

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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3	UNITED STATES OF AMERICA)	CIVIL NO.:
4	Plaintiff,)	22-2791-ACR
5	vs.)	
6	ASSA ABLOY AB, et al.,)	
7	Defendant.)	July 9, 2024
)	Washington, D.C.
)	9:57 a.m.

Transcript of Status Conference
Before the Honorable Ana C. Reyes
United States District Judge

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P R O C E E D I N G S

1
2 THE CLERK: We're in civil action 22-2791, United
3 States of America versus ASSA ABLOY, et al.

4 Can I have counsel approach the podium and state
5 your names for the record, starting with counsel for the
6 plaintiff.

7 MR. DAHLQUIST: Good morning, Your Honor. Good to
8 see you again. David Dahlquist on behalf of the United
9 States.

10 THE COURT: It's not good to see you again. I
11 thought I was done with you people.

12 MR. DAHLQUIST: We thought so as well, Your Honor.
13 And I'm, of course, joined by -- at counsel table by Mr.
14 Huppert, Miranda Isaacs, Ben Rudofsky. And as requested, the
15 monitor is here and we'll allow her to introduce herself, I
16 suppose.

17 THE COURT: Okay.

18 MR. BERNICK: Good morning, Your Honor. Justin
19 Bernick and Lauren Battaglia on behalf of ASSA ABLOY. Good to
20 see you.

21 THE COURT: Hi.

22 MS. COOLIDGE: Good morning, Your Honor. Melinda
23 Coolidge, the appointed monitoring trustee.

24 THE COURT: Good morning. You must have a big
25 headache. Is anyone representing you here today? Because I

1 have questions about all these issues. So who's taking up the
2 legal arguments?

3 MR. DAHLQUIST: On behalf of the United States, Mr.
4 Huppert will be taking up --

5 THE COURT: Okay. Well, let me start with some good
6 news for the trustee and it may be the only good news for the
7 trustee this hearing. You are going to -- ASSA ABLOY is going
8 to appoint some point person at ASSA ABLOY that she can
9 coordinate with to set up interviews, to get documents, et
10 cetera. If you, outside counsel, want to be part of those
11 interviews, that's totally fine. But no more of this letter
12 writing back and forth. I want her to have a point of contact
13 who is fully responsive. By that I mean, if she sends an
14 email, within 24 hours someone's back to her, okay? All
15 right. So I'm going to enter that into a minute order.

16 Now, I think the main question for us today or one
17 of the questions is on this interpretation of Section 4 of the
18 agreement, who's going to be arguing that for the Government?

19 MR. HUPPERT: I am, Your Honor.

20 THE COURT: All right. Here we are again. One day
21 you and I will agree on law. I'm not sure today will be it.

22 This seems pretty straight forward to me that they
23 did not want a five-year study. That what they were looking
24 at was a study of what's going on years '26 to '29. And that
25 the way that I read sort of the trustee's or the monitor's

1 briefs and your briefs, basically the way I understand it is,
2 well, we need to know what they're doing now, so if there's
3 decreased efficiencies in 2026 we'll know what caused them or
4 we'll know some of the causes of them. And to me that ignores
5 both the language of the document but also puts the cart
6 before the horse.

7 I mean, the assumption behind your briefing is there
8 is going to be diminished intensity and we need to know sort
9 of immediately how that happened. And it seems to me that
10 that's just totally backwards. First you have to find out if
11 there's intensity. And that starts in 2026, not now. So tell
12 me why I'm wrong about that. Because I would bet everything I
13 own, except for my dog scout and the Red Sox jersey I received
14 from the Red Sox after I took the bench, everything else I
15 would bet that there is no universe, none, in which those guys
16 agreed to a five-year study.

17 MR. HUPPERT: Well, I think it is not a five-year
18 study and I think the monitor made clear that is not what she
19 is conducting. What the monitor is conducting, as we
20 understand it, is an investigation that is going to prepare
21 her to be able to make the determination as soon as the
22 three-year mark, about whether there's been a diminishment in
23 competitive intensity.

24 THE COURT: But there's must be -- there's a
25 benchmark right now, right, as of the date of the divestiture

1 as to what the competitive intensity was. Like, let's say
2 it's a hundred. I'm just making up a number, right. If at
3 year 2026 it's a hundred and above then they don't have a
4 problem, right? And you would know whether there's a problem
5 or not because you have the benchmark from 2023.

6 Now, if it's 100 in 2023 and in 2026 it goes down to
7 90 or 80 or 70, and the monitor wants to have a look back to
8 see what cause that, then we would have a different argument.
9 Then I would be on your all's side. Yes, if there's
10 diminished -- I'm sorry, Christine, I'm talking too fast. If
11 there's diminished intensity, yes, then she would be able to
12 look back to see what caused that. But I don't think anything
13 in this agreement allows her to prepare for the possibility
14 that there's going to be diminished intensity.

15 MR. HUPPERT: Well, Your Honor, I think that ASSA
16 ABLOY has created a straw man by calling this a five-year
17 ongoing continuous academic --

18 THE COURT: Well, whatever you want to call it, I
19 mean, whatever she's doing, whether you call it playing
20 tick-tack-toe or a study or whatever, she's looking into
21 things that will help her when we get to 2026, that's related
22 somehow; right?

23 MR. HUPPERT: Well, actually, I think ASSA ABLOY's
24 reply brief is telling on this point, Your Honor. They
25 concede at page five, I believe, of their brief that the

1 monitor is permitted to be --

2 THE COURT: Hold on. I just want to make sure I'm
3 with you. All right. I'm at page 5.

4 MR. HUPPERT: So the long paragraph on that page,
5 starting with the bulk of the government's opposition, they
6 say in the middle of that paragraph, ASSA ABLOY understands
7 the monitor may analyze competitive intensity of the domestic
8 residential smart lock business at the time of the
9 divestiture, which they call the first snapshot.

10 THE COURT: Right. That's the hundred that I just
11 gave you.

12 MR. HUPPERT: I understand. So they acknowledge
13 that she's allowed to do two things. They acknowledge that
14 she's allowed to digest and understand the litigation record,
15 which they call a massive amount of information, which we
16 agree with. So, obviously, that's a significant amount of
17 work to understand and digest the litigation record.

18 THE COURT: But it can't be that complex. I mean
19 you guys came to litigation and you had some idea of what
20 their -- like what the decrease in the competition was going
21 to be, because you were arguing -- I mean, you guys have a
22 benchmark, don't you, as to what you thought the competitive
23 nature of ASSA ABLOY was at the time of the litigation, can't
24 you just give that to her?

25 MR. HUPPERT: Well, so two things, Your Honor. No.

1 1 is that the monitor, by the nature of her position, is
2 required to come to her own independent conclusion about what
3 the nature of competitive intensity is and how it should be
4 measured.

5 THE COURT: Right. But I don't -- to me that
6 doesn't mean like we're throwing out, you know, -- it feels
7 like -- and ma'am, this is not pejorative in any way, shape,
8 or form, this is just, the you is the legal you, not the you
9 you -- it feels like she's starting from scratch. And I don't
10 think that that's what they signed up for. I think it's
11 wholly inefficient and I don't see a reason for it.

12 If you all have a benchmark that you must have had
13 for the litigation, and she can go in 2026 and compare the
14 intensity in 2026, and if she sees a problem and we're back
15 here in 2026, I hope not, then I agree you would have a lot of
16 leeway in my view to figure out what caused the diminished
17 intensity. But I don't understand why we are spending
18 hundreds of thousands of dollars to figure out what the
19 competitive intensity is now, since we already know it or how
20 we got there. In the event that maybe there's diminished
21 capacity -- and ma'am, if you want to come up you can. I see
22 you standing.

23 MS. COOLIDGE: Yes. I apologize, Your Honor, when
24 you asked about who was doing the legal arguments, I was
25 deferring to the DOJ. But if we're going to discuss how I'm

1 approaching competitive intensity, I think with your
2 indulgence I am probably best suited to answer those
3 questions.

4 THE COURT: Okay.

5 MS. COOLIDGE: So there is not --

6 THE COURT: You are a lawyer, right?

7 MS. COOLIDGE: I am a lawyer.

8 THE COURT: Okay. Hausfeld is a law firm; right?

9 MS. COOLIDGE: Correct.

10 THE COURT: Okay. Because we're going to have a lot
11 of conversation about your invoices after we get done with
12 this, okay, just spoiler alert.

13 MS. COOLIDGE: Okay. With regard to competitive
14 intensity, the reason -- to answer one of your questions,
15 there is not yet a benchmark.

16 THE COURT: How is that possible because they -- how
17 is it possible that as of the time -- my understanding is that
18 the benchmark is as of the time of the divestiture, am I right
19 about that?

20 MS. COOLIDGE: Correct.

21 THE COURT: Okay. How is it possible that the
22 government did not have a benchmark for competitive intensity
23 in an antitrust case when their entire argument was that there
24 was going to be less competitive intensity if I let this
25 merger go forward. There must have been something.

1 MS. COOLIDGE: I am not best suited to answer
2 questions about --

3 THE COURT: Mr. Dahlquist, can someone just answer
4 this question for me, please?

5 MS. COOLIDGE: But I would really like to address
6 this point, Your Honor.

7 THE COURT: I'm going to let you talk as long as you
8 want. I promise you.

9 MR. DAHLQUIST: Your Honor, we of course had a
10 benchmark.

11 THE COURT: Okay. Can't you just give it to her?

12 MR. DAHLQUIST: She has all the material that we had
13 from the trial.

14 THE COURT: Look, guys, I don't mean give her
15 hundreds of thousands of documents that then spends millions
16 of dollars going through. I mean, you must have a benchmark,
17 like a document or a memo or something where you all said,
18 this is it, and you can just hand her that memo as opposed to
19 hundreds of thousands of documents.

20 MR. DAHLQUIST: Using Your Honor's example of a
21 benchmark of 100, that 100 includes a multitude of factors.
22 Those factors include our expert reports, expert testimony,
23 witness testimony --

24 THE COURT: But you have the bench mark, you have
25 the hundred number somewhere; right?

1 MR. DAHLQUIST: Your Honor, to be put it into an
2 actual number is an illusion, I would respectfully state.

3 THE COURT: Well, then you can never have this
4 benchmarking. Then this whole thing is not doable and then
5 you have a much bigger problem.

6 MR. DAHLQUIST: No, respectfully, it is doable.
7 Competitive intensity is aligned with the case law that is
8 from this court, from *Cisco*, from *Aetna*. But is a multitude
9 of factors, it is not -- let's take I think defendants like to
10 say market share. Market share is an element of a benchmark
11 and an element of competitive intensity, but it is not the
12 entirety. And it should not be the entirety, respectfully.
13 Market share as we know is a factor and is an element, but it
14 is not the end of the game. As the merger guidelines say, as
15 any other court case will say, it's a starting point but not
16 an end point.

17 THE COURT: So I'm just totally confused now. So
18 the agreement is they were agreeing to benchmark as of the
19 date of the divestiture. And your view is that there's no
20 actual number as of that date and it's just whatever the
21 monitoring trustee sort of comes up with.

