

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES



In the Matter of

STAPLES, INC.
a corporation,

and

OFFICE DEPOT, INC.
a corporation.

Docket No. 9367

JOINT MOTION TO AMEND SCHEDULING ORDER

Complaint Counsel and Respondents Staples, Inc. (“Staples”) and Office Depot, Inc. (“Office Depot”) jointly move the Court for an order amending the Scheduling Order. The Parties make this motion in conjunction with a Joint Expedited Motion for a 21-Day Stay of Administrative Proceedings to the Commission filed earlier today. *See* Exhibit A. The Parties respectfully request this Court to extend the imminent, remaining pre-trial deadlines in the Scheduling Order to the furthest extent possible, so as to avoid potentially unnecessary expense and burden on non-parties and the Court while the Parties’ joint expedited motion is pending before the Commission. If the Commission does not move the trial date, these amended pre-trial deadlines will still enable the Parties to commence the trial as scheduled, on May 10, 2016. If the Commission does move the hearing date, this Court will have saved more than 200 non-parties meaningful expense and burden during the interim while the Parties’ joint motion is pending before the Commission. If this Court grants this motion, but the Commission declines to enter the requested stay, the Parties are prepared to proceed in a manner that does not require that the Court have decided all of the motions for in camera treatment prior to the trial.

The parallel proceedings in federal district court on the Commission's request for a preliminary injunction in *FTC v. Staples, Inc.*, No. 1:15-cv-02115 (EGS) (D.D.C.) recently concluded, and the Parties are awaiting that court's ruling. The District Court has committed to issue its ruling before May 10, 2016, which is the same day that the administrative trial before this Court is currently scheduled to commence. *See* Exhibit B, PI Action Status Conf. Tr. 39:4-39:23 (Dec. 17, 2015). In light of the forthcoming ruling in the preliminary injunction proceeding, and the substantial likelihood that the ruling will cause these administrative proceedings to be suspended or rendered moot, the Parties filed a joint motion asking the Commission for a 21-day postponement of the start of the administrative trial until May 31, 2016.

The current scheduling order contemplates motions for in-camera treatment to be filed by non-parties on April 28. Amending the schedule as requested will move that date to May 3, reducing the risk that the more than 200 non-parties, who may have confidential information used or witnesses called at the administrative trial, will incur unnecessary expense and burden over the coming days and weeks on pre-trial preparation and commencing the administrative trial, only to have the trial permanently suspended shortly thereafter. Should the Commission grant the Parties' motion for a 21-day stay, the non-parties may never have to make their motions for in-camera treatment.

The Court entered the Scheduling Order in this matter on January 4, 2016 and previously ordered some deadlines modified on April 8, 2016. This is the second joint motion the Parties have made to modify the Scheduling Order. The parties hereby request the following amendments detailed below:

Event	Current Deadline	Proposed Deadline
Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.	April 28, 2016	April 28, 2016
Deadline for filing responses to motions <i>in limine</i> to preclude admissions of evidence.	April 28, 2016	April 28, 2016
Complaint Counsel files pretrial brief supported by legal authority.	April 28, 2016	May 3, 2016
Deadline for filing motions for <i>in camera</i> treatment of proposed trial exhibits.	April 28, 2016	May 4, 2016
Exchange proposed stipulations of law, facts, and authenticity.	April 30, 2016	May 4, 2016
By 1:00 p.m., file final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.	May 4, 2016	May 6, 2016
Deadline for filing responses to motions for <i>in camera</i> treatment of proposed trial exhibits.	May 5, 2016	May 6, 2016
Respondents' Counsel files pretrial brief supported by legal authority.	May 5, 2016	May 7, 2016
<p data-bbox="188 1192 971 1293">Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.</p> <p data-bbox="188 1331 922 1432">The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits.</p> <p data-bbox="188 1470 974 1570">To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations.</p> <p data-bbox="188 1608 971 1864">Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects. Any Joint Exhibit will be signed by each party. (Do not include a signature line for the ALJ.)</p>	May 6, 2016	May 9, 2016

Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.	May 10, 2016	May 10, 2016
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A Proposed Order is attached.

