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FEDERAL TRADE COMMISSION

In the Matter of: )  
Staples, Inc. )  
a corporation )  
and ) Docket No.  
Office Depot, Inc., ) 9367  
a corporation. )  
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Monday, January 4, 2016  
  
Room 532  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C.

The above-entitled matter came on for  
hearing, pursuant to notice, at  
2:10 p.m.

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 TARA REINHART, ESQ.

5 STELIOS XENAKIS, ESQ.

6 CHARLES A. LOUGHLIN, ESQ.

7 Federal Trade Commission

8 400 Seventh Street, S.W.

9 Washington, D.C. 20024

10 (202) 326-2350

11 treinhart@ftc.gov

12

13 ON BEHALF OF STAPLES, INC:

14 JEFFREY PERRY, ESQ.

15 MEGAN GRANGER, ESQ.

16 Weil Gotshal & Manges LLP

17 1300 Eye Street, N.W.

18 Suite 900

19 Washington, D.C. 20005

20 202-682-7000

21 jperry@weil.com

22

23

24

25

1 APPEARANCES (Continued):

2

3 ON BEHALF OF OFFICE DEPOT:

4 MATTHEW J. REILLY, ESQ.

5 ANDREW LACY, ESQ.

6 Simpson Thacher & Bartlett LLP

7 900 G Street, N.W.

8 Washington, D.C. 20001

9 202-636-5500

10 matt.reilly@stblaw.com

11

12

13

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1 JUDGE CHAPPELL: Changed teams. All  
2 right.

3 MR. REILLY: Matt Reilly, Simpson Thacher  
4 on behalf of Office Depot. With me is Andrew Lacy  
5 from Simpson Thacher as well.

6 JUDGE CHAPPELL: Thank you.

7 MR. REILLY: Nice to see you again.

8 JUDGE CHAPPELL: Let's talk first about  
9 the ancillary federal action, start with the  
10 government. You can maybe update me on the status  
11 of all of that.

12 MR. REILLY: Certainly, Your Honor. The  
13 FTC filed a complaint on December 8th, and it has  
14 been assigned to Judge Emmet Sullivan here in the  
15 District of D.C., and we have a schedule set in  
16 that case that contemplates the close of fact  
17 discovery around the middle of February with expert  
18 discovery following on and a hearing date set for  
19 March 21st.

20 JUDGE CHAPPELL: Anything to add to that?

21 MR. PERRY: No, Your Honor.

22 JUDGE CHAPPELL: Any of the parties keep  
23 me updated on the action, just follow up on any  
24 substantive orders or rulings that come out.

25 MS. REINHART: We will do so, Your Honor.



1 said he anticipates a ruling in May. And we're set  
2 for early May.

3           And I am wondering if we don't have a  
4 ruling, do the parties intend to file a joint  
5 motion to stay this proceeding pursuant to rule  
6 3.41?

7           MR. PERRY: Your Honor, our hope is that  
8 that will not become an issue. If it does, as Your  
9 Honor suggests, I believe that will be the position  
10 of Respondents. Obviously I can't speak to whether  
11 that motion will be joined or not.

12           JUDGE CHAPPELL: I am anticipating you  
13 are going to say you not sure today.

14           MS. REINHART: Well, we're not sure  
15 today, but as Mr. Perry said, he has no intention,  
16 as I heard him say, if indeed the injunction is  
17 granted, it is -- we would take the Court's  
18 decision on how to move forward.

19           I think it is our intention to litigate  
20 all the way through, so we would keep our options  
21 open.

22           JUDGE CHAPPELL: Well, if a joint motion  
23 is not agreed to, I see no reason why one party  
24 cannot file the motion.

25           MR. PERRY: Thank you, Your Honor.

1                   JUDGE CHAPPELL: Let's talk about the  
2 scheduling order. I'm sure you received the draft  
3 and the comments. I saw a few modifications to the  
4 dates on additional provisions.

5                   I wanted to note that the joint proposal  
6 set two deadlines on a Saturday, April 23rd and  
7 30th, and this is for exchange of expert reports  
8 and proposed stipulations.

9                   That's an exchange date, not a filing  
10 date. Did the parties intend for those dates to be  
11 Saturday? Is that fine?

12                  MS. REINHART: We did, Your Honor. We  
13 chose these dates just for the convenience of the  
14 parties and to give everyone more time on the  
15 experts and the schedule.

16                  MR. PERRY: That's right, Your Honor.  
17 We're comfortable with those dates. Thank you.

18                  JUDGE CHAPPELL: Other than that, all the  
19 modifications that were submitted are acceptable,  
20 and I will incorporate them into the order that I  
21 will issue shortly.

22                  MR. PERRY: Thank you, Your Honor.

23                  JUDGE CHAPPELL: I trust the parties have  
24 attempted to settle this matter. Who would like to  
25 update me on the status of settlement discussions?



1 I will start with the government.



1 presentation. We will start with the government.

2 MS. REINHART: Thank you, Your Honor. I  
3 have very brief slides as well as hard copies to  
4 hand out. May I approach?

5 JUDGE CHAPPELL: I don't need the slides  
6 if the screens work. If you have a copy of the  
7 slides, a member of my staff would like a copy.  
8 Thank you.

