UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TAPESTRY, INC., and CAPRI HOLDINGS LIMITED,

Defendants.

New York, N.Y.

24 Civ. 3109 (JLR)

PI Hearing

September 30, 2024
1:00 p.m.

Before:

HON. JENNIFER L. ROCHON,

District Judge

APPEARANCES

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(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MS. DENNIS: Your Honor, Abby Dennis, with the Federal Trade Commission. With me are me colleagues Peggy Femenella, Nicole Lindquist, Andrew Lowdon, Tim Singer, Danielle Quinn, and our paralegal Carlisle Woodward.

THE COURT: Good afternoon, everyone.

MR. PFEIFFER: Good afternoon, your Honor. Lawrence Buterman, with Latham & Watkins on behalf of Tapestry Inc.

With me are Al Pfeiffer, Amanda Reeves, Jennifer Giordano and David Johnson.

THE COURT: Good afternoon.

MR. BUTERMAN: Your Honor, I would also like to acknowledge our CEO, Joanne Crevoiserat; general counsel, David Howard, and deputy general counsel Amy Meliken.

THE COURT: Good afternoon all.

MS. GOLIN: Good afternoon, your Honor. Elaine Golin from Wachtell Lipton, for Capri Holdings. With me are my partner Jon Moses, by partner Adam Goodman, Damien Didden, Jordan Cohen Kaplan and of course our general counsel Kristen McDonough.

THE COURT: Good afternoon, everyone.

A few things.

One, we decided to hold the argument in this courtroom

to accommodate more folks so everyone can be here. We also have an overflow room I think still going, and we found it appropriate to have the Tapestry argument with the tapestry.

There are a couple of housekeeping items before we start that I thought it would be most efficient if we discussed them at the start of the hearing. I have two letter requesting that the Court admit exhibits that came in with the deposition designations. Neither party objects to the admission of those exhibits. Therefore, without objection, the Court will receive into evidence the exhibits laid out in the joint letter dated September 23, 2024 as clarified by defendant's letter dated September 26, 2024 so that is in evidence.

The other issue is the sealing request.

I have sealing motions related to the posthearing proposed findings of fact and conclusions of law. That is at Docket Nos. 329 and 332. I will grant both of those motions.

As I have explained throughout the case, the Second Circuit applies a three-part test to evaluate whether a document should be made available to the public under the common law right of public access. *Lugosch v. Pyramid Company of Onondaga*, 435 F.3d 110, 119, 120 (2d Cir. 2006).

First, the court determines whether the information to be sealed a judicial document to which the presumption of public access applies second the Court determines the weight of that presumption and third, after determining the weight of the

presumption of access the Court balances the competing considerations against it. The privacy interest of third parties should weigh heavily in a court's balancing equation. That is in the *Amodeo* case at 71 F.3d 1044, 1015 (2d Cir. 1995) and "the need to protect sensitive commercial information from disclosures to competitors seeking an advantage may merit sealing." That is *Keurig Green Mountain Single Serve Coffee Antitrust Litigation* 2023 WL 196134 at *3 (S.D.N.Y. January 17, 2023).

Here, the parties seek to seal confidential material of third parties and the defendants' sensitive commercial personal information in their posthearing findings of fact and conclusions of law. I find that the privacy interests of the third parties and the defendants' need to protect their sensitive commercial information from disclosures to competitors outweighs the presumption of public access here, and I will take them under seal.

I will note that it is only a portion of them that are under seal. Much of them are unredacted and available to the public. There's just some limited redactions that appear there.

I thought the way that we would proceed then is with our oral argument. I presume that the FTC will go first. Is that the presumption? I have a nice deck up here.

So I will hear from them and then we will hear from

defendants and then any rebuttal that the FTC has.

I intend to leave the courtroom open for the duration of the oral argument, so if there's something that you need to show me or point out to me you can do that in a reference to a document that I may have or whatever other way you can do it to make sure that we can keep this oral argument open.

The other thing is that this courtroom is quite large, so you do need to make sure you speak into the microphone. I assume that you will be using the podium so that shouldn't be an issue. I will try to let you get most of it out, but I may ask questions throughout if I find that to be appropriate.

So why don't we start with the FTC. Give me one moment while I make sure my realtime is going.

All right. Why don't we start.

Thank you.

MS. DENNIS: Your Honor, may my colleague approach?

THE COURT: Yes, please.

MS. DENNIS: Good afternoon, your Honor. Abby Dennis, for the Federal Trade Commission.

A few weeks ago, my colleague Ms. Lindquist highlighted in our opening statement the everyday working Americans, mostly women, who will bear the brunt of harm from the loss of competition if Tapestry acquires Capri, and the ionic Coach, Michael Kors, and Kate Spade brands all go under one roof.

Who is this woman?

The parties customer demographics tell us that she likely has an annual household income in the five figures. She's driven by bargains and promotions. She is also probably in her 40s. Maybe she is a mom and she wants something nice that will last a long time that shows she's going places in this world, but something that won't break the bank.

We heard a lot from defendants in this case about what their executives saw walking Fifth Avenue or what they saw their children and their children's friends wearing. To be clear, this case is not about the Gen Z'ers or disposal income in major cities, although they will be harmed too, nor is it about Macy's, Dillard's or defendants' competitors and the harm that those companies may face, although we do think they will suffer, too.

It is about the everyday Americans across this country as the demographics on the slide show. The mom hitting the outlets of Altoona, Iowa, or the Woodburn Premium Outlets in Oregon, the grandparents buying a gift for their grandchild's high school graduation at the Macy's in Okemos, Michigan, the young person purchasing a nice handbag for their first job at the University Mall in Mishawaka, Indiana, and the young mom celebrating a promotion at work with a new Coach or Michael Kors handbag from the Tanger outlets in Bluffton, South Carolina.

The Federal Trade Commission exists to give these American consumers a voice. Most Americans probably do not know who Tapestry and Capri are. As former Kate Spade CEO Liz Frasier told us, consumers do not know the companies that own their favorite brands, but they do know and love these iconic American brands. And they will know when prices go up promotions decrease and quality fades. These are the Americans who will be harmed by this transaction, even if it means, as defendants stated in paragraph 56 of their posthearing findings, that they just don't buy handbags anymore. That, too, is real harm.

The Court saw a variation of the slide in defendants' opening. This case is about the documents. Defendants proposed over 4 million of them. The FTC relied on a lot of those documents here and we will rely on even more in the administrative proceeding. On the other side of the ledger, how many of the parties' ordinary-course documents were admitted as DXs during the evidentiary hearing? 26 from Capri and 10 from Tapestry.

There is a reason for that. The documents all point in one direction, and it is not one that defendants like. So we're left with documents or corporate executive testimony, a common conflict in these cases. The case law tells us which one of these carries the day. Defendants' contemporaneous ordinary-course documents do. These documents show fierce

head-to-head competition and recognition of an accessible luxury market.

But that's not all the FTC's case is built on. We have also put forth defendants' statements to the SEC, their investors, Wall Street, consumer surveys, third-party documents, and testimony diversion ratios, market concentration numbers, no matter what the data source. Dr. Smith's upward pricing pressure index in merger simulation. All roads lead to the same path: This merger is anticompetitive.

Briefly, here's the road map for our discussion. I will save any extra time for rebuttal.

First, we will discuss the legal standards and, importantly, what both sides told you back at the initial scheduling conference in April and what still holds true today. The recent decision in IQVIA is an excellent guidepost for five decades of FTC precedent.

Second, the FTC's theories of anticompetitive harm.

And, finally, we will come back and address defendants' arguments and that the equities favor an injunction.

Turning to the legal standards. To be obtain an injunction under Section 13(b), of the FTC Act the FTC needs to show, one, a likelihood of success on the merits; and, two, that the equities favor a preliminary injunction.

The FTC meets the first element when it raises serious

questions about the antitrust merits that warrant thorough investigation in the first instance by the FTC.

What are the antitrust merits? Whether the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in any line of commerce in violation of Section 7 of the Clayton Act.

THE COURT: Ms. Dennis?

MS. DENNIS: Yes.

THE COURT: If the defendants' standard of a clear likelihood of success on the merits is applied here, what's your position about whether you still succeed?

MS. DENNIS: We believe we still succeed, your Honor. They're referring to *McKinney v. Starbucks*. In that case -- it's the next slide actually. It is a different statute out there, section 10(j) of the National Labor Relations Act.

The standard there asks Court to provide an injunction if it deemed just and proper. There was not any standard in the statute like the one here. The legislative history of the FTC Act shows that Congress intended to forgo the traditional equities standard. In the Second Circuit the serious questions standards still applies as to private equity actions as long as the equities tip in favor of the movant. Even if we are looking at just a plain likelihood of success over 50 percent, we think we satisfy that, your Honor.

THE COURT: Thank you.

MS. DENNIS: I think we can move past this slide.

We showed this slide to the Court in our opening statement. These are the FTC's two independent theories of harm, and we have raised serious questions about each, elimination of head-to-head competition between Coach, Michael Kors, and Kate Spade and undue market concentration in the market for accessible luxury handbags in the United States. In fact, well over 50 percent postmerger.

THE COURT: Ms. Dennis, what cases can you cite to me that have held that the elimination of head-to-head competition is sufficient in and of itself without the second test that you articulate here?

MS. DENNIS: *Fubo TV* a months ago here in the Southern District of New York. Judge Garnett had a preliminary injunction about getting to markets. She said we don't have to get into market definition necessarily here and granted a preliminary injunction here based on that basis alone.

THE COURT: I was going to ask any others.

MS. DENNIS: There's precedent from IQVIA that says -- obviously Judge Ramos did do a market concentration analysis there. There is case law from Whole Foods. All these cases recognize that elimination of head-to-head competition is really what the Clayton Act is getting at.

Market concentration numbers you pull out are a proxy, an indirect measure of that substantial lessening of

competition that the Clayton Act looks at. If we have direct evidence of anticompetitive effects, direct evidence of competition, that should carry the day. That's what the evidence points to here.

Turning to the FTC's first theory of anticompetitive harm, the loss of head-to-head competition, elimination of head-to-head competition provides an independent basis separate and apart from market concentration to obtain a preliminary injunction.

We just discussed the recent *Fubo* decision last month. I want to be clear about one thing here. Defendants have repeatedly misconstrued our argument to be that we don't have to raise serious questions about a relevant market to win on this theory. We have not argued that at all.

We don't have to show a dividing lines of the relevant market on this theory because we are not relying on market shares here. You see market shares are often used as indirect evidence of substantial lessening of competition to which the Clayton Act refers. The government can rely on market shares to obtain a presumption of illegality without having to show direct evidence of anticompetitive effects.

But here we have that direct evidence of the loss of competition that will happen here as a result of the merger. We have it in spades. There can also be no serious dispute that defendants do compete in a relevant market. Their fierce

competition demonstrates that. With their annual $3 billion in domestic sales, we are talking about a substantial lessening of competition in any line of commerce, which is what section 7 requires.

It is not just elimination of any head-to-head competition here. It is elimination of competition of closest competitors.

In their own language, John Idol told another competitor that Coach was a key competitor

Pippa Newman called Tapestry our biggest competitor.

Capri investors have referred to Coach as Michael Kors' closest competitor.

And Tapestry itself, as it began to analyze this potential deal, recognized that Coach and Michael Kors are each other's top competition when consumers are considering other brands for purchase.

Now, interestingly, after initially arguing that elimination of head-to-head competition is not a separate basis for granting a preliminary injunction, defendants now say that elimination of head-to-head competition has a, quote, particular meaning in Section 7 cases.

We don't agree that the standard requires auction-style bidding as they say. But in any event, there is evidence here that Coach, Michael Kors, and Kate Spade in defendants' words are actually impacting the price or quality

of each other's products, product offerings to customers.

So what is that evidence?

Throughout the seven-day evidentiary hearing the Court heard all the various ways in which Coach and Kate Spade on the one hand and Michael Kors on the other compete -- prices and discounts, innovation design, marketing, labor, brick-and-mortar stores sustainability, the evidence here is substantial.

First, pricing and discounts.

We saw numerous price benchmarking in Tapestry board documents. Coach and Kate Spade are also looking at the same players, Michael Kors, Tory Burch and Mark Jacobs.

For its part Michael Kors has priced with Coach in mind, as evidenced by this pricing deck here PX 2727, where Coach and Michael Kors are priced within just dollars of each, and Michael Kors' good, better, best pricing analysis.

