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 REDACTED DOCUMENT

Plaintiffs hereby provide notice of the filing of the redacted version of Plaintiffs' Proposed Findings of Fact and Conclusions of Law.

Dated: April 20, 2016

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FEDERAL TRADE COMMISSION, *et al.*, Plaintiffs, v. **STAPLES, INC.** and **OFFICE DEPOT, INC.**, Defendants.	Civil Action No. 15-cv-2115-EGS **PUBLIC VERSION**

PLAINTIFFS' PROPOSED FINDINGS OF FACT
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LIST OF COMMONLY USED ACRONYMS, ABBREVIATIONS, AND TERMS

Acronym	Full Term
AOPD	American Office Products Distributors, Inc. (a consortium)
APD	American Product Distributors, Inc. (a Tier 1 vendor)
B of A	Bank of America (a large B-to-B customer)
B2B	Business-to-business
B-to-B	Business-to-business
COGS	Cost of Goods Sold
GPO	Group purchasing organization
HPG	HealthTrust Purchasing Group (a GPO customer)
IH	Investigational Hearing
IS	Independent Stationers, Inc. (a consortium)
IS Group	Independent Stationers, Inc. (a consortium)
IT	Information technology
Jan/San	Janitorial and sanitation products
MPS	Managed print services
OD	Office Depot
ODP	Office Depot
OMX	OfficeMax
OP	Office products
PCA	Packaging Corporation of America (a paper manufacturer)
PDME	P.D. Morrison Enterprises Inc. (a Tier 1 vendor)
RFI	Request for information
RFP	Request for proposal
RFQ	Request for quote
SMB	Small- to medium-sized business
SPLS	Staples
TBS	Today's Business Solutions (a Tier 1 vendor)
Tier 1 Customer	Customer of a Tier 1 vendor
Tier 1 Vendor	Diversity vendor (e.g., woman, minority, disabled-veteran, LGBT or other qualifying diversity owned vendor)
WBM	W.B. Mason (a regional vendor)

PLAINTIFFS' PROPOSED FINDINGS OF FACT

I. THE RELEVANT MARKET IS THE SALE AND DISTRIBUTION OF CONSUMABLE OFFICE SUPPLIES TO LARGE B-TO-B CUSTOMERS IN THE UNITED STATES.

1. The relevant market is the sale and distribution of consumable office supplies to large B-to-B customers in the United States. Shapiro Hrg. 2122:17-22; PX06100 (Shapiro Rpt.) at 005. This market represents a very substantial volume of commerce, with the Defendants' sales totaling roughly [redacted] per year. Shapiro Hrg. 2112:13-24, PX06100 (Shapiro Rpt.) at 009. Defendants' sales in the market have not declined significantly over the past several years. Shapiro Hrg. 2637:25-2638:5.

A. The Relevant Market Is Properly Defined as the Sale and Distribution of Consumable Office Supplies to Large B-to-B Customers in the United States.

2. The Court has admitted Dr. Shapiro in this proceeding as an expert in the field of economics. Shapiro Hrg. 2082:1-6. Dr. Shapiro has decades of experience as an antitrust economist. Shapiro Hrg. 2076:11-16, 2766:6-8. His opinions on relevant market definition and other aspects of the *Merger Guidelines*' analysis were adopted by the court in *United States v. Bazaarvoice, Inc.*, 18-CV-10133 (WHO), 2014 WL 203966, at *28-*32, *37 (N.D. Cal. Jan. 8, 2014), and his articles on antitrust issues, including market definition issues, have been cited by other courts assessing mergers. *See ProMedica Health System, Inc. v. FTC*, 749 F.3d 559, 570 (6th Cir. 2014); *FTC v. Sysco Corporation*, 113 F. Supp. 3d 1, 46-48 (D.D.C. 2015).

3. Dr. Shapiro, applying the established framework of the *Merger Guidelines*, found that the sale and distribution of consumable office supplies to large B-to-B customers in the United States is a properly defined antitrust market. Shapiro Hrg. 2122:12-19; PX06100 (Shapiro Rpt.) at 002.

4. The relevant product market is a cluster market consisting of consumable office supplies

such as pens, file folders, Post-it notes, binder clips, and copy paper. Shapiro Hrg. 2122:17-2123:2; PX06100 (Shapiro Rpt.) at 006-007.

5. This cluster market includes many individual items that are not substitutes for each other. For example, a pen is not a substitute for a binder clip. The individual items included in the market here are aggregated into a single relevant market for analytical convenience, because it is impractical to analyze the thousands of different consumable office supply products separately. Shapiro Hrg. 2132:2-23; PX06100 (Shapiro Rpt.) at 007; PX06500 (Shapiro Demonstrative) at 014.

6. "Cluster markets" are common. The standard for determining whether items belong in a cluster market is whether the items are subject to similar competitive conditions. Shapiro Hrg. 2134:23; 2148:14-17; PX06100 (Shapiro Rpt.) at 007; PX06500 (Shapiro Demonstrative) at 014.

7. Defendants did not call their economic expert at the hearing. [redacted]

8. Products are subject to similar competitive conditions when the set of firms selling the products are generally the same. Shapiro Hrg. 2148:18-25, 2149:22-2150:3.

9. It is inappropriate to include in a cluster market products that are subject to different competitive conditions. Doing so would generate misleading market shares, obscure competitive conditions of the included products, and lead to major error. For example, assume two merging hospitals were the only two in an area offering both knee surgery and heart surgery, but numerous local surgery centers also offered knee surgery, but not heart surgery. It would be inappropriate to group both services in the same cluster market. The additional knee surgery centers would lower the merging parties' shares in this improper cluster market, and would cause

one to overlook the merger to monopoly in heart surgery. And the continuing competition for knee surgery would not help a patient facing a post-merger monopolist for heart surgery. Shapiro Hrg. 2134:24-2136:15, 2138:24-2139:18, 2143:3-6; PX06100 (Shapiro Rpt.) at 015; PX06300 (Shapiro Reply) at 007.

10. Competitive conditions are similar for the sale and distribution to large B-to-B customers of the items included in the consumable office supplies cluster here. In particular, the set of firms selling the items in the consumable office supplies cluster to large B-to-B customers are generally the same. Accordingly, it is appropriate to include these items in a "consumable office supplies" cluster market. Shapiro Hrg. 2138:7-13; PX06100 (Shapiro Rpt.) at 007.

11. There are distributors of copy paper that do not sell other consumable office supplies. But those other paper providers would have small market shares even in a separate market for copy paper. By contrast, Defendants' combined market share for copy paper alone is 71.4%. Thus, the competitive differences between core office supplies and copy paper are relatively minor. Moreover, Defendants' 71.4% share of a separate market for copy paper is still significantly above the threshold for competitive concern. As a result, breaking out copy paper from core office supplies would not change the conclusion that the merger is likely to result in competitive harm for both core office supplies and copy paper. Shapiro Hrg. 2276:2-2278:7, 2316:10-17; PX06300 (Shapiro Reply) at 008, 015-016; PX06500 (Shapiro Demonstrative) at 023. Thus, including paper in the cluster of consumable office supplies does not skew the analysis of the merger's likely competitive effects. Shapiro Hrg. 2277:9-23, 2289:25-2290:12, PX06500 (Shapiro Demonstrative) at 023, 028.

12. It is appropriate to define the relevant market in this matter around large B-to-B customers. "Large B-to-B customers" are commercial (i.e., non-governmental) customers that

buy at least $500,000 of consumable office supplies annually, for their own end-use (i.e., not for resale). PX06100 (Shapiro Rpt.) at 007-008, n.12. It is unrebutted that large B-to-B customers are distinct from other purchasers of consumable office supplies. Shapiro Hrg. 2103:13-2108:11; PX06100 (Shapiro Rpt.) at 008-011. Moreover, the key condition for defining a market around a particular type of customer—namely, that sellers can profitably price discriminate by setting different prices to the targeted customers than to other customers—is satisfied here, and is also undisputed. *See* PX08051 (*Merger Guidelines*) § 3. That condition is satisfied because distributors can identify large B-to-B customers based on their historical purchasing volumes and negotiate distinct prices with them, and because arbitrage by large B-to-B customers is not practical or attractive. Shapiro Hrg. 2153:2-2154:7, PX06500 (Shapiro Demonstrative) at 017 (citing *Merger Guidelines* § 3).

13. The relevant geographic market is the United States, which Defendants' expert concedes. Shapiro Hrg. 2151:23-2152:4; [redacted]; [redacted].

14. Dr. Shapiro employed the hypothetical monopolist test ("HMT") to assess whether Plaintiffs' proposed relevant market is properly defined. The HMT is the standard test used by antitrust economists to define relevant antitrust markets. Shapiro Hrg. 2125:23-2126:1.

15. The HMT asks whether a hypothetical, profit-maximizing monopolist over the supply of products in the "candidate" market could profitably impose at least a "small but significant and non-transitory increase in price" ("SSNIP") above prevailing price levels. The SSNIP is normally taken to be 5% of the prevailing price. If the answer is yes, the relevant market is properly defined. Shapiro Hrg. 2127:3-13, PX06100 (Shapiro Rpt.) at 013.

16. The candidate market consisting of the sale and distribution of consumable office

supplies to large B-to-B customers in the United States easily satisfies the HMT and thus qualifies as a relevant antitrust market. Shapiro Hrg. 2156:17-20; PX06500 (Shapiro Demonstrative) at 018; PX06100 (Shapiro Rpt.) at 013-015; PX06300 (Shapiro Reply) at 005-011.

17. Defendants' contention that ink and toner must be included in the relevant market has no basis in standard market definition principles. First, large B-to-B customers would not be able to discipline a hypothetical monopolist controlling the consumable office supplies cluster by switching to ink and toner, because ink and toner are not substitutes for the items in the consumable office supplies cluster. Shapiro Hrg. 2143:3-6, 2783:23-2784:11. Second, although the consumable office supplies cluster market contains products that are not substitutes, ink and toner do not belong in the market because they are sold to large customers under very different competitive conditions. Shapiro Hrg. 2123:3-2124:21, 2313:19-2314:8.

18. Defendants' contention that adjacency products—such as furniture—must be included in the relevant market likewise has no basis in standard market definition principles. They are properly excluded from the market for the same reasons that apply to ink and toner: (1) they are not substitutes in demand to products in the market and (2) they are not sold under sufficiently similar competitive conditions to products in the cluster market. Shapiro Hrg. 2134:9-2140:3.

19. Dr. Shapiro's testimony and analysis concerning the HMT stands unrebutted. Defendants chose not to call their economic expert, Jonathan Orszag, in this proceeding. [redacted]. Moreover, Mr. Orszag's expert report contains no evidence that Dr. Shapiro's implementation of the HMT is faulty. PX06300 (Shapiro Reply) at 003, 005-011.

B. The Evidence Confirms that Consumable Office Supplies Is an Appropriate Cluster Market.

20. Consumable office supplies, including copy paper, are Defendants' traditional product categories. *See*, *e.g.*, PX04506 (SPLS) at 007 ("We are gaining share even in our traditional categories such as paper and office supplies."); PX04630 (SPLS) at 007 (same); [redacted].

21. Consumable office supplies are the primary reason that large B-to-B customers purchase from Defendants. *See*, *e.g.*, PX02109 (Calkins (ODP) Dep. 30:2-14); PX02002 (Calkins (ODP) IH 208:7-21); Wright (HPG) Hrg. 1912:12-19.

22. Staples and Office Depot are the leading distributors of copy paper to large B-to-B customers. *See*, *e.g.*, PX03041 (Int'l Paper Decl.) ¶ 5; PX03047 (PCA Decl.) ¶ 4.

1. Ink and Toner Are Subject to Distinct Competitive Conditions.

23. Ink and toner are not included in the cluster market because they are (1) not substitutes for the items included in the consumable office supplies cluster *and* (2) sold under significantly different competitive conditions. Shapiro Hrg. 2143:3-6, 2136:19-2137:7.

24. In particular, large B-to-B customers have numerous providers for ink and toner in addition to the traditional office supplies distributors such as Staples and Office Depot. Many large B-to-B customers obtain ink and toner through managed print services ("MPS") programs, many of which are offered by ink and toner manufacturers, such as Hewlett-Packard, Lexmark, Ricoh, and Xerox. Shapiro Hrg. 2124:7-13, 2136:23-2137:7; 2140:12-25; PX06100 (Shapiro Rpt.) at 007; *see also* O'Neill (AEP) Hrg. 170:2-12; Cervone (McDonald's) Hrg. 357:25-358:4; Wilson (Select Medical) Hrg. 1019:13-1020:3; Meester (Best Buy) Hrg. 1317:13-1318:1; Meehan (WBM) Hrg. 1604:21-1605:5, 1606:3-6. By contrast, large B-to-B customers very

rarely purchase consumable office supplies directly from manufacturers. Shapiro Hrg. 2281:11-2282:5, 2420:9-14; PX06500 (Shapiro Demonstrative) at 075.

25. MPS providers, including ink and toner manufacturers, provide ink and toner as a core part of their MPS offering. *See*, *e.g.*, Wright (HPG) Hrg. 1922:20-25, 1923:12-14, 1925:17-20; PX02168 (Heacock (Xerox) Dep. 72:21-73:21); PX03038 (Lexmark Decl.) ¶ 5. Under an MPS program, customers generally pay a per-click fee that includes a bundle of services, such as device maintenance and service, as well as ink/toner. Wilson (Select Medical) Hrg. 1018:18-1019:3; Meehan (WBM) Hrg. 1604:14-20; Wright (HPG) Hrg. 1922:6-1923:2, 1924:23-1925:3; PX02127 (Komola (SPLS) Dep. 185:16-186:11); PX02168 (Heacock (Xerox) Dep. 100:2-22); PX03038 (Lexmark Decl.) ¶ 5.

26. The shift to MPS has been recent and rapid. *See*, *e.g.*, PX02011 (Heisroth (SPLS) IH 56:24-57:6) ("Our toner business is, you know, evaporating. . . . we're taking parts of the business that we've had and we've worked with for years and years and years and just kind of moving it to direct relationships with Xerox and Ricoh and Lexmark and HP."); PX02153 (Mutschler (SPLS) Dep. 111:22-112:8) (the recent rise of MPS has "changed the competitive landscape" and "brought in a whole new set of competitive influence"). Lexmark indicated that its "MPS sales grew approximately 32% from 2012 to 2014." PX03038 (Lexmark Decl.) ¶ 3.

27. Defendants concede that "Large Customers Are Increasingly Carving Out Ink, Toner, and Related Products Through MPS Programs." PX0007 (SPLS/ODP) at 068. According to the Executive Vice President of Contract Sales for Office Depot, the "onslaught" of competition for ink and toner comes from ink and toner manufacturers through MPS programs. PX02002 (Calkins (ODP) IH 155:5-18). According to the Senior Vice President of Staples Advantage, "All of our customers, all of our large customers and even medium-size customers are in some

sort of conversation with, about managed-print services which is a program whereby they purchase toner as a service." PX02100 (Heisroth (SPLS) Dep. 262:23-263:4). Ink and toner manufacturers "are competing for specifically toner sales at customers, all types of customers." PX02100 (Heisroth (SPLS) Dep. 157:14-20); *see also* Wright (HPG) Hrg. 1925:17-20, 2062:23-2063:2; Meehan (WBM) Hrg. 1604:21-24.

28. [redacted]. Purchasing data from Fortune 100 companies similarly shows significant usage of MPS programs by these companies. Shapiro Hrg. 2781:16-23, 2843:3-10.

29. Large B-to-B customers often hold sourcing events for ink and toner that are separate from their RFPs for consumable office supplies. *See, e.g.*, O'Neill (AEP) Hrg. 170:16-17; Meehan (WBM) Hrg. 1606:21-24; Wright (HPG) Hrg. 1925:4-20.

30. MPS providers do not compete in the sale of consumable office supplies, however. MPS providers, including ink and toner manufacturers, do not provide copy paper or other consumable office supplies as part of their MPS programs. *See, e.g.*, O'Neill (AEP) Hrg. 170:13-19; Meehan (WBM) Hrg. 1605:6-12, 1606:25-1607:3; Wilson (Select Medical) Hrg. 1020:21-23, 1925:17-1926:1, 2062:17-22; PX02002 (Calkins (ODP) IH 156:11-15); PX02168 (Heacock (Xerox) Dep. 66:11-67:13, 88:7-17); PX03037 (Xerox Decl.) ¶ 5; PX03038 (Lexmark Decl.) ¶ 7; PX03057 (Xerox 2d Suppl. Decl.) ¶¶ 10-11; PX03064 (IBM Suppl. Decl.) ¶ 3. As a result, large B-to-B customers do not view their MPS vendors as a viable alternative vendor of general office supplies or copy paper. *See, e.g.*, Wilson (Select Medical) Hrg. 1020:24-1021:2; Wright (HPG) Hrg. 1925:24-1926:1.

31. The evidence thus shows that while *some* large B-to-B customers *choose* to buy ink and

toner from the same vendor that sells them consumable office supplies, large B-to-B customers can and do obtain ink and toner from a broader number of vendors than they can for consumable office supplies. *See*, *e.g.*, Cervone (McDonald's) Hrg. 503:13-22; Wilson (Select Medical) Hrg. 1019:4-12 (explaining that Select Medical received more bids for MPS than it did for consumable office supplies); Meester (Best Buy) Hrg. 1318:20-24; Meehan (WBM) Hrg. 1606:15-1607:12; Wright (HPG) Hrg. 1925:4-1926:1; *see also* PX02153 (Mutschler (SPLS) Dep. 101:7-102:9) ("[S]o many companies now are moving to a manage[d] print services environment, and so many companies are involved in this. Large companies like HP and Xerox and Rico[h] and Lexmark . . . ."). That is, large B-to-B customers have options for ink and toner—namely MPS providers and value-added-resellers—that do not exist for other consumable office supplies. *See*, *e.g.*, Wright (HPG) Hrg. 1925:4-1926:1; PX02118 (Melamed (Fox) Dep. 54:18-56:12; 109:24-110:1).

32. It is therefore inappropriate to include ink and toner in the consumable office supplies cluster. Doing so would obscure the competitive conditions for the items that do belong in the consumable office supplies cluster—including Defendants' significant market share for consumable office supplies. Shapiro Hrg. 2124:14-21, 2141:23-2142:20; 2146:12-2148:6.

2. <u>Other Adjacency Products Are Subject to Distinct Competitive Conditions.</u>

33. An "adjacency" is a category or solution that is outside of the traditional office supply space. PX02109 (Calkins (ODP) Dep. 33:18-21). Adjacencies include office furniture, breakroom products, jan/san items, and copy and print services. *See, e.g.*, PX02109 (Calkins (ODP) Dep. 32:17-33:4); PX02110 (Goodman (SPLS) Dep. 43:16-45:4).

34. Adjacency products are not included in the cluster market because they are (1) not substitutes of the items included in the consumable office supplies cluster and (2) sold under

significantly different competitive conditions. Shapiro Hrg. 2134:9-13, 2138:3-13.

35. The competitive conditions for the sale and distribution of adjacency products to large customers are significantly different from those for the sale and distribution of the items in the consumable office supplies cluster. In particular, large customers have numerous providers for adjacency products in addition to the traditional office supplies distributors such as Staples and Office Depot. Shapiro Hrg. 2139:19-2140:3; PX06100 (Shapiro Rpt.) at 007; *see also* O'Neill (AEP) Hrg. 167:1-4 ("[T]here's three or four major office furniture companies in the United States"); *id*. at 168:9-169:3 (AEP has 52 contracts for jan/san supplies); Wilson (Select Medical) Hrg. 1124:9-1126:2; Meester (Best Buy) Hrg. 1317:4-8; Meehan (WBM) Hrg. 1601:14-1602:18, 1603:9-1604:5, 1604:21-1605:5, 1606:15-24, 1607:15-1608:24, 1609:6-23; Wright (HPG) Hrg. 1902:21-1903:11, 1903:12-1904:8, 1906:12-1907:8, 1907:9-21, 1908:6-12, 1908:13-23, 1909:13-1910:3; PX02122 (Eubanks-Saunders (B of A) Dep. 52:13-54:3, 58:10-13); PX02109 (Calkins (ODP) Dep. 37:4-7). For example, large B-to-B customers can purchase jan/san products from companies that also provide cleaning services. *See*, *e.g.*, O'Neill (AEP) Hrg. 168:9-24; Meehan (WBM) Hrg. 1602:15-18; PX02122 (Eubanks-Saunders (B of A) Dep. 55:20-56:6).

36. It is therefore inappropriate to include adjacency products in the consumable office supplies cluster. Doing so would obscure the competitive conditions for the items in the consumable office supplies cluster—including Defendants' significant market share. Shapiro Hrg. 2138:17-2139:18, 2785:21-2786:16; PX06300 (Shapiro Reply) at 007.

37. Moreover, vendors of adjacency products do not generally sell consumable office supplies. *See*, *e.g.*, O'Neill (AEP) Hrg. 167:11-12, 168:6-8, 169:8-169:10; Meester (Best Buy) Hrg. 1316:15-22, 1317:1-3; Meehan (WBM) Hrg. 1602:25-1603:3, 1604:6-9, 1606:25-1607:3,

1608:1-11, 1609:20-23; Wright (HPG) Hrg. 1903:4-11, 1904:2-8, 1906:25-1907:8, 1908:6-12, 1909:21-1910:3; PX02109 (Calkins (ODP) Dep. 31:5-12, 31:20-32:2); PX02127 (Komola (SPLS) Dep. 196:7-13, 210:4-18).

38. Large B-to-B customers often run sourcing events for adjacency products that are distinct from their RFPs for consumable office supplies. *See*, *e.g.*, O'Neill (AEP) Hrg. 167:8-10, 168:2-5, 169:4-7; Meehan (WBM) Hrg. 1608:12-24; Wright (HPG) Hrg. 1902:21-1903:11, 1903:12-1904:8, 1906:12-1907:8, 1907:9-21, 1908:6-12, 1908:13-23, 1909:13-1910:3; PX03044 (Valero Suppl. Decl.) ¶ 3; *see also* PX02109 (Calkins (ODP) Dep. 30:23-31:12, 31:20-32:2, 34:19-24) (Defendants participate in adjacency-only RFPs).

C. <u>The Evidence Shows that Large B-to-B Customers Are Distinct.</u>

39. According to Staples, spend of $500,000 per year on consumable office supplies is a "threshold" at which "closer attention" must be paid to a customer. PX02153 (Mutschler (SPLS) Dep. 56:11-20). Such customers [redacted]. *See*, *e.g.*, PX02002 (Calkins (ODP) IH 106:7-19).