9 MR. PERRY: May I pass one up as well?

10 JUDGE CHAPPELL: Yes. Thank you.

11 MS. REINHART: May it please the Court,  
12 Your Honor, the parties to this transaction are the  
13 two largest suppliers of consumable office supplies  
14 in the United States.

15 And they are the two most significant  
16 suppliers to the very important segment of their  
17 own customers, which are the large businesses that  
18 buy these consumable office supplies for their own  
19 use. We call them business-to-business or B-to-B  
20 customers because they purchase not for resale but  
21 for use in their own offices.

22 Before I move off this slide, let me give  
23 you a quick overview. It is companies that are the  
24 purchasers we're concerned about today, include  
25 household names that have branch offices and retail

1 outlets that we all see walking around this  
2 neighborhood. Staples and Office Depot are these  
3 large businesses' top two choices for vendors and  
4 many of these companies consider Staples and Office  
5 Depot to be the only two viable choices.

6           The evidence will show that any third  
7 option is a distant third option. And these large  
8 business customers play Staples and Office Depot  
9 off each other in lengthy bidding situations, and  
10 that results for the customers in the best prices  
11 and the most optimal services, things that they  
12 require to keep their costs down.

13           If this deal were to be consummated,  
14 there would be only one best option left and any  
15 second viable option would be a distant second. So  
16 these large business customers that count on  
17 competition between Staples and Office Depot would  
18 be harmed, and this is why the deal must be  
19 stopped.

20           Consumable office supplies, that's what  
21 we're concerned with here. And relevant product  
22 market is consumable office supplies sold or  
23 distributed to large B-to-B customers. These kinds  
24 of supplies provide the daily sustenance for basic  
25 office functions. You think of envelopes for a

1 bank, you think of pens for a retail store.

2           The companies use these supplies, they  
3 discard them, and then they reorder more on a  
4 constant basis. This is a cluster market. The  
5 envelopes and pens that I just mentioned are not  
6 themselves interchangeable with each other, but it  
7 is appropriate to combine into a single market a  
8 number of different products like these; where that  
9 combination reflects the commercial reality. And  
10 the commercial reality being that the customers buy  
11 these consumable office supplies together.

12           The relevant market excludes adjacent



1 to the employee who ordered them, so that employee  
2 doesn't have to go down to a local centralized  
3 supply location and figure out which of the things  
4 that he or she ordered.

5           The customers also require customized  
6 electronic catalogues. These are electronic  
7 systems that are very sophisticated and are tied in  
8 to the company's IT systems.

9           And this allows employees to order  
10 directly what they need but only within the  
11 confines of the products that are within the  
12 contract. So it is not Staples or Office Depot's  
13 entire catalogue on-line. It is just the products  
14 that the company has designated may be purchased.

15           And another example of a required service  
16 is detailed utilization reporting. Staples and  
17 Office Depot allow the companies to monitor their  
18 purchasing so that they can spot trends, they can  
19 tell if they are buying more or less of a certain  
20 product than they had expected, and they can make  
21 cost saving adjustments so that employees are  
22 steered away from expensive products to cheaper  
23 ones or they can negotiate more discounts with  
24 Staples or Office Depot because the company finds  
25 it is buying more than it had planned to.

1           JUDGE CHAPPELL: Let me go back a second.  
2 It says here next-day delivery on your slide. Are  
3 you saying that these companies' employees actually  
4 provide delivery or do they use someone like Fed Ex  
5 or UPS?

6           MS. REINHART: So they, if they -- to the  
7 extent they do not deliver themselves, they use  
8 third-party distributors. The point is that the  
9 products are coming overnight from the order, where  
10 they have been ordered from -- to the companies.

11          JUDGE CHAPPELL: And are you aware if  
12 both companies do this identically?

13          MS. REINHART: I am not aware if they do  
14 it identically, Your Honor.

15          The final example I wanted to point out  
16 from this slide is that the companies require  
17 dedicated customer service. And in the industry,  
18 this means there is one throat to choke, that's  
19 what they say.

20          A manager at any location, whether it is  
21 a company's branch office in New York or one in  
22 Idaho can pick up the phone and call to report a  
23 problem. And they get the same voice on the phone,  
24 the same responsive person who will fix whatever  
25 problem that is.



1           The large B-to-B customers will testify  
2 that Staples and Office Depot are by far their two  
3 best options to provide the lowest pricing as well  
4 as these required services.

5           JUDGE CHAPPELL: Did you say froke to  
6 choke?

7           MS. REINHART: Throat as in --

8           JUDGE CHAPPELL: Throat, all right.  
9 Makes more sense. I don't know what a froke is.

10          MS. REINHART: I need to enunciate  
11 better, perhaps, Your Honor. Okay.

12          Unlike small business customers, which  
13 buy on a purchase order by purchase order basis,  
14 large business customers go through a lengthy  
15 multi-step RFP process with their potential  
16 suppliers' vendors. They negotiate price. They  
17 negotiate the range of services. And they  
18 negotiate additional monetary incentives to give  
19 the vendor the business.

20          And they get the best price and the best  
21 terms because they have Staples and Office Depot  
22 bid against each other; usually through multiple  
23 rounds of negotiation.

24          These customers employ procurement  
25 specialists whose job it is to ensure they get what

1 they bargained for. Not so with small businesses.  
2 Small businesses do not receive monetary incentives  
3 or even significant discounts.

