UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

FEDERAL TRADE COMMISSION,	.	Case No. 24-cv-02508
Plaintiff,	.	
v.	.	
TEMPUR SEALY INTERNATIONAL, INC., et al.,	.	515 Rusk Avenue Houston, TX 770002
Defendants.	.	Monday, December 16, 2024
. . . . .	.	1:30 p.m.

TRANSCRIPT OF CLOSING ARGUMENTS RE: EVIDENTIARY HEARING DAY
BEFORE THE HONORABLE CHARLES ESKRIDGE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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(Proceedings commence at 1:30 p.m.)

THE COURT: All right. I call 23-2508 [sic], Federal Trade Commission v. Tempur Sealy and Mattress Firm. Can I get appearance of counsel, please.

MS. MALTAS: Good afternoon, Your Honor. Allyson Maltas on behalf of the Federal Trade Commission.

THE COURT: Thank you.

MR. SHORES: Good afternoon, Your Honor. Ryan Shores with Cleary Gottlieb on behalf of Defendant Tempur Sealy, and I'd like to reintroduce our general counsel, corporate representative, Mr. Mohammad Vakil.

THE COURT: Thank you, sir. Thanks for being here.

MS. RAZI: Good afternoon, Your Honor. Sarah Razi, Simpson Thacher, for Mattress Firm Group Incorporated, and (indiscernible).

THE COURT: All right. Thank you. Thank you all for being here.

All right. So we're here for closing arguments. A question -- I don't know if I've asked this before, but in terms of the deal itself, it's still and is intending to close on February 9th, absent other action by me. Is that the deadline?

MR. SHORES: That's correct. That's the --

THE COURT: Or that's the date?

MR. SHORES: That's correct, Your Honor. That's the

outside or termination date (indiscernible) agreed.

THE COURT: Okay. And I'm going to, follow this, get to a ruling as expeditiously as possible, but is there -- in terms of relief that might want to be taken from my order, is there kind of a drop-dead date that you all would say, Your Honor, please, if you could have it by X day, hopefully in January, that that would give you time that you need in advance of that?

MR. SHORES: I think if there's in January, Your Honor, from our perspective, that would be fine. One thing I was going to raise and is (indiscernible) to what you're saying, if you were going to rule in December, which I'm not suggesting you would, and I had all sorts of indication from a public company perspective, but a ruling in January is fine with us (indiscernible).

THE COURT: Okay. I don't see any way that I would be ruling in December with the amount of material.

Ms. Maltas.

MS. MALTAS: I think the only thing that we would ask is maybe at least 10 days before the outside date just to give us an opportunity to assess either by (indiscernible).

THE COURT: All right. All right. I will commit to have it entered at least 10 days prior. And I'll do it as early in January as I can.

MS. MALTAS: Thank you, Your Honor.

MR. SHORES: Thank you, Your Honor.

THE COURT: Okay. All right. So anything else that anyone wants to address with me before we move to the actual arguments?

MS. MALTAS: Nothing, Your Honor.

MR. SHORES: Nothing, Your Honor.

MS. MALTAS: I'd like to be said that we are, in good faith, shooting for an hour each, that's what we prepared for, but we do also want to be very responsive to your questions, so we're not going to necessarily hold ourselves to that --

THE COURT: Okay.

MS. MALTAS: -- if that is --

THE COURT: That's perfectly fine with me.

MS. MALTAS: And then I would just ask for, you know, for rebuttal.

THE COURT: Okay. As part of your overall hour or --

MS. MALTAS: (Indiscernible).

THE COURT: Hour, that's fine. I'm sure it'll be fine.

There was filed today four supplemental trial exhibit lists from the FTC, and what are these? Is it for purposes of argument today or -- I just want to make sure it's agreed because we've closed the evidence. I just want to make sure that, yes, this is evidence before me.

MS. MALTAS: It's simply that when we were finalizing

the deposition designations, we realized those exhibits from depositions were left off the final exhibit list. So they're in the deposition, and then we added them to the exhibit list.

THE COURT: So no objection then? Okay. Those are admitted.

All right. All right. Ms. Maltas.

MS. MALTAS: There we go.

THE COURT: There's no screen, but I know that this also probably has some confidential material.

MS. MALTAS: A few things, yeah.

THE COURT: Is that the -- so there will be no -- it won't be up at all during the argument?

MS. MALTAS: So you should have it on that screen.

THE COURT: Oh, that's fine. I --

MS. MALTAS: Okay.

THE COURT: I can see it.

MS. MALTAS: Yeah.

THE COURT: I'm just thinking we also have members of the public here.

MS. MALTAS: No, the gallery cannot see the slides.

THE COURT: Okay. All right. Go ahead.

MS. MALTAS: Thank you. Your Honor, thank you so much, just on behalf of the Federal Trade Commission and our whole team, for the time that you provided for us to bring this hearing and this proceeding before you a few weeks ago, and

thank you also to Ms. Gonzalez and to everyone else on your team. We felt very warmly welcomed and taken care of, and we really appreciate it.

THE COURT: I have said thank you to you all, but I haven't said thank you to Jennelle myself.

So Jennelle, thank you. You've done a good job.

Okay. Go ahead. And I know that you all have dealt a lot with her.

MS. MALTAS: Yeah.

THE COURT: And you all have been incredibly cooperative and productive counsels, so I appreciate that.

MS. MALTAS: Thank you. Let me start my timer.

So, Your Honor, the statutes that govern this case, and that's Section 13(b) of the FTC Act and Section 7 of the Clayton Act, ask this Court to do something that's a little different than happens in many cases. They ask this Court to look at information that's available today and use it to determine whether a merger that hasn't happened yet may cause substantial harm in the future. While this predictive exercise can be difficult in some cases, it's made easier here by the reams of contemporaneous documents produced by the defendants and third parties in this case and the ample testimony that we've been able to gather both live at the hearing a few weeks ago and in the many depositions that we submitted over the weekend. In fact, this evidence, particularly that produced by

the defendants themselves, enabled five commissioners of the FTC to issue a unanimous bipartisan vote in favor of this action, and that evidence has only gotten stronger through discovery and through the trial.

What this real-world evidence proves is that if this merger is allowed to go forward, Tempur Sealy has every financial incentive in the world to foreclose, limit, or deemphasize its rival premium mattress suppliers at Mattress Firm, resulting in substantial price increases across the board to American consumers. We saw contemporaneous evidence from Tempur Sealy and its stakeholders showing that from 2015, when Tempur Sealy first considered buying Mattress Firm as part of its Project Gray, to the present, Tempur Sealy executives, board members, investors, and observers of the industry all recognized that it would be more profitable for Tempur Sealy to grow its balance of share at Mattress Firm rather than keep the balanced floor that Mattress Firm carefully holds now in order to stave off undue influence from any supplier.

The evidence also shows that Tempur Sealy competes fiercely with other premium mattress suppliers and seeks every day to maintain and increase its balance of share against those suppliers at Mattress Firm. Steve Rusing, who's a sales executive at Tempur Sealy and who's actually being considered to be CEO at Mattress Firm, confirmed in this courtroom that Tempur Sealy will still work to increase its balance of share

on the floor of Mattress Firm after the merger. Nothing would change because Tempur Sealy will also run that retail business. We heard and we submitted testimony from premium mattress suppliers including Purple, King Koil, Serta Simmons, Paramount, Spring Air, and Casper, all confirming how important Mattress Firm is for business now and even more importantly for their future growth, long-term plans that are now at risk because of this merger.

All of this evidence is, of course, bolstered and confirmed by our expert, Dr. Gopal Das Varma, who modeled this industry based on a tried-and-true model and real-world facts and documents and confirmed through that modeling that Tempur Sealy has the financial incentive to increase its balance of share at Mattress Firm, and doing so will increase prices of premium mattresses to consumers up to $625 million a year.

Defendants do not provide any evidence to the contrary. They don't provide any evidence that they actually lack any financial incentive because they would not profit from increasing their balance of share and limiting and removing rivals at Mattress Firm. Instead, they claim that's just not the plan, that the standard for assessing a vertical merger is ability and incentive, not ability and the plan I wrote down. That is especially not the test when all of the plans were made after the merging parties also started planning for an antitrust investigation.

Importantly, none of these plans or statements are inconsistent with maintaining the appearance of a multivendor floor and disadvantaging rivals to increase Tempur Sealy's sales and profits. Scott Thompson said it best when he testified a few weeks ago, "I am doing this transaction to make money." Of course he is. That's why anyone does a deal. That's why ability and incentive is the test. The incentive is the risk, and it's present always. One bad quarter, this incentive is there. New management, the incentive is there. Serta Simmons Beautyrest Black doing better than expected, the incentive is there. And we cannot ignore this ever-present incentive because Tempur Sealy wants us to believe that it's going to leave money on the table.

Finally, I'm sure we're going to see the slide with pie charts that defendants use to show that the premium mattress market is small and, I guess, doesn't matter. But it's not small and it does matter. Tempur Sealy makes a significant amount of its revenue from premium mattresses. Mattress Firm makes a significant amount of its revenue from premium mattresses. And this market is growing every day as defendants continue to premiumize the market and grow the price umbrella.

Nearly every American sleeps on a mattress every night. And whether they pay $300 for a mattress or $3,000 for a mattress, they deserve to pay a real competitive price, not

some increased profit-maximizing price that will make Tempur Sealy more money.

Let's start by returning to the broad legal standards that govern this case. The FTC has brought the merits case, the actual case to permanently enjoin this merger in our own in-house administrative law court. But we cannot preliminarily enjoin that case while the merits are pending. So we've sought to preliminarily enjoin the merger under Section 13(b) of the FTC Act in this court.

Under Section 13(b), we should -- the court should enjoin the merger upon a proper showing, weighing the equities and considering the commission's likelihood of ultimate success that such action would be in the public interest. This test asks the Court to do two things: Decide if the FTC is likely to succeed on this case on the merits before the commission, and determine if a preliminary injunction is in the public interest.

In order to consider the commission's likelihood of success on the merits, this Court must consider the second legal important standard, Section 7 of the Clayton Act. Section 7 prohibits mergers, the effect of which may be to substantially lessen competition or tend to create a monopoly.

THE COURT: Can I ask one question?

MS. MALTAS: Sure.

THE COURT: I thought you were going to go into some

of the cases cited on that slide. Could you go back one?

MS. MALTAS: Uh-huh.

THE COURT: To the -- on the likelihood of ultimate success, the Third Circuit cite you have there -- and by the way, I did receive the joint proposed findings of fact and conclusions of law. So I feel like I've had closing arguments already. No, those were excellent. But I noticed this citation there in the Government's submission. Third Circuit saying, "A certainty, even a high probability, need not be shown, and any doubts are to be resolved against the transaction."

What's the, do you have a close cite of the Fifth Circuit saying that? I see that from the Third Circuit, so it's not nothing. I'm just wondering what the Fifth Circuit has said or thought about that.

MS. MALTAS: It's not really been expressly addressed by the Fifth Circuit. I think the Sunsites (phonetic) case is probably the closest -- that should be in our conclusions of law -- but not completely on point. It is an issue that's been addressed by courts in the Second Circuit, as well, and the Eleventh Circuit.

THE COURT: Okay.

MS. MALTAS: And I'm blanking on the (indiscernible) case.

THE COURT: Okay, thank you.

MS. MALTAS: And we can revisit, we saw this before, the burden-shifting framework, that we have the initial burden. It shifts to the defendants to try to rebut it and then comes back to us to go with the burden of persuasion at the end. This is going to come more when we talk about the legal standard for ability incentive and the evidence there, but I just wanted to pause on this when we're talking about Section 7 because I think it's an issue that defendants seem to be a little confused about in the conclusions of law.

Section 7 prohibits mergers that may substantially lessen competition. That's the harm. The mechanism of harm in this case would be customer foreclosure. Defendants have argued that the foreclosure must be substantial, that there has to be some certain level of foreclosure in order to substantially lessen competition, or even some level of harm to specific competitors in order to substantially lessen competition.

But that's not what's recognized in the case law. That's not what Section 7 stands for. The harm to competition and to consumers here is found in the significantly higher prices that they'll pay for premium mattresses, not in some specific importance of Mattress Firms and certainly not in harm to any specific competitors.

Finally, we should consider the legal standard that governs the type of evidence that we see in antitrust cases.

The first is that when weighing the types of evidence that are present in merger cases, courts credit regular course documents far over the testimony of executives who try to explain away those documents. So when we, for example, see document after document from Tempur Sealy files that recognize and describe and plan for a two-thousand-dollar-and-above premium market, we credit those documents over any testimony from an employee that testifies that, well, it's actually 1,000, or we don't really use those numbers.

Similarly, when we're considering documents, more weight is given to internal documents than documents that are crafted with the help of antitrust lawyers when an investigation is looming or that are designed to be shown to the public. And here we do have a cite from the Fifth Circuit. That's the Chicago Bridge & Iron. And that's because, as the Fifth Circuit held in Chicago Bridge & Iron, documents that can be subject to manipulation are not as credible.

So obviously, one of the issues where the parties spend a lot of time with witnesses and testimony and documents has been on the relevant market for this case. And before we go too far on revisiting that evidence, it's important, again, to focus on the legal standard, what the FTC has to prove, and why we have to prove it.

So the purpose of defining a relevant market is so we have a place to assess whether it's likely that there will be

harm to competition. The law is clear that there can be many relevant markets. There can be broad markets, and there can be sub-markets.

When assessing any possible market, we have to look at the real-world evidence, the economic realities of the market, to determine if that proposed market is plausible. It is not a science. The Supreme Court's expression is that it's not measured by metes and bounds. There are always arguments for every plausible market that something was left out or some line was not drawn as perfectly as it could be. But that does not make a market deficient. The key is whether the market is defined in a way where we can predict and measure harm, and as long as we can do that, the market is properly defined.

The market that we are calling premium mattresses is properly defined according to economic realities. Dr. Israel concedes that there is a higher-end product. He doesn't quibble with the idea that there's a high-end mattress that's different from lower-end mattresses.

And so the question is what belongs in this higher-end market. We looked at the regular course documents and how the defendants in this case and other market participants described their own products and the competition that they experience every day, and everything tells us that $2,000 and above is a reasonable definition of that market that we all agree exists.

So we can use a few -- two different tests to measure whether or not premium mattresses is a plausibly defined market. The first is Brown Shoe. This is all detailed in exhaustive detail on the findings of facts and conclusions of law, so we don't have to go into it in a lot of detail, but there are seven practical indicia in Brown Shoe. You don't have to meet them all. For example, in last week's Kroger case, the court found the existence of the market based on four of the Brown Shoe factors. That's really common. Four or five is fine. But the first one that we meet is characteristics and uses. This is in Findings of Fact 102 through 104. And there's just a testimony that we have that when you get over $2,000, the mattresses just get better. And it is a spectrum. It is not a bright line that something happens at $2,000 where the mattress has radically changed. But that's okay. There's no rule in any of the case law that this market has to be a bright line. It's fine if it travels along a continuum and gets better or changes over the spectrum.

Premium mattresses also have a different customer base. There's testimony about that and documentary evidence about that. Customers that have particular sleep needs are more likely to invest in a mattress.

There are specialized vendors. We've seen over and over again that premium mattresses are more likely to be sold in brick-and-mortar stores, specialty mattress and department

stores, less internet and a lot less big box, like Costco and Walmart.

With regard to distinct pricing, we have cut it off at $2,000 and above as sort of the line that we're using to draw here. And there's also the difference between premium mattresses and non-premium mattresses, the use of MAP and UPP prices. The data at Mattress Firm shows that there's MAP on 83 percent of mattresses priced above $2,000 and only 18 percent of mattresses priced between $1,000 and $2,000.

We also meet the industry recognition prong, which we'll talk a little bit more about. It's confirmed, it's recognized, again, by both defendants and multiple market participants.

The final is sensitivity to price changes. This is really just the HMT. I mean, that's the best way to measure this, but there is regular course evidence and testimony as well.

So we can talk about distinct pricing since I think that's where the dispute really comes to ground. And again, we've gone through a lot of this. It's in the findings of fact, it's in the evidence, so we don't have to belabor it, but it's clear that Tempur Sealy recognizes $2,000 and above as premium mattresses. They recognize it internally, they recognize it with their investors, they recognize it with their customers. And there's just a significant amount of

documentary evidence on this point.

There's also consistent evidence from Mattress Firm that they recognize a $2,000 and above luxury segment for mattresses. And again, we have testimony, we've seen documents from Mattress Firm on this point.

They use the industry-recognized price points from ISPA, which is an industry association. And we also saw consistent evidence from other market participants. This is the slide that captures some testimony, including a video deposition that we submitted from people who were here testifying. We have additional testimony from additional deposition designations that we put in as well.

THE COURT: Let me say, you're not wrong with what factually you're showing here because it's in documents and testimony that did occur. Defendants are going to point to the fact that there were documents and witnesses who got up and testified you have premium as $1,000 and above and -- or even beyond $2,000 and above. What do I do with those to reconcile those?

