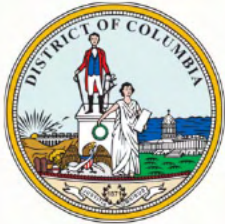


# FTC, et al. v. Staples, Inc., et al.

## Summation



**April 5, 2016**



## The Clayton Act Supports Enjoining This Anticompetitive Merger

- **Clayton Act § 7 prohibits mergers, the effect of which “may be substantially to lessen competition, or to tend to create a monopoly”**
- **“[T]he government need only show that there is a reasonable probability that the challenged transaction will substantially impair competition”** (*Sysco*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015); *Staples*, 970 F. Supp. 1066, 1072 (D.D.C. 1997))
  - **FTC “is not required to *establish* that the proposed merger would in fact violate section 7 of the Clayton Act”** (*Heinz*, 246 F.3d 708, 714 (D.C. Cir. 2001); *Staples*, 970 F. Supp. at 1071)
  - **The standard requires an assessment of the merger’s likely impact on immediate and future competition, and “doubts are to be resolved against the transaction”** (*Brown Shoe*, 370 U.S. 294, 332-33 (1962); *Elders Grain*, 868 F.2d 901, 906 (7th Cir. 1988) (Posner, J.) (citing *Phila. Nat’l Bank*, 374 U.S. 321, 362-63 (1963) and *Falstaff Brewing Corp.*, 410 U.S. 526, 555-58 (1973)))



## It Is Sufficient to Show Simply a Reduction in Competition

- **No requirement to show that all competition is eliminated**
  - ***See H&R Block***, merger enjoined even though #1 competitor with 62.2% market share would have remained post-merger (*833 F. Supp. 2d 36, 71-72 (D.D.C. 2011)*)
- **The merger could still be likely to substantially lessen competition even if the merged firm will still face competition from third-parties**
  - ***See Heinz***, holding that elimination of competition between second- and third-largest jarred baby food manufacturers would weaken competition (*246 F.3d at 716-17; see also FTC v. Swedish Match, 131 F. Supp. 2d 151, 169 (D.D.C. 2000); Staples, 970 F. Supp. at 1083*)



## 13(b) Preliminary Injunction Standard Is Well-Settled

- **Preliminary injunction should issue when it would be in the public interest, as determined by:**
  - Weighing the equities, and
  - Considering the FTC’s likelihood of success on the merits
- **§ 13(b) enacted to make preliminary relief “broadly available to the FTC”** (*Heinz*, 246 F.3d at 714; *Sysco*, 113 F. Supp. 3d at 22)
- **“The equities will often weigh in favor of the FTC because ‘the public interest in effective enforcement of the antitrust laws’ was Congress’s specific ‘public equity consideration’ in enacting Section 13(b)”** (*CCC Holdings*, 605 F. Supp. 2d. 26, 35 (D.D.C. 2009))



## Private Equities Are Afforded Little Weight

- **The risk that the transaction will not occur is a “private equity”**  
*(Heinz, 246 F.3d at 727 n.25; Whole Foods, 548 F.3d 1028, 1041 (D.C. Cir. 2008); CCC Holdings, 605 F. Supp. 2d at 76)*
- **Courts “must afford [private equities] little weight, lest we undermine section 13(b)’s purpose of protecting the ‘public-at-large, rather than the individual private competitors’”** *(Heinz, 246 F.3d at 727 n.25)*
- **“[T]he risk that the parties will abandon the merger rather than proceed to an administrative trial on the merits is, however, ‘at best, a private equity’ which cannot overcome the significant public equities weighing in favor of a preliminary injunction”**  
*(Sysco, 113 F. Supp. 3d at 87)*



## Burden Shifting Framework

- **Plaintiffs' initial burden of making *prima facie* case:**
  - Showing the merger would produce a firm controlling an **undue percentage** of the **relevant market**, and would result in **significant increase in concentration** (*Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); *Heinz*, 246 F.3d at 715)
  - Such a showing establishes a *presumption* that the merger violates §7 (*Baker Hughes*, 908 F.2d 981, 982 (D.C. Cir. 1990); *Heinz*, 246 F.3d at 715)



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- **Additional evidence of harmful effects corroborates the presumption**
  - Not part of our burden
  - Strong evidence that harm would occur: the merger would eliminate one of two best choices in a bidding market



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- **Defendants bear the burden of rebutting the presumption**
  - “The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully” (*Baker Hughes*, 908 F.2d at 991; *H&R Block*, 833 F. Supp. 2d at 72)



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  - “The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully” (*Baker Hughes*, 908 F.2d at 991; *H&R Block*, 833 F. Supp. 2d at 72)
- **Only if Defendants successfully rebut the presumption, Plaintiffs must produce additional evidence of anticompetitive effects** (*Baker Hughes*, 908 F.2d at 983; *Heinz*, 246 F.3d at 715)

**The Evidence Establishes a Strong Presumption of Illegality**



## Product Market Definition

- **Section 7 prohibits mergers that substantially lessen competition “in any line of commerce or in any activity affecting commerce in any section of the country”** (15 U.S.C. § 18)
- **The relevant market is the line of commerce that would be substantially lessened by the merger** (*Phila. Nat’l Bank* 374, U.S. at 355; *Brown Shoe*, 370 U.S. at 325)
- **“The Agencies may evaluate a merger in any relevant market satisfying the [hypothetical monopolist] test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects”** (*Horizontal Merger Guidelines* § 4.1.1)



## Product Market: Cluster Markets

- **Courts find product markets consisting of clusters of products**
  - **Sale of consumable office supplies through office supply superstores** (*Staples*, 970 F. Supp. at 1074-79)
  - **Inpatient generate acute care services sold to commercial health plans** (*ProMedica*, 749 F.3d at 565-68; *OSF Healthcare (Rockford II)*, 852 F. Supp. 2d 1075-76)
- **Different products appropriately included in a cluster market when competition conditions are similar** (*ProMedica*, 749 F.3d at 565-68)



## Product Market Properly Limited to Cluster of Consumable Office Supplies Sold and Distributed to Large Customers

- **Consumable office supplies are subject to similar competitive conditions**
- **Cluster includes paper**
  - **Most cut sheet paper sold and distributed to large customers by Staples and Office Depot**
    - **Customers want desktop delivery of cut sheet paper**
      - Fifth Third Bank Hrg. Tr. at 985-86; Select Medical Hrg. Tr. at 1083-85
    - **Manufacturers do not have the national distribution network necessary to meet day-to-day needs**
      - PX02122 (Bank of America Dep. Tr.) at 089-90
    - **Customers may leverage discounts from manufacturers but purchase from Staples and Office Depot**
      - PX02122 (Bank of America Dep. Tr.) at 090
  - **Specialty paper sold directly by manufacturers, excluded from market**
    - Fifth Third Bank Hrg. Tr. at 934-36; PX02122 (Bank of America Dep. Tr.) at 088 (“the reason we’re going to these other vendors is because they’ve got a specific type of paper that they manufacture that others don’t.” )



# Adjacent Categories Are Subject to Different Competitive Conditions, Not in Relevant Market

- **AEP:** “I think we have around 52 contracts [for jan/san products]. For jan/san, most if not all of those contracts are not only product but it’s also service, so – it’s a bundled package” (Hrg. Tr. at 329). AEP “literally [has] hundreds of contracts” for technology (Hrg. Tr. at 352)
- **McDonald’s:** Works with a number of suppliers for jan/san (Hrg. Tr. at 424). McDonald’s doesn’t use Office Depot for jan/san or technology products (Hrg. Tr. at 358)
- **Fifth Third Bank:** Has a company, Viox, that provides facility management across its locations, and that includes providing janitorial supplies (See Hrg. Tr. at 944)
- **Best Buy:** Affirmed that “there are a number of alternatives in the marketplace” for cleaning and break room (Hrg. Tr. at 1317)
- **WB Mason:** There are a number of competitors that can supply jan/ san, breakroom, furniture, technology products, but only Staples and Office Depot can serve “large customers with \$500,000 a year or more in spend who have a nationwide footprint” for consumable office supplies. (Hrg. Tr. at 1601-04, 1609)
- **HealthTrust:** HealthTrust has separate contracts in place with vendors other than Staples or Office Depot for janitorial products and furniture. These other vendors could not replace Staples as HealthTrust’s office supply vendor (Hrg. Tr. at 1906-09)

1021

1 for Select Medical?  
 2 A. We would not.  
 3 Q. Earlier, Mr. Wilson, you testified  
 4 other product categories that we  
 5 believe one of those was jan/san  
 6 A. Correct.  
 7 Q. Did the RFP also include  
 8 A. Yes.  
 9 Q. Let's start with jan/san. You said  
 10 what you mean by that term, "jan/san"  
 11 A. Jan/san really relates to all types  
 12 housekeeping-type products.  
 13 Q. And about how much did Select  
 14 products with Office Depot in 2014?  
 15 A. I believe it was a little over 400,000.  
 16 Q. And does Select Medical buy jan/san  
 17 other vendor?  
 18 A. We do. We purchase some products from Grainger as well.  
 19 Q. And has Grainger ever solicited Select Medical's general  
 20 office supplies or copy paper business?  
 21 A. They have not.  
 22 Q. Let's turn to technology products.  
 23 technology products do you – does Select  
 24 Office Depot?  
 25 A. We do not buy very much. There might be some

1022

1 accessories, such as a mouse, or a keyboard, or something of  
 2 that nature. So we would not utilize them for our larger spend  
 3 of computers.  
 4 Q. And does Select Medical purchase technology products from  
 5 other companies?  
 6 A. We do.  
 7 Q. And do you have contracts with these other companies that  
 8 sell technology products?  
 9 A. Yes, we have contacts with companies such as Dell, SHI,  
 10 CDW.  
 11 Q. And so Select Medical purchases technology products from  
 12 a variety of suppliers; is that right?  
 13 A. Correct.  
 14 Q. And has Dell, or CDW, or SHI ever solicited Select  
 15 Medical's general office supplies business?  
 16 A. They have not.  
 17 Q. And have any of those companies ever solicited Select  
 18 Medical's copy paper business?  
 19 A. They have not.  
 20 Q. Earlier, Mr. Wilson, we were talking  
 21 and its business. You testified that the  
 22 are located somewhere across the  
 23 A. Correct.