4           For all the reasons I have just stated,  
5 the sale and distribution of consumable office  
6 supplies to large B-to-B customers is the relevant  
7 product market.

8           Because of their nationwide footprint,  
9 Staples and Office Depot are able to serve these  
10 large customers that have locations scattered from  
11 shore to shore or at least across multiple regions.

12           They provide uniform pricing to these  
13 customers regardless of the location of the office  
14 that is actually receiving and using the supplies.  
15 The large business customers and other supply  
16 vendors will testify that large B-to-B customers  
17 prefer a single national supplier over the multiple  
18 regional or local vendors.

19           It goes back to the one throat-to-choke  
20 concept as well as just the ability to manage the  
21 number of locations that are ordering receivable  
22 supplies.

23           JUDGE CHAPPELL: Let me talk about this  
24 uniform pricing you referred to.

25           If I understood your point, if a customer

1 is located in all 50 states, that customer will get  
2 the same price in Hawaii as in Idaho?

3 MS. REINHART: That is my understanding,  
4 Your Honor.

5 JUDGE CHAPPELL: But what about not the  
6 same company, is your position that a customer in  
7 Idaho pays the same as a customer in Hawaii for the  
8 same product?

9 MS. REINHART: So we're talking two  
10 unrelated customers, Your Honor?

11 JUDGE CHAPPELL: Yes.

12 MS. REINHART: They do not necessarily  
13 get the same pricing. There are a whole host of  
14 factors that go into what prices are ultimately  
15 negotiated.

16 JUDGE CHAPPELL: Your position is on the  
17 nationwide company with headquarters in Atlanta, my  
18 people all over the country will pay the same  
19 regardless of where the product is delivered to?

20 MS. REINHART: Yes, Your Honor, that is  
21 one of the services that Staples and Office Depot  
22 provide to these large customers.

23 So the company's own documents state that  
24 they are the only two real choices for services  
25 across the country for these companies that have

1 this nationwide footprint. And the testimony of  
2 the customers and other supply vendors will confirm  
3 that as well.

4           And so, Your Honor, the relevant  
5 geographic market is the United States.

6           Many large B-to-B customers are expected  
7 to testify that they are concerned that they will  
8 be harmed by this deal. The proposed merger would  
9 take away one of their two top choices of vendors,  
10 and it would leave these large businesses with a  
11 supplier, single supplier with an overwhelming  
12 percentage of sales in the market, at least  
13 70 percent or more.

14           This combined firm would dwarf its next  
15 largest competitor. That would result in higher  
16 prices and would prevail absent a merger. The  
17 evidence will show it is unlikely that other viable  
18 vendors would replace the competition lost from  
19 this proposed merger.

20           JUDGE CHAPPELL: Is this next largest  
21 competitor you referred to a nationwide competitor?

22           MS. REINHART: I'm sorry, Your Honor, I  
23 didn't hear you.

24           JUDGE CHAPPELL: You said the next  
25 largest competitor would have 5 percent of the

1 market. Is that a nationwide competitor?

2 MS. REINHART: It is not. It is a  
3 regional competitor, Your Honor.

4 As I mentioned at the outset, Your Honor,  
5 the parties have proposed a fix. They originally  
6 proposed selling 500 million dollars in customer  
7 contracts to an acquiring company and then they  
8 recently announced they would go as high as 1.25  
9 billion in sales as a means of addressing the FTC's  
10 concerns, but the problem, as I said earlier, are  
11 two problems, actually.

12 JUDGE CHAPPELL: I don't want to get into  
13 anything that is proprietary.

14 MS. REINHART: I agree, Your Honor.

15 JUDGE CHAPPELL: I am just wondering if  
16 the acquiring company that was slotted in to take  
17 the proposed contracts, that's an existing company,  
18 correct, not a new company?

19 MS. REINHART: It is an existing company,  
20 Your Honor. And just without getting into  
21 confidentiality concerns, I can tell you that a  
22 concern about the acquiring company is just that  
23 they do not compete at the same level of commerce  
24 as Staples and Office Depot.

25 In other words, they do not currently

1 supply directly to these big customers.

2           It is speculative as to whether they  
3 would be able to provide the same level of  
4 necessary services at the same level of pricing.

5           JUDGE CHAPPELL: Let me ask you about  
6 your market analysis. I hear you talking a lot  
7 about apparently on-line ordering, on-line  
8 business.

9           Are you including the people in the  
10 office, three or four of them take a half a day, go  
11 get some coffee and go to Office Depot and Staples  
12 and buy office supplies? Are they included in your  
13 market?

14           MS. REINHART: The consumers in our market  
15 are the large business entities themselves, and, of  
16 course, all of the thousands of their employees are  
17 the ones who are actually doing the ordering, like  
18 you say.

19           Having the on-line catalogues allows them  
20 to do so without leaving their desks, but one of  
21 the other services that the companies provide to  
22 the customer is the ability of those employees to  
23 walk down the street if they need to and buy from  
24 either a Staples or Office Depot outlet.

25           JUDGE CHAPPELL: So walk-in traffic is

1 included in your market?

2 MS. REINHART: I think that services that  
3 are provided are intended to avoid the walk-in  
4 traffic, Your Honor. That's one reason why --

5 JUDGE CHAPPELL: Why do they have all  
6 those stores, though, if they don't want people to  
7 walk in?

8 MS. REINHART: Why do they have all the  
9 stores? Well, Your Honor, it is, it is the  
10 employee's ability to walk down the street if they  
11 need to, in other words, for an emergency. They  
12 can buy on the contract that way.

