In the Matter of

Sycamore Partners II, L.P.,
a limited partnership;  

Staples, Inc.,
a corporation;  

and  

Essendant Inc.,
a corporation.

Docket No. C-4667

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 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”).

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


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.

April Tabor
Acting Secretary

SEAL:
ANALYSIS OF AGREEMENT CONTAINING 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, 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, 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.

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.
Statement of
Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and
Commissioner Christine S. Wilson
Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc.
FTC File No. 181-0180

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

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.

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 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.
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. 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.

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

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.
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 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.

\(^5\) Chopra Statement at 3 n.9.
\(^6\) Chopra Statement at 4.
\(^8\) 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.
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 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-

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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 incipiency 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. Likewise, we fully 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 through, and we recognize that it is not a rarity for merging parties to overstate efficiencies or fail to support them properly. 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


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.”).
obtained a divestiture of the acquired, offending asset in another case. 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 incipiency 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.

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. 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. 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

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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.
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, citing left-leaning Washington think tanks and a few academics. 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.

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. While I do not dispute the accuracy of these broad statistics, they simply do not support such a sweeping claim about

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.”).
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. 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 analyses that have been roundly criticized. 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. As any practitioner knows, broadly defined “industries” are rarely coterminous with relevant antitrust markets, 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, courts routinely recognize that such shares are merely the first step in a much deeper market power analysis. They therefore tell us nothing about whether merger policy has

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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.


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 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
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 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”


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.


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.”)

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

16 Id. at 2.
STATEMENT OF
COMMISSIONER ROHIT CHOPRA
In the Matter of Sycamore Partners, Staples, and Essendant
Commission File No. 181-0180
January 28, 2019

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.

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.

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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. 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. 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. In my view, the Commission’s analysis did not adequately rule out the possibility of this type of harm from the merger.

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.

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. The Commission rightfully did not

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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.


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.

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.\footnote{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).}

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.\footnote{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).}

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.\footnote{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.} 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 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.\footnote{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.} 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 Commissioner 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 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. 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. 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. 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.

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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.
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, 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.
STATEMENT OF
COMMISSIONER REBECCA KELLY SLAUGHTER
In the Matter of Sycamore Partners, Staples, and Essendant
Commission File No. 181-0180
January 28, 2019

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 record rates in 2018, and three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components. 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.

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. I am particularly concerned that the current approach to vertical integration has led to substantial under-enforcement.

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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,
Concerns about vertical mergers are not new. We know that vertical mergers, particularly those involving highly concentrated markets, can pose a variety of significant threats to competition. Indeed, agency investigations have identified a range of competition concerns, including limiting access to or raising the costs of key inputs, restricting access to an important customer, inhibiting entry by new competitors, evading regulations, facilitating coordination, or, as the Commission also alleged in this case, allowing anticompetitive information sharing. But, among the enforcement actions that the Commission brings, many are settled with behavioral remedies rather than divestitures, and few of our enforcement actions challenge vertical mergers outright.

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


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. 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).


See Salop & Culley, supra note 9.
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. 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. 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. 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. To the extent that our enforcement decisions rely on claimed efficiency benefits of a transaction, 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. In other

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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.


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).
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 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

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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”].


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 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.