MS. MALTAS: So I think you can reconcile it best using the law. So the case law is clear that there does not have to be some sort of universality in the recognition of what the market is. We saw that in the Tapestry case from the Southern District of New York earlier this fall.

The defendants there made a big deal about the fact

that people use different words to describe the accessible luxury market. And the court said, you don't have to have this, give the exact quote, "uniform terminology for what the market should be." And here, premium is recognized like accessible luxury was there.

The case law is also clear that there's not -- there should not be an excessive concern for sort of the perfect cutoff. So one recent case that's on note on this topic is the publisher's case. That's U.S. v. Bertelsmann. And there, the court permanently enjoined a book publisher's merger because it was likely to harm competition in the market that the DOJ called anticipated best-selling books. And the court accepted the definition of books where the publishers pay an advance of $250,000 or more because that was a cutoff used by defendants and two other market participants, and it was useful as an analytical tool.

There were other people who may use something else. There were other ways to look at the market. But what the court said was that that was a reasonable and plausible way to look at the market. And importantly there, the court also rejected something that defendants here tried to do, which is to say that if you use a different cutoff, then there would not be harm, and because of that, that the market that the DOJ was putting forward was deficient. And the court said, absolutely not. As long as you can plausibly define a market and there's

harm in that market, you don't get a get-out-of-jail-free tax because there's some other way to define the market where there would be less harm.

Another, I think, important case I would just point the court to is the Anthem case from the D.D.C. So there, the court accepted a definition with a numerical cutoff. They were trying to define what's a national account for insurance, and they used 5,000 employees to equal a national account. The reason was that's what defendants used. And there, the defendants put in a lot of evidence from other market participants where they used a different cutoff. And the court said that it was fine if there were small variations or some exceptions to the proposed cutoff. It didn't have to be unanimous. The court there also -- the defendants there also tried to use a 1,000 or 3,000 cutoff. and the court said that just because there could be some overlap between the different products, that that didn't defeat the idea that 5,000 people and above was a plausible market.

So given all of this, given the case law that's addressed really similar markets, we've more than reasonably defined a relevant market, and we believe the defendants' complaints about that are legally and factually invalid.

So we've also heard a significant amount of testimony from the experts about the application of the hypothetical monopolist test, or the HMT, to this market. And this market

does pass the HMT. And here's a slide to take home. This has the analytical tool case law that we were just talking about.

THE COURT: Okay.

MS. MALTAS: So before we start -- yeah, the HMT will look at our testimony from Mr. Binke. Your Honor asked him the most important question, that when we're looking at instances where the starting price point at the greater than 2,000 and they go up, will they switch between 1,000 and 2,000? And his response was not very often, though.

So with regard to the HMT, this is just a slide that illustrates how the HMT works that Dr. Das Varma put together and how he explained how he conducted the HMT in this case. The candidate market that he used, $2,000 and above, passed the HMT with flying colors. He found 43.1 percent, which would be over the 13.5 percent. And so he had no concerns that this market would pass the hypothetical monopolist test in this case.

Again, defendants lobbed criticism at Dr. Das Varma's application of the HMT, but the case law again teaches us that that is not a sufficient reason to have concerns about the HMT. And that's primarily because Dr. Israel never conducted his own HMT and found that this market failed. And he also didn't try to fix any of the issues that he purportedly found in Dr. Das Varma's HMT and say that it would fail.

And so the case law is clear from cases like

Bazaarvoice and from Tapestry that ad hoc criticisms of the application of the hypothetical monopolist test are not enough under the law. Courts routinely reject defendant criticisms of the HMT when their expert does not put forward their own HMT or attempt to correct the purported problems with the plaintiff's HMT.

And this happened, in addition to these two cases, in Kroger last week. Dr. Israel was actually the expert there. He had some criticisms of the application of the HMT in that case, and the court in the District of Oregon said, you know, you didn't run your own, so it's not sufficient to have criticisms of this one.

Finally, just to pause on the geographic market because, at least according to the findings of fact and conclusions of law, that is a new issue. So we've proven again through -- and again through economic realities and the application of the HMT, which actually measures premium market -- premium mattresses in the U.S., that the market for the supply of premium mattresses is nationwide. For example, suppliers price nationwide using that pricing. And Dr. Israel did not actually contest that geographic market. Now, in the findings of fact and conclusions of law, defendants have put forward some new argument that seems to be about local competition, but it's not clear if they're arguing that there's local competition in the supply market or if what they're

really talking about is that there should be a retail market. The retail market, to be clear, is not at issue in this case at all. We're not putting forward a retail market. Our market is supply of premium mattresses.

So in any event, the market here is the supply of premium mattresses, and there's no evidence at all that this market is anything but national. And we would just ask the Court to reject this last minute and frankly unclear argument from defendants.

So moving on to the mechanism of harm, there are two paths to liability here, two different tests that Illumina has put forward: The ability and incentive test, and then also the Brown Shoe factors from the other part of Brown Shoe.

Now, defendants criticize the ability and incentive standard, but to be clear, that test is binding Fifth Circuit precedent. So that is the test that we need to apply.

So what is ability and incentive? It's just asked simply, is the merged firm able to foreclose and does it have the incentive to foreclose? So the analysis in Illumina was focused on profit maximization. The court of appeals considered two competing interests, Illumina's interest in maximizing its profits in the downstream market, what they called the MCED test that were sold by GRAIL and Illumina's interest in maximizing its profits in the upstream market for the platforms that it could sell to all MCED test developers,

including GRAIL. And the Court upheld the Commission's decision in that case because the real-world evidence showed the Fifth Circuit that it would be more profitable to foreclose than not. The same is true here, and that's why the merger here should be enjoined.

So starting with ability, clearly Tempur Sealy has the ability to foreclose competitors. This was testimony from Mr. Thompson when he was asked about some documents that he had written where he said that he could find a company and kick SSB out. He said when you own something, you have the opportunity to run it like you want to run it. So of course, Tempur Sealy has the ability to run Mattress Firms if it wants to run it, if this merger goes through.

And I think it's been clear through this case, but just to confirm, we're not arguing that Tempur Sealy can only fully foreclose rivals at Mattress Firms. We are also very concerned about the possibility of what you would call partial foreclosure. And partial foreclosure was actually very much at issue in Illumina and drove much of that decision. The Court was concerned not only that Illumina would stop selling to GRAIL's rivals, but it could continue to provide the necessary input that really disadvantaged rivals with pricing and other sales conditions. And so that would be the myriad of ways that Illumina could foreclose that the Fifth Circuit pointed out. And so too here.

So this is a document, our dance with the devil, that was created by a Mattress Firm. And it's interesting to us because it highlights a few mechanisms of partial foreclosure, which we have here on the right side, the having a special step, inflating RSA commissions so that they would be more likely to sell, doing more advertising.

And we also submitted a significant amount of testimony from depositions from TSI and Mattress Firm witnesses that's in our findings of fact, the Findings of Fact 169 through 181. And they described the many ways that Mattress Firm is currently, and other retails are currently, or could slant the floor for any various supplier. And as Mr. DeMartini from Purple explained, this is actually his biggest concern. His biggest concern is not being completely eliminated from stores, but it's being de-emphasized to the point that he's spending all his money to be on the floor at Mattress Firm, but he's not getting sold. And he's just what he called window dressing.

So partial foreclosure is a real risk and a real problem for rival suppliers and also consumers. Because, of course, Dr. Das Varma's model found substantial price increases when he modeled various illustrative partial foreclosure scenarios as well.

THE COURT: Part of the defendant's argument has been if -- so there's -- assuming the merger goes forward, if you

look at it in a static sense of Tempur Sealy continuing to act in its pricing and marketing practices, only as it did before, then -- I'm saying this, I don't know if they've ever said this -- but you look at it and you're like, yes, there'd be an ability and incentive to foreclose if Tempur Sealy continued to behave just like Tempur Sealy. But once they've acquired this very large retail channel and they're looking at the profitability that's built in there, some of their argument has been the incentive structure has changed.

So are you -- I hear your argument as sort of like Tempur Sealy is just going to continue to be like Tempur Sealy always has been, as opposed to what would the now hypothetical entity that's in charge of both of us, how would that entity behave?

MS. MALTAS: So I -- yes, definitely understand that. And I think that that's answered very cleanly by Dr. Das Varma's model. So the way that the model is put together is it uses the divorce and Mattress Firms' retention rate from the divorce to model what would happen in the future.

And so as I understand the testimony from Mattress Firms in particular is that they need to keep a multi-vendor floor in order to keep customers happy, that customers will come in and they'll be looking for something in particular. So the first sort of response to that is partial foreclosure, that you can leave customers on the floor, disadvantage them, still

increase your profits, still increase your prices, and still, you know, on the face of it offer that to customers. But what Dr. Das Varma's model found was he used the 71.8 percent retention rate from the divorce, which frankly is conservative because during the divorce, what Mattress Firm kicked off was the number one and number two best-selling mattresses in the country, Tempur-Pedic and Sealy. Here, they would retain on the floor and it would be other manufacturers who would presumably be removed.

But anyway, his model bakes in the idea that 30 percent of people could walk in the door, turn on their heel, and leave. And so what it shows is that even if you start taking into account the things that drive Mattress Firms the things that the Mattress Firm witnesses say drive them, that it's still more profitable to partially or fully foreclose competitors. That's baked into the model, and it's still shown there.

So in terms of the uniqueness of Mattress Firm, we've proven that Mattress Firm is competitively significant and deeply important for premium mattress suppliers. And no one disputes that Mattress Firm is by far the largest specialty mattress retailer in the country. It has 2,300 stores, far and away larger than any other competitor, and in fact, the next specialty -- next largest specialty retailer has fewer than 400 stores. This is the slide that I'm sure Your Honor has seen a

couple of times, but it just shows how Mattress Firm sells far and away the most premium mattresses as compared to any other multi-brand retailer of premium mattresses.

And it's something that is also expressed and understood by Mattress Firms. So this is testimony from Mr. Busker that was presented through the reading of his deposition. And what he's explaining here is how he explains Mattress Firms' proposition to Purple, what did he tell Purple to try to get Purple to sell at Mattress Firm. And this is what he is explaining, that they exist in every market, they have stores in every DMA, they have a website that drives 80 to 100 million customers, and that you can use Mattress Firm as a nationwide testing lab for new products. And that's why they use the word "kingmaker to describe Mattress Firm, that this is a unique value proposition that Mattress Firm offers to suppliers. And I think there was some suggestion that, you know, the "kingmaker" term was just some Busker bluster, that this was something that he used. But, you know, it's shown through Mr. Eck's testimony and through the documents that this is something that, as Mr. Eck put it, was sort of in the ether at Mattress Firms. This is something that they recognize.

And what does it mean? It means exactly this. It means what Mattress Firm did for Purple. And, you know, we heard testimony from Mr. DeMartini, but this is on the other side from Mattress Firm, recognizing how they benefited Purple,

how they helped Purple succeed. And we heard it from Purple, we heard it from Serta Simmons, that Mattress Firm is their most important customer. And Mr. DeMartini described it in a number of different ways, not only sort of the size of Mattress Firm or what they offered to Purple when they grew, but, again, that innovation, that Mattress Firm is the only place where they can go and get a nationwide view to help them develop mattresses.

And I wanted to touch just briefly on the Purple testimony as well because we heard from Dr. Israel, and I'll be a little circumspect here because I think some of this is confidential. But we heard from Dr. Israel that Mr. DeMartini was essentially wrong in his assessment of Mattress Firms' importance because they sell just as much to two other retailers. But, well, we found out through the course of the trial that that's not true, that they're not going to be selling to these retailers in the future. And so it's just something to highlight to say that, you know, Mr. DeMartini knows his business, he knows how important Mattress Firm is to Purple, and I think it's just another example of maybe Dr. Israel not being completely on top of the evidence or the real-world facts here.

We also heard from Mr. Binke from King Koil -- and I did want to just pause on King Koil for a second because this is a key fact that has to be considered under Illumina. In

Illumina, the court of appeals repeatedly rejected defendants' attempts to say that they had to look at the world right now, how competition and foreclosure would be right now. And the court said that you have to consider the potential for foreclosure that can occur in the future. And that's why King Koil matters. It's why other small manufacturers matter. Defendants only want to focus on the two what they call big players, Purple and Serta Simmons. And we saw on their slides that they say everybody else is other less than 3 percent. But the substantial risk of foreclosure here is also foreclosure of future competition. And we can't ignore King Koil and the other less than 3 percent like defendants want us to do.

King Koil has a small share now, but it's planning on growing substantially, and that future growth could be foreclosed. And, in fact, that's why Tempur Sealy investors have stated that they want to eliminate future competition. It's not just the competition on the floor today. It's the possibility of using Mattress Firm as an incubator, as a kingmaker, and future growth in the future as well.

And these are primarily from depositions, so I just wanted to focus on these. But we heard from a lot of other suppliers who don't sell at Mattress Firm right now or who sell a little bit and want to grow at Mattress Firm, that Mattress Firm is how you make it.

So this is Ashley. They don't sell at Mattress Firm

right now, but, you know, sort of explaining why it would be important to sell at Mattress Firm.

We heard the same thing from Spring Air, and he's talking about how selling at Mattress Firm provides a large feather in your hat. It helps you to develop your brand.

Similar things from BEDGEAR, the premium mattress supplier who'd like to sell at Mattress Firm. Casper has never been able to sell at Mattress Firm, and Paramount also as well. They all agree that Mattress Firm is how you make it.

Now, we've heard from defendants that there are other suppliers that do not sell at Mattress Firm, and that's completely true, and it also does not matter. I'm sure that they'll put a slide back up that has all of the different mattress suppliers on it, and I would just ask how many anyone here has heard of on that list.

We also understand from the testimony of Mr. Nguyen at Avocado that that path of trying to succeed without Mattress Firm is really hard. Mr. Nguyen came here and testified, and he confirmed that they -- that Avocado wanted to sell at Mattress Firm, but the terms Mattress Firm demanded were too rich and that they would still want to sell at Mattress Firm. He also talked about how they're nowhere near their profitability goals, and they've been struggling in recent years.

THE COURT: Well, what do I make of that? Because

that's Mattress Firm currently saying we're not going to carry your product.

MS. MALTAS: I don't think there's anything to think that after Tempur Sealy buys Mattress Firm that they want -- would want to carry the product.

THE COURT: I think that's true, but I don't know -- I don't know, because we're looking at things static and then predicting from the future, but just looking at it static, Mattress Firm says, Avocado, your product may be great, but we're not carrying it --

MS. MALTAS: Right.

THE COURT: -- for whatever reason because the financial terms are -- I know one thing in my job is not to oversee the details of what the proper licensing schemes should be, but Mattress Firm on its own, with Avocado and some others, has decided we're not carrying it now. But the Government's argument is I guess that's dynamic and there's influx, and people should be able to continue to compete for that.

MS. MALTAS: People should definitely be able to compete for us, and I do think that this is more of a rebuttal point for us than anything else. The defendants have tried to say that you don't need Mattress Firm. There's companies like Avocado out there. They're succeeding without Mattress Firm. And then when Mr. Ngyuyen came and testified, that's not necessarily the case.

THE COURT: Where will it fit into your argument, and maybe it's in rebuttal because one of the big points from the defendants that they have been emphasizing is, you know, Tempur Sealy got kicked off the Mattress Firm floor, the divorce that you referred to, and they worked hard and scrambled and replaced market share. I'm not sure that it got completely back up to 100 percent, et cetera, et cetera. But they're arguing that shows that you can compete and succeed without necessarily having access to Mattress Firm. I don't know that that's part of where you're arguing right now, but are you going to cover that, what lessons can be drawn from the divorce?

MS. MALTAS: So I think there are really -- as we think about it with how we see what will happen after the merger is there actually aren't too many lessons to be drawn from the divorce on that side. We definitely do see a lot of importance to the divorce in terms of Mattress Firm's retention of customers. But really at the end of the day, what we see in our modeling and what we think is going to happen in the future is that prices are going to go up to consumers, and that can be supercharged by foreclosing competitors partially or fully on the floor at Mattress Firm.

But that modeling is not dependent on there being any harm to those competitors. So we didn't do the type of thing where you look at whether or not there would be increased costs

to competitors and then take the higher prices off of that. So, you know, to us, whether or not the competitors can recoup, they can work really hard, they can try to go to other places, is a little beside the point to the harm that we see, which is as soon as Tempur Sealy owns Mattress Firm, they have the ability to raise prices, and those prices only go up the more that they control the floor and the more that they push off competitors.

There very well may be additional harms to competitors that have price effects in the market as those competitors start to experience cost issues. Then that can also have an effect on pricing for sure, but that's why our model is a very conservative model. It can only get worse as it's worse for competitors, but even if, you know, they are able to recoup, we're still going to see those price effects at Mattress Firm, and those bleed through the whole market because of MAP pricing.

THE COURT: Okay. All right.

