

9. Staples/Office Depot

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The Staples logo consists of the word "STAPLES" in a bold, white, sans-serif font, centered within a solid red rectangular background. Below the word "STAPLES" is the tagline "The Office Superstore" in a smaller, white, sans-serif font.

STAPLES

The Office Superstore

Office DEPOT®

OfficeMax®

Taking care of business

The Background

The deal

- Staples to acquire Office Depot for \$6.3 billion
 - Announced February 4, 2015
 - Take 2: Parties attempted to merge in 1997. The FTC challenged the deal and obtained a Section 13(b) preliminary injunction. The parties subsequently abandoned the deal.
 - Total transaction value: \$6.3 billion in cash and stock
 - Office Depot valued at \$11.00 per share
 - \$7.25 in cash
 - \$3.75 in Staples stock (0.2188 shares)
 - 44% premium over the February 2 Office Depot closing price
 - 65% premium over 90-day Office Depot average closing price
 - Office Depot shareholders will hold approximately 16% of the combined company
 - Combined company pro forma sales: \$39 billion

The parties

■ Staples

- ❑ Largest supplier of office supplies
- ❑ Opened first office products superstore in 1986
- ❑ Operates in three business segments:
 1. North American retail stores and online sales (48.0% of revenues)
 - ❑ 1,515 U.S. and 331 Canadian stores (FY2013 year-end)
 2. North American Commercial (34.8%)
 - ❑ Focusing on B2B sales
 3. International operations (17.2%)
 - ❑ Consists of businesses in 23 countries in Europe, Australia, South America and Asia
- ❑ 2014 revenues: \$22.5 billion



The parties

■ Office Depot

- ❑ Second largest supplier of office supplies
- ❑ Opened first store in 1986
- ❑ Acquired OfficeMax (third largest office supply superstore) on November 5, 2013
 - Announced February 2013
 - FTC closed investigation without enforcement action on November 1, 2013
- ❑ Operates in three business segments:
 1. North America retail (41% of revenues)
 - ❑ 1,912 stores, including 823 OfficeMax stores (FY2013 year-end)
 2. North American business solutions (B2B contract sales) (31.8%)
 3. International (27.1%)
- ❑ 2014 revenues: \$16.1 billion



Office Depot/OfficeMax (2013)

- FTC analyzed retail and contract sales separately
 - Retail: expanded competition from other retailers and online sellers; pricing evidence did not show likely anticompetitive effects
 - Contract: small and medium-sized customers had many alternatives
- Large contract customers
 - Office Depot and OfficeMax were rarely each other's closest competitor
 - Customers could source categories separately; Staples and other suppliers would remain competitive alternatives
- Significance for Staples/Office Depot
 - The earlier clearance was specific to that transaction and its evidence
 - The later merger would eliminate Staples as the principal remaining rival to Office Depot for large B2B customers

The deal

■ Purchase agreement

- Drop dead date: November 4, 2015 (9 months)
 - Automatic extension if antitrust conditions not satisfied to February 4, 2016 (one year after signing)
 - Not long enough: Decision was issued on May 10, 2016
 - Needed 3 months more than the contract originally provided
- Divestiture obligation:
 - Office Depot stores with 2014 revenues up to \$1.25 billion in the United States
 - 7.8% of Office Depot sales
- Antitrust reverse termination fee: \$250 million (4% of transaction value)



Deal rationale

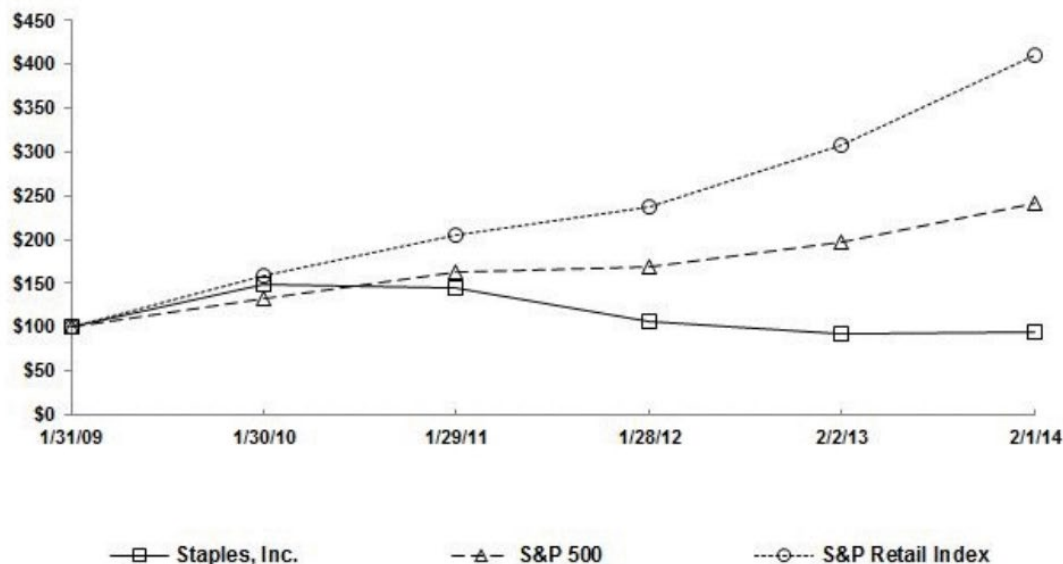
- Office superstores being severely challenged by other competitors
 - Increased competition since the original 1997 enjoined transaction
 - Mass merchants such as Walmart, Target and Tesco
 - Warehouse clubs such as Costco
 - Computer and electronics retail stores such as Best Buy
 - Specialty technology stores such as Apple
 - Copy and print businesses such as FedEx Office
 - Online retailers such as Amazon.com and other discount retailers
 - Concomitant sales declines

	Sales Year-over-Year		
	2011	2012	2013
Staples	-3.0%	-1.2%	-5.2%
Office Depot	-2%	-8%	-5%

- Staples' response
 - Recently announced that it would be closing up to 225 stores
 - Reduced the size of its store prototype from 24,000 square feet to 12,000 square feet

Deal rationale

- Staples stock performance —Return on \$100 investment on 1/31/2009



TOTAL RETURN TO STOCKHOLDERS

	31-Jan-09	30-Jan-10	29-Jan-11	28-Jan-12	2-Feb-13	1-Feb-14
Staples, Inc.	\$ 100.00	\$ 149.49	\$ 144.63	\$ 106.48	\$ 92.95	\$ 93.51
S&P 500 Index	\$ 100.00	\$ 133.14	\$ 162.67	\$ 169.54	\$ 197.98	\$ 240.58
S&P Retail Index	\$ 100.00	\$ 158.09	\$ 205.24	\$ 238.26	\$ 307.32	\$ 410.04

Deal rationale

Compelling Strategic and Financial Rationale

- Combined company better positioned to provide more value to customers and compete against a large and diverse set of competitors
- Strategic combination expected to deliver at least \$1 billion of synergies by third full fiscal year post-closing
- Operational efficiencies and cost savings used to dramatically accelerate Staples' strategic reinvention
- Provides ability to optimize retail footprint, minimize redundancy, and reduce costs
- Accretive to EPS in first year post-closing after excluding one-time integration and restructuring costs and purchase accounting adjustments



Deal rationale

Creating a \$39 Billion Distributor of Products and Services

			
LTM Revenue \$B ⁽¹⁾	<ul style="list-style-type: none"> North America \$18.8 International \$3.9 Total \$22.7 	<ul style="list-style-type: none"> North America \$12.7 International \$3.5 Total \$16.2 	<ul style="list-style-type: none"> North America \$31.5 International \$7.4 Total \$38.9
Distribution Facilities ⁽²⁾	<ul style="list-style-type: none"> North America 69 International 47 Total 116 	<ul style="list-style-type: none"> North America 91 International 36 Total 127 	<ul style="list-style-type: none"> North America 160 International 83 Total 243
Store Count ⁽³⁾	<ul style="list-style-type: none"> North America 1,721 International 303 Total 2,024 	<ul style="list-style-type: none"> North America 1,851 International 145 Total 1,996 	<ul style="list-style-type: none"> North America 3,572 International 448 Total 4,020

1. LTM Revenue as of 11/1/2014 and 9/27/2014 for Staples and Office Depot, respectively. Office Depot revenue pro forma for merger with OfficeMax and excludes revenue generated by the former OfficeMax business in Mexico.

