IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TAPESTRY, INC.,

and

CAPRI HOLDINGS LIMITED.

Defendants.

Case No. 1:24-cv-03109-JLR

REDACTED VERSION

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF DR. LOREN SMITH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Defendants' Motion to Exclude the opinions of the FTC's economic expert, Dr. Loren K. Smith, which rely on his diversion analysis, ECF No. 184, is based on misrepresentations of Dr. Smith's analyses and a fundamental misunderstanding of antitrust economics and law. It should be denied. Defendants do not contest that Dr. Smith employed standard quantitative techniques to analyze Tapestry's ordinary course consumer surveys, which show that, post-closing, Tapestry would have the incentive to raise prices by as much as 30% for Michael Kors handbags. These price effect results also show that Coach, Kate Spade, and Michael Kors could be a relevant product market by themselves, consistent with the documentary evidence showing the Parties are each other's closest competitors. Numerous courts have allowed the testimony of experts who relied on similar analyses of similar data in antitrust cases. This Court should do the same.

I. Background

Defendants' Motion concerns Dr. Smith's estimation of diversions ratios based on Tapestry's ordinary course consumer surveys. To estimate diversion figures, Dr. Smith analyzed the data from four of Tapestry's ordinary course consumer surveys which asked respondents, among other things, to identify the other brands they considered when they made their most recent handbag purchase. Separately, Dr. Smith conducted an econometric analysis of available sales data, which also showed high diversions ratios between the Parties' brands, corroborating his survey-based diversion ratios using a separate methodology and data sources. Dr. Smith's economic assessment of the qualitative evidence corroborates the results of his quantitative analyses, showing the Parties are close competitors in the accessible luxury handbag market.

Defendants' Motion focuses exclusively on Dr. Smith's use of Tapestry's ordinary course survey data to estimate diversions. Tapestry itself used the same survey data in the ordinary course to identify the "consideration sets" of its own and competing handbag brands. Tapestry further represented to the FTC earlier this year that the surveys were [redacted]

[redacted][1] Dr. Smith draws the intuitive conclusion—well-grounded in economic logic and consistent with Tapestry's use of the surveys—that these survey responses are indicative of what brands consumers would turn to in response to a price increase, a relevant question when assessing market definition under the Hypothetical Monopolist Test ("HMT").[2] Defendants cry foul, arguing that the surveys in question are not reliable (despite Tapestry's own reliance on them and prior representations to the FTC) and that they do not directly show consumer price-response (despite similar data being used for this purpose in many antitrust cases). At best, Defendants' purported concerns go to the weight given to Dr. Smith's opinions but are irrelevant as to their admissibility.

As noted above, Dr. Smith's survey analysis is not the only analysis he presents in his reports—though Defendants' brief misrepresents this to be the case. Dr. Smith also conducted an economic assessment of the qualitative evidence, corroborated his survey-based diversions using an econometric estimation of diversions based on sales data, and calculated conservative market concentration metrics that show that the proposed transaction is dramatically above the levels typically considered to be problematic. These analyses, although not dependent on Dr. Smith's survey-based diversions ratios, are nonetheless consistent with them, providing independent and corroborative support of Dr. Smith's opinions on market definition and his conclusion that the proposed transaction is likely to cause substantial lessening of competition and harm consumers.

II. Legal Standard

The trial court, in its consideration of the admissibility of proffered expert testimony, is

[1] PX0049 (Tapestry) at 025. Exhibits cited herein are attached to the accompanying Declaration of Andrew D. Lowdon.

[2] 2023 U.S. Dep't of Justice and FTC Merger Guidelines § 2.1 (Dec. 18, 2023) (hereinafter, the "Merger Guidelines") § 4.3.A. The HMT asks how consumers would respond to a small but significant and non-transitory increase in price or other worsening of terms ("SSNIPT").

charged with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993); *see also* Fed. R. Evid. 702. In *Daubert* the Supreme Court laid out a number of factors courts may consider to assess reliability, such as (1) "whether a theory or technique 'can be (and has been) tested,' (2) "whether the theory or technique has been subjected to peer review and publication," (3) "a technique's 'known or potential rate of error' and 'the existence and maintenance of standards controlling the technique's operation,' and (4) "whether a particular technique or theory has gained 'general acceptance' in the relevant scientific community." *Amorgianos v. Amtrak*, 303 F.3d 256, 266 (2d Cir. 2002) (quoting *Daubert*, 509 U.S. at 593-94). "In undertaking this flexible inquiry, the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." *Id.* (quoting *Daubert*, 509 U.S. at 595). "[C]ontentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony." *SEC v. Revelation Cap. Mgmt., Ltd.*, 215 F. Supp. 3d 267 (S.D.N.Y. 2016).