22 MR. DAHLQUIST: No, Your Honor. No, Your Honor.
23 Respectfully, it is in the independent judgment of the monitor
24 as to what factors, what elements should be looked at. She
25 has the entirety of --

1 THE COURT: I don't -- look, they're -- look, who
2 can tell me what Schrodinger's cat is?

3 MR. DAHLQUIST: I'm sorry, Your Honor.

4 THE COURT: Schrodinger's cat. Who can tell me what
5 it is, in the audience, anyone?

6 All right. We're going to get a physics lesson.
7 Schrodinger's cat is a thought experiment. It was brought up
8 by a physicist Schrodinger because he did not agree with the
9 new quantum mechanic physicist, because they said that there
10 is no actual reality, every single particle, every single
11 electron is in a state of probability and not real until it is
12 observed. And Schrodinger said, well, that's ridiculous,
13 because if I have a cat inside of a box and a radioactive
14 particle in that box and there's no observer, according to the
15 quantum mechanics the cat is both dead and alive, because
16 something hasn't happened yet to collapse the function to make
17 it real.

18 All right. And Einstein and Schrodinger said to the
19 quantum mechanic people, you guys are nuts. This can't be the
20 way the word works. And then the Coppenhagen physicists,
21 including Heisenberg said this is the way the world works.
22 The cat is dead and alive and off they go.

23 And then about two decades later a Ph.D. student
24 Everett came up with mathematical proof that the way to
25 resolve Schrodinger's cat is that the cat is alive in one

1 universe and dead in a different universe, and that every time
2 there's a decision point there's a new universe that occurs,
3 right. So there's a universe with a dead cat. There's a
4 universe with the alive cat. And when someone observes it we
5 go to one or other of the universes, and there's infinite
6 universes. All right. It's called the multiverse. And
7 everyone laughed at Everett, and he ended up like leaving
8 physics altogether because everyone laughed at him.

9 15, 20 years ago, up until the last ten years, a lot
10 of physicists actually have what they believe is mathematical
11 proof for the multiverse theories. That in fact there are
12 infinite universes.

13 All right. I am saying all that -- and the infinite
14 universes is in one universe I was nominated and confirmed to
15 the bench, in another one I wasn't, I'm still at W&C, in
16 another one I never became a lawyer I was like playing Reggae
17 or something. All right. I'm saying all this to express to
18 you my view that there is no universe, none, zero, zip, zilch,
19 in which those guys agreed to five-year anything. And they
20 certainly did not agree to some ambiguous, the monitor is
21 going to start afresh on what the competitive intensity number
22 is. Like, there's just no way that they agreed to that.

23 MR. DAHLQUIST: Understood, Your Honor. But there's
24 also no universe, this one or any multiverse, where the
25 government, the United States agreed to take a snapshot, which

1 is the colloquialism term that they use, on day one of this
2 divestiture and then wait five-years and take another snap
3 shop.

4 THE COURT: But you did agree to that, you agreed
5 three years and that's -- I mean, that's the language of the
6 provision. I mean, tell me where I'm wrong on the language on
7 that.

8 MS. COOLIDGE: Your Honor, it specifically says
9 after investigation and consultation with the United States.
10 I read investigation as me needing to do something other than
11 take something that the DOJ did. The reason I said there's
12 not a competitive benchmark is because --

13 THE COURT: Hold on. Hold on. Hold on. You're not
14 reading the whole thing. Because I'm focused on the
15 following: A, acquires competitive intensity in the
16 residential smart locks business has diminished relative to
17 ASSA ABLOY's competitive intensity in that business as of the
18 divestiture date. Not from 2023 to 2026. As of the
19 divestiture date.

20 MS. COOLIDGE: Correct.

21 THE COURT: That to me is the key language. That's
22 where I'm saying they would not have agreed to five-years,
23 because then they would have just said at any point in time.

24 MS. COOLIDGE: If you'll permit me, I think what
25 we're looking at is to establish a competitive benchmark as of

1 the divestiture date. The information provided to the
2 government in their litigation, the data ended in the year
3 before the divestiture. It ended in 2022. Thus, I do not
4 have the information to bring me all the way to the
5 divestiture date to understand competitive intensity.

6 THE COURT: Well, what do you need for that?

7 MS. COOLIDGE: I need the additional transaction
8 data that hasn't yet been produced.

9 THE COURT: But just till the divestiture date.

10 MS. COOLIDGE: To establish the benchmark,
11 absolutely, that is correct.

12 THE COURT: You guys didn't establish a divestiture
13 date -- or divestiture benchmark past 2022?

14 MS. COOLIDGE: The divestiture occurred after the
15 litigation.

16 THE COURT: I'm aware.

17 MR. DAHLQUIST: We had discovery cut-off date, Your
18 Honor, so that's where our data ended.

19 THE COURT: How much work will it take you to get --
20 if you get that additional document to the divestiture date.

21 MS. COOLIDGE: I've provided that in my statement, I
22 provided a budget to establish that benchmark.

23 THE COURT: What was the budget?

24 MS. COOLIDGE: It ranges from, I want to say, 1.5
25 million to 4 million depending --

1 THE COURT: Okay. That's insane. I'm sorry, but
2 that's insane. All right. I have done complex litigation for
3 22 years. I've worked with innumerable economic experts. I
4 have seen -- I've been involved in litigation involving
5 hundreds of millions if not billions of dollars as a
6 litigator. And 4 million, 1 million dollars is basically like
7 summary judgment plus lead up to trial. I mean, that is
8 intense stuff, at very high rates. So where are you getting
9 \$1.7 million to review a few more documents from them and get
10 a benchmark which you already should have from 2022.

11 MS. COOLIDGE: Your Honor, I also participate in
12 complex litigation. I'm basing it on the work that I do in
13 those cases, and the work I do with the same economists who
14 are here, doing essentially the same thing that I've been
15 charged with the Court --

16 THE COURT: Okay. Well, I'm not letting you spend a
17 million dollars on figuring this out. So we're going to have
18 to come up with something else, if I agree that you get more
19 information. Can you please be -- do you have more you want
20 to say? I'm happy to hear you out.

21 MS. COOLIDGE: I do, Your Honor. I believe that I
22 am required under the -- I want you to know that I spent a lot
23 of time with the plain language of the final judgment. I do
24 not understand myself to have a blank check. I spent quite a
25 bit of time with my team determining exactly what the final

1 judgment required. In order to come up with an Assessment of
2 competitive intensity in 2026 I must have this benchmark
3 before.

4 THE COURT: So but do you agree with me that you
5 don't need information from the divestiture date to 2026.

6 MS. COOLIDGE: I do not.

7 THE COURT: Okay. That seems to be --

8 MS. COOLIDGE: I would like to address that.

9 THE COURT: You do not agree with me?

10 MS. COOLIDGE: I do not agree with you and I'd like
11 to tell you why.

12 THE COURT: Okay. Hold on. All right. Go ahead.

13 MS. COOLIDGE: Competitive intensity is not a
14 number. It is an evaluation of a wide range of metrics as an
15 antitrust law practitioner, I understand it to involve an
16 assessment of price, price relative to quality or features,
17 customer churn, changes in market share, competing for
18 customers, winning over customers, lowering prices, adapting
19 features to respond to customer demands, investments in
20 research and development, investments in customer service and
21 resulting customer satisfaction, and possibly other factors
22 that I'm not thinking of at this moment. I will not be
23 coming -- I do not know how to come up with a number, it is an
24 assessment of competition in a marketplace for smart locks.

25 So I will need to -- I can not look at one day, June

1 20th, 2026, and say now that I've seen this day I know what
2 happened with competitive intensity. I need to understand
3 what sales have happened in the preceding year. What both
4 companies have done to, you know, recruit customers from each
5 other. What investments have they made to I improve their
6 products.

7 THE COURT: Okay. So what if I give you a
8 three-month look back? I still don't understand why you need
9 to be doing that for three years.

10 MS. COOLIDGE: So as I stated in my statement we're
11 not doing it for three years. I anticipate the benchmark
12 analysis will take through the end of 2024.

13 THE COURT: I don't -- I don't understand.

14 MS. COOLIDGE: I know that you don't like that
15 part.

16 THE COURT: Well, it's not that I don't like it,
17 it's not allowed by the judgment, the one I signed. I get to
18 decide what the judgment means.

19 MS. COOLIDGE: Yes, you do, Your Honor.

20 THE COURT: And I don't understand why you need
21 information past 2023 to get what the benchmark was as of
22 2023. And maybe you have a point that you can't just start on
23 day one of 2026, you might need some look-back information.
24 But I don't see why that has to happen now. And I certainly
25 don't see why that has to be ongoing through to 2026.

1 MS. COOLIDGE: So I agree with Your Honor that I do
2 not need future information to determine a past benchmark. We
3 are completely agreed on that. But I do need the data through
4 the date of the divestiture.

5 THE COURT: Okay. I mean, Mr. Bernick and I can
6 talk about that, that seems reasonable to me.

7 MS. COOLIDGE: In terms of doing the assessment of
8 competitive intensity in 2026, I am going to need to
9 understand what happened in the market preceding that.

10 THE COURT: For how long?

11 MS. COOLIDGE: At least a year.

12 THE COURT: I can't -- that just seems like that
13 can't be right. I mean, I just don't understand why you would
14 need a year look back in order to understand competitive
15 intensity. I mean -- just that seems wrong to me. All the
16 things that you mention, what sales they've had blah, blah,
17 blah, blah, blah. I mean, maybe on some issue you might need
18 a year. But it can't be that you just have open season on a
19 year's worth of discovery from '25 to '26. Because they --
20 that was the original language of the agreement and they
21 expressly, as I was not surprised to see, were like nope, not
22 in this universe or any other. And they cut that out. And
23 you guys, sorry, but they weren't able to bargain for it.

24 MS. COOLIDGE: I'd like to address that with you.
25 If you think about what a year looks like in an industry, it

1 would not be an appropriate assessment of competitive
2 intensity for me to look at a three-month period. There may
3 have been zero sales in a three-month period. It's not
4 indicative of what the market looks like over time. These
5 customers will buy large volumes in a particular month, and
6 the only way to do this reliably would be to have at least a
7 year's worth of data to understand what the competition looks
8 like in 2026.

9 Now, I had suggested, because employees are leaving,
10 they will not be able to -- the new employees will not be able
11 to explain to me the state of the market in the past. And I
12 am simultaneously undertaking or attempting to undertake
13 compliance interviews with various employees, that I could
14 more efficiently do that together so that a year from now I'm
15 not beginning the competitive intensity thing, finally
16 receiving documents, half of the employees have left, no one
17 can answer my questions, and I have to call back employees
18 I've already spoken with for compliance. That was my
19 thinking.

20 THE COURT: That's fine. That gets you to 2023.
21 What I don't understand is why you need 2024 to 2026. And
22 what you're telling me is you can't make a determination on
23 day one of 2026. And what I'm saying is that seems wrong to
24 me. But if that is so, wouldn't the real question be --
25 wouldn't the real response be to start at 2027, have a year

1 look back to see what the intensity was in 2026.

