IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, *et al.*,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 1:15-cv-02115 (EGS)
STAPLES, INC. and OFFICE DEPOT, INC.	:	
Defendants.	:	

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

The Commonwealth of Pennsylvania ("Pennsylvania") and the District of Columbia (collectively "Moving Plaintiffs") ask this Court to award an unprecedented windfall of attorneys' fees and costs for a cause of action they did not pursue. This case was not litigated under Section 16 of the Clayton Act, 15 U.S.C. § 26 ("Section 16"), which contains the fee-shifting provision invoked by Moving Plaintiffs. Rather, this case was litigated under Section 13(b) of the FTC Act, 15 U.S.C. §53(b) ("Section 13(b)"), which has no analogous fee-shifting provision—and which has a lower threshold for obtaining injunctive relief. Simply put, Moving Plaintiffs are not entitled to any shifting of fees or costs to Defendants as a matter of law because they did not litigate, much less substantially prevail, under the more demanding Section 16 standard. To our knowledge, the award Moving Plaintiffs now seek is unprecedented: no plaintiff has ever even sought, much less been granted, such an award in any preliminary

injunction action under Section 13(b).[1] Should this Court grant Moving Plaintiffs'' request, it would be the first court **ever** to do so. Moreover, even if their claim had any basis in the law, it would fail on the facts, as their work was duplicative of work done by the FTC, documented by deficient records, and largely spent on non-determinative issues (to the extent it is possible to determine what they worked on with any specificity at all).

First, Moving Plaintiffs' request should be denied as a matter of law. In contrast with the standard American rule on attorney-fee shifting, Section 16 of the Clayton Act allows courts to award attorneys' fees where a plaintiff "substantially prevails" under that section of the Clayton Act. But the only claim litigated in this case, and the only relief granted, was the FTC's claim for a preliminary injunction under Section 13(b) of the FTC Act. Indeed, the four elements of a Section 16 claim, on which Moving Plaintiffs would need to "substantially prevail" in order to support their motion, were not argued or even mentioned by the Plaintiffs at any point during the 10-day hearing or in their extensive pre- and post-hearing papers. In fact, aside from three token references in the Complaint, the record is entirely devoid of any mention of Section 16 of the Clayton Act. This Court has recognized that the award of an injunction under traditional equitable principles—as would be needed to satisfy Section 16 of the Clayton Act—requires a substantially more robust showing than the award of an injunction under Section 13(b). Rather than making such a showing, Moving Plaintiffs chose to spectate as the FTC litigated its Section 13(b) claim. And, having found that the FTC met its Section 13(b) burden, this Court granted an injunction under Section 13(b), and Section 13(b) alone. Moving Plaintiffs, however, are not

[1] Tellingly, Moving Plaintiffs cite no case where a state co-Plaintiff was awarded attorneys' fees in a Section 13(b) case. Indeed, Moving Plaintiffs themselves joined the Federal Trade Commission in their litigation to block the Sysco/U.S. Foods motion and, despite the FTC prevailing under Section 13(b), the states did not subsequently seek fees and costs under Section 16.

legally authorized to seek injunctions under Section 13(b) of the FTC Act, and Section 13(b) also does not provide for the award of fees and costs. Moving Plaintiffs cannot now at this late date claim to have "substantially prevailed" under *Section 16* in hopes of receiving a windfall. Despite numerous instances of State co-plaintiffs joining successful Section 13(b) preliminary injunction merger challenges such as this one, to our knowledge not one ever has been awarded attorneys' fees or costs.

Second, even if Moving Plaintiffs had, for the sake of argument, substantially prevailed under Section 16 and had a colorable basis to move for fees and costs, the facts underlying Moving Plaintiffs' request do not justify their claim. Well-established case law forbids reimbursement for time that (a) is spent on duplicative efforts, (b) has not been accounted for with sufficient detail to confirm relevancy, or (c) is spent on matters collateral to the prevailing claims. Here, Moving Plaintiffs ask to be awarded nearly $200,000 for all of their work, notwithstanding that much, if not all, of it was duplicative of Plaintiff FTC's work. Moreover, the records they have submitted in support of their request contain only cursory descriptions, which are deficient under applicable case law. Finally, although it is impossible to determine what issues they worked on based on their time entries, their request almost certainly includes substantial time spent on non-determinative issues. Therefore, Moving Plaintiffs are also not entitled to fee-shifting on the facts.

