

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

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

PUBLIC VERSION

**REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiffs' opening brief showed that the proposed Merger of Staples and Office Depot would combine the country's two largest vendors of consumable office supplies into a single dominant firm. That dominant firm would control at least 79% of the sales of consumable office supplies to large B-to-B customers.

In response, Defendants claim that Plaintiffs' attempt to block such a merger amounts to an "excessive, and unnecessary flexing of government muscle that this Court should rein in."¹ But rhetoric aside, Defendants do not provide any evidence that undermines Plaintiffs' *prima facie* showing that the Merger is presumptively unlawful. Nor do Defendants rebut the extensive evidence of head-to-head price competition that currently exists between Staples and Office Depot—and that directly benefits customers in the form of lower prices. If this Merger is allowed, that competition will end.

Rather than rebutting the evidence of their close competition—and the substantial benefits that customers derive from it—Defendants claim that Plaintiffs "concoct" the relevant product market to "[a]rtificially [i]nflate" Defendants' market shares.² But Defendants do not present the Court with an alternative product market theory, supported by Circuit authority and evidence. They present an avalanche of irrelevant facts. They point out, for example, that customers buy, and Defendants sell, products outside of the relevant market. That is entirely typical in antitrust cases. It is also irrelevant to the analysis of this Merger.

In a merger case, the "relevant product market" is the product or set of products that is "relevant" to the merger at issue. It is the line of commerce that will be substantially affected by the particular merger in question. Plaintiffs do not need to show that the Merger will harm

¹ Defs.' Br. at 5.

² Defs.' Br. at 7-8.

competition in *all* aspects of Staples' and Office Depot's business. Plaintiffs need only show that the Merger is likely to substantially lessen competition for the sale and distribution of consumable office supplies to large B-to-B customers. Yet there is no real question that Staples and Office Depot are each other's closest competitors in that line of business. They dwarf all other competitors. The fact that Defendants also sell office furniture, for example—and that the Merger may or may not also harm competition for the sale of office furniture—is irrelevant.

Beyond attacking Plaintiffs' definition of the product market, Defendants' brief conveys a litany of other arguments. Defendants tout Amazon Business as a new competitor that will resolve any anticompetitive concerns about this Merger. But Amazon's *own evidence* shows that Defendants' claims are exaggerated. Defendants suggest that their Merger cannot be anticompetitive because large customers do not have exclusive contracts. But a merger can be anticompetitive even if customers have *no* contracts. This court found the 1997 proposed merger of Staples and Office Depot anticompetitive because of its likely effects on retail customers—but retail customers do not have contracts at all. Defendants also misconstrue the Commission's 2013 statement on the merger of Office Depot and OfficeMax, ignoring that this statement concerned a different transaction that did not involve the market leader, *Staples*.

In the end, none of Defendants' arguments can change the fact that this is a proposed Merger between the two largest vendors of consumable office supplies to large B-to-B customers. The Merger would create a company with a market share of at least 79%. Large business customers rely on the competition between Staples and Office Depot to get lower prices and better service. But this Merger would eliminate that competition. This Court should grant the preliminary injunction.

I. The Relevant Product Market Is The Sale And Distribution Of Consumable Office Supplies To Large B-to-B Customers.

“A ‘relevant product market’ is a term of art in antitrust analysis.” *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 50 (D.D.C. 2011). “[T]he ‘market’ for antitrust purposes is the one relevant to the particular legal issue at hand.” *Id.* at 51 n.8 (quoting 5C Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 533, at 251 (3d ed. 2007)). In other words, it is the line of commerce in which competition will be substantially lessened because of the merger. *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 355-56 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). The relevant market need not include all aspects of a defendant’s business. After all, a merger may not substantially lessen competition in all aspects of a defendant’s business.

In analyzing the relevant product market, courts typically follow two complementary approaches. First, courts (and economists) generally apply the “hypothetical monopolist test” described in the federal antitrust agencies’ *Horizontal Merger Guidelines*. PX08051 (*U.S. Dep’t of Justice & Fed. Trade Comm’n Horizontal Merger Guidelines* (2010)) (hereinafter, “*Merger Guidelines*”) §§ 4.1.1-4.1.3; *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 33 (D.D.C. 2015) (the hypothetical monopolist test is “[o]ne of the primary methods used by economists to determine a product market.”); *H&R Block*, 833 F. Supp. 2d at 51-52 (the hypothetical monopolist test is an “analytical method often used by courts to define a relevant market.”); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 718 (D.C. Cir. 2001); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1076 n.8 (D.D.C. 1997). Second, and in addition, courts often assess “practical indicia” to determine the relevant market. *Brown Shoe*, 370 U.S. at 325.

Plaintiffs applied both of these approaches to the facts of this proposed Merger to arrive at the appropriate relevant product market for assessing the Merger’s effect on competition. The

evidence shows that the sale and distribution of consumable office supplies to large B-to-B customers is a relevant antitrust product market. In that regard, this case is similar to *Sysco*, where Judge Mehta found that the “product” at issue was a distribution channel comprising a group of different products and services—in that case “broadline” food distribution. *See Sysco*, 113 F. Supp. 3d at 26. *See also FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45-46 (D.D.C. 1998) (finding the relevant market to be “wholesale distribution of prescription drugs”); *Staples*, 970 F. Supp. at 1074-80 (finding the relevant product market to be the sale of “consumable office supplies through office supply superstores”).

