STAPLES/OFFICE DEPOT: CLARIFYING CLUSTER MARKETS

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I. INTRODUCTION

The recent challenge to Staples, Inc.'s ("Staples") acquisition of Office Depot, Inc. ("Office Depot") brought to the forefront several key aspects of antitrust merger analysis. In suing to block the deal, the Federal Trade Commission ("FTC"), together with the District of Columbia and Commonwealth of Pennsylvania (collectively, "Plaintiffs"), alleged that the acquisition would substantially lessen competition in the sale and distribution of consumable office supplies to large business customers. Staples and Office Depot vigorously disputed important elements of the Plaintiffs' case, including the Plaintiffs' definition of the relevant market and estimation of market shares, and the likelihood of sufficient entry and expansion by rival firms.

The case culminated in a nearly three-week preliminary injunction hearing before Judge Emmet G. Sullivan of the United States ("U.S.") District Court for the District of Columbia. In an unusual twist, at the close of the Plaintiffs' case-in-chief, Staples and Office Depot announced that they would rest without calling any witnesses. Staples' counsel asserted that the Plaintiffs had failed to establish their *prima facie* case, including establishing the relevant market, and, as such, there was "no need for additional evidence or

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rebuttal."[2]

The decision by Staples and Office Depot to rest after the close of the Plaintiffs' case raised the stakes—and the scrutiny—related to the Plaintiffs' alleged relevant market. If the court accepted the Plaintiffs' relevant market, Staples and Office Depot faced evidence that their combined share totaled 79 percent—a concentration level that carried a daunting presumption of anticompetitive harm.[3] While Staples and Office Depot critiqued this share estimate, their first and primary line of attack for avoiding a presumption of harm was contesting the relevant market. In stark terms, Staples and Office Depot argued that the Plaintiffs' alleged relevant market was "gerrymandered" and "made-for-litigation," and that the Plaintiffs had "sliced and diced the market in an attempt to achieve high concentration levels."[4]

In the end, Judge Sullivan held that the Plaintiffs had alleged a properly defined relevant market. In ruling, he observed that the relevant market combined the concept of a cluster market (consumable office supplies) and a targeted customer market (large business customers).[5] While the court's treatment of both aspects of the relevant market definition is significant, this article will focus on the cluster market aspect. The parties' dispute concerning the scope of the cluster market in *Staples/Office Depot* underscores key issues related to cluster market analysis.

This article begins with a brief discussion of the cluster market framework from prior cases, before turning to the cluster market analysis in *Staples/Office Depot* and its implications.

II. PRIOR CASE LAW ON CLUSTER MARKETS

The Sixth Circuit's decision in *ProMedica Health System, Inc. v. Federal Trade Commission*[6] contains perhaps the most fulsome discussion of the cluster market standard prior to *Staples/Office Depot*. As the court described in *ProMedica*, the "first principle" of product market definition is "substitutability": a relevant product market should include all reasonable substitutes, with the operative test being whether a hypothetical monopolist controlling the products in the proposed market would profitably impose a price increase.[7] If too many customers would switch to substitutes outside of the proposed market in response to the price increase, such that the price increase would be unprofitable, then the proposed market is too narrow and should include additional substitutes.

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[2] *FTC v. Staples, Inc.*, No. 15-2115 (EGS), 2016 WL 2899222, at *2 (D.D.C. May 10, 2016).
[3] *Staples*, 2016 WL 2899222, at *18, 20 (referring to the market shares as "striking," and concluding that the concentration levels "far exceed" what is "necessary to entitle Plaintiffs to a presumption that the merger is illegal").
[4] Defs.' Proposed Findings of Fact and Conclusions of Law (Public Version) ¶¶ 4-6, *FTC v. Staples, Inc.*, No. 15-2115 (EGS) (D.D.C. Apr. 20, 2016), ECF No. 438 (hereinafter, "DFOF/COL").
[5] *Staples*, 2016 WL 2899222, at *7.
[6] 749 F.3d 559 (6th Cir. 2014).
[7] Id. at 565; see also *U.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines* (2010), §§ 4.1.1-4.1.3 (hereinafter "*Merger Guidelines*"). Specifically, antitrust principles call for evaluating whether the hypothetical monopolist would impose a small but significant and non-transitory increase in price ("SSNIP"). *Merger Guidelines* §§ 4.1.1-4.1.2.