Particularly in a bench proceeding, where "there is no possibility of prejudice, and no need to protect the factfinder from being overawed by 'expert' analysis," "only serious flaws in reasoning or methodology will warrant exclusion" of a proffered expert's opinions. *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 502 (S.D.N.Y. 2013) (citations and quotation marks omitted).

III. Argument

A. Defendants misrepresent Dr. Smith's analyses in this case.

Throughout their Motion, Defendants misrepresent Dr. Smith's analyses. Although Dr. Smith does rely on the survey data to calculate diversion ratios, which are an input into his

quantitative implementation of the HMT,[3] as well as his estimates of consumer harm,[4] those quantitative findings are well-supported by his economic assessment of the qualitative record[5] and an econometric assessment of substitution between the merging Parties' brands based on actual sales data.[6] Dr. Smith's evaluation of this evidence shows that the Parties' brands—Coach, Kate Spade, and Michael Kors—are such close competitors that they, by themselves, represent a relevant market.[7] However, based on the Parties' own characterization of products in ordinary course documents, Dr. Smith determined that a more conservative market, including a broad set of accessible luxury handbag brands, is more useful for assessing the likely competitive effects of the proposed transaction. Accordingly, he uses this broad set of brands for his market share calculations.[8]

Defendants claim that Dr. Smith's survey-based diversion estimates are an input into each of his analyses, and therefore all of his opinions are unreliable. Deft.'s Mem. 2-3. But this is not the case. The survey-based aggregate diversion ratios define a relevant market that is consistent with the relevant market implied by the qualitative and econometric evidence. For example, the significant qualitative evidence, including evidence from the Parties' ordinary course documents, indicate that accessible luxury handbags are a well-recognized set of products with certain common characteristics, supporting a relevant market for accessible luxury handbags.[9] Dr. Smith's market concentration calculations use sales data from the Parties, third-parties, and wholesale point-of-sale data collected by NPD to calculate that the Parties represent nearly 60%

[3] PX6000 (Smith (FTC) Rep.) Section III.E.
[4] PX6000 (Smith (FTC) Rep.) Section V.B.2.b, V.B.2.c, Appendix II, Appendix III.
[5] PX6000 (Smith (FTC) Rep.) Section III.A, B.
[6] PX6000 (Smith (FTC) Rep.) ¶ 248 & n.448.
[7] PX6000 (Smith (FTC) Rep.) ¶¶ 258, 266.
[8] PX6000 (Smith (FTC) Rep.) ¶¶ 185-86 & Table 7.
[9] PX6000 (Smith (FTC) Rep.) Section III.A, B, F, G.

of the broad relevant market,[10] well above the level usually considered presumptively unlawful.[11] Thus, Dr. Smith's market definition and market share calculations are supported by evidence beyond the survey-based diversions Defendants challenge here.

Defendants ignore that Tapestry's surveys are not Dr. Smith's only diversion analysis. Dr. Smith also conducts an econometric analysis of available sales data to estimate diversions.[12] While Dr. Smith does not use these diversion estimates in his calculations of competitive harm, this analysis confirms that diversions between the Parties' accessible luxury brands are high, consistent with his survey-based diversion estimates, and with his economic analysis of qualitative evidence supporting his market definition opinions.[13]

B. Tapestry's ordinary course surveys are an appropriate source to estimate diversions.

At its core, Defendants' Motion argues that Dr. Smith erred by relying on Tapestry's ordinary course surveys to estimate diversion ratios, because those surveys do not directly ask about consumer responses to price changes—the behavior a diversion ratio measures. Deft.'s Mem. 4, 8. But economists regularly estimate diversion ratios using non-price-response data and those analyses are regularly used by Court's to assess mergers. For example, in *United States v. Anthem, Inc.*, the Court credited the diversion ratio analysis of the Government's expert, who estimated diversions based on internal bidding data from the merging companies, which included no information about price responses.[14] Notably, this data—like the survey data here—did not