A. Defendants Wholly Ignore The Hypothetical Monopolist Test.

As noted above, courts in this Circuit frequently use the “hypothetical monopolist test” to define the relevant product market. *See, e.g., Sysco*, 113 F. Supp. 3d at 38; *H&R Block*, 833 F. Supp. 2d at 51. Defendants’ economic expert, Mr. Jonathan Orszag, agrees that the hypothetical monopolist test is the appropriate method for defining the relevant product market.³ Yet nowhere does he apply the test.⁴ Indeed, Defendants’ brief does not even mention the hypothetical monopolist test.⁵ This silence is telling.

By contrast, Plaintiffs’ economic expert, Professor Carl Shapiro, applied the hypothetical monopolist test and found that the relevant market for assessing the proposed Merger of Staples and Office Depot is the sale and distribution of consumable office supplies to large B-to-B customers.⁶ As shown by Professor Shapiro, the economic evidence indicates that a hypothetical monopolist of consumable office supplies sold to large B-to-B customers could profitably

³ *See* DX02570 (Orszag Rpt.) ¶ 30.

⁴ PX06300 (Shapiro Rebuttal Rpt.) at 3.

⁵ *See* Defs.’ Br. at 7-24.

⁶ *See* Pls.’ Opening Br. at 17-18; *see also* PX06100 (Shapiro Rpt.) at 11-13; PX06300 (Shapiro Reply Rpt.) at 9, Appx. B.

impose a “small, but significant non-transitory increase in price” (SSNIP).⁷ This fact validates the relevant product market. Yet Defendants’ expert—and Defendants themselves—offer no rebuttal to this economic evidence.

B. Defendants Misapply *Brown Shoe*.

Defendants purport to apply the “practical indicia” set forth in *Brown Shoe*, but those factors support *Plaintiffs*, not Defendants. Plaintiffs’ opening brief conveys many examples of the “industry and public recognition” of a consumable office supplies market. Customers turn to specialized office supplies vendors, like Staples and Office Depot, for their ability to provide consumable office supplies along with high-level customer service offerings, including dedicated sales representatives, customizable catalogs, utilization tracking and reporting, free next-day and desktop delivery, and flexible payment terms.⁸ And Defendants’ own documents recognize that traditional office supplies comprise a unique category of products. For example, in a presentation to its North American Commercial business segments, Staples stated that “[f]or *core office supplies* we often compare ourselves to our most direct competitor, ODP.”⁹ Staples set a goal for 2014: “Act like the dominant player we are in a two player *OP* [office products] market.”¹⁰

C. Plaintiffs’ Relevant Product Market Is A Well-Defined “Cluster” Market.

As courts in this Circuit have recognized, in evaluating a merger between companies that offer a variety of goods and services to customers, the relevant antitrust product market may be defined as a cluster of goods and services that the firms compete to provide. *See Staples*, 970 F. Supp. at 1074-80 (finding the relevant product market to be the sale of consumable office

⁷ PX06100 (Shapiro Rpt.) at 11-13.

⁸ Pls.’ Opening Br. at 5.

⁹ PX04414 (Staples) at 008 (emphasis added); *see also* PX04266 (Staples) at 010.

¹⁰ PX04304 (Staples) at 014 (emphasis added); PX04042 (Staples) at 024.

supplies through office supply superstores). Antitrust law refers to such markets as “cluster markets.” Cluster markets are common in the antitrust analysis of mergers in some industries, such as hospitals, distributorships, and supermarkets. *See, e.g., FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2012) (applying cluster market to analyze hospital merger); *FTC v. Univ. Health Inc.*, 938 F.2d 1206, 1210-12 (11th Cir. 1991) (same); *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 1, 16 n.10 (D.D.C. 2007) (“Given the thousands of products sold by supermarkets, a product-by-product analysis was not feasible in this case.”), *rev’d on other grounds*, 548 F.3d 1028 (D.C. Cir. 2008). Indeed, *Brown Shoe*, which the Defendants cite extensively, adopted a cluster market. *See Brown Shoe*, 370 U.S. at 327-28 (relevant markets need not be subdivided into smaller groupings when “considered separately or together, the picture of this merger is the same”).

Courts and the FTC often employ cluster markets for reasons of administrative convenience. *See ProMedica Health Sys. v. FTC*, 749 F.3d 559, 565-68 (6th Cir. 2014) (hereinafter, “*ProMedica Circuit Opinion*”). Here, for example, Plaintiffs could have alleged that Defendants’ proposed Merger would harm competition in numerous individual relevant product markets for the sale and distribution of pens, folders, binder clips, and so on. But that would have been a colossal waste of the Court’s and the parties’ time and resources. The analysis would be the same whether conducted for each product individually or for the cluster as a whole. *Cf. ProMedica Circuit Opinion*, 749 F.3d at 565-66; *In the Matter of ProMedica*, FTC Dkt. No. 9346, 2012 WL 2450574, at *35 (F.T.C. June 25, 2012) (hereinafter, “*ProMedica FTC Opinion*”) (discussing analytical efficiency of cluster market approach).

Grouping otherwise diverse products into a cluster market is appropriate when the clustered products have similar competitive conditions. *See ProMedica Circuit Opinion*, 749

F.3d at 565-68; *ProMedica FTC Opinion*, 2012 WL 2450574, at *33-36. As the Commission has explained, “[t]he primary purpose of defining a relevant product market is to facilitate the analysis of competitive effects of a transaction,” and therefore grouping products “into a cluster based on whether they have similar market conditions enables an accurate assessment of competitive effects, which is our ultimate goal.” *ProMedica FTC Opinion*, 2012 WL 2450574, at *34-35. The competitive conditions courts generally look at to assess the similarity of competitive conditions include the identity and number of competitors and their market shares. *See ProMedica Circuit Opinion*, 749 F.3d at 566.

