

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney



In the Matter of

STAPLES, INC.
a corporation,

and

OFFICE DEPOT, INC.
a corporation.

Docket No. 9367

**JOINT EXPEDITED MOTION FOR A 21-DAY STAY
OF ADMINISTRATIVE PROCEEDINGS**

Pursuant to Rule 3.41 of the Federal Trade Commission's ("FTC" or "Commission") Rules of Practice, Complaint Counsel and Respondents Staples, Inc. ("Staples") and Office Depot, Inc. ("Office Depot") jointly move for a 21-day postponement of the commencement of the administrative trial currently scheduled to begin on May 10, 2016, to May 31, 2016, and for a corresponding stay of related pre-trial deadlines. This brief postponement will avoid significant expense and burden on more than 200 non-parties whose confidential information has been designated for use in the administrative trial.

The requested relief will not prejudice the Commission's ability to discharge its duties. The parallel proceedings in federal district court on the Commission's motion for a preliminary injunction in *FTC v. Staples, Inc.*, No. 1:15-cv-02115 (EGS) (D.D.C.) recently concluded. In that proceeding, the District Court committed to issue its order on the motion for preliminary injunction by May 10 at the request of Staples, because Staples' financing for the proposed

transaction will not extend beyond May 10, 2016, unless a favorable ruling is received from the District Court by 5:00 p.m. that day. If the preliminary injunction is granted, Staples and Office Depot have consistently stated—and reaffirm here—that they will abandon the proposed transaction. Under the recent revisions to Rule 3.26, if the PI is denied, the administrative proceeding will be automatically stayed or withdrawn on the request of the Respondents. *See also* FTC Revisions to Rules of Practice, 80 Fed. Reg. 15,157, 15,158 (Mar. 23, 2015). Therefore, regardless of whether the District Court grants or denies the injunction, the administrative proceeding either will be rendered moot by the merging parties abandoning the transaction or may be stayed pending any appeal. Even if the Commission determines to proceed with the administrative litigation following denial of the preliminary injunction motion, this brief stay will not hamper the Commission’s ultimate ability to obtain relief and will avoid starting the trial only to have it likely stayed pursuant to Rule 3.26.

ARGUMENT

Expedited consideration is appropriate because, unless this brief stay of the administrative proceedings is granted, more than 200 non-parties that have been notified by the Parties that their confidential material may be used at the trial are required to move by April 28, 2016, for *in camera* treatment of any material they do not want presented on the public record.¹ Such motions will address significant volumes of competitively and commercially sensitive documents and data that were produced during the course of the preliminary injunction proceeding and the FTC’s merger review. If the Commission grants this motion for a brief stay, then the 200-plus non-parties may avoid the substantial burden of reviewing voluminous documents, performing line-by-line proposed redactions of confidential information, preparing

¹ Simultaneously with this motion, the Parties moved the Chief Administrative Law Judge to amend the schedule to give the non-parties an additional five days in which to file their motions.

legal memoranda requesting *in camera* treatment of those materials, and filing copies of all such materials with the Court. Additionally, the Parties have identified approximately 45 non-parties as witnesses that may be called live at the administrative trial. A brief stay will postpone the need for those witnesses to prepare to testify. Moreover, because the administrative trial may become moot, a temporary stay could save non-parties tens of thousands, if not hundreds of thousands, of dollars in legal fees alone.²

This brief postponement of the administrative trial will not prejudice the Commission. As Staples and Office Depot have represented repeatedly, if the District Court grants the preliminary injunction, the Respondents will abandon their merger and this administrative proceeding will be moot. *See* Exhibit A, Scheduling Conf. Tr. 6:12-18 (Jan 4, 2016); Exhibit B, PI Hr’g Tr. 2901:14-19 (Apr. 5, 2016); *id.* at 3027:12-3028:24; *id.* at 3647:2-3 (“if the government’s application is granted, the merger will not be consummated”). If the District Court denies the motion for preliminary injunction, Respondents will file a motion pursuant to Rule 3.26 to withdraw the case from adjudication or dismiss the complaint.³ Rule 3.26(b)-(d). Once a respondent files such a motion, “the new rule now provides for an automatic withdrawal or automatic stay” of the administrative proceeding, depending on the type of motion. FTC Revisions to Rules of Practice, 80 Fed. Reg. 15,157, 15,158 (Mar. 23, 2015) (emphasis added); *see also* Rule 3.26(c); Rule 3.26(d)(2). Imposing a brief stay now avoids the inefficiency of beginning the presentation of evidence in the administrative trial only to suspend the proceeding following the ruling by the District Court, without prejudicing the Commission.

² Respondents also note that they face substantial and potentially unnecessary burdens—including legal fees—if a temporary stay is not granted.

³ Based on historical example, the D.C. Circuit may rule very quickly if the FTC seeks an injunction pending appeal. *See* Order, *FTC v. Whole Foods, Inc.*, No. 07-5275 (D.C. Cir. Aug. 23, 2007 (denying injunction pending appeal within 7 days of the district court denying the preliminary injunction).