ProMedica further noted that certain cases involve "hundreds if not thousands" of distinct product markets.[8] In *ProMedica*, for instance, which involved a hospital merger, the merging hospitals offered hundreds of distinct medical procedures that were not functionally interchangeable (e.g. chemotherapy is not a substitute for a hip replacement). Each distinct procedure therefore could be assessed as a distinct relevant market. But, as the court observed, it would be administratively burdensome to evaluate each of the hundreds of markets separately.[9]

That is where the cluster market concept arises. *ProMedica* endorsed the concept of aggregating the distinct relevant markets together into a single "cluster" for analytical convenience. Such aggregation is permissible, the court held, when the competitive conditions in the separate markets are similar.[10]

ProMedica is not the first or only case to endorse the concept of a cluster market based on analytical convenience. The concept has origins in the Supreme Court's landmark decision in *Brown Shoe Co. v. United States*.[11] In *Brown Shoe*, the Court first observed that the "outer boundaries" of a relevant product market are determined by evaluating the scope of reasonable substitutes.[12] But the Court then endorsed evaluating the markets for men's, women's and children's shoes together (even though distinct shoe sizes and types were not substitutes) because the competitive conditions for each market were similar.[13] More recently, the cluster market approach has become a common feature of hospital merger cases.[14]

It is worth noting that, because the cluster market concept has developed over decades, cases have used the term "cluster" to refer to concepts other than the approach utilized in *Brown Shoe* and *ProMedica*. In particular, cases have also recognized a distinct concept in which the product market itself consists of a package or bundle of products or services. In *United States v. Grinnell Corp.*, for instance, the Supreme Court endorsed an "accredited central station service" market, which included several distinct services, such as fire alarm and burglar alarm services.[15] The Court reasoned that the accredited central service stations offered "a single basic service," namely the "the protection of property through use of a central service station."[16]

In that scenario, distinct product markets were not being aggregated for analytical convenience (as in *ProMedica*). Rather, there was a single market in which customers purchased a bundle or package of goods. *ProMedica* referred to this latter scenario as a "package-deal" approach, and explained that it can arise when customers value the

[8] *ProMedica*, 749 F.3d at 565.
[9] Id. at 565-66.
[10] Id.
[11] 370 U.S. 294 (1962).
[12] Id. at 325.
[13] See id. at 327-28 (concluding that markets for men's, women's and children's shoes did not need to be subdivided into smaller groupings when "considered separately or together, the picture of this merger is the same" and further subdivisions were "impractical").
[14] See e.g. *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2012).
[15] 384 U.S. 563, 571-72 (1966).
[16] Id. at 572.

convenience of purchasing certain items together, as a package.[17] Another useful description is that the latter approach represents a bundle market.

As described below, the distinction between a cluster market and a bundle market became a point of contention in *Staples/Office Depot*.

III. THE CLUSTER MARKET IN STAPLES/OFFICE DEPOT

A. Judge Sullivan Affirms the Plaintiffs' Cluster Market

In *Staples/Office Depot*, the Plaintiffs alleged a cluster market consisting of thousands of consumable office supply items, including pens, file folders, Post-it notes, binder clips, and copy paper.[18] As Judge Sullivan observed, "a pen is not a functional substitute for a paperclip."[19] Nevertheless, citing *ProMedica* and the Plaintiffs' economic expert, Judge Sullivan concluded that it was appropriate to cluster the consumable office supply items for "analytical convenience," because "market shares and competitive conditions are likely to be similar for the distribution of pens to large customers and the distribution of binder clips to large customers."[20] Thus, Judge Sullivan affirmed the propriety of cluster markets for analytical convenience and used the "similar competitive conditions" standard as the test for whether it is appropriate to include items in the cluster.

