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 OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION TO EXCLUDE TESTIMONY OF KAREN GIBERSON

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INTRODUCTION

Plaintiff's motion to exclude handbag industry expert Karen Giberson—an individual with over 30 years of experience in virtually every facet of the industry—confirms that Plaintiff's case is focused on the wrong things. Plaintiff and its economic expert want the Court to turn a blind eye to the way the handbag industry operates in the real world. They want the Court simply to accept the conclusions of Plaintiff's economist—who has no background in the industry—no matter how divorced his views are from reality. But the Court's primary task at the preliminary injunction hearing is to assess the "commercial realities" of the handbag industry[1] and to determine whether Plaintiff is likely to prove that the proposed transaction may substantially lessen competition and harm consumers. To answer these questions, the Court needs to understand how consumers shop for handbags and the competitive options available to consumers *in the real world.* Ms. Giberson lives and breathes this real world every day.

Ms. Giberson is the President and CEO of the 350-member Accessories Council—one of the largest and most prominent trade associations devoted solely to fashion accessories (including handbags)—and the Editor-in-Chief of the Ac Magazine—the only publication dedicated solely to fashion accessories. She regularly interacts with the full range of handbag industry participants from designers to suppliers to wholesalers to manufacturers to retailers to journalists to bloggers to consumers. She has helped numerous designers start and grow handbag businesses; has traveled the globe to learn the intricacies of handbag sourcing and manufacturing; and is a prolific writer and voracious reader about all things handbags. Her unparalleled experience will provide the Court with a window into the true competitive breadth of the handbag industry—a marketplace where Plaintiff itself concedes that *at least* 235 companies compete. In reality, there are far more.

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[1] *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962).

Ms. Giberson is indisputably qualified to provide testimony as a handbag *industry expert*; even Plaintiff does not challenge that premise. Instead, Plaintiff lobs legally irrelevant, unfair or downright insulting jabs at the reliability and usefulness of Ms. Giberson's opinions based largely on mischaracterizing her deposition testimony. None lands. Indeed, Plaintiff cites to inapplicable cases such as ones that focus on the Rule 702 standards that apply to *scientific* or *technical* experts, rather than the law that applies to *industry* experts like Ms. Giberson.

First, Plaintiff seeks to chide Ms. Giberson for reaching opinions based solely on her "gut," but facts to support such an assertion are simply not in the record. Ms. Giberson submitted a lengthy and detailed report and sat for a 7-hour deposition, all of which laid out the extensive factual basis, experience and specialized knowledge that underlie each of her opinions. Plaintiff's attempt to take *one word* out of context from that fulsome record to prevent the Court from hearing about the actual commercial realities of the handbag industry is telling. Regardless, as courts have recognized, when it comes to industry experts like Ms. Giberson, "gut" is simply a shorthand way to refer to forming opinions based on experience and therefore is no basis to exclude testimony. *See Singleton v. Fifth Generation, Inc.*, 2017 WL 5001444, at *5 (N.D.N.Y. Sept. 27, 2017) (refusing to exclude opinions of industry expert based on a "personal gut call").

Second, Plaintiff argues the Court should exclude Ms. Giberson's testimony because she dares to criticize the opinions of Plaintiff's economist, Dr. Smith, despite not being an economist herself. Plaintiff misunderstands Ms. Giberson's role. *She is not offering any economic opinions*. Defendants' highly qualified economist, Professor Fiona Scott-Morton, handles that role. Ms. Giberson's response to Dr. Smith is focused on his failure to grapple with the real-world of the handbag industry, as well as his apparent failure to understand how data sources like NPD actually work, or how consumers shop and make decisions about handbag purchases. Plaintiff's real

concern seems to be that Ms. Giberson has exposed the frailty of Dr. Smith's opinions. But Plaintiff's choice not to ground Dr. Smith's opinions in commercial reality is no basis to bar Ms. Giberson from explaining what that reality is. Indeed, an industry expert's "practical experience is at least as valuable, and may prove moreso, than [an economist's] peer-reviewed theory." *See Gabel v. Richards Spears Kibbe & Orbe, LLP*, 2009 WL 1856631, at *3 (S.D.N.Y. June 26, 2009).