Page 1021 to 1024 of 1057

Select Medical Hrg. Tr. at 1021-22



# Ink and Toner Are Subject to Different Competitive Conditions, Not in Relevant Market

• In recent years, sales of ink and toner for Large Business Customers have shifted to sales of Managed Print Services from manufacturers and specialty MPS vendors that do not offer office supplies

- HealthTrust: Has relationships with Xerox and Konica Minolta and neither has “approached HealthTrust to try to be [its] primary vendor” (Hrg. Tr. at 1925)
- AEP: Has a contract with Xerox to cover multifunctional devices for ink and toner (Hrg. Tr. at 333-34)
- McDonald’s: Affirming “The set of companies that are capable of providing ink and toner to McDonald’s is broader, instead of companies that provide office supplies” (Hrg. Tr. at 503)
- Select Medical: Purchases ink and toner from Total Print, but does not “consider Total Print to be a viable alternative supplier of copy paper or general office supplies (Hrg. Tr. at 1018-21)
- Best Buy: Affirming there are a number of alternatives that Best Buy can seek for ink and toner in addition to Staples and Office Depot, such as MPS vendors (Hrg. Tr. at 1317-18)

1 business and the  
2 these customers  
3 Q. And what  
4 this service?  
5 A. Well, most  
6 that are looking  
7 Q. Does it  
8 services?  
9 A. We've gone  
10 this.  
11 Q. So I think  
12 services?  
13 A. Yes. We do  
14 with Hewlett-Pack  
15 Q. So there's a  
16 and Office Depot  
17 A. Yeah. Yeah.  
18 Q. Do have you  
19 much lower becau  
20 A. Oh, we've t  
21 Q. And in your  
22 win RFPs and co

Q. So there's a number of other providers besides Staples and Office Depot that provide these services?  
A. Yeah. Yeah, there are.  
Q. So have you ever had a customer who stopped buying as much toner because they picked up an MPS arrangement?  
A. Oh, we've had a number of them over the years.  
Q. And in your experience do MPS providers like Xerox and HP win RFPs and contracts to provide these services for large customers?  
A. Yes, they do.  
Q. And do these MPS providers also provide office supplies

Q. And do these MPS providers also provide office supplies like Post-it notes and paper clips?  
A. No. There are other office supply companies that, like us, try to do this stuff.

15 Q. Who else competes in this category?  
16 A. This is a category that's dominated by the manufacturers  
17 of the furniture, Steelcase, Herman Miller, Haworth. In most  
18 markets they own a dealer; they have a dealer. It may not be  
19 called their name, but they have -- they own the dealer. In  
20 addition to that, we have -- Staples is a good competitor for us  
21 on office furniture.  
22 Q. Okay. And in your experience, do furniture providers win  
23 RFPs and contracts to provide furniture for large business  
24 customers?  
25 A. Yes. That's how it's done, really.

WB Mason Hrg. Tr. at 1604-07







# Defendants Repeatedly Told the FTC Large Customers “Carv[e] Out” Ink and Toner

## Large Customers Are Increasingly Carving Out Ink, Toner, and Related Products Through MPS Programs

Weil

Simpson  
Thacher

- Major MPS programs for large customers include:

OEM	Description	Examples of Large Customers
	HP's printing business, which includes MPS, generated \$23.0 billion in 2014; global MPS business grew by double digits in 2013; more than 3,100 MPS customers globally <sup>1</sup>	Delta Airlines, DirecTV, Keybank, L'Oreal, Merck, The Walt Disney Company
	MPS segment grew 16% in '14 and 22% in '13; renewal rate for MPS customers was 95% FY'14 and 100% FY '13; 23 MPS contracts with companies listed on Fortune 500 <sup>2</sup>	Associated Bank, Columbia Sportswear, Cox Enterprises, The Home Depot, MainSource Bank, Synovus, Union Bank, United States Department of Agriculture, Unum Group
	MPS program generated \$3.8 billion globally in 2013 and grew by 7%; Xerox has more than 1,000 MPS customers <sup>3</sup>	Blackrock Financial Management, Groche America, Honeywell, Ingersoll Rand, Leidos, National Grid, Prudential Insurance, Reuters, Schenker Inc., Science Applications Intl Corp (SAIC), United Technologies Corporation (UTC)
	MPS program grew 14% in 2013; Ricoh has more than 4,000 MPS customers globally <sup>4</sup>	ADP, Inc., Albert Einstein Medical Center, Apollo Group, Kaplan, Kroger, MasterCard, Sempra Energy, State Street Bank & Trust, US Communities Government Purchasing Alliance

SPLS & ODP Presentation to the FTC, July 14, 2015

<sup>1</sup> Managed Print Services Landscape (HP Excerpt), June 2014, at 15, 21; (2) Lexmark International, Marketline, Feb. 2015, at 23; (3) Quocirca, Managed Print Services Landscape (Xerox Excerpt), June 2014, at 20; (4) Quocirca, Managed Print Services Landscape (Ricoh Excerpt), June 2014, at 13.

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## Product Market Red Herrings

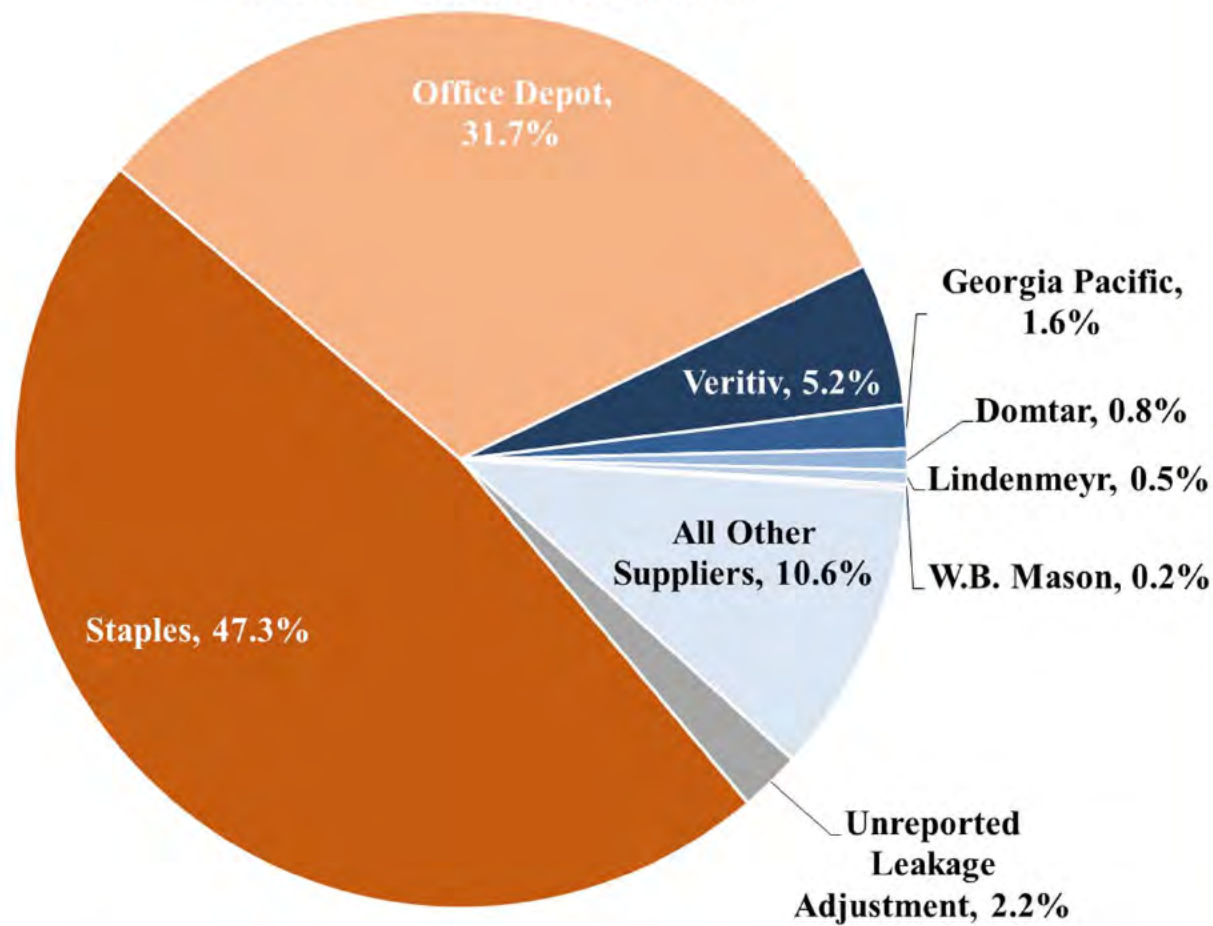
- **Defendants assert that consumable office supplies are commodities; not “mission critical”**
  - **Antitrust cases have involved markets for entirely discretionary products like beer, tobacco, and pies. *See, e.g.:***
    - *Swedish Match, 131 F. Supp. 2d at 158* (smokeless tobacco)
    - *Mrs. Smith’s Pie Co., 440 F. Supp. 220, 229 (E.D. Pa. 1976)* (frozen dessert pies)
- **Defendants express doubt that the largest companies in the U.S. can be harmed**
  - **Courts frequently grant injunctions in “upstream” markets (where direct customer is a corporation), removed from the ultimate consumers. *See, e.g.:***
    - *CCC Holdings, 605 F. Supp. 2d at 38-39* (estimatics products sold to insurance companies and auto repair shops)
    - *Bazaarvoice, 2014 WL 203966 at 1-2, 22 (N.D.Ca 2014)* (ratings & review platforms used by online retailers)
    - *Libbey, 211 F. Supp. 2d at 38, 50-51, 55 (D.D.C. 2002)* (foodservice glassware)



# Staples and Office Depot's Combined 79% Market Share Is Presumptively Unlawful

## Consumable Office Supplies Market Shares

*Fortune 100 Customers, 2014*



Source: Exhibit R1B, Shapiro Reply Report.