This pricing competition extends to discounts. For example, here in PX 2097 we see the CEO of Michael Kors Cedric Wilmotte asking to have examples of Coach and Kate Spade racing to the bottom on promotions in a board presentation to show the Capri board what Michael Kors was up against.

These examples made it to the board presentation at PX 2128.

To rebut this evidence, in their findings of fact at paragraph 175, defendants turn to the deposition designation of

a former employee who they did not bring here to testify. But here's what Kate Spade executives told the Tapestry board in PX 1387 in just August of last year. It's redacted for the public, but your Honor has the actual document. Here also is what the witness that they pointed to said in deposition.

Now, one of the explanations the Court heard for these pricing comparisons and the board documents was that the brands highlighted are easier to track because they are public. The information is more accessible. You heard that from Tapestry's CEO, but Tory Burch, who also appears consistently, is not public. We looked at its last SEC filings on EDGAR from 2006.

But you know who is a public company? Ralph Lauren. It is not on here. Steve Madden is not here. Neither is PBH, who owns Calvin Klein. Indeed, the Court already heard from Liz Harris, Tapestry's SVP of global strategy and consumer insights, about how these benchmarks do not include mass market brands like Steve Madden and Calvin Klein.

But it is not just on price and discounts that these brands compete. They compete on design and marketing and through their brick-and-mortar stores. We saw John Idol forward a Coach e-mail blast, the stuff you normally delete when it hits your inbox, with ideas for designs, and Michael Kors employees taking actions on those e-mails; Michael Kors employees buying Coach handbags and analyzing the hardware on them; Pippa Newman commenting about 2023 Fashion Week.

So now we have two brands in the same group, showing the same stuff, buying from the same consumer, those two brands being Michael Kors and Coach. Mr. Idol saying Coach's creativity on marketing e-mails is killing us and asking for help, fast.

And they compete on labor. We heard Tapestry CEO Joanne Crevoiserat call Tapestry's retail employees the best in the business and their competitive advantage. In July 2021, Tapestry raised the minimum wage for employees. Now it is true that other retailers have been doing the same at the time. John Idol of Capri pointed us to Target in his testimony. But it wasn't these other retailers that got Capri to act. Target had raised its minimum wage the year prior. What got Capri to raise its minimum wage was its rival Tapestry.

The Court also saw competition on sustainability efforts, how after Coach launched Coach Reloved, its handbag reuse program, Michael Kors did the same with an almost identical name Michael Kors Preloved.

Liz Harris of Tapestry called Michael Kors ankle biters in response and said that imitation is the sincerest form of flattery. We have many more examples of head-to-head competition that we have included at slides 20 through 27 for your Honor in the deck.

Turning to our second theory of anticompetitive harm, undue concentration in the market for accessible luxury

handbags in the United States. This is what defendants have spent the most time attacking, especially market definition.

We submit, your Honor, that every single road here, whether it's the qualitative evidence, the quantitative evidence or some mixture of both, all leads to the same place, a market for accessible luxury handbags, in which Coach, Michael Kors, and Kate Spade will own a combined share postmerger of 58 percent, dwarfing the 30 percent presumption of illegality in *Philadelphia National Bank*.

A few reminders on market definition. We discussed these in our opening statement. The question is one of reasonable interchangeability. To get back home to Washington, D.C. where I live, I can fly commercial out of LaGuardia, maybe go out to Newark, even go further out to JFK, or take the train, the regional the Acela, charter a plane or a helicopter or both. That is a lot of money, so maybe I could bike, take a scooter, or I could walk, although that would take a very long time. Are all these reasonably interchangeable just because they get me back to Washington, D.C.?

We do not dispute at some level handbags all have similar functionality. They can all carry personal items, but just like the transportation modes I just mentioned, how they all get me back home they are different, very different and not reasonably interchangeable.

Do we really think that an everyday American going to

the outlet in Altoona seeking a high quality bag for around $150 to $200 to spend will instead spend $2500 on a Louis Vuitton bag if the price of a Coach or Michael Kors bag goes up 5 percent?

THE COURT: Ms. Dennis, why wouldn't they then purchase a bag for $70 in the mass market category?

MS. DENNIS: I think the quality is just not there. We don't see -- there is no evidence here of consumers going back and forth between mass market and accessible luxury. You saw the defendants' submission to China saying they are not a reasonable substitute. You don't see them in defendants' board documents.

There is a reason for that. You don't see customer are taking the quality they get from these bags, the defendants' bags, and substituting that for lesser quality that cost less.

THE COURT: Is it your position that there are no -- let's take Ralph Lauren, ZARA, any of those in what you've classified as mass market that have a bag of the quality of an accessible luxury bag made of leather or whatever other characteristics you want to attach to it?

MS. DENNIS: Ralph Lauren is an accessible luxury.

THE COURT: Sorry. Steve Madden.

MS. DENNIS: No some of those brands indeed may have leather products. *Brown Shoe* tells us to look at it

holistically, a number of factors. We have pricing. We have quality. We have where these things are made. We have their customers. We have industry recognition.

So we don't dispute there might be some bags that are under $100 that have leather in them. We don't dispute that. Calvin Klein may actually have a few bags over a hundred dollars. There's not clear lines on pricing here, but that's not what *Brown Shoe* is about.

THE COURT: How do you address the argument raised by defendants that your expert, for example, Dr. Smith, doesn't rely on pricing categorization for this market, so having a $100 to $1,000 range, even if it is an imperfect one, is not one that he utilized in defining market.

MS. DENNIS: He didn't use a strict continuum and we've never pled that. He looked at all the factors. He didn't call them *Brown Shoe* factors. He is an economist. *Brown Shoe* is a legal thing.

He did look at the qualitative evidence. It matched up with what he was seeing in defendants' documents, their accessible luxury market.

Your Honor, is familiar that we used the NPD categorization of bridge and contemporary. NPD is an industry source. Tapestry spent a lot of money to get data from NPD. The participants in this market have never changed throughout this case.

You might recall back at the Rule 12(e) motion defendants wanted a list of competitors. We gave them to them very early, before we even had an obligation to. Those are the same ones that Dr. Smith looked at. The qualitative evidence, the quantitative evidence, it all points in the same direction here.

THE COURT: Thank you.

MS. DENNIS: Let's talk about the qualitative evidence regarding market definition first.

This was a slide we discussed in our opening. It sets forth the applicable *Brown Shoe* factors here. We pled them in our complaint, we briefed them, we showed them to the Court in opening, and we presented evidence to support each one.

Now defendants have said we did not address one or two of the other *Brown Shoe* factors. Although I do think there's evidence here of price sensitivity for consumers, but *Brown Shoe* is not about satisfying each factor as if they were elements. The law is clear on that. We do not have to show each one. And the factors don't stand in isolation. They have a holistic analysis. They are also not rigid. We don't have to show perfect lines drawn on each factor.

So let's discuss these factors starting with industry or public recognition.

There is a lot of information on the next two slides, and it is just a sampling of what defendants consistently told

the SEC, their investors, and their boards right up until this lawsuit.

We heard how Coach invented the term accessible luxury. Todd Kahn, CEO of Coach, described how the main idea of accessible luxury was to break the paradigm that you don't have to spend an extraordinary amount of money to buy a high-quality handbag. We also heard both the CEO of Tapestry and the CEO of Capri refer to it as their "brand positioning." But what is brand positioning other than a description of where these brands compete?

Now we recognize that there was not substantive testimony regarding several of these documents at the evidentiary hearing. But that doesn't mean, as defendants have suggested in the appendix to their posthearing papers, that the Court should ignore these documents. These are SEC filings. They are earnings calls. They are board documents.

We hear over and over again how defendants are truthful to investors, to the SEC, and their boards. It is incredible that defendants now ask this Court to disregard these statements as somehow unreliable.

The statements speak for themselves. They are truthful and accurate. And to the extent they are not, defendants have an obligation to correct them. In any event, in the administrative proceeding we will have up to 210 hours of hearing time to fully explore each and every one of these

documents.

It is not only defendants who recognize this market for accessible luxury handbags. Their competitors do, other industry participants do, their wholesale customers do. And Wall Street does a lot of -- this slide is confidential to the public, but your Honor has the unredacted version.

It is true that the terminology may vary, in addition to accessible luxury, we have heard affordable luxury, mid tier. But the specific nomenclature doesn't matter. We discussed the case law on this at paragraph 44 of our conclusions of law.

Nor does it matter that the parties themselves do not use this terminology with customers. They communicate the elements of the accessible luxury. That is great quality at an affordable price to consulars. And other brands do use the term accessible luxury with consumers. We saw that Rebecca Minkoff website. It is thus not surprising then that, as Tapestry's own customer research shows, consumers do recognize a distinct market here.

Whatever the terminology, it all points to the same thing: Quality well-made handbags at affordable prices for everyday Americans.

So let's talk a little bit about those prices and that quality.

First, pricing, which is another *Brown Shoe* factor.

The Court has seen this document before. PX 1431 is a Tapestry board document that shows how the Coach portfolio starts at $100 and does not exceed $1,000, where luxury owns the market.

The Court also heard from Todd Kahn that the bull's-eye for Coach was $300 to $500.

The sweet spot for Kate Spade was between $300 and 350.

And 95 percent or more of Michael Kors handbags have MSRPs between $300 and $450.

THE COURT: Ms. Dennis, are all of the numbers reflected on this slide MSRPs or AUR?

MS. DENNIS: These are MSRPs your Honor.

THE COURT: It is the FTC's position that the MSRP is the price point that the Court should consider in determining whether they are distinct prices, or should it be the AUR?

MS. DENNIS: Both, your Honor.

I believe there's been a lot of testimony here, at least from defendants' expert, about Michael Kors actually having an AUR under $100.

That's not what our expert determined. Using the four silhouettes in the customer market, it is above $100. I think, as we discussed the *Brown Shoe* factors, there's not clear delineation times. the Fact that Michael Kors might slip down under a hundred with AUR for a brief moment and come back up

doesn't suddenly mean that it is not in the market anymore.

I also think the difference between MSRP and AURs for accessible luxury actually shows how that is a distinct market. There's not that gap where you have true luxury, which doesn't discount, which doesn't really have outlets aside to a few north of Manhattan or Palm Springs.

THE COURT: Given that large gap sometimes between AUR and MSRP, why would the MSRP be relevant to the prices that consumers would pay in determining this market?

MS. DENNIS: I think a lot of it is how these consumers act. They are very bargain driven. They are into promotions. I think when an MSRP is at one ticket price and there is a markdown, it shows it is a great deal.

THE COURT: Okay.

So, again, just to confirm, your $100 to $1,000 range is an AUR range or an MSRP range?

MS. DENNIS: It is both, your Honor. It's both. I will say again that it is not -- it's the pricing range, so the pricing is the ticket price, which is MSRP, or the price that the consumer actually pays.

But, again, our case is not driven on a strict pricing range like you see in the Gillette Fountain Pens case. It is based on a holistic analysis of all the *Brown Shoe* factors.

THE COURT: Okay.

MS. DENNIS: Slide 37.

Turning to quality and the peculiar characteristics of accessible luxury handbags, we saw this *Brown Shoe* factor throughout the hearing, when defendants' witnesses showed their handbags to this Court, beautiful quality made handbags. They are proud of these items and they say so.

Quality accessible luxury handbags include craftsmanship by skilled artisans who create intricate designs, durability and solid construction, use of quality materials, craftsmanship at scale.

It you will adds up to what Ms. Crevoiserat boasted: We deliver really beautiful product that represents an incredible value.

THE COURT: How is this distinct from luxury?

MS. DENNIS: Luxury items have, you know, calf leather. They have much better stitching, they are predominantly -- we can talk about the supply chain. They are predominantly made in Europe. It's quality that lasts a lot longer than the quality you see with accessible luxury.

That being said, accessible luxury is able to offer a fantastic product because their supply chain has outsourced to third parties, normally offshore. They are able to -- we heard Ms. Crevoiserat talk about this. They are able to make quality products at a far cheaper price than you would get from a luxury manufacturer like Louis Vuitton, who does most of their manufacturing in Europe, does have a location, I believe, in

Texas in the United States, but those artisans are trained by the European artisans. That's the heart of true luxury.

