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

PUBLIC VERSION

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Staples and Office Depot are the two largest vendors of consumable office supplies to large business-to-business ("B-to-B") customers in the United States. Combined, they have a market share of at least 79%. In fact, Staples' CEO had a poster in his office showing that Staples and Office Depot were the incumbent office supplies vendor for *94* of the Fortune 100.[1]

Staples and Office Depot have such a large market share because for many large B-to-B customers (i.e., businesses buying office supplies for their employees' own use), Staples and Office Depot are the two best—and in some cases only viable—options. They provide the lowest prices, nationwide delivery, and other value-added services that large B-to-B customers require. Ordinary course documents show that each considers the other its closest competitor. Indeed, as Staples boasted in an internal document: "There are only two real choices for customers"—Staples and Office Depot.[2]

Large B-to-B customers agree. They have provided sworn declarations—and will testify in this case—that Staples and Office Depot are their two best options for office supplies. And they use the competition between the two to get lower prices and better service. Through requests for proposal ("RFPs"), "reverse" auctions, or direct contract negotiations, Staples and Office Depot must compete head-to-head to win the business of these large B-to-B customers. Bid data show that Staples and Office Depot most often win from, and lose to, each other.

This proposed Merger would eliminate that competition. It would be replaced by a dominant firm approximately 15 times the size of the next largest office supplies vendor—a company that supplies paper, not the full array of office supplies required by businesses. Absent judicial intervention, large B-to-B customers face a substantial risk of higher prices and

[1] PX04499 (Staples) at 001-002.
[2] PX04082 (Staples) at 029.

diminished service than would occur absent the Merger. Defendants' own documents concede this. For example, in April 2015—two months after the Merger was announced—Office Depot encouraged a business customer to accept promptly the contract terms it was offering; Office Depot explained that "[i]f and when the purchase of Office Depot is approved, Staples will have no reason to make this offer."[3] Staples is doing the same by, for example, making a "strong suggestion" to a customer that it consider contracting with Staples before the Merger is approved because the customer "will never get a more competitive offer than right now."[4] Thus, the Court need not guess about what will happen if this merger is allowed: Defendants' own documents make clear that prices will be higher.

In support of this Merger, Defendants will argue that they face competition from numerous other suppliers. But the next largest supplier—a paper supplier named Veritiv—has only a 5% market share. The next largest supplier of the full array of supplies—W.B. Mason—has a 1% share. The rest of the competitors each has less than a 1% share. None of them can counteract the anticompetitive effects of the proposed Merger. Indeed, regional and local vendors acknowledge that they cannot provide the low pricing, nationwide distribution, and unified package of services that Staples and Office Depot can. That is why Staples derides such competitors as "nobodies" that cannot take market share from them.[5]

Defendants will likely point to the recent launch of internet provider Amazon Business as an important competitor. But Amazon Business is not a significant competitor for large B-to-B customers now, and, [redacted]

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[3] PX05236 (Office Depot) at 001; *see also*, *e.g.*, PX05393 (Office Depot) at 002 (Office Depot telling customer in June 2015 that if Staples/Office Depot merger goes through, customer will lose opportunity to reduce pricing because "there will no longer be competition between the two largest suppliers to insure [sic] you have the lowest price!").
[4] PX04567 (Staples) at 002.
[5] PX04083 (Staples) at 001; *see also* PX04334 (Staples) at 001 (competition from independent vendors is "a weak house of cards").

[redacted]

A preliminary injunction is warranted. The increase in market concentration from this merger far exceeds the levels at which mergers are found to be presumptively unlawful. Extensive evidence that the transaction will lessen competition corroborates the presumption. Numerous customers have submitted sworn statements expressing their concerns. Those customers, and the public as a whole, have a strong interest in the effective enforcement of the antitrust laws. As a result, Plaintiffs respectfully request a preliminary injunction pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to preserve the status quo pending a full administrative proceeding on the merits.

BACKGROUND

Businesses across the country buy consumable office supplies, such as pens, folders, notepads, and copy and printer paper, for their employees to use in performing their job duties. This "B-to-B" contract business is important to Defendants. As Staples' CEO stated, B-to-B business "is a cornerstone of Staples. It is core to who we <u>are</u>, and it is so core to our <u>future</u>. It's one of our fastest growing businesses, and it's our most profitable large business. This year, contract will account for almost [redacted]% of company sales. . . . Today, our contract business is a powerhouse. It provides Staples with a huge competitive advantage." PX04023 (Staples) at 005 (emphasis in original; internal ellipses removed); *see also* PX04630 (Staples) at 007 (for B-to-B, Staples is the "clear industry leader <u>and</u> gaining share") (emphasis in original).

"Large" B-to-B customers are commercial (i.e., non-governmental) businesses that buy at least $500,000 in consumable office supplies each year. Their purchases account for about [redacted]% of Staples' B-to-B sales in the United States, and about [redacted]% of Office Depot's U.S. B-to-B sales. PX06100 (Shapiro Rpt. at 7). Such customers typically prefer to consolidate their office supplies purchases with one primary or preferred vendor to leverage their purchasing volume to negotiate lower prices than they could achieve if they split their purchases among multiple vendors.[6] Large B-to-B customers require a primary vendor that can service their geographically diverse locations.[7] They want one point of contact with the vendor in the event there are service issues.[8] They want to minimize the administrative costs and inefficiencies from having multiple vendors to negotiate with, multiple invoices to process, different procurement systems for employees to use, multiple utilization reports to keep track of, and different delivery schedules.[9]

These large B-to-B customers engage in often lengthy, formal processes, such as RFPs, to choose a primary office supplies vendor that will satisfy their requirements.[10] Procurement officers at large businesses spend considerable effort on RFPs to get the lowest prices and to increase efficiencies by streamlining their purchasing.[11] They then generally purchase pursuant

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[6] *See, e.g.*, [redacted] Decl.) ¶ 8; [redacted] Decl.) ¶ 9; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 8; [redacted] Decl.) ¶ 9; [redacted] Decl.) ¶ 6; [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 5.

[7] *See, e.g.*, [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 9; [redacted] Decl.) ¶ 8; [redacted] Decl.) ¶ 12.

[8] *See, e.g.*, [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 6; [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 7(f).

[9] *See, e.g.*, PX04329 (Staples) at 001 (noting that consolidating spend reduces administrative burden and saves money); [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 8; [redacted] Decl.) ¶ 9; [redacted] Decl.) ¶ 6.

[10] *See, e.g.*, [redacted] Decl.) ¶ 2; [redacted] Decl.) ¶ 6; [redacted] Decl.) ¶ 6; [redacted] Decl.) ¶¶ 6-7; [redacted] Decl.) ¶¶ 3, 8, 14-19; [redacted] Decl.) ¶ 9; [redacted] Decl.) ¶ 5; [redacted] Decl.) ¶ 3.

[11] *See, e.g.*, [redacted] Decl.) ¶ 5; [redacted] Decl.) ¶¶ 8-9; [redacted] Decl.) ¶ 4; [redacted] Decl.) ¶¶ 5-6, 11; [redacted] Decl.) ¶¶ 3-6; [redacted] Decl.) ¶ 9.

to a contract with that chosen vendor.[12]

Defendants have a significant advantage over other vendors in winning the business of large B-to-B customers. Unlike other vendors, Defendants buy the bulk of the products that they resell directly from manufacturers rather than from wholesalers.[13] Defendants' size and scale generally allow them to purchase at lower prices than their smaller competitors can.[14] That purchasing power means that Staples and Office Depot generally can offer lower prices to customers than their competitors can.[15] Their size and breadth also allow Staples and Office Depot to offer a combination of features that large B-to-B customers require, including nationwide distribution, next-day or desktop delivery, on-call sales representatives, customizable electronic product catalogs, IT integration with the customer's procurement system, product utilization tracking, customized invoicing, flexible payment terms, and well-known reputations and experience serving large B-to-B customers.[16] Defendants' delivery systems are supported by

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[12] *See, e.g.*, [redacted] Decl.) ¶ 3; [redacted] Decl.) ¶ 2; [redacted] Decl.) ¶¶ 3, 11; [redacted] Decl.) ¶ 3; PX04131 (Staples) at 002 (explaining to an investment analyst in April 2015 that [redacted]").

[13] PX05424 (Office Depot buys [redacted]% of its product volume from manufacturers); PX04629-004-05 (Staples buys [redacted]% of its product volume from wholesalers (i.e., [redacted]% from manufacturers)); [redacted] Decl.) ¶¶ 3, 24; [redacted] Decl.) ¶¶ 6, 25; [redacted] Decl.) ¶ 13(b).

[14] *See, e.g.*, PX04469 (Staples) at 012, 015 (noting in an RFP response Staples' "[redacted]" and "[redacted]"); PX05380 (Office Depot) at 012 (noting in an RFP response Office Depot's [redacted]); [redacted] Decl.) ¶ 24; [redacted] Decl.) ¶ 25; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶¶ 12-14; [redacted] Decl.) ¶ 12(a); [redacted] Decl.) ¶ 5; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 19; [redacted] Dep. at 184).

[15] *See, e.g.*, [redacted] Decl.) ¶¶ 25, 29; [redacted] Decl.) ¶¶ 12-14; [redacted] Decl.) ¶ 10; [redacted] Decl.) ¶ 15; [redacted] Decl.) ¶ 10; [redacted] Decl.) ¶ 10; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 4.

