

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

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FEDERAL TRADE COMMISSION, <i>et al.</i> ,	:		
	:		
Plaintiffs,	:		
	:		
v.	:	Civil Action No. 1:15-cv-02115 (EGS)	
	:		
STAPLES, INC. and	:		
OFFICE DEPOT, INC.	:		
	:		
Defendants.	:		

**DEFENDANTS’ SURREPLY IN OPPOSITION TO PLAINTIFFS’ MOTION FOR
ATTORNEYS’ FEES AND COSTS**

Defendants Staples, Inc. (“Staples”) and Office Depot, Inc. (“Office Depot”) (collectively, “Defendants”) respectfully submit this Surreply in opposition to Plaintiffs District of Columbia and Commonwealth of Pennsylvania’s (collectively, “Moving Plaintiffs”) Motion for Attorneys’ Fees and Costs (“Fees Motion”). Moving Plaintiffs’ reply brief does not, and cannot, demonstrate that Plaintiffs have substantially prevailed under Section 16 of the Clayton Act, 15 U.S.C. § 26 (“Section 16”), a prerequisite to recover fees and costs. The reason is simple: the Federal Trade Commission (“FTC”) and Moving Plaintiffs chose instead to litigate this case under the lower standard of Section 13(b), 15 U.S.C. § 53(b) (“Section 13(b)"). In their Fees Motion, Moving Plaintiffs now seek to re-cast this litigation after the fact as a Section 16 case, but their reply brief only serves to underscore the fundamental unfairness and futility of

that effort. Moving Plaintiffs' reply brief presents new Section 16 legal arguments that were never subject to discovery, briefing, cross-examination, argument by the parties, or questioning by the Court at any point in this litigation. Granting Moving Plaintiffs' Fees Motion and ruling on claims not litigated or adequately raised until *after* the litigation has concluded would not only be unfair, but would circumvent Defendants' fundamental right to due process. We respectfully urge the Court to deny Moving Plaintiffs' motion.

Moving Plaintiffs' after the fact attempt to convert this matter into a Section 16 case is fundamentally unfair. No court ever has awarded attorneys' fees and costs to a state co-plaintiff in an FTC preliminary injunction case such as this. Indeed, to our knowledge, no state co-plaintiff has even sought such an award, including the Moving Plaintiffs, who were co-plaintiffs along with the FTC in the recent *Sysco* litigation.¹ That fact is not surprising, given that this case, and similar prior FTC preliminary injunction merger cases like *Sysco*, all have been litigated ***and decided*** under Section 13(b), which does not permit an award of fees or costs.² Plaintiffs' arguments and papers throughout this proceeding made abundantly clear that they likewise preferred to proceed under Section 13(b) and, aside from three token references to Section 16 in Plaintiffs' Complaint, the record is completely devoid of any mention of, let alone analysis or argument regarding, Section 16's higher legal standard or an application of the facts to that standard. Instead, Plaintiffs explicitly urged the Court to apply the lower Section 13(b)

¹ See *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015). (The state co-plaintiffs in the *Sysco* litigation were: California, Commonwealth of Pennsylvania, Commonwealth of Virginia, District of Columbia, Illinois, Iowa, Maryland, Minnesota, Nebraska, Ohio, and Tennessee). None sought or were awarded attorneys' fees and costs.

² Notably, the token references to Section 16 that Moving Plaintiffs highlight in their Fees Motion were also present in the *Sysco* complaint, and to our knowledge are typical in prior 13(b) cases in which states join as co-plaintiffs. See Complaint at p. 2 and ¶¶ 17, 19, and 23, *FTC v. Sysco* (No. 15-cv-00256); see also Complaint at p. 1 and ¶¶ 8 and 12, *FTC v. ProMedica Health Sys., Inc.*, (No. 3:11-CV-47) 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011).

standard, and the Court's Opinion applied the facts of this case to Section 13(b)'s unique legal standard:

*** Plaintiffs' Memorandum in Support of Motion For A Preliminary Injunction:** "As a result, Plaintiffs [plural] respectfully request a preliminary injunction *pursuant to Section 13(b) of the FTC Act*, 15 U.S. C. § 53(b), to preserve the status quo pending a full administrative proceeding on the merits."³ (no mention of Section 16 in Plaintiffs' brief) (emphasis added).

*** Court's Order granting Plaintiffs' Motion For A Preliminary Injunction:** "Staples and Office Depot are hereby enjoined and restrained, *under Section 13(b) of the Federal Trade Commission Act*, 15 U.S.C. § 53(b), from completing the proposed merger . . ."⁴ (no mention of Section 16 in the Court's Order or Opinion) (emphasis added).

All parties tried this case, and the Court as a result decided this case, as a Section 13(b) preliminary injunction challenge, which favored Plaintiffs by providing access to a lower legal standard and more "readily available" injunctive relief than is available under Section 16.⁵ Moving Plaintiffs' therefore deprived Defendants, and we respectfully suggest also deprived the Court, of fair notice that there was any need to address the distinct elements of Section 16.

Moving Plaintiffs' Reply Brief further demonstrates the unfairness of this post-decision change of course. Having succeeded under the lower Section 13(b) standard, Moving Plaintiffs' reply brief now identifies this Circuit's "four part preliminary injunction test" that applies to Section 16 cases, and then purports to apply the facts of this case to each of the four elements.⁶ This marks the first time in this entire litigation that this four-part test has even been

³ Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction (Dkt. No.164) at p. 3.

⁴ May 10, 2016 Order Granting Motion for Preliminary Injunction (Dkt. No. 453) at p. 2.

⁵ Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Dkt. No. 379) at ¶ 257.

⁶ Plaintiffs' Reply to Defendants' Brief in Opposition to Plaintiffs' Motion for Attorney's Fees and Costs (Dkt. No. 471) at p. 5.

mentioned, let alone applied or argued. That fact alone should end the inquiry as to whether Plaintiffs have “substantially prevailed” under Section 16. Rather than point to evidence that they actually have substantially prevailed under Section 16, Moving Plaintiffs essentially argue that they *would have* or *could have* substantially prevailed under the higher Section 16 standard for an injunction if they had actually argued it, notwithstanding that Plaintiffs distinguished that standard throughout the trial as they proceeded under Section 13(b).⁷ A post-decision Fees Motion, however, is not the proper mechanism to argue for a new finding of statutory liability, which is precisely what Moving Plaintiffs ask of this Court. Having prevailed under Section 13(b), Moving Plaintiffs cannot now commence argument as to whether a different, higher legal standard could have been met had Plaintiffs pursued such a claim while this litigation was still active.

CONCLUSION

For the reasons stated herein, and in Defendants’ Brief in Opposition to Plaintiffs’ Motion for Attorneys’ Fees and Costs, Defendants respectfully request that this Court deny Moving Plaintiffs’ Fees Motion.

⁷ Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Dkt. No. 379) at ¶ 257.

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