

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

FEDERAL TRADE COMMISSION,

*Plaintiff,*

v.

TEMPUR SEALY INTERNATIONAL,  
INC.

and

MATTRESS FIRM GROUP INC.,

*Defendants.*

Case No. 4:24-CV-02508

**REDACTED VERSION OF  
DOCUMENT SOUGHT TO BE  
SEALED**

**PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION AND BRIEF IN  
SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

Tempur Sealy’s proposed \$4 billion acquisition of Mattress Firm (the “Proposed Acquisition”) would combine the world’s largest mattress supplier with the nation’s largest and most important mattress retailer. As the Supreme Court explained in *Brown Shoe Co. v. United States*, the “primary vice” of a vertical merger, such as this one, is that it may foreclose competitors from a segment of the market otherwise open to them, acting as a “clog on competition.” 370 U.S. 294, 323-24 (1962); *see also Illumina, Inc. v. FTC*, 88 F.4th 1036, 1051 (5th Cir. 2023). The Proposed Acquisition would act as a clog on competition because Tempur Sealy would have the ability and incentive to limit its closest rivals’ (and would-be rivals’) access to Mattress Firm—the most critical customer and distribution channel for suppliers of premium mattresses.

In a bipartisan 5-0 vote, the Federal Trade Commission (“FTC”) authorized an administrative proceeding to block the Proposed Acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18, and to authorize this action under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Under Section 13(b), the FTC requests a preliminary injunction preventing consummation of the Proposed Acquisition until the administrative proceeding concludes.

The FTC is likely to prevail in the administrative proceeding based on the extensive evidence showing the effect of the Proposed Acquisition “may be substantially to lessen competition or tend to create a monopoly.” 15 U.S.C. § 18. Multiple documents, including presentations to and communications with Tempur Sealy’s Board of Directors, show that post-acquisition, Tempur Sealy will have the ability and incentive to

limit premium mattress suppliers' access to Mattress Firm. For example, Tempur Sealy's Chairman and CEO noted that acquiring Mattress Firm could allow Tempur Sealy to "eliminate future competition" and "block new competition." An earlier presentation to the Board stated that the principal benefits of the Proposed Acquisition are "maximum control" over this "critical retail channel," and to "further build[] a competitive moat."

Those materials and others reinforce that among mattress retailers in the United States, Mattress Firm is by far the most competitively significant. It is eight times larger than the next largest mattress specialty retailer, the only such retailer with a nationwide footprint, and its overall mattress sales volume dwarfs all others. It also "over-indexes" toward higher end, premium mattresses for which brick-and-mortar retail stores are most important in generating sales. For these reasons, Mattress Firm is the number one wholesaler for premium mattress suppliers in the country and the primary battleground for competition among them. Mattress Firm's power is so great that Tempur Sealy dubbed it the "kingmaker" of mattress brands.

Tempur Sealy may fully foreclose its rivals and refuse to sell their mattresses at Mattress Firm. Alternatively, Tempur Sealy could engage in an equally pernicious—but more difficult to monitor—partial foreclosure scheme where rival mattresses remain on the floor but Tempur Sealy manipulates the process such that customers only or primarily buy Tempur Sealy mattresses. Regardless of the tactics, the effect is equally predictable: substantial lessening of competition and harm to consumers, causing Americans to pay hundreds of millions more annually for a better night's sleep.

Accordingly, this Court should grant the preliminary injunction motion to preserve competition pending completion of the FTC's administrative proceeding.

### **NATURE AND STAGE OF THE PROCEEDING**

On July 2, 2024, FTC counsel commenced an administrative proceeding to determine, upon a trial on the merits, the Proposed Acquisition's legality under Section 7 of the Clayton Act. That proceeding will begin on December 4, 2024.

The FTC filed its Complaint in this action on July 2, 2024. ECF No. 1. Per this Court's Amended Scheduling Order, ECF No. 107, the FTC now files this preliminary injunction motion.

### **STATEMENT OF FACTS**

#### **A. Premium Mattress Suppliers Rely on Access to Floor Space at Brick-and-Mortar Mattress Retailers**

For most Americans, a mattress is an infrequent and potentially expensive purchase. Consumer preferences vary depending on age, weight, health issues, sleeping preferences, and other factors, including how much they are willing and able to pay for a mattress. Over 90 percent of consumers want to test a mattress to determine its suitability before making a purchase. PX6226-021; PX9011-095. This is especially true when consumers look to invest in a higher quality, "premium" mattress. [REDACTED] Dep. 93:15-94:9; Shapiro (Wayfair) IH 48:1-4.

Premium mattresses have superior quality and enhanced features relative to entry-level mattresses, as well as reputable brand names, and they appeal to consumers who need to or are willing to pay more for improved comfort. *Infra* Section I.A.1.a.

Most premium mattresses are sold in mattress specialty stores, furniture stores, and department stores. Binke (King Koil) Dep. 129:18-23. Those stores may contain as few as a handful or as many as several dozen mattresses displayed in “slots” on the floor. Those stores also typically have trained retail sales associates (“RSAs”), who often play a key role in helping consumers find the right mattress.

