

**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

(Judge Emmet G. Sullivan)

**FILED UNDER SEAL**

**DEFENDANTS' BRIEF IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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## I. INTRODUCTION

“[REDACTED]”<sup>1</sup>—Staples knows it, Office Depot knows it, and most importantly, Amazon knows it. Increased digitization and an ever expanding set of office products suppliers, including the “800 pound gorilla,” Amazon Business, have transformed the marketplace and intensified competition. As Amazon Business engages in what its most senior leaders have called a “must win” initiative, signing up over 200,000 businesses (including Fortune 500 companies) within eight months of launch [REDACTED], Defendants seek to merge to achieve significant efficiencies that will be shared with all customers and enable Defendants to remain competitive in a dramatically evolving market.

Ignoring these realities, Plaintiffs seek “drastic and extraordinary” relief to “protect” the largest and most powerful corporations in America from supposedly higher prices for paperclips, post-it notes and rubber bands. If successful in blocking this merger, Plaintiffs would deprive millions of American consumers and hundreds of thousands of businesses from enjoying the lower prices for “back to school” and everyday office supplies resulting from the savings—over a billion dollars per year—that the merger will produce and that would not occur in the absence of the merger.<sup>2</sup> Every third-party industry analyst agrees that the merger will create synergies that will benefit *all* of Defendants’ customers, even the largest corporations that make up what Plaintiffs claim are the vulnerable Fortune 100. Not only have Plaintiffs failed to identify any injury to the public interest from the proposed merger, the evidence confirms the opposite is true.

Recognizing that the overwhelming majority of Staples’ and Office Depot’s customers will benefit from the merger (or at least not be affected), Plaintiffs are forced to create a fictional “relevant” market to support their litigation strategy. For starters, Plaintiffs’ contrived market definition excludes almost 99% of the customers of office products, thereby excluding all consumers who shop in stores and online, all small and medium-sized businesses, and most large

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<sup>1</sup> [DX01213] SPLS\_0438516 (Staples) at 0438416-0438417.

<sup>2</sup> [DX01685] SPLS\_2967031 (“ODP is our ticket to sustainable relevancy. We can’t squander it.”).

businesses. Then, even for the very largest businesses, Plaintiffs artificially narrow the group of relevant products to “consumable office supplies,” which they define to include pens, notepads and copy paper, **but exclude ink and toner** and other office supplies such as furniture, computers, cleaning supplies, kitchen supplies and breakroom supplies, that account for the majority of the parties’ sales to these “target” customers. Thus, according to Plaintiffs, the only “relevant antitrust market” in which the merger will somehow reduce competition is the sale of a tiny subset of *some* consumable office products to a tiny subset of the largest, most sophisticated and most powerful corporations in America. Not surprisingly, these customers already pay the lowest prices of any customer segment that Defendants serve.<sup>3</sup>

And, while they claim the equities are on their side, Plaintiffs all but ignore that the Federal Trade Commission (“FTC”) undertook a detailed analysis of the office supplies market in 2013, outside of active litigation, when it approved the merger of Office Depot and OfficeMax. There, consistent with the same definition it used in 1997 to bar Staples’ prior effort to merge with Office Depot, the FTC defined the relevant market—the same market here—as comprised of general office supplies, paper, **and ink and toner**, and concluded in its unanimous 2013 closing statement (“FTC 2013 Closing Statement”) that this very market was **highly competitive**, with a strong and growing number of competitors beyond Staples and Office Depot. Yet without explanation, the FTC now casually dismisses its own analysis and conclusions relating to the exact same industry, and alleges that there is minimal competition beyond the Defendants and that the relevant market and resulting market shares are much different today than they were in late 2013. The FTC’s about face is hardly equitable and strongly suggests these changes are the result of a calculated litigation strategy designed to ignore existing and expanding competition and artificially narrow the relevant market, rather than an effort to reflect actual, current competitive realities.

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<sup>3</sup> [DX02570] Expert Report of Jonathan Orszag, February 29, 2016 (hereinafter, “Orszag Report”), Exh. R. *See also* PX06100 Expert Report of Carl Shapiro, February 15, 2016 (hereinafter, “Shapiro Report”) at 17 (Finding that Staples’ retail prices are 46% higher than its large customers’ contract prices.).

But Plaintiffs cannot so easily run away from the FTC's recent public findings, which the agency itself admits are issued primarily to provide guidance and transparency to the public, including the merging parties.<sup>4</sup> Indeed, barely more than two years ago, the FTC unanimously found that a "host of non-OSS [non-Staples or Office Depot] competitors" were "growing in number and strength and *have demonstrated the ability to win large multi-regional and national customer contracts*" (emphasis added). The FTC concluded that this market was competitive for the delivery of the same products to the same customers at issue here. And that conclusion has been proven right: prices have *not* increased following the Office Depot and OfficeMax merger, nor has competition diminished. To the contrary, competition for office products has only intensified further.

W.B. Mason and numerous other dealers compete aggressively against, and have beaten, Staples and Office Depot for some of the largest national customers, distributing office products effectively throughout the country. Moreover, independent dealers (on their own or working with wholesalers such as Essendant and SP Richards), manufacturers selling direct to businesses, and consortia of dealers have grown, and Amazon has greatly expanded with the launching of Amazon Business *after* this merger was announced and is aggressively competing for customers of all sizes. Indeed, Amazon Business is expanding so rapidly that virtually all of the features it purportedly "lacked" during the FTC's investigation have since been launched, are in "beta-testing," or are on the short-term "roadmap" for implementation. In a "forward-thinking" case such as this, Amazon is the behemoth on which Defendants are focused.

Plaintiffs' case simply cannot withstand scrutiny. The companies that comprise the Plaintiffs' "targeted customers" are the *best* situated to thwart any attempted price increase. These companies are the world's largest corporations and have the most competitive alternatives for office products. Many of these companies also have long-term contracts with discounted

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<sup>4</sup> [DX02745] Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n: The Never-ending yet Vital Pursuit of Greater Cooperation, Convergence, and Transparency (Mar. 22, 2013); [DX02746] Deborah L. Feinstein, Dir., Bureau of Competition, Fed. Trade Comm'n: The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts (Sept. 17, 2013).

prices that will remain in effect for several years as rivals continue to expand and grow in strength, and a number of them will have their contracts served by Essendant instead of Staples and Office Depot after the merger. In addition, these companies have extraordinary resources that enable them to negotiate the lowest prices and protect themselves if Staples were to attempt to raise prices post-merger, as Plaintiffs speculate.

For instance, one of the Plaintiffs' trial witnesses stated that his organization believes the office supplies market is defined by "high buyer power" and "low supplier power."<sup>5</sup> Another of Plaintiffs' *primary* declarants, from a [REDACTED], testified in writing in opposition to the transaction, but privately boasted that his testimony was "*a work of art (mixed with BS).*"<sup>6</sup> Plaintiffs cannot credibly maintain that the distribution of commodity products like paperclips and pencils to the most sophisticated companies in the world may be *substantially* impacted, while the distribution of every other product Defendants sell to these same companies and every other business-to-business ("B2B") customer will continue as usual, or at lower prices owing to the merger's efficiencies.

It is also telling that even though Plaintiffs have had more than a year to use their subpoena power to gather more than 16 million pages of the Defendants' documents, prepare expert reports, interview hundreds of third parties, and obtain declarations or deposition testimony from third parties,<sup>7</sup> they have collected little evidence to suggest that the transaction poses *any* risk of harm to *any* customers. On the other hand, once permitted to conduct discovery of their own and play catch-up, in a few short months Defendants obtained customer declarations in which the overwhelming majority of large companies have expressed no concern on the merger.<sup>8</sup> Moreover, numerous witnesses and declarants, including the FTC's own

<sup>5</sup> [DX00198] [REDACTED] Dep. Ex. 6, at 17); [DX02553] [REDACTED] Dep. at 88:15-94:25).

<sup>6</sup> [DX00098] [REDACTED] Dep. Ex. 26, at 337) ("*If this gets blocked they should make a statue in front of [REDACTED] offices for me. My testimony was a work of art (mixed with BS).*").

<sup>7</sup> Plaintiffs' suggestion that Defendants had comparable ability to conduct pre-complaint discovery ignores reality. Plaintiffs issued subpoenas and civil investigative demands ("CIDs") to more than 170 third parties during their long pre-complaint investigation. Notably, every one of Plaintiffs' declarations notes that the testimony is being provided in lieu of response to a subpoena issued to the declarant.

<sup>8</sup> See attached Appendix A.

witnesses, conclusively demonstrate that the FTC’s made-for-litigation “relevant market” is a contrivance that does not reflect marketplace realities. Defendants’ sales, and the sales of their competitors, further underscore that Plaintiffs’ alleged relevant market does not reflect reality.

In sum, Plaintiffs have gerrymandered the relevant market by unduly limiting the scope of targeted customers and cherry picking products to include and exclude at their whim, disregarded the very competitors the FTC recognized as significant less than three years ago, dismissed intense and rapidly growing competition from Amazon—the world’s most efficient distributor of *everything*, and a notoriously aggressive competitor—and ignored the procompetitive benefits of the transaction, all in a transparent, excessive, and unnecessary flexing of government muscle that this Court should rein in. Plaintiffs’ inequitable, untenable and contradictory positions should be rejected and their request for a preliminary injunction denied.

## **II. BACKGROUND & OVERVIEW OF THE PARTIES**

Although Plaintiffs characterize the relevant market as “consumable office supplies” consisting of “pens, notepads, and copy paper” (Br. at 13), in reality Staples and Office Depot sell thousands of additional office supplies and services that include ink and toner; furniture; breakroom supplies; shipping, packing and mailing supplies; janitorial and sanitation products; computing and technology products; and many other products. Plaintiffs exclude *all* of these items (and, thus, the majority of Defendants’ business) even though many meet the FTC’s own definition of “consumable office supplies” and even though Plaintiffs’ newly-created “cluster” of products does not coincide with how the Defendants or any of their competitors structure their businesses, how prices and contracts are negotiated, how customers (including Plaintiffs’ own witnesses) define the competitive marketplace, or any other aspect of commercial reality.

Defendants offer a broad and growing array of products, as the two companies attempt to respond to declining demand for traditional office supplies (*e.g.*, pens, pencils, paper, and ink/toner) and seek to replace that revenue with the sale of other office products like cleaning supplies, kitchen and breakroom products, and technology products. This shift is part of

Defendants' self-preservation strategy, which requires becoming more efficient to drive lower prices and remain relevant in a highly competitive industry. The need to create savings, reduce prices, and remain relevant is precisely what led to this merger.

Staples and Office Depot announced their intention to merge in February 2015.

Following their announcement, Plaintiffs (the FTC, the Commonwealth of Pennsylvania, and the District of Columbia) spent nearly a year investigating the merger before deciding to file a complaint in this Court on December 7, 2015. The FTC also filed an FTC Administrative Complaint on the same day. On February 16, 2016, Plaintiffs filed their Motion for Preliminary Injunction.

### III. LEGAL STANDARDS

A preliminary injunction that blocks a proposed merger “is an extraordinary and drastic remedy.” *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (quotation marks omitted); *see also Mo. Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir. 1974) (injunction likely “spell[s] the doom of an agreed merger”). Indeed, no proposed merger has *ever* survived following the issuance of a preliminary injunction and the FTC’s lengthy review process. Thus, “[g]iven the stakes,” the FTC bears a heavy burden when it requests preliminary injunctive relief. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2007). The Court must determine that an injunction is “in the public interest,” after “weighing the equities and considering the Commission’s likelihood of ultimate success.” 15 U.S.C. § 53(b). Plaintiffs’ likelihood of success is of paramount concern: “[A]bsent a likelihood of success on the merits, equities alone will not justify an injunction.” *Arch Coal*, 329 F. Supp. 2d at 116. To warrant an injunction, the FTC “must show a reasonable probability that the proposed transaction would *substantially* lessen competition in the future.” *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998) (emphasis added) (internal quotation omitted). In other words, Plaintiffs must establish that the probable effect of the merger will be substantially to lessen competition in the relevant market. *See, e.g., Arch Coal*, 329 F. Supp. 2d at 116-17. A “failure of proof in any respect will mean the transaction should not be enjoined.” *Id.* at 116.

This Court will decide the merger's fate. The FTC will likely terminate its administrative proceedings if this Court denies Plaintiffs' requested relief. *See* FTC, Commission Approves Revisions to Its Rules of Practice (Mar. 13, 2015). And if this Court grants Plaintiffs relief, Defendants will abandon the merger. Thus, in assessing Plaintiffs' evidence, the Court must "exercise independent judgment"—it cannot simply defer to the FTC. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir 1981) (quoting H. Rep. No. 624 at 31).

