



# FTC's Mission: Protect Consumers



“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's Expert: Merger Will Not Cause Price Increase for Retail Consumers or Small and Medium Size Businesses

“The adverse competitive effects of concern is that the merger will cause prices paid by large customers to rise, **even if the merger does not cause prices paid by small businesses and retail customers to rise.**”

\* \* \*

**“As you go down the hierarchy of the customer sizes they have more choices. And I'm not alleging harm.”**



# FTC Customer Market: Most Powerful Companies on Earth

**ExxonMobil**  
\$337 billion

**Chevron**  
\$160 billion

**J.P.Morgan**  
\$207 billion

**Bank of America**  
\$127 billion

**Walmart**  
\$212 billion

**HALLIBURTON**  
\$30 billion

**DU PONT**  
\$55 billion

**DOW**  
\$56 billion

**Pfizer** \$186 billion

**Goldman Sachs**  
\$64 billion

**comcast**  
\$146 billion





**Office  
DEPOT®**



Source: DDX 121



# Traditional Office Supplies: Disappearing Market



**Traditional office supply  
sales declining**



**Staples and Office Depot  
share value declining**

# Decline in Demand and Increased Competition Forcing Staples and Office Depot to Close Retail Stores



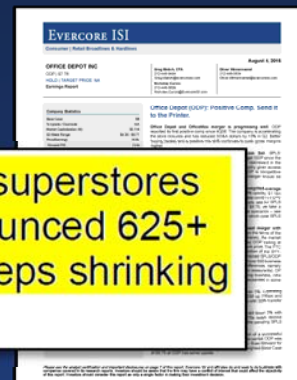
**TAG** TELSEY  
ADVISORY  
GROUP

June 25, 2015

**Retail:** ... Secondly, the explosive growth of online commerce has resulted in substantial loss of in-store sales to Amazon, which sells goods at lower prices.

**EVERCORE ISI**

August 4, 2015  
OFFICE DEPOT INC



**Industry consolidation is needed.** We've argued 3,400 superstores need to be at least 1,000 less. SPLS and ODP have announced 625+ combined store closures over 2-3 years. If the industry keeps shrinking in the meantime, 1,000 might not be enough.



**KeyBanc**  
Capital Markets

## Investment Risks

- **Competition.** Competition from internet retailers and mass merchants remains a significant channel threat, especially as more consumers shop online from retailers like Amazon.com.

# Decline in Demand and Increased Competition Forcing Staples and Office Depot to Close Retail Stores

The Amazon.com logo is displayed in a large, white, rounded rectangular box. The text "amazon.com" is in a bold, black, sans-serif font, with a registered trademark symbol (®) to the upper right of the "m". Below the text is the iconic orange curved arrow that starts under the "a" and points under the "z".

EVERCORE ISI

August 4, 2013  
OFFICE DEPOT INC

## 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

Online retailers stock a vast array of office supply products and can deliver them quickly anywhere in the country at nominal cost. Company documents show that OSS are acutely aware of, and feel threatened by, the continued growth of online competitors, most notably Amazon. OSS have lost, and continue to lose, substantial in-store sales to online competitors.

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





# All Customers Will Benefit From Merger





# All Customers Will Benefit From Merger



**TAG**® TELSEY  
ADVISORY  
GROUP

**COMPANY UPDATE**  
**STAPLES, INC.**  
**JUNE 25, 2015**

Subsequent to a merger of Staples and Office Depot, we expect the surviving company to continue to lose sales through store closures and market share shifts, with the real benefit of the merger being a streamlined cost structure, which should over time result in more competitive pricing and savings to consumers. *Please see our Staples pro-forma model on*

**CONFIDENTIAL**

# The Office Depot/OfficeMax Merger Produced Significant Efficiencies

- Office Depot has *already* achieved over \$600 million in annual synergies from its merger with OfficeMax
- Office Depot expects total run rate synergies of more than **\$750** million, far exceeding initial expectations of \$400 - \$600 million
- This is an **unprecedented** circumstance where two mergers so similar happen in such close succession
- This gives Staples and Office Depot the ability to accurately and confidently project the massive synergies for the merger



# Preliminary Injunction: Extraordinary and Drastic Remedy

- A preliminary injunction that blocks a proposed merger “is an **extraordinary and drastic remedy**.”<sup>1</sup>
- “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**.”<sup>2</sup>
- The public interest is the benefit of the proposed merger to all consumers – not just those mega-companies the FTC has sued to protect.<sup>3</sup>
- The FTC must show a “**reasonable probability**” that the merger will “**substantially impair competition**.”<sup>4</sup>

---

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

<sup>2</sup> 15 U.S.C. § 53(b)

<sup>3</sup> *F.T.C. v. Pharmtech Research, Inc.*, 576 F. Supp. 294, 299 (D.D.C. 1983) (“In the context of a merger proceeding ... public equities include beneficial economic effects and procompetitive advantages for consumers.”).

<sup>4</sup> *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015)



# FTC Burden of Proof

## Reasonable Probability = More Likely Than Not

- FTC must show it's **more likely than not** that the merger would substantially lessen competition.<sup>5</sup>
- 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 <sup>6</sup>
- **The failure to properly define a relevant market is fatal to a merger challenge.<sup>7</sup>**

<sup>5</sup> 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”)

<sup>6</sup> *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116-17 (D.D.C. 2007)

<sup>7</sup> *Arch Coal*, 329 F. Supp. 2d at 116; *FTC v. LabCorp*, No. SACV 10-1873 (C.D. Cal. Mar. 11, 2011)

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

Those few concerned are overwhelmingly  
Office Depot customers



38 years with Office Depot



15+ years with Office Depot



13 years with Office Depot



7 years with Office Depot



3 years with Office Depot



# Retail Customers Pay Almost 50% More Than Megacompanies

**ExxonMobil**

**Goldman  
Sachs**

**comcast**

**Bank of America**

**DOW**

**Pfizer**

**HALLIBURTON**

**J.P.Morgan**

**Chevron**

**DUPONT**

**Walmart**

“[I]n-store prices are 46%  
higher than the contract  
prices paid by Staples’  
large customers.”

– FTC’s Expert Dr. Carl Shapiro

CONFIDENTIAL MATERIAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Federal Trade Commission, et al.,  
Plaintiffs,

v.  
Staples, Inc. and Office Depot, Inc.  
Defendants.

Civil Action No. 1:15-cv-02115 (EGS)

EXPERT REPORT OF CARL SHAPIRO  
February 15, 2016

THIS DOCUMENT CONTAINS CONFIDENTIAL MATERIAL

# Megacompanies Use Many Tools to Secure Lowest Prices

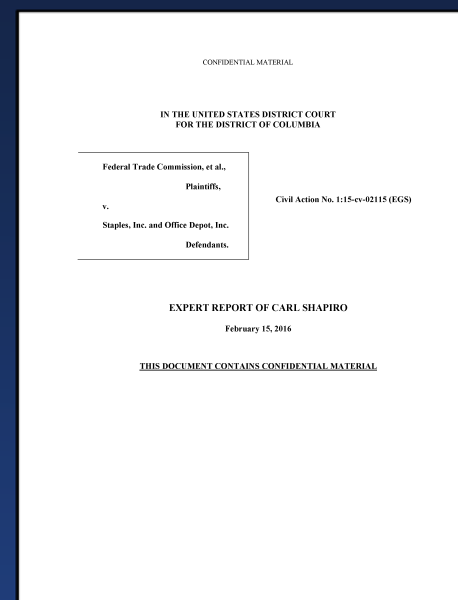
- Request-for-proposal process
- Use of procurement consultants
- Reverse auctions
- Purchase or threaten to purchase some products direct from manufactures
- Demand price adjustments during life of contracts
- Buy products off-contract
- Cross-category retaliation
- Comparison with online pricing



# FTC Concedes That Megacompanies Will Continue to Pay Substantially Less Post-Merger

“[L]arge customers typically pay less than smaller business customers or retail customers for their consumable office supplies, and this will remain the case even if Staples significantly raises the price to large customers (but not smaller customers or retail customers) following the merger.”

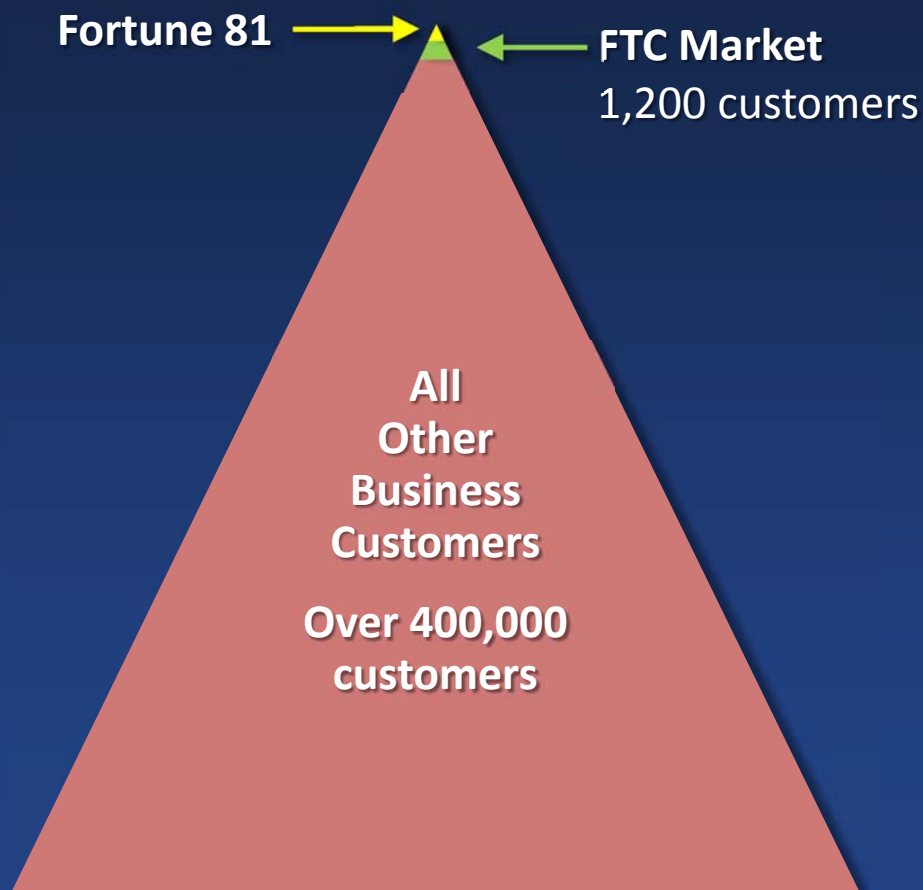
– FTC’s Expert Dr. Carl Shapiro



# The Business Contract Market Is Much Broader Than the Fortune 100

FTC customer market:

