



Preliminary Injunction: Extraordinary and Drastic Remedy

- A preliminary injunction that blocks a proposed merger “is an extraordinary and drastic remedy.”¹
- “Under 13(b) of the FTC Act, the Court must determine that an injunction is in the **public interest** after weighing the **equities** and considering the Commission’s **likelihood of ultimate success**.”²

¹ *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (quotation marks omitted)

² 15 U.S.C. § 53(b)

FTC Burden

Reasonable Probability = More Likely Than Not

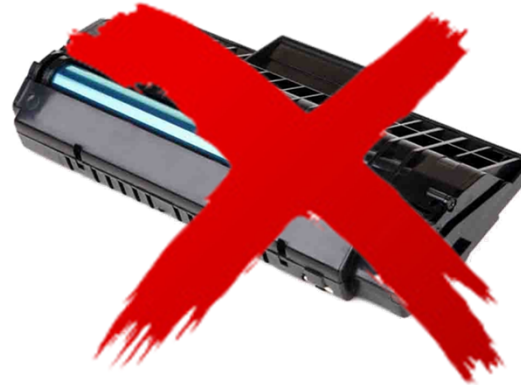
- FTC must show it's **more likely than not** that the merger would substantially lessen competition.⁴
- FTC has the burden of:
 - establishing the relevant market (including the target customers and relevant products)
 - establishing that Defendants would have an unduly high share of that relevant market ⁵
- **The failure to properly define a relevant market is fatal to a merger challenge.**⁶

⁴ March 21, 2016 A.M. Tr. at 21:21-22:3; *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998) (FTC must show “reasonable probability”)

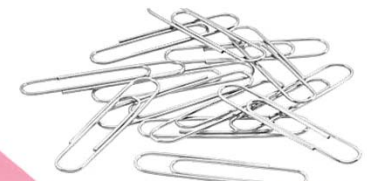
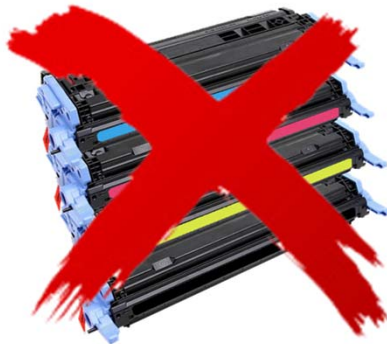
⁵ *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116-17 (D.D.C. 2007)

⁶ *FTC v. LabCorp*, No. SACV 10-1873 (C.D. Cal. Mar. 11, 2011)

