

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2019, TO JUNE 30, 2019

IN THE MATTER OF

**SYCAMORE PARTNERS II, L.P.,
STAPLES, INC.,
AND
ESSENDANT INC.**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT AND SECTION 7 OF THE CLAYTON ACT

*Docket No. C-4667; File No. 181 0180
Complaint, January 5, 2019 – Decision, January 5, 2019*

This consent order addresses the \$261.3 million acquisition by Staples, Inc. of certain assets of Essendant Inc. The complaint alleges that Sycamore's and Staples' access to certain commercially sensitive information ("CSI"), without adequate safeguards to ensure that Sycamore and Staples will not misuse the information, could lead to anticompetitive conduct. The consent order limits Sycamore's and Staples' access to: (1) CSI of Essendant's resellers; (2) CSI of end customers of Essendant's resellers; and (3) Essendant's CSI that includes, uses, or incorporates CSI of Essendant's resellers or CSI of end customers of Essendant's resellers.

Participants

For the *Commission*: Ryan Andrews, Michael Blevins, Christopher Caputo, Stephanie Cummings, Charles Dickinson, Maria DiMoscato, Victoria Lippincott, Mike Mikawa, Danielle Sims, Stelios Xenakis, and Robert Zuver.

For the *Respondents*: Michael DeRita and Matthew J. Reilly, Kirkland & Ellis LLP; Clifford H. Aronson and Charles E. Crandall, Skadden, Arps, Slate, Meagher & Flom LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Sycamore Partners II, L.P. ("Sycamore"), a limited partnership subject to the jurisdiction of the Commission, and Respondent Staples, Inc. ("Staples"), a corporation subject to the jurisdiction of the Commission, agreed to acquire Respondent Essendant Inc. ("Essendant"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, and it

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appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Sycamore is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the Cayman Islands, with its executive offices and principal place of business located at 9 West 57th Street, 31st floor, New York, New York 10019. Sycamore is a private equity firm specializing in retail and consumer investments. Sycamore own and operates a number of retailers, including Staples.

2. Respondent Staples is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 500 Staples Drive, Framingham, Massachusetts 01702. Staples is the largest vertically integrated reseller of office products in the United States, selling to individual consumers through its website and retail stores, as well as to business-to-business customers through its North American Delivery division.

3. Respondent Essendant is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at One Parkway North Boulevard, Suite 100, Deerfield, Illinois 60015. Essendant is the largest wholesale distributor of office products in the United States, selling exclusively to resellers.

II. THIRD-PARTY OFFICE PRODUCTS RESELLERS

4. Essendant's reseller customers include large national accounts (such as Staples and Office Depot, Inc.), online retailers (such as Amazon.com, Inc. and Jet.com), and a large number of independently owned and operated dealers throughout the United States. Most of these resellers compete with Staples to sell office products and related services to midmarket business-to-business customers.

III. JURISDICTION

5. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

IV. THE ACQUISITION

6. Pursuant to an Agreement and Plan of Merger dated as of September 14, 2018, Staples and its affiliates propose to acquire all of the outstanding shares of common stock of Essendant ("the Acquisition").

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V. THE RELEVANT MARKETS

7. The relevant line of commerce in which to analyze the effects of the Acquisition is the sale and distribution of office products to midmarket business-to-business customers. The sale and distribution of office products to midmarket business-to-business customers entails selling office products and related services to customers who purchase those products and services for consumption, not for resale. Midmarket customers are small- and medium-sized organizations.

8. The relevant geographic markets in which to analyze the effects of the Acquisition are local areas in the various resellers' territories.

VI. THE STRUCTURE OF THE MARKETS

9. The sale and distribution of office products to midmarket business-to-business customers in local areas is a relevant market. This market contains many resellers, with Essendant's reseller customers accounting for a substantial share of the market.

VII. ENTRY CONDITIONS

10. Entry into each relevant market would not be timely, likely, or sufficient to prevent or mitigate the anticompetitive effects described in Paragraph 11.

VIII. EFFECTS OF THE ACQUISITION

11. As a result of the Acquisition, Sycamore and Staples would have access to Essendant's reseller customers' commercially sensitive business information, which could allow Staples to offer higher prices than it otherwise would when bidding against a reseller for an end customer's business. Sycamore's and Staples' access to this commercially sensitive information may substantially lessen competition in the market for the sale and distribution of office products to midmarket business-to-business customers by eliminating direct and substantial competition between Respondents Staples' and Essendant's reseller customers which may result in higher prices to end customers.

IX. VIOLATIONS CHARGED

12. Sycamore's and Staples' access to commercially sensitive information could lead to anticompetitive conduct and constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and upon consummation, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, Federal Trade Commission on this twenty-fifth day of January, 2019, issues its complaint against said Respondents.

By the Commission, Commissioner Chopra and Commissioner Slaughter dissenting.

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DECISION
[Public Record Version]

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Staples, Inc. (“Staples”) and its affiliates, whose owner is Sycamore Partners II, L.P. (“Sycamore”), of all of the outstanding shares of common stock of Essendant Inc., (“Essendant”), collectively “Respondents.” The Commission’s Bureau of Competition prepared and furnished to Respondents a draft of the Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the draft Complaint, or that the facts as alleged in the draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepts the executed Consent Agreement and places it on the public record for a period of 30 days for the receipt and consideration of public comments. Now, in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order (“Order”):

1. Respondent Sycamore is a limited partnership organized, existing, and doing business under, and by virtue of, the laws of the Cayman Islands, with its executive offices and principal place of business located at 9 West 57th Street, 31st floor, New York, New York 10019.
2. Respondent Staples is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its executive offices and principal place of business located at 500 Staples Drive, Framingham, Massachusetts 01702.
3. Respondent Essendant is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at One Parkway North Boulevard, Suite 100, Deerfield, Illinois 60015.
4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondents, and the proceeding is in the public interest.

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ORDER**I. Definitions**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Sycamore” means Sycamore Partners II, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Sycamore Partners II, L.P., including but not limited to Staples, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Sycamore will include Essendant.
- B. “Staples” means Staples, Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Staples, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each.
- C. “Essendant” means Essendant Inc., its directors, officers, employees, agents, and representatives; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Essendant Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each.
- D. “Respondent(s)” means Sycamore, Staples, and Essendant, individually and collectively.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquisition” means the proposed acquisition of all of the outstanding shares of common stock of Essendant by Staples and its affiliates pursuant to the Agreement and Plan of Merger dated September 14, 2018, that was submitted by the Respondents to the Commission.
- G. “Acquisition Date” means the date on which the Acquisition is consummated.
- H. “Commercially Sensitive Information” means all confidential information, and all proprietary non-public information (*i.e.*, information that is not generally known or otherwise publicly available) Relating To Essendant Resellers and Essendant Resellers’ End Users, including but not limited to: Essendant and Essendant Reseller bidding procedures and bid proposals, and all related documents, data, and materials, including term sheets, initial bid terms, final bid terms, and other documents that support cost and rate structures underlying the bids; responses to requests for either proposals or other solicitations; cost information, including cost of goods; customer contracts; customer lists; customer

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product, service, and delivery specifications; customer purchasing histories; customer service and support requirements and materials; customer approvals and related information; price lists; actual sale prices (net and gross); rebate programs and rebates paid to customers; advertising, marketing and sales support payments or allowance programs, including actual payments under such programs; credit records; non-public advertising, promotional and marketing plans and materials, including website content; sales and marketing training and compliance materials; marketing methods and strategies; strategic plans; competitive intelligence and research; Essendant Reseller's and Essendant Reseller End User's identity and terms of service; and Essendant Reseller financial information, including profit and loss statements, balance sheets, and other confidential financial documents;

Provided, however, the term Commercially Sensitive Information (i) does not include information about Essendant Resellers that is presented in an aggregated (where information and identities of individual Essendant Resellers are not revealed) and anonymized (where identities of individual Essendant Resellers are not revealed) format; and (ii) does not include information about Staples.

- I. "Compliance Program" means a program that meets the definition of an "effective" compliance program under the guidance of Chapter 8 of the Guidelines Manual of the United States Sentencing Commission (including, but not limited to, an effective in-person or web-based training program) established to ensure compliance with the requirements and prohibitions of this Order.
- J. "End User" means any customer that purchases Office Products for its own consumption rather than for resale or redistribution. End Users include businesses (including private and public organizations) and individual consumers.
- K. "Essendant Reseller" means any Reseller that purchases Office Products from Essendant, other than Staples.
- L. "Essendant Reseller Commercially Sensitive Information" means:
 - 1. All Commercially Sensitive Information Relating To an Essendant Reseller: (i) that is being, will be, or has been maintained in confidence by such Essendant Reseller; (ii) that has been or will be provided, disclosed, or made available to Essendant prior to the Acquisition or otherwise is or will be in Essendant's possession, custody, or control as of the Acquisition Date; or (iii) that will be provided, disclosed, or made available to Essendant after the Acquisition Date; for avoidance of doubt, Essendant Reseller Commercially Sensitive Information includes any Essendant Reseller End User's Commercially Sensitive Information; and
 - 2. Any portion of any Essendant document that includes, uses, or incorporates Essendant Reseller Commercially Sensitive Information as described in the above sub-Paragraph I.L.1.

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- M. “Essendant Reseller Goods” means Office Products sold by Essendant and Essendant Resellers in the United States.
- N. “Essendant Wholesale Business” means the wholesale sale and distribution of Office Products to Essendant Resellers and any ancillary services that support Essendant Resellers and Essendant Resellers’ End Users, including, but not limited to:
1. Offering, sale, and distribution of Office Products, which span all product categories and brands of Office Products;
 2. Offering, sale, and distribution of private label Office Products;
 3. Office Product ordering support, including the Automatic Distributor Order Transfer (“ADOT”) system;
 4. Overnight delivery to Essendant Resellers;
 5. National next-day drop-ship delivery to an Essendant Resellers End Users on behalf of an Essendant Reseller;
 6. “Wrap and label” services that deliver orders to Essendant Resellers pre-packed for Essendant Resellers’ End Users, with each Essendant Reseller’s End User’s order ready for delivery to the name and address on the package;
 7. Direct purchasing assistance, coordinating direct purchasing of large quantities of Office Products at lower prices on behalf of Essendant Resellers; and
 8. Marketing assistance that includes helping Essendant Resellers with print marketing and digital marketing support, including web content, digital analytics, as well as Promotional Activities, marketing, Merchandising, and merchandising tools and training.
- O. “Firewalled Respondent Personnel” means Respondent Personnel who:
1. As of the date on which Respondents execute the Agreement Containing Consent Order, perform (i) Wholesaler Functions; (ii) Legal and Regulatory Functions; or (iii) Shared Services;
 2. Are Persons who report directly to such Respondent Personnel identified in sub-Paragraph I.O.1 and who, on or after the date on which the Agreement Containing Consent Order is executed, perform or who are assigned to perform Wholesaler Functions, Legal and Regulatory Functions, or Shared Services;

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3. Are described and identified pursuant to the provisions and procedures in Paragraph II.C. of this Order; or
 4. Are specifically identified in Appendix A to this Order; *provided, however,* that Firewalled Respondent Personnel includes additional Respondent Personnel who are identified and approved as Firewalled Respondent Personnel pursuant to the provisions in Paragraph II.C.4. of this Order.
- P. “Legal and Regulatory Functions” means activities necessary to comply with financial or other regulatory requirements, to obtain or provide legal advice, or otherwise comply with applicable laws and regulations, including this Order, to the extent that such activities require access to Essendant Reseller Commercially Sensitive Information.
- Q. “Management Oversight Group” means the persons or positions in Staples that are listed in Appendix B to this Order. The Management Oversight Group may have access to Essendant Reseller Commercially Sensitive Information for the purposes described in Paragraphs II.B.5 and II.D. of this Order. All changes to the Management Oversight Group shall be in accordance with the procedures outlined in Paragraph II.D. of this Order.
- R. “Merchandising” means determining the selection of products sold by Essendant or Staples that will be sourced from suppliers and re-sold on a wholesale or retail basis.
- S. “Monitor” means the Person appointed pursuant to Paragraph III. of this Order, as well as his or her designees.
- T. “Office Products” means consumables, equipment, and other products used by consumers, businesses, and other organizations, such as traditional office supplies (*e.g.*, pens, pencils, paper clips, staples, folders, and binders); copy paper; ink and toner; technology products (*e.g.*, laptops, personal computers, monitors, and tablets); office equipment (*e.g.*, printers and copiers); JanSan supplies (*e.g.*, bath tissue and dispensers, paper towels and dispensers, antibacterial lotion, and hand soap); breakroom supplies (*e.g.*, coffee, cold beverages, snacks, disposable plates, cups, cutlery, and napkins); office furniture; print and promotional services; managed print services; school supplies; safety supplies; and maintenance, repair and operations (“MRO”) supplies.
- U. “Ownership Interest” means any and all rights, title and interest, present and/or contingent, to own and/or hold any of the following: (i) any voting or non-voting stock, share capital, equity, membership interest, general or limited partnership interest, or any other interest(s) in a specified entity; or (ii) any notes or options or other instruments convertible into any voting or non-voting stock in a specified entity.

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- V. “Person” means any individual, partnership, joint venture, firm, corporation, limited liability company or partnership, association, trust, unincorporated organization, or other business or government entity.
- W. “Promotional Activities” means the preparation and supply of price and non-price promotions, in-store displays, electronic or paper catalog and mailer pages, on-line pages, social media content, and newspaper inserts.
- X. “Respondent Personnel” means any director, officer, employee, agent, representative, consultant, or other Persons designated, hired, retained, or otherwise representing Respondents.
- Y. “Relating To” means discussing, analyzing, summarizing, describing, or constituting, but not merely referring to.
- Z. “Reseller” means a Person that sells and distributes Office Products directly to End Users. Resellers include independent resellers, dealers, and distributors (“IDCs”), office supply superstores (*e.g.*, Staples, and Office Depot), online retailers, mass merchants, and club stores. For purposes of this Order, Staples is a Reseller.
- AA. “Reseller Functions” means the activities of a Reseller that are typical of a Reseller operating separately and independently of and from any Wholesaler with which it is affiliated or in which it may have an interest, including marketing, advertising, promoting, distributing, pricing, and selling Office Products to End Users; *provided, however*, that no Wholesaler Functions are included in Reseller Functions.
- BB. “Shared Services” means a Wholesaler Function that, before the Acquisition Date, was performed by Essendant and that, after the Acquisition Date, is transitioned to Respondent Personnel. Any Respondent Personnel providing Shared Services shall be Firewalled Respondent Personnel and subject to the provisions of Paragraph II.C. of this Order. Shared Services are listed in Appendix C.
- CC. “Staples Customer Goods” means Office Products sold by Staples in the United States to End Users.
- DD. “Staples Reseller Functions” means all Reseller Functions engaged in by Staples and all Respondent Personnel whose duties, responsibilities, activities or positions involve or constitute Reseller Functions. For purposes of this Order, Staples Reseller Functions are identified on Appendix D of this Order.
- EE. “Wholesaler” means a Person that sells and distributes Office Products to Resellers. For purposes of this Order, Essendant is a Wholesaler.

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- FF. “Wholesaler Functions” means the activities of a Wholesaler, typical of a standalone Wholesaler with no related Reseller Functions, including the functions necessary to support the Essendant Wholesale Business; *provided, however*, that no Reseller Functions are included in Wholesaler Functions; *provided, further* that Essendant’s Vertical Markets Group is included in Wholesaler Functions. Wholesaler Functions are listed in Appendix E.

II. Firewall and Related Requirements**IT IS FURTHER ORDERED** that:

- A. No later than the Acquisition Date, and except for (i) Firewalled Respondent Personnel as provided in Paragraph II.C. of this Order; (ii) the Management Oversight Group as provided in Paragraph II.D.; or (iii) to the extent necessary to comply with this Order, Respondents shall not:
1. Have access to, knowingly review, or otherwise request, solicit, seek, receive, or obtain, directly or indirectly, any Essendant Reseller Commercially Sensitive Information;
 2. Disclose, provide, share, convey, discuss, exchange, transfer, circulate, or otherwise provide access to, directly or indirectly, any Essendant Reseller Commercially Sensitive Information to any Person except as expressly permitted under this Order; or
 3. Use, directly or indirectly, any Essendant Reseller Commercially Sensitive Information for any purpose other than as provided in Paragraphs II.C and II.D of this Order.
- B. Beginning no later than the Acquisition Date, Respondents shall: (i) take all actions necessary and appropriate to prevent access to, and the disclosure or use of, Essendant Reseller Commercially Sensitive Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of this Order, including, but not limited to, Respondent Personnel performing Staples Reseller Functions as identified Appendix D; (ii) not integrate relevant functions or services or share Essendant Reseller Commercially Sensitive Information until Respondents comply with the requirements of sub-Paragraphs II.B.3, II.B.5.b, II.C.1.b, II.C.2.a, and II.D.5, with the approval of the Monitor; and (iii) with the advice, assistance, and approval of the Monitor, establish and maintain a Compliance Program, which shall include the development, implementation, and maintenance of procedures, requirements, and a system of access and data controls with respect to protecting and segregating such Essendant Reseller Commercially Sensitive Information, including:

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1. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restrictions;
2. Maintaining Essendant Reseller Commercially Sensitive Information separate from other Respondent data and information and granting access to Essendant Reseller Commercially Sensitive Information only to Firewalled Respondent Personnel by reasonable and appropriate means such as, segregating data in information systems; physically separating, securing, and/or shielding all electronic and hard copies of such Essendant Reseller Commercially Sensitive Information, and any email and hard copy communication regarding such Essendant Reseller Commercially Sensitive Information; maintaining current information in human resources and other systems to identify members of Firewalled Respondent Personnel and the Management Oversight Group; physically separating Firewalled Respondent Personnel; and employing other processes designed to confine the flow, discussion, and dissemination of such Essendant Reseller Commercially Sensitive Information to Firewalled Respondent Personnel only, and ensuring that this information is not shared with Respondent Personnel performing Staples Resale Functions as identified in Appendix D;
3. Requiring all (i) Firewalled Respondent Personnel; (ii) members of the Management Oversight Group; and (iii) any other Respondent Personnel who may have access to Essendant Reseller Commercially Sensitive Information to complete training on the requirements and prohibitions of this Order, sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of his/her/their responsibilities regarding the restrictions on the use and dissemination of Essendant Reseller Commercially Sensitive Information, and a statement attesting that he or she has received a copy of this Order or a summary of the key requirements and prohibitions of this Order (which summary will have been approved in advance by the Monitor), will comply with the terms of this Order, and will take all reasonable steps to assure that Respondent Personnel that report to him or her directly or indirectly will comply with the terms of this Order;
4. Preventing Firewalled Respondent Personnel from (i) participating in any way, directly or indirectly, in Staples Reseller Functions; and/or (ii) disclosing any Essendant Reseller Commercially Sensitive Information to any Respondent Personnel outside of Firewalled Respondent Personnel;
5. Preventing the Management Oversight Group from receiving or having access to Essendant Reseller Commercially Sensitive Information, and preventing Firewalled Respondent Personnel from directly or indirectly

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disclosing Essendant Reseller Commercially Sensitive Information to the Management Oversight Group, unless and solely to the extent permitted pursuant to this Paragraph and with the Monitor's approval. In this regard, the Management Oversight Group:

- a. May receive data and reports with detail only to the extent necessary for the management and oversight of the Essendant Wholesale Business. Such information may include budget reviews, long range plans, finance updates, but in no case shall the reports contain any information that reveals the identity of Essendant Resellers or Essendant Resellers' End Users; *provided, however,* nothing herein shall prevent the Management Oversight Group from receiving or having access to a list of Essendant Reseller Customers and their contact information, without more, and in each case, to enable the Management Oversight Group to perform the functions described in Paragraph II.D. of this Order:
 - i. only after Respondents' chief legal officer, or designee (each of whom shall be trained regarding the requirements and prohibitions of the Order, and shall sign appropriate non-disclosure or equivalent agreements providing written acknowledgement of their responsibilities regarding the restrictions on the use and disclosure of Essendant Reseller Commercially Sensitive Information), has reviewed any such Essendant Reseller Commercially Sensitive Information and verified that its disclosure to and use by the Management Oversight Group are in compliance with this Order; and
 - ii. where any such disclosure or communication to the Management Oversight Group containing Essendant Reseller Commercially Sensitive Information shall be provided to the Monitor for review 7 days prior to disclosure or communication to the Management Oversight Group;
- b. Shall receive training on the requirements and prohibitions of the Order, certify their understanding of and commitment to abide by the terms of the Order, and sign an appropriate non-disclosure agreement; and
- c. To the extent Firewalled Respondent Personnel are permitted to disclose Essendant Reseller Commercially Sensitive Information to the Management Oversight Group, the Management Oversight Group shall not thereafter disclose such information to Respondent Personnel or any Persons that are not part of the Management

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Oversight Group or use the disclosed information for any purpose except to the extent permitted by this Order.