ARGUMENT

I. As a Matter of Law, Moving Plaintiffs Are Not Entitled to Attorneys' Fees and Costs

Moving Plaintiffs' unprecedented request should be denied as a matter of law. Rather than attempt to meet the additional elements and higher burden imposed by the traditional standard for a preliminary injunction under Section 16 of the Clayton Act, Moving Plaintiffs

made the strategic decision to instead let the FTC pursue a preliminary injunction under the deferential Section 13(b) standard available only to the FTC. Moving Plaintiffs cannot now revisit that strategic decision and claim to have "substantially prevailed" under Section 16. In fact, although states commonly join the FTC as co-plaintiffs in Section 13(b) actions seeking temporary preliminary injunctions, Defendants are aware of **no** instance of a state subsequently seeking, let alone obtaining, attorneys' fees as though it had prevailed on a Section 16 claim. Accordingly, they are not entitled to fees and costs as a matter of law.

A. Only the Federal Trade Commission May Enforce the FTC Act

Only the FTC may enforce the FTC Act. *See Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973) ("The central ruling in this case holds that private actions to vindicate rights asserted under the Federal Trade Commission Act may not be maintained."). Not even the United States Department of Justice is authorized to enforce the provisions of the FTC Act, including seeking an injunction under Section 13(b). *See e.g. United States v. Gillette Co.*, 828 F. Supp. 78, 80, 85-86 (D.D.C. 1993) (denying the Department of Justice's request for a preliminary injunction). The standard for a preliminary injunction under Section 13(b) is the statutory "public interest" test, which—because it triggers only a more in-depth FTC administrative review—is less rigorous than this Circuit's fundamental four part preliminary injunction standard. *See F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (". . . Congress intended this standard to depart from what it regarded as the then-traditional equity standard . . ."); *see also* Opinion at 14 n. 7. Importantly, the FTC Act does **not** authorize the recovery of fees and costs related to Section 13(b) preliminary injunctions.

B. States May Seek Preliminary Injunctions Only Under Section 16 of the Clayton Act

As Moving Plaintiffs note, Section 16 of the Clayton Act has been interpreted to allow states to sue for injunctive relief "against threatened loss or damage by a violation of the antitrust laws." Pls.' Mem. in Supp. of Mot. for Att'ys' Fees and Costs, Dkt. 457 at 2. Section 16 claims are subject to the traditional four-part preliminary injunction standard. As a cause of action originally intended to encourage private enforcement of the antitrust laws in situations where federal and state governments had declined to do so, Section 16 does authorize the award of fees and costs where the plaintiff "substantially prevails" on their claim.[2] Despite Moving Plaintiffs' insistence to the contrary, this Court did **not** grant the only relief Moving Plaintiffs would be entitled to seek: an injunction under Section 16 of the Clayton Act.

C. The Standard for Preliminary Injunctive Relief Under Section 13(b) has Fewer Elements and is Significantly Less Burdensome than Under Section 16

The "public interest" standard that the FTC enjoys when seeking preliminary injunctive relief under Section 13(b) has fewer elements and is considerably less demanding, in light of the FTC's unique dual role as complainant and fact-finder. To obtain a preliminary injunction under Section 13(b), the FTC need only satisfy two elements: "(1) a likelihood of success on the merits; and (2) that the equities tip in favor of injunctive relief." Opinion at 14. In contrast, Moving Plaintiffs, other states, and any other antitrust plaintiff seeking preliminary injunctive relief under Section 16 of the Clayton Act must make a showing that satisfies "this circuit's fundamental four-part preliminary injunction standard." *Gillette*, 828 F. Supp. 78, 80

[2] Notably, "[t]he legislative history makes clear Congress' desire to provide an incentive to private parties who would otherwise be 'unable to afford or unwilling to bring antitrust injunction cases' to assume the role of 'private attorneys general' to help enforce the antitrust laws." *Grumman Corp. v. LTV Corp.*, 533 F. Supp. 1385, 1389 (E.D.N.Y. 1982) (emphasis added).

(D.D.C. 1993). The "fundamental four-part preliminary injunction standard" requires the court to balance "(1) the likelihood of the plaintiff's success on the merits; (2) the threat of irreparable injury to the plaintiff in the absence of an injunction; (3) the possibility of substantial harm to other interested parties from a grant of injunctive relief; and (4) the interests of the public." *Id.* Neither Moving Plaintiffs nor Plaintiff FTC ever **mentioned** these Section 16 elements at any point in the proceedings before this Court.

