

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TAPESTRY, INC.,

and

CAPRI HOLDINGS LIMITED,

Defendants.

Civil Action No. 1:24-cv-03109 (JLR)

**DEFENDANTS TAPESTRY, INC. & CAPRI HOLDINGS LIMITED'S**  
**MEMORANDUM IN OPPOSITION TO THE FEDERAL TRADE**  
**COMMISSION'S MOTION TO EXCLUDE TESTIMONY OF**  
**JEFF GENNETTE**

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### **PRELIMINARY STATEMENT**

Having failed to offer any expert testimony based on real-world experience, it is unsurprising that the FTC now seeks to exclude the testimony, opinions, and report of Jeff Gennette—the former CEO and Chairman of Macy’s Inc., and a more than 40-year-veteran of the fashion retail industry—claiming that Mr. Gennette is not qualified to opine on competition in handbag distribution channels, the role of multi-brand retailers in the purchase and sale of handbags, and how consumers shop for handbags. Although the Court’s mandate here is to assess the commercial realities of the handbag market, *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962), the FTC’s case depends on excluding those commercial realities and instead seeking to confine the Court’s review to a hermetically sealed bubble of economic theory: The FTC’s sole expert, Dr. Loren Smith, is an economist who apparently has never worked in fashion or retail, yet purports to use economic models and tests to opine on how consumers shop for handbags. Mr. Gennette’s testimony provides the real-world perspective, grounded in decades of experience selling handbags to consumers across a wide variety of platforms, that Dr. Smith’s opinions sorely lack. As set forth below, the FTC’s response is to baselessly attack Mr. Gennette’s expertise, as well as to attempt to criticize his testimony through a lens of scientific or economic methodologies, a lens wholly inapplicable to Mr. Gennette’s industry expertise as a veteran leader of fashion retail. Mr. Gennette is plainly qualified under Federal Rule of Evidence 702 to offer opinion testimony regarding competition in handbag distribution channels, the role of multi-brand retailers in the purchase and sale of handbags, and how consumers shop for handbags; his opinions are reliable; and his real-world expertise will be of assistance to the Court. The FTC’s attempt to keep Mr. Gennette out of the case should be denied.

## **BACKGROUND**

Earlier this year, Mr. Gennette retired from an illustrious 40-year career at Macy's, Inc., most recently serving as its CEO and Chairman. Expert Report of Jeff Gennette ("Rep.") ¶ 1, attached in full at ECF Nos. 177-2 (Report) and 177-3 (Exhibits and Appendices). Macy's, Inc. is the largest department store company in the United States, with over \$23 billion in annual revenue, and one of the country's largest retailers of handbags. The company includes the department stores Macy's and Bloomingdale's, as well as the beauty store Bluemercury. *Id.* Mr. Gennette started at Macy's in 1983 as an executive trainee. As he worked his way up at Macy's Inc., Mr. Gennette had a variety of roles in both store management and merchandising, many of which involved direct responsibility for the purchase and sale of handbags. He served at various times as Executive Vice President and Director of Stores for Macy's Central and Senior Vice President and General Merchandise Manager for Macy's West. *Id.* at ¶ 2. From 2009 to 2014, as Chief Merchandising Officer, he was responsible for developing a national strategy for all merchandising categories, including handbags, for both Macy's brick-and-mortar stores and its website. *Id.* Mr. Gennette testified that "a big proportion" of his time as Chief Merchandising Officer was spent on handbags, as handbags are "the most productive space in the store." Gennette Deposition Transcript ("Tr.") 46:17-47:1, attached in full at ECF No. 177-4. Mr. Gennette became President of Macy's Inc. in 2014, Chief Executive Officer in 2017, and Chairman in 2018. Rep. ¶ 2. From 2017 to 2024, Mr. Gennette also served as a member of the executive committee and Board of Directors of the National Retail Federation, the world's largest retail trade association. *Id.* at App. A.