Less than 1% of business customers (1,200 out of 400,000+ B2B customers)

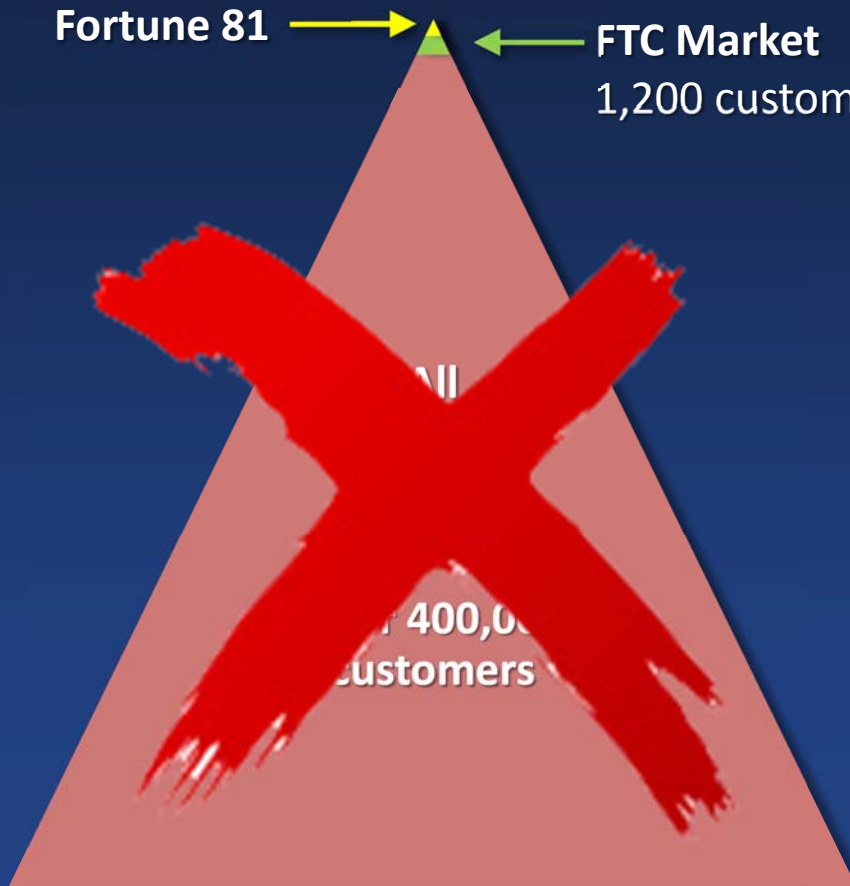


# The Business Contract Market Is Much Broader Than the Fortune 100

FTC customer market:

Less than 1% of business customers (1,200 out of 400,000+ B2B customers)

Fortune 81 → ← FTC Market  
1,200 customers



FTC cleaves out 399,999+  
business customers

99%+

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

**“As you go down the hierarchy of the customer sizes they have more choices. And I'm not alleging harm.”**

**No Market Share  
Analysis**

**1,200 Large B2B Customers**

**No Market Share  
Analysis**

**400,000+ B2B Customers**



CONFIDENTIAL MATERIAL

CONFIDENTIAL MATERIAL

CONFIDENTIAL MATERIAL

CONFIDENTIAL MATERIAL

CONFIDENTIAL MATERIAL

# Bid Data and “Primary Vendor” Analyses Are Not Market Share Analyses

Q. Dr. Shapiro, just briefly, FTC counsel asked you about the bid data and your primary vendor analysis. You've made pretty clear in your deposition and here, neither one of those are market share calculations, fair?

A. That's fair.



# Bid Data and "Primary Vendor" Analyses Are Not Market Share Analyses

**Exhibit 7**  
**Primary Vendor Relationships**  
*Consumable Office Supplies, 2014*

Supplier	Share
Office Depot	45.1%
Staples	42.6%
Venue	3.8%
Dynex	3.2%
W. B. Mason	0.9%
Hi Touch	0.9%
Trianga	0.8%
School Specifications	0.5%
Georgia Pacific	0.5%
ALPD	0.4%
Landoway's Museum	0.3%
Weeks-Larson	0.3%
Geisinger	0.2%
Gulf Coast Office Products	0.2%
American Paper & Tissue Co.	0.1%
Genesville	0.1%
Office Essentials	0.1%
Innovative Office Solutions	0.1%
Forman & Supply	0.1%
Indust	0.1%
A-Z Office Resources	0.1%
Complete Office, LLC	0.1%
Warehouse Direct	0.1%
Impact Office	0.1%
EDN Office	0.1%
Independent Stations	0.1%
Lawrence	0.1%
Adrian's Express	0.1%
Amazon Supply Business	0.1%
Capital Office Products	0.1%
Complete Office Supply	0.1%
Farmstead	0.1%
Office Solutions	0.1%
Total Office Products	0.1%
Village Office Supply	0.1%
Staples - Office Depot	0.1%
<b>Total</b>	<b>100.0%</b>

**Exhibit 9A**  
**Bidder Appearances: Consumable Office Supplies Opportunities**  
*Fortune 100 Customers, 2012-2015 (N = 43)*

Supplier	Share
Office Depot	45.1%
Staples	42.6%
Venue	3.8%
Dynex	3.2%
W. B. Mason	0.9%
Hi Touch	0.9%
Trianga	0.8%
School Specifications	0.5%
Georgia Pacific	0.5%
ALPD	0.4%
Landoway's Museum	0.3%
Weeks-Larson	0.3%
Geisinger	0.2%
Gulf Coast Office Products	0.2%
American Paper & Tissue Co.	0.1%
Genesville	0.1%
Office Essentials	0.1%
Innovative Office Solutions	0.1%
Forman & Supply	0.1%
Indust	0.1%
A-Z Office Resources	0.1%
Complete Office, LLC	0.1%
Warehouse Direct	0.1%
Impact Office	0.1%
EDN Office	0.1%
Independent Stations	0.1%
Lawrence	0.1%
Adrian's Express	0.1%
Amazon Supply Business	0.1%
Capital Office Products	0.1%
Complete Office Supply	0.1%
Farmstead	0.1%
Office Solutions	0.1%
Total Office Products	0.1%
Village Office Supply	0.1%
Staples - Office Depot	0.1%
<b>Total</b>	<b>100.0%</b>

**Exhibit 9B**  
**Office Depot and Staples Losses to Competitors**  
*Fortune 100 Bid Data*  
*Consumable Office Supplies Opportunities, 2012-2015*

Supplier	Winner	Number of Bids	Share of Incremental Losses
Office Depot	Staples	8	100%
Staples	Office Depot	0	0%
<b>Total</b>	<b>Total</b>	<b>8</b>	<b>100%</b>

**Exhibit 10**  
**Competitor Appearances in the Staples Bid Data**  
*Consumable Office Supplies Opportunities, 2012-2014 (N = 393)*

Supplier	Share
Office Depot	45.1%
Staples	42.6%
Venue	3.8%
Dynex	3.2%
W. B. Mason	0.9%
Hi Touch	0.9%
Trianga	0.8%
School Specifications	0.5%
Georgia Pacific	0.5%
ALPD	0.4%
Landoway's Museum	0.3%
Weeks-Larson	0.3%
Geisinger	0.2%
Gulf Coast Office Products	0.2%
American Paper & Tissue Co.	0.1%
Genesville	0.1%
Office Essentials	0.1%
Innovative Office Solutions	0.1%
Forman & Supply	0.1%
Indust	0.1%
A-Z Office Resources	0.1%
Complete Office, LLC	0.1%
Warehouse Direct	0.1%
Impact Office	0.1%
EDN Office	0.1%
Independent Stations	0.1%
Lawrence	0.1%
Adrian's Express	0.1%
Amazon Supply Business	0.1%
Capital Office Products	0.1%
Complete Office Supply	0.1%
Farmstead	0.1%
Office Solutions	0.1%
Total Office Products	0.1%
Village Office Supply	0.1%
Staples - Office Depot	0.1%
<b>Total</b>	<b>100.0%</b>

**Exhibit 11**  
**Competitor Appearances in the Staples Bid Data**  
*Consumable Office Supplies Opportunities, 2012-2014 (N = 393)*

Supplier	Share
Office Depot	45.1%
Staples	42.6%
Venue	3.8%
Dynex	3.2%
W. B. Mason	0.9%
Hi Touch	0.9%
Trianga	0.8%
School Specifications	0.5%
Georgia Pacific	0.5%
ALPD	0.4%
Landoway's Museum	0.3%
Weeks-Larson	0.3%
Geisinger	0.2%
Gulf Coast Office Products	0.2%
American Paper & Tissue Co.	0.1%
Genesville	0.1%
Office Essentials	0.1%
Innovative Office Solutions	0.1%
Forman & Supply	0.1%
Indust	0.1%
A-Z Office Resources	0.1%
Complete Office, LLC	0.1%
Warehouse Direct	0.1%
Impact Office	0.1%
EDN Office	0.1%
Independent Stations	0.1%
Lawrence	0.1%
Adrian's Express	0.1%
Amazon Supply Business	0.1%
Capital Office Products	0.1%
Complete Office Supply	0.1%
Farmstead	0.1%
Office Solutions	0.1%
Total Office Products	0.1%
Village Office Supply	0.1%
Staples - Office Depot	0.1%
<b>Total</b>	<b>100.0%</b>



# Large Business Customer Contracts Not Binding on Customer

## Section 14.11 Other Suppliers; Commitment.

This is not an exclusive agreement. Supplier acknowledges that [REDACTED] uses (and reserves the right to continue to use) other suppliers to provide goods and services that are similar or related to the Deliverables. Supplier will, to the extent reasonably requested by [REDACTED], cooperate in good faith and in a timely manner with [REDACTED]'s other suppliers to allow the suppliers to efficiently perform services for [REDACTED] and its customers.