[10] PX6000 (Smith (FTC) Rep.) Table 7 (Coach, Kate Spade, and Michael Kors account for 58.7% of the accessible luxury handbag market).
[11] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 364 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").
[12] PX6000 (Smith (FTC) Rep.) ¶ 248 n.448.
[13] PX6000 (Smith (FTC) Rep.) ¶ 248 n.448.
[14] *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 217, 220 (D.D.C. 2017).

explicitly identify a customer's second-choice option they would turn to if their first-choice was unavailable.[15] Nonetheless, the expert was allowed to opine on how this data was indicative of diversion, calculating estimated diversion ratios the Court ultimately relied on, among other evidence, in defining the relevant market.[16] Similarly, in *FTC v. Sysco Corporation*, the Court relied, in part, on the FTC's expert's diversion analysis based on RFP and bidding data—which, again, did not directly show consumer price response.[17] In both cases, the Court noted the limitations of the available data, but concluded that the data was indicative of diversions and that the results of the experts' analyses were consistent with the qualitative evidence.[18]

The caselaw is replete with other examples of Courts finding a relevant market, relying in part on diversion estimates calculated using data that does not explicitly measure consumer price response. *See, e.g., FTC v. Wilh. Wilhelmsen Holding ASA,* 341 F. Supp. 3d 27, 57 (D.D.C. 2018) (estimated diversions based on revenue, SalesForce data, and win/loss data); *United States v. Bertelsmann SE & Co KGaA*, 646 F. Supp. 3d 1, 39 (D.D.C. 2022) (estimated diversions based on market shares, win/loss data, runner-up data, and minutes from the Parties' meetings); *FTC v. Tronox, Ltd.*, 332 F. Supp. 3d 187, 205 (D.D.C 2018) (estimating actual loss from, inter alia, document stating that a substitute "could take up to 15 percent of . . . applications"); *FTC v. Hackensack Meridian Health, Inc.*, 2021 WL 4145062 at *22 (D.N.J. Aug. 4, 2021) (estimated diversions from patient choice model, not price-response data). *See also United States v. Vail Resorts, Inc.*, No. 97-B-10, Competitive Impact Statement, (D. Colo. Jan 22, 1997) (relying on ordinary course surveys to estimate switching); Merger Guidelines, § 4.2.A.

[15] *Anthem*, 236 F. Supp. 3d at 217 n.18.
[16] *Anthem*, 236 F. Supp. 3d at 219-20.
[17] *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 35-37 (D.D.C. 2015).
[18] *Anthem, Inc.*, 236 F. Supp.3d at 219-20; *Sysco Corp.*, 113 F. Supp. 3d at 37.

Indeed, Defendants' economic expert, Prof. Fiona Scott Morton, has written approvingly on the use of non-price-response data to inform diversion estimates used in market definition. In discussing AT&T's proposed acquisition of T-Mobile, Prof. Scott Morton explained:

> A good example of this is the FCC's data on customers who port their telephone number from one carrier to another. These people have chosen to switch carriers for reasons that we cannot observe in the FCC data. Many of them are probably switching for a reason that is essentially the same as perceiving a price difference. . . . As such, these data offer an opportunity to improve our information about how customers would respond if the price of any one product were to increase.[19]

Dr. Smith's use of Tapestry's ordinary course surveys here is akin to the analysis Prof. Scott Morton describes; it is reasonable to believe the consideration responses from the survey include the second-best choice respondents would turn to if faced with a SSNIPT.