The products that Plaintiffs included in their definition of “consumable office supplies” meet two appropriate criteria for inclusion in the cluster market: (1) they are all products for which competition would be harmed by the proposed Merger, and (2) they are products for which the competitive conditions—such as the set of competing vendors—are largely the same. By contrast, other categories of products that Staples and Office Depot sell to large B-to-B customers are subject to different competitive conditions. For example, large B-to-B customers buy ink and toner through managed print service (“MPS”) contracts with printer manufacturers as well as from Defendants.¹¹ As a result, the set of competitors for ink and toner is substantially different from the set of competitors for consumable office supplies. Plaintiffs therefore excluded ink and toner from the relevant product market.¹² Similar reasoning explains why Plaintiffs excluded office furniture, janitorial supplies, computers, and other business technology products from the relevant product market, even though Staples and Office Depot also sell those products to some large B-to-B customers.¹³

¹¹ Pls.’ Opening Br. at 14 n.37; PX06100 (Shapiro Rpt.) at 4-5, 13-14.

¹² Pls.’ Opening Br. at 14 n.37; PX06100 (Shapiro Rpt.) at 4-5, 13-14.

¹³ Pls.’ Opening Br. at 14 n.37; PX06100 (Shapiro Rpt.) at 4-5, 13-14.

Defendants do not appear to dispute that a cluster market is appropriate in this case. They argue, however, that the products Plaintiffs have included in the cluster are “arbitrary.”¹⁴ Defendants seem to argue that the cluster must include *all* product categories that customers purchase through their contracts with their office supplies vendors.¹⁵

But a cluster market should not include all products or services sold by the merging firms if some of those products face different competitive conditions. *See Staples*, 970 F. Supp. at 1073-74 (relevant product market included “the sale of consumable office supplies through office superstores,” but *excluded* “computers, fax machines, and other business machines or office furniture”).

As Professor Shapiro explains, if companies A and B were the only two companies selling men’s dress shoes, a merger between them would certainly reduce competition.¹⁶ The fact that the two companies also sell hiking boots—and face competition from companies C and D for hiking boots—would not change the merger’s harm to competition for dress shoes.¹⁷ Thus, the relevant market for analyzing the merger would be dress shoes.¹⁸ The same logic applies here.

The *ProMedica* case illustrates this point. *ProMedica Circuit Opinion*, 749 F.3d at 565-68; *ProMedica FTC Opinion*, 2012 WL 2450574, at *33-36. In *ProMedica*, the FTC challenged a hospital merger. The FTC argued that the relevant product market was a cluster market including certain categories of inpatient hospital services known as “primary” and “secondary” services. In response, ProMedica argued that the services included in the cluster market needed to include *all* services that the hospitals’ customers—commercial health plans—negotiated

¹⁴ Defs.’ Br. at 9-13.

¹⁵ *See* Defs.’ Br. at 8-9.

¹⁶ PX06100 (Shapiro Rpt.) at 13-14.

¹⁷ PX06100 (Shapiro Rpt.) at 13-14.

¹⁸ PX06100 (Shapiro Rpt.) at 13-14.

together in a single contract, including not only primary and secondary services, but obstetrics and “tertiary” services as well. *See ProMedica FTC Opinion*, 2012 WL 2450574, at *36-38.

The Sixth Circuit agreed with the Commission. It explained that “if the competitive conditions for [certain individual hospital services] are all reasonably similar, then we can cluster those services when analyzing a merger’s competitive effects.” *ProMedica Circuit Opinion*, 749 F.3d at 565-66. The Sixth Circuit upheld the FTC’s exclusion of tertiary services and obstetrics from the cluster market because the number of competitors and the market shares for those other services were different. *Id.* at 566. Thus, the relevant market for antitrust purposes analysis was primary and secondary inpatient services, and the issue in the case was the merger’s likely effect on such services. The fact that other services were negotiated in the same contracts as primary and secondary inpatient services did not change the analysis of that issue. *Id.* at 567-68.

D. The Relevant Market Is Properly Defined Around Large B-to-B Customers.

The relevant market in this case focuses on large B-to-B customers, i.e., those B-to-B customers that purchase at least \$500,000 of consumable office supplies per year.¹⁹ That is appropriate because after the Merger, those customers could be profitably targeted for price increases by the merged firm. *See Sysco*, 113 F. Supp. 3d at 40-48 (finding relevant product market of broadline food distribution to national customers); *Merger Guidelines* § 4.1.4 (discussing product market definition with targeted customers).

Defendants’ opposition argues that using a \$500,000 annual expenditure level to define large customers is “arbitrary.”²⁰ But using a significantly lower cutoff of \$250,000 does not yield any material change to the resulting market shares.²¹ Moreover, the “large B-to-B

¹⁹ PX06100 (Shapiro Rpt.) at 5-6.

²⁰ Defs.’ Br. at 13.