#### **IV. THE FTC IS UNLIKELY TO SUCCEED ON THE MERITS**

As a threshold matter, Plaintiffs have failed to identify an appropriately-defined, relevant market or to calculate reliable market shares, and therefore *cannot* demonstrate a presumption of illegality. *Arch Coal*, 329 F.Supp.2d at 119. Even if the Court finds that Plaintiffs have properly defined a relevant market and accepts their flawed share calculations, any presumption of illegality is thoroughly rebutted by the overwhelming evidence, including the FTC's own prior unanimous conclusions that the transaction will not harm competition. Plaintiffs rely heavily on a few inapposite cases, including the recent decision in *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015), to argue that Defendants' merger will be anticompetitive. As discussed below, however, Plaintiffs' analysis is irredeemably flawed and their motion for a preliminary injunction should be denied.

##### **A. Plaintiffs Have Not Earned a Presumption of Illegality**

Plaintiffs have not and cannot meet their initial burden of showing undue concentration in an appropriately-defined, relevant market and, therefore, have not demonstrated a presumption of illegality. Instead, Plaintiffs redefine and manipulate the alleged market in such a contorted manner that it bears no resemblance to the market in which large corporations actually buy office products, nor does it bear any resemblance to the Defendants' actual business operations. And as Defendants' economic expert, Jonathan Orszag, will explain during the hearing, Plaintiffs' dubious methodology and their dependence on a tiny sliver of the customers in their artificial market render their claimed market shares defective and unreliable.

Courts have warned against defining markets too narrowly, where such definitions

“require a relatively long laundry list of factors, which creates the danger of narrowing the market by factors that have little economic basis,” and have similarly warned against “‘identify[ing] artificially narrow groupings of sales on the basis of noneconomic criteria having little to do with the ability to raise price above cost.’” *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1119 (N.D. Cal. 2004) (quoting Areeda, Hovenkamp & Solow, 4 Antitrust Law ¶ 914a at 60.). Here, Plaintiffs use such an “artificially narrow grouping,” which bears no relationship with the real world.

1. *Plaintiffs Gerrymander the “Relevant” Market to Artificially Inflate Defendants’ Market Shares*

Plaintiffs concoct a “relevant market” aimed at those few customers that, in the past, may have shown a preference for Staples and Office Depot. They have excluded retail customers and the vast majority of B2B customers, ignoring small businesses, medium businesses, government customers, customers who purchase from Defendants’ competitors, including women- and minority-owned office supplies dealers (as dozens of Fortune 100 companies do today), customers who purchase from locally-owned and small business office supply dealers, customers who routinely purchase directly from manufacturers, customers willing to purchase from one of many new entrants, including Amazon Business, and customers who purchase from multiple vendors. Nevertheless, Plaintiffs concede that, to identify a relevant market, a court should assess the “practical indicia” of the boundaries of a relevant market, including the “product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices,” “industry or public recognition” of a separate market, and how the Defendants’ own materials portray the “business reality” of the market. Br. At 13; *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). But Plaintiffs ignore the “business reality” of the market here, as identified by their own witnesses and by other third parties during discovery, and as previously identified by the FTC itself. For example, only a tiny handful of firms put out RFPs that include traditional office supplies and copy paper, but *exclude* the myriad other office supplies they need such as ink and toner, cleaning supplies, breakroom supplies, technology, or

any of the other office products sold by Defendants and their competitors. Indeed, of the [REDACTED] large B2B contracts that Staples bid on in 2014, only 1.2% met Plaintiffs' alleged product market definition.<sup>9</sup> Almost no one purchases office supplies in the manner Plaintiffs describe.

As is discussed below, Plaintiffs' purported relevant market is not supported by any "practical indicia" of the behaviors of either customers or distributors of office products, but rather is rigged to support Plaintiffs' claim that this merger is anti-competitive. The law, however, is clear that this method of defining a relevant market cannot support their argument.

a) Plaintiffs Identify an Arbitrary Assortment of Products

Plaintiffs deliberately contort the market—what they term "consumable office supplies"—by cherry-picking which products should be included (e.g., pens, notepads and copy paper) and which excluded (ink, toner, and virtually everything else that Defendants sell). They even exclude some essential office supplies, such as ink and toner, which are obviously "consumable" in nature.<sup>10</sup> Plaintiffs bury their rationale for this purported relevant market in a footnote. (Br. at 14 n. 37). Plaintiffs essentially argue that ink and toner, and other office products, are sold under "different competitive conditions" than general office supplies and paper. But that "explanation" fails to show why general office supplies and paper are different from ink and toner, or from other "adjacent" products, all of which are consumable and are, as the FTC concedes, sold by numerous potential vendors. The law is clear that a mere assertion that a cluster of products is "different" from others cannot establish a relevant market. *United States v. Oracle Corp.*, 331 F. Supp. 2d at 1159.

In reality, both customers and competing suppliers of office supplies, including many of Plaintiffs' own declarants, typically do not recognize a distinct product category of "office

<sup>9</sup> [DX02570] Orszag Report at ¶ 38.

<sup>10</sup> Plaintiffs' expert, Carl Shapiro, defines "consumable office supplies" as "office supplies that customers use up, discard, and repurchase on a recurrent basis." [DX02591] Shapiro Report at 4. Ink and toner obviously are used up, discarded, and repurchased, *in conjunction with copy paper*. The FTC recognized as much in its definition of "consumable office supplies" from just over two years ago, when it included ink and toner. FTC 2013 Closing Statement.

supplies and paper.”<sup>11</sup> For example:

- [REDACTED] contract with Office Depot does not include only general office supplies plus paper, and they do not have any contract with any vendor or supplier for such category, and the category of general office supplies plus paper is not a category used in ordinary course of business at [REDACTED] ([DX02629] [REDACTED] Dep. at 86:9-20));
- [REDACTED] Response to FTC CIDs states that “the overall ‘office supplies’ category includes copying and printing related items such as paper, toner, ink, and occasionally, business cards” ([DX04243] FTC-PROD-0024195 [REDACTED] at 24196);
- [REDACTED] defines its office product categories as: a. General office supplies (i.e. pens, paper clips, paper, ink, and toners), break room supplies, and office furniture. b. Paper and Stationary. c. Office equipment (i.e. computers, smart phones, and tablets). d. Cleaning supplies and janitorial supplies. e. Office support services, copy and print services, and managed print services.) ([DX00335] FTC-PROD-0017743 [REDACTED] at 17754);
- [REDACTED] Office Supplies purchasing includes copy paper, ink, toner, general, janitorial and sanitation, break room, and limited shipping/packaging ([DX04988] [REDACTED] Dep. at 77:4-8, 77:21-78:3));
- [REDACTED] considers office supplies to include: ink and toner, paper, office essentials, and small office equipment, as well as potentially technology, promotional products, cleaning and janitorial supplies, and copy and print ([DX02553] [REDACTED] Dep. at 63:14-65:21); [DX00198] [REDACTED] Dep. Ex. 6));
- [REDACTED] purchases office products from Lee and Tejas in a number of different categories, including but not limited to office supplies, ink and toner, paper, facilities, furniture, technology, print, breakroom supplies, cleaning supplies, and copy and print depot.” ([DX02453] [REDACTED] Decl. (2/12/16)) ¶ 3);
- [REDACTED] definition of office supplies includes things like pens, pencils, markers . . . paper . . . toner products . . . office furnishings . . . CD-ROMs, optical disks, and certain office appliances.” ([DX04984] [REDACTED] Dep. at 48:5-49:3));
- [REDACTED]: Definition of “Office Supplies” includes ink and toner ([DX04413] FTC-PROD-0060810 [REDACTED] at 60811);

<sup>11</sup> In fact, many customers’ paper prices are linked to a commodity index, which is not true of any other products. *See, e.g.*, [DX05063] Calkins (Office Depot) Dep. at 44:24-25.

- [REDACTED]: “Q. Consumable office supplies, you would consider that to include things like pens, pencils, paper, ink and toner, right? A. Yes. I would.” ([DX02637] [REDACTED] Dep. at 76:13-16));
- [REDACTED]: “[REDACTED] is not aware of any RFP for only consumable office supplies including paper but excluding ink and toner, office furniture, and janitorial and breakroom supplies. [REDACTED] customers almost always request pricing for ink and toner and/or janitorial and breakroom supplies in addition to pricing for office supplies.” ([DX03890] [REDACTED] Decl. (2/2/16)) ¶ 10);
- [REDACTED]: In its “office supplies” category, [REDACTED] includes items such as printer cartridges, kitchen equipment under \$2500 per item, food vending supplies, kitchen supplies for the break room, drinking water, cleaning supplies, check stock, coffee, miscellaneous parts for office repairs, and small computer components. [DX04182] (FTC-PROD-0022957 at 0022957);
- [REDACTED]: Core office supplies include ink and toner (PX03007 [REDACTED] Decl. (10/1/15) ¶ 4).

In fact, of the [REDACTED] large B2B customers that purchased offices supplies and paper from Staples in fiscal year 2014, *every single one* also purchased significant amounts of products from Staples in other categories.<sup>12</sup> The same is true of Office Depot’s customers.<sup>13</sup> And *Plaintiffs’ own declarants* specifically define “consumable office supplies” to include ink and toner.<sup>14</sup> Even the

<sup>12</sup> [DX02570] Orszag Report at Exh. H; *see also* [REDACTED]

[REDACTED]

*See, e.g.*, [DX02570] Orszag Report at Exh. J.

<sup>14</sup> *See, e.g.*, [REDACTED]

[REDACTED] A list of companies that expressly recognize a broader market than the artificial construct alleged by Plaintiffs, as well as those who purchase an array of office products beyond those identified by Plaintiffs, is attached as Appendix B.

[REDACTED], who oversees its procurement activities, includes toner among “consumable office supplies.” [DX02988] [REDACTED] Dep. at 40:5-16; 81:14-82:10).

Plaintiffs’ gerrymandering of the relevant product market is thus a transparent attempt to draw a line around a particular subset of products to make the market appear less competitive than it really is. Plaintiffs’ gerrymandering defies logic and fails to reflect the actual manner in which customers buy “office supplies” from Staples, Office Depot, and their competitors. Not only do Defendants’ bid data and customer purchases undermine the FTC’s market definition,<sup>15</sup> but such an arbitrary narrowing of the market is improper. As the Supreme Court has stated, “the boundaries of the relevant market must be drawn with sufficient breadth...to recognize competition where, in fact, competition exists.” *See Brown Shoe*, 370 U.S. at 326. Just as the defendants inappropriately attempted in *Brown Shoe* to narrow the product market, Plaintiffs’ approach here likewise attempts to narrow the market to create the appearance that Staples and Office Depot are the only relevant sellers. But, Plaintiffs’ imagined category of “consumable office supplies” improperly ignores the FTC’s prior definition of this same market, and ignores how competition actually takes place.

Moreover, the practical indicia given as guideposts by the Supreme Court—“industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors” (*id.* at 325)—weigh against Plaintiffs’ new definition. Defendants, their competitors, and their customers, and even [REDACTED] [REDACTED], all consistently recognize that Plaintiffs’ alleged relevant product market does not exist.<sup>16</sup> And there is simply no evidence that, for example, pens or paper for large businesses have any peculiar characteristics or uses—in fact, the products at issue are used by everyone from school children to Fortune 100 companies. Nor do they require unique production facilities or have distinct customers. These products are delivered on the same trucks,

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<sup>15</sup> [DX02570] Orszag Report at 5; *id.* at Exh. J.