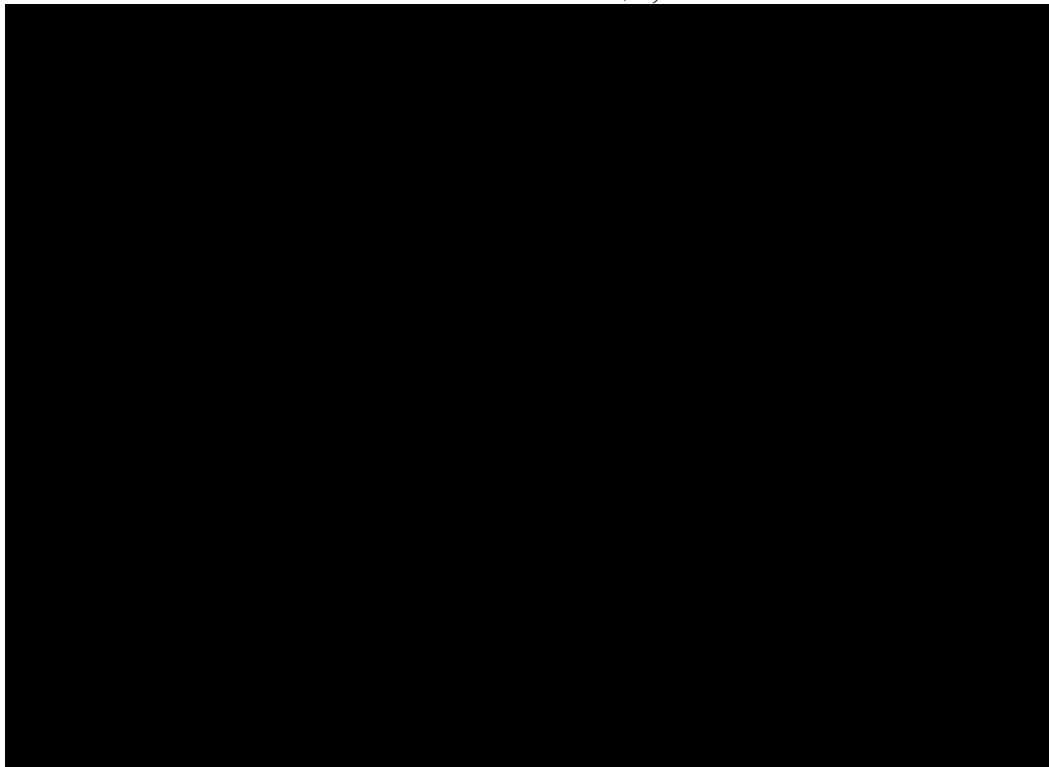
Premium mattress suppliers compete on product, branding, and price. But they also compete fiercely for distribution: to reach the vast majority of consumers, suppliers vie for—and need access to—slots on the floors of brick-and-mortar mattress retailers. Suppliers also compete for the favor of RSAs, who receive training from mattress suppliers as well as retail commissions that vary based on which mattresses they sell. Within the industry, the saying goes, “bedding is sold not bought.” PX1479-002; *see also* [REDACTED] IH 22:25-23:9.

**B. Tempur Sealy Leads a Highly Concentrated Field of Premium Mattress Suppliers in the United States**

Tempur Sealy is the world’s largest mattress supplier. Formed by the 2013 merger of Tempur-Pedic International and Sealy Corp., Tempur Sealy owns the top two U.S. mattress brands by sales revenue: Sealy and Tempur-Pedic, respectively. Known for its proprietary memory foam technology, the Tempur-Pedic brand is Tempur Sealy’s [REDACTED] [REDACTED] PX1436-027. Tempur Sealy also owns the high-end innerspring mattress brand Stearns & Foster, which it sees as its [REDACTED] PX0053-018. Although Tempur Sealy sells mattresses across a range of segments, it prioritizes premium mattresses, where the company derives [REDACTED] its earnings. PX1436-007.

The U.S. premium mattress market is highly concentrated, with only three companies—Tempur Sealy, Serta Simmons (“SSB”), and Sleep Number—capturing nearly [REDACTED] percent of all revenue. Among the big three, Tempur Sealy stands apart: its share of premium mattress revenue in the United States is nearly [REDACTED] percent, significantly greater than [REDACTED]

**Figure 1**  
**Revenue Shares of Premium Mattresses**  
 Mattresses Priced at \$2,000+



*Das Varma Rep. Ex. 7*

In competing for sales through third-party mattress retailers, Tempur Sealy looms even larger, as Sleep Number does not sell through that channel.

Purple and Casper are among a group of “disruptor” brands that emerged starting in 2014. Initially, these companies primarily sold bed-in-a-box mattresses online, while devoting significant resources to advertising. PX1702-004. The largest of the

“disruptors” soon realized that to scale they needed to sell through brick-and-mortar stores to reach the full universe of potential consumers, many of whom will not buy a mattress before trying it. [REDACTED] IH 19:9-22; PX3013-016; PX2649-056.

Like Tempur Sealy, other mattress suppliers also view expansion in the premium mattress market as key to achieving and maintaining profitability, PX2190-002, in part because premium mattress sales generally yield more revenue and margin on a per-unit basis than lower-end mattresses. Binke (King Koil) IH 19:22-20:5; Megibow (Casper) Dep. 196:17-197:10; [REDACTED] IH 23:18-24; [REDACTED] IH 14:6-13.

**C. Mattress Firm Is the Most Competitively Significant Retailer for Premium Mattress Suppliers in the United States**

**1. Mattress Firm Is the Clear Market Leader**

With approximately 2,300 stores, Mattress Firm is the only multi-vendor mattress specialty retailer with a national, brick-and-mortar store footprint. Mattress Firm describes itself as the “clear market leader” and “category-defining national mattress specialty retailer,” PX9011-012, and touts it is twice the size of its next largest competitor and eight times larger than the next largest multi-branded mattress specialty retailer. PX9011-012. Mattress Firm is especially important for premium mattress sales: unlike the average retailer, [REDACTED] PX2482-047; PX2131-010. For premium mattress suppliers, no other third-party retailer can provide anywhere near the same volume of mattress revenue as Mattress Firm. It is the number one retailer for Tempur Sealy’s three U.S. brands, SSB’s main brands (Serta and Beautyrest), and Purple. PX9011-012.