²¹ PX06300 (Shapiro Reply Rpt.) at 7, 15, Ex. R5.

customers included in Plaintiffs' definition overlaps significantly with the customers that Defendants themselves categorize as their largest customers in the ordinary course of business.²² Indeed, 94% of Staples' "large B-to-B customers," and 93% Office Depot's "large B-to-B customers," meet Defendants' definitions of their large customers.²³

But more importantly, Plaintiffs' case focuses on large B-to-B customers because they are the customers most likely to be harmed by the proposed Merger. Large B-to-B customers individually negotiate prices with Defendants through RFPs, reverse auctions, and direct negotiations. That individualized pricing leaves those customers particularly vulnerable to price discrimination—in the form of higher prices—after the Merger.²⁴

Indeed, there is no reason to assume that, just because customers are large, they will be immune from a price increase following an anticompetitive merger. In *Sysco*, for example, the court defined a relevant market based on sales to large national and multi-regional customers. *See Sysco*, 113 F. Supp. 3d at 42-43. And the *Sysco* court correctly rejected arguments that large buyers could not be harmed. *Id.* at 48. As the *Merger Guidelines* explain, "[e]ven buyers that can negotiate favorable terms may be harmed by an increase in market power." *Merger Guidelines* § 8.

Defendants suggest that these "most powerful corporations in America" can fend for themselves and do not need the Commission's action to "protect" them.²⁵ They argue that large customers have procurement departments, monitor their spending, and solicit bids via requests for proposal ("RFPs"), and that these business practices will somehow cure the elimination of

²² PX06100 (Shapiro Rpt.) at 6.

²³ PX06100 (Shapiro Rpt.) at 6-7.

²⁴ *See* Pls.' Opening Br. at 15-17.

²⁵ Defs.' Br. at 1.

competition from the Merger.²⁶ But business practices like RFPs *depend upon* competition to make them effective. Large customers use the existing competition between Defendants to leverage lower prices. This Merger will eliminate that competition and render large customers vulnerable to price increases.

II. The Relevant Geographic Market Is The United States.

Defendants' brief claims that the United States is an "arbitrary" relevant geographic market.²⁷ This is puzzling because Defendants' own economic expert *agrees* that the United States is the proper relevant geographic market.²⁸ In any event, the facts show that Staples and Office Depot compete nationally,²⁹ and that the United States is the relevant geographic market.

III. Defendants Have Extraordinarily High Market Shares.

Plaintiffs' economic expert, Professor Shapiro, showed that Defendants have a combined market share of at least 79%.³⁰ The Merger would result in market concentration levels far beyond those that render the Merger presumptively anticompetitive.³¹ Indeed, the concentration levels in this case are so far beyond the thresholds establishing that a merger is presumptively anticompetitive that no reasonable adjustments to the HHI calculations will alter the conclusion that market concentration is extraordinarily high.³²

Defendants quibble with Professor Shapiro's market share calculations, but the "FTC need not present market shares and HHI estimates with the precision of a NASA scientist."

²⁶ Defs.' Br. at 16. Unable to support their assertion that large customers, just because they are large, can avoid post-Merger price increases, Defendants quote a non sequitur e-mail remark by one declarant describing his declaration as "a work of art." Defs.' Br. at 4. Defendants fail to mention that the declarant re-affirmed under oath at his deposition that every paragraph of the declaration was true and accurate at the time he signed it, and remains so. *See* [REDACTED] Dep.) at 249-261.

²⁷ Defs.' Br. at 24.

²⁸ DX02570 (Orszag Rpt.) at 15 n.33 ("I agree with the FTC and Professor Shapiro that the relevant geographic market is the United States.").

²⁹ *See* Pls.' Opening Br. at 18-19.

³⁰ PX06100 (Shapiro Rpt.) at 2, 15-16, Ex. 5B; PX06300 (Shapiro Rebuttal Rpt.) at 11, Ex. R1B.

³¹ PX06100 (Shapiro Rpt.) at 19, Ex. 5C.

³² A merger is presumptively anticompetitive if it increases the HHI by more than 200 and results in a post-merger HHI exceeding 2500. *Merger Guidelines* § 5.3.

Sysco, 113 F. Supp. 3d at 54. And Professor Shapiro addresses each of Defendants' critiques in his reply report.³³ But Defendants' most puzzling argument is their claim that applying an HHI analysis to the 2013 merger of Office Depot and Office Max would have resulted in a 470-point increase in HHI.³⁴ Accepting Defendants' calculation for the sake of argument, what their calculation shows is that this Merger—with an expected HHI increase of 2994 and a post-merger HHI of 6265³⁵—creates a far higher level of market concentration and antitrust concern than the 2013 merger did.³⁶ Defendants' calculation only underscores how problematic this Merger is.

IV. Defendants' Fail to Rebut The Strong Presumption of Illegality

A. Defendants Misconstrue The Commission's 2013 Closing Statement.

Defendants also claim that the Commission's decision to challenge this proposed Merger represents an "about face" from the analysis and conclusions the Commission reached when it elected not to challenge the 2013 merger of Office Depot and OfficeMax.³⁷ But as the 2013 Closing Statement makes clear, "[a]nalyzing the likely competitive effects of a proposed transaction is always a fact-specific exercise."³⁸ And many key facts in this case are critically different from those in the 2013 Closing Statement.

Most fundamentally, the 2013 merger combined the second- and third-largest office supplies vendors to create a company that was still smaller than—but much closer in size to—the number one vendor, *Staples*. Moreover, in 2013, "the merging parties' own documents show[ed]

³³ PX06300 (Shapiro Reply Rpt.) at Appendix C and Ex. R1B.

³⁴ The Commission is not required to challenge every merger with an HHI increase above the presumptive threshold of harm, and the Commission's decision not to challenge any particular past merger does not mean it cannot challenge future mergers when the situation warrants.