- C. Firewalled Respondent Personnel shall, as relevant to their position, have access to and may use Essendant Reseller Commercially Sensitive Information as reasonably necessary to perform Essendant Wholesaler Functions, to perform Legal or Regulatory Functions, and to fulfill Shared Services, subject to the use and disclosure restrictions set forth in sub-Paragraphs II.B.3-5 above, and for no other purpose, in accordance with the following:
1. Firewalled Respondent Personnel shall include only those Persons (and related functions or positions) who, as of the Acquisition Date:
 - a. Perform Essendant Wholesaler Functions, Legal or Regulatory Functions, or Shared Services, or who report, directly to such Persons; *provided, however*, that Persons, functions, or positions included within Firewalled Respondent Personnel shall have access to and use of such Essendant Reseller Commercially Sensitive Information only to the extent necessary to perform their duties;
 - b. Do not perform and are not responsible, directly or indirectly, for Staples Reseller Functions, and if any such Person, function, or position reports (directly or indirectly) to a Person responsible for Staples Reseller Functions, that Person, function, or position shall receive training on Order terms, sign an appropriate non-disclosure agreement (if applicable), certify compliance with the terms of the Order, and not disclose, provide, or otherwise make available Essendant Reseller Commercially Sensitive Information to the Person responsible (directly or indirectly) for Staples Reseller Functions; and
 - c. Do not receive bonus or other tangible benefits related to the marginal sale of Staples Customer Goods as a disproportionate benefit to any bonus or tangible benefit related to the marginal sale of Essendant Reseller Goods.
 2. Firewalled Respondent Personnel shall be trained on the requirements or prohibitions of the Order and shall execute non-disclosure agreements and statements attesting that they have received a copy or approved summary of this Order, will comply with the Order's terms, and will take all reasonable steps to assure that employees who report to them directly will comply with the Order's terms:

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- a. For Firewalled Respondent Personnel, no later than forty (40) days after Respondents execute the Agreement Containing Consent Order; and
 - b. For Firewalled Respondent Personnel identified after Respondents execute the Agreement Containing Consent Order, sufficiently in advance of the date on which they assume those responsibilities to permit them to be trained and to sign the required non-disclosure agreements and statements attesting that they have received a copy or approved summary of this Order, will comply with the Order's terms, and will take all reasonable steps to assure that employees who report to them directly will comply with the Order's terms.
3. Firewalled Respondent Personnel reporting directly or indirectly into Essendant Wholesaler Functions may use Essendant Reseller Commercially Sensitive Information only to the extent necessary to perform their Essendant Wholesaler Functions, and for no other purpose, and the Firewalled Respondent Personnel reporting directly or indirectly into the Legal or Regulatory Functions or Shared Services function may use Essendant Reseller Commercially Sensitive Information only to the extent necessary to perform their respective functions.
4. Respondents shall add to or change the Firewalled Respondent Personnel only pursuant to the following procedures:
 - a. Replacing or adding individuals who report directly to the Persons, functions, or positions specifically identified in Appendices A and C shall be in accordance with Respondents' usual and customary business practices;
 - b. Replacing any of the Persons or positions specifically identified in Appendices A and C, or re-organizing functions or positions specifically identified in Appendices A and C, shall be in accordance with the usual and customary business practices of Respondents after notification to and no objection from the Monitor, provided that the Monitor is provided with information about the position and individual, including the individual's background and prior positions held, 7 days prior to the replacement or reorganization;
 - c. Transitioning or replacing Persons or positions specifically identified in Appendix A to Shared Services shall require Respondents to provide the Monitor with information about the position and individual, including the individual's background and prior positions held, 7 days prior to the transition or replacement,

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and such transition or replacement may take effect only if there is no objection from the Monitor;

- d. Adding new functions or positions that are not specifically identified in Appendices A and C shall require prior notification to the Monitor and Commission staff in accordance with the following:
 - i. Commission staff shall have 10 business days from notification to consider the proposed change; and
 - ii. If Commission staff does not object, in writing, including the reasons for objecting, to the change within 10 days of notification, Respondents shall be permitted to make the change.
- 5. Respondents who wish to transfer an employee working within the Firewalled Respondent Personnel group to any position within either Staples or Sycamore must notify the Monitor 30 days prior to such transfer with information on the nature of the employee's prior and future job responsibilities, and the nature and extent of his or her exposure to Essendant Reseller Commercially Sensitive Information, in accordance with the following:
 - a. If the transferred employee will be in a position directly competing with the Essendant Wholesale Business, then such employee must be removed from access to Essendant Reseller Commercially Sensitive Information for a period of 6 months prior to assuming his or her new responsibilities;
 - b. If the transferred employee (i) will be in a position that supports a business that does not compete with or manage the Essendant Wholesale Business, or (ii) was not exposed to Essendant Reseller Commercially Sensitive Information, the transfer may take effect after the notice period if there is no objection from the Monitor; and
 - c. The transferred employee shall continue to be bound by the terms of the non-disclosure agreement signed pursuant to Paragraph II.C. of the Order for the duration of the Order.
- D. The Management Oversight Group, as identified in Appendix B, may receive specified Essendant Reseller Commercially Sensitive Information as provided in Paragraph II.B.5 in order to make enterprise decisions to fulfill their oversight and management responsibilities; *provided, however*, that the Monitor must be notified 7 days in advance and must approve such receipt prior to the disclosure of

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Essendant Reseller Commercially Sensitive Information to any member of the Management Oversight Group; *provided, further* that the Management Oversight Group and each member thereof shall:

1. Receive Essendant Reseller Commercially Sensitive Information only to the extent necessary to perform their oversight responsibilities;
 2. Use such Essendant Reseller Commercially Sensitive Information only as necessary to perform their oversight responsibilities and not for any other purpose;
 3. Protect the confidentiality of such Essendant Reseller Commercially Sensitive Information;
 4. Not disclose such Essendant Reseller Commercially Sensitive Information to any Person not authorized to have it pursuant to this Order;
 5. Receive training on the Order, and execute (i) a non-disclosure agreement providing written acknowledgment of his or her responsibilities regarding the restrictions on the use and dissemination of such Essendant Reseller Commercially Sensitive Information; and (ii) a statement attesting that he or she has received a copy of this Order or an approved summary, has been trained on the requirements and prohibitions of the Order, will comply with its terms, and will take all reasonable steps to assure that employees who report to him or her directly or indirectly will comply with the Order's terms, all no later than 40 days after Respondents have identified the Management Oversight Group member or in any event before such member may have access to or receive any Essendant Reseller Commercially Sensitive Information; and
 6. Proposed additions to the Management Oversight Group shall be approved by the Monitor, and access to information shall follow the procedures outlined in this Paragraph II.D.
- E. Respondents shall develop and implement written procedures and protocols and maintain a system of access and data controls to assure compliance with the requirements and prohibitions of this Order ("Compliance Program"), to be reviewed and approved by the Monitor, which shall include, but not be limited to, procedures for:
1. Monitoring compliance;
 2. Requiring and enforcing compliance with appropriate remedial action in the event of non-compliance by Respondent Personnel;
 3. Notifying the Monitor in writing of any non-compliance with this Order;

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4. Distributing a copy of this Order or an approved summary to all (i) Firewalled Respondent Personnel; (ii) the Management Oversight Group; and (iii) any other Respondent Personnel who may have access to Essendant Reseller Commercially Sensitive Information within 7 days of the date this Order becomes final, and annually thereafter (or on such other schedule as the Monitor may approve) or, for Persons added to the Firewalled Respondent Personnel group or Management Oversight Group pursuant to Paragraph II.C.4 and II.D. of this Order no later than 20 days after Respondents have identified the additional Firewalled Respondent Personnel or Management Oversight Group member or in any event before such member may have access to or receive any Essendant Reseller Commercially Sensitive Information;
 5. Training on the requirements and prohibitions of this Order for all (i) Firewalled Respondent Personnel; (ii) the Management Oversight Group; and (iii) any other Respondent Personnel who may have access to Essendant Reseller Commercially Sensitive Information, where the content of such training shall be approved by the Monitor prior to delivery, and periodic refresher training and communications shall occur no less frequently than annually;
 6. Adding to or changing the composition of the Management Oversight Group;
 7. Internal auditing or self-evaluation of adherence to each provision of the Order; and
 8. The retention of documents and records in connection with Respondents' compliance with their obligations under this Order.
- F. No later than 30 days of the date this Order become final, Respondents shall submit a detailed plan for complying with the provisions of Paragraph II. of this Order to the Commission and the Monitor. No later than 15 days after receipt of the detailed compliance plan, the Commission and the Monitor shall advise Respondents of any objections and proposed modifications to the plan.
- G. The purpose of the provisions of Paragraph II. of this Order is to assure that Respondents maintain the confidentiality of and use Essendant Reseller Commercially Sensitive Information in a manner consistent with the applicable requirements and prohibitions, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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III. Monitor**IT IS FURTHER ORDERED** that:

- A. Theodore Banks shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix F (“Monitor Agreement”) and Non-Public Appendix G (“Monitor Compensation”). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order. The Monitor Agreement shall become effective no later than the date this Order is issued.
- B. Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order, in consultation with the Commission or its staff, on the following terms, which shall be included in the Monitor Agreement:
 - 1. The Monitor shall (i) monitor Respondents’ compliance with the obligations set forth in this Order, (ii) act in consultation with the Commission or its staff, and (iii) serve as an independent third party and not as an employee or agent of the Respondents or of the Commission.
 - 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents’ personnel, books, records, documents, and facilities Relating To compliance with this Order and to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;
 - 3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as the Monitor deems are reasonably necessary or advisable to carry out the Monitor’s duties and responsibilities;
 - 4. Respondents shall indemnify the Monitor and such consultants, accountants, attorneys, and other representatives and assistants as may be engaged by the Monitor, and hold them harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or

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expenses result from the Monitor's gross negligence or willful misconduct; and

5. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a suitable confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- C. The Monitor shall report in writing to the Commission (i) 30 days after this Order is issued or 30 days after Respondents submit their first interim compliance report pursuant to Paragraph V.B.1 of this Order, whichever is earlier, (ii) no later than 30 days after Respondents submit their subsequent interim and annual compliance reports as required by Paragraph V.B. of this Order, (iii) no later than 10 days after this Order terminates ("Final Report"), and (iv) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.
- D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- E. The Monitor's power and duties shall terminate 10 business days after the Monitor has completed his Final Report pursuant to Paragraph III.C.(iii) of this Order, or at such other time as directed by the Commission.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
 2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph III.

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- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

IV. Prior Notice

IT IS FURTHER ORDERED that, for a period of 10 years from the date this Order is issued, Respondents shall not, without providing prior written notification (“Notification”) to the Commission in the manner described in this paragraph, acquire directly or indirectly, through subsidiaries or otherwise, any Person engaged in selling Office Products directly or indirectly to any wholesaler, distributor, or reseller of Office Products or to Office Products End Users in the United States, or any Ownership Interest, in whole or in part, in such Person (“To-Be-Acquired Person”), *provided, however*, that prior notification shall not be required under Paragraph IV of this Order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a. With respect to the Notification:

- A. Notification required by this Paragraph shall contain:
1. The Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of Respondents and not of any other party to the transaction;
 2. The name, headquarters address, telephone number, and the name of a contact person of the To-Be-Acquired Person;
 3. A description of the proposed acquisition and the assets to be acquired, and the acquisition price;
 4. If acquiring less than 100 percent ownership interest in a To-Be-Acquired Person, Respondents’ plans if any, to acquire additional ownership interest in the future;
 5. All documents Relating To communications between Respondents and the To-Be-Acquired Person;
 6. A list of the top 20 customers and top 20 vendors of the To-Be-Acquired Person and the Respondents; and
 7. All documents Relating To the proposed acquisition.

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Provided, however, that Notification shall not be required for acquisitions resulting in total holdings of an Ownership Interest of 10 percent or less of a To-Be-Acquired Person.

- B. Respondents shall provide the Notification to the Commission at least 30 days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until 30 days after submitting such additional information or documentary material.
- C. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

V. Compliance Reports

IT IS FURTHER ORDERED that:

- A. Respondents shall notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date; and
- B. Respondents shall submit verified written reports (“compliance reports”) in accordance with the following:
 - 1. An interim compliance report 30 days after the Order is issued, and every 90 days thereafter until one year after the date this Order is issued, at which time Respondents shall submit reports in accordance with Paragraph V.B.2;
 - 2. Annual compliance reports one year after the date this Order is issued, and annually for the next nine years on the anniversary of that date; and
 - 3. Additional compliance reports as the Commission or its staff may request.
- C. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of the Order. Respondents shall retain copies of all material written communications, as well as all non-privileged

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internal memoranda, reports, and recommendations concerning completing their obligations under the Order for a period of 10 years, and shall provide copies of those records to Commission staff upon request.

- D. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov.
- E. Respondents shall provide a copy of each compliance report to the Monitor at the same time that they submit compliance reports to the Commission and to the Compliance Division.

VI. Change in Respondent

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least 30 days prior to:

- A. Its proposed dissolution;
- B. Its proposed acquisition, merger, or consolidation; or
- C. Any other change in the Respondent, including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VII. Access

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and 5 days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at the request of the authorized representative of the Commission and at the expense of the Respondents; and

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- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

VIII. Purpose

IT IS FURTHER ORDERED that the purpose of this Order is to remedy the harm to competition the Commission alleged in its Complaint and ensure that Respondents maintain the confidentiality of Essendant Reseller Commercially Sensitive Information in a manner consistent with all applicable requirements and prohibitions of this Order.

IX. Term

IT IS FURTHER ORDERED that this Order shall terminate on January 25, 2029.

By the Commission, Commissioner Chopra and Commissioner Slaughter dissenting.