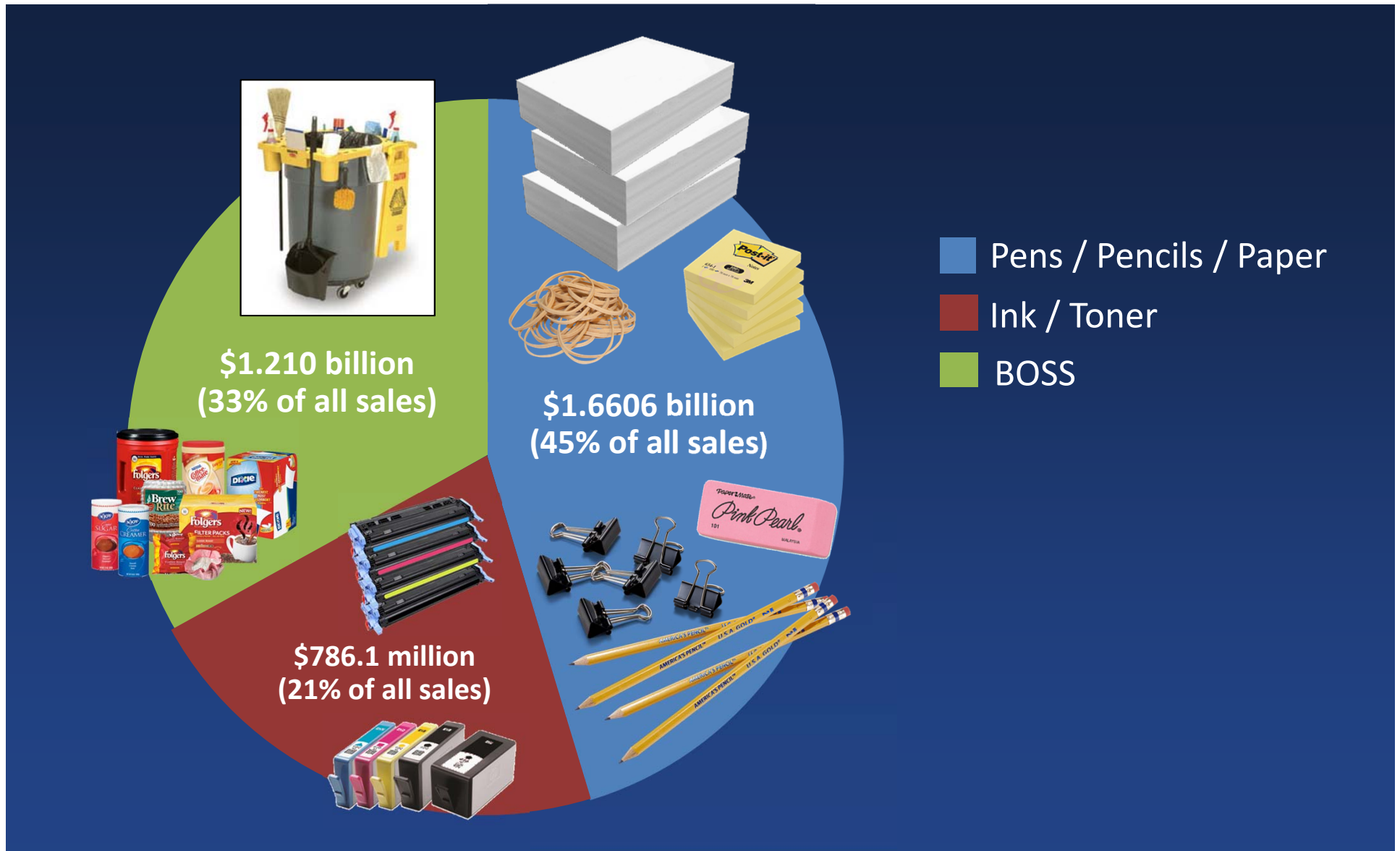
FTC's Gerrymandered Product Market



Definition of
"Consumable Office Supplies"
"Office supplies that customers
use up, discard, and repurchase
on a recurrent basis."



FTC's Gerrymandered Product Market: Eliminates 1/3 of Traditional Office Supplies and More Than Half of Relevant Product Market



FTC's Expert: Wrong Product Market = Screwed Up Market Shares

THE COURT: That's key, because if the relevant market isn't defined correctly, everything else is skewed, isn't it, the analysis?

- A. Yes and no. I think any lawyer would say yes, but an economist would push back a little bit. The market shares are probably going to be skewed because we're defining the market -- a lot of what we're doing is to figure out market shares and seeing if they're high, which is the second step. **So if you don't get the relevant market right, the shares are not going to be -- they're going to be misinformed, they're going to be misleading, they're going to be screwed up.**



FTC's Expert: I Might Have Made a Mistake

Q. But you made that conclusion without looking at any sales data for ink and toner from these MPS providers. How do you know how much of the market they have without looking at the data?

A. Well, again, there's a lot of other information – **I might have made a mistake, and the case should be bigger and include ink and toner. I've acknowledged that.**



FTC's Expert: Product Market Must Be Consistent with Business Realities

“So you get -- **the customer's view is very important**, and it's quite consistent here.”

Q. Dr. Shapiro, you also said yesterday and today it's important to hear from the customers, the customer's view is critical, right?

A. **The customer's view is critical** regarding their needs, their options, who they considered capable in the past. Basically, what they have visibility into, I put a lot of weight on that.