## The Significant Increase in Concentration Is Presumptively Unlawful

<b>Measure</b>	<b>Value</b>
<b>Pre-Merger:</b>	
Staples Share	47%
Office Depot Share	32%
HHI	3,274
<b>Post-Merger:</b>	
Staples & Office Depot Share	79%
HHI	6,274
<b>Increase in HHI</b>	<b>3,000</b>

**RELEVANT MARKET IS THE SALE AND DISTRIBUTION OF  
CONSUMABLE OFFICE SUPPLIES TO LARGE BUSINESS  
CUSTOMERS**

**MARKET SHARES OF 79%**

**SIGNIFICANT INCREASE IN CONCENTRATION**



**PRESUMPTION ESTABLISHED**

## **Significant Evidence Corroborates the Presumption**



# Evidence Shows Likely Anticompetitive Harm From Unilateral Effects

## HORIZONTAL MERGER GUIDELINES



U.S. DEPARTMENT OF JUSTICE  
AND THE  
FEDERAL TRADE COMMISSION

ISSUED: AUGUST 19, 2010

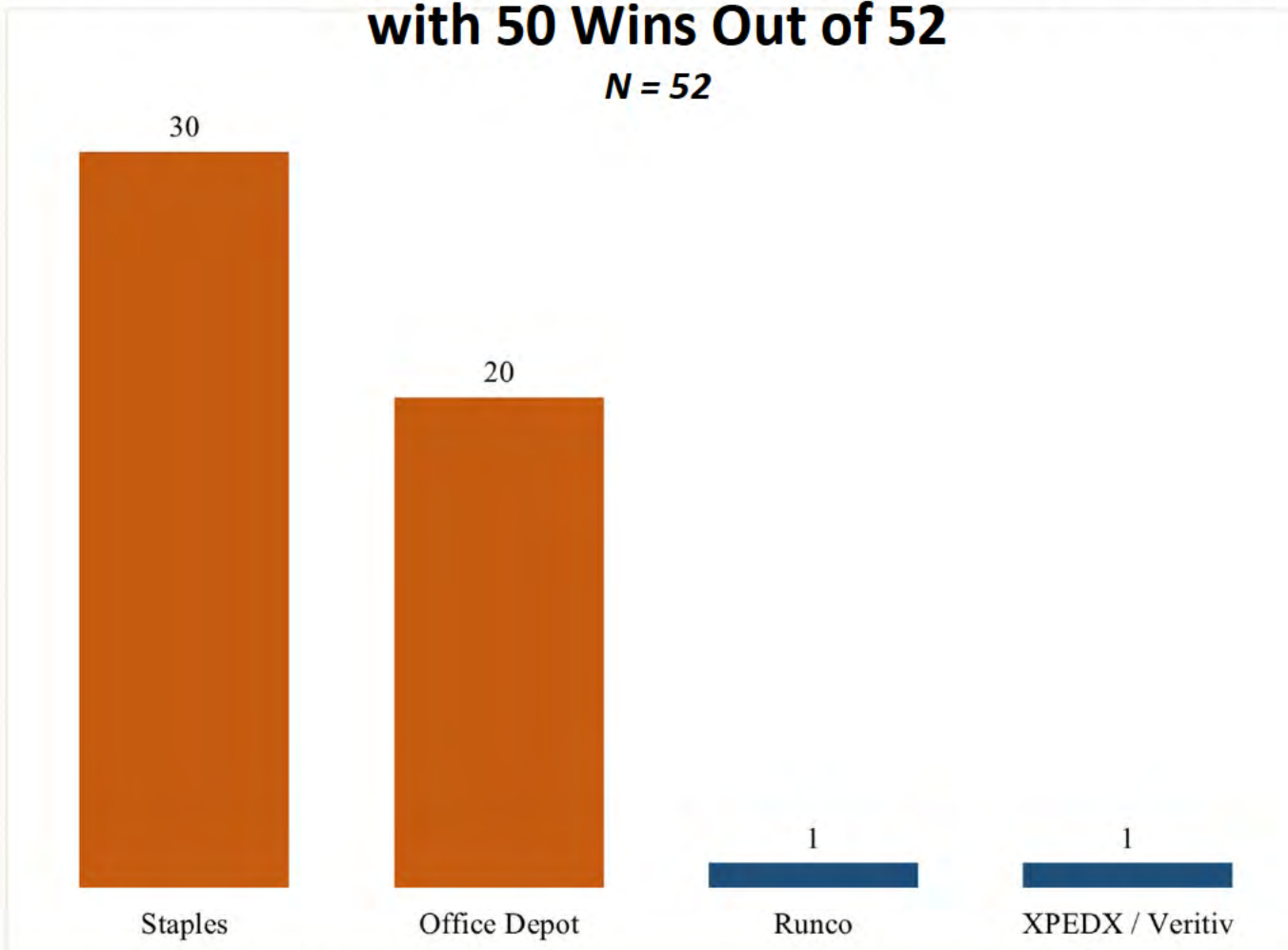
In a bidding market, effects “are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers’ needs.”

*Horizontal Merger Guidelines (2010) § 6.2*



## Effects Are Likely to Be Significant Because Staples and Office Depot Are Each Other's Closest Competitors in Bidding Market

### Staples and Office Depot Dominate in Fortune 100 RFP Data with 50 Wins Out of 52



*Note:* Based on most recent event at each Fortune 100 customer, 2012-2015.

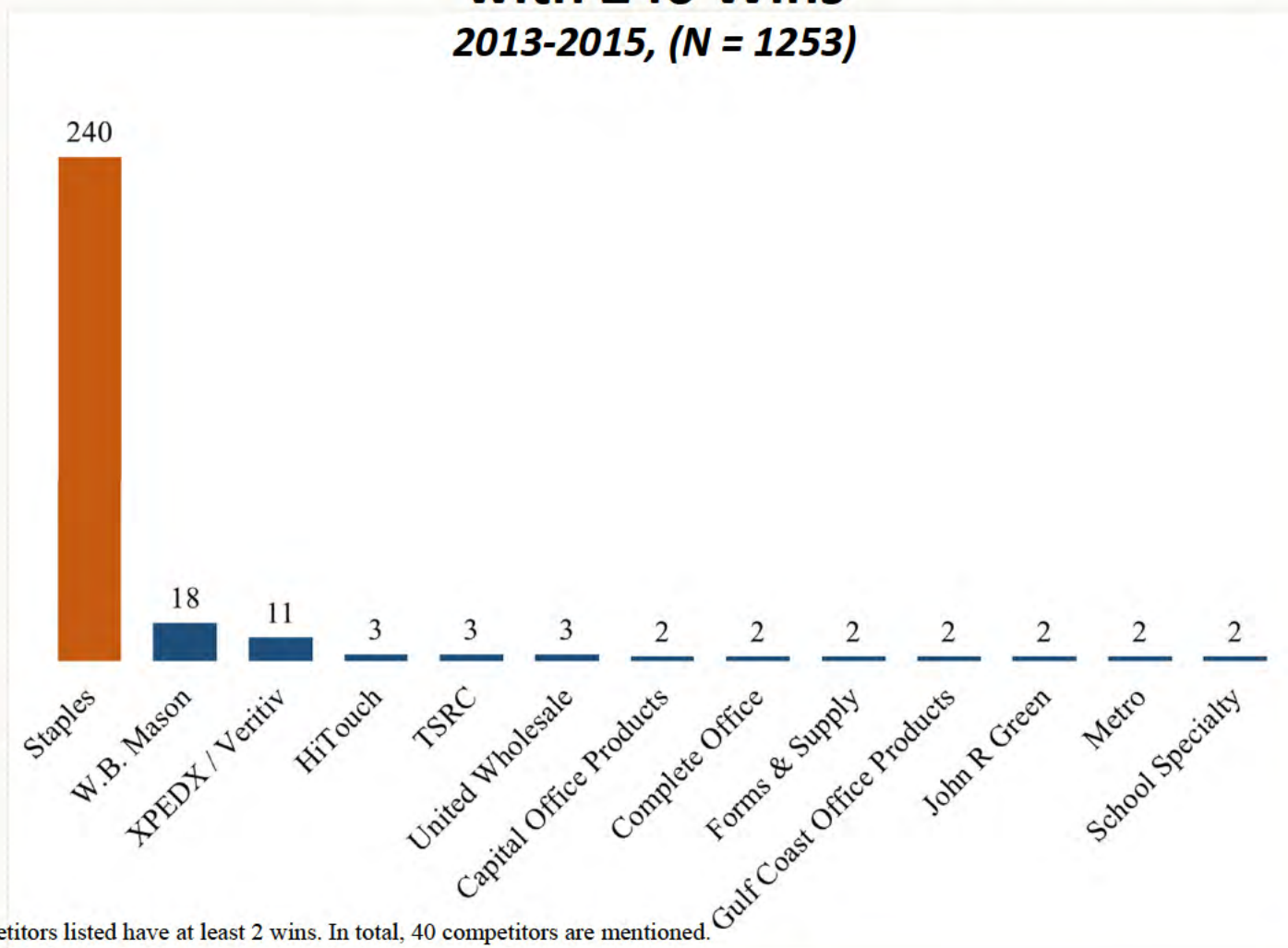
*Source:* Exhibit R7A, Shapiro Reply Report.