<sup>16</sup> *See, e.g., supra* at 10-11; n. 14.

by the same dealers, and pursuant to the same contracts as the products that are excluded by Plaintiffs. Thus, to classify the relevant product market as Plaintiffs do would be “impractical, unwarranted, and unrealistic.” *Id.* at 298-99. *Sysco* also supports a broader set of products than Plaintiffs claim here, given that large B2B customers do not use or acknowledge the Plaintiffs’ alleged product market. *Sysco*, 113 F. Supp. 3d at 26-27 (stating that customer recognition is relevant to determining the “relevant market.”). In the Supreme Court’s own words, Plaintiffs’ proposed relevant market fails to “recognize competition where, in fact, competition exists.” *Id.*<sup>17</sup>

In addition, without explanation, Plaintiffs rely on an alleged relevant market that is *different* from that which a unanimous FTC identified in November 2013, during the OfficeMax–Office Depot merger, as well as in 1997 when the FTC blocked Staples’ prior attempted merger with Office Depot: “Consumable office supplies’ refers to non-durable products that consumers use up, discard, and purchase on a recurrent basis. Examples included pens, paper, file folders, Post-it notes, **and ink and toner cartridges.**” See FTC 2013 Closing Statement at n.3. At bottom, Plaintiffs fail to explain how customers treat consumable office supplies like pens and paper any differently than other consumable office supplies like ink and toner, or other “adjacent” consumable office products supplied by numerous vendors. Plaintiffs’ arbitrary “made-for-litigation” market should therefore be rejected.

b) Plaintiffs Identify an Arbitrary Level of Targeted Customer Spend

Plaintiffs’ arbitrary definition of targeted customers as those that purchase \$500,000 or more per year in certain consumable office supplies and copy paper is not based on reliable analysis, does not reflect the way customers purchase office products, and artificially inflates Defendants’ market share. Indeed, it is not even clear that Plaintiffs’ class of so-called

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<sup>17</sup> *United States v. H&R Block, Inc.*, cited by Plaintiffs, provides no support for their contrived “relevant product market.” That case involved an entirely different question—whether the “digital do-it-yourself” method of tax preparation competed with assisted tax preparation and pen-and-paper tax preparation methods, such that the latter two should be included in considering the relevant product market. 833 F. Supp. 2d 36, 50 (D.D.C. 2011). To the extent the case has any relevance to the issue of whether businesses can “do it themselves” by purchasing directly from manufacturers, the FTC concluded in 2013 that purchasing from manufacturers should be included in the market. FTC 2013 Closing Statement at 2-3.

vulnerable customers has remained the same during this short three-month discovery period. Plaintiffs' complaint describes the relevant customer group as "including but not limited to \$1M/year...", while the pre-hearing brief seemingly changes the class of customers at issue. Plaintiffs have not offered a cognizable reason for their proposed \$500,000-plus cut-off that is based on empirical data analysis or a credible antitrust theory of harm. Indeed, focusing on large customers (excluding government customers) purchasing at least \$500,000 per year of (some) consumable office supplies reduces Defendants' customer base from [REDACTED] B2B customer accounts to only [REDACTED] of all Defendants' B2B customers.

Moreover, in calculating his "best estimate of market shares," Plaintiffs' expert focuses on an even smaller sliver of the overall sales of Staples and Office Depot, to 81 companies in the "Fortune 100."<sup>18</sup> Fortune 100 customers represented just 1.4 percent of overall sales and a miniscule fraction of the Defendants' B2B customer base.<sup>19</sup> The ostensible justification for isolating the market in this way, and the ostensible preferences of a miniscule sliver of Defendants' customers (*see* Brief, p. 15),<sup>20</sup> do not even apply to all customers that purchase more than \$500,000 of office supplies per year.<sup>21</sup> Rather than being "peculiar characteristics" of "distinct customers," the customers' requirements cited by Plaintiffs are simply individual preferences of a shifting and unidentifiable subset of those customers. For example, customers that purchase more than \$500,000 of office supplies do not all use RFPs or similar processes to negotiate office supplies contracts,<sup>22</sup> nor are such processes exclusive to those customers meeting that purchasing threshold.

<sup>18</sup> [DX02570] Orszag Report at 6-7 and Exh. A.

<sup>19</sup> *Id.* at 6-7; Exh. A; Exh. R (showing that Staples alone serves more than 170,000 B2B customers).

<sup>20</sup> Plaintiffs' purported requirements of its narrow set of customers are: nationwide distribution; next-day and/or desktop delivery; on-call sales representatives; customizable electronic product catalogs; IT integration with customer's procurement system; product utilization tracking; customized invoicing; flexible payment terms; and a wide and favorable reputation.

<sup>21</sup> *See, e.g.*, [REDACTED] : [DX04182] FTC-PROD-0022957 ("We do not enter into any master purchase contracts with any of the national office supply vendors. The local office managers and their administrative assistants enjoy a fair amount of autonomy on this matter.").

<sup>22</sup> *See, e.g.*, [REDACTED]

Similarly, many customers that purchase more than \$500,000 of “consumable” office supplies do not require (or even use) desktop delivery, whereas many customers with purchases below \$500,000 may have such a preference. Because customer *preferences* shed little light on customers’ *ability* to substitute in response to a post-merger price increase, the FTC’s proof here is “largely unhelpful.” *Oracle Corp.*, 331 F. Supp. 2d at 1130-31 (“[T]he issue is not what [products] the customers would *like* or *prefer* . . . ; the issue is what they *could* do in the event of an anticompetitive price increase.”); *Arch Coal*, 329 F. Supp. 2d at 122. Indeed, the fact that many large B2B customers do not share these preferences makes such a market unsustainable.

In any event, each of these “requirements” is as readily met by Defendants’ competitors as they are by Defendants. For example, Staples and Office Depot both depend on third-party couriers to make desktop deliveries to certain customers and these same couriers are available to provide (and do provide) desktop delivery on behalf of Defendants’ competitors.<sup>23</sup> In fact, both competitors and customers acknowledge that competitors meet these “requirements,” including: desktop delivery;<sup>24</sup> customizable catalogs;<sup>25</sup> IT integration;<sup>26</sup> product utilization tracking and reporting,<sup>27</sup> and volume rebates and prebates.<sup>28</sup> The fact that many customers meeting the FTC’s criteria for inclusion in the relevant market rely on office supplies competitors other than Defendants demonstrates that these preferences can be met by other competitors.

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<sup>23</sup> PX02110 (Goodman (Staples) Dep. 159:20-160:6) (“It’s not rocket science. The couriers who we use to do this Amazon works with as well ... it’s not all that complicated”).

<sup>24</sup> *See, e.g.*, [REDACTED]  
[REDACTED]  
*See, e.g.*, [REDACTED]  
[REDACTED]  
*See, e.g.*, [REDACTED]  
[REDACTED]  
*See, e.g.*, [REDACTED] offers tiered volume rebates [DX05027] FTC-PROD-0016608 [REDACTED];  
[REDACTED]  
[REDACTED]

Moreover, Plaintiffs' relevant market includes only the most sophisticated and powerful corporations in the world, with the most competitive alternatives available, and the greatest leverage and ability to demand and obtain the most competitive prices for office supplies. Any suggestion that these corporations are uniquely vulnerable to price increases is exactly backwards. Indeed, Plaintiffs concede that these customers have numerous tools at their disposal to obtain the lowest prices on office products, such as using RFPs or auctions. Br. at 4; FTC 2013 Closing Statement. Many of these corporations also use resources such as dedicated procurement employees and departments,<sup>29</sup> consultants,<sup>30</sup> price monitoring,<sup>31</sup> or sophisticated software that provides usage reporting,<sup>32</sup> all in an effort to maximize their office products purchasing power both before and after they enter into contracts with suppliers.<sup>33</sup> And customers recognize that office products are commodities, and not mission critical items, reducing the importance of any particular supplier:

- [REDACTED] "Office supplies are commodity products that are widely available from different sources" [DX02452] SPLS-FTC-DECL-1045 [REDACTED] Decl. (2/12/2016) ¶ 5;
- [REDACTED]: "Office supplies are commodity products and widely available." [DX02451] SPLS-FTC-DECL-1044 [REDACTED] Decl. (2/12/2016) ¶ 5;
- [REDACTED]: General office supplies like pens, paper, and highlighters are considered to be commodities [DX02628] [REDACTED] Dep. at 133:14-19);
- [REDACTED]: It doesn't matter where the pen comes from, just that [REDACTED] has pens [DX04988] [REDACTED] Dep. at 92:19-93:4; 132:8-23);

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<sup>29</sup> See, e.g., [REDACTED]

[REDACTED]  
See, e.g., [REDACTED]

[REDACTED]  
See, e.g., [REDACTED]

[REDACTED]  
See, e.g., [REDACTED]

A list of companies and the tools that they have identified as available to them is reflected in the attached Appendix C.

- [REDACTED] considers office supplies to be commodities [DX02553] Dep. at 46:10-25), [DX00198] [REDACTED] Dep. Ex. 6);
- [REDACTED]: Office supplies is a commodity category [DX02633] [REDACTED] Dep. at 69:5-10; 61:4-11); [DX00025] [REDACTED]
- [REDACTED] contract with Staples is “nonstrategic” meaning it is “not relevant to [REDACTED] core business” [DX04298] [REDACTED] Dep. at 90:22-91:12).<sup>34</sup>

Further, the evidence shows, and the FTC previously admitted, that many of these customers have resources that enable them to find alternative suppliers or supply relationships that can allow them to cut costs, and which further insulate them from any risk that the post-merger Staples could raise the prices of office supplies to these customers. For example, unlike small businesses, it is common for large business customers to purchase certain products directly from manufacturers—not only for products such as paper or ink and toner, which are commonly purchased direct from manufacturers, but also for products from manufacturers such as Sanford (e.g., Sharpies) and Avery (e.g., labels).<sup>35</sup> Other customers have noted that if some of their “requirements” are not available from a vendor, including online ordering and custom catalogs<sup>36</sup> and desktop delivery,<sup>37</sup> they can compensate in order to obtain lower prices. Such procurement strategies allow customers to take their business elsewhere if Staples attempts to raise prices.

<sup>34</sup> See also attached Appendix D, showing customers that have expressly recognized that office products are widely available items or are otherwise not mission critical to their business.

<sup>35</sup> [DX02570] Orszag Report ¶ 134.

<sup>36</sup> [REDACTED]: Other potential suppliers include W.B. Mason, Grainger, Wal-Mart, Guernsey, Amazon Business; the need for online systems is not a big obstacle, [REDACTED] has its own ordering systems and can control catalogs if they need to. [DX04451] [REDACTED] Dep. at 125:10-18).

<sup>37</sup> Indeed, large customers can centralize delivery of office products at their own warehouses, and use a third party or their own distribution capabilities to deliver office products to their various facilities. See [REDACTED]: [DX04985] [REDACTED] Dep. at 203:15-205:18) ([REDACTED] purchased ink and toner separately even though deliveries to [REDACTED] distribution center meant that [REDACTED] had to pay its own freight costs); [REDACTED]: [DX02639] [REDACTED] Dep. at 120:3-22; 122:6-124:5; 127:10-15; 171:16-20; 172:21-173:3; 174:4-175:10 (Paper and toner, both of which make up the majority of [REDACTED] spend, are delivered directly to five distribution centers); [REDACTED]: [DX02424] [REDACTED] Decl.) ¶ 6 (“For [REDACTED] retail stores, Domtar makes delivery of cut-sheet paper to 14 Bunzl distribution facilities. Bunzl delivers the paper to [REDACTED] stores.”).

c) Plaintiffs Overstate the Importance of Their Purported Cluster of Products

Plaintiffs focus on the alleged importance of clustering their cherry-picked selection of products as evidence that those products comprise the relevant market. Plaintiffs admit, however, that many customers *choose* to bundle purchases together.<sup>38</sup> But as discussed above, Plaintiffs' cluster market—traditional office supplies and paper—is not required under typical contracts, not regularly adhered to by Defendants' customers, and not even the preference of most customers. In fact, many customers purchase paper directly from manufacturers, thus completely undermining Plaintiffs' cluster market argument.<sup>39</sup> And to the extent customers *choose* to buy multiple product categories from one supplier, they do so only when it provides the least expensive and most convenient alternative. Faced with a price increase, as theorized by Plaintiffs, these same customers could simply purchase products from multiple suppliers, directly from manufacturers, or from other sources, as numerous large customers already do today.<sup>40</sup>

Mr. Orszag's analysis of Defendants' data shows that Plaintiffs' artificial cluster market of products is not supported by the evidence. For example, every single Fortune 100 company that chose to buy office supplies and copy paper from the merging parties in 2015 also purchased other office products.<sup>41</sup> But even focusing solely on the RFP process, Staples' bid data shows that of [REDACTED] bids in 2014 on large B2B contracts, only [REDACTED] (1.2%) included no other product

<sup>38</sup> Plaintiffs' Br. at 32; *see also* [DX02591] Shapiro Report at 14 (noting that customers' pricing and discounts are "based on the total purchases made by the customer, not just the customer's purchases of consumable office supplies."