Judge Sullivan also observed that the cluster market alleged by the Plaintiffs was quite broad. Specifically, the Plaintiffs' market included *all* methods by which a large customer could purchase the office supply items in the cluster, including "procurement through a primary vendor relationship, off contract purchases, online and retail buys."[21] In other words, the market was not limited to one channel of distribution, as was the case in *Federal Trade Commission v. Sysco Corp.*, where the relevant market was defined as "broadline foodservice distribution."[22] Instead, the market accounted for large customers' purchases through contracts with primary vendors, non-contract spot purchases from other office supply vendors, purchases through retailers and purchases directly from office supply manufacturers. The Plaintiffs' economic expert, Professor Carl Shapiro, explained that this candidate market satisfied the hypothetical monopolist test, the standard economic test for defining relevant markets.[23] Judge Sullivan endorsed and approved of Professor Shapiro's analysis.[24]

Notably, despite the breadth of the market definition, the Plaintiffs still demonstrated that Staples and Office Depot had a combined share of 79 percent.[25] The evidence suggested a plausible candidate market that was even narrower—the procurement of the

[17] *ProMedica*, 749 F.3d at 567-58.
[18] *Staples*, 2016 WL 2899222, at *8.
[19] Id.
[20] Id. (internal citations and quotation marks omitted).
[21] Id. at *12.
[22] 113 F. Supp. 3d 1, 24 (D.D.C. 2015).
[23] *Staples*, 2016 WL 2899222, at *12-13.
[24] Id. at *12-13, 16.
[25] Id. at *18-19.

cluster items only through the large customer's primary vendor—in which Staples' and Office Depot's shares would have been even higher.[26] Such a market would have excluded the other procurement channels (e.g. off-contract and retail buys), and the hypothetical monopolist would have faced substitution to those other channels. The Plaintiffs did not seek to establish that this narrower potential market also satisfied the hypothetical monopolist test, but instead included all substitutable channels of distribution.

B. Staples and Office Depot Failed to Undermine the Plaintiffs' Cluster Market Approach

While the Plaintiffs' cluster market followed the approach of *Brown Shoe* and *ProMedica*, Staples and Office Depot nonetheless vigorously disputed its propriety. Staples and Office Depot's arguments were unavailing, but are instructive of the disputes that can arise when dealing with cluster markets.

1. "Gerrymandering" Argument

Staples and Office Depot strenuously objected to the fact that the Plaintiffs did not include certain office products in their cluster market. Most notably, the cluster did not include ink and toner, even though, by all accounts, ink and toner are consumable, i.e. used up and reordered. Staples and Office Depot argued the market was therefore "gerrymandered and artificially narrow," and designed to inflate their market shares.[27]

In ruling for the Plaintiffs, Judge Sullivan rejected this argument. He observed that ink and toner (and the other office products excluded from the market) were subject to different competitive conditions from the consumable office supplies included in the Plaintiffs' cluster.[28] For instance, large customers not only purchased ink and toner from office supply distributors, but also made substantial purchases from printer and copier manufacturers through managed print service ("MPS") arrangements in which customers purchased the printers and copiers, maintenance services and ink and toner together.[29] Those printer and copier manufacturers generally did not sell other consumable office products. As such, ink and toner failed the similar competitive conditions test for inclusion in the proposed cluster market.

Other market definition principles also reveal why Staples and Office Depot's gerrymandering argument was misplaced. As referenced above, per *Brown Shoe*, the "outer boundaries" of a relevant product market are established by the inclusion of reasonable substitutes for products in the candidate market. In light of that, virtually every case on record that has found a proposed product market too narrow involved situations in which the plaintiff had excluded relevant substitutes.[30]

But that was not the case in *Staples/Office Depot*. Ink and toner are not substitutes for binders, file folders and the other products included in the Plaintiffs' cluster market. As

[26] Expert Report of Carl Shapiro (Public Version) at 11-12, *FTC v. Staples, Inc.*, No. 15-2115 (EGS) (D.D.C. Mar. 20, 2016), ECF No. 280-36.
[27] DFOF/COL ¶ 4; see also *Staples*, 2016 WL 2899222, at *9.
[28] *Staples*, 2016 WL 2899222, at *13-14.
[29] Id.
[30] See e.g. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1119-20, 1159-60 (N.D. Cal. 2004); *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 191-92 (D.D.C. 2001).

Professor Shapiro explained, customers could not switch to ink and toner in response to a hypothetical monopolist controlling the sale and distribution of the cluster items. Or, put more plainly, "[t]he fact that there's competition in ink and toner doesn't help a large customer who needs paper or office supplies."[31] As such, there was no basis for concluding under standard market definition principles that the Plaintiffs' market was too narrow to be a relevant antitrust market because of the "exclusion" of ink and toner.