2. As of fiscal year ended 2/1/2014 and 12/28/2013 for Staples and Office Depot, respectively. Office Depot data includes cross docks.

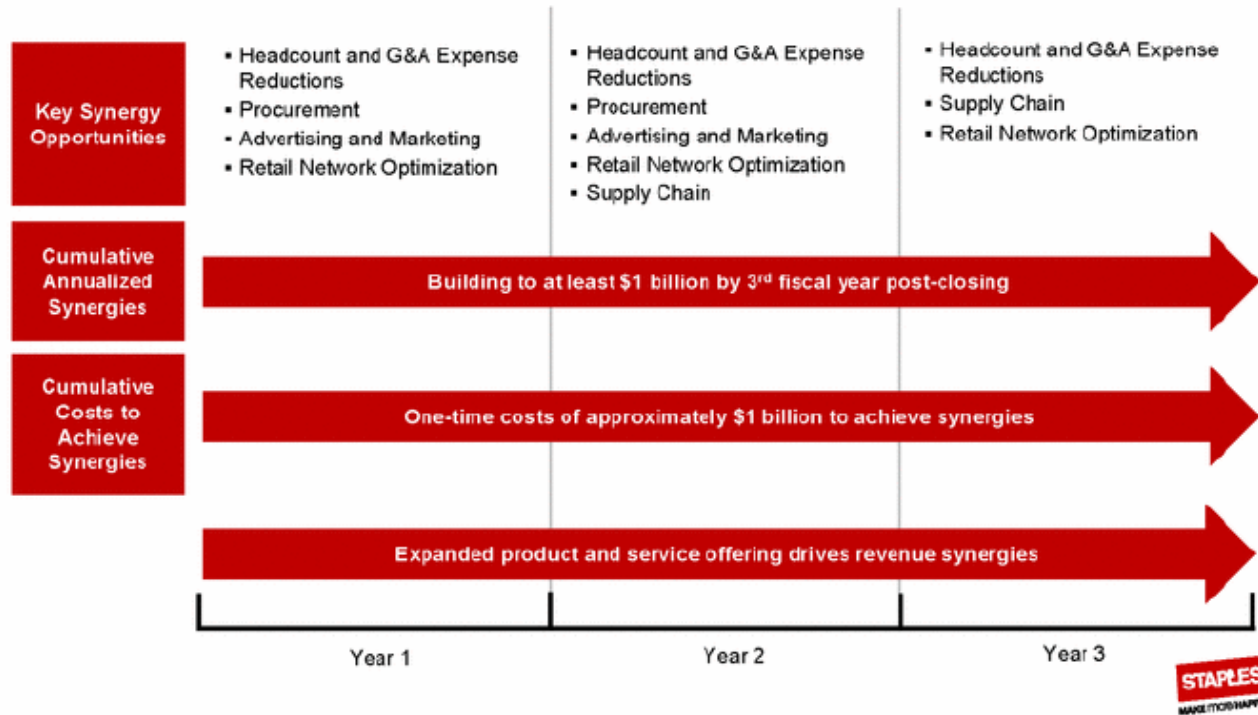
3. As of 11/1/2014 and 9/27/2014 for Staples and Office Depot, respectively.



Deal rationale

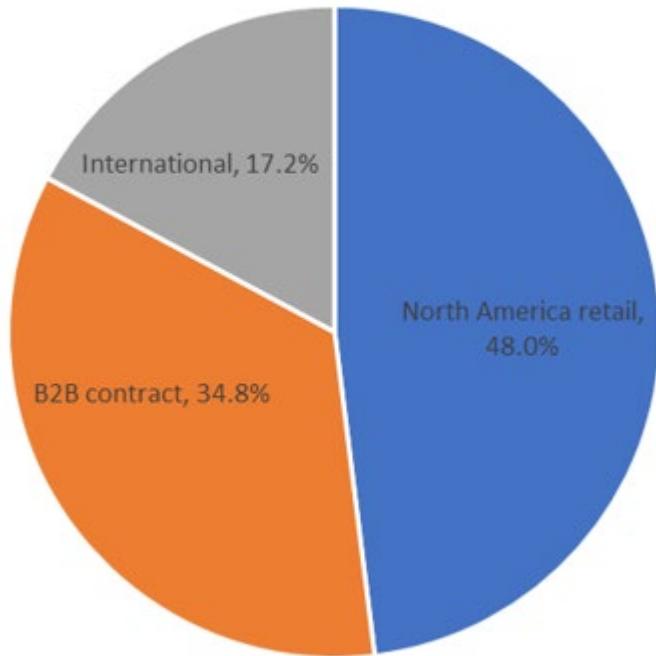
Annualized Synergies Building to at Least \$1 Billion Over Three Year Integration Period

The acquisition presents a unique and exciting opportunity to reduce costs and improve service in a way that neither company could achieve on its own



Overlaps

Staples



Office Depot



The FTC investigation and litigation

- FTC investigated for almost one year

Date	Event
February 4, 2015	Deal signed
March 30, 2015	Second request issued
August 28, 2015	Staples and Office Depot certify substantial compliance
October 12, 2015	Staples and Office Depot enter into a timing agreement with FTC not to close and the FTC agrees to decide outcome of investigation by December 8, 2015
November 4, 2015	Automatic extension of drop dead date to February 4, 2016
December 7, 2015	FTC challenges transaction by unanimous vote (4-0)

The complaint

- Two counts
 1. Acquisition, if consummated, would violate Clayton Act § 7
 2. Signing of the merger agreement violated FTC Act § 5
- Relevant market
 - Sale and distribution of consumable office supplies to large B2B customers in the United States
 - BUT excluding ink and toner for printers and copiers
 - *Query*: Why no challenge in retail markets?
- Prayer
 - Preliminary injunction pending resolution of the merits in an administrative proceeding

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

DISTRICT OF COLUMBIA
441 4th Street, N.W., Suite 600 South
Washington, DC 20001

COMMONWEALTH OF PENNSYLVANIA
14th Floor Strawberry Square
Harrisburg, PA 17120

Plaintiffs,

v.

STAPLES, INC.
500 Staples Drive
Framingham, MA 01702

and

OFFICE DEPOT, INC.
6600 North Military Trail
Boca Raton, FL 33496

Defendants.