<sup>39</sup> [REDACTED]: [DX02553] [REDACTED] Dep. at 97:24-98:13) ([REDACTED] separately negotiates a contract for Paper (Domtar)); [REDACTED]: [DX00152] [REDACTED] [REDACTED] (internal email stating that "If necessary we can order paper from a paper company and not through office supplies." (after having machine issues with Staples)); [REDACTED]: [DX04264] PX03002-001 [REDACTED] Decl. (9/8/2015)) ¶ 8: Separate contract from Staples contract with Domtar for paper. Also purchases from other paper mills, including Sappi [DX02560] [REDACTED] Dep. at 85:6-14), Finch Paper [DX02560] [REDACTED] Dep. at 86:20-23), Appleton Coated [DX02560] [REDACTED] Dep. at 87:14-17); [REDACTED]: [DX05031] FTC-PROD-0067331 [REDACTED] (Off Contract paper purchases from manufacturers); [REDACTED]: [DX04287] FTC-PROD-0006403 at 404 [REDACTED] ("[REDACTED] purchases ink, toner, and paper from Xerox" under an agreement).

<sup>40</sup> The fact that Defendants offer these bundled discounts is precisely due to the competitive threat that customers will split their purchases between multiple suppliers. *Oracle*, 331 F.Supp.2d at 1155.

<sup>41</sup> [DX02570] Orszag Report at Exh. J.

categories besides paper and office supplies.<sup>42</sup> Finally, of the [REDACTED] large customers who purchased offices supplies and paper from Staples in fiscal year 2014, *every single one* purchased significant amounts from Staples in other categories of office products.<sup>43</sup>

Nor do Plaintiffs explain why using alternative suppliers and disaggregation is logical for ink and toner or janitorial products, but not for paper or general office supplies. Customers purchase paper directly from manufacturers and paper distributors, and, to the extent those sellers cannot distribute the product on-site, customers negotiate with the Defendants to distribute these products.<sup>44</sup> Finally, Plaintiffs do not explain why the benefits of bundling do not extend to the full range of consumable products that customers purchase under the same contracts, and that Defendants make eligible for discounts and rebates and deliver in the same trucks as the alleged “relevant” products, but which Plaintiffs allege are *not* part of the relevant market.

In reality, customers routinely purchase from multiple suppliers by, for example, working with a specialty technology vendor or original equipment manufacturer for technology and computing products; purchasing janitorial products from specialty vendors or hiring a third-party janitorial service; and purchasing paper, ink, and toner directly from the large manufacturers:

- [REDACTED] contracts with a facilities maintenance company that purchases its own janitorial supplies [DX02553] [REDACTED] Dep. at 68:3-9);

- [REDACTED]

<sup>42</sup> [DX02570] Orszag Report at 19-20.

<sup>43</sup> [DX02570] Orszag Report at Exh. H; *see also* PX02008 Ghant (Staples) IH Tr. at 34:23-35:2.

<sup>44</sup> [DX02570] Orszag Report at 69-74; Exh. M.

- [REDACTED]: The administrative burden from buying furniture, janitorial and sanitation, and technology products from multiple companies is manageable for [REDACTED] ([DX02628] [REDACTED] Dep. at 101:19-102:13; 103:7-14));
- [REDACTED]: “The total number of suppliers used by [REDACTED] nationwide for the products identified in paragraph 5 is likely in the hundreds.” ([DX02432] [REDACTED] Decl.) ¶ 5);
- [REDACTED]: “Q. So, to summarize the document we just reviewed, which is Exhibit 5, [REDACTED] currently uses more than a dozen different suppliers to fulfill its office products -- office products needs, correct? A. Yes. (objection omitted)” ([DX04451] [REDACTED] Dep. at 78:19-24).

As the procurement officer for [REDACTED] put it, [REDACTED] will purchase any of its office supplies from anyone, “if the price is right.”<sup>45</sup> When customers choose to aggregate their products with one supplier, they do so because those suppliers (like Defendants) offer competitive pricing to attract business away from other suppliers. Likewise, customers often choose to disaggregate purchases to use different vendors for different products or geographic areas where those are the best options:

- [REDACTED]: “Given our overall capacity,” [REDACTED] does not believe that consolidating spend of consumable office supplies results in savings ([DX04263] [REDACTED] Dep. at 115:14-20);
- [REDACTED] has a main contract with Office Depot, but also purchases from WB Mason, and purchases are made outside of contract ([DX00369] FTC-PROD-0061314 [REDACTED]; [DX00370] FTC-PROD-0061534 [REDACTED]);
- [REDACTED] sources some of its products (e.g., janitorial supplies, paper and stationery products, end-user equipment, etc.), from multiple suppliers, including Grainger, Fastenal, and Pomeroy ([DX00335] FTC-PROD-0017743 [REDACTED] at 17757-17758);
- [REDACTED] purchases office supplies from national, regional and online providers (e.g., Amazon) ([DX04474] FTC-PROD-0005293 [REDACTED]);
- [REDACTED] Response to FTC CID states that “43% of [REDACTED] total YTD fiscal year 2015 Spend on Office Supplies/Janitorial Services went to 1,742 different suppliers” ([DX04186] FTC-PROD-0009811 [REDACTED] at 9812);
- [REDACTED] has approximately 120 different procurement contracts, spanning

<sup>45</sup> See [DX04985] [REDACTED] Dep. at 203:19-205:15.

“200 or more” different categories, and sources products from an estimated 10,000 different vendors. In addition, [REDACTED] spend data shows that [REDACTED] various locations procure supplies from multiple and different vendors ([DX02969] [REDACTED] Dep. at 19:6-18; 85:16-22; [DX04029] FTC-PROD-0106975);

- [REDACTED]: In 2015, approximately 30% of [REDACTED] office supplies purchases were off-contract spend with other office product vendors, including Amazon. [REDACTED] also purchases office supplies from other local and regional vendors ([DX02451] [REDACTED] Decl. (2/12/2016)) ¶ 12);
- [REDACTED]: 2014 Office Supply Spend includes 100 different suppliers, including Alpha Office Supplies, Office Essentials Inc., OfficeMax, Staples, Unisource, Professional Office Environments, Domtar, Fisher Group, Grainger, Xpedx, HP, Uline, Shaughnessy, Canon, Nishida, and others ([DX00304] FTC-PROD-0014308 [REDACTED]
- [REDACTED] “In addition to Office Depot, [REDACTED] and its operating companies also purchase office supplies from the following companies: Guy Brown Management LLC, S.P. Richards Co., U-Line Corp., Grand & Toy, Staples, Inc., American Business Solutions, Inc., En Pointe Technologies, Anders Group, Inc., Vulcan Information Packaging, DSI-Data Source, Inc., Toner Express Officetech, Corporate Graphics, International, and Midwest Fixture Group, Inc.” ([DX02442] SPLS-FTC-DECL-1035 [REDACTED] [REDACTED] Decl. (2/9/2016)) ¶ 7);
- [REDACTED] currently uses more than a dozen different suppliers to fulfill its office products, there are good business reasons why [REDACTED] has decided to use other suppliers to fulfill its needs for those products, and the business reasons outweigh any benefits to purchasing this range of products from Staples as a single supplier ([DX04451] [REDACTED] Dep. at 78:19-79:15)).

Many other customers likewise choose to disaggregate purchasing.<sup>46</sup> Indeed, [REDACTED] chooses to purchase its office supplies separately and from different suppliers for its [REDACTED], [REDACTED].<sup>47</sup> And numerous large customers purchase paper direct from the manufacturer or from other specialty vendors.<sup>48</sup>

<sup>46</sup> See [REDACTED]

<sup>48</sup> [REDACTED] [DX05090] FTC-PROD-0176913; [DX05091] FTC-PROD-0176917; [DX02988] [REDACTED] Dep. at 39:4-7. [REDACTED] [DX02553] [REDACTED] Dep. at 97:24-98:13) ([REDACTED] separately negotiates

As Mr. Orszag explains, if prices on general office supplies or paper increased due to the merger (or for any reason), the large customers the FTC seeks to protect could easily avoid those increases by taking (or threatening to take) their business elsewhere—including for their purchases of ink and toner, breakroom supplies, or cleaning supplies.<sup>49</sup> Customers have noted that the purported burden of disaggregating purchasing to multiple suppliers is minimal.<sup>50</sup> Further, recognizing that sales of products in Plaintiffs’ alleged market have steadily declined,<sup>51</sup> Defendants depend on customers purchasing *all* office products, especially those considered “beyond office supplies,”<sup>52</sup> that are not as heavily affected by the digitization of the workplace.<sup>53</sup> Defendants’ costs to serve customers, profitability, and survival ultimately depend on their ability to sell as many products as possible to customers, not on the hypothetical ability to raise prices in a segment of products that are—as Plaintiffs’ expert even admits—in secular decline.<sup>54</sup> Any attempt by Defendants to raise prices of general office supplies or paper risks losing customers not only for those items but for *all* of their other office products needs, which are the engine of growth for Defendants.<sup>55</sup> And customers can and do bundle these other products together with traditional office supplies to get better prices.<sup>56</sup>

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a contract for Paper (Domtar)); [REDACTED]: [DX00152] [REDACTED] (“If necessary we can order paper from a paper company and not through office suppliers.”); [REDACTED]: [DX04264] PX03002-001 [REDACTED] Decl. (9/8/2015)) ¶ 8: Separate contract from Staples contract with Domtar for paper. Also purchases from other paper mills, including Sappi [DX02560] [REDACTED] Dep. at 85:4-14); Finch Paper [DX02560] [REDACTED] Dep. at 86:1-8); Appleton Coated [DX02560] [REDACTED] Dep. at 87:14-17); [REDACTED]: [DX05031] FTC-PROD-0067331 [REDACTED] (Off Contract paper purchases from manufacturers); [REDACTED]: [DX04287] FTC-PROD-0006403 at 404 [REDACTED] (“ [REDACTED] purchases ink, toner, and paper from Xerox” under an agreement).

<sup>49</sup> See, e.g., [DX02570] Orszag Report at 98-100.

<sup>50</sup>

[REDACTED] PX02003 Ringel (Staples) IH Tr., at 209:6-25.

<sup>52</sup> PX02003 Ringel (Staples) IH Tr., at 44:11-18.

<sup>53</sup> [DX02570] Orszag Report at Exh. C (showing a 4% decrease in spend on products within the Plaintiffs’ market definition to B-to-B customers juxtaposed by a 6% increase in spend on cleaning and breakroom products.).

<sup>54</sup> [DX02591] Shapiro Report at 12 n.37.

<sup>55</sup> [DX02570] Orszag Report at Exh. H (in 2013 and 2014, *every single* large Staples B-to-B customer, as defined by Plaintiffs, purchased between one to nine additional product categories beyond the Plaintiffs’ defined product market).

<sup>56</sup> See, e.g., [DX02969] [REDACTED] Dep. at 97:5-22 ([REDACTED] combined print program and promotional item program “to leverage those programs to get a total better package from Staples on those three programs.”)

Plaintiffs also misapply a string of cases in support of their argument that “consumable office supplies” is the relevant product market. To the contrary, these cases suggest a much broader market than what Plaintiffs propose. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 566, 571-72 (1966) (holding that the entire central station service business, including services such as automatic burglar alarms, automatic fire alarms, sprinkler supervisory service, and watch signal service, was properly treated as a single relevant market because “there is here a single use, *i.e.*, the protection of property, through a central station that receives signals”); *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 357 (1963) (explaining why commercial banking is a “market ‘sufficiently inclusive to be meaningful in terms of trade realities’”). As in *Grinnell*, companies providing office supplies “recognize that to compete effectively, they must offer all or nearly all types of” office products, beyond those contained in the FTC’s limited “product market.” *Grinnell*, 384 U.S. at 572. As the Court stated, “[w]e see no barrier to combining in a single market a number of different products or services when that combination reflects commercial realities.” *Id.*

Customers’ purchases of office products are fluid, depending on the particular needs of the customer and the ability of vendors to serve those needs. Indeed, the RFPs submitted by Defendants’ customers, and the resulting contracts—which are non-exclusive with no minimum required purchases—reflect the broad array of products that customers buy together, and which are negotiated and purchased together. Not only do Defendants’ customers purchase a broad array of products under their contracts, they also look broadly to different suppliers and different regions for additional product needs. Indeed, central offices of the customers in Plaintiffs’ alleged market frequently give their individual locations autonomy to decide which vendors to use, including myriad local vendors, and what office products to buy.<sup>57</sup> Here, the commercial

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<sup>57</sup> *See, e.g.,* [REDACTED]: [DX04182] FTC-PROD-0022957 at 958 (“...our office supply purchase decisions are made at the local office level and are not part of a larger national purchasing program or a RFI, RFP or bid process”).

realities include a host of products that Plaintiffs exclude. Plaintiffs' proposed market is deficient and should be rejected.