MS. MALTAS: And I guess just the last thing, and this does go to your point a little bit too about the possibility of recoupment, just to, you know, try to talk about an argument that defendants make, is that it is really hard to make your own stores. That's definitely been focused as something that potentially people could do, but, you know, Sleep Number was here, they described the issues with that, and

then we have additional testimony live and then also from depositions on that as well.

Now, defendants' primary response to this is that we should just ignore all of this evidence that we just looked at about how important Mattress Firm is, its unique place in the market, and we should focus only on market shares. And if we do that, that Mattress Firm is just too small to matter.

So the first thing that they say about Mattress Firm's size, though, is just completely wrong. So they say that Mattress Firm's market share in premium mattresses is actually 8.8 percent, and it's not. That is just a made-up number by Dr. Israel. The way that they get that number is they claim that when we look at the share that Mattress Firm sells of premium mattresses, that we cannot look at the share that TSI has right now because that share somehow cannot be foreclosed in the future. But Dr. Israel admits that's not true. He admits that there is no -- that that share can be competed for by other firms, that there is no share that is currently foreclosed. And it's also completely inconsistent with their whole argument in this case, that Mattress Firm in the future will be independent and it will make its own decisions on merchandising. If TSI has nowhere to go but up, if its share is already not subject to foreclosure, it's not contestable, then that's inconsistent with how they're saying that they're going to run Mattress Firm.

So the market share here really is at least 25 percent, and it's as high as 35 percent if you exclude mono-brand retailers. But regardless of what the share is, the number, as a matter of law, is not the way that we assess customer foreclosure and harm to competition. There is no case that has any sort of brightline rule or cutoff for harm in a customer foreclosure case.

And defendants cited a few cases in their opening statement where they said had percentages that were just too low as a matter of law. But we have in the conclusions of law in our section as well some cases that show enjoining mergers and finding harm to competition on exactly the same shares. So -- and, you know, I don't have to run through all of them, but, you know, they have a case that says 19 percent is inconclusive. But Kimberly-Clark was enjoined at 12.5 percent to 18 percent. They also have a case that they say 8.8 percent was not enough. But we've seen cases where 8 percent is enough or where 10 percent is enough, and that's Sybron and Fo - rd.

And so what these cases demonstrate is just there's no brightline rule. The courts are pragmatic. They look at everything case by case in order to determine if there's a risk of substantial harm to competition.

The other thing I would just pause on with this from the conclusions of law is that defendants ask this court to consider case law from exclusive dealing cases. And just to

clarify, those are not relevant here at all. So there is a foreclosure element to exclusive dealing. But under Tampa Electric, the test for determining the violation related to exclusive dealing includes proof of substantial foreclosure. And that's why cases considering exclusive dealing may discuss foreclosure shares, because they're trying to determine if that share is substantial. But there's no such requirement in Section 7 or in the case law considering vertical mergers that foreclosure be substantial. And so those cases are just inapposite.

We also saw a lot of evidence about how competitive it is at Mattress Firm and how competition at Mattress Firm is intense. We saw a lot of evidence about the Casper handshake deal, the reason that Casper is not on the floor at Mattress Firm. But what's even more interesting is the story of all of the times that Tempur Sealy repeatedly tried to get Purple off the floor because Mattress Firm always said no. And Tempur Sealy recognized that it had to have Purple -- Mattress Firm, to get rid of Purple, that a combo of TSI and Mattress Firm would kill them. But historically, that's not how Mattress Firm has operated. Mattress Firm has never wanted to let Tempur Sealy dominate its floor, and it's actually fostered competition between suppliers in order to increase its leverage with them. These are just a couple of examples of Mattress Firm documents that talk about it, including saying that, you

know, they would be very disadvantaged if Tempur Sealy had 50 to 60 percent balance of share. These are also some examples of how Tempur Sealy tried to buy Mattress Firm's floor in the past, and an independent Mattress Firm had the ability to say no.

So these are times when Tempur Sealy pushed to be exclusive, to throw competitors off the floor, or to disadvantage rivals, and Mattress Firm had the ability to push back on that. But, of course, once Tempur Sealy owns Mattress Firm, the incentive will no longer exist.

So the internal evidence from Tempur Sealy is crystal clear that Tempur Sealy and all of its stakeholders recognize Tempur Sealy's incentive to increase its balance of share on the floor at Mattress Firm and disadvantage rivals post-acquisition. So every analysis that has been done that measures profitability with an increased balance of share, and that's from the accretion model that Tempur Sealy did, to back-of-the-envelope analyses conducted by investors, to Dr. Das Varma's rigorous model, confirm that increasing Tempur Sealy's presence on the Mattress Firm floor is more profitable than not.

And we can just see that these are consistent over time. This is Project Gray from 2015. Defendants like to push back on this and say this is not the plan for Project Lima. But no one's saying this is the plan for Project Lima. What

we're saying is this is a recognition from an analysis of buying Mattress Firm that says you can have additional value if you have more Tempur slots on the floor. And, importantly, when we think about Dr. Israel's model, that buying Mattress Firm gives improved pricing discipline, that you have the ability to control the pricing at Mattress Firm.

The accretion model shows this as well. This is the accretion model from 2021, September 2021. Mr. Thompson testified that he had never seen a model like this before, but he received it in September 2021, and it also shows that it would be more profitable than not to increase the balance of share here by just 5 percent. Mr. Thompson also admitted that he was told this repeatedly by investors, time after time, that they thought that it would be a good thing to do after buying Mattress Firm was to eliminate future competition and block new competition. And they continued to tell and ask questions to Tempur Sealy about this.

This is an email between Ms. Moore, Aubrey Moore, and an investor. And, again, this is not used to say that Ms. Moore didn't say to them, well, our plan is not to do this.

THE COURT: So let me ask. So these are all documents that were produced from, I guess, either Tempur Sealy or Mattress Firm files. And you're saying -- it's subjective to the person that was writing it up, but you're saying it's objective evidence of an incentive to foreclose. Something

along those lines?

MS. MALTAS: It's a recognition of the incentive.

THE COURT: And so is your argument then they need to -- we don't know. Like whatever the person here is saying, I mean, I can read it and decide whether it makes sense or not. But have the defendants said why this doesn't exist, like such incentive is this, such ability? It's -- because it's separate from ability. You're using this to show incentive. Something showing that, no, that's not really there. We can't really increase our profits by tamping down slots or absolutely foreclosing or disfavoring.

MS. MALTAS: I'm not aware of anything. I'm not aware of any modeling. Mr. Eck testified that there was no such modeling at Mattress Firm. I believe the defendants have said repeatedly that Tempur Sealy never modeled anything about increasing their balance of shares. I mean, obviously, they'll have the opportunity to discuss on this. But we're not aware of any counterevidence, again, to the incentive. Setting aside what they say their plan is, but to the actual incentive that if you were to foreclose partially or fully, that you would make more money, that there would be more profit.

THE COURT: And then maybe it's for your rebuttal, but, you know, one of the defendants' biggest arguments is to J.P. Morgan, whoever was doing the financials for it, was keep assumptions the same, that it's going to be a multi-brand

retailer going forward, that that's not there. And so there's -- you know, whatever liabilities could arise from that being inaccurate and disclosed improperly, et cetera. But are you responding to that? In what's coming up, are you responding to that?

MS. MALTAS: I can respond to that now, Your Honor.

THE COURT: Okay.

MS. MALTAS: I mean, I don't think we heard any concrete evidence of what these purported liabilities could be. I know Mr. Neu sort of testified about that, but I'm not familiar with it. What I would say is that as the pro formas were made and what J.P. Morgan was told and what the board of directors voted on is the most conservative case that could be made for buying Mattress Firm and the most conservative valuation for buying Mattress Firm. Because what we see is, is if you leave Mattress Firm's floor as it is, that that is that pro forma. And if you increase the balance of share, your profits increase.

So that means that you will make more money if you foreclose competitors. I don't think it's particularly telling that J.P. Morgan modeled and the board of directors voted on the most conservative profit or pro forma analysis of Mattress Firms. I don't think anyone is going to be disappointed if Tempur Sealy paid $4 billion for Mattress Firm based on the most conservative pro forma and then they're able to make

significantly more money than people were expecting. And so that's very different than what you see in cases where an assumption was made on a higher price or a higher profit, and then that would reduce over time. There, you could see that maybe something was, the assumptions were made and decisions were made on that -- But here it's very opposite. This is the most conservative. They can always make more money in the future if they foreclose.

THE COURT: Okay.

MS. MALTAS: And I did just want to touch on this top five shareholder annual letter because defendants have said, well, Mr. Thompson, when he talked to the investors, he told them no, this is not what they wanted -- how he wanted to run Mattress Firm. But the investors are clearly not listening, because this is just a few months ago, and they're still saying an increased balance of share at Tempur Sealy Brands within Mattress Firm could increase profitability. So there continues to be a beating of this drum and a recognition that this is something that could be done. And again, that's why the incentive matters, not the plan. This incentive remains, even if the plan today is not to do this. These investors could get seats on the board of directors. So we don't --

THE COURT: Say that again.

MS. MALTAS: They could get seats on the board of directors.

THE COURT: Oh, okay.

MS. MALTAS: We don't know what's going to happen in the future, but the incentive remains. And again, from Wall Street analysts, and more importantly from the board of directors. And we've seen these documents from Mr. Thompson that he recognizes and he's instructed Mattress Firm to hold the floor stable, recognizing the ability and the incentive to foreclose Serta Simmons.

And this is all reflected in Dr. Das Varma's model. And again, the key thing here, what we talked about earlier, is that he took into account this very thing that Mattress Firm says they're worried about, that, you know, customers, if there is foreclosure, they'll leave. But he took into account how many sales would be retained using the divorce. And he found that based on that, again a conservative assumption, that they would still be profitable to partially or fully foreclose. And we see this with his profit increases.

Very briefly, I just want to touch on Brown Shoe. We'll leave this behind. This is also all in the findings of fact and conclusions of law. But these are overlapping tests. There's nothing that's brand new when you're looking at the Brown Shoe foreclosure factors. But all of this evidence goes to proving the Brown Shoe foreclosure factors, as well, and it's the second reason why we meet the Illumina test for determining whether or not this is likely to happen.

I wanted just to touch on two more pieces that are sort of rebuttal to some of the things that the defendants have said. And the first one is talking about the plans. Again, we're focusing on the incentive. We're not focusing on the plans. But it is important to note that everything that was drafted, everything that was said, was said under the guise and under the expectation of an antitrust investigation. So we saw in the J.P. Morgan presentation that was made to the Board in October 2021, that they were analyzing whether or not there would be a second request. We see that the very first entry on the privilege log that deals with antitrust is September 2021. And we know that they filed HSR in October 2022, and, you know, immediately were brought into the antitrust process with the FTC. So under the case law, there is a credibility determination that is made when you're creating documents when you're under antitrust investigation.

Also, just wanted to touch briefly on the idea that Mattress Firm will be independent. So this was an interesting comment that was made by Mr. Eck, that Scott Thompson is driving the merger, so it's his car, he'll have the keys, and it's up to him to decide when we were talking about the post-merger supply contract. But we see this all over the place. I mean, Mattress Firm -- there's no reason to think Mattress Firm is going to be independent in the future because, frankly, Mattress Firm isn't independent now. We heard

testimony after testimony, so document after document, of all of the ways that Tempur Sealy is already planning for Mattress Firm after the merger, doing the post-close supply agreement, instructing Mattress Firm to hold the floor stable, doing some conditioning of the Purple Sherwood supply contract, and these are all on here. But it's clear that even today, Tempur Sealy is very interested in the management of Mattress Firm, and there's no reason to think that's going to all of a sudden change after they actually own Tempur Sealy -- own Mattress Firm.

We also heard a lot about Dreams, so that after the acquisition, Mattress Firm will be run just like Dreams, so we put together a slide to show what that would look like. You can see the peace sign that Mattress Firm likes to have, and this is how if it were like Dreams, 9 percent for all third parties, 91 percent for Tempur Sealy and Mattress Firm. There was a lot of testimony on Dreams and whether or not it's independent, but the undisputed facts from the data and the testimony is that Dreams has steadily decreased third-party presence on the floor and replaced it with Sealy. So whether it's Dreams doing all of that purportedly on its own or because, more reasonably, it's a subsidiary, and everyone recognizes it's in their personal and corporate-wide financial interest to do that, is something to be assessed.

Also, very, very briefly on SOVA, because

Mr. Montgomery ended up not coming to testify live, there was a lot of statements made about SOVA and SOVA being multi-brand. I just wanted to point out Mr. Montgomery's testimony that, you know, in addition to the fact that the evidence shows that Tempur has grown its balance of share at SOVA in Sweden, the reason Sealy hasn't is because it can't make the bed sets that are sold in Sweden. And that was Mr. Montgomery's testimony on this. So --

THE COURT: What's different about bed sets in Sweden?

MS. MALTAS: Apparently they don't just sell the mattresses, they sell a lot of products together, and Sealy, according to Mr. Montgomery, is not set up to actually do that, so it can't compete at the SOVA stores.

So moving on to the model, we talked a lot already about Dr. Das Varma's model, so I won't go into too much detail here. We'll just say that the way that Dr. Das Varma conducts his model in order to measure what the pricing effects would be is he balances upward pricing pressure and downward pricing pressure that may result from the merger. And now that upward pricing pressure comes from the fact that there's a lessening of competitive pressure on Tempur Sealy to compete on price at Mattress Firms. And once it raises its price at Mattress Firms, there's MAP pricing, so it goes everywhere through the market.

Now he balanced this against downward pricing pressure, caused by elimination of double marginalization, EDM. And this just occurs when there were two margins and one becomes a transfer payment. That eliminates the double marginalization, and in many cases, we do see downward pressure on prices. So in his model, he balanced those two things together, and he found that the upward pricing pressure wins out.

He also did a sensitivity analysis using prices at $1,500 and $1,750, and he still found harm. And these are the prices that he found in his affirmative models that he put together.

Now, in response to criticisms from Dr. Israel, Dr. Das Varma created what we call the bargaining model. Now, to hear defendants tell it, this model shows the merger is pro-competitive, because Serta Simmons can stay on the floor. But that is not accurate. The bargaining model shows harm to consumers and competition. It just uses a different mechanism of harm. So in this model, Serta Simmons has to pay a substantially higher margin to Tempur Sealy in order to buy a place on the floor at Mattress Firm. This raises Tempur Sealy's cost. This is sort of the more traditional way of looking at how customer foreclosure affects pricing. And that price, again -- those price increases migrate through the market. And he calculates $347 million per year price

increases.

So it's not something pro-competitive that Serta Simmons would have to pay so much more to stay on the floor at Mattress Firm. It's just another mechanism of harm, another mechanism of foreclosure that has a price effect on consumers.

And we were talking about how his model is conservative. These are just some other additional harms that can't really be quantified but are likely to occur and would also then sort of supercharge the price increases that we've already seen in terms of reduction -- reducing or eliminating incentives to help, raising costs, and compromising efficiency, enhancing information sharing.

Now, in contrast, Dr. Israel has created a model that is based on a phenomenon that he has made up called retailer effort that has never been recognized in any other case or article other than the one that he's written and has not been published. He calls this EDM, but it is not real EDM. And solely through the invocation of this retailer effort, Dr. Israel finds that this merger will cause Tempur Sealy to drop its price on each premium mattress by almost $500 and that, as a result, this merger is actually pro-competitive.

So this theory is not only untested, it's not based on any record evidence. There is no evidence in the record that Tempur Sealy intends to lower prices after this merger. That is actually a common claim made by merging parties, and

we've not put it forward here.

The actual record shows that Tempur Sealy intends to rationalize pricing after the merger. They want to raise the price umbrella, and they want to make sure that Mattress Firm follows MAP and does not discount. And we saw that earlier in Project Ray. That was something that was talked about as early as 2015. But then just very recently, in December 2023, there was a meeting between Tempur Sealy and Mattress Firm where they talked about raising the price umbrella.

We also heard evidence from Mr. Papettas, who very credibly testified about his discussion with Mr. Rusing, where Mr. Rusing described how you -- how he should view this -- Mr. Papettas should view this merger as positive, because it's very similar to the Sleep Outfitters merger, where Tempur Sealy was able to rationalize pricing, keep Sleep Outfitters from discounting, make sure that Sleep Outfitters was following MAP. So making sure that there was not the lower price effect from the merger, and that would be the same thing that would happen with Mattress Firm.

We also just see that Dr. Israel's model leads to some extreme and market-crushing results. The main one that we focused on, again with Mr. Papettas, was that rivals' retailer profit would decrease 34 percent. And when we asked Mr. Papettas about this, he explained that they would have to rethink their business if that's actually what happened because

that would be a pretty steep decrease. So the Court simply cannot rely on Dr. Israel's model.