During his 40-year career at Macy's, Inc., including as Chief Merchandising Officer—the executive responsible for, among other things, deciding what products Macy's would purchase—

Mr. Gennette was involved in the purchase and sale of handbags across the price spectrum. The Macy's department store chain positions itself in the middle of that price spectrum. Tr. 97:7-17. Mr. Gennette also led the introduction and rapid growth of Macy's Backstage, an off-price retail business, from six stores in 2015 to over 300 locations by 2023. Rep. ¶ 3. Macy's Backstage offers discounted handbags, including secondhand handbags, from brands including Louis Vuitton, Gucci, and Burberry. Tr. 92:25-93:14. As President and CEO of Macy's Inc., Mr. Gennette's also oversaw Bloomingdale's, a higher-end department store offering "so-called true luxury handbags." Tr. 89:25-90:20. Mr. Gennette also oversaw Macy's strategy to revitalize its private label brands, many of which offer handbags. Rep. ¶¶ 42-43, 47.

Mr. Gennette was involved in the sale of handbags across multiple distribution channels. Macy's and Bloomingdale's offer handbags through both their brick-and-mortar stores and websites. Rep. ¶ 2. Brands such as Louis Vuitton, Gucci, and Burberry sell handbags in shop-in-shops within Macy's and Bloomingdale's. *Id.* at ¶ 18; Tr. 42:10-43:1. Mr. Gennette led Macy's through the expansion of omnichannel shopping options, including the development of Macy's small-format store concept, expansion of Macy's online Vendor Direct business, which added a curated assortment of over one million products, including handbags, to Macy's website, and growth of Macy's Marketplace, a platform for vendors to sell their products—including handbags—directly to consumers. Rep. ¶¶ 4, 18.

At Macy's, Mr. Gennette was both a customer of, and a provider of data to, NPD, a company that tracks sales data from certain retailers. *Id.* at ¶¶ 88, 93. Throughout his career, it was essential for Mr. Gennette to pay close attention to competition in the retail industry, including competition with respect to handbags, and he engaged frequently with other stores and websites, vendor brands, and Macy's customers. Tr. 7:18-8:24; 240:2-6; 244:11-245:2.

Mr. Gennette was retained by Defendants to describe select aspects of the U.S. handbag industry, including its distribution channels, in particular the multi-brand retail—also called the wholesale<sup>1</sup>—distribution channel, the influence that consumers have on handbag prices, and the effects of the proposed acquisition on the handbag market—particularly the wholesale segment, and to respond to certain aspects of Dr. Smith’s report. Rep. ¶ 8. The information, analysis, and conclusions in Mr. Gennette’s report are based on his experience, knowledge, and expertise as applied to the documents, information, and testimony in this action. Tr. 21:18-22:1.

### ARGUMENT

Expert testimony is admissible under Rule 702 if it meets “three broad criteria”:

(1) qualifications, (2) reliability, and (3) relevance and assistance to the trier of fact. *Envy Branding, LLC v. William Gerard Grp., LLC*, 2024 WL 869156, at \*8 (S.D.N.Y. Feb. 29, 2024) (Rochon, J.) (citation omitted). Mr. Gennette’s opinions meet all three of these criteria.

**I. Mr. Gennette is qualified to offer expert testimony regarding the U.S. handbag industry.**

**A. Mr. Gennette qualifies as an industry expert under the relevant standards.**

To testify as an expert under Rule 702, a witness must be “qualified as an expert by knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. “‘Any of the five forms of qualifications will satisfy the rule,’ and a court makes this determination by considering ‘the totality of the witness’s background.’” *Envy Branding*, 2024 WL 869156, at \*8 (citation omitted). “[A]n expert may be qualified based on his experience.” *SR Int’l Bus. Ins. v. World*

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<sup>1</sup> A multi-brand retailer purchases merchandise from vendor brands at wholesale prices. Rep. ¶ 17. Thus, from the perspective of a handbag brand, such as Michael Kors or DKNY, department stores are customers referred to as “wholesalers,” and the Court will see this terminology in documents and testimony in this case. But from Mr. Gennette’s (and the consumer’s) perspective, such stores are “retailers.”



*Trade Ctr. Props., LLC*, 467 F.3d 107, 132 (2d Cir. 2006); *Dover v. British Airways, PLC (UK)*, 254 F. Supp. 3d 455, 459 (E.D.N.Y. 2017) (airline industry expert qualified due to 25 years of relevant experience); *ROMAG Fasteners, Inc. v. Fossil, Inc.*, 2014 WL 1246554, at \*3 (D. Conn. Mar. 24, 2014) (two experts qualified by 20 and 25 years of experience in the handbag industry). An individual may qualify as an industry expert if his experience was gained at a single company. *ROMAG*, 2014 WL 1246554, at \*3 (rejecting argument that because an expert “only worked for one company . . . he is not qualified to testify as an expert with respect to the entire handbag industry”). Mr. Gennette’s decades-long career as a successful Macy’s executive with direct experience relevant to the sale of handbags across a variety of channels and at all points in the price spectrum thus qualifies him under Rule 702 to offer expert testimony regarding the U.S. handbag market.