Appendix A: Firewalled Respondent Personnel

1. President & CEO
2. SVP, General Counsel
 - a. Counsel, Associate General
 - b. Assistant General Counsel
3. SVP, Chief HR Officer
4. SVP, Strategy & Corporate Development
 - a. Chief Operating Officer, Automotive
5. President, Office & Facilities
 - a. SVP, Trade Development
 - b. Architect, Senior, User Experience
 - c. Manager, Inventory Management & Analytics
 - d. VP, Customer Care & Sales Operations

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- e. Manager Senior, Marketing Research & User Experience
 - i. Manager, Reseller Development
 - ii. Analyst Senior, III
 - iii. Associate, Marketing Services
 - iv. Specialist, Marketing Communications
 - v. Manager, Web – Marketing
- f. VP, Vertical Markets
 - i. Director, Business Development – Enterprise Accounts
 - ii. Manager Senior, Business Development Healthcare
 - iii. Manager, Business Development Vertical Markets
 - iv. Director, Diverse Business Development
 - v. Director, Vertical Markets
 - vi. Director, New Channel
 - vii. Director, Vertical Markets Sales Operations
- g. Director, Marketing Sales Programs
 - i. Manager, Marketing Tech Specialist
 - ii. Manager, Marketing Customer Enablement
 - iii. Manager, Marketing Programs – Operations
 - iv. Manager, Channel Marketing
 - v. Manager Assistant, Graphic Mfg & O
- h. Director, Marketing
 - i. VP, Strategic Accounts
 - ii. Executive, Strategic Accounts
 - iii. Director, National Accounts

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- iv. Director, New Channel
- v. Director, Strategic Groups – FE
- vi. Manager, Strategic Events
- j. VP, Sales – Mason
 - i. Manager, WB Mason
 - ii. Director, Operations & Logistics – Mason
 - iii. Director, Category Management
- k. VP, Independent Channels
 - i. Director, Facilities Engagement
 - ii. Director, Strategic Groups
 - iii. Director, Field Support
 - iv. Director Senior, East Region Sales
 - v. Director, Inside Sales
 - vi. Director, Sales West Region
- l. Director, Digital Services
- 6. SVP, CFO & CIO
 - a. VP, Treasurer
 - b. Controller & CAO
- 7. VP, Operations & Transportation
 - a. VP, Operations Region OH
- 8. SVP, Merchandising, Inventory & Pricing
 - a. VP, Office Products & Furniture
 - b. VP, Pricing & Margin Management
 - i. Director, Pricing

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- c. VP, Essendant Brands & Global Sourcing
- d. VP, Merchandising
- e. VP, Pricing/Business Integration
 - i. Manager, Price Development & Communications
 - ii. Manager Senior, Pricing Development & Communications
 - iii. Director, Pricing/Margin LG
- f. VP, GM – Tech & Azerty
 - i. VP, Sales Azerty
 - ii. VP, Operations & Customer
- g. SVP, Inventory

Non-Public Appendix A-1: Firewalled Respondent Personnel

[Redacted From the Public Record Version, But Incorporated By Reference]

Appendix B: Management Oversight Group

- John Lederer, Executive Chairman
- Sandy Douglas, Chief Executive Officer
- Joanne Harris, Chief Commercial Officer
- Edward Ludwigson, VP Management Operations

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Appendix C: Shared Services

- Audit/Accounting/Compliance: SVP Corporate Controller; Assistant Controller; VP Financial Services & System; Director Corporate Credit; Director Finance, Staples Promotional Products; VP General Auditor
- Financial Planning and Analysis: Vice Chairman & CFO; VP Corporate Financial Planning & Analysis; Director, Financial Planning & Analysis
- Tax/Treasury: SVP Financial & Treasurer; Head of Tax
- Information Technology: Chief Technology Officer; SVP Chief Information Security Officer; SVP Global eCommerce Technology; VP Order Management Systems; VP Technical Operations SDS; VP Data & Analytics; Director Enterprise/Financial Systems; Director Threat Vulnerability Management; Director Security & Compliance; VP eCommerce Engineering; VP Data Solutions & Merch; VP eCommerce Product & Customer Experience; Director Quill Technology; Director e-Commerce Engineering; Director e-Commerce Product Management & Strategy; Director Supply Chain Systems; Director Telecom Remote Infrastructure Services; Director Business Systems
- Human Resources/Talent Management/Recruiting: Chief Human Resources Officer; VP Talent & Organizational Development; VP Talent Acquisition & Workforce Planning; Director Learning & Development; VP Total Rewards; Director Global Human Resources Operations; Directors Human Resources
- Real Estate: VP Real Estate; VP Property Management; VP Facilities Management & Design; Director Real Estate Development; Director Design & Construction; Director NA Fixture Procurement & Install
- Legal: Chief Legal Officer; VP Associate General Counsels; Senior Company Counsels
- Risk Management: Director Risk Management
- Merchandising: Chief Merchandising Officer; VP/DMMs; VP/GMMs; Director DMMs; VP Merchandise Operations & Vendor Management; Director Vendor Programs Administration; Director Portfolio Group; see also Staples Brands Group below
- Marketing: Chief Marketing Officer; VP Staples Creative Group; Director Category Marketing
- Supply Chain/Logistics: Chief Supply Chain Officer; VP Engineering & Operations Support: RVPs DC/FC/Fleet; VP Supply Chain Analytics & Strategy; Director DMM; VP Transportation & Supplier Collaboration; Distinguished Scientist; Director National Transportation; Directors Regional Delivery Operations; Directors Fulfillment Centers; Directors Distribution; Director Delivery Operations Planning; Director Transportation; Director Furniture Operations

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- M&A/Strategy: EVP Corporate Development
- Integration: Director Business Integration PMO; Director Integration
- Communications/Investor Relations: Director Corporate Communications
- Staples Brands Group: SVP Staples Brands Group; VP Global Sourcing Manufacturing & Operations SBG; VP Global Sales Channels; VP Product Development & Management; Director Product Quality & Compliance; Director Product Design Innovation; Director Sourcing & Procurement; Director SBG International Supply Chain; Directors Product Strategy
- Inventory Planning: SVP Merchandise Planning & Inventory Management; Director Sales & Operations Planning; Directors Planning & Inventory Management
- Loss Prevention: Director North America Delivery & Corporate Investigations; Director Global Health & Safety; Director, Fraud Intelligence
- Customer Service: VP NAC Customer Service; VPs Contact Center Operations; Director Business Intelligence & Project Services; Director Workforce Planning
- Indirect Procurement: VP Procurement; Directors Strategic Sourcing

Appendix D: Staples Reseller Functions

- Staples Business Advantage (“SBA”) Sales Admin & Ops (reporting to Vice President, Management Operations)
- SBA Pricing (reporting to Vice President, Pricing)
- SBA Commercial and Enterprise Sales (reporting to Senior Vice President, Commercial and Enterprise, SBA Sales)
- SBA Mid-market Sales (reporting to Vice President, Mid-market, SBA Sales)
- Quill (reporting to Senior Vice President, Quill)
- Customer Transformation (reporting to Vice President, Customer Transformation)
- Digital Business (reporting to Vice President, Digital Business)

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- Staples Promotional Products (“SPP”) (reporting to Vice President/General Manager, SPP)
- SBA Financial Planning & Analysis (reporting to Vice President, Financial Planning & Analysis)
- HiTouch (reporting to President, HiTouch,, who reports to Senior Vice President, Commercial and Enterprise, SBA Sales)
- Corporate Development—Tuck-in Integration (reporting to Director, Integration)
- North American Delivery B2B Marketing (reporting to Vice President, B2B Marketing)

Appendix E: Wholesaler Functions

- Senior Leadership Team (reporting to President & CEO) (excluding Assistant, Executive – CEO and Group President, Industrials)
- Legal (reporting to SVP, General Counsel) (Counsel, Associate General and Assistant General Counsel only)
- Strategy & Corporate Development (reporting to SVP, Strategy & Corporate Development) (Chief Operating Officer - Automotive only)
- Office & Facilities (reporting to President, Office & Facilities) (excluding Assistant, Executive)
- Finance, Accounting and Information Technology (reporting to SVP, CFO & CIO) (VP, Treasurer and Controller & CAO only)
- Operations & Transportation (reporting to VP, Operations & Transportation) (VP, Operations Region OH only)
- Merchandising, Inventory and Pricing (reporting to SVP, Merchandising, Inventory & Pricing) (excluding Consultant - Merch)
- Marketing Research & User Experience (reporting to Manager Senior, Marketing Research & User Experience)
- Vertical Markets Group (reporting to VP, Vertical Markets)

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- Marketing Sales Programs (reporting to Director, Marketing Sales Programs) (excluding direct reports of Manager Assistant, Graphic Mfg & O)
- Marketing (Director, Marketing only)
- Strategic Accounts (reporting to VP, Strategic Accounts)
- WB Mason (reporting to VP, Sales - Mason) (excluding Assistant, Executive)
- Independent Channels (reporting to VP, Independent Channels)
- Office Products & Furniture (VP, Office Products & Furniture only)
- Pricing & Margin Management (reporting to VP, Pricing & Margin Management)
- Essendant Brands & Global Sourcing (VP, Essendant Brands & Global Sourcing only)
- Merchandising (VP, Merchandising only)
- Technology & Azerty (reporting to VP, GM – Tech & Azerty) (excluding Director, Category Management)
- Pricing/Business Integration (reporting to VP, Pricing/Business Integration)
- Inventory (SVP Inventory only)

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Appendix F: Monitor Agreement**MONITOR RETENTION AGREEMENT**

This Monitor Agreement ("Monitor Agreement") entered into on October 26, 2018 between Theodore Banks ("Monitor") and Staples, Inc. ("Staples") provides as follows:

WHEREAS the United States Federal Trade Commission (the "FTC") has accepted or will shortly accept for public comment an Agreement Containing Consent Orders, containing a proposed Decision and Order ("Order"), which, among other things, (i) would require Staples to implement a "firewall" restricting its use of confidential information of Essendant, Inc. ("Acquired"), as defined in the Decision and Order, (ii) implement an effective compliance program regarding provisions of the Order, and (iii) contemplates the appointment of a Monitor to monitor Staples' compliance with its obligations under the Order;

WHEREAS the FTC may appoint Theodore Banks as Monitor pursuant to the Order;

WHEREAS the Order further provides that Staples shall execute an agreement, subject to the prior approval of the FTC, that confers all the rights and powers necessary to permit the Monitor to monitor Staples' compliance with the terms of the Order; and

WHEREAS the parties to this Monitor Agreement intend to be legally bound, subject only to the FTC's approval of this Agreement.

NOW, THEREFORE, the parties agree as follows:

All capitalized terms used in the Agreement and not specifically defined herein shall have the respective definitions given to them in the Order.

- A. Monitor's Responsibilities. The Monitor shall be responsible for monitoring Staples' compliance with its obligations as set forth in the Order ("Monitor's Responsibilities"). In so doing, the Monitor shall act in consultation with the FTC or its staff and **shall serve as an independent third party and not as an employee or agent of the Staples or the FTC.** The Monitor shall have all rights, duties, powers and authorities required by the Order, and nothing in the Monitor Agreement shall change, amend, modify or otherwise limit those rights, duties, powers, and authorities.
- B. Access to Relevant Information and Facilities. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to the personnel, books and records of Staples kept in the ordinary course of business, facilities, technical information related to Staples' compliance with its obligations under the Order and such other relevant information as the Monitor may reasonably request.

Staples shall cooperate with any reasonable request of the Monitor. The Monitor shall give Staples reasonable written notice of any request for such access or such information and shall attempt to schedule any access or requests for information in such a manner as will not unreasonably interfere with Staples' operations. At

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the request of the Monitor, Staples shall promptly arrange meetings and discussions, including tours of relevant facilities, at reasonable times and locations between the Monitor and employees of Staples who have knowledge relevant to the proper discharge of the Monitor's responsibilities under the Order.

- C. Compliance Reports. Staples shall provide the Monitor with copies of all compliance reports filed with the FTC in a timely manner, but in any event, no later than five (5) days after the date on which Staples files such report with the FTC.
- D. Additional Personnel. Staples agrees that, to the extent authorized by the Order, the Monitor shall have the authority to employ, at the expense of the Staples, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's Responsibilities.
- E. Monitor's Obligations. The Monitor shall:
1. Carry out the Monitor's Responsibilities, including submission of periodic reports to the FTC or its staff concerning performance by Staples of its obligations under the Order, and any additional written reports as may be requested by the FTC or its staff;
 2. Maintain the confidentiality of all non-public information, including Acquired's Commercially Sensitive Information, provided to the Monitor by Staples, Acquired, any supplier or customer of the Staples, Acquired, the FTC, or FTC staff in connection with the Monitor's Responsibilities ("Confidential Information"). Such Confidential Information shall be used only for the purpose of discharging the Monitor's obligations pursuant to this Monitor Agreement and not for any other purposes, including, without limitation, any other business, scientific, technological, or personal purpose. The Monitor may only disclose Confidential Information to:
 - a. Persons employed by or working with the Monitor under this Monitor Agreement and who have executed a confidentiality agreement consistent with the provisions of this Agreement;
 - b. Persons employed by Staples that are entitled to have access to such Confidential Information;
 - c. FTC staff that are working on this matter; or
 - d. Persons employed by Acquired that are entitled to have access to such Confidential Information.
 3. Maintain a record and inform the FTC or its staff of all persons to whom Confidential Information related to this Monitor Agreement has been disclosed;
 4. Require any consultants, accountants, attorneys, and any other representatives and/or assistants retained by the Monitor to assist in carrying out the Monitor's Responsibilities to execute a confidentiality agreement that requires such third parties

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to treat Confidential Information with the same standards of care and obligations of confidentiality to which the Monitor must adhere under this Monitor Agreement;

5. Maintain the confidentiality for a period of ten (10) years after the termination of this Monitor Agreement, of all other aspects of the performance of the Monitor's Responsibilities and not disclose Confidential Information relating thereto except as required by law, or as may be permitted by Staples. In the event the Monitor is requested pursuant to subpoena or other legal process to produce any documents or to provide testimony relating to this matter in judicial or administrative proceedings to which the Monitor is not a party, Staples shall reimburse the Monitor at standard billing rates for all professional time and expenses, including reasonable attorneys' fees, incurred in preparing for and responding to requests for documents and providing testimony;
6. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall consult with FTC staff regarding disposition of any written and electronic materials (including materials that Staples provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the FTC staff, as directed by the FTC staff. In response to a request by Staples to return or destroy materials that Staples provided to the Monitor, the Monitor shall inform FTC staff of such request and, if the FTC staff does not object, shall comply with the Staples' request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information obtained while acting as a Monitor.

For the purpose of this Monitor Agreement, information shall not be considered confidential or proprietary to the extent it is or becomes part of the public domain (other than as a result of any action by the Monitor or by any employee, agent, affiliate or consultant of the Monitor), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than the Monitor, Staples, or any director, officer, employee, agent, consultant or affiliate of the Monitor or Staples, when such source was not known to the recipient after the due inquiry to be restricted from making such disclosure to such recipient.

- F. Monitor Payment. Staples will pay the Monitor for services rendered by the Monitor and other employees performing services pursuant to this Agreement in accordance with the fee schedule listed on Schedule A to this Agreement. In addition, Staples will pay: (a) out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties; and (b) fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities hereunder. The Monitor shall invoice Staples monthly, including details and an explanation of all matters for which the Monitor submits an invoice to Staples. Staples shall pay such invoices within thirty (30) days of receipt. At its own expense, Staples may retain an

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independent auditor to verify such invoices. The Monitor and Staples shall submit any disputes about invoices to the FTC for assistance in resolving such disputes.

- G. Monitor's Indemnification and Limitation of Liability. Staples shall indemnify and hold harmless the Monitor against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's Responsibilities, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence, willful misconduct, or bad faith by the Monitor. In addition, the parties shall not be liable to each other for any consequential, incidental, special or punitive damages, nor shall the Monitor be liable for direct compensatory damages in excess of the fees actually received by the Monitor for the performance of services hereunder.
- H. Disputes. In the event of a disagreement or dispute between Staples and the Monitor concerning Staples' obligations under the Order, and, in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the staff of the FTC in charge of compliance.
- I. Conflicts of Interest. If the Monitor becomes aware during the term of this Monitor Agreement that the Monitor has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Monitor of any of the Monitor's Responsibilities, the Monitor shall immediately inform the Staples and FTC staff of any such conflict. The Monitor may accept other retentions during the term of this Monitor Agreement and thereafter, provided that, during the pendency of this Monitor Agreement, the Monitor agrees not to accept any other engagement which would result in the Monitor working in a position directly adverse to the FTC or Staples in any substantially related matter.
- J. Standard of Care. In the performance of the Monitor's Responsibilities, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of the person's own business affairs.
- K. Term. This Monitor Agreement shall terminate no later than: (i) the date set forth in the relevant provisions of the Order; (ii) the date on which the FTC appoints a substitute monitor pursuant to the Orders; (iii) the date Staples notifies the Monitor that Staples has received a notification from FTC staff that the Monitor has ceased to act or failed to act in a manner consistent with the Monitor's responsibilities under the Orders; or (iv) with at least thirty (30) days advance notice to be provided by the Monitor to Staples and to the FTC, upon resignation of the Monitor.
- L. Termination. In the event that FTC staff notifies Staples that the Monitor has ceased to act or failed to act in a manner consistent with the Monitor's responsibilities under the Order, Staples shall be entitled to immediately terminate this Monitor Agreement.
- M. Governing Law. This Agreement and the rights and obligations of the parties hereunder shall in all respects be governed by the substantive laws of the State of Delaware,

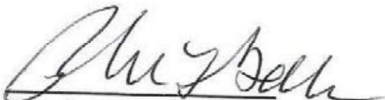
Decision and Order

including all matters of construction, validity and performance. The Order shall govern this Monitor Agreement and any provisions herein which conflict or are inconsistent with it may be declared null and void by the FTC and any provision not in conflict shall survive and remain a part of this Monitor Agreement.

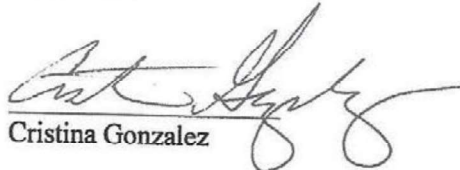
- N. Not an Attorney-Client Relationship. Staples and Monitor acknowledge that the relationship formed through this Agreement is not that of attorney/client and that no attorney/client privileges will apply to any communications between them.
- O. Disclosure of Information. Nothing in this Monitor Agreement shall require Staples to disclose any material information that is subject to a legally recognized privilege or that Staples is prohibited from disclosing by reason of law.
- P. Assignment. This Monitor Agreement may not be assigned or otherwise transferred by Staples or the Monitor without the consent of Staples, the Monitor, and the approval of the FTC. Any such assignment or transfer may only be made in a manner consistent with the terms of the Order.
- Q. Modification. No amendment, modification, termination, or waiver of any provision of this Monitor Agreement shall be effective unless made in writing, signed by all parties, and approved by the FTC. Any such amendment, modification, termination, or waiver may only be made in manner consistent with the terms of the Order.
- R. Approval by the FTC. This Monitor Agreement shall have no force or effect with respect to the Order until approved by the FTC.
- S. Entire Agreement. This Monitor Agreement, and those portions of the Order incorporated herein by reference, constitute the entire agreement of the parties and supersede any and all prior agreement and understandings between the parties, written or oral, with respect to the subject matter hereof.
- T. Duplicate Originals. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same document.
- U. Section Headings. Any heading of a section is for convenience only and is to be assigned no significance whatsoever as to its interpretation and intent.

IN WITNESS WHEREOF, the parties hereto have executed this Monitor Agreement as of the date first written above.

MONITOR


Theodore Banks

STAPLES


Cristina Gonzalez

Statement of the Commission

Non-Public Appendix G: Monitor Compensation**[Redacted From the Public Record Version, But Incorporated By Reference]****Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and
Commissioner Christine S. Wilson**

Staples, Inc. (“Staples”), now owned by the private equity fund Sycamore Partners (“Sycamore”), proposes to merge with Essendant, Inc. (“Essendant”). Staples is the world’s largest retailer of office products and related services. In addition to sales in other channels, Staples sells office supplies directly to mid-sized businesses. Essendant is a wholesale distributor of office products and sells to independent commercial dealers/resellers and others in the upstream office supply distribution market. The independent dealers that are customers of Essendant compete with Staples for downstream sales to mid-sized business customers. Thus, for the most part, Staples and Essendant do not compete with each other; rather, Staples competes with Essendant’s customers.

Following a staff investigation that considered several possible vertical and horizontal theories of competitive harm, the Commission has voted 3-2 to issue a complaint and accept a settlement, which would resolve the only competitive concern arising out of this transaction that is supported by the evidence. Specifically, the Commission found that, without adequate safeguards post-merger, Staples would gain access to the competitively sensitive information of Essendant’s dealer customers and the customers of those dealers, which could enable Staples to engage in anticompetitive conduct. To resolve this issue, the Commission’s proposed order imposes firewalls and other safeguards to protect the competitively sensitive information of Essendant’s dealer customers, as well as the sensitive information of the customers of those dealers.