[16] *See, e.g.*, [redacted] Decl.) ¶¶ 10-15; [redacted] Decl.) ¶ 15; [redacted] Decl.) ¶¶ 12-19; [redacted] Decl.) ¶ 7; [redacted] Decl.) ¶¶ 6-9; [redacted] Decl.) ¶¶ 7, 13-18, 22; [redacted] Decl.) ¶ 16; [redacted] Decl.) ¶¶ 9, 15; [redacted] Decl.) ¶¶ 14-15; [redacted] Decl.) ¶ 14.

a network of company-owned distribution centers spread across the country.[17]

Staples and Office Depot, although not the only office supplies vendors, dominate the sale and distribution of consumable office supplies to large B-to-B customers, with at least a 79% share. PX06100 (Shapiro Rpt. at 2, 15-16, Ex. 5B). They are the top two options for large B-to-B customers and, for a number of these customers, they are the only viable options. In fact, both Defendants assert in the ordinary course of business that they see themselves as competing in a two-player market.[18] They compete fiercely to win the role of primary vendor. And since the announcement of Staples' proposed acquisition of Office Depot, each has warned customers that, once the deal is consummated, the competition will end.[19]

In addition to Staples and Office Depot, there are many regional and local office supplies vendors, such as W.B. Mason Company, HiTouch Business Services, Guernsey, Inc., Weeks-Lerman, Gulf Coast Office Products, American Paper & Twine, Innovative Office Solutions, Forms & Supply, ImpactOffice, A-Z Office Resources, Capital Office Products, Complete Office Supply, Office Solutions, and many others. PX06100 (Shapiro Rpt., Ex. 7). None can provide the combination of low pricing and value-added services that Staples and Office Depot can. As a result, regional and local vendors are not meaningful suppliers to large B-to-B customers. For example, W.B. Mason is the largest of the regional and local vendors, and is the third-largest office supplies vendor in the country. [redacted]

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[17] *See*, *e.g.*, PX04469 (Staples) at 014 (describing in an RFP response Staples' national network of distribution centers); PX05380 (Office Depot) at 044 (describing in an RFP response Office Depot's nationwide network of distribution centers); [redacted] Decl.) ¶ 9; [redacted] Decl.) ¶ 12.

[18] PX04081 (Staples) at 001; PX04044 (Staples) at 025; PX04335 (Staples) at 001; PX04246 (Staples) at 001; PX05419 (Office Depot) at 021.

[19] PX05236 (Office Depot) at 001; PX05393 (Office Depot) at 002; PX04357 (Staples) at 001; PX07175 ([redacted] at 001; PX05249 (Office Depot) at 001; PX04567 (Staples) at 002.

[redacted].[20] W.B. Mason's share of the large B-to-B customer business is less than 1%. PX06100 (Shapiro Rpt., Ex. 5B, Ex. 7).

The other regional and local vendors each have shares under 1% as well. PX06100 (Shapiro Rpt., Ex. 5B, Ex. 7). Their small shares reflect the fact that large B-to-B customers see significant disadvantages to using regional or local suppliers. Regional or local vendors must use a wholesaler to distribute office supplies outside their home territories, increasing their costs.[21] Moreover, large B-to-B customers do not want to use a patchwork of regional vendors to cover a national or multi-regional area. Doing so results in the multiple deliveries, invoices, utilization tracking, e-procurement interfaces, and customer service personnel that those customers try to avoid.[22]

Some local and regional vendors have banded into consortia to try to serve large B-to-B customers. But the members of such consortia are all independent businesses and supply the customers separately, with their own invoices, their own product selection, and their own customer service.[23] As a result, consortia have been largely unsuccessful in attracting business from large B-to-B customers, who generally prefer to deal with, and consolidate spend with, a single office supplies vendor that can get them the lowest prices.[24]

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[20] [redacted] Decl.) ¶¶ 3, 23.

[21] *See, e.g.,* [redacted] Decl.) ¶¶ 5, 24; [redacted] Decl.) ¶ 7; [redacted] Decl.) ¶ 7; [redacted] Decl.) ¶¶ 12-13; *see also* [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 14; [redacted] Decl.) ¶ 10; [redacted] Decl.) ¶ 11.

[22] *See, e.g.,* [redacted] Decl.) ¶ 15; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 23; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 20.

[23] *See, e.g.,* [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 24; [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 14; [redacted] Decl.) ¶ 12; [redacted] Decl.) ¶ 20; [redacted] Decl.) ¶ 25; [redacted] Decl.) ¶ 15; [redacted] Decl.) ¶ 29; [redacted] Decl.) ¶ 8.

[24] *See, e.g.,* [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 24; [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 14; [redacted] Decl.) ¶ 12; [redacted] Decl.) ¶ 20; [redacted] Decl.) ¶ 25; [redacted] Decl.) ¶ 15; [redacted] Decl.) ¶¶ 18-19; [redacted]

Nor are manufacturers, wholesalers or retailers options for large B-to-B customers that want a primary vendor. Manufacturers of consumable office supplies, such as pens, folders, notepads, and copy paper, generally sell only in very large quantities, and so typically do not sell directly to B-to-B customers.[25] It would be impracticable, time-consuming, and costly for large B-to-B customers to undertake the administrative burden of buying pens from one manufacturer, notepads from another, staplers from another, etc.[26] Office supplies wholesalers are also not a viable supply option for B-to-B customers because wholesalers generally sell office supplies to vendors, who then resell those products to business customers.[27] Nor are retail suppliers a viable option for large businesses. Large B-to-B customers negotiate prices significantly below retail, and therefore buying at retail would not be cost-effective.[28] Moreover, buying at retail would not provide other services that large B-to-B customers want, such as delivery, consistency of product selection and availability, product utilization reporting, or customized catalogs.[29]

In April 2015, Amazon.com launched Amazon Business, an online division offering a wide variety of products, including consumable office supplies, to business customers that

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[redacted] Decl.) ¶ 10; [redacted] Decl.) ¶ 11; [redacted] Supp. Decl.) ¶ 2; [redacted] Decl.) ¶ 29; [redacted] Decl.) ¶ 23; [redacted] Decl.) ¶¶ 13-17.

[25] [redacted] Decl.) ¶ 6; [redacted] Decl.) ¶ 5; [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 21.

[26] [redacted] Decl.) ¶ 25; [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 27; [redacted] Decl.) ¶ 33; [redacted] Decl.) ¶¶ 26-27; [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 17.

[27] [redacted] Decl.) ¶¶ 2, 14; PX02001 (Goodman (Staples) IH at 226-27); [redacted] Dep. at 198).

[28] *See, e.g.*, PX06100 (Shapiro Rpt. at 7, 17, Exs. 6A-6F); [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 36; [redacted] Decl.) ¶ 5; [redacted] Decl.) ¶ 28; [redacted] Decl.) ¶ 18; [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 16; [redacted] Decl.) ¶ 18; [redacted] Decl.) ¶ 31.

[29] *See, e.g.*, [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 16; [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 37; [redacted] Decl.) ¶ 28; [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 14; [redacted] Decl.) ¶ 31; [redacted] Decl.) ¶ 18.

register with the site.[30] At present, however—and as Office Depot concluded this past December—Amazon "does not have a significant presence in the market" for large B-to-B customers. PX05427 (Office Depot) at 001. [redacted].[31] [redacted].[32] [redacted].[33]

Given these limited options for large B-to-B customers, it is easy to see why "[t]here are only two real choices for customers"—Staples and Office Depot. PX04082 (Staples) at 029.

ARGUMENT

On February 4, 2015, Staples and Office Depot agreed to merge in a deal that valued Office Depot at $6.3 billion. On December 8, 2015, the Commission filed a complaint for a preliminary injunction, alleging that the proposed Merger would substantially harm competition for the sale and distribution of consumable office supplies to large B-to-B customers.

The proposed Merger would combine the country's two largest vendors of consumable office supplies. It would create a dominant firm *over 15 times* the size of the next-largest supplier. And it would extinguish the direct, head-to-head price competition between Staples and Office Depot that provides large B-to-B customers with low prices today.

Having found reason to believe that the proposed acquisition violates Section 7 of the

[30] [redacted] Decl.) ¶ 3.
[31] [redacted] Decl.) ¶¶ 14-15.
[32] [redacted] Decl.) ¶¶ 10, 12, 15-16; [redacted] Dep. at 114-15, 175-77, 193-95).
[33] [redacted] Decl.) ¶¶ 12, 16; [redacted] Dep. at 113-15, 175-76, 204-05).

Clayton Act and Section 5 of the FTC Act, the Commission seeks a preliminary injunction under Section 13(b) of the FTC Act. 15 U.S.C. § 53(b). This preliminary relief will preserve the status quo and prevent consumer harm while the FTC holds an administrative proceeding to determine the merger's legality upon a full evidentiary record.[34] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001); *FTC v. CCC Holdings, Inc*., 605 F. Supp. 2d 26, 35 (D.D.C. 2009).

Under Section 13(b), a preliminary injunction should issue whenever such an injunction "would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *Heinz*, 246 F.3d at 714.

To evaluate the Commission's "likelihood of success on the merits," this Court must "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger '*may be* substantially to lessen competition, or to *tend to* create a monopoly' in violation of section 7 of the Clayton Act." *Heinz*, 246 F.3d at 714 (quoting 15 U.S.C. § 18) (emphasis added). At this preliminary stage, the Commission "is not required to *establish* that the proposed merger would in fact violate Section 7 of the Clayton Act." *Heinz*, 246 F.3d at 714 (emphasis in original). Nor is it "the district court's task 'to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *CCC Holdings*, 605 F. Supp. 2d at 67 (Tatel, J., concurring) (quoting *FTC v. Whole Foods Mkt., Inc*., 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring)); *accord*, *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1071 (D.D.C. 1997).