Q. And, Dr. Shapiro, one of the things you talked about on direct is that **it's important that the relevant product market be consistent with business realities.**

A. Certainly.

All FTC's Witnesses Disagree With FTC's Product Market



**“Add me
to the list”**

Product Descriptions in the Staples Bid Data Consumable Office Supplies Opportunities, 2012-2014 (N = 393)

Description of Products Included	Number of Opportunities	Share of Opportunities
Breakroom; Business Machines; Furniture; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	91	23.2%
Breakroom; Business Machines; Furniture; Ink/Toner; Jan/San; Misc; Office Supplies; Paper; Technology	54	13.7%
Office Supplies; Ink/Toner; Paper	43	10.9%
Breakroom; Business Machines; Furniture; Ink/Toner; Jan/San; Misc; Office Supplies; Paper; Print; Technology	36	9.2%
Breakroom; Business Machines; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	16	4.1%
Office Supplies	14	3.6%
Business Machines; Furniture; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	13	3.3%
Office Supplies; Ink/Toner; Furniture; Breakroom	9	2.3%
Breakroom; Business Machines; Furniture; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	5	1.3%
Business Machines; Furniture; Ink/Toner; Jan/San; Misc; Office Supplies; Paper; Print; Technology	5	1.3%
Business Machines; Furniture; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	5	1.3%
Office Supplies; Paper	4	1.0%
Breakroom; Business Machines; Furniture; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	3	0.8%
Business Machines; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	3	0.8%
Breakroom; Furniture; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	3	0.8%
Breakroom; Jan/San; Office Supplies; Paper; Technology	3	0.8%
Breakroom; Business Machines; Furniture; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	3	0.8%
Breakroom; Business Machines; Furniture; Ink/Toner; Jan/San; Office Supplies; Paper; Technology; Wholesaler	1	0.3%
Business Machines; Furniture; Ink/Toner; Jan/San; Office Supplies; Technology	1	0.3%
Business Machines; Furniture; Ink/Toner; Misc; Office Supplies; Paper	1	0.3%
Business Machines; Furniture; Ink/Toner; Misc; Office Supplies; Paper; Print; Technology	1	0.3%
Business Machines; Furniture; Ink/Toner; Office Supplies	1	0.3%
Business Machines; Furniture; Jan/San; Misc; Office Supplies; Paper	1	0.3%
Business Machines; Furniture; Jan/San; Misc; Office Supplies; Technology	1	0.3%
Business Machines; Furniture; Jan/San; Office Supplies; Paper; Technology	1	0.3%
Business Machines; Furniture; Office Supplies; Paper	1	0.3%
Business Machines; Furniture; Office Supplies; Paper; Technology	1	0.3%
Business Machines; Ink/Toner; Jan/San; Office Supplies; Paper	1	0.3%
Business Machines; Ink/Toner; Jan/San; Office Supplies; Paper; Technology	1	0.3%
Business Machines; Jan/San; Misc; Office Supplies	1	0.3%
Business Machines; Jan/San; Misc; Office Supplies; Paper; Technology	1	0.3%
Business Machines; Jan/San; Office Supplies; Technology	1	0.3%
Business Machines; Office Supplies; Paper; Technology	1	0.3%
FS CHEMICAL; FS LINERS; FS PAPER; FS SKINCARE; FS SUPPLIES; Office Supplies; Technology	1	0.3%
Furniture; Office Supplies	1	0.3%
Ink/Toner; Jan/San; Office Supplies	1	0.3%
Ink/Toner; Jan/San; Paper	1	0.3%
Jan/San; Misc; Office Supplies; Technology	1	0.3%
Jan/San; Office Supplies; Paper	1	0.3%
Office Supplies; Facilities	1	0.3%
Paper; Office Supplies; Ink/Toner	1	0.3%

Nearly all
RFPs include
ink and toner

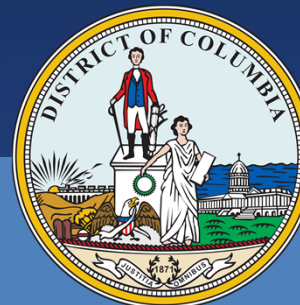
2016 FTC in Real Life: Consumable Office Supplies Include Ink and Toner

