His testimony effectively says "disregard what you see, ignore what the companies intended and rely solely on my model to establish that superstores are not unique rivals for one another." But his model is open to serious challenge.

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[9] It should be clear that the Guidelines "5% test" for market definition "is not a tolerance level for price increases" when assessing anticompetitive effects. Merger Guidelines § 1.0. In fact, since the Guidelines prohibit mergers well before they reach the monopoly level of a 10,000 HHI, the logic of the Guidelines makes clear that a price increase of less than 1% is actionable. Moreover, in the retailing industry, a 3 percent price increase could be quite substantial. See note 3, supra.

The Hausman model excludes numerous Staples stores in California -- at Staples direction and with no independent justification. PFF 215-17.[10] (Notably, among the stores he excludes is Visalia, a market where Staples was forced to drop prices 9% when Office Depot entered during the time period covered by the analysis.) The model also excludes all the stores in Pennsylvania, and numerous other stores around the country. PFF 219. The model ignores the Staples and Office Depot price zone structure, which recognizes competition from other superstores in the metropolitan area, and instead pretends that superstores more than 20 miles away from a Staples store are competitively irrelevant. When the model is corrected for these obvious infirmities, the price effect it yields increases to over 6% -- a level consistent with all the other evidence. PFF 205, 208

Perhaps recognizing that these obvious omissions render his original work suspect, on the eve of trial, and well after defendants' evidence was to have been disclosed, Dr. Hausman attempted to resuscitate himself with an eleventh hour change of methodology and offered a brand new study, this time using gross margins. PFF 223. But consumers care about prices, not gross margins. In any event, as with his previous analysis, Professor Hausman has provided only a rudimentary outline of what he did, and certainly not enough information to recreate his work. The study therefore ought to be ignored for present purposes, and left for the administrative trial to sort out. In any event, it should be noted that a study conducted on behalf of OfficeMax reveals that its are

[10] Professor Hausman calls these "rural" markets. Defining Santa Barbara, the Los Angeles suburb of Simi Valley, and the San Francisco/Oakland bedroom community of Pleasanton as "rural" gives new meaning to that term. While Professor Hausman originally testified that these stores were excluded because they were "rural;" he subsequently "remembered" that the "rule of decision" used to exclude the stores was that they faced fewer than four computer superstores. But Hausman included comparable stores in the rest of the country. Hausman fails to explain how excluding these stores from an analysis designed to determine, in part, whether computer superstores constrains makes any sense.

significantly higher in noncompetitive zones than in zones where it competes with other superstores. PX 280 at 8-9.

With econometrics unavailing, defendants argue that (1) their image as price cutters will prevent them from raising prices, (2) the productivity loop will force them to lower prices, and if the loop is broken, then, (3) there are dozens of competitors ready to punish them. Each of these arguments also fails.

Although the defendants have thrived by bringing low prices to consumers, low prices have resulted from aggressive competition with other office superstores, not by defendants' altruism. Where this competition has been absent, Staples has acted like any profit maximizing firm and cut prices only where necessary. The defendants' own exhibits make this point. They show that prices decline when Staples enters a market with no other superstore competition. But the exhibits also demonstrate that prices drop an additional 10.5% where Staples confronts superstore competition. PFF 170. These documents, prepared by and relied upon by defendants as trial exhibits, are consistent with other evidence in this case showing that the defendants deliberately charge higher prices where they face no superstore competition and the econometric evidence showing a 7.5% price effect resulting from the merger.

Nor will the so called "productivity loop" compel the defendants to cut prices when the constraining influence of superstore competition is absent.[11] The "productivity loop" is simply a term coined by business consultants that describes how businesses can increase revenue by managing inventory efficiently and increasing sales volume. It is not a substitute for competition; it is rather a

[11] If the productivity loop is truly a "first commandment" of these companies, as defendants counsel alleges, it is a recent find. We have been unable to find any ordinary course of business company documents that articulate the productivity loop or describe its importance.

manifestation of competition. In fact, defendants' expert conceded that competition was an important factor in keeping prices low.

> Q: Competition is one of the factors that companies must assess when they are setting their prices: is that correct?
> A: Correct.
>
> Q: And competition is also important in driving down cost; is that correct?
> A: Yeah, I would say it is correct.
>
> Q: And also in driving down prices; is that correct?
> A: Correct.

PFF 197.[12]

The relevance of the productivity loop to Staples actual marketplace behavior is uncertain at best. At trial, Mr. Stemberg conceded that competition and not just the productivity loop drives price cuts:

> Q: Now, if you did not have as much competition, it is not as necessary to pass on the cost reductions as quickly as when you do have competition. Is that a fair statement?
> A: Yes.

Id. Stemberg also admitted that he raised prices in Jacksonville, North Carolina, even though that would have violated the productivity loop. Id. He also conceded that Staples maintained higher average prices than Office Depot even though Staples' costs fell. Id. Indeed, as recently as mid-1996, a time when it is undisputed that its product costs were falling, an internal Staples' pricing analysis states that

The ultimate refutation of the notion that the "productivity loop" can be relied upon in lieu of competition to ensure low prices are the uncontradicted facts that (1) prices are higher where there is no superstore

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[12] Mr. Mandell also observed that Staples own adoption of the productivity loop was compelled by competition--the entry into Boston of OfficeMax.

competition; and (2) prices have fallen faster where there is superstore competition than where it is absent. See note 4, supra.

