UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, COMMONWEALTH OF PENNSYLVANIA, And THE DISTRICT OF COLUMBIA,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 15-2115 (EGS)**
STAPLES, INC. and OFFICE DEPOT, INC.	)	
Defendants.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

INTRODUCTION

The Commonwealth of Pennsylvania ("Pennsylvania" or "Commonwealth") and the District of Columbia (" the District") (collectively, the "Moving Plaintiffs"), acting through their Offices of Attorney General, submit this Reply to Defendants' Brief in Opposition to Plaintiffs' Motion for Attorneys' Fees and Costs.

As a preliminary matter, the Defendants' Brief in Opposition ignores what the Moving Plaintiffs' Complaint actually pled and the relief sought by the Complaint. The Moving Plaintiffs requested a preliminary injunction pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, as stated in the first paragraph of the Complaint. At all times, the Complaint put Defendants on notice that the Moving Plaintiffs requested injunctive relief under Section 16 of the Clayton Act. Defendants misapprehend the standing that each Plaintiff had in undertaking a

federal and state joint enforcement of the antitrust laws. Indeed, only the Federal Trade Commission ("FTC") can bring an action under Section 13 (b) of the Federal Trade Commission Act ("FTC Act" or "Section 13(b)"). As such, the Moving Plaintiffs could not have participated in an action brought solely under the FTC Act.

The Moving Plaintiffs represent their jurisdictions through their respective Offices of Attorney General in this matter. Their decisions to speak in a unified voice with the FTC in this matter does not change the independence of that representation. Had the interests of the FTC and the Moving Plaintiffs diverged, the Moving Plaintiffs could have continued to pursue their request for a preliminary or permanent injunction based on Section 16 of the Clayton Act before this Court. The preliminary injunction the Court granted fully satisfied the Moving Plaintiffs' request for relief under Section 16.

Defendants' actions, during the litigation, belie the Defendants' post-litigation assertion that the Moving Plaintiffs were merely spectators to the FTC's enforcement action under Section 13(b). At no time did Defendants seek to dismiss the Moving Plaintiffs from the litigation for failure to state a Section 16 claim. At no time during the trial did Defendants argue that the Moving Plaintiffs had not met their burden to obtain a preliminary injunction under Section 16. At no stage of the litigation did Defendants contend that the Moving Plaintiffs were not proper parties to the action: not during prehearing discovery (when Defendants served discovery specifically on each separate Plaintiff), not following the briefing on Plaintiffs' motion for a preliminary injunction, and not at any time during the preliminary injunction hearing.

Most notably, when Defendants rested their case following the conclusion of Plaintiffs' case in chief, the Defendants remained silent as to the Moving Plaintiffs' Section 16 claim. Indeed, as late as closing arguments, when the Court ensured that the District's Counsel had

room to sit at Plaintiffs' counsel table with all other Plaintiffs' counsel. Defendants did not argue that the District or Pennsylvania had no right to be represented in the proceeding.

The Complaint put the Defendants on notice that the Moving Plaintiffs requested a preliminary injunction pursuant to Section 16 of the Clayton Act no fewer than three times. Defendants' current position that Plaintiffs only sought and obtained an injunction under Section 13(b) is simply unsupported by the record. Furthermore, the prayer for relief requested that this Court award "such other and further relief as the court may determine is appropriate, just and proper." Complaint at 24. "Fed.R.Civ.P. 54(c) states that 'every final judgment shall grant the relief to which the party is entitled, even if the party has not demanded such relief in the party's pleadings.' Accordingly, '[a]dherence to the particular legal theories ... suggested by the pleadings is subordinated to the court's duty to grant the relief which the prevailing party is entitled, whether it has been demanded or not.'" *In re Lorazepam & Clorazepate Antitrust Litig.*, 531 F. Supp. 2d 82, 100 (D.D.C. 2008). This is not the case here, as the Plaintiffs clearly stated that they "seek this provisional relief pursuant to… and Section 16 of the Clayton Act, 15 U.S.C. § 26." Complaint at 2. The Moving Plaintiffs' Motion for Attorney Fees and Costs should be granted.