Third, Plaintiff's suggestion that an industry expert should not be allowed to tell the Court that there is no well-understood definition of the term "accessible luxury" in the handbag industry is baffling. Plaintiff put the question at issue by having an economist, with no industry expertise, opine about what the industry supposedly thinks about the term. Ms. Giberson rebuts that opinion based on decades of experience. If that is not the proper role of an industry expert, then what is?

Fourth, Plaintiff suggests that this Court should preclude Ms. Giberson from testifying about how and why consumers buy handbags—*a subject that has been the primary focus of her day-job for decades*—because she did not conduct a consumer survey. Plaintiff fundamentally misunderstands the law and Defendants' criticisms of Dr. Smith. All of Dr. Smith's *economic opinions* hinge on assumptions about what handbag brand consumers would buy in the event of a price increase. He is supposed to have a factual basis for those assumptions. But he did not conduct a consumer survey to study that question, so he does not have relevant factual evidence to rely on. Instead, he relied on years-old surveys that do not address the relevant question. While Dr. Smith, who has no experience in the handbag industry at all, opines about consumer behavior without doing any consumer-facing research, Ms. Giberson relies on her decades of real-world, consumer-facing experience to inform her conclusions. Courts recognize that *industry experts* like Ms. Giberson can use their experience to reliably opine about consumer behavior without conducting a survey. *ROMAG Fasteners, Inc. v. Fossil, Inc.,* 2014 WL 1246554, at *3 (D. Conn.

Mar. 24, 2014) (handbag industry experts permitted to opine on why consumers buy handbags based on experience). *Technical* experts like Dr. Smith have no industry experience to draw upon.

Finally, Plaintiff claims that Ms. Giberson testified that her opinions are based on "the interests of the Accessories Council's members" and are thus biased in favor of Tapestry. Plaintiff's Mot. to Exclude ("Mot.") 3, 5 (ECF No. 171). Ms. Giberson never said any such thing. In fact, she made clear that she was not favoring *any* member—Tapestry or any of the hundreds of other Council members, such as customers of Tapestry's brands like Nordstrom or competitors of Tapestry's brands like Steve Madden and Kurt Geiger. Nor would it make any sense for her to favor Tapestry, given that the Council's membership spans the whole industry. Ms. Giberson also stated that she has no interest in the outcome of this case or the transaction; and that she is simply offering "genuine, unbiased opinions of the industry [she] know[s] inside and out." Report of Giberson ("Rep.") ¶ 8 (attached in full at ECF No. 173-1). No one who listens to Ms. Giberson talk about the handbag industry would reasonably conclude she has any bias here. Regardless, this Court is perfectly capable of assessing her credibility on the stand.

Ms. Giberson's opinions satisfy Rule 702. The Court should deny Plaintiff's motion.

SUMMARY OF MS. GIBERSON'S EXPERT OPINIONS

Ms. Giberson offers essentially five expert opinions: **(1)** The U.S. handbag industry is dynamic and vibrant with thousands of different handbag options from hundreds of different brands across all price points. Rep. ¶¶ 16(b), 17-21; Rep. App. C (attached in full at ECF Nos. 156-2, 156-3). **(2)** Consumers shop for handbags for many different reasons and in many different ways. Rep. ¶¶ 16(a), 17-21. **(3)** There is no well-understood definition of the term "accessible luxury" in the handbag industry generally or among consumers. Consumers do not categorize any particular set of brands or handbags as "accessible luxury," nor do consumers shop only within some particular category of limited brands. There is competition across the wide spectrum of

handbags. Rep. ¶¶ 16(c), 22-28. **(4)** Because third-party company NPD obtains its data from only limited sources (*i.e.*, just a subset of retailers in the wholesale channel), it is well-understood in the industry that NPD does not provide any comprehensive data about handbag sales in the U.S. or about any particular handbag seller. NPD's "brand classifications" are not intended to, and do not actually, reflect which handbags or handbag brands compete with each other from the consumer perspective. Rep. ¶¶ 16(d), 29-75. **(5)** Given the extraordinary number of handbag options available to consumers at every price point and the dynamic nature of the industry—including the continuous entry, expansion and repositioning of players—based on her experience, Ms. Giberson does not believe that Tapestry (or any of its brands) would be able to successfully raise the price of Coach, Kate Spade or Michael Kors handbags without innovating or otherwise doing something to demonstrate increased value to consumers because consumers have so many other options to which they can turn. Report ¶¶ 16(e), 76-103; Rep. App. C.