Q. And just to be clear, what are you including in the definition of consumable office supplies? . . .

A. Pens, paper, pencils, binders, Post-Its, general office supplies.

Q. Does that include toner?

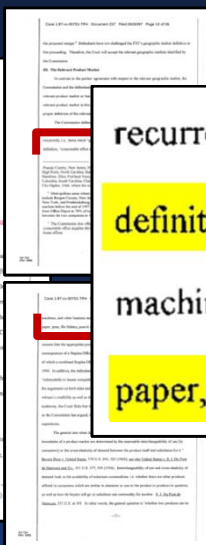
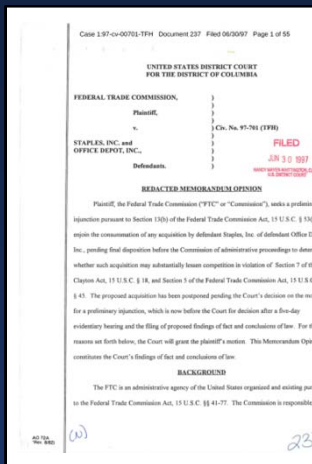
A. Yes.



Commonwealth of Pennsylvania and District of Columbia:
Office supplies includes ink and toner.

FTC Agreed Twice Before That Office Supply Market Includes Ink and Toner

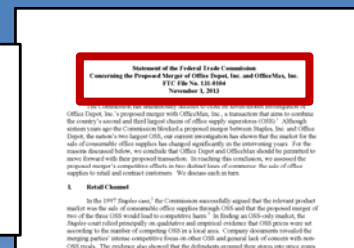
1997



recurrently, i.e., items which “get used up” or discarded. For example, under the Commission’s definition, “consumable office supplies” would not include capital goods such as computers, fax machines, and other business machines, or office furniture, but does include such products as paper, pens, file folders, post-it notes, computer disks, and toner cartridges. The defendants

2013

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

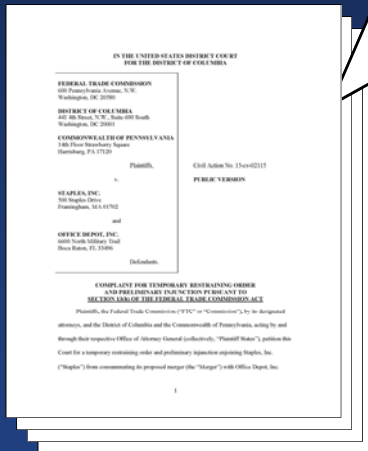


³ “Consumable office supplies” refers to non-durable products that consumers use up, discard, and purchase on a recurrent basis. Examples included pens, paper, file folders, Post-it notes, and ink and toner cartridges. *Id.* at 1080.



FTC Decides To Exclude Ink and Toner Based On No Evidence

39. Consumable office supplies do not include ink and toner for printers and copiers.



Dec 2015



Jan 2016

Feb 2016

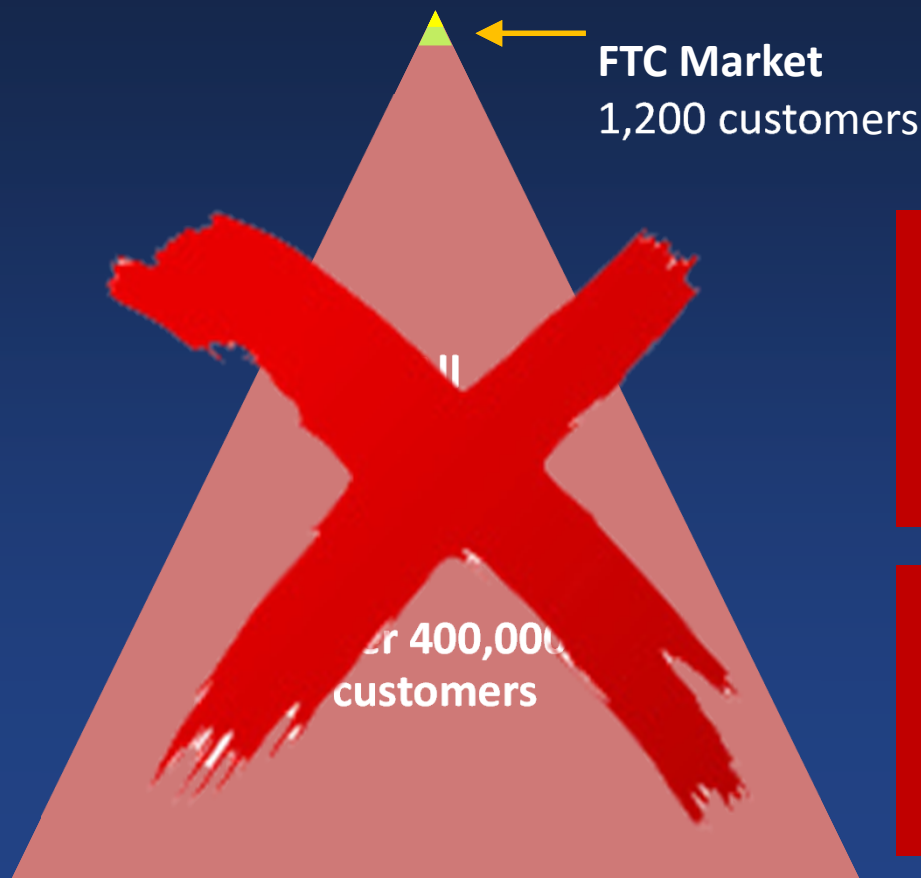
If You Include Ink and Toner, Market Shares Would Be Significantly Lower