40. [redacted]; *see also* PX04630 (SPLS) at 007 (for B-to-B, Staples is the "clear industry leader <u>and</u> gaining share") (emphasis in original).

1. <u>Competition for Large B-to-B Customers Often Occurs Through Formal or Informal Bidding Processes.</u>

41. Large B-to-B customers solicit pricing and service information from prospective office

supplies vendors through requests for proposal ("RFPs"), requests for information ("RFIs"), requests for quote ("RFQs"), or similar processes. *See*, *e.g.*, O'Neill (AEP) Hrg. 194:10-195:16; Wright (HPG) Hrg. 1883:7-14, 1915:13-1916:18; PX02109 (Calkins (ODP) Dep. 54:11-15); PX02120 (McCabe (SPLS) Dep. 76:6-77:7); PX02122 (Eubanks-Saunders (B of A) Dep. 24:2-12, 26:7-18).

42. During RFPs, large B-to-B customers typically ask prospective vendors to provide prices for each item on the customer's core list (or a representative subset of the core list). *See*, *e.g.*, O'Neill (AEP) Hrg. 207:19-208:10; Wilson (Select Medical) Hrg. 1012:18-25; 1112:14-18; Meester (Best Buy) Hrg. 1201:14-22; Wright (HPG) Hrg. 1913:4-1913:21, 1916:1-7. The core list represents the individual products that customers buy most frequently and in the highest volume. *See*, *e.g.*, Meester (Best Buy) Hrg. 1201:14-22; Moise (Fifth Third Bank) Hrg. 987:14-25; Wright (HPG) Hrg. 1913:22-1914:11.

43. Customers also evaluate non-price capabilities regarding delivery, customer service, e-commerce capabilities, and other service requirements. *See*, *e.g.*, O'Neill (AEP) Hrg. 208:12-208:22; Wright (HPG) Hrg. 1914:15-1915:10.

44. After receiving and evaluating the bids, customers negotiate with the finalist(s). *See*, *e.g.*, O'Neill (AEP) Hrg. 209:17-210:3; Wright (HPG) Hrg. 1883:7-14.

45. The RFP process results in an individualized contract with customer-specific pricing, terms-and-conditions, and value-added service requirements. *See*, *e.g.*, O'Neill (AEP) Hrg. 201:6-203:23; Wright (HPG) Hrg. 1916:19-1917:2; PX02109 (Calkins (ODP) Dep. 75:4-7, 76:9-10); PX02147 (Sargent (SPLS) Dep. 14:20-15:5).

46. Defendants determine pricing based on [redacted]

PX02012 (Sargent (SPLS) IH 112:7-113:20, 115:20-116:1, 118:7-119:20).

47. Defendants seek to win business at prices that are most favorable to them, not the customer, and if there is an opportunity to charge a customer more, Defendants "charge as much as possible." PX02002 (Calkins (ODP) IH 305:7-306:8).

48. Defendants usually know the identity of the incumbent office supplies vendor for a given customer. *See*, *e.g.*, O'Neill (AEP) Hrg. 210:18-23; PX04383 (SPLS) at 001; [redacted]; [redacted]; *see also* [redacted]. Defendants also typically know the identity of other participants in an RFP. *See*, *e.g.*, O'Neill (AEP) Hrg. 210:18-23; PX02003 (Ringel (SPLS) IH 167:14-18).

49. Moreover, Defendants typically know when they are competing against each other. *See*, *e.g.*, O'Neill (AEP) Hrg. 210:18-211:2; PX02100 (Heisroth (SPLS) Dep. 144:21-145:3); [redacted]; PX04383 (SPLS) at 001; PX05150 (ODP) at 001-002; [redacted]; [redacted].

2. <u>Large B-to-B Customers Have Distinct and Individualized Pricing.</u>

50. Large B-to-B customers have an individualized core list of products. O'Neill (AEP) Hrg. 170:20-171:3; Meester (Best Buy) Hrg. 1201:14-22; Wright (HPG) Hrg. 1913:4-1914:4; PX02109 (Calkins (ODP) Dep. 57:8-14). Customers may amend their core list during the life of the contract, subject to negotiation with the vendor. PX02100 (Heisroth (SPLS) Dep. 92:1-16); PX02152 (Meisner (MGM) Dep. 75:17-76:6).

51. The core list contains the products that large B-to-B customers purchase most frequently and, therefore, they negotiate the lowest pricing on those items. *See*, *e.g.*, O'Neill (AEP) Hrg. 170:20-171:3; Moise (Fifth Third Bank) Hrg. 987:14-25; Meester (Best Buy) Hrg. 1207:12-15; Wright (HPG) Hrg. 1913:22-1914:11; PX02109 (Calkins (ODP) Dep. 69:15-17); PX02116

(Ringel (SPLS) Dep. 93:21-94:5).

52. For non-core products, large B-to-B customers generally pay a flat percentage discount off published prices (e.g., list, catalog, or online prices). *See, e.g.*, O'Neill (AEP) Hrg. 173:1-23; Meester (Best Buy) Hrg. 1320:4-10; PX02120 (McCabe (SPLS) Dep. 28:7-30:1); PX02164 (Walden (Holland & Knight) Dep. 74:13-17).

53. Large B-to-B customers' contracts for consumable office supplies contain additional financial incentives beyond low pricing, such as upfront payments (signing or retention bonuses), and volume-based rebates. *See, e.g.*, O'Neill (AEP) Hrg. 174:2-10; Meester (Best Buy) Hrg. 1200:13-25; PX02003 (Ringel (SPLS) IH 214:7-215:6); PX02008 (Ghant (ODP) IH 44:9-24); PX03002 (B of A Decl.) ¶¶ 4, 7.

54. In some cases, termination of a contract, or failure to meet expected spend levels, results in the customer having to pay back a prorated portion of a bonus. *See, e.g.*, [redacted]; PX02113 (Ho (Rite Aid) Dep. 94:14-95:7); PX02116 (Ringel (SPLS) Dep. 103:8-104:12).

55. Upfront payments and volume-based discounts represent an additional source of cost savings for large B-to-B customers. *See, e.g.*, Moise (Fifth Third Bank) Hrg. 912:7-21; Wilson (Select Medical) Hrg. 1012:18-25, 1132:14-1133:3; Meester (Best Buy) Hrg. 1200:3-25.

56. Large B-to-B customers' consumable office supplies contracts provide for uniform pricing across all of a customer's locations. *See, e.g.*, Cervone (McDonald's) Hrg. 358:21-23; Wilson (Select Medical) Hrg. 1023:3-7; Meester (Best Buy) Hrg. 1232:4-7; Wright (HPG) Hrg. 1917:8-10; PX03002 (B of A Decl.) ¶ 4; PX03019 (Walgreens Decl.) ¶ 4.

3. <u>Large B-to-B Customers Have Distinct Requirements and Needs.</u>

57. Large B-to-B customers have distinct requirements and needs. Defendants recognize the high value large B-to-B customers place on these services. PX02003 (Ringel (SPLS) IH 127:9-

11) ("It's not always about the company wanting the lowest price, they want the best service, they want the best services, they want a competitive price, and they want good representation."). All of these services are factored into the prices that Defendants charge their customers. *See*, *e.g.*, PX02115 (Wilson (Select Medical) Dep. 163:18-20).

(a) Defendants Segment Their Customers in the Ordinary Course of Business.

58. Defendants segment customers according to their annual spend. *See*, *e.g.*, PX06100 (Shapiro Rpt.) at 006-007; PX02002 (Calkins (ODP) IH 85:16-86:7); PX02003 (Ringel (SPLS) IH 43:11-15; 49:4-9; 83:2-6); PX04088 (SPLS) at 023; *see also* PX04046 (SPLS) at 003 (list of "large/enterprise" contract wins). Others in the industry use similar segmentation and recognize large B-to-B customers as a distinct group. PX06100 (Shapiro Rpt.) at 008 n.14.

59. Defendants use these segments because there are differences in serving large B-to-B customers compared to smaller contract customers. In particular, large B-to-B customers typically have geographically dispersed locations and more sophisticated procurement organizations, and they also require "more high-touch hand-holding" with dedicated salespeople handling the accounts. *See*, *e.g.*, PX02012 (Sargent (SPLS) IH 36:4-12, 142:10-23).

60. Staples' ordinary course documents define "Enterprise" customers as those with spend over $1 million per year, "Commercial" customers as those with spend between $100,000 and $1 million per year, and "mid-market" customers as those with spend between $6,000 and $10,000 per year. [redacted]; PX04088 (SPLS) at 023; *see also* PX02120 (McCabe (SPLS) Dep. 43:17-24, 48:15-49:6); PX04226 (SPLS) at 002; [redacted].

61. Staples also segments customers by customer attributes for purposes of pricing. *See*, *e.g.*, [redacted]; PX04227; *see also* PX02147 (Sargent (SPLS) Dep. 39:21-40:15).

62. For Office Depot, "Enterprise" customers are those that spend over $1 million per year

with Office Depot, "Large" customers are those that spend between $150,000 and $1 million per year with Office Depot, and "SMB" customers are those that spend $150,000 or less per year with Office Depot. PX02002 (Calkins (ODP) IH 85:16-86:7); PX02129 (Lander (ODP) Dep. 8:7-9:8); *see also* PX02149 (Smith (ODP) Dep. 105:22-106:9).

63. Office Depot uses these customer segments [redacted] because customers behave differently the more they spend. PX02109 (Calkins (ODP) Dep. 46:8-13, 50:14-21); PX05167 (ODP) at 008. [redacted]; Morrison (PDME) Hrg. 1374:15-19, 1375:11-23 (SMB customers typically do not have contracts). [redacted].

64. SMB customers do not have the same needs as large B-to-B customers. Meehan (WBM) Hrg. 1566:8-16, 1610:21-1611:8. And SMB customers [redacted]. PX02008 (Ghant (ODP) IH 44:2-8). Nevertheless, SMB customers have [redacted]. *See, e.g.*, PX02002 (Calkins (ODP) IH 106:23-107:20). Likewise, public sector entities are distinct. *See* PX06100 (Shapiro Rpt.) at 008 n.12.

65. Dr. Shapiro's definition of large B-to-B customers is aligned with Defendants' Enterprise customer segment. Shapiro Hrg. 2103:13-2105:8; PX06100 (Shapiro Rpt.) at 007-009.

(b) <u>Distinct Requirements and Needs of Large B-to-B Customers.</u>

(i) <u>A Single Consumable Office Supplies Vendor That Can Service All Customer Locations</u>

66. Many large B-to-B customers have geographically dispersed locations. *See, e.g.*, PX06500 (Shapiro Demonstrative) at 065; O'Neill (AEP) Hrg. 163:20-164:21, 329:21-330:9; Cervone (McDonald's) Hrg. 356:21-357:8; Moise (Fifth Third Bank) Hrg. 895:24-896:13; Wilson (Select Medical) Hrg. 1003:21-1004:4; Meester (Best Buy) Hrg. 1194:25-1195:12; Wright (HPG) Hrg. 1883:18-24, 1884:21-1885:20.

67. Such geographically dispersed customers require a single office supplies vendor with nationwide delivery capabilities that can service all of their locations. *See, e.g.*, O'Neill (AEP) Hrg. 163:20-164:21, 180:19-181:10, 329:21-330:9; Cervone (McDonald's) Hrg. 356:21-357:8, 375:1-9; Wilson (Select Medical) Hrg. 1003:21-1004:4, 1009:2-18, 1023:8-11; Meester (Best Buy) Hrg. 1232:8-13, 1233:4-11; Morrison (PDME) Hrg. 1378:12-19; Wright (HPG) Hrg. 1929:8-1931:19; *see also* Meehan (WBM) Hrg. 1615:11-1617:9. There are many benefits to using a single consumable offices supplies vendor. *See infra* Section IV.C.1.

68. Large B-to-B customers require consistent pricing, products, and service levels across all of their locations. Wilson (Select Medical) Hrg. 1023:3-7; Wright (HPG) Hrg. 1930:11-1931:19; PX02122 (Eubanks-Saunders (B of A) Dep. 150:5-151:25, 169:21-171:20, 172:13-173:11); [redacted]; [redacted]; [redacted]; [redacted].

69. Defendants promote their nationwide distribution capabilities to differentiate themselves from other office supplies vendors. *See, e.g.*, PX02002 (Calkins (ODP) IH 118:21-119:2); PX04321 (SPLS) at 001; [redacted]; [redacted]; *see also* PX04320 (SPLS) at 001; PX04338 (SPLS) at 004.

(ii) <u>Customer-Specific Pricing</u>

70. Large B-to-B customers expect discounted, customer-specific pricing based on their purchase volumes. Wright (HPG) Hrg. 1886:18-1887:6, 1914:15-1915:10; PX02103 (Wright (HPG) Dep. 195:4-196:8); PX03002 (B of A Decl.) ¶¶ 4, 10.

71. Defendants recognize the importance of providing defined product lists with customer-specific pricing. *See, e.g.*, PX02100 (Heisroth (SPLS) Dep. 93:15-20); PX02120 (McCabe (SPLS) Dep. 92:10-19) ("[redacted]").

(iii) <u>Sophisticated Information Technology Capabilities</u>

72. Large B-to-B customers require a consumable office supplies vendor with sophisticated IT capabilities, such as a customizable punch-out site, a customizable product catalog that limits employees' purchases to certain low-priced products, and integration with customers' electronic procurement systems. *See, e.g.*, O'Neill (AEP) Hrg. 184:11-186:3; Cervone (McDonald's) Hrg. 375:25-376:13; Wilson (Select Medical) Hrg. 1013:17-24, 1027:4-8, 1074:20-1075:9; Meester (Best Buy) Hrg. 1233:20-1234:17, 1235:16-18; Morrison (PDME) Hrg. 1391:7-23; Meehan (WBM) Hrg. 1622:22-1625:24; Wright (HPG) Hrg. 1904:22-1905:12, 1914:12-1915:10, 1938:7-13. Defendants recognize that large B-to-B customers require their office supplies vendor to provide sophisticated IT. PX04487 (SPLS) at 001.

73. Large B-to-B customers require customized catalogs to limit the products available to their employees, thereby driving purchases to low-priced items, reducing off-contract spend, and helping them to secure more favorable pricing. *See, e.g.*, Wilson (Select Medical) Hrg. 1067:16-25, 1069:3-1070:4; Meester (Best Buy) Hrg. 1234:5-1235:1; Meehan (WBM) Hrg. 1620:24-1622:3, 1622:22-1623:23; Wright (HPG) Hrg. 1904:22-1905:12, 1905:20-1906:8. Defendants also recognize the importance of providing customized product lists. PX02100 (Heisroth (SPLS)

Dep. 93:15-20).

74. Large B-to-B customers would not consider a consumable office supplies vendor that lacked the ability to provide a customized product catalog. *See, e.g.*, O'Neill (AEP) Hrg. 184:11-18 (describing the customizable web portal as a "knockout" criterion); Wilson (Select Medical) Hrg. 1075:10-13; Meester (Best Buy) Hrg. 1235:19-23; Meehan (WBM) Hrg. 1626:25-1627:4; Wright (HPG) Hrg. 1914:12-1915:10, 1938:7-13.

75. Large B-to-B customers also demand an IT interface (e.g., a "punch-out") to facilitate and control, among other things, ordering, approval, payment, and invoicing. *See, e.g.*, Meehan (WBM) Hrg. 1624:3-1625:20; PX02132 (Corbett (Pep Boys) Dep. 289:22-290:4 , 315:16-316:1); PX02138 (Sears (Realogy) Dep. 102:3-5); [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted].

76. IT interfacing is costly, so reducing the number of consumable office supplies vendors with whom they have to connect helps customers to contain costs. [redacted].

77. Large B-to-B customers require consolidated invoicing for all customer locations. *See, e.g.*, Meehan (WBM) Hrg. 1613:2; PX02003 (Ringel (SPLS) IH 104:10-25); PX02122 (Eubanks-Saunders (B of A) Dep. 152:23-154:1); [redacted]; [redacted]. Consolidated invoicing allows customers to minimize the administrative burden associated with managing "a giant stack of invoices." PX02003 (Ringel (SPLS) IH 105:1-10); PX02122 (Eubanks-Saunders (B of A) Dep. 152:23-154:1).

(iv) <u>Dedicated Account Management and High Levels of Customer Service</u>

78. Large B-to-B customers have high-end and highly customized service requirements. *See, e.g.*, Morrison (PDME) Hrg. 1468:5-15; Meehan (WBM) Hrg. 1612:5-17; PX02003 (Ringel

(SPLS) IH 75:20-76:14; 99:10-100:10).

79. Large B-to-B customers require their preferred consumable office supplies vendor to provide a single point of contact, and usually a dedicated account manager. *See, e.g.*, O'Neill (AEP) Hrg. 187:19-188:14; Wilson (Select Medical) Hrg. 1077:12-1078:6; Meester (Best Buy) Hrg. 1238:15-1239:2, 1239:25-1240:5; Meehan (WBM) Hrg. 1631:18-1633:9; Wright (HPG) Hrg. 1930:11-1931:4, 1937:8-1938:6; PX02100 (Heisroth (SPLS) Dep. 112:7-20, 115:9-15).

80. Large B-to-B customers expect their dedicated account manager to know their business and understand their office supplies needs. *See, e.g.*, O'Neill (AEP) Hrg. 187:19-188:14; Meester (Best Buy) Hrg. 1240:6-11. Defendants expect their sales representatives to know their customers' office supply needs as well. PX02109 (Calkins (ODP) Dep. 96:14-97:3, 98:12-16, 100:1-10, 101:3-10, 102:24-103:11); PX02116 (Ringel (SPLS) Dep. 56:15-57:2).

81. Office Depot and Staples provide a dedicated account representative (i.e., a single point of contact), whereas Internet-only companies, such as Amazon, do not. PX02144 (Cervone (McDonald's) Dep. 257:5-257:24); Meehan (WBM) Hrg. 1715:24-1717:7; *see also* PX02116 (Ringel (SPLS) Dep. 56:15-57:2).

82. Large B-to-B customers would not consider a consumable office supplies vendor that did not provide them with a dedicated account manager. *See, e.g.*, Meester (Best Buy) Hrg. 1241:14-18; Wright (HPG) Hrg. 1938:7-13.

83. Large B-to-B customers require higher levels of customer service than smaller customers. *See, e.g.*, PX02009 (Smith (ODP) IH 76:24-77:11); PX04319 (SPLS) at 001; *see also* PX02100 (Heisroth (SPLS) Dep. 111:2-112:20, 113:3-114:23) (recognizing the need for a team of dedicated sales experts). According to Staples' CEO, large B-to-B customers require "more high-touch hand-holding" with dedicated salespeople handling the accounts. PX02012 (Sargent

(SPLS) IH 36:4-12).

(v) <u>Next-Day Delivery</u>

84. Large B-to-B customers require or strongly prefer next-day delivery to all of their locations. *See*, *e.g.*, Wilson (Select Medical) Hrg. 1079:23-1080:9; Meehan (WBM) Hrg. 1618:17-24; Wright (HPG) Hrg. 1934:23-1935:5; PX02153 (Mutschler (SPLS) Dep. 94:10-95:1); PX02164 (Walden (Holland & Knight) Dep. 34:7-17); [redacted]; [redacted]; [redacted]; [redacted]; [redacted].

85. Large B-to-B customers require next-day delivery because they have relatively little storage space for office supplies and, therefore, require fast shipments of small amounts of products. *See*, *e.g.*, Wilson (Select Medical) Hrg. 1082:1-1083:24; Meehan (WBM) Hrg. 1619:13-25; Wright (HPG) Hrg. 1934:23-1935:5. Next-day delivery also provides certainty so customers are not wondering when their office supplies will arrive. *See*, *e.g.*, O'Neill (AEP) Hrg. 189:3-15.

86. Defendants promote next day delivery and acknowledge that free next-day delivery is very important to large B-to-B customers. *See*, *e.g.*, PX02002 (Calkins (ODP) IH 121:25-122:6); PX02003 (Ringel (SPLS) IH 92:24-94:8) (customers "expect" their office supply vendor to provide "next-day service for must products."); PX02005 (Komola (SPLS) IH 113:5-10) ("Free next-day delivery is still important to our B2B customers, yes."); PX04309 (SPLS) at 035, 038.

(vi) <u>Desktop Delivery</u>

87. Desktop delivery is a service whereby delivery is made to a specific desk or site within a building. *See*, *e.g.*, Wilson (Select Medical) Hrg. 1080:14-21; Meehan (WBM) Hrg. 1717:13-19; PX09001 (WBM); Wright (HPG) Hrg. 1934:1-9; PX02122 (Eubanks-Saunders (B of A) Dep. 125:2-126:1); PX02145 (DeWitt (Highmark) Dep. 148:8-20).

88. Large B-to-B customers require or strongly prefer a consumable office supplies vendor

that can provide desktop delivery. *See, e.g.*, Moise (Fifth Third Bank) Hrg. 982:25-983:10, 983:17-984:12, 985:20-986:12; Wilson (Select Medical) Hrg. 1079:23-1080:9; Meehan (WBM) Hrg. 1620:7-16; Wright (HPG) Hrg. 1934:19-22; PX04481 (SPLS) at 006; [redacted]; [redacted].

89. Large B-to-B customers want desktop delivery to avoid having to hire additional employees to perform that internal delivery function. *See, e.g.*, Moise (Fifth Third Bank) Hrg. 982:25-983:10, 983:17-984:12; Wright (HPG) Hrg. 1934:10-18; PX03002 (B of A Decl.) ¶ 12. It would be more costly to hire additional employees to deliver office supplies internally than it would be to incur a 5-10% price increase by the merged entity. Moise (Fifth Third Bank) Hrg. 979:12-980:2.

90. Staples and Office Depot are the only two consumable office supplies vendors that provide nationwide desktop delivery. *See, e.g.*, PX02118 (Melamed (Fox) Dep. 96:3-97:3); *see also* Meehan (WBM) Hrg. 1695:25-1696:5.

(vii) <u>Detailed Utilization Reporting</u>

91. Large B-to-B customers require their office supplies vendor to provide detailed utilization reporting, including data such as product description, quantity, unit price, SKU, core or non-core, and delivery location. *See, e.g.*, O'Neill (AEP) Hrg. 182:1-9; Cervone (McDonald's) Hrg. 376:14-377:9; Wilson (Select Medical) Hrg. 1075:19-1077:11; Meester (Best Buy) Hrg. 1237:07-1238:4; Meehan (WBM) Hrg. 1631:8-17; Wright (HPG) Hrg. 1933:3-20, 1938:7-13; PX02153 (Mutschler (SPLS) Dep. 95:15-96:14; PX07055 (Select Medical) at 013; *see also* [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted].