ARGUMENT

I. The Moving Plaintiffs are Entitled to Seek Fees and Costs

Whether the Court's opinion reached the Moving Plaintiffs' Section 16 claim, which provides for fees to substantially prevailing plaintiffs, is not dispositive of the Moving Plaintiffs' Motion. "Plaintiffs who substantially prevail on their non-fee claims are entitled to recover attorneys' fees even if their fee-generating claims have not been reached by the Court." *Greene*

v. Gibraltar Mortgage Inv. Corp., 529 F. Supp. 186, 187 (D.D.C. 1981)(citing, *Maher v. Gagne*, 448 U.S. 122 (1980). In *Greene*, the District Court held that "the making of awards to plaintiffs who prevail on a non-fee claim joined to a fee-generating claim, where the fee-generating claim, while not reached, is substantial (e.g., affords a basis for federal question jurisdiction) and arises out of a 'common nucleus of operative fact'" was proper.

Greene, 529 F. Supp. at 188 (holding that plaintiff had substantially prevailed under the Truth in Lending Act and the D.C. Consumer Protection Procedures Act although the Court only reached her common law claims).

Here, the Moving Plaintiffs claims are substantial and arise out of a nucleus of operative fact that is common to that of the FTC's Section 13(b) claim: whether there was a substantial likelihood that Defendants' proposed merger would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and whether the equities or "public interest" favor granting the preliminary injunction. *See* Opinion at 13-16. Whether the Court reached the Moving Plaintiffs' Section 16 Claims in its Opinion is irrelevant as a matter of law.

II. The Moving Plaintiffs Met the Preliminary Injunction Standard Under Section 16 of the Clayton Act

The Defendants argue at great length that the standard for preliminary injunction under Section 16 of the Clayton Act differs from the standard under Section 13(b) of the FTC Act. Br. In Opp'n at 5-6. The Defendants make no effort, however, to apply that standard to the record. Certainly, this is no surprise because the facts in the record satisfy the four-part test under Section 16.

This Circuit's four-part preliminary injunction test, as stated in *Howard v. Evans*, 193 F. Supp. 2d 221, 226 (D.D.C. 2002), requires that the movant demonstrate:

> (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction is not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.

The district court must then balance the strengths of the moving party's showing on each of the four factors. *Id.* "These factors interrelate on a sliding scale and must be balanced against each other." *Davenport v. International Bhd. of Teamsters,* 166 F.3d 356, 361 (D.C. Cir. 1999); *Cf. Dimondstein v. American Postal Workers' Union*, 964 F. Supp. 2d 37, 41 (D. D. C. 2013 (noting that "the United States Court of Appeals for the District of Columbia Circuit has suggested, without holding, that a likelihood of success on the merits is an independent, free-standing requirement for a preliminary injunction [citations omitted]" but it was not necessary to resolve that issue as the plaintiff had "shown a clear likelihood of success on the merits and have satisfied the other requirements for a preliminary injunction"). Under the sliding scale approach a strong showing on one factor may also compensate for a weak showing on one or more of the other factors. *See Serono Labs. v. Shalala,* 158 F.3d 1313, 1318 (D.C.Cir.1998). "An injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *City Fed Fin. Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 747 (D.C. Cir. 1995). In Evans, the Court noted that it is particularly important to demonstrate a substantial likelihood of success on the merits. *Evans*, 193 F. Supp.2d at 226 (*Cf. Benten v. Kessler,* 505 U.S. 1084, 1085 (1992) (*per curiam*)).

This Court's Opinion cites Judge Mehta's recent decision in the *FTC v.Sysco* matter that a "typical" preliminary injunction standard includes three elements: 1) irreparable harm; 2) probability of success on the merits; and 3) a balance of the equities favoring the Plaintiff.