As Ms. Giberson details in her lengthy report, and as she explained during her deposition, each of these opinions is based on her decades of industry experience and amply confirmed by the record evidence. Ms. Giberson explained how each opinion was supported and based on, among other things: **(1)** Her 19-years and counting as the President of the Accessories Council, whose mission includes supporting new designers looking to start a business and existing designers looking to expand or reposition. Rep. ¶ 1. **(2)** Her role as the Editor-in-Chief of the Ac Magazine, the only publication devoted solely to fashion accessories (including handbags), and the hundreds of articles she has written on the handbag industry specifically. *Id.* ¶ 2, 8, App. A. **(3)** Her day-job responsibilities to stay current on all facets of the handbag industry, including industry players, industry trends and how consumers are shopping. *Id.* ¶ 8. **(4)** Her day-job requirements to ensure she understands consumer preferences and shopping behaviors, which involves regularly (i)

interacting with handbag consumers to learn how and where they shop, (ii) interfacing with Accessories Council member companies as well as other handbag designers, retailers, and industry participants to learn about their handbag customers, and (iii) reading established industry publications. Rep. ¶¶ 2, 8, 17. **(5)** Her prior role at QVC, where she was responsible for buying handbags and for developing private-label handbags. Rep. ¶ 4; Giberson Tr. 22:13-24 (attached in full at ECF No. 173-2). **(6)** Her partnership in Edit Consulting where she assists companies that source leather accessories and handbags from India, and her role consulting for the Council for Leather Exports of India. Rep. ¶ 6. **(7)** Her personal visits to over 100 accessories factories and leather tanneries all over the world. Rep. ¶ 7; Giberson Tr. 240:23-241:14. **(8)** Her familiarity with NPD because it is a member, sits on the Council's Board and reports to Council membership. Rep. ¶ 30. And her knowledge about how NPD creates its reports based on regular communication with the NPD Executive Director responsible for accessories (including handbags). *Id.*

ARGUMENT

The Second Circuit has distilled the requirements for the admissibility of expert testimony under Federal Rule of Evidence 702 "into 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*, No. 20-CV-03182 (JLR), 2024 WL 869156, at *8 (S.D.N.Y. Feb. 29, 2024) (quotation marks and citation omitted). Ms. Giberson meets all three criteria.

I. MS. GIBERSON'S OPINIONS SATISFY FEDERAL RULE OF EVIDENCE 702

Qualifications: Ms. Giberson's more than 30 years of experience amply qualify her to testify as an expert in the handbag industry. Experts do not all have to be doctors or scientists. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141-42, 148 (1999). Rule 702 itself states that an expert may be qualified by "knowledge" or "experience," and courts have held that "[a]n expert can be considered qualified under *Daubert* based on experience alone." *U.S. v. Patel*, 2023

WL 2643815, at *33 (D. Conn. Mar. 27, 2023) (refusing to exclude industry experts qualified by "experience alone" in antitrust case); *see also Dover* v. *British Airways, PLC (UK),* 254 F. Supp. 3d 455, 459 (E.D.N.Y. 2017) (industry expert qualified due to 25 years of experience). These types of experts are often referred to as industry experts, and they are common in many types of cases, including antitrust cases. *See id.*

Reliability: Ms. Giberson's opinions are reliable because each is firmly grounded in her decades of real-world experience in the handbag industry. *See supra* at 4-6. Evaluating industry expert testimony "calls for a flexible *Daubert* inquiry." *Singleton v. Fifth Generation, Inc.*, 2017 WL 5001444, at *5 (N.D.N.Y. Sept. 27, 2017) (denying motion to exclude expert with "substantial experience in the industry" who had "articulated the basic reasoning for his opinions"). Industry experts, like Ms. Giberson, are not expected to "rely on anything like a scientific method." Fed. R. Evid. 702, Advisory Committee Notes, 2000 Amendments. Instead, their "specialized knowledge" and personal experience may be "the predominant, if not sole, basis for a great deal of reliable expert testimony." *Id.* An industry expert's opinions are reliable when the expert shows "how [her] experience led to [her] conclusions or provided a basis for [her] opinions." *See Envy Branding,* 2024 WL 869156, at *8 (industry expert with over ten years of experience can opine on "industry norms"). Indeed, courts routinely allow industry experts to rely on their experience to opine on issues such as how and why customers buy a particular product and which products customers consider to be substitutes. *See, e.g.*, *Fossil,* 2014 WL 1246554, at *3 (handbag industry experts permitted to opine on why consumers buy handbags); *Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 40 (S.D.N.Y. 2016) (factfinder "may consider the testimony of industry experts regarding product substitutability"); *Singleton*, 2017 WL 5001444, at *9-10 (industry expert permitted to opine on brands of vodka consumers consider to be in the same "competitive set").