This is kind of a later-breaking development, but last week, two courts enjoined the merger of Kroger and Albertson, and Dr. Israel was actually defendant's expert there as well, and he used a -- he was opining on market definition, and he put forward a market definition model in that case. And it's nothing substantively like the retailer effort model here, but it's a really similar approach. So he created a brand-new model that had never been used before. He made assumptions that were not based on any record evidence or real data, and the model provided results that were inconsistent with the market, and it was rejected by the courts.

So the same result's required here. Dr. Das Varma's model is tethered in real-world facts and documents and provides a reliable prediction of what will happen as this merger goes forward.

Very briefly on efficiencies, we heard from Mr. Hearle. Defendants do not dispute any conclusions that he reached about their claimed efficiencies. Dr. Israel did not deal with efficiencies, so there really is no efficiencies defense in this case.

And as to the commitments that defendants have made, so first of all, just as a matter of law, the Court should disregard the slot commitment because it's not enforceable or

binding. And courts have repeatedly ignored similar offers made during investigations and litigation because they're just empty promises made to get the deal done. We saw that in Kroger last week. The defendants promised to invest a billion dollars in the stores if the merger went through, but the court disregarded that because it was unenforceable and it was made during the investigation.

Same thing happened in publishers. The defendants put together -- they promised that they would bid against each other, even if there were no other bidders, and the court found that that promise could be broken at will. The court actually explained that the promise called to mind the consciousness of guilt, that the defendants made the promise because they were so aware of how threatening the merger was to authors and agents. And so too here, this type of commitment, which is not binding in any way, not enforceable in any way, should not be considered.

It also doesn't help the very limited so-called commitment to keep slots on the floor. We heard from a number of different suppliers that this wouldn't be something that would be helpful to them, especially if you're thinking about potentially vertical slots as well.

THE COURT: So I was reading the Microsoft findings in advance of this, and at the conclusion there, the court was observing Microsoft had made specific commitments about 10

years would carry Call of Duty or -- I can't remember exactly the details of that market. Other than what has been committed here with Mattress Warehouse, there's nothing else about what slots would be or what balance of share Tempur Sealy would not go beyond, correct?

MS. MALTAS: I believe that the only contractual commitments, actually enforceable commitments, are the divestiture agreement with Mattress Warehouse, which will become in effect if the merger goes through and these one-year extensions of the supply agreements --

THE COURT: Right, there were those.

MS. MALTAS: that Tempur Sealy signed. But there's no commitment to a balance of share, to maintaining anything on the floor, which is actually enforceable in any way.

THE COURT: Am I -- I don't know if it's in the way of settlement negotiations, so I don't want anything like -- is that something that I can inquire as to whether you negotiated, asked for that? Or is it -- if they had made any offers as to any of that, it might have made a difference to you, but instead there were -- but -- or is it to the contrary, no, there's no terms and conditions on which the FTC could have ever gotten comfortable with this?

MS. MALTAS: It's hard to say, I mean, because nothing additional to this was ever offered. So, I mean, I think that we were always very open to having dialogue. This

was the offer that was made, and it is -- it is and remains insufficient.

THE COURT: Okay.

MS. MALTAS: So just finally, briefly, on the post-close, these are contacts that Tempur Sealy, for some reason, reached with the suppliers, not Mattress Firm, and, you know, they're just a year. Mr. DeMartini actually testified he thinks it hurts him, he put a date on an evergreen agreement, as he put it, that he had an agreement that was not going to terminate now in one year, and as Mr. Thompson admitted, you know, he may terminate all of these. If he doesn't think they're working, they don't have to keep going forward with them.

THE COURT: Right.

MS. MALTAS: And then to the divestiture, and I'm going to be very circumspect here because I think a lot of this is confidential, but it's just not going to make any -- it's just not going to help at all. I mean, this shows what happens with Mattress Warehouse in terms of retail shares, barely a dent. This is the map that shows where the stores are, and we also know about the commitments that are in the Mattress Warehouse and the Tempur Sealy agreement, which really make it so that it's not too much of an alternative now to Mattress Firm for other suppliers. And then finally, Mr. Papettas did testify about how long it would take to become a nationwide

retailer.

Finally, on the last element, which is the equities, the equities favor granting a preliminary injunction. And there are a number of problems that will occur immediately if the defendants are able to close before the Commission rules on the merits. But the one that we've been most focused on, because the suppliers are most focused on it, is the sharing of confidential information.

So Tempur Sealy has repeatedly refused to engage with any competitor supplier about the terms of any firewall or protection for confidential information post-close. These suppliers have repeatedly asked for protection, and they've repeatedly been refused. Tempur Sealy says that they'll get to it at some point after the post-close, but there's no plan or proposal or timeline.

And it's not a hypothetical concern. Tempur Sealy, as the evidence shows, has a history of surreptitiously obtaining competitor information, and in fact, Mr. Thompson is actively trying to access Serta Simmons' competitive information and access it post-close, as we saw with regard to the NDA. So we very much need the preliminary injunction in order to stop all of this competitively sensitive information immediately going into the hands of Tempur Sealy if the merger closes.

So, Your Honor, again, we thank you so much for your

time through this case and for everyone who's been involved. I mean, we feel very strongly that we have met our burden here, particularly for a preliminary injunction under Section 13(b), that it is very likely that there would be substantial harm to consumers in the form of higher prices if this merger is to go forward. And we would ask Your Honor to grant our motion for a preliminary injunction.

THE COURT: All right. Thank you very much.

All right. Mr. Shores, will you be arguing? I'm going to give you at least five minutes to get ready to argue.

MR. SHORES: Right. I will be arguing.

THE COURT: How much would you like?

MR. SHORES: Could I take ten minutes?

THE COURT: Ten minutes. All right. We'll be back on the record in ten minutes. Thank you very much.

(Recess taken at 2:46 p.m.)

(Proceedings resume at 3:00 p.m.)

THE CLERK: All rise.

THE COURT: Thank you, everyone. Please be seated.

Mr. Shores, will I be hearing from both you and Ms. Razi or just you?

MR. SHORES: I'll be handling the argument. Of course, Ms. Razi is available for questions to the extent they're (indiscernible).

THE COURT: Okay. Sounds good. Thank you.

MR. SHORES: Your Honor, may I proceed?

THE COURT: Yes, please.

MR. SHORES: Let me just echo the thanks to the Court, to all the staff of the Court, and also to the FTC for what was, I think, a very well-conducted litigation. And we certainly appreciate the Court's time and attention to this important matter. So I just wanted --

THE COURT: Thank you.

MR. SHORES: -- to say that at the outset.

THE COURT: I appreciate that very much, thank you.

MR. SHORES: May it please the Court. Your Honor, every vertical merger, including this one, must be analyzed against the backdrop of three well-accepted principles. Vertical integration is extremely common, has strong pro-competitive benefits, and it presents less competitive concerns than horizontal mergers of competition.

And the FTC brought a very specific case here that was framed in their opening statement. If we could go to the next slide. And what was that case?

They brought what is called a customer foreclosure theory. And that theory has not been adopted in 50 years by courts. And importantly, unlike input foreclosure that we saw in Illumina, which can completely prevent competition, customer foreclosure presents less competitive risks because there are ordinarily multiple channels to get products to consumers. And

we saw that in this case. You can get products there directly. You can get them there through the internet. And there are all types of retail formats to get your products to consumers.

But the Government's customer foreclosure theory was even more specific in that. This is the Government's opening statement framing this case. And what did they say? They said this case is about the central allegation that Tempur Sealy is going to prevent rival suppliers of so-called premium mattresses from selling at Mattress Firm after this merger.

And I want to pause here, Your Honor, because what we just heard in closing arguments is very different from that case and how this is cited. Foreclosure does matter in a foreclosure case, Your Honor. And the reason it matters is because the whole theory of the case is that you are going to foreclose competitors, and therefore, consumers are going to be harmed.

THE COURT: As in, does foreclose mean you're totally off the floor or you have less share than you did before?

MR. SHORES: Well, I think the way the Government started this case, it was completely off the floor.

THE COURT: Mm-hmm.

MR. SHORES: Where we are now, it is in a partial foreclosure world, Your Honor.

THE COURT: Does that matter?

MR. SHORES: I think it matters in this sense. As we

showed at --

THE COURT: Like, the partial -- assuming that the theory has changed, but partial foreclosure is about a theory; is that correct?

MR. SHORES: Well, it can be, Your Honor.

THE COURT: Okay.

MR. SHORES: But look at Illumina. The very myriad language that was talked about in Illumina, the next sentence in Illumina says, but more importantly, the reason matters is because your rivals don't have anywhere else to turn. So if your rivals have somewhere else to turn to sell their products, here mattresses, then the whole idea of partial foreclosure is thrown out.

And what we saw here -- and the math does matter, even in the cases that they cite, is the maximum amount of foreclosure, even giving the Government its best due, was 8.8 percent. And I'm happy to walk through that in detail, Your Honor.

But I will say this about the cases, and if we could go to the next slide, please. There are some cases, I would concede, from 1972 and earlier, that find these types of foreclosure percentages, or ten percent and under. They found that in the factual circumstances of those cases, it was enough to have a Section 7 violation. For a lot of different reasons, we could talk about the distinctions.

But the most fundamental point is that antitrust law changed. And it changed even at the Supreme Court. I'd refer the Court to the GTE Sylvania case from 1977. There was a sea change in the antitrust laws to focus it on consumer welfare and economics. And from the cases that we cite, Fruehauf from 1979 to the cases in the 1980s, all reject foreclosure cases where the percentage of foreclosure was below ten percent.

And what Fruehauf says, and what applies absolutely here is, at that level, first of all, if you reject those types of mergers, you're going to call into question a variety of -- garden variety pro-competitive vertical mergers. But also, there's simply going to be a realignment of sales to other channels.

So here, even if, and it's not the plan, it's not the intent, it's not the incentive to remove Serta, Simmons, or Purple from the floor, but even if that happened, the basic map in the evidence shows, in the words of Illumina, they have plenty of other places to turn to sell their products. And that's ultimately dispositive in a Section 7 case.

THE COURT: Are you going to -- in your slides, are you going to get into the 8.8 percent in more detail? Or should I ask the question about that now?

MR. SHORES: Why don't we go directly there? And I'm happy to jump around, Your Honor. If we could, it'll take me a second to get the right slide.

THE COURT: Well, actually, take it in your order. I have a question, and I'll ask it when you get there.

MR. SHORES: Okay. That sounds great, Your Honor.

THE COURT: You're still just, I guess, doing intro. Go ahead.

MR. SHORES: Okay. If we could go to the next slide, please, Mr. McLeod.

So the foreclosure percentage also has to be matched up with the evidence, Your Honor. And the evidence here was, Purple testified, the Government's lead-off witness, that it didn't really have a concern about being foreclosed, from being defloored totally.

Serta Simmons projected growth at Mattress Firm through 2027. And they submitted under oath declarations, saying that was their good faith projections about what was going to happen, even after the time frame and when this merger would have closed.

And then, finally, you heard about, over and over, the consistent contemporaneous evidence from Tempur Sealy that it has a plan, a multi-branded plan for Mattress Firm after the merger.

And I want to address directly this idea that plans don't matter. Okay? Plans do matter. This is a multi-billion dollar company with very sophisticated executives. These executives know how to run and model a business. And there was

a plan. It's reflected in their pro forma. When the plan was to adopt the multi-branded model that Mattress Firm has been successful under for decades, there was no evidence. The words "most conservative" were not used in this trial. That is made up. Okay.

The plan was a multi-branded plan because these very sophisticated executives recognized that if you went away from that multi-branded plan, there were a lot of downsides, Your Honor. Number one, you lose sales. As you heard the testimony, people are brand loyal to Serta Simmons and Purple. And I'll talk about the model in a minute that attempts to wash this away. But the reality is, all of the witnesses, the fact witnesses, said you would lose sales. You've heard John Eck say it would be a fool's errand. Ms. Dament said it would be catastrophic to try to remove those brands from the floor. That's number one.

Number two, retail sales associates want to sell most brands. They want multiple brands to sell. And the unequivocal testimony was that they would be demoralized. They would lose their incentives if they weren't able to sell multiple brands.

`We heard about other retailers, how Tempur Sealy went out, and other retailers were concerned that they would keep all the beds for Mattress Firms instead of selling at other retailers. So they told the retailer, we're going to

have a multi-branded floor. They told their investors. They had told the credit rating agencies. They told lenders. They told insurers.

And why did they do that? Because that plan makes sense. And the reality is, in your looking at incentives, you have to look at all the incentives, including the incentives reputationally and legally, from walking away from that plan.

And Your Honor mentioned the Microsoft case a second ago. And one of the things that Microsoft said was, those reputational incentives are very real. And they mean that companies act in accordance with what their plans are, what they represent to courts under oath, and what they represent to the market.

So if we could go to the next slide.

THE COURT: So that's reputationally, but legally there's not -- Mattress Firm, Tempur Sealy hasn't legally disincentivized itself from wanting to de-emphasize or de-floor other brands.

MR. SHORES: Well --

THE COURT: Which -- what I was pointing to, the Illumina case for, was that it's one thing to say it in your plans. It's one thing to say it. It's another thing to have said to the Court, you know, through this litigation, we also recognize that we're going to keep 35 percent of the slots on the floor for a particular retail brand, something akin to what

Microsoft did with the FTC and then signed on the dotted line before, in the legally enforceable way, before the Court.

MR. SHORES: Well, so with respect to the commitments, what Tempur Sealy did was committed to have a minimum number of third-party brands on the floor to the FTC. That was in writing. We've said it publicly. You know, the CEO has said it publicly and has said it under oath. So there's no binding contract, if that's the question being asked.

But I think Microsoft itself recognized that you are very much incentivized as a public company to keep promises you give to an antitrust regulator, that you give to a court, and that you commit to a public because you have reputational incentives on the line. So it's just not the case that there has to be a binding contract for that to be an important factor in the Court's analysis.

THE COURT: If I saw it as, like, I guess Ms. Maltas just articulated it, and I know you're disagreeing with it, that it was like the most conservative estimate. But she's saying, yes, it's represented being a multi-branded retailer going forward. But if Tempur Sealy believes it will do better profitability-wise by disadvantaging or foreclosing in whatever way the floor, it could do that. And there's not going to be like a shareholder investor action if you're doing better profitability-wise than you would have if you would be doing it

as a multi-branded floor. That's at least what I took from her argument.

MR. SHORES: Well, but I think that assumes, Your Honor, that there is no repercussions from walking away from a plan, and that at bottom it's the plan that makes the most sense from a board and an executive perspective. I mean, again, Tempur Sealy is paying $4 billion for a business model.

THE COURT: Right.

MR. SHORES: And what the plans reflect is --

THE COURT: And that was the question that I asked. I mean, I understand all of that as well, that there's a whole profitability model that comes with Mattress Firm running the way it has been running.

MR. SHORES: Yeah. Well, and I think if we could, this slide on the screen speaks directly to this --

THE COURT: Okay.

MR. SHORES: -- issue, Your Honor. Because if the only question in a vertical merger case, whether there's some hypothetical incentive, that sometime in the future there might be some profit motive, some profit motive to changing a strategy that the board members and the executives themselves decided on, that would condemn all vertical mergers.

I mean, take Microsoft, for example. The whole theory of the case was that Microsoft was going to withhold Call of Duty from Sony in that case. Hypothetically, that

could be a profitable thing to do. But what the Court there found --

THE COURT: But did -- wasn't one of the commitments was that it would agree not to withhold it for ten years? That was one of the commitments, right, that was made?

MR. SHORES: That's true, Your Honor.

THE COURT: Okay.

MR. SHORES: That was one of the commitments. But I think more generally, if you look at the overall evidence in that case, what the Court said, and there were like nine reasons listed, it's just not likely that there's going to be a foreclosure of competition for a lot of reasons, including, by the way, the very types of board modeling we saw in this case.

You know, the Court said, we don't assume that companies who present their boards a model think that that is not the most profitable path. They do it because they are thinking about what is the best way to run this business going forward, and that's the lodestar for what is likely going forward is what these companies actually do and believe, not what hypothetically and speculatively could be done at some point down the road, Your Honor.

THE COURT: So for the quote that you had up, and I noted it in your conclusions of the law, it is about the sum economic benefit of any vertical merger, but following the comma, despite the indisputable pro-competitive effects of many

vertical mergers. And so what's the pro-competitive effect here?

MR. SHORES: Well, the pro-competitive effect here would be the elimination of double marginalization.

THE COURT: So it's EDF, okay.

MR. SHORES: And I'm happy to go into that.

THE COURT: No, no, no.

MR. SHORES: But I think beyond that, you heard a lot of other things in this case. You know, this is going to bring us closer to the consumer, there's going to be innovation, there's a lot of different ways that this merger is going to allow us to reduce costs, so there's a lot of things that are pro-competitive coming out of this merger as well.

THE COURT: Okay. Okay.

MR. SHORES: So, Your Honor, let me just pause here for a second, because I want to answer your questions. I can either go to market definition --

THE COURT: Oh, no, no.

MR. SHORES: -- which I do have some things.