**B. The FTC attacks on Mr. Gennette’s experience are unavailing.**

In the face of Mr. Gennette’s 40-year-long, directly relevant industry experience, the FTC can only raise quibbles about his resume. The FTC’s argument that Mr. Gennette lacks relevant experience is almost comical in light of the fact that he led the largest department store company in the U.S. (and one of the country’s largest buyers and sellers of handbags) for years, and prior to that, had roles at that company with direct responsibility for handbag strategy. The table below contrasts the FTC’s attacks with key aspects of Mr. Gennette’s experience that the FTC ignores.

FTC’s quibble	Mr. Gennette’s Experience
Only has experience with Macy’s, Pl. Br. 4.	Years of experience leading the largest U.S. department store company with over \$23B in annual revenue, Rep. ¶ 1.
No experience with direct-to-consumer channels, Pl. Br. 4.	Developed Macy’s Marketplace business, where vendors own and ship their products directly to consumers, Rep. ¶ 4, as well as decades of experience observing Macy’s direct-to-consumer competitors, Tr. 7:22-8:24; 14:23-15:4; 32:22-25.

FTC's quibble	Mr. Gennette's Experience
No experience with other wholesalers, Pl. Br. 4.	Decades of paying close attention to the Macy's competition, as any successful executive must do, Tr. 7:22-8:8; 15:1-4; 32:22-25.
No experience at handbag brands not sold through Macy's, Pl. Br. 4.	Years of experience working with numerous vendor handbag brands sold through Macy's <i>and</i> Bloomingdale's, Rep. ¶ 46, as well as paying close attention to handbag offerings of other sellers throughout the industry.
Not employed by a "true luxury" brand, Pl. Br. 5.	Years of experience with vendor brands such as Louis Vuitton, Burberry, and Gucci, Tr. 42:19-43:1.
Not employed by websites offering secondhand bags like the RealReal, Pl. Br. 5.	Launched Macy's Backstage, which offers secondhand bags, Rep. ¶ 3; Tr. 92:25-93:14, and years of paying close attention to industry trends, including the growth of the resale market.
Not employed by a social media platform, Pl. Br. 5.	Years of experience developing Macy's e-commerce platforms, Rep. ¶ 4. and paying close attention to industry trends, including the explosion of social media.
No special expertise in monobrand stores, Pl. Br. 5-6.	Years of experience with vendor shop-in-shops at Macy's and Bloomingdale's, Rep. ¶ 18(a); Tr. 42:10-18, as well as paying close attention to Macy's monobrand competitors.

The FTC cites *Washington v. Kellwood Co.*, Pl. Br. 5, 7, 13, but *Kellwood* recognizes that courts will not exclude expert testimony where the expert has “experiential qualifications in a general field closely related to the subject matter in question.” 105 F. Supp. 3d 293, 305 (S.D.N.Y. 2015). In any event, as shown in the table above, Mr. Gennette’s responsibility as a senior retail executive to understand the retail landscape and the retailers that competed with Macy’s Inc. make the FTC’s criticisms ring hollow.

The FTC contends that because Mr. Gennette is not an economist, he is not qualified to offer any opinions regarding Dr. Smith’s economic analyses. Pl. Br. 8, 11. But courts have regularly rejected this argument. *See, e.g., In re Kirkland Lake Gold Ltd. Sec. Litig.*, 2024 WL 1342800, at \*3-4 (S.D.N.Y. Mar. 29, 2024) (court rejected argument that industry expert could not opine on stock price movements because he was not an economist, and ultimately credited experience-based opinions over economist’s opinions); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 638 F. Supp. 3d 227, 277 (E.D.N.Y. 2022) (rejecting claim that