This CORPORATE PROCUREMENT AGREEMENT ("Agreement"), effective September 1, 2009 ("Effective Date") is entered into between: **Office Depot, Inc.**, 6600 N. Military Trail, Boca Raton, FL 33496 (hereinafter referred to as "**Supplier**") and [REDACTED] (hereinafter referred to as "**Purchaser**").

2.5 Supplier and Purchaser understand that Purchaser does not guarantee any minimum amount of purchases nor does it guarantee any minimum amount of revenue to Supplier. Purchaser shall not be liable to Supplier for loss of business or revenues, or excess inventory, if Purchaser's Purchase Orders do not meet Supplier's expectations.

17.12 **Non-Exclusive Relationship.** This Agreement is not intended to, nor does it create, an exclusive relationship between the parties, nor will anything contained in this Agreement be deemed to be a restriction of any type on either party's ability to freely compete or enter into other relationships with other entities or individuals.

THIS CONTRACT, 3330380000X103 ("Contract") effective April 1, 2010 ("Effective Date"), is made between [REDACTED], a New York corporation, for itself and as agent for the affiliated companies of the [REDACTED] ("Owner" or [REDACTED]), and **OfficeMax Incorporated**, a Delaware corporation ("Seller" or "OfficeMax"). This Contract Letter supersedes Supply Agreement No. 723066X103.

## NON- EXCLUSIVE AGREEMENT:

The execution of this Contract does not constitute an exclusive relationship between the parties. Owner may use other sellers to obtain or purchase the same or similar Goods. Despite the incentive programs under this Contract, the Owner is not required to meet a certain volume of purchases under this Contract.

This Amendment #2 to Office Depot Supply Agreement (this "**Second Amendment**") is made and entered into as of the 15<sup>th</sup> day of November, 2013 (the "**Second Amendment Effective Date**"), by and between Office Depot, Inc. ("**Office Depot**") and [REDACTED] ("**Customer**"). The term "**Agreement**" as used herein shall mean the Current Agreement (as defined in Recital B) as amended, modified, and supplemented by this Second Amendment and all other capitalized terms used herein but not otherwise defined herein shall have the meaning ascribed to such terms in the Agreement.

e. **No Commitment.** Office Depot understands and acknowledges that neither Customer nor any of the Customer Locations has promised or committed to purchase any particular quantity of any of the Products or any particular percentage of its requirements for items such as the Products, and that Customer and/or the Customer Locations may purchase other products from other vendors and suppliers performing some or all of the same functions as the Products."

# Large Business Customer Contracts Not Binding on Customer

## Section 14.11 Other Suppliers: Commitment.

This is not an exclusive agreement. Supplier acknowledges that [REDACTED] uses (and reserves the right to continue to use) other suppliers to provide goods and services that are similar or related to the Deliverables. Supplier [REDACTED] in a timely manner with [REDACTED] and its customers.

This CORPORATE PRO  
("Effective Date") is ente  
33496 (hereinafter referre

2.5 Supplier and Pur  
purchases nor does it gu  
liable to Supplier for loss  
not meet Supplier's expe

17.12 Non-Exclusive R  
relationship between the  
restriction of any type o  
other entities or individu

re Date"), is made  
self and as agent for  
, and OfficeMax  
supersedes Supply

ties. Owner may use  
programs under this  
act.

amendment") is made  
Effective Date"), by  
("Customer"). The  
ed in Recital B) as  
capitalized terms used  
ns in the Agreement.

e. No Commitment. Office Depot understands and acknowledges that neither Customer nor any of the Customer Locations has promised or committed to purchase any particular quantity of any of the Products or any particular percentage of its requirements for items such as the Products, and that Customer and/or the Customer Locations may purchase other products from other vendors and suppliers performing some or all of the same functions as the Products."

## Contracts $\neq$ Market Share

# FTC's Expert: Leakage Could Be Substantially Higher Than His Estimate

Q. Notwithstanding the statements and the lack of hard financial data, you assigned an average of, what was it, 3 percent or 3.7 percent for all these companies in terms of leakage, right?

A. From these reports here we took a weighted average, yes.

Q. So if somebody said, okay, it's **de minimis**, you said, okay, I'll give that 1 percent?

A. That's what I did.

Q. Okay. And then you took that average based on this information that lacks hard, financial data, and you applied it to the 55 for which you had zero data, zero information, right?

A. Zero information about their unrecorded discretionary leakage, yes.

...

Q. And even for the 26 it would have been better if you had hard data rather than statements saying, you know, yeah, okay, I think it's **de minimis**, right?

A. For this piece, sure, I'd rather have hard data than estimates like this, yes.

Q. And that -- and it was on that basis that you assigned a leakage value across these companies of about 3.7 percent, right?

A. Correct.

Q. **And the truth is, it could be substantially higher?**

A. **It's -- it's conceivable.**



# FTC's Expert: Leakage Could Be Substantially Higher Than His Estimate

Q. Notwithstanding the statements and the lack of hard financial data, you assigned an average of, what was it, 3 percent or 3.7 percent for all these companies in terms of leakage, right?

A. From these reports here we took a weighted average, yes.

Q. So if somebody said, okay, it's **de minimis**, you said, okay, I'll give that 1 percent?

A. That's what I did.

Q. Okay. And then you said, "I don't have any hard financial data, and you applied it to the statements?"

A. Zero information.

...

Q. And even for the statements, saying, you know, "I don't have any hard financial data, and you applied it to the statements?"

A. For this piece, surely, you'd rather have hard data than estimates like this, yes.

Q. And that -- and it was on that basis that you assigned a leakage value across these companies of about 3.7 percent, right?

A. Correct.

Q. **And the truth is, it could be substantially higher?**

A. **It's -- it's conceivable.**

**De minimis??**

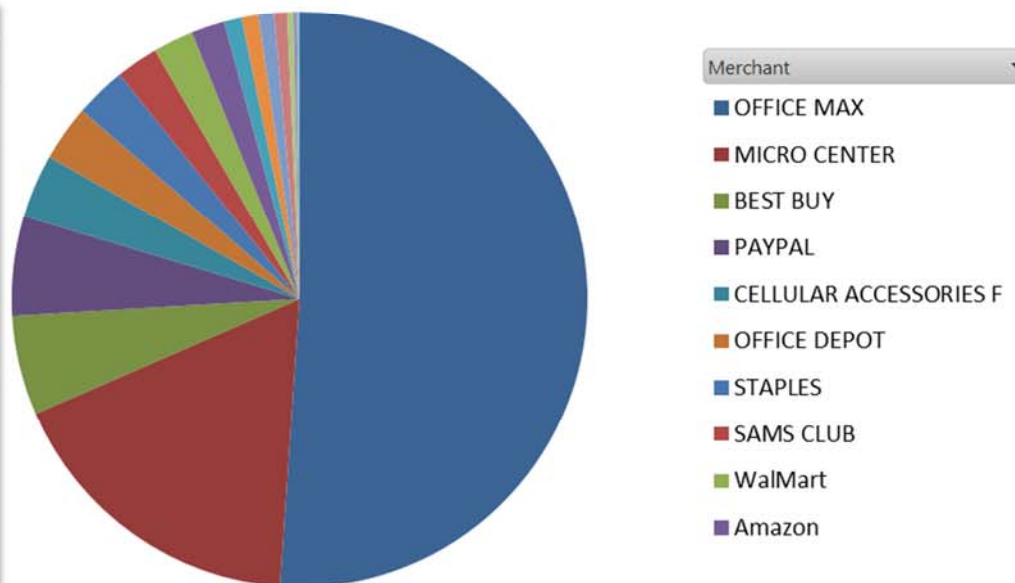
# Leakage Not “De Minimis”

**AEP had over \$200,000 in off-contract spend in just one month**

Merchant	Data	
	Sum of Amount	Count of Amount
OFFICE MAX	219,296.03	6,124
MICRO CENTER	74,590.00	6
BEST BUY	24,036.10	234
PAYPAL	24,028.03	118
CELLULAR ACCESSORIES F	15,390.12	349
OFFICE DEPOT	13,491.69	453
STAPLES	12,334.20	130
SAMS CLUB	10,173.24	104
WalMart	9,731.92	170
Amazon	8,040.48	113
RADIOSHACK	4,286.20	88
WM SUPERCENTER	4,001.90	67
CARDINAL OFFICE PRODUC	3,815.68	51
HARPER ENGRAVING	3,100.90	148
WWW.NEWEGG.COM	1,513.50	11
TARGET	778.89	89
QUILL CORPORATION	662.47	3
<b>Grand Total</b>	<b>429,271.35</b>	<b>8,258</b>

## Office/Kitchen Supply and Cellular Accessories

April 2014



**Total office supply contract spend: \$2.1 million**



## Leakage Not “De Minimis”

- 65% of McDonald’s franchisees purchase ALL office supplies off-contract
- McDonald’s did not track employees’ off-contract purchases of office supplies on corporate cards

**Majority of  
McDonald’s  
franchisees purchase  
off-contract**

## 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.**



# Product Market Must Reflect Business Realities

- “The appropriate line of commerce for Clayton Act purposes must be chosen in terms of **the realities of the business situations involved.**”<sup>8</sup>
- “[T]he determination of the relevant market in the end is ‘a matter of business reality--[]of how the market is perceived by those who strive for profit in it.’ **It is imperative that the Court, in determining the relevant market, take into account the economic and commercial realities** of the pharmaceutical industry.”<sup>9</sup>
- In *Sysco*, the Court found that one expert was more persuasive than another because his conclusions were “**more consistent with the business realities of the food distribution market.**”<sup>10</sup>

<sup>8</sup> *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 6-7 (D.D.C.), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990)

<sup>9</sup> *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) (internal citation omitted).