## 2. Mattress Firm's Unmatched Scale and Value Proposition Make It the "Kingmaker" for Premium Mattress Suppliers

Mattress Firm's distinct importance as a distribution channel allows it to serve as the "kingmaker" of mattress brands. One Mattress Firm executive remarked: "Purple is the most prominent 'disruptor brand' in the market. . . . [A]nd who made them such a dynamic disruptor[?] [W]e did. . . . That's the power of our border to border, coast to coast national brand food [sic] print and presence." PX2208-001.

Tempur Sealy agrees and has sought to restrain Mattress Firm's power to kickstart Tempur Sealy's rivals. A Mattress Firm executive wrote in 2020 that Tempur Sealy's CEO "knows we can king make Casper, he told me directly to my face 10 months ago and coined the Mattress Firm king maker mantra while urging me... 'you are the king maker and you have a responsibility not to let those bad guys in.'" PX2074-001.

Tempur Sealy's CEO also warned with regard to Purple: "[Mattress Firm] is screwing up BIG on this. They need to kill this ASAP. You let these guys [Purple] get capital and it is not good for anyone." PX1447-001; *see also* PX1449-001 (Tempur Sealy's CEO wrote: [REDACTED] In 2021, Tempur Sealy's CEO wrote to a Mattress Firm Board member amid its negotiations with Purple: [REDACTED] [REDACTED] PX2544-001.

### D. Tempur Sealy Recognizes That It Can Eliminate Future Competition and Block New Competition Through the Proposed Acquisition

Following 18 months of discussions, on May 9, 2023, Tempur Sealy agreed to acquire Mattress Firm for approximately \$4 billion. At every stage, Tempur Sealy has

shown that post-acquisition it will have the ability and incentive to limit current and future rivals' access to Mattress Firm. *Infra* Part I.B.1.b. For example, on the cover of a deck presented to Tempur Sealy's Board of Directors in May 2022, Tempur Sealy's Chairman and CEO wrote that the Proposed Acquisition could allow Tempur Sealy to "eliminate future competition" and "block new competition." PX1452-001. An earlier presentation to the Board stated that the Proposed Acquisition would give Tempur Sealy "[m]aximum control over a critical retail channel partner" and would "further build[] a competitive moat." PX1729-003.

These were not one-off statements. Another Board Member wrote to Tempur Sealy's CEO acknowledging his reference to Mattress Firm as [REDACTED] PX6345-002. A different Board Member separately wrote that acquiring Mattress Firm would put a [REDACTED] PX6344-002. Voluminous other deal-related documents paint a similar, clear picture of Tempur Sealy's ability and incentive to use Mattress Firm to obstruct rivals. *Infra* Part I.B.1.

### **STATEMENT OF ISSUES**

Whether, pursuant to FTC Act § 13(b), 15 U.S.C. § 53(b), the Court should grant a preliminary injunction preventing Defendants from consummating the Proposed Acquisition pending the FTC's administrative proceeding.

### **LEGAL STANDARD**

Section 7 of the Clayton Act bars mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. This statute is intended to arrest anticompetitive mergers "in their incipiency" and,

accordingly, requires a prediction of the merger’s likely impact on future competition.

*U.S. v. Phila. Nat’l Bank*, 374 U.S. 321, 362 (1963).

To evaluate Section 7 claims, courts apply a burden-shifting framework, under which the government bears the initial burden to establish a prima facie case. *Illumina*, 88 F.4th at 1048. If a prima facie case is made, “the burden shifts to the defendant to present evidence that the prima facie case inaccurately predicts the relevant transaction’s probable effect on future competition or to sufficiently discredit the evidence underlying the prima facie case.” *Id.* If the defendant succeeds, “the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.” *Id.*

Courts evaluate the potential competitive effects of vertical acquisitions using two different standards: (1) the “ability-and-incentive” standard, “which asks whether the merged firm will have both the ability and incentive to foreclose its rivals”; and (2) the *Brown Shoe* standard, which applies a set of factors established by the Supreme Court. *Illumina*, 88 F.4th at 1051. Recently, the Fifth Circuit in *Illumina* held that FTC complaint counsel carried its burden at the permanent injunction stage to show that “the Illumina-Grail merger is likely to substantially lessen competition in that market under either the ability-and-incentive test or looking to the *Brown Shoe* factors.” *Id.* at 1061.

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to obtain a preliminary injunction in federal court “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” Under Section 13(b), preliminary injunctions “are meant

to be readily available to preserve the status quo.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008). Courts “do not require the FTC to prove the merits of its case in a section 13(b) proceeding,” *FTC v. IQVIA Holdings Inc.*, 710 F.Supp.3d 329, 349 (S.D.N.Y. 2024), or require the FTC to prove irreparable harm, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991). Rather, courts follow a two-step analysis to: (1) determine the Commission’s likelihood of ultimate success on the merits; and (2) balance the equities to determine if preliminary relief serves the public interest. *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 721 (5th Cir. 1982). Because “the scope of the Section 13(b) inquiry is necessarily limited and narrow ... the FTC’s burden to obtain a preliminary injunction is lower than the burden it faces in the administrative proceeding.” *IQVIA*, 710 F.Supp.3d at 349. Moreover, in weighing the equities under Section 13(b), the interests of private parties carry “little weight” so as not to “undermine section 13(b)’s purpose of protecting the public-at-large, rather than individual private competitors.” *Univ. Health*, 938 F.2d at 1225.