RELIEF REQUESTED

For all of the reasons foregoing, Complaint Counsel and Respondents jointly and respectfully request that the Commission exercise its discretion under Rule 3.41(b) and/or Rule 3.41(f) to postpone commencement of the administrative hearing by 21 days, or until such later date as may be convenient for the Chief Administrative Law Judge and the Commission.

Complaint Counsel and Respondents also request that interim pre-trial deadlines be stayed for 21 days.

Dated: April 22, 2016

Respectfully Submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney

In the Matter of

STAPLES, INC.
a corporation,

and

OFFICE DEPOT, INC.
a corporation.

Docket No. 9367

**[PROPOSED] ORDER GRANTING JOINT EXPEDITED MOTION FOR A 21-DAY
STAY OF ADMINISTRATIVE PROCEEDINGS**

Good cause having been shown,

IT IS HEREBY ORDERED THAT Complaint Counsel's and Respondents' Joint Expedited Motion for a 21-Day Stay of Administrative Proceedings is **GRANTED**; and

(1) Commencement of the evidentiary hearing in this matter is moved from May 10, 2016 to May 31, 2016; and

(2) All other proceedings in this matter are stayed for 21 days from the date of this order.

By the Commission.

Donald S. Clark
Secretary

ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission's e-filing system, causing the document to be served on all of the following registered participants:

Donald S. Clark, Secretary
Office of the Secretary
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW Room H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

I also certify that I delivered, via electronic mail, a copy of the foregoing document to:

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Counsel for Respondent Office Depot, Inc.

Counsel Supporting the Complaint

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the original filing, and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: April 22, 2016

/s/ S. Nicole Booth
S. Nicole Booth
Paralegal

EXHIBIT A

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FEDERAL TRADE COMMISSION

In the Matter of:)
Staples, Inc.)
a corporation)
and) Docket No.
Office Depot, Inc.,) 9367
a corporation.)

Monday, January 4, 2016

Room 532
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C.

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

1 JUDGE CHAPPELL: Pursuant to 3.41(f) the
2 pendency of a collateral federal court action does
3 not stay the proceedings, unless a court of
4 competent jurisdiction or the Commission for good
5 cause so directs.

6 So my question is, first of all for the
7 government, are you prepared to tell me what your
8 plans are if the injunction is not granted?

9 MS. REINHART: We would have to consider
10 our options at the time, but, of course, if there
11 is a legal issue we would take an appeal.

12 JUDGE CHAPPELL: All right. Respondents,
13 are you prepared to tell me what your clients plan
14 to do if the injunction is granted?

15 MR. PERRY: Yes, Your Honor, Jeff Perry.
16 Unfortunately if the injunction is granted, I
17 expect the transaction will be terminated, Your
18 Honor.

19 JUDGE CHAPPELL: Based on what I just
20 heard, it appears that at some point our trial may
21 become a moot point. If either party doesn't plan
22 to pursue the merger case after the Federal Court
23 proceeding, perhaps that constitutes good cause.

24 So I am wondering if we don't have a
25 ruling, and I am -- I saw where I think the judge

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
)	
et al.,	)	Civil Action
	)	No. 15-2115
Plaintiff,)	
	)	Tuesday, April 5, 2016
v.	)	9:30 a.m.
)	
STAPLES INC., et al.,	)	Washington, D.C.
)	
Defendants.)	

DAY 10 - MORNING SESSION
TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING PROCEEDINGS
(INCLUDING SEALED PORTIONS)
BEFORE THE HONORABLE EMMET G. SULLIVAN,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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1 Dr. Shapiro said, "Yes, significantly it would, in terms of
2 reduction of any harm."

3 And so we think for all of those reasons, the -- that this
4 Motion for Injunction should be denied, Your Honor. And I'm
5 happy if the Court thinks -- whether the Court needs Findings of
6 Fact, we're perfectly happy, obviously, to do that.

7 THE COURT: Well, let me ask you this: So then -- so if
8 the Court were to deny the Request for Injunctive Relief, the
9 case is over?

10 MS. SULLIVAN: Yes, Your Honor.

11 THE COURT: If the Court -- it sounds like you're saying,
12 though, if the Court were to grant the motion, the Court could
13 grant the motion and still do some other things.

14 MS. SULLIVAN: Well, Your Honor, if the Court grants their
15 request for an injunction, from a practical standpoint, it kills
16 the deal. The time will be --

17 THE COURT: Right.

18 MS. SULLIVAN: It'll be over, one way or the other, Your
19 Honor.

20 THE COURT: So the proposal you're making -- and not for
21 the Court's consideration, the proposal, you're making it for the
22 government -- you're making an offer to settle the case,
23 essentially?