³⁵ PX06100 (Shapiro Rpt.) at 19. In his Reply Report, Professor Shapiro revised his HHI calculations based on updated market share information. PX06300 (Shapiro Reply Rpt.) at 15. The HHI have *increased*. *Id.*

³⁶ As discussed below, many key differences exist between this case and the 2013 OfficeMax transaction.

³⁷ Defs.' Br. at 2; *see generally* PX08064 (Statement of the FTC Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc., F.T.C. File No. 131-0104, Nov. 1, 2013) (hereinafter, the "2013 Closing Statement").

³⁸ PX08064 (2013 Closing Statement) at 003 ("[W]e emphasize that our decision . . . is limited to the facts before us in this particular matter.").

that they [were] rarely each other's closest competitor for most large customers."³⁹ Both Office Depot's and OfficeMax's closest competitor in 2013 was *Staples*.⁴⁰ And in 2013, "even the largest customers believe[d] the merger would be either procompetitive or competitively neutral."⁴¹

None of these key facts applies here. This Merger would combine what are already, by far, the two largest vendors in the relevant market, leaving the next-largest vendor a very distant third. Staples' and Office Depot's own documents and data make clear that they are each other's closest competitors for large business customers today, and that they win and lose more large customer business from each other than from all other vendors combined.⁴² Thus, it should come as no surprise that, unlike in 2013, large customers are much more concerned that the current proposed Merger will reduce competition.⁴³

B. Amazon Will Not Constrain A Post-Merger Staples.

Defendants rely on the 2015 launch of Amazon Business to argue that their proposed Merger will not harm competition. But Defendants bear the burden of proving that "'entry into the market[s] would likely avert [the proposed transaction's] anticompetitive effects.'" *Staples*, 970 F. Supp. at 1086 (quoting *United States v. Baker Hughes Inc.*, 908 F.2d 981, 989 (D.C. Cir. 1990)). Speculative entry or expansion will not suffice. Defendants must also show that entry or expansion would be "'timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.'" *H&R Block*, 833 F. Supp. 2d at 73 (quoting

³⁹ PX08064 (2013 Closing Statement) at 003.

⁴⁰ See PX0001 (Office Depot/Office Max, Presentation to the FTC: Competition for Contract Sales to Large and 'National' Customers, Sept. 13, 2013) at 021-022.

⁴¹ PX08064 (2013 Closing Statement) at 003.

⁴² See PX06100 (Shapiro Rpt.) at 23-31.

⁴³ Pls.' Opening Br. at 29; see also PX03002 (Eubanks-Saunders (B of A) Decl.) ¶ 40; PX03009 (Meester (Best Buy) Decl.) ¶ 24; [REDACTED] Decl.) ¶ 22; [REDACTED] Decl.) ¶ 20; PX03012 (Moise (Fifth Third Bank) Decl.) ¶ 16; PX03013 (Wilson (Select Medical) Decl.) ¶ 18; [REDACTED] Decl.) ¶ 17; [REDACTED] Decl.) ¶ 17; [REDACTED] Decl.) ¶ 30; [REDACTED] Decl.) ¶ 30.

Merger Guidelines § 9); *see also* *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 47 (D.D.C. 2009).

Defendants cannot satisfy this high standard. Indeed, [REDACTED]

[REDACTED]⁴⁴ And

[REDACTED]⁴⁵

Defendants support their argument with generalized information about the number of products available on Amazon, its growth, and its sales projections—but they do not even try to show that such growth or sales projections pertain to office supplies or to large businesses in particular. Defendants also cite to a handful of internal documents expressing concerns about possible competition from Amazon. But there are far more documents from Staples and Office Depot discussing competition with *each other* than with Amazon.⁴⁶

Nonetheless, Defendants complain that Plaintiffs' analysis does not sufficiently consider Amazon's *future* competitive significance. Not so. Rather than relying on public information or Defendants' internal speculation, Plaintiffs looked at what *Amazon's actual evidence* shows regarding its capabilities and plans for the future. That evidence shows that Amazon Business itself recognizes that large office supplies customers have different needs than small customers,

[REDACTED]⁴⁷

Indeed, [REDACTED]

⁴⁴ PX03014 (Wilson (Amazon) Decl.) ¶¶ 10-11.

⁴⁵ PX03014 (Wilson (Amazon) Decl.) ¶¶ 14-15; PX02125 (Wilson (Amazon) Dep.) at 170-71 ([REDACTED]).

⁴⁶ *See, e.g.*, Pls.' Opening Br. at 21-27.

⁴⁷ PX02125 (Wilson (Amazon) Dep.) at 175-76; *see also id.* at 182 ("[REDACTED]").

[REDACTED]⁵⁰ Large B-to-B customers want invoicing, so that they can pay one monthly invoice, with standard credit terms, for all purchases.⁵¹ [REDACTED]

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[REDACTED] 57 [REDACTED]

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⁵⁹ For example, [REDACTED]

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⁶⁰ PX02125 (Wilson (Amazon) Dep.) at 74.

