

FTC, et al. v. Staples, Inc., et al.

Closing Argument

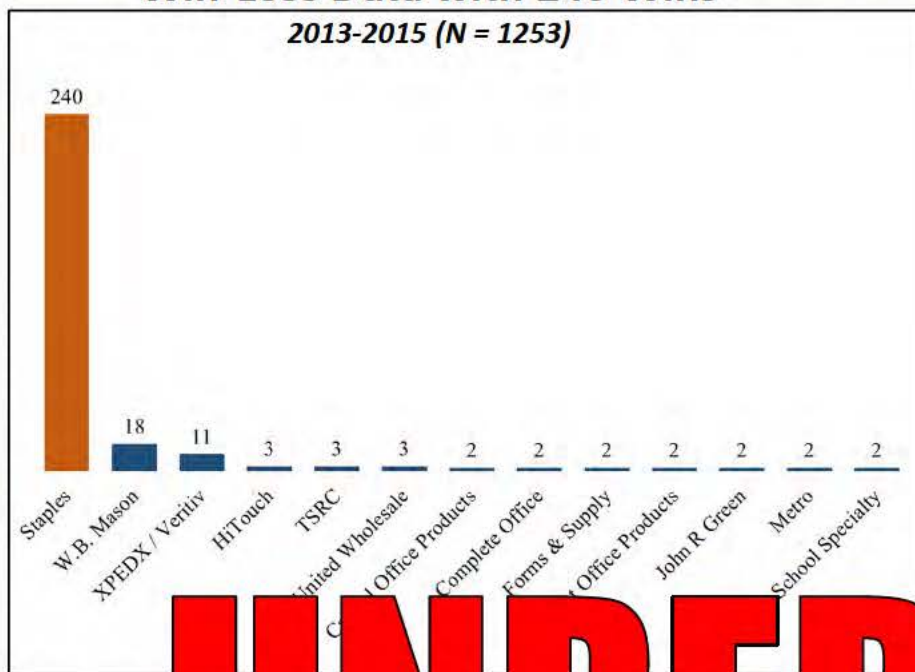


April 19, 2016

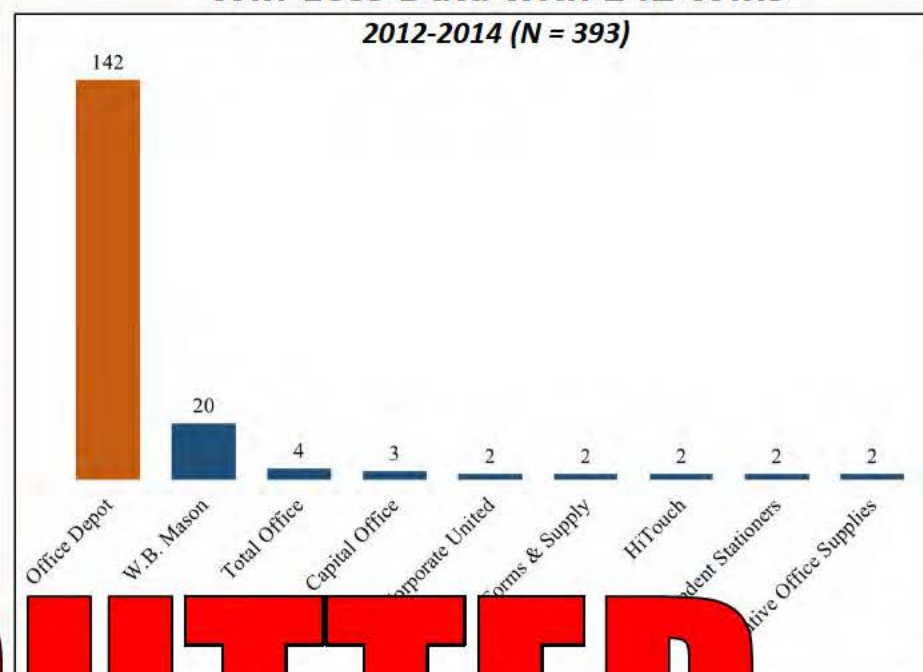


Defendants' Bid Data Show Likelihood of Significant Harm to Competition

Staples Dominates in Office Depot's Win-Loss Data with 240 Wins



Office Depot Dominates in Staples Win-Loss Data with 142 Wins



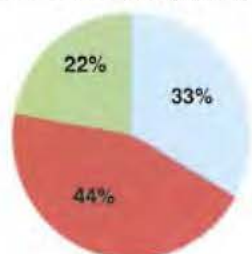
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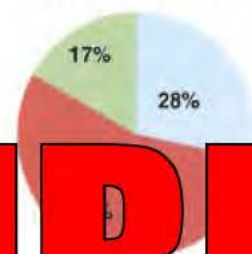
Staples Was Office Depot's and OfficeMax's Closest Competitor Before the 2013 Merger

Other B2B Suppliers are Frequently Identified as Winning >\$1M Accounts From Office Depot and OfficeMax

ODP Bid History (n=9)

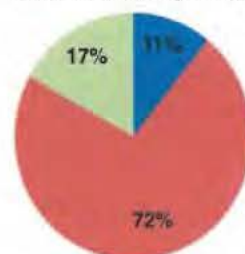


ODP WLR Records (n=109)



Other B2B Suppliers Are Identified as Winners in 17% - 22% of Losses

OMX Hunters (n=65)



- Other B2B Won
- OfficeMax Won
- Office Depot Won
- Staples Won**

UNREBUTTED



Customers Tangibly Benefit From the Head-to-Head Competition Between Staples and Office Depot



See e.g., O'Neill (AEP) Hrg. 341:9-16; Moise (Fifth Third Bank) Hrg. 913:24-914:8; Wilson (Select Medical) Hrg. 1017:12-25; Meester (Best Buy) Hrg. 1204:18-1205:8; Wright (HPG) Hrg. 1896:9-1898:14, 1901:2-16



The Hypothetical Monopolist Test Remains Unrebutted

Hypothetical Monopolist Test (“HMT”) Depends on a Threshold Recapture Rate

- Using 5% price increase, HMT is satisfied if:

$$\text{Recapture Rate} > \frac{10\%}{\text{Profit Margin} + 10\%}$$

- Profit Margin estimates range = ■% to ■%

UNREBUTTED



Key Evidence Is Unrebutted

- 1. Defendants' bid data show likelihood of significant harm to competition**
- 2. Office Depot admitted in 2013 that Staples was its closest competitor**
- 3. Customers tangibly benefit from head-to-head competition between Staples and Office Depot**
- 4. The hypothetical monopolist test confirms the market is properly defined**



Closing Argument Roadmap

- 1. Plaintiffs Properly Defined the Relevant Market**
- 2. Evidence Establishes Significant Increase in Post-Merger Concentration**
- 3. Evidence Consistently Predicts a Likelihood of Significant Harm to Competition**
- 4. Defendants Failed to Establish That Entry or Expansion Would Be Timely, Likely, or Sufficient**
- 5. Defendants Failed to Establish Proposed Fix or Efficiencies Would Save This Merger**



Plaintiffs Satisfied the Legal Standard

- **Clayton Act § 7 prohibits mergers the effect of which “may be substantially to lessen competition, or to tend to create a monopoly”**
 - **The standard requires an assessment of the merger’s likely impact on immediate and future competition, and “doubts are to be resolved against the transaction”** (*Brown Shoe, 370 U.S. at 332-33; Elders Grain, 868 F.2d at 906*)*
- **FTC “is not required to *establish* that the proposed merger would in fact violate section 7 of the Clayton Act”** (*Heinz, 246 F.3d at 714; Staples, 970 F. Supp. at 1071*)
 - **“[T]he government need only show that there is a reasonable probability that the challenged transaction will substantially impair competition”** (*Sysco, 113 F. Supp. 3d at 22; see also Staples, 970 F. Supp. at 1072*)

*Internal citations and quotations omitted throughout



13(b) Preliminary Injunction Standard Is Well-Settled

- **Preliminary injunction should issue when it would be in the public interest, as determined by:**
 - **Weighing the equities, and**
 - **Considering the FTC’s likelihood of success on the merits**
- **§ 13(b) enacted to make preliminary relief “broadly available to the FTC”** (*Heinz, 246 F.3d at 714; see also Sysco, 113 F. Supp. 3d at 22*)
- **“The equities will often weigh in favor of the FTC because ‘the public interest in effective enforcement of the antitrust laws’ was Congress’s specific ‘public equity consideration’ in enacting Section 13(b)”** (*CCC Holdings, 605 F. Supp. 2d at 35*)

1. Plaintiffs Properly Defined the Relevant Market



A Cluster Market Is an Aggregation of Non-Substitutes





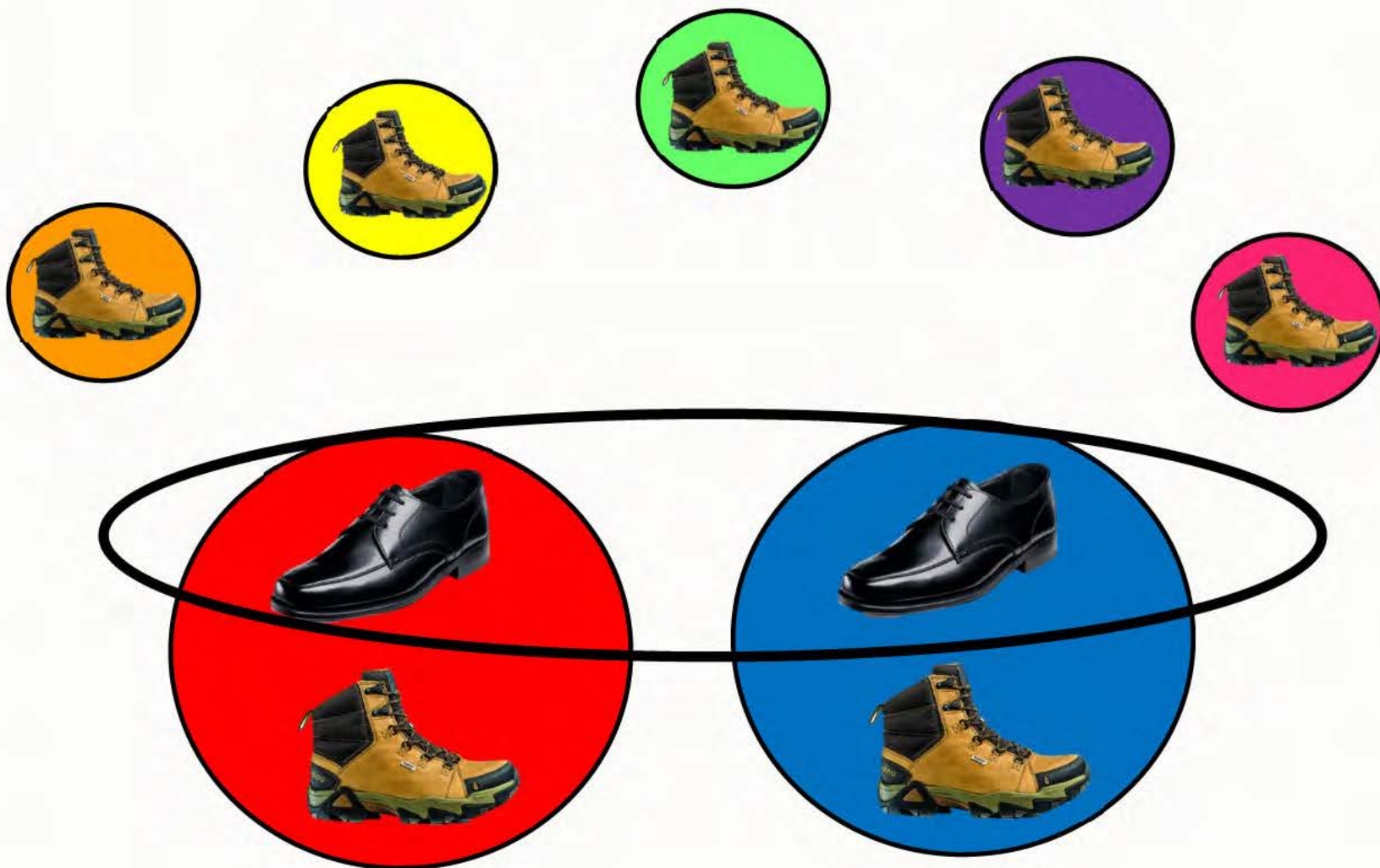
Non-Substitutes Are Clustered for Analytical Convenience

“Thus, whether considered separately or together, the picture of this merger is the same. We, therefore, agree with the District Court's conclusion that in the setting of this case to subdivide the shoe market further on the basis of ‘age/sex’ distinctions would be ‘impractical’ and ‘unwarranted.’”