Relevance and Assistance to the Trier of Fact: Ms. Giberson's opinions are clearly relevant to this case and would help this Court assess issues in dispute. Ms. Giberson's opinions explain how Plaintiff and its expert (i) ignore numerous competitive options for handbag consumers, including through the fast-growing resale channel, (ii) misunderstand or misconstrue how NPD collects and organizes its data and how the industry views NPD, (iii) ignore or downplay the significance of the continuous entry, expansion and repositioning of industry players, (iv) fail to account for the commercial realities of how consumers shop for handbags and (v) are wrong about the attributes they contend make "accessible luxury" handbags distinct from other handbags.

Industry experts routinely testify in antitrust cases, including for the government, because courts find their experience-based opinions relevant and helpful. *See, e.g.*, *Dial Corp.*, 165 F. Supp. 3d at 40 (industry expert permitted to testify about product substitutability); *Patel*, 2023 WL 2643815, at *33-35 (industry experts permitted to testify about industry hiring practices); *F.T.C. v. Foster*, 2007 WL 1793441, at *18 (D.N.M. May 29, 2007) (considering FTC's industry expert in merger case). The same should be true for Ms. Giberson here.

Ms. Giberson's opinions fall comfortably within Rule 702, and the Court should hear them. Plaintiff's grab-bag of gripes provides no reason to conclude otherwise.

II. MS. GIBERSON'S OPINIONS ARE BASED ON MORE THAN 30 YEARS OF EXPERIENCE AND SPECIALIZED KNOWLEDGE, NOT MERELY HER "GUT"

Plaintiff first accuses Ms. Giberson of not applying "reliable principles and methods to specific data" because she supposedly relied on her "gut" to reach opinions, had allegedly formed all of her opinions before ever being retained in this case and performed only a "shallow analysis." Mot. at 3-5. None of this is true. As an initial matter, Plaintiff relies inapplicable law. Rather than sticking to the wealth of authority addressing *industry* experts like Ms. Giberson, Plaintiff

mixes in a variety of inapposite cases about *technical* experts, like doctors and scientists.[2] While this body of law applies to economists like Dr. Smith and Professor Scott-Morton, it does not apply to industry experts like Ms. Giberson who are qualified based on their *experience* and are not expected to "rely on anything like a scientific method." Fed. R. Evid.702, Advisory Committee Notes, 2000 Amendments. Ms. Giberson's opinions are admissible because she showed how her experience "provided a basis" for them. *See Envy Branding,* 2024 WL 869156, at *8; *Pension Comm. of U. of Montreal Pension Plan v. Banc of Am. Securities*, LLC, 691 F. Supp. 2d 448, 464–65 (S.D.N.Y. 2010) ("[T]he reliability of [industry expert's] testimony largely depends on whether he has drawn the proffered industry standards from an adequate source—in this case, his experience."). Ms. Giberson is therefore unlike the expert in the case cited by Plaintiff, *LinkCo, Inc. v. Fujitsu Ltd.*, 2002 WL 1585551 (S.D.N.Y. July 16, 2002) (cited Mot. at 5, 10 n.2, 13), who failed "to explain how his experience supports his conclusion." *Id.* ¶ at *4.

Plaintiff's contention that Ms. Giberson formed all of her opinions before Defendants had even retained her in this case and thus before she had access to the record (Mot. at 4-6) is wrong. The bulk of her expert report *responds* to the opinions of Plaintiff's expert Dr. Smith that he disclosed for the first time on July 26, 2024; Ms. Giberson could not have known Dr. Smith's opinions before Defendants retained her in "early June [2024]." Giberson Tr. at 23:22-23.