Dated: April 22, 2016

Respectfully Submitted,

/s/ Carrie Mahan

Carrie Mahan
Jeffrey Perry
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street NW
Washington, DC 20005
Telephone: (202) 682-7000
Facsimile: (202) 857-0940
carrie.mahan@weil.com
jeffrey.perry@weil.com

Diane Sullivan
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8897
Facsimile: (212) 310-8007
diane.sullivan@weil.com

Counsel for Respondent Staples, Inc.

/s/ Matthew J. Reilly

Matthew J. Reilly
Andrew M. Lacy
Peter C. Herrick
SIMPSON THACHER & BARTLETT LLP
900 G Street, NW
Washington, DC 20001
Telephone: (202) 636-5566
Facsimile: (202) 636-5502
matt.reilly@stblaw.com
alacy@stblaw.com
peter.herrick@stblaw.com

Counsel for Respondent Office Depot, Inc.

/s/ Tara Reinhart

Tara Reinhart
Charles Loughlin
Alexis Gilman
Stelios Xenakis
Complaint Counsel
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue NW
Washington, DC 20580
Telephone: (202) 326-2638
treinhart@ftc.gov
cloughlin@ftc.gov
agilman@ftc.gov
sxenakis@ftc.gov

Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

In the Matter of

STAPLES, INC.
a corporation,

and

OFFICE DEPOT, INC.
a corporation.

Docket No. 9367

**[PROPOSED] ORDER GRANTING JOINT MOTION
TO AMEND SCHEDULING ORDER**

Upon joint motion of Complaint Counsel and Respondents, and good cause existing,

IT IS HEREBY ORDERED THAT the Parties' Joint Motion to Amend Scheduling

Order is **GRANTED** and the Scheduling Order is amended as follows:

Event	Deadline
Complaint Counsel files pretrial brief supported by legal authority.	May 3, 2016
Deadline for filing motions for <i>in camera</i> treatment of proposed trial exhibits.	May 4, 2016
Exchange proposed stipulations of law, facts, and authenticity.	May 4, 2016
By 1:00 p.m., file final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.	May 6, 2016
Deadline for filing responses to motions for <i>in camera</i> treatment of proposed trial exhibits.	May 6, 2016
Respondents' Counsel files pretrial brief supported by legal authority.	May 7, 2016

<p>Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.</p> <p>The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits.</p> <p>To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations.</p> <p>Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects. Any Joint Exhibit will be signed by each party. (Do not include a signature line for the ALJ.)</p>	<p>May 9, 2016</p>
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All other provisions of the Scheduling Order shall remain in effect.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES

In the Matter of

STAPLES, INC.
a corporation,

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a corporation.

Docket No. 9367

CERTIFICATION OF MEET & CONFER

Pursuant to Paragraph 4 of the Scheduling Order entered January 4, 2016, the Parties met and conferred telephonically, and the Parties agreed to submit this joint motion.

Dated: April 22, 2016

Respectfully Submitted,

/s/ Carrie Mahan

Carrie Mahan
Jeffrey Perry
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street NW
Washington, DC 20005
Telephone: (202) 682-7000
Facsimile: (202) 857-0940
carrie.mahan@weil.com
jeffrey.perry@weil.com

Diane Sullivan
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8897
Facsimile: (212) 310-8007
diane.sullivan@weil.com

Counsel for Respondent Staples, Inc.

/s/ Tara Reinhart

Tara Reinhart
Charles Loughlin
Alexis Gilman
Stelios Xenakis
FEDERAL TRADE COMMISSION
Bureau of Competition
600 Pennsylvania Avenue NW
Washington, DC 20580
Telephone: (202) 326-2638
treinhart@ftc.gov
cloughlin@ftc.gov
agilman@ftc.gov
sxenakis@ftc.gov

Counsel Supporting the Complaint

/s/ Matthew J. Reilly

Matthew J. Reilly
Andrew M. Lacy
Peter C. Herrick
SIMPSON THACHER & BARTLETT LLP
900 G Street, NW
Washington, DC 20001
Telephone: (202) 636-5566
Facsimile: (202) 636-5502
matt.reilly@stblaw.com
alacy@stblaw.com
peter.herrick@stblaw.com

Counsel for Respondent Office Depot, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission's e-filing system, causing the document to be served on all of the following registered participants:

Donald S. Clark, Secretary
Office of the Secretary
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW Room H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Chief Administrative Law Judge
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW Room H-110
Washington, DC 20580
oalj@ftc.gov