Brown Shoe, 370 U.S. at 327-28

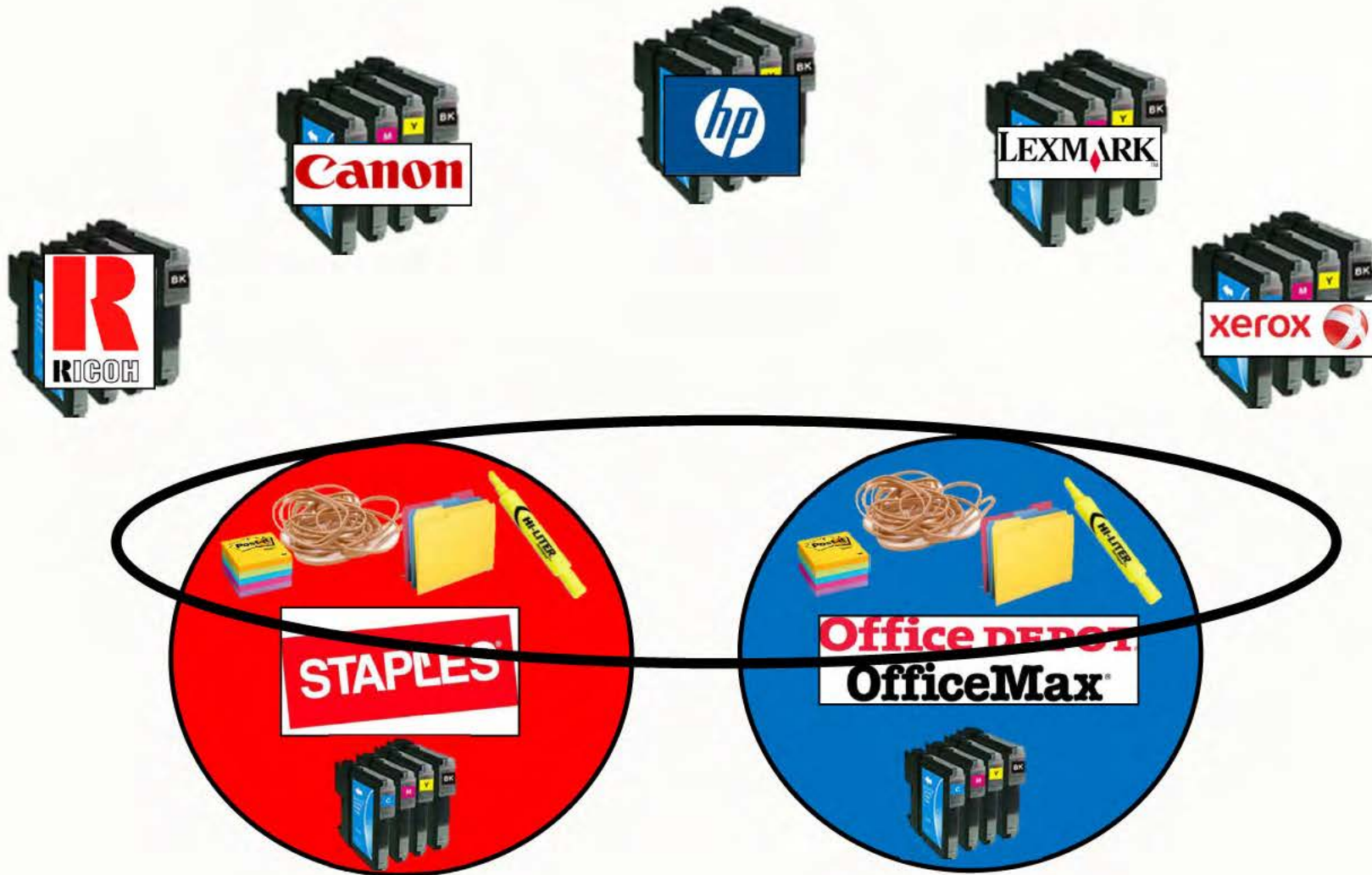


Cluster Markets Are Limited to Products That Face Similar Competitive Conditions





Ink/Toner DO NOT Face Similar Competitive Conditions









Defendants' Admission: Competitive Conditions Differ for Ink and Toner

Large Customers Are Increasingly Carving Out Ink, Toner, and Related Products Through MPS Programs

Weil

Simpson
Thacher

- Major MPS programs for large customers include:

DEM	Description	Examples of Large Customers
	HP's printing business, which includes MPS, generated \$23.0 billion in 2014; global MPS business grew by double digits in 2013; more than 3,100 MPS customers globally ¹	Delta Airlines, DirecTV, Keybank, L'Oreal, Merck, The Walt Disney Company
	MPS segment grew 16% in '14 and 22% in '13; renewal rate for MPS customers was 95% FY'14 and 100% FY '13; 23 MPS contracts with companies listed on Fortune 500 ²	Associated Bank, Columbia Sportswear, Cox Enterprises, The Home Depot, MainSource Bank, Synovus, Union Bank, United States Department of Agriculture, Unum Group
	MPS program generated \$3.8 billion globally in 2013 and grew by 7%; Xerox has more than 1,000 MPS customers ³	Blackrock Financial Management, Groche America, Honeywell, Ingersoll Rand, Leidos, National Grid, Prudential Insurance, Reuters, Schenker Inc., Science Applications Intl Corp (SAIC), United Technologies Corporation (UTC)
	MPS program grew 14% in 2013; Ricoh has more than	ADP, Inc., Albert Einstein Medical Center, Apollo Group, Kaplan, Kroger, MasterCard, Sempra

Sources: (1) Quocirca, Managed Print Services Landscape (HP Excerpt), June 2014, at 15, 21; (2) Lexmark International, Marketline, Feb. 2015, at 23; Lexmark 2014 Annual Report; (3) Quocirca, Managed Print Services Landscape (Xerox Excerpt), June 2014, at 20; (4) Quocirca, Managed Print Services Landscape (HP Excerpt), June 2014, at 13.

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Services Landscape (HP Excerpt), June 2014, at 13.

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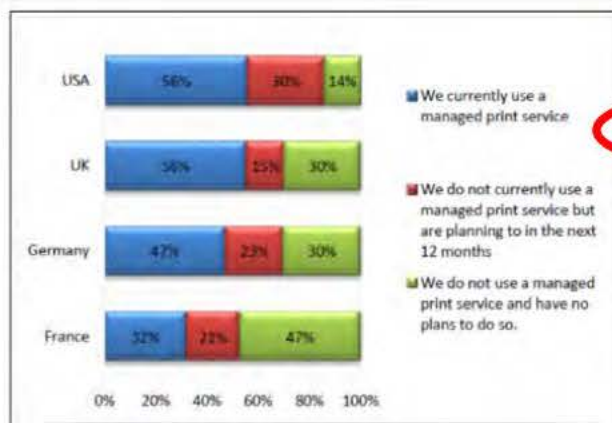
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Defendants' Admission: Competitive Conditions Differ for Ink and Toner

Large Customers Are Increasingly Carving Out Ink, Toner, and Related Products Through MPS Programs

Weil

Simpson
Thacher

- According to a 2014 industry study, 56% of organizations with over 1000 employees reported using MPS services; an additional 30% of respondents planned to begin using MPS services in the following 12 months (i.e., by Summer 2015)

Market leaders
characterised by mature
offerings and enhanced
workflow solutions
portfolio

The tightly contested MPS market is characterised by a cluster of leaders, with Xerox remaining in the lead. Despite limited MPS revenue growth in the past year (mainly due to an already large base than other vendors), its leadership margin is boosted by its breadth of capabilities across office and enterprise printing. Other market leaders are HP, Ricoh, Lexmark and Canon with Lexmark showing strong growth and continued investment in and enhancement of both its MPS and ECM portfolio.

Source: Quocirca, Managed Print Services Landscape, June 2014; Quocirca, Managed Print Services Landscape, June 2015.

PX0007-068



Customer Evidence: Competitive Conditions Differ for Ink and Toner

Appendix C: Materials Relied Upon

Third Party Documents

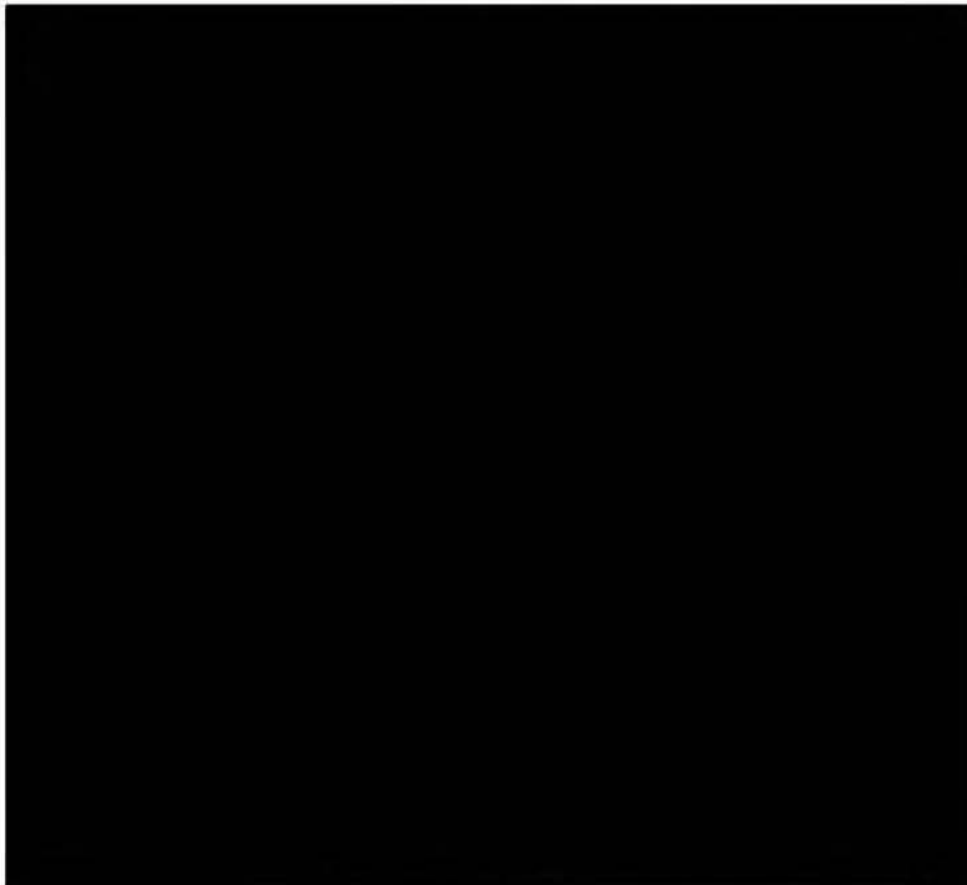
Third Party	Description	PX No. / Bates No.
[REDACTED]	[REDACTED] FW FTC CID Follow-up Question on MPS - [REDACTED].msg	
[REDACTED]	[REDACTED] 11-18-2015 [REDACTED] MPS Production Cover Letter.pdf	
[REDACTED]	[REDACTED] FW FTC Follow-up Question on MPS - [REDACTED].msg	
[REDACTED]	[REDACTED] FY14 MPS spend.xlsx	
[REDACTED]	[REDACTED] 0812.pdf	
[REDACTED]	[REDACTED] FW FTC CID Follow-up Question on MPS - [REDACTED].msg	
[REDACTED]	[REDACTED] RE FTC CID Follow-up Question on MPS - [REDACTED].msg	

Page C-12



MPS Provider Evidence: Competitive Conditions Differ for Ink and Toner

MPS REVENUE



**MPS sales revenue collected
during investigation...**



**...confirmed in declarations during
litigation**



Customer Testimony: Competitive Conditions Differ for Ink and Toner



Q. Do you -- does McDonald's headquarters buy toner and ink

358

from a managed print services vendor?

A. We recently just changed November 16th. We transitioned the offices to a managed print vendor; but prior to that, we bought toner directly from Office Depot.

Q. Right. And so the company -- the set of companies that are providing -- or, let me start that over.

The set of companies that are capable of providing ink and toner to McDonald's is broader, instead of companies that provide office supplies, correct?

A. Say that again. I'm sorry. It's broader than -- the set of suppliers is broader for ink and toner than all office supplies?

Q. Is that right?

A. Yes.



Competitor Testimony: Competitive Conditions Differ for Ink and Toner

1606

1 business and the paper business, the whole thing, and we sold
 2 those customers managed print.
 3 Q. And what size customer has come to you and asked you for
 4 this service?
 5 A. Well, mostly large and very large accounts are the ones
 6 that are looking for this service.
 7 Q. Does W.B. Mason partner with anyone to provide these
 8 services?
 9 A. We're partnering with HP right now to see if we can do
 10 this.
 11 Q. So I think you mentioned HP and Xerox provide these
 12 services?
 13 A. Yes. We don't have a relationship with Xerox, but we do
 14 with Hewlett-Packard.
 15 Q. So there's a number of other providers besides Staples
 16 and Office Depot that provide these services?
 17 A. Yeah. Yeah, there are.
 18 Q. So have you ever had a customer who stopped buying as
 19 much toner because they picked up an MPS arrangement?
 20 A. Oh, we've had a number of them over the years.
 21 Q. And in your experience do MPS providers like Xerox and HP
 22 win RFPs and contracts to provide these services for large
 23 customers?
 24 A. Yes, they do.
 25 Q. And do these MPS providers also provide office supplies



Q. So there's a number of other providers besides Staples and Office Depot that provide these services?

A. Yeah. Yeah, there are.

Q. So have you ever had a customer who stopped buying as much toner because they picked up an MPS arrangement?

A. Oh, we've had a number of them over the years.

16 A. This is a category that's dominated by the manufacturers

Q. And in your experience do MPS providers like Xerox and HP win RFPs and contracts to provide these services for large customers?

A. Yes, they do.

Q. And do these MPS providers also provide office supplies like Post-it notes and paper clips?

A. No. There are other office supply companies that, like us, try to do this stuff.



Expert Testimony: Competitive Conditions Differ for Ink and Toner



CRA Charles River
Associates

1 So, the -- what I learned was that, I think
2 especially in the last three to five years, these managed
3 print services have come in where ink and toner is often
4 purchased by a large customer along -- from the same company
5 that's providing the printer or the copier, that's servicing
6 them, and maybe some other services. I'm not exactly sure
7 of the scope. And so that is a different space. Okay?
8 And let me put it differently. The customers have
9 additional choices for ink and toner that are important.
10 And so, like I said, you look at the overlaps and then you
11 look at the choices. So since there are significantly
12 different choices, ultimately that did not warrant
13 aggregation into the same cluster or group with core and
14 paper. We're going to talk about this more, but that's the
15 gist of it.
16 BY MS. CEN
17 Q. So you defined consumable office supplies. What do you
18 mean by large customer?



Defendants' Arguments Conflict with Established Market Definition Principles

- **No case requires inclusion of non-substitute products in a cluster market**
 - *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*”)
- **Calling ink and toner “consumable office supplies” does not make them substitutes**
- **Irrelevant that customers buy multiple products through a single contract**
 - Not appropriate to require entire set of products sold by hospitals to be in the cluster, even though insurers “typically bargain for all of a hospital's services in a single negotiation.”
(*ProMedica*, 749 F.3d at 567-68)



No Conflict with FTC's Prior Investigations

- **FTC v. Staples/Office Depot (1997)**
 - Retail case defined market as sale of office supplies through “office supply superstores” *(970 F. Supp. at 1080)*
 - MPS services available to large customers today not available to retail consumers
- **Office Depot/OfficeMax (2013)**
 - FTC investigated all product markets in 2013, and, as in this case, brought **NO CHALLENGE** with respect to:
 - The sale and distribution of ink and toner to large customers
 - The sale and distribution of adjacent product categories to large customers



Relevant Market Properly Defined Around Large Customers

- Relevant market is defined around large customers because they individually negotiate customized prices
 - *FTC v. Sysco Corp.*, 113 F. Supp. 3d at 46
 - Merger Guidelines §§ 3, 4.1.4
- Unrebutted evidence also indicates that large customers have distinct requirements
 - *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)



Defendants Recognize Large Business Customers Are Distinct

Customer Profiles and Behaviors (Private Sector)

<\$24K	Low sophistication, responds to promotions/gifts. SMB
\$24 - 75K	Price conscious, focuses on small core with overall value. SMB
\$75 - 150K	Centralized decisions, de-centralized purchasing (disconnect of perceived value). SMB
\$150 - 250K	Fairly sophisticated buying process, expectations for cost savings. SMB
\$250 - 500K	More sophisticated processes, centralized purchasing, approval processes, vendor consolidation, rebates and some contractual obligations. Large: [REDACTED]
\$500K - 1M	Formal RFPs, centralized purchasing, approval processes, awareness and desire for up front money/conversion incentives & rebates. Large: [REDACTED]
>\$1M	Sophisticated sourcing and buying with formal RFIs/RFPs, sensitive to cost of change, expectation of conversion incentives and rebates. Global: [REDACTED]
GPOs	Aggregate group purchasing defined by end-user memberships, revenue-share rebates. GPO: [REDACTED], Buying Group = [REDACTED]
Private Sector Segments	

Confidential

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Office DEPOT.