2 MS. COOLIDGE: That is possible to do. It is not
3 how I read the final judgment, which I --

4 THE COURT: I'm the one who reads the final
5 judgment. All right.

6 MS. COOLIDGE: Which as you said is your
7 interpretation. I read, "if after three years following the
8 divestiture date the monitoring trustee determines after
9 investigation," so I read that as saying, June 2026 I may
10 determine, after investigation, which means to make that
11 determination I need to have an investigation after that. If
12 it were to say, if after four years following the divestiture
13 date, then I could make the assessment in 2027, and look back
14 to 2026 and do that investigation in 2026. That's not what I
15 see it saying.

16 THE COURT: I mean, I guess there's some ambiguity
17 as to whether after investigation and consultation with the
18 United States is after the three years or before the three
19 years. And given what they cut out, like, to me -- first of
20 all, I just don't read it the way you do. I read it that
21 investigation and consultation with the United States can
22 happen after 2026. So, therefore, you can determine sort of
23 in 2027 looking back to 2026. But even if I were to grant you
24 that it's ambiguous and I look at the negotiating history
25 between the parties, I mean, they cut out precisely the

1 language that would have allowed you to do this; right?

2 MS. COOLIDGE: I do not believe they do -- they
3 did.

4 THE COURT: Where is that -- can we look at that?
5 Where is it in the briefing? Mr. Bernick, is that in your
6 briefing?

7 MR. BERNICK: It is, Your Honor. I believe it's
8 Exhibit 1.

9 THE COURT: Exhibit 1 is the final judgment. I mean
10 the language that from the negotiating history.

11 MR. BERNICK: Right, the red line. I'm sorry
12 Exhibit 4, I misspoke, oh, 13. Page 13.

13 THE COURT: Page 13 of your brief.

14 MS. COOLIDGE: So, Your Honor, the way that I read
15 this is, I may not make a determination until three years have
16 passed. And that is the change that I see here.

17 THE COURT: Hold on. I'm still not seeing it. I'm
18 sorry, I just want to make sure we're all looking at the same
19 language.

20 MR. BERNICK: I think it's Exhibit 1, Your Honor.
21 I'm sorry.

22 THE COURT: Oh, hold on. I was at the wrong thing.
23 Hold on one second.

24 MR. BERNICK: If you look at Exhibit 1, Your
25 Honor.

1 THE COURT: Hold on, I think --

2 MR. BERNICK: It's on the fourth page, the relevant
3 language of that exhibit.

4 THE COURT: Okay. I'm at 144, page 13, right? And
5 I have what was red lined. If any time up to five-years from
6 the entry of this final judgment the monitoring trustee
7 determines after investigation and consultation, blah, blah,
8 blah, and any time up to five-years was taken out. And what
9 was put in was, "if after three years following the
10 divestiture date." I mean, to me it's very clear that there
11 was a negotiation there in which the government wanted the
12 monitor to be able to look at information for an entire
13 five-years. And those guys said nuh-uh and what they
14 negotiated and compromised on was three years.

15 MS. COOLIDGE: I absolutely agree --

16 THE COURT: Sorry, go ahead.

17 MS. COOLIDGE: I absolutely agree. It changed the
18 date of determination. It no longer could be the day after
19 the divestiture could I conclude that competitive intensity
20 had diminished. And I think it's very logical. Fortune
21 should have the assets for a while to build up and be able to
22 compete, at which point I may determine. But as I said, I
23 read "if after three years I determine, after investigation,"
24 it's authorizing me after June 2026 to make the determination.
25 And I couldn't do that without investigating first. That was

1 the reason I that I thought I should --

2 THE COURT: But it doesn't say that you have to make
3 the determination on the first day of 2026.

4 MS. COOLIDGE: It does allow me to, though.

5 THE COURT: It says that, yeah, if you've
6 investigated. But it doesn't allow you to investigate back
7 into 2025, that's what they negotiated around.

8 MS. COOLIDGE: How could I investigate if it didn't
9 involve any information?

10 THE COURT: Because you investigate starting 2026
11 midway or 2027, and have a look back to see what the date was
12 on 2026. I mean, your position is that you're allowed to on
13 day one of 2026 know what the competitive intensity is and
14 compare that to the benchmark. And what I'm saying is I don't
15 read it that way. And I certainly don't read -- and even if I
16 were to grant you that there's an ambiguity, I don't read the
17 negotiating history that way. Because the way to read it is
18 if you need three months, if you need six months, if you need
19 a year, you start 2026 plus three months, six months, 12
20 months. And then you look back and then in 2027 you have, or
21 2026, you have the answer.

22 Now, if you need a year, that's fine, take 2026 to
23 2027, not going to stop you. I don't know that you need a
24 year, but you're the economist, not me. But I don't see this
25 as -- I mean, let me put it to you this way, we're all agreed

1 that -- the divestiture was June 2023?

2 MS. COOLIDGE: Yes.

3 THE COURT: Okay. Let's just start using the
4 months. That will make my life easier. We're agreed that
5 from June 2023 to June 2024, and June 2024 to June 2025, those
6 two years, you agree don't need information for those two
7 years; right? Because you've told me you need a year look
8 back. And that would be June '24 -- no June '25 to June
9 '26.

10 MS. COOLIDGE: I do not believe the analysis will be
11 as strong without it, but I do believe it is possible to do
12 something without it.

13 THE COURT: Great. 2023 to 2024, June 2024 to 2025,
14 those are off the table. We're all agreed. Yes?

15 MS. COOLIDGE: If Your Honor so orders.

16 THE COURT: Okay. I will order. We're ordering
17 that. Off the table. Yes?

18 MR. HUPPERT: Your Honor, if I can just be heard on
19 the language issue of the final judgment. As we said in our
20 briefing, the final judgment requires that it be construed
21 with your normal canons of interpretation. And we talked in
22 our briefing about the nearest-reasonable-referent canon,
23 which we think clearly applies here and forecloses any
24 ambiguity about the text. That would also mean that the
25 negotiating history should not be considered at all. And --

1 THE COURT: Well, I can see why you would want me
2 not to consider it, but explain to me -- I just don't
3 understand your argument that this is plain that she gets to
4 do what she wants for three years on competitive intensity.

5 MR. HUPPERT: Well, that's not our position. But it
6 is our position that she is allowed to investigate prior to
7 making a determination that can be made as soon as the three
8 year mark and the reason why --

9 THE COURT: Okay. But she's just -- let's just say
10 I agree with both of you. She's just told me she can do it --
11 I mean, it's not ideal, she's not as happy as she otherwise
12 would be, but she can do it getting '23 to '24 and '24 to '25
13 off the table. Are we all agreed on that?

14 MR. HUPPERT: Well, Your Honor, we would object to
15 doing that, because that is not the way that competitive
16 intensity was investigated for the litigation in this case.
17 And it's not how competitive intensity has been approached by
18 prior courts. I think *Cisco* is another good example of this,
19 Your Honor, in terms of your question about what the number
20 is, whether it's 100 or 90. And *Cisco* is a illustrative
21 example of why it cannot just be boiled down to a mathematical
22 exercise. In that case Judge Mehta looked to numerous factors
23 that bear on competitive intensity, including investment in
24 the business, acumen of executives, customer preferences,
25 sales strategies, economies of scale, entanglements with

1 competitors, in addition to sort of more quantitative measures
2 like market shares and sales figures.

3 But the point is, Your Honor, that this is a
4 multifaceted question. It is not boiled down to a single
5 number. And it has to be analyzed going back -- and again,
6 cited evidence going back years. Just as in this case, we
7 didn't just look at the year prior to trial to assess what --
8 to in that case projecting into the future what the
9 competitive intensity of the business would be. We went back
10 to 2019. And we looked at evidence in 2020 and 2021 and 2022.
11 It was not just the six months or the three months or the year
12 preceding trial. Because you cannot understand the state of
13 competitive intensity without looking back to a longer period
14 of time.

15 It's just -- it -- you could look at it, but you
16 would be missing a tremendous amount of context and useful
17 information that would inform -- which could be helpful to
18 ASSA ABLOY and Fortune, by the way. It may be that the
19 monitor gets -- you know, there may be a dip in sales that is
20 not illustrative of the actual competitive intensity of the
21 business.

22 So it serves all parties to make sure that the
23 monitor has a more complete picture of how competition is
24 playing out in the marketplace, which is not just one day or
25 one month or even a year. Because the cycle of these

1 businesses is not that short.

2 THE COURT: I don't see where the language gives her
3 carte blanche to investigate the three years that they
4 definitely carved out of the agreement, ask for whatever
5 documents she wants, to lead up to determining the competitive
6 intensity on 2026, and then determining then whether it meets
7 or doesn't meet the benchmark. The language -- there is no
8 reasonable reading of this agreement that allows her to do
9 that, none, it's just an unreasonable approach. Because
10 basically what she's saying is every day from 2023 to 2026 I'm
11 going to be investigating all of these factors that you're
12 telling me about, so that in 2026 I have all of this
13 information and I can come up to a decision. And that is what
14 you didn't bargain for. If you had bargained for that, this
15 would read differently.

16 MR. HUPPERT: Well, again, Your Honor, the
17 limitation -- so just to go to the text briefly. So the
18 clause that I think everybody's focused on, appropriately, is
19 the clause "after three years." So that clause set off by
20 commas, "after three years, following." And what immediately
21 follows that limitation is "the monitoring trustee
22 determines." And I would agree with you, Your Honor, if that
23 clause said "the monitoring trustee investigates." Because
24 that would mean clearly that if after three years the
25 monitoring trustee investigates, that would mean that her

1 investigation should not start until after three years.

2 THE COURT: No, the way that it would read if you
3 all were right is "if at three years following the
4 divestiture," not after. The -- this is saying that three
5 years happens first before the -- before the determination and
6 before the investigation and before the consultation with the
7 United States. If it your reading was accurate it would say
8 "if at three years following the divestiture date."

9 MR. HUPPERT: Well, fine. But at three years and a
10 day she's allowed to make a determination.

11 THE COURT: That's fine, but not going back a year
12 into 2025.

13 MR. HUPPERT: But that's when the determination
14 happens, Your Honor. That's the key point. The key point is
15 that the is the limitation on when the determination can
16 happen. And this is exactly the situation that Judge Cote
17 dealt with in the Apple case. There was a provision in the
18 final judgment that allowed the monitoring trustee to make in
19 that case an assessment, similar to a determination, about
20 whether the company's policies were sort of sufficient to
21 prevent antitrust violations essentially. And it said at --
22 it said the policies as of 90 days after the monitor had been
23 appointed.

24 And Apple made the same exact argument that ASSA
25 ABLOY is making here. They said, well, whoa, he's not

1 supposed to be able to make that assessment until 90 days. He
2 can't be doing any work until 90 days. And what Judge Cote
3 said is, no, what he can do is he can make an assessment after
4 90 days, but that means he obviously has to be doing work to
5 put him in a position to make that determination --

6 THE COURT: All right. Even if I were to agree with
7 you for purposes of compromise in this world, I'm not doing it
8 for three years. It's not going to happen. That is
9 unreasonable on its face. It cannot be that this language
10 allows her for three years, day in, day out, to get all of
11 this documentation that you all claim she will need for June
12 2026 plus day one to make her investigation. Now, she has
13 told me that ideally she would have three years but that she
14 could do it in one. So 2023 to 2024 and 2024 to 2025 are off
15 the table.