13 But the bulk of the sales that are done  
14 under these contracts are done through the on-line  
15 portal.

16 JUDGE CHAPPELL: I am just trying to  
17 drill down into exactly what market the government  
18 is proposing here. Sounds like you are focused on  
19 on-line contracts. It doesn't sound like to me you  
20 are talking about these people that go in and buy  
21 their supplies maybe once a month without a  
22 contract.

23 MS. REINHART: I apologize, Your Honor.  
24 I do understand your question at this point.

25 We are not alleging harm in the retail

1 sector. We are alleging the harm is through the  
2 business consumers, specifically the large  
3 businesses that buy for their own use.

4 To the extent that the employees of those  
5 large businesses buy on-line or walk down the  
6 street to buy from Staples or Office Depot, they  
7 are included in the market.

8 But what is excluded are people who are  
9 employees of the small businesses who regularly  
10 just go to Staples and Office Depot or any other  
11 provider like Walmart to get their suppliers.

12 JUDGE CHAPPELL: Would the Department of  
13 Defense be considered a customer in your eyes?

14 MS. REINHART: Government entities have a  
15 lot of similarities to these big customers, big  
16 business customers that are the market. A lot of  
17 the government entities that we have seen actually  
18 have local preferences. They buy from local  
19 suppliers, small business preferences required by  
20 law.

21 JUDGE CHAPPELL: How about the government  
22 entity you are standing in the middle of?

23 MS. REINHART: Exactly. The FTC buys  
24 from a small supplier. And so while there are a  
25 number of government entities that we have seen



1 that have the indicia of the big B-to-B businesses,  
2 not all of them do, and they are not considered  
3 part of the market.

4 JUDGE CHAPPELL: All right. Thank you.

5 MS. REINHART: Okay. Your Honor, I think  
6 I already addressed the fix in my opening remarks  
7 before I started this. So that concludes my  
8 presentation, unless you have further questions.

9 JUDGE CHAPPELL: Nope. Thank you.

10 For Respondent, are we going to have one  
11 or two Respondents?

12 MR. PERRY: Just one, Your Honor, Jeff  
13 Perry. I will be giving remarks on behalf of both  
14 Respondents. Mr. Reilly won't be shy if he has  
15 anything to add, I'm sure.

16 JUDGE CHAPPELL: You need to clear the  
17 screen.

18 MR. PERRY: Thank you, Your Honor.  
19 Success.

20 May I begin, Your Honor?

21 JUDGE CHAPPELL: Go ahead.

22 MR. PERRY: Your Honor, there isn't time  
23 to address every area of disagreement, you won't be  
24 surprised to know, with Complaint counsel. So I  
25 want to focus on four areas I would like to

1 address.

2                   The first area is the motivation --

3                   JUDGE CHAPPELL: You said I won't be

4 surprised, correct?

1 boundaries of the so-called market are a fairy  
2 tale; is that what your position is?

3           MR. PERRY: Yes, Your Honor, this  
4 collection of customers and this collection of  
5 products is a product market made for this  
6 litigation. It does not comport with how these  
7 companies do business or how suppliers and  
8 customers buy and sell these services. That's my  
9 point, Your Honor.

10           JUDGE CHAPPELL: So you are saying that  
11 the problem with the government's market is more of  
12 a problem from the company's angle or from the  
13 consumers' stand?

14           MR. PERRY: It is both, Your Honor. It  
15 is both. It doesn't fit how these companies sell  
16 these services. And it doesn't fit from a customer  
17 side of that negotiating table how they think about  
18 the contract and pricing and delivery to their  
19 offices.

20           And, Your Honor, I will talk about that  
21 more in detail, but I hope that gives you a brief  
22 answer to your question.

23           Your Honor, in addition to the market, I  
24 want to talk about the options that customers have  
25 for the delivery of consumable office supplies.

1 And on top of that, the additional tools that these  
2 large customers have to ensure competitive pricing.

3 And those two points, Your Honor, were  
4 admitted by the FTC in 2013. And we will show you  
5 that language, Your Honor.

6 Your Honor, to start at the beginning,  
7 the purpose and effect of this acquisition, Your  
8 Honor, is to reduce costs but not to just reduce  
9 costs, to reduce costs and reinvest those savings,  
10 Your Honor, in lower pricing, better service, and  
11 greater value for our customers.

12 And when Staples and Office Depot, not  
13 for purposes of this litigation, but back in 2014,  
14 when they were evaluating this transaction and  
15 advising their respective boards, they did their

1 have actual numbers. They estimated 1.5 billion.

2 What was the reality?

3 MR. PERRY: I'm sorry, Your Honor. What  
4 I meant to say is informed by the experience from  
5 2013, that 1.5 billion is an estimate for this  
6 transaction.

7 Mr. Reilly can speak to the Depot Max  
8 synergies. I think the public guidance is annual  
9 synergies in the range of 700 million dollars.