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Large Business Customers Testified About Their Distinct Needs



A. In our last sourcing event, we have a lot of business requirements and then we have some that we call knockout criteria. And knockout criteria is if they can't meet that particular component, they're no longer considered. So our knockouts were they had to service all 15 states in which we have employees, that was the first one. Another one is to have a customizable web portal, level 3 reporting, and the ability to negotiate both on price and rebate, the ability to lock-in pricing. And then I think our metrics were



So we're looking for an account management team that provides the service on a national basis under a single corporate umbrella. You know, the idea of subcontracting out account management services based on regions or based upon territories to us is less than ideal. It somewhat fragments and



A. Within our locations it is important that our facilities have the ability to get things next day, and actually to the -- the desktop of the site or location. Our storage base in our facilities is typically quite small. So we tend to keep our par levels rather small or low in -- in quantity.



Office Supplies Vendors Are Aware of Large Business Customers' Distinct Needs



A. Never encountered W.B. Mason. In my opinion, this large enterprise space is not their sweet spot, so to speak. Take out retail, you basically have two definitive categories of commercial office product sales. You have the small- to medium-size business, then you have your large commercial corporate enterprise, and they're completely two different animals. They purchase differently. Their requirements are different. And the corporate -- the large corporate contracts will ask a lot more of you than you will ever be asked of of a small- to medium-size business.

If you're not properly partnered, in my case years ago, and geared for dealing with these large corporations, an independently owned office product company cannot engage with these large corporate entities due to everything that they ask for in their contractual relationships.



The Hypothetical Monopolist Test Is Unrebutted

Hypothetical Monopolist Test (“HMT”) Depends on a Threshold Recapture Rate

- Using 5% price increase, HMT is satisfied if:

$$\text{Recapture Rate} > \frac{10\%}{\text{Profit Margin} + 10\%}$$

- Profit Margin estimates range = ■ % to ■ %

UNREBUTTED

2. Evidence Establishes Significant Increase in Post-Merger Concentration



Market Share Calculations Readily Meet Legal Standard

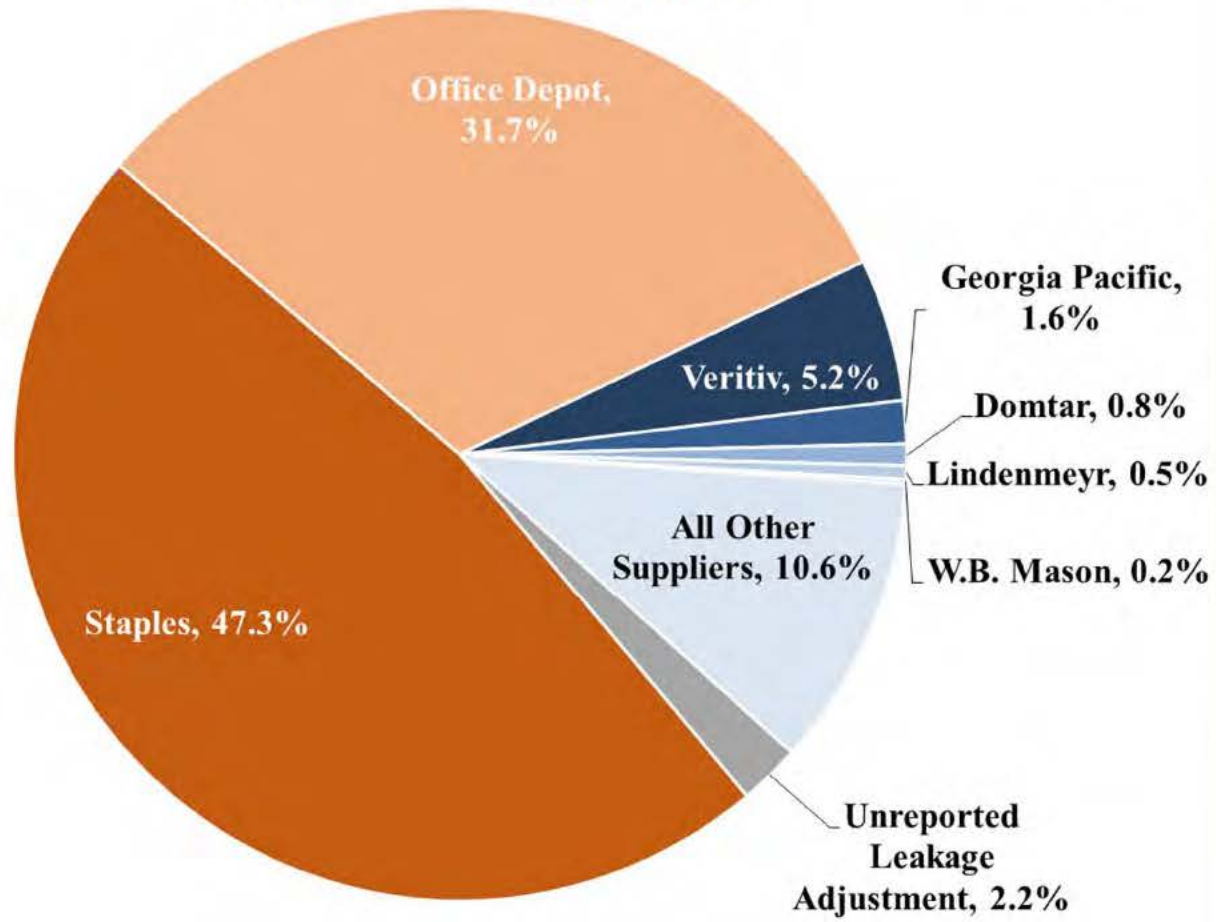
- **“The FTC need not present market shares and HHI estimates with the precision of a NASA scientist”** (*Sysco*, 113 F. Supp. 3d at 54)
- **“A reliable, reasonable, close approximation of relevant market share data is sufficient”** (*H&R Block, Inc.*, 833 F. Supp. 2d at 72)
- **“The market shares, computed by the Commission largely from statistics provided by PPG, are concededly imprecise. Nevertheless, although PPG and Swedlow ‘may point to technical flaws in the compilation of these statistics, . . . in cases of this type precision in detail is less important than the accuracy of the broad picture presented.’”** (*FTC v. PPG Indus.*, 628 F. Supp. at 884)



Defendants Together Have 79% of the Relevant Market

Consumable Office Supplies Market Shares

Fortune 100 Customers, 2014





Market Share Estimate Based on Fortune 100 Data Is a Good Proxy

- **Fortune 100 sample is unbiased**
 - **F100 list exists independent of merger—so it does not over-represent Staples/Office Depot customers**
 - **Diverse mix of industries**
- **Months of careful work to collect and process**
 - **Nearly all of the 19 companies that did not submit usable data have significant purchases with Staples and Office Depot**
- **Other data corroborate that Fortune 100 market share estimate is representative of Defendants' position in the relevant market**



Primary Vendor Relationship Study Confirms F100 Market Share Analysis

Primary Vendor Relationship Shares

Consumable Office Supplies, 2014

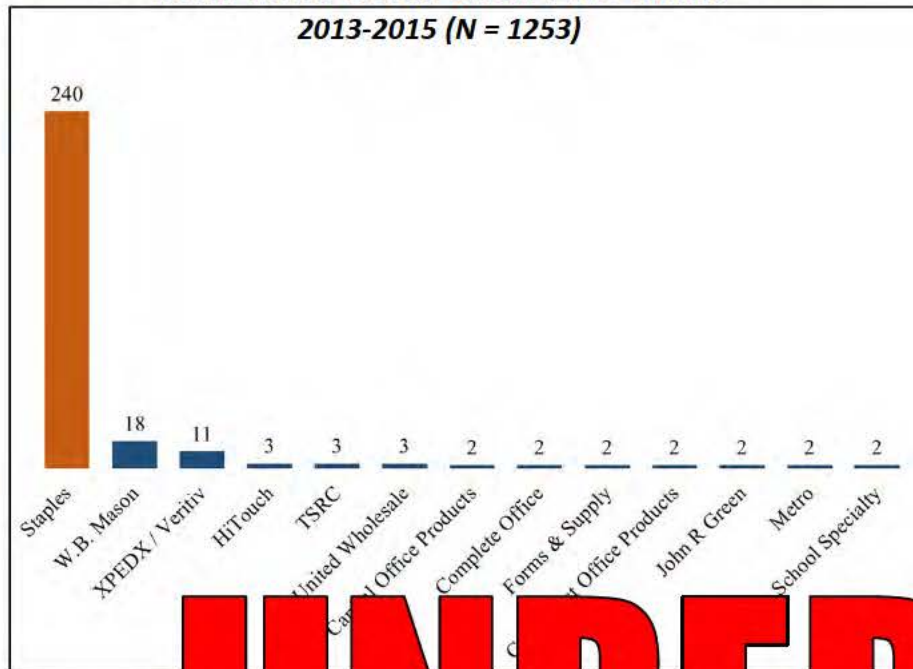




Defendants' Bid Data Corroborate Staples and Office Depot Are Each Other's Closest Competitor

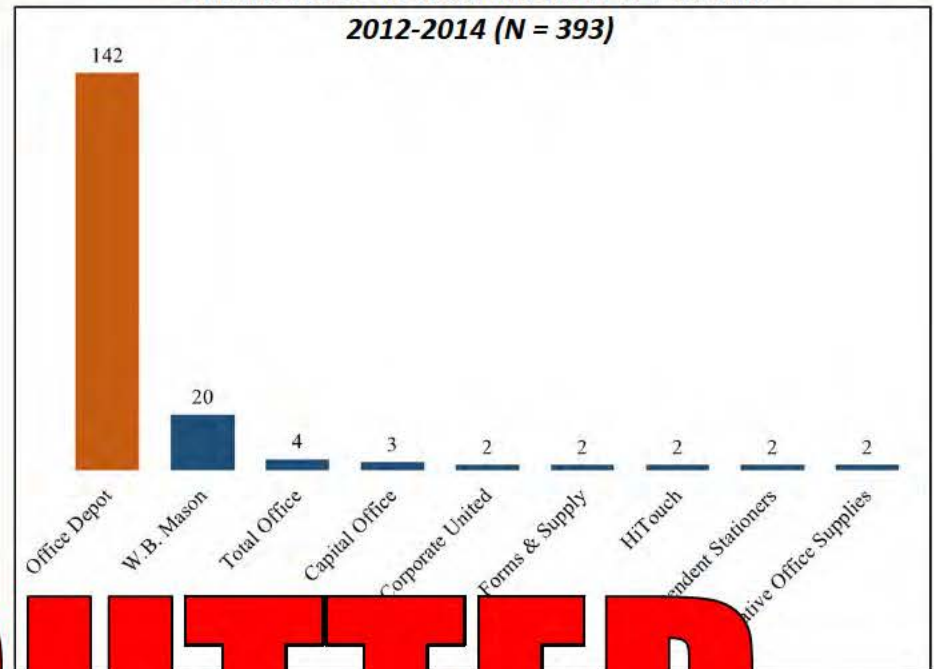
Staples Dominates in Office Depot's Win-Loss Data with 240 Wins

2013-2015 (N = 1253)



Office Depot Dominates in Staples Win-Loss Data with 142 Wins

2012-2014 (N = 393)



UNREBUTTED



Tier 1 Vendors Are Not Independent Competitors for Large Customers



1378

1 down w
2 didn't r
3 were w
4 Q. Righ
5 rule?
6 A. Yes
7 Q. Oka
8 customer
9 vendor?
10 A. No,
11 independ
12 Q. Oka
13 large cor
14 independ
15 A. We
16 our Tier
17 homoge
18 one con
19 States.
20
21 program
22 compete against Office Depot or Staples.
23 Q. Are you able to offer upfront payments or rebates to
24 large corporate customers in your capacity as a traditional
25 independent office supply company?

Q. Okay. So does PDME currently serve any large corporate customers as a traditional independent local office supplies vendor?

A. **No, we do not. We don't have the capability. Most independent dealers across the country do not either.**

Q. Okay. And why don't you have the capability to serve large corporate customers in your traditional role as an independent local office supplies vendor?

A. Well, first, **major corporate clients that we service in our Tier 1 model, they -- first of all, they want a homogenized program, a program where they're dealing with one company for all their locations throughout the United States.**

Second, we can't be cost competitive by buying the program from Essendant or S.P. Richards and then be able to compete against Office Depot or Staples.



F100 Market Shares Include Off-Contract Spend

- **F100 market shares include *all* purchases by the companies of consumable office supplies**
- **Includes recorded off-contract spend for all companies**
- **Includes “discretionary leakage” measurement for 26 companies, with imputed estimate for the rest**



Increase in HHI Is 15 Times the Presumption Threshold

Market Concentration Measures

Fortune 100 Customers, 2014

Measure	Value
Pre-Merger:	
Staples Share	47%
Office Depot Share	32%
HHI	3,274
Post-Merger:	
Staples & Office Depot Share	79%
HHI	6,274
Increase in HHI	3,000

*Phil. Nat'l Bank
Presumption=30%*

Threshold=200

3. Evidence Consistently Predicts a Likelihood of Significant Harm to Competition



Harm Is Likely

“[T]here 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

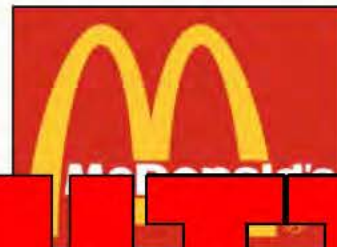


Testimony Overwhelmingly Proves Staples and Office Depot Are Large Business Customers' Best Options



3 **Q.** And what companies can serve large customers with
4 \$500,000 a year or more in spend who have a nationwide footprint
5 for, you know, pens, and file folders, and Post-it notes, and
6 that sort of thing?

7 **A.** So in my opinion there are two people who can do that:
8 That would be Staples and Office Depot.



