

Comment by Jeff Hauser to FTC on Proposed Consent Agreement in the Matter of Staples/Essendant, Inc.

Federal Trade Commission
Office of the Secretary
Constitution Center
400 7th Street SW
Washington, DC 20024

Re: Proposed Consent Agreement In the Matter of Staples/Essendant, Inc., File No. 1810180

Dear Sir or Madam:

The proposed merger between Staples and Essendant has been the target of a great deal of deserving criticism. The Federal Trade Commission’s (FTC) decision and proposed consent agreement do not fully take into account the significant potential direct and indirect anti-competitive effects of this merger.

While expressing agreement with those critiques, this comment focuses on an issue with this merger that goes to the heart of the Revolving Door Project’s work.¹ The Revolving Door Project works to reveal to civil society the advantage that corporate America currently enjoys in influencing how the executive branch writes and implements the rules that govern our economy. In a word, that advantage is “personnel” — corporate America strategically identifies key jobs across the federal government and ensures they maintain strong ties to the people who hold them.

It is as an entity with deep expertise in identifying soft corruption (i.e., legal but wrong behavior) that the Revolving Door Project offers the following warning to the Commission. It is very likely that Sycamore Partners has made a strategic decision with respect to whom they hired to represent them, one that calls into question the genuine independence of the individuals who worked on this settlement at the FTC.

¹ Center for Economic and Policy Research, *Jeff Hauser, Executive Director of the Revolving Door Project*, (last visited on Feb. 22, 2019), available at http://cepr.net/about-us/staff/jeff-hauser-executive-director-of-the-revolving-door-project#revolving_door.

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Again, to emphasize so as to avoid any misinterpretation, we are not alleging that any entity has acted illegally — just that something troubling has occurred which calls this consent decree’s legitimacy into question.

According to the “Agreement Containing Consent Order,”² this settlement was reached by three attorneys in “Mergers IV Division, Bureau of Competition:” Maria DiMoscato, Kevin Hahm, and Melissa Hill.³

The team at Mergers IV was negotiating with Matthew J. Reilly of Kirkland & Ellis LLP, who represented Sycamore Partners, i.e., the acquirer in this deal.

Reilly’s law firm bio makes clear the conflict of interest at play here:

Matt Reilly is a partner in the Washington, D.C., office of Kirkland & Ellis LLP. Matt’s practice focuses on a wide range of antitrust matters, including antitrust litigation, complex transactions and antitrust counseling and government investigations. **Matt is frequently relied upon to obtain regulatory clearance for many of the toughest, high profile deals.**

Matt is a former assistant director of the Federal Trade Commission (FTC), Bureau of Competition. **In this role, he served for five years as the head of the FTC’s Mergers IV division**, where he led numerous investigations and oversaw the FTC’s litigation efforts in industries such as hospitals, supermarkets and other retailers, and a variety of consumer products.⁴ (emphasis added)

2 Federal Trade Commission, *In the Matter of Staples/Essendant, Inc., File No. 1810180* (Jan. 28, 2019), available at https://www.ftc.gov/system/files/documents/cases/1810180_staples_essendant_agreement_1-28-19.pdf.

3 *Id.* (identifying Kevin Hahm and Melissa Hill as Assistant Director and Deputy Assistant Director, respectively, of Mergers IV Division, Bureau of Competition K); see also Federal Trade Commission, *Inside the Bureau of Competition* (June 2018), available at https://www.ftc.gov/system/files/attachments/inside-bureau-competition/inside_the_bureau_of_competition_2018_2.pdf (listing Maria DiMoscato as part of Mergers IV).

4 Kirkland & Ellis, *Matthew J. Reilly, P.C.* (last visited Feb. 22, 2019) available at <https://www.kirkland.com/lawyers/t/reilly-matthew-j-pc>.

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In short, Kirkland & Ellis markets Matthew J. Reilly to prospective clients as someone who can be “relied upon to obtain regulatory clearance for many of the toughest, high profile deals” based in large part on “five years as the head of the FTC’s Mergers IV division.”⁵ Note that Mergers IV is the division responsible for assessing this specific acquisition. The potential for Reilly’s prior relationships with members of the Mergers IV division to have helped secure the deal’s approval irreparably undermines public confidence in this merger’s merits.

Reilly led the Mergers IV division for five years prior to leaving the FTC for private practice in 2012.⁶ That work brought him into close contact with two of the FTC attorneys who are now responsible for the Staples/Essendant case. DiMoscato has been a general attorney at the FTC since 2006 and worked on at least one case with Reilly in that time.⁷ Hahm has also been with the FTC since 2006 and worked as a staff attorney on many of the cases for which Reilly was a lead litigator.⁸ Given his seniority in the division compared to these two attorneys it is probable that Reilly would have been involved in some manner in their professional reviews, including potentially holding some sway over promotions, bonuses, or other career milestones.

While it is obviously possible that the current senior attorneys in the division did not like Reilly, it is concerning that:

- (a) current Mergers IV attorneys may have received mentorship from Reilly;
- (b) current Mergers IV attorneys may have received promotions or bonuses recommended by Reilly; and

5 Id.

6 Kirkland & Ellis, *Kirkland Boosts Antitrust and Competition Practice with Hire of Former Federal Trade Commission Assistant Director Matthew J. Reilly in Washington D.C.* (Oct. 31, 2016) available at <https://www.kirkland.com/news/press-release/2016/10/kirkland--ellis-boosts-antitrust-and-competition-p>.

7 LinkedIn, *Maria DiMoscato* (last visited Feb. 22, 2019) available at <https://www.linkedin.com/in/maggie-dimoscato-b6b4953/>; Federal Trade Commission Office of the Administrative Law Judges, *Unopposed Motion to Extend Respondents’ Time to Answer Administrative Complaint, Docket No. 9348* (May 12, 2011), available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/05/110512phoebemotion.pdf>.

8 LinkedIn, *Kevin Hahm* (last visited Feb. 22, 2019) available at <https://www.linkedin.com/in/kevin-hahm-7aa63/>; Kirkland Ellis, *Matthew J. Reilly, P.C.* (last visited Feb. 22, 2019) available at <https://1npdf9.onenorth.com/pdf>.

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(c) Reilly may have had unusual insight into the specific strengths, weaknesses and organization of Mergers IV that would allow him to be unusually effective above and beyond any other experienced antitrust lawyer.

In light of these facts, our suggestions are two-fold.

First, the FTC should withdraw its approval for this deal. The conflict-of-interest concerns involving Mr. Reilly taint the integrity of the Mergers IV division's analysis and conclusions and make it impossible for the public to have confidence in the process that lead to this deal.

Second, the FTC should implement new rules governing conflicts of interest within the merger approval process. No former attorney for the FTC should be permitted to represent a client in proceedings before a mergers division if that attorney has ever recommended a promotion or bonus to an FTC lawyer working on or supervising that case.

The FTC's must guard against such conflicts of interest in order to restore public trust in the institution serving the public interest, rather than the interests of the regulated.

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