THE COURT: You're good. I will stop you if you haven't answered my questions. Go ahead. No --

MR. SHORES: Okay.

THE COURT: -- you've answered them so far.

MR. SHORES: Okay.

THE COURT: All right.

MR. SHORES: Let me go to market definition, because this is a gating issue. And if we could go to the next. All right.

And, Your Honor, I just want to start with the case law here. And there are a number of courts, including the Supreme Court, that have rejected using price distinctions to define markets. And we're not saying, we're not claiming that a pricing distinction can never be used to define a market. But as the Fourth Circuit put it well, in the case that we have on the screen here, price distinctions are economically meaningless, where the differences are actually a spectrum of price and quality difference. A spectrum of price and quality differences.

And I'll note, the counsel said, this case involves a spectrum. And it does. There simply was not evidence about a common industry understanding of where, along that spectrum, in terms of price or quality, a premium mattress falls.

And let's look at what the Government's own witnesses said about that, if we could go to the next slide. It's a sliding scale, is what one of our witnesses, Ms. Galimidi, said. John Studner, called by the Government, it's an arbitrary line. And Ms. Moore from Tempur Sealy said, there's no one common definition. And that's the theme of the evidence we heard throughout the case.

And I would point you to the Tapestry case, because

it actually supports our view. What the Court found there was the evidence of a $1,000 accessible luxury handbag market was valid because there was reams of ordinary course evidence, reams, that there was a consistency among the evidence that this was how the industry looked at the market.

And if we go to the next slide, there's no consistency here. This is Melissa Barra, who was called by the Government. And what she said when the Court asked about what is premium, is the general industry definition. The general industry definition is mattresses priced over $1,000.

And it wasn't just Ms. Barra. Testimony from Purple, who was called by the Government, Rooms To Go called by -- for the Government, King Koil called by the Government, and Casper, who was called, but ultimately designated by the Government, all placed the definition of premium at or somewhere just north of $1,000. So it's not a question of there being a fuzziness around the number. What these witnesses recognized as premium was about half of what the Government is asking this Court to adopt.

And if we can go to the next slide, Tempur Sealy itself, the Government put almost dispositive weight on the idea that Tempur Sealy used $2,000 in ordinary course documents. But again, Ms. Moore testified, and we saw documents, that they used other price thresholds as well, depending on what the question was internally. So the evidence

simply does not support any inconsistency, Your Honor.

And if we go to the next slide, please. Really, the only thing the Government offered to explain this inconsistency in the evidence was Dr. Das Varma's overall impression about the documents that he read. But he didn't quantify that. He didn't do any analysis. And I would submit these types of unsubstantiated overall impressions are not reliable evidence in this case.

And if you look at the Brown Shoe factors, if we can go to the next slide. Industry recognition, again, there's no common industry recognition. No unique production facilities here. I think that's conceded. Distinct customers, we heard from Macy's that customers shop across price points for the very same purchase. And from another retailer in a confidential session, the retailers showed customers mattresses across price points.

Peculiar characteristics in use, and this is an important one because there has to be something different about the quality at $2,000. And Dr. Das Varma said he couldn't even analyze that because quality is in the eye of the beholder.

Specialized vendors, brick and mortar retailers, 96 percent at $2,000-plus, but also 94 percent at $1,000 to $2,000. Distinct pricing. it's true that math and UPP policies typically apply at a higher level. But Ms. Galimidi from Macy's testified that can be under $1,000 as well. And price

sensitivity really does go to the hypothetical monopolist test, which I will address in just a second.

But the point, Your Honor, is when you look at these factors, it's not a matter of counting four versus three. It's a matter of the fact that they overwhelmingly point against the Government's market in this case.

In terms of the hypothetical monopolist test, this is going to get into a little bit into the weeds, but I think it's --

THE COURT: Let me ask you this.

MR. SHORES: Sure.

THE COURT: So your argument on the market is that the FTC hasn't defined it correctly. And if I agree with that, full stop, but is it really a full stop? Because your argument then as to ability of incentive to foreclose, et cetera, I assume that you're, like, accepting the premise of $2,000 as an acceptable price point for analysis purposes? Or because you're not shifting it and being, and like we're looking at it at $1,000 and above.

MR. SHORES: Well, I would say, Your Honor, the Government has a burden of proof.

THE COURT: Right.

MR. SHORES: The first step in every case is bringing --

THE COURT: I have the burden to write something up

at the end of this, however. And so I'm trying to figure out, like, where your argument goes.

MR. SHORES: Well --

THE COURT: I'm not saying I agree with what you just said, but I'm -- okay, so put that aside. I've agreed with it or disagreed with it. If I agree with it, would your argument be you don't have to go on to anything else?

MR. SHORES: That is my argument. Yeah.

THE COURT: And in the context of anything, I've obviously not done one of these and sent it up to the circuit courts before. Is it useful to go on and answer the rest of it in the alternative if the Fifth Circuit disagreed with me on that? And Ms. Maltas, I'd like your view on that as well. I'm just -- I don't know what it's going to look like when I write it up.

MR. SHORES: Understand.

THE COURT: And so I want to have it be useful as quickly as possible by the appellate court.

MR. SHORES: Yeah. Our view would be you could stop there. And I think that's what the law is, is that the competitive -- I mean, the market is a predicate to defining and talking about competitive effects, because it only makes sense to talk about it in a relevant market.

As to the question of whether it'd be helpful to write up the additional amount, I think it would, Your Honor --

THE COURT: Okay.

MR. SHORES: -- but obviously that's up to the Court and I don't want to be so presumptuous as to suggest that.

THE COURT: All right. And Ms. Maltas, I assume you would want me to go on and continue writing it even if I disagreed with you all on market definition.

MS. MALTAS: Yes.

THE COURT: Okay. All right. Go ahead.

MR. SHORES: And, Your Honor, if I could, let's go two slides. Would it be helpful to talk about the hypothetical monopolist test or would you like me to go further?

THE COURT: It would.

MR. SHORES: Okay. All right. So let me then just pause there, Your Honor.

So the hypothetical monopolist test asks if there's a price increase on the product being tested, your mattress is priced over $2,000, will there be a critical loss above a threshold level of diversion? And Dr. Das Varma did two things wrong in his test, both of which biased his results in the Government's favor.

First, to reach the result he wanted, he started by artificially lowering the diversion level that you have to exceed. And he did that by making a simple math error. And I won't go into the weeds of this, but simply instead of using the standard 10 over margin calculation, he for some reason

used a 5 over margin calculation. And this is addressed in our findings.

And I'd also point the Court to Judge Rochon's opinion in Tapestry, which describes in detail how the Government's own expert in that case, unlike Dr. Das Varma here, did the calculation correctly. Okay. So that's Part 1, he lowered the bar.

Part 2 is he effectively pulled himself up the ladder to reach the artificially low diversion level by failing to exclude factors that caused him to find more sales staying within this $2,000-plus mattress market than in reality would have happened after this hypothetical increase. Let me explain two reasons why.

Number one, just to frame this, Dr. Das Varma used the divorce between Tempur Sealy and Mattress Firm to test what would happen if there was a price increase on Tempur Sealy premium mattresses. So we're just focused on premium mattresses here. That's the product being tested. But he ignored the Tempur Sealy's non-premium mattresses, so those below $2,000, which customers could have turned to in the face of a price increase for those premium mattresses. They were also kicked off the floor at Mattress Firm, and that effectively created a price increase on these non-premium mattresses. And that effective price increase underestimated the diversion that would have gone to the premium mattresses

had their prices remained the same.

In addition, his model, and this is the second point here, the red, effectively incorporated a price decrease on other non-premium mattresses because of the work that Mattress Firm was doing to sell those mattresses. And again, this ultimately biased the results in his favor.

So the way I think to understand this and put it simply is, he failed to hold everything else constant other than what he was trying to test, which is the price increase on the premium mattresses. And as a matter of basic economics, that skewed his results, making them unreliable.

And if we can go to the next slide, because I think this is an important point, Your Honor. It's not just the overwhelming evidence that we saw that shows $2,000 is not a place where the industry overall looks at premium or the HMT. Let's look at how this $2,000 operates in application.

And there's no dispute that the very same mattress can be above $2,000 in one size, like a king size, and below in another size, like a queen, priced above $2,000 one day, but on sale the next for below $2,000, and priced above $2,000 at some stores, but not others. In fact, we saw an example at trial of this Purple mattress that sold at Mattress Firm for over $2,500 while it was retailing at a bunch of other retailers for less than $2,000.

So in the Government's construction of this market --

THE COURT: Is this -- these prices aren't confidential?

MR. SHORES: They're not confidential.

THE COURT: Okay. So if I'm reading this right, am I reading this right? At Mattress Firm, this particular Purple in September of 2023 was $2,500, and at Mattress Warehouse it was $675.

MR. SHORES: That's correct. That's correct.

THE COURT: Is that evidence that I saw in trial?

MR. SHORES: It was one of the slides that was used by Dr. Israel, and I think it's in the -- I can't see the screen here, it's a little too far off.

THE COURT: Oh, it's got a -- yeah, it's got a --

MR. SHORES: But (indiscernible) 6-2 --

THE COURT: -- exhibit number.

MR. SHORES: -- 7-2 at the bottom.

THE COURT: Okay. Everybody here is wondering where the closest Mattress Warehouse is. Go ahead.

MR. SHORES: So, Your Honor, the point is the way that the Government constructed this model results in arbitrary results in application. Okay?

Now, Your Honor, I want to move forward, if I could, and address the question of the 8.8 percent and the foreclosure percentage. If we could skip a couple slides ahead.

Now, to begin, and let's go go one slide forward.

One more. We're skipping ahead. Okay.

THE COURT: Okay.

MR. SHORES: So this is the steps surrounding the 8.8 percent, and I want to walk through them just to explain this, but I want to start by making clear that there's no dispute about the underlying data. Dr. Israel, to construct this, used Dr. Das Varma's own data. There's no dispute around the underlying data.

But what does this actually show? And let's walk through it. On the left, it shows this graph that 85 percent of mattresses sold in this country are not within the Government's definition of premium. So, by the Government's own admission, there's no risk of foreclosure here, and they've got to be removed from the calculation. Okay. So that's the 85 percent is out.

And then the blue, the 15 percent, is the funnel related to premium mattress sales in this country. So we're just now looking at the 15 percent. And it --

THE COURT: So are we looking at now foreclosure in -- so, that's mattress sales overall, but I think the argument was foreclosure in the relevant market once defined.

MR. SHORES: That's correct. And the blue --

THE COURT: So I shouldn't be -- so I shouldn't be looking at 85 percent.

MR. SHORES: That's correct. That's correct.

THE COURT: Okay.

MR. SHORES: Yeah, because 85 percent of beds are not in the premium space at all, right? These are beds below $2,000. 85 percent of beds sold is in --

THE COURT: No, I got it. But then, so when we're going over to the funnel here, is 14.8 percent becoming 100 percent?

MR. SHORES: That's correct. You have to rebase it, because now we're talking about --

THE COURT: So it is 14.8 becomes the 100 percent.

MR. SHORES: That's correct.

THE COURT: Okay.

MR. SHORES: Because I'm just moving over --

THE COURT: All right.

MR. SHORES: -- to the premium side.

THE COURT: Okay.

MR. SHORES: Okay.

THE COURT: Got it.

MR. SHORES: So then the next question becomes, once you rebase it and look over at the premium side, how much of those sales are made through Mattress Firm? Because that's the only retail outlet that possibly could be foreclosed here. And what the data shows, and this is really important, is just 25 percent of premium sales are even made through Mattress Firm, meaning 75 percent are made through other specialty mattress

retail stores, furniture stores, online, other channels. So that's the 25 percent.

The last step is to focus it down even further and ask the question, how much of the premium sales are attributable to third parties, those that the Government is claiming could be foreclosed here, as opposed to Tempur Sealy and Mattress Firm? Because the claim is not that we're going to foreclose ourselves. And if you look at that number --

THE COURT: But I think Ms. Maltas was saying that you are, you simply, but you -- the starting point that Tempur Sealy goes with into Mattress Firm when it's independent, they no longer have to compete for. But every day prior to the merger, that whatever percentage it was, let's call it 60 percent, 70 percent, whatever it was, they're competing on that for that day-to-day. And now it's foreclosed because it's no longer subject to competition.

MR. SHORES: If we could go a couple slides. I'm sorry, we're skipping around a little bit, Your Honor. If we could go a couple slides down, Ray. One more. Okay.

So Section 7 of the Clayton Act, Your Honor, only is concerned about harms that flow from the merger itself. Okay? And so courts, looking at this exact situation, we've cited two here, including the Third Circuit, have said when you're doing this calculation, you take out the shares of the acquiring company.

THE COURT: Okay.

MR. SHORES: And the Government hasn't cited any case reaching a different conclusion. And even their own expert agreed that you focus on rivals' pre-existing shares. And you exclude Tempur Sealy's own share. Because, again, Section 7 is about what is happening because of the merger. And there's simply no evidence that anything about the merger is, can, or would change that Tempur Sealy is still going to be the major supplier at Mattress Firm that it already is.

THE COURT: Okay.

MR. SHORES: And if we could just go to the next slide very briefly.

The Government also mentioned vertically integrated sales. And I would just point out on this slide in particular, again, the case law says you include those in the calculus. You can't exclude them because there's alternatives for customers. There are alternatives for customers at the end of the day. And that's what the ultimate focus is.

And, again, the Government hasn't cited any evidence or case law, sorry, that that should be excluded from the calculus. So --

THE COURT: Well, sure, there's that. But that's -- so that's in the Omega Environmental case, stuff like that is. Direct sales to end users or an alternative channel of distribution in this market. And here the premium market is

such that it's coming with the definition that it needs to have floor space and it needs to -- it's going to go through retail because of its nature.

And, in fact, I mean, you made the point that it's like 96 percent of premium is going through --

MR. SHORES: 1,000 or 2,000.

THE COURT: -- floor space versus 94 percent if it was 1,000. But that's recognizing that in this market, the direct sales to end users is not an alternative channel. I mean, theoretically, it's an alternative --

MR. SHORES: Yeah.

THE COURT: -- channel.

MR. SHORES: It's -- and --

THE COURT: But it's not one that's being used.

MR. SHORES: Yeah, and I probably confused this issue. What is it mean by vertically integrated here is that sell their own products, whether it's online or through a retail channel here. So we definitely see that take Sleep Number, for example. That's a company that sells its own products vertically integrated, right, in its own retail stores, brick-and-mortar stores, and through online as well. And the point is that just like Tempur Sealy did, you can sell direct to consumer. You can have your own stores in this market. And that's what this case is saying is.

THE COURT: Actually look at the practical reality is

that in this market, for premium, except -- I mean, even if it's 1,000 and above, that means the testimony was consistent on that, is that there's not direct-to-retail -- direct-to-consumer really going on. That's not something that consumers want given the expense of the purchase that they want to touch and feel the mattress before they buy it.

MR. SHORES: Well, again, I think it's a definitional issue, Your Honor, because I'm using direct-to-consumer to mean through brick-and-mortar as well.

Again, take Sleep Number, for example, which the Government said you should exclude their sales from the calculus. They have almost 700 brick-and-mortar stores, and they go, in my terminology, direct-to-consumer.

So I would agree with you that for premium -- or the 1,000 to 2,000 and 2,000 and above, that online is a lesser-used channel. But the question that we're trying to face here, and as I understand the Government's argument, is that you should exclude all of the brick-and-mortar sales through Sleep Number. Tempur Sealy sells its own through its own brick-and-mortar. And the point of this case is saying you can't exclude all of those because that's another way to get the consumers and it's part of the market share calculation.

So I think you're referring to online sales, and I would agree --

THE COURT: Okay.

MR. SHORES: -- that that's a lesser part of the market. But the question we're addressing here is what about the vertically-integrated retail sales from people like Sleep Number.

THE COURT: Okay.

MR. SHORES: Okay?

THE COURT: Mm-hmm.

MR. SHORES: If we could go forward two slides. So Your Honor's seen this slide before, and I won't dwell on it, but I do think it's important to point out that the merged firm in Illumina would have had a monopoly, a 100 percent control over the input that was needed to compete for cancer testing there. And what the Fifth Circuit said is, given that, the cancer-testing rivals would simply have nowhere else to turn for sequencing products.

And there was some talk about geographic market here and market at the retail level, and I want to bring that back to why this is important.

THE COURT: Why is the --in this pie chart, why is it 8.8 percent and not -- I'm going back to the funnel.

MR. SHORES: Okay.

THE COURT: At what 25 percent of premium mattresses -- go back to Slide 21. Let me make sure I understand all what you've broken out here.

MR. SHORES: Okay. Are you referring to this?

THE COURT: Yes. Yeah.

MR. SHORES: Okay.

THE COURT: So the 25.1 percent is -- the 100 percent that the overall 14.8 percent of the premium market has become

MR. SHORES: That's correct.

THE COURT: All right. And it's 25 premium mattresses sold at Mattress Firms?