“I believe as well that, therefore, if one were to calculate market shares for ink and toner, which I have not done, that Staples and Office Depot’s share would be significantly smaller.”



The Business Contract Market Is Much Broader Than the Fortune 100

FTC concedes its customer market is only
0.3% of business customers (1,200 out of over 400,000 B2B customers)



FTC cleaves out almost
399,999 business customers

99.7%

FTC cleaves out
government customers
Over 15% of sales

FTC Has No Market Share Proof for 95 Percent of Its Target Customers

Fortune ~~100~~
~~81~~
78
- 23 (use diversity suppliers)
55

No Market Share Analysis

1,200 Large B2B Customers

No Market Share Analysis

400,000+ B2B Customers

Customer Viewpoint Is Critical: Business Customers Overwhelmingly Not Opposed to Merger

Those few concerned are overwhelmingly Office Depot customers (disruption concerns)



38 years with Office Depot



15+ years with Office Depot



13 years with Office Depot



7 years with Office Depot

Large Companies Have Significant Market Power

- **Sophisticated procurement departments**
- **Leverage their size to obtain better prices and services**
- **Demand price adjustments during the life of contracts**
- **Negotiate favorable contract terms**
- **Lock in favorable pricing in multi-year contracts**
- **Buy off-contract when they find lower prices**

FTC's Witnesses Have Locked in Prices Through Long-Term Contracts

Merger



Staples Stipulates to Honor and Extend Long-Term Contracts

FTC's Expert Agrees Extending Contracts Significantly Reduces Alleged Harm

THE COURT: Right. All right. But that would lessen -- and this is all hypothetical, but that would lessen the anticompetitive concerns that you have --

A. Yes.

THE COURT: -- dramatically, right?

A. Yes. Significantly, yes, it would.



FTC Has Not Fulfilled Its Duty



“The traditional emblem of justice, the scales represent not only the FTC’s history as a law enforcement agency, but also the Commission’s **commitment to fairness and balance** in its work on behalf of consumers nationwide.”

“The winged flywheel, representing progress, reflects the FTC’s commitment to protect consumers’ interests **in a world of evolving technology.**”

FTC Relies on Declarations That It Knows Are False

On Tue, Sep 22, 2015 at 4:49 PM, Ara Arslanian <aarslanian@corporateunited.com> wrote:

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Ara Arslanian
VP, Commercial Operations
e:aarslanian@corporateunited.com
p:218.325.0421 m:218.238.5541

<CorporateUnited_Logo_Color_WithTagline copy.png>

On Tue, Sep 22, 2015 at 1:51 PM, Lisa Wittmer <littmer@corporateunited.com> wrote:
I figured you would be pissed that I sent that out, but it could be big news so I couldn't help myself.... marketing should send something out to the members...they are constantly asking.