THE COURT: How do you address then that some of the luxury brands, let's take Prada has a nylon bag, Louis Vuitton has a canvas bag, so it is not all about the quality of leather and the craftsmanship of putting together these intricate leather bags in Europe.

MS. DENNIS: I think the quality -- some of those fabrics still might be better than a fabric or a nylon that is for an accessible luxury brand. But at the end of the day this also comes down to the *Brown Shoe* factors being a holistic analysis. Just like we are not doing a case on the price continuum, we are not doing a case on the quality continuum, like what bag has what leather, does every bag have to have leather, although the record shows the majority of Kate Spade Coach and Michael Kors handbags do have leather. It's not based on, you know, who's in or who's out, if you have nylon or leather, or where you are made. It is a holistic analysis of how we look at these markets. That is how *Brown Shoe* tells us to look. That's how the case law tells to us look at these things.

THE COURT: Explain to me a little bit more -- and I think it goes back to what we have discussed since probably the outset of this case, which is if you are not basing the market on a price continuum or quality continuum, where it is made,

then what are the parameters that define it?

I know you say that it's based on a holistic view, but there to have to be some lines of demarcation somehow. What is your response to the defendants' argument that I am sure I will hear that those lines are blurred if not nonexistent?

MS. DENNIS: A few points.

I think one factor we are missing here is, again, industry recognition. We have the parties' documents talking about an accessible luxury market. They have identified the brands that Dr. Smith used as accessible luxury. So that is a starting point there. I also think, you know, this gets back to what we have to show in a Section 13(b) proceeding. We actually have to show elimination of head-to-head competition.

The lines of that market don't have to be drawn with the precision a NASA scientist. We are just raising serious questions here. There is not a line where it says, you go over $1,000 suddenly you are not in the market anymore. we have look the all factors.

It is true there might be a Gucci bag that is under $1,000. That doesn't necessarily mean Gucci is in the market. We have to look at the holistic, what Gucci offers as a brand which definitely falls in the accessible luxury category, and we don't see anywhere this in defendants documents as it being an accessible luxury brand.

THE COURT: Thank you.

MS. DENNIS: I think we can go to slide 40 maybe. Wait. Excuse me. We'll do slide 38.

We talked very briefly, your Honor, just now about the supply chains, and how that's who -- that is another *Brown Shoe* factor, unique production facilities and how their supply chains for these companies is what enable them to put out these great quality products at a great price.

We see how Tapestry told its board just a few months before the instant transaction: Our approach to delivering innovative, high-quality product while optimizing costs creates the accessible luxury market.

We have heard Ms. Crevoiserat testify here that others followed suit. We also heard from her about how they did not own their supply chain, but still created capability to bring beautiful product to market. That supply chain for accessible luxury is outsourced to offshore artisans. And that is in contrast to the true luxury players, who own their own factories and produce predominantly in Europe, as we heard from Chanel and Louis Vuitton on this.

The Court also saw this document from BCG, which has done a lot of work with Tapestry over the years. This is hardly an example of BCG fishing for business, as defendants said in their findings of fact. BCG presented this document to Peter Charles, the head of supply chain at Tapestry, who then discussed it with Ms. Crevoiserat a few weeks later and

afterwards sent her the slide deck calling it "useful context and a good reminder around luxury supply chains organizing principles and main characteristics."

That's not something you would do with a standard sales pitch, which normally ends up in the trash. You don't discuss it with the busy CEO of a multi-billion-dollar company. You don't tell her it is not -- you don't tell her it's useful when it's not.

Finally, there are the distinct customers. We showed the slide in our opening statement, how Michael Kors customers are bargain hunters for promotions. And during the evidentiary hearing we heard about how more than 50 percent of Coach and Kate Spade customers buy handbags at a discount. These are our everyday working women searching for a great deal at a great price.

I will note that the case law makes clear that these customers do not have to be exclusive. They can shop outside the market. Some very well may do from time to time.

We heard about how an accessible luxury customer may purchase, for example, a Chanel handbag and treasure it for the rest of her life. But that doesn't mean she's shopping for a Chanel handbag when she's shopping for a handbag at Macy's in Okemos.

The Court heard from Suwon Yang of Chanel saying that Chanel tracks the brands that it believes its customers are

considering, and Coach Michael Kors and Kate Spade are not part of that conversation.

And then there was talk of Coach analogizing in 2021 that even with the COVID stimulus checks at that time and long before the inflation of the past few years, Gucci bags at $2,000 is just not our customer in North America.

Distinct customers, that is the fifth *Brown Shoe* factor here. Indeed, with price tags in the four figures plus, true luxury brands like Louis Vuitton and Prada are not just reasonable substitutes for accessible luxury handbags.

We see that in the ever widening white space between these brands and accessible luxury brands. We heard it from Liz Frasier, former CEO of Kate Spade: Bottom line, saying that we are in the same market with true luxury is a joke. Nobody says, should I buy a Louis Vuitton bag or a Coach bag?

We also heard it from Tapestry board member Pam Lipford. We don't really play today in that top tier. We also heard Ms. Fraser's frustration as true luxury raised prices during COVID and Kate Spade could not. No one is willing to pay a thousand dollars for a Kate Spade handbag she told us.

Even defendants' expert Jeff Gennette said that he considered Coach and Michael Kors to be above fast fashion, but below high-end designer brands.

Now it is true that we did hear testimony from defendants' witnesses about how they compete with true luxury

handbags, and maybe even the Hermes Birkin bag, which retails in the tens of thousands of dollars.

But what is the support for this testimony?

What they see on the streets, which isn't memorialized anywhere. Treasure troves of consumer data according to Ms. Crevoiserat, but that was never presented here; that some participants in some small ethnographic studies may have had true luxury and accessible luxury handbags in the same closet.

But where the documents showing this competition?

There aren't any.

Remember that slide from earlier, 4 million documents.

Where's the evidence of the competing other than executive testimony?

The closest examples are a few documents that say accessible luxury is losing share to true luxury because the latter has been growing in recent years.

But there is a simple explanation for that, as Ms. Frasier told us: European luxury raised its prices and thus has generated more revenues. That's how European luxury gains share.

Tapestry and Michael Kors are not ceding sales or consumers to European luxury. European luxury is just growing from its increased revenues.

Here's a question: Why don't Coach, Michael Kors, and Kate Spade charge what Louis Vuitton and Gucci charge for their

handbags?

It is because they can't.

Why is that?

They are offering something different. They are suffer from different constraints, different supply chain. They have different consumers. The short way to say it: They are in a different market.

We also heard about mass market or fast fashion handbags in the evidentiary hearing, how they have lower quality and are generally priced below $100.

As previously mentioned, we do not see any of these brands in the Tapestry price benchmarking documents sent to its board. Todd Kahn testified that he does not think of mass as one of the areas that we compete with for mind share of the customer.

Capri's CEO John Idol too said that he did not think of fast fashion brands as peers for Michael Kors.

Then there's Capri's submission to the China antitrust body: High end mass market products also offer good quality and performance and are made with decent materials and manufacturing processes, but they are not on the same level as luxury products.

Mr. Idol testified that he would want submissions to government regulators to be truthful accurate and reliable.

Nor are other handbags reasonable substitutes for

accessible luxury handbags. We heard a lot about used handbags from defendants' executives and their experts in this case. But the only documentary evidence shows that these bags are not reasonable substitutes, Capri employees observing on the RealReel most comparable Gucci bags with double the price of a new Michael Kors bag. And that's in DX 837 here.

The FTC obtained a sworn declaration from the Charles Gorra Rebag making clear that Rebag does not consider itself as a competitor to Coach, Michael Kors, and Kate Spade. It does not even offer those handbags because it specializes in true luxury bags and resells those bags at many multiples of the parties' offerings.

Defendants experts do not even consider this declaration. They could have deposed Mr. Gorra or the RealReel. They did not.

Athleisure bags are also not a reasonable substitute. The Court heard from one such company on that score, which we include here, but do not show on the public screens because it is confidential.

So we have discussed the *Brown Shoe* evidence, the quality of evidence here. We can also demonstrate a relevant market by quantitative evidence, specifically, the hypothetical monopolist test, or HMT.

Judge Ramos in IQVIA labeled the test well. Basically, he had a hypothetical monopolist with all brands in

the candidate market and proposed a price increase or worsening of terms. If yes, the candidate market passes the HMT.

We heard a lot about diversions when it came to the HMT. Here Dr. Smith specifically conducted an aggregate diversion ratio analysis, which measures the diversion from one product to all other products in a candidate market.

This test calculates first the critical aggregate diversion beyond which the collection of brands would pass the hypothetical monopolist test. This threshold was determined by margins, and here it was 17 percent.

Second, it calculates the actual aggregate diversions, and this is the part of Dr. Smith's analysis that was based on Tapestry's consumer surveys. If the aggregate diversions are more than a critical threshold, the candidate market passes the HMT.

So let's talk a little bit more about the candidate market that Dr. Smith looked at here. It is a conservative one. It is 200-plus brands labeled as bridge and contemporary in NPD/Circana. In internal documents Tapestry labeled these two categories as accessible luxury. And these just weren't random internal documents. They went to the CEO of Tapestry, and they went to the CEO of each of the brands.

So what did Dr. Smith's analysis show?

The baseline aggregate diversions were three times the critical aggregate diversion ratio of 17 percent. Even the

sensitivity aggregate diversions were two times the critical aggregate diversion ratio of 17 percent. This demonstrates that the candidate market passes the HMT, and there was a lot that would have to go wrong for it not to.

THE COURT: So this slide should say at the bottom two times for the sensitivity?

MS. DENNIS: Two times. I apologize, your Honor. That's two times.

THE COURT: That's fine.

MS. DENNIS: As the Court heard, Dr. Smith calculated these diversions based off four consumer surveys that Tapestry had conducted on its behalf. They each include a question about the other brands the consumer considered when making their last handbag purchase.

Defendants have attacked the use of these surveys, arguing that Dr. Smith should have used more recent surveys. Those were recent surveys. They did not ask the right question on which to calculate diversions. They instead ask what the consumer may buy in the next 12 months, not specifying the occasion or the purpose, although I will note that those surveys do have Coach Michael Kors and Kate Spade as the top-considered brands.

Defendants also attack the survey findings as not robust. But that is directly contrary to what they told the FTC back in March. Then they wanted us to look at the surveys

for evidence of competition and substitution. They stood by the surveys when they suited defendants' purposes. Now it is a different tune.

(Continued on next page)

The Court also heard defendants' economic expert attack Dr. Smith's analysis because it showed that a market of just Coach, Kate Spade, and Michael Kors would pass the HMT. As she herself has recognized, markets can be much narrower than the ones mentioned by the government, and in fact can be comprised of just the parties. And that outcome is not surprising here, given all the qualitative evidence showing that these brands are close competitors.

We showed this slide in our opening statement. When you compute the market shares for all the brands in the accessible luxury handbag market, the combined market share for Coach, Kate Spade, and Michael Kors easily passes the *Philadelphia National Bank* threshold and the HHI thresholds in the old and new merger guidelines. Perhaps not surprisingly given these big shares, even if one added the better brands, those higher-end mass market brands, as Professor Scott Morton did in the industry analysis, these three brands still boast a combined market share of 49 percent. And even if one considered a broad premium market, so a market of true luxury plus accessible luxury, we're still looking at shares around 30 percent. We saw that in a Capri document, PX 1408.

A word about the number of brands in the accessible luxury handbag market here. There are a lot of brands in Dr. Smith's conservative analysis, hundreds, but that doesn't change anything. We've cited case law on that. And one need

look no further than the DOJ's actions toward the Modelo Anheuser-Busch merger when Professor Scott Morton was at DOJ. There are tons of small craft breweries all throughout this country, but those breweries, like the hundreds of small brands here, are not competitive constraints to big beer companies like Modelo and Anheuser-Busch. In fact, if all those small brands were competitive restraints, we would not see Coach, Michael Kors, and Kate Spade remain the big players year after year with over 60 percent margins.

There's also been a lot of discussion about the data on which Dr. Smith relies. As a preliminary matter, most of the data on which she relies was data produced in the investigation or the litigation either by the party or third parties, and specifically, maybe 75 percent or 67 -- between 67 percent and 75 percent were actually produced by parties or third parties; 15 percent was NPD wholesale data; and there's roughly 9 percent of this gap when we conducted a proxy analysis.