As to the rest of her opinions, Plaintiff either misunderstands or mischaracterizes what Ms. Giberson said and did. As an industry expert, of course she formed some preliminary views after

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[2] *See, e.g.,* Mot. at 3-5, citing *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416 (7th Cir. 2005) (social scientist performing quantitative analysis); *Daniels-Feasel v. Forest Pharms., Inc.*, 2021 WL 4037820, at *17 (S.D.N.Y. Sept. 3, 2021) (toxicologist); *E.E.O.C. v. Bloomberg L.P.*, 2010 WL 3466370, at *15 (S.D.N.Y. Aug. 31, 2010) (economists and social psychologist); *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) (medical doctor).

reading Plaintiff's complaint. That is what industry experts do, *i.e.,* assess whether, based on their experience, specific contentions about their own industry are true. This is decidedly *un*like the case Plaintiff cites (Mot. at 6), *Viterbo v. Dow Chem. Co.*, 646 F. Supp. 1420, 1424-25 (E.D. Tex. 1986), where a medical doctor first diagnosed a patient without having run any medical tests.

Ms. Giberson did not need to run any tests or review extensive record evidence to assess whether, as Plaintiff alleged in its complaint, handbag "[i]ndustry participants recognize a distinct market for 'accessible luxury' handbags, which have peculiar characteristics, as well as distinct prices and consumers and unique production facilities, that distinguish them from other types of handbags." Compl. ¶ 27 (ECF No. 1). Ms. Giberson knew that was not true based on more than 30-years of real-world experience. But Ms. Giberson did not, as Plaintiff suggests, ignore the record. Before she prepared her report, she read *all* the third-party depositions that had taken place as well as a number of party depositions, and also reviewed a wealth of other record evidence. Rep. App. B. This clearly was not all one-sided evidence. Indeed, Ms. Giberson reviewed Dr. Smith's report and record evidence he cited as supposedly supporting his opinions. Giberson Tr. 264:14-265:3; Rep. App. B. Before her deposition, she also reviewed his rebuttal report and cited record evidence. *Id.* As Ms. Giberson explained at her deposition, her review of all this evidence did not change what she knew to be true based on her experience, but it certainly "fortified" her opinions. Giberson Tr. 266:8-12. Plaintiff pooh-poohs the 80-hours Ms. Giberson personally spent reviewing the record and preparing her report—the equivalent of two full-time work weeks—as a "shallow analysis" (Mot. at 5), but neglect to credit her more than 30-year head start, and the assistance of her support team. Rep. ¶ 15.

Plaintiff relies heavily on *E.E.O.C. v. Bloomberg L.P.*, 2010 WL 3466370, at *15 (S.D.N.Y. Aug. 31, 2010) (Mot at 4, 6), but that case is inapposite. There, a scientific expert (i)

"did not conduct a scientific study that would meet peer review standards," but admitted that he could have done so; (ii) "ignore[d] completely" evidence that did not support his opinion; and (iii) admitted that if he had reviewed additional evidence he would have "reconsider[ed]" and "back[ed] off" his conclusions. *Id.* at *15. Nothing like that happened here. To the contrary, in addition to a wealth of other evidence, Ms. Giberson also reviewed *the* set of evidence that Plaintiff and its expert contend supports Plaintiff's case. Giberson Tr. 264:14-265:3; Rep. App. B. None of it changed her opinions about the competitive options available to *consumers* in the real world because Plaintiff's evidence simply is not focused on that key issue. *E.g.,* Rep. ¶¶ 26-28.

III. MS. GIBERSON IS NOT OFFERING ANY "ECONOMIC" OPINIONS, BUT SHE IS QUALIFIED TO REBUT DR. SMITH

Plaintiff next argues that the Court should not hear from Ms. Giberson at all because she is not an economist and thus has no basis to rebut anything that Dr. Smith did. Mot. at 6-8, 11. That is a non sequitur because she is not offering any economic opinions. Defendants' expert economist Professor Fiona Scott Morton will do that. Ms. Giberson does explain where Dr. Smith disregards the commercial realities of the handbag industry, and specifically the consumer perspective, but she is doing that as an industry expert, not as an economist. E.g., Rep. ¶ 76.