Defendants claim that dozens of firms stand ready to discipline Staples if it fails to keep prices low. But if the claim is true why don't these firms constrain superstore pricing today in markets where Staples and Office Depot face no superstore competition? Why don't these other retailers force prices in Leesburg and Fredericksburg down to the price levels found in Orlando and Charlottesville? Defendants never address these questions. They instead rely on the lawyer-crafted affidavits of third parties that were read in court. Those firms state what the Commission does not dispute. They sell office supplies and would like to increase those sales. But these other retailers do not offer the defendants support on the ultimate question in this or any other Section 7 case. Not one says that they *constrain* the prices charged by the superstores. Indeed, as the FTC demonstrated in its rebuttal case, most say the opposite.

The defendants and their expert also suggest that price differences are due to a world of factors including the mix of products, population, advertising costs, or the cost of living. But they have offered no reliable evidence on this point. And they cannot square the explanation with the fact that both Staples and Office Depot base their pricing decision on the degree of office superstore competition.[13]

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[13] Defendants also argue that history shows office superstore prices actually decrease after a merger, pointing to two examples from the early 1990s, one from Dallas and another from Los Angeles. But these acquisitions were much smaller than this one and the defendants presented no evidence that there was any competition between Staples or Office Depot and the acquired firms. Moreover, prices were generally decreasing across all markets during this time period. What is important is that as a general proposition prices decreased more rapidly in other markets where there was more office superstore competition. PFF 173, 174.

Defendants finally suggest that the pricing differences between competitive and non competitive superstore markets is guided by mere chance and consists of nothing more than "nonsense correlations." This contrivance was put to rest by Mr. Stemberg who testified to the direct impact of Office Depot on Staples' prices.

> Q. In other words, Mr. Kempf was talking about completely unrelated events that just happened by coincidence to occur simultaneously. Do you remember that?
> A. Yes
>
> Q. It is not your view, is it Mr. Stemberg, that your prices are completely unrelated to those of Office Depot?
> A. I testified the opposite; I said that they were related.

Stemberg, 5/22 Tr. at 243-44.

2. The Proposed Transaction Will Increase Concentration Significantly

Usually courts rely on market share and market concentration to measure the likely anticompetitive effect from a merger. In this case, the pricing analysis confirms what high market shares predict -- that this merger will harm competition. For decades courts have held that mergers that significantly increase market concentration are presumptively unlawful because the fewer the competitors and the bigger the respective market shares, the greater the likelihood that a single firm, or a group of firms, could raise prices above competitive levels. Hospital Corp. of Am., 807 F.2d at 1389; Merger Guidelines, § 2.0. Market concentration may be measured by determining the market shares of industry leaders or by calculating the Herfindahl-Hirschman Index ("HHI").[14] PPG Indus., 798 F.2d at 1503; Merger Guidelines, § 1.5. Under the Merger Guidelines, a merger that results in an HHI over 1800 indicates a highly concentrated market; it is presumed that mergers producing an increase in the HHI of more than 100 points in such markets are likely to create or enhance market

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[14] The HHI is calculated by squaring the individual market shares of all firms in the market and adding up the squares.

power or facilitate its exercise. Merger Guidelines, § 1.51. Courts have adopted similar thresholds. Philadelphia Nat'l Bank, 370 U.S. at 364 (30% post-merger market share was sufficiently high to be presumptively unlawful); PPG, supra.

Here the merger of Staples and Office Depot in the office superstore market will create non-competitive markets in 15 metropolitan areas. PFF at VI. In 27 other metropolitan areas, the merger will create duopolies in which Staples will control 45% to 94% of sales, and will produce concentration levels of HHIs from 5,003 to 9049. These percentages and HHIs far exceed the levels raising a presumption of illegality recognized by this court and others.[15]

The most appropriate market is one limited to office superstores. But even if this Court were to broaden the market to include other retailers that sell office supplies, the result would be the same. In a market defined to include all retailers of office supplies[16] whom defendants contend compete with office superstores, defendants' combined market share still raises competitive concern. Concentration