[REDACTED]

[REDACTED].⁶¹

Moreover, even if Amazon Business were to develop additional features to attract large B-to-B customers, its business model—a marketplace that allows third-party sellers to offer products directly to customers—makes it particularly difficult for Amazon to offer those features and negotiated pricing terms on a consistent basis. [REDACTED]

[REDACTED]⁶² Thus, if a customer wanted to use Amazon Business as its primary office supplier, the customer would need to have pricing discussions with numerous different suppliers, not just Amazon.⁶³ But large B-to-B customers prefer dealing with a single office supplies vendor, not many.⁶⁴

Despite this evidence, Defendants cite examples of a few large businesses that have expressed potential interest in working with Amazon Business. But they cannot cite any large business customer that is actually using Amazon Business as its primary source of office supplies. For example, Defendants note that [REDACTED] invited Amazon Business to respond to its RFP.⁶⁵ [REDACTED]

[REDACTED]⁶⁶ Meanwhile, Staples and Office Depot identify themselves as the primary suppliers to *94 of the Fortune 100*.⁶⁷

Defendants also assert that customers “have begun purchasing significant volumes of

⁶¹ PX02125 (Wilson (Amazon) Dep.) at 202-05. Defendants tout an Amazon Business sales forecast of [REDACTED] by 2020. Defs.’ Br. at 29. [REDACTED]

[REDACTED] PX02125 (Wilson (Amazon) Dep.) at 110-11. And, of course, Amazon Business’ overall sales forecast does not relate solely to consumable office supplies.

⁶² PX02125 (Wilson (Amazon) Dep.) at 67.

⁶³ PX02125 (Wilson (Amazon) Dep.) at 180-81.

⁶⁴ Pls.’ Opening Br. at 4, 7.

⁶⁵ Defs.’ Br. at 29 n.69.

⁶⁶ [REDACTED] Dep.) at 185-87.

⁶⁷ PX04499.

office supplies from Amazon.”⁶⁸ But Defendants’ citations do not identify a single customer that is actually doing so. The cited [REDACTED] deposition testimony, for example, says the exact *opposite*: [REDACTED] is unaware of any [REDACTED] employees buying office supplies from Amazon.⁶⁹ Similarly, [REDACTED]’s cited testimony refers to competition from Amazon for *retail* customers.⁷⁰ Defendants also rely on speculation from [REDACTED] that Amazon might be a competitor in the future.⁷¹ But [REDACTED] has not conducted an evaluation of Amazon Business’ capabilities, and agreed that [REDACTED].⁷²

At bottom, Defendants are able to offer speculation about possible future competition from Amazon Business, but nothing more.⁷³ That is insufficient to rebut Plaintiffs’ *prima facie* case. Defendants bear the burden of “produc[ing] evidence that ‘show[s] that the market-share statistics [give] an inaccurate account of the [merger’s] probable effects on competition’ in the relevant market.” *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975)); *see also H&R Block*, 833 F. Supp. 2d at 72 (the stronger the *prima facie* case, the more evidence defendants need to rebut the presumption of unlawfulness).

C. Off-Contract “Leakage” Will Not Prevent Anticompetitive Effects.

As noted above, it is Defendants’ burden to present this Court with evidence establishing that their market shares do not reflect Defendants’ true competitive significance. *Heinz*, 246 F.3d at 715; *H&R Block*, 833 F. Supp. 2d at 72. In that regard, Defendants argue that their

⁶⁸ Defs.’ Br. at 30 n.78.

⁶⁹ [REDACTED] Dep.) at 35-36, 118.

⁷⁰ [REDACTED] Dep.) at 54; *see also* DX00381 (cited [REDACTED] document does not show any sales by Amazon); DX00217 ([REDACTED] document references online ordering by *consumers*; key vendors in RFP include Staples and Office Depot).

⁷¹ Defs.’ Br. at 30 n.77.

⁷² [REDACTED] Decl.) ¶ 15.

⁷³ Defendants’ claims about other companies entering or expanding their presence in the relevant market are also insufficient to rebut the presumption of anticompetitive effects. *See* PX06100 (Shapiro Rpt.) at 42-46, Appendix H at H-3-16; PX06300 (Shapiro Reply Rpt.) at 23-25.

contracts are not exclusive and do not “bind” customers into buying from Defendants.⁷⁴ But Professor Shapiro measured Defendants’ market shares based on *sales*, not numbers of contracts.⁷⁵ And his analysis showed that Defendants have a share of at least 79 percent.⁷⁶ Moreover, a merger can be anticompetitive even if customers have *no* contracts at all. Indeed, this court found the 1997 proposed merger of Staples and Office Depot anticompetitive because of its likely effects on retail customers—but retail customers do not have contracts. *Staples*, 970 F. Supp. 1066.⁷⁷

Defendants also claim that there is considerable “leakage” or off-contract purchases of consumable office supplies.⁷⁸ But Defendants fail to offer any concrete evidence quantifying leakage or showing that leakage meaningfully constrains their prices. Indeed, the record shows that large customers view off-contract purchasing, to the extent it occurs, as a problem to be rooted out and eliminated, not a means of saving money on office supplies.⁷⁹ For example, [REDACTED] has a system to flag off-contract buying so that the company can put a stop to it.⁸⁰ Another customer requires off-contract spend to be paid from a division’s budget—rather than the overall corporate budget—ensuring that the divisional manager will discourage his or her employees from buying off contract.⁸¹ Based on their efforts, various customers testified that they generally achieve compliance levels of over 90% with their protocols to eliminate leakage.⁸²

⁷⁴ Defs.’ Br. at 39.

⁷⁵ PX06300 (Shapiro Reply Rpt.), Ex. R1B.

⁷⁶ PX06300 (Shapiro Reply Rpt.), Ex. R1B.

⁷⁷ And of course, neither Defendants nor their customers would enter into contracts if they did find them valuable. See Pls.’ Opening Br. at 31-32.

⁷⁸ Defs.’ Br. at 40.