MR. SHORES: Correct.

THE COURT: So 25 percent of premium mattresses are sold at Mattress Firms.

MR. SHORES: That is correct.

THE COURT: That's what that's showing.

MR. SHORES: And then the next step, if I could --

THE COURT: And then what's the -- and so then the -- and of that 25.1 percent, where does the 8.8 percent come from? Because that would seem to me to be saying that 97.2 -- 90 -- whatever it would be, 91.2 percent is being sold by Tempur Sealy, but it's not that. That's not what --

MR. SHORES: No.

THE COURT: -- they currently are selling.

MR. SHORES: That's right. What the 8.8 percent is is that of the 25 percent, 8.8 percent are the sales of third parties. I think Serta, Simmons, and Purple almost makes this up exclusively, and I can show you a chart on that. Actually, it's on the next page, next slide, if we could go down two --

THE COURT: So --

MR. SHORES: No, if you go back up, I'm sorry.

THE COURT: All premium mattresses -- so of the 100 percent, 25 percent-ish is --

MR. SHORES: Yeah, the 20 --

THE COURT: But what -- so 25.1 percent is premium mattresses sold at Mattress Firm, and 8.8 percent is only the non-Tempur Sealy --

MR. SHORES: That's correct.

THE COURT: -- portion of that?

MR. SHORES: That's correct. So if we could go to Slide 23, I can just show you this visually, Your Honor.

THE COURT: And so that would be -- so about a third, that's what I'm remembering from the data. So it's about a third of --

MR. SHORES: That's correct.

THE COURT: Is it by revenue or by quantity? By revenue?

MR. SHORES: It's by units, but --

THE COURT: Units? Okay. So if I can just --

MR. SHORES: We did run this overall calculation by revenue, and it is not materially different.

THE COURT: So that would be something over 30 percent of what's going through Mattress Firm. So remind me, the commitments that Tempur Sealy has going forward is to not

go below 20 percent balance of share to others?

MR. SHORES: That is correct, Your Honor. It's not --

THE COURT: Okay.

MR. SHORES: It's a minimum five-year commitment of not going below 20 percent.

THE COURT: Okay. So as a cynic, if I wanted to be a cynic about it, why wouldn't I be seeing that as a concession, that the ability and incentive to foreclose is at least from 35 percent down to 20 percent on balance of share?

MR. SHORES: Well --

THE COURT: Why wouldn't I be concerned about that?

MR. SHORES: Well, the --

THE COURT: Why wouldn't Tempur Sealy tie its hands and say, we're going to at least keep it where it's at?

MR. SHORES: Well, because balance of share sham, I mean this market, these markets are dynamic. And if you're paying --

THE COURT: They are dynamic, and Tempur Sealy agrees that there are other great competitors out there, so there's always going to be somebody else great that they can floor, whether it's Serta Simmons or somebody else that can expand Purple, they could bring in Casper, who they wanted to keep off. Avocado looks great. They can come up with deals for them. Why wouldn't they, in a legally binding way, like I

asked before, say, we're at 35 percent, and that's a great model that we like and we want to keep, and so we're going to keep it at 35 percent?

MR. SHORES: Well, let me add a couple answers to that. Number one is, you're paying $4 billion for a company. Mattress Firm ultimately has to run this company.

THE COURT: I see where you're going. But the idea is that you're saying it's like they want -- customers want great choice. And it's like, yes, and there are other mattresses out there that are a great choice. Why wouldn't you commit to keeping that great choice on the floor at simply the same percentages? Or maybe marginally down, but you're talking about going from 35 percent down to 20 percent, and that's only by agreements with your competitors. That's not an agreement that you have with the FTC or that would be enforceable before me or the FTC.

MR. SHORES: Well, Your Honor, let me go to the -- and you asked this question, so I feel like the door has been opened. I usually don't like to go into 408 conversations, but I do think the door was opened on settlements.

THE COURT: I think so, perhaps, but I think -- actually, I'd like y'all to talk about it before you do it, because I want to make sure that I can go into it. I don't know what you're planning to say, and I'm always cautious about, before I hear it, I think your adversary needs to --

MR. SHORES: Well, I also feel like, Your Honor, there was a statement made that I think is not correct, so I feel like you asked the question, counsel answered about the negotiations. I think I at least need to say what our perspective on that is, but I am happy to meet and confer on that.

THE COURT: Hold on. It's my -- is it my question as to why didn't you agree --

MR. SHORES: Correct.

THE COURT: -- to keep it at 35 percent?

MR. SHORES: Yeah, and I think you asked Ms. Maltas about the negotiations around that as well.

THE COURT: Well, I can see what your answer might be on that. I think it's fair to answer that question, but it depends -- y'all talk briefly about it, because --

MR. SHORES: So you asked about the negotiations, Your Honor.

THE COURT: And so there's not --

MR. SHORES: And what I'm going to --

THE COURT: So to answer my question is -- that's the thing. Like, when I -- like, I jumped in so robustly, because with Ms. Maltas, I said, I don't want to get into, like, what might be settlement conversations, but then I had that conversation with her. So I mean, hard with you, but that's why I'm, like, on this topic. And so I thought it was okay to

go into this.

MR. SHORES: Okay.

THE COURT: Okay.

MR. SHORES: And I just cleared it with Ms. Maltas.

THE COURT: Okay. Go ahead.

MR. SHORES: Our perspective is that we made this offer, and we got no feedback that a different number ultimately would have made a difference. We saw this as a measure.

THE COURT: Which is the question that I asked, that it was like, was there some other number that would have been better, that objections would have been withdrawn?

MR. SHORES: Exactly.

THE COURT: Got it. Okay.

MR. SHORES: And so that's our perspective on that issue, Your Honor. And I didn't want to -- I'm sorry. I didn't want to get out in front of things there in my answer.

THE COURT: Okay. Well, this is an unusual proceeding. I mean, it's like if I was -- if this was not an FTC merger action, I'd be telling the parties, you know, until I rule, y'all can continue to talk about what you want to add to the deal, or other ways that you might want to resolve it. I'd be happy to hear and receive other things. I don't tell you that you have to do that, but it seems obvious to me, you're hearing my concerns, if you want to talk about that

further, you can.

MR. SHORES: Okay.

THE COURT: Okay.

MR. SHORES: I appreciate that, Your Honor.

THE COURT: Go ahead.

MR. SHORES: Of course, we'll take that into account. So I appreciate that.

THE COURT: Well, I know there's a whole other -- there's a lot of other business. It's not that simple. I understand that. Go ahead.

MR. SHORES: Okay. I just want to make sure, Your Honor, that I've answered your questions on the math, because it's important for us for you to understand how we've done that.

THE COURT: No, I do understand that now. No, I've got it now.

MR. SHORES: If we could go to the next set of slides, and specifically, I just -- before, I want to just go back to one point on this.

THE COURT: Tempur Sealy could also unilaterally commit to me as part of the deal, I mean, it could commit that it was going to stay at 35 -- it'll pick whatever percentage. I mean, 20 percent is just picked out of the ether. That could have been part of the case and stipulated as what was going to be happening, correct?

MR. SHORES: That could happen, Your Honor.

THE COURT: Okay.

MR. SHORES: That could happen.

THE COURT: All right. Go ahead.

MR. SHORES: Okay. I just want to make one point about this Illumina matter and how it relates to the retail geographic competition, because I do think this is important. So the premise of Illumina was there was 100 percent complete foreclosure. And what the Fifth Circuit said was there would be nowhere else to turn.

And where that ties into the geographic market is Mr. Eck testified, and it makes sense, that competition in this business is local. It occurs at the local level. If I'm going to buy a mattress in Houston, Texas, I'm going to consider Gallery Furniture. There's some other mom-and-pops. There's big stores. So it occurs on a local level. And both experts agreed that it occurs on the local level.

So to answer the question of whether there's going to be a substantial lessening of competition, you have to look at where the harm could possibly occur, that is, at the local level. And where this comes in is that the FTC didn't define, it didn't do the work to go out and define or look at local regional markets and say that harm is actually going to occur in any of those particular markets.

THE COURT: I think the FTC's point is -- and I hear

that, and I've been trying to think about it, and certainly what you're saying is true if you're looking at the retail market. But as to the premium mattress market, I guess part of the argument was, you know, map pricing is pretty much, so that's a national price that's set for mattresses by and large, and there's a smaller percentage of that that is done for mattresses between $1,000 and $2,000.

So it's like, if it is a standard price nationwide, to me that does signal a national market, although I hear you when you say that any particular person in this audience, when they want to go buy their mattress, they're not leaving the Houston area.

MR. SHORES: Right.

THE COURT: They're not going more than ten miles from their house.

MR. SHORES: Right.

THE COURT: So how do I reconcile --

MR. SHORES: Well --

THE COURT: -- that? Because this is, it's vertical with a supply that's going into a retail chain.

MR. SHORES: Yeah. And what I would say, Your Honor, is just that there's map pricing or UPP pricing doesn't mean there's not differential pricing across retailers where competition actually occurs at the retail level, you know, in Houston, Texas. I mean, you saw the example, we're all going

to Mattress Warehouse next week, the Purple example.

So it's still, you have to ultimately look, despite those policies, and it's not just a premium, non-premium issue. All mattress competition ultimately occurs at the local level. Sure, there are some internet sales, there are some other types of sales, but competition is local. And that's where you have to look to see how competition plays out. And our point is simply, there was no evidence of how that competition plays out at the local level.

THE COURT: Do we know on that chart, it's back on Slide 16, and it's stating it's an average retail price, so that's across all of their stores at whatever region they were in.

MR. SHORES: I believe that is correct, Your Honor.

THE COURT: The middle cost, it's an average retail price, that'd be an average across Mattress Firm, an average across Denver Mattress. It wouldn't be cherry picking between what's the highest in one versus the lowest in others.

MR. SHORES: I do believe that's an average price, Your Honor.

THE COURT: Okay.

MR. SHORES: Yes, I do.

THE COURT: Okay.

MR. SHORES: And somebody should correct me if I'm wrong. Okay.

THE COURT: Okay.

MR. SHORES: I'm seeing head nods.

THE COURT: All right.

MR. SHORES: So, Your Honor, I have quite a few slides about one of our favorite topics, which is the deal modeling and the fairness opinion, but I'm not going to go through those in the interest of time. The one thing --

THE COURT: Now, which slides are these?

MR. SHORES: They are the slides starting at 36, and they go all the way through 40.

THE COURT: Okay. Let me just turn these real quick and see if I've got questions.

MR. SHORES: And I'm happy to go through them, but I know the expert stuff I want to get to, and I want --

THE COURT: Right.

MR. SHORES: -- to come back.

THE COURT: Let's go back to Slide 33.

MR. SHORES: Okay.

THE COURT: I'll just ask you what was the point that you --

MR. SHORES: Okay.

THE COURT: -- were making with that?

MR. SHORES: So the point is, and actually, could we just go back to 30, 31, if we could, because it leads into that. I'm sorry. I tried to skip.

THE COURT: No, I -- catch me. I've got what you're saying as --

MR. SHORES: On 31.

THE COURT: -- on Serta Simmons, yeah.

(Sealed portion from 3:50 p.m. to 3:51 p.m. contained in separate volume)

MR. SHORES: So on June 14th, 2023, the bankruptcy court adopted Serta's proposed bankruptcy plan, explicitly relying on the CEO's affidavit and Serta's financial projections. And they never identified, never identified, this transaction as a material risk to those growth projections.

And Your Honor gave Mr. Genender, if we go to the next slide, the opportunity to explain this contradiction between what was said in the bankruptcy court and this existential threat testimony in this court. And I think it's fair to say his testimony did not offer a coherent or credible explanation because there really is none.

And so the importance of this, Your Honor, is Serta Simmons is the biggest competitor that would be affected by this. There's no question about that. And they, themselves, in a foreclosure case, are projecting growth at Mattress Firm even well after this merger would be consummated.

So if we could, Mr. McLeod, go to the next set of slides. I'm on 36. And Your Honor, again, I'm happy to pause on these slides. I think you know this.

THE COURT: No, this is -- okay, I --no, no, no. You covered it in your intro and I'm familiar with these --

MR. SHORES: Okay.

THE COURT: -- documents.

MR. SHORES: And --

THE COURT: From your findings of fact and conclusions of law, I've seen all this.

MR. SHORES: Okay. And I will again just emphasize the importance of the fact that this is our plan. This is what is modeled. This reflects what the incentives of the company are to preserve that multi-branded model, to preserve the $4 billion investment that we've made in Mattress Firm. Okay?

THE COURT: Okay.

MR. SHORES: If we could go all the way to Slide 51. I'm sorry, to Slide 50. And I do want to make the point, Your Honor, and we skipped a lot of slides, but I think this is really important. Because the idea that there were a minority of investors suggesting that we could take over Mattress Firm with Tempur Sealy or change the balance of share, not only was that not in the plan, but we went out into the investor community and we said, here is not only the plan, but the benefits of the plan of having multiple brands on the floor.

For example, investors were told that it reduces our risk by not just selling Tempur Sealy beds, but also selling third-party beds that other people want. That was one of the

benefits to the credit rating agencies. So the entire investor community had an opportunity to look at this, and what did Mr. Neu testify? They reacted positively, and Tempur Sealy's share has gone up.

So that is certainly a very important incentive for us to keep that plan that our investors reacted positively to.

And if you look at the next slide, it's really --

THE COURT: What do I do with the materials that Ms. Maltas showed me that it's -- you're characterizing on the slides prior, you know, a noisy minority of investors, but that there are these others that have looked at it from an objective standpoint and said, gosh, you know, balance of share increased by 5 percent or whatever? I mean, they're all kind of anticipating that happening.

MR. SHORES: I don't know that I would agree that they were anticipating this happening. What you have is you have some investors exploring that question. You have one particular investor that they've cited to, and I can't remember if it was confidential or not, wrote a letter about that possibly happening.

But in any big deal, as Rick Neu testified, you're going to have a variety of investor views. The analyst community out there is extremely large. You're going to have some investors say, think about the deal this way. You're going to have investors, analysts say that. You're probably

even going to have in most deals internal people in the company say things like that.

But again, you have to look at what the ultimate plan is and what the people closest to the company actually decided was in the best interest of the company because that reflects their incentives. And it's not just Tempur Sealy. You heard from Mr. Eck and Ms. Dament how critical multiple brands are to the business model of Mattress Firm. And that's what they conveyed to the Tempur Sealy board and the executives who ultimately did -- and JP Morgan that ultimately did the modeling.

So it's not like it was an unconsidered decision. Tempur Sealy's executive team looked at this and said, this is the model that's been run for decades and the one that makes most sense for us to do in the future. And again, it would be quite extraordinary for, and I think this is what the FTC is asking, for the Court to say, nevertheless, for an antitrust case, a completely different plan is what is likely to what's happened -- going to happen in the future, particularly since the investor community has received this plan very well.

THE COURT: You know, but the things that are, like on the prior page, you just have sort of the handwritten notes that Thompson had there, but there's the other presentations and analyses that Ms. Maltas showed, and there's nothing in those that seem suspect or wrong. It's not something that

Tempur Sealy's ever said it's intending to do. And my standard, as I understand it, is just incentive.

And so I look at that and it's sort of like --

MR. SHORES: Can I address that?

THE COURT: -- it's sort of like is it subjective? Is it objective evidence? What is it? But it's like others are articulating that, not for purposes of this litigation, but they're basically saying there's an incentive to foreclose here.

MR. SHORES: Yeah. So the standard is Section 7 of the Clayton Act asks the question whether a merger is likely to substantially lessen competition. And that's in the Illumina case as well. That's the ultimate question.

Ability and incentive is a tool to inform that --

THE COURT: Right.

MR. SHORES: -- question. And what the case is saying, I'd point Your Honor to the AT&T case we cited, United Health, the recent Microsoft case. What they say is you start with an incentive. We wouldn't be here if there wasn't an incentive.

THE COURT: Yeah, of course.

MR. SHORES: But that's not enough. That gets you out of the gate. And then you have to ask the question of what do all the incentives suggest here is likely? It's a probability standard about the future. It's not could this

happen, might it happen. Section 7 doesn't deal with, they say, impossibilities. It's is it likely to substantially lessen competition.

THE COURT: That's why I go back to, and I'm kind of stuck on, the floor's currently 35 percent non-Tempur Sealy and the agreement's going forward are only 20 percent. And I look at that 15 percent. That's probably going to happen. Why wouldn't I think that's probably going to happen? There's not even a notion of restraint in taking it down to 20 percent of the floor.

MR. SHORES: Well, I disagree with that, Your Honor. I mean, ultimately the consumers need to determine, or will determine, what the balance of share is on the floor. And Tempur Sealy has said that Mattress Firm will be run in an autonomous way post-merger. They're going to have their own merchandising decisions.

So I don't think there's any testimony that it's likely that tomorrow, in fact, the testimony was the complete opposite, that they're going to go say, hey, put all these Tempur Sealy mattresses at Mattress Firm and remove five Purple mattresses. There's just no testimony to suggest that is likely.