16 MR. HUPPERT: Understood, Your Honor. But I want to
17 be clear that we object to that because we think that that
18 would deprive us of any reasonable opportunity to get any
19 additional relief in this case.

20 THE COURT: She just told me that she could do it in
21 a year. It's on the record.

22 MR. HUPPERT: But I think --

23 THE COURT: She's the monitor. She just told me.

24 MR. HUPPERT: I don't want to speak for the monitor,
25 what I heard her say IS it would be a less effective and less

1 thorough investigation and we think that that will --

2 THE COURT: She said she could do it, but it
3 wouldn't be ideal. It would be less than she would
4 necessarily want, but she could do it.

5 MR. HUPPERT: Well, we --

6 THE COURT: I mean, why not -- why not -- it seems
7 like all of you all are insistent on just making this as
8 inefficient as humanly possible and doing this investigation.
9 If she gets to 2026 and she finds that she needs more than
10 from 2025, I'm happy to put in an order for everyone to
11 maintain documents and not destroy anything and keep all the
12 information, and you can even send a letter of all the things
13 that they need to keep. And I'm happy to do that. And if she
14 gets to 2026, and she gets from 2025 and 2026 and she looks at
15 that and says this isn't enough, I need more come. Then come
16 back to me or negotiate with them and then we can readdress
17 it.

18 But I don't understand why we need to do it -- I
19 mean, basically what you're saying is they have to give you
20 ongoing production on these numerous things that you all have
21 talked about, day in and day out for three years because it
22 may possibly help her later.

23 MR. HUPPERT: So, and the monitor is best positioned
24 to address these questions in terms of the specifics, but our
25 understanding is that really what this is about is a set of

1 document requests that was served to ASSA ABLOY in March that
2 they objected to because they didn't want to be continuously
3 producing data. And my understanding -- and I defer to the
4 monitor -- my understanding is the monitor had been willing to
5 work with them on the cadence of those productions, that it
6 wouldn't have to be monthly or quarterly, that it could be
7 annual to sort of lessen the burden on ASSA ABLOY in terms of
8 producing the information.

9 THE COURT: How many documents -- how many requests
10 were there?

11 MS. COOLIDGE: Two.

12 THE COURT: And what were the requests?

13 MS. COOLIDGE: The requests were for the transaction
14 data that would then allow me to match with --

15 THE COURT: What transaction data?

16 MR. DAHLQUIST: Typical transaction data that is
17 needed to assess competition.

18 THE COURT: Describe to me what that is. I mean
19 give me number of boxes or gigabytes that we're talking
20 here.

21 MS. COOLIDGE: It would be fields of data, including
22 price, product, customer, date, rebates. I do believe that it
23 is an exhibit to one of our attachments here. But it is
24 standard data, you just run a script and you export the data.
25 And then there was a category of business plans. So this is

1 things that are produced in the regular course of business
2 that would show the company's doing their own assessments of
3 competition. How are we doing? Did we lose a customer? What
4 can we do to attract more customers?

5 THE COURT: You need this from ASSA ABLOY or from
6 Fortune. I mean, it seems like the question is what Fortune's
7 competitive intensity is, right? So why are you getting this
8 information from ASSA ABLOY? I mean, I guess that's another
9 major question.

10 MS. COOLIDGE: Yes, Your Honor. The assessment is
11 about changes to Fortune's competitive intensity with regard
12 to how ASSA's competitive intensity was as of the date of
13 the --

14 THE COURT: Right. So why does ASSA ABLOY's
15 competitive intensity in 2026 even matter? Do we have
16 Kirkland here, are there any lawyers here for Fortune?

17 MS. BRYANT: Yes, Your Honor.

18 THE COURT: Come on up.

19 MS. BRYANT: Would you like me to approach?

20 THE COURT: No, you're going to approach pretty
21 soon. I'm going to remind you that you all refused to give me
22 a summer job offer.

23 MS. BRYANT: I was not at the firm at that time.

24 THE COURT: Obviously, I was not going to amount to
25 anything.

1 MS. COOLIDGE: The competitive intensity benchmark
2 that we do is not going to be ASSA ABLOY all by itself. And
3 the later assessment is not going to be Fortune all by itself.
4 Because competition doesn't occur within a company, it occurs
5 in a market. And so we need to understand the state of the
6 industry, the state of competition.

7 THE COURT: So you're going to send a bunch of third
8 party subpoenas out for all the other companies?

9 MS. COOLIDGE: It would be helpful to have data that
10 went beyond the two alleged competitors in this room, yes. I
11 don't know exactly what we will do. We have not figured that
12 out in detail yet. But competition is not going to be
13 occurring just between Fortune and ASSA, there are other
14 important competitors in the market. And we need to be able
15 to assess, in order to not make the wrong conclusion about
16 diminishment of competitive intensity, what the state of
17 competition is in the market.

18 For example, if Fortune's market share decreases, if
19 all you were looking at was market share you might say ooh
20 diminishment of competitive intensity. But if what you saw
21 when you looked at the industry was there are seven new
22 entrants, and every single company including Fortune is
23 competing tooth and nail for customers, decreasing prices,
24 offering rebates, that's a pretty good sense of great
25 competition. So the lowering market share wouldn't actually

1 be a diminishment in competitive intensity. That is why we
2 have to look broader than just one particular company in order
3 to be able to do the assessment that we are charged with.

4 THE COURT: Have you asked for this information from
5 Fortune yet?

6 MS. COOLIDGE: Yes, Your Honor.

7 THE COURT: Fortune, what's your response to their
8 document request?

9 MS. BRYANT: Thank you, Your Honor. Tracie Bryant,
10 that's T-r-a-c-i-e, Bryant, with Kirkland and Ellis on behalf
11 of Fortune Brands.

12 Yes, so Fortune has been working with the monitor on
13 a number of different issues. For instance, the Vietnam
14 facility which the monitor takes up in her statement. She's
15 also served a number of requests. In all fairness the parties
16 have been working together on them. There are a handful,
17 though, and I appreciate the back to the transactional data
18 one. It's not in the record as Fortune is not a party here,
19 so didn't file it. But if I may, it is FB, F as in Frank, B
20 as in boy, DR 21 and it asks for all electronic databases
21 showing all transactions on an individual transaction by
22 transaction basis from January 1, 2022, to the present, in
23 which you sold a smart lock product to any purchaser in the
24 United States. And it asks for that information to be
25 produced every six months.

1 THE COURT: Okay. If I got that document request
2 and someone -- and they brought a discovery dispute before me
3 I would kill the request. That is -- I mean, you're basically
4 asking them for every single piece of paper, electronically,
5 for every single transaction. Like, that's just not
6 reasonable.

7 MS. COOLIDGE: Your Honor, it will not be possible
8 to do a competitive intensity assessment without transaction
9 data. It is always produced in every antitrust case. All I
10 do is antitrust cases. We always have the transaction data.
11 It is a simple export, it is -- and I did offer with Fortune
12 to --

13 THE COURT: Go to the mike, please.

14 MS. COOLIDGE: -- of often do we need to actually
15 receive the transaction data, but I cannot do my job without
16 it.

17 MS. BRYANT: If I may briefly, Your Honor.
18 Unfortunately, it's not a simple data request, which I'm sure
19 comes as no surprise here. And I want to be fair to the
20 trustee and her team, they have been clear and signaled a
21 willingness to work with Fortune. But to respond to the
22 request as written, it would require, if even possible, a
23 significant investment to try to come close to providing the
24 level of detail and granularity that's being asked for here.
25 It's not the way that Fortune currently keeps this

1 information. It's not what it would be doing if it was
2 spending all its time and attention, as it wants to, to build
3 the business, to grow the business, to try to be in a place
4 that when in 2026, and hopefully long before that, the
5 business is much more competitive than what it is today.

6 THE COURT: Okay. Ma'am, what's an example of a
7 court that has allowed you for years to get all information on
8 every transaction, give me an example. I'm going to look up
9 the docket.

10 MS. COOLIDGE: It's not all information on every
11 transaction.

12 THE COURT: Well, she said all transaction data.
13 Read it again.

14 MS. COOLIDGE: I think that's a summary. We gave
15 you the specific fields that we needed.

16 MS. BRYANT: No, Your Honor, this isn't a summary.
17 I would be happy to pass up the letter if that would be
18 helpful. One second, please.

19 MS. COOLIDGE: The point is, though, Your Honor, we
20 would discuss the fields that are needed. It is a significant
21 amount of data, absolutely. I can provide you probably a
22 hundred cases --

23 THE COURT: Great. You're going to do that.

24 MS. COOLIDGE: Where this data --

25 THE COURT: You're going to provide to me a hundred

1 cases where every other judge in America has done this, and
2 I'm the only one who is concerned.

3 MR. HUPPERT: If I may, Your Honor, we received
4 similar transaction data from ASSA ABLOY and nonparties,
5 including Fortune, in the litigation. So this is in terms of
6 whether --

7 THE COURT: Yeah, but you settled the litigation.

8 MR. HUPPERT: But in terms of your point about
9 discovery requests, there were discovery requests made to ASSA
10 ABLOY, to Spectrum, and to Fortune, and to Allegion for this
11 kind of granular transaction data, sort of fields, these kinds
12 of back and forths are common in our experience in --

13 THE COURT: Mr. Bernick, are they right about this?
14 Is this like every day and I just don't know what I'm talking
15 about because I'm not an antitrust lawyer?

16 MR. BERNICK: No, Your Honor this is crazy. So I
17 know what Ms. Coolidge is talking about.

18 THE COURT: Ma'am, you can sit down for a bit.

19 MR. BERNICK: I'm very often opposite Hausfeld,
20 because they're a plaintiff's firm that brings antitrust class
21 actions. And in antitrust class actions, sure, they're
22 looking at transaction data to determine if there's --

23 THE COURT: You need to slow down. We all need to
24 slow down. Sorry, Mr. Bernick.

25 MR. BERNICK: That's okay. To determine if there's

1 competitive effects or damages in the context of an antitrust
2 violation. I defend a lot of those cases, again, against
3 Hausfeld. But that's not what we're talking about here. We
4 negotiated a narrow scope of a competitive intensity analysis.
5 It should be a benchmark, it should be a number we can know in
6 advance. Not results --

7 THE COURT: But they're telling me that there is no
8 number. They're telling me that they look at all this stuff
9 and it's just like a gut feel. It's like President Bush, it's
10 just I know it in my gut.

11 MR. BERNICK: I'm shocked. You know, I'm sitting
12 here listening to this and this is not what we negotiated. If
13 you're trying to evaluate whether something diminished it's
14 got to be measurable.

15 And I think there's a good example, Ms. Coolidge
16 gave a the example of, okay, I need to evaluate whether
17 changes in prices caused a change in market share. The change
18 in price is not a measure of competitive intensity. The
19 market share might be. And if we see the market share go
20 down, then I agree, Ms. Coolidge might need to go back and
21 look at prices and determine if prices were the cause of that,
22 or maybe a lack of access to the old trademark rights were the
23 cause of that.