### SUMMARY OF ARGUMENT

This Court should issue a preliminary injunction under Section 13(b) of the FTC Act because the FTC is likely to prevail in the administrative proceeding in showing that the effect of the Proposed Acquisition “may be substantially to lessen competition or tend to create a monopoly” in the U.S. premium mattress market. Premium mattresses typically have superior quality, enhanced features, reputable brand names, and supplier-imposed pricing policies. Unlike entry-level mattresses, premium mattresses primarily are sold through brick-and-mortar retailers that provide consumers with the opportunity

to try them first. Many industry participants, including Tempur Sealy, define mattresses priced \$2,000 and above as comprising the premium mattress market, and Tempur Sealy's ordinary-course documents are replete with references to its commanding share in this market.

The Proposed Acquisition's threatened harm to premium mattress competition is shown by a substantial volume of evidence, particularly Defendants' internal documents. The best way to predict this acquisition's impact on future competition is to look at the expectations of Tempur Sealy's Board Members, executives, shareholders, and other investors. Tempur Sealy's Chairman and CEO has noted that acquiring Mattress Firm may "eliminate future competition" and "block new competition." His fellow Board Members expect the Proposed Acquisition to build a "competitive moat" around Tempur Sealy's business. And Tempur Sealy, its shareholders, and Wall Street analysts have projected [REDACTED]

[REDACTED]

Although Defendants downplay Mattress Firm's importance, their documents show otherwise. Tempur Sealy considers Mattress Firm a "critical retail channel partner," and named the retailer "kingmaker." Recognizing Mattress Firm's unmatched ability to drive sales, Tempur Sealy repeatedly has sought to block its competitors from entering or expanding in Mattress Firm. A premium mattress supplier foreclosed from Mattress Firm would lose an enormous and irreplaceable volume of sales. To make matters worse, Tempur Sealy has executed numerous agreements blocking access to other retailers to which a foreclosed supplier could otherwise turn. Foreclosing suppliers at

Mattress Firm will weaken premium mattress competition and force consumers to pay hundreds of millions annually in higher prices.

The Proposed Acquisition would raise prices for consumers regardless of the manner in which Tempur Sealy forecloses. There are no countervailing benefits to the Proposed Acquisition's threatened harm, and none of Defendants' proposed remedies would alleviate this harm in any material way. Such harm could occur immediately if Defendants consummate the Proposed Acquisition before the FTC concludes its administrative trial.

## **ARGUMENT**

### **I. The Commission Is Likely to Succeed on the Merits**

The FTC is likely to succeed at the administrative hearing in proving that the effect of the Proposed Acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. The Proposed Acquisition would give Tempur Sealy the ability and incentive to limit its rivals' (and would-be rivals') access to Mattress Firm, the most competitively significant premium mattress retailer in the United States, and act as a clog on competition.

Such foreclosure—in whatever form it takes—would likely substantially lessen competition in the U.S. market for premium mattresses by raising prices, reducing innovation, reducing quality, and restricting consumer choice.

#### **A. The Relevant Market Is Premium Mattresses in the United States**

A relevant market is the “line of commerce” and the “section of the country” where the relevant competition occurs. *Illumina*, 88 F.4th at 1048. Although the relevant

market must “correspond with commercial realities of the industry,” *id.* at 1048-49, the government is not required to define a market by “metes and bounds.” *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966).

The FTC may define a relevant market using “the ‘*Brown Shoe*’ methodology, which looks at certain ‘practical indicia’ of market demarcation,” *Illumina*, 88 F.4th at 1049, or the “hypothetical monopolist test.” *Id.* at 1050 n.8. Here, both the *Brown Shoe* practical indicia and the “hypothetical monopolist test” show that premium mattresses sold in the United States is a relevant market in which to assess competitive effects from the Proposed Acquisition.

