

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**FEDERAL TRADE COMMISSION, et al.,**

Plaintiffs,

v.

**STAPLES, INC. and  
OFFICE DEPOT, INC.,**

Defendants.

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

**NOTICE OF FILING PREVIOUSLY SEALED DOCUMENT**

Pursuant to the Court's Order, issued orally during the preliminary injunction hearing on March 23, 2016, filed herewith is Plaintiff Federal Trade Commission's Briefing Regarding Wilson Declaration, which was previously filed under seal on March 2, 2016.

Dated: March 23, 2016

By: /s/ Ryan K. Quillian

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**PUBLIC VERSION**

**PLAINTIFF FEDERAL TRADE COMMISSION'S BRIEFING  
REGARDING WILSON DECLARATION**

As Plaintiff Federal Trade Commission understands the dispute between Defendants and Amazon, Defendants seek draft declarations of Amazon employee Prentis Wilson that are in the files of Amazon. Defendants assert that the drafts are not protected by the attorney-client privilege or the attorney work product doctrine because, as Mr. Wilson testified in his deposition, the declaration was prepared with input from members of Mr. Wilson's business team. *See Ex. 22 to Hochstadt Decl.* at 126-27. The FTC is not involved in that dispute. In the course of its defense of Defendants' Motion to Compel Discovery from Non-Party Amazon.com. Inc., Amazon provided points and authorities to the Court that, in part, described the process in which the declaration of Mr. Wilson was prepared. In this briefing ordered by the Court, the FTC addresses its role in that process, as well as consultations between the FTC and third parties more broadly.<sup>1</sup>

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<sup>1</sup> In describing its internal processes, the FTC does not waive any privilege or protection, including under the work product doctrine or investigative privilege.

**I. The Role of Third Parties in FTC Investigations.**

The FTC staff attorneys are charged with investigating whether a proposed merger may be anticompetitive and, after investigating, making a recommendation to the Commission whether to challenge the merger or allow the transaction to close with no regulatory action. To do this, they seek information through subpoenas or Civil Investigative Demands not only from the merging parties but from knowledgeable market participants, such as customers, competitors, and others that may have relevant information that may inform the staff's recommendation and Commission's ultimate decision. The information gleaned from all of these sources provides the information the FTC staff need in order to make a recommendation and develop evidence supporting a complaint in federal court, should the Commission authorize a challenge through litigation.

In the course of any investigation, the FTC staff gather documents and other information. Staff review business records and assess data related to revenues, costs, production, and the like, both from the parties to the proposed merger and third parties. Staff may also take testimony in investigational hearings. All of this is done pursuant to the FTC Rules of Practice. See 16 C.F.R. Part 2. Investigations often include interviews with employees of the customers, competitors and other market participants. The purpose of the interviews is to learn about the industry, including factors that affect supply, demand and competition. In some instances, FTC staff lawyers seek to memorialize information learned in the interview in a written declaration or through an investigational hearing in which the witness provides testimony under oath, deposition-style.

Declarations typically provide information about the company's business and transactions with the merging parties or other market participants. These declarations include

specific facts that the FTC staff synthesize for use in its recommendation to the Commission and allegations in a complaint.

Each declaration is prepared differently. The FTC staff often prepare a draft based on what the witness told the FTC staff in interviews. This is done because it can be time-consuming to draft a declaration, and because the FTC staff are in the better position to set forth the information in a manner that would be relevant to the economic and legal issues presented by the proposed merger. After a draft is prepared, FTC staff typically discuss the draft with the witness, and often the witness' counsel, to ensure the accuracy and clarity of the statements in the draft, or to seek additional detail, such as specific revenue or volume information. Sometimes drafts are sent to the third party, which makes changes before the witness executes the declaration. Sometimes, when the facts are sufficiently clear, the FTC finalizes the declaration before sending it to the third party for execution. Sometimes the third party prepares the declaration itself in consultation with the FTC. Those drafts may then be subject to additional internal discussions within the witness' company, involving counsel or other employees. The FTC is typically not privy to those internal discussions.

Ensuring the integrity of a declaration—that the statements are truthful, accurate, and clear—is critical to the FTC, because the Commission relies on the information to discharge its mandate; and courts may rely on them in any subsequent challenge to the transaction.

## **II. The Role of Third Parties in Merger Litigation.**

Fact declarations are evidence. Not only do they support the FTC's staff's recommendation to the Commission, but many courts admit them as evidence in preliminary injunction proceedings. Of course, the declarations may be discoverable in litigation, as are many of the FTC's communications with the third parties. In this litigation, the FTC produced

its third-party declarations, including the Amazon declaration, to the Defendants on December 11, 2015, just three days after the filing of the complaint. The FTC produced all its communications with the third parties, including Amazon, on December 14. All of this occurred before initial disclosures were due.

In litigation, the Defendants depose the declarants and question them about their declarations, including how they were prepared and what role the FTC played. Again, the FTC has every incentive to do what it can to ensure the declarations are truthful and accurate and contain relevant, admissible, statements. Factual errors may be uncovered, and corrected, during the course of discovery. Major errors may prevent the FTC from relying on the declaration in its presentation of evidence.

Defendants solicit sworn declarations from market participants as well. They often draft the declarations for the third parties, and they consult with the witnesses and counsel, as the FTC staff do. They offer the declarations as evidence, and they produce the declarations and communications with the third parties in discovery.

### **III. The Preparation of the Wilson Declaration.**

The FTC staff conducted a detailed interview of Prentis Wilson and drafted a declaration for him based on staff's understanding of his statements. Staff engaged in conversations with Amazon counsel to seek clarification of certain assertions and confirm the truthfulness and accuracy of others. As part of this process, the FTC staff and Amazon counsel participated in three WebEx conversations in which Amazon counsel viewed the proposed draft. Following that process, Amazon undertook to prepare a fresh declaration. The FTC staff were not privy to that process, and did not receive a draft of the declaration. After Amazon drafted the declaration, the FTC staff and Amazon counsel spoke by phone on occasion about the declaration in an attempt

to ensure the statements were clear and accurate and contained relevant admissible statements.

Amazon provided the executed Wilson declaration to the FTC on November 17, 2015.

The FTC does not consider the process that resulted in the Wilson declaration to be anything unusual or inappropriate. We hesitate to call the process “routine,” as indicated in the Court’s March 1, 2016, order, because the process varies from witness to witness and investigation to investigation. It is crucial for the FTC to be able to generate evidence for its investigation and to support a complaint, should one be authorized by the Commission. Given the length and complexity of most declarations, the FTC staff tend to play a role, often a leading role, in the drafting of the declaration. Close consultations with the third party, including counsel, are crucial to ensuring the truthfulness, accuracy, and clarity of the declarations.

Respectfully submitted,

Dated: March 2, 2016

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 23rd day of March, 2016, I filed the foregoing with the Clerk of the Court via the CM/ECF system, which will automatically send electronic mail notification of such filing to the CM/ECF registered participants as identified on the Notice of Electronic Filing.

/s/ Ryan K. Quillian  
Attorney for Plaintiff Federal Trade Commission