Opinion at 14, n.7 (*citing FTC v. Sysco Corporation,* 113 F.Supp.3d 1, 22(D.D.C. 2016)). This third element combines the lack of injury to other interested parties and furtherance of the public interest elements into a single "balancing the equities" element. The record establishes that, under any form of the legal standard, the Moving Plaintiffs have satisfied all necessary elements to obtain a preliminary injunction.

A. Substantial Likelihood of Success on the Merits.

The Court found that the Plaintiffs "have established their *prima facie* case by demonstrating that Defendants' proposed merger is likely to reduce competition in the Business to Business ("B-to-B") contract space for office supplies." Opinion at 4. The proof necessary to make out a violation of Section 7 of the Clayton Act is identical for the FTC proceeding under Section 13 (b) of the FTC Act and for the Moving Plaintiffs proceeding under Section 16 of the Clayton Act. The rebuttable presumption of a Clayton Act violation based on a showing of post-merger statistics applies both to Federal Government Plaintiffs, such as the Department of Justice and the FTC, as well as State Government Plaintiffs. *See, State of Cal. v. Am. Stores Co.*, 697 F. Supp. 1125 (C.D. Cal. 1988), *aff'd in part, rev'd in part sub nom. State of Cal. v. Am. Stores Co.*, 872 F.2d 837 (9th Cir. 1989), *rev'd sub nom. California v. Am. Stores Co.*, 495 U.S. 271 (1990)(in a Section 16 case brought by the State of California, the District Court found that statistical evidence of post-merger market shares and market concentration trends overwhelmingly created the presumption that the increased concentration in the relevant markets would result from the proposed merger).

The *prima facie* case established by the Plaintiffs is particularly strong here because the Defendants chose to offer no fact or expert witnesses, leaving the Plaintiffs' case unrebutted. Upon this record, the Plaintiffs have met their burden of showing a significant increase in market

concentration in the relevant market, which is also unrebutted. Opinion at 49-50, 56. Furthermore, the Plaintiffs have made a showing beyond mere statistical evidence of post-merger market shares by showing that the Defendants currently compete head-to-head through bidding data, ordinary course documents and fact witness testimony, which "strengthens Plaintiffs' claim that harm will result in the form of loss of competition if Staples is permitted to acquire Office Depot." Opinion at 57-61. The Defendants' sole argument in response to the *prima facie* case was unpersuasive. *Id.* at 61.

The Plaintiffs' strong and unrebutted showing at the preliminary injunction stage of the proceedings established a substantial likelihood of success on the merits. This showing is sufficient to meet the Moving Plaintiffs' burden on this element under Section 16. Moreover, evaluation of a Section 16 action brought by the Moving Plaintiffs does not require the Court to predict the result of a separate proceeding before a different factfinder. An action brought under Section 16 of the Clayton Act for a permanent injunction would require more proof to ultimately prevail, but would remain before this Court, which has already made significant findings with regard to whether Plaintiffs have carried their burden regarding Section 7 of the Clayton Act. For the purposes of obtaining a preliminary injunction, Moving Plaintiffs met their burden of showing a substantial likelihood of success.

B. Irreparable Injury

The Moving Plaintiffs, as *parens patriae* on behalf of their residents, would have been irreparably harmed if the preliminary injunction were not granted and if the merger were allowed to be completed. The Plaintiffs have demonstrated that a significant reduction in competition would be likely if the merger were allowed to pass. Opinion at 56-61. This is precisely the kind

of irreparable injury that the injunctive remedies available under the Clayton Act are intended to prevent. *State of Cal. v. Am. Stores Co.*, 697 F. Supp. at 1134.