10 MR. REILLY: That's correct, Your Honor.

11 And Office Depot has an range of 700 y, if ce isu.MR.k is And 02f.

1 Honor. And that guidance allowed them to estimate  
2 the proposed efficiencies and synergies in this  
3 transaction.

4 JUDGE CHAPPELL: Thank you.

5 MR. PERRY: Thank you, Your Honor. And  
6 it is not just Staples and Office Depot. Every

1 and lower pricing to your customers. Again, that  
2 is what this deal is about, Your Honor.

3           So let's look, Your Honor, if we could at  
4 the FTC 2013 statement. This wasn't mentioned by  
5 Complaint counsel. Your Honor, this is the most  
6 on-point merger precedent in the history of a  
7 merger case.

8           In 2013 the FTC investigated this market,  
9 these products, these customers for seven months.  
10 And when it closed that investigation concluding  
11 that it would not result in competitive harm, it  
12 put out public guidance to the business community.

13           And, Your Honor, these companies, Staples  
14 and Office Depot, relied upon that guidance. And  
15 on top of that, Your Honor, there are factual  
16 findings in the Commission's statement that were  
17 true in 2013, they are more true today, and they  
18 undermine any theory of competitive harm.

19           So here is what the Commission said, Your  
20 Honor, in 2013. It admitted that a host of non-OSS  
21 competitors, and what that means, Your Honor, OSS  
22 competitors are Staples, Office Depot, OfficeMax,  
23 that stands for office supply super stores, it  
24 relates more to the retail side of the business,  
25 but the Commission in talking about this B-to-B

1 side of the business said that other competitors, a  
2 host of them, provide strong competition for  
3 multi-regional and national customers. Those are  
4 the large customers.

5           So I understand Ms. Reinhart suggested  
6 that the third largest competitor has a tiny market  
7 share, and it is regional. The FTC said there are  
8 --

9           JUDGE CHAPPELL: But at the time one of  
10 those competitors was Staples, correct?

11           MR. PERRY: Yes, Your Honor, Staples  
12 certainly was another competitor at the time, but  
13 none of these statements relate to Staples.  
14 Because they all say a host of non-OSS competitors.  
15 And Staples is an OSS competitor.

16           So this statement says a host of other  
17 firms provide strong competition for these  
18 customers, the same ones at issue. The FTC  
19 admitted in 2013 that these non-OSS competitors are  
20 growing in number and strength and have  
21 demonstrated the ability to win large accounts.  
22 This is the same accounts we're talking about here,  
23 Your Honor.

24           The FTC admitted as well in 2013 that  
25 these non-OSS competitors win business in a



1 substantial number of contracting opportunities.

2 And on top of that, the large customers, the same

3 customers at issue today, have a variety of tools

4 to ensure that they receive competitive pricing.

5 JUDGE CHAPPELL: I understand we're

1 ability to win these accounts. These are the same  
2 issues before the court here, Your Honor.

3           And, Your Honor, I want to talk if I  
4 could about the customers because I mentioned when  
5 I first began that this case relates to a small  
6 fraction of Staples and Office Depot's customers.  
7 And I wanted to give a little context.

8           This chart shows that Staples and Office  
9 Depot have about 405,000 B-to-B customers. These  
10 are all businesses. This is not Joe Schmow going  
11 to buy for his home. These are businesses.

1 impacted. That's where we start.

2           And when we look at this one-tenth of  
3 1 percent of our business customers, that's the  
4 relevant market, and I know Ms. Reinhart mentioned  
5 that many customers consider Staples and Office  
6 Depot is their best options, but those allegations,  
7 Your Honor, are based largely on 21 customer  
8 declarations; seven Staples customers and 14 Office  
9 Depot customers who have submitted declarations  
10 either supporting Complaint counsel's case or  
11 expressing concern about the merger.

12           Now, those small numbers, Your Honor, can  
13 hardly be representative of even this .1 percent,  
14 let alone business customers more generally.

15           Now, Your Honor, if you look at  
16 the .1 percent, these are the largest, most  
17 powerful customers we have. In many cases these  
18 are the largest, most powerful companies in the  
19 country. These are the Fortune 100-type companies.

20           These customers today on average pay the  
21 lowest prices. They have numerous alternatives, as  
22 the FTC admitted, and they already multi-source  
23 today. Your Honor gave one example of people at a  
24 business going across the street. That's true on a  
25 much grander scale even because none of these

1 businesses buy all of these consumable office  
2 supplies from Staples or Office Depot.

3           They send people to the store. They have  
4 the Topeka office order from the local supplier or  
5 they order paper directly from a paper  
6 manufacturer. Because they are a Fortune 100  
7 company and they can do that today. And, of  
8 course, if we raise prices, they can do that even  
9 more.

10           Your Honor, the evidence will show in  
11 this case that these Fortune 100 companies, these  
12 top 454 customers are fully capable of defending  
13 against higher prices for the delivery of these  
14 basic supplies like paper clips.

15           Now, Your Honor, I want to talk about the  
16 definition of the relevant market. And  
17 Ms. Reinhart discussed this. And she talked about  
18 paper and ink and toner. And that is an example I  
19 want to highlight for a second because one of the  
20 reasons -- and Your Honor asked about this -- that  
21 this market doesn't align with how competition  
22 takes place is because the market excludes a huge  
23 range of products, in many cases half or more than  
24 half of what the customers are actually buying from  
25 Staples or Office Depot.