Civil Action No. 15-cv-02115

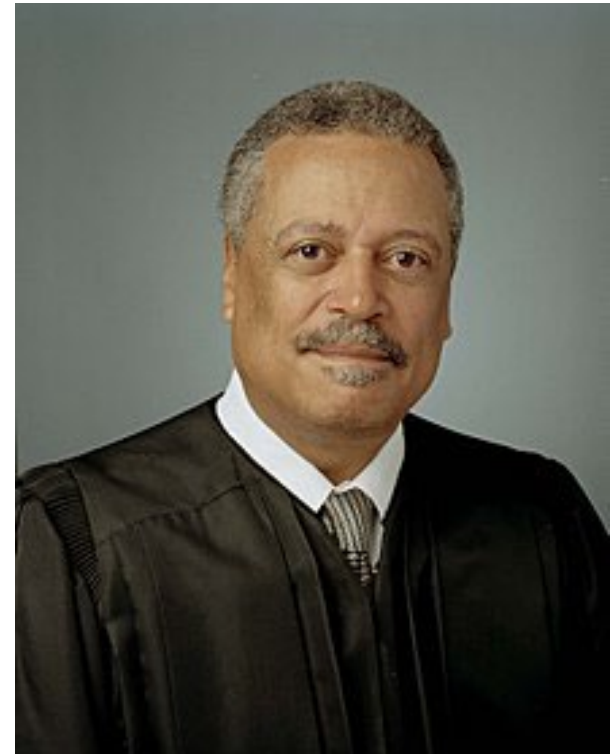
PUBLIC VERSION

COMPLAINT FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION PURSUANT TO
SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

Plaintiffs, the Federal Trade Commission (“FTC” or “Commission”), by its designated attorneys, and the District of Columbia and the Commonwealth of Pennsylvania, acting by and through their respective Office of Attorney General (collectively, “Plaintiff States”), petition this Court for a temporary restraining order and preliminary injunction enjoining Staples, Inc. (“Staples”) from consummating its proposed merger (the “Merger”) with Office Depot, Inc.

The District Court

- Tried in the District Court of the District of Columbia
 - Judge Emmet G. Sullivan
 - Appointed by President Clinton
 - Assumed office: June 16, 1994
 - First merger antitrust case



The Section 13(b) proceedings

■ Timing developments

Date	Event
December 7, 2015	Section 13(b) complaint filed
December 21, 2015	Staples proposes divesting \$1.25 billion in commercial contracts — FTC rejected with no counteroffer
February 2, 2016	Parties extend drop-dead date to May 16, 2016
February 10, 2016	EU approval (with conditions) — Divestiture of Office Depot's European contract business — Divestiture of all of Office Depot's operations in Sweden
February 16, 2016	Staples agrees to sell \$550 million in large corporate contracts business to Essendant for \$22.5 million — Conditioned on closing of Staples/Office Depot merger
March 21, 2016	Evidentiary hearing commences — 3½ months after filing of the complaint

The Section 13(b) proceedings

■ Discovery

- ❑ 15 million pages of documents produced
- ❑ >70 depositions taken
- ❑ Five expert reports

■ The trial

- ❑ March 21, 2016, to April 5, 2016
- ❑ 10 live witnesses
- ❑ 4000 exhibits admitted
- ❑ At the conclusion of the plaintiffs' case, the *defendants rested their case without presenting any fact or expert witnesses*
- ❑ NB: Defendants represented to Court that they would *terminate their transaction* if the Court entered a preliminary injunction

PI entered: May 10, 2016
Deal terminated: May 16, 2016

The expert witnesses

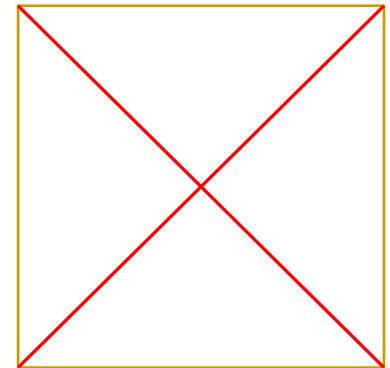
■ FTC expert: Carl Shapiro

- Professor of Business Strategy, UC Berkeley
- Former chief economist, Antitrust Division (twice)
- One of two principal drafters of the 2010 Merger Guidelines
- Former Member, Council of Economic Advisers
- Very experienced trial expert witness
- A favorite of the DOJ and FTC



■ Merging parties: None

- Rested their case without calling witnesses
 - Had an expert witness but elected not to call any fact or expert witnesses



The Section 13(b) standard

- Preliminary injunction pending the FTC's administrative merits proceeding
 - Court considers the FTC's likelihood of ultimate success and weighs the equities
 - Under the D.C. Circuit standard applied here, serious and substantial questions warranting further investigation can satisfy the merits showing
 - The court does not finally adjudicate the Section 7 merits at this stage
- Baker Hughes framework
 - Plaintiffs establish a prima facie case of likely anticompetitive effects
 - Defendants bear a burden of producing evidence to rebut that case
 - If rebutted, the court evaluates all the evidence; the ultimate burden of persuasion remains with plaintiffs
- Public equities include preserving effective relief after the merits proceeding

Organization of opinion

■ Relevant markets

- The relevant geographic market
 - Stipulated to be the United States
- The relevant product market
 - Consumable office supplies sold to large B2B customers BUT excluding ink and toner
 - Legal principles considered when defining a relevant market
 - Application of legal principles to plaintiffs' market definition
 - Defendants' arguments in opposition to plaintiffs' alleged market
 - Conclusions regarding the relevant market

■ Application of *PNB* presumption

- Analysis of the plaintiffs' arguments relating to the probable effects on competition based on market share calculations
- Defendants' arguments in opposition to plaintiffs' market share calculations
- Conclusions regarding plaintiffs' market share

■ Additional evidence of competitive harm

- Plaintiffs' evidence of additional harm

■ Defendants' further response to plaintiffs' prima facie case

- Downward pricing pressure defenses

■ Weighing the equities

The District Court Opinion

1. The Prima Facie Case

A. Relevant Geographic Market

Relevant geographic market

- Stipulated: The United States

The District Court Opinion

1. The Prima Facie Case

B. Relevant Product Market

Relevant product market: The parties' positions

■ FTC alleged market

- Sale and distribution of consumable office supplies to large B2B customers in the United States (excluding certain products)
 - **Cluster market** with carveouts
 - Excludes ink and toner
 - Also excludes “BOSS” (“beyond office supplies” such as breakroom and janitorial/sanitation supplies, office furniture, and other ancillary categories sometimes sourced separately)
 - Also a **targeted customer market**
 - Shapiro’s large-customer cutoff: \$500K annual office supply spending (appx. 1200 companies); not a precise economic boundary
 - Includes purchases from all supplier types; the issue is their ability to constrain prices for large B2B customers

■ The parties

- Sale and distribution of all consumable office supplies by all firms
 - Cluster market without carveouts: What Staples and Office Depot sell in their stores and online
 - No targeted customers

The Court: Accepts FTC's definition

- Notes that *cluster markets* and *targeted customer markets* are recognized by the courts and Merger Guidelines
- Three *Brown Shoe* factors support:
 1. Public recognition as a separate market (based on parties' business documents)
 2. Exhibits distinct prices and high sensitivity to price changes
 - Bid for vendors using RFPs for 3-5 yr. contracts (with upfront lump-sum rebates)
 - NB: Contracts not exclusive
 - Customers “play” Staples and Office Depot off against each other
 - Pay about half as much as the average retail customer
 - Bids are %-off list prices for core products
 - Customers will switch vendors for small percentage differences
 3. Consists of distinct customers with distinct requirements
 - Require bids by RFP
 - Require sophisticated IT capabilities
 - Personalized, high-quality customer service
 - Nationwide delivery to dispersed geographic locations
 - Expedited delivery services (next day and “desktop” delivery – direct to user within organization)
 - Internal business units organized to focus on B2B business

The Court: Accepts FTC's definition

- Hypothetical monopolist test satisfied
 - Parties agree on test and its applicability
 - *Evidence*: Shapiro expert testimony on hypothetical monopolist test
 - Court provides few details
 - An exhibit used in Shapiro's testimony shows he used a recapture analysis:

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

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

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

Query: What kind of test is this? Is it the right test?