The FTC is not required to show irreparable harm to obtain a preliminary injunction under Section 13(b) of the FTC Act. Nevertheless, the issue of harm was discussed constantly throughout this proceeding. Harm was discussed in FTC Counsel Ms. Reinhart's opening statement, and continued throughout the entire hearing. In fact, the word "harm" was used more than a hundred times over the course of the preliminary injunction hearing (found by totaling the number of uses listed in the official hearing transcripts). Furthermore, in assessing irreparable injury, courts consider that the "egg must be examined before it becomes an omelette" in determining whether preliminary injunctive relief is granted. *See, State of Cal. v. Am. Stores Co.*, 697 F. Supp. at 1134 (considering California's request for a preliminary injunction under Section 16 of the Clayton Act). The concept of "unscrambling the eggs" was discussed throughout the preliminary injunction hearing in this matter, and was discussed in bench memoranda requested by the Court. There were more than thirteen references to an egg or eggs during the hearing, in the context of the Plaintiffs' need to prevent the parties from merging until a full examination of the merger occurred, because of the harm that would result from the loss of an effective remedy (this count was again obtained by totaling the number of uses listed in the index of the official hearing transcripts). Based on this record, the Court found that the need to preserve the ability to order effective relief after a decision on the merits "weighs in favor of enjoining the proposed merger." Opinion at 72-73.

The record is clear that the Moving Plaintiffs met their burden of showing irreparable injury in order to obtain a preliminary injunction.

C. Balancing of the Equities Favors the Moving Plaintiffs.

The Court noted that in government enforcement actions, this element requires the government to show a combination of the lack of injury to other interested parties and furtherance of the public interest. Opinion at 14, n.7. For purposes of evaluating Plaintiffs' request for a preliminary injunction, the Court described the equities element as:

> The equities or "public interest" in the antitrust context include: (1) the public interest in effectively enforcing antitrust laws, and (2) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial. *Sysco*, 113 F. Supp. at 86.

Opinion at 16. The Court found that the "[b]ecause the law is clear that this merger is likely to lessen competition in the relevant market, it is in the public's interest for the merger to be enjoined." *Id.* at 72. The Court further found that that the need to preserve the ability to order effective relief after a decision on the merits supported issuance of the preliminary injunction, as discussed above. *Id.* at 72-73.

Nothing in the record suggests that the Court's findings and reasoning do not apply with equal force to the Moving Plaintiffs. As state enforcers, the Moving Plaintiffs have significantly more in common with Federal enforcers such as the FTC than the average litigant proceeding under Section 16 of the Clayton Act. The Court's Opinion reflects this reality. For purposes of issuing a preliminary injunction, the interests of the Moving Plaintiffs in furthering the public interest through a preliminary injunction under Section 16 are equally applicable to the FTC's interests in a Section 13(b) analysis.

Furthermore, the Court found that Defendants had made no "showing of public equities that favor allowing the merger to proceed immediately." Opinion at 73. Defendants made no showing of substantial harm to Defendants, or to any other interested party, from entry of the

preliminary injunction. Accordingly, Defendants cannot dispute that the record shows that the Moving Plaintiffs prevailed on this element, whether it was considered separately by the Court or as part of the "equities" analysis discussed in the Court's Opinion.

Should the Court identify an equity favoring the Defendants, the test should still show that the equities tip in favor of the Moving Plaintiffs. The Court, sitting in equity, balances the interrelated preliminary injunction factors against each other. *See Davenport* 166 F.3d at 361. The final balancing test of all three "equities" factors establishes that the Moving Plaintiffs were entitled to a preliminary injunction.

Combined with Plaintiffs' strong showing with regard to likelihood of success on the merits, which was further bolstered by Defendants' decision not to put on a defense to the Plaintiffs' *prima facie* case, the Moving Plaintiffs were entitled to issuance of a preliminary injunction.

III. The Moving Plaintiffs Have Substantially Prevailed On Their Request for a Preliminary Injunction

As has been shown above, and in the record, the Plaintiffs presented every element necessary to obtain a preliminary injunction under Section 16 of the Clayton Act. The Defendants' assertions to the contrary are incorrect at best. Furthermore, the Defendants, on notice that the Moving Plaintiffs' claims were before the Court, presented no evidence to refute the Plaintiffs' showing.