d) Plaintiffs Identify an Arbitrary Geographic Market

Plaintiffs' proposed national geographic market is also designed to focus the market share analysis on Staples and Office Depot. For example, Plaintiffs dismiss W.B. Mason as a viable alternative for Defendants' customers, characterizing it as only a regional competitor, despite W.B. Mason's proven ability to serve national customers such as [REDACTED].<sup>58</sup> As discussed below, Plaintiffs' characterization of a "national market" for certain customers that can only be served by Staples and Office Depot is not supported by the record, which identifies a number of large "national" customers that rely on W.B. Mason and other vendors to provide office products.<sup>59</sup> "National" customers often choose different office products vendors for different geographic regions:

- [REDACTED]: "For example, some customers only use MPS for printers in their corporate headquarters but exclude printers located in satellite offices. For those excluded printers, customers may independently purchase their toner cartridges from their preferred office supplies vendor. Thus, even customers who use MPS may nonetheless purchase toner cartridges for printers they manage from other sources." [DX02455] [REDACTED] Decl. (2/12/2016)) ¶ 12;
- [REDACTED] location stopped purchasing on contract because of service issues [DX00004] [REDACTED]; [REDACTED] using local supplier named SOS [DX00006] ([REDACTED]);
- [REDACTED] does not engage in centralized purchasing of office supplies and does "not enter into any bulk contracts with office supply

<sup>58</sup> [REDACTED]

vendors.” Instead, “office supply purchase decisions are made at the local level and are not part of a larger national purchasing program or RFI, RFP or bid process.” [DX04182] (FTC-PROD-0022957 at 0022957-58);

- [REDACTED] purchases office supplies from national, regional and online providers (e.g., Amazon) [DX04474] (FTC-PROD-0005293-4 [REDACTED]);
- [REDACTED]: In its response to the FTC’s CID, [REDACTED] noted that despite selecting Staples as the “Preferred Supplier” in a sourcing event, they “did not mandate to all of the business units and divisions in the enterprise that all future Office Supplies/Janitorial Supplies orders were to be placed with Staples. Rather, due to the existing [REDACTED] culture at the time and change management hurdles, this program was deemed a ‘Preferred Supplier’ relationship, meaning, it was communicated to all within [REDACTED] that users could receive savings and high quality service if they chose to participate in this program. At the time and currently today, there remain hundreds of suppliers from whom the [REDACTED] enterprise is purchasing Office Supplies/Janitorial Supplies in a decentralized manner.” [DX04186] FTC-PROD-0009811 [REDACTED] at 0009817;
- [REDACTED]: “[REDACTED] utilizes a decentralized procurement strategy for office products. In general, [REDACTED] distribution centers are individually responsible for their office product purchasing decisions and each distribution center is empowered to acquire office products from the suppliers of its choice, including online suppliers. Often the distribution center selects a supplier that has operations or a facility in or near the city in which the distribution center is located.” [DX02432] SPLS-FTC-DECL-1025 [REDACTED] Decl. (2/4/2016) ¶ 6.

## 2. *Plaintiffs Present a Faulty HHI Analysis*

For the reasons provided above and in Sections IV.B.1-2, Plaintiffs’ “relevant” market is improperly defined, and thus their market share calculation and Herfindahl Hirschman Index (“HHI”) analysis are inherently flawed as they rely on that market definition. But even if it were a proper market, Plaintiffs have still failed to establish reliable market shares needed to establish a presumption of harm. The underlying market shares are unreliable for several reasons, including: (i) The Fortune 100 is not representative of the more than 1,000 customers in Plaintiffs’ alleged relevant market; (ii) Professor Shapiro’s market share calculation is limited to 81 of the Fortune 100 and thus is not even representative of the Fortune 100; (iii) Professor Shapiro misattributes certain purchases by large B2B customers, such as copy paper purchases from manufacturers, to Staples and Office Depot; (iv) Professor Shapiro does not fully account

for “leakage” purchasing from distributors other than a customer’s primary contracted supplier; (v) Professor Shapiro fails to account for the “future competitive significance” of rival firms,<sup>60</sup> such as Amazon Business, which are growing rapidly; and (vi) finally, Professor Shapiro does not properly analyze the role of “diversity” suppliers, but simply lumps their sales in with Staples and Office Depot.<sup>61</sup>

Underscoring the arbitrary approach employed by the FTC is the absurd results it implies. If the market definition and HHI analysis utilized here were applied to the recent Office Depot-OfficeMax transaction, the result would have been a 470-point increase in concentration and a highly concentrated market that would trigger a presumption of harm to competition under the Horizontal Merger Guidelines (hereinafter the “HMG”). Tellingly, however, the FTC unanimously approved that acquisition, stating that “[a] substantial body of evidence demonstrates that the merger is unlikely to substantially lessen competition or harm large contract customers.” Further, there has been *no increase* in prices following the Office Depot-OfficeMax transaction.<sup>62</sup> That fact simply cannot be squared with Plaintiffs’ alleged market or their claimed shares here. The reason is that the FTC was correct in 2013—this is a highly competitive market with scores of competitors for the products Defendants sell. But Plaintiffs and their expert turn their backs on reality, using a new—and wrong—market definition and creating a flawed HHI calculation by improperly excluding a host of products and competitors. Because Plaintiffs have failed to show undue market concentration in a properly defined relevant market, the merger should not be enjoined. *Arch Coal*, 329 F.Supp.2d at 116.

## **B. Overwhelming Evidence Rebutts Any Presumption of Illegality**

### *1. Expansion by Competitors—as Confirmed by the FTC Just Two Years Ago—Demonstrates There is No Risk of Anticompetitive Effects*

Even if their relevant market definition, and consequent market share analysis, could

<sup>60</sup> [DX02576] HMG at p. 16.

<sup>61</sup> [DX02570] Orszag Report at 6-7.

<sup>62</sup> [DX02570] Orszag Report at 91-93 (“Professor Shapiro’s calculations also imply that the [Office Depot-OfficeMax] merger increased HHI by 470 points, which is more than the 200 that ‘triggers a presumption of harm to competition,’ as Professor Shapiro put it”).



Plaintiffs' reliance on a few off-hand and stale internal statements by a few of Defendants' salespeople—out of 16 million pages of documents submitted by Defendants—that they are the two largest companies competing for sales to some large customers thus cannot establish that they are unconstrained by other competitors. Further, Plaintiffs' selective quotation of a few documents ignores a robust record of internal documents—and independent third-party verification—demonstrating Staples and Office Depot's competitive concern for, and reaction to, numerous other competitors, including Amazon and W.B. Mason. The record in this case amply demonstrates that Defendants face competition from all sides, given the wide variety of vendors available for office products.

In the short time since the FTC's 2013 statement, Amazon has expanded to become an even more formidable competitor for office supplies.<sup>66</sup> Amazon overall now has \$100 billion in annual sales, operates more than 50 distribution centers for nationwide delivery (more than either Staples or Office Depot), offers hundreds of millions of products (far more than Defendants), and has even greater purchasing power from suppliers than do Defendants. Though Amazon has operated its B2B office supplies business for less than one year, its capabilities are increasing at a stunning rate, as is its customer base, and it is aggressively building out a sales force with

[REDACTED]<sup>67</sup> And, contrary to Plaintiffs' contention that Amazon Business "is currently focused on small businesses" and has "uncertain"

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[DX02667] Martin Wilde Associates Ltd & Office Products International Ltd., *Swimming with Piranha*, at Vol. 1, § 1.1, ¶ 3 (Sept. 2014) (use of Amazon is growing most rapidly among larger companies); [DX01574] SPLS\_0849228 ("Amazon already used more frequently than national OP suppliers for several OP categories.").

<sup>67</sup> See, e.g., [REDACTED]

prospects with larger customers,<sup>68</sup> the evidence shows that Amazon Business is aggressively seeking new customers, including by working with Amazon Web Services on joint sales pitches to the large enterprises it serves, and already serves *more than 200,000 businesses*, including Fortune 500 customers, just eight months after its launch.<sup>69</sup>

[REDACTED]

In fact, even before the formal launch of Amazon Business (and before this litigation), Staples executives at the highest levels of the company declared Amazon—not Office Depot—the most serious competitive threat to its business:

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<sup>68</sup> Br. at 33.

<sup>69</sup> [REDACTED]

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[REDACTED]

“ [REDACTED] ”

[REDACTED].<sup>74</sup> Yet Plaintiffs now attempt to shift the Court’s focus improperly on Amazon’s and Amazon Business’s past sales to B2B customers, rather than its expectations and active steps for expansion.<sup>75</sup> For these reasons and more, Stanford University Professor Haim Mendelson, who has studied Amazon’s disruption and dominance across various products and services, has opined that Amazon Business will meaningfully constrain a combined Staples/Office Depot.<sup>76</sup>

Indeed, Defendants are already losing customers and sales to Amazon Business. B2B Customers have identified Amazon as a competitor to Staples,<sup>77</sup> and others have begun purchasing significant volumes of office supplies from Amazon.<sup>78</sup> Nevertheless, Plaintiffs

<sup>73</sup> [DX01213] SPLS\_0438516 (Staples) at 0438416-17; *see also* [DX01725] SPLS\_3250747 (Staples) (June 2014) (“Amazon threat continues to intensify and requires action by Staples.”); [DX01691] SPLS\_2980321 (Staples) (Nov. 2013) (“New players are much more formidable threats to us. Amazon plays by different rules and it is setting customer expectations based on their model.”).

<sup>74</sup> [REDACTED]

“[T]his is a forward-thinking case. What’s the future going to look like if indeed these companies are allowed to merge.” March 4, 2016 Hearing Tr. at 64:16-20; *See also* Dkt. No. 182 (“This type of information [e.g., revenue projections] is likely relevant to Staples’ defense in this case because the information appears to relate to how competitive Amazon Business will be with other competitors in the industry *over the course of the next several years.*”) (emphasis added).

<sup>76</sup> [DX02538] Expert Report of Haim Mendelson, February 29, 2016, ¶¶ 10-15; 54-73.

<sup>77</sup> *See, e.g.*, [REDACTED]: [DX04451] [REDACTED] Dep. at 81:5-8) ([REDACTED] would consider Amazon Business as an alternative office supplies supplier if, post-merger, prices rose); [REDACTED]: [DX02628] [REDACTED] Dep. at 54:12-19, 55:16-23) (Since November 1, 2013 [FTC statement on Office Depot/OfficeMax merger], Amazon has emerged to sell a lot of consumable office supplies and could be looked at as additional competition.); [REDACTED]: [DX00122] [REDACTED] Dep. Ex. 15) at 5278 (“If this approach holds true, this will significantly disrupt the pricing approach that Staples/Office Depot and even [REDACTED] has used to sell our OP program. This will bring full transparency to the market and change the sourcing approach for categories that are offered through the AmazonBusiness site.”); [REDACTED]: [DX04263] [REDACTED] Dep. at 89:22-25) (Amazon is a competitor to Staples in the future); [REDACTED]: [DX02426] [REDACTED] Decl. ¶ 16 (“Amazon Business will be a viable alternative source for [REDACTED] Office Products needs going forward”).

<sup>78</sup> [REDACTED]: [DX00381] FTC-PROD-0064444 [REDACTED] ([REDACTED] purchased office supplies from four main companies: Office Depot, Office Max, Staples, and Amazon); [REDACTED]: [DX04451] [REDACTED] Dep. at 35:13-36:22) (When [REDACTED] finds better prices for non-core (non-Staples) office products or when [REDACTED] needs something that Staples does not offer, [REDACTED] will buy items from a different supplier including Amazon); [REDACTED]: [DX00217] [REDACTED] (acknowledges shift to online ordering, specifically “Amazon model”).



[REDACTED]

- **AOPD:** [REDACTED]

- **HiTouch:** [REDACTED]

- **TriMega and Independent Stationers:** [REDACTED]

The risk of anticompetitive problems is lower where, as here, “strong companies with concrete plans to expand” are present in the relevant market. *Arch Coal*, 329 F.Supp.2d at 149. Intense and growing existing competition forces Staples to identify ways to cut costs and offer lower prices for its customers, as the FTC has recognized.

Courts have noted that “[i]n the absence of significant barriers, a company probably cannot maintain supracompetitive pricing for any length of time.” *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990).<sup>83</sup> Here, it is clear that Staples and Office Depot’s prices are constrained (and often beaten) by Amazon and other vendors who can make sales to

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<sup>83</sup> Barriers are particularly low where existing competitors serve the market. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1415 (7th Cir. 1989) (“If such barriers to increasing output are low for existing competitors, barriers to entry would likely be low for market entrants.”). *See also* [DX00198] [REDACTED] Dep. Ex. 6) at 17 (Barriers to entry for office supplies are “Medium,” regional suppliers are competing with national suppliers, and online suppliers have relative ease of start-up).

their B2B customers with a few clicks of a mouse, and already have the existing infrastructure to compete for—and win—contracts for large, nationwide customers and to sell in large volumes to those customers’ individual locations. The evidence demonstrates that these same constraints will exist post-merger.