92. Detailed utilization reports identify the employees making specific purchases, track the volume of purchases at a product-specific level, and identify what locations are receiving products through the contract. O'Neill (AEP) Hrg. 186:9-14; *see also* Meehan (WBM) Hrg. 1628:3-16; Wright (HPG) Hrg. 1933:3-14; PX02144 (Cervone (McDonald's) Dep. 24:16-25:5); PX02164 (Walden (Holland & Knight) Dep. 35:14-36:5). This detail helps drive savings by allowing the customer to measure its consumption habits and make necessary adjustments. *See* O'Neill (AEP) Hrg. 186:15-18; Meester (Best Buy) Hrg. 1237:18-1238:4; Wright (HPG) Hrg. 1933:3-20.

93. Large B-to-B customers would not consider an office supplies vendor that could not provide detailed utilization reporting. *See, e.g.*, O'Neill (AEP) Hrg. 180:16-181:6, 182:1-9; Wilson (Select Medical) Hrg. 1077:6-11; Meehan (WBM) Hrg. 1631:8-17; Wright (HPG) Hrg. 1933:3-14, 1938:7-13.

(viii) <u>A Good Reputation for Successfully Serving Large B-to-B Customers</u>

94. Large B-to-B customers require their consumable office supplies vendor to have a proven track record of successfully serving other large B-to-B customers. *See, e.g.*, Moise (Fifth Third Bank) Hrg. 985:6-19; Meester (Best Buy) Hrg. 1323:6-1324:7; Meehan (WBM) Hrg. 1634:13-25; Wright (HPG) Hrg. 1935:6-25, 1937:1-7, 1937:25-1938:6, 1938:7-13, 1943:14-1945:8; PX02122 (Eubanks-Saunders (B of A) Dep. 156:21-157:3, 158:3-159:6).

95. Large B-to-B customers will not award their consumable office supplies business to entities that do not have an established—and exemplary—track record of serving large B-to-B customers because service disruptions or poor product quality can harm employee productivity. *See, e.g.*, Moise (Fifth Third Bank) Hrg. 985:6-19; Meester (Best Buy) Hrg. 1324:9-1325:9; Morrison (PDME) Hrg. 1411:14-1412:15; Meehan (WBM) Hrg. 1634:13-1635:9, 1714:9-21;

Wright (HPG) Hrg. 1943:18-1944:16; PX02122 (Eubanks-Saunders (B of A) Dep. 165:4-166:19).

96. Amazon Business lacks a demonstrated track record of serving large B-to-B customers. Wright (HPG) Hrg. 1943:14-1945:8; PX03002 (B of A Decl.) ¶ 31.

(ix) <u>A Network of Retail Locations</u>

97. Some large B-to-B customers require or strongly prefer their preferred office supplies vendor to have a network of retail locations for urgent purchases and employee convenience. *See*, *e.g.*, Cervone (McDonald's) Hrg. 373:9-374:8; PX02132 (Corbett (Pep Boys) Dep. 286:1-7); *see also* PX03000 (HiTouch Decl.) ¶ 28.

98. Defendants tout the ability for customers to make in-store purchases when soliciting the business of large B-to-B customers. *See*, *e.g.*, PX02002 (Calkins (ODP) IH 125:25-126:2); PX02011 (Heisroth (SPLS) IH 75:10-24); *see also* Meehan (WBM) Hrg. 1687:13-1688:3.

II. EXTRAORDINARILY HIGH MARKET CONCENTRATION LEVELS ESTABLISH A STRONG PRESUMPTION OF HARM TO COMPETITION IN THE RELEVANT MARKET.

99. Under the *Merger Guidelines*, a merger is presumptively anticompetitive if it increases the HHI by more than 200 points and results in a post-merger HHI exceeding 2,500. PX08051 (*Merger Guidelines*) § 5.3.

A. <u>The Proposed Merger Is Presumptively Illegal in the Relevant Market.</u>

100. Staples and Office Depot dominate the sale and distribution of consumable office supplies to large B-to-B customers and together have a market share of 79%. PX06500 (Shapiro Demonstrative) at 020.

101. The post-merger HHI is 6,274, with an increase of 3,000 from the pre-merger HHI. PX06500 (Shapiro Demonstrative) at 024. The Staples/Office Depot merger is presumptively illegal under the *Merger Guidelines* because the HHI increases by more than 200 points and the

post-merger HHI exceeds 2,500. *See* PX08051 (*Merger Guidelines*) § 5.3.

102. Dr. Shapiro estimated market shares using data provided by the Fortune 100 companies. Shapiro Hrg. 2249:22-2250:10. Using the Fortune 100 to calculate market shares is an unbiased method because the Fortune 100 list exists independently of this case, and thus does not over-represent Defendants' customers. Shapiro Hrg. 2292:7-23, 2483:23-2484:19. The data are based on responses from Fortune 100 companies to Civil Investigative Demands that the FTC issued during its investigation of the proposed Merger, and follow-up conducted by the FTC. Shapiro Hrg. 2250:3-9. Dr. Shapiro's staff then spent significant time processing and assembling the data. Shapiro Hrg. 2250:24-2251:11. The data Dr. Shapiro ultimately used to calculate his Fortune 100 market shares reflect 81 of the Fortune 100 companies' purchases of consumable office supplies from any vendor that supplies them. Shapiro Hrg. 2294:3-19; PX06100 (Shapiro Rpt.) at 017; PX06300 (Shapiro Reply) at 098. By breaking out the source of such spend, Dr. Shapiro could reliably attribute shares to each vendor. Shapiro Hrg. 2251:12-24. Defendants treat accounts served with their Tier 1 diversity partners, and the resulting revenue, as belonging to Defendants. Evidence also shows that Tier 1 diversity firms cannot serve large B-to-B customers without Defendants. *See infra* Section III.E.4. On this basis, Dr. Shapiro attributed revenue for Tier 1 customers to Defendants. Shapiro Hrg. 2309:11-2310:6, 2795:2-2796:3; PX06300 (Shapiro Reply) at 110.

103. Dr. Shapiro tested the robustness of the Fortune 100 results. Dr. Shapiro used data from over 30 office supplies vendors to examine the extent to which Staples, Office Depot, and other distributors serve as the primary vendor of consumable office supplies to large B-to-B customers. Shapiro Hrg. 2250:11-23, 2285:8-2287:19; PX06500 (Shapiro Demonstrative) at 026-027. This analysis shows that Defendants are the dominant primary vendors of consumable office supplies

to large B-to-B customers, which confirms that the Fortune 100 market shares accurately represent Defendants' position in the relevant market. Shapiro Hrg. 2291:14-2292:3; PX06500 (Shapiro Demonstrative) at 027 (in 2014, Staples and Office Depot each had more than 500 customers that spent over $500,000 annually on consumable office supplies; the third-place vendor, a paper distributor, had just 38 such customers). At his deposition, Defendants' expert, Mr. Orszag, agreed that "[Defendants] are in the first chair multiple times for large corporate customers." PX02167 (Orszag Dep.) at 222:22-223:5. This is true even when the annual spend threshold is reduced to $250,000. Shapiro Hrg. 2290:17-2291:9; PX06500 (Shapiro Demonstrative) at 029. These results are unrebutted.

104. Dr. Shapiro also analyzed bid data, which included Defendants' win-loss data for all large B-to-B customers—not just the Fortune 100. Shapiro Hrg. 2291:17-2292:3, 2328:6-20; PX06500 (Shapiro Demonstrative) at 039. Dr. Shapiro's analysis shows that Staples and Office Depot overwhelmingly surpass all other vendors in both appearances and wins in large B-to-B customer bid opportunities for consumable office supplies. Shapiro Hrg. 2097:17-2098:4, 2098:16-23; PX06500 (Shapiro Demonstrative) at 042-043, 045-046. These results are unrebutted. Thus, the bid data also confirm that the Fortune 100 market shares are representative of Defendants' position in the relevant market. Shapiro Hrg. 2250:11-23; 2331:16-2332:14; 2807:22-2808:6.

B. <u>Ordinary Course Materials Confirm Defendants' High Shares in the Relevant Market.</u>

105. Staples' documents show that it serves more than half of the Fortune 100. [redacted]; *see also* PX04129 (SPLS) at 001; [redacted]; PX04253 (SPLS) at 002; PX04408 (SPLS) at 002; [redacted]; [redacted]; PX04506 (SPLS) at 003.

106. Combined, Staples and Office Depot serve almost all of the Fortune 100. *See*, *e.g.*, PX04253 (SPLS) at 002 ("SPLS estimates that it has 2/3 of the Fortune 100 while ODP has most of the balance."); [redacted].

107. Ordinary course materials from third parties confirm that Defendants have a high market share in the sale and distribution of office supplies to large B-to-B customers. *See*, *e.g.*, PX04281 (SPLS) at 006 (attaching report from Cleveland Research); PX07010 (Chevron) at 004 ("The Big Three [were] soon to become the Big Two, and [would] make up 75% of total market share"); PX07071 (HPG) at 002 (estimating that Staples and Office Depot have a combined market share of about 80%).

III. THE EVIDENCE SHOWS THAT THE MERGER WOULD SUBSTANTIALLY LESSEN COMPETITION IN THE RELEVANT MARKET.

108. The merger will substantially lessen competition in the sale and distribution of consumable office supplies to large B-to-B customers. The evidence in the record—including ordinary course documents, testimony, and data—uniformly shows that Staples and Office Depot are the top two consumable office supplies vendors, and closest competitors, for most large B-to-B customers. They compete vigorously head-to-head for the large B-to-B customers, and that delivers substantial benefits to those customers in the form of lower prices and improved service. The elimination of this competition will result in substantial harm. Shapiro Hrg. 2100:10-2102:25, 2112:13-24, 2317:19-2318:16, 2325:10-19, 2331:13-2333:13, 2339:2-18, 2349:15-2351:2.

A. Dr. Shapiro's Analyses Show that the Merger Will Likely Result in Harm.

109. Dr. Shapiro's analysis of bidding events for large B-to-B customers ("bid data") is unrebutted. Dr. Shapiro analyzed five separate sources of bidding data, which included

Defendants' win-loss data, data on Defendants' top wins and top losses, and Fortune 100 bid data. PX06500 (Shapiro Demonstrative) at 039. That analysis shows that Staples and Office Depot are each other's closest competitor. Indeed, the bid data show that Staples and Office Depot appear as competitors far more frequently than any other competitor and routinely compete head-to-head. Shapiro Hrg. 2331:8-12, 2333:2-10, 2333:18-21; PX06500 (Shapiro Demonstrative) at 041-043; *see also* [redacted].

110. The bid data also show that Staples and Office Depot win large B-to-B customer bids far more frequently than any other competitor. Shapiro Hrg. 2334:10-21; PX06500 (Shapiro Demonstrative) at 044-046. Defendants dominate at winning large B-to-B customer bid opportunities. Shapiro Hrg. 2334:25-2335:2. Other bidders rarely appear or win. Shapiro Hrg. 2333:18-21, 2338:13-2339:1; PX06500 (Shapiro Demonstrative) at 041-046.

111. Dr. Shapiro's bid data analysis also showed that when Office Depot lost large B-to-B customers, 78% of those losses were to Staples. Shapiro Hrg. 2337:8-17; PX06500 (Shapiro Demonstrative) at 048. When Staples lost large B-to-B customers, 81% of those losses were to Office Depot. Shapiro Hrg. 2337:20-22; PX06500 (Shapiro Demonstrative) at 049; *see also* [redacted] PX04094 (SPLS) at 023; PX04108 (SPLS) at 001.

112. Dr. Shapiro analyzed each Defendant's top 50 losses. Shapiro Hrg. 2337:23-2338:9. Of Staples' top 50 losses, 80% were to Office Depot. Shapiro Hrg. 2338:3-9; PX06500 (Shapiro Demonstrative) at 050. Of Office Depot's top 50 losses, 72% were to Staples. Shapiro Hrg. 2338:3-9; PX06500 (Shapiro Demonstrative) at 050.

113. Altogether, Dr. Shapiro's various analyses of the bid data indicate that the proposed

Merger would likely result in significant competitive harm, and they confirm the concerns raised by Defendants' large share of the relevant market. Shapiro Hrg. 2366:22-2367:3. Dr. Shapiro's bid data analyses suggests significant anticompetitive effects are likely. Shapiro Hrg. 2338:13-2339:1, 2366:22-2367:6; PX06100 (Shapiro Rpt.) at 22-23, 41.

114. Dr. Shapiro explained that the lower bound on the magnitude of harm likely resulting from the proposed Merger is at least 6%. Shapiro Hrg. 2347:17-2349:22; PX06500 (Shapiro Demonstrative) at 053; PX06300 (Shapiro Reply) at 024-025. This is a lower bound because it only reflects one aspect (cost of goods sold) of the competitive gap between Office Depot and the next strongest competitor, W.B. Mason. Shapiro Hrg. 2349:15-22; PX06300 (Shapiro Reply) at 024. But W.B. Mason and numerous other regional vendors face additional significant competitive disadvantages. Shapiro Hrg. 2348:21-2349:6; PX06300 (Shapiro Reply) at 024; *see also infra* Section III.E.

B. <u>The Evidence Confirms That Defendants Are Each Other's Closest Competitor.</u>

1. <u>Defendants' Evidence Confirms That Staples and Office Depot Are Each Other's Closest Competitor for Large B-to-B Customers.</u>

115. Defendants' executives testified that Staples and Office Depot are each other's closest competitor for the sale of consumable office supplies to large B-to-B customers. PX02002 (Calkins (ODP) IH 154:12-17); PX02116 (Ringel (SPLS) Dep. 170:10-23).

116. Defendants' ordinary course documents show that Staples views Office Depot as its closest competitor, and vice versa. *See, e.g.*, [redacted]; PX04360 (SPLS) at 001; PX04414 (SPLS) at 008 ("For core office supplies we often compare ourselves to our most direct competitor, ODP"); PX04506 (SPLS) at 007 (same); PX05212 (ODP) at 018; [redacted]; [redacted]

at 008; *see also* PX04047 (SPLS) at 023; [redacted]; PX05313 (ODP) at 008; PX08176 (SPLS) at 007 ("In the contract business, we've got basically two big competitors, Office Depot and OfficeMax.").

117. Defendants' ordinary course documents show that Staples and Office Depot are the best choices for large B-to-B customers. *See*, *e.g.*, [redacted]; PX04042 (SPLS) at 024 ("Act like the dominant player we are in a 2 player OP market"); [redacted] PX04304 (SPLS) at 010; [redacted]; [redacted] [redacted]; [redacted]; PX05215 (ODP) at 002; PX05250 (ODP) at 003. [redacted]

118. Staples and Office Depot routinely characterize the contract channel as a two-player market. *See*, *e.g.*, PX04042 (SPLS) at 024; PX04083 (SPLS) at 001; PX04304 (SPLS) at 010; PX04246 (SPLS) at 001 (Staples and ODP are like Coke and Pepsi); PX04366 (SPLS) at 001; PX05311 (ODP) at 001; *see also* PX02116 (Ringel (SPLS) Dep. 149:8-150:12); PX04082 (SPLS) at 029 ("[T]here are only two real choices for customers. Us or Them."); PX04304 (SPLS) at 010.

119. Defendants recognize that competition from each other is causing margin declines for large B-to-B customers. *See*, *e.g.*, PX05178 (ODP) at 002 ("What is driving [the decline in margin for global accounts] across the board? Competition – mostly from Staples."); *see also* [redacted]

[redacted]

120. [redacted]

121. Defendants frequently are the only or the top two bidders for the office supplies business of large B-to-B customers. *See*, *e.g.*, [redacted]; PX05255 (ODP) at 001 ("It is down to OD and Staples"); PX05331 (ODP) at 001-002; *see also* [redacted]; [redacted].

122. Defendants identify each other as the primary competitor for large B-to-B customers more frequently than any other office supplies vendor. *See*, *e.g.*, PX04367 (SPLS) at 007; [redacted]; PX04630 (SPLS) at 007; [redacted]; [redacted]; PX05158 (ODP) at 001 (retaining [redacted] as a customer by "fending off Staples and assertions that the merger integration was a negative"); [redacted]; [redacted].

123. Defendants frequently target each other's large B-to-B customers in an attempt to get those customers to switch. PX04052 (SPLS) at 001, 003-005; [redacted]; [redacted]; PX05327 (ODP) at 001; [redacted]; *see also* [redacted]; PX05188 (ODP) at 003.

124. For example, in late 2014 and all of 2015, Staples executed a strategy called "Operation Take Share," which had the explicit goal of applying "intense focus [on] taking ODP/OMX

market share for the remainder of 2014 and beginning of 2015." PX04432 (SPLS) at 003.

2. <u>Large B-to-B Customers View Staples and Office Depot as Their Best Options.</u>

125. It is unrebutted that Defendants are large B-to-B customers' best options for consumable office supplies. *See, e.g.*, O'Neill (AEP) Hrg. 225:14-16, 225:25-226:5 (after Staples and Office Depot "we're in trouble"); Meester (Best Buy) Hrg. 1205:17-20; Wright (HPG) Hrg. 1938:14-1939:18; PX03002 (B of A Decl.) ¶¶ 39-40; PX03044 (Valero Suppl. Decl.) ¶ 14; *see also* PX02116 (Ringel (SPLS) Dep. 149:8-150:12); PX04082 (SPLS) at 029 ("[T]here are only two real choices for customers. Us or Them.").

126. Large B-to-B customers view Defendants as the only two office supplies vendors that can meet their office supplies needs on a national scale. *See*, *e.g.*, O'Neill (AEP) Hrg. 225:14-226:5; Cervone (McDonald's) Hrg. 361:2-21, 373:9-15, 492:3-7; Wilson (Select Medical) Hrg. 1018:1-13; Wright (HPG) Hrg. 1896:9-15, 1939:16-18; PX02113 (Ho (Rite Aid) Dep. 86:12-17); PX02122 (Eubanks-Saunders (B of A) Dep. 149:25-151:25, 155:13-156:11, 156:21-160:7); PX07001 (Wells Fargo) at 002; PX07008 (Capital One) at 001; PX07010 (Chevron) at 004; [redacted]; *see also* [redacted]; PX07003 (State Farm) at 003.

127. Large B-to-B customers have told Defendants that Staples and Office Depot are the only two options for the office supplies needs of large B-to-B customers. *See*, *e.g.*, PX05436 (ODP) at 001 ("You 2 [Office Depot and Staples] are the only companies left in this space with the capabilities to handle corporate accounts."); *see also* [redacted].

128. Large B-to-B customers testified that Staples and Office Depot are the only two vendors that actively seek their consumable office supplies business. *See*, *e.g.*, Meester (Best Buy) Hrg. 1205:9-16 (since Best Buy amended its contract with Office Depot in 2013, neither Amazon nor

W.B. Mason has solicited Best Buy's general office supplies or copy paper business); *see also* Meehan (WBM) Hrg. 1600:25-1601:2 (W.B. Mason does not solicit large B-to-B customers if most of their business is outside of Masonville); Wright (HPG) Hrg. 1941:18-20, 1943:8-10; 1943:14-1945:1 (testifying that W.B. Mason, Grainger, and Amazon have expressed no interest in serving as HPG's primary office supplies vendor).

129. Defendants are frequently the only two vendors that submit bids in response to RFPs. *See, e.g.*, PX02130 (Knepper (Foot Locker) Dep. 135:19-25); *see also* Meehan (WBM) Hrg. 1614:16-1615:8.

130. Eliminating Office Depot as an independent competitor would leave large B-to-B customers without effective competition for their office supplies needs. *See, e.g.*, PX06100 (Shapiro Rpt.) at 033-043; Cervone (McDonald's) Hrg. 377:19-378:7; Moise (Fifth Third Bank) Hrg. 982:4-19; Wilson (Select Medical) Hrg. 1127:7-23; Wright (HPG) Hrg. 1952:22-1953:25; PX02119 (O'Neill (AEP) Dep. 165:11-23); PX02130 (Knepper (Foot Locker) Dep. 189:19-190:1); PX07009 (Capital One) at 001; [redacted]; PX07001 (Wells Fargo) at 002.

131. Without the threat of moving their business to Office Depot, large B-to-B customers would have no choice but to pay higher prices. PX06100 (Shapiro Rpt.) at 009-010, 025.

C. <u>Large B-to-B Customers Benefit from Head-to-Head Competition Between Defendants.</u>

132. It is unrebutted that competition between Staples and Office Depot results in lower prices for large B-to-B customers. *See, e.g.*, O'Neill (AEP) Hrg. 341:11-16; Moise (Fifth Third Bank) Hrg. 913:24-914:8; Wilson (Select Medical) Hrg. 1017:12-20; Meester (Best Buy) Hrg. 1204:18-1205:8.

133. Some of the many examples of this direct head-to-head competition include:

a. In early 2015, HPG began negotiations with Staples to extend its office supplies contract. Staples initially offered a price reduction but later retracted it. When HPG then invited both Staples *and* Office Depot to compete for its office supplies business, HPG was able to elicit substantial price concessions from both vendors. Wright (HPG) Hrg. 1896:9-1898:14, 1901:2-16.

b. In May 2015, Staples offered $[redacted] in upfront money to retain [redacted], a Fortune 500 company. When Staples discovered that [redacted] was considering Office Depot, it reduced prices as well: "This will [reduce our profit] from a [redacted]. I know it's a significant investment but if it goes to a formal RFP involving [Office] Depot, it could end up costing us a lot more." PX04294 (SPLS) at 001.

c. In April 2015, to avoid losing [redacted]' business to Staples, Office Depot offered a $[redacted] signing bonus, warning: "TIMING – This offer is time sensitive. If and when the purchase of Office Depot [by Staples] is approved, Staples will have no reason to make this offer." PX05235 (ODP) at 003-004; [redacted].

d. Staples was "in a dog fight with ODP" in February 2015 for [redacted]'s business, so it offered an additional 1.5% volume rebate, but bemoaned that "ODP is getting cheaper by the week." PX04064 (SPLS) at 001.

e. In November 2014, Staples offered a $[redacted] upfront payment to win a contract with [redacted], beating Office Depot's offer [redacted]. PX04297 (SPLS) at 002; [redacted].

f. To avoid losing [redacted] to Office Depot in November 2014, Staples increased its upfront payment to $[redacted] PX04034 (SPLS) at 001.

g. In October 2014, Staples increased the upfront payment it offered [redacted] to $[redacted] to try to win the business from Office Depot. PX04033 (SPLS) at 001-002; [redacted].

h. In March 2014, [redacted] informed Office Depot that it was putting its business out for bid. [redacted] and Office Depot discussed the fact that the bidding would come down to Staples and Office Depot, the "only two players that can service them nationwide." PX05215 (ODP) at 002. To keep the business from Staples, Office Depot offered [redacted] a retention incentive of $[redacted] per year for three years. PX05266 (ODP) at 001.

i. [redacted] a Fortune 100 company, pitted Staples and Office Depot against each other in an RFP with multiple rounds of bidding. To beat Staples, Office Depot needed "to go deeper than 3%" core list savings to a "total of 6% core list savings." Staples' lower line-item pricing won out in the end and [redacted] switched from Office Depot to Staples in March 2014.