Indeed, the Defendants did not prevail on a single issue before the Court in this matter. They became subject to a judicially-decreed preliminary injunction. As they had long stated they would, Defendants terminated their proposed merger following the entry of the

preliminary injunction. There is no question that termination of the merger was the result of the entry of the preliminary injunction, and not a purely voluntary act by Defendants. Defendants' contention that the Moving Plaintiffs have not "substantially prevailed" on their Section 16 claims, given the Court's findings and entry of the Plaintiffs' requested preliminary injunction, is meritless.

IV. The Moving Plaintiffs' Fee Requests are Reasonable

Contrary to Defendants' assertions, the Moving Plaintiffs' fee requests are neither unreasonable nor duplicative. The Moving Plaintiffs' work conducted in support of the issuance of the preliminary injunction was not duplicative of each other's legal work or that of the FTC. Each Moving Plaintiff is a party in this action, as is the FTC, and is independently represented. Defendants' contention that Moving Plaintiffs' counsel should not have actively represented their clients because the FTC was taking the lead in the proceedings is meritless. Moreover, the Moving Plaintiffs' documentation is not deficient.

The Defendants also attempt to equate the decision by the Plaintiffs not to bring a retail market case against them as some kind of vindication of their position. The Defendants have not prevailed on a single issue. No time was submitted by the Commonwealth to the Defendants for the preparation of a retail market case against the Defendants that was never brought. Similarly, the Moving Plaintiffs have collectively not charged the Defendants for any time related to preparing a retail market case against them.

At all times, the Moving Plaintiffs represented the interests of their residents. Recovery of fees in this matter does not represent a "windfall" as is claimed by the Defendants, but rather a recovery of taxpayer-funded resources expended in pursuit of this matter.

A. The Time Submitted by the Moving Plaintiffs was Neither Duplicative Nor Excessive

Each Moving Plaintiff had a single attorney, from its respective Office of Attorney General, representing its interests throughout this litigation, and only utilized additional attorneys to cover tasks when the primary attorney was unavailable. Moreover, counsel for the two Moving Plaintiffs sought to coordinate their attendance at depositions and the preliminary injunction hearing in order to be as efficient as possible. These proceedings were often attended by counsel from one Moving Plaintiff or the other, but rarely by counsel from both. Nor are the fees requested by the Moving Plaintiffs excessive. Moving Plaintiffs did not seek fees for significant amounts of time spent on this matter that could not be efficiently recorded. For example, counsel for Moving Plaintiffs each received approximately 1600 emails over the course of the preliminary injunction proceedings, but did not try to recover fees for reviewing these emails and attachments, or emails received and reviewed prior to the filing of the Complaint.

Defendants do not, and cannot, cite any authorities holding that work done on behalf of separate independently represented plaintiffs is unreasonable or duplicative for purposes of receiving fees. All the cases cited by the Defendants for the principle of denying fees due to duplication are either class actions in which class counsel represented all plaintiffs or cases in which more than one attorney was duplicating efforts on behalf of a single plaintiff. The Defendants suggest that neither Moving Plaintiff is entitled to separate and independent representation, and must sit back and rely on the FTC's efforts to protect their interests. That suggestion is simply without basis.

The Commonwealth is a sovereign state, and the District is the seat of the national government. As such, each is entitled to be represented by its own counsel. Defendants have failed to cite any example of legally duplicative efforts by attorneys for the Commonwealth or the District.

The Defendants fail to recognize the purpose of denying fees for duplicative efforts. That purpose is to prevent parties from having to pay multiple times for a single service rendered, not to avoid paying for separate and independent services. Here the Defendants essentially argue that the FTC's legal work precludes the Moving Plaintiffs from recovering fees for their separate and independent legal services on behalf of each of their clients. Under Defendants' analysis the result here would be to prevent any recovery at all, rather than to prevent duplicative recovery.