expert overreached expertise by connecting opinions about brand marketing to relevant economic factors). Mr. Gennette is not offering an economic opinion and freely acknowledges that he has no formal training or expertise in economics.<sup>2</sup> Tr. 16:22-25; 70:7-9. Mr. Gennette's opinions that Dr. Smith's conclusions do not reflect commercial reality are based on his experience in the fashion retail industry in roles that required him to have in-depth knowledge of the competition and consumer behavior and to employ this expertise day-after-day and year-upon-year in the business of buying and selling handbags. *See Gabel v. Richards Spears Kibbe & Orbe, LLP*, 2009 WL 1856631, at \*3 (S.D.N.Y. June 26, 2009) (court refused to exclude the industry expert's testimony, noting "practical experience is at least as valuable, and may prove moreso, than [the economist's] peer-reviewed theory").

## **II. Mr. Gennette's opinions are reliable and will be of assistance to the Court.**

Under Rule 702, an expert's opinion must be reliable; that is, an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *In re MTBE Prod. Liab. Litig.*, 2008 WL 1971538, at \*3 (S.D.N.Y. May 7, 2008). The FTC repeatedly attacks Mr. Gennette for not having performed consumer surveys or data analysis or utilized economic tests. Pl. Br. 1, 5, 6, 8, 9, 11, 15. But this fundamentally misunderstands the role of an industry expert like Mr. Gennette. Industry experts are not required to use scientific methods; he "may properly rely on his experience to testify about all matters within his experience, including basic economic considerations." *MTBE*, 2008 WL 1971538, at \*8. "In certain fields, experience is the predominant, if not sole, basis for a great

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<sup>2</sup> While Mr. Gennette does not offer an economic opinion in response to Dr. Smith, Professor Fiona Scott-Morton, a Yale professor and the former Chief Economist of the Antitrust Division of the Department of Justice, does.

deal of reliable expert testimony.” Fed. R. Evid. 702, advisory committee notes to 2000 Amendments.

Here, Mr. Gennette supports his opinions with both record evidence and specific instances of industry practice that he observed. This easily meets the standard for reliability. *In re Stand ‘N Seal, Prod. Liab. Litig.*, 2009 WL 1772585, at \*6 (N.D. Ga. June 22, 2009) (expert testimony based on application of experience to the facts of the case is “the product of reliable principles and methods”). Indeed, an industry expert does not even need to correlate his opinions to such specific instances, as “the reliability of such an expert’s opinion may be inferred from his experience.” *In re Davis N.Y. Venture Fund Fee Litig.*, 2019 WL 2896415, at \*6 (S.D.N.Y. May 30, 2019), *aff’d*, 805 F. App’x 79 (2d Cir. 2020).

An expert’s opinion must also be relevant and of assistance to the trier of fact; here, the Court. *Envy Branding*, 2024 WL 869156, at \*8. The FTC does not challenge the relevance of Mr. Gennette’s opinions, nor could it: the subjects he opines on, including handbag distribution channels, the influence that consumers have on handbag prices, and the effects of the proposed acquisition, go directly to the heart of the case. And Mr. Gennette’s analysis, grounded as it is in a wealth of industry experience, will give the Court important real-world context when evaluating the FTC’s theoretical claims. *See F.T.C. v. Foster*, 2007 WL 1793441, at \*18 (D.N.M. May 29, 2007) (considering testimony from industry expert in merger case).

### **III. Applying these standards, each of Mr. Gennette’s challenged opinions is admissible.**

#### **A. Mr. Gennette’s opinions regarding consumer behavior are admissible.**

Mr. Gennette opines that Dr. Smith’s opinions do not accurately reflect real-world consumer behavior in the U.S. handbag market. Rep. ¶ 12(a). Consumers are adept at researching handbag options and can tell if they are being asked to pay too much for a handbag, resulting in an intensely competitive distribution environment for handbags. *Id.* at ¶¶ 12(a), 20-

24. And contrary to Dr. Smith’s theory that handbag brands categorized as “Bridge” and “Contemporary” by NPD form a distinct market and that other bags are more distant substitutes, consumers purchase handbags across all NPD brand categories and across the price spectrum. *Id.* at ¶¶ 12(a), 25-26. Mr. Gennette also opines that U.S. consumers love discounts and promotions, and that (contrary to Dr. Smith’s opinion) the vast majority of handbag styles sold in the United States, including those sold by so-called “true luxury” brands, are subject to discounting and promotions at some point in their product lifecycle. Rep. ¶¶ 12(a), 27-37; Tr. 292:23-294:22. Mr. Gennette further opines that digitally native brands have been successful at entering the U.S. handbag market. Rep. ¶¶ 12(a), 38-39.