The structure of this market and the competitive questions about the proposed transaction required an in-depth, careful investigation and analysis. That is exactly what the staff conducted. They interviewed more than a hundred market participants, analyzed party and third-party data, reviewed full document productions by the merging parties that included millions of documents, and conducted sophisticated economic analyses using the best economic tools available. Staff thoroughly investigated every theory of anticompetitive harm that might reasonably be applicable to this case. Based on that investigation, staff found that the evidence did not support any claims of likely anticompetitive harm other than the one for which a remedy has been obtained. We agree.¹

¹ Commissioner Chopra’s dissent suggests that the Commission is “jumping to conclusions” and that “an independent fact-finder or Court” would likely reach different conclusions. But the Commission is basing its

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The primary theory of harm that was considered and rejected involves Staples potentially raising Essendant's prices. This hypothetical conduct potentially would force Essendant's independent dealer customers to raise prices to their customers—the mid-sized businesses—some of whom would presumably look for other suppliers. Staples would lose money from whatever sales Essendant lost due to its higher prices. But if enough businesses that switched sales away from the independent dealers decided to buy from Staples, in theory, the overall strategy could be profitable. The evidence, however, did not support this theory.

First, the evidence showed that rather than absorbing price increases from Essendant, many independent dealers would switch to Essendant's largest competitor, S.P. Richards. The evidence demonstrated that S.P. Richards offers comparable products and services and is viewed as a strong substitute for Essendant. Staff closely scrutinized the strengths and weaknesses of S.P. Richards relative to Essendant, including geographically, and the evidence showed that S.P. Richards is a viable substitute for Essendant. Although there are some transaction costs to switching wholesalers, the evidence showed that a substantial number of independent dealers have switched their wholesaler in the past, use both wholesalers today, and reported that they would be willing to shift their business in the face of a price increase from Staples.² Further, the evidence showed that many independent dealers could take other actions to counter any attempt by Staples to increase prices or degrade services, including buying directly from office supply manufacturers or from other sources. Thus, the evidence did not support the theory that Staples could profitably raise the prices that Essendant charges its customers in the first place.

The record further showed that even if Staples raised Essendant's prices and in turn independent dealers that used Essendant as their primary wholesaler raised prices, the customers those dealers would lose would not likely switch to Staples. Staples' share in the downstream market for mid-sized businesses is small. And even that small share likely overstates Staples' competitive significance, because Staples is not presently a particularly close substitute for mid-sized end customers who currently purchase from Essendant dealers. The evidence indicated that Staples' niche of this market is focused on customers who are less reliant on high-touch services. In contrast, the customers of Essendant's dealers typically value service, such as optimized delivery, personalized customer service, and inventory services, and, accordingly, find Staples unattractive. Even if Essendant's dealer customers stuck with Essendant in the face of a price increase, the downstream customers that those dealers would lose from the resulting higher prices would not switch to Staples; they would likely switch to dealers buying from S.P. Richards or other sources of supply. Thus, there was insufficient evidence to support the theory that Staples would engage in any kind of post-merger cost-increasing or "foreclosure" strategy aimed at Essendant and its customers.

conclusions on, as we describe above, staff's extremely thorough investigation conducted in this matter. The notion that the Commission is relying on an "insufficiently developed record" is simply untenable.

² Although Commissioner Slaughter argues that "some qualitative evidence indicates that switching from Essendant to SPR is costly for independent resellers," as discussed, the strong weight of the evidence rejects Commissioner Slaughter's hypothesis.

Statement of the Commission

Staff also investigated a number of other theories of harm. They considered whether there would be a loss of potential competition in which either Staples or Essendant would move into the distribution space currently occupied by its merger partner. The investigation found insufficient evidence to support such a theory of competitive harm. Staff also considered whether the combined entity could exercise increased market power on the “buy side”—*i.e.*, in purchasing supplies from manufacturers or other suppliers—that Staples could then exploit against its suppliers. A significant portion of the procompetitive efficiencies expected to arise from the merger would indeed flow from lowering purchasing costs. However, while the record reflects that such cost savings are likely to be achieved, the evidence did not support the theory that those cost savings would result from an increase in Staples’ buyer market power. Such cost savings are only anticompetitive when they result from an exercise of market power by the buyer, which requires that the buyer possesses the ability to reduce *overall* market demand and price by reducing its own purchases. This conduct inflicts a welfare loss under well-recognized monopsony models—but that welfare loss does not occur when, for example, a buyer obtains a reduced price from suppliers by offering to buy *more* of their output, or by reducing the suppliers’ transactions costs.³ The evidence here did not support any monopsony theory, and instead was consistent with procompetitive cost reductions.

In their dissenting statements, Commissioners Slaughter and Chopra raise a number of issues concerning this transaction. We address each below.

Both dissents question the parties’ efficiency claims, arguing in particular that the merged firm’s proffered ability to buy office supplies at lower prices should not be fully credited as an efficiency because it could instead constitute evidence of an increase in monopsony power. However, as we discuss above, this issue was carefully considered and the record did not support this concern based on the facts of this case. In any event, our decision does not rest on efficiencies, but rather on the absence of evidence that this acquisition will result in anticompetitive harm outside of the specific area addressed in our order.

Commissioner Chopra argues that, post-merger, Sycamore “will have a strong incentive to rapidly increase margins to make a clear case to a potential future acquirer,”⁴ on the grounds that private equity firms “generally take controlling equity stakes in firms with the hope of realizing significant gains through sale to a buyer or an exit through public markets”⁵ and likely “will operate assets much differently” than an independent Staples would.⁶ Commissioner Chopra has repeatedly stated his negative view of private equity,⁷ but the application of that

3 Roger D. Blair & Jeffrey L. Harrison, *Monopsony: Antitrust Law and Economics* 45-48 (2d ed. 2011).

4 Statement of Commissioner Chopra, *Sycamore Partners, Staples, and Essendant* (Jan. 28, 2018) at 3 (hereinafter “Chopra Statement”).

5 Chopra Statement at 3 n.9.

6 Chopra Statement at 4.

7 See, e.g., Pallavi Guniganti, FTC Commissioner hits out at private equity, GCR (Sept. 28, 2018), <https://globalcompetitionreview.com/article/usa/1174735/ftc-commissioner-hits-out-at-private-equity>; Statement of

Statement of the Commission

general view to the facts of this case does not raise a cognizable antitrust concern. The antitrust laws focus on curbing harm to the competitive process. This concern has nothing to do with the competitive process; it would exist regardless of whether Sycamore owned Staples, did not own Staples, or started a brand new private equity fund and made its first acquisition the purchase of Essendant.⁸ The Commission does not dwell on motives that have no relevance to how the acquiring company would use the acquired business to harm the competitive process.

Commissioner Slaughter's dissent raises concerns that de novo entry is unlikely. The staff and the majority do not rest any part of their analysis on a likelihood of de novo entry. We assume it will not occur, and so do not rely on it for our conclusions.

Commissioner Slaughter also is concerned that switching between Essendant and its primary direct competitor in wholesaling, S.P. Richards, is costly and unlikely. As discussed above, the evidence does not support this concern. We know that independent resellers are not locked in to either Essendant or S.P. Richards; indeed, many independent resellers use both. Staff's investigation, involving hundreds of interviews, also showed that switching wholesalers was not an insurmountable hurdle for independent resellers; in fact, many of them can and do switch or credibly leverage one wholesaler off the other in negotiations. Moreover, while the dissent speculates that there may be geographic areas in which switching would be more difficult, as noted above, staff investigated this issue and concluded that the evidence did not support this concern.

As we also discuss above, this concern only would rise to the level of an antitrust problem if the customers of Essendant's dealers were likely to switch to Staples to a sufficient degree to provide Staples with an incentive to raise prices to Essendant's customers. But the evidence did not support this hypothesis; rather, it showed that sufficient switching to Staples is unlikely because of Staples' low share in this particular downstream market, and the differentiation between the services Staples and the wholesalers provide. As a law enforcement agency, our fidelity must be to the facts—not speculation.

Commissioner Slaughter asserts that staff concluded significant price effects would arise as a part of a raising rivals' cost strategy by Staples. This mischaracterizes the staff's analysis. Staff specifically concluded that a raising rivals' cost strategy would not be profitable for

Commissioner Rohit Chopra, *Linde AG, Praxair, Inc. and Linde PLC* (Oct. 22, 2018) at 2-3, https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf.

8 Commissioner Chopra also expressed concerns that the firewall remedy is potentially penetrable, and thus he would allow independent resellers to freely port customer data to another wholesaler. But the Commission has employed firewalls in past vertical merger cases, and the integrity of those firewalls was robust. Fed. Trade Comm'n, *The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics* at 17 n.34 (Jan. 2017) ("All vertical merger orders were judged successful."), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf. Also, many independent resellers already use both Essendant and S.P. Richards. As a result, such an addition to the Order would not change competitive conditions much, but would impose an undue burden on the merging parties. And finally, independent resellers did not request this remedy during our investigation.

Statement of the Commission

Staples. Overall, Commissioner Slaughter is substituting hypotheses for the informed conclusions drawn from the staff's thorough investigation.

Commissioner Chopra, on the other hand, claims we put too much faith in economic models. Not so. As in any case, we considered staff's recommendation based on their investigation of documents, interviews, data, and economic analysis. In this case, none of those items supported taking any action other than the remedies we have imposed.

In addition to commenting on this specific transaction, Commissioner Slaughter's dissent raises a series of generalized concerns about merger enforcement, and in particular, vertical merger enforcement. Although a detailed discussion of the many and complex issues implicated by a general critique of vertical merger enforcement is beyond the scope of this statement, a few points are worth noting.

First, the dissent seems to suggest that our decision in this case is part of a decades-long, bipartisan pattern of faulty analysis, improper assumptions, unreliable predictions, underweighting evidence of anticompetitive effect, and overweighting evidence of efficiencies. But there is a vigorous debate over whether that assertion has any merit, and the sources cited in the dissent have been subject to substantial criticism for both methodological flaws and irrelevance to competition policy.⁹ Consistent with our long-standing tradition of self-evaluation, learning, and evidence-based policy-making, the Commission has instituted a series of public hearings, in part, to determine whether the evidence supports the concerns raised by our dissenting colleagues. In this process, we hope our colleagues are willing to subject the sources on which they rely to the same scrutiny they apply to those that have garnered widespread acceptance in the past.

Second, while the dissent tries to carve a sharp distinction between the Commission's approach to vertical mergers and the dissent's preferred approach, this is a false dichotomy. There is no disagreement that vertical mergers can be pro- or anticompetitive; that as the economy generates increased merger activity, there may be more mergers—and more problematic mergers—that should be reviewed carefully; that Section 7 of the Clayton Act is an incipency statute; and that we should seek to enjoin or otherwise remedy anticompetitive transactions before they are consummated. There is no dispute that vertical mergers can harm competition in several ways, which have been well-known at least since the seminal article on vertical foreclosure theory was published in the *Yale Law Journal* in 1986.¹⁰ Likewise, we fully

9 See, e.g., Joshua D. Wright et al., "Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust," Sept. 14, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524; Joshua D. Wright, "Market Concentration," Note submitted to the Hearing on Market Concentration, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, OECD (June 7, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf); Greg Werden & Luke Froeb, "Don't Panic: A Guide to Claims of Increasing Concentration" (Apr. 16, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912; Carl Shapiro, *Antitrust in a Time of Populism*, (Oct. 24, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345.

10 See Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 YALE L.J. 209 (1986).

Statement of the Commission

agree with the dissent's view that we should investigate all potential theories of harm in vertical mergers—just as the staff did in this matter. We also agree that under the Horizontal Merger Guidelines, claimed efficiencies must be verified, cognizable, merger-specific, and passed through¹¹, and we recognize that it is not a rarity for merging parties to overstate efficiencies or fail to support them properly.¹² And, we agree that where there is credible evidence, the Commission should obtain relief that will eliminate the relevant harm, and that structural remedies are usually preferred but not always essential. The decision in this case embodies that view.

So with what aspect of the Commission's vertical enforcement philosophy does the dissent disagree? One point appears to be a simple misapplication of particular facts—the dissent's claim that the Commission challenges few vertical mergers. But the Commission has blocked or obtained relief in numerous vertical transactions in that period. In fact, in the two years that our current Chairman served as Bureau Director and Commissioner Wilson served as Chief of Staff under then-Chairman Timothy J. Muris, the Commission voted to block one vertical transaction, which the parties abandoned as the result of the Commission vote to seek to enjoin it, and obtained a divestiture of the acquired, offending asset in another case.¹³ The fact that the parties chose not to litigate does not negate the Commission's willingness to challenge these deals. And of course, of the 1,500 to 2,000 or so HSR filings we receive annually, the overwhelming majority are universally recognized as presenting no anticompetitive concerns at all. Thus, the fact that most of them were not remedied means nothing.

More broadly, the dissent seems to take issue with the Commission's emphasis on bringing cases where theories are supported by facts. But the incipency standard under Section 7 imposes meaningful obligations on the government before allowing it to block a transaction. Specifically, it requires us to establish more than a theoretical concern—it must be probable (not certain) and substantial. Simply theorizing a harm that might arise out of a merger is not enough. We must be able to explain and to prove with facts how a given vertical merger is likely to cause harm in the *case at hand*. We must provide evidence.

11 The Commission's hearings that addressed vertical mergers considered whether the Commission should promulgate vertical merger guidelines. One question that may be considered is whether the standards for efficiency claims in vertical mergers should parallel the standards for horizontal mergers.

12 We do not, however, share Commissioner Slaughter's apparent view that the staff does not test efficiency claims. The staff rigorously, and often skeptically, examine any and all efficiency claims. Indeed, staff has declined to credit the parties' proffered efficiencies in so many litigated cases that many antitrust lawyers and economists have argued that efficiencies are ineffective as a defense in court. *See, e.g.,* Herbert Hovenkamp, Appraising Merger Efficiencies, 24 GEO. MASON L. REV. 703, 704 (2017) ("Few areas of merger law are more controversial than the treatment of such efficiency claims, which are often raised but almost never found to justify a merger that has been shown to be prima facie unlawful."); Timothy J. Muris & Bilal Sayyed, Three Key Principles for Revising the Horizontal Merger Guidelines, The Antitrust Source at 7 (Apr. 2010) ("In our experience, agency leaders do not apply different levels of proof, but some (not all) investigating attorneys appear more skeptical of efficiency claims than they do of potential anticompetitive effect claims.").

Statement of the Commission

Finally, the dissent appears to suggest that the Commission commit to a retrospective review of every transaction that raises antitrust concerns, but where the Commission does not challenge the transaction because the evidence available at the time indicates that those concerns are unlikely to be realized. That suggestion is interesting in theory and given unlimited resources, we might well support it. Also interesting would be retrospectives on vertical mergers we chose not to challenge, and retrospectives on assumptions we have made about how markets likely would develop in cases where we brought enforcement actions (*e.g.*, a finding of high entry barriers in the challenged market). But the practical reality is that we do not have remotely enough resources to institute such a program, even if the data were available (which may not be true in many cases). Consider, for instance, some of our recent enforcement numbers. In FY 2017, the FTC issued 33 second requests and brought 21 merger enforcement actions.¹⁴ One could easily claim that each transaction subject to a second request was a close call. Thus, to do a retrospective for every merger subject to a second request but that did not result in an enforcement action would have required us to do 12 retrospectives. Commissioner Slaughter also would commit us to do retrospectives on transactions where relief was obtained. Her approach would likely commit us to doing on the order of five times or more the number we have done in most years, which is not possible with our current resources.

The issue of retrospectives is a critical one for the Commission and merger enforcement more generally. This is why expanding our merger retrospective program has been a priority of the Chairman and Commissioner Wilson since before confirmation, and why it is one of the issues being explored in our Hearings.¹⁵ The Commission has a record of conducting retrospectives and, after the Hearings conclude, we will synthesize what we have learned and develop an approach or approaches for additional retrospectives that make sense. We are likely to consider how to best use our existing resources, which may militate in favor of one approach, and also what would be a more optimal approach assuming access to more resources. But we cannot commit to a program that is unsustainable with our current resources and may in many cases be impossible to implement even with unlimited resources.

In closing, we emphasize one overarching point: as a law enforcement agency, we are constrained by the parameters of our authorizing statute and the facts of the case in front of us. That constraint is critical to the rule of law and the effective functioning of markets. Even in the context of a merger review, which, as both dissents emphasize, is a forward-looking exercise, we must base our predictions on facts supporting a cognizable theory under Section 7 of the Clayton Act. The dissents highlight a number of concerns, but all of those concerns were either investigated assiduously and ruled out by staff or speak to potential injuries that fall outside the scope of antitrust law. For these reasons, we decline to take broader action and vote to accept the consent decree as currently formulated.

14 FTC & DOJ, Hart-Scott-Rodino Annual Report FY 2017, <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>.

15 See Fed. Trade Comm'n, *Hearings on Competition and Consumer Protection in the 21st Century*, <https://www.ftc.gov/policy/hearings-competition-consumer-protection>.

Concurring Statement

Statement of Commissioner Christine S. Wilson

Staff in this case conducted a thorough examination, sifted through the resulting evidence to identify legitimate antitrust concerns, and crafted a remedy to address them. I therefore support the action the Commission takes today. Given my dissenting colleagues' desire to abstract from the facts of this case to discuss vertical merger policy writ large, I write separately to express my views. To be clear, I base my vote upon the theories, evidence, and facts of this case, rather than upon any general view of what the Commission's vertical merger policy is or should be.

A. The Concerns Voiced About Vertical Mergers Are Part of a Broader Debate

It is fashionable today to argue that antitrust policy has long been too permissive. My two dissenting colleagues echo this claim,¹ citing left-leaning Washington think tanks and a few academics.² According to some proponents of this view, our alleged laxity in antitrust enforcement has led to historic levels of consolidation and concentration. This, in turn, is apparently the cause of all that ails us, from declining competitiveness to greater income inequality, stagnant wages, and reduced innovation.³

Yet there is scant evidence that markets are less competitive today than they were in some ill-defined golden age of yore. Commentators most often point to general upward trends in the number of mergers, their valuations, or the size of the largest businesses.⁴ While I do not

1 Dissenting Statement of Commissioner Rebecca Kelly Slaughter at 2 & n.6, Staples/Essendant, File No. 181-0180 (Jan. 28, 2019) ("I am particularly concerned that the current approach to vertical integration has led to substantial under-enforcement. . . . I am also concerned about under-enforcement of horizontal mergers."); Dissenting Statement of Commissioner Chopra at 2, Staples/Essendant, File No. 181-0180 (Jan. 28, 2019) ("I share the concerns raised by Commissioner Slaughter and agree that our approach can lead to lax enforcement.").