**1. The Brown Shoe Practical Indicia Show that Premium Mattresses in the United States Are a Relevant Market**

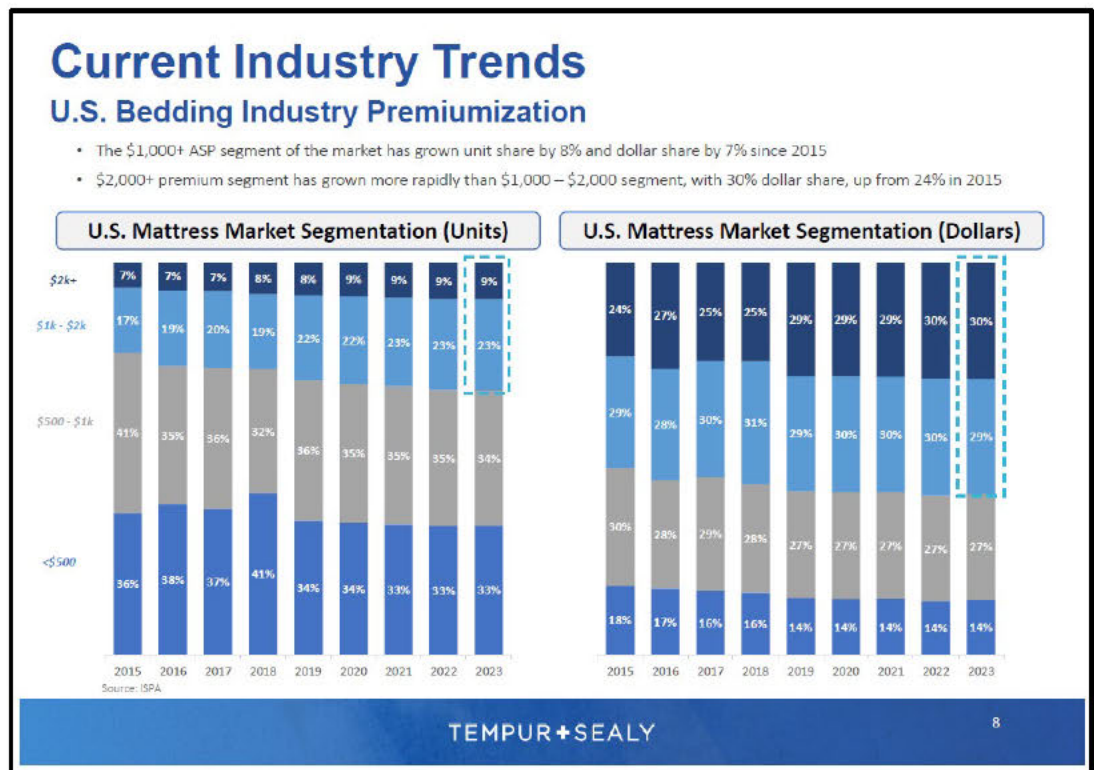
The *Brown Shoe* “practical indicia” include factors such as “industry or public recognition of the [market] as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *Illumina*, 88 F.4th at 1049. The factors “are not rigidly applied,” and the determination of the relevant market is ultimately “a matter of business reality.” *IQVIA*, 710 F.Supp.3d at 353.

*a. The Relevant Product Market Is Premium Mattresses*

“When determining the relevant product market, courts often pay close attention to the defendants’ ordinary course of business documents.” *United States v. H&R Block, Inc.* 833 F.Supp.2d 36, 52 (D.D.C. 2011); *see also IQVIA*, 710 F.Supp.3d at 362 (same).

Here, those documents consistently show that premium mattresses are a relevant product market:

- Tempur Sealy analyzes and calculates its share in the market for premium mattresses above \$2,000. *E.g.*, PX9027-008 (identifying “\$2,000+” as “premium segment.”); PX1751-001 [REDACTED] PX1371-001 (“Tempurpedic is the dominant industry market share leader in the premium price point (+2k) segment”); PX1733-001 (similar).



PX9027-008

- Tempur Sealy highlights its “focus[] on premium bedding with its Tempur-Pedic and Stearns & Foster brands.” PX9027-003.
- [REDACTED] (MFRM) IH 68:11-69:3.
- Tempur Sealy has sought exclusivity [REDACTED] asking to be the [REDACTED]

- A Tempur Sealy agreement with at least one retailer provides that the retailer [REDACTED] PX6199-001.

Extensive evidence further confirms that premium mattresses are a relevant product market under the *Brown Shoe* factors.

Particular Characteristics and Features. Premium mattresses are typically characterized by superior quality and enhanced comfort features, such as adaptive pressure relief, cooling comfort, and increased support layers. [REDACTED] (MFRM) IH 22:16-24:1; [REDACTED] (MFRM) IH 101:12-104:6; [REDACTED] Dep. 18:18-19:24; [REDACTED] (MFRM) IH 124:11-125:12. They are constructed using specialized and often expensive components, including higher quality materials and more layers of memory foam, cooling gel, or higher quality coils or grid construction. [REDACTED] (TSI) Dep. 99:7-100:2; [REDACTED] (MFRM) IH 101:12-104:6; Nguyen (Avocado) Dep. 27:7-28:2; [REDACTED] IH 59:4-23; Megibow (Casper) Dep. 198:5-13; Haverty's Dep. 123:12-23. Most premium mattresses are flat-pack mattresses and not sold as a bed-in-a-box. [REDACTED] IH 23:8-11; [REDACTED] IH 55:5-56:16.

Premium mattresses are also predominantly branded mattresses, and are heavily advertised with an emphasis on their enhanced sleep and wellness features. Barra (Sleep Number) IH 23:20-24:9; [REDACTED] IH 26:16-25; Megibow (Casper) Dep. 209:21-211:11.

Distinct Customers. Premium mattress customers often have particular sleep needs and are willing to invest in a mattress that provides superior comfort and wellness. PX1274-008; [REDACTED] Dep. 20:25-22:12. Most prefer to test a

mattress in a brick-and-mortar store, where they can compare multiple mattresses.

Megibow (Casper) Dep. 199:2-10; Nguyen (Avocado) Dep. 72:14-73:5.

Distinct Pricing. Premium mattress suppliers, including Tempur Sealy, typically set the retail prices of their premium mattresses using a Uniform Pricing Policy (“UPP”) or a Manufacturer’s Advertised Pricing Policy (“MAPP”), [REDACTED] (MFRM) IH 125:3-126:16, intended to establish uniform pricing nationwide and prohibit retailer discounting. [REDACTED] (TSI) IH 48:23-51:6; [REDACTED] Dep. 11:5-13:1 (Vol. 2). Non-premium mattresses are typically not subject to such policies. [REDACTED] (MFRM) IH 125:3-22; *see also* PX2607-004; PX0064 at -026-29.