Query: If the SSNIP was 5%, why did Shapiro use 10% in calculating the critical recapture rate?

- Profit Margin estimates range = ■% to ■%

- Leads to Threshold Recapture Rate = ■% to ■%

Redacted in public version of exhibit

The Court: Accepts FTC's definition

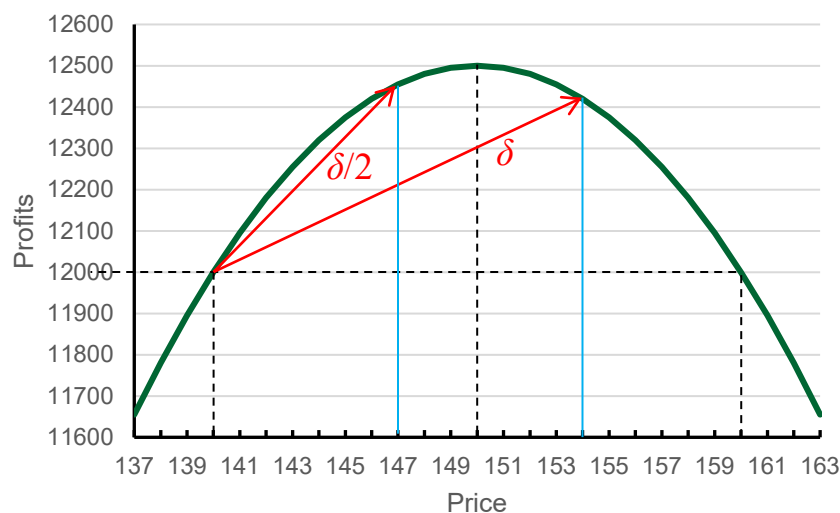
■ Hypothetical monopolist test satisfied

□ Shapiro testimony: Used the *profit-maximization* version of the HMT

■ Illustration—Not Shapiro's analysis

- As shown by the diagram below, the equal profit-prices are at the prevailing price of 140 and at 160
- For linear demand and constant marginal cost, the profit-maximizing price is one-half the distance between the equal profit prices—here, 150
- So, for a SSNIP of 5% under a profit-maximizing HMT, use 10% in the critical loss or critical recapture formulas: Profitability under $2 \times \text{SSNIP}$ → Satisfies profit-maximization HMT

Profits as a Function of Price



Propositions:

1. If a SSNIP δ is profitable, then the profit-maximizing percentage price increase is at least $\delta/2$
2. If a SSNIP δ is not profitable, then the profit-maximizing percentage price increase is less than $\delta/2$

NB: Assumes linear demand and constant marginal cost

The Court:

- Accepts FTC's definition
 - Proposed market encompasses all methods of procuring office supplies by large companies
 - Types of suppliers included in proposed market:
 - Primary vendors
 - Off-contract purchases
 - Online
 - Retail
 - Evidence
 - Customers
 - Documents (?)
 - Competitors
 - Note
 - Court relies on both the Shapiro and customer testimony for the proposition that companies can get lower prices because of the competition between Staples and Office Depot → a hypothetical monopolist could raise prices
 - WDC: This amounts to using an anticompetitive effect to prove market definition

The Court: Rejects defendants' attack

■ *Argument 1: Gerrymandered cluster market*

□ Parties' position:

1. No principled reason to exclude BOSS—Just made for litigation
 - Plaintiffs admit that excluded products are included in primary vendor contracts “the overwhelming majority of the time”
2. Definition inconsistent with the one used by the FTC in assessing the 1997 proposed merger

3. FTC made the decision on exclusions prior to Shapiro's independent determination

NB: But defendants did not invoke *Brown Shoe* factors or hypothetical monopolist test to justify inclusion

□ Court: Rejects argument

- Defendants' arguments fail to address the key question: “[A]re the items subject to the same competitive conditions?”

□ WDC:

- Just because the excluded products are typically included in the primary vendor contracts does not mean that they are subject to the same competitive conditions as the products in the FTC's market
- It just means that the superstores are meeting the competition of the competing specialized vendors

The Court: Rejects defendants' attack

■ *Argument 1: Gerrymandered cluster market*

□ Court: Rejects argument (con't)

1. Found ink and toner properly excluded because they are subject to significantly different competitive conditions than other consumable office supplies because of the “recent and rapid rise” of Managed Print Services (MPS) providers such as Xerox, HP, Lexmark, and Ricoh
 - Recall, contracts not exclusive, so customers can purchase from other vendors
 - Customers view MPS vendors as viable contracting suppliers of ink and toner, but view only Staples and Office Depot as viable contracting suppliers for other consumable office supplies
 - Large customers increasingly source or bid separately for MPS contracts, disaggregating purchases of ink and toner from purchases of other consumable office supplies
 - Parties' market shares in ink and toner were lower than they are in the alleged relevant market, showing the lack of “analytical similarity” with the FTC's alleged relevant product market
 - WDC: Missed the most important thing: Products can be and are separately priced to respond to product-by-product competitive conditions that are different from other products in the cluster market
2. Competitive conditions have “dramatically” changed since 1997
 - MPS had since grown rapidly as a competitive alternative
 - Case focused on retail consumers and not contract channels for large B2B customers
3. Irrelevant that the FTC decided on exclusions prior to Shapiro making an independent determination
 - “Voluminous” empirical evidence supports the exclusions
4. Found BOSS properly excluded from market because of similar reasons:
 - Frequently sourced outside of office superstores
 - Involves major specialized competitors in addition to office superstores that create distinct competitive conditions

The Court: Rejects defendants' attack

■ *Argument 1: Gerrymandered cluster market*

- A point not made in the opinion (but should have been): In its SEC reporting, Staples breaks out Ink & Toner and reports adjacent categories—Facilities & Breakroom, Office Furniture, Business Technology, Services—outside of core office supplies, providing corroborating evidence of distinct product categories:

	Fiscal Year Ended		
	February 1, 2014	February 2, 2013	January 28, 2012
Core office supplies	27.5%	28.1%	29.4%
Ink and toner	20.2%	19.7%	19.5%
Business technology	15.2%	16.6%	18.0%
Paper	9.0%	9.0%	9.0%
Facilities and breakroom	8.7%	7.4%	6.5%
Computers and mobility	6.9%	6.9%	6.8%
Services	6.9%	6.7%	5.7%
Office furniture	5.6%	5.6%	5.1%
	100.0%	100.0%	100.0%

- Relevant product categories (all customers and geographies):
 - Core office supplies (27.5%)
 - Paper (9.0%)