And ultimately, if you make those sort of decisions, it disenfranchises the people running the business, because you want them to have autonomy and accountability for their

decisions. So I don't think it's fair to say --

THE COURT: I mean, yes, but it's currently being run independently and autonomously at Mattress Firm, and that's the balance that they've got.

MR. SHORES: I agree. And it's being run not just independently and autonomously, it's being run profitably. So if the goal of these companies, which everybody agrees is, is to run a profitable business, then why would they risk changing that profitable business model that's happening today? That's what they bought Mattress Firm for --

THE COURT: Right. But then --

MR. SHORES: -- is to continue at that model.

THE COURT: But then your answer to my first question would be like, Your Honor, I agree, and that's why it's going to be kept at 35 percent going forward, but there's no such commitment to do that.

MR. SHORES: There's no commitment, Your Honor, that necessarily gets to the 35 percent. But let me just say a couple things.

THE COURT: I would say, it's like, it's at 35 or 36 percent, I think is what the evidence showed, and it was like, if you had picked a third, because 33.3 percent is the closest to where it is, that'd be one thing, but instead it's a fifth. And it's down to 20 percent. It's not even a fourth. It's like, where did 20 percent come from? Nobody's tried to

justify that to me. So what's the reason? Why 20 percent? It's a specific number. There's an actual objective number that's currently being used. Why --0 that's a wide delta to move that far down --

MR. SHORES: Yeah, well --

THE COURT: -- with no other constraint on them, legally, reputationally, whatever, they can take it down to that if they want to.

MR. SHORES: And that's the ability piece. They could, but ability is not -- you have to have an incentive to actually do that. I mean, that is what the cases say, and again, my point I'm trying to make is --

THE COURT: Well, and the -- and that's the thing, the investor letters, et cetera all show that there's an incentive to do that, because look how profitable it will be if you increase your balance of share, and that's what they're modeling and saying.

MR. SHORES: So yes, there is some statements that say that, but there's also a ton of testimony that that comes with a lot of risks. I mean, if you try -- if you're Tempur Sealy and you try to dictate the floor with your brands, customers may react negatively. They may say, no, that Purple brand you left, I wanted that one. And --

THE COURT: I agree, but that goes back to where I was before, and that could have been priced into the percentage

that was selected, that yes, I agree, if the notion is, and I heard the testimony from many, that it was like they want robust selection, they want other great mattresses out on the floor, and there's clearly other great mattresses that could fit 35 percent of the slots on a Mattress Firm floor. Purple's great, Casper's great, Avocado's great, and I'm only saying that based on what people were saying about the mattress technology, King Koil, and whatever premium mattress they're about to launch, it's supposed to be a really terrific mattress, so those are all there.

So I think I've made my point on it, and I've got your response.

MR. SHORES: Okay. Can I make one more point related --

THE COURT: Please do.

MR. SHORES: -- to --

THE COURT: Yeah. No, you don't have to stop if you don't want to. Go ahead.

MR. SHORES: Okay. Section 7 of the claim, this is from Illumina, only prohibits mergers that are likely to substantially lessen competition. So in that case, what the Fifth Circuit said is, we don't have to recreate the pre-merger world. We don't have to solve every competitive problem.

THE COURT: Right.

MR. SHORES: All we have to do is ensure there's not

a substantially lessening of competition. And what you're talking about, which is effectively not full foreclosure, which is the 8.8 percent math, but maybe 25, 30, let's call it even 50 percent of that, I would submit, even if that happens, that's not a substantial lessening of competition under Section 7, and creates the same issue that the Fifth Circuit found was reversible error in Illumina itself --

THE COURT: Maltas was arguing though --

MR. SHORES: -- demanding that you have to recreate the pre-merger world.

THE COURT: Ms. Maltas was arguing it more that it's not a particular percentage that goes down, but it's the likelihood whether the competition, how to articulate it, the substantially lessening competition is not so much the percentage that's happening, that has happened, but is it likely to happen?

And so, I'd be skeptical if it was like, well, it's going to go from 35 to 34. I mean, I guess at some level it's too little, but the point I've been trying to articulate is that it seems like there's a chance that that's going to happen from 35 percent down to 20 percent. At least that's the argument that Ms. Maltas is making.

MR. SHORES: I understand, and the point that I'm trying to make is that Section 7 of the Clayton Act, even if that happens, it's not enough to violate Section 7.

THE COURT: Okay. All right.

MR. SHORES: Because if you look at Illumina, what it says is any commitment, you don't have to recreate the pre-merger world. You don't have to eliminate any risk to competition. And if 8.8 percent is the foreclosure percentage for throwing all third-party brands off the floor completely, then reducing their share by 40 percent, 45 percent is going to be so small that I don't think you could say it's going to substantially lessen competition, even if that happened.

In fact, I don't think the Government can or has or could point to a case in decades where that type of percentage of foreclosure --

THE COURT: Okay.

MR. SHORES: -- has been found enough in a Section 7 case.

THE COURT: All right.

MR. SHORES: Okay. Do I have time to address the modeling issues, Your Honor?

THE COURT: I've taken you way off track, so you have as much time as you need. Go ahead.

MR. SHORES: Okay. Okay. And I know we want to talk about EDM --

THE COURT: Yes.

MR. SHORES: -- now, so if we could, let's go to Slide 57.

So, Your Honor, with respect to the expert evidence, and what I heard in closing is, the FTC's case at this point, to show that there's any harm here, boils down to Dr. Das Varma's model. And I'd want to make a couple of foundational points, if we can go to the next slide.

Number one, and this goes to your question about what happens if you don't find the $2,000 market. Well, Dr. Das Varma did not do any sensitivity test of his farm below a $1,500 threshold. So what that means is, if the Court finds that a premium market really starts at $1,000, there is no model from Dr. Das Varma, there's no evidence, no expert evidence, that addresses that level. Okay? So the model has to be disregarded at that point. That's point one.

Point two is, the model doesn't account -- it's a model. It's not meant to account for all the real world evidence or incentives in the sense that after this merger, we're going to have a lot of reputational and legal incentives not to go back on our multi-brand plan. And it doesn't account for that.

`And I want to point Your Honor back to the Microsoft case, where the Court discounted the model in that case for the very reason, it just can't account and ultimately answer the all incentives question. That's point two.

And then point three is, it contradicts the FTC's complete, impartial foreclosure theory. And that's not

irrelevant in this case, as the FTC is trying to make it. The whole theory of this case, and the whole theory of every foreclosure case, is there's a few steps. You start with foreclosure, that eliminates competitors, and then prices go up. Okay?

And as I'll talk about in a second, his bargaining model simply ignores step two, that these competitors are gone. That's the link between the foreclosure and the actual harm. And then I want to talk a little bit about the EDM point and just the real world examples. Because I think, when you step back and look at this, putting aside the econometric modeling, courts, and even the Government's own merger guidelines, focus on real world events of what's happened.

And I was surprised to hear the Government's counsel say that somehow, Tempur Sealy's divorce doesn't matter, because the history does matter. And what that history shows, as I'll talk about in a second, is there has been no consumer harm from the exact thing they're worried about here, people being thrown off the floor or other vertical mergers.

But let me address the bargaining, the contradiction point, if we could turn to the next slide.

So, Your Honor, we criticized Dr. Das Varma's model when it was based just on complete foreclosure for not allowing for the real world possibility that the companies could negotiate. Mattress Firm and Serta Simmons and Purple could

sit down after the merger, and they probably will. That's the most likely scenario and model about being on the Mattress Firm floor.

And what Dr. Das Varma did was he then went back and allowed his model to account for that, to actually account for modeling. And once he did that, and this is the important part, it showed that Mattress Firm has no incentive to throw Serta Simmons off the floor, because it would be profitable to keep them on the floor.

And further, and this is what's shown on Slide 60, it shows that Serta Simmons and Purple are better off in every way once they bargain to stay on the floor. Their profits go up, their revenues go up, their balance of share goes up. So they're better off in every way.

There's a standard concept, not just in merger litigation, but all litigation, that the model has to fit the theory of the case or it's going to be thrown out. And what his own model is showing is that there's not going to be any foreclosure. There's not even incentive to foreclose.

So, Your Honor, I think point one is that the model cannot be divorced from the theory of the case. But point two is, how did he get to these higher prices?

THE COURT: But why -- what's the reason for 60? I see the increases there, profit, revenue, total sales, premium market share, and balance of share at Mattress Firm all up.

What's the logical explanation for that?

MR. SHORES: Because he's finding that in the real world of bargaining, these companies will be better off by having them on the floor. That's the real world explanation.

THE COURT: Well, just show me.

MR. SHORES: Well, I don't have any --

THE COURT: I'm just saying, this is showing them going up --

MR. SHORES: Correct.

THE COURT: -- in all of these things. Why when Tempur -- but I don't understand why it would be -- they're sitting down and bargaining with Mattress Firm right now, and they're not at these levels. So why, when Tempur Sealy is at the reins, is their bargaining so much better that they go up? What's happening? Is EDM benefiting them as well or something? I mean, like, why?

MR. SHORES: I think that's just a function of the way the model is constructed. I'm not sure it --

THE COURT: I know it's not your model, but --

MR. SHORES: Yes.

THE COURT: -- he reran these numbers and showed this?

MR. SHORES: He allowed for bargaining in his model after we criticized him for not allowing for bargaining in the complete foreclosure scenario.

THE COURT: I guess are these -- not -- what's sponsored here on Page 60, is this statistics derived from something that Das Varma did himself or --

MR. SHORES: That's correct. I'm sorry. Yes, that's correct.

THE COURT: Okay. So that's not something that you calculated in there now, right? Das Varma did this.

MR. SHORES: That's correct.

THE COURT: Okay.

MR. SHORES: This is his own modeling, Your Honor. These are the results of his own modeling.

And so it -- let me move on to -- and I'm going to tie this back together. But I want to talk a little bit about the EDM effect here, because it will tie back to what these numbers here.

And if we go to the next slide, the real reason why Dr. Das Varma found that there were going to be these so-called price increases after the merger, despite no foreclosure, is that he's identified this idea of upward pricing pressure. And as far as we know, this concept hasn't been discussed, much less adopted, in any case. And the way he got his upward pricing pressure model actually found a price increase is by effectively eliminating, through his assumptions, EDM. Okay?

And so as a starting point, there's no dispute by any of the parties that EDM is a standard benefit of vertical

mergers. Both experts agree with that.

But it's important to understand concretely what that means, Your Honor, and specifically the idea of reduced price for EDM, which is really just a proxy for consumer welfare. Now, EDM reduces the overall cost of the combined firm by eliminating the need for two different margins. So once your costs go down, it doesn't simply mean that you're going to pocket the extra money or altruistically decide to pass it on. What the economics shows is that what you're going to do is, because you're going to make more profit, you're going to go after more sales.

And there's different ways you can do that. You could lower the sticker price, but there's a lot of other things you could do. You could reduce financing. You could improve the consumer experience. You could open more stores. But with profit margin, you can do all of these things.

And the idea of an effective reduced price from EDM means that those consumer welfare benefits are going to flow to consumers, even if it's not necessarily in the sticker price. That's a distraction. It's going to flow through to consumers necessarily because companies want to use that additional benefit to compete and gain more sales.

And what Dr. Das Varma's model did, if we could go to the next slide, is he built in some assumptions to his model that ultimately had the effect of eliminating EDM. And these

assumptions are just not consistent with industry reality. Okay?

First, his model ignores overwhelming evidence that manufacturers have to pay retailers to exert effort to sell their products. That's this first point, this first row. So he's effectively assuming retailers act kind of like vending machines. They dispense the same amount of profit regardless of what the margin is.

But you heard from Mr. DeMartini from Purple, and he testified about when his sales were lower at Mattress Firm, what did he do? He used that improved retail margin to encourage Mattress Firm to sell more of its beds. So it's just not true that these retailers act like vending machines. They were encouraged by this additional margin. That's point one.

And it highlights the second flawed assumption, which is he assumes retailers have a fixed, unchanging percentage margin for manufacturers on retail sales. And in fact, not only is that inconsistent with the evidence from Mr. DeMartini, Tempur Sealy's own contracts with Mattress Firm are not based on fixed, unchanging percentage margins.

Tempur Sealy's agreements with Mattress Firm provide for a dollar margin, not a fixed percentage margin. So that's point two.

And the third point that he assumes is that customers are not sensitive -- are insensitive to price changes, which is

contrary to all the evidence and I think our intuition here.

So what effectively happens in his model is with those assumptions, the EDM benefit goes away. And if any one of those assumptions is not correct, his model's not reliable. It doesn't show the price harm that they suggest.

By contrast, what Dr. Israel did, and let me just pause for a second. There's been a lot of criticisms of the fact that Dr. Israel constructed a model for this case. That's what Dr. Das Varma did too. That's what happens in merger litigation. You take baseline models, ideas of linear regression, there's a whole bunch out there, and you build on top of it.

And the fact that Dr. Israel published his modeling results is a good thing, not a bad thing, because he got feedback on it. So I just want to pause on that for a second.

But what he did in his model is that he recognized the benefits of EDM would be passed on, if you want to use that word. I don't like that word because it's really the idea that these companies are incentivized to give all these benefits from the lower cost, from the higher margin.

They would be consumer welfare gains, let's call them, from all the types of things that Jonathan Hirst of Dreams testified. You're going to have store improvements, you might have better financing terms, greater innovation. And at the end of the day, the standard economic thinking is, you may

not have a specific plan for it now, because it's impossible to make all these plans in the future, but EDM will be passed on, will be given to the consumers, is a better word, in the form of all of these consumer welfare gains. Okay?

Now, I did mention -- and I'm happy to answer any questions on the modeling.

THE COURT: No, that's okay.

MR. SHORES: Okay. I did want to go to the natural experiments quickly, and I know I'm probably short on time. On 64, I just want to point out that natural experiments are really important in merger cases.

This is the Government's merger guidelines, and I mentioned it before. But I'd also encourage Your Honor to go to the AT&T case, where Judge Leon specifically looked at prior vertical mergers and what happened, and criticized the fact that defendant's expert looked at these things and found no consumer effect, and the plaintiff's expert didn't even look at them. So these are important -- this is important evidence in this case.

And if we can go to the next slide. What Dr. Israel looked at and found, and there's no dispute about this, that with respect to Dreams, which is the most analogous acquisition here, prices went down in output, which is a standard measure of consumer welfare in antitrust sense, went up after the merger.

And as opposed to complicated econometric modeling, this is concrete proof of what happens from EDM and the benefits from vertical mergers like this. And importantly, there is no consumer harm found anywhere here.

Sleep Outfitters, if we can go to the next slide. Dr. Israel found that overall, when you compare it to a benchmark, as you have to, output went up after the merger. Again, another level, another type of example of no consumer harm for the merger.

But it's equally important that Dr. Das Varma, himself, if we go to the next slide, he didn't look at any of these things. So there's just no evidence that Dreams, Sleep Outfitters, or SOVA, there's no evidence, he didn't look at them to find consumer harm and he didn't find any.

So the only evidence in this record is that these natural experiments benefit consumers. Okay? These are prior vertical mergers.

And then I do want to talk about the divorce quickly. Because again, this is exactly what the FTC is postulating could occur here, but not to Tempur Sealy, but Serta Simmons and Purple. Tempur Sealy was thrown off the floor at Mattress Firm from 2017 to 2019.

And you heard the testimony from Mr. Thompson and Mr. Rusing, both of whom said, we didn't just stop competing, we weren't foreclosed. What they did is they doubled down on

retailer effort, they opened up new stores, they sold more through the internet, they invested in product development. And at the end of the so-called divorce period, Mr. Thompson testified they had recovered all of their profit margin. I don't think quite their sales, but all of their profit margin, which is what a business cares about.

And even more important than that, showing that nobody's going to be foreclosed if they're off of the Mattress Firm floor, if we can go to Slide 69, please, Ray. I'm sorry. Yes.

Even more important than that, Your Honor, is there's no evidence that customers, consumers were harmed as a result of the divorce. In fact, the only evidence in the record is that prices went down after the merger. And that's from SSB. Okay?

Your Honor, I've addressed the next thing that I was going to talk about, which is the commitments. I think we've talked about that, as well as the divestiture.

There is a slide to the point I was making before, Slide 73, that's the quote from Illumina that says you don't have to eliminate any possible harm to competition. That's not what's required. It just has to be the commitments, and combined with our divestiture and the post-close agreements here, all ensure that competition will not be substantially lessened after the merger.

THE COURT: Okay.

MR. SHORES: Okay. So the last thing I'd like to say, Your Honor, is just going to conclude quickly.

The Fifth Circuit recently said in an en banc decision, the burden to obtain a preliminary injunction is a heavy one, and you have to prove a likelihood of success on the merits.

And for the reasons that are on Slide 75, it's a summary, and I'm not going to go through it.