Misconstruing the role of an industry expert, the FTC claims that Mr. Gennette did not use reliable methodology to form these opinions. For example, the FTC complains that Mr. Gennette did not conduct or review consumer surveys or surveys of pricing. Pl. Br. 5-6. But the law does not require that an industry expert conduct or review surveys. *See, e.g., ROMAG*, 2014 WL 1246554, at \*3 (industry experts allowed to offer testimony despite not having based their opinions on consumer surveys); *see also supra* Section II.

Nor is it true that Mr. Gennette’s use of internet searches to illustrate his opinion that so-called “true luxury” handbag brands participate in discounting and use of record evidence reflect a lack of expertise. Rep. ¶¶ 27-37. The internet searches are “illustrative examples [used] merely to assist in concretizing [his] points.” *Conn. Gen. Life Ins. v. BioHealth Lab’ys, Inc.*, 2024 WL 2106577, at \*7-8 (D. Conn. Mar. 1, 2024) (rejecting argument that expert’s use of illustrative examples called into question the reliability of her conclusions). The cases that the FTC cites are inapposite. In *Grdinich v. Bradlees*, the purported expert based “his opinion on non-existent industry standards” and limited professional experience. 187 F.R.D. 77, 82

(S.D.N.Y. 1999). As set forth above, Mr. Gennette’s experience is anything but “limited.” And as for the record evidence, unlike in *LinkCo, Inc. v. Fujitsu Ltd.*, Mr. Gennette’s report is not merely a summary of documents and testimony in the case. 2002 WL 1585551, at \*2 (S.D.N.Y. July 16, 2002). Rather, Mr. Gennette is applying his experience to the facts.<sup>3</sup> See *supra* Section II.

**B. Mr. Gennette’s opinions that multi-brand retailers are incentivized to foster handbag competition are admissible.**

Mr. Gennette opines that multi-brand retailers are incentivized to foster handbag competition because they need to carry a variety of handbag offerings across the price spectrum, and must keep their handbag offering fresh. Rep. ¶¶ 12(b), 40-59. Multi-brand retailers cannot be overly dependent on any one supplier and thus support new handbag brands and extensions of existing brands, as well as develop private label brands to provide additional choices to consumers. *Id.*

The FTC carps that, by using the word “incentivized,” Mr. Gennette is offering an economic opinion, although he is not an economist. Pl. Br. 7. But the word “incentivize” is hardly the sole property of economists; to the contrary, any CEO who did not understand what incentives drive his company to make business decisions would be deficient. As a successful fashion retail executive, Mr. Gennette is eminently qualified to opine on the business incentives of multi-brand retailers. *Cf. In re Payment Card*, 638 F. Supp. 3d at 278 (marketing expert permissibly used the economic term “free-riding”).

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<sup>3</sup> Indeed, the FTC wants to have it both ways—at times complaining that Mr. Gennette’s application of his experience to the record to opine is improper, *e.g.*, Pl. Br. 9, and at other times that he hasn’t made enough use of the record. *E.g.*, Pl. Br. 10.

The FTC argues that these opinions should be excluded because they are purportedly based on anecdotes and because Mr. Gennette does not have citations to support his anecdotes. Pl. Br. 7-8. The FTC ignores the multiple citations to the record, including to the depositions of Dillard's and Macy's. Rep. ¶¶ 42, 45, 48, 54, 57. Moreover, the only authority that the FTC cites here is the *LinkCo* case. Pl. Br. 7. But there, the purported expert did not provide “articles, studies *or* anecdotal evidence to support or explain his conclusions.” *LinkCo*, 2002 WL 1585551, at \*4 (emphasis added). Here, Mr. Gennette supports his opinions with both record evidence and so-called “anecdote”—or rather, specific instances of industry practice that he observed. This easily meets the relevant standards. *See supra* Section II.