PX05234 (ODP) at 001; PX04300 (SPLS) at 001-002.

j. [redacted], a Fortune 500 company, switched back and forth between Staples and Office Depot between 2003 and 2013. Those switching decisions were always "about the lowest price offered." In mid-January 2014, [redacted] issued an RFP. Staples offered upfront money, immediate cost savings, and tiered volume rebates in an effort to retain the business. [redacted]. PX04373 (SPLS) at 001; [redacted].

k. In October 2013, Staples and Office Depot each bid on the business of [redacted] a Fortune 100 [redacted] company. Office Depot put "$[redacted] cash on [the] table." [redacted]. PX04029 (SPLS) at 001; [redacted].

l. [redacted]

134. As shown above, Defendants routinely offer customers upfront payments (e.g., retention incentives, conversion incentives, renewal bonuses, and pre-bates) to win or retain business from each other. Wilson (Select Medical) Hrg. 1017:21-25; PX02122 (Eubanks-Saunders (B of A) Dep. 37:18-21, 38:7-22); PX02137 (Beck (DaVita) Dep. 221:17-22, 239:7-25); PX04028 (SPLS) at 001-002; PX04029 (SPLS) at 001; [redacted]; PX04297 (SPLS) at 001-002; [redacted]; [redacted]; [redacted]; PX04458 (SPLS) at 002; [redacted]; PX05235 (ODP) at 004; [redacted]; PX05327 (ODP) at 001; PX05432 (ODP) at 001-003; PX05507 (ODP) at 001; [redacted]; *see also* [redacted]; PX05255 (ODP) at 001.

135. Defendants routinely increase the upfront payments they have offered customers in

response to direct competition from each other. *See, e.g.*, PX02145 (DeWitt (Highmark) Dep. 166:14-23); PX04029 (SPLS) at 001; PX04033 (SPLS) at 001; PX04034 (SPLS) at 001; [redacted]; [redacted]; [redacted]; [redacted]; PX05237 (ODP) at 002; [redacted]; PX05481 (ODP) at 001; PX05482 (ODP) at 001, 002.

136. Defendants routinely offer or increase rebates and discounts to win or retain business from each other. *See, e.g.*, Meester (Best Buy) Hrg. 1200:13-16, 1203:23-1204:6; PX02145 (DeWitt (Highmark) Dep. 168:24-169:10); PX03029 (McDonald's Decl.) ¶ 5 (Office Depot retained McDonald's business by offering a [redacted]% discount on non-core items); [redacted]; PX04064 (SPLS) at 001; PX04294 (SPLS) at 001; [redacted]; PX04383 (SPLS) at 001; PX05234 (ODP) at 001; PX05330 (ODP) at 001-002; [redacted]; [redacted]; [redacted]; *see also* PX05255 (ODP) at 001 ("It is down to OD and Staples . . . . [D]o you think we should . . . drop our core from [redacted]% to [redacted] or [redacted]%?").

137. In response to direct competition from each other, Defendants increase large B-to-B customers' overall savings in order to win business. *See, e.g.*, Wright (HPG) Hrg. 1896:9-1898:14, 1901:2-16; PX03013 (Wilson (Select Medical) Decl.) ¶ 6; PX03030 (Highmark Decl.) ¶ 22; PX03032 (Pfizer Decl.) ¶ 4; PX04294 (SPLS) at 001; PX04295 (SPLS) at 001-002; PX04302 (SPLS) at 001; PX04400 (SPLS) at 001-002; PX05016 (ODP) at 002; [redacted]; [redacted]; PX05432 (ODP) at 001-003; PX05433 (ODP) at 001; PX07004 (State Farm) at 001-002; [redacted].

138. Large B-to-B customers use competition (or the threat of competition) between Defendants to obtain lower prices when renewing contracts. *See, e.g.*, Wright (HPG) Hrg.

1893:16-1894:4; [redacted]; PX02122 (Eubanks-Saunders (B of A) Dep. 105:2-15); PX02144 (Cervone (McDonald's) Dep. 236:5-238:7); [redacted]; PX05020 (ODP) at 001-002; PX05317 (ODP) at 002; PX07002 (Aramark) at 010; [redacted]; [redacted].

139. Defendants offer discounts to convince customers to renew their contracts without issuing RFPs (thereby avoiding competition with each other). *See*, *e.g.*, Wright (HPG) Hrg. 1893:16-1894:4; PX02141 (Perkins (GEICO) Dep. 99:12-102:6); PX02144 (Cervone (McDonald's) Dep. 233:10-234:24); PX03010 (Dryden Decl.) ¶ 5; [redacted]; PX04294 (SPLS) at 001; PX04371 (SPLS) at 001; [redacted]; PX05176 (ODP) at 001-003; PX05179 (ODP) at 001; PX05316 (ODP) at 001.

140. Staples and Office Depot frequently solicit large B-to-B customers while they are under contract. *See*, *e.g.*, Wilson (Select Medical) Hrg. 1016:12-1017:3; PX05327 (ODP) at 001.

141. Large B-to-B customers routinely use Staples and Office Depot as leverage against each other to obtain better pricing. *See*, *e.g.*, PX02121 (Harris (Walgreens) Dep. 149:3-150:12); PX03026 (DaVita Decl.) ¶ 30; PX03029 (McDonald's Decl.) ¶ 11; PX05150 (ODP) at 001-002; [redacted]; PX07000 (General Dynamics) at 006-008; [redacted]; [redacted].

142. Large B-to-B customers also value non-price factors, including service, communication, replacement products, and utilization reporting. *See*, *e.g.*, Wright (HPG) Hrg. 1914:15-1915:10; PX02119 (O'Neill (AEP) Dep. 262:16-263:5); [redacted].

143. Competition between Staples and Office Depot results in better service and higher quality. Moise (Fifth Third Bank) Hrg. 914:1-8; Wilson (Select Medical) Hrg. 1017:12-20; PX03034 (Fox Decl.) ¶ 20 ("I believe this ability to switch back to Office Depot gives Staples an

incentive to continue to provide us with high-quality service at low prices.").

144. Defendants compete directly with each other to provide sophisticated IT platforms that integrate with large B-to-B customers' IT platforms. PX04487 (SPLS) at 001 (failing to support [redacted] punch out via Ariba would "put us at risk of losing the business to ODP who has demonstrated agility with their technology"); PX05328 (ODP) at 002.

145. Defendants compete directly with each other to provide the best possible contract terms. *See*, *e.g.*, [redacted].

146. Defendants compete directly with each other to provide high levels of customer service. *See*, *e.g.*, PX04293 (SPLS) at 001 ("[Staples] must capitalize on [Office Depot's warehouse closures] by aggressively discussing them with the prospects in these markets").

147. Defendants compete directly with each other to provide other non-price services. *See*, *e.g.*, PX02130 (Knepper (Foot Locker) Dep. 50:1-8) (direct-to-store delivery); [redacted]; PX05284 (ODP) at 001 (desktop delivery).

D. Defendants Acknowledge the Merger Will Substantially Lessen Competition in the Relevant Market.

148. Defendants acknowledge they will not have to compete as aggressively after the merger. *See*, *e.g.*, PX04357 (SPLS) at 001 (Staples noting that ODP is "try[ing] to get our large customers to go out to bid, before they lose Office Depot as a lever to negotiate lower prices with Staples."); PX05235 (ODP) at 004 ("An offer like this will not be available to [redacted] after the sale of OD is approved, because Staples will have no reason to make an offer like that.").

149. Defendants have told their customers that the merger will reduce competition. *See*, *e.g.*, [redacted]; PX05393 (ODP) at 002 ("As of right now, your incumbent (Staples) and Office Depot are still 100% competitors. That may

change at the end of the year if the FTC allows the acquisition to go through. If they do however, you will not have taken advantage of your last opportunity to check the market place and reduce your pricing according to the market's current price and there will no longer be competition between the two largest suppliers to insure you have the lowest price!"); PX05514 (ODP) at 003 ("Today, the FTC announced 45 days for its final decision. You still have time! You would be able to leverage the competition, gain an agreement that is grandfathered in and drive down expenses.").

150. For example, Staples wrote the following to [redacted], a large B-to-B customer: "[T]he FTC is expected to approve the Staples acquisition of Office Depot/Max, and it is my strong suggestion that [redacted] consider any and all program offerings from Staples beforehand. [redacted] will never get a more competitive offer than right now." PX04567 (SPLS) at 002.

151. Office Depot has made similar statements to customers. *See, e.g.*, PX05249 (ODP) at 001 ("[The merger] will remove your ability to evaluate your program with two competitors. There will be only one."); PX07175 ([redacted]) at 001 ("I am sure you have heard the news today regarding the Staples acquisition. . . . I thought it was odd after the Max/Depot merger that global and large national organizations had basically only two options for office supplies. If this deal is approved that will dwindle to one.").

E. <u>Other Consumable Office Supplies Vendors Are Inferior Options for Large B-to-B Customers.</u>

1. <u>W.B. Mason Cannot Constrain a Post-Merger Staples.</u>

152. W.B. Mason is the third-largest B-to-B office supplies vendor in the United States. PX03021 (WBM Decl.) ¶ 6; [redacted]. It has a share of less than 1% in the relevant market. PX06300 (Shapiro Reply) at 038-042. W.B. Mason has no customers in the Fortune 100 and only 9 customers in the Fortune 1000. Meehan (WBM) Hrg. 1611:21-1611:24.

153. W.B. Mason is based in Massachusetts and only serves customers headquartered in its primary distribution footprint, known as "Masonville" (with one exception). Meehan (WBM) Hrg. 1562:21-23, 1575:20-25. Masonville is an area encompassing 13 states plus the District of Columbia, stretching down the east coast from Maine to Northern Virginia and as far west as Cleveland, Ohio. Meehan (WBM) Hrg. 1564:20-1565:9, 1572:13-1573:7.

154. W.B. Mason lacks the ability to service locations outside of Masonville on its own. Meehan (WBM) Hrg. 1584:23-1585:9; Wright (HPG) Hrg. 1940:2-16; PX02141 (Perkins (GEICO) Dep. 132:19-137:15); [redacted]. Consequently, W.B. Mason does not bid on all large customer RFPs, and does not solicit large customers if most of their business is outside of Masonville. Meehan (WBM) Hrg. 1600:25-1601:2, 1614:16-1615:8, 1707:12-1708:24. For example, W.B. Mason told Fifth Third Bank that W.B. Mason does not "have the size of infrastructure in the Midwest to support [Fifth Third Bank's] footprint." Moise (Fifth Third Bank) Hrg. 907:17-23; *see also* Meehan (WBM) Hrg. 1707:12-23. Outside of Masonville, W.B. Mason's revenues in FY2015 were only $40 million. Meehan (WBM) Hrg. 1574:11-13.

155. The few large B-to-B customers that Defendants have lost to W.B. Mason are all headquartered in Masonville. *See, e.g.*, PX02109 (Calkins (ODP) Dep. 85:6-86:14). And several large B-to-B customers testified that W.B. Mason has not even solicited their business. *See, e.g.*, O'Neill (AEP) Hrg. 330:10-11; Cervone (McDonald's) Hrg. 371:2-4; Wilson (Select Medical) Hrg. 1017:4-7; Meester (Best Buy) Hrg. 1205:9-12; Wright (HPG) Hrg. 1941:18-20; *see also* Meehan (WBM) Hrg. 1600:25-1601:2.

156. Some large B-to-B customers have switched from W.B. Mason to Staples or Office Depot because of service issues outside of Masonville. *See, e.g.*, [redacted]; PX03028 (ANN INC. Decl. ¶¶ 3-6); Meehan (WBM) Hrg. 1598:13-1599:2.

157. W.B. Mason does not manage large B-to-B customer accounts with hundreds of locations well. [redacted]; *see also* Meehan (WBM) Hrg. 1696:6-15. W.B. Mason is unable to fulfill large B-to-B customers' requirements. Meehan (WBM) Hrg. 1697:2-8; *see also* Wright (HPG) Hrg. 1940:2-1941:4; PX03028 (ANN INC. Decl.) ¶ 7. [redacted]. Its distribution centers are inferior to Defendants' distribution centers. *See, e.g.*, Meehan (WBM) Hrg. 1577:12-15; [redacted]. And it lacks a strong reputation for back-end systems. *See, e.g.*, [redacted].

158. Post-merger, W.B. Mason will not be able to constrain Staples in any area outside of Masonville. Meehan (WBM) Hrg. 1718:23-1719:4, 1837:8-22; PX05316 (ODP) at 001 (referring to W.B. Mason's bid as "filler. Competition is SPLS.").

2. Other Regional and Local Office Supplies Vendors Are Inferior Options for Large B-to-B Customers.

159. Defendants view regional and local office supplies vendors, as well as consortia thereof, as "nobodies" that "don't have much volume." PX04083 (SPLS) at 001.

(a) Regional Office Supplies Vendors Do Not Compete for Large B-to-B Customers Today.

160. Regional and local office supplies vendors have very few—if any—large B-to-B customers. *See, e.g.*, PX06300 (Shapiro Reply) at 041-042; PX03025 (Guernsey Decl.) ¶¶ 6, 10; [redacted]; PX03079 (ImpactOffice Suppl. Decl.) ¶ 7; [redacted]; [redacted]; *see also* [redacted].

161. Regional and local vendors typically do not bid on RFPs issued by large B-to-B customers. *See, e.g.*, Moise (Fifth Third Bank) Hrg. 907:7-14; Wright (HPG) Hrg. 1941:18-20; PX02101 (Brown (HiTouch) Dep. 110:11-15); PX02137 (Beck (DaVita) Dep. 235:23-236:1;

236:16-18); PX03025 (Guernsey Decl.) ¶¶ 10, 12; [redacted]; [redacted]; [redacted]; [redacted]. And large B-to-B customers rarely invite regional office supplies vendors to bid to be their primary office supplies vendor. *See, e.g.*, Wright (HPG) Hrg. 1941:21-1942:16; PX03025 (Guernsey Decl.) ¶ 11. Even when regional and local office supplies vendors respond to RFPs issued by large B-to-B customers, they are usually eliminated from consideration. *See, e.g.*, PX02138 (Sears (Realogy) Dep. 156:15-21, 191:6-17); [redacted]; PX03074 (Archer Daniels Midland Suppl. Decl.) ¶ 3; [redacted].

162. Regional and local vendors lack success in winning large B-to-B customer accounts. *See, e.g.*, [redacted]; PX03072 (Complete Office LLC Suppl. Decl.) ¶ 7; [redacted]. Most regional and local office supplies vendors—including American Paper & Twine, Capital Office Products, Complete Office LLC, Forms & Supply, Guernsey, and HiTouch—have not won any large B-to-B customers from Defendants in the last two years. PX02109 (Calkins (ODP) Dep. 87:12-14, 87:23-88:1, 90:10-91:1, 91:18-21, 107:1-22, 108:2-22, 109:15-110:2).

(b) <u>Regional Office Supplies Vendors Are at a Competitive Disadvantage Compared to Defendants.</u>

163. Regional and local vendors are inferior alternatives to Staples and Office Depot for large B-to-B customers. *See, e.g.*, O'Neill (AEP) Hrg. 332:17-333:13; Wilson (Select Medical) Hrg. 1009:24-1010:13; Wright (HPG) Hrg. 1941:21-1942:16; *see also* PX02101 (Brown (HiTouch) Dep. 206:14-19). According to Staples, "smaller, regional players [like W.B. Mason] lack the resources to service large commercial and enterprise accounts." PX04635 (SPLS) at 009.

164. Regional and local office supplies vendors have regional and local service footprints.

See, e.g., Morrison (PDME) Hrg. 1374:20-1375:5, 1375:24-1376:9; Wright (HPG) Hrg. 1940:2-1941:16; PX03025 (Guernsey Decl.) ¶ 3; PX03029 (McDonald's Decl.) ¶¶ 13-14; PX03072 (Complete Office LLC Suppl. Decl.) ¶ 3; PX03075 (Forms & Supply Decl.) ¶¶ 4, 5; PX03079 (ImpactOffice Suppl. Decl.) ¶¶ 4-6, 10, 12-13; [redacted]; [redacted]. Defendants are the only office supplies vendors who can serve large B-to-B customers that have a nationwide footprint. Meehan (WBM) Hrg. 1601:3-8, 1687:13-22, 1697:2-8.

165. Regional and local office supplies vendors must rely on wholesalers to deliver products to customers outside their local geographic service area. *See, e.g.*, Morrison (PDME) Hrg. 1376:4-25,1378:7-11; PX03011 (IS Group Decl.) ¶ 7; PX03072 (Complete Office LLC Suppl. Decl.) ¶ 4; *see also* Meehan (WBM) Hrg. 1588:3-9, 1589:13-19. As a result, regional and local office supplies vendors incur significantly higher costs delivering to customers outside of their geographic service area. *See, e.g.*, Morrison (PDME) Hrg. 1377:1-20; Meehan (WBM) Hrg. 1585:10-21, 1586:5-14, 1588:3-9, 1589:2-6; PX03000 (HiTouch Decl.) ¶ 8; [redacted]; PX03025 (Guernsey Decl.) ¶¶ 3, 7; [redacted]; [redacted]; [redacted]; [redacted]; [redacted].

166. Regional and local office supplies vendors source more of their consumable office supplies from wholesalers than Staples and Office Depot do. *See*, *e.g.*, Meehan (WBM) Hrg. 1584:23-1585:2, 1578:19-24; PX02109 (Calkins (ODP) Dep. 163:9-15, 164:1-6); [redacted]; PX03001 (AOPD Decl.) ¶ 5; PX03025 (Guernsey Decl.) ¶ 13(c); PX03072 (Complete Office LLC Suppl. Decl.) ¶ 5; [redacted]; [redacted]; [redacted];

[redacted]; PX04468 (SPLS) at 051; [redacted].

167. Defendants, by contrast, buy directly from manufacturers [redacted]% or more of the consumable office supplies that they resell. PX04629 (SPLS) at 004-05; [redacted] at 001; *see also* PX02110 (Goodman (SPLS) Dep. 183:7-15). This approach benefits Defendants in many ways, including higher fill rates, faster deliveries, reduced COGS, and lower prices for large B-to-B customers. *See*, *e.g.*, [redacted]; [redacted]; [redacted]; [redacted]; PX04468 (SPLS) at 051; [redacted]; PX07417 (Archer Daniels Midland) at 012, 029.

168. Due to their smaller purchasing scale and reliance on wholesalers, regional and local office supplies vendors cannot price as competitively as Staples and Office Depot. *See, e.g.*, Morrison (PDME) Hrg. 1378:12-22; [redacted]; PX02106 (Guernsey (Guernsey) Dep. 209:8-210:5); [redacted]; [redacted]; [redacted]; *see also* [redacted]; Morrison (PDME) Hrg. 1387:13-24, 1511:7-17. The regional and local vendors' smaller purchasing scale results in higher COGS than Staples and Office Depot. PX06100 (Shapiro Rpt.) at 035-037. It is also more expensive to buy consumable office supplies through wholesalers than to purchase them directly from manufacturers. *See*, *e.g.*, Meehan (WBM) Hrg. 1585:19-21, 1595:21-24; PX02002 (Calkins (ODP) IH 137:4-11, 138:7-139:5); PX02106 (Guernsey (Guernsey) Dep. 209:8-210:5); PX03000 (HiTouch Decl.) ¶ 6; PX04240 (SPLS) at 001; PX04377 (SPLS) at 001; [redacted] 021.

169. Regional and local office supplies vendors lack sufficient sales and customer service infrastructure to adequately service large B-to-B customers. *See*, *e.g.*, Cervone (McDonald's) Hrg. 497:17-24; Meehan (WBM) Hrg. 1697:2-8; Wright (HPG) Hrg. 1940:2-1942:16; [redacted]

[redacted]; PX03026 (DaVita Decl.) ¶ 21; [redacted]; [redacted]; [redacted]. And they do not have the necessary IT infrastructure. *See*, *e.g.*, Cervone (McDonald's) Hrg. 497:17-498:1; Meehan (WBM) Hrg. 1624:1-24; [redacted]; PX03025 (Guernsey Decl.) ¶ 15; *see also* PX03008 (TriMega Decl.) ¶ 8.

170. Regional and local office supplies vendors also lack the financial resources to offer the significant upfront payments that large B-to-B customers often expect. *See*, *e.g.*, Meehan (WBM) Hrg. 1686:11-17; [redacted]; [redacted]; PX03025 (Guernsey Decl.) ¶ 13(d); [redacted]; [redacted]; [redacted]. The rebates and incentives that Office Depot provides its B-to-B customers amount to [redacted] of its contract revenue, [redacted], which is 15% of W.B. Mason's annual revenue as a company. *See* PX02002 (Calkins (ODP) IH 223:6-9); PX02109 (Calkins (ODP) Dep. 58:23-25); Meehan (WBM) Hrg. 1573:9-11.

171. Even when partnered with wholesalers, regional and local vendors do not have established reputations necessary to work with large B-to-B customers. PX03026 (DaVita Decl.) ¶ 22; [redacted].

3. **Ad Hoc Networks and Consortia of Local and Regional Distributors Are Inferior Options for Large B-to-B Customers.**

172. Sourcing consumable office supplies from different vendors for each region of the country is an inferior option for large B-to-B customers. *See, e.g.*, Meehan (WBM) Hrg. 1615:9-1617:9; PX03003 (Edward Jones Decl.) ¶¶ 15-16.

173. Using an ad-hoc network of local and/or regional office supplies vendors would eliminate the benefits of consolidating their spend with a single vendor. *See, e.g.,* O'Neill (AEP) Hrg.

204:1-20; Meehan (WBM) Hrg. 1617:1-1618:4; Wright (HPG) Hrg. 1929:8-1931:19; PX02137 (Beck (DaVita) Dep. 218:10-23); PX02155 (Lozier (Kindred) Dep. 220:7-22); *see also* PX04329 (SPLS) at 001. It would increase customers' administrative costs and decrease their bargaining leverage, resulting in higher total cost. *See*, *e.g.*, O'Neill (AEP) Hrg. 203:24:204:20; Meehan (WBM) Hrg. 1616:16-20; Wright (HPG) Hrg. 1931:5-19; PX02122 (Eubanks-Saunders (B of A) Dep. 209:19-215:2).