HEALTHTRUST
PURCHASING GROUP

FIFTH THIRD BANK

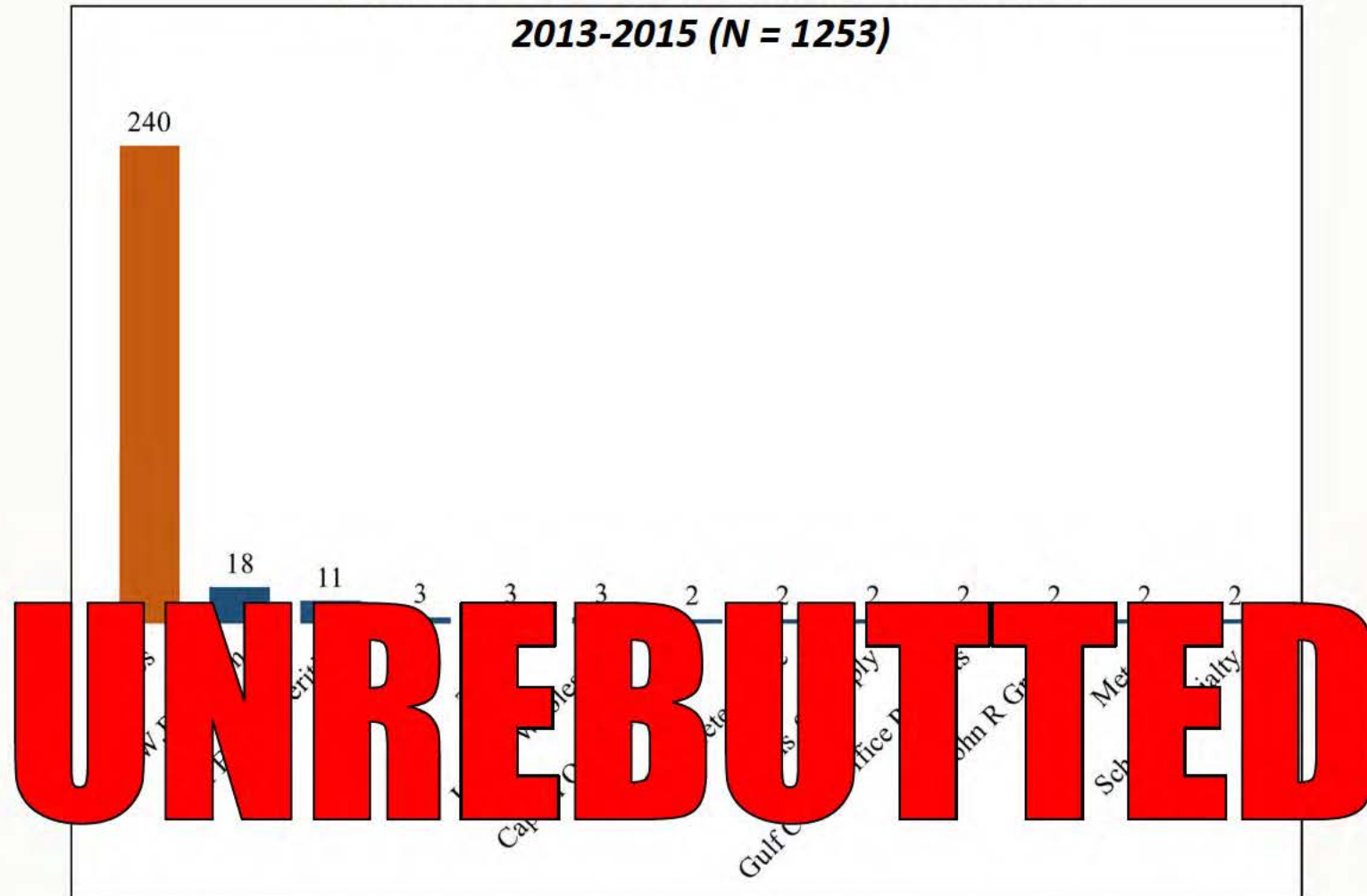
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Sources: WB Mason Hrg. at 1601:3-8; see also; AEP Hrg. at 225:14, 225:25-226:5; Select Medical Hrg. at 1018:1-4; HealthTrust Hrg. at 1939:16-22; Fifth Third Bank Hrg. at 922:8-14; Best Buy Hrg. at 1205:17-20; McDonald's Hrg at 373:9-15; PD Morrison Hrg. at 1395:5-21; 1384:14-23; PX02122 (Bank of America) Dep. at 149:25-151:25; 155:13-156:11; 156:21-160:7



Defendants' Bid Data Show Likelihood of Significant Harm to Competition

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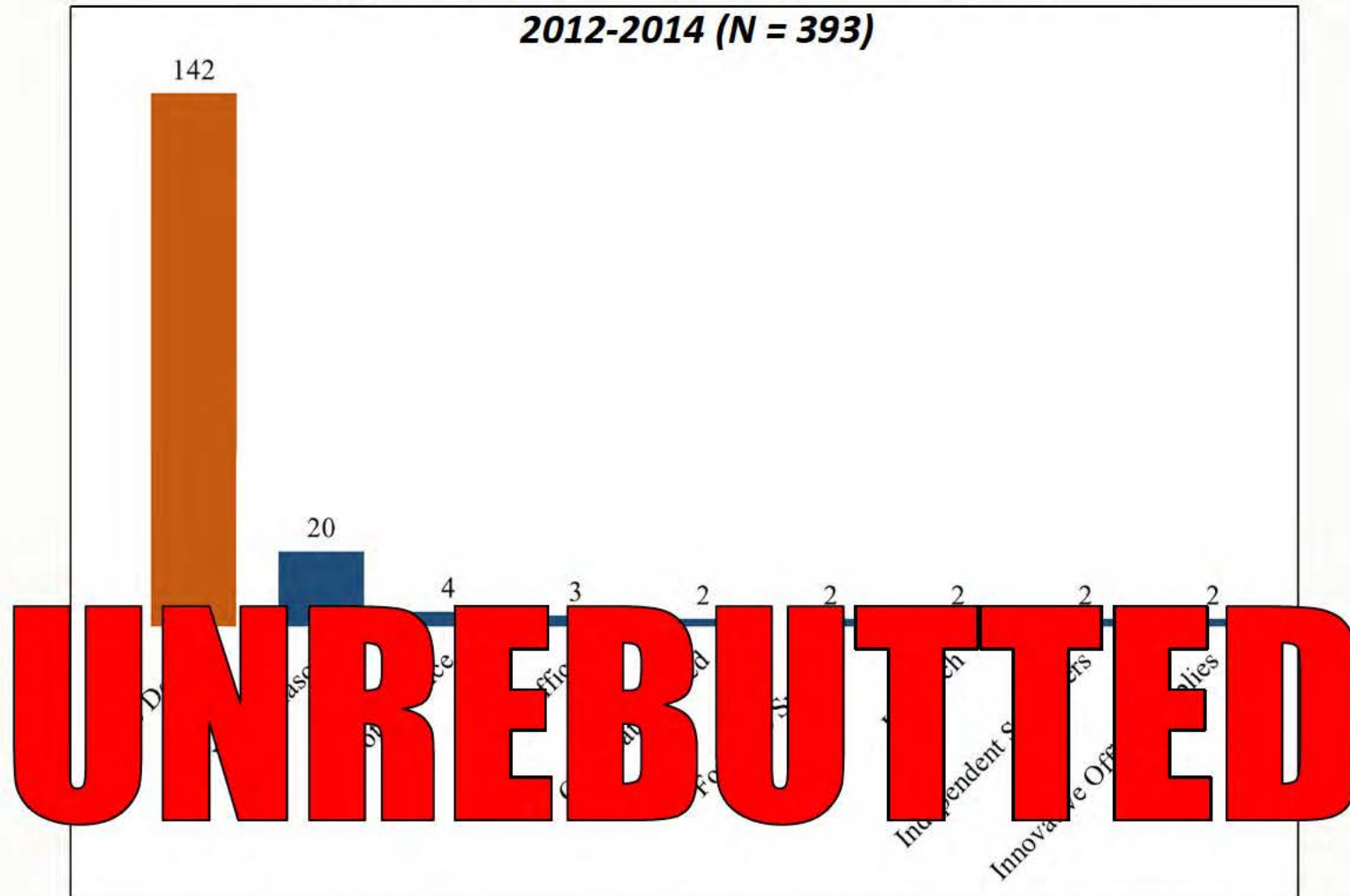




Defendants' Bid Data Show Likelihood of Significant Harm to Competition

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2012-2014 (N = 393)



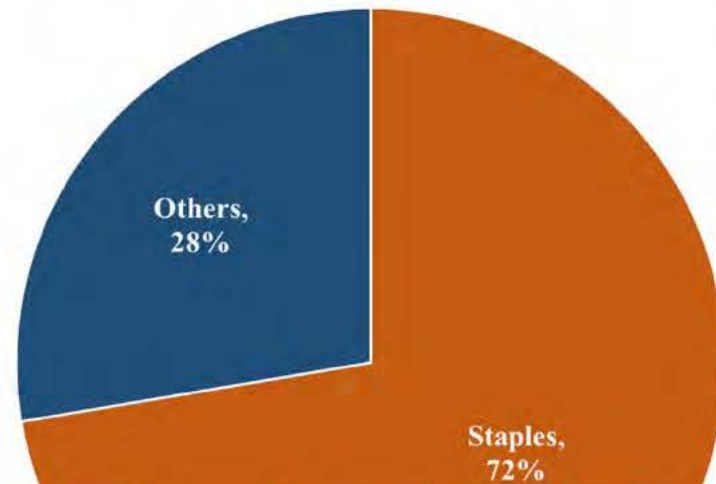
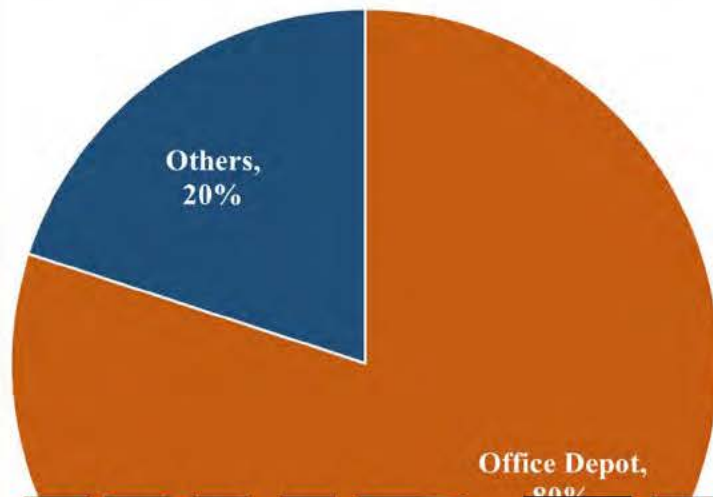


Defendants' Bid Data Show Likelihood of Significant Harm to Competition

Each Company's Top Losses Are to the Other 2012-2015

Staples' Top 50 Losses Went To:

Office Depot's Top 50 Losses Went To:



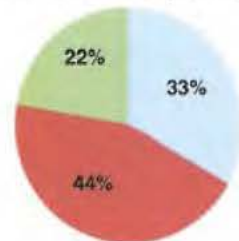
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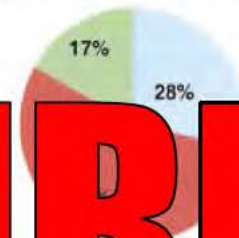
Office Depot/OfficeMax Represented Staples Was Their Closest Competitor

Other B2B Suppliers are Frequently Identified as Winning >\$1M Accounts From Office Depot and OfficeMax

ODP Bid History (n=9)

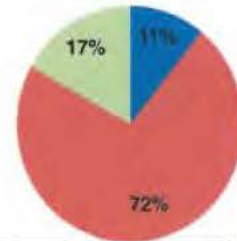


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Other B2B Suppliers Are Identified as Winners in 17% - 22% of Losses

OMX Hunters (n=65)



- Other B2B Won
- OfficeMax Won
- Office Depot Won
- Staples Won**

UNREBUTTED



Office Depot Targets Staples

Re: OfficeMax and Office Depot Receive U.S. FTC Clearance for Proposed Merger

From:

Matthew Stusick <mattstusick@officedepot.com>

To:

Steve Babineaux <steve.babineaux@officedepot.com>

Cc:

Jeff Hicks <jeff.hicks@officedepot.com>, Angela Kubacki <angela.kubacki@officedepot.com>, David Potts <david.potts@officedepot.com>, "Jenna Bowler" <jenna.bowler@officedepot.com>, Joe Stodola <joe.stodola@officedepot.com>, Robert Jose <robert.jose@officedepot.com>

Date:

Fri, 01 Nov 2013 09:45:04 -0400

Look out Staples!!! Here we come bigger and stronger!!!

Matthew Stusick | Office Depot Business Solutions Division

Look out Staples!!! Here we come bigger and stronger!!!

www.officedepot.com

Forwarded message

From: News Assessment <newsassessment@officedepot.com>

Date: Fri, Nov 1, 2013 at 9:10 AM

Subject: OfficeMax and Office Depot Receive U.S. FTC Clearance for Proposed Merger

To: DL-ODP-A-Global Mail User <dl-odp-a-global@mail.officedepot.com>

News Release

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ODP-OMX-FTC-07410228

PX05479-001



Staples Creates an “ODP Attack” Plan

“ODP Attack: We Only Have One National OP [office products] Competitor!”

Geurin, John
Wednesday, February 12, 2014 10:28 PM
Harrington, Heather
Loreau, Kevin

ODP Attack: We Only Have One National OP Competitor!

Heather,

To follow-up on our conversation this AM, spoke to Neil this afternoon. Now that it is a 2-player national market, he wants us to create robust strategy to capitalize on ODP vulnerability. He feels we should now more about ODP/OMX than they know about themselves and asked that we devote adequate time to learn as much about them as possible (pain points – IL closures/headcount reductions, leadership changes, etc).

As discussed:

- I will challenge the BDE RSDs/ASMs to identify every ODP/OMX customer and segment in SFDC if possible
- Your team will create tools that will help us generate a competitive assault against them by convincing their customers of their vulnerability vs. our stability/investments, etc

Three areas of immediate possible pain:

- Leadership changes and how they may impact decisions/direction
- SKU Rationalization and how it could impact mix and/or proprietary customer inventory
- OMX major cuts in IL – which means that all systems, back office, etc is probably transitioning to ODP process (major transition for legacy OMX customers)

Thanks for your help!

John Geurin
VP, Business Development
Commercial & Enterprise

STAPLES Advantage

T: 918-668-4695
M: 918-629-1456

“Now that it is a 2-player national market, [Neil] wants us to create robust strategy to capitalize on ODP vulnerability”

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PX04335-001



Staples CEO: “two major companies”



“Over the past 20 years, we have changed the world. The industry has gone from seven major contract companies (Remember Boise, BT, Office Max, USOP, Corporate Express?) and 15,000 regional players...to two major companies and less than 2,500 regional stationers.

This didn't happen by chance. Staples– and those of you in this room–drove this industry consolidation”



Staples Knows There Are “only two real choices for customers”



- The merger is complete
- Opportunity we've worked so hard for
- There are only two real choices for customers. US or Them. (list reasons)
- Don't let this opportunity pass
- Recent events remind us how hard their work will be

- There are only two real choices for customers. US or Them.

SPLS_0899499

PX04082-029

26



Office Depot Recognizes “only two” Can Serve Large Business Customers Nationwide

RE: Recap [REDACTED]

From:

"Marino, Marianna" <marianomarin@officemax.com>

To:

"Wasson, Tabatha" <tabatha.wasson@officedepot.com>

Date:

Fri, 28 Mar 2014 19:49:29 -0400

only two players that can service them nationwide

From: Wasson, Tabatha

Sent: Friday, March 28, 2014 4:00 PM

To: Marino, Marianna

Subject: RE: Recap [REDACTED]

Good recap. Clearly we have our work cut out for us but for the challenge.