1           So what does that mean? So their market,  
2 consumable office supplies, has paper in the  
3 market, ink and toner out of the market. Now,  
4 those products are negotiated together as part of  
5 the same contract. The pricing for those products  
6 is not determined independently. It is determined  
7 as part of everything else that goes into the  
8 contract.

9           And those products are literally  
10 delivered on the same trucks to the same customers  
11 to the same loading docks. Splitting them up  
12 doesn't make sense here, Your Honor. And the  
13 impact of that is that it ignores significant  
14 competition from the likes of HP and others for our  
15 most significant product, ink and toners,  
16 20 percent in many cases of what these large  
17 customers buy from us.

18           And it pushes that competition to the  
19 side but, Your Honor, that is part of how these  
20 contracts are made. That's part of how competition  
21 works.

22           The other point on relevant market, Your  
23 Honor, the market has changed.

24           JUDGE CHAPPELL: Do I understand you to  
25 say that ink and toner is still a big part of your

1 business?

1 systematic way.

2 I will show you the best sources we have  
3 for that information, but we know unquestionably  
4 that this carving out of the market drives up the  
5 shares.

6 So, Your Honor, the .1 percent at issue,  
7 this is a sampling of the kinds of competition they  
8 have and suppliers they have available to them.  
9 They have independent office products dealers.  
10 And, Your Honor, I will show you the web sites of  
11 these companies.

12 They are not regional. They say they can  
13 deliver nationally. And the FTC in 2013  
14 specifically said that a host of them can deliver  
15 to multi-regional and national customers. That's  
16 the FTC's admission.

17 Eighteen of these others dealers, not  
18 Staples and Office Depot, today -- these are just  
19 the ones we're aware of -- today are serving these  
20 large customers with the same products, 18 other  
21 firms that won this business, Your Honor, and they  
22 work in conjunction with wholesalers. And  
23 wholesalers are an important part of this industry.

24 Because these established wholesalers  
25 give every competitor geographic access to the

1 entire country because they use their warehouses.

2 And we rely upon them as well, Your Honor.

3           So every dealer can deliver everywhere in  
4 the country next day. Every dealer can deliver  
5 every product that Staples and Depot have next day  
6 because we rely on the wholesalers for delivery and  
7 for products.

8           You asked about whether Staples and  
9 Office Depot are doing that career delivery  
10 internally to the customers? We at Staples  
11 out-source about 95 percent of that, Your Honor.  
12 It is not a unique special sauce that Staples has.  
13 Office Depot out-sources about 90 percent of it.  
14 These are third parties, like Fed Ex and UPS and  
15 couriers that anyone can use. We don't own them.  
16 We don't own them.

17           JUDGE CHAPPELL: So did I understand you  
18 to say that there are simply located wholesalers,  
19 and if someone buys a case of extra fine black  
20 Sharpies, you buy from the wholesaler and have it  
21 delivered to your customer?

22           MR. PERRY: It is a mix, Your Honor. So  
23 to answer your question directly, there are some  
24 products that Staples --

25           JUDGE CHAPPELL: I understand it is not



1 100 percent, but is that a significant portion of  
2 your business that you are going to a third-party  
3 wholesaler that another company may be using also?

4 MR. PERRY: It is a meaningful part. It  
5 is not the majority of Staples' or Office Depot's  
6 business. The very, very high volume SKUs, we buy  
7 directly from vendors and stock in our warehouses.

8 But there is a huge long tail of SKUs.  
9 So we may stock at Staples 50,000 or so products,  
10 but we may -- we are able to deliver something  
11 closer to a million products. The reason we do  
12 that is in reliance and partnership with  
13 wholesalers, just as an understanding.

14 In addition to wholesalers, Your Honor,  
15 these large customers, in addition to going to  
16 dealers, go directly to manufacturers. So if we  
17 call up a Fortune 100 company after this  
18 transaction and say we're going to raise your price  
19 of paper, they are going to call the paper company,  
20 Your Honor. They are just going to call the paper  
21 company and get it delivered directly.

22 We are an intermediary. We don't make  
23 the paper. We don't have the monopoly on the  
24 paper. They will get it from another dealer or  
25 they will go to the paper company.

1           There are also, Your Honor, cooperatives  
2 of independent dealers. And some of these have  
3 been born and developed even after the 2013  
4 investigation. And the sole purpose and motivation  
5 of these cooperatives is to achieve economies of  
6 scale and serve large multi-regional, national  
7 customers. That's another option.

8           Competitors in adjacent categories, Your  
9 Honor, so the way this market is so carved up, Your  
10 Honor, with consumables, you get down to about half  
11 or less than half of what we sell as part of the  
12 market, part of the alleged market, and all of that  
13 other stuff the FTC seems to acknowledge that these  
14 customers can get somewhere else.

15           But those other competitors like Granger  
16 is a large company that delivers, for example,  
17 kitchen and break-room products and cleaning  
18 supplies, those companies also sell paper clips and  
19 paper and pens.

20           So if we raise prices to these customers  
21 and you are a Fortune 100 company, you step down  
22 one bay in your loading dock and you tell the next  
23 company making a delivery, next time throw in paper  
24 clips and pencils and pens. It is cost-effective  
25 because they are already delivering to you. They

1 are already in your procurement system and doing  
2 your utilization reporting and all these things  
3 that Ms. Reinhart mentioned.

4           The other thing I will say for just a  
5 couple minutes, Your Honor, is Amazon Business.  
6 And Amazon is a significant competitive threat, as  
7 we will talk about.