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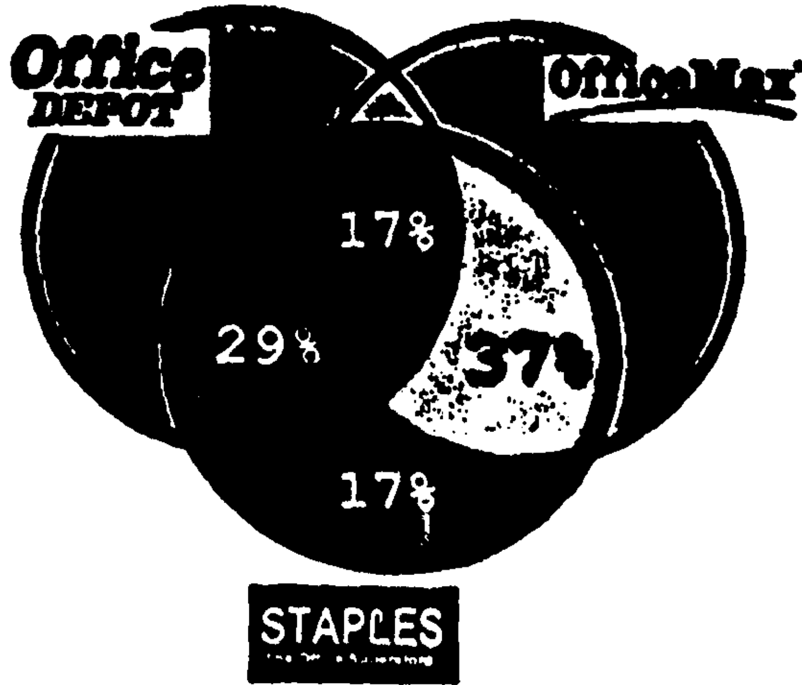
[15] Courts have barred mergers resulting in far lower HHI concentration levels or four-firm concentration ratios. Elders Grain, 868 F.2d at 902 (acquisition increased market shares of largest firm from 23% to 32%); PPG Indus., 798 F.2d at 1503 (combined market share of 53% and post-acquisition HHI's of 3295); Hospital Corp. of Am., 807 F.2d at 1384 (acquisition increased market share of second largest firm from 14% to 26%); FTC v. Warner Communications, 742 F.2d 1156, 1163 (9th Cir. 1984) (four-firm concentration ratio of 75%); United States v. United Tote, 768 F. Supp. 1064, 1069-70 (D. Del. 1991) (merger between two firms with 13 and 27% of sales, increasing the HHI from 3940 to 4640, held presumptively unlawful); United States v. Ivaco, Inc., 704 F. Supp. 1409, 1419 (D. Mich. 1989) (joint ventures among two firms with 45% and 25.1% of sales, increasing the HHI from 3549 to 5809, held presumptively unlawful); Tasty Baking Co. v. Ralston Purina, 653 F. Supp. 1250, 1265 (E.D. Pa. 1987) (post-acquisition HHIs ranging from 2797 to 6420); Coca-Cola Co., 641 F. Supp. at 1134, 1139 (combined market share of 42% held presumptively unlawful); FTC v. Bass Bros. Enters., 1984-1 Trade Cas. (CCH) ¶ 66,041 at 68,609-10 (N.D. Ohio 1984) (acquisition increased market share of second largest firm from 20.9% to 28.5%).

[16] The firms include: Wal-Mart, Kmart, Target, Sam's Club, BJ's Warehouse Clubs, Price/Costco, Best Buy, Computer City, and CompUSA. It also includes estimated sales of office supplies by independent stationers in each city.

Percent of Staples Stores That Overlap With Office Depot and/or OfficeMax Stores



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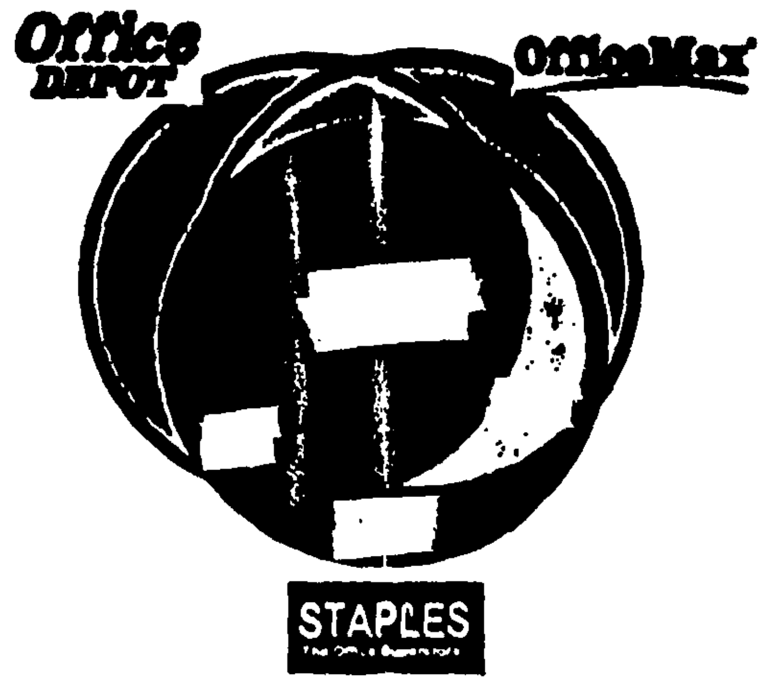

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is high and would increase significantly because of the merger. In the 42 geographic areas where Staples and Office Depot today compete, the post-merger HHI's average over 3000, and range from approximately 1800 to over 5000. PX 159, Table F. Increases in HHIs are on average over 800 points, and range from 162 to over 2000.

In short, this acquisition is presumptively unlawful in either a superstore market or a market that includes those other retailers the defendants allege to be competitors.

3. The Proposed Transaction Also Will Eliminate Potential Competition

Although the defendants ignored at trial the impact of the acquisition on future competition between Office Depot and Staples, their contemporaneous business documents do not. The competitive "problem" with Office Depot as Staples sees it exists not only in the 42 markets where the two firms compete today, but also in the dozens of additional markets where they expect to compete by the year 2000. PFF 188. Staples' strategic planning documents predict that it will face competition from Office Depot in 6 of its store base by the year 2000; compared to the 46% overlap between the two companies in 1996. Id. (see diagram on facing page). Future competition will be eliminated if the merger is allowed. The merger thus threatens to injure both consumers who benefit from today's rivalry between Staples and Office Depot as well as those who otherwise would enjoy the future benefits of office superstore competition.