THE COURT: Which case are you pointing to from the Fifth Circuit? I mean, that's something that they frequently say. But --

MR. SHORES: I'm thinking of United States v. Abbott, which is 110 F.4th 700.

THE COURT: Okay.

MR. SHORES: And it talks in general. I think it's a very helpful case talking about the burden on the plaintiff to actually prove these standards. Okay?

And I'm not going to go back through all the reasons that we believe that the Government failed to meet this likelihood of success.

THE COURT: That's also what the Supreme Court said in Starbucks case.

MR. SHORES: They did.

THE COURT: Right?

MR. SHORES: They did. And the Abbott case goes a little bit deeper in the context of one particular statute. But yes, that's correct, Your Honor.

THE COURT: Is Abbott on -- particular to this statute? It's not, is it?

MR. SHORES: It's not.

THE COURT: Okay.

MR. SHORES: It's not. But I think the rationale --

THE COURT: Just generally?

MR. SHORES: Yeah.

THE COURT: Okay.

MR. SHORES: I think the rationale also applies, Your Honor. We can get into a discussion about how 13(b) applies in this context if you would like. But I think this case resolves that issue, and I just point forward to that case.

THE COURT: All right.

MR. SHORES: Okay.

THE COURT: Thank you.

MR. SHORES: But I do want to address, if I could, just one second, the equities here. And this will be the last point I make.

If you find there's no likelihood of success, you don't have to reach the equities. But if, for some reason, the Court does address the equities, I do want to say that this merger has been under consideration for a long time now. It

was signed 18 months ago. And the termination date is fast approaching on February 9th.

And as a practical matter, as the FTC itself has acknowledged, that's often the death knell for cases like this. So in Microsoft, what the Court said was, even if there's some debate, it's debatable on the merits, it would be unfair, and it wouldn't be in favor of the equities, to prohibit this injunction because the FTC does have another remedy it can pursue, which is a divestiture.

But our position, strongly held view, is the merits are not -- they're not debatable here. And there was a statement that the full commission -- it's been said in opening and closing, so I want to address it. That the full commission voted out this case, voted to bring this case.

But, Your Honor, we had an intense litigation. There were about 40 depositions taken. We were able to cross-examine third parties, and I think you saw what Mr. Genender's testimony was. We learned what the actual foreclosure theory was here in this litigation, in this case.

And the Court's job is to determine whether that is likely to substantially lessen competition. So ultimately, the FTC had a chance to take its best shot, but that shot failed, and it's time to let this merger go through, Your Honor. Thank you.

THE COURT: All right. Thank you very much.

Ms. Maltas, how much time would you like, and would you like a break before you take that time?

MS. MALTAS: I would like to have 10 to 15 minutes, and I would very much like five minutes for --

THE COURT: That would -- five minutes for a break?

MS. MALTAS: Yes.

THE COURT: Okay. All right. So we'll be back on the record in five minutes. Thank you.

(Recess taken at 4:26 p.m.)

(Proceedings resumed at 4:33 p.m.)

THE CLERK: All rise.

THE COURT: Thank you, everyone. Please be seated.

All right. Ms. Maltas, you have 15 minutes.

MS. MALTAS: Thank you, Your Honor.

So I will probably jump around just a little bit.

THE COURT: Of course.

MS. MALTAS: With apologies. I want to start with the product market. There are so many slides, there are so many quotes, there are so many documents. I don't think anyone disputes what's written in the documents, what the quotes are. What I will say is I just want to refer Your Honor to the Tapestry case, the Bertelsmann's case, and Anthem, U.S. v. Anthem, in the District of Columbia.

These cases confirm that our product market is plausible. They confirm that the way that we applied the Brown

Shoe factors, the evidence that is in this case, the industry recognition, particularly, again, that both defendants recognize this market, and so do other large market participants, means that this market is plausible. And we don't have to have every factor, but we have the majority of the factors.

And the fact that, sure, Melissa Barra thinks it's 1,000. That does not trump the weight of the evidence. It does not undermine in any way, if you apply the Brown Shoe factors and apply the analysis the way that these cases apply it, that we have a plausible product market.

THE COURT: Well, Tapestry, Bertelsmann, and what was the third?

MS. MALTAS: Anthem.

THE COURT: Anthem. Okay. Go ahead.

MS. MALTAS: Second, on the hypothetical monopolist test, I just want to confirm, I don't know, Mr. Shores probably didn't mean to leave this out, but Dr. Das Varma did, in response, apply the HMT on the 10 percent price increase, and it still passed. So it's not as if you apply the 10 percent that it fails. It's just the 5 percent is actually the right way to do it, but it passes at both.

Again, I just want to reiterate, when it comes to the case law, that it is very clear that defendants' criticisms are insufficient to question the HMT or to find it to be deficient.

And again, that's going to be Tapestry, that's going to be Kroger, that's going to be Bazaarvoice, very clear that you -- the defendants' expert can take pot shots, that's fine, that's what they do, but it doesn't undermine the HMT unless the defendants' expert actually conducts an HMT, fixes the problems.

If there is actually some sort of a close call on the HMT to start with, whereby if you were to fix the problems, it would cause it to fail. Nothing like that here. So we've registered Dr. Israel's criticisms, but they legally do not matter.

THE COURT: Okay.

MS. MALTAS: Third thing, our theory has never changed. Everyone can go back and read our complaint. Our complaint is very clear that we are alleging the potential for full foreclosure or partial foreclosure. I don't have the paragraph in front of me, but we list in a paragraph all the different ways that we think that Tempur Sealy can partially foreclose its suppliers in the complaint. It has always been our theory.

And our theory has also always been, as it is required to be under Section 7 of the Clayton Act, that this will cause harm to consumers. That is what we have to show.

We do not have to show it will cause harm to any competitors. Actually we're not allowed to have a case that is

brought in that way. We need to show harm to consumers, harm to competition. Harm to competitors is not enough, and it is not the basis of our case.

Again, the foreclosure is the mechanism of the harm. The competitors do not actually have to be independently harmed for us to show, as Dr. Das Varma does, that prices will increase.

It is common, and I think this is maybe where defendant's confusion comes from, that in a foreclosure case that your model actually calculates the cost increases to competitors and then calculates price increases off of that. That's a very common way to do this. It is not required.

The way Mr. Shores was talking about it was as if it was somehow a requirement that our model do that, and it's not. Our model shows something different. Our model shows that Tempur Sealy, because of how much presence it currently has on the floor at Mattress Firms right now, which we've talked about a lot, that it has the upward pricing pressure. It has the incentive to raise its prices at Mattress Firm, and the more it forecloses, the more that upward pricing pressure increases. It's a legitimate model, and we're not required to do it the defendant's preferred way.

On the 8.8, I just want to confirm again that that is not accurate. It's not the way to actually calculate the market share. Dr. Israel admitted that the share that Tempur

Sealy has on the floor at Mattress Firm is contestable.

There is no requirement to take that out. It is inconsistent with their theory to take that out.

THE COURT: That's Israel saying that as an economist. But Mr. Shores was saying that there's cases that have said that that's not a contestable percentage.

MS. MALTAS: I believe there is one case from the Third Circuit from the '80s that says that. I do not think that that is in any way the vast majority of any cases. I don't think it's something --

THE COURT: Granted. And I was like on you about a Third Circuit cite. Anything from the Fifth Circuit, anything else other than that one case? But that's what I'm remembering. There was that one cite --

MS. MALTAS: Right.

THE COURT: -- you said, you know.

MS. MALTAS: Yeah, there's the one cite. I'm not --

THE COURT: So I'll have to -- I just have to decide what I make of that.

MS. MALTAS: I'm not aware of anything from the --

THE COURT: Okay.

MS. MALTAS: -- Fifth Circuit or the Supreme Court. Also say from the Fifth Circuit, Illumina, you know, they put up the slide that has the 100 percent and the 8.8 percent. I don't know where that 100 percent comes from. I don't recall

seeing in Illumina a determination of what of the share was actually the share that was being sold to GRAIL currently versus being sold to other MCED test creators.

So I'm not even sure that -- I don't know what that 100 percent is. It's not -- it's definitely apples to oranges, whatever is on the slide.

THE COURT: Well, Illumina was not a retailer that was being --

MS. MALTAS: No.

THE COURT: -- acquired. But I think that was whatever the -- what was being acquired as the input for other things was --

MS. MALTAS: Exactly.

THE COURT: -- it was only one source for -- it was the one source for supply.

MS. MALTAS: Right.

THE COURT: And 100 percent was being -- so I think that's the 100 percent.

MS. MALTAS: Right. But I don't -- to my knowledge, there's no calculation in the case of what percentage of that input was being supplied to GRAIL, which would be the closest thing to an apples to apples with that 8 percent. That was just that they had 100 percent of the market.

THE COURT: Okay.

MS. MALTAS: I also -- I will just caution that, you

know, in -- they put up the quote from Dr. Das Varma where he said that you should look at what the percentage is that's being sold currently. He definitely did say that. Dr. Das Varma looked at a lot of things, including thousands of documents, so I'm not surprised that he thinks that's one thing you should look at.

In their findings of fact and conclusions of law, defendants do say that he admitted that you have to take out the market share for Tempur Sealy, and their citation is that quote. So I would just -- that's just a caution that that's not something that's in the findings, the facts, and conclusions of law that's accurate. That is all that he said is that you should look at it.

On to the remedy, which you talked a lot about. So the 20 percent, Mr. Thompson made that up. That's where that comes from. He did it without talking to anyone at Mattress Firm about what they would want. It's just something that he came up with as the percentage that he thought was reasonable. So I'm not sure what more to say about that.

I will say that one thing that I think got a little muddy in that conversation is the difference between balance of floor and balance of share. So as a number of witnesses, including Mr. Diamonstein from Paramount pointed out in some of the testimony that we submitted by deposition, there's a big difference between committing to floor --

THE COURT: Right.

MS. MALTAS: -- and committing to sell. So even if they are committing --

THE COURT: Committing to sell.

MS. MALTAS: -- to sell.

THE COURT: Yeah. No, I get that.

MS. MALTAS: Yeah.

THE COURT: Yeah.

MS. MALTAS: So that's just an additional issue with that.

Retail market, we do -- just to be clear, we are not putting forward a retail market. Our market is the supply of premium mattresses. It is nationwide. I'm not sure where the retail competition points come from. I don't think they're saying that there is a retail market. If so, that is not our market.

So anyway, I just want to be very clear that there is no -- that the retail sales of premium mattresses and whatever competition that consumers -- that you might see on the retail side for consumers is completely irrelevant to this case. The competition that we're concerned about is the competition for the supply of retail mattresses to retailers.

There was some discussion of a few other vertical cases, and I just wanted to take that -- have a discussion about those as well. So the first one was Microsoft. I will

probably be in trouble if I do not start this conversation by saying that the Microsoft decision is on appeal. But if we assume that the decision as drafted stands, as Mr. Shores pointed out, there were about nine things that the Court pointed out in the Microsoft decision.

The Microsoft decision absolutely did not turn on whether or not there was a plan from the Microsoft defendants. Your Honor pointed out the commitments, the binding legal commitments that the defendants made. Also, in the decision, it's very clear the Court says that there was not a plan that was expressed to the board of directors.

The next thing the Court says is, and there is absolutely no evidence in any internal documents, text messages, emails of anything that contradicts them, millions of pages of discovery, and nothing that contradicts this. So this is not that case. We have ample evidence from investors, from employees, from executives, from board members, where they recognize the existence of this incentive. So it's not a situation where there's no plan in the board materials, and then that's wholly consistent with everything else that's said.

You know, we can take a look at our Slide 54. We can see here, because you ask about whether or not there was any testimony about reducing the slots or reducing what was being offered, there's plenty of testimony. In addition to the investors and the board members, SSB is committing suicide. So

we expect others will grab a good bit of their share if they were supportive.

There's lots of testimony that everyone recognizes that Tempur Sealy can and has the incentive to decrease slots and decrease sales for competitors after the merger. So it's completely different than Microsoft in that way.

THE COURT: But that slide is saying that Tempur Sealy has missed the boat, but others will grab that share.

MS. MALTAS: Potentially, yes.

THE COURT: Yeah. Okay.

MS. MALTAS: Including Tempur Sealy. Because as Mr. Thompson testified, the reason that he doesn't want to negotiate any slot commitments, because that's another thing that Mr. Thompson was offered the opportunity to negotiate slot commitments with rivals and refused. Serta Simmons explicitly asked for one. Purple asked for one. And he said, no, I'm not going to do this right now.

And when I asked him in the cross-examination why he wouldn't want to, he said, because I would have to give those slots. I would have to take the slots. I would have to take the sales from other suppliers and give them to them. And I said, why wouldn't you just take Tempur Sealy's? Oh, no, I could never do that, because we, you know, sell so much and we have such a great product. We're going to stay on the floor, so.

I can also talk just a little bit about United, United Change. Mr. Shores brought that up. I mean, that is a case that just has absolutely -- also completely an opposite to this case. And United Change, the claim failed because the Court said it would have to assume that United was going to uproot its entire business strategy, corporate culture, violate or repeal long-standing policies, flout existing commitments, and sacrifice financial interests in order to take the steps that the Department of Justice was claiming that they might take because of the merger.

Which is completely different here where foreclosure is consistent with long-standing strategies that Tempur Sealy has. And again, the modeling shows that it would be profit-maximizing to do that. And there's no commitments or anything to stop them.

Finally, turning to the models, I think this got a little confused again. I addressed this, but just to reiterate. Dr. Das Varma did take into account EDM in his model. He took into account real EDM, the elimination of double marginalization. He did not take into account the so-called retailer effort, which is basically a brand new efficiency that Dr. Israel has made up for this case, that he calls EDM.

But Dr. Das Varma affirmatively has EDM in his model. He uses it as a countervailing factor against upward pricing

pressure.

As I suspected, the bargaining model was presented as being something that was good or was pro-competitive. And just to reiterate, it is absolutely not. The bargaining model assumes that Serta Simmons will pay to stay on the floor at Mattress Firm. And it will result in $347 million of increased prices per year. It's a different model. It's done in response. It wasn't something that, you know, that Dr. Das Varma put up affirmatively. It was done in response to Dr. Israel.

But it does show massive price increases. It is not pro-competitive. It is not a get-out-of-jail-free card in any way.

THE COURT: On EDM, you said what -- Das Varma did account for, but that he did not model retailer, what was it?

MS. MALTAS: Effort.

THE COURT: Effort. Yeah, effort. Okay. All right. Thanks.

MS. MALTAS: Finally, just the last thing I wanted to touch on with regard to the model is that, you know, Dr. -- this is in the findings of acts and conclusions of law, that Dr. Das Varma's decision to assume that retailers have percentage margins in his model is completely consistent with the record. There's -- that I know of, there's just one contract that doesn't, but the vast, vast majorities do. And

so, his decision to make that be a basis in his model is not unreasonable in any way, shape, or form.

With regard to Dreams in the U.K., SOVA in Sweden, and Sleep Outfitters, Dr. Das Varma affirmatively testified that he did not take into account Dreams and SOVA because they're in different countries. And so it's just not a good model to look at if you're looking at what happened in prior vertical mergers.

We talked about SOVA. In Sweden, they sell bed sets. It's very different there. Dreams is in a very different situation than Mattress Firm because there's another equally large retailer called Beds by Benson's that's in the U.K. And he just, he determined reasonably that they were not good things to compare against this Mattress Firm.

And just with regard to Sleep Outfitters, it was in bankruptcy. That's actually how Tempur Sealy bought it, I think, out of bankruptcy. And so, the fact that it got better after it was purchased and it was run differently, I don't think says very much about -- and Dr. Das Varma, I believe, testified it doesn't say very much about it as a model or a past event.

Finally, on 13(b), Abbott is not about 13(b). It does not address or resolve anything about 13(b). The standard, which defendants have agreed to repeatedly in this case, is that 13(b) is different than the winter test. It does

not require irreparable injury, for example. It does just have the two elements that we are likely to succeed before the commission. And that the public equities, not the private equities. Private equities are not part of this. And 13(b) should be balanced to determine whether or not a preliminary injunction should issue. And we believe that it should. And thank you so much for your time.

THE COURT: All right. Thank you very much.

All right. Decision to follow. Well-argued both sides. I appreciate everyone's time and attention over a long course, longer for you than it has been for me.

Is there anything else that anyone needs to address before we adjourn? All right. Thank you. We are adjourned.

THE CLERK: All rise.

(Proceedings concluded at 4:52 p.m.)

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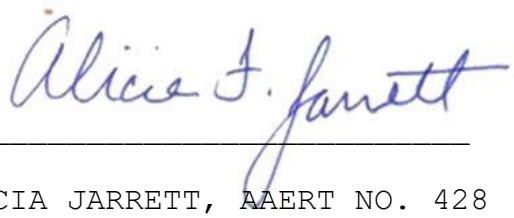
C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



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ALICIA JARRETT, AAERT NO. 428 DATE: December 18, 2024

ACCESS TRANSCRIPTS, LLC