8           The next two slides, Your Honor, I won't

1 is a logistics business. This is about delivering  
2 pens and pencils and paper clips to large  
3 companies. There is no company in the world, with  
4 all due respect to our clients, more sophisticated  
5 or more capable than Amazon when it comes to  
6 delivery logistics.

7           In office products, in particular, Amazon  
8 has 6.9 million SKUs under their office products.  
9 They have 65,000 roller ball pens. I misspeak a  
10 lot, but I didn't misspeak there. They have 65,000  
11 roller ball pens.

12           JUDGE CHAPPELL: You mean 65,000  
13 different varieties?

14           MR. PERRY: Different varieties,

1 contract but sales that might be through other  
2 sources, three guys on their coffee break go across  
3 the street or someone goes on-line, third parties  
4 have looked at that, Your Honor.

5           And in a survey in 2014, they looked at  
6 Amazon's share of all of that for core office  
7 products and they found that it was 45 percent,  
8 that 60 percent, as many as 60 percent of  
9 Respondents to the survey -- and not Respondents  
10 us -- have purchased from Amazon in the last 12  
11 months with usage growing the fastest in larger  
12 companies.

13           And they asked those companies: What  
14 percentage of you could envision buying all of your  
15 office products from Amazon? And 46 percent said  
16 definitely or probably. Definitely or probably.

17           Now you fast forward after that survey to  
18 April of this year. And this year, Amazon launched  
19 Amazon Business. This is a major new initiative,  
20 you can tell by its name, specifically targeting  
21 business customers; adding capabilities, adding  
22 services, the very same things Ms. Reinhart was  
23 giving a litany of that are unique to Staples and  
24 Depot, they are either not unique any more or by  
25 the week they are being crossed off the list, Your

1 Honor, and Amazon is specifically targeting  
2 Staples.

3           And we have been called out by business  
4 journals. You see one here on the left side of  
5 slide 17, this is about Amazon entering the real  
6 B2B market, "the E-marketplace gorilla is now  
7 officially loose." You will see at the end of  
8 this, "buckle your seatbelt, especially if you are  
9 an incumbent distributor like Staples."

10           If there is any question about whether  
11 they are coming after us, Your Honor, they are also  
12 trying to steal our people. Amazon and its  
13 recruiters are calling high-level marketing and  
14 sales execs at Staples and Office Depot and trying  
15 to steal them away to support this effort.

16           And you see their quotes to one of our  
17 people saying that Amazon's goal is to take over  
18 the B2B world.

19           And at a recent major conference, Your  
20 Honor, this was in October, the director of sales  
21 for Amazon Business gets on stage and talks about  
22 the analysis they have been doing to analyze their  
23 own presence with business customers.

24           And one of the key points he made is that  
25 they are already serving the Fortune 100-type

1 customer.

2           And they say they are doing it in every  
3 industry, Your Honor. Those are the same customers  
4 at issue here.

5           Your Honor, the last point I want to make  
6 on slide 20 relates to competition and market  
7 share. I don't know the basis, frankly, for the  
8 70 percent market share, but it doesn't reflect the  
9 way competition really plays out. And it doesn't  
10 reflect the type of contracts that these companies  
11 have. Here is what I mean by that.

12           The customers when they come to us to  
13 discuss a contract make it clear upfront that they  
14 are under no obligation to buy anything, anything.  
15 The contracts literally do not require the  
16 customers to purchase any products. They can go  
17 enter as many additional contracts as they want.  
18 They can go on-line. They can go to other dealers.  
19 They can go to stores. And they can go direct to  
20 manufacturers.

21           And they do that. And the reason we know  
22 they do that, Your Honor, is that they continue to  
23 price-shop throughout the life of the so-called  
24 contract.

25           And as they find lower prices, they come

1 back to Staples and Office Depot and force us to  
2 match or they take their business elsewhere.

3           This is the essence of competition. And  
4 this is what is completely missed if you try to  
5 calculate market shares or assess this market by  
6 tallying up contract wins and losses. That is just  
7 not how this contract, how this market, excuse me,  
8 works, Your Honor.

9           JUDGE CHAPPELL: If this is all correct  
10 regarding the contracts, why would you enter into  
11 contracts?

12           MR. PERRY: Your Honor, because it  
13 establishes a relationship with the customer.

14           JUDGE CHAPPELL: Sounds like it is no  
15 more than a business account?

16           MR. PERRY: It is a hunting license. It  
17 is a business account. They get -- we get tied  
18 into their system. And we hope that if we give  
19 them good service and great pricing, that they will  
20 buy from us.

21           JUDGE CHAPPELL: Does it guarantee a  
22 price for the customer?

23           MR. PERRY: It locks in a price for the  
24 customer. And then what happens, unfortunately,  
25 for our bottom line is that throughout the life of



1 that contract, we are forced by those customers to  
2 lower prices thousands of times per week, millions  
3 of dollars in price cuts. That's competition.

4           If you just tally up who won and pretend  
5 that competition began and ended with that RFP, you  
6 missed that. But that's what these companies deal  
7 with right there.

8           Now those lost sales, Your Honor, under  
9 the contract are what these companies call leakage.  
10 And you talk about the three guys going to the  
11 coffee shop. But as I mentioned leakage in many  
12 cases is 20, 30, 40, 50 percent or higher of a  
13 customer's purchase.