On Friday, March 28, 2014, Marino, Marianna <marianomarin@officemax.com> wrote:
Recap of [REDACTED] meeting:

- Outlined new team & benefits the global team brings [REDACTED]
- Asked them to share their feedback & what they'd like to see moving forward
- Discussed cost of change & **only two players that can service them nationwide**
- Offered to prepare cost of conversion worksheet for them
- Shared the value of their partnership & asked if we could move forward with a renewal offer

(Short answer "No")

There were [REDACTED] folks that attended the meeting. Highest level & decision maker for ODP [REDACTED]
[REDACTED] for Procurement & Strategic Sourcing. The person preparing the RFP [REDACTED]
Associate Buyer, Procurement & Strategic Sourcing (new to role & department). No high level folks.

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ODP-OMX-FTC-01839378

PX05233-001



Staples and Office Depot Compete Fiercely to the Benefit of Large Customers

Re: [REDACTED]

From:

Tabitha Wasson <tabitha.wasson@officedepot.com>

To:

Warren Avery <warren.avery@officedepot.com>

Date:

Thu, 30 Jan 2014 13:25:32 -0500

Model: a CPM taking the additional 3% (total 6%) we can offer ASAP.

I got all the right people to decide in the room with me. Please copy me and Tonya Schultz on this request to Anah.

He told me that he asked Staples for clarification on few items, but for the most part Staples was still lower on the "line item pricing". He reiterated that during the original RFP, we were higher on pricing but our incentives made up for it.

He told me that by keeping our pricing the same in this new proposal, we are still high. Jeff told me that if we were holding anything back, that this would be the time to share. I asked him if we were able to do anything, should we focus on pricing rather than incentives. He said yes.

In our CPM in December, we all agreed to a 3% core list savings for [REDACTED] that we did not offer to Jeff. In talking to Mark and taking cues from Jeff, I believe we need to go deeper than 3%. I think we need to go in with another 3% for a total of 6% core list savings.

I have already asked Anah to re-do the CPM with that change.

I have already asked Anah to re-do the CPM with that change.

Thoughts??

Warren Avery
Strategic Accounts Manager - Global
Office Depot
3380 E. Willow Street
Signal Hill, CA 90755

we can offer ASAP.

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ODP-QMX-FTC-01842675

PX05234-001



Staples and Office Depot Compete Fiercely to the Benefit of Large Customers

This is in regards to a \$7 Million opportunity where we are in a dog fight with Depot. We currently have \$1 Million and stand to gain \$6 Million due to [REDACTED] acquisition of [REDACTED] Depot (Max) has the former [REDACTED] piece of business.

You approved us going in at about [REDACTED] % Advantage.

We have an internal coach who is telling us we can likely secure this with an additional [REDACTED] % volume rebate taking the Advantage to [REDACTED] %. The SAL has known this [REDACTED] contact for many years and feels he is shooting us straight. I think it's the right move as the customer likely thinks it's simpler to go with Depot (Max) as they have the lion's share, so less business to implement. I think we've outsold Depot (Max), but unfortunately, the committee making the decision is being led by a [REDACTED] guy who is extremely hard cost driven.

Will you approve the additional [REDACTED] % Volume Rebate and the new Advantage of [REDACTED] %? I believe they are nearing a decision so would like to not wait for Friday's Council.

I'll approve this. But ODP is getting cheaper by the week.



Staples and Office Depot Compete Fiercely to the Benefit of Large Customers

From: Russell, Gregory <Gregory.Russell@Staples.com>
Sent: Wednesday, May 06, 2015 7:07 PM
To: Heisroth, Tom
Subject: RE: Charles Schwab Offer

Will do Thanks.

—Original Message—
From: Heisroth, Tom
Sent: Wednesday, May 06, 2015 4:05 PM
To: Russell, Gregory
Subject: Re: Charles Schwab Offer

OK - update Ed for audit trail

Sent from my iPad

> On May 6, 2015, at 4:07 PM, Russell, Gregory <Gregory.Russell@Staples.com> wrote:

> Tom:

> A few weeks ago, we presented [REDACTED] to the Deals Council. Our plan was to stay margin neutral by offering a \$200K signing incentive but raising some prices to offset it, along with a \$50 Hard Stop.

> In the meantime, a new Sourcing Director named [REDACTED] as taken over the negotiation. We found out that she was the previous contract manager for [REDACTED]. We had a conference call with [REDACTED], the Staples SAI that worked with her a [REDACTED] turns out that she moved the [REDACTED] s.l./No contract to OfficeMax, away from Staples. In addition the team has had with her this week, she is coming across expecting significant savings and a signing incentive.

> In order to keep this away from Office Depot, I believe we should invest [REDACTED] basis points of margin to be used to sharpen our pencil on some high visibility items. This will take us from a [REDACTED] % A.P. to a [REDACTED] % A.P. I know it's a significant investment but if it goes to a formal RFP involving Depot, it could end up costing us a lot more.

> Please advise if you agree and approve.

> In order to keep this away from Office Depot, I believe we should invest [REDACTED] basis points of margin to be used to sharpen our pencil on some high visibility items. This will take us from a [REDACTED] % A.P. to a [REDACTED] % A.P. I know it's a significant investment but if it goes to a formal RFP involving Depot, it could end up costing us a lot more.

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PX04294-001



TODAY: Competition Between Staples and Office Depot Tangibly Benefits Large Business Customers

A. Pretty much we felt there was **only two players that can meet our needs, Office Depot and Staples**, and those are the two that were part of the sourcing event process.

8 A. Pretty much we felt there was only two players that can

9 A. That's correct.

Q. So I think we just mentioned it, but **in what ways has AEP benefited from the competition between Staples and Office Depot?**

A. Primarily, financially. So our sourcing event process, we're driving for the **best value, the best cost; and that's what we got as a result of that competition.**

Q. So you still **benefit from competition no matter how big and sophisticated you are?**

A. **That is correct.**



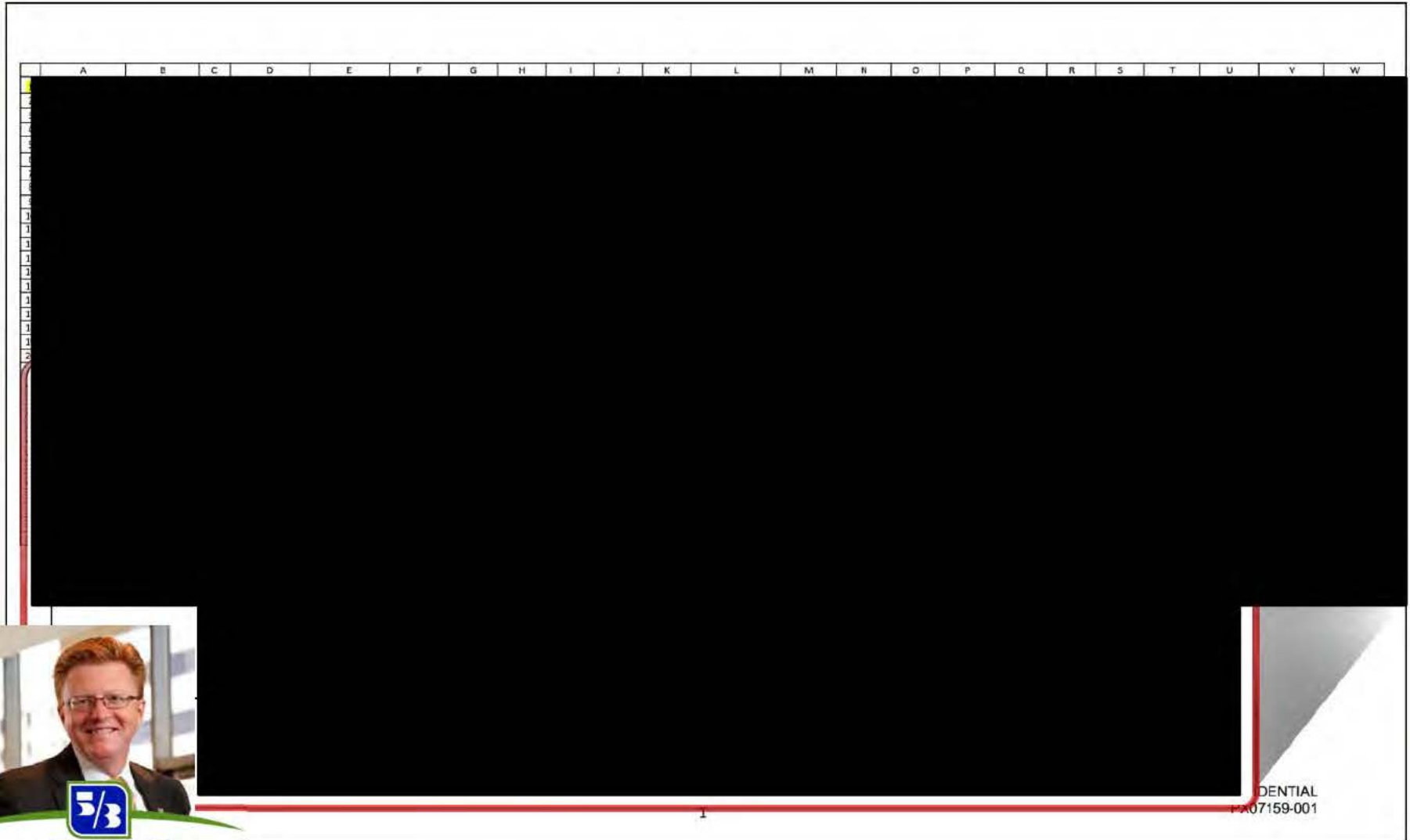
AEP: Outcome of 2015 RFP Process: 10% Savings!

Total Savings for Office Supplies & Paper

54



TODAY: Competition Between Staples and Office Depot Tangibly Benefits Large Business Customers





Staples and Office Depot Warned Customers the Merger Would Eliminate the Benefits of Competition

REDACTED

From: Kimberly Cutler <kimberli.cutler@officedepot.com>
Sent: Wednesday, February 04, 2015 4:29 PM

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

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.

For companies wanting savings, new terms, or additional incentives now is the time to ink those details in a long term contract. with Depot.

Kimberli Cutler
Canada Business Development Officer (Europe) - Office Depot
7700 Woodbine Ave. Suite 100, Richmond Hill, Ontario L4B 1N1

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<http://officedepotnow.com/view/nav?ID=Y75F93BK4PXTSFNL973C>

PX07175-001



Staples and Office Depot Warned Customers the Merger Would Eliminate the Benefits of Competition

Office Depot Final RFP Offer

From:
Hugh McKean <hugh.mckean@officedepot.com>
To:
[REDACTED]
Re:
[REDACTED]
Date:
Tue, 21 Apr 2015 10:43:12 -0400

Hi Rich,

Office Depot is willing to make a best and final offer to secure the Global RFP.

Office Depot has been the vendor of choice for the past 8 years for [REDACTED] and we hope that we have earned this opportunity to present this offer.

In return for a three year agreement, Office Depot offers [REDACTED] a \$500,000 signing bonus. This will be made in two payments, \$325,000 at the contract signing and \$175,000 on the first anniversary date.

This offer is based on and is conditional to adding the [REDACTED] spend to the program.

Here are a few things for you to consider in evaluating this offer:

- **TIMING - This offer is time sensitive. If and when the purchase of Office Depot is approved, Staples will have no reason to make this offer**

In return for a three year agreement, Office Depot offers [REDACTED] a \$500,000 signing bonus. This will be made in two payments, \$325,000 at the contract signing and \$175,000 on the first anniversary date.

This offer is based on and is conditional to adding the [REDACTED] spend to the program.

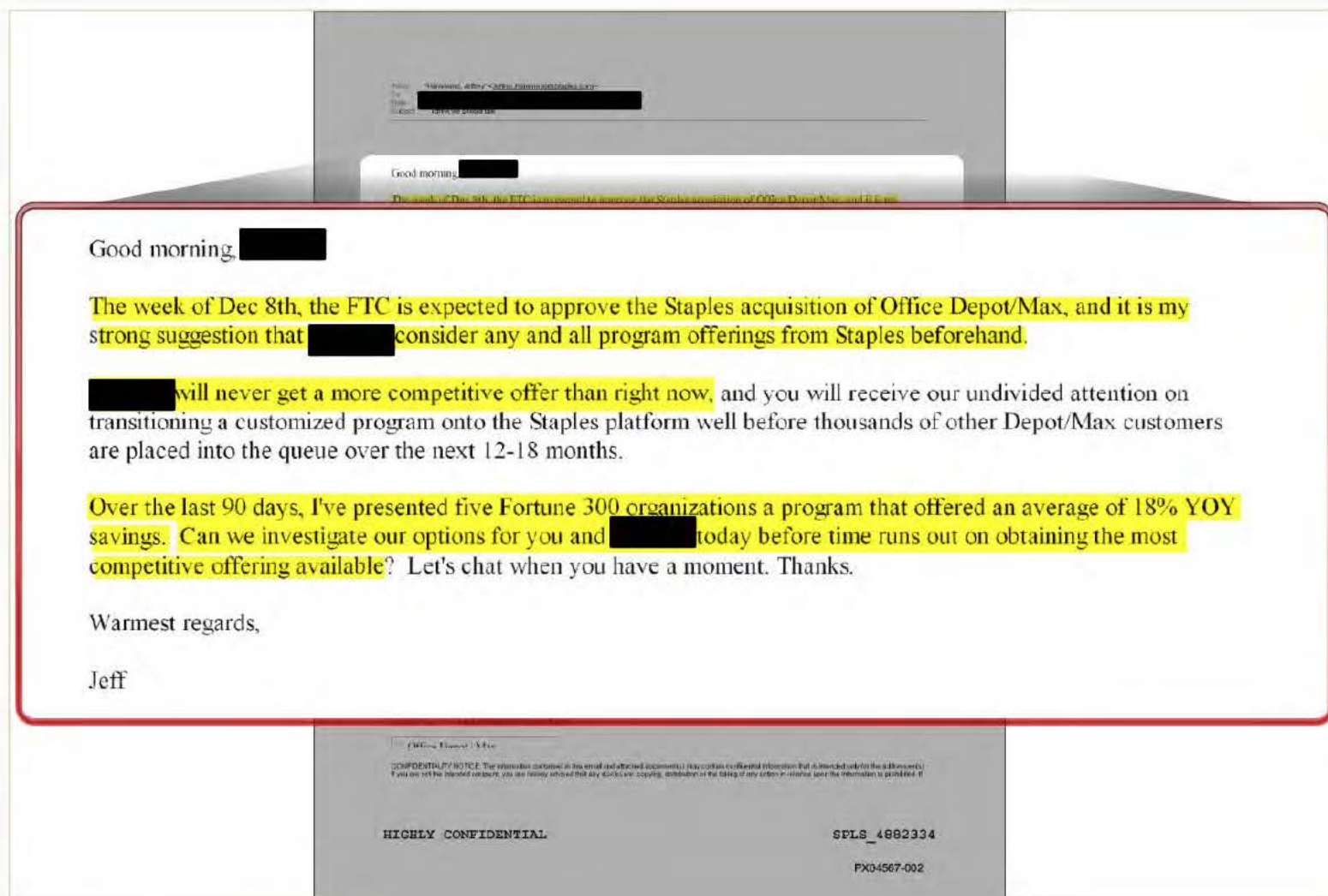
Here are a few things for you to consider in evaluating this offer:

- **TIMING - This offer is time sensitive. If and when the purchase of Office Depot is approved, Staples will have no reason to make this offer**

PX05236-001



Staples and Office Depot Warned Customers the Merger Would Eliminate the Benefits of Competition





Large Business Customers Are Concerned About the Proposed Merger

14 Q. Why is that important to McDonald's?
 15 A. Well, it's important to McDonald's because it's a
 16 and loss of competition. It's a loss of competition.
 17 corporate. It's a loss of competition.
 18 more than just a loss of competition.
 19 Q. M
 20 between
 21 A. Y
 22 Q. W
 23 A. B
 24 other.
 25 Q. A

Q. Mr. Cervone, are you concerned about the proposed merger between Office Depot and Staples?

A. Yes, I am.

Q. Why is that?

A. Because it removes one of the closest competitors to the other.

Q. And do you believe that's going to affect McDonald's?

378

A. I do. I believe that when you take all competition out of the marketplace in this case, I believe that it -- it would likely have a negative effect on the customers.