174. Consortia of independent vendors that supply customers separately—each with its own invoices, product selection, customer service, cost structure, and capabilities—are not attractive options for large B-to-B customers. *See*, *e.g.*, Wright (HPG) Hrg. 1947:11-1948:19; PX02122 (Eubanks-Saunders (B of A) Dep. 116:4-117:4; 176:4-16); *see also* PX03025 (Guernsey Decl.) ¶ 19. Consortia face significant cost and price disadvantages compared to Defendants. *See*, *e.g.*, PX02114 (Gentile (IS Group) Dep. 80:23-81:5, 183:8-184:9); PX03001 (AOPD Decl.) ¶¶ 11-12; PX03008 (TriMega Decl.) ¶ 5. Additionally, consortia lack the financial resources to make upfront payments like those Defendants offer to win large B-to-B customers. PX03008 (TriMega Decl.) ¶¶ 14-15, 21.

175. Consortia do not target large B-to-B customers. *See*, *e.g.*, PX02114 (Gentile (IS Group) Dep. 179:3-10, 234:4-5); PX03008 (TriMega Decl.) ¶ 9. They have not been successful in competing for the consumable office supplies business of large B-to-B customers. *See*, *e.g.*, PX02114 (Gentile (IS Group) Dep. 50:12-14) (no F500 contracts); *id*. at 233:5-11 (EPIC, the joint venture between IS Group and TriMega, has not been invited to an office supplies RFP); PX03000 (HiTouch Decl.) ¶ 23; [redacted] PX03008 (TriMega Decl.) ¶¶ 9-10, 13-17, 22; PX03025 (Guernsey Decl.) ¶¶ 18-19. To the extent that consortia sell and distribute consumable office supplies to Fortune 1000 companies, their sales are miniscule. *See*,

e.g., [redacted].

4. Tier 1 Diversity Vendors Are Not Independent Competitors and—on Their Own—Are Inferior Options for Large B-to-B Customers.

176. Tier 1 diversity vendors serve large B-to-B customers only in partnership with Staples or Office Depot. Morrison (PDME) Hrg. 1435:21-1436:14; [redacted]; PX03043 (Guy Brown Decl.) ¶¶ 6-8; PX03049 (MRO/GBEX Suppl. Decl.) ¶¶ 3, 12; PX03053 (Midway Suppl. Decl.) ¶ 4; PX03055 (TBS Decl.) ¶ 4; [redacted]. Tier 1 diversity vendors cannot serve large B-to-B customers on their own. Morrison (PDME) Hrg. 1378:7-22, 1387:13-24, 1395:5-7; [redacted]; PX03049 (MRO/GBEX Suppl. Decl.) ¶¶ 8, 12; PX03053 (Midway Suppl. Decl.) ¶¶ 3-4; [redacted].

177. Defendants view the accounts served by their Tier 1 diversity partners, and the resulting revenue, as belonging to Defendants. *See, e.g.*, PX06300 (Shapiro Reply) at 110; [redacted]; PX05492 (ODP) at 002; PX05493 (ODP) at 001. Defendants receive nearly all of the revenue from Tier 1 accounts. Morrison (PDME) Hrg. 1500:13-16, 1512:11-17; PX03043 (Guy Brown Decl.) ¶ 18.

178. Defendants pay a fee/commission to Tier 1 diversity vendors that is a percentage of the revenue generated by the contract. *See, e.g.*, PX02002 (Calkins (ODP) IH 303:22-304:7); [redacted]; PX03043 (Guy Brown Decl.) ¶ 18; PX03049 (MRO/GBEX Suppl. Decl.) ¶ 5; PX03053 (Midway Suppl. Decl.) ¶ 3; [redacted]. As a result, purchasing through Tier 1 diversity vendors involves a markup relative to purchasing from Defendants directly. *See, e.g.*, PX03049 (MRO/GBEX Suppl. Decl.) ¶ 6; [redacted]; PX03030 (Highmark Decl.) ¶ 16; PX04374 (SPLS) at 001; PX04339 (SPLS) at 001; [redacted]; *see also* PX02002 (Calkins (ODP) IH 284:7-14, 303:22-

304:7); PX02100 (Heisroth (SPLS) Dep. 180:3-13).

5. Purchasing Directly from Manufacturers Is an Unworkable Option for Large B-to-B Customers.

179. Purchasing consumable office supplies directly from manufacturers is not a viable alternative for large B-to-B customers. *See, e.g.*, Meester (Best Buy) Hrg. 1229:16-1231:16; PX02118 (Melamed (Fox) Dep. 159:18-23); PX02132 (Corbett (Pep Boys) Dep. 66:10-67:6); PX03002 (B of A Decl.) ¶ 33.

180. Manufacturers are not set up to sell and distribute consumable office supplies directly to large B-to-B customers. PX03000 (HiTouch Decl.) ¶ 19; PX03025 (Guernsey Decl.) ¶ 21; PX03041 (Int'l Paper Decl.) ¶¶ 4, 6; PX03047 (PCA Decl.) ¶¶ 4-5. Moreover, purchasing from multiple manufacturers of office supplies would eliminate the benefits customers obtain by consolidating spend with a single vendor. *See, e.g.*, Meester (Best Buy) Hrg. 1230:6-1231:4; PX02122 (Eubanks-Saunders (B of A) Dep. 193:20-195:14); PX02138 (Sears (Realogy) Dep. 199:21-200:7); PX04329 (SPLS) at 001. It would increase large B-to-B customers' "total cost of ownership" because of the multiple deliveries and invoices from "each individual manufacturer for each individual product, and distributors of [those] product[s]." PX02003 (Ringel (SPLS) IH 135:2-11). It would also increase customers' administrative costs from negotiating and managing contracts with several manufacturers. *See*, *e.g.*, Meester (Best Buy) Hrg. 1229:16-1230:5; PX02118 (Melamed (Fox) Dep. 159:18-160:7); PX03002 (B of A Decl.) ¶ 33.

181. Defendants' purported examples of large B-to-B customers that purchase directly from manufacturers are inaccurate. For example, Defendants claim that Starbucks purchases Sharpies directly from the manufacturer of Sharpies, but Starbucks buys its Sharpies from Office Depot. PX05332 (ODP) at 001; *see also* PX02122 (Eubanks-Saunders (B of A) Dep. 80:15-81:22, 87:21-88:21, 89:9-90:19, 94:13-95:5, 102:18-104:3, 222:23-225:21, 226:18-227:19).

IV. DEFENDANTS HAVE FAILED TO REBUT THE STRONG PRESUMPTION OF HARM TO COMPETITION IN THE RELEVANT MARKET.

182. The sale and distribution of consumable office supplies to large customers is marked by significant barriers to entry and expansion, including high customer retention rates, economies of scale in purchasing, economies of scale and scope in distribution, reputation, and the time and expense associated with developing the services required by large B-to-B customers, such as IT capabilities. Shapiro Hrg. 2406:22-2407:24, 2415:1-2416:5.

183. Moreover, the proposed merger would eliminate a significant competitor—Office Depot, which controls 31.7% of the relevant market and is Staples' strongest and closest head-to-head competitor. As such, entry or expansion would need to be substantial to replace even a fraction of the competition lost from the merger. Shapiro Hrg. 2422:12-22, 2436:15-19, 2442:11-18.

184. Entry or expansion sufficient to counteract the anticompetitive effects of the merger is unlikely and even if it occurred would not be timely or sufficient. Shapiro Hrg. 2414:10-25, 2422:12-22, 2436:15-19, 2442:11-18.

A. Entry by Amazon Business Would Not Be Timely, Likely, or Sufficient.

1. Amazon Business's Model Is at Odds with Requirements of Large B-to-B Customers.

185. Amazon Business is a B-to-B marketplace hosted on Amazon.com that allows millions of third parties to sell products directly to customers. Wilson (Amazon) Hrg. 521:14-522:8. [redacted]. Specifically, half of the products offered on Amazon Business are sold by third-party vendors—not Amazon itself. Shapiro Hrg. 2439:21-2440:5; Wilson (Amazon) Hrg. 540:17-23. Amazon Business projects the share of its third-party vendor sales to [redacted]

[redacted]. Amazon Business does not control the pricing or shipping terms offered by third-party sellers, and does not intend to in the future. Wilson (Amazon) Hrg. 539:14-540:7, 569:4-8, 842:9-15, 843:7-9. Nor does Amazon Business intend to fund discounts itself. Wilson (Amazon) Hrg. 842:21-843:6.

186. Large B-to-B customers receive attractive pricing from Staples and Office Depot in large part through negotiating volume discounts and upfront payments based on their total purchases. Shapiro Hrg. 2105:15-2106:8, 2350:2-2351:2. [redacted] *see also* Moise (Fifth Third Bank) Hrg. 904:17-905:1, 906:2-10 (third-party vendor pricing, including a separate fee for delivery charged by third parties, made Amazon Business's pricing uncompetitive). [redacted].

187. Amazon Business is unlikely to change its business model in the foreseeable future, including in response to the merger. Consumable office supplies are just a small fraction of Amazon Business's overall sales. Wilson (Amazon) Hrg. 542:17-25. Amazon Business therefore is unlikely to make fundamental changes to its business model simply to compete for the sale of consumable office supplies to large B-to-B customers. Shapiro Hrg. 2399:10-25, 2430:11-20. Nor is Amazon Business seeking to disrupt the way in which large B-to-B customers procure consumable office supplies. [redacted]. PX02125 (Wilson (Amazon)

Dep. 193:10-194:1); *see supra* Section I.C.1.

2. <u>Amazon Business Does Not Serve Large B-to-B Customers Today.</u>

188. Today, Amazon Business barely has a presence in the relevant market. Shapiro Hrg. 2399:17-25; PX06300 (Shapiro Reply) at 028.

189. Amazon Business does not serve as the primary office supplies vendor to a single large B-to-B customer and lacks many of the features required by large B-to-B customers. *See* Wilson (Amazon) Hrg. 544:8-10; Wilson (Amazon) Hrg. 554:5-13; 554:20-25. Amazon Business has never won an RFP to be a customer's primary vendor of office supplies. Wilson (Amazon) Hrg. 551:11-13; PX07386 (Amazon) at 002-003. To the contrary, Amazon Business has won only a portion of one office supplies RFP, which was limited to 20 items for a single location [redacted], and through which Amazon Business has not sold a single product. Wilson (Amazon) Hrg. 849:19-850:5.

190. Moreover, to date, Amazon Business has participated in RFPs for office supplies sales to large B-to-B customers only "in a limited way." Wilson (Amazon) Hrg. 546:18-547:4. For some RFPs, Amazon Business has not even responded. Wilson (Amazon) Hrg. 550:12-22. For still other RFPs, Amazon Business has submitted incomplete bids, responding only to the RFQ portion of the RFP by providing price quotes on pa[redacted] products. Wilson (Amazon) Hrg. 546:23-547:12; PX02159 (McDevitt (Dryden) Dep. 185:16-186:1) (Amazon submitted only partial response to Merck RFP). Amazon Business's prices also have not been competitive, and they have lacked products that customers wanted. Wilson (Amazon) Hrg. 551:11-552:5, 851:21-852:8; PX02159 (McDevitt (Dryden) Dep. 186:6-16) ([redacted]); PX07386 (Amazon) at 002-003.

191. [redacted]

[redacted]"). Amazon Business's deficiencies include:

a. **Customer-specific pricing.** Amazon Business does not offer customer-specific pricing. Wilson (Amazon) Hrg. 552:16-553:11; *see also* O'Neill (AEP) Hrg. 331:10-24; Moise (Fifth Third Bank) Hrg. 904:19-905:7; Morrison (PDME) Hrg. 1404:9-12; PX04053 (SPLS) at 002. Amazon Business is unable to provide customer-specific pricing because half of the products sold on Amazon Business are offered by third-party sellers and Amazon does not control the pricing on those. Wilson (Amazon) Hrg. 540:21-541:4, 842:9-20; *see also* Moise (Fifth Third Bank) Hrg. 904:17-905:13.

b. **Guaranteed pricing.** Amazon Business does not offer guaranteed pricing; instead, pricing can change as frequently as the website is updated. Moise (Fifth Third Bank) Hrg. 905:1-13; PX03022 (AEP Decl.) at ¶ 11; *see also* [redacted]").

c. [redacted].

d. **IT integration.** Amazon Business offers only self-service implementation of integration with large B-to-B customers' third-party platforms such as SAP and Ariba. Morrison (PDME) Hrg. 1398:14-21.

e. **Dedicated customer support personnel.** Amazon Business does not offer dedicated customer support personnel. *See, e.g.*, O'Neill (AEP) Hrg. 206:3-13; Moise (Fifth Third Bank) Hrg. 905:14-906:1; Wright (HPG) Hrg. 1904:9-21; [redacted]; PX04053 (SPLS) at 002; *see also* Morrison (PDME) Hrg. 1397: 24-1398:2; PX04053 (SPLS) at 002. Instead, Amazon Business has approximately 48 B-to-B sales representatives that sell hundreds of millions of products, not just consumable office supplies. Wilson (Amazon) Hrg. 745:6-13; PX02125 (Wilson (Amazon) Dep. 15:10-20); DX5285 (Amazon) at 001; *see also* PX02125 (Wilson (Amazon) Dep. 86:12-20) (Amazon may hire [redacted] additional sales representatives). Large B-to-B customers have tried to contact Amazon Business, but large B-to-B customers have found it difficult to find a telephone number to speak with someone at Amazon Business or have not received a response. Moise (Fifth Third Bank) Hrg. 903:18-22; PX02132 (Corbett (Pep Boys) Dep. 215:7-216:13).

f. **Desktop and next-day delivery.** Amazon Business does not currently offer or provide desktop delivery. Wilson (Amazon) Hrg. 551:9-10; *see also* Wilson (Amazon) Hrg. 550:23-551:3 (Amazon does not offer on-site stocking of customers' storage shelves); [redacted]; PX02118 (Melamed (Fox) Dep. 96:3-97:3; 97:17-98:6). Amazon Business does not provide free next-day delivery; instead, Amazon Business offers free two-day delivery on orders of at least $49 for Prime members. Wilson (Amazon) Hrg. 540:8-16; *see also* PX02138 (Sears (Realogy) Dep. 239:22-242:11) (two-day delivery on orders of at least $49 is unacceptable); PX02159 (McDevitt (Dryden) Dep. 109:5-9); PX04352 (SPLS) at 008.

g. **Detailed utilization reporting.** Amazon Business does not offer detailed utilization reporting. *See, e.g.*, PX04053 (SPLS) at 002. Amazon Business's reporting allows customers to see that they have made purchases from Amazon, but they are unable to see the items purchased, the quantity, or even a product description. *See, e.g.*, O'Neill (AEP) Hrg. 295:8-20; PX03030 (Highmark Decl.) ¶ 17.

h. **Product curation**. Amazon Business does not offer product curation, which is the ability for a business customer to restrict the selection of products its employees can purchase. Wilson (Amazon) Hrg. 530:16-531:5, 554:20-25, 555:23-556:7; *see also* O'Neill (AEP) Hrg. 204:25-206:5; Wright (HPG) Hrg. 1904:9-21, 1905:13-18. [redacted].

i. **Contract negotiation.** Amazon Business does not negotiate contracts with large B-to-B customers; the only agreements that Amazon Business has with large B-to-B customers are the terms-of-use agreements that such customers agree to when creating an Amazon Business account. Wilson (Amazon) Hrg. 543:14-23; *see also* Wright (HPG) Hrg. 1904:9-21.

j. **Product breadth and consistency.** Amazon Business currently has gaps in its product breadth, meaning that Amazon Business is [redacted] *see also* Morrison (PDME) Hrg. 1403:13-20; PX02159 (McDevitt (Dryden) at 185:16-186:1). Amazon Business also does not offer private label products. PX02170 (Park (Amazon) Dep. 83:2-8).

k. **A national network of retail locations.** Amazon Business does not have a national network of retail stores. [redacted]; *see also* PX02118 (Melamed (Fox) Dep. 126:20-127:19); PX02126 (Lamphier (Detroit Regional Chamber) Dep. 156:4-25).

l. **Organized delivery.** Amazon Business controls deliveries from its warehouses but it does not control deliveries from third-party sellers.

Moise (Fifth Third Bank) Hrg. 905:14-906:1. Therefore, instead of contacting Amazon Business for all delivery problems, large business customers would have to contact individual third-party sellers to resolve delivery issues on a case-by-case basis. Moise (Fifth Third Bank) Hrg. 905:14-906:1.

192. As a result, large B-to-B customers do not consider Amazon Business a viable alternative to be their preferred consumable office supplies vendor. *See, e.g.*, O'Neill (AEP) Hrg. 206:14-18; Wright (HPG) Hrg. 1943:14-1947:9. [redacted]. Moreover, large B-to-B customers would not consider Amazon Business to be a viable vendor of consumable office supplies unless Amazon Business could meet their pricing and service requirements. *See, e.g.*, O'Neill (AEP) Hrg. 206:19-207:2; Meester (Best Buy) Hrg. 1322:25-1323:5; PX02138 (Sears (Realogy) Dep. 203:9-204:4).

3. **<u>Amazon Business Is Not Poised to Serve the Consumable Office Supplies Needs of Large B-to-B Customers for the Foreseeable Future.</u>**

193. Amazon has been in the office supplies business for fourteen years and has been targeting business customers (primarily SMBs) for over ten years. *See* [redacted]; Wilson (Amazon) Hrg. 525:10-526:10. [redacted]. [redacted].

194. In April 2012, Amazon launched Amazon Supply, a marketplace for selling a variety of products, including office supplies, to business customers. *See* Wilson (Amazon) Hrg. 522:17-22, 524:3-4; PX02125 (Wilson (Amazon) Dep. 22:20-25:1). Large B-to-B customers did not view Amazon Supply as a viable alternative to serve as their primary office supplies vendor because, among other things, Amazon Supply lacked sufficient customer service resources, could

not integrate with customers' electronic procurement platforms, and was not price competitive with Staples and Office Depot. Cervone (McDonald's) Hrg. 371:15-25, 372:5-7, 372:9-14, 372:15-20; PX02131 (Castro (Republic) Dep. 48:1-7). Amazon Supply ceased operations in April 2015 when Amazon Business was launched. Wilson (Amazon) Hrg. 524:3-9. That Amazon Supply failed to gain any traction in the relevant market after three years underscores the time, expense, and obstacles associated with entering the sale and distribution of consumable office supplies to large B-to-B customers.

195. Amazon Business, according to its own financial projections, is likewise not poised to replace Office Depot in the relevant market for the foreseeable future. In November 2015, Amazon Business internally projected *total* consumable office supply revenues *to all customers* of only $[redacted] in 2017. PX06300 (Shapiro Reply) at 028. These November 2015 projections were based on [redacted]; *see also* PX02125 (Wilson (Amazon) Dep. 15:10-20, 43:9-24) (testifying that Amazon Business sells hundreds of millions of products in numerous non-office-supplies categories).

196. Since November 2015, [redacted]. [redacted]; PX02125 (Wilson (Amazon) Dep. 110:12-111:11); [redacted]

[redacted]; *see also* [redacted]. [redacted].

197. Even assuming Amazon Business were to sell $[redacted] in consumable office supplies in 2017—[redacted]. Shapiro Hrg. 2432:11-19, 2436:15-19; Wilson (Amazon) Hrg. 587:15-588:16.

198. Additionally, while Amazon Business is seeking to develop certain capabilities required by large B-to-B customers, those capabilities are in their infancy—their funding and technical success is uncertain. This includes, for instance:

a. [redacted]

b. [redacted] Amazon does not offer (and has no plans to fund) customer-specific pricing (i.e., discounts) itself, and does not intend to require third-party sellers to offer customer-specific pricing. Wilson (Amazon) Hrg. 842:21-843:9. [redacted]

[redacted]. Until then, Amazon is limited in its ability to respond to RFPs. *See* Wilson (Amazon) Hrg. 846:1-847:2 [redacted]); PX02170 (Park (Amazon) Dep. 214:25-217:2) ("we can't take what we're doing and apply to -- use that same process [redacted]).

199. [redacted] Nor does Amazon Business plan to fund customer-specific pricing (i.e., discounts) itself. Wilson (Amazon) Hrg. 842:21-843:6. [redacted]. [redacted].[1]

200. Notably, even with respect to capabilities that do not entail fundamental adjustments to the marketplace model, it is undisputed that [redacted]. Despite the size of Amazon.com, Amazon Business does not receive unlimited resources. The head of Amazon Business, Prentis Wilson, explained: "[T]here's no guarantee that we'll get the resources assigned. We have to go in and ask, and then we have to see if we're – if the company's willing to fund it." PX02125 (Wilson (Amazon) Dep. 203:21-24); *see also* PX02170 (Park (Amazon) Dep. 68:7-13, 189:19-190:21, 228:20-229:20, 230:19-231:8). In January 2016, the team made a request for additional funding outside

[1] [redacted]

of the ordinary budgeting process for [redacted] employees to create [redacted] PX07518 (Amazon) at 001; *see also* Wilson (Amazon) Hrg. 576:11-577:10. [redacted]

201. [redacted] As a result, the average annual spend per business customer on Amazon Business is [redacted]. Amazon Business's development of capabilities remains consistent with its focus on SMB customers and tail spend: "Because of [Amazon's] stated strategy to focus on the small and medium businesses and end users, we don't have the resourcing to focus on all of the features that we need to engage with enterprises, particularly top down. So we're being very selective about which of those features we want to start with." PX02170 (Park (Amazon) Dep. 88:17-89:1).

202. Staples and Office Depot likewise recognize that Amazon Business is focused on SMB customers rather than large B-to-B customers, *see* PX04200 (SPLS) at 001; PX04156 (SPLS) at 001; PX04473 (SPLS) at 001-002, and that Amazon Business faces significant barriers to expansion in serving large B-to-B customers. *See* PX04096 (SPLS) at 001 ("The lack of a sales force and systems to manage larger customers as well as last-mile delivery has protected us and it would be a sizable barrier to entry for some time period."); PX04200 (SPLS) at 001 ("I'm a little less concerned about [Amazon's] attempts to gain enterprise share [sic] then I am securing

an advantage in the mid-market. The enterprise is our lowest margin business with the most barriers for them to overcome (RFP responses/contracts, desktop delivery, custom invoicing, reporting, proprietary inventory, etc.).”); PX05427 (ODP) at 001 (“Amazon does not have a significant presence in the market.”); *see also* [redacted].