Here, the high market share and concentration levels establish a presumption that the merger is unlawful. The direct evidence of head-to-head competition between Defendants

[34] Defendants have stated that if the Court grants a preliminary injunction, they will not proceed with an administrative trial. Defendants' strategic decision to forego a trial on the merits—if they so choose—cannot change the statutory standard chosen by Congress for a preliminary injunction under Section 13(b) of the FTC Act.

bolsters that presumption—as well as bolstering the Commission's likelihood of success. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963).

The second prong of Section 13(b) requires the Court to "weigh the equities" to determine whether a preliminary injunction is in the public interest. *Heinz*, 246 F.3d at 726. "The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws." *Id.* Thus, if the Commission shows a likelihood of success on the merits, the equities necessarily favor a preliminary injunction to prevent Defendants from merging their operations before the administrative proceeding. Absent such relief, it would be extremely difficult, if not impossible, for competition to be restored to its previous state if the Commission ultimately finds the merger unlawful. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085-86 n.31 (D.C. Cir. 1981). In fact, "[n]o court has denied relief to the FTC in a [Section] 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *FTC v. ProMedica Health System, Inc.*, 2011 WL 1219281, at *60 (N.D. Ohio Mar. 29, 2011).

I. THE FTC IS LIKELY TO SUCCEED ON THE MERITS

Courts generally assess whether a merger violates Section 7 by determining: (1) the "line of commerce," or relevant product market; (2) the "section of the country," or relevant geographic market; and (3) the merger's probable effect on competition in the relevant product and geographic markets. *See United States v. Marine Bancorp.*, 418 U.S. 602, 618-23 (1974); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 422-23 (5th Cir. 2008).

A merger's "probable" effects on competition are at issue because Section 7 of the Clayton Act is intended to arrest anticompetitive mergers "in their incipiency." *Phila. Nat'l Bank*, 374 U.S. at 362. Indeed, "Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties"—even on the ultimate merits. *Heinz*, 246 F.3d at 713 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). As a result, "certainty, even a high probability, need not be shown." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989)

This standard requires an assessment of the merger's *likely* impact on future competition, and "doubts are to be resolved against the transaction." *Id.*; *Brown Shoe*, 370 U.S. at 323. Indeed, the Supreme Court has made clear that "a merger which produces a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is *not* likely to have such anticompetitive effects." *Phila. Nat'l Bank*, 374 U.S. at 363 (emphasis added).

Thus, by "showing that the proposed transaction . . . will lead to undue concentration [for a particular product in a particular geography], the Commission establishes a *presumption* that the transaction will substantially lessen competition." *Staples*, 970 F. Supp. at 1083 (emphasis added); *see Heinz*, 246 F.3d at 715. Once that presumption is established, the burden of rebutting the *prima facie* case shifts to Defendants. *See Marine Bancorp.*, 418 U.S. at 631; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 167 (D.D.C. 2000).

A. The Proposed Merger Is Presumptively Unlawful

The proposed Merger is presumptively unlawful. It would substantially increase concentration and reduce competition in the market for the sale and distribution of consumable office supplies to large B-to-B customers in the United States.

1. The Relevant Product Market Is The Sale And Distribution of Consumable Office Supplies to Large B-to-B Customers

The relevant product market is the "line of commerce" affected by a proposed merger. *Brown Shoe*, 370 U.S. at 324. In construing the product market, "courts look at 'whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.'" *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011) (citation omitted); *see also Brown Shoe*, 370 U.S. at 325 (product market determined by "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it").

To do this, courts should assess the "practical indicia" of the boundaries of a relevant market, such as "the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices," the existence of special classes of customers who desire particular products and services, "industry or public recognition" of a separate market, and how the defendants' own materials portray the "business reality" of the market. *Brown Shoe*, 370 U.S. at 325; *see United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966); *see also FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986). It is well recognized that the form of distribution may constitute a relevant product market. *See, e.g.*, *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d. 34, 45-46 (D.D.C. 1998) ("wholesale distribution of prescription drugs"); *Staples*, 970 F. Supp. at 1074-80 (sale of office supplies by office supply superstores).

The product market relevant to this proposed Merger is the sale and distribution of consumable office supplies to large B-to-B customers. The term "consumable office supplies" includes a bundle of office supplies, such as pens, notepads, and copy paper, that must be replenished frequently. Large B-to-B customers generally contract with a single vendor to provide them with their requirements of office supplies.[35] Indeed, it would be impracticable—

[35] *See, e.g.*, [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 8; [redacted] Decl.) ¶ 4.

and unmanageable—for a business to buy staplers from one company, pens from another, file folders from another, and so on.[36]

In such circumstances, rather than defining a pen market and a binder clip market, and separately measuring market shares in each, the products can be bundled together for analytical convenience. PX06100 (Shapiro Rpt. at 5). Although the individual types of office supply products are not substitutes in demand for each other—i.e., a pen is not a substitute for a binder clip—these products are purchased together and the competitive conditions for them are largely the same. *See* PX06100 (Shapiro Rpt. at 5). Thus, whether the products are assessed individually or as part of a bundle, the result of the analysis will be the same.[37] *See Brown Shoe*, 370 U.S. at 327-28 (shoe market need not be subdivided into smaller groupings when "considered separately or together, the picture of this merger is the same"); *Grinnell Corp.*, 384

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[36] *See, e.g.*, [redacted] Decl.) ¶ 25; [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 30; [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 21.

[37] Following the Supreme Court's practical approach to market definition, the relevant product market here includes copy and printer paper. That is because large B-to-B customers generally buy copy and printer paper with their consumable office supplies, and the set of vendors selling copy and printer paper to those customers is very similar to the set of vendors selling general office supplies (i.e., pens, pencils, staplers, etc.) to those same customers. *Id.* at 4-5. By contrast, ink and toner for printers and copiers is not included in the relevant product market. *Id.* at 5. Although some customers may buy those products in the same contract as consumable office supplies, many large B-to-B customers buy ink and toner through managed print service arrangements under which the leasing or purchase of printers and copiers is bundled with repair and maintenance services. *Id.* at 5, 13-14. As a result, ink and toner is often sold under different competitive conditions than consumable office supplies, and it makes sense to exclude them from the relevant market. *Id.* at 5, 13-14. For example, if companies A and B were the only two companies selling men's dress shoes, a merger between them would certainly reduce competition. The fact that the two companies also sell hiking boots—and for hiking boots face competition from companies C and D—would not change the merger's harm to competition for dress shoes. *Id.* at13-14. Thus, the relevant market for analyzing the merger would be dress shoes. *Id.*

Also excluded from the relevant market are adjacent product categories, such as break room supplies, janitorial and sanitation products, office furniture, and technology products; the set of vendors selling those adjacent products is different and broader than for consumable office supplies. *Id.* at 5. Again, it does not matter that such products may be acquired in the same contract as consumable office supplies. For example, if two airlines were the only ones offering flights between cities A and B, there would be concern about a reduction in competition for such flights if the two airlines merged. *Id.* at 14. That would not change simply because the airlines also offered flights to other cities and provided frequent flier miles on those other flights. *Id.* Competition for flights between cities A and B would still be harmed, and such flights would represent the relevant market. *Id.*; *see also FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2012) (relevant market for inpatient general acute care services even though health plans contract for broader set of services); *In the Matter of ProMedica Health Sys., Inc.*, FTC Dkt. No. 9346, 2012 WL 2450574, at *38-*41 (F.T.C. June 25, 2012) (same); *ProMedica*, 2011 WL 1219281, at *54-*55 (same).

U.S. at 572 (relevant product market combines "a number of different products or services where that combination reflects commercial realities"); *Phila. Nat'l Bank*, 374 U.S. at 356 (relevant product market is cluster of commercial banking products and services).

"Large B-to-B customers" are commercial (i.e., non-governmental) customers that buy at least $500,000 of consumable office supplies annually, for their own end-use (i.e., not for resale). PX06100 (Shapiro Rpt. at 5-6 n.12). They typically select an office supplies vendor by issuing detailed RFPs setting forth specific requirements, such as dedicated account representatives and/or customer service representatives; next-day and/or desktop delivery to reduce customers' storage and internal distribution costs; a nationwide distribution network to service customers' geographically dispersed office locations; flexible payment terms; detailed utilization reporting so that customers can track and monitor employees' uses and needs for office supplies; customizable electronic catalogs to encourage the customer's employees to use supplies on which the customer has negotiated the lowest prices; sophisticated IT capabilities that integrate into the customers' e-procurement and billing systems; private label products; environmentally-friendly "green" products; a well-known reputation and experience supplying large B-to-B customers with office supplies; and demonstrated financial stability.[38]

Large B-to-B customers' formal contracting processes allow them to leverage the competition between Staples and Office Depot to obtain favorable pricing, higher discounts and rebates, and other pricing concessions, such as up-front signing bonuses. Those favorable terms are then memorialized in individual contracts.

Because of these customers' specific requirements, industry participants typically view

[38] *See* notes 16-17, *supra*. *See also* PX06100 (Shapiro Rpt. at 7-9).

large B-to-B customers as a distinct customer group.[39] Both Staples and Office Depot group B-to-B customers into categories based on size of spend. *See*, *e.g.*, PX04088 (Staples) at 023; PX02007 (Lander (Office Depot) IH at 13-14); PX04046 (Staples) at 003 (list of "large/enterprise" contract wins); PX06100 (Shapiro Rpt. at 6-7).