# Effects Are Likely to Be Significant Because Staples and Office Depot Are Each Other's Closest Competitors in Bidding Market

## Staples Dominates in Office Depot's Win-Loss Data with 240 Wins

2013-2015, (N = 1253)



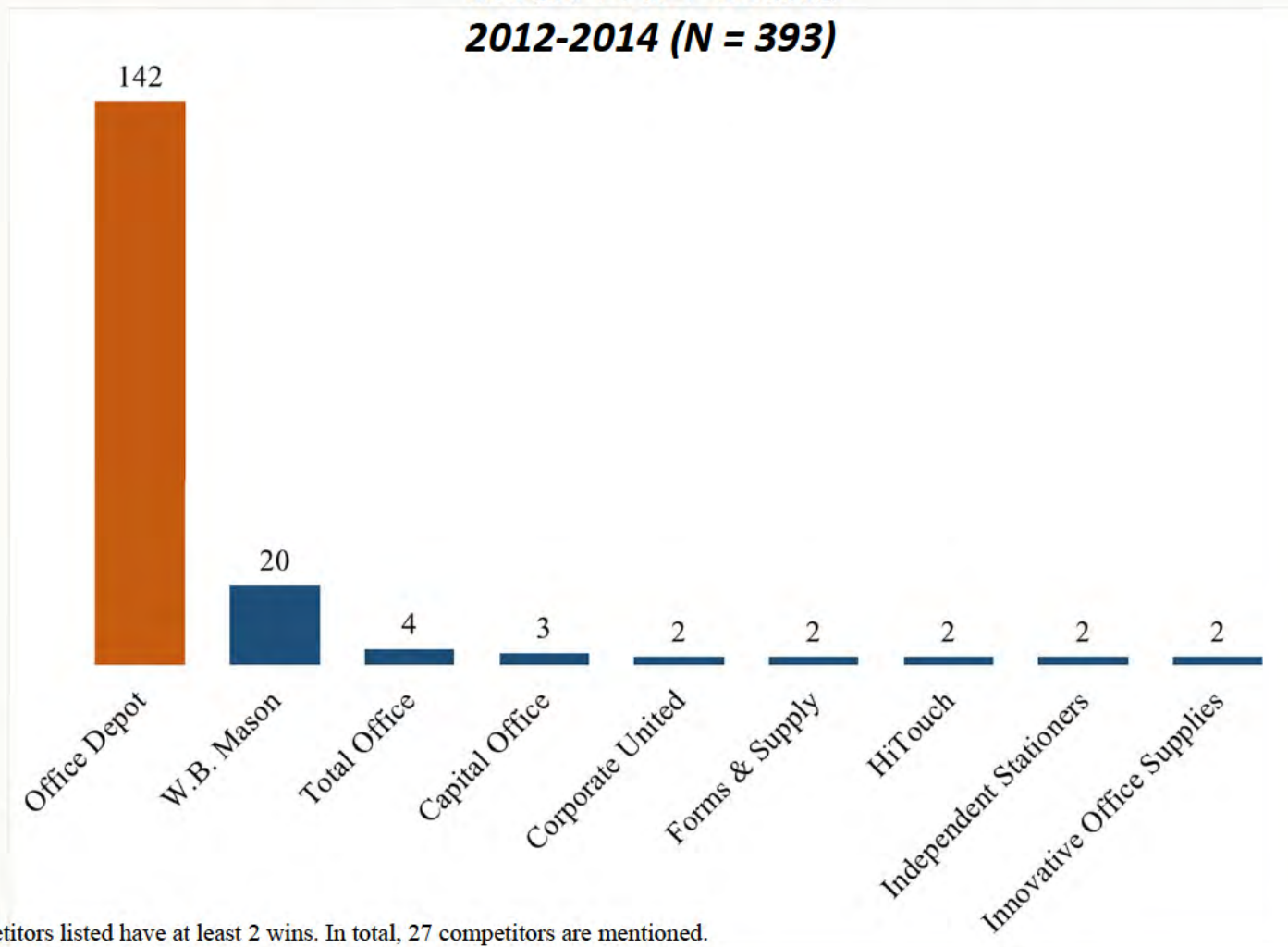
Note: Competitors listed have at least 2 wins. In total, 40 competitors are mentioned.  
Source: Exhibit 10, Shapiro Report.



# Effects Are Likely to Be Significant Because Staples and Office Depot Are Each Other's Closest Competitors in Bidding Market

## Office Depot Dominates in Staples Win-Loss Data with 142 Wins

2012-2014 (N = 393)



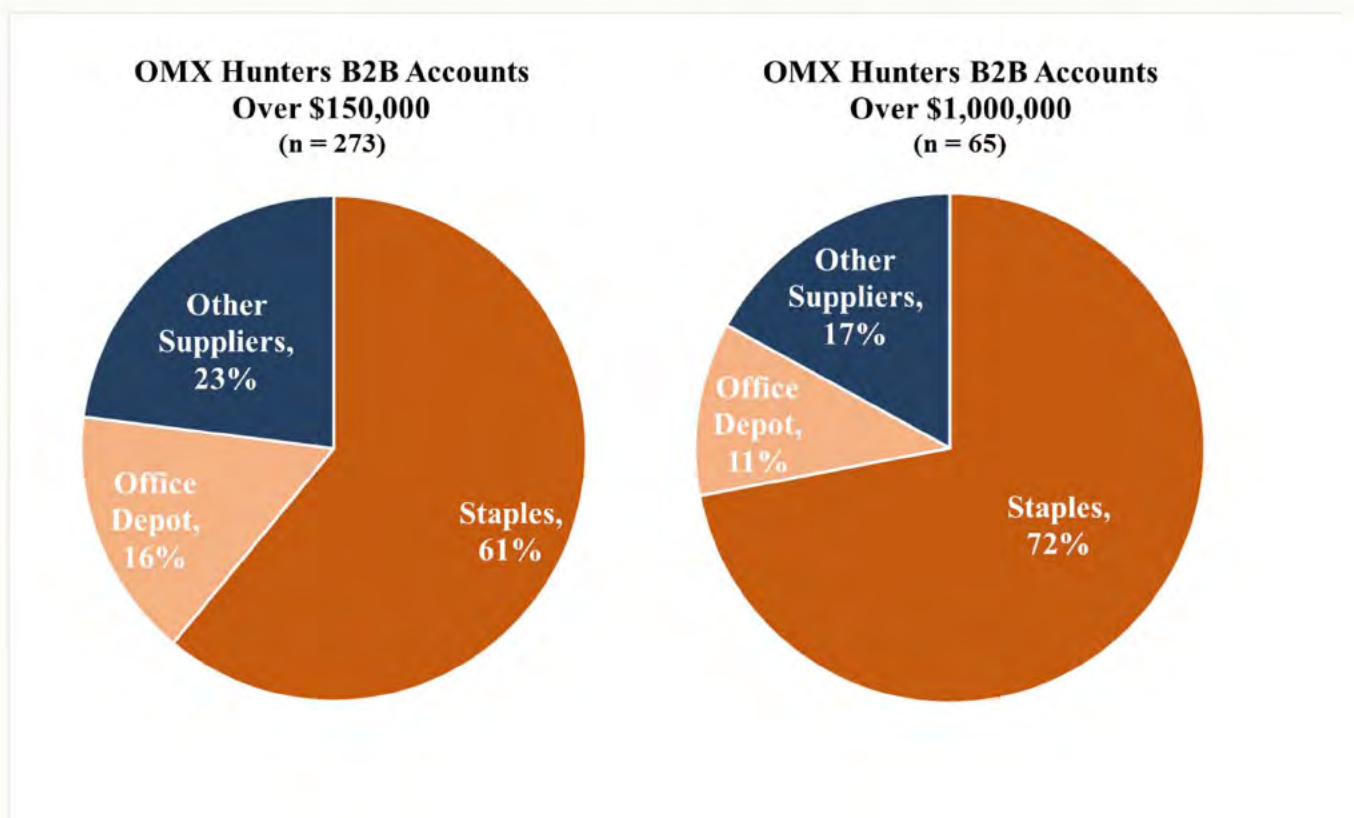
*Note:* Competitors listed have at least 2 wins. In total, 27 competitors are mentioned.  
*Source:* Exhibit 11, Shapiro Report.