As the Court ruled in this case, to satisfy its burden, the FTC need only "raise[] questions going to the merits 'so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.'" Opinion at 15 (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001)). Indeed, in a Section 13(b) case, "the district court "'is **not authorized to determine whether the antitrust laws . . . are about to be violated**.' That responsibility lies with the FTC." Pls.' Proposed Findings of Fact and Conclusions of Law, Dkt. 379 at ¶ 259 (quoting *FTC v. Whole Foods Mkt., Inc*., 548 F.3d 1028, 1035 (D.C. Cir. 2008)) (ellipses in original) (emphasis added). This lower standard is permitted in view of the fact that a Section 13(b) temporary preliminary injunction on its face is not intended to permanently derail the merger (although in most if not all instances that is the practical effect); it only enjoins closing until after the FTC has the opportunity to conduct a full evaluation on the merits via an administrative hearing. In stark contrast, every plaintiff that relies on Section 16 of the Clayton Act to obtain injunctive relief must do that which the FTC need not: convince a district court that it has met the standard four-prong preliminary injunction test.

D. Plaintiffs Sought Relief Only Under Section 13(b) of the FTC Act and That Was the Only Relief the Court Granted

Other than three passing references in the Complaint, the record is entirely devoid of any mention of Section 16 of the Clayton Act, let alone argument or evidence that would support "substantially prevailing" under that Section. Specifically, Moving Plaintiffs failed at any point in pre-trial briefing, discovery, during the hearing, or in their proposed findings of fact and conclusions of law to mention Section 16 once, despite countless opportunities to do so, including:

- the Complaint's discussion of the relevant law or the applicable legal standard, perhaps reflecting a strategic decision to focus on the more deferential Section 13(b) standard (Compl. at ¶¶ 22-23);
- the Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction filed by the FTC, which again focuses solely on the Section 13(b) standard (Pls.' Memo. in Supp. of Pls.' Mot. for a Prelim. Inj., Dkt. 177.);
- the Reply Memorandum In Further Support Of Plaintiffs' Motion For A Preliminary Injunction filed by the FTC (Pls.' Reply Mem. in Further Supp. of Pls.' Mot. for a Prelim. Inj., Dkt. 274);
- Plaintiffs' opening statement—conducted exclusively by FTC counsel—or the accompanying demonstratives (Hrg. Tr. 10:17 – 57:23; Pls.' Opening Slides, Dkt. 286);
- the entire 10-day preliminary injunction hearing;
- Plaintiffs' closing statements—also conducted entirely by the FTC—or the accompanying demonstratives;[3] and

[3] Indeed, the FTC specifically emphasized that the Court need not address the Section 16 standard. *See, e.g.*, Hrg. Tr. at 3561:10 – 3562:7 ("THE COURT: . . .the Court must grant the FTC's motion for preliminary injunction if it is shown that: One, the Federal Trade Commission is likely to succeed on the merits. And two – likely to succeed on the merits, not before this Court but before the Federal Trade Commission. And two, the equities weigh in favor of granting the injunction . . . Indeed the Court – it's very interesting, the authorities dictate that the Court should not focus on whether or not the merger will, as a matter of law, violate the Clayton Act, right? [] That's not before the Court. It's just the likelihood of whether or not the government can prevail at a subsequent administrative hearing before the Federal Trade Commission, correct? MS.

- Plaintiffs' proposed Findings of Fact and Conclusions of Law, which again asked the Court only to apply Section 13(b)'s more deferential "public interest" standard to "preserve the status quo while the FTC develops its ultimate case." (Pls.' Proposed Findings of Fact and Conclusions of Law, Dkt. 379 at ¶¶ 257-61).

Moreover, the Court made it very clear in its opinion that it was granting relief only under Section 13(b) of the FTC Act. Nowhere did the Court cite to or reference Section 16 of the Clayton Act. Instead, the Court expressly distinguished the standard that it was applying—"[t]he standard for a preliminary injunction under Section 13(b)"—from "the typical preliminary injunction standard," which carries additional requirements and involves a different analysis. Opinion at p. 14 n.7. There can be no doubt that Moving Plaintiffs did not seek—and the Court did not grant—injunctive relief under the Section 16 standard.