2 Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 1 ("Right now, a great debate is taking place in Washington policy circles and even around the country at family dinner tables. The debate concerns the consequences for American citizens of fewer and more dominant companies controlling large swaths of industries and firms across sectors of the economy."); *see id.* at 1 n.1 (collecting citations to work by the Roosevelt Institute, Open Markets Institute, and academics Grullon et al.).

3 *See, e.g.*, Senate Democrats, A Better Deal: Cracking Down on Corporate Monopolies, at 1 (2017) [hereinafter A Better Deal], <https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf> ("Over the past thirty years, growing corporate influence and consolidation has led to reductions in competition, choice for consumers, and bargaining power for workers. The extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors.").

4 *See, e.g.*, Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 2 (arguing vertical mergers "present an enforcement challenge that we must meet" because "companies announced mergers at record rates in 2018," "three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components," and "some observers believe that recent high-profile vertical mergers . . . will spark further vertical merger activity"); A Better Deal, *supra* note 3, at 1 ("Over the last thirty years, courts and permissive regulators have allowed large companies to get larger, resulting in higher prices and limited consumer choice in daily expenses such as travel, cable, and food and beverages.").

Concurring Statement

dispute the accuracy of these broad statistics, they simply do not support such a sweeping claim about the failure of American antitrust policy. What I would find persuasive, but have not seen, is evidence that firms' market power has increased significantly in relevant *antitrust* markets throughout the American economy and that this change has meaningfully harmed American consumers.⁵ My dissenting colleagues do not make this more probative claim, and for good reason; there is no such evidence today.

What we see instead are highly flawed analyses⁶ that have been roundly criticized.⁷ Perhaps the most common mistake assumes increased concentration, and consequently consumer harm, using *ad hoc* estimates of increased revenue shares in one industry or another.⁸ As any practitioner knows, broadly defined "industries" are rarely coterminous with relevant antitrust markets,⁹ which usually are defined around the demand substitutes available to customers. Nor are revenues always the best measure of competitive significance. Even if these industry revenue shares were calculated within a relevant antitrust market, and even if they contained all relevant competitors,¹⁰ courts routinely recognize that such shares are merely the first step in a much deeper market power analysis.¹¹ They therefore tell us nothing about whether merger

5 As in any case we bring, such an analysis typically requires one to define a relevant market, identify competitors, estimate each rival's competitive significance, evaluate entry, exit, repositioning, and other changes to these competitive dynamics, and estimate how consumer welfare is likely to change as a result of the proposed transaction.

6 See OPEN MARKETS INSTITUTE, AMERICA'S CONCENTRATION CRISIS (2019), *available at* <https://concentrationcrisis.openmarketsinstitute.org/>; JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015); COUNCIL OF ECONOMIC ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (updated May 2016), *available at* https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf.

7 See Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361 (2018); Joshua D. Wright, "Market Concentration," Note submitted to the Hearing on Market Concentration, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD (June 7, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf); Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST (forthcoming 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912 (critiquing the CEA analysis).

8 See, e.g., OPEN MARKETS INSTITUTE, *supra* note 6; Senate Democrats, A Better Deal, *supra* note 3, at 2-3.

9 For example, the Open Markets Institute estimates market shares for the \$525 billion "e-commerce" industry, which is hardly a relevant antitrust market. See OPEN MARKETS INSTITUTE, *supra* note 6, "E-Commerce."

10 Omitting or conflating competitors is a common defect in these data. For example, the recent Open Markets Institute analysis discloses in fine print that it omits all imports, which are significant for products such as washing machines. See *id.* ("Data does not include market share for foreign imports."). The same analysis also lumps all "Store Brand" (private label) peanut butter brands together, thereby treating products sold by many different competitors as if they were all under one roof. See *id.*, "Peanut Butter."

11 See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486, 494-98 (1974) (affirming the district court's dismissal of a merger challenge in which "[t]he Government sought to prove a violation of § 7 of the Clayton Act principally through statistics showing that within certain geographic markets the coal industry was concentrated among a small number of large producers; that this concentration was increasing; and that the acquisition of United Electric would materially enlarge the market share of the acquiring company and thereby contribute to the trend

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policy has allowed firms to amass the market power required to raise prices, restrict output, or reduce quality.

Despite the dearth of evidence that antitrust policy has failed to arrest the accumulation of market power,¹² many – including proponents of the so-called “Better Deal” – question essentially everything we have learned about sound antitrust enforcement. They ask: Should we continue to use the consumer welfare standard as our lodestar, or instead jettison it in favor of a more flexible (and amorphous) multifaceted analysis that examines a merger’s impact on wage levels, employment, suppliers, competitors, and any other goals the decision-maker cares to add? Should we continue to evaluate horizontal mergers under the current framework, which considers industry structure alongside entry, efficiencies, and several other competitive dynamics,¹³ or should we return to earlier rules that emphasized industry structure to the exclusion of any other relevant factors?¹⁴ Finally, and most pertinent for today’s discussion, should we assume that, in the words of Commissioner Slaughter, vertical mergers “can be just as

toward concentration” because “[i]n *Brown Shoe v. United States*, we cautioned that statistics concerning market share and concentration . . . were not conclusive indicators of anticompetitive effects” and finding that changes in a coal miner’s ability to compete in the future merit discounting its present market share); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) (explaining, in a Section 2 case, that “market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share”). These cases make clear that courts have rejected the old Structure-Conduct-Performance paradigm advanced by Joe Bain. *See generally* Herbert J. Hovenkamp, *The Neal Report and the Crisis in Antitrust*, at 4, *Univ. Iowa L. Stud. Res. Paper No. 09-09* (Mar. 5, 2009), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348707 (describing the fall of the S-C-P model into “the dung heap of defunct economic doctrines”).

12 Although there is today no evidence of a widespread failure of competition policy, there is ample evidence that vested interests abuse government regulation to carve out spaces safe from competition. Competitor-erected licensing requirements keep capable individuals from entering the vocations of their choice. Certificate of need requirements keep new hospitals from entering incumbents’ regions. Local government regulations restrict the ability of “gig economy” competitors, particularly ride-hailing services and short-term lodging rental firms, to compete against long-established franchises. Sectoral regulation, such as in banking, communication, and transportation, often favors large incumbents over nimble new competitors. Regulatory processes at the U.S. Food and Drug Administration – for example, Citizens’ Petitions – are abused by branded manufacturers to delay the entry of lower-cost generic competitors, sometimes for years. Government-imposed restraints are at least as deleterious to competition as those imposed by private entities, and in many instances are more durable.

13 *See* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* (issued Aug. 19, 2010), *available at* <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

14 *See, e.g.*, Open Markets Institute, *The Failure and Potential Redemption of Federal Merger Policy* at 2, Comments Submitted to the U.S. Federal Trade Commission, Hearings on Competition and Consumer Protection in the 21st Century, Comment #FTC-2018-0053-D-0021 (filed Aug. 20, 2018) [hereinafter Open Markets Institute FTC Comments] (“The agencies should look to the 1968 Merger Guidelines as a template. Accordingly, they should abandon the current rule of reason-like framework and establish market share and market concentration thresholds for horizontal and vertical mergers. Mergers that exceed these thresholds should be presumptively or per se illegal.”)

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pernicious in sapping our economy's vitality"¹⁵ and that "the current approach to vertical integration has led to substantial under-enforcement"?¹⁶

B. Procedural Concern

Before turning to the substance, my dissenting colleagues' eagerness to rethink vertical merger policy raises a procedural concern: It is folly to think that the Commission unilaterally can "fix" this perceived problem simply by being more aggressive. As the decision of the federal district court in the AT&T-Time Warner case makes clear,¹⁷ the antitrust agencies do not have the last word, and aggressive agency enforcement may well backfire by creating binding precedents that constrain future challenges to problematic deals.

C. Substantive Concerns

Recognizing both our limited authority to alter antitrust law and the fact that we as government enforcers bear the ultimate burden of proof before a neutral decision-maker (*i.e.*, a federal court), let us finally turn to the crux of the issue raised by my dissenting colleagues: What do we know about the likely competitive effects of vertical mergers?

We know that vertical mergers by definition combine firms that operate at different levels of production. Consequently, and unlike in a horizontal merger, a vertical merger does not alter concentration in any relevant market.¹⁸ Purely vertical mergers therefore do not implicate many of the key competitive dynamics – and particularly the elimination of current competition between the merging firms – at play in horizontal mergers.¹⁹ Indeed, even the scholar my colleague cites in support of her sweeping skepticism of existing vertical merger policy says that competitive harm is likely to occur only in a narrow set of circumstances.²⁰ Ultimately, we seek

15 Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 1.

16 *Id.* at 2.

17 United States v. AT&T, No. 17-2511, slip op. at 4 (D.D.C. June 12, 2018), *appeal docketed*, No. 18-5214 (D.C. Cir.)

18 For example, if a merger unites a firm with 30 percent of upstream market and a firm with 25 percent of the downstream market, immediately after close the combined firm would still control 30 percent of the upstream market and 25 percent of the downstream market. Its shares have not changed, nor have those of its competitors. By contrast, a horizontal merger combining firms with 25 and 30 percent of the *same* relevant antitrust market results in a combined firm with 55 percent and a marketplace with one fewer competitor.

19 See, e.g., D. Bruce Hoffman, Director, FTC Bureau of Competition, Vertical Merger Enforcement at the FTC: Remarks at the Credit Suisse 2018 Washington Perspectives Conference, at 2-3, Washington D.C., Jan. 10, 2018, available at https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf ("In contrast [to horizontal mergers], vertical mergers do not combine substitutes, and in fact often involve complements Where horizontal mergers reduce competition on their face . . . vertical mergers do not.").

20 See Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with other commentators that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset

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to determine not whether harm is theoretically possible, but whether – as required by Section 7 of the Clayton Act – such harm is likely to “substantially lessen competition, or to tend to create a monopoly” in a relevant antitrust market.²¹

On the other side of the ledger, we know that integrating operations at different levels of production often yields clear economic benefits.²² Perhaps the most commonly cited benefit in the economic literature is the elimination of double marginalization (EDM), which is simply to say that a firm has an economic incentive to reduce the total profit margin it charges customers when it operates at successive levels of production.²³ Some commentators view EDM as a phenomenon inherent in vertical mergers,²⁴ which may indicate that a lower burden of proof for at least some efficiencies claims would be appropriate in the vertical merger context.²⁵ That

potential competitive harms in many cases”); Steven C. Salop, Revising the Vertical Merger Guidelines: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century, at 8 (Nov. 1, 2018), available at https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf (“A stronger overarching procompetitive presumption for vertical mergers does not make sense *in oligopoly markets*.”); see also, e.g., James C. Cooper, Luke M. Froeb, Dan O’Brien, & Michael G. Vita, *Vertical Merger Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 641 (2005) (“The theory shows that vertical practices potentially can harm competition. This finding is fragile, however, as anticompetitive equilibria emerge only under specific – and difficult to verify – assumptions about (among other things) costs, demand, the nature of input contracts, conditions of entry, the slope of reaction functions, and the information available to firms.”).

21 15 U.S.C. § 18; *AT&T*, No. 17-2511, slip op. at 4 (holding the government failed to meet its burden under Section 7 “to establish that the proposed transaction is likely to lessen competition substantially”).

22 For the seminal work, see R.H. Coase, *The Nature of the Firm*, 4 *ECONOMETRICA* 386 (1937).

23 See, e.g., Francine Lafontaine, Vertical Mergers: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century, at 86 (Nov. 1, 2018), available at https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf (“Eliminating ‘double markups’”); Remarks of D. Bruce Hoffman, *supra* note 19, at 3 (“Due to the elimination of double-marginalization and the resulting downward pressure on prices, vertical mergers come with a more built-in likelihood of improving competition than horizontal mergers.”); Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, ANTITRUST, at 74, 75-76 (Fall 2007) (seeking to categorize the circumstances under which the net competitive effects of a vertical merger, including the elimination of double marginalization, “will benefit consumers” or “might be anticompetitive”).

24 Transcript at 19, 25, 116, 141, FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5 (consumer welfare and vertical merger policy), available at https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf (statements of Prof. Shapiro) (“[T]here are some inherent efficiencies – at least possible efficiencies including elimination of double marginalization. . . . So I think what is fundamentally different is that how do we handle the efficiencies in the vertical deals than horizontal, and we are hearing from panels about these inherent efficiencies, which economists would agree with, including me.”)

25 The FTC also held hearings on the appropriate welfare standard. See FTC, Hearings on Competition and Consumer Protection in the 21st Century, Hearings #1 & #5 (review of competition and consumer protection landscape, concentration and competitiveness in the U.S. economy, privacy regulation, consumer welfare standard in antitrust; consumer welfare and vertical merger policy), Sept. 13, 2018 & Nov. 1, 2018, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century>. This debate similarly could have implications for the analysis of both vertical and horizontal mergers. For example,

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said, our recent hearing on vertical mergers featured a lively debate on whether EDM arises in all vertical mergers.²⁶ Focusing solely upon the narrow circumstances under which anticompetitive effects are plausible,²⁷ economic theory suggests that the potential gains from EDM are likely significant.²⁸

Vertical mergers also generate other procompetitive benefits. For example, these mergers allow firms at successive levels to coordinate their production, design, or innovation activities, thereby reducing costs, increasing quality, and speeding the introduction of new products.²⁹ Vertical integration also incentivizes greater investment by harmonizing upstream and downstream incentives and by reducing transaction costs, “free-riding,” and the risk of hold-up.³⁰ Although my colleague is correct to note that vertical agreements short of a merger can confer similar procompetitive benefits,³¹ I have not seen any evidence – and she does not cite any – for the proposition that these contractual arrangements necessarily replicate the benefits of a full merger. To the contrary, economists have long known that there are many circumstances in which contractual arrangements may be inferior to mergers.³²

if total surplus (or aggregate economic welfare) is selected as the appropriate welfare standard, then it would be unnecessary to analyze whether and to what extent efficiencies may be passed through to consumers. *See, e.g.,* Roger D. Blair and D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 *FORDHAM L. REV.* 2497 (2013).

26 *See* FTC, Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5 (consumer welfare and vertical merger policy), Nov. 1, 2018, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century>.

27 Hearing #5 Transcript, *supra* note 27, at 19, 25, 116, 141, (statements of Prof. Salop and Msrs. Hoffman and Yde agreeing that, in Mr. Yde’s words, “we are only going to look at vertical transactions where we are confident that we are looking at an oligopoly at both stages”); Salop, *Revising the Vertical Merger Guidelines*, *supra* note 20, at 8 (arguing “[e]nforcement should be focused on oligopoly markets” because in these markets the risk of anticompetitive harm may be larger and the likelihood of procompetitive benefits may be smaller); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 *YALE L.J.* 1962, 1972 (2018) (“While vertical mergers in oligopoly markets should not be subject to near-per se illegality, they also are not entitled to near-per se legality.”); *see id.* at 1967 (“[F]oreclosure concerns cannot simply be dismissed in oligopoly markets.”); *id.* at 1969 (“[I]n oligopoly markets with multiple competitors, vertical mergers can harm competition from input or customer foreclosure, even without coordination.”).

28 Cooper, Froeb, O’Brien, & Vita, *supra* note 20, at 658 (“Most models that predict (potential) harm from vertical restraints require pre-existing market power at multiple stages of production. This condition usually implies the existence of efficiencies from vertical control, and the magnitude of the efficiency often rises monotonically with the level of pre-existing market power.”).

29 *See, e.g.,* Salop, *Revising the Vertical Merger Guidelines*, *supra* note 20, at 13.

30 *See, e.g.,* Lafontaine, *Vertical Mergers*, *supra* note 23, at 86.

31 *See* Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 4 (asserting “claimed [efficiency] benefits should not be taken at face value” because, among other things, “[t]he claimed benefits may not be merger-specific and instead may be achieved via unilateral conduct or contractual arrangements”).

32 *See, e.g.,* Paul L. Joskow, *Vertical Integration*, in *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* 321 (C. Menard & M. Shirley eds., 2008) (summarizing the literature on various forms of vertical integration, from

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We also know that economic models that attempt to predict the net competitive effect of a given vertical merger are often more art than science. Most models identify the possibility of both procompetitive and anticompetitive effects, and sometimes even their magnitude, but make no attempt to assign probabilities to any of them. Standing alone, these “highly stylized [and] largely game-theoretic models” do not provide clear guidance on how to separate the wheat from the chaff.³³ The economic evidence regarding completed transactions, however, indicates the typical vertical merger does not harm competition.³⁴

Given limitations in the models, and particularly in their ability to reliably predict anticompetitive harm, we must marry these theoretical models with hard evidence collected during the investigation. When the theory and facts both point to a potential diminution in competition, it may be appropriate to take remedial steps, as we have done here. When the model, the evidence, or both do not support this view, it is not appropriate to act.

D. When Crafting a Remedy, We Must Take Care Not to Impose a Cure Worse than the Disease

Even when we identify a vertical merger that presents meaningful antitrust problems, that is not the end of the analysis. As in any case, we must then choose a remedy that is narrowly tailored to address the likely competitive harms without doing collateral damage. This task is

contracting to merger, and explaining that “[c]ontractual incompleteness, and its interaction with the attributes of different types of transactional attributes including asset specificity, complexity, and uncertainty, plays a central role in the evaluation of the relative costs of governance through market-based bilateral contracts versus governance through internal organization”); Oliver E. Williamson, *The Theory of the Firm as Governance Structure: From Choice to Contract*, 16 J. ECON. PERSP. 171, 179-192 (2002) (describing the “make-versus-buy” decision, graphing the relative attractiveness of various options, and addressing its application to vertical integration); Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297 (1978) (identifying “the possibility of post-contractual opportunistic behavior” as one reason a firm may choose “an intrafirm rather than an interfirm transaction”).

33 Michael A. Salinger, *Vertical Mergers*, in I OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 551, 574 (Roger D. Blair & D. Daniel Sokol eds., 2015).

34 See, e.g., Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding “even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances”); Cooper, Froeb, O’Brien, & Vita, *supra* note 20, at 658 (“Most studies find evidence that vertical restraints/vertical integration are procompetitive” and “[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings.”); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission’s Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies “indicated vertical integration resulted in positive welfare changes” or “no change” in welfare); David Reiffen and Michael Vita, *Is There New Thinking on Vertical Mergers? A Comment*, 63 ANTITRUST L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with Reiffen and Vita that “efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases”).