When we did have to fill those gaps, we looked at NPD Circana and Euromonitor as proxies. Who else does this in the ordinary course? The defendants. Tapestry uses NPD and Euromonitor in board documents and to prepare for calls with investors. Capri also uses Euromonitor in board documents. The Court may remember this exchange with Tapestry's SVP of global strategy and consumer insights, Liz Harris.

So I just discussed our *prima facie* case and how the FTC has raised serious questions about both our theories about anticompetitive harm.

THE COURT: Let me ask one question about Dr. Smith's analysis. I'm not remembering the numbers precisely, but we had a colloquy at the hearing where the defendant pointed to Dr. Smith's, I'll call them, extrapolations for certain companies, and they led to results such as they had $17 of sales in one year or $187 in sales for J.Crew. I don't remember exactly what they were, but the numbers were very small and could not possibly be right under the type of analysis that Dr. Smith did in order to project. What is your response to that?

MS. DENNIS: I think there's three responses to that. First, I mean, we're not talking about a large chunk of the market here. It's the long tail we have the data on the major players. I think there's also no evidence to the extent that one number is very, very low compared to what it might have been in actuality, but also other numbers that are overestimated, so they wash out.

And then, three, a lot of evidence that we saw at the hearing, and I'm cognizant that a lot of them were third parties so we can't talk about their actual numbers here. The silhouettes that Dr. Scott Morton were talking about or the defense were talking about, the revenues were all their

silhouettes, not the cluster market that Dr. Smith relied upon. So that's also why there might be some discrepancies in revenues.

THE COURT: Thank you. Are you able to identify any that are overestimated, or are you just supposing that some are?

MS. DENNIS: I believe -- I mean, I definitely think that there are some. I don't know them offhand for your Honor. I am happy to provide some after this on or maybe on rebuttal I can bring some up.

THE COURT: Well, I can imagine that it might be difficult for you to do that, because if he had the actual numbers, he would have used them. Right?

MS. DENNIS: Right. Exactly.

Now we'll talk a little about defendants' rebuttal arguments, which largely boil down to three things: Entry is easy; Tapestry will revitalize the Michael Kors brand; and the brands will be autonomous.

First entry. The test here is not whether entry is possible or even if it's easy, the test is whether entry expansion will be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern. Put differently, entry and expansion must fill the competitive void resulting from the merger. Entry and expansion will not fill the competitive void

here.

In their post-hearing briefing, defendants claim our primary support for our arguments on entry is the declaration of Griffin Guez of Sunrise Brands, which brought Rebecca Minkoff brand just a few years ago, but that is not at all true. This is what other third parties had to say about entry and expansion.

I'll also note that each of the third parties, and in fact each of the third parties called in the hearing, either has brick-and-mortar stores now and/or is attempting to build out those stores to enter and have brick-and-mortar stores. That undercuts defendants' argument that brick and mortar is not important. So does the fact that none of these are new entrants at all. The youngest of the third-party witnesses who appeared at the hearing have been around over a decade.

But the biggest thing undermining defendants' arguments about entry and expansion is the purchase price here. Why would Tapestry pay billions for Michael Kors when it could have bought Rebecca Minkoff for a small fraction of that price a few years ago? If expansion was so easy, why not build out Stuart Weitzman's handbag business?

THE COURT: Before we move to that, do you agree that in terms of an entry analysis, the Court should be looking at certainly whether the single entrant can join but whether more likely in this case, there could be a collective or aggregate

number of entrants who joined like in the Waste Management case. Do you agree that's the analysis even though you might distinguish Waste Management?

MS. DENNIS: Waste Management was so different in that case, I believe that it was so easy to enter into the Dallas market, that somebody already had attempted to do so without even setting up the garage business of doing the waste management. Here, we heard about designing a handbag takes over a year. We don't dispute it's usually one big company that comes in. A collection of companies can constrain defendants, but there's no evidence of that here. Dr. Smith ran a merger stimulation. He added a company with the equivalent of Tory Burch entering, and it only increases the pricing by 1 percent.

THE COURT: Thank you.

MS. DENNIS: Next, the defense contends that Tapestry will revitalize the Michael Kors brand. We heard a lot about this at the hearing. To be clear, no one has raised a failing firm defense here, nor could they. Michael Kors, the brand, remains profitable to this day, and will remain so with or without the merger and will remain a strong brand as well.

Instead at the 11th hour, the defense have raised a quasi-failing firm defense in their post-hearing submission. This kind of weakened competitive defense, the Sixth Circuit has referred to as the Hail Mary pass for presumptively doomed

mergers. And it doesn't work here, not with these margins, these profits, these sales. In fact, just look at what Michael Kors had to say himself about the ups and downs of the fashion industry. "Well, when you've been a designer for 45 years, it's a very cyclical business, so you're definitely going to have highs and lows. So much of it is dependent on trend, the economy, consumer mood, and sometimes you'll be the hottest thing on the walk, other times you'll be lukewarm. Other times you'll be cold, but you are always moving forward." He's exactly right.

As of late 2022, Michael Kors still had great brand positioning versus its competitors. That's what an investor study prepared at the request of the Capri board said about Michael Kors. Michael Kors AURs were going up. Mr. Edwards of Capri told us about that. What happened? The Michael Kors brand hit a lull. It happens, but you don't give up and ink a deal with your closest competitor to buy you the next year. That doesn't make sense except for Capri shareholders.

Defendants have also not proven that revitalization is merger specific but could only be pulled off by Tapestry. There's no evidence in the record, other than executive testimony, that Tapestry has any special mojo to improve Michael Kors. Tapestry certainly did not help Stuart Weitzman or Kate Spade after those acquisitions, as Kate Spade still struggles to today. It let go of the brand CEO and president

right before this hearing.

Defendants have also contended that there will be no harm after the merger because Tapestry will run the brands independently and siloed. The defendants devoted a fair amount of real estate to this argument in their pre-hearing submissions and during the hearing testimony, but it takes up just two paragraphs in the post-hearing submissions and for good reason. Black letter law and the evidence are against it. In sum, none of defendants' arguments can rebut the FTC's case.

So turning to the second prong in Section 13, the analysis weighing the equities. This is another slide we showed during our opening statement. What are the equities? Public equities are the effective enforcement of the antitrust laws. Then are the private equities, which are not afforded great weight. Indeed, private equities have never salvaged a transaction for which the FTC has demonstrated a likelihood of showing illegal under Section 7 of the Clayton Act.

Defendants have argued that the equities favor them here; that if the Court rules against them, that will be the end of this transaction. The FTC process just takes too long, they say. That is not true. Defendants' merger agreement precludes them from abandoning their deal any earlier than February 10, 2025. And even on February 10, 2025, they have to proactively opt out of the deal. If they do nothing, all systems remain go. In any event, there's nothing magical about

the February 10, 2025, date. If the merger makes sense now, there's no reason why it won't on February 11th of next year. Firms can and do extend these dates, and the parties don't have to do that here. They just have to hang tight.

As for the administrative process, it is defendants who continue to push out that process. It is now set to begin, at their request, on October 28. On the other side of the ledger, we have evidence that shows defendants intend a fast integration of Michael Kors, just 90 days after closing. Competitive information will be shared; operations will be integrated. It will be difficult at best to unravel these plans and lobotomize employees with the competitive information that they have received.

We leave the Court where we started: Consumer harm. Defendants note that no competitors complained. No wholesalers complained. They note that these products are discretionary, so consumers can just do without them if they don't like the prices. That's not how the antitrust laws work. These laws apply to any line of commerce from gas and coal to beer and to consumer retail goods like handbags.

We showed evidence that Tapestry intends to reduce Michael Kors discounting and reliance on wholesale post-merger. We showed what their investors think at slide 69, which defendants maintain is confidential, and Dr. Smith ran both an upper pricing pressure index and a merger simulation and felt

the harm from this deal translated to hundreds of millions of dollars of Americans. That is who this case is about. That is why we are here. The FTC respectfully asks the Court to grant its motion for a preliminary injunction. Thank you, your Honor.

THE COURT: Thank you very much. Who will be speaking on behalf of Tapestry?

MR. BUTERMAN: I will, your Honor, Lawrence Buterman.

THE COURT: Thank you, Mr. Buterman, and take the time that you need. Will you be doing the whole argument or will Capri be doing some arguing as well?

MR. BUTERMAN: The plan is that I will do the entire argument. To the extent that your Honor has a particular question related to Capri that I am not able to answer, I have some very capable colleagues who I might have to tag in.

THE COURT: That's fine. Thank you.

MR. BUTERMAN: May I proceed?

THE COURT: Yes.

MR. BUTERMAN: Thank you, your Honor.

Your Honor, I'd like to begin by thanking the Court, clerks, chambers, the court reporters, security, and staff for all their hard work and diligence throughout this matter. I know that the nature of these proceedings puts a lot of strain on everybody, and we greatly appreciate all the efforts to ensure that we got to present our case in a full and timely

fashion.

I also want to acknowledge our friends across the aisle at the FTC. While we obviously have strong disagreements with them on the merits of the case, and we'll talk about that in a little bit, throughout this matter on tight time frames and some enormously stressful situations, the parties were able to work together extremely collaboratively.

THE COURT: I will say that I noticed that as well. Thank you.

MR. BUTERMAN: And, your Honor, that's not always the case. Before coming to Latham, I had the honor of spending several years at the Department of Justice Antitrust Division where I investigated and tried a number of merger cases including the ones we talked a lot about in this case. I know just how hard the lawyers work to put together these cases. On behalf of the Latham and the Watchell teams and our clients, we really do appreciate the professionalism.

But that said, your Honor, no amount of hard work or professionalism can change the facts that the FTC's theory here just does not comport with the realities of how competition works in the handbag industry in 2024. The FTC's theory is that if this transaction goes through, Tapestry will be able to flip a switch and immediately raise the prices of Michael Kors, Kate Spade, and Coach by an average of 18 percent overnight or decrease innovation and the quality of these brand bags and

continue to offer them at the same price. But the facts presented at this hearing establish that that is just not plausible.

Your Honor heard from witness after witness in this case, including from the parties, customers, competitors, and industry experts, that there is so much competition in this industry, that it's simply not possible for brands like Kate Spade, Coach, and Michael Kors to raise prices without increasing value in the eyes of consumers.

As the evidence made clear, if they tried to, they would fail, and they'd fail for the simple but critical reasons that customers, who are the ones that really matter when it comes to setting price in this industry, would either buy different handbags, different products, or just defer their purchases. The FTC did not present a single piece of evidence to the contrary.

The FTC claimed in their opening if this deal closes, consumers going to stores like Macy's would face significant harm. But the fact is, we brought Macy's into this courtroom, and their representative testified that what the FTC was theorizing just would not and could not come true at their stores. There are just too many alternatives for consumers today to pivot to, and the evidence has made clear that Michael Kors is not uniquely, competitively relevant. And your Honor, it's not just Macy's.

Unlike any other FTC merger challenge, here, not a single customer or third-party witness supports the FTC's theories in this case or believes that they reflect commercial reality. And on this topic, your Honor, I just want to highlight a few important points: Customer testimony matters. It is important to hear from customers, and if you look at most of the recent cases that have been decided in antitrust merger enforcement, they've relied on customer testimony heavily. And I would cite, specifically, *Sysco* and *Staples* and *Cardinal Health* and *Chicago Brick*, and it's not just customers that's important to hear from. Anyone who is in the industry really helps inform the Court's decision on a number of relative issues, as you can see, in *Anthem*, in *Sysco*, and *CC Holdings*. The fact of the matter is the customers are the ones who can provide that information to the agencies about their own purchasing behavior and about the effects of the merger.

And, your Honor, the reason I wanted to emphasize those points is because those are not my words. Those are the FTC's words. That's what they told another federal judge in a closing argument in a merger hearing just a few years back. But what are they telling you here, your Honor? This is from paragraph 98 of their conclusions of law: "Defendants' arguments that there is no third-party support for this case is irrelevant." With respect, customer support and testimony doesn't become irrelevant just because it doesn't support the

FTC's case. That is not the way this is done.

If the FTC is going to get an injunction and kill this deal, they have to present facts that support the idea that this transaction may substantially lessen competition in a relevant antitrust market. As the court said in *Arch Coal* antitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence related to the market and its probable future.

THE COURT: Mr. Buterman?

MR. BUTERMAN: Yes, your Honor.