# Office Depot and OfficeMax Represented to the FTC That Staples Was its Closest Competitor

## OfficeMax Losses Prior to Merger with Office Depot in Office Depot Presentation to FTC, 2013

*Opportunities for >\$150K and >\$1M B2B Accounts, 2008-2013*

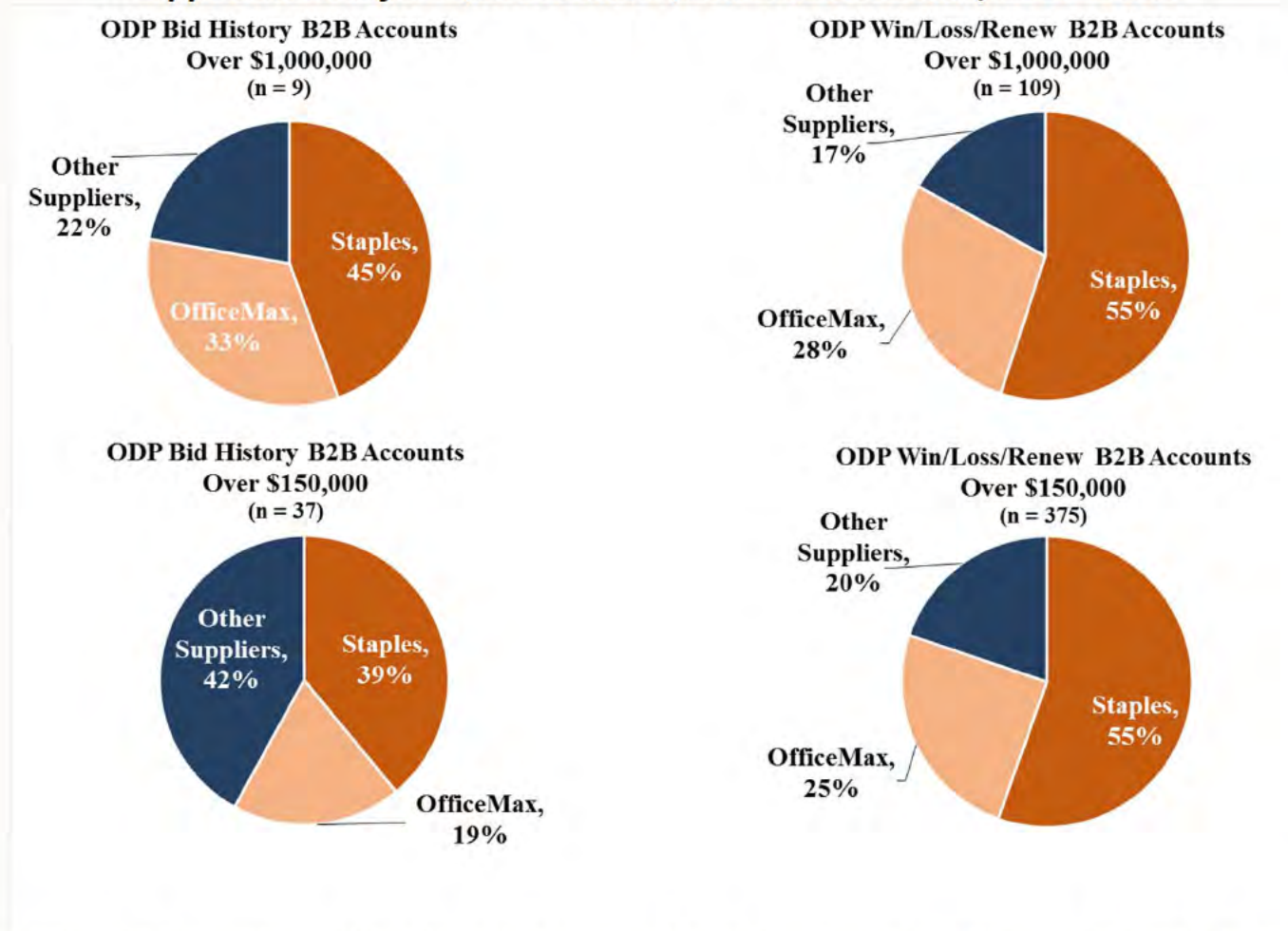


Source: Office Depot OfficeMax Presentation to FTC on Competition for Contract Sales to Large and National Customers, September 13, 2013, pp. 18, 21.



# Office Depot and OfficeMax Represented to the FTC that Staples Was its Closest Competitor

## Office Depot Losses Prior to Merger with OfficeMax in Office Depot Presentation to FTC, 2013 *Opportunities for >\$150K and >\$1M B2B Accounts, 2007-2013*



Source: Office Depot OfficeMax Presentation to FTC on Competition for Contract Sales to Large and National Customers, September 13, 2013, pp. 18, 21.



# Staples and Office Depot Are the Two Best Options for Large Business Customers



**W.B. MASON**

1601

1 their business is outside of Masonville?

2 **A. No.**

3 **Q.** And what companies can serve large customers with  
4 \$500,000 a year or more in spend who have a nationwide footprint  
5 for, you know, pens, and file folders, and Post-it notes, and  
6 that sort of thing?

3 **Q.** And what companies can serve large customers with  
4 \$500,000 a year or more in spend who have a nationwide footprint  
5 for, you know, pens, and file folders, and Post-it notes, and  
6 that sort of thing?

7 **A.** So in my opinion there are two people who can do that:

8 **That would be Staples and Office Depot.**

22 five towns the competition changes to somebody else, whereas in

23 office supplies it stays pretty much the same wherever you go.

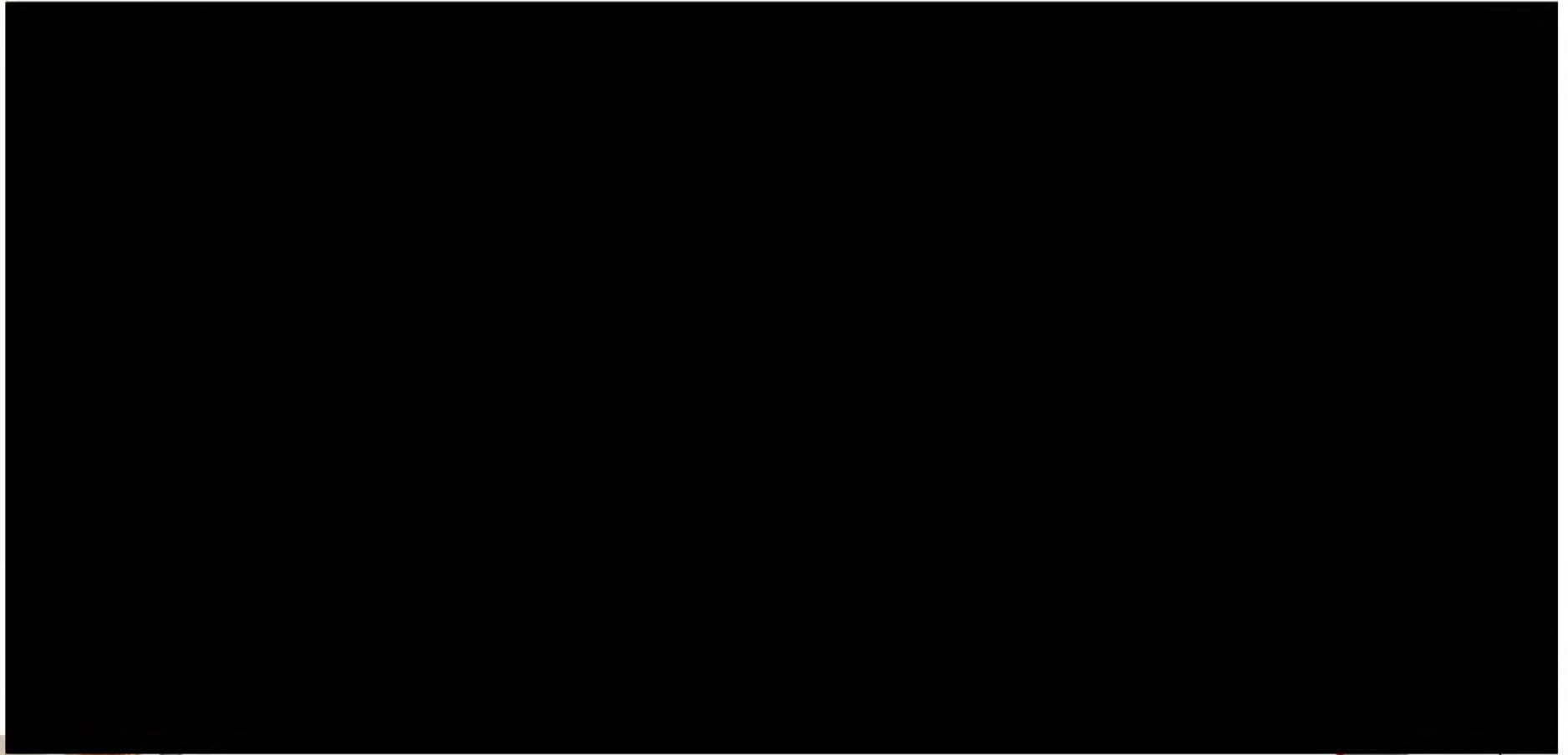
24 **Q.** And what do you mean it stays the same wherever you go?