I also certify that I delivered, via electronic mail, a copy of the foregoing document to:

Tara Reinhart
Chief Trial Counsel
FEDERAL TRADE COMMISSION
Bureau of Competition
400 Seventh Street, S.W.
Washington, D.C. 20024
treinhart@ftc.gov

Matthew J. Reilly
Andrew M. Lacy
Peter C. Herrick
SIMPSON THACHER & BARTLETT LLP
900 G Street, NW
Washington, DC 20001
matt.reilly@stblaw.com
alacy@stblaw.com
peter.herrick@stblaw.com

Charles Loughlin
Stelios Xenakis
Ryan Quillian
FEDERAL TRADE COMMISSION
Bureau of Competition
400 Seventh Street, S.W.
Washington, DC 20024
cloughlin@ftc.gov
sxenakis@ftc.gov
rquillian@ftc.gov

Counsel for Respondent Office Depot, Inc.

Counsel Supporting the Complaint

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the original filing, and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: April 22, 2016

/s/ S. Nicole Booth
S. Nicole Booth
Paralegal

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney

In the Matter of

STAPLES, INC.
a corporation,

and

OFFICE DEPOT, INC.
a corporation.

Docket No. 9367

JOINT EXPEDITED MOTION FOR A 21-DAY STAY
OF ADMINISTRATIVE PROCEEDINGS

Pursuant to Rule 3.41 of the Federal Trade Commission's ("FTC" or "Commission") Rules of Practice, Complaint Counsel and Respondents Staples, Inc. ("Staples") and Office Depot, Inc. ("Office Depot") jointly move for a 21-day postponement of the commencement of the administrative trial currently scheduled to begin on May 10, 2016, to May 31, 2016, and for a corresponding stay of related pre-trial deadlines. This brief postponement will avoid significant expense and burden on more than 200 non-parties whose confidential information has been designated for use in the administrative trial.

The requested relief will not prejudice the Commission's ability to discharge its duties. The parallel proceedings in federal district court on the Commission's motion for a preliminary injunction in *FTC v. Staples, Inc.*, No. 1:15-cv-02115 (EGS) (D.D.C.) recently concluded. In that proceeding, the District Court committed to issue its order on the motion for preliminary injunction by May 10 at the request of Staples, because Staples' financing for the proposed

transaction will not extend beyond May 10, 2016, unless a favorable ruling is received from the District Court by 5:00 p.m. that day. If the preliminary injunction is granted, Staples and Office Depot have consistently stated—and reaffirm here—that they will abandon the proposed transaction. Under the recent revisions to Rule 3.26, if the PI is denied, the administrative proceeding will be automatically stayed or withdrawn on the request of the Respondents. *See also* FTC Revisions to Rules of Practice, 80 Fed. Reg. 15,157, 15,158 (Mar. 23, 2015). Therefore, regardless of whether the District Court grants or denies the injunction, the administrative proceeding either will be rendered moot by the merging parties abandoning the transaction or may be stayed pending any appeal. Even if the Commission determines to proceed with the administrative litigation following denial of the preliminary injunction motion, this brief stay will not hamper the Commission’s ultimate ability to obtain relief and will avoid starting the trial only to have it likely stayed pursuant to Rule 3.26.

ARGUMENT

Expedited consideration is appropriate because, unless this brief stay of the administrative proceedings is granted, more than 200 non-parties that have been notified by the Parties that their confidential material may be used at the trial are required to move by April 28, 2016, for *in camera* treatment of any material they do not want presented on the public record.¹ Such motions will address significant volumes of competitively and commercially sensitive documents and data that were produced during the course of the preliminary injunction proceeding and the FTC’s merger review. If the Commission grants this motion for a brief stay, then the 200-plus non-parties may avoid the substantial burden of reviewing voluminous documents, performing line-by-line proposed redactions of confidential information, preparing

¹ Simultaneously with this motion, the Parties moved the Chief Administrative Law Judge to amend the schedule to give the non-parties an additional five days in which to file their motions.

legal memoranda requesting *in camera* treatment of those materials, and filing copies of all such materials with the Court. Additionally, the Parties have identified approximately 45 non-parties as witnesses that may be called live at the administrative trial. A brief stay will postpone the need for those witnesses to prepare to testify. Moreover, because the administrative trial may become moot, a temporary stay could save non-parties tens of thousands, if not hundreds of thousands, of dollars in legal fees alone.²