Given that the superstore market is highly concentrated, the loss of this potential competition by the only chains uniquely situated to enter, and with actual plans to enter and provide effective competition to each other, also violates Section 7. FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967) (instructing that a court must look at a merger's impact on competition "present and future"); PPG Indus., 798 F.2d at 1503. The elements of a potential competition case are met here. FTC brief at 31-32. First, the markets are highly concentrated. Second, Staples strategic planning documents

make clear that this entry will result in significant procompetitive effects. Third, Staples and Office Depot are two of only a few equally likely potential entrants. Fourth, Staples and Office Depot would have been likely entrants but for this merger. Finally, entry into these markets by either or both of these firms would occur in the near future.

D. The Relevant Market Is Insulated From New Entry and Expansion or Repositioning by Other Retailers

The strong evidence of increased concentration, the motive for the merger, and the analysis of likely price effects, demonstrate that this merger is likely to result in a substantial reduction in competition. The burden thus shifts to defendants to demonstrate that these anticompetitive effects are unlikely to occur. United States v. Baker Hughes, Inc., 908 F.2d 981, 983 (D.C. Cir. 1980). We have previously discussed the many flaws in the defendants effort to rebut these presumptions. In addition, the defendants argue that new entry will prevent the merged firm from exercising market power. Once again, their argument is inconsistent with the weight of the evidence.

There is little dispute in this case about the legal analysis of entry. In assessing the conditions of entry, the ultimate issue is whether entry is so easy that it "would likely avert anticompetitive effects from [the] acquisition . . . ." Id. at 989. Only where entry is of such a magnitude to prevent the exercise of market power does it reverse the presumption of anticompetitive effects. American Stores, 697 F. Supp. at 1131.[17]

[17] The Merger Guidelines articulate the conditions under which entry would likely avert anticompetitive pricing. Entry is considered easy if it would be "timely, likely and sufficient in its magnitude, character and scope to deter or counteract the [anti]competitive effects" of a proposed transaction. Merger Guidelines, § 3.0, quoted with approval, Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1440 (9th Cir.), cert. denied, 116 S. Ct. 515 (1995). Entry is timely if a new entrant would have a significant market impact within two years. Merger Guidelines, § 3.2. Entry is likely if it would be profitable at premerger prices. Id. at § 3.3. Entry is sufficient if it would be on a large enough scale to counteract the

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Numerous courts, including this one, have found the history of entry as particularly probative in assessing the likelihood of future entry. See United States v. United Tote, 768 F. Supp. at 1076, 1080-82 (lack of entry supported finding of barriers); American Stores, 697 F. Supp. at 1131-33; Coca-Cola Co., 641 F. Supp. at 1137. Here, the history of failed entry provides persuasive proof of the significance and durability of entry barriers. The evidence shows that exit, not entry has been the trend. Despite many markets with little superstore competition and the resulting elevated prices, no new firm has entered the superstore market in years and some 20 have exited through bankruptcy or acquisition. PFF 225. A score of unsuccessful entrants lie by the roadside, testament to the difficulties of entering this market. The failed entrants in this industry include such large, well-known retail establishments as Kmart, Montgomery Ward, Ames and Zayres. Id.

In the FTC's initial brief we presented the facts showing that entry into this market is difficult. These facts remain unrefuted:

- Because a new entrant must open multiple stores on a national scale in order to compete effectively against a superstore chain, the costs of entry are formidable. PFF 233-34.
- Entry on a national scale, however, is impeded because the incumbents have saturated many important local markets. PFF 237-43.
- In many other markets, opening a sufficient number of stores may take more than two years from initial planning to actual store opening. PFF 244-46.

Indeed the top officials of Staples and Office Depot could identify no likely new entrant. PFF 228. Office Max's CEO went even further stating that "the challenge of the retail sale of office supplies are sufficiently formidable that I expect no new entrant...." Id.

(...continued)
anticompetitive effects of the transaction. Id. at § 3.4. In this case, the defendants have failed to demonstrate that entry will satisfy any of these conditions.

The only evidence of entry the defendants presented was the contention that U.S. Office Products' recent acquisition of Mailboxes, etc. gave it the ability to enter. But even if such speculative entry were to occur, it could not constrain post-merger pricing by Staples. Mailboxes Etc. today is a franchised operation with small stores of 1000 to 4000 square feet -- a mere fraction of the 20,000 square feet typical of an office superstore -- that offers mail box services and limited mail-oriented supplies. PFF 230. Mr. Ledecky has no firm plans on how Mailboxes could compete effectively with office superstores, other than his suggestion that U.S. Office Products mail order catalogue could be handed out to businessmen *coming* in for their mail, hardly effective entry into *retailing*.[18] Id.

Although defendants assert that a major retailer could enter the office supply superstore industry within two years by altering its product mix and store layout (i.e. "repositioning") and becoming an effective constraint against anticompetitive pricing by the merged firm, the weight of the evidence suggests that this is unlikely. Even in the presence of anticompetitive pricing in various markets, no retailer has successfully expanded its consumable office supplies to the point where it constrains office superstore pricing. PFF 247.