25 **A.** Well, if you drive around Masonville, Staples, Office

Hrg. Tr. at 1601



# Competition Between Staples and Office Depot Tangibly Benefits Large Business Customers



FIFTH THIRD BANK

CONFIDENTIAL  
PX07159-001

Fifth Third Bank RFP Evaluation  
PX07159-001



# Competition Between Staples and Office Depot Tangibly Benefits Large Business Customers



**A. Pretty much we felt there was only two players that can meet our needs, Office Depot and Staples, and those are the two that were part of the sourcing event process.**

**Q. So I think we just mentioned it, but in what ways has AEP benefited from the competition between Staples and Office Depot?**

**A. Primarily, financially. So our sourcing event process, we're driving for the best value, the best cost; and that's what we got as a result of that competition.**

## AEP: Outcome of 2015 RFP Process: [REDACTED] % Savings

	<u>Office Supplies</u>	<u>Paper</u>
Reduction from RFQ process	[REDACTED]	[REDACTED]
Reduction from Demand Process	[REDACTED]	[REDACTED]
Increased savings from Rebate	[REDACTED]	[REDACTED]
Fixed Price for 3 yrs.	[REDACTED]	[REDACTED]
10% off all orders for 90 days	[REDACTED]	[REDACTED]
Savings	[REDACTED]	[REDACTED]

**Total Savings for Office Supplies & Paper**

[REDACTED] [REDACTED]

“The final step was to conduct a demand negotiation or counter-proposal with Staples and Office Depot. The main issue with Staples was—what the team believed to be—deceptive pricing tactics used in the RFQ. Staples refused to accept this point. In the end, the incumbent supplier (OfficeMax, which was acquired by Office Depot) came in with a better cost profile and agreed to more of our demand points.”

Source: AEP, PX07366



# Large Business Customers Are Concerned About the Proposed Merger

19 **Q.** Mr. Cervone, are you concerned about the proposed merger  
20 between Office Depot and Staples?

21 **A.** Yes, I am.

22 **Q.** Why is that?

23 **A.** Because it removes one of the closest competitors to the  
24 other.

25 **Q.** And do you believe that's going to affect McDonald's?

378

1 **A.** I do. I believe that when you take all competition out  
2 of the marketplace in this case, I believe that it -- it would  
3 likely have a negative effect on the customers.

4 **Q.** What sort of negative effect do you think it will have on  
5 customers?

6 **A.** Well, I would imagine upward pressure on pricing,  
7 potentially decreased options in terms of product offerings.



Hrg. Tr. at 377-78



# Large Business Customers Are Concerned About the Proposed Merger

A.M. MINF009

THE WITNESS: You know, having been in procurement for quite some time, whenever there's a **consolidation** in the marketplace, **it throws up a lot of red flags.** Because my life's

10 delivery, feel we've been treated very fairly. But now all of a  
11 sudden if they're going to be owned by somebody else that I don't

And then, you know, on a financial standpoint, if they become the **only capable supplier for our business model**, then I get **concerned that they really don't have to service us well**, and **they really don't have to be as competitive** as they were if indeed they are the only company left that can service somebody of our size and footprint.

5 emerging companies and emerging ways of going to market,  
6 including if we need to change things internally to make sure  
7 that we safeguard Fifth Third to make sure we're getting the  
8 right, you know, quality, and delivery, and cost.



FIFTH THIRD BANK

Hrg. Tr. at 917-18



# Large Business Customers Are Concerned About the Proposed Merger

**Q.** And I just want to follow up on the sequence of events here.

So if I'm understanding correctly, you initially approached Staples on its own to try to renegotiate the contract before it expired later this year; is that right?

**A.** Correct.

**Q.** Okay. And they offered you some value, but then the value was taken back? Do I understand that correctly?

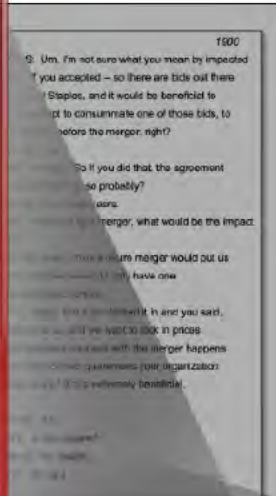
**A.** Correct.

**Q.** Okay. And then Office Depot got involved in the bid process?

**A.** Correct.

**Q.** And at that point both Office Depot and Staples offered you value?

**A.** Correct.



**THE COURT:** All right. **So what happens if they merge?**  
**THE WITNESS:** Well, my belief is that if they merge we'll be in the same situation that -- **we'll be in a noncompetitive environment. We will not have a competitive environment behind which to negotiate with a nationally-capable contracted vendor.**





# Large Business Customers Are Concerned About the Proposed Merger

Who does Select Medical consider to be its next best option for general office supplies and copy paper?

1018  
Depot.  
to be its next best  
paper?

**A. The next best option would be considered to be Staples.**

7 A. I do have concerns from Select Medical's perspective.  
8 Large corporate organizations such as Select Medical, I believe  
9 it's important to have that competition to be able to properly

**Q. And given the proposed merger between Staples and Office Depot, do you have any concerns about that proposed merger?**

**A. I do have concerns from Select Medical's perspective. Large corporate organizations such as Select Medical, I believe it's important to have that competition to be able to properly service our national footprint, our national presence, and to also be able to provide the best possible pricing. Given buying power and things of that nature to truly consolidate spend, I would have concerns if there was only one company.**



**Entry or Expansion Will Not Be Timely, Likely, or Sufficient**



## Entry or Expansion Will Not Be Timely, Likely, or Sufficient

**“According to the Merger Guidelines, entry or expansion must be ‘timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern’”** (*H&R Block, 833 F. Supp. 2d at 73*)

**“Defendants bear the burden of demonstrating the ability of other distributors to ‘fill the competitive void’ that will result from the proposed merger”** (*Sysco, 113 F. Supp. 3d at 80*)



## Entry or Expansion Will Not Be Timely

**Timely: “[R]apid enough that customers are not significantly harmed by the merger, despite any anticompetitive harm that occurs prior to the entry”** (*Horizontal Merger Guidelines* § 9.1)

- Harm from merger will be immediate
- Contracts come up for renewal
- Non-core item prices not protected by contract
- Contracts allow Staples/Office Depot to terminate at will

4 A. Well, usually this is a matter of how far out can we  
5 look, given this market. We talked about this, I think,  
6 early in my testimony. Really, fast enough so that  
7 customers aren't harmed for any, you know, significant  
8 period of time. And a year or two is a common timeframe.  
9 Go out a little further, perhaps, that's about it.  
10 Q. And does that mean that you only start to consider harm  
11 a year or two out?  
12 A. No, no. Any harm that occurs, including day after the  
13 merger and the deal closes, that's harm to customers, we  
14 care about it. The question is whether, if the curative  
15 effects of the entry are fast enough, we basically -- I

Hrg. Tr. at 2403



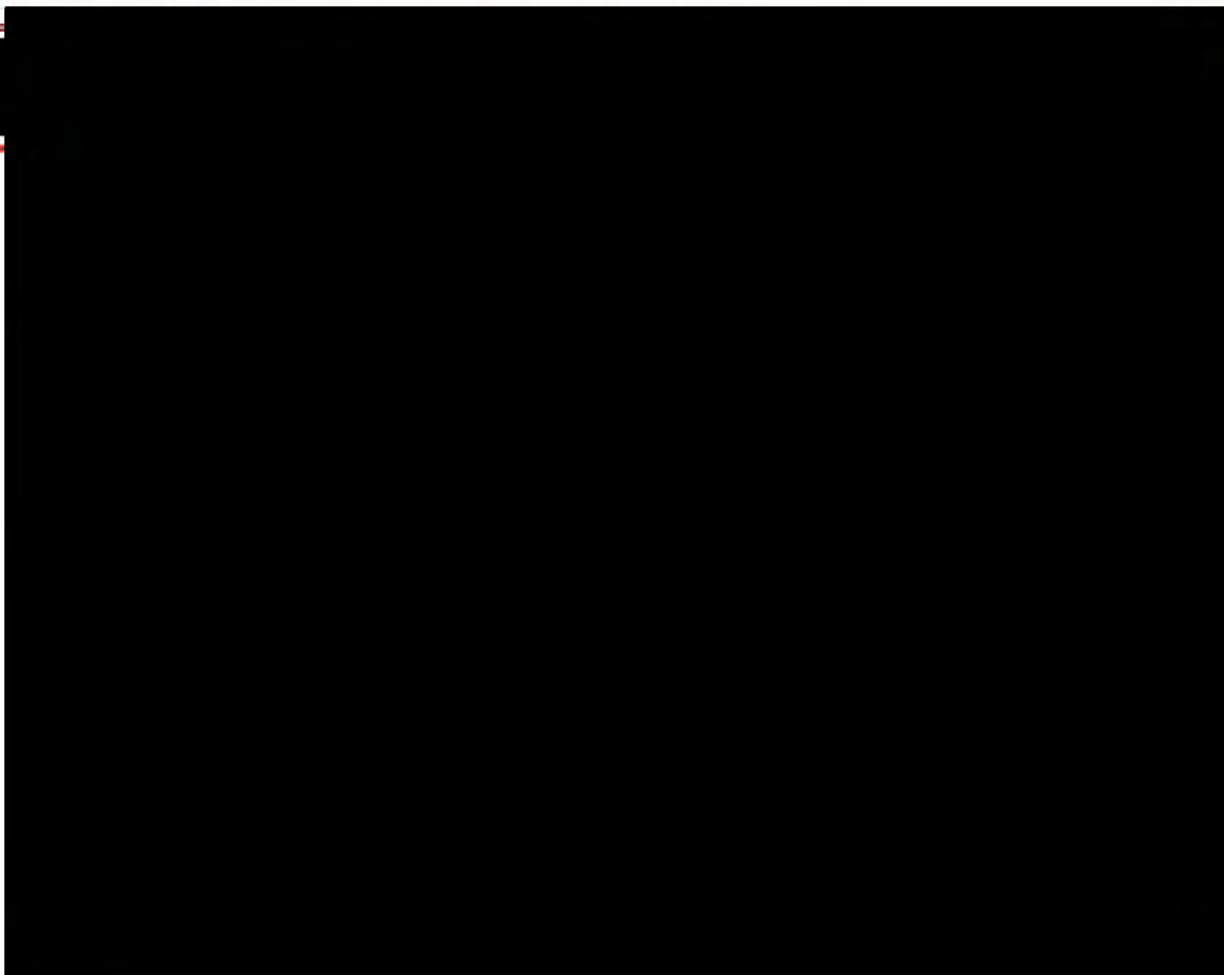
## Entry or Expansion Is Not Likely

**Likely: Whether it would be profitable to enter the market after considering the assets, capabilities, capital needed, and risk associated with entry** *(Horizontal Merger Guidelines § 9.2)*