} 36.5% of Staples' overall business

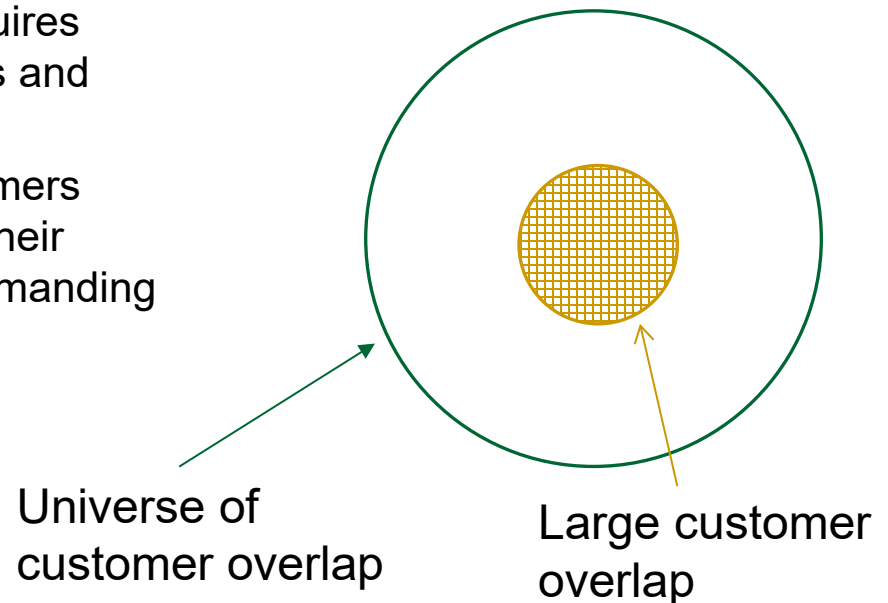
Further limited to sales to large U.S. B2B customers

The Court: Rejects defendants' attack

- *Argument 2: Improper to limit the market to large B2B customers*
 - Parties' position
 - Plaintiffs' attempt to protect "mega companies" is misplaced, because the merger "indisputably will benefit all retail customers, and more than 99 percent of business customers"
 - Court: Rejects argument
 - Antitrust laws exist to protect customers, including relatively small targeted groups
 - Recognized by Merger Guidelines
 - Part of the judicial "submarket" concept
 - Here—
 - "Large" customers can be identified by suppliers
 - Can be differentially priced
 - No meaningful opportunities for arbitrage (i.e., markets are separable)
 - "Significantly, Defendants themselves used the proposed merger to pressure B2B customers to lock in prices based on the expectation that they would lose negotiating leverage if the merger were approved."
 - *QUERY*: Why did the Court think this was significant?
 - *QUERY*: What was really going on here?

Targeted customer markets

- WDC: Subset of targeted customer markets
 - When arbitrage is not possible and suppliers can price discriminate, a targeted customer market still requires an economic basis, including satisfaction of the hypothetical monopolist test
 - Differences in demand and competitive alternatives can support a targeted market. Buyer power alone does not establish a separate market, but may affect the ability to resist post-merger price increases
 - If stronger buyers cannot protect themselves, an inference about weaker buyers requires comparable procurement requirements and competitive alternatives
 - In Staples/Office Depot, smaller customers may have more alternatives because their procurement requirements are less demanding



The District Court Opinion

1. The Prima Facie Case

C. The *PNB* Presumption

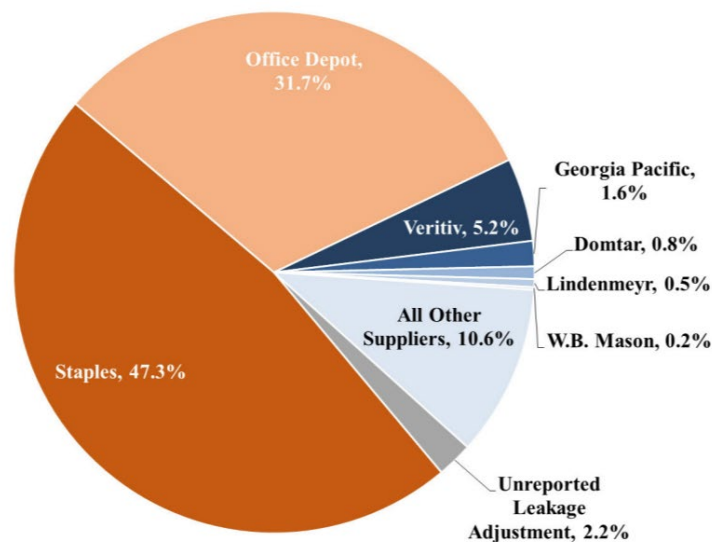
PNB presumption triggered

■ Data

- Carl Shapiro used data obtained from a survey of Fortune 100 companies—81 responded with sufficient data:
 - Their overall spend on consumable office supplies
 - The amount spent on consumable office supplies from Staples
 - The amount spent on consumable office supplies from Office Depot

Consumable Office Supplies Market Shares

Fortune 100 Customers, 2014



Source: Exhibit R1B, Shapiro Reply Report.

PNB presumption triggered

■ Plaintiffs' market shares and HHIs

- Illustration using reported shares and six equal fringe firms:

	Share	HHI
Staples	47.3%	2237
Office Depot	31.6%	999
Others (6)	21.1%	74
TOTAL	100.0%	3310
Combined	78.9%	3310
Delta		2989
Post		6299

WDC: Six equal "other" firms are assumed. The opinion reports HHIs of 3,270 before and 6,265 after the merger (increase: 2,995); the table is illustrative.

■ Court:

- Triggers *PNB* presumption and establishes a prima facie case of anticompetitive effect
 - NB: Court relied on judicial precedent (including *Heinz*) and the 2010 Guidelines
- "Put another way, Staples and Office Depot currently operate in the relevant market as a 'duopoly with a competitive fringe'"

PNB presumption triggered

■ Defendants' attack

1. Challenged whether sample was representative of buyers in the relevant product market
 - 1200 companies in relevant market
 - Only 81 companies responded with sufficient data
2. Did not adequately account for “leakage” (unreported discretionary “purchases” by employees)
 - Shapiro survey asked for leakage data
 - 26 reported
 - 12 indicated that leakage was de minimis
 - Fact witnesses testified that leakage was insignificant
 - Shapiro assumed 1%

■ Court: Rejects attacks as speculative

- *WDC*: Big problem for defendants
 - Failed to offer alternative data or analysis that would reach a materially different result
 - Common problem we have seen before:
 - Showing arguable flaws alone often will not cause the court to reject the analysis
 - The defendants also need to show why a correction of the flaws changes the antitrust result

PNB presumption: Revenue attribution

- Tier 1 diversity suppliers
 - Minority- or veteran-owned suppliers generally depended on nationwide suppliers to serve large B2B accounts
 - The parties counted these accounts in their ordinary-course revenues
 - Shapiro attributed the relevant Tier 1 sales to Staples or Office Depot; the court accepted their commercial dependence
- Paper manufacturers
 - Paper sold through and distributed by Staples or Office Depot was attributed to that distributor
 - Paper sold and delivered directly by a manufacturer was attributed to the manufacturer
- Court: Attribution reflected commercial realities and did not overstate the parties' market shares