24 We need to have some sort of benchmark baseline we
25 can determine up front before spending \$3.3 million. And the

1 fact that we still don't know what that benchmark is today,
2 after spending 3.3 million, and then we're going to spend 4.5
3 million more before 2026 is shocking to me.

4 I guess the other point that I'd make too is this
5 notion about, well, do we need a lead up. From our
6 perspective that was explicitly negotiated in this document,
7 as you alluded to. We didn't say you have to make a
8 determination on day one in 2026 and if you miss it, you miss
9 the boat, tough. No, we acknowledged there was a two-year
10 window of time for the monitor to conduct this analysis. And
11 so this notion we should provide a wind up period is really
12 beyond the pale.

13 THE COURT: Actually, that's a good point I hadn't
14 looked at, Mr. Huppert. Why can't we read this language as
15 the investigation/consultation happening between the three
16 years and the five-years. That's what I was saying, I just
17 hadn't focused on the five-years Mr. Bernick just reminded
18 me.

19 MR. HUPPERT: Well, because -- so again, there's
20 three clauses in a row that I think have to be read together.
21 And the first clause is "after three years." That modifying
22 clause modifies what comes after it, which is "the monitoring
23 trustee determines." So the monitoring trustee determines
24 after three years, but the determination also, as makes clear
25 from the third clause, "the determination comes after an

1 investigation and consultation" --

2 THE COURT: Yeah, but you left out in your analysis
3 or your reading the five-years. Why isn't it read that the
4 investigation happens between the three years and the
5 five-years. That would seem more logical, especially given
6 the negotiating history that -- I mean, you took out any time
7 up to five-years. You took it out.

8 MR. HUPPERT: No, so that is a window in time --

9 THE COURT: So why can't the investigation happen
10 during that window of time? Why isn't that a natural reading
11 of that clause?

12 MR. HUPPERT: Because the investigation happens
13 before the determination and the determination can happen --

14 THE COURT: But you're just saying that as a fact.
15 I'm saying look at the language, where in the language does it
16 tell me that?

17 MR. HUPPERT: Because it says determination --
18 determines, comma, after investigation. So the determination
19 has to --

20 THE COURT: No. No. You keep leaving out -- you
21 keep leaving out that until five-years, if -- let's just leave
22 out the clause altogether. If the monitoring trustee
23 determines, after investigation and consultation with the
24 United States, blah, right, that leaves out the whole clause.
25 And then you say if after three years following the

1 divestiture the monitor determines, but the actual clause is
2 "after three years following the divestiture date and until
3 the date that is five-years from entry of the final judgment
4 the monitoring trustee determines." The monitoring trustee
5 would be referring to the between three years and five-years
6 not just the three years.

7 MR. HUPPERT: Correct. So what I'm saying is the
8 monitoring trustee's determination can take place between the
9 three year mark and five-year mark. In other words, she can't
10 make the determination at the six year mark or the seven year
11 mark, right. We agree that there's an outer bound at the back
12 end. So that's what the "until the date that is five-years
13 from entry" is conveying, is that the determination cannot
14 take place before the three-year mark and cannot take place
15 after the five-year mark.

16 THE COURT: Yeah, you're saying the determination
17 can't, but the investigation can. And what I'm saying is,
18 what in the language allows the investigation to happen before
19 the three years? I mean, you're just saying, like, that's
20 just the way trustees do it, but it's not actually in the
21 language.

22 MR. HUPPERT: No, no, I'm not saying that's how the
23 trustees do it. What I'm saying is that the determination --
24 I think we can all agree, the determination comes after an
25 investigation.

1 THE COURT: Yes.

2 MR. HUPPERT: Okay. So if the determination comes
3 after an investigation then the question is when can the
4 determination occur. And what the text provides, again,
5 nearest reasonable referent, well established canon of
6 interpretation, is that the after three years and until
7 five-years limiting clause only modifies the clause that
8 follows it, which is when the determination can happen. And
9 so we know that the determination can only happen during that
10 window of time, and we know that the investigation can and
11 should happen before the determination is made. So it's a
12 syllogism --

13 THE COURT: There has to be -- it has to be a bound
14 on that, that can't just be an open season, five-years, I
15 mean, there has to be some reasonableness to that. And her
16 telling me that she needs more than a year's worth of data to
17 do it as ideally as she wants, to me sounds -- like, it just
18 doesn't make sense to me. It just can't be right. It can't
19 be right that they negotiated for an open-ended trustee to ask
20 for anything that she wants, all databases, all records from
21 the entire year period. Because then their negotiating away
22 from the five-years would have been meaningless. They would
23 have said, yeah, just come take all our stuff for
24 five-years.

25 MR. HUPPERT: Well, so I think, again, the monitor

1 is better position to answer exactly on the document request.
2 But I do want to come back to ASSA ABLOY's reply brief, Your
3 Honor, because they concede in their reply brief that she is
4 allowed to spend time and do work digesting the significant
5 litigation record and setting what they call -- they call
6 establishing a baseline.

7 THE COURT: Where are you again?

8 MR. HUPPERT: Sorry, this is page five of their
9 reply brief, Your Honor, ECF 150. They acknowledge that she
10 is permitted to do this. That she's permitted to digest what
11 they call a massive amount of information.

12 THE COURT: Wait, hold on. But you're misconstruing
13 what they've said. I mean, let's all just actually look at
14 the language here. Because Mr. Bernick hasn't conceded
15 anything in this entire litigation, so I don't think that he's
16 going to start in his reply brief.

17 MR. HUPPERT: I was as surprised to see it as you,
18 Your Honor.

19 THE COURT: Hold on. Just hold on. The bulk of the
20 governments opposition attacks a straw man in this point,
21 suggesting that ASSA ABLOY's position is that the monitor may
22 not do any work at all before three years following the
23 divestiture date. To the contrary, ASSA ABLOY understands
24 that the monitor may analyze quote, unquote, competitive
25 intensity of the divested residential smart lock business at

1 the time of the divestiture, the first snapshot.

2 MR. HUPPERT: Yes.

3 THE COURT: So and I'm going to give her that. She
4 wants information from 2022 to 2023, that makes sense to me.
5 She's going to get that. But that is not a concession about
6 what happens after year three.

7 MR. HUPPERT: I understand, Your Honor. But what
8 I'm trying to circle back to is the fact that the work that
9 has already been performed and that has been invoiced for,
10 that ASSA ABLOY has categorically refused to pay, has been
11 dedicated to analyzing the litigation record and establishing
12 a baseline, which are things that ASSA ABLOY acknowledges she
13 is permitted to do.

14 THE COURT: Okay. ASSA ABLOY is going to pay that.
15 And they're going to pay it out of escrow in the next seven
16 days. Okay. She's going to get her money.

17 MR. HUPPERT: I didn't want to lose sight of the
18 invoices.

19 THE COURT: She's going to get wired money by Monday
20 and we're going to talk about how much money that's going to
21 be, but it's going to happen. She obviously is going to be
22 compensated for her time. No question. Okay. But I'm not
23 focused on that --

24 MR. HUPPERT: But we're talking about going forward,
25 understood.

1 THE COURT: I'm talking about going forward.

2 MR. HUPPERT: Yes.

3 THE COURT: All right. Now, Mr. Bernick, come back
4 up.

5 MR. BERNICK: Your Honor, I -- one reaction. I
6 understand all these things about canons of construction, but
7 there's nothing to investigate prior to 2026. And that's why
8 I'm scratching my head, because nothing can happen until we've
9 determined that there's been a reduction in competitive
10 intensity. And so to use your language, Your Honor, it puts
11 the cart before the horse. We need to observe what's happened
12 with this metric of competitive intensity starting at 2026.
13 Even if Fortune's sales or market share have gone down at some
14 point in time over the intervening period, there's nothing to
15 investigate there. That's what we negotiated out of this
16 document, from our perspective.

17 THE COURT: But she's telling me that she can't
18 start doing that without knowing the information from 2023 to
19 2026. And that she needs that to be able to hit the
20 ground run -- she wants to hit the ground running on June
21 2026, after an investigation what the competitive intensity
22 is. And what she's saying is she needs information going back
23 in order to do that.

24 MR. BERNICK: I think it's really hard because we're
25 talking in a vacuum here without even knowing what the metric

1 is. Again we spent \$3.3 million and I still haven't heard
2 what this metric is. If we knew what the metric was, perhaps
3 Ms. Coolidge could tell us, maybe it's market share, maybe
4 it's something else --

5 THE COURT: All right. Ms. Coolidge, what have you
6 done with \$3.3 million to come up what is the competitive --
7 what is the competitive intensity as of 2022.

8 MS. COOLIDGE: Your Honor, the invoices to date are
9 only 40 percent related to competitive intensity.

10 THE COURT: Okay. For \$1.4 million, \$1.3 million.

11 MS. COOLIDGE: The economic team has reviewed the
12 litigation record, which ASSA is very insistent that we do.
13 We have begun to work with the transaction data that was
14 produced to the government in order to be able to incorporate
15 additional data that we will be receiving, to make the
16 assessment of competitive intensity.

17 THE COURT: How much more -- once you get the 2023
18 data, how much more work are you going to have to do to get
19 the benchmark.

20 MS. COOLIDGE: I go back to the estimates that I've
21 already provided. There are a number of metrics that we are
22 going to need to look at and understand. It would be very
23 helpful to speak with employees at the companies to understand
24 how they view competition and how they view these various
25 metrics, so that we're well informed in making our assessment

1 of the benchmark.

2 THE COURT: Mr. Bernick, is it right that she's
3 asking for basically to talk to these people on the same two
4 issues so she doesn't have to call them back, can't we just do
5 that?

6 MR. BERNICK: I might have missed the two issues.
7 I'm not tracking.

8 THE COURT: She's saying that she wants to talk to a
9 bench of your employees on compliance issues, and while she
10 has them for those interviews she wants to also talk to them
11 about competitive intensity. Is there any reason to not allow
12 her to do that?

13 MR. BERNICK: My understanding is that all the
14 interviews that have been requested have already happened on
15 compliance. They're already done. And so we're talking about
16 new interviews. If there's some new interview request that
17 Ms. Coolidge would like to make, that's fine. I believe we
18 complied with all the outstanding interview requests.

19 THE COURT: Ms. Coolidge.

20 MS. COOLIDGE: Yes, Your Honor. We would like to
21 receive the documents and the data and then speak to
22 additional employees. We are certainly not complete with our
23 compliance analysis. We are trying to very systematically
24 work through what needs to be evidenced, so that we do not do
25 more work than necessary or go outside our mandate. So there

1 will, of course, be additional interview requests coming.

2 MR. BERNICK: Your Honor, if I may, this is just not
3 that complicated. We, frankly, expected this exercise to cost
4 some money, perhaps a 10th of what we're at now, because we
5 say, okay, here's Fortune's market share as of the
6 divestiture. We're going to take a pause in 2026, if
7 fortune's sales and market shares plummeted then there would
8 be an investigation, we'd dig into this a little bit deeper at
9 that point in time. This is very simple. It doesn't require
10 this continuous assessment.