THE COURT: With respect to customer complaints, I recognize that there are certain cases where there have been customer complaints, but there have also been cases where there have not been customer complaints. I'm looking at *Bazaarvoice* where they enjoined a merger where there were 104 customers who were part of the record, and none complained that the merger had hurt them. So can you talk to me about the contrasting case law to that, which you have cited.

MR. BUTERMAN: Yes, absolutely, your Honor, and *Bazaarvoice* was one of those cases that I supervised while I was at the justice department. Let me just begin by saying what was said in *Bazaarvoice* just happens not to be accurate. What happened in *Bazaarvoice* was that the parties there did very, very short depositions of witnesses where they just asked them like two questions, and they tried to play all of that and

it didn't go really well for them.

But what is really interesting about *Bazaarvoice*, while we're talking about it and I think what really, really highlights the difference between a case like that and a case like this. You know, the FTC talks a lot about fierce competition and documents. I would recommend that we look at what *Bazaarvoice* said about what actual bad documents showing fierce competition looked like.

The main document there was an email from the CEO who said that the rationale for doing that deal was literally——and he put this in all caps——LITERALLY no other competitors. That's the type of evidence that typically the government has in these types of cases. And your Honor is correct, there are certainly cases out there where customer complaints may not be at the forefront, but if we look at the cases that the FTC has brought in recent years, I think you see a common theme that they do have customers complaining.

And by the way, it's not just customers. It's anybody. Nobody came in. Nobody came in and said what they're positing as their theory, that that's actually reality. It just isn't there, and the reason is because what they are saying didn't match up with the real world.

THE COURT: Thank you.

MR. BUTERMAN: Now, that concept that the FTC has to bring in facts and can't rely on theory and speculation, it

isn't just from that *Arch Coal* case. It's been echoed recently in other merger cases, including the Thomas Jefferson case that we've talked about previously where Dr. Smith's analyses were rejected. And the unrebutted facts from this hearing are that this is a dynamic and ever-changing industry, where consumers have hundreds of choices for handbags at every price point; where consumers shop up and down the price spectrum and where Kate Spade, Coach, and Michael Kors bags face competition on a daily basis from bags from the companies like Ralph Lauren, Longchamp, and Steve Madden, that often sell at the precise same price point as Kate Spade and Michael Kors; from preowned and entry-level bags from so-called luxury brands, that again are sold at similar price points to the merchant parties' bags; from bags of new entrants and companies that have grown astronomically in popularity in recent years like MZ Wallace, Kurt Geiger, and Cult Gaia; from the bags of companies like Telfar, Aupen and Cuyana that are sold predominantly online; and from the bags of large-established apparel companies that have repositioned themselves in the handbag space in recent years like Lululemon, J.Crew, and Veronica Beard.

Because this market is so dynamic, the FTC's theory that there's a segment of customers that do not view these options as alternatives to Kate Spade, Coach, and Michael Kors is just not supported by the evidence. And because of that, the FTC simply cannot meet its burden to establish a relevant

market, competitive effects, and therefore, they cannot prevail under any 13(b) standard.

THE COURT: One moment.

MR. BUTERMAN: Yes.

THE COURT: The screens, do they still have the slides on them, your screens?

MR. BUTERMAN: No, your Honor.

THE COURT: Okay. Is that intentional?

MR. BUTERMAN: Yes. Some of the slides we didn't want to keep up for too long to be distracting.

THE COURT: No problem. Go ahead.

MR. BUTERMAN: Thank you, your Honor.

So with that induction, I'd like to focus my remarks today on some of the fundamental problems with the FTC's case. So let me just delve straight into several of the key problems that the FTC has that go to specific elements of their case, and also, in some instances, cut across the various elements. And the truth is, your Honor, the actual list is too long to cover in this closing, so I'm going to highlight five specific issues, and those are:

The FTC's failure to establish that Coach, Kate Spade, and Michael Kors are fierce or close competitors; the FTC's failure to define a relevant market; the FTC's failure to present concentration figures on the market they propose; several failings of Dr. Smith that are critical to carrying the

FTC's burden, including his failure to analyze the market that the FTC proposed, his failure to conduct a proper application of the hypothetical monopolist test, and his failure to present reliable market share and market concentration figures on the market that he supposedly did analyze; and finally, the FTC's failure to even raise the specter that this transaction will lead to anti-competitive effects.

Each of these five points reflects promises that the FTC made in their opening, but failed to deliver at the hearing, and each of these five failures doom their ability to plausibly claim that they are likely to succeed on the merits here.

So, your Honor, I want to begin by directly addressing the FTC's repeated claim that Kate Spade, Coach, and Michael Kors are each other's closest competitors, which goes both to the market definition and also to the possibility of competitive effects. Now typically, if we look at the cases that the FTC cites, including Staples, Office Depot, Whole Foods, Sysco, IQvia, when the FTC claims that companies are closest competitors, they establish that with concrete examples of head-to-head competition that typically come in two forms: Repeated and persistent example of the merging parties bidding against each other for customer opportunities and/or for lowering the price in response to one another. And here are just a few examples, your Honor, you see from Staples, multiple

bid data analyses that show when Staples loses Office Depot wins. Unrebutted. Staples is in a dog fight. Staples is matching Office Depot and customers are benefiting. Whole Foods. The FTC's expert prepares a study showing that when Whole Foods opened near an existing Wild Oats, it reduced sales at Wild Oats stores dramatically. You see others here. And from Sysco, right, real world evidence showing that customers have obtained lower prices by bidding Sysco and US Foods against each other.

We don't have those here, and it's not because the FTC didn't look. There were over four million documents produced in this case, as Ms. Dennis said. And with the record closed, the FTC has not pointed to a single instance in which Kate Spade, Coach, or Michael Kors lowered prices on handbags in response to a competitive action from others. Let's just think about that for a moment. The FTC's claim here is that combining Kate Spade, Coach, and Michael Kors is going to cause consumers $365 million annually in harm because that lost head-to-head competition means that Tapestry will just be able to raise prices, and consumers will just have to pay it. But unlike these other cases, they didn't present a single piece of evidence in this hearing reflecting any instance in which any customer saved even a single penny on the basis of competition between the three brands.

THE COURT: Mr. Buterman, what about the documents

that refer to "racing to the bottom"?

MR. BUTERMAN: Your Honor, what's interesting about the documents that the FTC puts forth is that you don't see action that occurs as a result of it, and that's what ultimately is really, really critical here. So you certainly have people who are talking about what's going on in the industry. And by the way, let's be clear, it's what's going on in the industry, right. When we talk about the examples that the FTC brought forth, a Mother's Day sale, a $15 minimum wage, right, those are industry trends. By the way, they were all trends going in one direction. It was Michael Kors responding to industry trends. But what we don't see and what the FTC's obligation to put forward if they are saying that these companies are their closest or fiercest competitors is competitive action that occurs as a result of these statements, and they don't have it. We have -- and we've heard the testimony that Mr. Idol was focused on Coach. I think one of the other executives joked about how obsessed he seemed to be. But where did that translate into some sort of pricing decision that was made? We don't have it here.

Again, we have the Coach -- excuse me. We have Michael Kors making the Parker bag softer. We have a Mother's Day sale that was introduced a few days earlier and was changed, and we have minimum wage. Again, none of that actually, the evidence showed, was in response to the parties.

It was in response to industry trends, but that's all that they have. And even if you spot them that, your Honor, that's not -- that's not what these cases talk about when they talk about fierce competition. That's the fierce competition that they say needs to be protected here. That fierce competition, those three examples that I just gave, they say translates somehow into saving consumers today $365 million. That doesn't make any sense.

Your Honor, so here, the FTC's basis for claiming that we're close competitors is the fact that in our documents we often monitor and benchmark our success off one another. But that has never been enough for the FTC in other cases, and there's no reason that it should be here.

Now, beyond all our documents, the truth is that all the FTC has to suggest that Kate Spade, Coach, and Michael Kors are each other's closest competitors is Dr. Smith's diversion analysis based on those backwards looking circuits from 2021 and 2022. And I am going to return to those later, but suffice it to say that the real world facts of how it works in 2024 shows that Kate Spade, Coach, and Michael Kors were not each other's closest competitors in the market for handbags. And the reason we know that, your Honor, is because of something called a natural experiment.

Natural experiments are tools that careful economists, including those hired by the FTC in merger cases, often use in

order to confirm that their theories match up with reality. Indeed, in the past, the Federal Trade Commission and the Department of Justice have claimed that natural experiments were one of the most valuable tools in analyzing the viability of market theories.

Here we have a natural experiment resulting from the fact that Michael Kors' share has declined in recent years. So if what the FTC and Dr. Smith are theorizing is correct, we could expect to see Kate Spade and Coach gaining a significant portion of the sales lost by Michael Kors. That's their entire theory of what's going to happen post-acquisition. If the price of Michael Kors goes up and Michael Kors sales decline, those sales are going to go to Coach and to Kate Spade. So certainly we would expect that if we saw Michael Kors' shares declining in recent years, that Kate Spade and Coach would be getting that benefit of those shares.

But contrary to the foundation of the FTC's theory of harm, those lost sales for Michael Kors have not gone to Coach and Kate Spade. On the Tuesday of the last day of the hearing, we confronted Dr. Smith with this chart, and he was forced to admit that the real world facts were inconsistent with his theory. That's devastating. And Dr. Smith has no explanation as to why this Court should ignore the facts and evidence that unambiguously call into question the validity of his theory.

The reality is that companies like Michael Kors, Kate

Spade, and Coach are, as shown in Tapestry's contemporaneous documents, losing share not to each other but to bags from both European luxury brands and domestic brands with non-leather offerings; brands that Dr. Smith doesn't even bother to include in his relevant market. The reality is that Kate Spade, Coach, and Michael Kors are just not putting any competitive pressure on one another that is unique from the multitude of other competitors out there today.

So the second problem with the FTC's case is that the FTC cannot meet its burden to show that accessible luxury handbags are a relevant market. And for starters, your Honor, I want to be clear: The FTC does have to establish a relevant market to meet its burden. No court, including all the cases that they cite, has ever accepted the FTC's theory that they can meet their burden based on elimination of close competition without defining a relevant market.

Ms. Dennis cited to *Fubo*. Your Honor, if we look at *Fubo*, the first thing that the court says is, "To evaluate anti-competitive effects of a joint venture in the Clayton Act, courts must first define the relevant market." Judge Garnett goes on to say "to do so, courts look to consumer demand." And I am going to highlight this later, but Judge Garnett also says that courts "should consider the entire context of the structure, history and probable future of the relevant industry."

We'll talk about that in a little bit when we will talk about Dr. Smith and how he conducted his analysis. But there is no case that the FTC can point to where a court has actually not defined the relevant market. And Judge Garnett in this case actually goes on and says point blank that "the JV defendants are unlikely to be successful in their claim that the broader paid TV market is the relevant market." So I don't think that case really supports what they are trying to say here.

THE COURT: Did she do a definition of "market" in that case?

MR. BUTERMAN: Did -- I'm sorry?

THE COURT: In the *Fubo TV* case, was there a defined market set forth?

MR. BUTERMAN: There were two proposing market definitions that were presented, and the court said that the court found that the JV defendants would be unlikely to succeed in theirs. So did she do a complete full-on market definition analysis? I don't think so, but where she got was to say that the market definition that had been proposed by the defendants was unlikely to succeed.

Your Honor, what we're here for is because we're saying that this Court can very much easily reach the conclusion that the market definition that the FTC proposed is unlikely to succeed, and we'll talk about that in a few

minutes.

But again pivoting to the actual exercise of market definition, your Honor will recall that in the opening we showed how Dr. Smith at his deposition was unable to define what an accessible luxury handbag was, and respectfully, your Honor, that's a big deal. Now that the hearing is over, nothing has changed.

And indeed, this is the FTC's findings of fact and conclusions of law. And when we look through it, what's truly remarkable is that the FTC still has not defined what an accessible luxury handbag is. The closest they come is in paragraph 45 of their findings of fact when they say——quote——"The term accessible luxury denotes a quality, well-made product produced at a lower cost and retailed at a fraction of the price of traditional luxury, European luxury" What does that mean?