CONFIDENTIAL-FTC v. Staples Inc. and Office Depot Inc. Case No: 1:15-cv-02115-EGS (DOC) CU00000337

CONFIDENTIAL- FTC v. Staples Inc. and Office Depot, Inc., Case No. , 15-cv-2115 0300000337

DX0098.002

FTC Pushed for Testimony That Was Not True



17. I am concerned about the proposed merger between Staples and Office Depot. I am confident that we received better pricing from Office Depot during our most recent contract negotiation due, in large part, to the competition from Staples. Staples and Office Depot are currently McDonald's only two realistic options for an office supplies vendor. I believe Staples and Office Depot are each other's closest competitors. They are the only two companies that can independently satisfy all of McDonald's requirements for an office supplies vendor. After the merger, McDonald's would be forced to choose between Staples and far inferior options. ~~While McDonald's would explore any other sourcing options, it is likely that Staples could significantly increase our prices or decrease its service offerings before we would take our business elsewhere. In the absence of competition from Office Depot, it is hard to envision the marketplace exercising any pricing or service discipline on Staples.~~

Amazon Refused to Adopt FTC's Position on Its Capabilities

DRAFT VERSION - ATTORNEY WORK PRODUCT

responses to other parts of a typical RFP, such as stocking arrangements or on-site support, because AB currently has not invested any resources in developing services. AB recently won a small portion—comprising 20 items [ANIZN full # of items in market basket], including notepads and toner—of the business from Multicare Health Systems ("MHS"). MHS awarded AB this small sample office supplies business because AB's pricing for these items—particularly attractive, and because MHS was interested in testing out AB. The award is for a single MHS location [ANIZN will provide]. The MHS win occurred very recently, so AB does not yet know what MHS' spend will be with AB.

DRAFT VERSION – ATTORNEY WORK PRODUCT

9. Of the other eight office supplies RFPs since AB's launch, three other companies

12. ~~[Currently, AB does not believe it will be in a position to respond more comprehensively to large office supplies customer RFPs until the beginning of 2017, and AB will do so only if it can successfully develop and launch the required technologies over the course of 2016.]~~ AB is still researching whether it can develop the necessary technology for certain functions such as customer-specific pricing, invoicing, and bulk shipping. Still, AB recognizes that even if it successfully develops these capabilities, it would be limited in its ability to respond to important RFP requirements such as utilization reporting,

pricing has been more expensive, and AB is looking for ways that AB and its third-party sellers can lower costs.

12. [Currently, AB does not believe it will be in a position to respond more comprehensively to large office supplies customer RFPs until the beginning of 2017, and AB will do so only if it can successfully develop and launch the required technologies over the course of 2016.] AB is still researching whether it can develop the necessary technology for certain functions such as customer-specific pricing, invoicing, and bulk shipping. Still, AB recognizes that even if it successfully develops these capabilities, it would be limited in its ability to respond to important RFP requirements such as utilization reporting,

3



Amazon Refused to Adopt FTC's Position on Its Capabilities



Comment [REDACTED]: The FTC asked us to insert the following sentence: "It is not clear that AB will add all, or even most, of these capabilities over the next two years." This is the FTC's highest priority item. We intend to push back on this proposed forward-looking statement and instead propose the sentence shown in track, which is similar to the "business judgments" sentence in para. 15.



FTC Ignored and Tried to Conceal the Facts

FTC's Opening Argument

Evidence

“Entry or expansion by Amazon, simply as the evidence will show, would not be timely, it’s not likely enough; and by that I mean for Amazon to become the primary supplier to the large business customers.”

12. [Currently, AB does not believe it will be in a position to respond more comprehensively to large office supplies customer RFPs until the beginning of 2017, and AB will do so only if it can successfully develop and launch the required technologies over the course of 2016.] AB is still researching whether it can develop the necessary technology for certain functions such as customer-specific pricing, invoicing, and bulk shipping. Still, AB recognizes that even if it successfully develops these capabilities, it would be limited in its ability to respond to important RFP requirements such as utilization reporting,

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[Faded document snippet showing text]

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Exhaustive Investigation to Delay and Stop Merger

- 14 months since FTC launched investigation
- 16 million pages of documents produced
- 300 third party subpoenas
- 51 third party depositions
- 20 executive depositions
- 10 days of hearings

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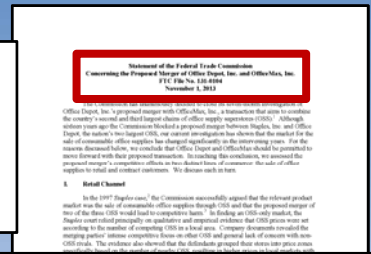
A. Yes.

2016



2013

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