The District Court Opinion

1. The Prima Facie Case

D. Additional Evidence of Anticompetitive Effect

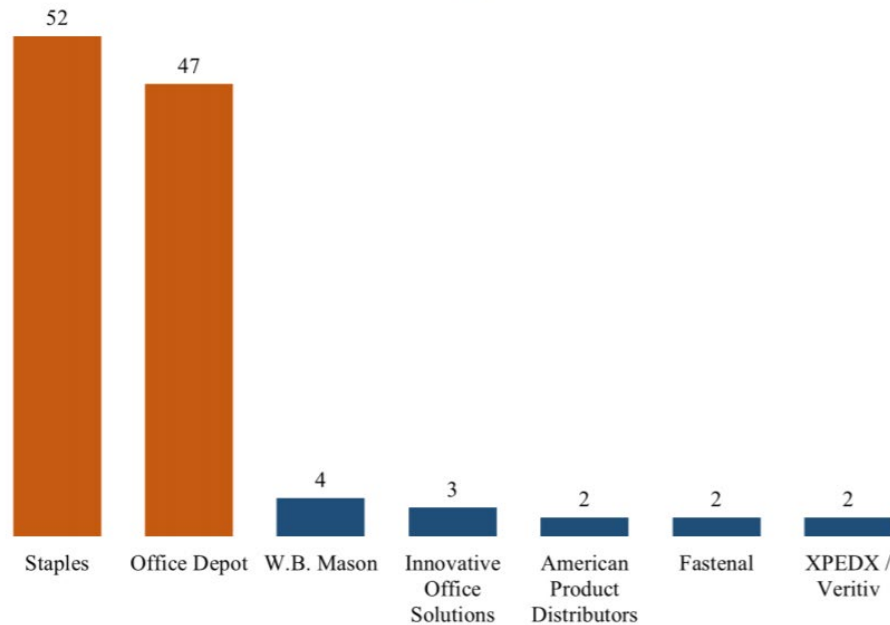
Additional evidence: Unilateral effects

1. Bidding data showed that Staples and Office Depot engaged in significant head-to-head competition
 - ❑ 81% of Staples' bid losses were to Office Depot
 - ❑ 78% of Office Depot's bid losses were to Staples
 - ❑ Often "played off" against each other by customers

Additional evidence: Unilateral effects

1. Bidding data showed that Staples and Office Depot engaged in significant head-to-head competition
 - From Shapiro exhibit:

**Staples and Office Depot Dominate in Fortune 100
RFP Data Appearances**
N = 52

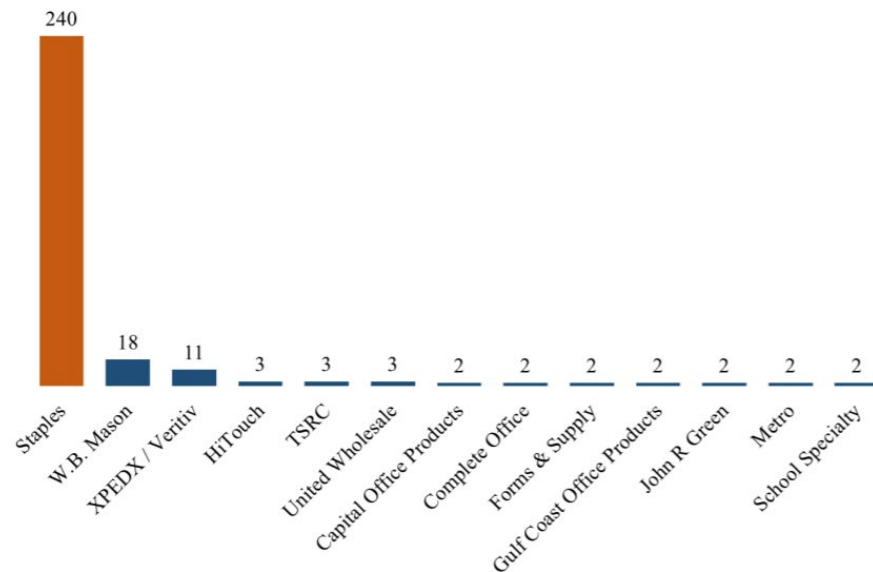


Note: Based on most recent event at each Fortune 100 customer, 2012-2015. In total, 45 suppliers are mentioned.
Source: Exhibit R7A, Shapiro Reply Report.

Additional evidence: Unilateral effects

1. Bidding data showed that Staples and Office Depot engaged in significant head-to-head competition
 - From Shapiro exhibit:

**Staples Dominates in Office Depot's Win-Loss Data
with 240 Wins**
2013-2015 (N = 1253)

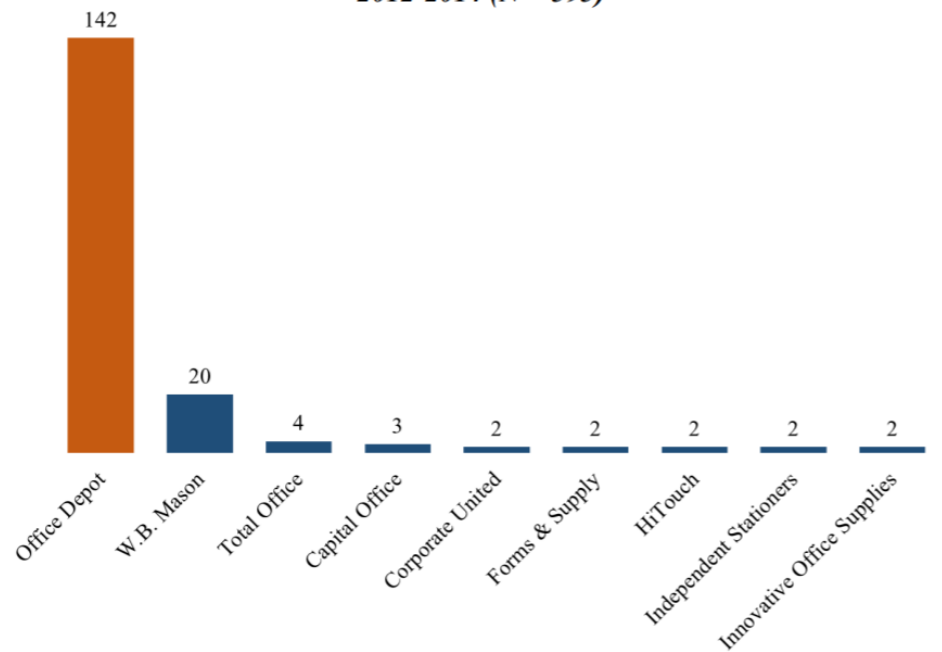


Note: Competitors listed have at least 2 wins. In total, 40 competitors are mentioned.
Source: Exhibit 10, Shapiro Report.

Additional evidence: Unilateral effects

1. Bidding data showed that Staples and Office Depot engaged in significant head-to-head competition
 - From Shapiro exhibit:

**Office Depot Dominates in Staples Win-Loss Data
with 142 Wins**
2012-2014 (N = 393)



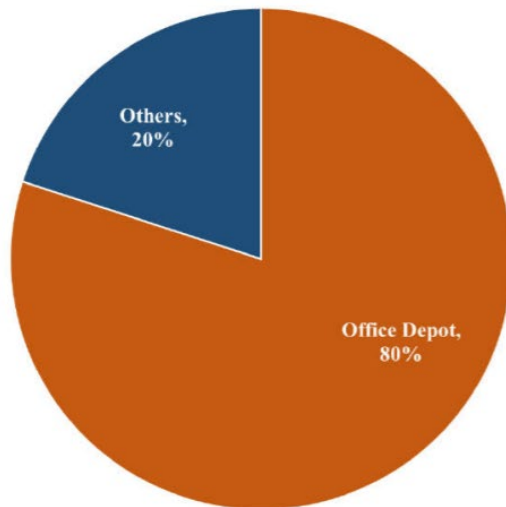
Note: Competitors listed have at least 2 wins. In total, 27 competitors are mentioned.
Source: Exhibit 11, Shapiro Report.