This brief postponement of the administrative trial will not prejudice the Commission. As Staples and Office Depot have represented repeatedly, if the District Court grants the preliminary injunction, the Respondents will abandon their merger and this administrative proceeding will be moot. *See* Exhibit A, Scheduling Conf. Tr. 6:12-18 (Jan 4, 2016); Exhibit B, PI Hr’g Tr. 2901:14-19 (Apr. 5, 2016); *id.* at 3027:12-3028:24; *id.* at 3647:2-3 (“if the government’s application is granted, the merger will not be consummated”). If the District Court denies the motion for preliminary injunction, Respondents will file a motion pursuant to Rule 3.26 to withdraw the case from adjudication or dismiss the complaint.³ Rule 3.26(b)-(d). Once a respondent files such a motion, “the new rule now provides for an automatic withdrawal or automatic stay” of the administrative proceeding, depending on the type of motion. FTC Revisions to Rules of Practice, 80 Fed. Reg. 15,157, 15,158 (Mar. 23, 2015) (emphasis added); *see also* Rule 3.26(c); Rule 3.26(d)(2). Imposing a brief stay now avoids the inefficiency of beginning the presentation of evidence in the administrative trial only to suspend the proceeding following the ruling by the District Court, without prejudicing the Commission.

² Respondents also note that they face substantial and potentially unnecessary burdens—including legal fees—if a temporary stay is not granted.

³ Based on historical example, the D.C. Circuit may rule very quickly if the FTC seeks an injunction pending appeal. *See* Order, *FTC v. Whole Foods, Inc.*, No. 07-5275 (D.C. Cir. Aug. 23, 2007 (denying injunction pending appeal within 7 days of the district court denying the preliminary injunction).

RELIEF REQUESTED

For all of the reasons foregoing, Complaint Counsel and Respondents jointly and respectfully request that the Commission exercise its discretion under Rule 3.41(b) and/or Rule 3.41(f) to postpone commencement of the administrative hearing by 21 days, or until such later date as may be convenient for the Chief Administrative Law Judge and the Commission.

Complaint Counsel and Respondents also request that interim pre-trial deadlines be stayed for 21 days.

Dated: April 22, 2016

Respectfully Submitted,

/s/ Carrie Mahan
Carrie Mahan
Jeffrey Perry
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street NW
Washington, DC 20005
Telephone: (202) 682-7000
Facsimile: (202) 857-0940
carrie.mahan@weil.com
jeffrey.perry@weil.com

/s/ Tara Reinhart
Tara Reinhart
Charles Loughlin
Alexis Gilman
Stelios Xenakis
600 Pennsylvania Avenue NW
Washington, DC 20580
Telephone: (202) 326-2638
treinhart@ftc.gov
cloughlin@ftc.gov
agilman@ftc.gov
sxenakis@ftc.gov

Diane Sullivan
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8897
Facsimile: (212) 310-8007
diane.sullivan@weil.com

Counsel Supporting the Complaint

Counsel for Respondent Staples, Inc.

/s/ Matthew J. Reilly

Matthew J. Reilly

Andrew M. Lacy

Peter C. Herrick

SIMPSON THACHER & BARTLETT LLP

900 G Street, NW

Washington, DC 20001

Telephone: (202) 636-5566

Facsimile: (202) 636-5502

matt.reilly@stblaw.com

alacy@stblaw.com

peter.herrick@stblaw.com

Counsel for Respondent Office Depot, Inc.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney

In the Matter of

STAPLES, INC.
a corporation,

and

OFFICE DEPOT, INC.
a corporation.

Docket No. 9367

**[PROPOSED] ORDER GRANTING JOINT EXPEDITED MOTION FOR A 21-DAY
STAY OF ADMINISTRATIVE PROCEEDINGS**

Good cause having been shown,

IT IS HEREBY ORDERED THAT Complaint Counsel's and Respondents' Joint Expedited Motion for a 21-Day Stay of Administrative Proceedings is **GRANTED**; and

(1) Commencement of the evidentiary hearing in this matter is moved from May 10, 2016 to May 31, 2016; and

(2) All other proceedings in this matter are stayed for 21 days from the date of this order.