11 Essentially, what it would be, Your Honor, is a
12 perpetual second request investigation for five-years. And
13 it's not what we signed up for. And that's the cost. This
14 run rate that we're talking about, it's about 30 percent of
15 the EBITDA of the monitored company. I mean, I know there's a
16 \$4.3 billion transaction, but the smart residential business
17 that was divested is tiny. And we're taxing this business. I
18 know ASSA ABLOY is paying the bill, about a third of its
19 profits to engage in this massive industry-wide study.

20 We should know what the benchmark is. The baseline
21 is now. Is it market shares? Is it something else? And if
22 there is some supplementation to get a market share number as
23 of the divestiture date, granted. But then we should be able
24 to quickly in 2026, it might take some wind up, get an
25 assessment what that benchmark is. And if it's decreased, we

1 understand we're back here with more work to do. But this
2 should be simple.

3 THE COURT: Ms. Coolidge, what's it going to look
4 like when you come to your analysis of what the benchmark was
5 in 2023, what's that going to look like? Is it going to be a
6 number? Is it going to be a memo? What's it going to be?

7 MS. COOLIDGE: It will not be number. If the
8 department requests a memo, we could do a memo. We will
9 certainly be documenting our thinking on various metrics. As
10 I mentioned, the market share would not be sufficient in order
11 to understand competitive intensity.

12 THE COURT: What else do you need? You need market
13 share and what?

14 MS. COOLIDGE: We need a variety of metrics. We're
15 going to be looking at customer -- the customer churn around
16 that time period. So how many customers are moving between
17 competitors.

18 THE COURT: Okay.

19 MS. COOLIDGE: We are going to be looking at --

20 THE COURT: Around what time period?

21 MS. COOLIDGE: Around the June 2023 time period.

22 THE COURT: Around the June 2023 and the June 2026;
23 right?

24 MS. COOLIDGE: Well, for the benchmark.

25 THE COURT: And then for the comparison. Okay.

1 MS. COOLIDGE: So, obviously, we won't be looking at
2 the customers that moved in June 2023, we'll be looking at the
3 last year or two, right, to get an actual understanding of the
4 market. We'll look at the investments that the company made
5 in research and development for the smart lock business. What
6 are they devoting to R&D. What new products are coming out.
7 How many products. What are the different features. What
8 kinds of innovations have taken place. We'll take look at
9 customer satisfaction surveys, I hope, to understand are the
10 customers -- at the time of the divestiture were the customers
11 reporting high levels of satisfaction. Were they getting the
12 quality that they needed. Were they getting a service they
13 needed. Were they getting the features that they wanted.
14 What kind of competition for price was there.

15 Do we see ASSA ABLOY in the competitive benchmark
16 period, you know, negotiating on price, being forced to lower
17 prices, providing rebates. Things that are showing there is
18 competition and that ASSA ABLOY doesn't have things locked up.
19 If we find they had things locked up, that's the state of
20 competitive intensity in the benchmark. There's a number of
21 metrics like this that we'll be looking at and then we will be
22 comparing those metrics, I hope in 2026, in order to make that
23 assessment.

24 And I do think the government, as I read the final
25 judgment, the government negotiated for the monitor to be able

1 to make that determination three years following the
2 divestiture date. And I do fear not meeting that requirement
3 as written in the final judgment because they did negotiate
4 for that. They want to be able to --

5 THE COURT: They did not ne- -- no, look, they did
6 not negotiate for five-years of open-ended investigation.
7 Stop talking about that because that's not what they did.
8 There is no universe in which they would do this. It's not on
9 the plain meaning of the language. It's not in the
10 negotiating history. Literally, there is no universe in which
11 Mr. Bernick -- I mean, this was a heavily litigated case. And
12 they had a lot of negotiating power in these negotiations for
13 the settlement, a lot. And they did not give up five-years of
14 open-ended investigation by you all. They just didn't.
15 You're never going to convince me they did, maybe you can
16 convince three people ahead of me that they did. But I was
17 sitting during the trial and I watched them litigate the trial
18 and I saw all the evidence and I talked to them about all
19 this. And I'm telling you right now, Mr. Bernick did not
20 negotiate for five-years open-ended document request.

21 MS. COOLIDGE: And that's definitely not what I'm
22 trying to convince you of, Your Honor. What I am trying to
23 convince you of is that I am permitted, under the final
24 judgment, to have a determination three years following the
25 divestiture date. And I can understand why the government

1 would want that, because if all of these metrics are met they
2 can order more divestiture, right. And they didn't want to
3 have to wait five-years if the determination were made three
4 years. Which is why I saw my mandate as being able to make
5 some assessment as of the three-year date, which I could only
6 do if I do an investigation preceding that.

7 THE COURT: And you want a three-year
8 investigation.

9 MS. COOLIDGE: I do not, Your Honor.

10 THE COURT: Okay. What do you want? How much time
11 do you want? You want a year?

12 MS. COOLIDGE: I would like to be able to be able to
13 make an assessment in June 2026.

14 THE COURT: Okay. Well, why don't we all come back
15 in June 2026. I mean, that's going to be my next point. If
16 in June 2026 you think I need X, Y, and Z, why are you getting
17 all the information now? Why don't we all just reconvene in
18 2026 to find out if you actually need the information. I
19 mean, you might not. It might just be obvious on its face
20 that this thing is off to the races. I don't understand why
21 you need the information now.

22 I mean, come back the 2026, say, based on what we
23 have seeing in the marketplace, we need a lot more
24 information. We need X, Y, and Z. And at that point we can
25 say, yes, okay, you're going to get X, Y, and Z. Yes, you're

1 going to get three years look back. I'm happy to put in a
2 protective order or some order that they can't destroy these
3 documents. Whatever you want me to tell them to save I'll
4 order them to save and then we come back in 2026. What's the
5 problem there?

6 MS. COOLIDGE: I won't have a determination then, in
7 2026.

8 THE COURT: They don't have a right to determination
9 on day one, okay. That's not -- they don't get, like,
10 determination day one. If they had a determination day one,
11 it wouldn't have said from 2026 -- from three years to
12 five-years. Like, you guys don't think you get a
13 determination on day one; right? And let's not all lose our
14 credibility here.

15 MR. HUPPERT: Sorry, Your Honor?

16 THE COURT: You don't think that you get a
17 determination day one; right?

18 MR. HUPPERT: The determination can happen after
19 three years. So as we said, three years and a day, three
20 years and a week. But yes, there should be able to be a
21 determination, at least a preliminary determination, as soon
22 as three years. And I think what the monitor laid out in her
23 statement was that she would, you know, make essentially a
24 preliminary determination and then would -- you know, because
25 it's a window of opportunity, there's a two-year window of

1 opportunity to make a determination.

2 THE COURT: Yeah, so but -- yeah, I guess that's the
3 whole point. But she and maybe you all want it not in the
4 two-year span, you all want it like on day one. I mean, how
5 hard is it to figure out -- market share is not the only
6 issue, but I take it's a big issue; right?

7 MS. COOLIDGE: I would not say it is the most
8 important issue --

9 THE COURT: What is the most important issue?

10 MS. COOLIDGE: There is not a most important issue.
11 And I'm not trying to be difficult, Your Honor, but
12 competition involves a lot of different factors. I've listed
13 those factors and I think they are all very important to this
14 assessment.

15 MR. BERNICK: Can I be heard on those factors, Your
16 Honor?

17 THE COURT: Well, hold on, Mr. Dahlquist has been
18 quiet.

19 MR. DAHLQUIST: I was going make a proposal, Your
20 Honor. I know we've been circling around the date issue. And
21 I hear the Court loud and clear as to this is not an open
22 five-year investigation. I hear you. Perhaps with a two
23 minute recess, connecting with my co-counsel and the monitor,
24 we can come back -- and understand, I know you keep asking if
25 it's agreed, and with respect I'm probably not going to agree,

1 but we will say with the Court's order we can follow your
2 instruction as to how it should be conducted over the next
3 five-years, so that we can put that issue behind and maybe
4 move to the other issues that are here and cognizant of the
5 Court's schedule and time.

6 THE COURT: Yeah, what is my schedule? Do I have
7 something at 11:30? All right. Well --

8 MR. DAHLQUIST: We can do that right now or we can
9 move to the other issues, and because if there's other things
10 we need to discuss, and come right back. But I think there's
11 a solution, or at least a resolution, perhaps, with respect to
12 Your Honor's five-year time issue --

13 THE COURT: All right. I'm going to be back at
14 11:05.

15 MR. DAHLQUIST: Understood, Your Honor.

16 THE COURT: Thank you, Mr. Dahlquist.

17 (A recess was taken at 11:01 a.m. to 11:08 a.m.)

18 MR. DAHLQUIST: Thank you, Your Honor, for the brief
19 recess.

20 THE COURT: Yeah, of course.

21 MR. DAHLQUIST: I will defer to the monitor who
22 after consultation I think has a proposal to make regarding
23 the time.

24 THE COURT: Okay. Go ahead, ma'am.

25 MS. COOLIDGE: Your Honor, I think we've already

1 settled, we'll get the data through the date of the
2 divestiture.

3 THE COURT: Yes.

4 MS. COOLIDGE: Okay. So that is finished. In order
5 to do the assessment, I can try to start with just one year's
6 worth of data that they produce on the date of the divestiture
7 in 2026.

8 THE COURT: Okay.

9 MS. COOLIDGE: So June 20th, 2026. That will be the
10 data and the documents that I've already requested. I will
11 further provide to you --

12 THE COURT: For a year.

13 MS. COOLIDGE: For one year.

14 THE COURT: Okay.

15 MS. COOLIDGE: I will further provide to you, with a
16 list of documents, my best guesses of what might exist that
17 will further need to be preserved in case additional documents
18 are needed. And I will come back to the Court if we find that
19 the one year, or whatever documents have been produced, are
20 insufficient to make the assessment.

21 THE COURT: Okay. I mean, you don't have to come
22 back. You can go to them with a list, agree on the list, and
23 I'll enter a order.

24 All right. Mr. Bernick, can we live with this?

25 MR. DAHLQUIST: Thank you, Your Honor.

1 THE COURT: Thank you, Mr. Dahlquist.

2 MR. BERNICK: Your Honor, if I may, I think it
3 depends on what we mean by data. These requests are massive
4 and have nothing to do with establishing a benchmark for
5 competitive intensity. There's -- here's just a list of the
6 fields: Invoice transaction ID, purchase sale order, the date
7 the purchase order was issued, the invoice number, the date
8 when you billed or invoiced, the brand name, specifications,
9 types, connectivity, use cases and finish to the smart lock,
10 the product groupings under hierarchy, the end use of the
11 smart lock, the quantity of the smart locks, the unit of
12 measure.