Additional evidence: Unilateral effects

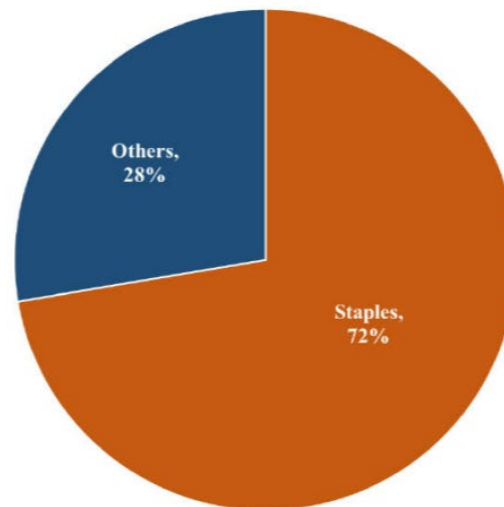
1. Bidding data showed that Staples and Office Depot engaged in significant head-to-head competition
 - From Shapiro exhibit:

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:



Sources: Exhibits 17-18, Shapiro Report.

Additional evidence: Unilateral effects

2. B2B customers see the merging parties as each other's most significant, if not only, competitor
 - From Shapiro exhibit:

Customers Recognize Staples and Office Depot as Closest Competitors

- [REDACTED] (June, 2015): “Only two B2B providers, Staples and Office Depot, are left in the Office Supplies space since the merger of Office Depot and OfficeMax.”
- [REDACTED] (April, 2014): “Only two providers can support [REDACTED] requirements, Staples and Office Depot”
- [REDACTED] (November, 2013): “The Big Three are soon to become the Big Two, and will make up 75% of total market share”

Sources: See Shapiro Rpt. at 26 (citing PX07008, PX07001, PX07010).

Additional evidence: Unilateral effects

3. Party ordinary course of business documents show that each merging company views the other as its most significant competitor
 - From Shapiro exhibit:

Staples and Office Depot Recognize They Are Closest Competitors

- Staples (November, 2013): “There are only two real choices for customers. US or Them.”
- Office Depot (March, 2014): “only 2 primary players in the Enterprise space.”
- Office Depot (February, 2015): “I am sure you have heard the news today regarding the Staples acquisition.... I thought it was odd after the Max/Depot merger that global and large national organizations had basically only two options for office supplies. If this deal is approved that will dwindle to one.
For companies wanting savings, new terms, or additional incentives now is the time to ink those details in a long term contract. [sic] with Depot.”

Sources: See Shapiro Rpt. at 24-25, 40 (citing PX04082, PX05250, PX07175).

Additional evidence: Unilateral effects

■ Observations

- Interestingly, the court did not refer by name to “unilateral effects”
- Rather, without going into the details provided in the 2010 Merger Guidelines, the Court simply cited the first sentence of Guideline 6 (entitled “Unilateral Effects”):

The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition.¹

- After discussing the competitive closeness of the merging firms revealed by the win-loss evidence, customer testimony, and regular course of business documents of the parties, the Court simply concluded:

This additional evidence strengthens Plaintiffs' claim that harm will result in the form of loss of competition if Staples is permitted to acquire Office Depot.²

- WDC: Although the Court’s approach is qualitative, I agree that the evidence is compelling. Given the strength of this evidence, a more quantitative approach was not required

¹ FTC v. Staples, Inc., 190 F. Supp. 3d 100, 131 (D.D.C. 2016). ² *Id.* at 133

Aside: GUPPI/2 illustration

■ Formula:

$$GUPPI_1 = D_{12} m_2 \frac{p_2}{p_1}$$

Rule: With linear residual demand, constant marginal cost, and other prices fixed, the unilateral percentage price increase is GUPPI/2

■ Data

□ Assumed diversion ratios

- $D_{S \rightarrow OD}$: 81%
 - $D_{OD \rightarrow S}$: 78%
- } Win-loss proxies

NB: Win-loss shares need not measure diversion after a price increase. This illustration is not a full equilibrium merger simulation.

□ Percentage gross margin

- Assume Staples and Office Depot have the same percentage gross margin of 25%

□ Prices

- Assume Staples and Office Depot have roughly the same prices

■ Application

□ Firm 1: Staples

$$GUPPI_1 = (0.81)(0.25)(1) = 0.2025 = 20.25\%$$


- Implies a GUPPI/2 = 10.125% unilateral price increase in Staples' prices

□ Firm 1: Office Depot

$$GUPPI_1 = (0.78)(0.25)(1) = 0.195 = 19.5\%$$

- Implies a GUPPI/2 = 9.75% unilateral price increase in Office Depot's prices

The District Court Opinion

2. Defendants' Rebuttal Arguments

Staples' trial strategy

- Remember:
 - Staples and Office Depot did not call any witnesses
 - Evidence closed after the plaintiffs presented their case-in-chief
 - Staples had to rely on its cross-examination of the FTC's witnesses to make out its defense
- *Query:* What was Staples' strategy here?

Two rebuttal arguments

Defendants' sole argument in response to Plaintiffs' *prima facie* case is that the merger will not have anti-competitive effects because [1] Amazon Business, as well as [2] the existing patchwork of local and regional office supply companies, will expand and provide large B-to-B customers with competitive alternatives to the merged entity.¹

- Query: Staples was claiming synergies of \$1 billion per year.
 - Why didn't Staples substantiate its claimed efficiencies at the hearing?

¹ FTC v. Staples, Inc., 190 F. Supp. 3d 100, 133 (D.D.C. 2016). See also id. at 138 n.15 (unsupported remedy and efficiencies arguments).

Amazon Business

■ Defendants' position:

- Amazon Business, a newly emerging company in the B2B space, would replace any lost competition
 - Started in 2015
- WDC: This is an *expansion defense*

■ Court: Rejected—Fails sufficiency and timeliness requirements

- Court: On the 2016 record, Amazon Business had strengths, but it—
 1. Lacks RFP experience
 2. Has no commitment to guaranteed pricing
 3. Lacks ability to control third-party price and delivery [half of AB's sales are through 3Ps]
 4. Has no ability to provide customer-specific pricing
 5. Lacks customer service agents dedicated to the B2B space
 6. Has no desktop delivery
 7. Has no proven ability to provide detailed utilization and invoice reports
 8. Lacks product variety and breadth
- Also, has a low market share projected for 2020, so is unlikely to provide significant additional competition in the four years following a Staples/Office Depot merger
- Failure to satisfy the burden of production in *Baker Hughes* Step 2

Amazon Business

- WDC: The court could have gone further
 - Assume Amazon expands with or without the merger
 - Illustration: Amazon takes 30% or 50% of the total market, proportionately from all incumbents (including the assumed six equal fringe firms):

	Before Amazon		After Amazon (30%)		After Amazon (50%)	
	Share	HHI	Share	HHI	Share	HHI
Staples	47.3%	2237	33.1%	1096	23.7%	559
Office Depot	31.6%	999	22.1%	489	15.8%	250
Amazon	0.0%	0	30.0%	900	50.0%	2500
Others (6)	21.1%	74	14.8%	36	10.6%	19
TOTAL	100.0%	3310	100.0%	2522	100.0%	3328
Combined	78.9%	3310	55.2%	2522	39.5%	3328
Delta		2989		1465		747
Post		6299		3987		4075