The only firm that tried repositioning failed and has no plans to try again. Best Buy, an electronics retailer that carries a broad range of computers and business machines, sought to capture additional business by creating a separate office supply department in 1994. PFF 253 (Best Buy offered 2000 SKUs of office supplies). Two years later, Best Buy gave up and took a $15 million dollar charge against profits. Id. As Dr. Warren-Boulton's econometrics analysis shows, even this

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[18] Indeed, on the witness stand Mr. Ledecky conceded that his current retail operation could not take business away from Staples and Office Depot. Id. The evidence shows that one of the few retailing operations U.S. Office Products currently operates, a San Francisco stationer named McWhorter's, is significantly higher priced than office superstores and offers only a limited selection of office supplies. PX 404; 5/22 Tr. 27-28.

significant expansion did not give Best Buy the ability to constrain Staples' pricing to the same degree that Office Depot does. PFF 253.

Other retailers are also unlikely to reposition because, in order to compete effectively with office superstores, they would have to change dramatically the nature of their operations: they would not only have to expand the floor and shelf space dedicated to office products on a national basis, but also offer slower-moving products and extra services and maintain a large inventory of a broad range of office supply consumables. This point is made repeatedly by retailers.

- Firms such as BJ's, Computer City and Kmart would not increase their product offerings in response to a price increase by the merged firm. PFF 255, 258.
- Other club stores testified that expanding office supplies [19]

Ultimately, the evidence falls far short of demonstrating that there will be sufficient entry to counteract the market power that the merged firm will possess.

E. Defendants have not demonstrated that the alleged costs savings from the merger will counteract its anticompetitive effects

Defendants' final argument is their would-be silver bullet -- even though the merger will give the defendants the ability to price above competitive levels, that risk is dwarfed by massive efficiencies that defendants will be compelled to pass on to consumers in the form of lower prices. These dramatic and unprecedented claims cannot meet the stringent obligations established by law that: (1) they are not recognized in a merger to monopoly; (2) the claims must be verified by clear and convincing

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[19] It is unlikely that entry by one of these retailers would have a significant impact. Professors Warren-Boulton and Ashenfelter estimated the effect of a 10% increase in office supply sales by Wal-Mart on the projected merger-caused price increase. Ashenfelter determined that the effect was inconsequential: A 10% increase in Wal-Mart office supply sales would reduce the merger's price effect from a 7.5% price increase to 7.4%. Warren-Boulton, 5/23 at 307-10.

evidence; (3) that the savings are merger specific; (4) the savings are in the market affected by the merger; and (5) the savings will be passed on to consumers. University Health, 938 F.2d 1222-23; United States v. Rockford Mem. Corp., 717 F. Supp. 1251, 1289 (N.D. Ill. 1989), aff'd, 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990); Merger Guidelines, § 4.0.

The acid test of efficiencies is whether they benefit competition. As this Court has explained:

> A merger the effect of which may be to substantially lessen competition is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress.

FTC v. Alliant Techsystems, 808 F. Supp. 9, 23 (D.D.C. 1992) (quoting Philadelphia Nat'l Bank, 374 U.S. at 371).[20] Courts have uniformly rejected an efficiencies justification in highly concentrated markets such as this one. Alliant Techsystems, 808 F. Supp. at 23 (where merger would create firm with market power, efficiency claims are "insufficient to override the public's clear and fundamental interest in promoting competition"); FTC v. Imo Indus., 1992-2 Trade Cas. (CCH) ¶ 69,943, at 68,560 (D.D.C. 1989) (rejecting production efficiencies where firms had "such a controlling position in the market that there is a substantial likelihood they could raise prices."). The Merger Guidelines embody the well-settled precedent that

> When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from

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[20] Many courts, including this one have held that efficiencies are irrelevant to Section 7 analysis. As Judge Gesell wrote: Any federal judge considering regulatory aims such as those laid down by Congress in Section 7 of the Clayton Act should hesitate before grafting onto the Act an untried economic theory such as the wealth-maximization and efficiency-through-acquisition doctrine expounded by [defendants]. . . . To be sure, efficiencies that benefit consumers were recognized [by Congress] as desirable but they were to be developed by dominant concerns using their brains, not their money by buying out troubling competitors. The Court has no authority to move in a direction neither the Congress nor the Supreme Court has accepted. Coca-Cola Co., 641 F. Supp. at 1141; see Alliant Techsystems, 808 F. Supp. at 23.

being anticompetitive . . . . Efficiencies almost never justify a merger to monopoly or near-monopoly.[21]

At the very least, if the only issue remaining is efficiencies, the FTC has shown "substantial questions" going to the merits sufficiently serious to warrant a full trial on the merits. Indeed, no court has ever denied a preliminary injunction solely on an efficiencies defense.

But even if these costs savings claims are to be considered, they fall far short of the strict requirements established by the courts. The thorough, candid, and balanced testimony and report of the Commission's expert, Mr. Painter, credited certain efficiency claims but identified major deficiencies in the defendants' projections of costs savings:

- The defendants' cost savings claims are almost five times greater than those developed at the time the acquisition was approved by the Boards of both Staples and Office Depot and disclosed recently to shareholders and the SEC. PFF 262.[22] After-the-fact generated estimates of cost savings should be given little weight "because of the relatively little attention placed by the defendants in planning for and agreeing upon the merger." Rockford, 717 F. Supp. at 1289.
- Claims of massive product cost savings fail to account for the ability of Staples and Office Depot to achieve many of those savings without the merger. PFF 264-72.
- In estimating costs savings, the defendants failed to use reliable methodology, (PFF 278-80), or provide adequate substantiation. PFF 261; 263; 273-77; 281-83.
- Vendors do not substantiate the specific cost savings attributed to them. PFF 273-77.