13 None of this goes to evaluating whether Fortune
14 Brands' sales or market share have gone up or down. It's a
15 lot of detail about ASSA ABLOY's business, but our concern
16 here is scope. It's not just the time. If we're compressing
17 \$4.5 million of work into one year instead of spreading it
18 over three, that's still a problem. And it comes down to the
19 scope issue. When you asked Ms. Coolidge what the competitive
20 intensity analysis would be she gave four examples, customer
21 churn, investments in R&D customer, customer satisfaction,
22 pricing. Those are things, Your Honor, that don't measure
23 competitive intensity. They might cause a change in
24 competitive intensity, but that comes after 2026.

25 So what we should be looking at as of the

1 divestiture and what we should be looking at to determine if
2 there's been a diminishment in competitive intensity, are just
3 sales, market share, something simple, not these massive
4 requests.

5 And, similarly, with respect to the documents. It's
6 not just some straight forward business plan. It is on a
7 recurring, monthly or quarterly basis, monthly and quarterly
8 business reviews; sales and marketing reviews; business
9 strategies; business plans; analyses of major customers;
10 product plans; business strategies; monthly, quarterly, annual
11 forecasts, budgets, and it goes on and on and on. This is a
12 second request investigation. So whether it's confined to a
13 refresh in 2023 and a wind-up period in 2026, none of it is
14 necessary unless we've established that Fortune Brands
15 competitive intensity has diminished.

16 THE COURT: All right. Mr. Dahlquist.

17 MR. BERNICK: That's the problem we've got.

18 MS. COOLIDGE: Should I respond to that, Your Honor?

19 MR. DAHLQUIST: If I can make two points, Your
20 Honor. First of all, this is not intended to be a discovery
21 dispute hearing. We know you're here for competitive
22 intensity and for the invoices. I think we'll address those
23 points. ASSA ABLOY has not engaged with the monitor,
24 respectfully, on these points, that should happen. If there's
25 issues, specific issues what the monitor is requesting, we're

1 happy to get involved in order to assess those. At a minimum
2 I would say refresh, redo everything that they did in
3 litigation, that's probably going to be enough --

4 MR. BERNICK: Your Honor this is crazy. We settled
5 the litigation.

6 THE COURT: That's what I thought.

7 MR. BERNICK: We settled litigation and these
8 requests, Your Honor, expand to current commercial multifamily
9 it's not just --

10 THE COURT: You have to come to the microphone, Mr.
11 Bernick.

12 MR. BERNICK: I'm sorry. These requests cover
13 commercial and multifamily, they're not even limited to
14 residential --

15 THE COURT: Oh, yeah, I forgot about all that.

16 MR. BERNICK: It's refreshing the entire litigation
17 record.

18 THE COURT: Hold on. Stop. I'm with you. Quit
19 while you're ahead. Why are you looking at commercial and
20 everything else and not just residential?

21 MS. COOLIDGE: Because the causation component in
22 the competitive intensity, that Section B, says I am to
23 determine whether the cause of diminishment in competitive
24 intensity is Fortune's lack of rights to Yale commercial.

25 THE COURT: Okay. But that's definitely pulling the

1 cart before the horse, because you don't need any of that
2 until you find out that there has been decreased intensity.
3 You agree with that; right?

4 MS. COOLIDGE: I agree the first assessment is is
5 there a decline.

6 THE COURT: Okay. So we're putting off all of that
7 discovery until we need it. That's just going to happen right
8 now. You're not going to get all that right now because you
9 may never need it. Now, if you come back and tell me there's
10 diminished intensity, and I agree with you and you need it,
11 you can have it. Maybe. I mean, I have to hear argument at
12 the time. But you're not getting it now. All right. Now
13 we've gotten you down to residential, okay?

14 MR. BERNICK: I still think there is a question
15 about what is necessary, because we still haven't heard
16 exactly what this benchmark is. What is necessary to
17 determine if there's been a diminishment. And if we can know
18 what that standard is, and maybe we can know before we leave
19 the courtroom today, then we can help aim at that target. If
20 you need ASSA ABLOY's sales to know what the denominator is
21 for market share calculation, we get that. But that's not
22 something that's required \$4.5 million worth of work. And
23 what I'm hearing is that we're just going to defer the \$4.5
24 million to the year before 2026 --

25 THE COURT: In fairness she said \$1.7 million to

1 \$4.5 million potentially. You're taking the high end. She's
2 given you a range. We've already taken commercial, et cetera,
3 off the table. We've cut it down from some dates.

4 Here's where I'm hamstrung, you guys keep talking
5 about competitive intensity in different ways. And I have a
6 feeling that this is going to be an issue going forward. So
7 what I'm still confused about is when you get to your
8 benchmark, what's it going to be? Like, what are you going to
9 tell them? What are you going to say the benchmark is.

10 MS. COOLIDGE: I'm not sure I'm going to be telling
11 anybody anything, that's not part of the final judgment.

12 THE COURT: Well, at some point you're going to have
13 to tell them, because there's going to be a comparison. And
14 they have a right to challenge the comparison.

15 MS. COOLIDGE: If you say so.

16 THE COURT: I say so.

17 MS. COOLIDGE: In 2026 we'll be making that
18 assessment.

19 THE COURT: Yeah. Yeah. Yeah. But what is the
20 benchmark? Like, you say it's not a number, what is it?

21 MR. DAHLQUIST: It will be a combination of the
22 factors that I've previously laid out.

23 THE COURT: I understand it's a combination of the
24 factors, but at the end of the day what's it going to say?
25 Like give me an example of the benchmark you used in the past,

1 what does it look like?

2 MS. COOLIDGE: We've looked at -- I mean, typically
3 in the cases I do, it is simply price, because our job is to
4 prove that prices got higher as a result of antitrust
5 violations. That's not competitive intensity, that's price,
6 that's damage to --

7 THE COURT: So have you done competitive intensity
8 benchmarking before.

9 MR. BERNICK: Your Honor, if I may, this has never
10 been done before. Despite the government's position that this
11 was a term of art, you know, where this comes from, it comes
12 from *Cisco* where the judge was citing the DOJ's merger
13 remedies guide, which the DOJ then withdrew. We're paying on
14 a blank slate. There's nothing here, in the case law or
15 anywhere, that defines what competitive intensity is.

16 THE COURT: Okay. Everyone's burying the lead,
17 because everyone's been telling me that this is done all the
18 time. Mr. Huppert?

19 MR. BERNICK: It's never been done, Your Honor.

20 MR. HUPPERT: Can I address that issue, Your Honor?
21 It has been done by multiple courts, including *Cisco*. And the
22 notion that this is a mathematical exercise is belied by the
23 Court's analysis in that case.

24 THE COURT: Hold on, look, maybe it's not a
25 mathematical exercise, got it. You've convinced me it. But

1 has to be some exercise. It can't just be out in the ether
2 somewhere.

3 MR. HUPPERT: No, no, it's not out in the ether, but
4 it is a flexible standard like many --

5 THE COURT: But what's the benchmark going to say?
6 When you all are fighting in front of me that there's
7 diminished competitive intensity, she's going to say, here's
8 what it was as of 2023 and here's what it is now, and there's
9 a decrease. What is she going to tell me? What's it going to
10 look like? Is it just going to be I think competitive
11 intensity was a lot and now it's not so much, or it was not so
12 much and now it's a lot. Like, what is it going to be, or is
13 it just going to be follow your gut, which it sounds like what
14 you're getting to.

15 MS. COOLIDGE: It certainly won't be follow your
16 gut, Your Honor.

17 THE COURT: All right. So what will it be? Wait.
18 Hold on. Answer my question, have you done this before?

19 MS. COOLIDGE: I -- have I done a competitive -- no
20 there's not litigation about competitive intensity.

21 THE COURT: Have you ever done a competitive
22 intensity benchmark?

23 MS. COOLIDGE: It's -- the reason I'm struggling,
24 Your Honor, is because I do only competition cases. We do
25 benchmarking in all of those, but the specific competition

1 metric we're looking at in those is only price.

2 THE COURT: Okay. So the answer to my question is
3 no, you've never done this before.

4 MS. COOLIDGE: Not like this.

5 THE COURT: Okay. Well, it seems like we have a
6 much bigger problem everybody, because it seems like we're not
7 even sure what the benchmark is going to be.

8 MS. COOLIDGE: Shall I answer your other question
9 about what that looks like in 2026?

10 THE COURT: In 2023, yes, please, what where are you
11 going to show?

12 MS. COOLIDGE: So I think it's more relevant in 2026
13 and I'll explain why, because it's a comparison. So in 2026,
14 I expect we'll have these various metrics and we'll say, in
15 2023 ASSA's smart lock business recruited 10 per -- or
16 increased their, you know, customer churn, recruited ten new
17 customers of major magnitude. They also were offering rebates
18 to these other customers. They had -- they had X market
19 share. We see competition for price. We see downward
20 pressure on price. We also see that they were investing \$10
21 million a year on R&D, and in the preceding year they
22 introduced 20 new smart locks --

23 THE COURT: So it's basically like a multifactor
24 task and you're just going to gut it.

25 MS. COOLIDGE: It is a multifactor test that I do

1 not believe results in a gut determination, I believe it
2 results in a qualitative and quantitative analysis
3 determination.

4 THE COURT: How is it quantitative if you say, well,
5 they had less market share, but more R&D, but less customer
6 churn, but more advertising, like how do you factor that all
7 together to get to a what? You just said it was quantitative,
8 so what's the quantitative aspect of it?

9 MS. COOLIDGE: The quantitative aspect would be how
10 are prices changing, right, if you control for --

11 THE COURT: Why don't you just need to know what the
12 pricing is?

13 MS. COOLIDGE: Because you have to control for
14 product quality, for product features, for the customer,
15 right. There's different prices depending what customer you
16 are. There's different prices depending on what product you
17 have, what features you have, where you're selling it in the
18 United States. There's a lot that has to be controlled for
19 which is why we need that data.

20 THE COURT: If in 2026 the Fortune pricing for
21 residential locks is lower than ASSA ABLOY's residential lock,
22 and they have not de minimis market share, does that answer
23 the question?

24 MS. COOLIDGE: I wouldn't look at it with just those
25 two metrics.

1 THE COURT: But that would get you a really long
2 way, right? I mean, the concern is that prices are going to
3 rise; right?

4 MS. COOLIDGE: I don't believe my job is to look at
5 price. I believe my job is to look at competitive
6 intensity.

7 THE COURT: What I'm saying is part of competitive
8 intensity is price; right. I mean, that's the whole point of
9 antitrust, unless I just totally missed it because I'm a
10 poly-sci major from a small liberal arts college in Kentucky,
11 but my understanding is the concern is that the prices will be
12 higher than they were predivestiture; right?

13 MS. COOLIDGE: That would certainly be a concern.

14 THE COURT: And another concern would be market
15 share; right?

16 MS. COOLIDGE: Yes and --

17 THE COURT: And one of the ways that antitrust law
18 and antitrust lawyers account for whether or not there's been
19 diminished competition is whether or not the prices are
20 higher, lower, and how much market share the new company has;
21 right?

22 MS. COOLIDGE: That is one of the ways. Right.

23 THE COURT: Those are two of the ways; right? Okay.
24 Those are two of the main ways. I mean, if you come back and
25 you have residential smart locks which are cheaper than they

1 were or are with ASSA ABLOY, and they have not de minimis
2 market share, doesn't that get you like pretty much there that
3 there's not an issue, what else would you need to look at?