24 MS. SULLIVAN: Well, the stipulation was part of the
25 record in the case, so the Court can consider that. And

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Federal Trade Commission, et)	Civil Action
al.,	)	No. CA 15-2115
)	
Plaintiffs,	)	PRELIMINARY INJUNCTION
)	
vs.	)	Washington, DC
	)	April 5, 2016
Staples, Inc., et al.,	)	Time: 2:30 p.m.
)	
Defendants.)	

TRANSCRIPT OF PRELIMINARY INJUNCTION
AFTERNOON SESSION
HELD BEFORE
THE HONORABLE JUDGE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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1 THE COURT: But it's not the individual -- it's
2 not the individual consumers at all, right?

3 MR. REILLY: Your Honor, I would suggest the
4 public interest in the equities, you have broad discretion
5 to weigh the equities. And the fact that mom and pops and
6 small businesses who are trying to survive in this
7 environment will benefit from this deal should be weighed by
8 you and should be considered, it is appropriate for you to
9 do so.

10 THE COURT: But that's not the government's claim,
11 though. That's not the government's case-in-chief, is it?

12 MR. REILLY: The public equity that they cite is
13 effective in enforcing the antitrust laws. We humbly
14 suggest that effective enforcement of the antitrust laws
15 here is to deny this injunction and let this deal happen.

16 Ms. Reinhart had also mentioned that, again, we
17 could decide to litigate this trial, the administrative
18 trial. It's just -- Your Honor, it's not possible. As I
19 mentioned, I think under closed session, Office Depot board
20 had to do a lot of gut wrenching to make the decision to go
21 this far. This deal is critically important.

22 But when you're a company like Office Depot, who's
23 in a holding pattern, who can't hire employees -- who would
24 want to work for Office Depot when they don't know what the
25 future is? Hey, great news, honey, I got a job, I could be

1 gone in two months. No one is going to do that. It's been
2 very difficult for them.

3 To the company's credit, they've done a great job,
4 as great as possible, sustaining and trying to keep their
5 head above water as this merger investigation has gone on
6 for several, several months, well over a year, and they
7 have. But to be able to survive a merits trial, and then a
8 de novo appeal to the commission, it takes a long time, a
9 long time.

10 And no deal, even if you're printing your own
11 money and you're making products that people are trying to
12 buy off the shelf, even those deals can't survive a full
13 administrative trial on the merits. In fact, that's why
14 there's been never, not one administrative trial that's gone
15 the distance where the deal has been unconsummated. It just
16 doesn't happen for that reason, Your Honor.

17 So, no, we cannot litigate the administrative
18 trial. As you know, this is it. Your decision, thumbs up
19 or thumbs down, will decide the future of Staples and Office
20 Depot, will decide whether they continue to be relevant,
21 serve their customers, pass on cost savings and benefit all
22 their customers. That is what is riding with this decision.
23 And if the injunction is issued, the merits trial is a
24 fairytale, it's not going to happen.

25 Let me talk briefly -- I know Ms. Sullivan covered

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
)	
et al.,	)	Civil Action
	)	No. 15-2115
Plaintiff,)	
	)	Tuesday, April 19, 2016
v.	)	10:00 a.m.
)	
STAPLES INC., et al.,	)	Washington, D.C.
)	
Defendants.)	

DAY 11

**TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING PROCEEDINGS
(CLOSING ARGUMENTS)
BEFORE THE HONORABLE EMMET G. SULLIVAN,
UNITED STATES DISTRICT COURT JUDGE**

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1 This is a -- you are the final check in all practicality
2 on the government, because if the government's application is
3 granted, the merger will not be consummated, so you are the
4 final check --

5 THE COURT: Is that a fact that the Court has to give
6 weight to?

7 MS. SULLIVAN: Well, it's a factor that's cited in some of
8 the case law, Your Honor, in terms -- in looking at --

9 THE COURT: The Court has to give some weight to it,
10 correct?

11 MS. SULLIVAN: Yes, I agree, yeah. And actually the *FTC*
12 *versus Occidental Petroleum* court case says: "Because it's such
13 an extraordinary and drastic remedy that will kill a merger, that
14 the commission has a heavy burden." So you certainly can
15 consider in weighing the equities here and weighing the evidence,
16 consider that your ruling will be final in terms of whether the
17 merger is consummated or not.

18 And, Mark, I'm sorry. Thank you.

19 And one of the -- in terms of the likelihood of success,
20 Your Honor, their burden is to define the relevant market, both
21 the product market and the customer market. If they fail to do
22 that, then their market share calculations, as Dr. Shapiro
23 testified, are screwed up and it's fatal; they can't meet their
24 burden. If they have incorrectly defined the relevant product
25 market or the target customer market, their case must fail. They

Notice of Electronic Service

I hereby certify that on April 22, 2016, I filed an electronic copy of the foregoing Joint Expedited Motion for a 21-Day Stay of Administrative Proceedings, with:

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Chief Administrative Law Judge
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Donald Clark
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I hereby certify that on April 22, 2016, I served via E-Service an electronic copy of the foregoing Joint Expedited Motion for a 21-Day Stay of Administrative Proceedings, upon:

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