As the FTC said in the closing in IQvia, which they like to rely on, "The goal of defining a relevant market is to identify what the reasonably interchangeable substitutes are to the customer." How can we possibly identify what the reasonably interchangeable substitutes are to the consumer when the universe is defined amorphously as a quality made product produced at a lower cost and retailed at a fraction of the price of traditional luxury?

Your Honor, this isn't the way that it's done, and

it's not the way the FTC does it. When you look through the FTC's cases, you will see that when it comes to market definition, they don't do it this way. And that's because the exercise of market definition requires a crisp understanding of what's in and what's out, so that the parties and Court can test from a consumer perspective -- a consumer substitution perspective, whether that market is correct and what the shares are.

The FTC loses cases all the time because they failed to define a relevant antitrust market. But I think this is the first time in history——certainly the first time I've ever seen——that the FTC has failed to define the market that they are claiming is relevant. Now, as to whether accessible luxury handbags are, in fact, a relevant antitrust market, the FTC relies on the brown shoe factors, as we know, and those are meant to test the sufficiency of a well-defined market.

We've spent a lot of time in our pleadings and in our openings on these factors, and I'll just say that I believe the evidence on these has come in very strongly. As your Honor will see, it's summarized here, and it includes several unrebutted points -- we've included several unrebutted points on each, but in efficiency, I just want to focus on a few of them.

The first is the FTC's argument related to public or industry recognition of the term accessible luxury. And

primarily what the FTC says is that in Tapestry and Capri's documents, we use the term accessible luxury, which means we view accessible luxury bags as being a distinct market for purposes of analyzing competition. And I will spot the FTC that the term accessible luxury appears in our documents, but that does not mean that we refer it to as a relevant market; meaning, that it reflects the universe of markets that consumers consider in competition with one another and would substitute to in the event of an increase in price or decrease in quality.

The unrebutted facts are that the terms, as the parties use them, never identify or denote substitution for the consumer. And rather, it was a way for Tapestry's brands to identify themselves to the investment community and to talk internally and efficiently about some of the competitors that we benchmark against. And courts recognize this distinction, your Honor.

If we look at the *Kraft General Food* case that we cite in our conclusions of law, you see that the court said there——by the way, that case there, your Honor, was Judge Kimba Woods' case. I know we're in that courtroom. You'll see that the court in *Kraft General Foods* said, "It is not appropriate to use the market segments adopted from time to time by any particular RTE, ready-to-eat, cereal producer to define a relevant, economic product market. The market segments that

Post managers use in analyzing the performance of particular products do not define the scope of competition for those products."

Ms. Dennis, in her closing, put up slides 32 to 35 talking about the industry recognition. And though I saw the word "consumer" in there——I looked pretty hard——I didn't see statements from consumers that back-up what she's saying. Where are those references to the customers, your Honor? This is all about customer substitution. Is there any evidence that customers know what accessible luxury is or buy, via accessible luxury, make their purchasing decisions based on what constitutes an accessible luxury handbag or not? It's not there.

The FTC also contends that accessible luxury is a term that is widely and commonly understood throughout. Again, the evidence actually doesn't support that, your Honor. There is no standard definition, as witness after witness testified. And let's remember, the only customer who testified live at this hearing, Macy's, and they said pointblank, it's not a term that Macy's even uses.

Another factor that the FTC prior to the hearing made a big deal about were unique production facilities, but the unrebutted testimony is that factories all over the world are making mass-market, accessible and luxury handbags in the same facilities. And the FTC hasn't shown that there are distinct,

discernible customers for whatever an accessible luxury handbag might be. Third party after third party confirmed there's no such thing, as did ordinary course surveys.

Household income, despite what Ms. Dennis said in the beginning of her closing, simply does not determine which bags consumers buy. And that matters, your Honor, because it means our clients have to assume every sale is at risk; be it to one of the hundreds of other brands that sell handbags at the same prices, to pricer brands that provide a status symbol, or to less expensive handbags that look attractive and serve the same purpose. Defining a narrower, relevant market based on these brown shoe factors simply does not work when the evidence is that customers do not limit themselves to those products but shop up and down the spectrum.

You know, Ms. Dennis asked at one point, she said, Why is it that Kate Spade and Coach don't sell their bags for $1,000 like some prices like the other brands? She said, We don't do it because we can't, because we are offering something different. What does the FTC do with the fact that there are all those other bags from supposed mass market companies and from supposed luxury companies that are selling at the same price points as our bags? How can they reconcile that?

We see -- and I'd like to point your Honor to the *Super Premium Ice Cream* case.

THE COURT: Before you get there, Mr. Buterman. You

were talking about price points for a minute——and I don't think it's under seal——but I saw some reference to a $92 AUR.

MR. BUTERMAN: Yes.

THE COURT: I don't think that's under seal. So I want to ask about that a bit. Does that figure, because I didn't see it in your prehearing proposed findings of fact; I didn't see it in your opposition brief. I saw it for the first time at the hearing. I wanted to know: Does that include wristlets, pouches, things like that, that Professor Scott Morton refers to when she's calculating a 70 percent or so figure?

MR. BUTERMAN: I am not positive sitting here what silhouettes are included in that, your Honor. But the point that I would make about that is that Dr. Smith, in his analysis, said that you could add in other silhouettes, and it wouldn't change his market share views, his views on the hypothetical monopolist test, and on competition. And so, regardless of what that $92 includes, I think that you have to apply the same logic. And let's be clear about something else, that regardless of what the $92 average is, there is unrebutted evidence that a significant portion of Michael Kors' handbags and Kate Spade's handbags, as silhouettes defined by Dr. Smith as relevant in this case, are absolutely selling at below $100.

And on that, your Honor, I'd ask the question to Ms. Dennis about what matters here. Is MSRP or AUR? It's

obviously AUR. This is about the price the customer pays. The MSRP, that's just the ticket price. That doesn't matter. What matters is what the customer pays.

So when a customer goes into a store, and it can buy in Dillard's, for instance. A customer can go to Dillard's, and there's a $400 bag from one of the merging parties and right next to it is a bag that may have had a ticket price of $1,500 initially because it was a European luxury bag but now it's sold as a used bag right next to it and it sells for the same price. The customer is going to be looking at the two of those and making the purchasing decision. And there's no way to say that -- there's no way to say that that customer is not going to consider those two bags that are based next to each other as potential substitutes.

Your Honor, I've been informed by my friends here representing Capri that the $92 figure does not include wristlets. So we have that, at least, piece of information.

THE COURT: Okay. Does it include wholesale sales?

MR. BUTERMAN: Yes.

THE COURT: Because again, I'm seeing a comparison. When I was reading your post-hearing proposed findings of fact that seemed to talk about that figure, and then Professor Scott Morton's figures in terms of the 70 percent. And in hers, she includes wristlets and pouches, and she excludes wholesale. I'm trying to figure out if that is the same for the $92 as

what she did.

MR. BUTERMAN: My colleagues say the $92 figure does not include wholesale.

THE COURT: Does not include wholesale?

MR. BUTERMAN: Does not. Your Honor, may Ms. Moses address the point?

THE COURT: Absolutely.

MR. MOSES: The $92 figure is information we have at Capri. It reflects the sales of bags that we classified as handbags, and the information we gave in the second request to the FTC, does not include wristlets. Hopefully, that clarifies it.

I will say that even if you accept Ms. Dennis that it's slightly more than $100 at AUR, that means that necessarily more than half our bags sell for under $100. Because to get an average unit retail of approximately $100, more than half your bags have to sell for less than $100.

THE COURT: The number doesn't include wholesale, right?

MR. MOSES: It doesn't because we don't know the ultimate price that the wholesalers select.

THE COURT: Right. Thank you.

MR. BUTERMAN: And, your Honor, there's a point worth emphasizing there, which is that even Dr. Smith when he ran his figures, he barely got figures above $100. I think he had $105

or so. So there's a significant amount of sales below that figure, and we'll talk about that in a little bit.

THE COURT: Thank you.

MR. BUTERMAN: I was starting to mention the *Super Premium Ice Cream* case. The reason I wanted to mention it is because there the court recognized that there were gradations among various ice creams based on price and quality, but it nonetheless defined a relevant market of all frozen desserts, given that the grades of ice cream competed with one another both for customer preference and space in retailers' freezers.

The Federal Trade Commission put up a slide about the *ABI Modelo* beer case. I thought it was curious the first time. That's in another case when I was at the division, and I thought it was curious that Dr. Smith wanted to lean into that one and the FTC has, because there, the government recognized in their complaint, and let's be clear, that wasn't a litigated case. It was a complaint filed and the case was never ultimately tried. There the government recognized that despite the fact that *Anheuser-Busch* in its documents segregated the beer market into four segments: Sub premium, premium, premium plus and high end. The appropriate relevant market was all beer. Why? Because beer competes with one another across segments.

Again, your Honor, the same thing in Judge Woods *Kraft General Foods* case, where there, despite being a myriad of

peculiar characteristics that supported segmenting ready-to-eat cereals into narrow sub markets, competition across the spectrum mandated that the court adopt a broader relevant market definition.

Here the unrebutted evidence and this hearing showed that competition exists across the pricing and other spectra that supposedly define accessible luxury. We see it in the testimony of supposedly mass market players like Steve Madden, who stated unequivocally that they compete with emerging parties, and we see it in the survey and data from various competitors in this case that show that consumers of supposed accessible luxury bags also purchase and own those so-called luxury bags. And as a result and consistent with those cases, defining a narrow relevant market here based on the brown shoe factors is just inappropriate.

Now, the third problem that I want to address is one that we actually haven't talked about a lot here during the hearing, but it's really critical. And that's the fact that even if this Court were to recognize that accessible luxury market -- if the Court were to recognize the accessible luxury market based on the FTC's application of the brown shoe factors, the FTC still hasn't presented any market share or concentration figures to support that market, which they have to do to satisfy their *prima fascie* burden to show that the transaction is presumptively anti-competitive.

So what do I mean by this? Well, normally, once a market is defined, it's a straightforward exercise. You take the bags that have the characteristics you claim denote accessible luxury, and then you go and figure out prospective shares in the marketplace. The FTC didn't do that here, your Honor, and the reason we think they didn't do it is because of what we talked about a minute ago. It's because they do run into a very big problem in the fact that Coach, Kate Spade, and Michael Kors bags, a significant number of them, sell for under $100.

The problem is if you are going to define the market by those brown shoe factors, then you are going to have to exclude those bags from the market. And that's going to eviscerate their claim of any——any——problematic market shares with so many of these bags not being in the relevant market. I want to reiterate that, your Honor. If your Honor finds that the FTC has defined a relevant market using the brown shoe factors, including price, then we believe that based on the uncontroverted evidence of Kate Spade and Michael Kors' prices, this case should be over. They can't get an injunction, your Honor.

THE COURT: Let's pause on this for a moment. I'm looking at the Michael Kors 70.4 percent. I'm assuming that that's coming from Professor Scott Morton's report; is that right?

MR. BUTERMAN: Yes, your Honor.

THE COURT: And that includes wristlets, pouches, and other handbags. You have that at the bottom, right?

MR. BUTERMAN: Yes, it says wristlets, pouches and other handbags, your Honor.

THE COURT: And it doesn't include wholesale?

MR. BUTERMAN: That's correct, at least with respect to Capri.

THE COURT: Right. Okay. And then with Kate Spade, does the Kate Spade number include outlets? Because the problem I'm having is I see documents -- let me just cut to the chase.

MR. BUTERMAN: Yes.

THE COURT: I see documents that talk about outlet projected AUR. So we're in the AUR, not the MSRP range. I see, for example——and I'm on PX 1250 at 18——that 43 percent of the Kate Spade outlet projected AUR is $101 to $125, which is a lot larger than the number that seems to be reflected here with the 61.9 percent.

MR. BUTERMAN: So this does include the outlet numbers, your Honor. What I believe——and I don't have that exhibit in front of me but you said it was projected——I think what we see at the outlets is that oftentimes even the number that you project for a sale at the outlet ends up translating into a lower AUR, given sales and the like. And I believe --

THE COURT: Actually, I misspoke then. You're right. If I look at the column then, it is fiscal year '23 outlet AUR, not the fiscal year projected. I still have 41 percent sold between $101 and $125, and that's the outlet ones. So those are presumably cheaper than the ones that are sold at Macy's or brick-and-mortar.