**W.B. MASON**

2  
3





## Entry or Expansion Will Not Be Sufficient

**Sufficient: sufficient to deter or counteract the competitive harm**  
(*Horizontal Merger Guidelines § 9.3*)

- Defendants “bear the burden of demonstrating the ability of other distributors to ‘fill the competitive void’ that will result from the proposed merger” (*Sysco, 113 F. Supp. 3d at 80*)
- Insufficient to simply identify other competitors that might possibly expand (*H&R Block, 833 F. Supp. 2d at 73-76*)

14 whether entry will be sufficient. Given the magnitude of  
15 the shares and the bidding data we've seen, it's a pretty  
16 high hurdle, in my view, for entry to be sufficient. And so



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# Large Business Customers Require a Vendor with an Established and Proven Track Record

**Q.** And in terms of customer service, what are you looking for from an office supplies vendor?

**A.** Well, we're looking for, you know, a company that has a demonstrated track record of providing on-time deliveries, you know, that can quickly correct any deficiencies or any issues that may pop up across the membership, and somebody that is empowered, has the authority to make the issue go away.

**Q.** So thinking about all the service requirements that we've talked about, all the attributes that you look for in an office supplies vendor, aside from competitive pricing, would you consider an office supplies vendor to be a viable option for you and your membership if it didn't offer all these services and attributes?

**A.** We wouldn't consider it to be viable.





# Amazon's Characteristics Today Supports That Amazon's "Entry" Will Not Be Timely, Likely, or Sufficient

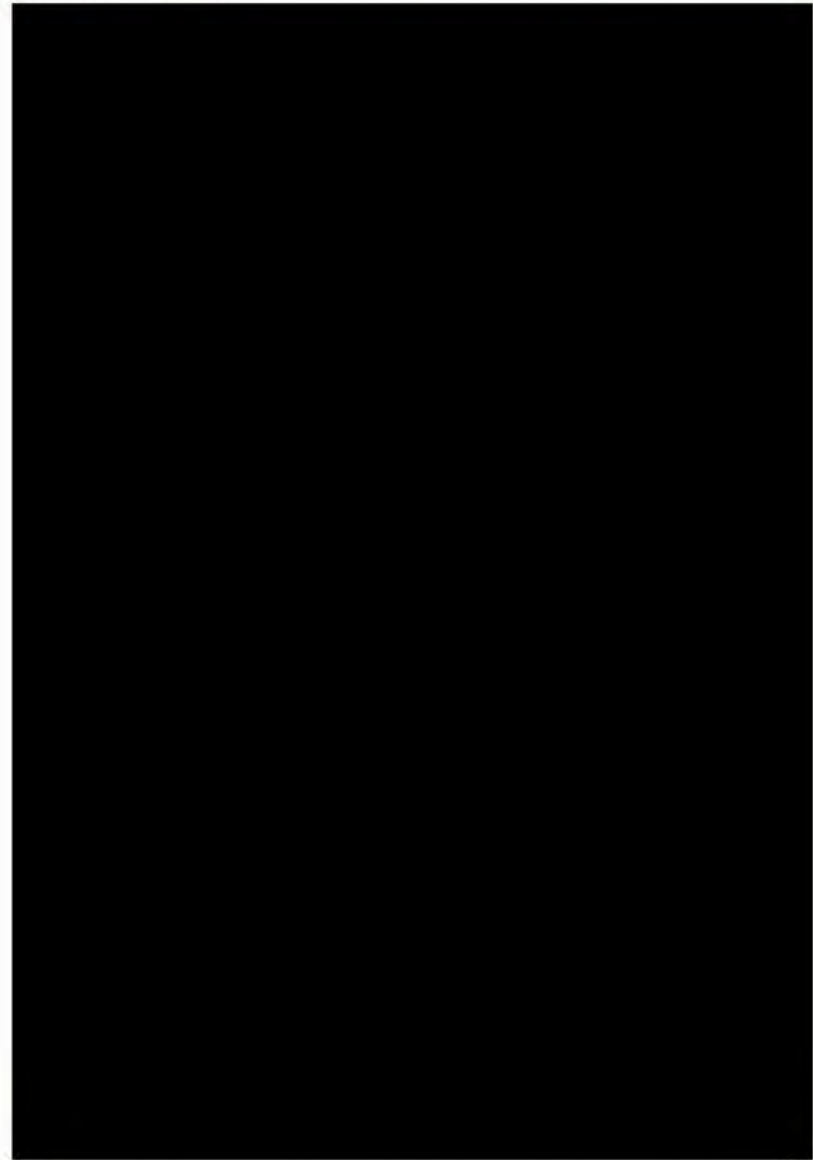
- Before the launch of Amazon Business, Amazon sold office supplies, and Amazon targeted business customers, first through smallparts.com and then through Amazon Supply (Hrg. Tr. at 522-26)
- Amazon Business is a B2B marketplace that is hosted on the Amazon.com website (*Id.* at 521:14-23)
- The marketplace allows third parties to sell products directly. Amazon does not control pricing, volumes or delivery terms of third-party sellers, which provide half of the products sold on Amazon Business (*Id.* at 540:17-541:4).





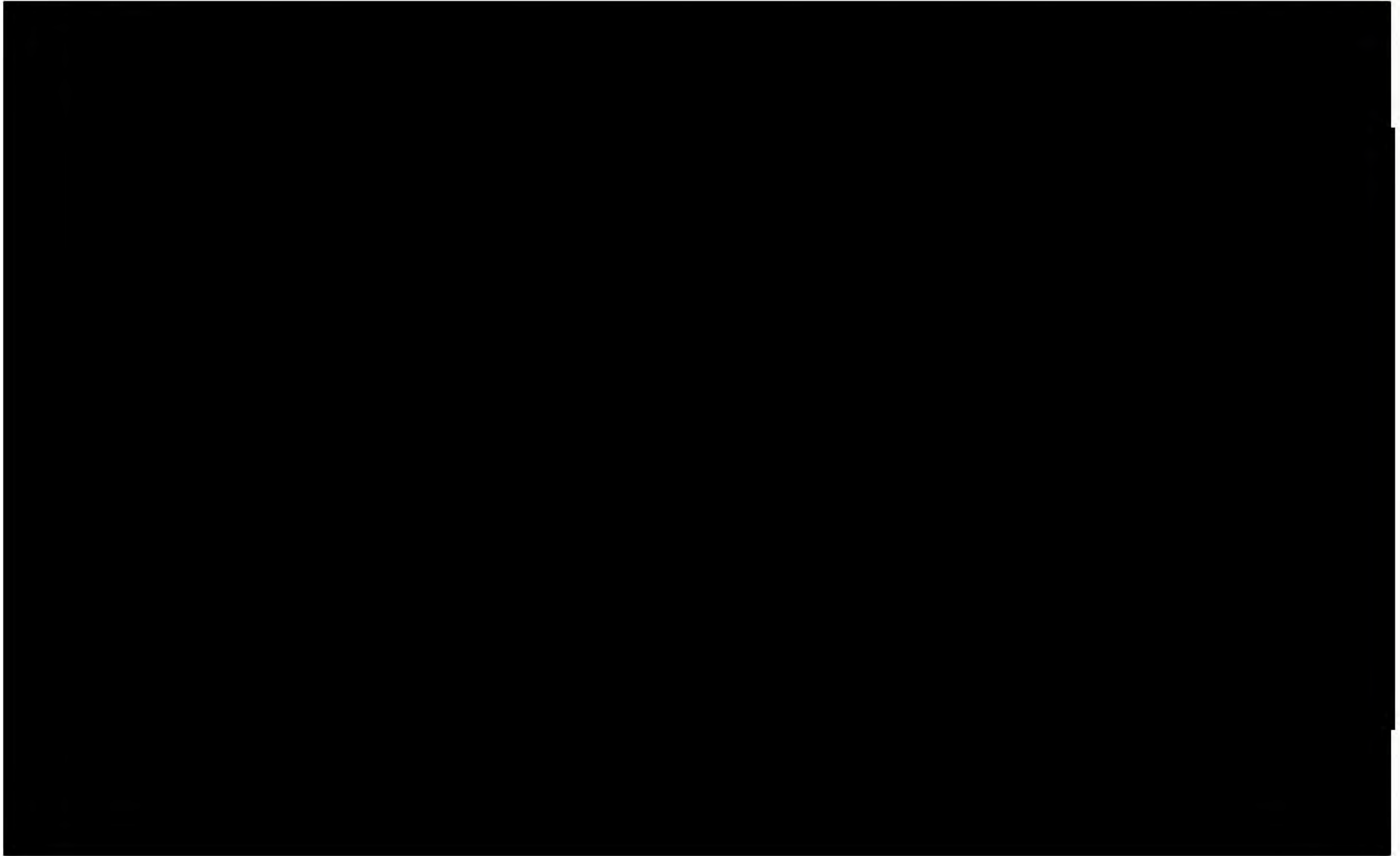
# Defendants Cannot Show that Entry By Amazon Will Be Timely, Likely, or Sufficient