203. [redacted].

B. <u>Entry, Expansion, or Repositioning by Other Firms Would Not Be Timely, Likely, or Sufficient.</u>

1. <u>Regional Distributors</u>

204. Local and regional office supply distributors face all of the barriers to expansion identified above, including significant purchasing and distribution scale disadvantages. Shapiro Hrg. 2410:9-2411:20, 2412:19-25; PX06500 (Shapiro Demonstrative) at 053, 062-063, 066-067; PX06300 (Shapiro Reply) at 118-120, 122-123.

205. Moreover, geographic expansion through building distribution centers is time-consuming, risky, and expensive. *See* PX03021 (WBM Decl.) ¶ 37; PX03000 (HiTouch Decl.) ¶ 34. It is expensive to develop IT capabilities required by large B-to-B customers. *See* Meehan (WBM) Hrg. 1624:1-17, 1626:9-24; PX03025 (Guernsey Decl.) ¶ 27. And it is time-consuming and difficult to develop relationships with large B-to-B customers and a sales force to serve them. *See, e.g.*, Meehan (WBM) Hrg. 1713:17-1714:2; PX03000 (HiTouch Decl.) ¶ 35; *see also* PX02003 (Ringel (SPLS) IH 150:5-151:18); [redacted]. This is

particularly true given that Defendants enforce non-compete clauses for their sales representatives. *See*, *e.g.*, PX05283 at 001-012.

206. [redacted], does not have the resources to expand its geographic footprint in any significant way. *See*, *e.g.*, [redacted]. Other local and regional distributors have indicated the same. Shapiro Hrg. 2414:10-25; PX06500 (Shapiro Demonstrative) at 067.

2. <u>Adjacency Products Vendors and Manufacturers</u>

207. Adjacency products vendors, [redacted], have a minuscule presence in the relevant market, which creates a high hurdle for sufficient expansion to replace Office Depot. Shapiro Hrg. 2419:24-2420:7, 2420:23-2421:20; PX06300 (Shapiro Reply) at 124-125.

208. [redacted]. PX02105 (Rusk (Fastenal) Dep. 160:7-161:8, 197:12-25); PX03006 (Grainger Decl.) ¶¶ 5-6.

209. The adjacency vendors do not solicit large B-to-B customers' consumable office supplies business. *See*, *e.g.*, Wilson (Select Medical) Hrg. 1021:19-21, 1022:14-19, 1131:13-19; Wright (HPG) Hrg. 1902:22-1903:8, 1903:21-1904:5, 1906:25-1907:4, 1909:21-25, 1943:8-10. They also fall far short of Staples and Office Depot with respect to the breadth of office supplies they offer and on pricing. *See*, *e.g.*, PX02105 (Rusk (Fastenal) Dep. 151:24-152:19, 191:21-192:8). This is at least in part due to the fact that vendors of adjacency products have higher product costs for consumable office supplies than Staples and Office Depot. *See*, *e.g.*, PX02105 (Rusk (Fastenal) Dep. 100:21-101:18, 156:2-19). Notably, Grainger does not even supply its own consumable office supplies—it is a customer of Office Depot. PX02109 (Calkins (ODP) Dep. 89:19-23); PX02129 (Lander (ODP) Dep. 195:13-25); PX05260 (ODP) at 001.

210. Manufacturers also have a [redacted] in the relevant market, which likewise

creates a [redacted]. Shapiro Hrg. 2281:11-2282:5; PX06300 (Shapiro Reply) at 125-127. Manufacturers also face significant obstacles to expansion, including that their business models generally are not organized to serve end customers, *see*, *e.g.*, PX03041 (Int'l Paper Decl.) ¶ 6, PX03047 (PCA Decl.) ¶ 5, and that it would be burdensome and costly for large B-to-B customers to purchase from numerous manufacturers. PX03002 (Bank of America Decl.) ¶¶ 32-34; PX03031 (MGM Decl.) ¶ 21.

211. Ink and toner manufacturers have also indicated that they do not compete and have no plans to expand to compete for the consumable office supplies business of large B-to-B customers. *See, e.g.*, [redacted]; PX03038 (Lexmark Decl.) ¶ 7.

C. <u>Other Purported Constraints on Defendants' Competitive Conduct Are Misleading and Insufficient to Rebut the Strong Presumption of Harm.</u>

1. <u>Purported "Leakage" or "Off-Contract Spend" Does Not Constrain Prices Today and Would Not Constrain Prices Post-Merger.</u>

212. Defendants have contended that "leakage"—or off-contract spend by customers—is "widespread." Defs.' Opp'n Br. (Dkt. 199) at 40. Defendants failed to present evidence of significant leakage at the hearing, and the record evidence is to the contrary.

213. First, Dr. Shapiro's market share estimate *includes* off-contract spend, and Defendants' combined market share is still 79%. Shapiro Hrg. 2294:3-7; PX06100 (Shapiro Rpt.) at 017. Defendants' combined share exceeds the threshold for competitive concern by so much that even if off-contract spend were significantly greater than estimated by Dr. Shapiro it would not materially shift the market shares. Shapiro Hrg. 2792:10-2793:4. Moreover, Defendants have not presented any evidence that Dr. Shapiro's estimation is misstated. Defendants' economic expert, Mr. Orszag, offered a "potential leakage" analysis in his expert report, DX2570 (Orszag Rpt.) ¶ 147, but Defendants did not offer it at the hearing. Dr. Shapiro demonstrated that Mr.

Orszag's analysis contained major errors, including by measuring declining spend having nothing to do with "leakage"—such as customers whose declining spend was due to layoffs, or who had switched contracts from Office Depot to Staples. PX06300 (Shapiro Reply) at 020-021, 113-116.

214. Second, the record indicates that large B-to-B customers significantly value their contracts for consumable office supplies and have high compliance rates. Dr. Shapiro's analysis of the F100 purchasing data revealed that 78% of a customer's purchases went to the customer's single largest vendor—in other words, customers are purchasing the significant majority of their consumable office supplies with a primary vendor. Shapiro Hrg. 2287:21-2288:7.

215. This corroborates the testimony of large B-to-B customers. Large B-to-B customers indicate that they invest significant time and effort negotiating their office supplies contracts to get the lowest prices and best service. *See*, *e.g.*, O'Neill (AEP) Hrg. 200:24-201:5; Wilson (Select Medical) Hrg. 1104:4-6; Moise (Fifth Third Bank) Hrg. 897:8-900:23, 913:24-914:8; Wright (HPG) Hrg. 1915:20-1916:10, 1918:18-22, 1993:25-1994:15; PX02122 (Eubanks-Saunders (B of A) Dep. 24:6-12, 24:20-25:12, 26:3-18). Moreover, by consolidating their spend, large B-to-B customers are able to leverage their purchasing volume to negotiate lower prices and higher discounts. *See*, *e.g.*, O'Neill (AEP) Hrg. 203:24-204:20; Cervone (McDonald's) Hrg. 365:24-366:8; Wilson (Select Medical) Hrg. 1027:9-25; Wright (HPG) Hrg. 1880:16-1881:7, 1929:8-1930:10.

216. As such, large B-to-B customers purchase significantly better on-contract than if they purchased off-contract, such as at retail or online outlets. *See*, *e.g.*, Shapiro Hrg. 2295:22-2296:17, 2355:4-18; [redacted]; O'Neill (AEP) Hrg. 173:10-20, 215:20-216:6, 242:9-13; Meester (Best Buy) Hrg. 1206:25-1207:15; Wright (HPG) Hrg.

1921:14-1922:5; 2057:3-10; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted].

217. As a result, large B-to-B customers want employees to purchase consumable office supplies through the contract. *See, e.g.*, Wilson (Select Medical) Hrg. 1027:13-25; Meester (Best Buy) Hrg. 1206:25-1207:6; Wright (HPG) Hrg. 1885:21-1886:17; 1918:23-1919:3. And they take steps to promote contract compliance. *See, e.g.*, O'Neill (AEP) Hrg. 175:2-177:13, 180:1-180:9; Cervone (McDonald's) Hrg. 367:21-368:10; Wilson (Select Medical) Hrg. 1028:17-1029:10, 1032:15-1033:6; Meester (Best Buy) Hrg. 1209:19-1210:9, 1217:6-12, 1319:16-24; Wright (HPG) Hrg. 1920:21-1921:13, 2057:11-24; PX02113 (Ho (Rite Aid) Dep. 115:12-116:25); PX02141 (Perkins (GEICO) Dep. 116:6-119:14, 176:12-23).

218. Large B-to-B customers achieve high contract compliance rates. *See, e.g.*, O'Neill (AEP) Hrg. 178:1-180:3; Cervone (McDonald's) Hrg. 367:13-20, 369:18-370:12; Meester (Best Buy) Hrg. 1213:8-21, 1218:2-10, 1220:8-1221:25, 1223:20-1224:2, 1309:14-21, 1328:25-1329:7; Wilson (Select Medical) Hrg. 1033:16-25; Wright (HPG) Hrg. 1918:23-1919:16, 1920:11-20; PX02122 (Eubanks-Saunders (B of A) Dep. 160:14-162:8); PX02121 (Harris (Walgreens) Dep. 161:4-164:21, 163:16-163:24).

219. Indeed, when off-contract purchases occur, the most common reasons are that the non-compliant employee purchased the item from a retail store because he needed it immediately, or the non-compliant employee was unaware of the processes for purchasing from the preferred vendor. *See, e.g.*, Meester (Best Buy) Hrg. 1215:15-20; Wilson (Select Medical) Hrg. 1033:7-15; PX02122 (Eubanks-Saunders (B of A) Dep. 98:2-21); [redacted].

220. Defendants' ordinary course documents reflect that large B-to-B customers are generally successful at achieving contract compliance. Indeed, Staples told investors in April 2015 that while "[c]ontracts do not preclude customers from buying from other vendors," that is "less likely to occur especially with our larger enterprise customers[.]" PX04131 (SPLS) at 002; *see also* PX05408 (ODP) at 021 (Staples' investor call stating that there is "less leakage out there" and "companies are doing a much better job today of controlling their spend"); [redacted]; PX04401 (SPLS) at 001 (customer request to drive compliance); [redacted]; [redacted]; PX02116 (Ringel (SPLS) Dep. 65:21-66:3); PX02129 (Lander (ODP) Dep. 177:9-23).

221. [redacted]. And even where Prism identifies declining sales, there are numerous reasons—other than leakage—for that to occur, including: (i) layoffs, restructuring, or financial difficulties at the customer, (ii) cost-cutting initiatives by the customer, or (iii) the customer's cyclical purchasing cycle. PX02109 (Calkins (ODP) Dep. 138:8-139:18); PX02129 (Lander (ODP) Dep. 104:15-105:24); PX02157 (Klein (ODP) Dep. 120:10-122:20); [redacted]; [redacted]; *see also* PX02116 (Ringel (SPLS) Dep. 40:6-41:22); [redacted].

222. Finally, while Defendants also claim that they routinely cut prices in response to leakage, *see* Defs.' Opp'n Br. (Dkt. 199) at 40, this claim did not stand up to scrutiny. Defendants' expert Mr. Orszag presented an analysis claiming to show frequent price *adjustments* by Staples related

to leakage. But he did not attempt to isolate price adjustments made in response to leakage threats, and many of the adjustments were price *increases* or simply attempts to correct data entry errors. PX06300 (Shapiro Reply) at 021-023. [redacted].

223. In any event, Dr. Shapiro explained that the merged firm can employ strategies to raise prices that do not create any incremental threat of off-contract spend, such as by reducing signing bonuses while leaving the price of individual items unchanged. Shapiro Hrg. 2350:2-2351:2.

2. **Any "Tools" Available to Large B-to-B Customers Are Insufficient to Constrain the Post-Merger Exercise of Market Power.**

224. Defendants argue that large B-to-B customers have "tools" to protect themselves from the substantial lessening of competition likely to result from the merger. Large B-to-B customers' primary tool to obtain low prices is competition between vendors. *See*, *e.g.*, O'Neill (AEP) Hrg. 340:11-341:1; Cervone (McDonald's) Hrg. 490:6-492:7; Wright (HPG) Hrg. 1890:15-24. Indeed, all of the procurement tools available to large B-to-B customers are predicated on competition. O'Neill (AEP) Hrg. 340:21-341:1; Wright (HPG) Hrg. 1890:15-24; 1952:22-1953:13, 2053:17-25; PX02122 (Eubanks-Saunders (B of A) Dep. 24:2-12, 119:5-24). The proposed merger would eliminate the substantial competition between Staples and Office Depot. *See*, *e.g.*, O'Neill (AEP) Hrg. 340:11-20, 341:5-8; Wright (HPG) Hrg. 1952:22-1953:13, 2053:17-25.

225. Indeed, the proposed merger would reduce large B-to-B customers' viable alternatives for consumable office supplies. Wilson (Select Medical) Hrg. 1127:7-12 ("Yes, they would have decreased. Especially as it relates to large corporate companies such as ourselves, given our focus on the national service capabilities."); Wright (HPG) Hrg. 1952:22-1953:25, 2053:17-25;

see also Meehan (WBM) Hrg. 1708:1-10 (describing a "shortage . . . right now in the market place" for suppliers to large B-to-B customers with broad geographic needs because "there used to be six people who did this and now there is only two").

226. Thus, although the proposed merger does not change the amount of spend that large B-to-B customers can leverage with consumable office supplies vendors, it would reduce their leverage vis-à-vis the merged firm, because there would be fewer comparable alternatives to which large B-to-B customers could shop their spend. *See, e.g.*, Wilson (Select Medical) Hrg. 1126:22-1127:23; Meester (Best Buy) Hrg. 1310:19-1312:3; Wright (HPG) Hrg. 1952:22-1953:13, 2053:17-25.

227. Similarly, customers are already using any leverage they have as a result of post-contract competition. [redacted]; *see also* PX06100 (Shapiro Rpt.) at 017-020, 070-072 (market shares account for leakage).

228. Defendants' contention that large customers can protect themselves from the competition lost by the merger by threatening to reduce purchases of ink and toner or adjacency products is also mistaken. A customer's ability to threaten to reduce purchases of such other products does not change because of the merger. What does change is that large B-to-B customers will lose the substantial competition between Staples and Office Depot for consumable office supplies. Thus, such customer threats cannot replace the competition lost from the merger. Shapiro Hrg. 2355:19-2357:21; PX06300 (Shapiro Reply) at 007-008.

229. Multiyear contracts do not protect large B-to-B customers from the proposed merger's

anticompetitive effects. Staples and Office Depot typically have the right to terminate these contracts for convenience. *See, e.g.*, Cervone (McDonald's) Hrg. 494:25-495:3; Moise (Fifth Third Bank) Hrg. 986:25-987:12; Wilson (Select Medical) Hrg. 1016:4-11; Meester (Best Buy) Hrg. 1198:7-9; PX02122 (Eubanks-Saunders (B of A) Dep. 33:19-34:6); *see also* PX07047 (Best Buy) at 008 ("Termination for Convenience"). Moreover, changes to the core list involve mid-contract negotiations with the vendor (*see supra* Section I.C.2), and large B-to-B customers' contract prices for core items are usually fixed for only one year, while prices of non-core products can increase at any time if Defendants increases their list, catalog, or online prices, even though the contractual discount is unchanged. *See*, *e.g.*, O'Neill (AEP) Hrg. 187:4-18; Moise (Fifth Third Bank) Hrg. 987:14-988:5; Wilson (Select Medical) Hrg. 1013:1-16; [redacted]; PX02116 (Ringel (SPLS) Dep. 93:17-94:5); PX02120 (McCabe (SPLS) Dep. 25:20-26:1); *see also* Cervone (McDonald's) Hrg. 377:10-18; Meester (Best Buy) Hrg. 1320:11-18; [redacted]; PX02116 (Ringel (SPLS) Dep. 98:21-25. Even if *some* large customers are *temporarily* "protected" by their existing contracts, expirations and renewals continue on a staggered basis, exposing other large customers to near-term post-merger harm. *See* Shapiro Hrg. 2359:14-2360:1. Finally, competition between Defendants benefits large customers during the terms of their contracts as well. *See, e.g.*, [redacted] The proposed merger will immediately and completely end this competition.

D. <u>**The 2013 Investigation of the Office Depot/OfficeMax Merger Found that Staples Was the Closest Competitor to Both Office Depot and OfficeMax.**</u>

230. In 2013, Office Depot and OfficeMax told the FTC that Staples was each company's closest competitor. *See* [redacted]; Shapiro Hrg. 2361:12-2363:4.

231. Since the ODP/OMX merger, Staples has competed fiercely with the combined entity. For example, during the Office Depot/OfficeMax merger, Staples created an "ODP Attack Plan" that was successful at taking [redacted] worth of business from Office Depot. *See, e.g.*, PX04044 (SPLS) at 025; PX04081 (SPLS) at 001; [redacted]; PX04335 (SPLS) at 001; PX04338 (SPLS) at 007; [redacted]; [redacted]; [redacted]; PX04351 (SPLS) at 003-004.

232. Large B-to-B customers have benefited from the head-to-head competition between Staples and Office Depot since the Office Depot/OfficeMax merger. O'Neill (AEP) Hrg. 341:5-16; Wright (HPG) Hrg. 1896:9-1898:14, 1901:2-16; Moise (Fifth Third Bank) Hrg. 982:4-10.

233. In 2013, large B-to-B customers were either neutral toward the ODP/OMX merger or in favor of it, primarily because Staples would still compete against the merged entity. *See, e.g.*, PX02107 (Egan (Pfizer) Dep. 122:11-24); PX02122 (Eubanks-Saunders (B of A) Dep. 117:6-119:4); PX08064 at 003. Now, in contrast, large B-to-B customers are concerned about the Staples/ODP merger. O'Neill (AEP) Hrg. 225:14-226:5; Cervone (McDonald's) Hrg. 377:19-378:7; Wilson (Select Medical) Hrg. 1018:5-13; Moise (Fifth Third Bank) Hrg. 916:20-918:8, 982:11:-19; Meester (Best Buy) Hrg. 1205:21-1206:21; Wright (HPG) Hrg. 1952:22-1953:25.

E. <u>Defendants Have Not Asserted Any Cognizable Efficiencies.</u>

234. Upon announcement of the proposed transaction, Defendants publicly disclosed projected cost synergies from the merger. [redacted]. At the hearing, however, Staples presented no witnesses or evidence to substantiate their claimed efficiencies. In any event, even accepting the assessment of Defendants' efficiencies expert Defendants' claims are not enough to offset the competitive harm caused by the merger. Shapiro Hrg. 2453:18-2454:2.

1. Defendants Failed to Establish That Claimed Efficiencies Are Verifiable.

235. Defendants failed to provide sufficient foundation for the inputs and assumptions underpinning their claimed efficiencies. PX06200 (Zmijewski Rpt.) ¶¶ 7, 48; PX06400 (Zmijewski Reply) ¶¶ 8, 10-12, 20, 37-39, 83-91, 123. Defendants provided no expert testimony or other evidence at the hearing to substantiate their efficiencies claim. Many of Defendants' assumptions appear to be based on nothing more than personal business judgment. PX06200 (Zmijewski Rpt.) ¶¶ 7, 48; PX06400 (Zmijewski Reply) ¶¶ 38-39, 85, 123. As a result, Plaintiffs' expert Professor Mark E. Zmijewski concluded that Staples' claimed efficiencies are speculative and not verifiable. PX06200 (Zmijewski Rpt.) ¶¶ 7, 48, 50; PX06400 (Zmijewski Reply) ¶¶ 10-12, 36, 39, 82, 91, 123. [redacted]. [redacted]. [redacted]

236. Defendants also failed to provide any evidence at the hearing to substantiate their claimed cost savings from the previous Office Depot/OfficeMax and Staples/Corporate Express transactions. PX06200 (Zmijewski Rpt.) ¶¶ 7, 43-44, 49; PX06400 (Zmijewski Reply) ¶¶ 9, 31-33, 43-44, 50-56. Defendants' extrapolation of cost savings from these previous transactions does not provide a reliable basis to verify the claimed efficiencies for the Staples/Office Depot transaction. PX06200 (Zmijewski Rpt.) ¶¶ 7, 37, 44, 49; PX06400 (Zmijewski Reply) ¶¶ 7, 9, 32-34. Furthermore, Defendants' expert has not performed any analysis regarding the divestiture

proposal and its potential impact on Defendants' claimed efficiencies. PX02171 (Anderson Dep. 226:11-227:10).

2. Defendants Failed to Establish That Claimed Efficiencies Are Merger-Specific.

237. Defendants have alternative means, other than their Merger, to achieve cost reductions. For example, Staples has engaged in detailed discussions with [redacted] regarding a joint venture to achieve similar cost savings. PX04714 (SPLS) at 006, 025; PX06400 (Zmijewski Reply) ¶¶ 71-73. [redacted] *See*, *e.g.*, PX04714 (SPLS) at 006; PX04605 (SPLS) at 015-151. [redacted]. PX06008 (SPLS) at 015-016; PX04714 (SPLS) at 006; *see also* PX04605 (SPLS) at 003.

238. Staples put discussions with [redacted] on hold [redacted]. PX02147 (Sargent (SPLS) Dep. 156:23-157:4). [redacted].

239. Claimed efficiencies are not merger-specific if they are likely to be achieved absent the merger, such as through a joint venture between Staples and [redacted]. PX06400 (Zmijewski Reply) ¶¶ 71-74, 117. Other claimed efficiencies appear to include cost savings that are not merger-specific because they are attributable to "best practices," which can be achieved without the merger. PX06400 (Zmijewski Reply) ¶¶ 70, 115-116, 119, 123, 126, 133; PX06200 (Zmijewski Rpt.) at ¶¶ 46-47.

3. Defendants Failed to Establish That Any Efficiencies Will Be Passed Through to Customers.

240. It is unlikely that any meaningful merger-specific efficiencies would be passed on to large B-to-B customers. Shapiro Hrg. 2448:20-2449:7, 2451:10-2452:3; PX06100 (Shapiro

Rpt.) at 054-055. Defendants presented no witnesses or evidence at the hearing indicating that they would pass on any claimed efficiencies to large B-to-B customers.

241. [redacted]. PX02148 (Hare (ODP) Dep. 127:14-128:2); PX02010 (Hare (ODP) IH 108:15-109:21). [redacted] PX04673 (SPLS) at 001. Indeed, most of the claimed cost savings are fixed, not variable, indicating that they will not be passed on to customers. PX02146 (Granahan (SPLS) Dep. 135:13-137:2, 161:12-162:19).