Q. What sort of negative effect do you think it will have on customers?

A. Well, I would imagine upward pressure on pricing, potentially decreased options in terms of product offerings.

A. They're a wholesaler of office products.

Q. Has a regional or local office supplies vendor backed by





Large Business Customers Are Concerned About the Proposed Merger

1898

- 1 Q. Okay. And is that -- are you getting substantial value
2 from both Staples and Office Depot in those proposals?
3 A. We're getting value from both.
4 Q. Okay.

THE COURT: All right. So what happens if they merge?

THE WITNESS: Well, my belief is that if they merge we'll be in the same situation that -- we'll be in a noncompetitive environment. We will not have a competitive environment behind which to negotiate with a nationally-capable contracted vendor.

17 Staples, and there's value on the table?

18 THE WITNESS: Yes, sir.

19 THE COURT: All right. So what happens if they merge?

20 THE WITNESS: Well, my belief is that if they merge we'll
21 be in the same situation that -- we'll be in a noncompetitive
22 environment. We will not have a competitive environment behind
23 which to negotiate with a nationally-capable contracted vendor.

24 THE COURT: Could you lock in one of those bids prior to
25 the merger, though?



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Large Business Customers Are Concerned About the Proposed Merger

Who does Select Medical consider to be its next best option for general office supplies and copy paper?

1018
Depot.
to be its next best
paper?

A. The next best option would be considered to be Staples.

7 A. I do have concerns from Select Medical's perspective.
8 Large corporate organizations such as Select Medical, I believe
9 it's important to have that competition to be able to properly

Q. And given the proposed merger between Staples and Office Depot, do you have any concerns about that proposed merger?

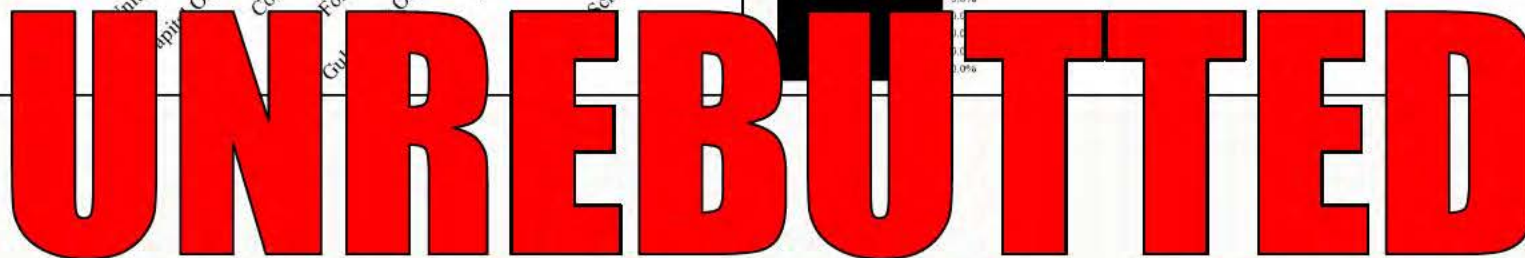
1 A. I do have concerns from Select Medical's perspective.
1 Large corporate organizations such as Select Medical, I believe
1 it's important to have that competition to be able to properly
1 service our national footprint, our national presence, and to
2 also be able to provide the best possible pricing. Given buying
2 power and things of that nature to truly consolidate spend, I
2 would have concerns if there was only one company.





No Customers Testified in Support of the Merger

Staples Dominates in Office Depot's Win-Loss Data with 240 Wins



**Defendants Cannot Meet Their Burden of Rebutting the
Strong Presumption of Anticompetitive Harm**

4. Defendants Failed to Establish That Entry or Expansion Would Be Timely, Likely, or Sufficient



Entry or Expansion Will Not Be Timely, Likely, or Sufficient

- Defendants “bear the burden of demonstrating the ability of other distributors to ‘fill the competitive void’ that will result from the proposed merger.” (*Sysco*, 113 F. Supp. 3d at 80)



CRA Charles River Associates

14 whether entry will be sufficient. Given the magnitude of
15 the shares and the bidding data we've seen, it's a pretty
16 high hurdle, in my view, for entry to be sufficient. And so

- Insufficient to simply identify other competitors that might possibly expand (*H&R Block*, 833 F. Supp. 2d at 73-76)
- “[T]he mere fact that new entrants and fringe firms have an intent to compete does not necessarily mean that those firms are significant competitors capable of replacing lost competition” (*CCC Holdings*, 605 F. Supp. 2d at 59)



Entry or Expansion Will Not Be Timely, Likely, or Sufficient

- **Defendants have failed to establish adequate entry or expansion by: (i) local and regional vendors, (ii) consortia, (iii) manufacturers, or (iv) adjacency vendors**
- **These firms have trivial shares today creating huge hurdle for sufficient entry:**

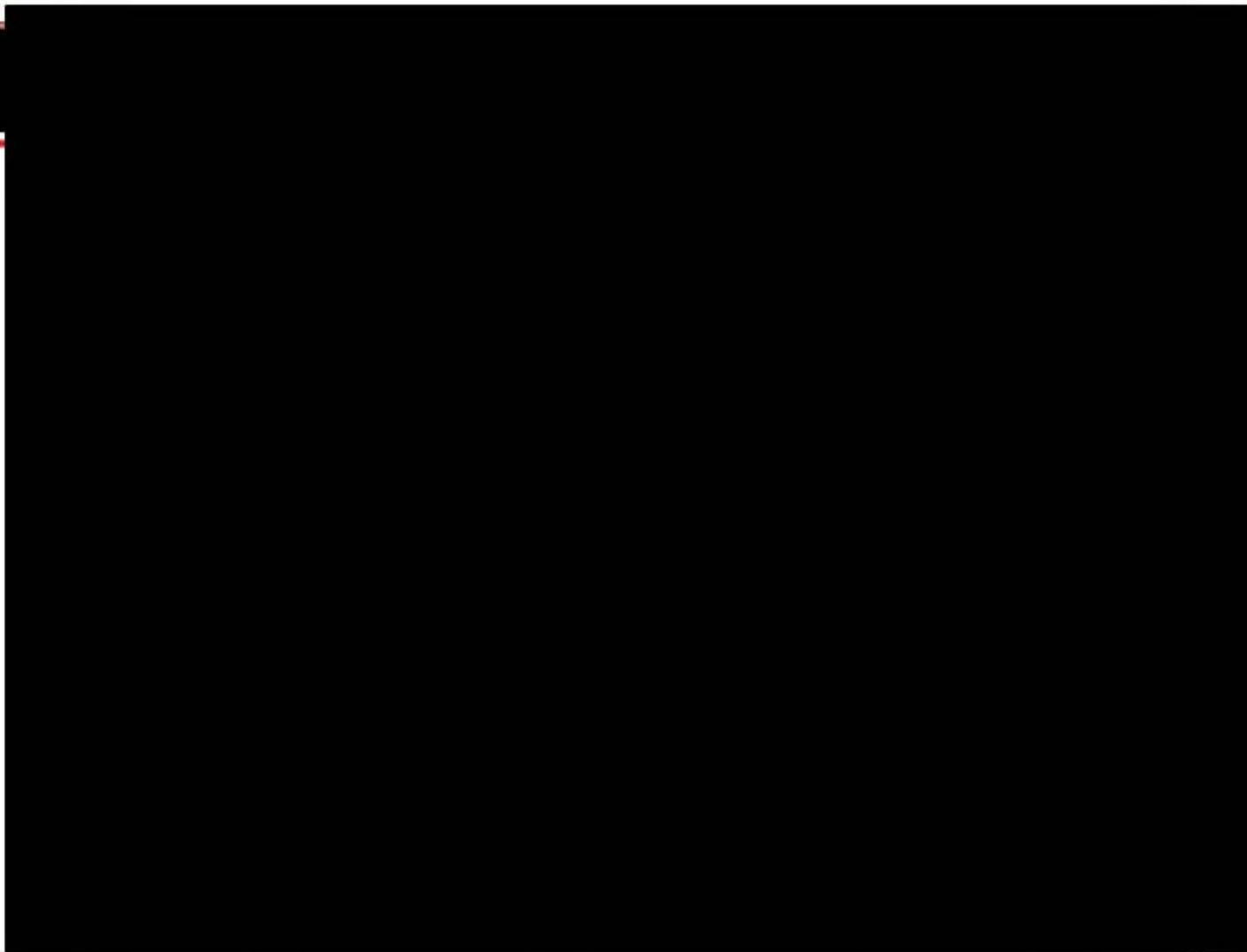
	Market Share	Primary Vendor Share
WB Mason	0.2%	[REDACTED]
Other Regionals	None > 0.3%	None > 0.7%
Consortia	< 0.1%	[REDACTED]
Paper Manufacturers	2.5%	[REDACTED]
Other Large Manufacturers	< 0.05%	0%
Adjacencies	0.4%	0.2%



WB Mason Explained the Difficulties of Expansion



W.B. MASON



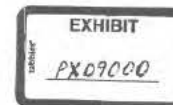


WB Mason's Expansion Will Not Be Timely, Likely, or Sufficient



W.B. MASON

INSIDE M-ville	outside M-ville
\$1.405 B Sales	\$40 M Sales
~ 9890 sales	3% sales
4 hubs	0 hubs
46 Branches	0 branches
1/2 product from Manuf	19 cross docks - 3 free standing
1/2 from Essendant	100% product from M Essend
800 trucks	28-29 trucks
~ 1200 sales people	1 Salesperson
lower product cost	higher product cost
higher rebates	lower rebates
lower delivery cost	higher delivery cost
all customer service (350)	0 customer service
~ 230,000 cust HQ	1 cust HQ



0 9000



Entry or Expansion Will Not Be Timely, Likely, or Sufficient



1378

1 do Q. Okay. So does PDME currently serve any large corporate
2 did customers as a traditional independent local office supplies
3 we vendor?
4 Q.

5 rule A. **No, we do not. We don't have the capability. Most**
6 A. **independent dealers across the country do not either.**

7 Q.
8 cus Q. Okay. And why don't you have the capability to serve
9 ver large corporate customers in your traditional role as an
10 A. independent local office supplies vendor?

11 ind A. **Well, first, major corporate clients that we service in**
12 Q. **our Tier 1 model, they -- first of all, they want a**
13 larg **homogenized program, a program where they're dealing with**
14 ind **one company for all their locations throughout the United**
15 A. **States.**

16 our
17 hor
18 on Second, we **can't be cost competitive by buying the**
19 Sta **program from Essendant or S.P. Richards and then be able to**
20 **compete against Office Depot or Staples.**

21 pro
22 compete against Office Depot or Staples.

23 Q. Are you able to offer upfront payments or rebates to
24 large corporate customers in your capacity as a traditional
25 independent office supply company?

**Amazon Will Not Be Sufficient to Replace the Lost
Competition in the Foreseeable Future**



In the Record: Amazon Does Not Serve as the Primary Vendor for Any Large Business Customer

551

544

1 little into forward-looking matters. I'm certainly happy to
 2 have the witness answer that. I would like to have him
 3 answer that in a closed session, if we may.
 4 THE COURT: All right. Thank you.
 5 Thank you, Counsel.
 6 MR. MONTS: Thank you.
 7 BY MS. REINHART:
 8 Q. Does Amazon Business currently act as
 9 supplier of office supplies to an enterprise business?
 10 A. No, not -- not to my knowledge. No.
 11 Q. And you -- you understand I'm -- I'm asking
 12 Amazon Business supplies the needs of a company
 13 of -- when I say primary supplier, you're familiar with
 14 term?
 15 A. Yeah. Can you -- can you explain what you mean by
 16 call a primary?
 17 Q. Is that not a term that you use?
 18 A. We -- we've used it.
 19 Q. What does it mean to you?
 20 A. It means to us, the way that we've defined it is
 21 supplying all of -- or, the primary selection that a
 22 customer would need for office supplies. It would be the --
 23 what's also called the head items or the items that they buy
 24 in, most frequently, in bulk.
 25 Q. So when you said head items --

Q. Does Amazon Business currently act as the primary supplier of office supplies to an enterprise business?

A. No, not -- not to my knowledge. No.

Q. Has Amazon Business ever won an RFP for the role as primary supplier of office supplies?

A. No.





Amazon Business Lacks Key Features Large Customers Require

- **Currently, Amazon Business:**
 - **DOES NOT** offer product curation (Amazon Hrg. at 529:5-531:5; 555:25-556:7)
 - **DOES NOT** offer [REDACTED] (Id. at 849:4-12)
 - **DOES NOT** offer customer-specific pricing (Id. at 540:21-541:4; 842:9-24)
 - **DOES NOT** offer desktop delivery (Id. at 551:9-10)
 - **DOES NOT** allow for automatically recurring weekly deliveries (Id. at 648:23-649:11)
 - **DOES NOT** negotiate contracts (Id. at 543:21-23)
- **This is why Amazon Business participates in RFPs “only in a limited way,” often responding only to a request for a quote for a limited number of items** (Id. at 546:18-547:12)



Amazon Business Faces Significant Challenges Even for the Features It Is Working On

- Twice in the last several months, Amazon Business [REDACTED]

— [REDACTED]

— [REDACTED]

- Certain features in development are limited [REDACTED]

- Beta testing limited solution to allow customers to see pricing they negotiate with third-party sellers

- [REDACTED]

- [REDACTED]



Amazon Business Model Is at Odds With Large Customer Requirements

- Before the launch of Amazon Business, Amazon sold office supplies, and Amazon targeted business customers, first through smallparts.com and then through Amazon Supply (Amazon Hrg. at 522:25-526:17)
- Amazon Business is a B2B marketplace that is hosted on the Amazon.com website (*Id.* at 521:14-522:4)
- The marketplace allows third parties to sell products directly. Amazon does not control pricing, volumes or delivery terms of third-party sellers, which provide half of the products sold on Amazon Business (*Id.* at 539:14-541:4)





Amazon Does Not, and Has No Plans to, Control Third-Party Seller Pricing



7 about
8 might
9
10 little b
11 sir, do
12 are th
13 not co
14 A. C
15 and b
16 Q. A
17 are so
18 A. H
19 Q. H
20 A. T
21 Q. O
22 direct
23 that c
24 A. T
25 Q. A

And I want to go back to pricing. We've talked a little bit about customer-specific pricing. But you agree, sir, don't you, that to the extent that third-party sellers are the sellers of the products on Amazon, that Amazon does not control the pricing that those sellers set?

