

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Staples, Inc., Staples AMS, Inc., and Office Depot, Inc.*, 2016 Comp. Trib. 6

File No.: CT-2015-012

Registry Document No.: 31

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an Order pursuant to section 92 of the *Competition Act*;

AND IN THE MATTER OF the proposed acquisition of Office Depot, Inc. by Staples Inc.

B E T W E E N:

Commissioner of Competition
(applicant)

and

Staples, Inc., Staples AMS, Inc., and Office Depot, Inc.
(respondents)



Decided on the basis of the written record.

Before Judicial Member: Gascon J. (Chairperson)

Date of Order: April 18, 2016

CONFIDENTIALITY ORDER

[1.] FURTHER TO the application filed by the Commissioner of Competition (the "Commissioner") against the Respondents pursuant to section 92 of the Competition Act, R.S.C. 1985, c. C-34, as amended (the "Act"), for one or more orders pursuant to subsection 92(1) of the Act;

[2.] AND FURTHER TO the draft confidentiality order filed on consent by the Commissioner and the Respondents;

THE TRIBUNAL ORDERS THAT:

[3.] For the purpose of this order:

- (a) "Affiliate" means , in respect of a Person, any other Person controlling, controlled by or under common control with such first Person, whether directly or indirectly, and "control" means directly or indirectly hold securities or other interests in a Person (i) to which are attached more than 50% of the votes that may be cast to elect directors or persons exercising similar functions or (ii) entitling the holder to receive more than 50% of the profits of the Person or more than 50% of its assets on dissolution;
- (b) "Commissioner" means the Commissioner of Competition appointed pursuant to section 7 of the Act or any person designated by the Commissioner to act on his behalf;
- (c) "Designated Representatives" means up to two in-house counsel and up to four additional individuals designated by each of Staples and Office Depot as their respective representatives who will be permitted access to Documents designated as Level B Protected Documents in accordance with the terms of this Order, which designations shall be made by written notice to the Tribunal, with a copy sent concomitantly to counsel for the Commissioner. The Commissioner may make a motion to the Tribunal objecting to such designations;
- (d) "Document" means any document whatsoever, whether in physical or electronic form, including "Records";
- (e) "Document Review Vendor" means a professional service provider retained by a Party with respect to the Proceeding to facilitate the review of documents, both digital and paper, by legal professionals and who has executed a confidentiality undertaking in the form attached as Schedule A hereto;
- (f) "Independent Expert" means an expert retained by a Party with respect to the Proceeding who (i) is not a current employee of a Respondent or its Affiliates, (ii) has not been an employee of a Respondent or its Affiliates within two years prior to the date of this Order, (iii) is not a current employee of a competitor of a Respondent or its Affiliates; and (iv) has not been an employee of a competitor of a Respondent or its Affiliates within two years prior to the date of this Order; and (v) has executed a confidentiality undertaking in the form attached as Schedule A hereto;

- (g) "Office Depot" means Office Depot, Inc., its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by Office Depot, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each;
- (h) "Parties" means the Commissioner and the Respondents, and "Party" means the Commissioner or any one of the Respondents;
- (i) "Person" means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;
- (j) "Proceeding" means the application filed by the Commissioner against the Respondents (File Number CT-2015-012) for an order pursuant to section 92 of the Act;
- (k) "Protected Document" means any Document (including the information such Document contains) that is produced in the Proceeding, including documents listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to undertakings, documents produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits or submissions that the Party producing the Document claims is confidential pursuant to section 4 of this Order, or the Tribunal has determined is confidential, in whole or in part;
- (l) "Record" has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any email or other correspondence, memorandum, pictorial or graphic work, spreadsheet or other machine readable record and any other documentary material, regardless of physical form or characteristics;
- (m) "Respondents" means Staples and Office Depot collectively; and "Respondent" means any of them;
- (n) "Staples" means Staples, Inc., its directors, officers, employees, agents, representatives, successors and assigns; and all joint ventures, subsidiaries, divisions, groups and Affiliates controlled by Staples, Inc., and the respective directors, officers, employees, agents, representatives, successors and assigns of each; and
- (o) "Third Party" means any Person other than the Commissioner or Respondents.