F. <u>The Proposed Assignment of Contracts to Essendant Does Not Address the Merger's Competitive Harm.</u>

242. Defendants seek to assuage concerns about their proposed merger by pointing to an "Asset Purchase Agreement" ("APA") signed by Staples and Essendant in mid-February of 2016. *See* PX07302 (Essendant) at 001. Pursuant to the APA, Staples' and Office Depot's contracts with Tier 1 vendors and customers (amounting to at least $550 million in annual sales) would be assigned to the wholesaler Essendant in exchange for a payment of $22.5 million. PX07302 (Essendant) at 005-006. Staples would provide certain as-yet-unfinalized transition services for a period lasting as long as six years, and Essendant would have an opportunity to hire Staples and Office Depot employees with experience in areas where Essendant lacks it today. *See* PX07302 (Essendant) at 021-025, 037-041.

243. Defendants presented no evidence at the hearing that the proposed assignment of contracts to Essendant would remedy the likely reduction in competition caused by the Merger. By contrast, Plaintiffs' expert, Professor Shapiro, testified that the Essendant proposal would not replace the competition lost to the Merger. Shapiro Hrg. 2455:13-2457:19; PX06500 (Shapiro Demonstrative) at 081.

244. The proposed divestiture does not create another competitor in the relevant market. Morrison (PDME) Hrg. 1405:22-23. Indeed, Essendant does not sell directly to large B-to-B customers today, and does not intend to do so after the proposed divestiture. *See, e.g.*, Meehan (WBM) Hrg. 1712:17-1713:15; PX02001 (Goodman (SPLS) IH 226:21-227:2); PX02109 (Calkins (ODP) Dep. 158:14-19, 166:14-17); PX02112 (Dochelli (Essendant) Dep. 198:13-20); PX02153 (Mutschler (SPLS) Dep. 72:1-3); *see also* PX02123 (Brown (S.P. Richards) Dep. 46:24-47:1, 153:17-22) (S.P. Richards, another wholesaler, does not sell to end users either).

245. Today, Essendant serves Tier 1 vendors as a wholesaler, but it does not provide the services and support that large B-to-B customers expect and demand. Morrison (PDME) Hrg. 1405:12-1406:21, 1439:7-12; [redacted]. Essendant has no experience serving large B-to-B customers directly. Morrison (PDME) Hrg. 1395:16-18; 1406:15-21; [redacted]. Nor does Essendant participate directly in large B-to-B customer RFPs. *See, e.g.*, [redacted]; *see also* PX02123 (Brown (S.P. Richards) Dep. 278:10-18) (S.P. Richards, another wholesaler, does not participate in such RFPs either).

246. As a result, Essendant does not have a reputation for selling directly to large B-to-B customers, nor does it have the salesforce to do so. Morrison (PDME) Hrg. 1409:19-21, 14:06:12-16; [redacted]; [redacted]. In fact, Essendant admits that it does not have the capabilities necessary to allow its vendors to serve large B-to-B customers today, particularly in the areas of information technology, sales and customer service, and last-mile delivery. *See*, *e.g.*, PX07032 (Essendant) at 001; PX07066 (Essendant) at 004.

247. [redacted]. The transition

time necessary is at least several years. PX03049 (MRO/GBEX Suppl. Decl.) ¶ 17; PX03055 (TBS Decl.) ¶ 13 (three years at a minimum); *see also* PX02112 (Dochelli (Essendant) Dep. 151:22-152:6).

248. Staples, Office Depot, and Essendant have not provided specific details about the proposed divestiture to Tier 1 vendors or customers. *See, e.g.*, Morrison (PDME) Hrg. 1430:4-18, 1437:6-20; PX03043 (Guy Brown Decl.) ¶ 26; PX03049 (MRO/GBEX Suppl. Decl.) ¶ 13; PX03055 (TBS Decl.) ¶¶ 10-11; PX03080 (Lee Office Solutions Suppl. Decl.) ¶ 12; PX03084 (Humana Suppl. Decl.) ¶ 12.

249. Nonetheless, Defendants have offered "transition incentive payments" to Tier 1 vendors to try to get them to accept the proposed divestiture. *See, e.g.*, [redacted]; [redacted]; PX02129 (Lander (ODP) Dep. 217:14-219:11, 221:17-222:3, 229:4-6); PX07089 (Essendant) at 001-002 (payments "would range up to [redacted] of annual volume" and "would be funded by Staples"); *see also* PX07090 (Essendant) at 001.

250. For example, Office Depot asked PDME to sign a Relationship Transfer Agreement to transfer his Tier 1 vendor relationship from Office Depot to Essendant. Morrison (PDME) Hrg. 1430:4-9; 1430:19-1431:9, 1437:21-1438:1; PX07536 (PDME) at 001. PDME has not signed the Relationship Transfer Agreement because he believes the proposed divestiture will not work, and the amount offered by Office Depot does not provide an adequate buffer if the proposed divestiture fails. Morrison (PDME) Hrg. 1433:5-1434:23.

251. Defendants also have offered transition incentive payments to customers whose contracts would be assigned to Essendant under the proposed divestiture. *See, e.g.*, [redacted]; PX02129 (Lander (ODP) Dep. 230:9-12, 238:4-6, 240:7-21).

252. If the proposed transfer of contracts to Essendant fails, it could decimate Tier 1 vendors within the office products space. Morrison (PDME) Hrg. 1434:15-18.

253. Notably, Essendant views the proposed divestiture as an opportunity to create an "entangling alliance" with Staples, not as a way to compete against Staples for large B-to-B customers. PX07030 (Essendant) at 003.

PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW

I. THE COURT HAS JURISDICTION OVER THIS ACTION.

254. This action seeks a preliminary injunction pending an administrative trial on the question of whether Defendants' Merger violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 53(b).

255. At all relevant times, Defendants have been engaged in "commerce" as defined in 15 U.S.C. § 44 and 15 U.S.C. § 12. At all relevant times, Defendants have been engaged in commerce in each of the Plaintiff States.

256. Defendants transact substantial business in the District of Columbia and are subject to personal jurisdiction therein. Venue is proper. 28 U.S.C § 1391(b)-(c); 15 U.S.C. § 53(b).

II. THE STANDARD FOR A PRELIMINARY INJUNCTION IS MET HERE.

257. Plaintiffs "seek a preliminary injunction to prevent a merger pending the Commission's administrative adjudication of the merger's legality." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (internal quotation marks omitted). Preliminary injunctions are "readily available" under 15 U.S.C. § 53(b) "to preserve the status quo while the FTC develops its ultimate case." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008).

258. The Court must issue a preliminary injunction under 15 U.S.C. § 53(b) whenever "such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." *Heinz*, 246 F.3d at 714; *accord Whole Foods*, 548 F.3d at 1034-35. The "district court must balance the likelihood of the FTC's success against the equities, under a sliding scale." *Whole Foods*, 548 F.3d at 1035.

259. To evaluate the FTC's "likelihood of success" at the administrative trial, this Court need only "measure the probability that, after an administrative hearing on the merits, the

Commission will succeed in proving that the effect of the [proposed] merger '*may be* substantially to lessen competition, or to tend to create a monopoly' in violation of section 7 of the Clayton Act." *Heinz*, 246 F.3d at 714 (quoting 15 U.S.C. § 18) (emphasis added). The Commission "is not required to *establish* that the proposed merger would in fact violate Section 7 of the Clayton Act." *Id.* (emphasis in original). In fact, the district court "'is not authorized to determine whether the antitrust laws . . . are about to be violated.' That responsibility lies with the FTC." *Whole Foods*, 548 F.3d at 1035 (ellipses in original) (citation omitted); *cf. FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015) (discussing 15 U.S.C. § 53(b) standard).

260. The Commission's showing of a likelihood of success on the merits "weighs heavily in favor of a preliminary injunction blocking the acquisition." *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C. Cir. 1986) (internal quotation marks omitted). Indeed, "[t]he equities will often weigh in favor of the FTC, since the 'public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting" 15 U.S.C. § 53(b). *Whole Foods*, 548 F.3d at 1035 (quoting *Heinz*, 246 F.3d at 726).

261. By contrast, the "risk that the transaction will not occur at all" is "a private consideration that cannot alone defeat the preliminary injunction." *Whole Foods*, 548 F.3d at 1041(internal quotation marks omitted); *see also Heinz*, 246 F.3d at 726; *Sysco*, 113 F. Supp. 3d at 87.

III. PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

262. Plaintiffs' underlying antitrust claims—which will be adjudicated in the administrative trial on the merits—are brought under Section 7 of the Clayton Act and Section 5

of the FTC Act.[1] Section 7 of the Clayton Act prohibits mergers "the effect of [which] may be substantially to lessen competition" in "any line of commerce." 15 U.S.C. § 18.

263. Section 7 of the Clayton Act is intended to prevent anticompetitive mergers "in their incipiency," *before* they create anticompetitive harm. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (internal quotation marks omitted). Indeed, "Congress used the words '*may* be substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties"—even on the ultimate merits. *Heinz*, 246 F.3d at 713 (internal quotation marks omitted). As a result, "certainty, even a high probability, need not be shown," and "doubts are to be resolved *against* the transaction." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) (emphasis added).

264. At the merits stage, courts often assess whether a merger violates Section 7 by determining: (1) the "line of commerce," or relevant product market; (2) the "section of the country," or relevant geographic market; and (3) the merger's probable effect on competition in the relevant product and geographic markets. *See, e.g.*, *United States v. Marine Bancorp. Inc.*, 418 U.S. 602, 618-24 (1974); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 422-23 (5th Cir. 2008). However, establishing a presumption of illegality based on undue concentration "does not exhaust the possible ways to prove a § 7 violation on the merits… much less the ways to demonstrate a likelihood of success on the merits in a preliminary proceeding." *Whole Foods*, 548 F.3d at 1036 (citation omitted).

265. By showing that the proposed transaction "will lead to undue concentration in the market," the Commission "establishes a presumption that the transaction will substantially lessen competition." *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1083 (D.D.C. 1997); *accord Heinz*, 246

[1] An acquisition that violates the Clayton Act by definition also violates Section 5 of the FTC Act. *See, e.g., FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *PPG Indus.*, 798 F.2d at 1501 n.2.

F.3d at 715. This presumption establishes a *prima facie* case that the merger is unlawful. *See Heinz*, 246 F.3d at 715.

266. Defendants bear the burden of rebutting the *prima facie* case. *Marine Bancorp,* 418 U.S. at 631. Indeed, a presumptively unlawful merger "must be enjoined," *Phila Nat'l Bank*, 374 U.S. at 363, unless the defendants provide rebuttal evidence demonstrating "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 (alterations and internal quotation marks omitted). The "more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725 (citation omitted); *accord United States v. H&R Block, Inc*., 833 F. Supp. 2d 36, 72 (D.D.C. 2011). If, and only if, Defendants come forward with evidence sufficient to rebut the presumption, does the burden of producing additional evidence of anticompetitive effect shift back to the government. *H&R Block,* 833 F. Supp. 2d at 50; *Sysco*, 113 F. Supp. 3d at 23.

A. The Relevant Market Is The Sale And Distribution Of Consumable Office Supplies To Large B-to-B Customers In The United States.

1. Product Market Definition Principles.

267. A relevant product market "for antitrust purposes is the one relevant to the particular legal issue at hand." *H&R Block.*, 833 F. Supp. at 51 n.8 (emphasis omitted) (quoting 5C Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 533, at 251 (3d ed. 2007)). In a merger case, a relevant product market is the line of commerce in which competition may be substantially lessened because of the merger. *See Phila. Nat'l Bank*, 374 U.S. at 355-56; *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

268. "An analytical method often used by courts to define a relevant market is to ask hypothetically whether it would be profitable to have a monopoly over a given set of

substitutable products." *H&R Block*, 833 F. Supp. 2d at 51. If such a hypothetical monopolist could profitably impose a small but significant non-transitory increase in price—typically five percent—over particular products or services, then those products or services constitute a relevant antitrust market. *Id.*; *U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* (2010) (hereinafter, "*Merger Guidelines*"), §§ 4.1.1-4.1.3.

269. This approach—the "hypothetical monopolist test"—is endorsed by the *Merger Guidelines* and has been widely used by courts. *See Heinz*, 246 F.3d at 718; *Sysco*, 113 F. Supp. 3d at 33; *H&R Block*, 833 F. Supp. 2d at 51-52; *Merger Guidelines* §§ 4.1.1-4.1.3.

270. Defining a relevant product market turns on inclusion of all reasonable *substitute* products. *See H&R Block*, 833 F. Supp. 2d at 51. In some instances, otherwise separate individual relevant product markets also can be grouped together into a cluster market for analytical convenience. *See ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565-68 (6th Cir. 2014); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2012). Such clustering is appropriate only when the individual products face similar competitive conditions. *See ProMedica*, 749 F.3d at 565-68; *In the Matter of ProMedica Health Sys, Inc.*, FTC Dkt. No. 9346, 2012 WL 2450574, at *33-36 (F.T.C. June 25, 2012). If the products face similar competitive conditions, then the product market analysis will be the same whether conducted for each product individually or for the cluster as a whole. *See Brown Shoe*, 370 U.S. at 327-28 (shoe market need not be subdivided when "considered separately or together, the picture of this merger is the same").

271. It also can be appropriate to define a relevant market based on distinct categories of customers. *See Sysco*, 113 F. Supp. 3d at 38-48 (relevant market for sales to "national customers"); *OSF Healthcare*, 852 F. Supp. 2d at 1075-76 (general acute care inpatient services

sold to commercial health plans); *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 933-35 (6th Cir. 2005) ("leisure or price-sensitive passengers" rather than all air passengers); *Merger Guidelines* §§ 3, 4.1.4.

272. Defining a market around distinct categories of customers is appropriate when a firm can raise prices to certain customers but not to others. *See Merger Guidelines* §§ 3, 4.1.4; *Sysco*, 113 F. Supp. 3d at 46. Such price discrimination is feasible when firms are able to impose "differential pricing" on customers and where "limited arbitrage" is present. *Merger Guidelines* § 3; *see also Sysco*, 113 F. Supp. 3d at 46.

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

273. The relevant product market is the sale and distribution of consumable office supplies to large B-to-B customers. Pls.' Proposed Findings of Fact [*hereinafter* PFF] ¶¶ 1, 3. Large B-to-B customers are defined as commercial customers that buy at least $500,000 of consumable office supplies per year for their own end-use. PFF ¶ 12.

274. "Consumable office supplies" refers to a cluster of individual consumable office supplies products, such as pens, file folders, Post-it notes, binder clips, and copy paper. The individual items in this cluster generally are not substitutes for each other—*i.e.*, a pen is not a substitute for a file folder. As such, the sale and distribution of each class of product generally constitutes a distinct relevant antitrust market, and Plaintiffs could have challenged the proposed Merger with respect to each of those individual product markets. Given the thousands of items at issue, however, it would be impractical to analyze each individual market separately. PFF ¶¶ 4-5.

275. Instead, Plaintiffs aggregated these distinct items into a single relevant cluster market for analytical convenience. This cluster market is appropriate because these items are subject to

similar competitive conditions, i.e., the vendors competing to sell those products are similar.[2] PFF ¶¶ 6-8. *See Promedica*, 749 F.3d at 565-68.

276. Plaintiffs also analyzed the proposed Merger's effects on large B-to-B customers. This is appropriate because these customers individually negotiate customized prices and therefore could be subject to individualized price increases. PFF ¶¶ 12, 45; *see generally* PFF § I(C)(1)-(2). *See Merger Guidelines* § 4.1.4 (agencies "often consider markets for targeted customers when prices are individually negotiated and suppliers have information about customers that would allow a hypothetical monopolist to identify customers that are likely to pay a higher price for the relevant product"); *Sysco*, 113 F. Supp. 3d at 46 (applying *Merger Guidelines'* framework to define relevant market for "national customers" where "Defendants engage[d] in individual negotiations with their national customers and possess[ed] substantial information about them").

277. Moreover, the unrebutted evidence indicates that large customers have office supply requirements that are distinct from small and medium-sized businesses. *See* PFF ¶ 12; *see generally* PFF § I(C)(3); *Sysco*, 113 F. Supp. 3d at 42-43 (defining a relevant market of "national customers" where national customers had requirements that were distinct from local and regional broadline customers).

278. The expert testimony of Professor Carl Shapiro, one of the leading antitrust economists in the United States, confirms that the sale and distribution of consumable office supplies to large B-to-B customers is a properly-defined relevant market. The hypothetical monopolist test is readily satisfied for this market. This analysis is unrebutted. PFF ¶¶ 16, 19.

[2] Plaintiffs also could have alleged a "core" consumable office supplies market and a second relevant market for copy paper. Because of the similar competitive conditions for those products, however, Plaintiffs did not need to.

279. Courts often consider "expert testimony in the field of economics" in evaluating product market definition. *Sysco*, 113 F. Supp. 3d at 33. But Defendants offered none. Moreover, even if Defendants had presented expert testimony, a preliminary injunction would still be appropriate. "[C]ourts . . . trench on the FTC's role when they choose between plausible, well-supported expert studies." *Whole Foods*, 548 F.3d at 1048. Here, Defendants presented no expert testimony—plausible or otherwise.

3. Defendants' Criticisms Of The Relevant Market Are Wrong As A Matter Of Law.

280. Defendants contend that the "exclusion" of ink and toner from the relevant product market—and, to a lesser extent, other products like office furniture—is a "fatal flaw" in Plaintiffs' case. Defendants' argument misunderstands antitrust market definition principles. Not surprisingly, Defendants' position is unsupported by any economic expert testimony and is inconsistent with case law. Ink and toner are not part of the relevant cluster market because they are not substitutes for the items in the consumable office supply cluster and because they are subject to different competitive conditions.

281. First, ink and toner are *not substitutes* for any of the items in the consumable office supply cluster defined by Plaintiffs: large business customers could not switch to ink and toner in response to a price increase by a hypothetical monopolist controlling file folders or other consumable office supplies. PFF ¶¶ 17, 23; *cf. United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990) ("If you need your hip replaced, you can't decide to have chemotherapy instead because it's available on an outpatient basis at a lower price."). Thus, ink and toner *cannot* be included in the relevant product market as substitute products under accepted market definition principles. *See Brown Shoe*, 370 U.S. at 325 ("*The outer boundaries*

of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself *and substitutes for it*.") (emphasis added).

282. Indeed, Defendants have failed to identify *any substitute product* for the sale and distribution of consumable office supplies that Plaintiffs or Dr. Shapiro excluded from the relevant market. Thus, Defendants have failed to offer any conceptual basis—much less any evidence—for concluding that Plaintiffs' proposed market fails to satisfy the hypothetical monopolist test or otherwise is too narrow to be a relevant antitrust market.

283. Second, it is *not appropriate* to include ink and toner in the cluster because they are subject to different competitive conditions than products like pens, notepads, binders, and copy paper. *See supra* ¶ 281. Large business customers face different competitive options for sourcing ink and toner because of the prevalence of managed print services offered by the ink and toner manufacturers. PFF § I(B)(1). Therefore, it would be *legal error* to include ink and toner in the "consumable office supplies" cluster market. *See FTC v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *55 (N.D. Ohio Mar. 29, 2011) ("inappropriate" and "misleading" to include obstetrics in a relevant cluster market for hospital services because the market shares and entry conditions for obstetrics were different from other hospital services). Indeed, because of the prevalence of managed print services, large business customers have more choices for their ink and toner purchases than they do for consumable office supplies. Thus, if Staples and Office Depot merged, the Merger might not substantially lessen competition for ink and toner, but it would substantially lessen competition for the sale and distribution of pens, notepads, post-it notes, copy paper and so on. That is the antitrust concern.

284. The same principles above apply to the adjacency product categories—furniture, janitorial and sanitation supplies, technology, and breakroom supplies. The relevant cluster

market excludes those products because they are not substitutes for the items in the consumable office supply cluster and because they are subject to different competitive conditions. PFF § I(B)(2).

285. The governing principles discussed above show that Defendants' other critiques of the relevant market are equally unfounded. Thus, the fact that Defendants sell ink, toner and adjacency products to large customers along with consumable office supplies does not mean that all of those products are necessarily in the same *antitrust* market. *See ProMedica*, 749 F.3d at 565-66. Indeed, in *ProMedica*, a hospital merger case, the defendant argued that the cluster market needed to include *all* services that the merging hospitals' customers—commercial health plans—negotiated together in a single contract. *See ProMedica*, 749 F.3d at 567-68. The Sixth Circuit rejected that argument because services like obstetrics faced different competitive conditions. *ProMedica*, 749 F.3d at 566. The fact that obstetric services were negotiated in the same contracts did not change the analysis. *Id.* at 567-68.

286. The fact that customers testified that ink and toner are "consumable" and are "office supplies" is similarly irrelevant to whether ink and toner should be included in the cluster market for antitrust purposes. The issue is not what the FTC *names* the cluster; it is whether the products in the cluster face similar competitive conditions. Indeed, in *ProMedica*, it was undisputed that obstetrics is a hospital service. But that did not govern the antitrust analysis, and it did not mean that obstetrics was properly included in the cluster market.

287. Defendants also argue that Plaintiffs did not include ink and toner in the relevant cluster market because doing so would have weakened Plaintiffs' challenge to the Merger. As noted above, it would have been inappropriate, and contrary to case law, to include ink and toner in the cluster. Of course, Plaintiffs *could* have considered an *additional* challenge to Defendants'

Merger on the ground that the Merger may substantially lessen competition for the sale and distribution of ink and toner. But Plaintiffs' prosecutorial decision not to bring that additional challenge does not undermine the case that Plaintiffs did bring.[3] *See CCC Holdings*, 605 F. Supp. 2d at 34 & n.10 (merger challenged for partial loss estimation and total loss valuation software, but not "add-on" products typically sold with the software; the add-on products were also "sold by a large number of companies" in addition to the merging parties); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 39 n.10 (D.D.C. 2002) (merger challenged in the foodservice glassware market, but not the retail glassware market where imported glassware suppliers dominated); 9C Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 929d ("The 'line of commerce' language of §7 of the Clayton Act, and the general principles of merger policy, require the government to identify some grouping of sales that constitutes a relevant market in which prices might rise as a consequence of the merger. That a larger or smaller grouping of sales might also constitute a market is beside the point."). *Cf. Rockford Memorial Corp.*, 898 F.2d at 1284 ("If a firm has a monopoly of product X, the fact that it produces another product, Y, for which the firm faces competition is irrelevant to its monopoly unless the prices of X and Y are linked.").