E. As a Matter of Law, Moving Plaintiffs Have Not "Substantially Prevailed" Under Section 16

Plaintiffs made a strategic decision to litigate this case under the more deferential Section 13(b) standard, and those efforts were successful. As discussed above, this merger was litigated, and evaluated by the Court, solely under the Section 13(b) standard. Given the record in this case, moving Plaintiffs cannot now suggest that they have also substantially prevailed on a Section 16 claim—a claim that they totally disregarded until making this request for fees—in hopes of obtaining a windfall.

In order "[t]o determine whether a Plaintiff has substantially prevailed," Moving Plaintiffs assert that the Court need only "consider: a) the situation immediately prior to the commencement of suit, and b) the situation today and the role, if any, played by the litigation in effecting any changes between the two." Pls.' Mem. in Supp. of Mot. for Att'ys' Fees and Costs, Dkt. 457 at 5. But the test that Moving Plaintiffs ask the Court to employ—known as the

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REINHART: That's correct, Your Honor."). Moving Plaintiffs made no attempt to dispute the standard articulated by the Court and confirmed by the FTC.

"catalyst theory" for granting fees and costs awards—was rejected by the Supreme Court in 2001 when it denied a request for attorneys' fees under the Americans with Disabilities Act of 1990 and the Fair Housing Amendments Act of 1988. *See Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001) ("Numerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.' The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not."). In *Buckhannon*, the Court made clear that a plaintiff must have "prevailed on the merits of at least some of his claims" in order to obtain an award of counsel fees. *Id.* at 603-04 ("Our respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.") (internal quotations omitted); *see also Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682-83, 694 (1983) ("[W]e hold that, absent some degree of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorney's fees . . .").

Under current law, "a plaintiff 'prevails' when actual relief on the merits of his claim 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff,' and that such material alteration occurs only when the plaintiff becomes entitled to enforce a judgment." *Union of Needletrades, Indus. & Textile Employers, AFL-CIO, CLC v. U.S. I.N.S.*, 202 F. Supp. 2d 265, 277 (S.D.N.Y. 2002), *aff'd sub nom. Union of Needletrades, Indus. & Textile Employees, AFL-CIO, CLC v. U.S. I.N.S.*, 336 F.3d 200 (2d Cir. 2003) (*quoting Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). Thus, a party "substantially prevails" under the Clayton Act only where it obtains at least some relief **under the Clayton Act** on the merits of a claim that it brought through a judgment that it can

enforce. Therefore, as a matter of law, parties cannot "substantially prevail" unless the claim asserted, and the relief granted, was pursuant to a law that they were entitled to enforce.

Here, although Moving Plaintiffs made token references to Section 16 in non-substantive portions of the Complaint, they made no effort to litigate their Section 16 claim. No briefing, memoranda, presentations or oral advocacy referred to Section 16. No mention of Section 16's four-part test was ever made, and Defendants had no basis to know that such elements were allegedly being litigated. Indeed, Plaintiffs made clear that they were not pursuing a Section 16 claim when they told this Court that the merits of Defendants' merger would **not** be decided in any proceeding before this Court, but would instead be decided "in an administrative proceeding that begins on May 10, 2016 before an administrative law judge." Pls.' Reply Bench Mem. Regarding Defs.' Latest Unilateral Remedial Proposal, Dkt. 390 at 2 (filed under seal). As a result, the Court's opinion likewise makes no reference to Section 16. Moving Plaintiffs have received no adjudication or relief on the merits of a Section 16 claim, let alone relief under that Section that has altered the legal relationships of the parties. Moving Plaintiffs therefore cannot have "substantially prevailed" on that claim and are not entitled to fees and costs as a matter of law.[4]

II. Moving Plaintiffs' Request for Fees and Costs are Unreasonable and Excessive

Even if this Court determines that Moving Plaintiffs are legally entitled to seek fees and costs in this case, the facts underlying Moving Plaintiffs' request do not justify their

[4] Moreover, granting Moving Plaintiffs' request would encourage an outcome Congress could not have intended, as other state attorneys general could hop-on to future FTC Section 13(b) litigations in a low-risk, high-reward effort to generate windfall income. Indeed, all 50 states could decide to join FTC 13(b) cases with the expectation of receiving fees for doing no more than serving as spectators to the litigation. This significant additional financial risk to merging parties could have an unintended chilling effect and materially impact the considerations and determinations made by parties evaluating a potential merger or whether to defend the merger in court.

claim. The law in this Circuit is clear: under the "market value" approach, before awarding any fees and costs, the Court must first establish the "lodestar: the number of hours reasonably expended multiplied by a reasonable hourly rate." *New York v. Microsoft Corp.*, 297 F. Supp. 2d 15, 27-28 (D.D.C. 2003) (internal quotations omitted). After establishing the "lodestar" amount, the Court must "exercise [its] discretion as conscientiously as possible" to adjust the value to reflect various factors such as insufficient time records or requests for time spent on matters collateral to the prevailing claim. *Id.* Here, Moving Plaintiffs ask to be reimbursed for duplicative work, supported by deficient records that cover time that—at least in large part—must have been spent on collateral issues. Moving Plaintiffs' request should therefore be denied.