Defendants' reference to the *H&R Block* case is not compelling. Defendants cite heavily to the Government's brief in *H&R Block*—not the court's holding—for the proposition that surveys that do not measure consumer price-responses cannot be used to estimate diversions. Deft.'s Mot. 2, 10. But the FTC is not bound by the arguments made by a different government agency, in a different matter, involving a different survey. The court in *H&R Block* denied the motion *in limine* to exclude the survey at issue in that case,[20] a point Defendants omit from their Motion. The switching data the court ultimately relied on is the very sort of non-price-response data Defendants claim cannot be used to estimate diversions.[21] The court explained that while data on "switching cannot serve as a complete proxy for diversion . . . switching data can provide

[19] W. Robert Majure & Fiona Scott Morton, *The Year in Review: Economics at the Antitrust Division: 2011*, 41 Rev. Indus. Org. 321, 325 (2012).
[20] *See United States v. H&R Block, Inc.*, 831 F. Supp. 2d 27, 36 (D.D.C. 2011).
[21] *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 62 (D.D.C. 2011) ("The IRS switching data does not directly measure diversion because switching can occur for any number of reasons, many of which may not involve price.").

a 'reasonable second estimate' of diversion ratios."[22] Finally, the court noted methodological concerns with the survey—which Defendants have not identified here—and concluded that the available switching data was more reliable, not that surveys could never inform diversion.[23]

Defendants posit that the hypothetical survey question in *H&R Block* is more revealing of diversion than the Tapestry ordinary course surveys. The survey in *H&R Block* asked respondents about their hypothetical response to a change in tax software "price, functionality, or quality."[24] Here, Tapestry's ordinary course surveys address the real world question of what other brands they actually considered when deciding to make a specific past purchase of a handbag.[25] This consideration data is the best available evidence of diversions in this case.

Defendants' other cases are similarly inapposite. The survey at issue in *FTC v. CCC Holdings, Inc.*, included only 31 respondents, and its use in the ordinary course was accompanied by the warning that the results "cannot be projected to the population as a whole due to the limited number of [survey] completes."[26] Dr. Smith's analysis relies on 3,758 respondents to Tapestry's surveys who purchased a Coach, Kate Spade, or Michael Kors bag.[27] As discussed below, Tapestry's ordinary course surveys were regularly relied on by Tapestry with no such caveat. The *Dentsply* case similarly does not state that ordinary course surveys cannot be used to

[22] *H&R Block*, 833 F. Supp. 2d at 71.
[23] *H&R Block*, 833 F. Supp. 2d at 70-71.
[24] *H&R Block*, 833 F. Supp. 2d at 70.
[25] PX5012 (Yu (Tapestry) Dep.) at 246:2-18. *Cf. H&R Block*, 833 F. Supp. 2d at 70 ("Moreover, since there is extensive IRS data reflecting actual switching behavior in the marketplace—as opposed to the hypothetical switching behavior asked about in the email survey—the Court will not rely on the 'diversion ratios' suggested by the 2011 email survey.").
[26] *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 70 (D.D.C. 2009). *See also id.* at 605 F. Supp. 2d at 71, n.48 ("The Court does not conclude that the predictions of Dr. Hayes's Bertrand model are necessarily wrong or that the diversion ratios he used are necessarily incorrect. The Court merely concludes that it cannot rely upon such a limited amount of data.").
[27] PX6000 (Smith (FTC) Rep.) nn. 562, 568.

estimate diversions; rather, the Court there declined to rely on the survey at issue for design and methodological issues that Defendants do not raise here. *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387, 435-40 (D. Del. 2003). Defendants' remaining authority, *Merisant Co. v. McNeil Nutritionals, LLC* and *Loctite Corp. v. National Starch and Chemical Corp.*, are Lanham Act cases standing for the unremarkable proposition that a survey must relate to a question relevant to the case.[28] However, as the extensive case law cited above shows, non-price-response data, such as the surveys here, are indicative of diversions and appropriate for an expert to consider.

Finally, Defendants' claim is inconsistent with Tapestry's own use of the surveys, including in their presentations to the FTC, to show closeness of competition between handbag brands. Specifically, Tapestry described the surveys as providing "[redacted]"[29] claiming that this "[redacted]"[30] Dr. Smith's analysis of the same data shows that consumers consider Kate Spade and Michael Kors to be much closer competitors.