In the recent *Sysco* decision in the U.S. District Court for the District of Columbia, Judge Mehta found that the sale and distribution of a bundle of food products ("broadline distribution") to a specific set of customers ("National Customers") comprised a relevant product market. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 37-48 (D.D.C. 2015). The court recognized that "broadline" food distribution included a bundle of products and related services that customers required, and that broadline distribution was distinct from other forms of food distribution. *Id.* at 25-37. Moreover, large customers with operations in multiple geographical locations, i.e., "National Customers," had particular needs: centralized negotiation of contracts for delivery to geographically dispersed locations; "efficient contract management and administration (e.g., centralized ordering and reporting, a single point of contact, and consistent pricing across all locations), volume discounts from aggregated purchasing;" product consistency and availability; and a preference to contract with a single broadline distributor with national scope. *Id.* at 38. They also individually negotiated prices, making National Customers particularly susceptible to being targeted for price discrimination. *Id.* at 46. As a result, the relevant product market was broadline distribution to National Customers. *Id.* at 48.

The same is true here. As noted above, large B-to-B customers have distinct requirements for the sale and distribution of consumable office supplies, and many view Staples

[39] *See*, *e.g.*, PX06100 (Shapiro Rpt. at 6 n.14); [redacted] Decl.) ¶ 7; [redacted] Decl.) ¶ 9; [redacted] Decl.) ¶ 16; [redacted] Decl.) ¶ 6; [redacted] Decl.) ¶ 3.

and Office Depot as their only two viable sources of supply.[40] Recognizing this, Staples and Office Depot develop specific "pricing and business strateg[ies]" for large B-to-B customers with the other competitor in mind. *H&R Block*, 833 F. Supp. 2d at 53; *see also* PX04335 (Staples) at 001 (outlining Staples' "ODP Attack" plan). This provides "strong evidence [of] the relevant product market." *H&R Block*, 833 F. Supp. 2d at 53.

These same factors leave large B-to-B customers particularly vulnerable to price increases resulting from the Merger. PX06100 (Shapiro Rpt. at 7, 10). That is because, after the Merger, Staples could price discriminate by increasing prices to these "targeted customers" and not others. PX06100 (Shapiro Rpt. at 7, 10); PX08051 (*U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* (2010) ("*Merger Guidelines*") §§ 3, 4.1.4). And without the threat of moving their business to Office Depot, large B-to-B customers would have no choice but to pay those higher prices. PX06100 (Shapiro Rpt. at 7, 10).

As discussed by Dr. Shapiro, most economists rely on what is known as the "hypothetical monopolist" test to define the relevant product market. *See* PX06100 (Shapiro Rpt. at 11); *see also H&R Block*, 833 F. Supp. 2d at 51-52. This test asks whether a hypothetical monopolist over particular products or services could impose "a small but significant and nontransitory increase in price" (SSNIP)—typically five percent—without losing so many customers to competitors that the price increase would be unprofitable. *See* PX06100 (Shapiro Rpt. at 11); *see also* PX08051 (*Merger Guidelines* §§ 4.1.1-4.1.3).[41] If the hypothetical monopolist could

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[40] *See* PX06100 (Shapiro Rpt. at 7-9); [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 23; [redacted] Decl.) ¶ 20; [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 28; [redacted] Decl.) ¶ 16; [redacted] Decl.) ¶ 15; [redacted] Decl.) ¶ 22; [redacted] Decl.) ¶ 22; [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 12; [redacted] Decl.) ¶¶ 13, 20; [redacted] Decl.) ¶ 16; [redacted] Decl.) ¶ 14; [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 29.

[41] Although not binding, courts often rely on the *Merger Guidelines* as persuasive authority in antitrust cases. *See, e.g.*, *Heinz,* 246 F.3d at 716 n.9; *H&R Block*, 833 F. Supp. 2d at 52 n.10; *Staples*, 970 F. Supp. at 1082.

profitably impose such a price increase, then the particular products at issue comprise the relevant product market; if not, the proposed product market is too narrow. *Ibid*.

Here, the hypothetical monopolist test demonstrates that the relevant product market is the sale and distribution of consumable office supplies to large B-to-B customers. PX06100 (Shapiro Rpt. at 11-13). As Dr. Shapiro points out, Defendants themselves argue that competition for large B-to-B customers' business is fierce. *Id*. at 12. And the evidence shows that large B-to-B customers use that competition to obtain low prices. *Id*. These facts suggest that if such competition were eliminated (because a hypothetical monopolist controlled all sales), prices to large B-to-B customers would be higher. *Id*. That supports the finding that the sale and distribution of consumable office supplies to large B-to-B customers is a proper relevant antitrust market. *Id*. at 12-13.

2. The United States Is The Relevant Geographic Market

"The 'relevant geographic market' identifies the geographic area in which the defendants compete in marketing their products or services." *H&R Block*, 833 F. Supp. 2d at 50 n.7 (quoting *CCC Holdings*, 605 F. Supp. 2d at 37); *see also Cardinal Health*, 12 F. Supp. 2d at 49; PX08051 (*Merger Guidelines* § 4.2). The relevant geographic market must "correspond to the commercial realities of the industry" as determined by a "pragmatic, factual approach" to assessing the industry. *Brown Shoe*, 370 U.S. at 336.

As described above, this Merger would harm competition for large B-to-B customers located across the country. Thus, the United States is the relevant geographic market. PX06100 (Shapiro Rpt. at 11). Even Staples' and Office Depot's own documents refer to themselves as competing in a "national market." For example:

- In February 2014, Staples prepared an ODP "Attack Plan," noting that they compete in "2-player national market." PX04081 (Staples) at 001; *accord* PX04044 (Staples) at 025; PX04335 (Staples) at 001.

- Office Depot acknowledged that "[o]n a national scale Office Depot's competition is Staples . . . ." PX05042 (Office Depot) at 051.
- Office Depot noted that Staples was its "[t]oughest and most aggressively priced national competitor." PX05229 (Office Depot) at 149.
- Office Depot explained to a customer that only Staples and Office Depot can serve them nationwide. PX05233 (Office Depot) at 001.

3. The Merger Would Create Extraordinarily High Market Shares And Concentration In The Relevant Market

The proposed merger would result in a dominant firm controlling at least 79% of the relevant market.[42] No court has ever allowed such a merger. And for good reason: Congress enacted the Clayton Act so that courts could prevent undue economic concentration *before* a dominant firm could use its market power to harm customers. *Brown Shoe*, 370 U.S. at 317-18; *Phila. Nat'l Bank*, 374 U.S. at 363. In accordance with that statutory directive, the Supreme Court has made clear that mergers that significantly increase economic concentration should be deemed presumptively unlawful. *Phila. Nat'l Bank*, 374 U.S. at 363.

To assess a merger's presumptive illegality, courts first consider Defendants' shares of the relevant market, and then employ a statistical measure of market concentration called the Herfindahl-Hirshman Index (HHI). This index calculates market concentration by adding the squares of each market participant's individual market share. *See Cardinal Health,* 12 F. Supp. 2d at 53. A merger is presumptively anticompetitive if it increases the HHI by more than 200 points and results in a post-merger HHI exceeding 2500. PX08051 (*Merger Guidelines* § 5.3); PX06100 (Shapiro Rpt. at 19); *accord H&R Block*, 833 F. Supp. 2d at 71-72; *Heinz*, 246 F.3d at 716 n.9.

The proposed Staples/Office Depot merger blows past these thresholds. Plaintiffs' expert, Dr. Shapiro, measured Defendants' market shares in two different ways to validate his

[42] PX06100 (Shapiro Rpt. at 2, 15-16, Ex. 5B).

analyses. First, Dr. Shapiro calculated market shares based on data from Fortune 100 companies regarding their 2014 purchases of consumable office supplies. PX06100 (Shapiro Rpt. at 14-18). He found that Staples' market share is approximately 47% and Office Depot's is 32%. *Id.* at 15, Ex. 5B. Combined, they have a market share of 79%. *Id.* That is about fifteen times the size of the next largest supplier—a paper merchant named Veritiv—which has a market share of 5.2%. *Id.* at 15-16, Ex. 5B. Other vendors, such as W.B. Mason, each have less than a 1% share. *Id.* at 16, Ex. 5B.

As explained by Dr. Shapiro, purchases of consumable office supplies by the Fortune 100 are a reasonable proxy for purchases by all large B-to-B customers. PX06100 (Shapiro Rpt. at 15-16). Indeed, Dr. Shapiro tested the soundness of his market share calculations using sales data from competing office supplies vendors to measure the extent to which office supplies vendors serve as the "primary vendor" for a given customer. PX06100 (Shapiro Rpt. at 14, 18-19). Dr. Shapiro's "primary vendor" analysis shows that either Staples or Office Depot serves as the primary office supplies vendor for [redacted] large B-to-B customers, and have a combined market share of almost 88%. PX06100 (Shapiro Rpt. at 19, Ex. 7). By contrast, the next largest primary vendor, W.B. Mason, is the primary vendor for [redacted] such customers. *Id.* at Ex. 7. Its market share is less than 1%. *Id.* These results demonstrate that a significant number of large B-to-B customers view Staples and Office Depot as the two best options to serve their office supplies needs. *See* PX06100 (Shapiro Rpt. at 18-19). As a result, these shares are highly informative about competition between Staples and Office Depot, and corroborate Dr. Shapiro's other market share calculations. *See* PX06100 (Shapiro Rpt. at 14, 18-19).

With a post-merger market share for Staples of at least 79%, the Merger would result in an HHI of 6265—well over the HHI of 2500 that signifies a market as "highly concentrated."

PX06100 (Shapiro Rpt. at 19, Ex. 5C). The Merger would increase concentration by 2994 points—almost *15 times* the increase of 200 points that triggers a presumption of illegality. PX06100 (Shapiro Rpt. at 19, Ex. 5C).