“A firm that never enters a given market can nevertheless exert competitive pressure on that market. If barriers to entry are insignificant, the threat of entry can stimulate competition in a concentrated market, regardless of whether entry ever occurs....If a firm that never enters a market can keep that market competitive, a defendant seeking to rebut a prima facie case certainly need not show that any firm will enter the relevant market.” *Id.* at 988. Where, as here, Defendants have demonstrated ongoing entry and expansion, they have more than rebutted any presumption of competitive harm. Further, in addition to this actual competitive entry and expansion, the FTC recognized just two years ago that “[p]otential competitors in adjacent product categories, such as janitorial and industrial products, have existing contractual relationships with large office supply customers and can leverage those relationships to enter the office supply distribution market.” *Id.* For example, competitors in adjacent spaces, such as Grainger, have existing relationships with the very “target customers” in the FTC’s proposed market and can and easily could sell these large companies office supplies on the same trucks delivering janitorial and industrial products.<sup>84</sup>

## 2. *Numerous Vendors Compete for the Sale of Relevant Products*

The record developed in this case flatly contradicts Plaintiffs’ characterization of the market as a “two-horse” race in which Defendants’ customers can only buy office supplies from Defendants. Indeed, dozens of large customers have selected competitors other than Defendants to be their primary office supply provider. W.B. Mason alone, for example, has [REDACTED]

<sup>84</sup> [DX02590] W.W. Grainger, Inc., 2014 10-K, at K-3, K-4 (“Customers range from small and medium-sized businesses to large corporations, government entities and other institutions.... Approximately 75% of sales are concentrated with large customers.... The United States business operates in all 50 states through a network of 19 distribution centers (DCs), 377 branches and 51 contact centers.”); [REDACTED]

[REDACTED] See also [DX01213] SPLS\_0438516 (Staples) “We are competing more and more with Grainger—a formidable company who is ahead of us in reinvention and does not have the pressure of secular decline.”

customers with more than \$1 million in annual purchases, including national chains like [REDACTED], among others.<sup>85</sup> And W.B. Mason has also gone head-to-head against Staples, Office Depot, and OfficeMax and won a number of large, national contracts.<sup>86</sup> Even when it does not win, W.B. Mason is an aggressive bidder, forcing Staples and Office Depot to sharpen their pencils and offer the most competitive prices. And Tier 1 suppliers currently serve at least thirty-two Fortune 100 companies and many other large national customers.<sup>87</sup> Customers also use these suppliers to drive lower prices from Staples and Office Depot.<sup>88</sup>

Aside from competition from companies like W.B. Mason and Tier 1 suppliers such as Guy Brown, customers have numerous other alternatives for purchasing office supplies. These include other independent dealers,<sup>89</sup> wholesalers such as Essendant and SP Richards, working with independent dealers and Tier 1 dealers;<sup>90</sup> large manufacturers such as Domtar (paper) and

<sup>85</sup> [DX02637] [REDACTED] Dep. at 146:18-147:22).

<sup>86</sup> [REDACTED]

[DX02570] Orszag Report ¶ 166.

<sup>88</sup> [REDACTED]: [DX04993] [REDACTED] Dep. at 27:18-28:12) ([REDACTED] relies on competitive pricing from entities other than Staples, including My Office Supplies, W.B. Mason, Corporate Product Supplies, and others.); [REDACTED]: [DX02408] SPLS-FTC-DECL-1001 [REDACTED] Decl. (1/7/16)) ¶ 18 (“As [REDACTED] for [REDACTED], I have a staff devoted to monitoring prices for office products, including on Amazon’s websites (retail and business) and can use the pricing information contained on such websites in our annual renegotiation of office product prices with Office Depot. As such, the products [REDACTED] purchases from Office Depot are often discounted or competitively priced because of the price transparency [REDACTED] can leverage from the internet and other sources.”); [REDACTED]: [DX02628] [REDACTED] Dep. at 81:9-82:16; 83:12-84:16) ([REDACTED] has sourced or threatened to source certain categories of office supply products from multiple firms in order to obtain more favorable pricing from Office Depot. [REDACTED] would most likely do that on any categories of office supply products for which a combined Office Depot and Staples increased prices.).

<sup>89</sup> [REDACTED]



options exist in the event of an attempted price increase.<sup>97</sup> If customers like [REDACTED] and [REDACTED] can obtain the office supplies and services they need from an independent dealer like APD, then any customer in the alleged market can turn to APD or one of the many comparable options. Similarly, other office supply vendors would be chomping at the bit at the opportunity to steal customers if post-merger Staples raised prices.<sup>98</sup>

Ignoring this overwhelming evidence of competitive alternatives, Plaintiffs weakly cling to brief references in a few documents—many several years old—from Defendants’ salespeople suggesting that they view each other as their primary competitors.<sup>99</sup> But these few anecdotal documents out of more than 16 million pages submitted cannot change the realities in the marketplace, which the FTC itself acknowledged just over two years ago. For example, the FTC relies on an Office Depot document from 2010 where Office Depot identified Staples as its “toughest and most aggressively priced national competitor.” PX 05229 at 149. Even the FTC would have to concede that much has changed in the office supplies market in the past 6 years, which has seen the emergence and growth of several competitors, including Amazon and Amazon Business, WB Mason, and a host of new competitors and business models. Reliance on

<sup>97</sup> [REDACTED]: [DX00041] [REDACTED] (Staples raised their prices. [REDACTED] reaction was, “I think we should RFP it, as we did in 2009.”); [REDACTED]: [DX04242] FTC-PROD-0024195 [REDACTED] at 197 ([REDACTED] Response to [REDACTED] states “If the merger is consummated and the merged Staples/Office Depot entity imposed a 5-10% price increase, [REDACTED] would focus on more direct buys from suppliers, where possible, and utilize regional suppliers like WB Mason or Forms & Supply. In addition, several web-based suppliers, such as Shoplet.com, are coming online, which may be able to meet [REDACTED] supply requirements.”); [REDACTED]: [DX03917] FTC-PROD-0023982 [REDACTED] at 983-84 [REDACTED], states, “In the unlikely event that [REDACTED] were to become unhappy with Staples over the next few years, [REDACTED] would open up a new RFI in early 2017. [REDACTED] believes that other competitors (e.g., Walmart, Amazon) could offer similar (or the same) products for similar (or the same) price. [REDACTED] only ‘known unknown’ in such an RFI event would be Walmart’s or Amazon’s willingness to provide, and strictly manage, a product catalogue. Even in the event that no competitor would be willing to provide and strictly manage a product catalogue, [REDACTED] recognizes and understands that it could control spending through its own internal controls and governance, with no or limited supplier help.”)

<sup>98</sup> See, e.g., [REDACTED]

<sup>99</sup> See, e.g., Br. at 6. Plaintiffs omit from their analysis the scores of other documents that demonstrate a less self-centered view of the competitive landscape. For example, in support of the contention that Defendants “see themselves competing in a two-player market” (Br. at 6), Plaintiffs cite a February 2014 internal Staples email describing an “ODP Attack Plan” [PX04081] but conveniently fail to mention that Staples similarly implemented an “attack plan” aimed at WB Mason in Sept. 2014. See [DX01219] SPLS\_0466554; [DX01227] SPLS\_0466573; [DX01651] SPLS\_1660322. See also [DX01149] SPLS\_0427272 (“In Contract, Grainger is B2B supplier that increasingly competes head-to-head with Staples.”).

documents like these cannot change the facts relating to the office supplies market *today*, let alone into the future.<sup>100</sup>

In reality, Defendants perceive Amazon Business as a massive threat:

- “Next week at our quarterly strategy meeting we will be discussing how to win against Amazon Business... [I]t may be worth reading ... this excerpt from Malcolm Gladwell’s book, *David and Goliath*” ([DX01770] SPLS\_4057341);
- “How will we compete with Amazon now that they are frontally assaulting our business ... Amazon is a competitor the world has never seen. Jeff [Bezos] isn’t thinking about 2016. He’s already planning the death of Staples” ([DX01685] SPLS\_2967031 at 2967033; *id.* at 2967036);
- “Here we go! Amazon prime for business. This is going to unfold very quickly and remains a major threat” ([DX01671] SPLS\_2078955);
- “Scary! This is big-time competition and threat.... This is a shot across our bow...” ([DX01733] SPLS 3480047);
- “We knew it was coming and here it is. Ups the urgency for our business dramatically... We have to change our game” ([DX01684] SPLS\_2966875);
- “Check out the Amazon business video ... gulp ... Amazon is out aggressively marketing its business” ([DX04510] ODP-OMX-F TC-00426608);
- “They are replacing Amazon Supply with Amazon Business ... Scary prospects for OD” ([DX04847] ODP-OMX-FTC-05932305).

Plaintiffs also dramatically claim that Defendants’ own documents demonstrate there will be no competition in the office supply market if the merger is consummated, leading to higher prices. *See, e.g.*, Br. at 1-2, 6, 19 and 26 and documents PX05236; PX05393; PX04357; PX07175; and PX04567. Not so. In fact, these documents reflect nothing more than aggressive sales tactics by individuals pushing to make a deal. Moreover, far from creating a sense of worry and dread, the recipients of these tactics were hardly moved and saw the statements for what they were: sales pitches. *See, e.g.*, PX05393 (responding that company was satisfied with current

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<sup>100</sup> Similarly, off-the-cuff references in a few documents from 2013 and 2014 to a “2-player” market (PX04335; PX04082; PX04083; PX05233) and one document from 2011 characterizing another competitor’s abilities as “weak” (PX04334), fail to inform the state of the market today and are flatly contradicted by the evidence demonstrating intense competition and various alternatives to Staples and Office Depot.”



3. *Defendants' Customers Are Not Restricted by Their Contracts with Defendants and Routinely Purchase "Off Contract"*

Defendants' contracts with their B2B customers are non-exclusive,<sup>104</sup> have no minimum purchase requirements, and many customers maintain overlapping contracts with multiple vendors.<sup>105</sup> These contracts do not bind customers in any way. They simply grant the customer the option to buy at the contracted-for prices during the term of the contract. In fact, customers expressly reserve for themselves the right to purchase products from other sources, and they do in fact purchase the same products from those other sources when they can get better prices.<sup>106</sup> This is referred to as "leakage."

Staples' and Office Depot's customers also routinely seek and obtain lower prices, based on competitive offerings by other companies such as Amazon and W.B. Mason, after the award of a contract.<sup>107</sup> Such practice is commonplace. [REDACTED]

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eProcurement capability, nationwide delivery capability, and competitive pricing."); [REDACTED]: [DX04989] [REDACTED] Dep. at 31:1-8; 160:14-15) ([REDACTED] is neutral on the merger.).  
*See, e.g.,* [REDACTED]  
 [REDACTED] Decl. (2/4/16) ¶14 (" [REDACTED] contracts with its office products suppliers to merely guarantee [REDACTED] a particular price, but [REDACTED] is free to buy supplies from any supplier.");  
<sup>105</sup> [REDACTED]: [DX04298] [REDACTED] Dep. at 32:10-13; 33:1-3) ([REDACTED] contracts directly with manufacturers and will multi-source some of those contracts (OEM contracts); [REDACTED]: [DX04013] FTC-PROD-0024145 [REDACTED] ([REDACTED] sources ink/toner for its small desktop devices under its contract with Office Depot, but purchases ink/toner for its MFDs directly from the manufacturers (Xerox and Ricoh)); [REDACTED]: [DX02560] [REDACTED] Dep. at 105:17-23) ("if it meets our strategic objectives at the time", [REDACTED] may dual or multisource for particular goods); [DX02560] [REDACTED] [REDACTED] Dep. at 104:15-105:15) (from 2009-2012, [REDACTED] triple sourced its office supplies from Pitney Bowes (ink/toner), Staples (general), and OfficeMax (paper)); [REDACTED]: [DX04451] [REDACTED] Dep. at 78:19-24 ([REDACTED] currently uses more than a dozen different suppliers to fulfill its office products).  
<sup>106</sup> [REDACTED]: [DX02412] [REDACTED] Decl. (1/20/16) ¶ 14 (" [REDACTED] is not required to purchase any minimum quantity of products under its contract with OfficeMax/Office Depot"); [REDACTED]: [DX02633] [REDACTED] Dep. at 47:3-15; 187:8-19 (off-contract spend with Staples, Amazon, Quill, Wal-Mart, and Target); [REDACTED]: [DX02451] [REDACTED] Decl. (2/12/16) ¶12 (" [REDACTED] purchases office supplies from many other vendors. In 2015, approximately 30% of [REDACTED] office supplies purchases were off-contract spend with other office product vendors. A non-exclusive list of these other vendors includes Amazon, Office Depot, OfficeMax, Office Solutions, Standard Register, Staples, Target, Walmart and Walgreens. [REDACTED] also purchases office supplies from other local and regional vendors."); [REDACTED]: [DX00097] [REDACTED] Dep. Ex. 6, at 153) (Spreadsheet showing prospective [REDACTED] had purchased 81.54% of its office supplies "off contract"); [REDACTED]: [DX02627] [REDACTED] Dep. at 60:21-61:1) ("Q. Would you characterize the amount of off-contract spending for office supplies as significant? THE WITNESS: I would say it's pretty high").  
<sup>107</sup> *See, e.g.,* [REDACTED]: [DX02967] [REDACTED] Dep. at 202:16-203:22).