A. Correct. In no way. The sellers own their own prices and their own offers.

Q. And that accounts for about half of the products that are sold for Amazon Business?

A. Half of the sales on Amazon Business.

Q. Half of the sales, meaning dollars, right?

A. That's correct.

Q. Okay. And then as to the products that Amazon sells directly, Amazon itself does not fund any discounting; is that correct?

A. That's correct.

Q. And so that means that if the vendor that sells you the

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2 the cu
3 correc
4 A. T
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6 A. T
7 Q. Y
8 partic
9 A. N
10 Q. O
11 that v
12 specia
13 any price that's offered on Amazon Business, you can't do

843

product does not give you a low enough price, you can't give the customer a low enough price that it must be asking for, correct?

A. That's correct.

Q. And you have no plans to change that?

A. That's correct.

Q. You have no plans to force the third parties to offer particular prices?

A. No, we'll never do that. No.



Evidence Shows Amazon's Expansion Will Not Be Timely, Likely, or Sufficient

- × Amazon HAS NOT won a single RFP to be a primary vendor to a large business customer
- × [REDACTED]
- × [REDACTED]
- × Amazon DOES NOT and WILL NOT control third party sellers' pricing, volumes, or delivery terms
- × Amazon DOES NOT and WILL NOT [REDACTED]
[REDACTED]
- × [REDACTED] they WILL NOT expand in a manner that would be timely, likely, or sufficient



Large Business Customers Require a Track Record



"And if a company doesn't have a track record of doing that, unless some – unless the other option is significantly worse, you're probably not going to go there. You want something proven. I think any consumer does."

The risks of using a new vendor are:



"The likelihood that there will be issues that are unresolved or not resolved in a timely manner. Just the long-term seamless nature of working together with a company that knows how to manage a large customer and the complexities of a large customer."

Large customers ask for references because:



"they want to make sure that what you said in this RFP, that you've actually done this someplace before." "[Without a track record] It's a problem. And we were, and it took us a lot of years to get there, a lot of years. It's very difficult, and, like, if you're in a marketplace to get your first hospital, to get your first university, to get your first of any kind of a customer, that's a battle to break into that -- that part of the market, it's really tough to do. Because you can't use any references."

78



Large Business Customers Require a Track Record



shoes of an Office Depot any time soon. First of all, Office Depot and Staples have been in this space for at least 25 years, so they've perfected it. Their web presence

enterprise client. And, you know, in life, as in business, first you want to crawl, then you want to walk, then you want to run. Dealing with these large enterprise customers is a full-out Olympic sprint.

So they don't have the experience. And in life, whether in business or just your general life, experience is everything. And they don't have the other ancillary



Case Law Supports: Expansion Will Be Insufficient

- **FTC v. Sysco Corp., 113 F. Supp. 3d at 73-78 (D.D.C. 2015)**

- *Divestiture of 11 “strategically located” distribution centers*
- *Already established competitor*
- CEO with *one year of experience in the distribution business*
- Backed by *a large parent firm with a net worth of almost \$500 million*
- Projected 20% share *in relevant market* after 5 years

INSUFFICIENT

- **FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 56-59 (D.D.C. 2009)**

- *Already established competitor in relevant market*
- Offering *the same product line as the merging parties’ “firm changer”*
- Had *double the market share in relevant market as the merging parties*
- Merger “would free [competitor’s] hands to compete as he wishes”
- But was projected to have *only a small fraction of the merging parties’ market shares* within several years

INSUFFICIENT

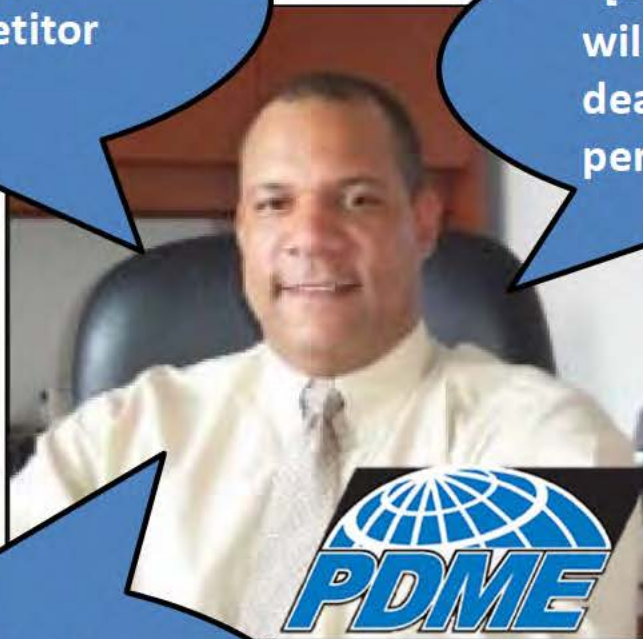
5. Defendants Failed to Establish Proposed Fix or Efficiencies Would Save This Merger



The Proposed Divestiture Will “kill Tier 1 supplier diversity”

“[The proposed divestiture to Essendant] will not create another competitor in the marketplace.”

“[The proposed divestiture] will put several of the Tier 1 dealers out of the business permanently”



“[The proposed divestiture will] kill Tier 1 supplier diversity within the office product space ultimately.”



Defendants' Efficiencies Claims Do Not Rebut the Presumption

- **No court has ever found that efficiencies rebutted presumption**
- **Defendants must present “proof of extraordinary efficiencies” to rebut the presumption of likely anticompetitive effects** (*Heinz, 246 F.3d at 720*)
- **Defendants failed to establish efficiencies save this merger**



Private Equities Are Afforded Little Weight

- **The risk that the transaction will not occur is a “private equity”** (*Heinz*, 246 F.3d at 727 n.25; *Whole Foods*, 548 F.3d at 1041; *CCC Holdings*, 605 F. Supp. 2d at 76)
- **Courts “must afford [private equities] little weight, lest we undermine section 13(b)’s purpose of protecting the ‘public-at-large, rather than the individual private competitors.’”** (*Heinz*, 246 F.3d at 727 n.25)
- **“[T]he risk that the parties will abandon the merger rather than proceed to an administrative trial on the merits is, however, ‘at best, a private equity’ which cannot overcome the significant public equities weighing in favor of a preliminary injunction.”** (*Sysco*, 113 F. Supp. 3d at 87)

Appendix



The Relevant Market Is the Line of Commerce That Would Be Affected by the Merger

“This is what we do in merger analysis, we look at where the firms overlap and are significant and where there are fewer choices. As I study this, you know, it shifted away from retail because there's more competition there. It shifted away from ink and toner or furniture. So it's honing in on where the problem is. And sure, that's going to go along with high shares. Okay. That's what we do all the time. This notion that that's somehow gerrymandering or rigging it, I just -- that's why -- that's just nonsense to me, okay. That is not correct.”



CRA Charles River
Associates



The Evidence Shows Paper Is Properly Included in the Cluster

Consumable Office Supplies Market Shares: Core v. Paper

Fortune 100 Customers, 2014

Supplier	Consumable Office Supplies	Core	Paper
Staples	47.3%	48.4%	46.2%
Office Depot	31.7%	38.3%	25.2%
Other Suppliers	21.0%	13.3%	28.6%
Staples + Office Depot	79.0%	86.7%	71.4%



***Grinnell* Does Not Support Defendants' Contention**

- **No single use**
 - ***Grinnell* agreed with Plaintiffs that the entire accredited central station business was a single market** (*Grinnell*, 384 U.S. at 4)
 - **There is not a single use for ink and toner and other consumable office supplies**
- **No package/bundle**
 - **Defendants' evidence here shows that companies buy different products; there is no set of products everyone buys – they are individual products**
 - ***Promedica* rejected argument that all products must be considered together when they were negotiated in same contract**



Product Market Need Not Include All Products Sold by the Merging Parties

- ***Staples***: consumable office supplies, but excluding capital goods (computers, fax machines, and other business machines) and office furniture
- ***ProMedica***: inpatient general acute care hospital services, but excluding inpatient tertiary services, inpatient obstetrics services, and outpatient services; (*see also OSF Healthcare (Rockford II)*)
 - *ProMedica* (6th Cir.) explicitly rejects Defendants' theory that all products/services sold under contract define a product market



Defendants' Documents Recognize Large Business Customers Are Distinct

Distribution Network & Wholesaler Dependence

11.7 Will [REDACTED] be serviced by company owned distribution centers, or will some areas be serviced through either a dealer network or a wholesaler? M/C

Company-owned distribution centers

Staples offers [REDACTED] fast, accurate and efficient delivery by operating one of the most extensive and technologically-advanced distribution networks in the industry. Through our strategically-located fulfillment centers

18.1 What is your standard shipment and delivery time? (Please detail out variances for all countries). Attach a file.

U.S.

Next Day

Minimized Wholesaler Dependence

Staples' inventories throughout our network of fulfillment centers represent the most popular brands that customers demand. Our product inventories represent more than 95% of the items sold everyday. As a result, we have been able to minimize our dependence on wholesaler product inventories, resulting in higher fill rates and more competitive pricing since we are not paying an inflated cost for the product.

E-Procurement

17.1 Describe the features and benefits of your Internet ordering solution. LONG ANSWER + ATTACHMENT

Staples has the unique expertise to customize an e-procurement solution to help better control your costs, streamline your ordering process, increase program compliance and minimize your time spent on procurement.

Integration Capabilities

Staples has extensive expertise in electronic procurement implementations and can integrate seamlessly with all major third-party e-procurement applications, including Ariba, Oracle and others. We will leverage the industry's



Defendants' Documents Recognize Large Business Customers Are Distinct

Compliance

Compliance Savings

One of the easiest ways to manage costs is simply to support compliance to your Staples program. Prior to program launch and on an ongoing basis, our Field Marketing team will work with [REDACTED] to conduct communication campaigns to drive greater awareness and acceptance of your Staples program.

We also help support program compliance through our extensive Staples retail network. With more than 1,500 convenient U.S. locations to choose from, your end-users can make same day, emergency purchases without going outside your established office supply program.

Order Size

Minimizing Small Orders

Small, inefficient orders can add significant program costs by increasing the number of POs, invoices and deliveries you must process.

Monitoring

23.4 [REDACTED] has retained Dryden Procurement Technologies, LLC for the sole purpose of insuring all pricing and discount structures agreed to through the RFP and subsequent award and agreement with the selected supplier are met and the program remains at optimal levels throughout the term. In addition, supplier agrees to pay to Dryden an annual commodity management fee for the term of the agreement.





Defendants' Documents Recognize Large Business Customers Are Distinct

Demand Management

Staples will analyze [REDACTED] current product usage and develop a core product list that offers immediate savings. Your Strategic Account Manager will regularly review your core list to identify continuous opportunities where Staples can offer better value on the products you use most. Our industry-leading buying power and strong supplier relationships give us the flexibility to find the most cost-effective solutions for your needs.

Itemized Prices on Core Products

16.4 Outline best practices for pricing core items throughout the world. **LONG ANSWER + ATTACHMENT**

To drive the highest end-user participation, Core pricing should be global in scope, but country-specific, based on each participating countries' laws, regulations, product selection, required services, operational costs and market-competitive pricing

21.9 Please provide your rebate % based on the following tiers:

21.9.2 Annual US Sales from \$0 to \$1,999,999.99 = %

[REDACTED]

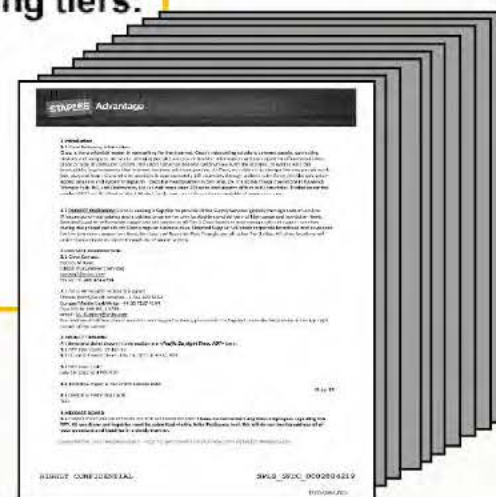
Volume Rebates

21.9.4 Annual US Sales from \$2,000,000 to \$2,749,999.99 = %

[REDACTED]

21.9.6 Annual US Sales above \$2,750,000 = %

[REDACTED]





F100 Market Shares Include Off-Contract Spend

- **Evidence indicates that large customers have high contract compliance rates for consumable office supplies**
 - **Buy much better on-contract than at retail or online**
 - **F100 purchasing data revealed that 78% of a customer's purchases went to the customer's single largest vendor**
 - **Customers also testified that they value contract and direct employees to purchase consumable office supplies through the contract vendor**



In the Record: Customers Highly Value Their Contracts

Q. From start to finish, about how long did the 2015 sourcing event for office supplies take?

A. **About six months.**

Q. And what about contract negotiations after that?

A. **That took about nine months.**

Q. **Total of about 15 months?**

A. **Correct.**



Q Why is it that Bank of America uses an RFP process to enter into its contracts?

A **One, we've got a corporate policy around it. It yields for us competitive – the necessary competitive due diligence in the marketplace so that we're getting the greatest value for the quality that we're looking for.**



Q. So switching gears and talking about the arrangement that you have with Staples as your single primary office supplies vendor, why did you -- why did Health Trust decide to choose only one primary office supplies vendor?

A. **Well, there's -- first and foremost is when you can aggregate all your members' volume and award that volume to a single vendor, you're going to secure best pricing.**

But there's also a lot of efficiencies associated with a single nationally-capable contracted vendor for office supplies.