In fact, the combined market share, market concentration, and increases in concentration exceed the levels that have created a presumption of illegality and warranted injunctions in past merger cases:

Case	Combined Share	HHI Increase	Post-Merger HHI	Holding
Phila. Nat'l Bank (Supreme Court 1963)	30%	N/A	N/A	Enjoined
Cardinal Health (D.D.C. 1998)	37.2% 39.9%	1,431	3,079	Enjoined
Swedish Match (D.D.C. 2000)	60%	1,514	4,733	Enjoined
Heinz (D.C. Cir. 2001)	32.8%	510	5,285	Enjoined
CCC Holdings (D.D.C. 2009)	70% 65%	2,035 545	5,685 5,460	Enjoined
H&R Block (D.D.C. 2011)	28.4%	400	4,691	Enjoined
Sysco (D.D.C. 2015)	75%	2,800	5,836	Enjoined
Combined Staples/Office Depot	**79%**	**2994**	**6265**	**TBD**

No court has ever allowed a merger with market shares like those here.

4. Extensive Evidence Corroborates The Presumption

To rebut the presumption of illegality established by the Supreme Court in *Philadelphia National Bank*, Defendants must show that, despite their huge market shares, they have "evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S. at 363. Defendants can make no such showing. The evidence *corroborates* the presumption of illegality in this case.

First, Staples' and Office Depot's own business records, in their executives own words, show that Defendants are each other's closest competitor. PX04360; PX02116 (Ringel (Staples) Dep. at 170); PX02002 (Calkins (Office Depot) IH) at 152, 154, 156-57. For example, in 2013, Staples created a poster to be hung in the office of Staples' CEO. The poster listed the primary office supplies vendor and estimated sales to each of the Fortune 100 companies. Staples or Office Depot was the supplier for *94* of them. PX04499 (Staples) at 002. That huge market share is no surprise: for many large B-to-B customers, Staples and Office Depot are the best, if not only, viable options.[43]

Each Defendant is the competitor most like the other, and each is the competitor on whom the other company focuses most of its competitive efforts:

- In an August 2015 enterprise business review, Office Depot explained that it was facing "Aggressive $$ Offers From Staples – Creating Losses." PX05437 (Office Depot) at 008.
- In July 2015, Office Depot was not surprised to lose a customer to Staples: "We took a ton of business from Staples over the last couple of weeks, so this could be a little retaliation." PX05258 (Office Depot) at 001.
- In a presentation to its North American Commercial business segments, Staples stated that "[f]or core office supplies we often compare ourselves to our most direct competitor, ODP." PX04414 (Staples) at 008; *see also* PX04266 (Staples) at 010.
- At a Leadership Summit in September 2014, Staples stated that it was looking "to crush Office Depot and take market share at their weakest moment." PX04386 (Staples) at 009.
- In June 2014, Staples' Chief Financial Officer told an investor conference, "So I think competition, I think Depot and Max competition is obviously the first one that you run into . . . ." PX05212 (Office Depot) at 018.
- An April 2014 document from customer [redacted] states that "Only two providers can support [redacted] requirements, Staples and Office Depot ("ODP")." PX07001 ([redacted]) at 002.

[43] *See, e.g.*, [redacted] Decl.) ¶ 22; [redacted] Decl.) ¶ 18; [redacted] Decl.) ¶ 14; [redacted] Supp. Decl.) ¶ 14; *see also* PX04082 (Staples) at 029 ("there are only two real choices for customers. Us or Them."); PX02116 (Ringel (Staples) Dep. at 149-50); PX04304 (Staples) at 010.

- In February 2014, Staples prepared an "[Office Depot] Attack: We Only Have One National [Office Products] Competitor!" PX04335 (Staples) at 001.[44]
- In November 2013, Staples set a goal for 2014: "Act like the dominant player we are in a two player OP [office products] market." PX04304 (Staples) at 014; PX04042 (Staples) at 024.[45]

Second, this head-to-head rivalry results in significant competition between Staples and Office Depot for large B-to-B customers. Staples and Office Depot must lower prices, and provide upfront payments, rebates, and other incentives, to keep and take business from each other. To take just a few examples:

- In [redacted], Staples offered [redacted] in upfront money to retain [redacted], a Fortune 500 company. When Staples then discovered that [redacted] was considering Office Depot, it reduced prices as well: "[redacted] I know it's a significant investment but if it goes to a formal RFP involving [Office] Depot, it could end up costing us a lot more." PX04294 (Staples) at 001.
- In [redacted], Staples and Office Depot competed for [redacted]'s office supplies business. To avoid losing Staples, Office Depot offered a [redacted] signing bonus. But Office Depot warned: "TIMING – This offer is time sensitive. If and when the purchase of Office Depot [by Staples] is approved, Staples will have no reason to make this offer." PX05235 (Office Depot) at 003-004; PX05236 (Office Depot) at 001.
- Staples was "in a dog fight with ODP" in [redacted] for the business of [redacted] Staples offered an additional [redacted], but bemoaned that "ODP is getting cheaper by the week." PX04064 (Staples) at 001.

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[44] Staples' "Attack Plan" explained that "Now that it is a 2-player national market," Staples needed a "robust strategy to capitalize on [Office Depot] vulnerability." PX04081 (Staples) at 001. Staples presented its "ODP Attack Plan" at a February 2014 Leadership Meeting, asking: "ODP Attack Plan—how will we play in a 2 player national market?" PX04044 (Staples) at 025. The goal was to "determine how to annihilate [Office Depot] in a 2 player national market." PX04044 (Staples) at 025. In a March 2014 update on its "Office Depot Attack Plan," Staples exclaimed that "***We have*** [redacted] ***ODP prospects in the pipeline representing roughly*** [redacted] ***in potential revenue. In addition we've had*** [redacted] ***of ODP wins over the past few months and already have approx.*** [redacted] ***on the table for negotiation as we speak – Excellent Effort!***" PX04348 (Staples) at 004 (emphasis in original). *See also* PX04246 (Staples) at 001 (Staples and Office Depot are the "Coke & Pepsi" for office supplies); PX05419 (Office Depot) at 021 (Office Depot consultant noting that in North America, Staples and Office Depot were the "Big 2 players" in a "Two horse race").

[45] *See also* PX07010 ([redacted] at 004 ([redacted] referring to Staples and Office Depot as the "Big Two"); PX05311 (Office Depot) at 001 (Office Depot stating that customer would "seriously have to consider us more than ever, since it's us an[d] Staples now. The big two."); PX04366 (Staples) at 001 (referring to "two player market"); PX05229 (Office Depot) at 149 (stating that Staples is Office Depot's "Toughest and most aggressively priced national competitor"); PX04083 (Staples) at 001 (noting that the "OP channel[ ] has contracted to 2 players.").

- In [redacted], Staples offered a [redacted] upfront payment to win a contract with [redacted], beating Office Depot's offer of [redacted]. PX04297 (Staples) at 002; PX05175 (Office Depot) at 001-002.
- To avoid losing [redacted] to Office Depot in [redacted], Staples increased its upfront payment to [redacted], even though the [redacted] account would then be less profitable. PX04034 (Staples) at 001.
- In [redacted], Staples increased the upfront payment it offered [redacted] from [redacted] to [redacted] to try to win the business from Office Depot. PX04033 (Staples) at 001-002; PX07028 ([redacted] at 008.
- In [redacted], [redacted] informed Office Depot that it was putting its business out for bid. [redacted] and Office Depot discussed the fact that the bidding would come down to Staples and Office Depot, the "only two players that can service them nationwide." PX05215 (Office Depot) at 002. To keep the business from Staples, Office Depot offered [redacted] a retention incentive of [redacted]. PX05266 (Office Depot) at 001.
- [redacted] a Fortune 100 company, pitted Staples and Office Depot against each other in an RFP with multiple rounds of bidding. Office Depot recognized that to beat Staples it needed [redacted] to [redacted] Staples' lower line-item pricing won out in the end and [redacted] agreed to switch from Office Depot to Staples in [redacted]. PX05234 (Office Depot) at 001; PX04300 (Staples) at 002.
- [redacted], a Fortune 500 company, switched back and forth between Staples and Office Depot between [redacted]. Those switching decisions were always "about the lowest price offered." In [redacted], [redacted] issued an RFP. Staples offered upfront money, immediate cost savings, and tiered volume rebates in an effort to retain the business. Nonetheless, [redacted] accepted a better offer from Office Depot. PX04373 (Staples) at 001; PX05294 (Office Depot) at 013.
- In [redacted], Staples and Office Depot each bid on the business of [redacted] a Fortune 100 [redacted] company. Office Depot put [redacted] cash on the table." To beat Staples' response, Office Depot increased its offer to a [redacted]. PX04029 (Staples) at 001; PX05293 (Office Depot) at 027.
- In the [redacted], [redacted] informed Office Depot that it was switching its business unless Office Depot could match Staples' [redacted] lower pricing. An internal Office Depot email explained that [redacted] PX05155 (Office Depot) at 001-002; PX02002 (Calkins (Office Depot) IH at 219-22).