The FTC nitpicks aspects of these opinions, complaining that Mr. Gennette does not specify the portion of Macy's handbag business that is private label, and that he did not perform data analysis to support that the Michael Kors business “cooled” at Macy's. Pl. Br. 7-8. The FTC does not explain how the lack of a percentage could render Mr. Gennette's opinion that private brands provide additional handbag options to consumers unreliable. In any event, the FTC now has the answer it claims to need: Mr. Gennette testified at deposition that he believed that the proportion of Macy's handbag sales attributable to private brands was between 16%-20%. Tr. 265:18-25. And Michael Kors' declining performance at Macy's (and indeed overall) is amply supported by the record in this action. *See, e.g.*, Rep. ¶ 69.

Finally, the FTC objects to the photographs of private-label brands in Mr. Gennette's report. Pl. Br. 8. But Mr. Gennette's opinions regarding private label brands are based on his 40 years of experience, Tr. 43:15-44:1, and the photographs, taken at his direction, Tr. 32:13-18, like the internet searches he uses, are illustrative examples that concretize his points. *See supra* pp. 9-10.

**C. Mr. Gennette’s opinions that Dr. Smith is wrong to assume that a merged Tapestry-Capri can impose a large price increase without adding value are admissible.**

Mr. Gennette relies on his 40 years of fashion retail experience to opine that Dr. Smith’s theoretical conclusions regarding price increases on Michael Kors handbags after the proposed merger do not comport with commercial reality. Rep. ¶¶ 12(c), 60-87. Mr. Gennette opines (based on his experience selling handbags to consumers) that it is not possible to raise handbag prices without offering additional value to consumers, who are value-conscious, because handbag purchases are generally optional and contain an emotional element, and because consumers have many alternatives available to them. *Id.* at ¶¶ 61-87.

The FTC argues that these opinions should be excluded because, by responding to Dr. Smith’s economic analyses, Mr. Gennette is purportedly asserting an economic opinion. Pl. Br. 8-11. By the FTC’s logic, the only type of expert that could ever respond to an economist is another economist. But it is clear that an industry expert may rebut an economic opinion. *Supra* Section I.B. In any event, Mr. Gennette is expressly *not* offering an economic opinion, Tr. 70:7-9, but instead opines, grounded in his experience, that Dr. Smith’s opinions about price increase are not consistent with real-world experience.

The FTC sounds again the familiar refrain that Mr. Gennette did not perform any economic analyses or consumer surveys, that he uses record evidence to support his opinions, and that his methods are not “reliable.” Pl. Br. 9-11. The cases that the FTC cites here are once again inapplicable to industry expertise based on experience and application of experience to the facts of the case. *See FTC v. Vyera Pharms., LLC*, 2021 WL 5403749 at \*2 (S.D.N.Y. Nov. 18, 2021) (purported expert admitted no direct experience in either area at issue in the case); *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, 2021 WL 4931996,



at \*6 (S.D. Ohio Oct. 22, 2021) (doctor was offering an opinion that should have related to medical research); *Castagna v. Newmar Corp.*, 2020 WL 525936, at \*3 (N.D. Ind. Feb. 3, 2020) (purported expert was offering an opinion as to market value, which required performing calculations); *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 32 F. Supp. 3d 453, 460, 462 (S.D.N.Y. 2014) (significant portion of report was spent summarizing documents in the record); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004) (purported expert wanted to provide a history of regulatory events).

**D. Mr. Gennette’s opinions that Dr. Smith’s use of NPD data is divorced from real-world industry conditions are admissible.**

Mr. Gennette opines that Dr. Smith’s use of NPD data is divorced from how handbags are bought and sold in the real world. Mr. Gennette offers an opinion that NPD data has inherent limitations, the fashion retail industry is aware of these limitations, and the industry *does not* use NPD data to calculate market share. Rep. ¶¶ 12(d), 88-110. Mr. Gennette also opines that the NPD’s division of brands into categories does not reflect how consumers actually shop for, or how retailers actually sell, handbags. *Id.* The FTC asserts that Mr. Gennette has “no qualifications” to critique Dr. Smith’s use of NPD data. Pl. Br. 11-13. But Mr. Gennette had ample practical experience with the limitations of NPD data: during his tenure, Macy’s both supplied data to and purchased data from NPD, and Mr. Gennette received regular summaries of that data. Rep. ¶ 88; Tr. 55:2-19; 199:9-200:1. And Mr. Gennette’s 40 years of fashion retail experience certainly gives him a basis to opine on whether the NPD categorizations actually are used—or not used—by buyers and sellers of handbags.