[REDACTED]

[REDACTED]<sup>108</sup>.

Although Plaintiffs attempt to downplay the level of leakage, the business reality is that leakage is widespread, including for the customers in Plaintiffs' purported market. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Many customers acknowledge leakage but admit they do not have means to reliably track it.<sup>109</sup> In response to this leakage, suppliers like Office Depot and Staples routinely cut prices (or maintain already-low prices) on their products, including Plaintiffs' purported relevant products. Indeed, Staples cut prices during the duration of a contract more than [REDACTED] times during fiscal year 2014.<sup>110</sup> Moreover, Staples' and Office Depot's contracts contain no minimum volume commitments that require customers to maintain contracts only with Staples and Office Depot.<sup>111</sup> These customers are instead free to purchase products from whichever vendors they choose, and they often do, as demonstrated above.

The reality is that the driver for these large corporations is price and they will do whatever is necessary to find and obtain the best price. And they commonly find better prices

<sup>108</sup> [DX02637] [REDACTED] Dep. at 284:1-12).

<sup>109</sup> See, e.g., [REDACTED] : [DX00335] FTC –PROD-0017743 [REDACTED] at 56 (it has “limited visibility” in terms of tracking leakage); [REDACTED] : [DX04985] [REDACTED] Dep. at 165:12-17) [REDACTED] does not have any way of checking how much was spent off-contract on office supplies across [REDACTED]); [REDACTED] : [DX04298] [REDACTED] Dep. at 150:24-151:1) ([REDACTED] does not have a way of tracking off-contract spending); [REDACTED] : [DX04981] [REDACTED] Dep. at 106:9-107:7) ([REDACTED] has no way of tracking where owner-operators (~65% of [REDACTED] business) purchase office supplies if they do not participate in the Office Depot contract through Marketplace).

<sup>110</sup> [DX02570] Orszag Report at 78.

<sup>111</sup> See, e.g., [REDACTED] : [DX04399] ODP-OMX-FTC-2-00010651 [REDACTED] Decl. (2/11/16) ¶13 (“[REDACTED] is not required under its contract with Staples to purchase any quantity of general office products from Staples”); [REDACTED] : [REDACTED] have neither a minimum volume nor a minimum purchase dollar requirement. [DX04334] [REDACTED] Dep. at 16:16-22); [REDACTED] : [DX04185] FTC-PROD-0005821 at 5824 (“As a result of the RFP in 2013 with Staples being the successful bidder, [REDACTED] has purchased approximately 30% of its ‘relevant products’ from Staples since 9-1-13...[i]t was treated as optional.”); [REDACTED] : [DX00079] [REDACTED] (“Supplier acknowledges that Supplier is not the exclusive manufacturer or supplier of the Products and [REDACTED] is making no minimum quantity commitments unless otherwise explicitly set forth in the applicable Product Agreement. [REDACTED] is free to purchase Products from other suppliers or to produce Products at [REDACTED] owned or operated facilities with no liability to the Supplier hereunder.”).

from alternative suppliers, and either purchase office products from those suppliers, or bring those prices to Staples' and Office Depot's attention to demand a price match. There is nothing to indicate this practice will be impacted by the merger. In fact, it is likely to escalate if Staples were to attempt to raise prices post-merger, as ██████ reported to the FTC:

“If the merger is consummated and the merged Staples/Office Depot entity imposed a 5-10% price increase, ██████ would focus on more direct buys from suppliers, where possible, and utilize regional suppliers like WB Mason or Forms & Supply. In addition, several web-based suppliers, such as Shoplet.com, are coming online, which may be able to meet ██████ supply requirements.”<sup>112</sup>

4. *The Market Characteristics Here Differ Substantially from Those in Sysco*

Plaintiffs rely on the recent decision in *Sysco*, 113 F. Supp. 3d 1, to argue that Defendants' merger will be anti-competitive. This reliance is misplaced, as the office products industry presents significantly different competitive conditions than in the “broadline food distribution” industry at issue in *Sysco*. For instance, the Internet plays a major role in both ordering and price-checking in the office products industry, and nothing even remotely akin to Amazon exists as an option for broadline food service customers. Unlike *Sysco*, this market is also characterized by huge national wholesalers—Essendant and SP Richards—that have at least as many distribution centers as Defendants and enable national delivery of office supplies for *any* supplier. This simply did not exist in *Sysco*.

Moreover, unlike with food, office supplies are indirect products, not key inputs into the customers' business. Office supplies are also not “mission critical”; business will continue as usual with a black pen if the company runs out of blue pens. There is also no need for standardization across locations whereas a McDonald's in California may require the same size and color of cheese as a McDonald's in Florida, neither location requires a particular ball point pen, which is invisible to the consumer. Office supplies, unlike food, are also non-perishable and lack special handling requirements. And these large companies do not care who sells them pens or binders or whether the delivery box bears a “Staples” or “Office Depot” sticker. What

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<sup>112</sup> ██████ [DX04242] FTC-PROD-0024195 ██████ at 197.

they care about is price.<sup>113</sup> Customers suffer no adverse consequences from buying off-contract. Thus, market characteristics here make the court’s decision in *Sysco* inapposite.

5. *There are no Significant Barriers to Entry or Expansion for Firms*

If a combined Staples and Office Depot attempted to raise prices, their competitors would enter or expand rapidly to compete for the combined firm’s customers. Staples and Office Depot hold no specialized or unique assets as inputs that are not equally available to other competitors. Almost all of the products sold by the companies are commodities procured from third parties through non-exclusive contracts. Further, as discussed above, despite Plaintiffs’ claim that Defendants alone provide certain “requirements” to customers, Defendants have no specialized assets or intellectual property unavailable elsewhere. Defendants’ competitors also offer these features, and in any event, the evidence shows that these are actually customers’ preferences, not requirements, and these competitors can ably serve large national customers.<sup>114</sup>

6. *The Proposed Merger Will Generate Enormous, Credible Efficiencies That Will Benefit All Customers*

Staples has publicly stated that the proposed merger will generate at least \$1 billion of annualized synergies to create greater value, which will benefit customers of all sizes through lower prices, improved quality, enhanced service, and new products. In fact Staples and Office Depot *need* to realize and pass on these efficiencies to remain competitive in selling B2B office products.<sup>115</sup> Staples’ and Office Depot’s past acquisition experiences<sup>116</sup> in Corporate Express and OfficeMax, respectively, along with Paul Anderson’s expert report on the efficiencies resulting from the merger, show that the Defendants’ publicly stated efficiencies are reliable estimates that should be credited. Additionally, investment analysts have overwhelmingly accepted the efficiencies calculations put forth by Defendants.<sup>117</sup>

<sup>113</sup> See, e.g., [REDACTED]; [REDACTED]: [DX02560] [REDACTED] Dep. at 26:20-27:9) ([REDACTED] conducts audits to ensure it gets the best prices).

See *supra* § IV.A.1.b.

<sup>115</sup> PX02127 Komola (Staples) Dep. at 80:5-20; 120:2-10.

<sup>116</sup> PX02146 Granahan (Staples) Dep. at 67:19-69:15; PX02005 Komola (Staples) IH Tr. at 186:5-187:4.

<sup>117</sup> See, e.g., [DX01050] SPLS\_ 5323729 (KeyBanc Capital Markets, “SPLS: Upgrading to Overweight with \$20 Price Target,” April 1, 2015) “could be as high as \$2B”; [DX01047] SPLS\_ 5323695 (Credit Suisse, “Hardline Retail: Office Supply,” September 2, 2014) – “conservatively estimated at \$1.44 billion”; [DX01048]

The HMG credit verifiable, merger-specific efficiencies that can enhance competition.<sup>118</sup> Indeed, while the HMG recognize that quantifying and verifying efficiencies may be difficult given the imperfect information flow between parties, Plaintiffs conveniently ignore the HMG's statements that "efficiency claims substantiated by analogous past experience are those most likely to be credited."<sup>119</sup> Staples' acquisition of Corporate Express in 2008 is an example of an analogous transaction where Staples tracked, achieved and exceeded its variable cost synergy targets by 44%.<sup>120</sup> The ongoing integration of Office Depot and OfficeMax provides a uniquely recent, analogous experience as Office Depot and OfficeMax operated in the same customer channels in which Staples and Office Depot currently operate.<sup>121</sup> Indeed, Defendants are aware of no other merger with such robust and contemporaneous evidence of immense efficiencies.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>123</sup>

Both of these analogous transactions yielded hundreds of millions of dollars of annual cost savings that the companies shared with their customers. And neither transaction led to higher prices or otherwise lessened competition or harmed consumers. Further, the cost savings from this merger are derived from virtually identical initiatives utilized by Staples and Office Depot to achieve cost savings in their prior analogous transactions with Corporate Express and OfficeMax, respectively. The Court can also take particular comfort in the recent DepotMax integration, as it serves as a highly instructive roadmap for Staples to achieve well over \$1

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SPLS\_5323720 (Jefferies, "Staples (SPLS) Initial Thoughts on Starboard Stake," December 11, 2014) "synergy estimate of \$1.5 - \$1.7 [billion]."

<sup>118</sup> [DX1041] HMG, at Section 10.

<sup>119</sup> [DX1041] HMG, at Section 10.

<sup>120</sup> [DX02561] Declaration of Paul S. Anderson, February 29, 2016 (hereinafter, "Anderson Report") at 11; PX02005 Komola (Staples) IH Tr., at 65:16-66:13.

<sup>121</sup> [DX02561] Anderson Report at 10 & n. 21.

<sup>122</sup> [DX00737] ODP-OMX-FTC-05507338 (Office Depot and OfficeMax Joint Press Release, "OfficeMax and Office Depot Announce Merger of Equals to Create \$18 Billion Global Office Solutions Company," February 20, 2013).

<sup>123</sup> [DX02561] Anderson Report at 14.

billion of annualized synergies with the benefit of Office Depot’s integration experience and “best practices.”<sup>124</sup> The magnitude of these savings is overwhelming when contrasted with the narrow scope of alleged competitive harm and the wide range of customers that face no prospect of competitive injury but will share in the benefits of the transaction.

7. *Defendants’ Proposed Divestiture Provides Further Assurance That the Merger Will Not Lead to Competitive Harm*

Though not necessary for the Court to deny Plaintiffs’ motion for a preliminary injunction preventing the merger, which for the reasons discussed above does not lessen competition and in fact will *increase* competition, to further address the allegedly negative impact of the merger, Staples has proposed divesting a substantial portion of business as well as related assets to Essendant. The proposed remedy enhances a competitive model of dealers working together with a wholesaler to serve large, corporate customers with consumable office supplies—a model that the FTC expressly credited in its 2013 Statement as an effective strategy for serving large B2B accounts. FTC 2013 Closing Statement at 3. A larger Essendant, with lower costs and additional capabilities to serve customers, can enable Tier 1 suppliers, and *all* independent dealers to more effectively compete for large B2B customers.<sup>125</sup>

Plaintiffs state that Essendant will obtain mere contracts without assets, but they are wrong. Essendant will receive information technology assets, including: its choice of the Office Depot or OfficeMax IT systems that the FTC alleges is so valuable; human resources including the dedicated customer service representatives that the FTC claims are so important; access to the courier agreements that can provide desktop delivery; and transition services to provide an orderly transfer of the business. *See* [DX00175] ESS-FTC-000191 (Disclosure Schedule to Asset Purchase Agreement Between Staples, Inc. and Essendant Co. (Feb. 16, 2016)); [DX05082] ESS00057162 (Schedule A – Services). Indeed, Essendant will obtain all assets it needs to effectively serve large B2B accounts. The only assets *not* included in the divestiture are

<sup>124</sup> [DX02561] Anderson Report at 9 & n.20; *see also* PX02149 (Smith (Office Depot) Dep. at 81:3-8).