B. The Moving Plaintiffs' Documentation Supports an Award of Fees and Costs

Defendants contend that the Moving Parties' documentation is "wholly deficient." Br. In Opp'n. at 12. However, Defendants do not identify any specific deficiencies in the District's Schedule of Requested Attorney's Fees or in the declarations supporting the District's requested fees. *See* Br. In Opp'n. at 12-13. Nor do Defendants cite to any cases holding that fee entries with the level of detail and support of the District's entries are insufficient to support a fee award. Defendants cite examples of time entries that were held to be deficient in this Circuit, but do not apply this guidance to any of the District's entries. *See New York v. Microsoft Corp.*, 297 F. Supp. 2d 15, 42-44 (D.D.C. 2003); *Michigan v. U.S. EPA*, 254 F.3d 1087, 1093-94 (D.C. Cir. 2001). Nor can Defendants make that case, as the District's fee request provides the appropriate level of detail regarding the work performed. *See* Exh. B-1 to Mot. for Fees and Costs (District's Schedule of Requested Attorney's Fees).

Defendants point to certain of the Commonwealth's time entries as deficient. The Moving Plaintiffs informed the Defendants that any additional descriptive information for the Commonwealth's Schedule of Fees likely would have to be filed under seal, as it contains the names of third parties called or interviewed over the course of the investigation. Before the Moving Plaintiffs filed their instant Motion for Fees and Costs, the Commonwealth offered to provide additional details to Defendants in order to allow them to identify any objections they might have to the Commonwealth's request. The Defendants did not respond to this offer. The Commonwealth remains ready to submit additional detail to the Court, should it be deemed necessary, but notes that "extremely detailed billing entries are not required in this Circuit." *See Heller v. District of Columbia*, 832 F. Supp. 2d 32, 51 (D.D.C 2011).

CONCLUSION

For the foregoing reasons, and those set forth in the Moving Plaintiffs' Motion for Attorney's Fees and Costs, the Court should grant the Motion and award the Commonwealth $137,555.30 in fees and $4,997.82 in costs, and award the District $33,547.32 in fees. The Moving Plaintiffs also request fees and costs incurred in pursuing this Motion, with an accounting to be made upon disposition of the Motion.

Dated: June 20, 2016

Respectfully submitted,

BRUCE L. CASTOR, JR.
Solicitor General

BRUCE R. BEEMER
First Deputy Attorney General

JAMES A. DONAHUE, III
Executive Deputy Attorney General

Public Protection Division

TRACY W. WERTZ
Chief Deputy Attorney General

By: */s/ Norman W. Marden*
Norman W. Marden (Bar ID# 203423)
Senior Deputy Attorney General
PA Office of Attorney General
Antirust Section
14th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-4530
nmarden@attorneygeneral.gov

Attorneys for the Commonwealth of Pennsylvania

KARL A. RACINE
Attorney General for the District of Columbia

ELIZABETH SARAH GERE
Deputy Attorney General
Public Interest Division

/s/ Bennett Rushkoff
Bennett Rushkoff (Bar #386925)
Assistant Deputy Attorney General
Public Integrity Unit

/s/ Catherine A. Jackson
Catherine A. Jackson (Bar #1005415)
Assistant Attorney General
Office of the Attorney General
441 Fourth Street, N.W., Suite 630-S
Washington, DC 20001
(202) 442-9864
catherine.jackson@dc.gov

Attorneys for the District of Columbia

NWM/lkl/replytomemoopposingattorneysfees1196

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 20, 2016, I filed the foregoing with the Clerk of Court via the CM/ECF system, which will automatically send electronic mail notification of such filing to the CM/ECF registered participants identified in the Notice of Electronic Filing.

/s/ Norman W. Marden
Norman W. Marden