Industry Recognition. Industry participants recognize premium mattresses as a distinct market. Alternatively referring to the segment as “high-end,” “best,” or “luxury,” mattress retailers and suppliers alike distinguish the premium “\$2,000 and above” segment from lower price points. *E.g.*, [REDACTED] IH 18:10-14 (above \$2,000 is “premium”); [REDACTED] Dep. 17:8-24 (\$2,000-3,000 is “premium”); Barra (Sleep Number) IH 22:7-20 (\$2,000 and above is “best”).

Specialized Vendors. Premium mattresses are sold primarily through mattress specialty stores, furniture stores, and department stores, which allow customers to test multiple premium mattress brands and consult knowledgeable salespeople. PX3013-017; Megibow (Casper) Dep. 121:14-20. Other types of retailers predominantly sell lower-end mattresses, carry fewer mattress models in-store, may not display mattresses, and do not employ trained mattress salespeople. *E.g.*, PX6000 Meyer (Lowe’s) Decl. ¶¶ 4, 6, 9; PX6001 [REDACTED] Decl. ¶¶ 3-6; Galimidi (Macy’s) Dep. 138:19-140:15.

Online retailers also predominantly sell lower-end mattresses. *E.g.*, Moran (Wayfair) Dep. 194:19-195:6.

*b. The United States Is a Relevant Geographic Market*

Like a relevant product market, a relevant geographic market must both “correspond to the commercial realities of the industry and be economically significant.”

*Brown Shoe*, 370 U.S. at 336-37. Here, that market is the United States. Tempur Sealy and its U.S. rivals: (a) have U.S.-specific marketing and business strategies for their mattresses, *e.g.*, PX6346-002 [REDACTED]

[REDACTED] (b) evaluate and react to competitive strategies of other U.S.-based premium suppliers, *e.g.*, PX1300-005; (c) set prices nationally; (d) track U.S. market shares, *e.g.*, PX1733-001 [REDACTED] Megibow (Casper) Dep. 23:1-12; and (e) view U.S. customers as distinct from regional or international customer bases.

**2. Expert Economic Analysis Shows Premium Mattresses in the United States Is a Relevant Market**

Courts also rely on the “hypothetical monopolist test” to define a relevant market. This test asks if a single firm that controlled the entire market, as defined by the FTC, could profitably impose a price increase, or would customers move so much business in response that the increase would be unprofitable. If the price increase would be profitable, then the FTC has defined the relevant market accurately. *IQVIA*, 710 F.Supp.3d at 369. “Federal agencies typically use a price increase—or SSNIP—of 5%

when analyzing prospective mergers.” *Id.*; see also *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 n.1 (3d Cir. 2016).

Here, economic expert Dr. Gopal Das Varma conducted a quantitative analysis to show that a market for premium mattresses in the United States satisfies the hypothetical monopolist test. Das Varma Rep. Sec. IV.B.

**B. Tempur Sealy’s Proposed Acquisition of Mattress Firm May Substantially Lessen Competition or Tend to Create a Monopoly**

The Fifth Circuit instructs courts to evaluate the competitive effects of vertical acquisitions using two different standards: (1) the “ability-and-incentive” standard; and (2) the *Brown Shoe* standard. *Illumina*, 88 F.4th at 1051. The FTC is likely to prevail under either standard.

**1. Post-Acquisition, Tempur Sealy Will Have the Ability and Incentive to Foreclose Rival Premium Mattress Suppliers**

Because it will own and thus have full control of Mattress Firm post-acquisition, Tempur Sealy will have the ability to limit rival suppliers’ access to Mattress Firm. For several reasons, Tempur Sealy will have the incentive to limit those suppliers’ access to Mattress Firm as well. Numerous deal-specific documents reveal Tempur Sealy’s incentive to use this merger to limit rivals’ access to Mattress Firm and negatively affect competition for premium mattresses.

*a. Tempur Sealy Will Have the Ability to Foreclose Rivals at Mattress Firm*

The structure of the Proposed Acquisition gives Tempur Sealy the ability to foreclose rivals at Mattress Firm. Currently, Mattress Firm controls its own floor and

makes its own merchandising decisions. When Tempur Sealy has sought in the past to influence those decisions to oust rivals, Mattress Firm resisted some of those requests. Post-acquisition, however, Tempur Sealy will have the ability to stop carrying rival mattresses or limit their sales through a variety of actions. *See Illumina*, 88 F.4th at 1051.

*b. Tempur Sealy's Internal Documents Recognize Its Ability and Incentive to Limit Access to Mattress Firm Post-Acquisition*

Contemporaneous business documents are among the strongest evidence in Section 13(b) merger cases. In a recent merger challenge, for example, a court was “more persuaded by the plain import of [Defendants’] contemporaneous statements as reflected in the documentary record than by Defendants’ attempts to diminish the substantial evidence.” *IQVIA*, 710 F.Supp.3d at 385; *see also FTC v. Hackensack Meridian Health*, 2021 WL 4145062, at \*9 (D.N.J. Aug. 4, 2021). By contrast, “subjective corporate testimony” by executives of a merging firm is “generally deemed self-serving and entitled to low weight.” *FTC v. Meta Platforms Inc.*, 654 F.Supp.3d 892, 937 (N.D. Cal. 2023).

Over and over, Tempur Sealy has revealed its incentive—and further, its explicit objective—to use Mattress Firm to protect its business from future competition.