C. Tapestry's ordinary course surveys are reliable.

Defendants' claim that Dr. Smith's reliance on Tapestry's ordinary course surveys is inappropriate is inconsistent with both the law and the facts. Deft.'s Mem. 12. Courts have regularly relied on party ordinary-course survey data, both directly and as material informing expert analysis. For example, the district court in the *American Express* relied in part on American Express's own ordinary course surveys of cardholders as well as the Government's

[28] *Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 315, 328 (E.D. Pa. 2007) (rejecting survey asking respondents to come to a legal conclusion); *Loctite Corp. v. Nat'l Starch and Chem. Corp.*, 516 F. Supp. 190, 206 (S.D.N.Y. 1981) (survey that does not test awareness of the term "Super Glue" is not relevant to whether "Super Glue" was a generic term).
[29] PX0050 at 001.
[30] PX0051 at 003.

expert analysis of the surveys.[31] The court noted American Express's own use of its surveys in the ordinary course of business to demonstrate their relevance.[32] Beyond merely being appropriate for an expert witness to rely on, ordinary course party surveys, like Tapestry's consumer surveys here, are generally admissible as evidence in their own right, especially where the producing party relied on the survey in the ordinary course, "thus manifest[ing] a belief in the trustworthiness of both" the respondents' "statements and on the survey methodology itself."[33]

Moreover, Defendants identify no evidence indicating that Tapestry believed the results of the surveys on which Dr. Smith relies was *unreliable*. The record, in fact, shows the opposite. Tapestry VP of Consumer Insights Alice Yu—upon whose testimony Defendants rely—stated [redacted][34] Tapestry's corporate representative, Liz Harris, testified that [redacted][35] Tapestry's corporate representative further testified that [redacted][36] Indeed, Tapestry has used the specific question Dr. Smith relies on to show closeness of competition between Coach and Michael Kors [redacted]

[31] *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 193, 238 (E.D.N.Y. 2015), *rev'd on other grounds*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom Ohio v. Am. Express Co.*, 585 U.S. 529 (2018).
[32] *Am. Express*, 88 F. Supp. 3d at 193, n.28.
[33] *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 239 (2d Cir. 1999) (Sotomayor, J.).
[34] PX5012 (Yu (Tapestry) Dep.) at 45:2-9.
[35] PX5028 (Harris (Tapestry) Corp. Dep.) at 18:16-21:9 (results of brand health trackers incorporated into materials for the Board, Ms. Crevoiserat, and preparation of earnings calls).
[36] PX5028 (Harris (Tapestry) Corp. Dep.) at 51:3-10, 54:21-55:5.

[redacted][37] Tapestry even relied on these surveys—[redacted]—in their advocacy to the FTC regarding the proposed transaction, [redacted][38] [redacted][39] undercutting Defendants' claim that the survey data is too old to be an indicator of current market realities. Deft.'s Mem. 8.

Defendants suggest that because Tapestry never used the results of its surveys to calculate diversion ratios, Dr. Smith should be precluded from doing so. Deft.'s Mem. 12. Such a proposition would preclude virtually all quantitative analysis of market definition, as market definition is a litigation-specific exercise. Unsurprisingly, no case supports this contention. The sole case Defendants cite here, *Loctite*, discussed above, simply states that an ordinary course survey must test a question relevant to the litigation.[40] *Loctite* does not state that experts are limited in their use of ordinary course data to the manner in which the producing party used it. In none of the cases cited above in which courts found a relevant market based, in part, on diversion ratios calculated form ordinary course, non-price-response data do the courts first determine whether the *parties* had used the data at issue to calculate diversion ratios.

Defendants next argue that even if Tapestry's ordinary course surveys are the best available evidence of diversion, Dr. Smith still is not entitled to rely on them, due to purported (but unexplained) "concerns regarding the reliability of the data." Deft.'s Mem. 12-13. But this argument "fundamentally confuses the *credibility and accuracy* of [Dr. Smith's] opinion with its *reliability*."[41] This attack—"garbage in, garbage out"—at best goes to the weight the Court

[37] PX1216 (Tapestry) at 012.
[38] PX0050 (Tapestry) at 004*; see also* PX0051 (Tapestry) at 003.
[39] PX0049 (Tapestry) at 025.
[40] *Loctite*, 516 F. Supp. at 206.
[41] *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008) (emphasis in original).

should ascribe to Dr. Smith's opinions, not their admissibility under Rule 702.[42] Notably, every case Defendants cite in this portion of their Motion discusses the reliability of an expert's *methodology* under the *Daubert* standard, not their underlying data, as Defendants suggest.[43] Defendants do not contest Dr. Smith's aggregate diversion HMT methodology. Deft.'s Mem. 5.