A. Moving Plaintiffs' Work was Duplicative of the FTC's Efforts

The Supreme Court has made clear that plaintiffs cannot recover attorneys' fees for hours that were not "reasonably expended." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). "Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Id.* Any time spent duplicating other attorneys' efforts is not "reasonably expended" and by definition is "unnecessary," as it is excessive and redundant. *See e.g. Envtl. Def. Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258 (D.C. Cir. 1993), *as supplemented* (Sept. 10, 1993) ("In deciding the reasonableness of the hours reported, we properly disallow time spent in duplicative, unorganized or otherwise unproductive effort.") (internal quotations omitted); *see also Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. U.S. EPA*, 169 F.3d 755, 761 (D.C. Cir. 1999).

Here, the Court should exclude virtually all of the time that Moving Plaintiffs claim to have spent on this case because their efforts were excessive, redundant, and unnecessary. Moving Plaintiffs explain that they supported the FTC's litigation by "participating

in depositions, preparing discovery responses and producing documents, as well as by representing Moving Plaintiffs at status conferences, a settlement conference, and the multi-week preliminary injunction hearing before the Court." Pls.' Mem. in Supp. of Mot. for Att'ys' Fees and Costs, Dkt. 457 at 2. Moving Plaintiffs, however, played no discernible role in this case—they said nothing throughout the duration of the hearing, nor did they ask questions in any of Plaintiffs' 26 depositions Moving Plaintiffs gave every appearance of playing the role of "bystander" as the FTC litigated its Section 13(b) claim throughout these proceedings. Under the circumstances, their request for almost two hundred thousand dollars in legal fees is unjustified and should be denied.

B. Moving Plaintiffs' Documentation is Wholly Deficient

Setting aside the nature of the efforts for which they seek reimbursement, Moving Plaintiffs are not entitled to the recovery they seek because the documentation they have provided to justify their request is deficient. Moving Plaintiffs note that "[t]he lack of contemporaneous billing records for each task is not fatal to a fee request." Pls.' Mem. in Supp. of Mot. for Att'ys' Fees and Costs, Dkt. 457 at 6, citing *Microsoft*, 297 F. Supp. 2d 15, 42-43 (D.D.C. 2003). But in the very case they cite for this proposition, *Microsoft*, the court went on to strike more than $45,000 worth of time records because they were "wholly deficient." 297 F. Supp. 2d at 43-44. Indeed, the *Microsoft* court held that the Commonwealth of Massachusetts could not recover for time entries consisting of "conference calls with no indication of who these calls were with or what they concerned," or that were "nevertheless devoid of any descriptive rationale for their occurrence." *Id.* (internal quotations omitted). Other decisions in this Circuit have taken the same approach. *See e.g. Michigan v. U.S. EPA*, 254 F.3d 1087, 1093-94 (D.C. Cir. 2001) (deducting the full amount of "numerous deficient entries," such as those listing only "conference calls with no indication of who these calls were with or what they concerned," since

"such description[s] fail[] to provide the court with any basis to determine with a high degree of certainty that the hours billed were reasonable") (internal quotations omitted).

Moving Plaintiffs' documentation is replete with entries of precisely the type that the D.C. Circuit has held fall well short of what is required to justify forcing Defendants to pay their fees and costs. For example, Moving Plaintiffs ask the Court to order Defendants to pay more than $40,000 for "Telephone Calls" that the Commonwealth of Pennsylvania had "With Witnesses or Non-Parties" ($38,454.50), "With Co-Counsel" ($5,315.50), with "Clients" ($455), or "With Opposing Counsel" ($227.5). *See* Appendix A (summarizing Pennsylvania's Schedule of Attorneys' Fees Requested, Pls.' Mot. for Att'ys' Fees and Costs, Dkt. 456 at Exhibit A-1). Moving Plaintiffs fail to describe the subject matter of such "Telephone Calls" or even identify the actual participants. Moving Plaintiffs also demand that Defendants pay more than $17,000 for time spent on "Discovery," and more than $10,000 for "Depositions/Discovery Matters." *See* Appendix A. These time records do not provide any basis to determine what legal work was being done or whether the hours billed were reasonable and non-duplicative, let alone provide the "high degree of certainty" required under the law.