In the Record: Large Business Customers Are Highly Compliant To Their Contract; They Already Negotiated the Best Prices!

Q. Mr. Meester, I now want to change gears and ask you a few questions about Best Buy's purchases of general office supplies and copy paper under the Office Depot contract. First off, does Best Buy prefer that its employees purchase general office supplies and copy paper through the Office Depot contract?

A. Yes, definitely.

Q. And why is that?

A. Because the **costs are significantly lower than if they were to buy retail or buy someplace else off-contract.**



Q. Now, based on those reviews of the data, what have you learned about McDonald's purchasing of office supplies from vendors other than Office Depot?

A. We've learned that there's -- what I would say **is limited spending in other sources. We did have a little bit with Staples from one particular office that we've addressed. We've had very little from other what you would call "traditional retailers," and really limited online retailer activity.**



Does Select Medical prefer that its employees purchase its general office supplies and copy paper through the Office Depot contract?

A. Yes.

Q. Now, why is that?

A. The -- there are a few reasons. One being consistency and use of the products that are available through our catalog, getting the best overall price point, as we talked about, core products versus noncore products. **We want to channel them to using the core products that give us the best price point; along with, as I had mentioned, the threshold for once we hit an annual spend level and go above that, we have an opportunity to obtain additional rebate dollars from the current vendor.**





Defendants Incorrectly Assert That Shapiro's Opinion Was "Predetermined" and Based on No Data



CRA Charles River Associates

A. Yes. We have a lot of that from the Fortune 100 sample where they're giving us -- in fact, it includes a wider range of products, and so we a lot of MPS services there as well.

Q. So did this presentation and the industry study reference, did it inform your views and your developing understanding that ink and toner was subject to different competitive conditions, even before the complaint was filed?

A. Yes. Yes, this is just the sort of thing I would be looking at at that phase and did look at.

A. This is an example, Your Honor, of just the number of documents from one Fortune 100 company. That in response to this, in terms of their vendors and then purchases, you can see some of the other names here of other vendors and where counsel has highlighted what would be the MPS. So, yes, we were certainly getting a lot of that during the fall in the Fortune 100 discovery process.

2781

y's MPS customers are Fortune 1000."

goes along with what I think you've heard,

at the MPS is really maybe best suited to

operations, and sometimes as a desktop

handle things differently. So it's widely

well, you can see, by Fortune 1000 companies.

suggests a lot of this big number is, in

o into the large customers that we're

So, that's -- that tells me that this is not

t all. And so -- and since we know they're

ed toner in many -- most of the cases with

significant competitive difference between

and the other main buckets that we're

the cluster, which -- namely, paper and core

have this testimony and information from the

manufacturers. And then, likewise, did you

e in the records from the customers

MPS adoption was happening?

ave a lot of that from the Fortune 100 sample

giving us -- in fact, it includes a wider

acts, and so we a lot of MPS services there as

now what about defendants themselves, have

ation in the record indicating that ink and



Staples and Office Depot Recognize They Are Each Other's Closest Competitor



First, we are a clear industry leader and gaining share.

For core office supplies we often compare ourselves to our most direct competitor, ODP. We are 1.5x their size and have demonstrated 12% annual growth over time vs their 2% annual decline over the same period.

We are gaining share even in our traditional categories such as paper and office supplies.

First, we are a clear industry leader and gaining share.

For core office supplies we often compare ourselves to our most direct competitor, ODP. We are 1.5x their size and have demonstrated 12% annual growth over time vs their 2% annual decline over the same period.

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Case Law Imposes Heavy Burden on Defendants Given the Strength of Plaintiffs' Prima Facie Case

- “[B]ecause the proposed merger would eliminate head-to-head competition between the number one and number two competitors in the market for national customers, the merger is likely to lead to unilateral anticompetitive effects in that market. Evidence of probable unilateral effects strengthens the FTC’s prima facie case that the merger will lessen competition in the national customer market.” (*Sysco*, 113 F. Supp. 3d at 65-66)
- Defendants must “produce 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)
- The stronger the prima facie case, the more evidence defendants must present to rebut the presumption (*Sysco*, 113 F. Supp. 3d at 23)

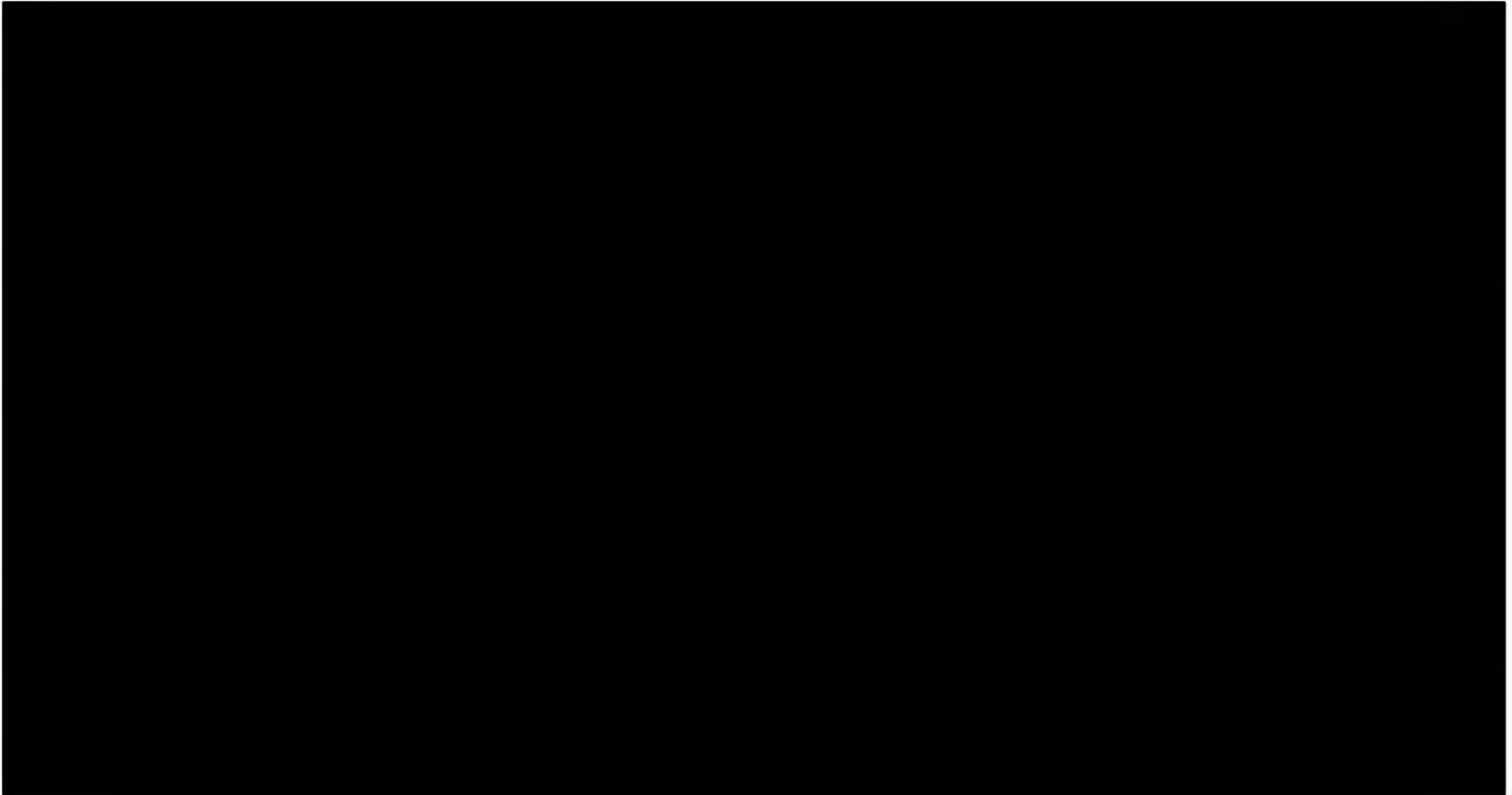


Entry and Expansion Will Not Be Timely, Likely, or Sufficient

- **Regional vendors, consortia, manufacturers, and adjacency vendors have no plans to expand**
- **And they face significant barriers even if they planned to, including:**
 - **Defendants' high retention rates for large customers**
 - **Purchasing scale disadvantages**
 - **Distribution scale disadvantages**
 - **Time and expense of developing IT and other capabilities required by large customers**
 - **Reputational barriers**



Amazon Business' "Enterprise Catalog"





No Evidence That Savings Will Be Passed Through to Customers

- **Defendants provided ZERO evidence at the hearing to demonstrate that either party passed on cost savings to customers following the ODP/OMX Merger and Corporate Express Merger**
 - **Neither ODP's CFO nor Staples's CFO could identify whether cost savings generated in the prior transactions actually resulted in lower prices to consumers** (PX02148 (Hare (ODP) Dep. 127:14-128:2); PX02010 (Hare (ODP) IH 108:15-109:21); PX02127 (Komola (Staples) Dep. 16:15-22, 108:12-24))
- **Defendants provided ZERO evidence that any efficiencies would be passed through to customers *this time either***
 - **The reasons to lower the price – to sell more to a customer or to retain a customer – are “much less of a concern after the merger”** (Shapiro Hrg. at 2451:10-2452:3)
 - **“[T]hey're going to have all these customers already after the merger and they're not going to have the same incentive to give them these up-front payments. So I don't see why they would do much pass through”** (*Id.* at 248:20-2449:7)



TriMega's Declaration Reflects All Changes Requested

From: Mike Maggio <mmaggio@trimega.org>
Sent: Sunday, October 4, 2015 7:08 PM
To: [REDACTED]
Subject: RE: FTC Investigation of Staples/Office Depot

Well reading it c
 words, you left out quite
 appear. This makes us se
 states that we are not. A

- Our official pos
 less competitor
- We have nation
 date to leverage
- Our largest challenges when competing with Staples are product, perception and experience.
- And that while price is an issue, it is one that we overcome daily when competing with Staples on a local and regional level.

- Our official position is that the acquisition is good for Independent Dealers based on our belief that one less competitor is a good thing.
- We have national coverage that surpasses Staples but we have not collaborated effectively enough to date to leverage it.

There are some

Paragraph 5 – rep
 Paragraph 9 – ad
 invitation....” (We
 Paragraph 20 – re
 “national account

Sorry about this k

Let me know.

Mike

Michael Maggio
 President

5600 N. River Road
 direct (847) 261-007
 mobile (809) 254-85

DECLARATION OF MICHAEL MAGGIO

State of Illinois)
)
 City of Rosemont)

Michael Maggio declares as follows:

1. I am the President of TriMega Purchasing Association (“TriMega”), position since December 2013. As President of TriMega, I oversee operations, which includes: managing the customer accounts department with our members; and reporting directly to TriMega’s Board of Directors. I have experience working in every channel of the office products industry. I was a general manager at Bellia Sons, a family-owned independent of southern New Jersey, which exists today as Bellia Enterprises. In 1998, I worked at SP Richards, one of two national office products wholesalers, where I was a sales manager and ultimately served as Division Vice President of the Northern Virginia, serving hundreds of independent office products dealers. In 2000, I became CEO of a regional wholesaler, ActionFormco, located in North Bergen, New Jersey and Grand Rapids, Michigan. After overseeing the sale of ActionFormco to SP Richards and United Stationers (now Essendant, the other national office products wholesaler), I worked with a Midwest manufacturer, Group Dekko, as President of Sales and Marketing. In 2012, I became the General Manager of the largest independent office products dealer in the Mid-Atlantic region, Supply Room Company. During my tenure at Supply Room Company, I assisted in the acquisition of two large office products dealers that Supply Room Company acquired in the area.

TriMega and Its Members

2. TriMega was founded in 1987 as a not-for-profit office products buying organization for small and local independent office products dealers. TriMega was founded by independent dealers who wanted to combine their purchasing volume to obtain lower prices from office products manufacturers and wholesalers to obtain a lower cost. TriMega negotiates directly, and handles the billing, with wholesalers and manufacturers on behalf of our member-dealers. Our member-dealers place their orders with manufacturers or wholesalers. Manufacturers and wholesalers bill TriMega, and TriMega in turn bills its member-dealers.

I nevertheless believe that the acquisition will benefit independent dealers, based on my belief that one less competitor is generally a good thing for other competitors.

TriMega’s 512 member-dealers—who collectively operate more than a thousand distribution points nationwide—provide Point Nationwide with coverage across the country that surpasses Staples and Office Depot, but we have not collaborated effectively enough to date to leverage that network.



TriMega's Declaration Reflects All Changes Requested

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Sent: Sunday, October 4, 2015 7:08 PM
To: [REDACTED]
Subject: RE: FTC Investigation of Staples/Office Depot

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Mike

Michael Maggio
 President



5600 N. River Road
 direct (847) 261-007
 mobile (839) 254-8

DECLARATION OF MICHAEL MAGGIO

State of Illinois)
 City of Rosemont)

Michael Maggio declares as follows:

1. I am the President of TriMega, Inc. since December 2014. TriMega, Inc. is a company that provides office products and services to its members. I have experience working in every aspect of the office products industry, including as a general manager at Best Buy, a regional manager at Staples, and as a CEO of a regional wholesaler, ActionEmco, located in North Bergen, New Jersey and Grand Rapids, Michigan. After overseeing the sale of ActionEmco to SP Richards and United Stationers, I worked with TriMega as its President of Sales and Marketing. TriMega is the largest independent office products company in the United States. During my tenure, I have managed two large office products distribution areas.

TriMega and Its Members

2. TriMega was founded in 1998 as a small and local independent wholesaler of office products. It is now a national independent wholesaler who works with office products manufacturers to negotiate directly, and handle on behalf of our member-dealers, manufacturers or wholesale orders, and TriMega in turn

14. The largest challenges that Point Nationwide and TriMega's member-dealers face when competing against Staples and Office Depot for multi-regional and national accounts is the inability to offer prebates, negative customer perception, and lack of experience serving customers of comparable spend, size, and geographic scope.

15. One of the largest hurdles we face when targeting multi-regional and national accounts is price. TriMega's member-dealers compete quite effectively on price against Staples and Office Depot on a local and regional level.



McDonald's Declaration Is True and Correct

14 Q. Okay. In your final declaration you took those two
15 sentences out, right?

16 A. That's correct.

17 Q. Because you don't believe those two sentences are true?

18 A. No, I believe we --

19 THE COURT: Do you believe they're true?

20 THE WITNESS: I do believe they're true. I
21 believe everything in the declaration is --

22 THE COURT: Why did you delete those two sentences?

23 THE WITNESS: It was at the advice of our senior
24 director, Anne Berens, that was duplicative -- some of the
25 things were duplicative of what was previously stated, as

485

1 well as just the language of it is hard to envision. It's
2 not really a -- it's somewhat speculative. And so her
3 thought was there was really no added benefit to maintaining
4 those lines and it just didn't sound like something we would
5 put in a -- any sort of document.