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[21] Merger Guidelines, § 4.0. Commentators agree. FTC brief at 40.

[22] Defendants half-hearted attempt to explain away this fact is as transparent as it is unavailing. They contrast what they characterize as an estimate done for the Board of Directors to assess accretion to the companies earnings, with a comprehensive analysis of efficiencies that will be passed on to consumers, and not captured as value by the shareholders. Such a distinction is obviously nonsense. If the cost savings can be realized, the company obviously has its choice of pocketing the money, or passing them on to consumers through reduced prices. If the cost savings are pocketed, they appear as additional profit immediately, and should be reflected in enhanced stock value. If the company chooses to pass the efficiencies on in the form of lower prices, it must be because the additional sales generated would result in *even higher* profits to the firm (unless one were to assume that management is wasting corporate assets.)

Moreover, in her testimony the defendants' efficiency witness, Ms. Goodman, was forced to concede that: (1) the efficiency study included savings estimates that Staples had already achieved (PFF 263c, 271-72); (2) the study ignored significant costs savings Staples and Office Depot would have achieved on a stand alone basis (PFF 269-72); and (3) her "aggressive case" cost savings scenario relied on work by Dr. Hausman that he subsequently admitted should not be relied upon "to predict anything." PFF 263d-f.

Ultimately, the basis for these claims is defendants' assertion that they "surely have the best knowledge of their own business; they are confident that they can achieve the substantial efficiencies . . . ." Defendants' Reply Brief at 27. But "trust me" is not the standard of proof adopted by the courts. See University Health, 938 F.2d at 1223 ("defendant [cannot] overcome a presumption of illegality based solely on speculative, self-serving assertions"). This standard would allow defendants in any merger effectively to repeal Section 7 merely by claiming costs savings regardless of the risk to competition. Here, their biased methodology, their disregard of contrary facts, and the questionable credibility of their witnesses, demonstrate that defendants' efficiency analysis simply can not be trusted.

Defendants also have failed to demonstrate that the alleged costs savings are specific to the merger. "[T]he Agency will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects." Merger Guidelines, § 4.0; see University Health, 938 F.2d at 1222 n.30; Rockford Mem. Hosp., 717 F. Supp. at 1289-91; United States v. Ivaco, Inc., 704 F. Supp. 1409, 1425-26 (D. Mich. 1989).[23] The major sources of defendants' claimed

[23] Section 7 protects competition, not competitors. Brown Shoe Co., 370 U.S. at 320. Because savings that would be achieved in another manner benefit only the merging parties, the only savings relevant for determining procompetitive efficiencies are those that are made
(continued...)

cost savings are possible product cost reductions associated with volume purchasing and the utilization of best purchasing practices. Because both Staples and Office Depot are expanding rapidly, as is the office superstore market as a whole, the volume of products these companies purchase will increase with or without this merger. PFF 266. Each party to this merger had previously projected expanding within the next few years to operate approximately the number of stores that the merged entity would operate if this merger were permitted to go through. PFF 8; PFF 192. Where parties can usually achieve such efficiencies via internal expansion, it is an error to treat them as "merger specific." Areeda & Turner, IV Antitrust Law ¶ 946a (1980). Similarly, improved purchasing practices are not merger specific. They are achieved by the parties internally every day when they search for lower cost sources of supply. PFF 267, 269. Such practices are also achievable by hiring talented and proven purchasing representatives. PFF 266. These efficiencies will accrue with or without the proposed transaction, since in a competitive environment both companies would seek out improved purchasing methods and would continue to increase the volume of products they purchase as they continue their inexorable expansion. PFF 191. Rockford Mem. Corp., 717 F. Supp. at 1291 (rejecting "best practices" efficiencies claims precisely because such efficiencies can be achieved without merging).

Over fifty percent of the alleged cost savings are for products outside the office supply consumable market. PFF 284-86. Procurement savings for goods such as book cases, computers, and office furniture will not affect the level of competition in the office supply consumable market. Savings outside the market are irrelevant because "anticompetitive effects of an acquisition in one market cannot be justified by procompetitive effects in another market." Philadelphia National Bank, 374 U.S.

(...continued)
possible only through the merger. See Rockford Mem. Corp., 717 F. Supp. at 1289.

at 370-71; see also Clayton Act Section 7, 15 U.S.C. § 18 (proscribing acquisition if it may lessen competition "in any line of commerce" in "any section of the country").

The most critical element of defendants' efficiency claims is the assumed pass through to consumers. Staples' projection that about two-thirds of the firm specific costs savings would be passed through to consumers should be rejected for several reasons. PFF 288. As Dr. Ashenfelter testified, this estimate is inconsistent with Staples' experience in which their pass through of firm specific efficiencies is approximately 15%. PFF 300, 303. Moreover, competition helps determine the amount of pass through and the defendants have put forth no evidence to show that once Office Depot -- the most aggressive competitor in the market -- is eliminated, the incentive to pass through costs savings will remain as robust as in the past. PFF 301-02. As Staples' CEO said in the ordinary course of business, Staples' cost savings are passed on "to the customer in the form of lower net prices *to become fully competitive with Office Depot.*" PFF 302 (emphasis added). At trial he admitted that it was competition with Office Depot that caused Staples to reduce costs and improve its efficiency. PFF 301. He also conceded that competition affected the speed with which costs savings were passed on to consumers, and where competition is lacking Staples does not have to pass savings on as quickly as when there is competition. Id. Indeed, Mr. Stemberg conceded that the 1996 Staples pricing strategy is to pass on cost reductions on computers immediately due to the extremely competitive nature of that market, but to retain office supply costs savings unless and until competition forces them to lower prices. Id.