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sometimes more difficult than it sounds; as I have written previously, misguided behavioral remedies – particularly in vertical mergers – have sometimes *decreased* competition and harmed consumers. For example, I have been deeply troubled by behavioral remedies imposed in previous vertical mergers that required “compulsory innovation,” the “compulsory FRAND licensing of a product that did not yet exist,” and “long-term bans on serving specific current clients.”³⁵

Given the risks of either undershooting or overshooting the mark, I support conducting targeted retrospectives to analyze prior enforcement decisions and determine whether, going forward, revisions to enforcement policy or remedies need to be undertaken. I have long advocated for a more extensive merger retrospectives program, as retrospectives serve as an important check on whether we are employing sound enforcement policies.³⁶ But I am wary of clearing mergers with remedies, after extensive investigations, while simultaneously threatening to undo those mergers later, which is precisely what Commissioner Slaughter hopes to do.³⁷ Absent certainty, a merged entity will be reluctant to make capital and other investments that may be lost if a subsequent merger challenge forces it to unwind the transaction. This uncertainty is bad for both businesses and their consumers. If applied on anything like the scale Commissioner Slaughter envisions, it also risks returning the Commission to its earlier role as the “national nanny” with an ongoing mandate to monitor prices, output, entry, and other marketplace developments throughout the economy.³⁸

35 Christine Wilson & Keith Klovers, *Yes We Can, But Should We? Merger Remedies During the First Obama Administration*, CPI ANTITRUST CHRONICLE 2 (Dec. 2014). As I explained there, I have substantially fewer qualms about long-standing and less invasive tools, such as the “firewalls, fair dealing, and transparency provisions” the Antitrust Division endorsed in the 2004 edition of its *Policy Guide*. U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 22-25 (June 2004), available at <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf>.

36 See “Dynamic Efficiencies in Merger Analysis,” Submission of the Business and Industry Advisory Committee, Presented by Christine S. Wilson to the OECD Competition Committee (June 6, 2007) at para. 58 (asserting that “it would be instructive for enforcement agencies to perform retrospective studies of merger enforcement decisions . . . to assess the efficacy of merger policy generally, and would be particularly useful in assessing the impact of dynamic efficiencies, given that benefits from such efficiencies may accrue over extended periods of time”).

37 Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 9-10 (“With the benefit of pre-commitment, hindsight, and ongoing monitoring, we may be able to refine and bolster confidence in our analysis and deter or prosecute future anticompetitive conduct by Staples. Ultimately, if there is sufficient evidence of actual anticompetitive effects as a result of the transaction, we can and should bring an enforcement action to break-up the merger.”).

38 See, e.g., Daniel A. Crane & Thibault Schrepel, *The Democrats’ ‘Better Deal’ Is Neither Better Nor a Deal*, N.Y.U. J. L. & BUS. 1, 4 (2017) (“Allowing the agencies to give conditional blessing to a merger and then hover over the merged company for years with the constant threat of divestiture would create a ‘national nanny’ culture in which the agencies became de facto regulators rather than competition enforcement agencies. The fear of post hoc divestiture orders would deter beneficial investments and tearing apart companies integrated for years would result in chaos and economic loss (for all of the reasons recognized by the D.C. Circuit in *Microsoft*). It’s a bad idea.”).

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Conclusion

For all of these reasons, I have grave concerns about my dissenting colleagues' enthusiasm for treating all vertical mergers with skepticism and conducting a fundamental reevaluation of our vertical merger policy. Policy should be dictated by applicable law and relevant facts. On that basis, there are very few vertical mergers that should be challenged. Two of my colleagues believe that this is one of those few vertical mergers that the Commission should challenge, based on nothing more than a hunch that Staples "may" or "might" be able to harm rivals by integrating vertically. I prefer to base my analysis on the evidence we have gathered and the law as it exists today, and therefore vote to accept the limited relief we order.

STATEMENT OF COMMISSIONER ROHIT CHOPRA**Summary**

- This transaction violates the law, and I am skeptical that this settlement is in the public interest. While Commission staff worked hard to explore key aspects of the transaction, I am concerned that the Commission is jumping to conclusions without further investigation into the buyer's plans, especially given the limitations of our economic models.
- Our investigation should have more closely analyzed how the buyer will flex its muscles with suppliers. The Commission seems too quick to assume this is an "efficiency" instead of a harm stemming from increased market power.
- In addition, the evidence points to potential harm to independent dealers, especially in geographic markets where Essendant is the market leader and where switching may be difficult.

Sycamore Partners, a private equity fund that controls office supply giant Staples, seeks to acquire Essendant (NASDAQ: ESND), the largest office products wholesale distributor in the U.S and supplier to thousands of independent dealers. The merger combines two powerhouses, each the largest competitor within their respective level of office supply distribution. The market for nationwide wholesale distribution of office supplies is particularly concentrated, where Essendant is one of only two U.S. wholesalers supplying a wide assortment of office products nationwide.

At first glance, the transaction is a vertical merger, but it also raises important horizontal concerns. I believe the Commission is relying on an insufficiently developed record that underestimates the likely anticompetitive harms on both of these fronts. I share the concerns raised by Commissioner Slaughter and agree that our approach can lead to lax enforcement.

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Sycamore reportedly announced that it would put a “firewall” into place – regardless of whether or not the FTC required one¹ – to prevent Staples from exploiting sensitive dealer data from Essendant. The Commission has voted to put Sycamore’s promise on paper, rather than seek additional measures to address anticompetitive harms or block the transaction altogether.

Horizontal Concerns

Both Staples and Essendant source office supply products from a wide range of upstream trading partners, including small and large manufacturers alike. Proponents of the merger will claim that this will create “efficiencies” in the form of increased buyer power that reduces prices paid to suppliers. But is this an efficiency or a harm?

To start, efficiencies are far from a sure-fire defense to an anticompetitive merger.² Increased buyer power exerted by the combined firm against its upstream trading partners in this matter would not be an efficiency at all if it stems from an increase in market power on the buy side of the market.³ Sycamore’s expanded empire potentially allows it to squeeze its suppliers, in effect transferring income from those suppliers to the merged firm, with little or no resource savings.⁴ In my view, the Commission’s analysis did not adequately rule out the possibility of this type of harm from the merger.⁵

My colleagues voting for this settlement claim that the potential for this type of harm was ruled out after a thorough analysis and investigation. I disagree. If an independent fact-finder or a Court reviewed the same evidence, I think they would disagree too and find that there are many unanswered questions.

1 See Andy Braithwaite, *Dealer Organisations Unite for FTC Letter*, OPI, Oct. 1, 2018, <https://www.opi.net/news/dealer-organisations-unite-for-ftc-letter/>.

2 See Federal Trade Commission et al. v. Penn State Hershey Medical Center et al., 838 F.3d 327, 347 (3rd Cir. 2016), where Judge Michael Fisher, in a unanimous reversal siding with the Commission, noted that the Court has never formally adopted the efficiencies defense, and the Supreme Court has “. . . cast doubt on its availability.” Judge Fisher added that “. . . we are skeptical that such an efficiencies defense even exists.” *Id.* at 348.

3 U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines, § 12 (2010) [hereinafter Horizontal Merger Guidelines], <http://www.ftc.gov/os/2010/08/100819hmg.pdf>. See also C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 *YALE LAW JOURNAL* 2078 (2018); Jonathan Sallet, *Buyer Power in Recent Merger Reviews*, *ANTITRUST*, Vol. 32, No. 1, at 82 (Fall 2017).

4 The Department of Justice’s lawsuit challenging the proposed merger of Anthem and Cigna alleged that the increased buyer power of the combined firm would give Anthem enhanced leverage over physician practices and hospitals, likely reducing the rates that both types of providers earn. Although the complaint predicted likely reductions in output from hospitals and physicians, the Department of Justice argued that the court did not need to make such a finding. See Complaint at 27 and Plaintiff’s Supplemental Memorandum on the Buy-Side Case, at 2 [hereinafter Department of Justice Buy-Side Memo], *United States v. Anthem, Inc.*, No. 16-1493 (ABJ) (D.D.C. 2017).

5 I am also concerned that Sycamore might use its increased buyer power to extract favorable non-price terms from suppliers to give itself preferential treatment over its rivals, further hampering vigorous competition. See Hemphill & Rose, *supra* note 3, at 2103-2104.

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Manufacturers with market power and must-have brands may very well be able to protect themselves from an anticompetitive exercise of buyer power by the merged firm, but this is an area where we needed further analysis and investigation to reach a conclusion about potential monopsony power over a broad range of suppliers. Even if the wealth transfer from suppliers to Sycamore will translate into some cost savings for end-user purchasers, this is not necessarily an adequate legal justification.

Six months ago, this Commission ordered divestitures of blood plasma collection centers in the Grifols-Biotest merger, since the combined entity would be able to use its increased bargaining leverage to lower payments to suppliers of blood plasma.⁶ The Commission rightfully did not seek to determine whether the reduced supply costs would be passed through to final consumers, since the reduction was caused by the merged firm's increased market power.⁷

Here, it is possible there will be some legitimate resource savings that are not merely the result of increased market power on the buy side of the market, such as supply chain improvements. However, it is unclear whether these are substantial or even merger-specific. Moreover, while benefits to downstream consumers might be weighed against harm to suppliers as a matter of prosecutorial discretion, it is not a bulletproof defense as a matter of law.⁸

Vertical Concerns

The record evidence and the buyer's track record suggest that Sycamore will have a strong incentive to rapidly increase margins to make a clear case to a potential future acquirer.⁹ Absent this transaction, Essendant cannot easily raise prices or reduce service to its dealers, because Essendant would lose sales, either because dealers would switch to another wholesaler, such as S.P. Richards, or because the dealers would pass on price increases to their B2B customers, some of whom would then switch to competing dealers, including Staples. After this transaction, however, Sycamore would capture revenue from B2B customers that switch to

6 *In the Matter of Grifols, S.A., and Grifols Shared Services North America, Inc.*, C-4654, Sept. 18, 2018, <https://www.ftc.gov/news-events/press-releases/2018/09/ftc-approves-final-order-requiring-grifols-sa-divest-assets>.

7 This competitive harm is within the purview of the Clayton Act and is well recognized in the 2010 Horizontal Merger Guidelines. Horizontal Merger Guidelines, *supra* note 3, at § 12 ("Example 24: Merging Firms A and B are the only two buyers in the relevant geographic market for an agricultural product. Their merger will enhance buyer power and depress the price paid to farmers for this product, causing a transfer of wealth from farmers to the merged firm and inefficiently reducing supply. These effects can arise even if the merger will not lead to any increase in the price charged by the merged firm for its output."). See Sallet, *supra* note 3, at 84. See also Judge Millett's opinion in *United States v. Anthem, Inc.*: "[I]ncreased bargaining power is not a procompetitive efficiency when doing so 'simply transfers income from supplier to purchaser without any resource savings.'" *United States v. Anthem, Inc.*, 855 F.3d 345, 371(D.C. Cir. 2017).

8 Case law supports the assertion that harm in one market cannot be offset by benefits in another. *United States v. Philadelphia National Bank*, 374 U.S. 321, 370-71 (1963); Department of Justice Buy-Side Memo, *supra* note 4, at 10 (citing *Philadelphia National Bank* for this conclusion).

9 Private equity firms generally take controlling equity stakes in firms with the hope of realizing significant gains through sale to a buyer or an exit through public markets.

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Staples in reaction to a price increase or reductions in customer service from Essendant. This strategy seems even more likely given Sycamore's actions to date since taking ownership of Staples.

The evidence in the record points to regional differences across markets in the country. The risk of steering to Staples will be particularly high in geographic markets where Essendant is the market leader.¹⁰ Regional managers incentivized on sales and operating margin targets will be particularly susceptible to this type of conduct. This is not nefarious – this is just obvious.

The Commission has put great faith in its interpretation of the economic evidence to justify its conclusion. However, Commissioner Wilson rightfully notes in her statement that economic models are often more art than science. We must be humble about their predictive power, and this matter is a perfect illustration. The Commission's economic model predicts competitive harm, but largely ignored regional differences. I agree with Commission Slaughter that our prediction likely *underestimates* the harmful effects. How can the majority confidently reach an accurate conclusion on the vertical effects of this transaction without a closer look at specific geographic markets where effective switching would be particularly difficult?

I am also less confident than the majority that Essendant-supplied dealers can easily switch to S.P. Richards to discipline any attempt by Sycamore to disadvantage Staples's rivals. Record evidence indicates that some dealers have high switching costs. In addition, the majority's conclusion that Staples is a poor substitute for Essendant-backed dealers seems to assume that the industry will operate as it has in the past, despite being known for rapid changes. If anything, there will be even greater change.

Buyer Incentives

The Commission's decision to wave through this transaction with few strings attached rests on an incomplete picture of the competitive landscape over the long term, since we did not conduct rigorous analysis on what the buyer plans to do post-purchase.

Section 7 of the Clayton Act is a forward-looking statute, requiring enforcers to make certain predictions about how a transaction might change competitive dynamics in a market. We are much wiser when we consider the buyer's plans and track record. This will also help us determine how other market participants will respond so we can analyze the impact on competition. For example, an investigation might uncover that a buyer who is a dominant player is purchasing a company that poses a threat to their dominance to shut off potential competition. This is just one example of many where a buyer's plans have a major impact on competition.

In this matter, the buyer, Sycamore, is a well-known private equity fund specializing in retail and consumer investments. While some investment firms have strategies to invest substantial capital to grow and nurture a business, other investment firms might not have a

10 While I was open to counterarguments that existing competitors could constrain these price increases, there was not conclusive evidence that allayed concerns about anticompetitive effects in regions where Essendant is the market leader.

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strategy that is aligned with vigorous competition. Sycamore's investment approach and track record suggest that the fund will operate assets much differently than a typical buyer, in ways that lead to higher margins, without any guarantee of greater output and service offerings.¹¹ This is not the first time Sycamore Partners has come before the FTC. In 2015, the agency approved the fund as a divestiture buyer in the dollar store market. But Sycamore quickly resold the assets.¹² The majority seems to believe we should wear blindfolds when it comes to this type of buyer evidence.

At a minimum, our failure to consider Sycamore's incentives gives me less confidence in our ability to accurately predict the likely competitive outcome of this transaction using our traditional merger analysis tools.¹³ In addition, Sycamore and Staples have been buying up a range of companies in the supply chain, and this transaction will likely force the hand of its competitors to consolidate more quickly, leading to greater reductions in competition over the long term. Going forward, I hope the Commission can conduct in-depth analysis on buyer incentives and long-term market impact to inform how we can best exercise our prosecutorial discretion.

Abuse of Data

The Commission is codifying a firewall reportedly promised by Sycamore (regardless of any action on the Commission's part), overseen by a monitor, to prevent Sycamore from exploiting commercially-sensitive data. Essendant's business model gives it access to detailed data about the purchase history and usage for its dealers and their customers. Many B2B suppliers in the U.S., like Essendant, collect sensitive financial data in order to set sales terms. Dealers are rightfully concerned this data will be weaponized against them. In addition, if Staples can get its hands on how much end-users are currently paying through an existing dealer, it might bid *less* aggressively for their business.

While the firewall will reduce the chance of misuse of data, it does not eliminate it. Given the hundreds of customers and resellers of Essendant, it may be difficult to police the firewall, especially with oral communications. We could have sought the return of detailed data to customers, who would be free to continue to keep their data with Essendant, but only if they chose to. If this data was portable, this could even reduce switching costs and foster competition,

11 See Khadeeja Safdar & Miriam Gottfried, *How One Investor Made a Fortune Picking Over the Retail Apocalypse*, Wall Street Journal, Mar. 21, 2018, <https://www.wsj.com/articles/how-one-investor-made-a-fortune-picking-over-the-retail-apocalypse-1521643491>.

12 See Commission letter approving application filed by Sycamore Partners II, L.P. to permit Dollar Express to sell and assign stores and leases to Dollar General Corporation, *In the Matter of Dollar Tree, Inc., and Family Dollar Stores, Inc.*, C-4530, April 27, 2017, <https://www.ftc.gov/news-events/press-releases/2017/04/ftc-approves-sycamore-partners-ii-lp-application-sell-323-family>.

13 Commissioner Slaughter's statement argues for more retrospective analysis of consummated mergers. I agree, and it will be especially important to pursue these lookbacks when we have not carefully considered buyer-specific incentives.

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since prospective wholesalers could use the data to ensure proper service and customized offerings.

Conclusion

I agree with the Commission's complaint that this transaction violates the Federal Trade Commission Act and the Clayton Act. The Commission's proposed remedy takes steps to safeguard against some of the potential anticompetitive conduct stemming from the vertical aspects of this transaction. But, based on my review of the evidence, there are unresolved issues regarding other aspects of competition that may be harmed from this transaction. I am skeptical that this proposed settlement is in the public interest.

My colleagues voting in favor of this settlement acknowledge that it is critical for the Commission's actions to be based on facts and sound analysis. But in this matter, the Commission is simply jumping to conclusions.

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STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

Right now, a great debate is taking place in Washington policy circles and even around the country at family dinner tables. The debate concerns the consequences for American citizens of fewer and more dominant companies controlling large swaths of industries and firms across sectors of the economy.¹ While mergers between direct competitors contribute to this phenomenon and raise competitive concerns, vertical mergers that integrate trading partners can be just as pernicious in sapping our economy's vitality.

By its proposed acquisition of Essendant, Inc. ("Essendant"), Sycamore Partners, the parent company of Staples, Inc. ("Staples"), would acquire the country's largest, and one of only two, nationwide office product wholesale distributors. Today, the Commission voted to accept a proposed consent agreement placing certain conditions on the Staples-Essendant merger. While I appreciate that the Commission chose to impose conditions rather than clearing the transaction outright, I disagree with the Commission's decision because I believe that staff identified significant evidence of likely harm, and I do not believe that the parties have provided evidence showing that the merger's likely harm is offset by cognizable procompetitive benefits. I also agree with many of the points raised by Commissioner Chopra in his dissent; he has done a thorough job outlining the horizontal elements of this transaction and articulating important points for the Commission's consideration.

I write separately to highlight some observations regarding vertical merger enforcement generally, to explain my dissent, and to urge the Commission to commit to a retrospective investigation of the merger that will facilitate the Commission's ability to take any necessary enforcement action, including against any anticompetitive conduct by the post-merger firm.

Observations Regarding Vertical Merger Enforcement

Notwithstanding the majority's apparent view that the resolution of a vertical merger investigation is an inappropriate occasion for a discussion of vertical merger enforcement generally, I would like to make some broad observations about vertical mergers and share my views on how the Commission should approach them before addressing the specific merits of the Staples-Essendant merger.