For example, contrary to Plaintiff's suggestion (Mot. at 11), Ms. Giberson is not critiquing *how* Dr. Smith mathematically ran NPD data through his various economic models. Instead, she explains that his decision to limit his analysis solely to the NPD's "bridge" and "contemporary" categories "ignores how consumers actually shop in the real world" because (i) "NPD's 'brand classifications' are not intended to, and do not actually, reflect which handbags or handbag brands compete with each other from the consumer perspective," as the industry understands and as NPD itself has acknowledged (Rep. ¶¶ 43-63), and (ii) NPD data is very limited because it does not track handbag sales in many channels, such as resale and direct to consumer (*id.* ¶¶ 33-34, 58-59).

Similarly, contrary to Plaintiff's contention (Mot. at 14), Ms. Giberson is not opining whether, from an economics perspective, entry or expansion would be sufficient to address any potential anticompetitive effects. Rather, she explains the many real-world facts that Dr. Smith does not address, including (i) numerous recent examples of entry, expansion and repositioning that Dr. Smith does not discuss (Rep. ¶¶ 81-84), (ii) the ease with which new handbag brands can enter and grow (*id.* ¶¶ 81-101) and (iii) the vast global manufacturing and sourcing options for handbags (*id.* ¶¶ 85-95)—all of which she knows from her own experience.

Demonstrating how a technical expert's opinions are divorced from the real world is an important role that industry experts serve, not a basis to exclude them. For example, in *Gabel v. Richards Spears Kibbe & Orbe, LLP*, the defendant retained an industry expert to rebut the opinions of the plaintiff's labor economist. 2009 WL 1856631, at *3 (S.D.N.Y. June 26, 2009). The court refused to exclude the industry expert's testimony, noting that the industry expert's "practical experience is at least as valuable, and may prove moreso, than [the economist's] peer-reviewed theory." *Id.* at *3. Similarly in *In re Kirkland Lake Gold Ltd. Securities Litig.*, the court rejected an argument that an industry expert could not opine on stock price movements because he lacked the economic qualifications of the plaintiff's Ph.D. economist. 2024 WL 1342800, at *3 (S.D.N.Y. Mar. 29, 2024). The court explained that the industry expert served a different role than the parties' "dueling" economists. *Id.* Ultimately, the court credited the experienced-based opinions of the industry expert over the economist's opinions, which the court found to be "of little probative value on the subject of price impact." *Id.* at *12.

Plaintiff implies that Ms. Giberson's opinions about commercial realities are not reliable because they supposedly conflict with the "antitrust economics" that Dr. Smith purports to apply. Mot at 6-14. But Plaintiff has things backwards. The fact that the commercial realities conflict

with the predictions that Dr. Smith makes using his mathematical models means it is Dr. Smith who has the reliability problem, not Ms. Giberson. *Cf. F.T.C. v. Thomas Jefferson U.*, 505 F. Supp. 3d 522, 544, 553 (E.D. Pa. 2020) (finding Dr. Smith's economic results unpersuasive because they did not "correspond[] with commercial realities").

IV. MS. GIBERSON IS CLEARLY QUALIFIED TO OPINE ON WHETHER "ACCESSIBLE LUXURY" IS A WELL-UNDERSTOOD INDUSTRY TERM

One of Plaintiff's most surprising arguments is that the Court should not hear Ms. Giberson explain that the term "assessable luxury" has no well-understood meaning in the handbag industry, and that the "distinct" features Plaintiff contends make "accessible luxury" handbags different from other types of handbags actually are not so distinct. Mot. at 9-10. Plaintiff argues that "*[i]ndustry participants* recognize a *distinct* market for 'accessible luxury' handbags, which have *peculiar* characteristics, as well as *distinct* prices and consumers and *unique* production facilities, that distinguish them from other types of handbags." Compl. ¶ 27 (emphasis added). Ms. Giberson strongly disagrees based on her experience. Rep. ¶¶ 22-28, 55-75. It is the job of an industry expert to explain what is—and what is not—recognized as "distinct," "peculiar" or "unique" in their industry. *E.g., Patel*, 2023 WL 2643815, at *33 (industry expert testifies about "industry practice"). If Ms. Giberson is not qualified to reliably do that for the handbag industry, then it is hard to imagine who is—certainly not an economist with no industry expertise at all. Plaintiff and its expert are free to put on blinders and focus solely on some cherry-picked internal documents and statements to the investment community. But the Court should hear from Ms. Giberson about the much bigger picture—one that includes the real-world *consumer* perspective.