Mr. Gennette is not, as the FTC would have it, critiquing Dr. Smith’s techniques or calculations; rather, he is opining that the NPD data has limitations and is not used in the industry for the purposes for which Dr. Smith uses it. Rep. ¶¶ 88-110. The FTC complains that

Mr. Gennette did not review the underlying NPD sales data that Dr. Smith used. That underlying data is beside the point: Mr. Gennette's opinions, based on real-world experience, as to the limitations of NPD data were confirmed by his review of an NPD User Guide, which describes, among other information, the subset of retailers that provide data to NPD and NPD's methodology. Rep. at App. B (Tapestry-FTC-001070828 ("NPD User Guide")). Mr. Gennette had ample basis to opine that the sales data NPD provides is not comprehensive.

The same framework applies to the FTC's criticism that Mr. Gennette is not qualified to criticize Dr. Smith's analyses of market definition, because he is not performing the Hypothetical Monopolist Test or other tools recognized by the FTC's Merger Guidelines (as if Plaintiff's self-created guidelines define what is relevant). Pl. Br. 12. Mr. Gennette offers no opinion on Dr. Smith's execution of the Hypothetical Monopolist Test. Rather, he relies on his decades of experience selling handbags to consumers to explain that Dr. Smith's assumptions that the relevant market can be defined by the brands in the "Bridge" and "Contemporary" categories created by NPD (an assumption that underlies Dr. Smith's HMT analysis), and that consumers find other brands to be "more distant substitutes," are divorced from how handbags are bought and sold in the real world. Rep. ¶¶ 12(d), 88-110.

Finally, the FTC argues that Mr. Gennette has no basis to opine how handbags are sold at stores other than Macy's. Pl. Br. 13. The FTC would have the Court believe that Mr. Gennette could rise to CEO of Macy's Inc. without developing any knowledge of merchandising methods used by others in the industry. Once again, the FTC's position is divorced from the real world of fashion retail.

**IV. Mr. Gennette is not a fact witness, and any claim of bias can be addressed during cross-examination.**

The FTC argues that, because Mr. Gennette's opinions are supported by his experience at

Macy's, Mr. Gennette is testifying as a fact witness. Pl. Br. 13-14. But by the FTC's logic, any industry expert testifying based on his experience would be testifying as a fact witness. There is nothing improper about Mr. Gennette applying his experience at Macy's to the facts of this case—that is what an expert qualified by his experience is expected to do. *See supra* Section II.<sup>4</sup>

As for the FTC's claim that Mr. Gennette improperly opined on the credibility of Mr. Steinmann, the Macy's 30(b)6 deponent, Pl. Br. 14-15, Mr. Gennette offered no such opinion. Rather, the FTC teed up the issue by asking: "Do you have any reasons to believe that Mr. Steinmann's testimony was not correct . . . ?" Tr. 216:21-24. Mr. Gennette did not opine on Mr. Steinmann's credibility, but explained that any difference between his testimony and Mr. Steinmann's testimony could be explained by the difference in their experience. Tr. 216:25-217:8 ("I think that my perspective is a broader view than Chris has. Chris is not responsible for the placement of goods in stores at Macy's.").

The FTC attempts to insinuate that Mr. Gennette is biased because he is being paid for his time, and because, back in 2019, Capri purchased a table at a charity gala raising scholarship funds for Parsons School of Design. Pl. Br. 1, 14; ECF No. 177-1. Putting aside that compensating an expert for his time is customary and that it is implausible that a single charitable donation years ago would induce Mr. Gennette to perjure himself, arguments about bias go to the weight of Mr. Gennette's testimony, not its admissibility, *Int'l Cards Co., Ltd. v. MasterCard Int'l Inc.*, 2016 WL 7009016, at \*8 (S.D.N.Y. Nov. 29, 2016), and can be addressed on cross-examination.

### **CONCLUSION**

This Court should deny the FTC's motion to exclude the testimony of Jeff Gennette.

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<sup>4</sup> If Mr. Gennette were a fact witness, that would not be a basis to preclude him from testifying. Federal Rule of Evidence 701 permits opinion testimony by lay witnesses.

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Respectfully submitted,

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<sup>5</sup> Electronic signatures used with consent in accordance with Rule 8.5(b) of the Court's ECF Rules and Instructions.