Notably, Staples and Office Depot invoked the hypothetical monopolist test in their post-hearing conclusions of law.[32] But their proposed findings of fact lacked any application of the test, or any evidence or critique showing that Professor Shapiro's application of the test was faulty. As referenced above, the Plaintiffs' market definition was very broad—comprising all methods by which a large customer could purchase pens, pencils and other cluster items. In the end, there simply was no evidence in the record indicating that a hypothetical monopolist controlling this candidate market would not profitably impose a price increase. In light of that, as Judge Sullivan concluded, the Plaintiffs' candidate market was a properly defined relevant antitrust market.[33]

It is worth recalling here that a cluster market is an aggregation of distinct relevant markets for analytical convenience. The "similar competitive conditions" test articulated in *ProMedica* establishes when it is *permissible* to include product markets in a cluster. But the cases (including *Brown Shoe* and *ProMedica*) do not suggest any *requirement* to include additional product markets (such as an ink and toner market) in a cluster, or even to cluster any markets at all.

Moreover, it is hard to imagine a scenario in which defendants would be legitimately prejudiced by a plaintiff's decision to exclude additional non-substitute products from a cluster market. If the excluded products faced similar competitive conditions as the included products (for which the plaintiff would be alleging competitive concern), this would only imply additional antitrust liability for the defendants. If instead the excluded products faced different competitive conditions from the included products—most likely meaning lower market shares for defendants—defendants may very well want to include the additional products in the cluster to dilute their shares in the problematic markets. But this is not a legitimate use of clustering, and is likely to lead to the error of overlooking harm in the problematic markets.[34]

Professor Shapiro elaborated on this error in his *Staples/Office Depot* analysis:

> [A] common-sense approach reveals why it would be a major error to include, say, the sale and distribution of furniture in the relevant market. To see why, suppose that large customers spend far more on furniture than they do on consumable office supplies, but as a group they buy relatively little of their furniture from Staples and Office Depot. Suppose also that they buy most of

[31] Shapiro Hr'g. Tr. 2783:15-17, *FTC v. Staples, Inc.*, No. 15-2115 (EGS) (D.D.C. Apr. 4, 2016).
[32] DFOF/COL ¶ 31 ("The key question is whether a hypothetical monopolist in the alleged market profitably could impose a small but significant and non-transitory increase in price ("SSNIP").").
[33] *Staples*, 2016 WL 2899222, at *17.
[34] Pls.' Proposed Findings of Fact and Conclusions of Law (Public Version) ¶¶ 9, 283, *FTC v. Staples, Inc.*, No. 15-2115 (EGS) (D.D.C. Apr. 20, 2016), ECF No. 444.

> their furniture from firms that specialize in furniture and sell few if any office supplies. In this situation, including furniture in the relevant market would greatly reduce the market shares of Staples and Office Depot. Critically, those lower shares would *not* accurately reflect the competitive significance of Staples and Office Depot in selling consumable office supplies to large customers.[35]

The potential for this error is indeed why courts have adopted the similar competitive conditions test for cluster markets.[36]

2. "Commercial Realities" Argument

In criticizing the Plaintiffs' relevant market, Staples and Office Depot emphasized that they sold many products in addition to those in the Plaintiffs' cluster, including ink and toner, furniture, janitorial supplies, breakroom supplies and technology products.[37] Staples and Office Depot also noted that many large customers purchased these additional items from them, often pursuant to the same bids or contracts through which they procured consumable office supplies.[38]

Invoking language from *Brown Shoe*, Staples and Office Depot argued that the "commercial realities" of this broader selling and purchasing behavior required a broader market definition encompassing all products.[39] Judge Sullivan rejected this argument, concluding that *Brown Shoe*'s "commercial realities" language was not on point.[40]

Indeed, while *Brown Shoe* mentions "commercial realities," it grounds product market definition in substitutability, not the breadth of what a company sells. It is not unusual for merging parties to sell many distinct products—effectively operating in multiple relevant antitrust markets—but for a merger to raise competitive concerns only in certain markets.[41]

An alternative standard invoking the breadth of all products or services sold by the merging parties (unmoored from substitutability and the hypothetical monopolist test) would be difficult to apply and would leave customers vulnerable with respect to products in which the merger eliminated substantial competition. As Professor Shapiro explained, such an approach lacks a "limiting principle," and would allow a merger to monopoly "on the hope that customers could protect themselves from the monopoly power thus created by virtue of

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[35] Reply Report of Carl Shapiro (Public Version) at 5, *FTC v. Staples, Inc.*, No. 15-2115 (EGS) (D.D.C. Mar. 20, 2016), ECF No. 280-38 (hereinafter, "Shapiro Reply Report").