V. MS. GIBERSON HAS AMPLE EXPERIENCE TO EXPLAIN HOW CONSUMERS SHOP FOR HANDBAGS WITHOUT CONDUCTING A CONSUMER SURVEY

Plaintiff argues that Ms. Giberson should not be allowed to opine on how consumers shop for handbags or the variety of handbag options available, because she did not perform a consumer

survey. Mot. at 9, 13. This is both hypocritical and wrong. It is hypocritical because Dr. Smith also wants to opine on how consumers shop for handbags, *but he did not conduct his own consumer survey to study that question* (and the old surveys on which he seeks to rely are not fit for the purpose he wants to use them for). If Dr. Smith, who has no experience in the handbag industry, is permitted to opine about what handbag consumers are likely to do if, for example, the price of a Michael Kors handbag were to increase, "then someone who has actually worked in the field [like Ms. Giberson] can most certainly do so." *Gabel*, 2009 WL 1856631, at *3.

Here again, the distinction between *industry* experts and *technical* experts is key. Courts permit *industry* experts to opine on consumer and marketplace behavior without conducting a survey so long as they have the experience to do so, which Ms. Giberson clearly does. *ROMAG Fasteners, Inc. v. Fossil, Inc.*, 2014 WL 1246554, is particularly instructive. In *Fossil,* the defendants sought to exclude the testimony of two industry experts regarding the role that a handbag's hardware plays "in a consumer's choice of handbag." *Id.* at *2. Defendants argued that the two experts' experience in the handbag industry (twenty and twenty-five years) was insufficient and that they should have conducted a consumer survey. *Id.* at *3. The court disagreed and held their industry experience was sufficient to support their opinions without a survey. *Id.; see also Singleton*, 2017 WL 5001444, at *9-10 (industry expert can testify about brands in consumers' "competitive set"). By contrast, a *technical* economic expert like Dr. Smith has no industry experience to rely on to justify not conducting his own survey to support his assumptions about what consumers would do in the event of a handbag price increase.

VI. MS. GIBERSON'S OPINIONS ARE HER OWN

Finally, Plaintiff makes a halfhearted attempt to exclude Ms. Giberson because she is biased. This argument is wrong legally because an expert's potential bias goes to weight, not admissibility. *Int'l. Cards Co., Ltd. v. MasterCard Intl. Inc.*, 2016 WL 7009016, at *8 (S.D.N.Y.

Nov. 29, 2016). But this argument is also deeply wrong factually. Anyone who hears Ms. Giberson speak or reads her testimony would know instantly that her opinions are her own, and she is not testifying to do favors for anyone. It does not even make sense to suggest, as Plaintiff does, that Ms. Giberson is somehow favoring Tapestry because it is member of the Accessories Council or because it donated to a charity event. Mot. at 1 n.1, 5. The Accessories Council has over 350 members and many donate to its charity events. Ms. Giberson not only expressly rejected any bias, but also has no incentive to favor Tapestry over the many other members that span the gamut from handbag manufacturers like Tivoli to retailers like Nordstrom's to data analyst firms like NPD to resellers like Fashionphile to brands like Tory Burch, Kurt Geiger, and Vera Bradley.

Ms. Giberson never testified that she based her opinions on "the interests of the Accessories Council's members," as Plaintiff claims (Mot. at 3). Nor did Ms. Giberson take "a straw poll of Accessories Council board members" to reach her opinions (*id.* at 5). Instead, she testified that after she read Plaintiff's complaint, she briefly talked to a few of her Board members (none of whom is from Tapestry or Capri), had one in-depth conversation (with an independent consultant) (Giberson Tr. 271:6-272:5; Rep. Ex. 2) and thought "long" and "careful[ly]" about how the transaction "would impact the industry or how it could impact my members" (Giberson Tr. 265:24-266:4). This is unremarkable. Of course she talked to others in the industry about this high-profile lawsuit; the case was headline news in her industry and across the country when Plaintiff filed it. And of course she thought carefully about how this potential transaction might impact the handbag industry generally, which includes many Accessories Council members. Careful thought ensures reliable opinions. Ultimately, as she stated, the opinions in her report are her own and are the "culmination of [her] years of experience." Giberson Tr. 266:24-267:20.

CONCLUSION

Ms. Giberson's opinions satisfy Rule 702. This Court should deny Plaintiff's motion.

Dated: August 30, 2024

Respectfully submitted,

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