C. Moving Plaintiffs' Cannot Seek Reimbursement for Time Spent on Claims They Never Asserted

A prevailing party cannot recover a fee award for hours spent on a claim unrelated to a successful claim. *Hensley*, 461 U.S. at 435 (1983) (explaining that "[t]he congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim"). While "there is no certain method of determining when claims are related or unrelated," *Id.* at n. 12, "the [District of Columbia] court of appeals has held that under *Hensley* 'when a party has received no favorable results in a particular aspect of a litigation, that

party may receive no fee for work on the part of the case.'" *Trout v. Winter*, 464 F. Supp. 2d 25, 32 (D.D.C. 2006), *aff'd sub nom. Trout v. Sec'y of Navy*, 540 F.3d 442 (D.C. Cir. 2008) (citing *Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1993)). As courts in this Circuit have explained, "[a] plaintiff should not be able to force his opponent to pay for the legal services involved in bringing groundless claims simply because those unsuccessful claims were brought in a lawsuit that included successful claims," and "a party should not be able to 'piggyback' fees for unsuccessful claims upon unrelated, successful claims." *Sierra Club v. E.P.A.*, 769 F.2d 796, 801 (D.C. Cir. 1985). Indeed, the D.C. Circuit has said: "We believe that **it would be an inequity . . . to force a defendant who has completely vindicated his own position on a particular issue to pay for his opponent's efforts on that issue**." *Id.*at 801-02 (emphasis added). And this makes sense, as Congress cannot have intended to award attorneys' fees for non-violations of the Clayton Act.

But Moving Plaintiffs are, at least in part, asking the Court to do just that. The FTC—allegedly with the assistance of Moving Plaintiffs—conducted an extensive months-long investigation of *every aspect* of Defendants' businesses in connection with their review of the proposed merger. A significant portion of the FTC's and Moving Plaintiffs' review of the transaction related **entirely** to the question of whether the proposed transaction would negatively impact retail consumers, small business consumers, and medium business consumers. And the Moving Plaintiffs' time records for the fees requested date back to March 2015, when the investigation still focused on those portions of Defendants' businesses. In bringing its claim before this Court, however, Plaintiffs confined the alleged harm to the very narrow customer group comprised of only certain "Large B-to-B customers" and alleged no harm to retail, small, or medium-sized business or government customers. Pls.' Memo. in Supp. of Pls.' Mot. for a

Prelim. Inj., Dkt. 177 at 15. Even if Moving Plaintiffs arguably were entitled to attorneys' fees, they are not entitled to fees for time spent on aspects of the proposed merger that were found to be competitively neutral or even beneficial. Accordingly they should receive no attorneys' fees because it is impossible to determine which entries, if any, relate to the sole claim on which the FTC succeeded (i.e., likely harm to Large B-to-B customers under Section 13(b)) and which do not.

CONCLUSION

For the reasons stated herein, Defendants respectfully request that the Court deny Moving Plaintiffs' Motion for Attorneys' Fees and Costs Under Section 16 of the Clayton Act.

Dated: June 10, 2016

/s/ *Andrew M. Lacy*
Matthew J. Reilly (DC Bar 457884)
Andrew M. Lacy (DC Bar 496644)
Peter C. Herrick (DC Bar 1029327)
Simpson Thacher & Bartlett LLP
900 G Street, N.W.
Washington, DC 20001
Telephone: (202) 636-5900
Facsimile: (202) 636-5502
matt.reilly@stblaw.com
alacy@stblaw.com
peter.herrick@stblaw.com

Counsel for Office Depot, Inc.

/s/ *Carrie Mahan*
Carrie Mahan (DC Bar 459802)
Jeffrey Perry (DC Bar 465991)
1300 Eye Street NW
Washington, DC 20005
Telephone: (202) 682-7000
Facsimile: (202) 857-0940
carrie.mahan@weil.com
jeffrey.perry@weil.com

Diane Sullivan (DC Bar 1014037)
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8897
Facsimile: (212) 310-8007
diane.sullivan@weil.com

Counsel for Defendant Staples, Inc.