[36] See *FTC v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *55 (N.D. Ohio Mar. 29, 2011) (stating that it would be "inappropriate and misleading" to include obstetrics in a relevant cluster market for hospital services, because the competitive conditions for obstetrics were different from other hospital services).

[37] DFOF/COL ¶¶ 72-73.

[38] Id. at ¶¶ 107-12.

[39] Id. at ¶¶ 32, 74; see also *Staples*, 2016 WL 2899222, at *14.

[40] *Staples*, 2016 WL 2899222, at *14.

[41] See e.g. *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 34 & n.10 (D.D.C. 2009) (alleging harm for partial loss estimation and total loss valuation software, but not "add-on" products typically sold with the software, where the add-on products were also "sold by a large number of companies" in addition to the merging parties); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 39 & n.10 (D.D.C. 2002) (alleging harm in the foodservice glassware market, but not the retail glassware market where imported glassware suppliers "dominated").

the fact that they also purchase other products from the monopolist."[42] Yet economic principles indicate that customers could not protect themselves from a monopolist in that scenario, including by threatening not to buy the out-of-market products. Specifically, one would expect that customers are already making use of the threat not to buy the out-of-market products today, so that threat does not alleviate the harm from a merger to monopoly with respect to the products in the candidate market.[43]

3. Proposed Alternative "Bundle" Market

As a corollary to the "commercial realities" argument, Staples and Office Depot floated the notion that the product market should have been treated as a *bundle* market, rather than as a cluster market. Staples and Office Depot sent mixed messages related to this argument, and Judge Sullivan did not explicitly address it in his opinion. In any event, this argument did not undermine the Plaintiffs' case.

As referenced above, a bundle market (or "package-deal" market) is one in which a group of products or services is viewed as a single product offering. As noted, this scenario can arise when customers value purchasing a group of products or services together. Citing *Grinnell* and invoking this concept, Staples and Office Depot at times suggested a potential product market consisting of a bundle of the products large customers purchased pursuant to their bids and contracts.[44] Similarly, Staples and Office Depot's economic expert (though not called at the hearing) observed in his report that large customers "typically demand that distributor intermediaries supply a bundle of products that is far broader than the FTC's and Professor Shapiro's claimed relevant market."[45] He therefore questioned "whether it is more appropriate to define the product market in this matter in terms of intermediary services, including bundling and distribution," rather than as a cluster of particular products.[46]

Staples and Office Depot's suggestion of a bundle market was unavailing for several reasons. As an initial matter, Section 7 of the Clayton Act prohibits mergers that substantially lessen competition "in any line of commerce."[47] As described above, the Plaintiffs presented unrebutted expert testimony that their alleged market satisfied the hypothetical monopolist test, which thus qualified the market as a relevant line of commerce. On its face, a statement positing that a bundle market may be "more appropriate" does not refute the Plaintiffs' relevant market. Relevant markets "need not be mutually exclusive," and once a relevant market has been identified, "[t]hat a larger or smaller grouping of sales might also constitute a market is beside the point."[48]

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[42] Shapiro Reply Report at 5-6.
[43] Id. at 5-6 & n.6.
[44] DFOF/COL ¶¶ 74, 98, 100, 111 (quoting *Grinnell*, 384 U.S. at 572, to state that office supply companies "'recognize that to compete effectively, they must offer all or nearly all types of' office products, beyond those contained in the FTC's limited 'product market,'" and stating that large customers put out bids for and purchase "a bundle of goods that includes far more than just office supplies").
[45] Expert Report of Jonathan Orszag (Public Version) ¶ 37, *FTC v. Staples, Inc.*, No. 15-2115 (EGS) (D.D.C. Mar. 20, 2016), ECF No. 277-2.
[46] Id. at ¶ 41.
[47] 15 U.S.C. § 18.
[48] 9C Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 929d (3d ed. 2007).