<sup>10</sup> *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 36-37 (D.D.C. 2015)



## 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**.

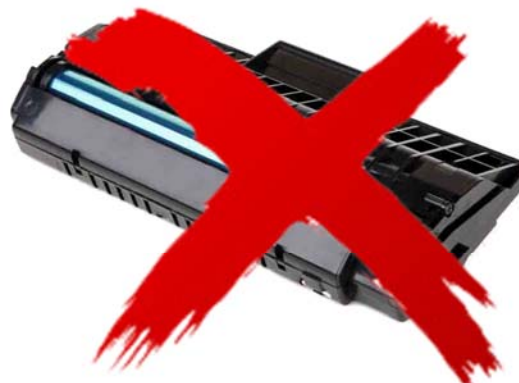
A. Certainly.

# 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

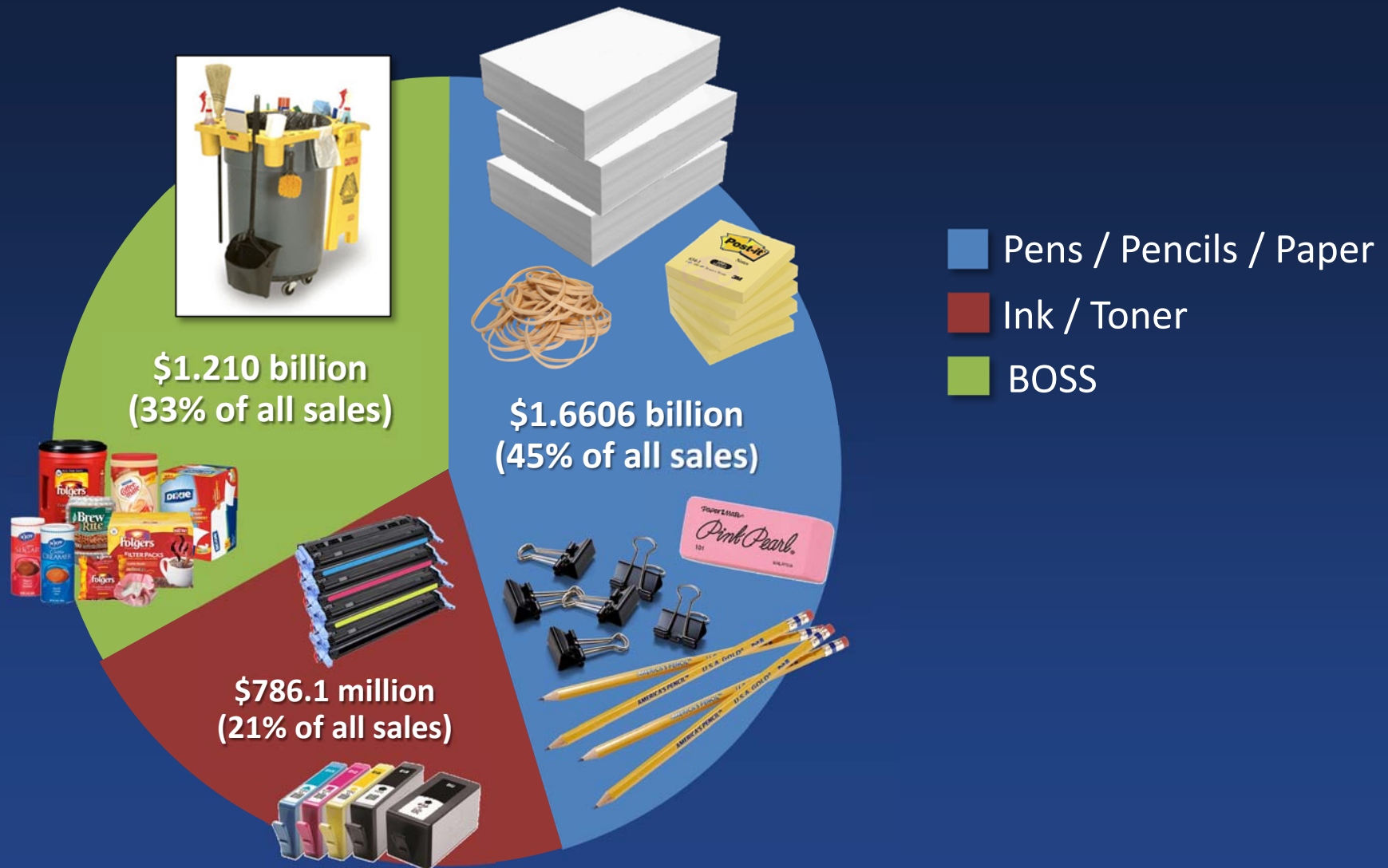


Definition of  
"Consumable Office Supplies"  
"Office supplies that customers  
use up, discard, and repurchase  
on a recurrent basis."



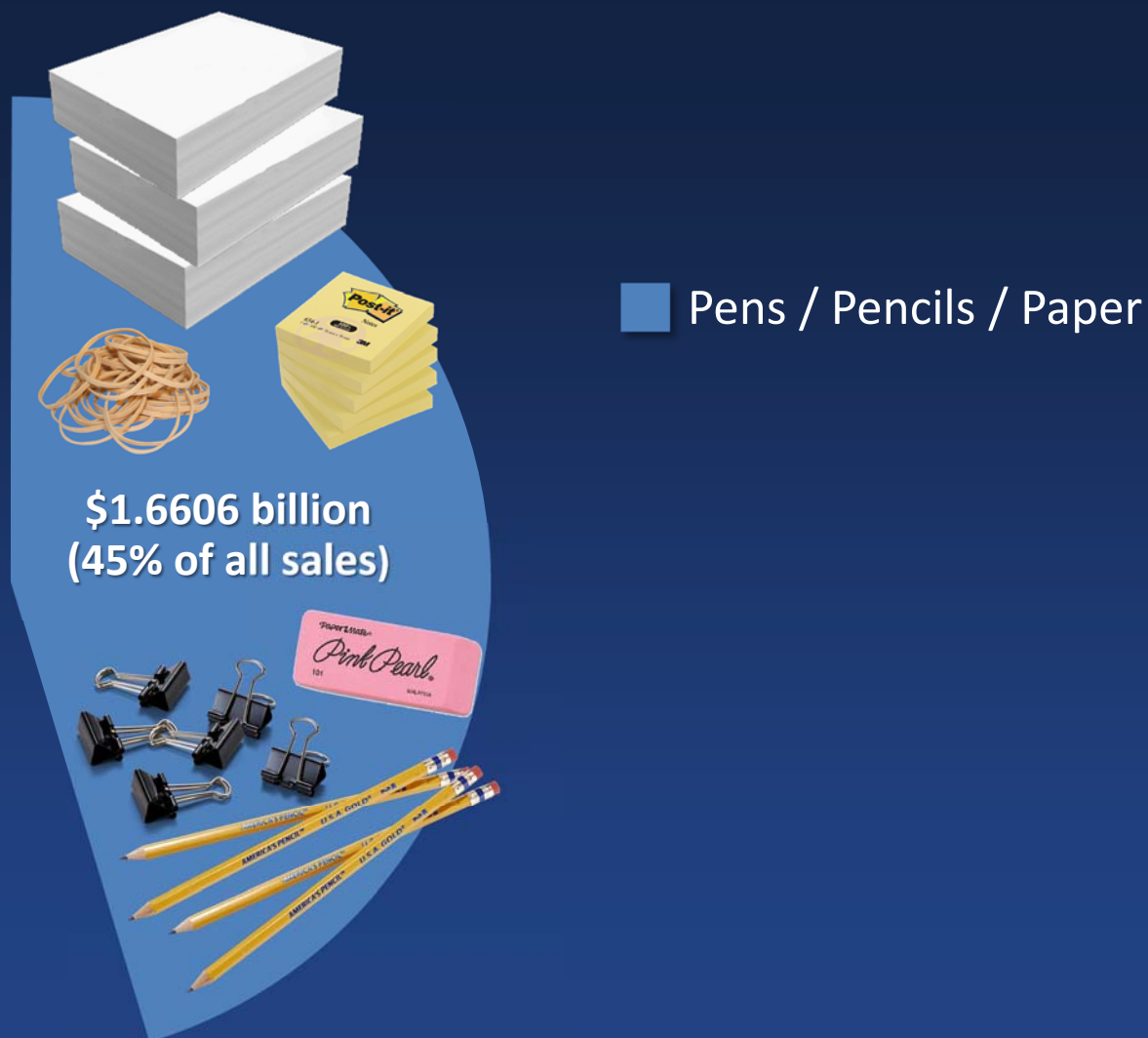


## FTC's Gerrymandered Product Market Eliminates a Third of Traditional Office Supplies and More Than Half of Product Revenue





## FTC's Gerrymandered Product Market Eliminates a Third of Traditional Office Supplies and More Than Half of Product Revenue



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



Source: Tr. at 233:5-19, 397:11-15, 524:19-25, 937:5-12, 1098:7-1099:1, 1262:17-1263:20, 1471:6-15, 1799:24-1800:12, 2004:16-25, 2606:6-14; BoA Dep. Tr. at 50:21-51:17, 73:11-13

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



**“Add me  
to the list”**



# FTC's Witnesses: Ink and Toner Are Consumable Office Supplies



Q. So you include, in **consumable office supplies, ink and toner**, correct, sir?

A. Yes, I did.



Q. Best Buy considers **consumable office supplies** to include, not just general office supplies, but also copy paper and **ink and toner**; is that right?

A. Yes.



Q. Well, at the very least, sir, when you think of something called **consumable office supplies**, you would include -- you would define that to include general office supplies, paper, **ink and toner**, right, sir?

A. Yes. Yes, I would.



Q. When you refer to the office product category team, what types of products fall within the office product category team?

A. Office printers -- we call it office electronics, things like that. Ink jet printers. And then there's a lot of **consumable office products, like** paper, pen, notebooks, **ink jet cartridges**.



# FTC's Witnesses: Ink and Toner Are Consumable Office Supplies



HEALTHTRUST™

Q. And **consumable office supplies** also includes **ink and toner**, right, sir?

A. It does



Our Office Depot contract covers our purchases of **consumable office supplies**, which includes general office supplies (i.e., pens, pencils, notepads, staplers, paperclips, post-it notes, and other such items), paper, and **printer ink and toner**.



**THE COURT:** What encompasses office supplies?

A. Office supplies, [at] McDonald's, is your **standard consumables**: Pens, paper, notepads, binders, paperclips. And we also include **toner** and paper, copy paper in that as well.