14           The FTC may call it a win and say we own  
15 that customer but the reality is often they are  
16 buying more office products from other suppliers  
17 than they are from us. And we have to compete  
18 against them.

19           And, Your Honor, let me just conclude by  
20 saying that the purpose and effectiveness of this  
21 acquisition is not to raise prices. This  
22 acquisition will lead to lower prices for the  
23 individuals who shop in our stores and on-line and  
24 mom-and-pop businesses and businesses of every  
25 size, including the .1 percent that are at issue

1 here.

2                   This competitive analysis was undertaken  
3 by the Commission in 2013, and they admitted the  
4 market was competitive then and it is even more  
5 competitive today, Your Honor.

6                   Thank you. Your Honor, that's all I  
7 have, unless you have additional questions.

8                   JUDGE CHAPPELL: I have nothing further.  
9 Thank you.

10                  MR. PERRY: Thank you, Your Honor.

11                  JUDGE CHAPPELL: I will ask you to  
12 respond to his claim that only .1 percent of  
13 customers are affected. I let him go over time, so  
14 I will give you some time.

15                  MS. REINHART: Thank you, Your Honor.

16                  JUDGE CHAPPELL: I am not asking for

1 the actual number of companies.

2           Staples and Office Depot sell to lots of  
3 business companies. I think he had the number on  
4 his slide. It is a small portion of those business  
5 companies that account for a large portion of the  
6 revenues on the B-to-B side.

7           And so our market is not .1 percent, it  
8 is -- I would hesitate to give you a percentage  
9 today, but it is something in the neighborhood of  
10 between 20 or 20 plus percent.

11           JUDGE CHAPPELL: Of their revenues?

12           MS. REINHART: Of their B-to-B revenues,  
13 putting aside the retail, Your Honor. And I should  
14 also add that --

15           JUDGE CHAPPELL: Go ahead. Go ahead.

16           MS. REINHART: Pardon me, Your Honor. It  
17 is a significant business as seen in their ordinary  
18 course documents and the words of their own  
19 executives. In other words, they track the large  
20 B-to-B customers. They sell to them specifically.

21           And one of the large reasons for that is  
22 as the retail business is migrating away from  
23 Staples and Office Depot to other providers, like  
24 Walmart, the large B-to-B customers are not  
25 migrating away. They need the services. They need

1 the pricing.

2 JUDGE CHAPPELL: And what about the  
3 apparent claim that Respondents are using the FTC's  
4 own words from the OfficeMax merger as a template  
5 for how to complete a legal merger?

6 MS. REINHART: Your Honor, your questions  
7 from the bench were spot on regarding Staples.  
8 Staples was in the market, was not part of that  
9 deal. And, in fact, the evidence will show that  
10 back then, as today, Staples is the closest  
11 competitor to Office Depot. It was true back then.  
12 In other words, Office Depot and OfficeMax were not  
13 each others' closest competitors.

14 JUDGE CHAPPELL: But the non-super store,  
15 are there more of those today than there were in  
16 2013 or less or about the same?

17 MS. REINHART: As it pertains to the large  
18 B-to-B customers, Your Honor, I believe it is fair  
19 to say that the predictions were not borne out. In  
20 other words, companies that looked to be growing  
21 have not grown. We will be able to show that the  
22 third best supplier, the distant third, only has a  
23 small portion of the large B-to-B business. That  
24 has not changed.

25 JUDGE CHAPPELL: All right. Thank you.

1 Any quick reply to what she just said?

2 MR. PERRY: No, Your Honor. If there is  
3 anything you want to hear, I am happy to say it.  
4 The only thing I would add to what I mentioned is  
5 it is not fair to say that the Commission's 2013  
6 statement, the words were that these competitors,  
7 not Staples, put them to the side because the  
8 Commission had, already provide strong competition  
9 for these customers and have demonstrated the  
10 ability -- demonstrated, past tense -- the ability  
11 to win these accounts. Those aren't predictions.  
12 That is a fact that was put out by the Commission  
13 and it remains true today, Your Honor.

14 JUDGE CHAPPELL: Well, I'm sure that's  
15 going to be aired out in the District Court and, if  
16 necessary, here as well.

17 MR. PERRY: I am sure you are right, Your  
18 Honor.

19 Thank you.

20 JUDGE CHAPPELL: Anything further?

21 MR. PERRY: Nothing for Respondents, Your  
22 Honor.

23 MR. REILLY: Nothing more, Your Honor.

24 JUDGE CHAPPELL: Hearing nothing further  
25 until we meet again, we are adjourned.

1                   (Whereupon, at 3:07 p.m., the hearing  
2 adjourned.)

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1 C E R T I F I C A T I O N   O F   R E P O R T E R

2   DOCKET/FILE NUMBER:   Docket 9367

3   CASE TITLE:   STAPLES/OFFICE DEPOT

4   DATE:   January 4, 2016

5

6           I HEREBY CERTIFY that the transcript contained  
7 herein is a full and accurate transcript of the  
8 notes taken by me at the hearing on the above cause  
9 before the FEDERAL TRADE COMMISSION to the best of  
10 my knowledge and belief.

11

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14                           DATED:   January 11, 2016

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18                           KAREN BRYNTESON, RPR, RMR, CRR, FAPR

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