Vertical tie-ups are occurring across the economy, and they present an enforcement challenge that we must meet. According to Thomson Reuters, companies announced mergers at

¹ See, e.g., Adil Abdela & Marshall Steinbaum, *The United States Has a Market Concentration Problem*, (Sept. 11, 2018), <http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-United-States-has-a-market-concentration-problem-brief-final.pdf>; Open Markets Institute, *AMERICA'S CONCENTRATION CRISIS* (Nov. 29, 2018), <https://concentrationcrisis.openmarketsinstitute.org/>; Gustavo Grullon, Yelena Larkin, & Roni Michaely, "Are U.S. Industries Becoming More Concentrated?" (last revised Oct. 27, 2018), <https://ssrn.com/abstract=2612047> (concluding that, "[i]n the last two decades, over 75% of U.S. industries have experienced an increase in concentration levels" and that concentrated industries have higher profit margins without increased operational efficiency).

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record rates in 2018,² and three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components.³ Moreover, some observers believe that recent high-profile vertical mergers, including the potential clearance of the AT&T-Time Warner merger by the courts, will spark further vertical merger activity.⁴

Given the enormous impact these mergers will have on the economy, markets, and consumers, the Commission should carefully examine all mergers, including vertical mergers, with a forward-looking perspective. As the Supreme Court explained, Section 7 of the Clayton Act enables the Commission to prevent anticompetitive mergers in their incipiency without having to wait until the merger's anticompetitive effects come to fruition.⁵ I am particularly concerned that the current approach to vertical integration has led to substantial under-enforcement.⁶

2 See Thomson Reuters, *Mergers & Acquisitions Review, First Nine Months of 2018*, at 1–2, 5 (2018).

3 See *id.*; Thomson Reuters, *Mergers & Acquisitions Review, Full Year 2017*, at 3, 6 (2017); Thomson Reuters, *Mergers & Acquisitions Review, Full Year 2016*, at 2, 6 (2016); U.S. Dep't of Justice Press Release, "Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner." (Nov. 20, 2017) (discussing harm from vertical merger); U.S. Dep't of Justice Press Release, "Statement of the Department of Justice Antitrust Division on the Closing of its Investigation of the Cigna-Express Scripts Merger." (Sept. 17, 2018) (discussing vertical merger analysis); U.S. Dep't of Justice Press Release, "Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger." (Oct. 10, 2018) (citing vertical integration); see also U.S. Dep't of Justice Press Release, "Lam Research Corp. and KLA-Tencor Corp.

Abandon Merger Plans." (Oct. 5, 2016) (discussing potential harm from abandoned vertical merger); European Commission Press Release, "Commission Approves Acquisition of Rockwell Collins by UTC, Subject to Conditions." (May 4, 2018) (citing vertical component).

4 Tony Romm & Brian Fung, *AT&T- Time Warner Merger Approved, Setting the Stage for More Consolidation Across Corporate America*, WASH. POST, (June 12, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/06/12/att-time-warner-decision/>; Cecelia Kang, Brooks Barnes, & Michael J. de la Merced, *AT&T-Time Warner Ruling has Deal Makers Bracing*, N.Y. TIMES, (June 10, 2018), <https://www.nytimes.com/2018/06/10/technology/att-time-warner-ruling.html>.

5 See *Brown Shoe Co. v. United States*, 370 U.S. 294, 317–18 (1962) ("[I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum."); *Phila. Nat'l Bank v. United States*, 374 U.S. 321, 362 (1963) (Section 7 "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future").

6 I am also concerned about under-enforcement of horizontal mergers, but for the purposes of this case I am confining my comments to vertical merger analysis. Cf. Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENFORCEMENT 1, 3–5 (2016) (documenting a decline in the number of vertical merger enforcement actions by presidential administration after the period between 1994 and 2000, but also noting that the level of enforcement is impracticable to judge absent further information); Steven C. Salop & Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994–July 2018* (Georgetown Univ. Law Ctr., Aug. 23, 2018) (showing that, in the period

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Concerns about vertical mergers are not new.⁷ We know that vertical mergers, particularly those involving highly concentrated markets, can pose a variety of significant threats to competition.⁸ Indeed, agency investigations have identified a range of competition concerns,⁹ including limiting access to or raising the costs of key inputs,¹⁰ restricting access to an important customer,¹¹ inhibiting entry by new competitors,¹² evading regulations,¹³ facilitating coordination,¹⁴ or, as the Commission also alleged in this case, allowing anticompetitive information sharing.¹⁵ But, among the enforcement actions that the Commission brings, many

between 2001 and 2018, the number of vertical merger enforcement actions remain lower than the six-year period between 1994 and 2000).

7 Some have argued that vertical mergers are rarely, if ever, anticompetitive and in fact are almost always procompetitive. See Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, 225–45 (1978); Richard A. Posner, *Antitrust Law*, 223–29 (2d ed. 2001). However, more recent economic literature provides good cause to be skeptical about this perspective. For a summary of Post-Chicago School thinking on vertical mergers, see Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L. J. 1662, 1666 n.17 (2018) (identifying papers). The 1984 Merger Guidelines, which offer agency guidance on non-horizontal mergers, took a particularly narrow view of harm from vertical integration, and have recently been criticized as inconsistent with contemporary analysis and ripe for revision. Compare U.S. Dep’t of Justice, 1984 Merger Guidelines (1984), <http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf> with Fed. Trade Comm’n, Hr’g No. 5: Competition and Consumer Protection in the 21st Century, Tr. 57:3-15, 68:9-11 (Nov. 1, 2018) (Prof. Shapiro stating that the 1984 Merger Guidelines are not consistent with contemporary vertical merger analysis, noting the “complete shift” in agency thinking on unilateral effects, and calling for revised guidelines); but see Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, ANTITRUST, 74–82 (Fall 2007).

8 Such threats can also be heightened in nascent or rapidly evolving markets, markets with significant barriers to entry, or markets that may benefit from potential entry.

9 See D. Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, 4–7 (Jan. 10, 2018) (summarizing recent vertical merger enforcement actions), <https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc>; Steven C. Salop & Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994–July 2018* (Georgetown Univ. Law Ctr., Aug. 23, 2018).

10 See *In re The Boeing Company*, Dkt. C-4188 (compl. filed Oct. 3, 2006), <https://www.ftc.gov/sites/default/files/documents/cases/2006/10/0510165complaint.pdf>.

11 See U.S. Dep’t of Justice Press Release, “AMC Required to Divest Movie Theatres, Reduce NCM Ownership and Complete Screen Transfers in Order to Complete Acquisition of Carmike Cinemas.” (Dec. 20, 2016), <https://www.justice.gov/opa/pr/amc-required-divest-movie-theatres-reduce-ncm-ownership-and-complete-screen-transfers-order>.

12 See Fed. Trade Comm’n Press Release, “FTC Seeks to Block Cytyc Corp.’s Acquisition of Digene Corp.” (June 24, 2002).

13 See *In re Fresenius Medical Care AG & Co. KGaA*, Dkt. C-4236 (compl. filed Oct. 21, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/10/081021freseniuscmpt.pdf>.

14 See *United States v. Premdor, Inc.* (compl. filed Aug. 3, 2001), <https://www.justice.gov/atr/case-document/complaint-184>.

15 See *In re PepsiCo, Inc.*, Dkt. C-4301 (compl. filed Feb. 26, 2010), <https://www.ftc.gov/sites/default/files/documents/cases/2010/02/100226pepsicocmpt.pdf>; *In re The Coca-Cola Company*, Dkt. C-4305 (compl. filed Sept. 27, 2010), <https://www.ftc.gov/sites/default/files/documents/cases/2010/09/100927cocacolacmpt.pdf>; *In re*

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are settled with behavioral remedies rather than divestitures, and few of our enforcement actions challenge vertical mergers outright.¹⁶

I understand that predicting the net effects of vertical mergers can be difficult, but I am worried about the reliability and permissiveness of the conclusions we draw from the evidence gathered and analysis conducted by staff. I am concerned that we end up allowing vertical mergers that are anticompetitive in an effort to avoid challenges to procompetitive mergers.

In particular, I am concerned that our conclusions depend on unreliable assumptions and predictions about how a vertically integrated firm will conduct itself and are too credulous about claimed procompetitive benefits unique to vertical integration.¹⁷ The Commission should always thoroughly investigate all potential theories of harm in vertical mergers. Where the Commission identifies competitive concerns, it should be more willing to challenge and seek to block vertical mergers.

Where the Commission finds evidence that a vertical merger is likely to enhance a firm's incentive and ability to engage in anticompetitive conduct, the parties must demonstrate that claimed efficiencies are verifiable, merger-specific, do not arise from anticompetitive reductions in output or service, are not mitigated by any costs necessary to achieve the efficiencies, and fully offset the anticompetitive harm.¹⁸ If these requirements are not met, then the Commission should challenge the merger.

Merging parties will almost always cite benefits of vertical integration, including enhancing product quality, reducing costs, or streamlining operations.¹⁹ But such claimed benefits often go unsubstantiated. The claimed benefits may not be merger-specific and instead may be achieved via unilateral conduct or contractual arrangements. Even where they are merger-specific, the claimed benefits may be mitigated or eliminated by opportunity costs.²⁰ To the extent that our enforcement decisions rely on claimed efficiency benefits of a transaction,

Broadcom Limited, Dkt. C-4622 (compl. filed July 3, 2017), https://www.ftc.gov/system/files/documents/cases/1710027_broadcom_brocade_complaint.pdf.

¹⁶ See Salop & Culley, *supra* note 9.

¹⁷ Professor Salop articulated a similar concern in his recent article on vertical merger enforcement, criticizing an enforcement framework that “presum[es] that efficiency benefits are highly likely while competitive harms are unlikely or speculative.” Salop, *supra* note 7, at 1963.

¹⁸ In addition, I share Commissioner Chopra's concern that merger effects that are claimed as “efficiencies” may in fact be harms that cannot be credited as procompetitive benefits.

¹⁹ See Steven C. Salop & Daniel P. Culley, *Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners*, GEORGETOWN LAW FACULTY PUBLICATIONS AND OTHER WORKS. 1392 at 5, 32–37 (2014), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2404&context=facpub>.

²⁰ See Salop, *supra* note 7, at 1970–71 n.37 (citing William P. Rogerson, “A Vertical Merger in the Video Programming and Distribution Industry: Comcast-NBCU” (2011), in *The Antitrust Revolution: Economics, Competition, and Policy*, 534 (John E. Kwoka, Jr. & Lawrence J. White eds., 6th ed. 2014)).

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those claimed benefits should not be taken at face value; any investigation should include a requirement that the parties substantiate the magnitude and merger-specificity of the claimed benefits in the same way the Commission endeavors to substantiate theories of harm.²¹ In other words, have the parties met their burden of providing adequate evidence to show that the claimed benefits are verifiable, merger-specific, and sufficiently large to give the Commission enough comfort that the merger indeed will not be, on balance, anticompetitive?

In practice, the likely anticompetitive effects of some vertical mergers may be difficult to predict reliably enough at the time of the transaction to mount a successful challenge. This uncertainty does not excuse the Commission from its obligation to utilize all of our authority to ensure that parties never abuse their position.²² As noted above, the Commission's authority under Section 7 is forward-looking, and we are charged with preventing the exercise or attainment of market power, not merely correcting its abuse. It is particularly important that enforcers are mindful of this point when evaluating mergers between vertical partners in a supply chain; it may be more difficult to predict whether vertical mergers will be anticompetitive, procompetitive, or competitively neutral, but such difficulty does not alter our fundamental obligation to preempt illegal vertical integration.

When faced with a close case—a vertical merger that raises meaningful competitive concerns, but where we have not identified sufficient evidence to justify a court challenge,²³ or where we obtained a limited consent decree—the Commission would do well to adopt a general practice of planned retrospective investigations that could inform subsequent enforcement decisions, including a decision to challenge the consummated merger if necessary.²⁴ While the

21 Cf. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) [Hereinafter "Horizontal Merger Guidelines"] ("Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."); Steven C. Salop, *The AT&T/Time Warner Merger: How Judge Leon Garbled Professor Nash*, 6 J. OF ANTITRUST ENFORCEMENT 459, 467–68 (2018).

22 Some have proposed additional legislative authority that would shift the burden of proof to the parties to certain mergers to show that their transaction is unlikely to substantially lessen competition. For example, Senator Amy Klobuchar proposed legislation that would shift the burden of proof to parties to certain large vertical mergers (in excess of \$5 billion) or certain vertical mergers involving very large firms (with assets, net annual sales, or market capitalization exceeding \$100 billion). See Consolidation Prevention and Competition Promotion Act of 2017, S.1812, 115th Cong. (2017) [Hereinafter "CPCPA"].

23 See 15 U.S.C. § 21(b); 15 U.S.C. § 45(b).

24 The idea of routinely conducting retrospectives of close-call vertical mergers has been suggested by others, including Professor Tim Wu and former Commission Chairman Robert Pitofsky. See Tim Wu (@superwuster), Twitter (Nov. 26, 2018, 9:33 AM) <https://twitter.com/superwuster/status/1067109078214864896> ("Re-reading [the] AT&T - Time Warner opinion I am struck by sense that in hard vertical cases, retroactive merger review might be the way to go. Indeed the US might even announce that the merger will be watched."); Robert Pitofsky, "Subsequent Review: A Slightly Different Approach to Antitrust Enforcement." (Aug. 7, 1995) (Suggesting that, in close cases, the Commission "put[] the parties on notice that at some future time—two, three or four years down the road—it

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anticompetitive effects of consummated mergers are more difficult to remedy and involve significant interim competitive harms from delayed enforcement, the ability to bring such challenges is an important enforcement backstop.²⁵

In such close cases, the Commission should commit publicly, at the time the investigation concludes, to a follow-up retrospective investigation a few years after the merger is consummated and should require the parties to provide whatever data might be necessary to complete it.²⁶ To the extent necessary, the Commission should also request and obtain information from relevant third parties. This retrospective should compare the reality of the post-merger market with the predictions the Commission made at the time of the transaction about whether anticompetitive harms and benefits would be realized.

Where the Commission's predictions were incorrect and there is sufficient evidence of anticompetitive effects as a result of the transaction, this retrospective investigation would allow the Commission to challenge the consummated merger or any anticompetitive behavior by the merged entity. Knowing that the Commission will conduct such a follow-up study also could disincentivize the parties from making over-reaching claims during the investigation and incentivize them to behave in a more procompetitive manner after the merger is consummated.²⁷ Furthermore, if the Commission finds that the parties had materially misrepresented the likely effects or benefits of the merger, it can take appropriate action.²⁸

intends to revisit the market segment and the transaction to see if the transaction and others like it led to anticompetitive effects.”), <https://www.ftc.gov/public-statements/1995/08/subsequent-review-slightly-different-approach-antitrust-enforcement>.

25 See, e.g., *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 2018 WL 4855459 (Oct. 5, 2018) (order requiring divestiture in private consummated merger enforcement action).

26 The Commission could seek and obtain such information from merging parties, and other firms, pursuant to Section 6 of the Federal Trade Commission Act. See 15 U.S.C. § 46.

27 See Pitofsky, *supra* note 24 (“First, parties claiming efficiencies or brushing off the possibility of anticompetitive practices may be induced in the years following the merger to pursue more aggressively the efficiencies or avoid more carefully anticompetitive effects. Second, lawyers, economists and others defending transactions may be a little more cautious in submitting extravagant claims if they know they will be called to account at a later date.”).

28 Cf. Fed. Trade Comm’n Press Release, “Hearst Corp. to Disgorge \$19 Million and Divest Business to Facts and Comparisons to Settle FTC Complaint.” (Dec. 14, 2001) (disgorgement and divestiture obtained for illegally withholding materials required for Hart-Scott-Rodino notification and consummating anticompetitive merger); U.S. Dep’t of Justice Press Release, “Bristol-Myers Squibb Pleads Guilty to Lying to the Federal Government About Deal Involving Blood-Thinning Drug.” (May 30, 2007) (guilty plea obtained and fine levied for two violations of the False Statements Act in connection with a Commission conduct matter); see also European Commission Press Release, “Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover.” (May 18, 2017) (fine levied for providing incorrect or misleading information during merger investigation). To be sure, parties must refrain from making material misrepresentations in connection with any government proceeding, not merely vertical merger investigations. I emphasize this requirement here to underscore the importance of truthful and correct representations by parties as part of our forward-looking merger review. The spirit of this prohibition should deter not only explicit misrepresentations but also pre-merger claims or pre-commitments that are generally inconsistent with post-merger conduct. Cf. Kenneth Li, *AT&T’s WarnerMedia Accuses DOJ with ‘Collaborating’ with Dish in HBO Dispute*, REUTERS (Nov. 1, 2018),

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At a minimum, these retrospective investigations could allow the Commission to analyze whether its predictions about market behavior were accurate and to improve its analysis going forward. As the majority concedes, such retrospectives can have significant value. Chairman Simons has spoken frequently about the importance of the Commission's "tradition of self-critical examination,"²⁹ and routine study of the accuracy of our analysis can play an important role in that tradition.³⁰ The Commission has already identified one recent merger as a potential subject of a retrospective investigation, including on the effects of efficiencies.³¹ Similarly, Bureau of Economics Director Bruce Kobayashi has urged stakeholders to identify vertical mergers that merit retrospective investigation.³² I applaud and join these calls for retrospective review generally, and I emphasize their importance as part of our vertical merger enforcement program.

I acknowledge that these retrospective investigations will require significant resources, and I share the majority's concerns about how best to allocate our existing resources. I do not believe that a program of retrospective investigations in close cases would require unlimited resources, however, because these instances should arise relatively infrequently.³³ I understand that reasonable Commissioners can disagree on what constitutes a close case—this case appears to be one such example—but I would nevertheless propose that the Commission determine whether a retrospective is appropriate based on the evidence presented in a given case. In any event, as with other areas of enforcement, I believe that bolstering our program of retrospective merger reviews is a compelling reason for Congress to devote additional resources to the

<https://www.reuters.com/article/us-media-att-dish/atts-warnermedia-accuses-doj-with-collaborating-with-dish-in-hbo-dispute-idUSKCN1N667O> (Department of Justice criticizing WarnerMedia blackout of HBO on Dish network following AT&T proposed commitment to refrain from blackouts on Turner networks following a merger with Time Warner).

29 See Prepared Remarks of Chairman Joseph Simons, at 3, Hearing on Oversight of the Federal Trade Commission, Before the Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security, United States Senate, (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423967/js_oral_remarks_hearing_on_oversight_of_the_federal_trade_commission.pdf; see also Prepared Remarks of Chairman Joseph Simons Announcing the Competition and Consumer Protection Hearings, at 3 (Jun. 20, 2018), https://www.ftc.gov/system/files/documents/public_statements/1385308/prepared_remarks_of_joe_simons_announcing_the_hearings_6-20-18_0.pdf.