Q. And, also, you include in this RFP **ink and toner**, but it's not in this summary, is it?

A. That is correct. . . .

Q. So all of these is considered by Select Medical and by you personally as office supplies, right?

A. Yes. They would be office supplies.




Q. Would you include **ink and toner** in the category of office supplies?

A. I would.

# Customer RFPs and Contracts Include Ink and Toner in Bundle

## 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, Paper, Tech, Furniture, Breakroom	9	2.3%
Breakroom, Business Machines, 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, Office Supplies, Paper, Technology	5	1.3%
Office Supplies, Paper	5	1.3%
Breakroom, Business Machines, Furniture, Ink/Toner, Jan/San, Office Supplies, Paper, Print, Technology	4	1.0%
Business Machines, Ink/Toner, Office Supplies, Paper	4	1.0%
Breakroom, Furniture, Ink/Toner, Jan/San, Office Supplies, Paper, Technology	3	0.8%
Breakroom, Jan/San, Office Supplies, Paper	3	0.8%
Business Machines, Furniture, Ink/Toner, Jan/San, Misc. Office Supplies, Paper, Technology	3	0.8%
Business Machines, Ink/Toner, Office Supplies, Paper, Technology	3	0.8%
Ink/Toner, Jan/San, Office Supplies, Paper	3	0.8%
Ink/Toner, Office Supplies, Paper	3	0.8%
Jan/San, Office Supplies, Technology	3	0.8%
Breakroom, Business Machines, Furniture, Jan/San, Misc. Office Supplies, Paper, Technology	2	0.5%
Breakroom, Business Machines, Furniture, Jan/San, Office Supplies, Paper, Technology	2	0.5%
Breakroom, Business Machines, Ink/Toner, Jan/San, Misc. Office Supplies, Paper, Technology	2	0.5%
Breakroom, Business Machines, Ink/Toner, Jan/San, Office Supplies, Paper	2	0.5%
Breakroom, Business Machines, Ink/Toner, Office Supplies, Paper, Technology	2	0.5%
Breakroom, Ink/Toner, Jan/San, Office Supplies, Paper	2	0.5%
Business Machines, Furniture, Ink/Toner, Jan/San, Office Supplies, Paper, Print, Technology	2	0.5%
Business Machines, Furniture, Ink/Toner, Office Supplies, Paper	2	0.5%
Business Machines, Ink/Toner, Office Supplies	2	0.5%
Business Machines, Office Supplies, Paper	2	0.5%
Furniture, Office Supplies, Paper	2	0.5%
Ink/Toner, Jan/San, Office Supplies, Paper, Technology	2	0.5%
Ink/Toner, Office Supplies	2	0.5%
Mail/ship supplies	2	0.5%
Paper	2	0.5%
Breakroom, Business Machines, FS BREAKROOM, Ink/Toner, Jan/San, Office Supplies, Paper	1	0.3%
Breakroom, Business Machines, FS LINERS, Furniture, Ink/Toner, Jan/San, Office Supplies, Paper, Technology	1	0.3%
Breakroom, Business Machines, Furniture, Ink/Toner, Jan/San, Misc. Office Supplies, Paper	1	0.3%
Breakroom, Business Machines, Furniture, Ink/Toner, Jan/San, Misc. Office Supplies, Technology	1	0.3%
Breakroom, Business Machines, Furniture, Ink/Toner, Office Supplies, Paper	1	0.3%
Breakroom, Business Machines, Furniture, Jan/San, Office Supplies, Paper, Print, Technology	1	0.3%
Breakroom, Business Machines, Ink/Toner, Jan/San, Misc. Office Supplies, Paper, Print, Technology	1	0.3%
Breakroom, Business Machines, Jan/San, Misc. Office Supplies, Paper	1	0.3%
Breakroom, Business Machines, Jan/San, Misc. Office Supplies, Paper, Technology	1	0.3%
Breakroom, Furniture, Jan/San, Office Supplies, Paper, Technology	1	0.3%
Breakrooms, Ink/Toner, Jan/San, Misc. Office Supplies, Paper, Technology	1	0.3%
Breakroom, Ink/Toner, Jan/San, Office Supplies, Paper, Technology	1	0.3%
Business Machines, Furniture, Ink/Toner, Jan/San, Office Supplies, Paper	1	0.3%
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%



Overwhelming majority include ink and toner

# FTC Witness: Ink and Toner Critical to Include in Product Bundle



HEALTHTRUST™

**Q.** Well, sir, for whatever reason, if you weren't happy with Staples' service, one of the levers your negotiators have, whether you actually want to use it or not, you can take that business elsewhere, right, sir?

**A.** Which business are you referring to?

**Q. The ink and toner.**

**A. We think that we would lose the overall value proposition by segmenting these categories. We feel like we create better value by aggregating these categories.**

**Q.** Your negotiators wouldn't even try to make that claim to Staples, they would just say, You got us?

**A. We have never, ever separated ink and toner, except for reman'd for minority business. We have always bundled it together.**



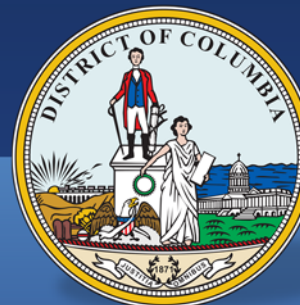
# FTC 2016: Consumable Office Supplies Include Ink and Toner

**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 Consumable Office Supplies Include 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

products at previously negotiated prices. Because there are dozens, if not hundreds, of office suppliers that compete effectively to serve small and medium-sized businesses, the investigation focused on contracts for large multi-regional or national customers, which typically have the most demanding purchasing requirements and, as a result, fewer potential suppliers capable of meeting their needs.

<sup>3</sup> “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.



# Dr. Shapiro's Changing Story on Exclusion of Ink and Toner

## Dr. Shapiro's Morning Testimony

**THE COURT:** You did your analysis based upon what the government's definition of consumable office supplies was, correct? In other words, the government defined this market before you did your investigation, right?

**A.** No, that's not correct. ... It's more of a back-and-forth. I'll say collaborative.

\* \* \*

**Q.** Did you see any preliminary analysis from anybody where ink and toner was in the market share analysis? There was a decision to take it out. It must have been based on some data?

**A.** I can't speak to the FTC's decision. I can speak to my views on it, that I communicated to them, which was based on declarations from Lexmark, Xerox, probably HP, some of the big eight MPS vendors.



# 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.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

RECEIVED  
DEC -7 2015  
Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

FEDERAL TRADE COMMISSION  
400 Pennsylvania Avenue, N.W.  
Washington, DC 20580

DISTRICT OF COLUMBIA  
441 4th Street, N.W., Suite 600 South  
Washington, DC 20001

COMMONWEALTH OF PENNSYLVANIA  
14th Floor Strickland Square  
Harrisburg, PA 17120

Plaintiff, Civil Action No. \_\_\_\_\_  
v. FILED UNDER SEAL  
and  
STAPLES, INC.  
300 Staples Drive  
Pleasanton, MA 01792  
and  
OFFICE DEPOT, INC.  
6000 North Military Trail  
Boca Raton, FL 33496  
Defendants.

COMPLAINT FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION PURSUANT TO  
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiffs, the Federal Trade Commission ("FTC" or "Commission"), by its designated  
attorneys, and the District of Columbia and the Commonwealth of Pennsylvania, acting by and  
through their respective Office of Attorney General (collectively, "Plaintiff States"), petition this  
Court for a temporary restraining order and preliminary injunction enjoining Staples, Inc.  
("Staples") from consummating its proposed merger (the "Merger") with Office Depot, Inc.

RECEIVED  
DEC -7 2015  
Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

DECLARATION OF MICHAEL HEACOCK

STATE OF NEW YORK )  
CITY OF ROCHESTER )

Michael Heacock declares as follows:

1. I am Vice-President and General Manager for Managed Print Services ("MPS"), as part  
of Xerox Corporation's ("Xerox") Graphic Communications Business Group. I have  
worked at Xerox for 10 years and have served in my current capacity for 3 years. As  
Vice-President and General Manager, I am responsible for Xerox's MPS program in  
support of our Graphic Communications Business Group.

2. In 2014, Xerox had annual revenues of \$11.041 billion in the United States. MPS

I am Vice-President and General Manager for Managed Print Services ("MPS"), as part  
of Xerox Corporation's ("Xerox") Graphic Communications Business Group. I have  
worked at Xerox for 10 years and have served in my current capacity for 3 years. As  
Vice-President and General Manager, I am responsible for Xerox's MPS program in  
support of our Graphic Communications Business Group.

1/4/2016  
Date



# 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.

RECEIVED  
DEC -7 2015  
Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION  
400 Pennsylvania Avenue, N.W.  
Washington, DC 20580

DISTRICT OF COLUMBIA  
441 4th Street, N.W., Suite 600 South  
Washington, DC 20001

COMMONWEALTH OF PENNSYLVANIA  
140 First Street  
Harrisburg, PA 17120

Plaintiff,

Civil Action No. \_\_\_\_\_

FILED UNDER SEAL

STAPLES, INC.  
300 Staples Drive  
Pleasanton, MA 01792

and

OFFICE DEPOT, INC.  
6000 North Military Trail  
Boca Raton, FL 33496

Defendants.

COMPLAINT FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION PURSUANT TO  
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), by its designated  
attorneys, and the District of Columbia and the Commonwealth of Pennsylvania, acting by and  
through their respective Office of Attorney General (collectively, "Plaintiff States"), petition this  
Court for a temporary restraining order and preliminary injunction enjoining Staples, Inc.  
("Staples") from consummating its proposed merger (the "Merger") with Office Depot, Inc.

RECEIVED  
DEC -7 2015  
Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

I am the Director of Channel Sales for North America for **Lexmark International, Inc.** ("Lexmark"), a leading developer, manufacturer, and supplier of printing, imaging, device management, and managed print services ("MPS"). I have worked at Lexmark for 15 years and have served in my current capacity for the past three years. As Director of Channel Sales for North America, I am responsible for our business relationships with our channel partners, including those partners that provide toner fulfillment services to our MPS customers.