Third, customers consider Staples and Office Depot to be the closest competitors, and they leverage the competition between the two to drive prices lower:

- Having Staples and Office Depot bid against each other "resulted in material savings" for [redacted]—"[t]he impact that competition from Staples had on Office Depot was stark." [redacted] Decl.) ¶¶ 21-22.
- [redacted] benefitted from "the vigorous and close competition between Staples and Office Depot." "Having Office Depot as a next-best option allows us to push harder on Staples, in terms of pricing and service, than we otherwise could." [redacted] Decl.) ¶¶ 39-40.
- [redacted] testified that Office Depot and Staples compete "aggressively to win and keep [redacted] business from each other by offering us low prices and high-quality service. [redacted] certainly benefits from this competition." [redacted] Decl.) ¶¶ 22, 24.
- [redacted] has "used Staples and Office Depot as leverage against one another to obtain competitive pricing and service." In fact, [redacted]'s "ability to switch to Staples gives [redacted] a significant amount of leverage to keep Office Depot honest and on its toes." [redacted] Decl.) ¶ 30.
- In [redacted] with its contract with Staples expiring, [redacted] informed Staples that it was considering Office Depot and Office Max as potential suppliers. Staples lowered its prices [redacted] to keep the business. [redacted] Decl.) ¶ 6.
- [redacted] was able to reduce the prices it paid Office Depot by approximately [redacted] through the implied threat of issuing an RFP. "Without the prospect of an RFP to Staples, [[redacted] would not have received this substantial reduction in prices." [redacted] Decl.) ¶¶ 11-13.
- [redacted] uses "bids from Staples and Office Depot to negotiate lower pricing for office supplies because no other company can offer the basket of office supplies we use as cost-effectively [redacted]." "Staples and Office Depot are the only office supplies vendors that are able to offer the high level of delivery and customer service [[redacted]] need[s] on a nationwide basis." [redacted] Decl.) ¶ 12.
- [redacted] bid Staples against Office Depot or OfficeMax [redacted] over a [redacted] period. In the most recent RFP, [redacted] selected Office Depot for its consumable office supplies business, but "it was important for Staples to bid on [redacted] business so [redacted] could better negotiate favorable pricing and service levels from . . . Office Depot." [redacted] Decl.) ¶¶ 16-17.

- "Staples and Office Depot are [redacted] only options for office supplies today. . . . [redacted] greatly benefits from the competition between Staples and Office Depot." [redacted] Decl.) ¶¶ 28-29.

If the Merger were to be consummated, this competition would end. Large B-to-B customers would no longer be able to use the threat of buying from Office Depot as bargaining leverage against Staples (and vice versa) to negotiate lower prices and better services. As a result, the Merger will lead to higher prices.

Staples and Office Depot have already made this clear. Staples internally complained in late 2013 that the "[Office Products] space is polluted with volume rebates and upfront money—[we] need to lead by example and stop doing these things!" PX04304 (Staples) at 012. This Merger will finally give Staples the power to end them. Indeed, just two months after the proposed Merger was announced, Office Depot was candid about the Merger's anticompetitive effects, telling a large B-to-B customer it should accept the upfront payments it was offering because "[i]f and when [Staples'] purchase of Office Depot is approved, Staples will have no reason to make this offer." PX05236 (Office Depot) at 001. Office Depot told another customer to consider Office Depot's proposal quickly: if the Staples/Office Depot Merger goes through, "there will no longer be competition between the two largest suppliers to insure [*sic*] you have the lowest price!" PX05393 (Office Depot) at 002. Staples was similarly candid, telling one customer to investigate its options with Staples "before they lose Office Depot as a lever to negotiate lower prices . . . ." PX04357 (Staples) at 001.[46]

All of this is consistent with economic theory—and common sense. Customers' bargaining leverage is largely a function of the availability of other options if negotiations with

[46] *See also* PX07175 ([redacted] at 001 (Office Depot telling customer that "global and national organizations had basically only two options for office supplies. If this deal is approved that will dwindle to one."); PX05249 (Office Depot) at 001 (Office Depot telling a customer that the merger "will remove your ability to evaluate your [current contract] with two competitors. There will only be one."); PX04567 (Staples) at 002 (Staples urging customer to accept offer before the Staples/Office Depot Merger is approved: the customer would "never get a more competitive offer than right now").

the first vendor fall through. PX06100 (Shapiro Rpt. at 22-23). As a result, the anticompetitive effects from a merger are "likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business." PX08051 (*Merger Guidelines* § 6.2); *see also id*. § 6.1 (extent of direct competition between the merging parties is "central" to the analysis of anticompetitive effects). In other words, the more often two competitors are the customers' top two choices in bidding contests or contract negotiations, the more likely it is that a merger of those two competitors will reduce customers' bargaining leverage—and increase prices.

Plaintiffs' economic expert, Dr. Carl Shapiro, conducted an empirical study of Defendants' history of bidding for large B-to-B customers. PX06100 (Shapiro Rpt. at 28-29). That study shows that Staples and Office Depot are overwhelmingly the top two choices for large B-to-B customers. Each Defendant is most often the runner-up when the other wins, with other vendors appearing as bidders only intermittently. PX06100 (Shapiro Rpt. at 28-29, Exs. 10-14). Staples' data on RFP wins indicate that Staples wins contracts from, and loses contracts to, Office Depot far more than any other competitor. *Id*. Office Depot's RFP data shows the same thing. *Id*. And the parties' own documents show that when Defendants win contracts for large B-to-B customers, they overwhelmingly win them from each other.[47] As a result, eliminating competition between them through this Merger makes it highly likely that prices will increase.

Courts in this Circuit have found that eliminating a significant competitor makes it highly

[47] *See, e.g.*, PX04367 (Staples) at 003-004 (showing [redacted] Staples wins, all of which are from Office Depot or OfficeMax); PX04463 (Staples) at 006-007 (showing [redacted] pending opportunities of $1 million or greater in various stages of negotiations, of which [redacted] are from Office Depot, and [redacted] "Key Wins" of $1 million or greater, of which [redacted] came from Office Depot); PX05039 (Office Depot) at 003-008 (identifying Staples as the competitor in more than [redacted]% of Enterprise customer opportunities); PX05221 (Office Depot) at 005 (similar); PX06100 (Shapiro Rpt. at 24-28).

likely that the merged entity can charge higher prices than it otherwise could. *See Swedish Match*, 131 F. Supp. 2d at 169 ("[A] unilateral price increase . . . is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors."); *H&R Block*, 833 F. Supp. 2d at 88-89 (finding unilateral effects likely in a merger between the second and third largest firms in the relevant market); *Staples*, 970 F. Supp. at 1083 (finding unilateral anticompetitive effects where the transaction "would eliminate significant head-to-head competition" between the merging parties). This Court should do the same.

B. Defendants Cannot Rebut The Strong Presumption Of Illegality

With the presumption of illegality firmly established, the burden shifts to Defendants to rebut the presumption by "produc[ing] evidence that 'show[s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)). Here, Defendants bear a particularly heavy burden given the strength of the *prima facie* case. *See H&R Block*, 833 F. Supp. 2d at 72 (the stronger the *prima facie* case, the more evidence defendants must present to rebut the presumption).

1. The Commission's 2013 Statement Does Not Rebut The Presumption

Defendants will likely point to the Commission's decision not to challenge the 2013 merger of Office Depot and Office Max as a reason that the current Merger should not be enjoined. *See* PX08064 (Statement of the FTC Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., Nov. 1, 2013) (hereinafter, "2013 Closing Statement"). But the Office Depot/Office Max merger combined what were then the second- and third-largest vendors of office supplies. It left the largest vendor, Staples, competing in the market against the merged company. *See id.* at 003. The evidence presented to the FTC by Office Depot and Office Max established that the two were not each other's closest competitor—Staples was. *See* PX0001

(Office Depot/OfficeMax Presentation to the FTC, Sept. 13, 2013) at 018, 021.

Moreover, in 2013 "there was little concern from contract customers about the [Office Depot/Office Max] merger, and even the largest customers believe the merger would be either pro-competitive or competitively neutral." *See id.* In its closing statement, the Commission noted that post-merger, the combined Office Depot-Office Max would still face competition from a number of other competitors. *See* PX08064 (2013 Closing Statement) at 003. But the primary competitor was, and would remain, *Staples*. *Id.*

This Merger would eliminate Staples as a counterweight to the combined Office Depot-Office Max. It would combine the two largest vendors of office supplies and create a dominant firm *over 15 times* the size of the next-largest supplier. There would be no remaining large competitor to constrain the combined firm's pricing. And unlike in 2013, numerous customers have voiced their concerns about the current Merger's likely anticompetitive effects.[48]

2. Amazon Cannot Constrain A Post-Merger Staples

Defendants also will likely argue that the emergence of Amazon Business is a unique competitive threat that will significantly constrain a post-Merger Staples. The evidence is to the contrary.[49] Indeed, just this past December, Office Depot concluded that "Amazon does not have a significant presence in the market." PX05427 (Office Depot) at 001. And Staples' concerns focus on smaller customers, not large customers where there are "the most barriers for [Amazon] to overcome." PX04200 (Staples) at 001.

The facts confirm this assessment. [redacted]

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[48] *See, e.g.*, [redacted] Decl.) ¶¶ 38-40; [redacted] Decl.) ¶ 18; [redacted] Decl.) ¶ 16; [redacted] Decl.) ¶ 22; [redacted] Decl.) ¶ 24; [redacted] Decl.) ¶ 23; [redacted] Decl.) ¶ 18; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 21; [redacted] Decl.) ¶ 17; [redacted] Decl.) ¶ 22.

[49] *See* PX06100 (Shapiro Rpt. at 47-53).

[redacted].[50] [redacted]. [redacted] Decl.) ¶¶ 14-15. [redacted]. [redacted] Decl.) ¶ 16; [redacted] Dep. at 98-99, 114-15, 177-78, 191-92). [redacted]. [redacted] Dep. at 189-90). [redacted]. [redacted] Decl.) ¶¶ 10-12, 16; [redacted] Dep. at 78-80).

Amazon's business model would make it particularly difficult for Amazon to offer on a consistent basis the types of services and negotiated pricing terms that large B-to-B customers require. More than [redacted] of Amazon's offerings are from third-party sellers on the Amazon marketplace. [redacted] Decl.) ¶¶ 3-4, 6, 8; [redacted] Dep. at 174). [redacted]. [redacted] Dep. at 67-69, 172-74). [redacted]. [redacted] That would defeat the benefits that large B-to-B customers achieve through consolidating their spend with one primary vendor. *See* pp. 3-4, *supra*. [redacted]

[50] [redacted] Dep. at 113, 175).