[4.] Disclosure of Documents containing any of the following types of information could cause specific and direct harm, and such Documents may be designated as Protected Documents:

- (a) Information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers), capacity,

specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives;

- (b) Confidential contractual arrangements between a Respondent and its customers and/or suppliers;
- (c) Financial data or reports, or financial information relating to a Respondent or its customers, suppliers or a Third Party;
- (d) Business plans, marketing plans, strategic plans, budgets, forecasts and other similar information;
- (e) Internal market studies and analyses; and
- (f) Other Documents containing competitively sensitive and/or proprietary information of a Respondent or a Third Party and/or identifiable customer information (e.g., name, address, contact or financial information).

[5.] If information from a Protected Document is incorporated into any other Document, that Document shall be a Protected Document. Any Protected Document shall cease to be a Protected Document if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); (b) if the Parties agree in writing that the Document shall cease to be a Protected Document; or (c) the Tribunal determines that the Document shall cease to be a Protected Document.

[6.] Protected Documents will be identified in the following manner for the purpose of this Proceeding:

- (a) A person who claims confidentiality over a Document shall at the time of production of a Protected Document mark it with "Confidential – Level A" or "Confidential – Level B" on the face of each Document and/or on each page that is claimed as confidential;
- (b) Subject to Section 3 of this Order, all Documents designated as Protected Documents shall be treated as a Protected Document, save for determination otherwise by the Tribunal or re-designation pursuant to Section 8 below;
- (c) If a Document originates with or from more than one Party and is designated by at least one Party as a Protected Document, the highest level of confidentiality shall universally attach to that Document, subject to the resolution of any challenge to that claim of confidentiality;
- (d) At any point in the Proceeding, a Party may challenge a claim of confidentiality or level of confidentiality made by another Party. The Parties shall use their best efforts to agree as to whether the Documents (or portions thereof) are to be treated as Protected Documents; and

- (e) If agreement cannot be reached, the Parties may apply to the Tribunal to determine whether the Document or a portion thereof, is a Protected Document.

[7.] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Document, or as required by law, Protected Documents marked "Confidential – Level A" ("Level A Protected Documents") may be disclosed only to:

- (a) the Commissioner, Counsel for the Commissioner, and the Commissioner's staff who are directly involved in the Proceeding;
- (b) outside counsel to the Respondents, including outside counsel's staff who are directly involved in the Proceeding;
- (c) Independent Experts retained by the Parties and their staff who are directly involved in the Proceeding; and
- (d) Document Review Vendors.

[8.] Subject to a further Order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Document, or as required by law, Protected Documents marked "Confidential – Level B" ("Level B Protected Documents") may be disclosed only to:

- (a) the individuals described in paragraph 5; and
- (b) Designated Representatives of the Respondents who have executed a confidentiality undertaking in the form attached as Schedule A.

[9.] Notwithstanding any provision of this Order, the Commissioner may disclose any Level A Protected Documents or Level B Protected Documents that he has so designated, and that have not been produced in this Proceeding by a Respondent or otherwise originated from a Respondent, to any person for the purpose of preparing for the hearing of this Proceeding, subject to the limits prescribed by section 29 of the Act.

[10.] A Party may at any time and with prior reasonable notice to the other Parties re-designate any of its own Level A Protected Documents as Level B Protected Documents or public documents, and/or may re-designate any of its own Level B Protected Documents as public documents. Where another Party disputes the re-designation, the Tribunal shall determine the proper designation. Documents re-designated as public shall cease to be Protected Documents and shall form part of the public record if introduced into evidence at the hearing of the Proceeding, unless the Parties agree otherwise or the Tribunal so orders. If a Party changes the designation of a Document to confidential, a prior disclosure of it shall not constitute a breach of this Order.

[11.] If a Party is required by law to disclose a Protected Document, or if a Party receives written notice from a person who has signed a confidentiality undertaking pursuant to this Order that they are required by law to disclose a Protected Document, that Party shall give prompt

written notice to the Party that claimed confidentiality over the Protected Document so that a protective order or other appropriate remedy may be sought.

[12.] Outside counsel for a Party and his or her staff, Counsel for the Commissioner, the Commissioner and his staff, and Independent Experts and their staff, may make copies of any Protected Document as they require in connection with the Proceeding.

[13.] Nothing in this Order prevents a Party from having full access to Protected Documents that originated from that Party, as applicable.

[14.] For greater certainty, in accordance with Rule 62 of the *Competition Tribunal Rules*, all persons who obtain access to Documents and information through this Proceeding are subject to an implied undertaking to use the Documents and information solely for the purposes of this Proceeding (including any application or proceedings to enforce any order made by the Tribunal in connection with this Proceeding) and any related appeals.