MR. BUTERMAN: They may be. They may not be, your Honor. Certainly outlets do sell bags at lower levels, but in certain instances if something is not selling at wholesale, then the parties at the retailers do need to -- excuse me. The retailers will discount themselves as well. And I apologize. I don't have the document in front of me, so I don't know if it's a unit issue, which it may be as well, as opposed to, you know, a revenue issue.

I do recall the testimony from Ms. Frazier about the percentage of handbags that sold for an AUR of over $100, that she testified to, and I do not believe that the number that she presented was -- I believe it might have been above -- it was about 15 percent if I recall, but I don't have that in front of me at the moment, your Honor.

(Continued on next page)

THE COURT: Thank you.

MR. BUTERMAN: Your Honor, now I would like to turn and focus on Dr. Smith and really focus on the series of fatal flaws in Dr. Smith's empirical work. We have been over several of these in our written submissions and during our examination.

I want to focus here on just three, as I mentioned earlier. His claim that he confirmed the validity of the accessible luxury handbag market through his empirical work, his failures, the failures in his hypothetical monopolist test, and the unreliability of the market share calculations that he presented during his rebuttal testimony.

Let's start with his empirical analysis.

We need to be very, very clear about something. The FTC chooses their words carefully, but let's be clear. The market that the FTC defined, that they allege in their complaint and that they claim that they defined in this case by reference to those *Brown Shoe* factors is not the market that Dr. Smith ran his analyses on. They are two separate things.

He ran every single quantitative analysis in reference to brands listed in NPD's bridge and contemporary categories. Critically, Dr. Smith never did any work whatsoever to confirm whether the FTC's *Brown Shoe* market and his own bridge and contemporary brand market actually matched up.

As proof of that, your Honor, we asked Dr. Smith if he could tell us whether a bag was in his relevant market if we

provided him the information that the FTC claims is critical to making that determination.

And as your Honor can see on the slide, regardless of whether he knew the price, the material, the place of manufacturing, competitive alternatives, he could not say whether the bag was in his relevant market or not.

Dr. Smith even admitted under oath that the FTC's supposed *Brown Shoe* factors don't align with the markets he studied. He said, "Not all handbags that are in my relevant market would exhibit all those features and not all handbags that are out of my market would exhibit none of those features."

Your Honor, that is not the only threshold issue here. Although the FTC presented a market of accessible luxury handbags -- handbags -- Dr. Smith presents a market of handbag brands. By focusing on handbag brands instead of handbags, Dr. Smith's relevant market necessarily excludes handbags that meet all of the *Brown Shoe* criteria, because they are either sold by brands that aren't listed as bridge or contemporary in NPD, which would be because they don't sell through department stores, or it could be just because of the arbitrariness with which NPD determines its classifications.

It also means that a $10,000 Coach Rogue bag that is made of alligator skin is in Dr. Smith's relevant market simply because, regardless of the fact that the bag does not meet any

of the *Brown Shoe* factors, it's sold by a brand that is identified in NPD as bridge. Right?

As Ms. Dennis said in her closing, Gucci may sell a bag for under $1,000, but that doesn't mean that Gucci the brand is in the market.

Why does the brand matter, your Honor?

The FTC defined a relevant market of handbags. So why do they do this bait and switch and all of a sudden say, no, it's brands?

THE COURT: Is it your view that brand is irrelevant in the handbag industry?

MR. BUTERMAN: No, your Honor, not in the slightest.

What I am suggests is when we're calculating market shares and we're determining the effects of competition and whether this transaction is going to substantially lessen competition and we look at what the consumer substitutes, the consumer substitutes bag to bag, not brand to brand.

The uncontroverted evidence in this case is that that's the way competition occurs. It doesn't make sense otherwise. This isn't a situation -- you know we talked about cluster markets here, right? This isn't a situation where people buy a basket of goods, like they go into Whole Foods and they want to get organic goods and they buy a basket of goods. People go and they shop for a handbag.

Ms. Dennis in her closing, Ms. Lindquist in her

opening talked about the consumer buying a handbag. They didn't say a consumer goes into a shopping mall in middle America and decides that they want to buy a tote, a satchel, a cross-body, a cluster of bags from a particular brand. That's not the way this works.

It was incumbent on the FTC to actually calculate shares based on the market they defined. And it's not a brand market. It's a bag market.

What's interesting is, think about it from this perspective: We, the merging parties, get tagged with all of our sales for bags like that bag or any others that are not in the relevant market as defined by the FTC under *Brown Shoe*. But if there are other companies out there just because they're listed as bridge because they are not listed as bridge or contemporary, all of their sales are out, even the sales that are at the exact same price point on bags that look exactly the same as ours. That just doesn't make sense.

Your Honor, we put these slides up quickly during the opening. I am putting them up again because I think that it really, really highlights the mishmash that results from what Dr. Smith did here.

How can anyone look at one of these bags and look at the other and come to a conclusion that a customer -- remember that's what we are looking at -- a customer is going to say, let's just pause on this one, that Polo Ralph Lauren bag that

sells at $698 isn't something that the customer who is looking at that Tory Burch bag for $628 is going to consider a substitute? It doesn't make any sense.

Now, your Honor, there isn't any dispute about that. Even Dr. Smith noted that when he was doing his market analysis he was using the brands that are contained in the two categories, bridge and contemporary. He said, "At that point, when I'm doing that, I am not assessing the characteristics of the product."

And Dr. Smith says that he can use bridge and contemporary as a proxy for accessible luxury because he found three instances in 2021 where one junior employee put the words "accessible luxury" in parentheses after bridge and contemporary.

We didn't hear about that today. The FTC didn't even bother to mention it. Dr. Smith in his own testimony glossed over it completely.

But that is not the type of rigorous analysis that the case law expects an expert to use as a basis for his opinions. At a minimum Dr. Smith should have done some work to examine whether the bridge and contemporary brands actually matched up with the accessible luxury *Brown Shoe* factors.

THE COURT: Who was the witness who gave the testimony in the document you referred to as a junior person?

MR. BUTERMAN: That witness didn't testify at trial,

your Honor.

THE COURT: I'm sorry. That produced the document.

MR. BUTERMAN: The employee's name was Rae Tao.

THE COURT: He was presented as your 30(b)(6) witness, right?

MR. BUTERMAN: Rae Tao was offered up as a 30(b)(6) witness on certain topics in this case. Yes, your Honor.

THE COURT: Okay. Thank you.

MR. BUTERMAN: Now, Dr. Smith could have run some types of tests to make sure that what some employee of Tapestry, one he's never spoken to, to check whether what that person identified as accessible luxury actually matches up with what the FTC has defined as accessible luxury.

The FTC certainly could have talked to NPD or at least Dr. Smith could have. But they didn't. Instead, they're relying on a game of semantic gotcha. That's just not defensible when you are trying to block a transaction like this.

A second problem with Dr. Smith's analysis is his hypothetical monopolist test. As we previewed in our *Dauberts* and our opening, Dr. Smith's entire analysis is based on those backwards-looking survey questions from 2021 and '22 that are not informative of what consumers would do in the future if faced with a price increase on the bags that they want to purchase.

We spent a lot of time on that, your Honor, and I am not going to reiterate all of it here. You can see some of the points on these slides.

But I want to emphasize a related problem that became crystal clear during this hearing, and that's the significance of how outdated these 2021 and '22 surveys are.

Your Honor will recall that when we asked Dr. Smith whether he had taken into account the fact that the market had changed dramatically since the surveys he relied upon, he responded that he had not done so because he had no reason to believe anything had changed since then. But the uncontroverted evidence from the parties, third-parties, industry experts, and documents is that this is an ever-changing and dynamic market.

Let me just highlight two points on that, your Honor.

First, here's a slide that Dr. Scott Morton presented which shows how various handbag brands have grown in popularity from 2021 to 2023.

Your Honor, what's so striking about this slide are the sheer revenue and growth percentages. Ms. Dennis in her closing said Dr. Smith's analyses would have to be really off by a lot to make a difference.

Your Honor, we have companies here that have grown thousands of percents in just two years. And we have increased sales by hundreds of millions of dollars. Indeed, if you look

at it, all the growth over those just two years on this slide from this one page of brands that equates to Michael Kors' entire business in terms of sales. Meanwhile, Michael Kors has been declining, as we know.

If the FTC and Dr. Smith think that Michael Kors is so significant, what's their response to all this expansion by competition and the sharp decline of Michael Kors?

Well, Dr. Smith's response is to say it is irrelevant and that if we are going to analyze what brands consumers would divert to in 2024 and beyond, the world that existed in 2021 is what matters. But we know that world is vastly different than it is today, in part because of what the world was dealing with back then. At that time there was a hit into digital sales that was rapidly intensifying.

Your Honor, I want to highlight something very important. You will recall that when Dr. Smith was on the stand we asked him whether he had attempted to calculate diversion ratios from that more recent 2023 Tapestry surveys that he had access to.

What did Dr. Smith say?

"Not that I am relying on."

He didn't say no. He said, "Not that I am relying on."

Doesn't that tell us everything we need to know?

If those later surveys led to similar diversion ratios

that supported his hypothetical monopolist test, Dr. Smith would certainly have relied upon them and presented them in this case as confirming his conclusions.

But of course he didn't. And the results of those surveys show that consumers considered on average 30 different brands in their competitive sets. As the Court, going back to the *Kraft General Foods* decision, noted approvingly, any market definition and any measure of market concentration that ignores the dynamic aspects of changing demands would produce misleading results.

We have those here. As we know, Dr. Smith's use of those '21 and '22 surveys led to the conclusion that Kate Spade, Coach, and Michael Kors constitute a relevant market on their own. That was a red flag.

And when we confronted Dr. Smith, he actually conceded that it would be improper to analyze the effects of this transaction through a relevant market of just those three brands. He said that to analyze the market based on these three brands, even though they passed his hypothetical monopolist test, would be "ignoring the commercial realities within which these brands compete."

That is a remarkable admission by Dr. Smith. What he's saying is that the smallest relevant market he tested and that passes his hypothetical monopolist test doesn't comport with commercial realities and so it should be ignored.

What does that say about the validity of his entire analysis?

Dr. Smith and the FTC claim that he corrects this error by running his hypothetical monopolist test over NPD and bridge and contemporary. But claiming that that fixes the problem, it is a parlor trick.

As Professor Scott Morton described, because Dr. Smith bases his hypothetical monopolist test on the same faulty diversion ratios calculated off of those surveys, literally any market that includes Kate Spade, Coach, and Michael Kors would pass. He could add every single handbag brand that ever existed and he could add shoes, he could add bananas. It wouldn't matter. His test would be passed.

Your Honor, a test that is always passed and cannot be failed is not a test. Dr. Smith even admitted that his test could not be failed.

If Dr. Smith admitted that his diversion ratios were leading to uninformative results that didn't comport with commercial realities, he should have realized that something was wrong and started over, but he didn't.

Even if he could get past that problem, there's a third fatal flaw with Dr. Smith's analysis that dooms the FTC's case. That is the market share calculation that is Dr. Smith put together that formed the basis of his concentration figures. They are wholly unreliable.

Let's recall what Dr. Smith did. He took the brands listed in NPD's bridge and contemporary, and those categories are comprised only of companies that have wholesale sales that are reported to NPD, so brands that don't sell in department stores, like Telfar, Cuyana, Polene, Aupen, they are not included in his market, even if they would otherwise constitute accessible luxury as defined by the FTC under *Brown Shoe*, and use those brands that are not classified as bridge and contemporary -- excuse me, and use bags and brands that are not classified as bridge and contemporary, like Steve Madden, Calvin Klein, Prada, Chloe, Gucci, they are also not included even when they are sold at the exact same price as bags of bridge and contemporary brands.

And you know, your Honor, we can go on and on about the use of those NPD brands. But beyond all of those missing brands, there is another problem, because NPD only tracks sales made through wholesale.

So for those companies that didn't provide him with sales data, which was virtually all of them, he had to account for those company's sales that took place direct to consumer. So he developed a shortcut. And he just assumes that 40 percent of all sales for all those companies are through wholesale, and then adds in an additional 60 percent to the NPD sales figures to come up with total sales and market shares.

So why is this so wrong?

Well, let's just look at data he did have available to him, your Honor.

If we look at this chart, we see -- and we've redacted the names, but we see that Dr. Smith badly underestimates the handbag revenues for numerous companies. This is really important, your Honor, because by underestimating the sales of other brands it makes the merging parties' shares appear artificially higher.