30 Retrospective analysis has also received additional legislative support. Senator Amy Klobuchar's bill promised to expand Commission authority to obtain information relevant to retrospective analysis of merger consent decrees. See CPCA, *supra* note 22.

31 Statement of the Commission, Concerning the Proposed Affiliation of CareGroup, Inc.; Lahey Health System, Inc.; Seacoast Regional Health System, Inc.; BIDCO Hospital LLC; and BIDCO Physician LLC (Nov. 29, 2018).

32 Fed. Trade Comm'n, Hr'g No. 5: Competition and Consumer Protection in the 21st Century, Tr. 86:2-15 (Nov. 1, 2018).

33 Cf. Pitofsky, *supra* note 24 ("Circumstances that justify 'subsequent review' or 'conditional clearance' are rare.

Most times, the enforcement agencies are in a position to make the difficult prediction that anticompetitive effects will or will not occur.").

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Commission's enforcement activities. If the majority's intuition is correct that the Commission encounters enough close cases to require a dramatic increase in our appropriations in order to staff retrospectives for such cases, then we owe it to ourselves and to the public to advocate for and dedicate adequate resources to scrutinize and improve upon our conclusions.³⁴

Staples/Essendant Case

As noted above, Essendant is one of only two nationwide office product wholesale distributors, along with S.P. Richards ("SPR"). SPR and Essendant provide important services to local and independent office product resellers, who, in turn, serve the office product needs of mid-sized businesses across the country.³⁵ Staples competes with independent resellers to serve mid-sized businesses and, as a result of this vertical merger, Staples will control the price and quality of the wholesale distribution services that Essendant provides to Staples's Essendant-backed independent reseller competitors.

I appreciate that the Commission's staff have given serious treatment to a range of theories of anticompetitive harm from the merger. I am also pleased that the Commission imposed conditions that seek to deal with the very real threat of anticompetitive information sharing and to enhance our ability to review Staples's future acquisitions in the office supply industry. I voted against the resolution of this investigation, however, because I believe that staff identified significant evidence of likely harm to competition, and I am concerned that the conclusions drawn from the evidence staff identified may underestimate the likely harm. I am also concerned that the parties have not met their burden of substantiating the efficiencies necessary to offset the transaction's likely harm. The conditions imposed by the Commission's proposed consent order do not fully resolve these concerns.

As noted in the statement of the majority, staff conducted an analysis of whether the integrated firm could profitably implement a strategy of raising rivals' costs. Staff's analysis considered the extent to which independent resellers would switch to SPR and the extent to which mid-sized businesses would switch from independent resellers to Staples given such a strategy. The result of staff's analysis indicated that the transaction would result in significant harm. The majority accuse me of mischaracterizing this analysis. I do not; I simply disagree with the conclusion that the majority draws from staff's analysis. I believe this analysis is evidence of harm. It suggests that, as a result of a strategy of raising rivals' costs, mid-sized businesses would be forced to pay higher prices or suffer diminished quality of service regardless of which supplier they chose for their office supply needs.

34 Cf. Pitofsky, *supra* note 24 ("[T]he approach offers some hope, never air tight, that enforcement officials perplexed by the uncertainties of a situation, will not make the mistake of allowing deals to proceed that have major anticompetitive and anticonsumer effects. If the significant anticompetitive effects begin to occur after the transaction is complete, all concerned parties know the enforcement agency may review the deal again and take actions necessary to preserve or restore a competitive market.").

35 Essendant and SPR also serve resellers who, in turn, serve small and large businesses.

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The majority have concluded that independent resellers can easily switch from Essendant to SPR if the integrated firm implemented such a strategy, and, therefore, that this strategy would not be profitable. The key relevant inputs in staff's analysis, however, are consistent with the conclusion that independent resellers can easily switch from Essendant to SPR, and staff's analysis nonetheless predicts significant harm. Moreover, some qualitative evidence indicates that switching from Essendant to SPR is costly for independent resellers.

The majority have offered reasons to believe that the harm estimated in staff's analysis is too high or insufficiently reinforced by other lines of evidence. I acknowledge those points, but I believe that staff's analysis is significant evidence that harm from the transaction is likely, and, indeed, I am concerned that there are reasons to believe that the estimated harm is too low. For example, we did not have data at sufficient levels of granularity to assess whether there are certain markets where mid-sized businesses would switch to Staples in larger numbers than we have estimated. In addition, I am concerned that independent resellers have only two viable options in the market for nationwide wholesale distribution today—Essendant and SPR—and that *de novo* entry by other firms into the nationwide wholesale distribution business is unlikely. As a result, even if SPR is a viable alternative to Essendant for many independent resellers, it is likely the only viable option and thus may be able to charge higher prices to resellers looking to avoid a relationship with Staples.

The majority insist that their decision does not rest on crediting claimed efficiencies, but given my disagreement about whether and to what extent there is evidence of likely harm, I briefly describe below my assessment of the efficiencies evidence adduced in this investigation. Taking staff's estimate of harm on its face, the Commission must ask whether there is sufficient evidence to conclude that cognizable efficiencies do in fact offset that estimate. I am not persuaded that there is such evidence.

As an initial matter, upon review of the record, I do not believe that efficiencies from the elimination of double marginalization are a meaningful effect of this merger. Focusing on the identified claims, I am concerned that the parties have not produced evidence showing that the claimed efficiencies are indeed efficiencies and not harms, are merger-specific, are not mitigated by any costs that must be incurred to achieve the efficiencies, or will likely be realized at sufficient magnitudes after the merger is consummated.³⁶ The Commission brings significant experience to bear in our analysis of efficiencies in the office supply industry, but that expertise does not excuse the parties from meeting their burden to substantiate their claims, and I do not believe that the remaining substantiation provides a sufficient basis to credit the efficiency claims made in this case. Confronted, as I am, with what I believe to be evidence of likely harm

36 As discussed in note 21 above, our analysis of efficiencies claims is predicated on information in the parties' possession. This is true in both horizontal and non-horizontal mergers. It is therefore incumbent on the parties to substantiate their claimed efficiencies, including by detailed and comprehensive responses to requests from Commission staff, to allow the Commission to credit any cognizable efficiencies against any likely harm. *Cf.*

Horizontal Merger Guidelines § 10; *see also* Herbert J. Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 726 (2017) (“[I]nformation is asymmetrical: firms almost always know more about their own internal processes and the costs of changing them than any outsider, including the merger enforcement Agencies.”).

Dissenting Statement

and a lack of evidence of cognizable, offsetting efficiencies, I must respectfully disagree with the majority that the transaction is unlikely to result in anticompetitive harm outside the scope of the Commission's order.

Our consent order does not address Staples's control over Essendant prices to its independent reseller competitors or its enhanced incentives to hamper independent reseller competitiveness. I also share Commissioner Chopra's concerns about the efficacy of the firewall to remedy the information sharing harm. Accordingly, I do not believe the consent order fully remedies the merger's likely anticompetitive effects.

A Retrospective and Monitoring

The Commission's order requires that Staples provide prior notice of any acquisitions in excess of 10% of any independent reseller or other marketer of office supplies. Staples's market position relative to other independent resellers was a significant issue in our investigation, and I believe that prior notice will be a useful tool for the Commission to monitor whether Staples will pursue a strategy of raising rivals' costs in local office supply markets.

In addition, I call on the Commission to commit publicly to a targeted retrospective investigation, within several years of the acquisition's consummation, to evaluate other aspects of the market bearing on our analysis, and to assess whether such developments are consistent with our pre-merger analysis. Besides this analysis, I urge the Commission to monitor conduct in this industry, and I encourage Essendant-backed independent resellers and other stakeholders to report any evidence of anticompetitive conduct by Staples. With the benefit of pre-commitment, hindsight, and ongoing monitoring, we may be able to refine and bolster confidence in our analysis and deter or prosecute future anticompetitive conduct by Staples. Ultimately, if there is sufficient evidence of actual anticompetitive effects as a result of the transaction, we can and should bring an enforcement action to break-up the merger.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT**I. INTRODUCTION AND BACKGROUND**

The Federal Trade Commission (“Commission”) has accepted an Agreement Containing Consent Order (“Consent Agreement”) from Sycamore Partners II, L.P. (“Sycamore”), Staples, Inc. (“Staples”), and Essendant Inc. (“Essendant”) (collectively, “Respondents”) to remedy the anticompetitive effects that otherwise would result from Staples’ acquisition of all of the outstanding shares of common stock of one of its wholesalers, Essendant (the “Acquisition”). The proposed Consent Agreement, among other things, limits the persons within Sycamore and Staples who have access to certain commercially sensitive information.

On September 14, 2018, Staples and its affiliates agreed to acquire all of the outstanding shares of common stock of Essendant. The Complaint alleges that Sycamore’s and Staples’ access to certain commercially sensitive information (“CSI”), without adequate safeguards to ensure that Sycamore and Staples will not misuse the information, could lead to anticompetitive conduct. The proposed Consent Agreement remedies this concern by limiting Sycamore’s and Staples’ access to: (1) CSI of Essendant’s resellers; (2) CSI of end customers of Essendant’s resellers; and (3) Essendant’s CSI that includes, uses, or incorporates CSI of Essendant’s resellers or CSI of end customers of Essendant’s resellers.

On January 25, 2019, by a vote of 3-2—with Chairman Simons, Commissioner Phillips and Commissioner Wilson voting in the affirmative, and Commissioner Chopra and Commissioner Slaughter dissenting—the Commission issued an Administrative Complaint, and accepted for public comment an Agreement Containing Consent Order, resolving allegations in the Complaint that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct and substantial competition between Staples’ and Essendant’s reseller customers in the market for the sale and distribution of office products to midmarket business-to-business customers. The elimination of this competition could result in higher prices for midmarket end customers. The proposed Consent Agreement would remedy the alleged violations by limiting Sycamore’s and Staples’ access to CSI as described above.

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. The Commission issued the accompanying Decision and Order (“Order”) as final prior to seeking public comment, as provided in Section 2.34(c) of the Commission’s Rules. This will allow the Commission to enforce the Order if there are any violations of its provisions during the public comment period. Comments received during this period will become part of the public record. After 30 days, the Commission again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw from the Consent Agreement, or modify the accompanying Order.

II. THE PARTIES

Sycamore is a private equity firm specializing in retail and consumer investments. Sycamore acquired Staples in September 2017. Headquartered in Framingham, Massachusetts,

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Staples is the largest vertically integrated reseller of office products in the United States, selling office products to consumers through its e-commerce website and retail stores and to corporate and government end customers through its North American Delivery business. Before Sycamore acquired Staples, Staples reported sales of \$18.2 billion, which includes revenues from its U.S. and foreign operations.

Essendant is the largest wholesale distributor of office products in the United States, with net sales of over \$5 billion in 2017. Headquartered in Deerfield, Illinois, Essendant sells and distributes office products to thousands of commercial resellers through its extensive network of more than 60 U.S. distribution centers. Essendant also provides value-added services to its reseller customers, such as digitized product content and marketing tools. Essendant's broad base of reseller customers includes large national accounts (such as Staples, Office Depot, and Costco), independent dealers, and online retailers. Essendant does not offer its products directly to end customers, i.e. customers buying office products for their own use.

III. THE PRODUCTS AND STRUCTURE OF THE MARKETS

Staples and Essendant both provide a broad and deep assortment of office products across a number of product categories—including traditional office supplies, copy paper, ink and toner, janitorial and sanitation supplies, breakroom supplies, and technology products—but do so at different levels of the supply chain. Staples sells office products directly into all end customer segments—including individual consumers, small/home office, midmarket (small-and-medium businesses or “SMB”), and enterprise (large organizations such as Fortune 100 companies or the federal government).

Essendant and S.P. Richards Company (“SPR”) are the only two U.S. wholesalers supplying a wide assortment of office products as well as value-added services to commercial resellers, including thousands of independently owned and operated dealers (also known as the independent dealer channel, “IDC” or, collectively, “IDCs”), throughout the United States. The IDCs, which predominately serve midmarket end customers in their local communities, excel at providing high-touch service and customizing their programs and services to fit the needs of their customers. The IDCs compete directly with Staples to sell office products to these midmarket customers.

The relevant line of commerce in which to analyze the effects of the Acquisition is the sale and distribution of office products to midmarket business-to-business customers. The sale and distribution of office products to midmarket business-to-business customers entails selling office products and related services to customers who purchase those products and services for consumption, not for resale. The relevant geographic markets in which to analyze the effects of the Acquisition on this market are local. Most midmarket customers have one or only a few locations in the same local area. Likewise, most of the IDCs who serve these midmarket customers compete in one or a small handful of local markets. These relevant markets contain many resellers—including Staples, Office Depot, independent resellers (including Essendant's resellers and SPR's resellers), Amazon, and others—with Essendant's reseller customers accounting for a substantial share of the market. Entry into these markets would not be timely,

Analysis to Aid Public Comment

likely, or sufficient to mitigate the anticompetitive effects of the Acquisition, which are described below.

IV. THE EFFECTS OF THE ACQUISITION

To carry out the distribution activities currently undertaken by Essendant under its “Wrap and Label” and “Drop-ship” programs, Essendant’s reseller customers must regularly provide Essendant with CSI about their end customers.

Under the Wrap and Label program, Essendant’s resellers furnish detailed information about each end customer’s orders so that Essendant can deliver products to the reseller pre-packed for the end customer. This saves a reseller the time necessary to sort through multiple unlabeled pallets and compile each end customer’s orders for the day. Similarly, under the Drop-ship program, Essendant delivers products directly to a reseller’s end customer on behalf of the reseller when the end customer’s location is outside of the reseller’s local delivery area. This allows an Essendant reseller to serve end-customer locations outside of the reseller’s delivery area on a next-day basis seamlessly. To take advantage of these programs, Essendant’s resellers must regularly furnish CSI such as end-customer names, locations, purchasing history, and product and service preferences.

Absent a remedy, the Acquisition would give Staples access to information it previously could not obtain relating to Essendant’s resellers’ (i.e., Staples’ competitors’) end customers. The Commission’s Complaint alleges that this detailed end-customer information, together with Staples’ access to Essendant’s resellers’ costs of goods, could enable Staples to offer higher prices than it otherwise would when bidding for an end customer’s business against one of Essendant’s resellers. Accordingly, access to this CSI may substantially lessen competition in the market for the sale and distribution of office products to midmarket business-to-business customers by eliminating direct and substantial competition between Staples and Essendant’s resellers, which could result in higher prices to midmarket end customers.

V. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies the likely anticompetitive effects of the Acquisition by limiting Sycamore’s and Staples’ access to (1) CSI of Essendant’s resellers; (2) CSI of end customers of Essendant’s resellers; and (3) Essendant’s CSI that includes, uses, or incorporates CSI of Essendant’s resellers or CSI of end customers of Essendant’s resellers (hereinafter, “Protected Commercially Sensitive Information”). Specifically, the proposed Consent Agreement requires Sycamore and Staples to create a firewall separating Staples’ business-to-business end customer selling functions from Essendant’s wholesale selling function. The firewalled employees will have responsibilities for performing Essendant’s former wholesale functions for Essendant’s resellers. Sycamore and Staples will be required to take all actions necessary to prevent access to, or the disclosure or use of, Protected Commercially Sensitive Information. After the Acquisition, only those Staples employees performing wholesale, legal and regulatory, or shared services functions or members of a prescribed management oversight group will have access to the Protected Commercially Sensitive Information, and only to the extent necessary to perform their assigned functions.

Analysis to Aid Public Comment

The proposed Consent Agreement also provides for the appointment of a monitor for ten years to assure Sycamore's and Staples' compliance with the Consent Agreement. Further, the proposed Consent Agreement contains appropriate reporting requirements.

Finally, the proposed Consent Agreement contains a prior notice provision for subsequent acquisitions by Sycamore or Staples resulting in total holdings of an ownership interest of more than ten percent of any company meeting specific criteria related to office products sales (a "Notifiable Acquisition"). Under the proposed Consent Agreement, for the next ten years, Sycamore and Staples will be required to give the Commission thirty days' advanced notice of any Notifiable Acquisition that is not subject to the Hart-Scott-Rodino Act. Sycamore and Staples must also provide the Commission with information about and documents relating to the to-be-acquired company. If 30 days expire without Commission action, Sycamore and Staples will be permitted to consummate the Notifiable Acquisition.

The Consent Agreement will have a term of ten years.

* * *

The sole purpose of this analysis is to facilitate public comment on the proposed Consent Agreement. This analysis does not constitute an official interpretation of the proposed Consent Agreement or modify its terms in any way.

Complaint

IN THE MATTER OF

**CREAXION CORPORATION,
MARK PETTIT,
INSIDE PUBLICATIONS, LLC OF GEORGIA,
AND
CHRISTOPHER KOROTKY**

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SECTION 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket No. C-4668; File No. 172 3066

Complaint, January 31, 2019 – Decision, January 31, 2019

This consent order addresses Creaxion Corp.’s endorsement and advertising format practices with respect to the advertising and promotional campaign they created and implemented for FIT Organic Mosquito Repellent. The complaint alleges that the respondents violated Section 5(a) of the Federal Trade Commission Act by misrepresenting that certain endorsements reflected the independent experiences or opinions of impartial users, and by deceptively failing to disclose that certain endorsers had material connections with the endorsed product, namely that they were paid spokespersons, they were reimbursed for the cost of the product, or they owned or were employed by Creaxion, the public relations firm hired to promote the product. The complaint also alleges that the respondents violated Section 5(a) by misrepresenting that certain advertisements were independent statements and opinions of impartial publications when they actually were paid commercial advertising. The consent order prohibits misrepresenting the status of any endorser or person reviewing the product or service, including that he or she is an independent user or ordinary consumer of the product or service; and any representation about any consumer or other endorser of such product or service without disclosing, clearly and conspicuously, and in close proximity to that representation, any unexpected material connection between such endorser and any respondent, or other individual or entity affiliated with the product or service.

Participants

For the *Commission*: Karen Mandel and Shira Modell.

For the *Respondents*: Craig G. Kunkes, Robbins Ross Alloy Belinfante Littlefield
LLC.

COMPLAINT

The Federal Trade Commission, having reason to believe that Creaxion Corporation, Mark Pettit, Inside Publications, LLC of Georgia, and Christopher Korotky (collectively, “Respondents”) have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Creaxion Corporation (“Creaxion”) is a Delaware corporation with its principal office or place of business at 1080 Peachtree Street NE, Suite 1810, Atlanta, Georgia 30309. Creaxion is a marketing and public relations company.