DECLARATION OF RICARDO DUQUE

State of Kentucky )  
County of Fayette )

I, Ricardo Duque, declare as follows:

1. I am the Director of Channel Sales for North America for Lexmark International, Inc. ("Lexmark"), a leading developer, manufacturer, and supplier of printing, imaging, device management, and managed print services ("MPS"). I have worked at Lexmark for 15 years and have served in my current capacity for the past three years. As Director of Channel Sales for North America, I am responsible for our business relationships with our channel partners, including those partners that provide toner fulfillment services to our MPS customers.

1/15/16  
Date

# 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.

RECEIVED  
DEC - 7 2015  
Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION  
400 Pennsylvania Avenue, N.W.  
Washington, DC 20580

DISTRICT OF COLUMBIA  
401 4th Street, N.W., Suite 600 South  
Washington, DC 20001

COMMONWEALTH OF PENNSYLVANIA  
140 First Street  
Harrisburg, PA 17120

Plaintiff,

vs.

STAPLES, INC.  
300 Staples Drive  
Pleasanton, MA 01922

and

OFFICE DEPOT, INC.  
6000 North Military Trail  
Boca Raton, FL 33496

Defendants.

Civil Action No. \_\_\_\_\_  
FILED UNDER SEAL

COMPLAINT FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION PURSUANT TO  
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiffs, the Federal Trade Commission ("FTC" or "Commission"), by its designated  
attorneys, and the District of Columbia and the Commonwealth of Pennsylvania, acting by and  
through their respective Office of Attorney General (collectively, "Plaintiff States"), petition this  
Court for a temporary restraining order and preliminary injunction enjoining Staples, Inc.  
("Staples") from consummating its proposed merger (the "Merger") with Office Depot, Inc.

My name is Bob Brock, Vice President, Legal and Managed Services at Ricoh Americas Corporation ("Ricoh"). I have worked in this capacity for more than three years. My job responsibilities include leading the team responsible for selling Ricoh's Legal Services and Managed Services to existing customers and prospective accounts.

Dated: February 9, 2016

# 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.

RECEIVED  
DEC -7 2015  
Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION  
400 Pennsylvania Avenue, N.W.  
Washington, DC 20580

DISTRICT OF COLUMBIA  
441 4th Street, N.W., Suite 600 South  
Washington, DC 20001

COMMONWEALTH OF PENNSYLVANIA  
140 First Street  
Harrisburg, PA 17120

Plaintiff,

Civil Action No. \_\_\_\_\_

FILED UNDER SEAL

STAPLES, INC.  
300 Staples Drive  
Pleasanton, MA 01701

and

OFFICE DEPOT, INC.  
6000 North Military Trail  
Boca Raton, FL 33436

Defendants.

COMPLAINT FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION PURSUANT TO  
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiffs, the Federal Trade Commission ("FTC" or "Commission"), by its designated  
attorneys, and the District of Columbia and the Commonwealth of Pennsylvania, acting by and  
through their respective Office of Attorney General (collectively, "Plaintiff States"), petition this  
Court for a temporary restraining order and preliminary injunction enjoining Staples, Inc.  
("Staples") from consummating its proposed merger (the "Merger") with Office Depot, Inc.

RECEIVED  
DEC -7 2015  
Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,  
Plaintiff,  
v.  
STAPLES, INC.,  
Defendant.

Civil Action No. 1:15-CV-02115 (EGS)

DECLARATION OF DENNIS AMOROSANO ON BEHALF OF NON-PARTY  
CANON U.S.A., INC. IN RESPONSE TO SUBPOENAS TO JANUARY 20, 2016

1. I am the Vice President & General Manager of BISG Marketing & CIIS Professional Services within the Marketing Division of the Business Imaging Solutions Group at non-party Canon U.S.A., Inc. ("Canon USA"). I submit this declaration in response to the subpoenas issued on behalf of defendant Staples, Inc. ("Staples") to Canon USA on January 20, 2016 (the "Subpoenas") in the above-captioned action pending in the U.S. District Court for the District of Columbia (the "Action").

Dated: February 11, 2016

# 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.

RECEIVED  
DEC - 7 2015  
Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION  
400 Pennsylvania Avenue, N.W.  
Washington, DC 20580

DISTRICT OF COLUMBIA  
441 4th Street, N.W., Suite 600 South  
Washington, DC 20001

COMMONWEALTH OF PENNSYLVANIA  
140 First Street/Market Square  
Harrisburg, PA 17129

Plaintiff, Civil Action No. \_\_\_\_\_  
v. FILED UNDER SEAL  
and  
STAPLES, INC.  
300 Staples Drive  
Pleasanton, MA 01792  
Defendants.  
OFFICE DEPOT, INC.  
6000 North Military Trail  
Boca Raton, FL 33486

COMPLAINT FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION PURSUANT TO  
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), by its designated  
attorneys, and the District of Columbia and the Commonwealth of Pennsylvania, acting by and  
through their respective Office of Attorney General (collectively, "Plaintiff States"), petition this  
Court for a temporary restraining order and preliminary injunction enjoining Staples, Inc.  
("Staples") from consummating its proposed merger (the "Merger") with Office Depot, Inc.

RECEIVED  
DEC - 7 2015  
Clerk, U.S. District & Bankruptcy  
Courts for the District of Columbia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, et al.,  
Plaintiffs,  
v.  
STAPLES, INC. and  
OFFICE DEPOT, INC.  
Defendants.

Civil Action No. \_\_\_\_\_

DECLARATION OF DAVID NEARY PREZZANO, HP Inc.

My name is David Neary Prezzano, Vice President, HP Solutions America, HP Inc. I have  
been with HP for 16 years in various leadership roles. In my current role, I am responsible  
for leading business development, sales, operations and professional services for our print  
and PC services in the Americas, including Managed Print Services ("MPS").

Dated: 2/12/2016



# Dr. Shapiro's Changing Story on Exclusion of Ink and Toner

## Dr. Shapiro's Afternoon Testimony

**Q.** And you told us under oath this morning that the reason you did that was primarily based on the affidavits from the MPS -- I'm sorry, manufacturers, right?

**A.** ...If I said at an earlier time I was aware of competition from MPS, and I mistakenly thought I'd seen these declarations before, you know, before, then I have -- I have to be corrected.

\* \* \*

**Q.** And the FTC made the decision to exclude ink and toner, right, in the complaint?

**A.** That's correct.



# FTC Expert Did Not Do Market Share Analysis With Ink/Toner

**Q.** You acknowledge you did not obtain from the FTC any financial data, any sales data from these MPS manufacturers in terms of their sales of ink and toner to analyze and do a market share calculation for ink and toner; you didn't get that?

**A.** That's correct.



# **FTC Expert's Basis for Excluding Ink and Toner**

## **The FTC Told Me To**

## 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 Cut Up Bundle After Defendants Displayed Competitive Conditions for Products in the Bundle

## "National" Customers Have Numerous Alternatives Across Categories

Weil

Simpson  
Thacher

Category	Select Competitors <sup>1</sup>
Traditional Office Products Other Than Ink/Toner/Paper	ESSENDANT SPR WHO BUY W.B. MASON a GRAINGER MyOfficeProducts PROFTECH AMERICAN PRODUCT DISTRIBUTORS INCORPORATED Many others
Paper	ESSENDANT SPR WHO BUY W.B. MASON Veritiv Lindenmeyr xerox DadePaper BUNZL BOISE Many others
Ink/Toner	ESSENDANT SPR WHO BUY W.B. MASON a LEXMARK xerox hp RICOH Many others
Technology	ESSENDANT SPR WHO BUY W.B. MASON a DELL CDW MoreDirect LEXMARK xerox hp Many others
Facilities & Breakroom	ESSENDANT SPR WHO BUY W.B. MASON a WAXIE ULINE BUNZL GRAINGER Veritiv INTERLINE DadePaper Many others
Furniture	ESSENDANT SPR WHO BUY W.B. MASON a Steelcase HON Office Furniture HermanMiller MAYLINE ROBERT T. LORD CO. Many others
Copy & Print	RICOH Shutterfly vistaprint FedEx Office RR DONNELLEY alphagraphics Many others

Source: (1) See Appendix for examples of "many other" competitors that compete to serve "national" accounts, including independent dealers.

20

# With 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.”**



# FTC 2013: Staples Has Numerous Rivals for National Business Customers

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

The Commission has unanimously decided to approve Office Depot, Inc.'s proposed merger with OfficeMax, Inc., the country's second and third largest chains of office supply stores. Sixteen years ago the Commission blocked a proposed merger of the nation's two largest OSS, our current investment in consumable office supplies has changed significantly. As discussed below, we conclude that Office Depot and OfficeMax can move forward with their proposed transaction. In reaching this decision, the Commission considered the proposed merger's competitive effects in two distinct markets: retail and contract customers. We discuss each market below.

## I. Retail Channel

In the 1997 *Staples* case,<sup>2</sup> the Commission successfully argued that the relevant product market was the sale of consumable office supplies through OSS and that the proposed merger of

## 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

take business from the parties in a substantial number of contracting opportunities. Third, the parties will continue to face strong competition for such customers from Staples and a host of non-OSS competitors, such as W.B. Mason Co., Inc. Non-OSS competitors are growing in number and strength and have demonstrated the ability to win large multi-regional and national customer contracts. In particular, regional office supply competitors have developed and utilized various strategies to compete successfully for large national accounts, including working with office supply wholesalers and joining cooperatives of independent office supply dealers to create a distribution network capable of meeting the needs of large multi-regional and national customers. Finally, potential competitors in adjacent product categories, such as janitorial and industrial products, have existing contractual relationships with large office supply customers and can leverage those relationships to enter the office supply distribution market.