By the Commission.

Donald S. Clark
Secretary

ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission's e-filing system, causing the document to be served on all of the following registered participants:

Donald S. Clark, Secretary
Office of the Secretary
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW Room H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

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Chief Administrative Law Judge
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW Room H-110
Washington, DC 20580
oalj@ftc.gov

Tara Reinhart
Chief Trial Counsel
FEDERAL TRADE COMMISSION
Bureau of Competition
400 Seventh Street, S.W.
Washington, D.C. 20024
treinhart@ftc.gov

Charles Loughlin
Stelios Xenakis
Ryan Quillian
FEDERAL TRADE COMMISSION
Bureau of Competition
400 Seventh Street, S.W.
Washington, DC 20024
cloughlin@ftc.gov
sxenakis@ftc.gov
rquillian@ftc.gov

Matthew J. Reilly
Andrew M. Lacy
Peter C. Herrick
SIMPSON THACHER & BARTLETT LLP
900 G Street, NW
Washington, DC 20001
matt.reilly@stblaw.com
alacy@stblaw.com
peter.herrick@stblaw.com

Counsel for Respondent Office Depot, Inc.

Counsel Supporting the Complaint

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the original filing, and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: April 22, 2016

/s/ S. Nicole Booth
S. Nicole Booth
Paralegal

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
)	
et al.,)	Civil Action
)	No. 15-2115
Plaintiffs,)	
)	December 17, 2015
v.)	3:39 p.m.
)	
STAPLES INC., et al.,)	Washington, D.C.
)	
Defendants.)	

**TRANSCRIPT OF STATUS CALL PROCEEDINGS
BEFORE THE HONORABLE EMMET G. SULLIVAN,
UNITED STATES DISTRICT COURT JUDGE**

APPEARANCES:

**For Plaintiff Federal
Trade Commission:**

Tara L. Reinhart, Trial Attorney
FEDERAL TRADE COMMISSION
Bureau of Competition
400 Seventh Street, NW
Washington, DC 20024
(202) 326-2638
Email: Treinhart@ftc.gov

Alexis Gilman, Trial Attorney
FEDERAL TRADE COMMISSION
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-2579
Email: Agilman@ftc.gov

Charles A. Loughlin, Trial Attorney
FEDERAL TRADE COMMISSION
400 7th Street, SW
Washington, DC 20024
(202) 326-2114
Fax: (202) 326-2286
Email: Cloughlin@ftc.gov

APPEARANCES: Cont.**For Plaintiff Federal
Trade Commission:**

Kevin Hahm, Trial Attorney
 FEDERAL TRADE COMMISSION
 400 7th Street, SW
 Washington, DC 20024
 (202) 326-3680
 Fax: (202) 326-2286
 Email: Khahm@ftc.gov
 (617) 449-6889

Stelios S. Xenakis, Trial Attorney
 FEDERAL TRADE COMMISSION
 400 7th Street, SW
 Washington, DC 20024
 (202) 326-2821
 Fax: (202) 326-2286
 Email: Sxenakis@ftc.gov

**For Plaintiff District
of Columbia:**

**Catherine A. Jackson, Assistant
Attorney General**
 OFFICE OF THE ATTORNEY GENERAL
 Public Advocacy Section
 441 4th Street, NW
 Suite 630-S
 Washington, DC 20001
 (202) 442-9864
 Fax: (202) 741-0655
 Email: Bennett.rushkoff@dc.gov

**Defendant
Staples, Inc.:**

Diane P. Sullivan, Esq.
 WEIL GOTSHAL & MANGES, LLP
 301 Carnegie Center
 Suite 303
 Princeton, NJ 08540
 (609) 986-1120
 Email: Diane.sullivan@weil.com

Jeffrey H. Perry, Esq.
 WEIL, GOTSHAL & MANGES LLP
 1300 Eye Street, NW
 Suite 900
 Washington, DC 20005
 (202) 682-7000
 Fax: (202) 857-0940
 Email: Jeffrey.perry@weil.com