[redacted]. *See* [redacted] Dep. at 203-05); PX06100 (Shapiro Rpt. at 52) ([redacted]).

3. Purported "Leakage" Does Not Rebut The Presumption

Defendants do not dispute that based on their contracts with large B-to-B customers, they are the two dominant vendors of office supplies. Instead, they argue that contracts simply do not matter much; the contracts do not guarantee sales, and despite the contracts, there is considerable "leakage," i.e., off-contract spend going to Defendants' competitors. Again, the facts do not bear this out.

First, Dr. Shapiro's market share analysis already takes leakage into account.[51] And even accounting for leakage, Staples' post-Merger market share is at least 79%. PX06100 (Shapiro Rpt. at 2, 15-16, Ex. 5B).

Second, Defendants' assertion of massive off-contract spend is implausible. During the RFP process, large B-to-B customers spend months assessing the market, evaluating vendors' submissions, negotiating with potential vendors, and working out a contract.[52] They put in all that time and effort to get the lowest prices and the best service.[53] It is wholly implausible that after all that work, customers simply shop the internet to try to buy at better prices from retail websites, or shop around at other vendors.

Defendants themselves also spend considerable time, effort and money to win contracts.[54] They have teams of people responding to RFPs from customers, and evaluating and negotiating

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[51] PX06100 (Shapiro Rpt. at 15-18, Ex. 5B). In fact, Dr. Shapiro's analysis may be conservative, imputing any possible off-contract sales to leakage, even though any actual "leakage" from retail and online sources may well come from Staples and Office Depot themselves. PX06100 (Shapiro Rpt. Appendix E, at E-12).

[52] *See, e.g.*, [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 11.

[53] [redacted] Decl.) ¶ 12.

[54] *See, e.g.*, PX05023 (Office Depot) at 002 (12-month RFP process in which Office Depot lost to Staples). For these reasons, Defendants have sought to deter contracted customers from returning to the RFP process. *See, e.g.*, PX04412 (Staples) at 001(Staples looking to "sustain talks and avoid the RFP"); [redacted] Decl.) ¶ 5; PX04294 (Staples) at 001 ("[I]f it goes to a formal RFP involving Depot, it could end up costing us a lot more").

contracts.[55] They give large upfront payments—sometimes in [redacted]—as well as rebates and discounts to win these contracts.[56] Defendants would not continue to offer such terms unless customers were buying enough to make such payments worthwhile.

In fact, large B-to-B customers themselves deny that significant leakage exists. *See, e.g.*, [redacted] Decl.) ¶ 7 (off-contract spend "is extremely limited"); [redacted] Decl.) ¶ 17.[57] They have an incentive to spend on contract because they often have rebates or other incentives tied to anticipated spend levels with Staples or Office Depot.[58] They may lose out on rebates or even have to refund part of an upfront payment if they do not meet the targeted spend levels specified in the contract. *See* PX02116 (Ringel (Staples) Dep. at 101-03); [redacted] Dep. at 95). As a result, companies take steps to ensure compliance with their contracts.[59] Based on these efforts, customers testified that they generally achieve compliance levels of over 90%.[60]

4. Entry And Expansion Would Not Be Timely, Likely, Or Sufficient

Defendants bear the burden of proving that "'entry into the market[s] would likely avert [the proposed transaction's] anticompetitive effects.'" *Staples*, 970 F. Supp. at 1086 (quoting *United States v. Baker Hughes Inc.*, 908 F.2d 981, 989 (D.C. Cir. 1990)). Speculative entry or expansion will not suffice. To meet their burden, Defendants must show at least a "reasonable probability" of sufficient entry. *Chicago Bridge*, 534 F.3d at 430 n.10. Defendants must also

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[55] *See* PX02100 (Heisroth (Staples) Dep. at 103-06, 114); PX02002 (Calkins (Office Depot) IH at 19-20).

[56] *See, e.g.,* PX02116 (Ringel (Staples) Dep. at 101); PX02100 (Heisroth (Staples) Dep. at 68-69, 80); PX05235 (Office Depot) at 003-004; PX05236 (Office Depot) at 001; PX04425 (Staples) at 001; PX04034 (Staples) at 001.

[57] Competitor [redacted], for example, does not even bother trying to win business from customers under contract elsewhere. *See* [redacted] Dep. at 107).

[58] *See* [redacted] Decl.) ¶ 16.

[59] *See, e.g.,* [redacted] Decl.) ¶ 19; [redacted] Decl.) ¶ 14; [redacted] Dep. at 282-83); [redacted] Decl.) ¶ 5; [redacted] Decl.) ¶ 5; [redacted] Decl.) ¶ 10; [redacted] Decl.) ¶ 7.

See, e.g., [redacted] Dep. at 144-45); [redacted] Decl.) ¶ 16; [redacted] Decl.) ¶ 5; [redacted] Decl.) ¶ 7; [redacted] Decl.) ¶ 6. [redacted] confirmed similarly high rates of compliance among [redacted]. *See* [redacted] Decl.) ¶ 16.

show that entry would be "'timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.'" *H&R Block*, 833 F. Supp. 2d at 73 (quoting *Merger Guidelines* § 9); *see also CCC Holdings*, 605 F. Supp. 2d at 47. Defendants cannot satisfy this high standard.

As described above, Amazon Business [redacted] Decl.) ¶¶ 3, 14-16; [redacted] Dep. at 113, 175, 203-05); PX06100 (Shapiro Rpt. at 47, 52).

Other market participants recognize the difficulty of expansion of their geographic reach necessary to satisfy the requirements of large B-to-B customers. [redacted] testified that it is "a gamble" to "invest millions of dollars to acquire or build and stock a new distribution center, in the hopes that it will be able to attract enough customers to eventually make the operation profitable. Even when this gamble pays off, it generally takes 3-5 years before a new market is profitable." [redacted] Decl.) ¶ 37. And it takes several more years to fully recoup the infrastructure investment. *Id*. As result, [redacted] has no current plans to expand geographically. *Id*. ¶ 38. Similarly, office supplies vendor [redacted] testified that building a new distribution center "is time-consuming, financially risky, expensive, and logistically challenging." [redacted] Decl.) ¶ 34. In [redacted] it cost [redacted] over [redacted] to build a new distribution center. *Id*.

Smaller vendors also lack the necessary technology to compete successfully, and acknowledge the difficulty of gaining capabilities in that area. [redacted], testified that it took [redacted] and about a year just to develop its customer billing, reporting, and delivery IT interface. [redacted] Decl.) ¶ 8. In the past five years, [redacted] has spent another [redacted] to keep that system technologically up to date. *Id.*; *see also* [redacted] Decl.) ¶ 10 (electronic ordering and billing system would cost between [redacted]). Small vendors do not have the resources to make this kind of IT investment on their own. [redacted] Decl.) ¶ 8; *see also* [redacted] Decl.) ¶ 10 ([redacted] unwilling to spend [redacted] on electronic ordering and billing system). And even that investment has not been enough to allow [redacted] to be competitive with Staples and Office Depot. [redacted] Decl.) ¶¶ 9-10, 13.

The lack of meaningful entry into the office supplies business for large B-to-B customers speaks volumes. *See Cardinal Health,* 12 F. Supp. 2d. at 56 ("[T]he history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future."). Defendants dominate the market for the sale and distribution of consumable office supplies to large B-to-B customers. There is no likely entrant to counteract that dominance.

5. Defendants' Efficiencies Defense Fails

No court has ever relied on efficiencies to rescue an otherwise unlawful transaction. *See CCC Holdings*, 605 F. Supp. 2d at 72; *Heinz,* 246 F.3d at 720-21. The result should not differ here.

Defendants bear a heavy burden to substantiate their efficiencies claims. They must present sufficient evidence for an independent party to "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific." *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines* § 10); *see also Staples*, 970 F. Supp. at 1089-90. Moreover, "[h]igh market concentration levels require 'proof of extraordinary efficiencies.'" *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz,* 246 F.3d at 720).

Defendants have provided insufficient information to substantiate their efficiencies claims. PX06200 (Zmijewski Rpt.) ¶¶ 7, 35, 37, 42-44, 46-50; PX06100 (Shapiro Rpt. at 52). What they have provided, however, shows that much of their efficiencies claim must be rejected. For example, Defendants' own documents show that much of their claimed efficiencies are likely not merger specific because the cost savings could be achieved without the Merger. PX06200 (Zmijewski Rpt.) ¶¶ 46-47. Savings that can be implemented without a merger are not merger specific—and therefore are not cognizable. *See H&R Block*, 833 F. Supp. 2d at 90 ("If a company could achieve certain cost savings without any merger at all, then those stand-alone cost savings cannot be credited").

In addition, many of Defendants' claimed efficiencies are not verifiable. They are based on management or personal "business judgment" rather than data analysis. PX06200 (Zmijewski Rpt.) ¶ 49; *see H&R Block*, 833 F. Supp. 2d at 91 (rejecting efficiencies based on managers' judgments rather than detailed analysis of data). Indeed, many such claims appear to be merely speculative. *See* PX06200 (Zmijewski Rpt.) ¶¶ 48-49. Efficiencies claims based on "speculation and promises about post-merger behavior" are not cognizable. *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz,* 246 F.3d at 720).