⁷⁹ See, e.g., PX02119 (O’Neill (AEP) Dep.) at 282-83; [REDACTED] Decl. ¶ 5; [REDACTED] Decl. ¶ 10; PX03029 (Cervone (McDonald’s) Decl.) ¶ 7; PX03010 (McDevitt (Dryden) Decl.) ¶ 16.

⁸⁰ See [REDACTED] Decl. ¶ 5.

⁸¹ See [REDACTED] Decl. ¶ 14.

⁸² See, e.g., PX02115 (Wilson (Select Medical) Dep.) at 144-45; PX03002 (Eubanks-Saunders (BoFA) Decl.) ¶ 16; [REDACTED] Decl. ¶ 5; [REDACTED] Decl. ¶ 7; [REDACTED] Decl. ¶ 6; PX03029 (Cervone (McDonald’s) Decl.) ¶ 7.

Defendants imply that Office Depot has a tool, called “Prism,” that allows it to measure leakage. [REDACTED]

[REDACTED]⁸³ [REDACTED]

[REDACTED]⁸⁴ [REDACTED]

[REDACTED]⁸⁵ [REDACTED]

In fact, there are myriad reasons why a customer’s purchases may decline in a given time period. For instance, some customers reduced their expenditures with Office Depot because they implemented “green” or cost-cutting initiatives such as two-sided printing, which uses less paper.⁸⁶ Other customers reduced their purchases of office supplies because they had layoffs or sold divisions.⁸⁷ Still others merely appeared to be buying less because of the cyclical nature of their purchasing patterns.⁸⁸ Even Defendants’ own economic expert acknowledges that declines in purchases identify only “*potential* leakage.”⁸⁹ And, perhaps most telling, several instances that Defendants have described as “leakage” involved business moving from Office Depot to Staples—thus underscoring the very competition that would be lost because of this Merger.⁹⁰

⁸³ Defs.’ Br. at 40.

⁸⁴ DX02570 (Orszag Rpt.) at 75.

⁸⁵ See PX02157 (Klein (ODP) Dep.) at 36.

⁸⁶ PX05390 (Office Depot) at 006; PX05498 (Office Depot) at 006.

⁸⁷ PX05391 at 006 (giving examples of [REDACTED] branch closures and layoffs and [REDACTED] sale of [REDACTED] business).

⁸⁸ PX05391 at 006 ([REDACTED]’s weekly sales down because of purchasing patterns, but “on course” for the year).

⁸⁹ DX02570 (Orszag Rpt.) at 75.

⁹⁰ See PX06300 (Shapiro Reply Rpt.) at 18-19. And while Defendants claim Staples reduced prices during the term of a contract “more than [REDACTED]” times in 2014, Defs.’ Br. at 40, many of these price reductions were to correct data entry errors or involved price reductions that were later offset by price increases. PX06300 (Shapiro Reply Rpt.) at 20-21.

D. Defendants' Efficiencies Defense Fails.

Given the “[h]igh market concentration levels” in this case, Defendants bear the burden of presenting “proof of extraordinary efficiencies.” *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Heinz*, 246 F.3d at 720). No court has ever relied on efficiencies to rescue an otherwise unlawful transaction. *See CCC Holdings*, 605 F. Supp. 2d at 72.

Defendants present the Court with an unsubstantiated efficiencies claim that Staples’ own CEO called “guesstimates.”⁹¹ That does not meet the high standard of verifiability that courts require. *See H&R Block*, 833 F. Supp. 2d at 89; *see also Merger Guidelines* § 10. In fact, Defendants’ own efficiencies expert does not even offer an opinion on *more than half* of Defendants’ claimed efficiencies.⁹² In contrast, Plaintiffs’ efficiencies expert, Dr. Zmijewski, has concluded that Defendants have failed to show that *any* of the claimed categories of efficiencies are verifiable or merger-specific.⁹³

For example, Staples asserts that it can only achieve its claimed efficiencies through the Merger with Office Depot. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].⁹⁴ Such efficiencies are not merger-specific. [REDACTED]

[REDACTED]⁹⁵ *See Sysco*, 113 F. Supp. 3d at 82 (“[E]fficiencies, no matter how great, should not be considered if they could also be accomplished without a merger.”) (quoting *Cardinal Health*, 12 F. Supp. 2d at 62); *see also Heinz*, 246 F.3d at 722.

⁹¹ PX02012 (Sargent (Staples) IH) at 282.

⁹² DX02561 (Anderson Rpt.) at 45-46. *See* PX06001_native (Staples) at tab Summary (shows breakdown of claimed efficiencies for retail, marketing, and SG&A totaling [REDACTED]).

⁹³ PX06400 (Zmijewski Reply Rpt.) at 21-22, 57-58, 68-69.

⁹⁴ PX06008 (Staples) at 015-016 ([REDACTED]); PX02005 (Komola (Staples) IH) at 172-174.

⁹⁵ PX07576 (Essendant) at 001; PX04763 (Staples) at 009.

Defendants also attempt to substantiate their claimed efficiencies by pointing to purported savings from past mergers. But as Plaintiffs' expert, Dr. Zmijewski, explains, Defendants fail to show that the prior cost savings they rely on are themselves verifiable and merger-specific.⁹⁶ Further, some of the claimed savings from past mergers are only *projected* savings that Defendants still have not achieved. [REDACTED], but Staples cites those *projections* as substantiating evidence here.⁹⁷ Moreover, in terms of scale and complexity, none of Staples' prior acquisitions is comparable to the proposed Office Depot acquisition.⁹⁸

Defendants also attempt to substantiate their efficiencies claims with the views of "investment analysts," but that should be rejected too.⁹⁹ Investment analysts base their views on publicly available information—primarily from the merging parties—and do not address the legal tests of merger-specificity and verifiability that courts require.