288. Finally, rather than applying the hypothetical monopolist test, Defendants argue that "commercial realities" undermine Plaintiffs' market definition. But the "commercial realities" are that Defendants are the largest and second-largest office supplies vendors in the country; they are each other's closest competitor for large business customers; bid data show that they lose bids most often to each other; and large customers currently benefit greatly from their head-to-head competition. That competition would be eliminated by this Merger. PFF § III. Those are the "commercial realities" here. And they are unrebutted.

[3] By analogy, if a prosecutor in a criminal case can bring two counts against a criminal defendant but chooses to bring only one, that prosecutorial decision does not in any way undermine the viability of the first count.

4. The United States Is The Relevant Geographic Market.

289. "The 'relevant geographic market' identifies the geographic area in which the defendants compete in marketing their products or services." *H&R Block*, 833 F. Supp. 2d at 50 n.7 (quoting *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009)) (internal quotation marks omitted); *see also FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 49 (D.D.C. 1998); *Merger Guidelines* § 4.2. Here, the relevant geographic market is the United States, as Defendants' own expert conceded during discovery. PFF ¶ 13.

B. The Acquisition Is Presumptively Unlawful.

290. A merger that significantly increases market shares and concentration is presumed unlawful under Section 7 of the Clayton Act. *See Phila. Nat'l Bank*, 374 U.S. at 363. Such a merger "is so inherently likely to lessen competition substantially that it *must be enjoined*" unless the defendants can rebut the presumption. *Id.* (emphasis added); *see also Heinz*, 246 F.3d at 715. In *Philadelphia National Bank*, the Supreme Court enjoined a merger resulting in a combined share of "at least 30%." *Phila. Nat'l Bank*, 374 U.S. at 364.

291. Plaintiffs may rely on "the closest available approximation" of market shares when calculating concentration levels. *See FTC v. PPG Indus.*, 798 F. 2d 1500, 1505 (D.C. Cir. 1986). Indeed, the "FTC need not present market shares and HHI estimates with the precision of a NASA scientist." *Sysco*, 113 F. Supp. 3d at 54.

292. Courts employ a statistical measure called the Herfindahl-Hirschman Index (HHI) to measure market concentration. *See, e.g., Heinz*, 246 F.3d at 716; *H&R Block*, 833 F. Supp. 2d at 71. This index calculates market concentration by summing the squares of the individual market share of each market participant. *See Sysco*, 113 F. Supp. 3d at 52.

293. A merger is presumptively unlawful if it increases the HHI by more than 200 points and results in a post-merger HHI exceeding 2,500. *Merger Guidelines* § 5.3; *see also Heinz*, 246 F.3d at 716-17; *Sysco*, 113 F. Supp. 3d at 52; *Staples*, 970 F. Supp. at 1081-82.

294. Staples' acquisition of Office Depot would increase the HHI by 3,000 points. PFF ¶ 101. That is *fifteen times* the threshold. It would result in a post-merger HHI of 6,274—over two and a half times the threshold. PFF ¶ 101. And it would result in a post-Merger market share of 79%. The Merger is presumptively unlawful. *See Heinz*, 246 F.3d at 716-17 (HHI increase of 510 points creates presumption of harm "by a wide margin").

295. Dr. Shapiro calculated market shares using purchasing data from 81 of the Fortune 100. PFF ¶ 102. Dr. Shapiro confirmed these results by analyzing sales data from more than 30 office supply competitors to capture Defendants' share as the "primary vendor" to large customers. PFF ¶ 103. This analysis reveals that Defendants are far more successful than other office supply vendors in becoming the primary vendor to large customers, even when the annual spend threshold is reduced to $250,000. *Id*. Staples' and Office Depot's bid data—covering *all* large customers, not just the Fortune 100—similarly demonstrates that Staples and Office Depot far surpass other competitors in appearances and wins in bid opportunities for large customers. PFF ¶ 104. Thus, both the primary vendor shares and the bid data confirm that the Fortune 100 market shares are representative of Defendants' position in the relevant market. PFF ¶¶ 103-104.

296. Dr. Shapiro's market share calculations satisfy the established legal standards. Indeed, in *Sysco*, the court affirmed an expert's calculations of market shares based on sales by only three competitors, checked by a separate analysis of data from 16 competitors, for which the expert made various adjustments and assumptions about the data. *Sysco*, 113 F. 3d at 53. The *Sysco* court found the market share estimates reliable over defendants' objections because they

were the "closest available approximation" of market shares. *Id*. at 54 (quoting *PPG Indus.*, 798 F.2d at 1505) (internal quotation marks omitted); *see also PPG Indus.*, 798 F.2d at 1505 (affirming finding of highly concentrated market based on comparison of market shares in a *related* market); *United States v. Bazaarvoice, Inc.*, No. 13-cv-133, 2014 U.S. Dist. LEXIS 3284, at *237 (N.D. Cal. Jan. 8, 2014) ("The Court recognizes that the above measures do not perfectly capture the combined entity's share of the R & R market. Nonetheless, each of the measures reveals the same basic market structure: that Bazaarvoice and PowerReviews are the two dominant providers of R & R and they have a combined market share in excess of 50 percent."); *H&R Block*, 833 F. Supp. 2d at 72 (a "reliable, reasonable, close approximation of relevant market share data is sufficient"); *cf. Brown Shoe*, 370 U.S. at 340-41 ("fair sample" of markets sufficient to evaluate the merger; defendants could object "to some details" of the market share calculations, but "[could not] deny the correctness of the more general picture they reveal").

C. Direct Evidence Shows That The Acquisition Likely Would Substantially Lessen Competition.

297. Rather than defining markets and calculating market shares and HHIs to establish a presumption that the Merger is unlawful, the FTC also may demonstrate a likelihood of success on the merits by producing direct evidence that a proposed acquisition would likely result in a substantial lessening of competition. *See Whole Foods*, 548 F.3d at 1036 (establishing a presumption of illegality based on undue concentration "does not exhaust the possible ways to prove a § 7 violation on the merits"). Plaintiffs' direct evidence of likely anticompetitive effects both satisfies this standard and corroborates Plaintiffs' *prima facie* case. *See generally* PFF § III.

298. Courts in this Circuit have repeatedly held that transactions that would eliminate significant head-to-head competition are likely to result in anticompetitive effects. *See, e.g.*, *Sysco*, 113 F. Supp. 3d at 61-65; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C.

2000); *H&R Block*, 833 F. Supp. 2d at 88-89; *Staples*, 970 F. Supp. at 1083. Indeed, "there can be little doubt that the acquisition of the second largest firm in the market by the largest firm in the market will tend to harm competition in that market." *Sysco*, 113 F. Supp. 3d at 66 (quoting *Whole Foods*, 548 F.3d at 1043.

299. This common-sense notion is reflected in the *Merger Guidelines*. As the *Merger Guidelines* explain, a "merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations." *Merger Guidelines* § 6.2. The elimination of that competition "alone can significantly enhance the ability and incentive of the merged entity to obtain a more favorable result to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger." *Id*. Thus, where a merger "eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage," the merger is likely to cause competitive harm. *Merger Guidelines* § 8.

300. Plaintiffs have produced significant evidence from Defendants' ordinary business documents that head-to-head competition between Staples and Office Depot has directly benefitted customers through lower prices and better service. PFF ¶ 133(b)-(l); *see generally* PFF § III(C). Such evidence is particularly informative. *See, e.g.*, *H&R Block*, 833 F. Supp. 2d at 81-82 (relying on defendants' business documents to conclude merging parties are head-to-head competitors); *Sysco*, 113 F. Supp. 3d at 64-65 (same). The Merger will eliminate that competition.

301. Moreover, as Dr. Shapiro's analysis of the bidding data shows, Staples and Office Depot win bidding opportunities for large customers significantly more frequently than any other competitor. PFF § III(A). This also indicates the likelihood of significant anticompetitive effects. *Id.*; *see also Sysco*, 113 F. Supp. 3d at 62-64; *Merger Guidelines* § 6.2

("Anticompetitive unilateral effects in [bargaining or auction] settings are likely in proportion to the frequency or probability with which, prior to the merger, one of the merging sellers had been the runner-up when the other won the business. These effects also are likely to be greater, the greater advantage the runner-up merging firm has over other suppliers in meeting customers' needs.").

302. Importantly, Plaintiffs are not "required to show that *all* competition will be eliminated as the result of a merger in order to obtain an injunction." *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1083 (emphasis added); *see also H&R Block*, 833 F. Supp. 2d at 72 (finding likely anticompetitive unilateral effects where combined firm would have 28.4% market share). Plaintiffs must show only that the Merger may substantially *lessen* competition. *See* 15 U.S.C. § 18. Here, the fact that the Merger removes competition between the largest and second-largest vendors in the market leaves "little doubt" that the Merger "will tend to harm competition in that market." *Whole Foods*, 548 F.3d at 1043.

D. Defendants Cannot Rebut The Strong Presumption Of Illegality Or Plaintiffs' Showing Of Likely Competitive Harm.

303. Defendants have the burden to rebut the presumption by "produc[ing] evidence that 'show[s] that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (alterations in original) (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)). Defendants bear a heavy burden given the strength of Plaintiffs' *prima facie* case. *See Sysco*, 113 F. Supp. 3d at 23 (the stronger the *prima facie* case, the more evidence defendants must present to rebut the established presumption).

1. Defendants Cannot Show That Amazon Business Will Counteract the Anticompetitive Effects Of The Transaction.

304. Defendants "carry the burden to show that ease of expansion is sufficient 'to fill the competitive void that will result if [defendants are] permitted to purchase' their acquisition target." *H&R Block*, 833 F. Supp. 2d at 73 (alterations in original) (quoting *Swedish Match*, 131 F. Supp. 2d at 169); *see also Staples*, 970 F. Supp. at 1086. Indeed, it is not enough that entry or expansion would replace "*some* of the competition" lost to the Merger. *See Swedish Match*, 131 F. Supp. 2d at 170 (emphasis added). Prospective "entry into the relevant market will alleviate concerns about adverse competitive effects only if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers." *Sysco*, 113 F. Supp. 3d at 80 (quoting *Merger Guidelines* § 9).

305. To meet their burden, Defendants must 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 *Merger Guidelines* § 9); *see also CCC Holdings*, 605 F. Supp. 2d at 47.

306. Defendants have not shown that Amazon Business will replace the competition lost to the Merger. As an initial matter, Defendants cannot show that expansion by Amazon Business will be *timely*, meaning that Amazon Business will "fill the competitive void" left by Office Depot within one to two years. Shapiro Hrg. 2403 ("a year or two is a common timeframe" to assess entry or expansion). Indeed, even under its most optimistic projections, Amazon Business does not know when or whether it will achieve certain capabilities required by large B-to-B customers. PFF ¶ 198.

307. Nor have Defendants shown that it is *likely* that Amazon will expand sufficiently to "fill the competitive void" left by Office Depot. Amazon Business does not currently offer all

the services that large B-to-B customers require, such as the ability to respond fully to RFPs; negotiate customized pricing; [redacted]; guaranteed pricing; a curated catalog that limits employees' ordering to the products on which the company has negotiated the lowest prices; or desktop delivery. PFF ¶¶ 190-191.

308. While Amazon Business has stated that it hopes to develop some of those capabilities, there are significant obstacles. It must get funding from Amazon.com to develop those features, and it must find technological solutions that will allow it to provide the services that large B-to-B customers require. PFF ¶¶ 198, 200-201. [redacted], and finding technological solutions to Amazon Business' shortcomings takes time and testing, the outcome of which is uncertain. PFF ¶¶ 196, 198, 200-201.

309. Even more critically, Amazon Business's "marketplace" model—which is centered on sales by numerous third-party sellers—is fundamentally at odds with important aspects of the pricing and services that large B-to-B customers receive from their consumable office supplies vendors. As such, Amazon Business has no plans to implement certain features that are key to attempting to replace the competition lost from Office Depot, such as [redacted]. PFF ¶¶ 185-187, 199.

310. Finally, Defendants bear the burden of proving that expansion by Amazon Business would be *sufficient* to fill the competitive void left by Office Depot. But even Amazon Business' most optimistic sales projections—[redacted]

[redacted]. PFF ¶ 197. Thus, even the most optimistic sales projections show that Amazon Business would not come close to filling the competitive void left by Office Depot.

311. *Sysco* is instructive here. In *Sysco*, the court noted that the proposed divestiture buyer, PFG, projected to grow to a 20 percent market share in five years. 113 F. Supp. 3d at 73. That was less than half of the acquired firm's pre-merger sales. *Id.* The court found such expansion insufficient to "maintain the intensity that characterizes the present competition" between the merging parties. *Id.* at 76. Indeed, it is not enough that competitors' entry or expansion would replace *some* of the competition lost to the Merger; the issue is whether such competition will be "sufficient in its magnitude, character, and scope to deter or counteract" anticompetitive effects. *H&R Block*, 833 F. Supp. 2d at 73; *see also CCC Holdings*, 605 F. Supp. 2d at 59 (expansion by existing firm held insufficient when the firm was projected to have only a small fraction of the merging parties' market shares within several years).

312. Here, even if—contrary to the evidence—Amazon Business [redacted], was able to develop all of its proposed enhancements successfully, on time, and without any hiccups, and was able to meet its most optimistic sales forecasts, its expansion would not be sufficient to replace the competition lost to the Merger.[4]

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

313. The Federal Trade Commission's Closing Statement conveying its decision not to challenge a different merger—the 2013 merger of Office Depot and OfficeMax—cannot rebut the presumption that *this* Merger is unlawful. Indeed, the Commission was clear that its decision

[4] Defendants have not advanced any evidence that expansion by regional distributors or companies in other product markets will be timely, likely, or sufficient to counteract the reduction in competition caused by the Merger. For example, W.B. Mason, the largest regional office supplies distributor in the United States, testified that it is not competitive for large customers outside of "Masonville," [redacted]. *See* PFF ¶ 154, § IV(B).

was "limited to the facts before us in this particular matter." PX08064 (2013 Closing Statement) at 003. It also would be inappropriate for the Court to give any weight to the Commission's 2013 Statement in the weighing of equities. Indeed, an "agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

314. Moreover, there is no inconsistency in the Commission's treatment of those two different transactions. In both 2013 and currently, the Commission chose not to challenge the proposed merger's likely effects in the retail market. In both 2013 and currently, the Commission chose not to challenge the proposed merger's likely effects on the sale of ink and toner. In both 2013 and currently, the Commission chose not to challenge the proposed merger's likely effects on the sale of adjacent products such as office furniture, breakroom supplies or janitorial supplies.

315. The only difference is that the current action challenges the proposed Merger's likely effects on the sale and distribution of consumable office supplies to large B-to-B customers. But "[a]nalyzing the likely competitive effects of a proposed transaction is always a fact-specific exercise." PX08064 (2013 Closing Statement) at 003. And many key facts in this case are critically different from those concerning Office Depot's 2013 acquisition of OfficeMax.

316. 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*. Further, in 2013, the merging parties' own documents showed that they were rarely each other's closest competitor for most large customers. PX08064 (2013 Closing Statement) at 003. The closest competitor to both companies was *Staples*. PFF ¶ 230.

317. Relevant market analysis is also fact-specific and necessarily based on the particular circumstances of the merger at issue. *See ProMedica*, 2012 WL 2450574, at *39 ("[D]efining a relevant product market in any particular case is a fact-specific question."); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 52 (D.C. Cir. 2001) (*en banc*, *per curiam*) ("[T]he determination of a relevant market is a factual question. . . .").

318. Further, in 2013, "even the largest customers believe[d] the merger would be either procompetitive or competitively neutral." PX08064 (2013 Closing Statement) at 003. By contrast, customers testified at the hearing that they believed the current Merger would reduce competition. PFF ¶ 233.

3. Purported Off-Contract "Leakage" Does Not Rebut The Presumption.

319. It is Defendants' burden to present this Court with evidence establishing that their high market shares do not reflect Defendants' true competitive significance. *Heinz*, 246 F.3d at 715; *H&R Block*, 833 F. Supp. 2d at 72. Defendants' suggestion of off-contract purchasing—so-called "leakage"—does not satisfy that burden. Leakage is minimal. Indeed, large customers view off-contract purchasing, to the extent it occurs, as a problem to be eliminated, not a means of saving money on office supplies. PFF § IV(C)(1).

320. Moreover, the market shares in this case include sales to large B-to-B customers from *any* supplier. PFF ¶ 213 Thus, any "leakage" is already reflected in Plaintiffs' analysis.

4. Defendants' Efficiencies Claims Do Not Rebut The Presumption.

321. Defendants bear the burden of proving an efficiencies defense. *See H&R Block*, 833 F. Supp. 2d at 89. No court has ever relied on efficiencies to rescue an otherwise unlawful transaction. *See CCC Holdings*, 605 F. Supp. 2d at 72.

322. Given the high market concentration levels in this case, Defendants must present "proof of extraordinary efficiencies" to rebut the presumption of likely anticompetitive effects.

Id. (quoting *Heinz*, 246 F.3d at 720). But Defendants did not present any expert or fact witness to testify about efficiencies. Thus, Defendants failed to show any likely efficiencies from the proposed Merger, let alone that any such efficiencies are (1) "merger-specific," and (2) "reasonably verifiable by an independent party." *H&R Block*, 833 F. Supp. 2d at 89; *see also Heinz*, 246 F.3d at 721-22; PFF § IV(E).

323. Nor have Defendants presented any evidence that their purported efficiencies would benefit customers. *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991); *CCC Holdings*, 605 F. Supp. 2d at 74. And the evidence is to the contrary. PFF ¶240-241.

5. Defendants' Essendant Proposal Does Not Rebut The Presumption.

324. Defendants also bear the burden of showing that their proposed transfer of certain contracts to Essendant would negate any anticompetitive effects. Defendants must demonstrate that their proposal would establish "a viable alternative to the merged entity 'on day one' to maintain the intensity that characterizes the present competition between [the merging parties.]" *Sysco*, 113 F. Supp. 3d at 76.

325. Defendants put on no evidence to support their proposed transfer of assets to Essendant. And the evidence in the record makes clear that the proposed Essendant transaction would not replace the competition lost through the Merger. PFF § IV(F).

6. Defendants' Other Arguments Are Meritless.

326. Finally, Defendants have suggested that there is no concern with the Merger because large businesses will not "close their doors" after the Merger, and have "sophisticated procurement departments" that can protect them from anticompetitive harm.

327. "Even buyers that can negotiate favorable terms may be harmed by an increase in market power." *Merger Guidelines* § 8; *see also Sysco*, 113 F. Supp. 3d at 48 (rejecting arguments that large buyers would not be harmed). In fact, business practices used by

sophisticated procurement departments, such as RFPs, *depend upon* competition to make them effective. PFF § IV(C)(2). *See Chi. Bridge & Iron*, 534 F.3d at 440. This Merger will eliminate that competition. *See Sysco*, 113 F. Supp. 3d at 48 (finding that national customers may be vulnerable to post-merger price discrimination); *ProMedica*, 2012 WL 2450574, at *53-54 (health insurance companies less able to resist price increases post-merger despite still having some leverage).

328. Moreover, many cases have challenged mergers that threatened to substantially lessen competition for goods and services sold to other businesses. *See, e.g.*, *CCC Holdings*, 605 F. Supp. 2d at 30 (D.D.C. 2009) (loss estimation products sold to auto insurance companies and repair shops); *Sysco*, 113 F. Supp. 3d at 42-43 (broadline food distribution to national and multi-regional customers); *Bazaarvoice*, 2014 U.S. Dist. LEXIS 3284, at *4 (review and rating software platforms for online retailers); *Polypore v. FTC*, 686 F.3d 1208, 1211-12 (11th Cir. 2012) (battery separators sold to battery manufacturers); *ProMedica*, 749 F.3d at 561-62 (inpatient hospital services sold to national health insurance companies).[5]

IV. THE EQUITIES FAVOR A PRELIMINARY INJUNCTION.

329. A preliminary injunction is in the public interest. *See Heinz*, 246 F.3d at 726. Indeed, the public has a strong interest in the protection of competition through the effective enforcement of the antitrust laws. After all, "competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy." *Phila. Nat'l Bank*, 374 U.S. at 372.

[5] Nor is it Plaintiffs' burden to show the extent to which price increases will be passed on to consumers. *See Heinz*, 246 F.3d at 719. "[N]o court has ever held that a reduction in competition for wholesale purchasers is not relevant unless the plaintiff can prove impact at the consumer level." *Id.*

330. In fact, "[t]he equities will often weigh in favor of the FTC, since 'the public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting [§ 13(b)]." *Whole Foods*, 548 F.3d at 1035 (quoting *Heinz*, 246 F.3d at 726). Indeed, "[n]o court has denied relief to the FTC in a [Section] 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *ProMedica*, 2011 WL 1219281, at *60; *see also PPG Indus.*, 798 F.2d at 1508 (likelihood of success "weighs heavily in favor of a preliminary injunction") (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085 (D.C. Cir. 1981)).

331. An equally important public equity is the preservation of the Commission's ability to obtain effective relief if the Merger is ultimately found to violate Section 7 of the Clayton Act. Without a preliminary injunction, Defendants can "scramble the eggs"—that is, combine their operations and make it extremely difficult, if not impossible, for competition to be restored to its previous state. *Heinz,* 246 F.3d at 726 (citing *FTC v. Dean Foods Co*., 384 U.S. 597, 606 n.5 (1966)) ("Administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture.")); *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085-86 n.31 (D.C. Cir. 1981); *Whole Foods*, 548 F.3d at 1034; *Libbey,* 211 F. Supp. 2d at 54.

332. Defendants have failed to establish any public equities in their favor. Indeed, having failed to establish an efficiencies defense, Defendants' purported efficiencies claims cannot serve as a countervailing public equity. *See CCC Holdings*, 605 F. Supp. 2d at 76.

333. Defendants assert that the transaction will not occur if a preliminary injunction is issued, but that is "a private consideration that cannot alone defeat the preliminary injunction."

Whole Foods, 548 F.3d at 1041 (citing *Heinz*, 246 F.3d at 726). *See also Sysco*, 113 F. Supp. 3d at 87.

334. This Court also should not give weight to any private equity arguments about Office Depot's financial condition. Defendants did not put on any evidence on this topic at the hearing. Nor is Office Depot a "failing firm" under the case law. *See Univ. Health*, 938 F.2d at 1221 (describing requirements of failing firm defense and noting that arguments about financial condition are "probably the weakest ground of all for justifying a merger") (citation omitted).

335. The equities decisively favor a preliminary injunction.

Dated: April 13, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of April, 2016, I caused the foregoing to be filed 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/ Tara Reinhart
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