For years, Tempur Sealy has considered purchasing Mattress Firm because of its potential to inflict competitive harm. For example, a deck prepared when Tempur Sealy examined acquiring Mattress Firm in 2015 (and recirculated by Tempur Sealy’s CFO in 2021) [REDACTED]

[REDACTED]

[REDACTED]

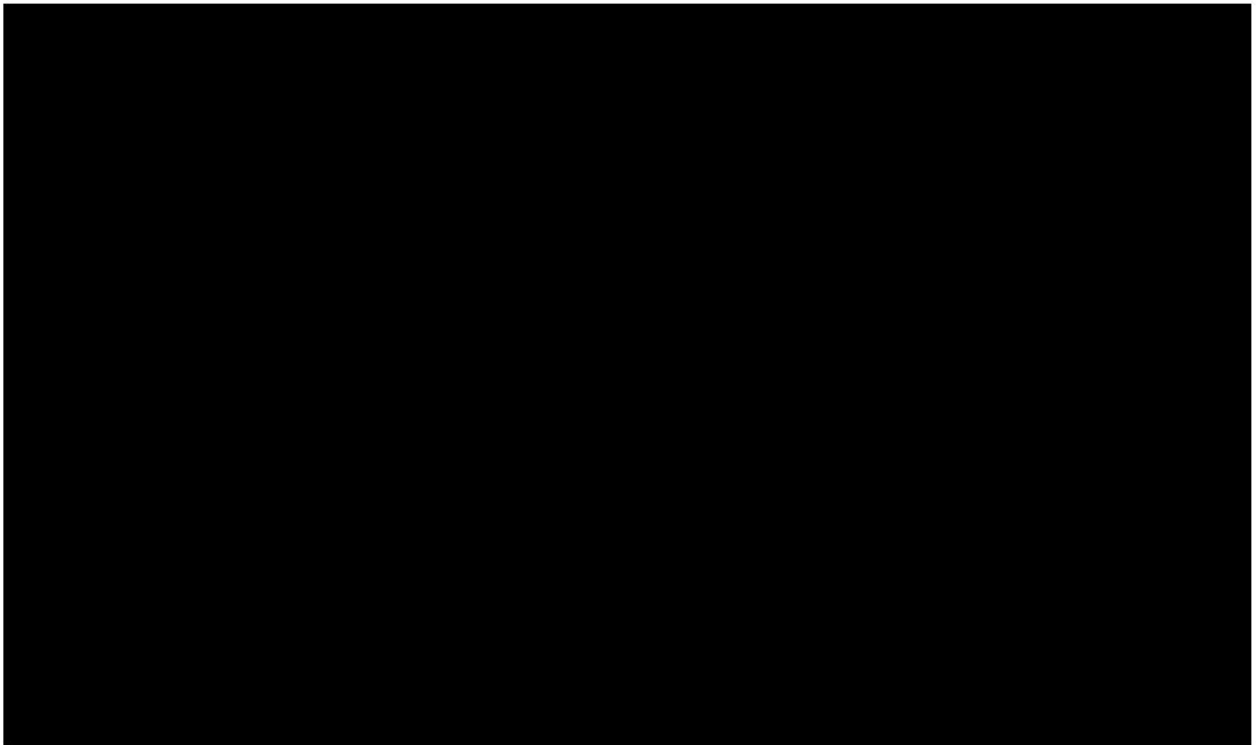
[REDACTED]

[REDACTED]

[REDACTED]

*PX1754-030, 054, and 064*

In October 2021, a Tempur Sealy Board presentation stated that the Proposed Acquisition would give Tempur Sealy “[m]aximum control over a critical retail channel partner” and would “further build[] a competitive moat.” PX1729-003.



*PX1729-003*

Tempur Sealy's vision of building a "competitive moat" resonated throughout the Board. After a May 5, 2022 Board meeting, a Board Member texted Tempur Sealy's Chairman and CEO: [REDACTED]

[REDACTED] PX6345-002.



*PX6345-002*

Another Board Member texted Tempur Sealy's Chairman and CEO in 2023 that



[REDACTED] PX6344-002.