In markets where Staples does not face Office Depot, its prices and profits are higher, because it is free to be more selective about passing on cost savings. Any notion that post-merger Staples will generously pass on most of the speculative cost savings of the merger, once the disciplining force of

Office Depot is gone, is belied by Staples' current conduct in markets where Office Depot does not compete.

The ultimate question with respect to efficiencies is whether they will reverse the anticompetitive effects of the merger. Professor Warren-Boulton explained that even assuming a pass through rate of 20%, the efficiencies as a percentage of sales needed to counteract the likely price increase arising from this acquisition would have to be extraordinarily large. PFF 311, 313. For example, if a 7.5 percent price increase is expected to occur and 20 percent of the cost savings are passed on to consumers, the amount of efficiencies necessary to exactly counteract the potential price increase would have to equal 37.5 percent of revenues (7.5% minus .2 times 37.5% = 0).[24] PFF 313. In this case, defendants most aggressive case posits efficiencies of only 6% of sales, yielding a net price increase of 6.3% (7.5 minus .2 times 6% = 6.3%). Under no circumstances, then, do the efficiencies justify this anti-competitive merger. PFF 311, 313-14; Merger Guidelines, ¶ 4.0.

In short, the defendants have failed to demonstrate that the verified, merger-specific cost savings will outweigh the acquisition's likely anticompetitive effect and lead to a more competitive market. Late-blooming, litigation-driven speculation cannot meet that burden.

II. JUDGED BY THE STATUTORY STANDARD OF SECTION 13(B), THE COMMISSION'S ENTITLEMENT TO A FULL-STOP PRELIMINARY INJUNCTION IS CLEAR.

While the presentations of both sides have been extensive, a proper regard for the nature of this proceeding and the standard for relief makes the correct outcome clear. This is a suit for a statutory preliminary injunction, to preserve the status quo pending an administrative proceeding that will determine whether the merger of Staples and Office Depot violates Section 7 of the Clayton Act. This

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[24] Professor Warren-Boulton explains the formula as the expected price increase minus the pass through rate times the efficiencies.

Court's role, therefore, is "to make only a preliminary assessment of the merger's impact on competition," Warner Communications, 742 F.2d at 1162, not to "resolve conflicts in the evidence . . . or undertake an extensive analysis of the antitrust issues." Id. at 1164. The merits are reserved to the Commission in its administrative proceeding, because Congress "thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act," Hospital Corp. of America, 807 F.2d at 1386. The bounty of documentary evidence, the complex economic issues, and the brevity of this proceeding all counsel that an administrative trial is the proper forum for resolution of this matter.

Section 13(b) authorizes a Court to enter preliminary relief where it is in "the public interest," 15 U.S.C. § 53(b), a statutory standard that "places a lighter burden on the FTC than that imposed by the traditional equity standard for issuance of a preliminary injunction," FTC v. Harbour Group Investments, L.P., 1990-2 Trade Cas. (CCH) ¶ 69,247 at 64,913 n.1 (D.D.C. 1990) (Hogan, J.). In determining whether a preliminary injunction in aid of the Commission's administrative proceeding is in the public interest, "a district court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities." University Health, 938 F.2d at 1217. The Commission carries its burden of showing a likelihood of ultimate success whenever it "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." University Health, 938 F.2d at 1218. Once the Commission has raised serious and substantial questions about the legality of this proposed merger under Section 7, the D.C. Circuit has "consistently held . . . that there is a 'presumption in favor of a preliminary injunction.'" Alliant Techsystems, 808 F. Supp. at 22-23 (quoting PPG Indus., 798 F.2d at 1507).

Defendants have attempted to blur the focus of this inquiry by flooding the court with a continual barrage of documents. While the FTC laid out its case on day one, the defendants have submitted over half their "evidence" after discovery deadlines had passed. While the FTC relies extensively on the firms' ordinary course business records, defendants produced just over 100 business records out of over 3000 "exhibits," and cited the court to none. On close examination, only a paultry sum of the documents are legitimate business records entitled to any evidentiary value. And most of those support plaintiffs case. Defendants tactic of flooding the court with thousands of exhibits of marginal or non evidentiary value and late-breaking, made-for-litigation econometrics only reinforces the need to carefully review their submission in a full trial on the merits. The weighty showing made by the Commission is more than adequate to assure this Court that the Commission has raised serious questions about the likely anticompetitive effects of this transaction that warrant final resolution in an administrative proceeding. Judged by that standard, injunctive relief is warranted.

Beyond considering the Commission's likelihood of success, this Court must consider the equities. In this case, as in most others, the equities are likely to follow the merits, because "[i]f the acquisition seems anticompetitive, then failing to stop it during the administrative proceedings will deprive consumers and suppliers of the benefits of competition pendente lite and perhaps forever, for it is difficult to undo a merger years after it has been consummated," Elders Grain Co., 868 F.2d at 904. "The principal equity weighing in favor of issuance of the injunction is the public's interest in effective enforcement of the antitrust laws." University Health, 938 F.2d at 1225. Although private equities may be considered, public equities receive far greater weight. Id.; Elders Grain Co., 868 F.2d at 905; Warner Communications, 742 F.2d at 1165. Where the Commission has demonstrated "that it is likely that the proposed acquisition would substantially lessen competition, the [d]efendants face a difficult task in justifying the nonissuance of a preliminary injunction," because a decision not to issue

the injunction "would frustrate the FTC's ability to protect the public from anticompetitive behavior." University Health, 938 F.2d at 1225.