[15.] At the hearing of the Proceeding:

- (a) Protected Documents tendered as evidence at the hearing of the Proceeding shall be identified and clearly marked as such, in accordance with paragraph 4(a), above;
- (b) Following submissions from the Parties, the Tribunal may determine whether the Document should be treated as a Protected Document;
- (c) Protected Documents shall not form part of the public record unless the Party or Parties claiming confidentiality waive the claim, or the Tribunal determines that the Document is not a Protected Document; and
- (d) Documents over which no privilege or confidentiality claim has been asserted shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record in this Proceeding if introduced into evidence or otherwise placed on the record. Public Documents shall be marked "Public" on the face of the document.

[16.] The Parties shall provide the Tribunal with redacted versions of Protected Documents at the time any such Documents are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked "Public" on the face of the document and shall form part of the public record in this Proceeding. Each Protected Document shall identify the portions of the document which have been redacted from the "Public" version, by highlighting such portions in the Protected Document.

[17.] The termination of the Proceeding shall not relieve any person to whom Protected Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Documents in accordance with the provisions of this Order and any confidentiality undertaking, subject to any further order of the Tribunal.

[18.] Upon completion or final disposition of the Proceeding and any related appeals, all

Protected Documents and any copies of Protected Documents, with the exception of Protected Documents in the possession of the Commissioner and his staff, shall be destroyed or returned to the Party that produced them unless the Party that produced the Protected Documents states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Parties, including outside counsel to the Parties in jurisdictions outside Canada, and Counsel to the Commissioner may keep one set of Protected Documents in their files.

[19.] Nothing in this Order prevents or affects the ability of a Party from applying to the Tribunal for further orders or directions with respect to the use or disclosure of Documents or information produced by another Party.

[20.] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 18th day of April, 2016.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

SCHEDULE "A":

CONFIDENTIALITY UNDERTAKING

IN CONSIDERATION of being provided with information or documentation in connection with this application over which claims for confidentiality have been advanced ("Protected Documents"),

I, _____, of the city of _____, in the [province/state of] _____, hereby undertake and agree to maintain the confidentiality of any Protected Document that I obtain, and in particular:

1. I will not disclose a Protected Document to any other person, except to a person permitted to receive it under the Confidentiality Order of the Competition Tribunal (the "Tribunal") dated April _____, 2016, or such further Order as the Tribunal may make.
2. I will not use the information or documentation so obtained for any purpose other than in connection with the Proceeding (including any application or proceedings to enforce any Order made by the Tribunal in connection with the Proceeding, and any application under section 106 of the *Competition Act* to vary or rescind any Order made by the Tribunal in connection with the Proceeding), and any related appeals.
3. I will not copy, transfer, disseminate, or otherwise share or disclose any Protected Document or the information contained therein to any other person, entity, or party, contrary to the terms of the Confidentiality Order.
4. Upon completion of this Proceeding and any related appeals, I agree that all Protected Documents in my possession shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by Order of the Tribunal. I may retain in my confidential files, subject to the requirements of confidentiality imposed by this undertaking, materials prepared by me, such as my expert report, as well as study results and materials of a general nature which do not replicate any confidential information from a Protected Document.
5. I have read the Confidentiality Order, a copy of which is attached to this undertaking, and agree to be bound by it. I acknowledge that any breach of this undertaking by me will be considered to be a breach of the Confidentiality Order of the Competition Tribunal.
6. I acknowledge and agree that the Party that claims confidentiality over a Protected Document may not have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this undertaking are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that the Party that claims confidentiality over a Protected Document shall be entitled to injunctive relief to prevent breaches of this undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.
7. In the event that I am required by law to disclose any Protected Document that is subject to this undertaking, I will provide [insert name of retaining or employing Party] with prompt written notice so that the person that claimed confidentiality over such information or documentation may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Document that is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded to it.

8. I will promptly, upon the request of the person providing a Protected Document, advise where it is kept by me.

9. I hereby attorn to the jurisdiction of the Competition Tribunal to resolve any disputes arising under this undertaking.

SIGNED, SEALED AND DELIVERED before a witness this ____ day of _____, _____.

Name of Signatory:

Name of Witness:

COUNSEL

For the applicant:

The Commissioner of Competition:

Jonathan Chaplan

Jonathan Hood

For the respondents:

Staples, Inc. and Staples AMS, Inc.:

Adam Fanaki

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