# WB Mason Continues to Grow Its National Footprint

- Fierce competitor to Staples and Office Depot within “Masonville”
- Over 60 locations spanning all 50 states
- Revenue has grown by 10 – 20% per year, and CEO expects this growth to continue at same rate, **including outside “Masonville”**
- Has expanded to D.C., Ohio, Pennsylvania, California, Texas, Illinois, Michigan, Georgia, Florida, and New York state in just the past five years

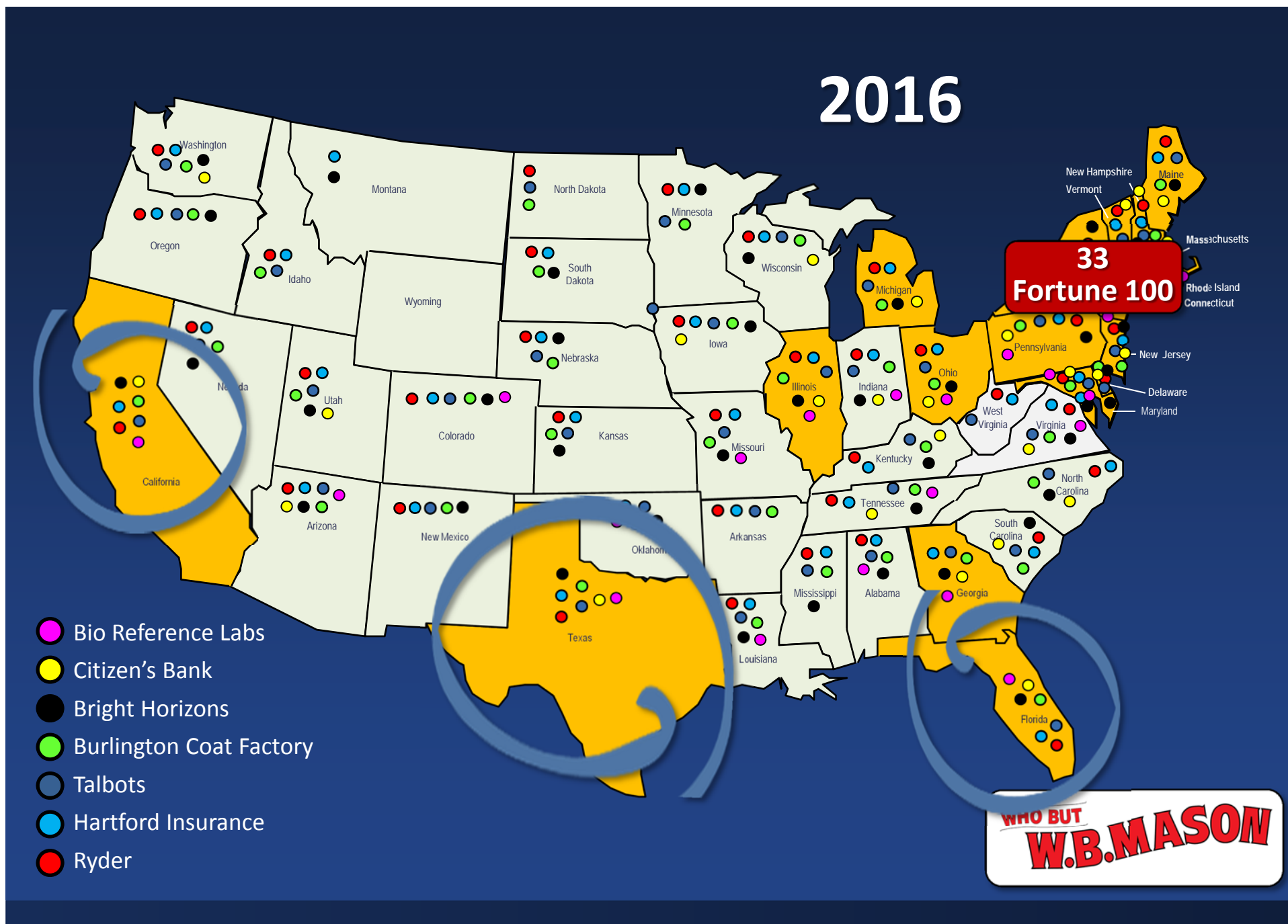


Key to W.B. Mason's expansion plans is its ability to execute them as quickly as possible.

Within the next five years, the company plans to expand locations throughout the Midwest, and exceed \$2 billion in revenues. It plans to be operating in every state within the decade.







# Amazon Launched 'Amazon Business' After Staples/Office Depot Merger Announced

April 28, 2015

amazonbusiness

THE WALL STREET JOURNAL.  
TUESDAY, APRIL 28, 2015  
© 2015 The Jones G Company, Inc. All Rights Reserved.

FROM  
PAPERCLIPS  
TO  
PARTICLE  
COUNTERS.



INTRODUCING  
amazonbusiness

★★★★★  
EVERYTHING YOU LOVE ABOUT AMAZON. FOR YOUR BUSINESS.  
Sign up for your free business account at [amazon.com/business](http://amazon.com/business)



# June 2014: Pre Merger Discussions

Ron,

At the strategy session last week you posed the provocative question of what we would do if we were facing bankruptcy. I can't get that question out of my mind because it is not a rhetorical question for us. Bankruptcy might not be imminent but we are on a road to increasing financial distress, declining cash flows and irrelevancy. But we still have options and if we act boldly and decisively I think that we have a fair shot of truly reinventing Staples to be a great company for decades to come. We are at a crossroads and the decisions we make this summer and the embrace will determine Staples' future for years to come and perhaps for ever.

**The noose is tightening**

You have o  
business ou  
are challeng

1. Con  
the  
cou  
doc
2. Cha  
pre
3. Am  
pri  
in r

Ron,

Bankruptcy might not be imminent but we are on a road to increasing financial distress, declining cash flows and irrelevancy.

**The noose is tightening**

We are still far from dead but the noose is tightening. There is not a business out there that is not being impacted by digitization but in our case it is double whammy-impacting what we sell and how we sell.

**3. Amazon and other:** New players are much more formidable threats to us. Amazon plays by different rules and it is setting customer expectations and pricing levels based on their negligible profitability model.



# Defendants Recognize Amazon Business As Massive Threat

On Apr 30, 2015, at 00:18, Masud, Faisal <Faisal.Masud@Staples.com> wrote:

#2 Amazon is a competitor the world has never seen. Jeff isn't thinking about 2016. He's already planning the death of Staples. Like he did for Circuit City, Bestbuy, Sears, RadioShack and many many more.

**From:** Lachman, Danielle

**Sent:** Tuesday, April 28, 2015 8:24AM

"Scary! This is big-time competition and threat.... This is a shot across our bow..."

**From:** Joe Offenheiser <joe.offenheiser@officedepot.com>

**Date:** Fri, May 15, 2015 at 9:41AM

"Check out the Amazon business video ... gulp ... Amazon is out aggressively marketing its business"

On Tue, Apr 28, 2015, "Rajeeb Mohapatra" <rajeeb.rnohapatrar?lofficedeoot.com> wrote:

"They are replacing Amazon Supply with Amazon Business • ... Scary prospects for OD"

**From:** "Masud, Faisal" <Faisal.Masud@Staples.com>

**Date:** April 27, 2015 at 9:27:02 PM EDT

"Here we go! Amazon prime for business. This is going to unfold very quickly and remains a major threat"

On Apr 29, 2015, at 5:42PM, Goodman, Shira <Shira.Goodman@Staples.com> wrote:

"We knew it was coming and here it is. Ups the urgency for our business dramatically... We have to change our game"



# FTC Did Not Pursue Documents or Data from Amazon Business



April 2015: Amazon Business launch

July 2015:  
Staples' Presentation to  
FTC Flags Competition  
from Amazon Business  
as a Game-Changer



September 2015:  
Staples Sends FTC a  
42-Page White Paper on  
Amazon Business



November 2015:  
FTC Pursues Declaration –  
But Not Documents or Data –  
From Amazon Business



February - March 2016:  
Staples Petitions Court to  
Compel Amazon to Produce  
Documents and Data



2015

2016

# FTC Excluded Amazon Business as Competitor Without Evaluating Data or Documents

**“[W]e were pretty comfortable with the data we got from Amazon”**

**What Data?**



# Amazon Business Geared Up for a “Land Grab”

## 2015 Consumer STeam OP1 Review: Business to Business (B2B)

October 20<sup>th</sup>, 2014

Amazon.com Confidential

**We consider the next 3 to 4 years being a “land grab”** where we have a limited window to capitalize on our Amazon brand and existing capabilities to succeed in this market segment.

## Amazon Business Offsite – May 4<sup>th</sup> 2015 Strategy Session

██████ proclaimed at the Mar 4<sup>th</sup> 2015 VPD session that **Amazon Business is a “must win” initiative.**

Our vision is to be the preferred marketplace for all professional, business, and international customers worldwide

**Amazon leadership has clearly told us that Amazon Business is a top priority**



# Amazon Targets Fortune 500 Customers

Exhibit  
EX-99.1 2 amzn-20151231sec991.htm EXHIBIT 99.1

AMAZON.COM ANNOUNCES FOURTH QUARTER SALES UP 22% TO \$35.7 BILLION

SEATTLE—(BUSINESS WIRE)—January 28, 2016—Amazon.com, Inc. (NASDAQ: AMZN) today announced financial results for its fourth quarter ended December 31, 2015.

Operating cash flow increased 74% to \$11.9 billion for the trailing twelve months, compared with \$6.8 billion for the trailing twelve months ended December 31, 2014. Free cash flow increased to \$7.3 billion for the trailing twelve months, compared with \$1.9 billion for the trailing twelve months ended December 31, 2014.

Common shares outstanding plus year ago

Fourth Quarter 2015

Net sales increased 22% to \$35.7 billion for the fourth quarter 2015, compared with \$29.2 billion for the fourth quarter 2014.

Operating income increased 88% to \$4.6 billion for the fourth quarter 2015, compared with \$2.4 billion for the fourth quarter 2014.

Net income was \$482 million for the fourth quarter 2015, compared with \$101 million for the fourth quarter 2014.

Full Year 2015

Net sales increased 20% to \$107.0 billion for the full year 2015, compared with \$89.0 billion for the full year 2014.

Operating income was \$2.2 billion for the full year 2015, compared with \$1.1 billion for the full year 2014.

Net income was \$596 million for the full year 2015, compared with \$101 million for the full year 2014.

"Twenty years ago, I was driving a pickup truck and selling books out of the back of it. Today, I'm driving a BMW and serving customers in 190 countries. It's a testament to the power of the Internet and the power of the Amazon team."

Highlights

- Fire TV remains the #1 best-selling TV in the U.S., including the new Fire TV Edition.
- The \$50 Fire tablet has been introduced in 19 weeks.
- The Alexa Skills Kit and Amazon announced plans to integrate local search results into the app.