Moreover, Defendants do not articulate what "obvious concerns regarding reliability" infect Tapestry's ordinary course surveys. As discussed above, Tapestry relied on these surveys in preparing materials for its CEO, its board, for investors, and in their submissions to the FTC. Elsewhere in their Motion, Defendants suggest that respondents may have been confused about the survey's use of the word "consider," or may have listed brands that they considered and rejected, and thus are unlikely to turn to in response to a SSNIPT. Deft.'s Mem. 8-9. First, when Tapestry revised its survey in FY23 [redacted]"[44] Second, even if Defendants were correct that some respondents to Tapestry's surveys were confused by the question or listed brands they actually would not purchase, Dr. Smith's survey-based aggregate diversions would have to be *two-to-three times higher* than the actual aggregate diversions for it to undermine his market definition.[45] Defendants have identified no concern with Dr. Smith's survey-based

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[42] *Scrap Metal*, 527 F.3d at 529-30*; see also Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1344 (11th Cir. 2003) ("The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination.").

[43] *Siharath v. Sandoz Pharms. Corp.*, 131 F. Supp. 2d 1347, 1373 (N.D. Ga. 2001) (*Daubert* requires "reliable scientific methodology"); *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95, 111 (E.D.N.Y. 2019) (focus of the Court's inquiry is "methodology"); *Lara v. Delta Int'l Mach. Corp.*, 174 F. Supp. 3d 719, 734 (E.D.N.Y. 2019) (expert proponent must show reliability of expert's "theories"); *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir. 2000) (expert testimony can be excluded for "failure to test a theory").

[44] PX1185 (Tapestry) at 010 [redacted]; PX5012 (Yu (Tapestry) Dep.) at 280:5-283:7.

[45] PX6000 (Smith (FTC) Rep.) ¶ 105 (critical aggregate diversion ratio is 17%), Table 5 (estimated aggregate diversion ratios of 61.4%-65.1% (baseline) and 35.7%-50.8% (sensitivity)).

diversions that suggests an error of this magnitude.[46] Such a result would also be inconsistent with the qualitative evidence showing close competition between the Parties' brands.

D. Dr. Smith's survey-based diversions are consistent with the qualitative evidence.

Defendants also claim Dr. Smith's survey-based diversions lead to the "absurd" outcome that the Parties' brands by themselves constitute a relevant market, and so must be faulty. Deft.'s Mem. 14-15. Defendants inaccurately claim that "Dr. Smith is necessarily opining that other third party handbags are not interchangeable with the parties' products." Deft.'s Mem. 15.

This statement fundamentally misunderstands the process of market definition. Interchangeability is a necessary but not sufficient criterion for a product's inclusion in a relevant antitrust market; the product must be a *reasonable* substitute that sufficient numbers of consumers would actually turn to in response to a SSNIPT.[47] "Market definition is guided by the 'narrowest market' principle."[48] "While a firm may be a competitor in the overall marketplace, that 'does not necessarily require that it be included in the relevant product market for antitrust purposes.'"[49] Courts frequently find that narrow product markets exist that exclude functional substitutes.[50] Third-party handbags may be interchangeable with the Parties' own, but that does

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[46] *Cf. Wilhelmsen*, 341 F. Supp. 3d at 58 ("Moreover, the gap between critical loss and aggregate diversion in every trial was so large as to ensure the stability of the HMT's qualitative result against any but the gravest of statistical errors.").

[47] *FTC v. RAG-Stiftung*, 436 F.Supp.3d 278, 292 (D.D.C. 2020) ("A relevant product market also 'must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn . . . .'" (quoting *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 612, n.31 (1953)).

[48] *FTC v. IQVIA Holdings, Inc.*, ___ F. Supp. 3d ___, 2024 WL 81232, at *12 (S.D.N.Y Jan. 8, 2024) (quoting *Sysco*, 113 F. Supp. 3d at 26).

[49] *IQVIA*, 2024 WL 81232, at *12 (quoting *FTC v. Staples*, 970 F. Supp. 1066, 1075 (D.D.C. 1997)).