In arguing for an unprecedented standard of proof and a quasi-merits determination by this Court, the defendants have asserted that for them, the entry of a preliminary injunction would be outcome determinative, because they will voluntarily abandon their transaction rather than await the Commission's decision on the merits. Defendants, of course, are the masters of their own destiny, but they should not be allowed to hijack the statutory standard that governs this proceeding by placing a gun to their own heads. Congress enacted Section 13(b) precisely because experience had shown that the absence of preliminary relief frequently proved outcome determinative of the Commission's ability effectively to remedy effectively adjudicated violations of Section 7, thus rendering "the legality of the challenged merger . . . essentially a moot question," FTC v. Exxon Corp., 636 F.2d 1336, 1342 (D.C. Cir. 1980).

Defendants' lawyers -- although they have not offered evidence to support the claim -- have argued that the equities weigh against a preliminary injunction because the Commission may achieve effective relief by ordering a combined Staples/Office Depot to divest itself of a new superstore competitor comprised of a selection of those stores that would remain after the consolidation is complete. But Staples and Office Depot (and their sole remaining post-merger superstore competitor, OfficeMax) are far more than a collection of buildings. The testimony of defendants demonstrate this.

- Mr. Stemberg stressed the importance of efficient distribution and conceded that the current distribution systems of the two firms would be dismantled and merged into one. PFF 317.
- Ms. Goodman reinforced the importance of knowledgeable product buyers and efficient distribution; 5/22 Tr. at 108-09, 113-14 (Goodman); PX 283, Tab 7 at 60, 109-110 (Goodman).

- Mr. Fuente's declaration, in stressing the interim harm to Office Depot, revealed that the loss of key personnel in the real estate and other departments would cripple Office Depot as a competitor, DX 9015 at 1-2 (Fuente).

The proposed merger would effectively dismantle the infrastructure -- including the distribution system -- that makes Office Depot a vibrant, dynamic competitor of Staples (as well as cause the closing and sale of many of those stores where competition between the two firms is now most intense). See PFF 317. Recreating a second, independent competitive organization a year or more after the eggs have been scrambled would be difficult, if not impossible. Defendants' blithe insistence that this would be feasible mocks the "congressional concern with the FTC's historic inability to effectuate a remedy once an acquisition is consummated," that underlay the enactment of Section 13(b). FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1096 (S.D.N.Y. 1977).

Defendants' cite only one equity in favor of allowing the merger to proceed -- alleged losses to Office Depot shareholders if the merger is enjoined.[25] This Circuit has made clear, in cases in which defendants' claims evoked far more sympathy than here -- that courts may "not rank as a private equity meriting weight a mere expectation of private gain from a transaction the FTC has shown is likely to violate the antitrust laws." PPG Indus., 798 F.2d at 1507, quoting FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1083 n.26 (D.C. Cir. 1981). The logic of this position is unassailable; a windfall gain to shareholders resulting from illegal price increases to consumers cannot be an "equity" recognized by courts charged with protecting those consumers under the antitrust laws. In PPG Industries, for example, the putative acquired firm was a closely held corporation whose ailing owner hoped, by the acquisition, to preserve his life's work and support his heirs. The D.C. Circuit held that this interest could not justify denial of full-stop preliminary relief where the district court had found likelihood of

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[25] As a factual matter, we observe that Office Depot's stock recently sold at 17, about the price at which it stood when the merger was first announced.

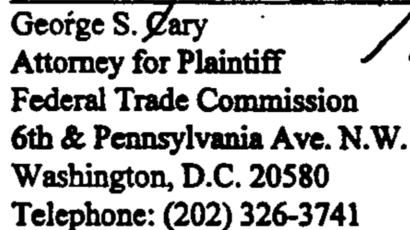
success on the merits. See also University Health, 938 F.2d at 1225 (rejecting effort to "convert . . . private injuries into public costs"). By contrast to these precedents, the present case involves merely a return of Office Depot's stock to the same levels as before the illegal transaction was announced. Much of the stock was purchased at these higher levels by arbitrageurs speculating on the transaction. A windfall gain for speculators should not override the public interest in unfettered competition.

In sum, the Commission has made a strong showing of likely success on the merits, and beyond peradventure, has demonstrated serious and substantial questions going to the merits that require final resolution in an administrative proceeding. Both to prevent interim harm to competition, and to assure that effective relief remains possible after the administrative proceeding to decide the merits, a preliminary injunction should be entered.

CONCLUSION

For the foregoing reasons, the Court should grant the Federal Trade Commission's motion for a preliminary injunction.

Respectfully submitted,



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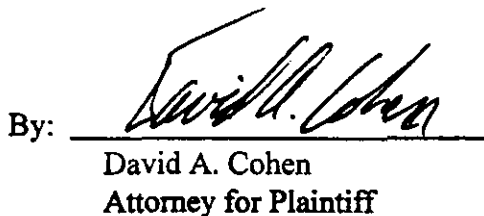
By: 

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