<sup>125</sup> *See, e.g.*, [DX02449] [REDACTED] Supp. Decl. ¶¶ 7-13.

in areas where Essendant already has relevant assets and capabilities that match or exceed those of Defendants—most notably, a national distribution infrastructure that is larger than Staples’ or Office Depot’s, and that already provides nationwide, next-day delivery. Essendant will thus receive the tools to ensure that it will, along with its independent dealer partners, compete even more effectively with Defendants for customers of all sizes.

Finally, Plaintiffs’ suggestion that the consummation of the divestiture is speculative is incorrect. The agreement has been signed, all material terms agreed upon, and it will be ready to implement by the time of the Court’s ruling, after finalizing a few remaining granular details.<sup>126</sup>

#### **V. PLAINTIFFS HAVE NOT SHOWN THAT THE EQUITIES FAVOR AN INJUNCTION**

Even if Plaintiffs could demonstrate a likelihood of success on the merits, which they cannot, Plaintiffs still must show that the equities weigh in their favor. Here, the equities weigh strongly in Defendants’ favor in light of the enormous synergies and the unique opportunity this merger provides to *lower* prices to consumers at all levels of the market: retail customers, parents buying school supplies, mom and pop businesses, small businesses, medium business, and large businesses, as well as women- and minority-owned businesses. Those benefits stand to be lost under the Plaintiffs’ theory. The district court’s ruling is the only opportunity for Defendants to generate these cost savings, which will directly benefit all of their customers, including even the very large businesses at issue here. Further, the inequity of the FTC’s unexplained shift from its position in the 2013 FTC Closing Statement to the position taken in this litigation, after both merging parties relied on that guidance to pursue this merger, weighs strongly in favor of the Defendants.

#### **VI. CONCLUSION**

Defendants respectfully request that the Court deny Plaintiffs’ motion for a preliminary injunction so that their proposed merger may proceed.

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<sup>126</sup> [DX00156] ESS-FTC-000001, Asset Purchase Agreement between Staples, Inc. and Essendant Co. (Feb. 16, 2016).

Dated: March 8, 2016

Respectfully Submitted,

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# **Appendix A**

**Appendix A: Position on Merger<sup>i</sup>**

**Declarations were submitted in this case by both the FTC and the Defendants. Of those customers and competitors that submitted declarations, the following companies expressed no concerns or have taken no position on the merger.**

[REDACTED]

[REDACTED]

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[REDACTED]

# **Appendix B**

**Appendix (B): Market Definition**

**(1) The following companies expressly recognize a broader market definition that contradicts the FTC's narrow definition of just consumable office supplies and paper<sup>1</sup>:**

[REDACTED]

[REDACTED]

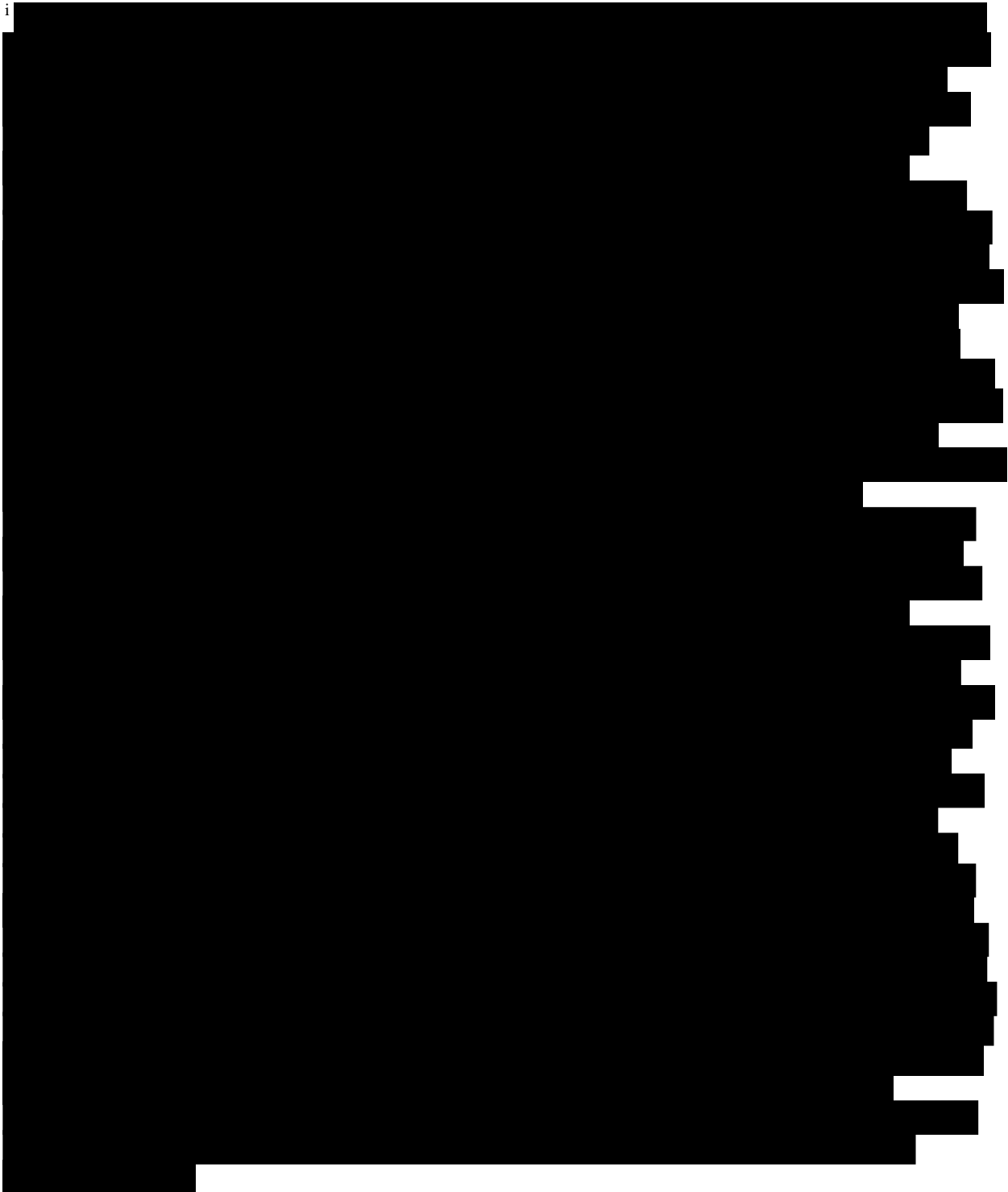
**(2) Although not expressly stating an opinion regarding the definition of the office supplies product market, the following companies purchase or sell an array of office products far beyond merely consumable office supplies and paper in connection with office supply purchasing transactions<sup>ii</sup>:**

[REDACTED]

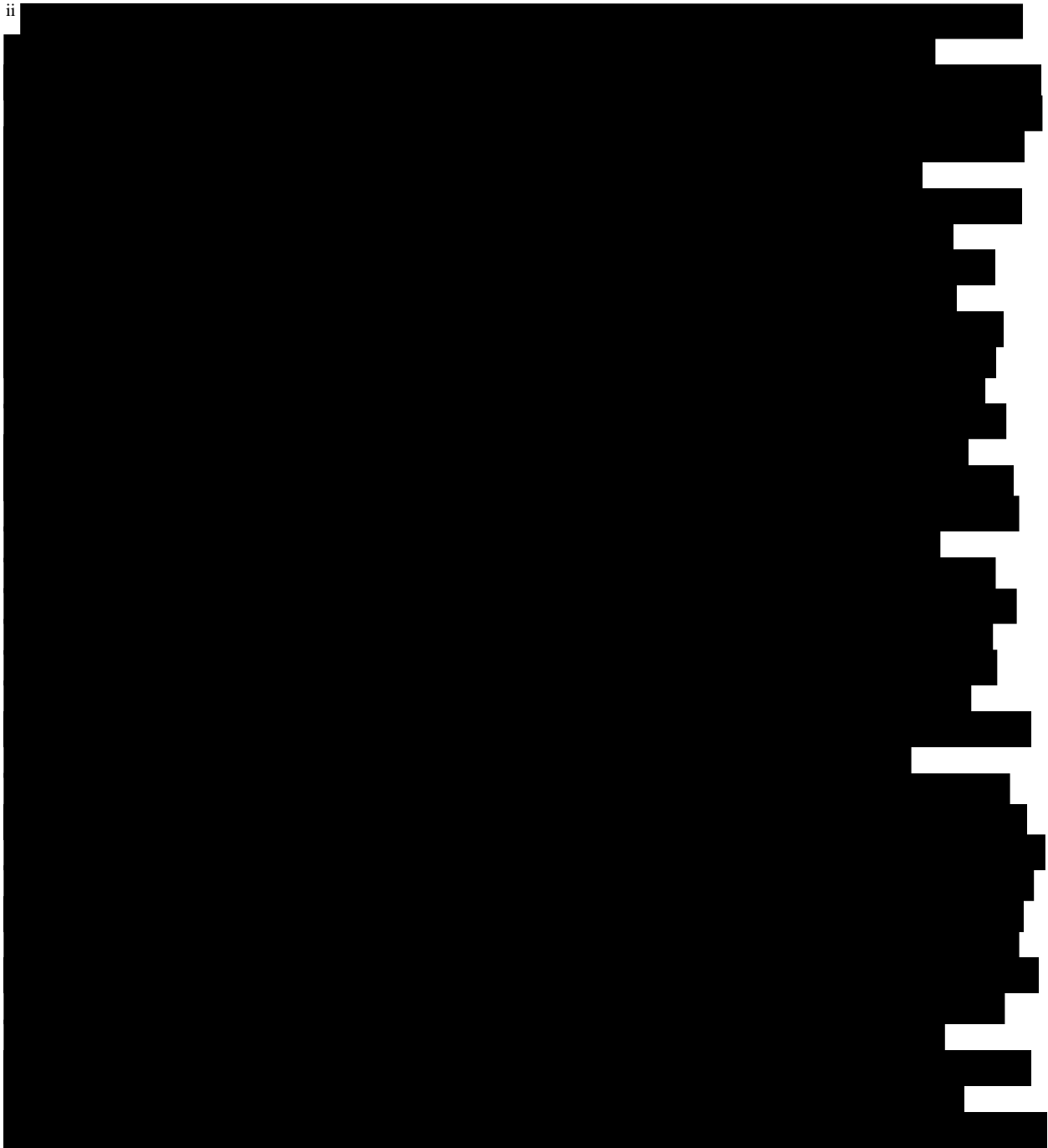
[REDACTED]

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i



ii



# **Appendix C**

**Appendix (C): Large Companies' Sophisticated Tools To Negotiate Better Pricing**

Third parties identified a variety of available tools to negotiate better pricing, in their declarations, depositions, or internal documents that were produced to Plaintiffs and Defendants. These sophisticated tools include:

**(1) In-house Procurement Professionals<sup>i</sup>:**

[REDACTED]

[REDACTED]

**(2) Outside Procurement Consultants<sup>ii</sup>:**

[REDACTED]

[REDACTED]

**(3) Procurement or Auction Software<sup>iii</sup>:**

[REDACTED]

[REDACTED]

**(4) Disaggregate Spending<sup>iv</sup>:**

[REDACTED]

[REDACTED]

**(5) RFPs, Auctions or Reverse Auctions<sup>v</sup>:**

[REDACTED]

[REDACTED]

**(6) Monitoring Other Sellers' Prices and Demanding Price-Matching<sup>vi</sup>:**

[REDACTED]

[REDACTED]

**(7) Renegotiate During Life of Contract/Threatening to Terminate Contract<sup>vii</sup>:**

[REDACTED]

[REDACTED]

**(8) Group Purchasing Organization<sup>viii</sup>:**

[REDACTED]

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i

[REDACTED]

ii

[REDACTED]

iii

[REDACTED]

iv

[REDACTED]

[REDACTED]

v [REDACTED]

vi [REDACTED]

vii [REDACTED]

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[REDACTED]

viii

[REDACTED]

# **Appendix D**

**Appendix (D): Commodity Products Are Not Mission-Critical<sup>i</sup>**

The following companies expressly recognized that office products are widely available commodity items or are otherwise not mission critical to their business:

[REDACTED]

[REDACTED]

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<sup>i</sup> [REDACTED]