Finally, Defendants' efficiencies claims also fail because efficiencies only benefit the public if they are passed on as cost savings to customers. Here, it is unlikely that Staples will pass on cost savings to customers post-Merger.¹⁰⁰ See *CCC Holdings*, 605 F. Supp. 2d at 74.

E. Defendants' "Divestiture" Proposal Will Not Restore Competition

As explained in Plaintiffs' opening brief, Staples' proposed divestiture of certain contracts to Essendant, one of its own largest wholesalers, will not replace the competition lost

⁹⁶ See PX06400 (Zmijewski Reply Rpt.) at 19.

⁹⁷ See DX02561 (Anderson Rpt.) at Table 2 ([REDACTED]).

⁹⁸ In the last six years, Staples made six acquisitions with values from \$1.2 million to \$58 million. PX04572 at 121-22 (Staples Second Request Narrative Response). In 2008, Staples acquired Corporate Express for \$2.8 billion. *Id.* at 123.

⁹⁹ Defs.' Br. at 42.

¹⁰⁰ PX06100 (Shapiro Rpt.) at 53.

from the Merger.¹⁰¹ Staples' complex plan is fraught with execution risks and, even if carried out, would not create a new direct vendor of office supplies to replace the competition eliminated by removing Office Depot from the marketplace.

Defendants offer no compelling response to the basic fact that, as a wholesaler, Essendant is not an office supplies competitor like Office Depot is today, [REDACTED]

[REDACTED]¹⁰² Thus, the divestiture does not even attempt to position Essendant as a competitor to replace Office Depot. Rather, the hope is that the divestiture will, in time, enable smaller, independent dealers that buy products from Essendant to become better competitors for large customers' business.¹⁰³ This indirect, speculative approach will not restore pre-Merger competition. *See Sysco*, 113 F. Supp. 3d at 72-73 (an antitrust remedy "must be effective to redress the violations and to restore competition") (internal quotation marks omitted).

Nor do Defendants rebut the fact that Essendant's supplier relationship with Staples substantially dampens Essendant's incentive to foster competition against Staples. [REDACTED]

[REDACTED],¹⁰⁴ [REDACTED]

[REDACTED]¹⁰⁵ [REDACTED]

[REDACTED]¹⁰⁶ Thus, it is not clear why Essendant would risk [REDACTED] by competing with

¹⁰¹ See Pls.' Opening Br. at 36-39.

¹⁰² PX02112 (Dochelli (Essendant) Dep. at 198).

¹⁰³ See PX07017 (Essendant) at 039.

¹⁰⁴ See PX02108 (Aiken (Essendant) Dep.) at 28-29.

¹⁰⁵ [REDACTED]. PX02108 (Aiken (Essendant) Dep.) at 28-29. The majority of Office Depot's wholesale business for office products today goes to Essendant's competitor, S.P. Richards. *Id.* at 42-43. After the Merger, Staples will be in a position to move all of Office Depot's wholesale purchases to Essendant, and [REDACTED]

[REDACTED] See PX02112 (Dochelli (Essendant) Dep.) at 44-46.
¹⁰⁶ PX02112 (Dochelli (Essendant) Dep.) at 164-166.

Staples. Indeed, Essendant considers one of the primary benefits of the divestiture [REDACTED]

[REDACTED]¹⁰⁷

Moreover, the proposed divestiture remains speculative. The divestiture transaction is contingent on various conditions, some of which may never come to pass. For example,

[REDACTED]¹⁰⁸ [REDACTED]

[REDACTED]¹⁰⁹

Defendants argue that Essendant “will obtain all assets it needs to effectively serve large B2B accounts.”¹¹⁰ Yet Essendant and its vendors lack the ability to provide divested customers with the same pricing and service that they get from Staples and Office Depot today. These deficiencies will persist well beyond the closing date of the divestiture.¹¹¹ [REDACTED]

[REDACTED]¹¹² [REDACTED]

[REDACTED]¹¹³ [REDACTED]¹¹⁴

[REDACTED]¹¹⁵ These deficiencies

¹⁰⁷ PX07030 (Essendant) at 003; *see also id.* at 005.

¹⁰⁸ *See* PX07302 (Asset Purchase Agreement between Staples, Inc. and Essendant Co., Feb. 16, 2016) § 5.1(d) and Art. X (hereinafter “APA”); PX02161 (Essendant) (Aiken) Rule 30(b)(6) Dep.) at 98-100.

¹⁰⁹ PX02162 (Staples (Komola) Dep.) at 116-118, 135-138.

¹¹⁰ Defs.’ Br. at 44.

¹¹¹ The consummation of the Merger is a condition to the closing of the divestiture. *See* APA § 5.2(d).

¹¹² *See, e.g.*, PX07067 (Essendant) at 003; PX04280 (Staples) at 009 (“[REDACTED]”).

¹¹³ *See, e.g.*, PX07078 (Essendant) at 002.

¹¹⁴ *See, e.g.*, PX04280 (Staples) at 009; PX04168 (Staples) at 002.

¹¹⁵ *See* PX07017 (Essendant) at 022; PX07066 (Essendant) at 004. [REDACTED]

make it clear that Essendant is not a replacement for the competition currently provided by Office Depot.

CONCLUSION

For the reasons described above and in Plaintiffs' opening brief, Plaintiffs respectfully request that the Court grant a preliminary injunction.

Respectfully submitted,

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