- **Currently, Amazon Business:**
  - **DOES NOT** offer product curation, a feature that large businesses use to limit employees' choices of products (Hrg. Tr. at 529:5-531:5; 555:25-556:7)
  - **DOES NOT** offer desktop delivery (*Id.* 551:9-10)
  - **DOES NOT** allow for automatically recurring weekly deliveries (*Id.* at 648:23-649:11)
  - **DOES NOT** negotiate contracts with customers (*Id.* at 543:21-23)
  - **DOES NOT** serve as the primary vendor of office supplies to any large customer, and has not won an RFP to be the primary vendor of office supplies (*Id.* at 544:8-10; 551:11-13)
- **Currently, Amazon Business participates in RFPs only in a limited way, often responding only to a request for a quote for a limited number of items (*Id.* at 546:18-547:12)**





# Defendants Cannot Show that Entry By Amazon Will Be Timely, Likely, or Sufficient



## **Proposed Fix Does Not Remedy Harm**



# Proposed “Fix” Is “designed to fail”

1408

1 over time, given enough time, yeah, you can solve it, but it

**So, it's a fantasy to think that somebody who has never done Tier 1 before, has never dealt with the end user before, has never dealt with large enterprise end users is now going to, in 18 months, take at least 30 Office Depot**

14 never done Tier 1 before, has never dealt with the end user

15 before, has never dealt with large enterprise end users is

**It's an experiment at best. It is an experiment that is almost designed to fail. It's hard enough doing one. It's hard enough doing one when you've never done one,**

23 one. It's hard enough doing one when you've never done one,

24 let alone trying to do 30 all at once. So my concern really

25 is more on the integration. The integration is so massive



# **Efficiencies Cannot Save This Anticompetitive Deal**



# Alleged Efficiencies Cannot Save This Anticompetitive Deal

- **High market concentration levels require “proof of extraordinary efficiencies”** (*Heinz, 246 F.3d at 720-21*)
- **Defendants must establish that their claimed efficiencies are:**
  - **Merger-specific:** “cost saving that could not be achieved without the merger” (*H&R Block, 833 F. Supp. 2d at 89-90*)
  - **Verifiable:**
    - Requires method of factual analysis and documentation that can be independently assessed (*H&R Block, 833 F. Supp. 2d at 91-92; Staples, 970 F. Supp. at 1089-90*)
    - Assertions about managerial judgments insufficient (*H&R Block, 833 F. Supp. 2d at 91-92*)
    - “Delayed benefits” difficult to predict and entitled to less weight (*CCC Holdings, 605 F. Supp. 2d at 73 (quoting the Horizontal Merger Guidelines)*)



# Alleged Efficiencies Cannot Save This Anticompetitive Deal

2 THE WITNESS: So, just to set the stage where  
 3 we're at. The question in this part of efficiency analysis  
 4 is if Staples and Office Depot -- let's suppose they can buy  
 5 pens more cheaply because they're now even bigger, and  
 6 Mr. Anderson, their efficiency expert, says they will be  
 7 able to do that. Will they charge Bank of America less for  
 8 pens? That's what we're asking one of our customer. And  
 9 this is absolutely addressed on page 52 of my first report.

10 The -- what I'm saying -- I said generally some  
 11 costs get passed through, some costs they don't, just as a  
 12 general principle. Here I don't expect there to be much  
 13 pass through from what I've seen because Staples will -- the  
 14 reason to pass through the lower pen cost to Bank of America  
 15 is if they think they can sell more pens to Bank of America,  
 16 otherwise why? there's no good reason to do it.

17 One reason might be that they would fear that they  
 18 would lose Bank of America as a customer if they don't do  
 19 that. That seems much less of a concern after the merger  
 20 for the very reason we talked about.

21 Another would be maybe Bank of America will use  
 22 more pens if they give them a little bit lower price. And  
 23 again, the evidence -- there's no evidence that that sort  
 24 off elasticity or response is very significant here in  
 25 driving prices. So I don't think -- I'm not saying zero

- **Defendants must also establish that their claimed efficiencies would benefit customers** (*St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 791-92 (9th Cir. 2015), *CCC Holdings*, 605 F. Supp. 2d at 74 (D.D.C. 2009))



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# Appendix



## Product Market Need Not Include All Products Sold By the Merging Parties

- ***Staples***: consumable office supplies, but excluding capital goods (computers, fax machines, and other business machines) and office furniture *(970 F. Supp. At 1073-74)*
- ***ProMedica***: inpatient general acute care hospital services, but excluding inpatient tertiary services, inpatient obstetrics services, and outpatient services *(FTC v. ProMedica Health Sys., 2011 WL 1219281, \*23-25 (N.D. Ohio Mar. 29, 2011))*
  - ***ProMedica*** (6<sup>th</sup> Cir.) explicitly rejects Defendants’ theory that all products/services sold under contract define a product market *(749 F.3d at 567)*



## Market Share Need Not Be Precise

- **“The FTC need not present market shares and HHI estimates with the precision of a NASA scientist.”** (*Sysco*, 113 F. Supp. 3d at 54)
- **“A reliable, reasonable, close approximation of relevant market share data is sufficient, however.”** (*H&R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011))
- **“The market shares, computed by the Commission largely from statistics provided by PPG, are concededly imprecise. Nevertheless, although PPG and Swedlow ‘may point to technical flaws in the compilation of these statistics, . . . in cases of this type precision in detail is less important than the accuracy of the broad picture presented.’”** (*FTC v. PPG Indus.*, 628 F. Supp. 881, 884 n.6 (D.D.C. 1986) (quoting *Brown Shoe*, 370 U.S. at 342 n.69))



## Market Share Is Valuable Predictor of Future Harm

- “The **market share** which companies may control by merging **is one of the most important factors** to be considered **when determining the probable effects of the combination** on effective competition in the relevant market” (*Brown Shoe, 370 U.S. at 343*)
- “[Market share and concentration] statistics provide a graphic picture of the immediate impact of a merger, and, as such, also **provide a meaningful base upon which to build conclusions of the probable future effects of the merger**” (*Brown Shoe, 370 U.S. at 342 n.70 (1962)*).
- A “merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is **so inherently likely to lessen competition substantially that it must be enjoined** in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.” (*Phila. Nat’l Bank, 374 U.S. at 363*)



## Relevant Geographic Market Is the United States

- **The geographic market is “where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate”** (*Sysco*, 113 F. Supp. at 48 (quoting *Phila. Nat'l Bank*, 374 U.S. at 357)).
  - Staples and Office Depot compete nationally for large customers
- **Geographic market can be defined using hypothetical monopolist test.** (*Horizontal Merger Guidelines* § 4.2)
  - Hypothetical monopolist of consumable office supplies sold to large customers could profitably impose a SSNIP
  - Large customers would not defeat a SSNIP by switching to foreign vendors of consumable office supplies



## Proposed “Fix” Is Inadequate

- **“Restoring competition requires replacing the *competitive intensity* lost as a result of the merger rather than focusing narrowly on returning to premerger HHI levels”** (*Sysco*, 113 F. Supp. 3d at 72-73 (quoting DOJ Remedies Guidelines))
- **Competition must be restored “on day one”** (*Sysco*, 113 F. Supp. 3d at 76)
  - “If you're not properly partnered, in my case years ago, and geared for dealing with these large corporations, an independently owned office product company cannot engage with these large corporate entities due to everything that they ask for in their contractual relationships” (PD Morrison Hrg. Tr. at 1385)
  - “Essendant cannot fill the shoes of an Office Depot any time soon” (PD Morrison Hrg. Tr. 1395)
    - Essendant cannot compete on price to Tier 1 customers (PD Morrison Hrg. Tr. at 1413, 1387-88)
    - Essendant does not have experience dealing directly with large corporate customers (PD Morrison Hrg. Tr. at 1395)
    - Essendant does not have the services, such as an e-commerce platform or relationship engagement, necessary to serve large customers (PD Morrison Hrg. Tr. at 1395-96)



## Behavioral Remedies Rare, Strongly Disfavored

- **Divestiture is the usual, proper remedy** (*United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 329-30 (1961); *Polypore Int'l, Inc.*, No. 9327, 2010 WL 9933413, at \*32 (FTC Dec. 13, 2010))
- **“The very words of § 7 suggest that an undoing of the acquisition is a natural remedy.”** (*E.I. du Pont*, 366 U.S. at 329-30)
- **“[C]omplete divestiture provides the greatest likelihood that the asset package will restore competition and be sufficiently viable” to attract a buyer** (*Polypore Int'l, Inc.*, No. 9327, 2010 WL 9933413, at \*32 (FTC Dec. 13, 2010))
- **A remedy is “more likely to restore competition if the firms that engaged in premerger competition are not under common ownership”** (*In re Evanston Northwestern Healthcare Corp.*, 2007 FTC LEXIS 210, \*245 (FTC Aug. 6, 2007))
- **“Even remedies which ‘entail harsh consequences’ would be appropriate to ameliorate the harm to competition from an antitrust violation.”** (*FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033 (D.C. Cir. 2008) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327, (1961))