• Last quarter, developers on the Amazon Appstore added over 100 new capabilities to Alexa-enabled devices. Amazon Echo and Fire TV customers can now use the app to get stock quotes with Fidelity, hear headlines from The Huffington Post, exercise with a seven-minute workout, and more.

• Amazon announced the first devices available with Amazon Dash Replenishment Service, including products from iRobot, OnePlus, and more.

• In 2015, worldwide paid Prime memberships increased 31% — 47% in the U.S. and even faster outside the U.S.

• Prime Video continues to grow internationally with nearly double the streaming customers compared with fourth quarter 2014.

• The Prime-exclusive Original Series *Masters of the Air* received two Golden Globes for Best Television Series — Musical or Comedy and Best Performance by an Actor in a Television Series — Musical or Comedy (Gael García Bernal).

• Amazon announced the launch of its new Amazon Music service, which will allow customers to stream music from over 100 million songs.

• Amazon announced the launch of its new Amazon Fresh grocery delivery service, which will allow customers to order groceries online and have them delivered to their homes.

• Amazon announced the launch of its new Amazon Pharmacy service, which will allow customers to order prescription drugs online and have them delivered to their homes.

• Amazon announced the launch of its new Amazon Health service, which will allow customers to access health information and services.

• Amazon announced the launch of its new Amazon Care service, which will allow customers to access primary care services.

• Amazon announced the launch of its new Amazon One service, which will allow customers to use their fingerprints to make purchases.

• Amazon announced the launch of its new Amazon Go service, which will allow customers to use their smartphones to make purchases.

<http://www.sec.gov/Archives/edgar/data/1013724/00011872410001701/amzn-20151231sec991.htm> [2/4/2016 1:21:54 PM]

Exhibit 99.1

AMAZON.COM ANNOUNCES FOURTH QUARTER SALES UP 22% TO \$35.7 BILLION

SEATTLE—(BUSINESS WIRE)—January 28, 2016—Amazon.com, Inc. (NASDAQ: AMZN) today announced financial results for its fourth quarter ended December 31, 2015.

Exhibit 99.1

Only eight months after launch, Amazon Business, a marketplace with features and benefits tailored to businesses, serves more than 200,000 businesses ranging from small businesses to Fortune 500 companies.



## **FTC's Expert: Time Frame for Assessing Amazon Business' Threat Is Two to Three Years**

“in the foreseeable future, by which I mean the next two to three years”



## FTC's Expert Defers to Mr. Wilson on Extent of Amazon Threat

"I should say I'm relying quite heavily on what we learned from Mr. Wilson at Amazon, since, you know, he's in -- he's the Amazon person who's very well placed to know about what they can do, what they hope to do, what they're -- what they've achieved so far, what they haven't."

\* \* \*

**Q.** And you made clear, Dr. Shapiro -- while we're pulling that up -- that you rely on Mr. Wilson. He is the person who knows better than any of us in the courtroom about Amazon Business' capabilities and growth projections and competitive abilities, right? You defer to Mr. Wilson on that score?

**A.** Yes, I do.







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

Merger



2016

2017

2018

2019

# **Staples 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?

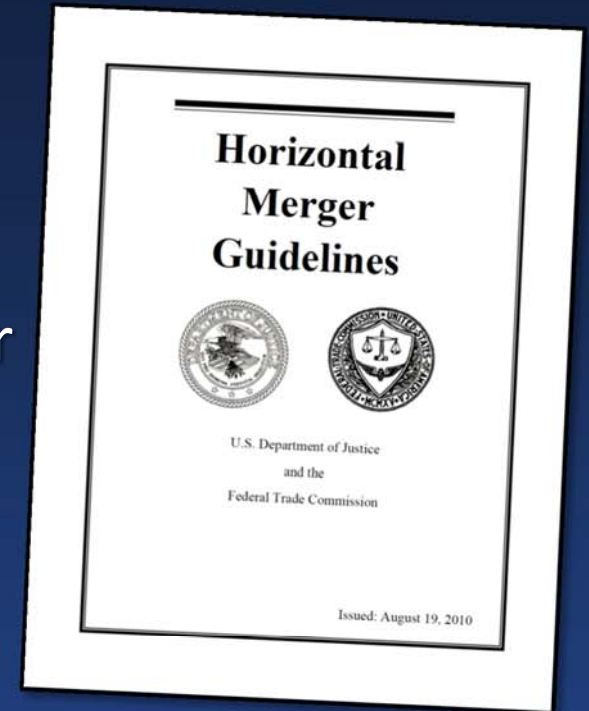
**A. Yes. Significantly, yes, it would.**





# Horizontal Merger Guidelines: FTC's Lack of Evidence

- No evidence of intent to raise prices as motivation for merger
- No evidence of intent to reduce product variety or withdraw products post-merger
- No ability to reduce product output (not manufacturers)
- No evidence of a premium being paid for Office Depot in excess of market value



# Equities Do Not Favor FTC



“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.**”

# Witness to FTC: Be More Balanced

**From:** Mike Maggio <mmaggio@trimega.org>  
**Sent:** Sunday, October 4, 2015 7:08 PM  
**To:** [REDACTED]@ftc.gov>  
**Subject:** RE: FTC Investigation of Staples/Office Depot

Well reading it certainly gives a different perspective than having it read to you. While these are my words, you left out quite a bit of my comments that indicate we are not as helpless as this narrative makes us appear. This makes us seem totally ineffective against Staples, which if you include all that I said, I think clearly states that we are not. A few things I would like included:

- Our official position is that the acquisition is good for Independent Dealers based on our belief that one less competitor is a good thing.
- We have national coverage that surpasses Staples but we have not collaborated effectively enough to date to leverage it.
- Our largest challenges when competing with Staples are prebates, perception and experience.
- And that while price is an issue, it is one that we overcome daily when competing with Staples on a local and regional level.

Sorry about this kiddo, but I would prefer it be as balanced as I attempted to be.



## FTC Draft Affidavits: Not True

20. In my view, Office Depot and Staples are currently [REDACTED]'s best option for purchasing office supplies because they currently are best able to provide all of the services [REDACTED] requires at competitive prices. I believe that [REDACTED] has benefitted from the competition between these two office supplies vendors. In particular, it is my impression that during our last RFP process, Office Depot was willing to provide lower line item prices, a large incentive, and other rebates and discounts, in part, to win [REDACTED]'s business from Staples. If these two companies were to merge, it would eliminate one of [REDACTED] two current best options for consumable office supplies. Because [REDACTED] would ultimately be forced to choose between the combined Staples/Office Depot and a less attractive option, [REDACTED] could be vulnerable to price increases.



## FTC Draft Affidavits: Not True

20. In my view, Office Depot and Staples are currently [REDACTED]'s best option for purchasing office supplies because they currently are best able to provide all of the services [REDACTED] requires at competitive prices. I believe that [REDACTED] has benefitted from the competition between these two office supplies vendors. In particular, it is my impression that during our last RFP process, Office Depot was willing to provide lower line item prices, a large incentive, and other rebates and discounts, in part, to win [REDACTED]'s business from Staples. If these two companies were to merge, it would eliminate one of [REDACTED] two current best options for consumable office supplies.

~~Because [REDACTED] would ultimately be forced to choose between the combined Staples/Office Depot and a less attractive option, [REDACTED] could be vulnerable to price increases.~~



# The FTC's Case Looks Backward Not Forward





# The FTC's Case Looks Backward Not Forward

## Exhibit 3

### Staples and Office Depot Consumable Office Supplies: Revenue by Category

*Large Customers, FY 2014*



## Exhibit 11

### Competitor Appearances in the Staples Bid Data

*Consumable Office Supplies Opportunities, 2012-2014 (N = 393)*

## Exhibit 16A

### Staples' Retention Rates for Large Customers

*50% Retention Cutoff, FY 2011-2014*



## Exhibit 16B

### Office Depot's Retention Rates for Large Customers

*50% Retention Cutoff, FY 2011-2014*



# The FTC's Case Looks Backward Not Forward

Exhibit 3



**Q.** Dr. Shapiro, you said, and I wrote it down, you said that historical market shares do not account for entry and expansion, true?

**A.** That's correct.

**Q.** And you will agree that some significant things happened in the market over the last two years; Amazon Business launched, for example?

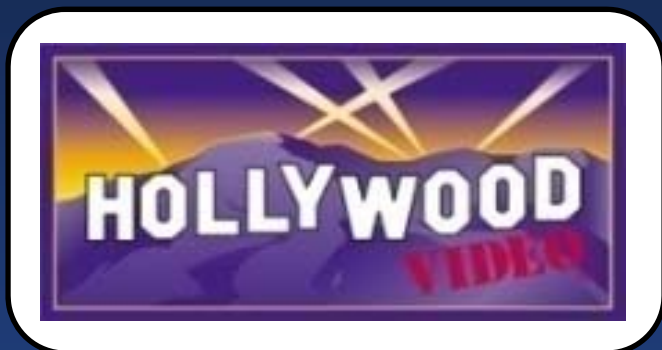
**A.** That's certainly the biggest one, and we've all been talking about that.



50% Retention Cutoff, FY 2011-2014



# FTC Opposed Hollywood Video and Blockbuster Merger



# FTC Opposed Hollywood Video and Blockbuster Merger



# FTC Got It Wrong: History Repeating ...

“One matter that comes to mind is **the Blockbuster/Hollywood Video merger, which was ultimately abandoned in the face of FTC opposition.** One of the questions there was the expected effect of a transaction that would have resulted in a firm with significantly more brick-and-mortar video stores. **But, even then (in 2005), the industry was moving toward streaming, and I don’t know if we as an agency really understood the magnitude of that change in video distribution during the investigation. These are the kinds of things that we need do to in evaluating fast-changing industries—really understand what’s happening in terms of changing business models and consumer preferences.”**



- FTC Commissioner Maureen Ohlhausen

# The Case In a Nutshell



**Protecting the Fortune “81”**

**vs.**

**Benefiting *All* Customers**

**Some Consumable Office Supplies**

**vs.**

**All Consumable Office Supplies**

**FTC’s “Flip Flop”**

**vs.**

**2013 Statement**

**Newly Created Made-for-Litigation Relevant Market**

**vs.**

**Commercial realities**

**The Past**

**vs.**

**The Future**