[50] *See, e.g., FTC v. Meta Platforms, Inc.*, 654 F. Supp. 3d 892, 915 (N.D. Cal. 2023) (non-VR fitness products do not preclude finding VR fitness market); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1040-41 (D.C. Cir. 2008) (conventional supermarkets do not preclude finding

not mean they are required to be included in the relevant product market. Of course, Dr. Smith's concentration analysis shows that even if you do include over 200 third-party handbag brands, the proposed transaction still threatens to substantially lessen competition.[51]

Quantitatively, the HMT is a function of two inputs: margins and diversions. A hypothetical monopolist with high margins can profitably impose a SSNIPT even if diversions are relatively low.[52] Here, margins are high.[53] In addition to Dr. Smith's high diversion ratio estimates, ordinary course evidence, including the Parties' Board documents, statements to investors, and internal competitive analyses, all indicate that Coach, Kate Spade, and Michael Kors are each other's closest competitors.[54] Hence, it is not surprising—much less "absurd"—that the Parties' brands constitute a relevant market.

Similarly, Dr. Smith's analysis showing that, post-merger, Tapestry would have the incentive to increase Michael Kors prices by as much as 30% is not "facially implausible," and Defendants misrepresent what this result indicates. Deft.'s Mem. 15. The 30% upward pricing pressure is a measure of the *incentives* Tapestry will face post-merger to increase prices; this incentive could also lead to a reduction of quality or innovation.[55] Moreover, Dr. Smith's upward pricing pressure findings are consistent with Tapestry's own analyses, which show that, there is "[redacted]" and the "[redacted]"[56]

E. Defendants misrepresent Dr. Smith's analysis in the *Thomas Jefferson University* case.

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premium natural and organic supermarket market); *United States v. Visa, USA, Inc.*, 163 F. Supp. 2d 322, 335-38 (S.D.N.Y 2001) (use of cash, checks, and debit cards does not preclude market for general purpose credit cards).

[51] PX6000 (Smith (FTC) Rep.) Table 7.

[52] Merger Guidelines, § 4.3.C.

[53] PX6000 (Smith (FTC) Rep.) ¶ 105; Giberson (Defendants) Rep. ¶ 74.

[54] PX6000 (Smith (FTC) Rep.) Sections III.F, V.A.1.

[55] PX6000 (Smith (FTC) Rep.) ¶ 234.

[56] PX1216-017, 018.

Defendants misrepresent Dr. Smith's work in the *Thomas Jefferson University* case to suggest that his analysis was improper there, and by extension the Court should exclude him here. Contrary to Defendants' description, the court in *Thomas Jefferson University*, and indeed the merging parties, all agreed that Dr. Smith properly calculated diversion ratios and that the resulting geographic market Dr. Smith put forward satisfied the HMT.[57] Where the Court and Dr. Smith diverged was in regard to whether Dr. Smith's analysis of patient diversion ratios was indicative of how insurers would respond to a SSNIPT.[58] Dr. Smith relied on economic principles and market participant testimony to conclude that patient and insurer behavior would be correlated.[59] The Court, based on its review of the qualitative evidence, disagreed.[60]

Defendants' attempts to connect *Thomas Jefferson* to the relevant questions in this matter are strained, to say the least. In *Thomas Jefferson*, reasonable people could dispute the degree to which patient behavior was correlated with insurer behavior—a question raised by the unique features of the healthcare services market. Here, Dr. Smith uses Tapestry's ordinary course surveys of actual handbag purchasers listing the brands they considered during a specific recent purchase to estimate diversion ratios, and, as discussed in Section III.A, his results are consistent with the qualitative evidence in this case showing that the Parties compete most closely with each other and other accessible luxury handbag brands.

IV. Conclusion

For the foregoing reasons, Defendants' Motion (ECF No. 184) should be denied.

[57] *FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522, 542 (E.D. Pa. 2020).
[58] *Thomas Jefferson Univ.*, 505 F. Supp. 3d at 543.
[59] *Thomas Jefferson Univ.*, 505 F. Supp. 3d at 544.
[60] *Thomas Jefferson Univ.*, 505 F. Supp. 3d at 546.

Dated: August 30, 2024

Respectfully submitted,

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