Moreover, there was no basis to conclude that the adoption of a bundle market would have obviated competitive concerns. Staples and Office Depot presumably had in mind that the bundle market would include ink and toner for customers that purchased ink and toner through their office supply distributor rather than an MPS provider. But in such a bundle market, Staples' and Office Depot's market shares likely would have been *higher* than in the Plaintiffs' alleged cluster market. Such a market posits that customers value the "package deal" of purchasing general office supplies, copy paper and ink and toner from a single provider. But such a market would by definition exclude the MPS providers that only sell ink and toner and the specialty paper merchants that only sell copy paper.[49] The exclusion of these firms from the market would only serve to increase the shares of office supply distributors like Staples and Office Depot that carry all office supply categories.

Perhaps realizing this, Staples and Office Depot floated the concept of a bundle market, but also disputed it by arguing that customers frequently fractured their spending for various product categories. For instance, their briefing on the merits contended that large customers "routinely purchase from multiple suppliers," purchasing technology products from "specialty technology vendor[s]," janitorial products from "specialty vendors" and janitorial service companies and ink and toner from manufacturers.[50] Staples and Office Depot's invoking of the bundle market concept thus reached a point of contradiction.

IV. CONCLUSION AND IMPLICATIONS

As summarized above, Judge Sullivan upheld the Plaintiffs' alleged cluster market of consumable office supplies, rejecting Staples and Office Depot's attacks on the market. Judge Sullivan's ruling did not break new ground, in that it is a straightforward application of the cluster market approach accepted in *Brown Shoe* and *ProMedica*. Nonetheless, the ruling is significant in that it contains a clear endorsement and articulation of the approach in a modern setting and outside of the hospital merger context. In rejecting Staples and Office Depot's assertions of "gerrymandering" and unmoored "commercial realities" criticisms, Judge Sullivan also upheld and reaffirmed established market definition principles.

Finally, because Staples and Office Depot directed so much energy and attention to contesting the relevant market, it is easy to lose sight of the breadth of the Plaintiffs' other evidence. As described by Judge Sullivan, the Plaintiffs did not simply rest on a presumption of harm from high market shares. They also presented extensive evidence related to anticompetitive effects. For instance, Professor Shapiro presented multiple bid data analyses demonstrating that Staples and Office Depot overwhelmingly won from and lost to each other.[51] The Plaintiffs also cited numerous ordinary course documents demonstrating fierce head-to-head competition between the merging parties, and in which Staples and Office Depot recognized each other as "the most viable office supply vendors for large businesses in

[49] See, e.g. *Sysco*, 113 F. Supp. 3d at 18, 28-30, 37 (finding a market for broadline foodservice distribution, and excluding specialty food distributors that offered some, but not all, food product categories).
[50] Defs.' Brief in Opp'n to Pls.' Mot. for a Prelim. Injunction (Public Version) at 19-21, *FTC v. Staples, Inc.*, No. 15-2115 (EGS) (D.D.C. Mar. 16, 2016), ECF No. 248-1.
[51] *Staples*, 2016 WL 2899222, at *20.

the United States."[52]

Judge Sullivan concluded that this evidence "strengthen[ed]" the Plaintiffs' case that the merger was likely to harm competition.[53] Notably, Judge Sullivan referenced this evidence in his market definition discussion. Addressing Staples and Office Depot's contention that the Plaintiffs' relevant market did not reflect "commercial realities," Judge Sullivan replied:

> To the extent that the "commercial realities of the industry" are important in this case, the Court agrees with Plaintiffs that the commercial realities are "that Defendants are the largest and second-largest office supplies vendors in the country; they are each other's closest competitor for large business customers; bid data show that they lose bids most often to each other; and large customers currently benefit greatly from their head-to-head competition." Pls.' FOF ¶ 288.[54]

Thus, Judge Sullivan used the Plaintiffs' effects evidence as the final word on Staples and Office Depot's "commercial realties" criticism. Even when merging parties stake their defense on an attack on market definition, they should not ignore the broader evidentiary record.

[52] Id. at *21.
[53] Id.
[54] Id. at *14.