

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION, *et al.*,

Civil Action No. 1:15-cv-02115-EGS

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

**STAPLES, INC. and
OFFICE DEPOT, INC.,**

Defendants.

Civil Action No. 1:15-cv-02115-EGS

PUBLIC VERSION

**PLAINTIFF FEDERAL TRADE COMMISSION'S BRIEFING
REGARDING WILSON DECLARATION**

As Plaintiff Federal Trade Commission understands the dispute between Defendants and Amazon, Defendants seek draft declarations of Amazon employee Prentis Wilson that are in the files of Amazon. Defendants assert that the drafts are not protected by the attorney-client privilege or the attorney work product doctrine because, as Mr. Wilson testified in his deposition, the declaration was prepared with input from members of Mr. Wilson's business team. *See* Ex. 22 to Hochstadt Decl. at 126-27. The FTC is not involved in that dispute. In the course of its defense of Defendants' Motion to Compel Discovery from Non-Party Amazon.com. Inc., Amazon provided points and authorities to the Court that, in part, described the process in which the declaration of Mr. Wilson was prepared. In this briefing ordered by the Court, the FTC addresses its role in that process, as well as consultations between the FTC and third parties more broadly.¹

¹ In describing its internal processes, the FTC does not waive any privilege or protection, including under the work product doctrine or investigative privilege.

I. The Role of Third Parties in FTC Investigations.

The FTC staff attorneys are charged with investigating whether a proposed merger may be anticompetitive and, after investigating, making a recommendation to the Commission whether to challenge the merger or allow the transaction to close with no regulatory action. To do this, they seek information through subpoenas or Civil Investigative Demands not only from the merging parties but from knowledgeable market participants, such as customers, competitors, and others that may have relevant information that may inform the staff's recommendation and Commission's ultimate decision. The information gleaned from all of these sources provides the information the FTC staff need in order to make a recommendation and develop evidence supporting a complaint in federal court, should the Commission authorize a challenge through litigation.

In the course of any investigation, the FTC staff gather documents and other information. Staff review business records and assess data related to revenues, costs, production, and the like, both from the parties to the proposed merger and third parties. Staff may also take testimony in investigational hearings. All of this is done

specific facts that the FTC staff synthesize for use in its recommendation to the Commission and allegations in a complaint.

Each declaration is prepared differently. The FTC staff often prepare a draft based on what the witness told the FTC staff in interviews. This is done because it can be time-consuming to draft a declaration, and because the FTC staff are in the better position to set forth the information in a manner that would be relevant to the economic and legal issues presented by the proposed merger. After a draft is prepared, FTC staff typically discuss the draft with the witness, and often the witness' counsel, to ensure the accuracy and clarity of the statements in the draft, or to seek additional detail, such as specific revenue or volume information. Sometimes drafts are sent to the third party, which makes changes before the witness executes the declaration. Sometimes, when the facts are sufficiently clear, the FTC finalizes the declaration before sending it to the third party for execution. Sometimes the third party prepares the declaration itself in consultation with the FTC. Those drafts may then be subject to additional internal discussions within the witness' company, involving counsel or other employees. The FTC is typically not privy to those internal discussions.

Ensuring the integrity of a declaration—that the statements are truthful, accurate, and clear—is critical to the FTC, because the Commission relies on the information to discharge its mandate; and courts may rely on them in any subsequent challenge to the transaction.

II. The Role of Third Parties in Merger Litigation.

Fact declarations are evidence. Not only do they support the FTC's staff's recommendation to the Commission, but many courts admit them as evidence in preliminary injunction proceedings. Of course, the declarations may be discoverable in litigation, as are many of the FTC's communications with the third parties. In this litigation, the FTC produced

its third-party declarations, including the Amazon declaration, to the Defendants on December

to ensure the statements were clear and accurate and contained relevant admissible statements.

Amazon provided the executed Wilson declaration to the FTC on November 17, 2015.

The FTC does not consider the process that resulted in the Wilson declaration to be anything unusual or inappropriate. We hesitate to call the process “routine,” as indicated in the Court’s March 1, 2016, order, because the process varies from witness to witness and investigation to investigation. It is crucial for the FTC to be able to generate evidence for its investigation and to support a complaint, should one be authorized by the Commission. Given the length and complexity of most declarations, the FTC staff tend to play a role, often a leading role, in the drafting of the declaration. Close consultations with the third party, including counsel, are crucial to ensuring the truthfulness, accuracy, and clarity of the declarations.

Respectfully submitted,

Dated: March 2, 2016

By: /s/ Tara L. Reinhart
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of March, 2016, I filed the foregoing with the Clerk of the Court via the CM/ECF system, which will automatically send electronic mail notification of such filing to the CM/ECF registered participants as identified on the Notice of Electronic Filing.