To show you how off this whole thing is, if Dr. Smith applied the same formula to Coach's sales that he applied to Coach's competitors, he would end up with Coach having one-sixth of the sales that it actually does. Again, to Ms. Dennis' point that we need to show that he's off by a lot for this to matter, these are off by a lot, your Honor.

Now, to be fair, your Honor asked this question, we can't know how precisely all of his numbers are, how off they are. But we do see some pretty incredulous results.

Your Honor highlighted two of them.

Emporio Armani, who has over 200 different types of bags on its website, ranging in price from $195 to $795, according to Dr. Smith's calculations, only had $5885 in sales.

The reason is because they only had minimal sales through the wholesale channel, and Dr. Smith's assumptions don't take into account the fact that the overwhelming majority of their sales could have taken place outside in direct to

consumer.

As your Honor pointed out, even more absurd, Dr. Smith calculates that J.Crew, who offers numerous silhouettes of handbags and has almost 100 different offerings between $100 and $400, had $197 of sales. Apparently J.Crew told two handbags according to Dr. Smith in 2023.

Again, your Honor, we could go on and on. Your Honor, when Ms. Dennis was asked about this, she said that, well, you know, she assumes that these companies are the tail, and the numbers might go in the other way.

But that is all supposition. Where is the evidence?

The problem is here that this undermines the credibility of Dr. Smith's entire analysis. When we asked Dr. Smith about this and whether he had done anything to check the accuracy of his results, given how facially bizarre they were, he said no.

In fact, your Honor will recall he was sort of flippant. Dr. Smith admitted that those numbers were off, but that it was irrelevant because he assumed, like the FTC, in the aggregate they probably worked out.

Your Honor, this is an $8.5 billion transaction. It is not okay for Dr. Smith to stand up in this court and present market share figures which he says show that this transaction is anticompetitive that he knows and admits are obviously wrong and wrong by thousands and thousands of percentages.

Now, we didn't move to *Daubert* Dr. Smith based on these errors because he didn't present this demonstrative with those market share calculations before his rebuttal testimony on the last day of the hearing. But the lack of rigor that he put into his analysis does not comport with what is generally accepted for economists in these cases.

Because of that and all the other errors and problems that we have identified with this analysis, we respectfully submit his opinions in this case should carry absolutely no weight.

Your Honor, as I close out my discussions on Dr. Smith, one thing that does need to be repeated is that these flaws are not isolated. When he talks about his diversion ratios, which are improperly based on stale survey data that is not informative of diversion, that is the backdrop not only for his market definition but you also for his upward pricing pressure and merger simulations that Ms. Dennis pointed the Court to in her closing.

It is a virus that infects all of his quantitative analyses, and it dooms the FTC's case, whether they are trying to establish a likelihood of success based on the lessening of competition in the relevant market or the elimination of close competitors, as Ms. Dennis said, with respect to Dr. Smith, all roads lead to the same path. We couldn't agree more.

Now, your Honor, just briefly, I would like to talk

about the wholesale absence of any plausible competitive effects, because even if this Court were to conclude that the FTC had properly identified the relevant market and established concentration figures that give it a presumption that this transaction is anticompetitive, it would still need to establish that this transaction would actually lead to consumer harm.

As we have discussed the FTC's theory of harm is premised on a fact that is completely at odds with the uncontroverted evidence, which is that the merging parties simply cannot increase price without increasing value of the brands to consumers.

Your Honor heard from multiple witnesses whose quotes are in the printed material. Beyond that I also want to address the issue of brand autonomy that the Federal Trade Commission brought up. There's been a lot of discussion about brand autonomy, so I want to make sure the record is clear.

Brand autonomy and the uncontroverted evidence that pricing, discounting, design are all handled at the brand level is another reason why Dr. Smith's theory of competitive harm doesn't make sense here.

But to be clear, we don't need to establish that the brands operate completely autonomously in order to prevail. Indeed, even if pricing were handled at the Tapestry level rather than at the brand level, that wouldn't change the

reality, that Tapestry can't raise prices overnight, and certainly not to the levels that Dr. Smith posits and be successful.

And because of that, the FTC's theory of competitive effects simply cannot carry the day.

THE COURT: Mr. Buterman, you have said it a couple of times, raise prices overnight.

Is that the test, that they have to be raised overnight or that they can gradually be raised.

MR. BUTERMAN: Dr. Smith could certainly posit that it is going take them some time, but the reason we use the word overnight your Honor, is because it highlights what Dr. Smith says, which is that we don't need to change anything.

That's the real problem here. Tapestry's acquiring Capri because it wants to elevate the brand. It wants to make it better in the eyes of consumers.

But what Dr. Smith says is the second you own that company, you could raise prices of Michael Kors by almost 30 percent and people are going to eat it. That doesn't make any sense. There is not a shred of evidence in this case that supports it. That's the reason we say overnight.

THE COURT: Thank you.

MR. BUTERMAN: Now, separate and apart from that, the record is just absolutely silent on competitive effects. What's striking is that neither the prehearing submissions or

the posthearing findings of fact or conclusions of law provide any evidence to support the notion that this transaction will lead to anticompetitive effects.

Instead, as you heard from Ms. Dennis, all they have is their expert's upward pricing pressure and merger simulation models which are based on those problematic diversion ratios that don't comport with the real world and are unreliable for the reasons that we have discussed.

So, your Honor, with that, the FTC just can't meet their burden here under any standard. The facts are that consumers have hundreds of choices at every price point when it comes to this discretionary purchase. The parties' handbags compete up and down the spectrum with all sorts of handbags, and new brands are entering or repositioning, and existing brands are growing all the time.

You want to see the competition, your Honor, it is right there. It is not just on Broadway, it is not just in middle America, it is not just on your iPhone, it's everywhere. And the FTC and their expert have failed to meet their technical requirements to establish a relevant market and concentration figures that support the idea that they're likely to prevail on the merits in establishing in their administrative proceeding that this transaction may substantially lessen competition.

Your Honor did not hear from anyone in this hearing

that supports the FTC's theories other than Dr. Smith, who we respectfully submit presented analyses that are so lacking in rigor that they cannot be relied upon in such an important situation.

Tapestry is acquiring the Michael Kors brand in order to revitalize the brand and plans to use its consumer insights and supply chain expertise to deliver a better product to consumers.

As Tapestry's CEO, Ms. Crevoiserat, said, the goal of this transaction is to sell more product to more consumers globally. It is to sell more handbags.

This deal is pro-competitive because it will increase competition from a declining brand, and, contrary to the FTC's statements, the decision as to whether to grant this injunction is not a minor one.

It is not just a temporary pause that they're asking for. Given the length of time needed to get through the part three process that they've identified, granting this injunction will in all likelihood crater this deal.

We respectfully submit that because of the fatal flaws in the FTC's case from market definition, to analyzing the parties' head-to-head competition, to the lack of quantitative support for their case, including the lack of reliable data showing that this market is concentrated, to showing on balance that the transaction will have anticompetitive effects, the FTC

simply cannot meet its burden under any formulation of 13(b). Accordingly, we respectfully request that the Court deny the FTC's request for a preliminary injunction.

THE COURT: Thank you, Mr. Buterman.

Ms. Dennis.

MS. DENNIS: Very briefly, your Honor.

I think there are about one or two party ordinary-course documents in these slides. That's where we fundamentally disagree here.

We didn't come up with this term accessible luxury, whether there's an accessible luxury market out of thin air. A lot of times in these cases you see the government actually define something, use a term. I used Whole Foods as an example. There's a term there about the type of products that are sold at Whole Foods. That wasn't a product used in the ordinary course.

We were already told by the defendants we are making up markets. Here Joanne Crevoiserat said our supply chain created the accessible luxury market.

There is some discussion that we really don't show competition on pricing. If these brands do not compete on pricing, why do they monitor each other. Why is this information in their board documents?

Why does Lee Levine send her employees into Michael Kors stores?

Why does John Idol say the brand we compare most to is Coach?

There is some argument, again, that we are saying that we do not define a relevant market. We have never ever said that. We don't need to prove one here. The case law is clear on that. There needs to be a relevant market for head to head, but it doesn't have to be our market. *Manufacturers Hanover* rejected the government's market, the geographic market there, but still found the merger violated Section 7.

There was comments about how there's nothing in our slides to show that consumers don't recognize this market. I direct your Honor -- we did have a slide that had PX 1936 and PX 1925, which are I Tapestry consumer ethnographic studies that have consumers mentioning the terms accessible luxury, noting that Coach is a brand for consumers who want to buy something nice, but are not as affluent as Louis Vuitton or Gucci.

There's lots of talk about competition here. We don't dispute at some level there's competition among lots of brands even brands outside the accessible luxury market. But the question here is competitive constraints, not just any competition, competition that constrains the players in the market.

We also heard some comments about how the FTC should define the market by product. We do. We have a cluster market

of four handbag silhouettes. The brands are very important in this market.

You have heard that testimony from Joanne Crevoiserat. She said brands matter here.

Ms. Giberson said brands matter. Consumers search by brands.

There is discussion about the surveys. Why did we use these surveys?

We used these surveys, Dr. Smith did, because they asked the right question: What did you consider at your last purchase? A question asking you what you may consider in the future, the next 12 months, where anything could happen to you and you could be looking for any occasion, doesn't answer diversions.

They also told us to look at these surveys when they were being investigated. Look at these. Now we are not supposed to look at them.

But I do want to direct the Court to DX 288 at page 15, which is one of the more recent surveys, which actually shows the Coach, Kate Spade, and Michael Kors are among the top three consumer brands.

Finally, there's been a lot of talk about Dr. Smith here and what the FTC has done. We have been conservative in every turn. Dr. Smith conservatively had 200 brands in his candidate market that the parties themselves, that Tapestry had

said were accessible luxury brands in the NPD bridge and contemporary categories. Those were not random analyses.

Rae Tao is not a random junior employee. She is still at Tapestry. As your Honor knows, she was a 30(b)(6) witness here and she also testified that these market sizing models were around before they got there. We just don't have those documents. That wasn't what the document cutoff period was here.

So at every turn we have been conservative. At every one of those turns it points all in one direction: These parties are part of accessible luxury market that appears throughout their documents, and they dominate that market no matter how you slice it.

Thank you.

THE COURT: Ms. Dennis, before you step away, you said that Dr. Smith conservatively added 200 brands to his candidate market.

How do you address defendants' argument that because the three brands met his test you could add any number of brands to the market and it wouldn't matter?

How is the addition of the 200 brands more conservative?

MS. DENNIS: Three brands meeting the HMT by themselves is not surprising here, given how close they are as competitors, but only relying on that for the market is

actually ignoring the market reality, which we don't want to do.

Your Honor also saw on these board documents Tory Burch, Marc Jacobs. It is obvious that they compete in that market. There's documents showing third parties -- that these parties are considered accessible luxury.

That is the market reality. We are not trying to ignore those. He looked at the broadest swath possible and saw that that passed the HMT. Even there, these parties have very high concentration levels.

One more point while we are talking about third parties. There was discussion about how the FTC always brings forward customers who complain and that third parties here don't support our theories.

There are third parties here who recognize the accessible luxury market. Were there any who complained that this merger is bad?

There are a couple if you go through some of the documents. There's one document -- I believe that's -- I don't want to name the name of the party. I actually don't have it here, but it is in the 3200 range. If you look, the party said the merger will lead to market power.

But leave that aside. The cases to which Mr. Buterman pointed, Sysco, Staples, Cardinal, CCC Holdings, Chicago Bridge, those were business-to-business cases. Those were the

consumers, consumers who are large corporations who have sophisticated counsel who can come to the Federal Trade Commission.

The consumers here are everyday Americans. It is not odd at all that there's not a single everyday American who we put on the stand. That's why this agency exists. There is a private right of action under the Clayton Act. Companies can bring their own lawsuits against each other to stop mergers. We exist to protect the American public.

Thank you.

THE COURT: Thank you.

All right.

Anything further from either of the parties?

MS. DENNIS: Not for the FTC.

MR. BUTERMAN: No. Just to reiterate thanks to everybody.

THE COURT: Anything from Capri?

MS. GOLIN: No, your Honor.

THE COURT: Thank you very much.

Thank you all for the excellent papers, for the good presentations, and I will take the matter under advisement.

Thank you very much.

Court is adjourned.

(Trial concluded)