4 MS. COOLIDGE: That would be relevant, Your Honor.

5 THE COURT: What else would you need to look at?

6 MS. COOLIDGE: If I can just say, I couldn't just
7 like eyeball a price and eyeball a market share and make that
8 assessment, that would not be appropriate. We need to control
9 for all of the factors, which is why all that data is
10 necessary.

11 THE COURT: But why do you have to control for the
12 factors? I mean, maybe you have to control for the factors if
13 the price goes up, because it may not go up because of
14 antitrust issues, it may go up because there's a pandemic or
15 because there's, you know, supply issues. I understand if the
16 price goes up that they would want you to control for issues,
17 but if the price goes down, who cares. That's -- you all are
18 happy. Yay, prices are down.

19 MS. COOLIDGE: If the price goes down we could see
20 that that is a result in changes in, for example, the cost
21 inputs.

22 THE COURT: Okay.

23 MS. COOLIDGE: But that doesn't mean there hasn't
24 been diminishment in competitive intensity.

25 THE COURT: But they're competitive if their prices

1 are lower and they have market share; right? I mean, I'm a
2 simple person from Kentucky. I, you know, I read *Anne of*
3 *Green Gables* on my spring break. I'm not a whiz at this
4 stuff. But it seems to me that if their prices goes down,
5 whatever the reason, they're competitive if they have
6 continued market share. Now, if their price goes down because
7 they're putting out junk products and no one's buying it,
8 okay, but that gets to the market share. So what else do you
9 need?

10 MS. COOLIDGE: I believe that it would be relevant
11 to be looking at customer satisfaction, competition for
12 customers, innovations in the products.

13 THE COURT: Okay. Look, I think that all gets to
14 market share. If customers aren't happy, they're not going to
15 be buying the product. The R&D was not part of the agreement.
16 The agreement wasn't that Fortune has to create the smartest
17 of smart locks ever. It's not that they now have to go create
18 AI smart locks, okay. So, I mean, I just --

19 All right. I want to talk about invoices. We're
20 all coming back on the 17th. And we all are going to figure
21 this out in a way that makes sense. And you all in the
22 meantime are going to meet and confer, in person, as to the
23 appropriate scope of document requests.

24 Starting in -- you're going to, Mr. Huppert -- Mr.
25 Bernick, you're going to get them -- the 2023 data that

1 they've asked for, you're just going to get them whatever you
2 gave them in litigation. Okay. Just make life simple for me.
3 You're going to get that to them.

4 You're also going to get them, we're going to talk
5 about in a minute how much, you're also going to get them the
6 invoices out of escrow by Monday. It's going to be in their
7 account by Monday. Okay?

8 We're coming back on the 17th. I want you all to
9 meet and confer in person and come to some agreement as to
10 what exactly the benchmark is going to look like and what
11 documents you will need for that. And if you all can't come
12 to agreement, we're going to stay here on the 17th until we
13 figure it all out. Because what I'm not going to have happen
14 is everyone going around for three years and then we have this
15 mess on the back end. We're fixing it on the front end.
16 Okay?

17 MS. COOLIDGE: Yes, Your Honor.

18 THE COURT: All right. Okay. Stay up for a moment.

19 Now, I looked at your invoices and just talking
20 about form for a moment, I've never seen invoices like this.
21 I'm just trying to find one of them. So I have here as
22 Exhibit 5, 1443. And I have the invoice is basically the name
23 of an individual, generalized information about what they do,
24 rolled up on a monthly basis. Right?

25 MS. COOLIDGE: I'm sorry, I'm just trying to get the

1 exhibit. Their Exhibit 5, I think?

2 MR. HUPPERT: 3.

3 THE COURT: 3, it's 5 in the booklet.

4 MS. COOLIDGE: Go ahead though, I can answer your
5 questions.

6 THE COURT: I mean, that's what it is; right?

7 MS. COOLIDGE: That is what the invoice reflects,
8 yes.

9 THE COURT: Okay. When you invoice your clients you
10 don't do it on a monthly basis; right? You do it on a daily
11 basis in six- or 15-minute increments, right, and you don't
12 block, though; right?

13 MS. COOLIDGE: I never block bill including for
14 this.

15 THE COURT: What is this?

16 MS. COOLIDGE: This is a summary.

17 THE COURT: Is there something else to this invoice
18 that I'm not aware of?

19 MS. COOLIDGE: No, Your Honor. So we record our
20 time in six-minute increments, both Hausfeld, StoneTurn, and
21 Bates White.

22 THE COURT: Have you given them those invoices?
23 Because maybe I missed it.

24 MR. BERNICK: No, Your Honor.

25 MS. COOLIDGE: We have not provided that in

1 invoices. The reason for that is ASSA ABLOY is not my client.
2 And I understand from --

3 THE COURT: But they're paying for it and I mean --
4 no one would pay on this.

5 MS. COOLIDGE: Respectfully, Your Honor, this is the
6 typical way that monitors provide invoices to monitored
7 parties. And the reason for that is it is not beneficial in
8 the pursuit of the monitorship to reveal to the monitored
9 parties.

10 THE COURT: That's fine. Okay. So going forward
11 you're going to send all your invoices to me, in camera.

12 MS. COOLIDGE: Absolutely.

13 THE COURT: And it's going to be in six-minute
14 increments. And I'm going to personally look at the invoices
15 every single month. And I will personally tell you if you're
16 going to write off time. And keep in mind when you do that,
17 that I was a litigation partner for 12 years, and on my firm's
18 executive committee. And I have reviewed hundreds and
19 hundreds and hundreds of invoices of this nature. And I can
20 spot fluff very quickly. Okay?

21 MS. COOLIDGE: Absolutely, Your Honor. I very much
22 appreciate you taking the time to do that.

23 THE COURT: All right. And I just -- I'm just
24 stunned that anyone has accepted this before. I mean, I take
25 you at your word that this is how it's done, but, you know,

1 maybe again, because I'm not of the monitorship world, I don't
2 know. But --

3 MR. BERNICK: Your Honor, I'm not aware of any
4 reason why ASSA ABLOY couldn't receive the detailed invoices,
5 there's no -- I don't know that there's been a past practice
6 that prohibits it one way or the other, but I'm not aware of
7 any legal requirement that would prohibit us from getting the
8 actual invoices that would allow us to evaluate the time.

9 THE COURT: I think she has a point that she doesn't
10 want you nitpicking what they're doing. I mean, that's not
11 reasonable to me.

12 Mr. Huppert?

13 MR. HUPPERT: Your Honor, just in terms of our
14 interest here is, as the monitor said, this is not an
15 attorney-client relationship, it is a -- it is strictly a
16 payment relationship.

17 THE COURT: Yeah, I know, but these costs are
18 outrageous. These costs are way too high. And you're talking
19 to someone who has been dealing for many, many dec- -- for two
20 decades with how much litigation costs. And yes, this is not
21 litigation, but it's pretty close.

22 Now, I am not suggesting by any stretch or means
23 that you are inflating the invoices. I am not. I believe you
24 that this is the work that has been done. But I know, having
25 done this for a very long time, that churn happens very

1 quickly and prices add up and we're not doing this moving
2 forward. So what is the solution to this going -- I mean,
3 part of the solution, I guess, is that we're not going to be
4 looking at the intensity study for two years.

5 MR. HUPPERT: Perhaps, Your Honor. But I just
6 wanted to make sure that I address the point that from our
7 perspective there is a good reason why ASSA ABLOY should not
8 have access to the detailed --

9 THE COURT: They're not going to get. I'm going to
10 get it.

11 MR. HUPPERT: Okay. I understand. And that the
12 reason for that is because the relationship is very
13 different.

14 THE COURT: Okay.

15 MR. HUPPERT: I wanted to make that point.

16 THE COURT: All right. That's fair.

17 MR. BERNICK: I have a suggestion.

18 THE COURT: Yeah.

19 MR. BERNICK: I think we've heard this number, the
20 \$1.7 to \$4.5 million number. I think it would be helpful to
21 the Court and everyone if we had a revised budget in light of
22 the hearing today and whatever order the Court issues, so that
23 we know -- and look, maybe there's a reason to depart from it,
24 and Ms. Coolidge can come back to the Court and request leave,
25 but I think it would be helpful for all of us to understand

1 what that budget is in advance.

2 THE COURT: Okay. So we can take that up on the
3 17th too, right, after you all talk.

4 MR. BERNICK: I think that would be helpful.

5 THE COURT: Okay. Ms. Coolidge, can you do that?

6 MS. COOLIDGE: Yes. We can absolutely meet and
7 confer about that.

8 MR. BERNICK: And the only other point of
9 clarification I had, Your Honor, on the -- as payment out of
10 escrow, some of the amounts, we couldn't tell from the
11 invoices because they were so general, were specifically
12 related to the disputed competitive intensity studies. Should
13 we pay the full amount of the invoices out of escrow, I just
14 want to make sure I understand --

15 THE COURT: You're going to pay -- I keep going back
16 and forth. You're certainly going to pay most of the
17 invoices. I would like for you to take a 5 percent haircut,
18 because these invoices to me I can't read and because -- you
19 guys work it out. I would like you to take a 5 percent
20 haircut. I'm not going to order it. Whatever you guys agree
21 to you, they're going to get paid, you're going to pay them
22 everything that they want for these invoices for everything
23 because we only just now got to this, out of escrow.

24 MR. BERNICK: Okay.

25 THE COURT: I'm not going to punish them because --

1 they did the work. Ms. Coolidge, I would be much happier if
2 you gave them a 5 percent haircut, but I'm not going to order
3 you to do it.

4 MS. COOLIDGE: I understand, Your Honor.

5 THE COURT: All right. Anything else before we --
6 let's get back here on the 17th at -- first of all, is
7 everyone free on the 17th?

8 MR. DAHLQUIST: We will be, Your Honor.

9 MR. HUPPERT: Yes, we will be.

10 MS. COOLIDGE: I don't have my calendar with me, but
11 I will prioritize this.

12 THE COURT: Mr. Bernick?

13 MR. BERNICK: Yes, Your Honor.

14 THE COURT: Ma'am?

15 MS. BRYANT: We will have ourselves be as well, Your
16 Honor.

17 THE COURT: All right. If by some miracle of God
18 you all come to agreement and don't need me on the 17th,
19 please don't hesitate to reach out. I don't particularly want
20 to see you again, much as I like you all individually.

21 MR. DAHLQUIST: We thank you for your time, Your
22 Honor.

23 THE COURT: All right. Thank you. Mr. Dahlquist,
24 thank you for suggesting a different way forward.

25 MR. DAHLQUIST: Thank you.

1 THE COURT: All right. Thank you, everyone.

2 (The proceedings were concluded at 11:30 a.m.)

3 I, Christine Asif, RPR, FCRR, do hereby certify that
4 the foregoing is a correct transcript from the stenographic
5 record of proceedings in the above-entitled matter.

6 /s/

7 Christine T. Asif
8 Official Court Reporter
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