- These HHIs support a rebuttable structural presumption; they do not conclusively resolve the expansion defense
 - Not surprising, since even with Amazon as a major player, the transaction is a 3-to-2 merger with a fringe

WB Mason and other competitors

■ Defendants' position:

- *WB Mason* and other competitors would grow to replace any competition lost because of the merger—This is a type of *entry/expansion defense*

■ Court: Rejected

- The court evaluated potential entrants under the familiar “timely, likely, and sufficient” standard, applying a two-to-three-year horizon to the evidence in this case
1. WB Mason is a regional supplier that targets 13 NE states and DC
 - \$1.4 billion in revenues
 2. Distant #3, with less than 1% market share
 - No customers in the Fortune 100
 - Nine customers in the Fortune 1000
 3. Does not have resources to serve nationwide customers
 4. Does not bid for large RFPs outside “Masonville” (its regional territory)
 5. CEO testified that WB Mason does not have the desire or ability to compete with the merged company outside of Masonville



WB Mason and other competitors

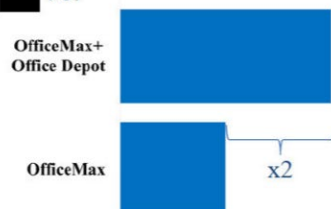
■ Court: Rejected

6. *Purchasing economies of scale*: Costs are higher than Staples and Office Depot, reflecting greater reliance on wholesalers and less favorable purchasing terms

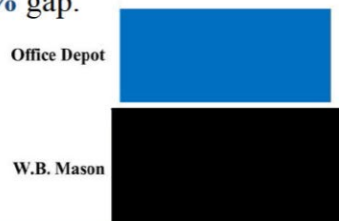
- From Shapiro exhibit:

Estimate of a COGS Gap Between W.B. Mason and Office Depot

- Based on estimates from OfficeMax-Office Depot merger, doubling in scale lowers COGS by █%.



- W.B. Mason would need to double roughly █ times to match Office Depot's scale – implying a **6.0%** gap.



Query for the mathematically inclined (or the just curious): What does a scale illustration imply?

Illustration: Revenue proxies for scale
OD = \$16.1 billion
WBM = \$1.4 billion

Solving for the number of doubling times:
 $(1.4)^{2^x} = 16.1$
 $x = 3.5236$ (about $3\frac{1}{2}$ doublings)

Assume this scale increase reduces WBM's starting cost by 6%

Solving for the doubling percentage y :
 $(1 - y)^{3.5236} = 1 - 0.06 = 0.94$
 $y = 0.0174$

This implies that doubling in scale lowers COGS by about 1.74%

Note: Assumes exponential cost decay, not Shapiro's model. Why should costs follow this relationship?

WB Mason and other competitors

■ Court: Rejected

6. *Purchasing economies of scale*: Costs are higher than Staples and Office Depot, reflecting greater reliance on wholesalers and less favorable purchasing terms

- From Shapiro exhibit:

Other Market Participants Have Higher COGS

- **W.B. Mason**: “I believe that no other vendor can consistently compete effectively with Staples or Office Depot on the cost of goods. They purchase far more volume from manufacturers than any other vendor. From my experience as a buyer of office supplies from manufacturers, I know Staples’ and Office Depot’s unmatched scale leads to unmatched buying power. WBM, as the third-largest office supplies vendor in the country, has some ability to obtain discounts from manufacturers, but not as much as Staples and Office Depot, so our cost of goods is higher.”
- [REDACTED]: “In terms of overall purchase volume, it is generally true that the more a customer buys the better the overall pricing and program incentive. As a result, Office Depot and Staples typically receive better combined pricing and program incentives based on their mix of purchases (less commodity/higher value mix) than do smaller independent dealers. Further, independent dealers often require additional services [REDACTED] (e.g., catalog support, marketing programs, digital platform support, etc.), which must be covered in the overall transactional pricing and incentive programs that they receive.”
- [REDACTED]: “Based on my experience working for [REDACTED] for over a decade, I am familiar with the difference in COGS that large companies like Staples and Office Depot can negotiate with manufacturers compared to [REDACTED]. Although it varies based on the commodity and manufacturer, I estimate that Staples and Office Depot are able to obtain a net cost differential (including back-end rebates) of about 5% to 25% lower [REDACTED].”

WB Mason and other competitors

- Court: Rejected

7. WB Mason would not commit to expand nationally even if Staples and Office Depot financed the expansion through a “cash divestiture”

WB Mason and other competitors

■ Court: Rejected

7. Other firms would not expand even in the event of a SSNIP

- From Shapiro's exhibit:

Competitor Views on Expansion

- [REDACTED]: “[REDACTED] has no specific plans to expand into any new markets.”
- [REDACTED]: “Even if Staples merged with Office Depot and the combined firm raised prices significantly (by 10%, for example), we would not alter our expansion plans. We currently do not have any excess physical capacity.”
- [REDACTED]: “[REDACTED] has no material plans to pursue large national or multiregional customers, like Fortune 1000 companies. [REDACTED] does not have the resources to expand our geographic footprint or invest in the services necessary to compete for these large customers, and I do not see [REDACTED] making these investments within the foreseeable future.”
- [REDACTED]: “[REDACTED] focuses on customers smaller than [the Fortune 1000], mostly within our primary operating region.”
- [REDACTED]: “[REDACTED] has] no foreseeable plans to materially expand our business to pursue large national or multiregional accounts, such as Fortune 500 companies.”
- [REDACTED]: “[REDACTED] would find it prohibitively expensive to make the investments necessary to compete for large business customers the way Staples and Office Depot do today.”
- [REDACTED]: “[REDACTED] lack of a national sales and distribution network has impeded our ability to win national accounts. . . . More often than not, we choose not to bid on national accounts, because...it is an exercise in futility.”

WB Mason and other competitors

- Court: Rejected
 - *Conclusion*: No evidence that supports defendants' contention that a collection of regional or local office supply companies could meet the needs of large B2B customers
 - Failure to satisfy the burden of production in *Baker Hughes* Step 2

The District Court Opinion

3. Determining the Net Anticompetitive Effect

Determining the net anticompetitive effect

- Unnecessary to proceed to Step 3 of *Baker Hughes* since the defendants failed to produce sufficient evidence to put the prima facie case in dispute
 - Merging parties failed to rebut the prima facie case; plaintiffs retained the ultimate burden of persuasion

Courts may resolve the case at Step 1 or Step 2. Step 3 assesses all the evidence; it does not authorize unrestricted offsets of harm to one customer group against benefits to another.

- Query: If you had to balance, how would you do it?
 - Consider two situations:
 1. Everyone is affected the same way
 - *Example:* The merger creates upward pricing pressure through the elimination of rivalry, but it also produces downward pricing pressure from marginal cost efficiencies. Depending on which pressure is dominant, everyone's price will either go up or go down
 2. Different customers are affected differently—some are harmed and some benefit
 - *Example:* Prices go up for everyone, but some customers value the product improvements the merger enables, while other customers do not value it

The District Court Opinion

4. Balancing the Equities

The equities

- FTC: Equities in favor of entering preliminary injunction
 - Public interest in effectively enforcing antitrust laws
 - Public interest in ensuring that the FTC can order effective relief if it succeeds at the merits trial
- Merging parties: Equities in favor of denying the preliminary injunction
 - Court rejected claimed benefits to retail customers and the other 99% of B2B customers, referring back to its market analysis

The canonical public equities

PI entered: May 10, 2016
Deal terminated: May 16, 2016