Finally, Defendants' efficiencies claims also fail because it is unlikely that the post-Merger Staples would pass on cost savings to customers. PX06100 (Shapiro Rpt. at 52-53). *See, e.g.*, *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 789-92 (9th Cir. 2015); *FTC v. University Health*, 938 F.2d 1206, 1223 (11th Cir. 1991); *CCC Holdings*, 605 F. Supp. 2d at 74.

C. Defendants' Proposed "Divestiture" Does Not Resolve The Likely Anticompetitive Harm

As a purported "fix" to remedy the likely anticompetitive harm from the Merger, Defendants have proposed assigning to a wholesaler named Essendant most of their contracts with diversity vendors (i.e., minority- or women-owned vendors), also known in the industry as Tier 1 vendors, as well as certain other contracts.[61] Through these Tier 1 diversity vendor contracts, Staples and Office Depot help certain customers satisfy state or federal contracting requirements, or meet the customers' internal diversity goals, by buying through a diversity vendor.[62] Staples and Office Depot partner with the diversity vendors to satisfy the customers' office supplies requirements.[63]

In total, Tier 1 vendor contracts account for at least [redacted] of Staples' and Office Depot's total B-to-B revenue.[64] Staples and Office Depot propose to assign these contracts to Essendant, a wholesaler, who would assume Staples' and Office Depot's role in supporting the diversity vendors.

The proposed fix cannot salvage this Merger. A remedy "must be effective to redress the violations and to restore competition." *Sysco*, 113 F. Supp. 3d at 72 (internal quotations omitted). It must "replac[e] the *competitive intensity* lost as a result of the merger . . . ." *Id.* (emphasis in original). The divestiture must be substantial enough to enable the purchaser to maintain the pre-merger level of competition. *Id.* at 73. This proposed divestiture cannot meet

[61] The exact number of contracts actually assigned will depend on the number of vendors and customers who consent to such an assignment, which is currently unknown. PX04501 (Staples) at 001, ¶ 2 (Sept. 29, 2015 non-binding Term Sheet between Staples, Inc. and Essendant Co.). Defendants have also produced an unsigned draft of an Asset Purchase Agreement and no Transition Services Agreement. The draft Asset Purchase Agreement contains no information about [redacted]. PX07204 (Essendant).

[62] *See, e.g.,* [redacted] Decl.) ¶¶ 4-5; [redacted] Decl.) ¶¶ 3, 6; [redacted] Decl.) ¶ 13.

See, e.g., [redacted] Decl.) ¶¶ 4-5; [redacted] Decl.) ¶¶ 3, 6; [redacted] Decl.) ¶ 13; [redacted] Decl.) ¶ 4.

PX04501 (Staples) at 003, ¶ 8(2); [redacted] Dep. at 122-23); PX07078 (Essendant) at 001 (noting divested contracts represent [redacted]).

those standards, for a number of reasons. *See* PX06100 (Shapiro Rpt. at 54) (proposed fix "seems woefully inadequate" to replace lost competition from Merger).

First, there is no binding Asset Purchase Agreement between Staples and Essendant, and it does not appear that the parties have even begun drafting a Transition Services Agreement. Thus, the proposed remedy should be rejected on its face. *See* PX0009 (Hearing Tr., *FTC. v. Ardagh Group S.A.*) at 28-30, 34-37 ("premature and precipitous" for court to consider proposed divestiture when no definitive agreement presented).

Second, the proposed remedy consists entirely of short-term Tier 1 partnerships, customer contracts and transition services.[65] As the contracts expire, or the customer is permitted to terminate, the customers would be free to choose the combined Staples/Office Depot as their office supplies vendor, rather than continue to use Essendant.[66] Essendant would retain no assets to enable it to compete more effectively for large customers.

Third, Essendant does not currently sell directly to B-to-B customers, [redacted][67] It is not an office supplies vendor competing with Staples and Office Depot for sales to large B-to-B customers. Thus, by definition, the divestiture cannot replace the competition from Office Depot that would be eliminated by the Merger. Essendant simply does not—[redacted]—compete at that level of distribution.

Fourth, Essendant [redacted]. *See Sysco*, 113 F. Supp. 3d at 76 (rejecting divestiture when buyer not viable competitor "on day one"). Essendant [redacted]

[65] PX04501 (Staples) at 002, ¶¶ 2(a), 4-5. *See also*, *e.g.*, PX07035 (Essendant) at 002 ([redacted]); PX07089 (Essendant) at 002 ([redacted]); PX06100 (Shapiro Rpt. at 54).

PX07089 (Essendant) at 002 ([redacted]

PX02112 ([redacted]i (Essendant) Dep. at 198); *see also* PX05222 (Office Depot) at 002; PX02001 (Goodman (Staples) IH at 226-27); PX06100 (Shapiro Rpt. at 54).

[redacted].[68] [redacted][69] As a result, its ability even to provide these services to Tier 1 vendors in a timely manner is uncertain.

Fifth, even in its proposed role as a partner with Tier 1 vendors, Essendant cannot replace the competition currently provided by Office Depot. [redacted][70]

Finally, [redacted]. Indeed, one of the primary benefits of the divestiture to Essendant is [redacted]. PX07030 (Essendant) at 003; *see also id.* at 005. Post Merger, Essendant would continue to need Staples to help transition customers, work with vendors, transition the e-commerce platform, and provide customer deliveries. In other words, Tier 1 vendors partnering with Essendant would have to rely on their primary competitor—and by far the biggest vendor in the market—to succeed. That is a recipe for disaster. In fact, a study by the Commission on merger remedies found that continuing entanglements between the divestiture buyer and the merging parties often presented unexpected problems. PX08063 (*A Study of the Commission's*

[68] PX07222 (Essendant) at 022 [redacted]; PX07108 (Essendant) at 001 ([redacted]); PX07032 (Essendant) 001 ([redacted]). *See* PX06100 (Shapiro Rpt. at 54).
[69] PX07222 (Essendant) 022 ([redacted]). *See* PX06100 (Shapiro Rpt. at 54).
[70] [redacted] Dep. at 184, 188) [redacted]); PX04257 (Staples) at 001 ([redacted]); PX04422 (Staples) at 010 (noting that [redacted]); PX07222 (Essendant) at 022 ([redacted]); PX04168 (Staples) at 002 ([redacted]); PX07035 (Essendant) at 002 ([redacted]).
[71] [redacted] Dep. at 28-29).

Divestiture Process, 1999) at 019.

Defendants' proposed divestiture would not "fix" anything.[72] It would not position Essendant to compete for large B-to-B customers, or allow independent vendors to compete effectively for large B-to-B customers in the near future. *See* PX06100 (Shapiro Rpt. at 54). Today, independent office supplies vendors backed by Essendant or other wholesalers have not been able to compete effectively for the business of large B-to-B customers.[73] This divestiture would not change that.

II. THE EQUITIES HEAVILY FAVOR A PRELIMINARY INJUNCTION

"No court has denied relief to the FTC in a [Section] 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *ProMedica*, 2011 WL 1219281, at *60; *see also FTC v. PPG Industries*, 798 F.2d 1500, 1508 (D.C. Cir. 1986) (establishment of a likelihood of success "weighs heavily in favor of a preliminary injunction") (quoting *Weyerhaeuser*, 665 F.2d at 1085). "Only 'public equities' that benefit consumers" can trump the Commission's showing of likely success on the merits. *CCC Holdings*, 605 F. Supp. 2d at 75-76 (citing *Whole Foods*, 548 F.3d at 1041 (Brown, J.)).

The paramount public equity favoring injunctive relief is the "public interest in effective enforcement of the antitrust laws," *Heinz*, 246 F.3d at 726, as Congressional concern for antitrust enforcement was the genesis of Section 13(b). *Whole Foods*, 548 F.3d at 1035 (Brown, J.) (*citing Heinz* 246 F.3d at 726). The inherent difficulties of divesting integrated assets after a merger has been consummated also weighs in favor of injunctive relief. *Heinz* 246 F.3d at 726; *accord FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n.5 (1966).

[72] By contrast, to resolve substantially similar antitrust issues raised by the European antitrust authorities, Staples has agreed to divest the *entire* Office Depot B-to-B business in Europe to a suitable buyer. PX08065.
[73] *See, e.g.*, [redacted] Decl.) ¶ 10; [redacted] Decl.) ¶ 11; [redacted] Decl.) ¶ 2; [redacted] Decl.) ¶ 29; [redacted] Decl.) ¶ 23; [redacted] Decl.) ¶¶ 18-19; [redacted] Decl.) ¶¶ 13-17.

Allowing this merger to close before the merits proceeding is completed would irreparably harm the public interest. Staples would be free to begin integrating Office Depot immediately, accessing Office Depot's sensitive business information, laying off sales people, and approaching customers as a unified dominant supplier. If Staples is permitted to alter the landscape in this way, it would likely be impossible to undo the transaction and fully restore the lost competition. Any harm that customers suffer in the interim would be irreversible.

By contrast, Defendants can claim only private harm from delaying consummation of the merger. But courts have been clear that a "'risk that the transaction will not occur at all,' by itself, is a private consideration that cannot alone defeat the preliminary injunction." *Whole Foods*, 548 F.3d at 1041 (citing *Heinz*, 246 F.3d at 726). Indeed, private equities are "subordinate to public interests and cannot alone support the denial of preliminary relief." *FTC v. Illinois Cereal Mills, Inc*., 691 F. Supp. 1131, 1146 (N.D. Ill. 1988) (citing *Weyerhaeuser*, 665 F.2d at 1083). Accordingly, to protect interim competition and preserve the Commission's ultimate ability to order effective relief, the equities strongly favor preliminary relief.

CONCLUSION

For the reasons described above, Plaintiffs respectfully request that the Court grant a preliminary injunction.

Dated: February 16, 2016

By: /s/ Charles A. Loughlin

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