APPEARANCES: (Cont.)**For Defendant Office
Depot:****Matthew James Reilly, Esq.**
SIMPSON, THACHER & BARTLETT LLP
900 G Street, NW
9th Floor
Washington, DC 20001
(202) 636-5566
Fax: (202) 326-2286**Andrew McHie Lacy, Esq.**
SIMPSON, THACHER & BARTLETT LLP
900 G Street, NW
9th Floor
Washington, DC 20001
(202) 636-5505
Fax: (202) 220-7702
Email: Alacy@stblaw.com**John Lawrence Goheen, III, Esq.**
SIMPSON, THACHER & BARTLETT LLP
900 G Street, NW
9th Floor
Washington, DC 20001
(202) 636-5567
Fax: (202) 636-5502
Email: John.goheen@stblaw.com**Court Reporter:****Scott L. Wallace, RDR, CRR**
Official Court Reporter
U.S. District Court for the District
of Columbia
333 Constitution Avenue, NW
Room 6503
Washington, DC 20001
(202)354-3196
Email: Scottlyn01@aol.com

Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

1 MS. SULLIVAN: Thank you.

2 THE COURT: Hold on. Just one second.

3 (Brief pause in proceedings.)

4 THE COURT: All right. I'll give you whatever date you
5 want. You're asking for May 10th? Is that what you're asking?

6 MS. SULLIVAN: Yes, and I apologize for asking, Your
7 Honor, but -- because I know it puts pressure on your --

8 THE COURT: No, no, no, no. No, it's just -- but I will
9 tell you in all likelihood it'll be before then.

10 MS. SULLIVAN: Perfect, Your Honor.

11 THE COURT: Yeah.

12 MS. SULLIVAN: Thank you.

13 THE COURT: But at the very outside it'll be May the
14 10th --

15 MS. SULLIVAN: Appreciate it.

16 THE COURT: -- but I'd be shocked if we'd run up to May
17 the 10th.

18 MS. SULLIVAN: Thank you, Your Honor.

19 THE COURT: I'd be shocked.

20 MS. SULLIVAN: Thank you, Your Honor.

21 THE COURT: But that's what you've asked for, and you need
22 that for compelling reasons, and that's fine. We'll be happy to
23 do that.

24 MS. SULLIVAN: I appreciate it.

25 THE COURT: To the extent that -- and, actually, we were

Notice of Electronic Service

I hereby certify that on April 22, 2016, I filed an electronic copy of the foregoing Joint Motion to Amend Scheduling Order, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on April 22, 2016, I served via E-Service an electronic copy of the foregoing Joint Motion to Amend Scheduling Order, upon:

Matthew Reilly
Simpson Thacher & Bartlett LLP
matt.reilly@stblaw.com
Respondent

Andrew Lacy
Simpson Thacher & Bartlett LLP
alacy@stblaw.com
Respondent

Peter Herrick
Simpson Thacher & Bartlett LLP
peter.herrick@stblaw.com
Respondent

Alexis Gilman
Attorney
Federal Trade Commission
agilman@ftc.gov
Complaint

Kevin Hahm
Attorney
Federal Trade Commission
khahm@ftc.gov
Complaint

Charles A. Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Tara Reinhart
Attorney
Federal Trade Commission
treinhart@ftc.gov
Complaint

Stelios S. Xenakis

Attorney
Federal Trade Commission
sxenakis@ftc.gov
Complaint

Matthew Reilly
Attorney
Simpson Thacher & Bartlett LLP
matt.reilly@stblaw.com
Respondent

Andrew Lacy
Attorney
Simpson Thacher & Bartlett LLP
alacy@stblaw.com
Respondent

Peter Herrick
Attorney
Simpson Thacher & Bartlett LLP
peter.herrick@stblaw.com
Respondent

Diane Sullivan
Weil, Gotshal & Manges LLP
diane.sullivan@weil.com
Respondent

Carrie Mahan Anderson
Weil, Gotshal & Manges LLP
carrie.anderson@weil.com
Respondent

Jeffrey Perry
Weil, Gotshal & Manges LLP
jeffrey.perry@weil.com
Respondent

Eric Hochstadt
Weil, Gotshal & Manges LLP
eric.hochstadt@weil.com
Respondent

Brianne Kucerik
Weil, Gotshal & Manges LLP
brianne.kucerik@weil.com
Respondent

Megan Peloquin-Granger
Weil, Gotshal & Manges LLP
megan.granger@weil.com
Respondent

Allison Brown
Weil, Gotshal & Manges LLP
allison.brown@weil.com
Respondent

Carrie Anderson
Attorney