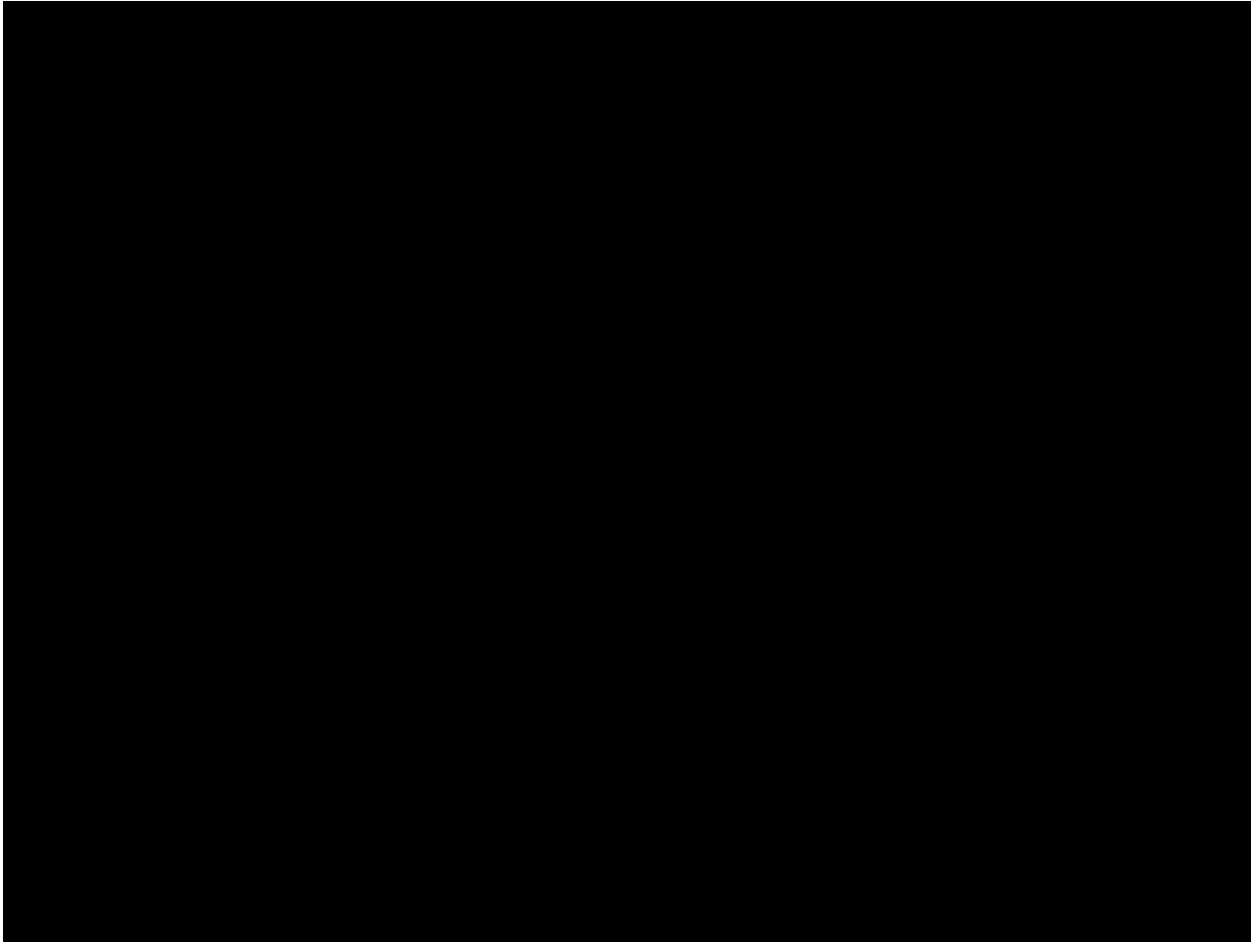
[REDACTED]

*PX6344-002*

Notably, this text was sent months after the FTC issued a litigation hold, but it was deleted from the CEO's phone, along with all texts that he sent or received before Tempur Sealy and Mattress Firm executed their merger agreement. Accordingly, the documentary record of communications concerning the Proposed Acquisition, though consistent, is incomplete.

On May 5, 2022, on the cover of a deal deck presented to the Board of Directors, Tempur Sealy's Chairman and CEO compared the benefits of [REDACTED] versus the Proposed Acquisition, codenamed "Project Lima." [REDACTED]

[REDACTED] Acquiring Mattress Firm, by contrast, would allow Tempur Sealy to "eliminate future competition" and "block new competition."



*PX1452-001*

Early in the process, Tempur Sealy's Chairman and CEO explained in a text message to a fellow Board Member that by acquiring Mattress Firm, [REDACTED]

[REDACTED] PX6343-002.

[REDACTED]

PX6343-002

The same Board Member later wrote to Tempur Sealy's CEO that acquiring Mattress Firm is [REDACTED]

[REDACTED] PX6343-002.

[REDACTED]

PX6343-002

Tempur Sealy's acknowledgment of its incentive to control the floor at Mattress Firm and harm competition continues to this day. In a June 2024 text exchange, Tempur Sealy's CEO [REDACTED]

[REDACTED]

[REDACTED] PX6236-002. In

November 2023, Tempur Sealy's CEO [REDACTED]

[REDACTED] PX6237-002.

*c. Foreclosure Will Allow Tempur Sealy to Increase Profit on Each Sale*

Tempur Sealy will make significantly more profit by favoring its own products in Mattress Firm post-acquisition. When Tempur Sealy sells a mattress through Mattress Firm, the combined entity will earn both the wholesale and retail margin. By contrast,

when Mattress Firm sells a rival supplier's brand, the combined entity will earn only the retail margin.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*PX6257-003*

[REDACTED]

[REDACTED]

[REDACTED] (TSI) Dep. 103:3-16; PX1123-001.

Wall Street analysts have likewise concluded that Tempur Sealy could generate hundreds of millions of dollars in additional profit by displacing its rivals in Mattress

Firm. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*PX6230-001*

Tempur Sealy’s investors and Wall Street expect the combined company to seize this opportunity. One analyst wrote that the Proposed Acquisition would give Tempur Sealy “an opportunity to serve its largest competitor a ‘gut shot’ by siphoning off distribution of [SSB] product in the largest US mattress retailer.” PX6274-004. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dr. Das Varma’s economic analysis further confirms that the full vertical margin earned by the combined entity from selling a premium mattress will meaningfully exceed

the retail margin from selling a rival's product, creating a profit incentive for the combined firm to foreclose rival suppliers at Mattress Firm. Das Varma Rep. ¶¶ 232-35. Accordingly, unlike an independent Mattress Firm, the combined firm will be incentivized to foreclose rival premium mattress suppliers, weakening competition and enabling Tempur Sealy to benefit from increased sales and higher prices.

*d. Mattress Firm Suppliers Are Among the Most Important Competitors in the Premium Mattress Market*

Tempur Sealy further has an incentive to foreclose competitors at Mattress Firm because its most significant competitors within Mattress Firm—SSB and Purple—are its most significant competitors overall. Tempur Sealy engages in robust price and other competition with those rivals. Das Varma Rep. Sec. IV.C. Eliminating or reducing their presence at Mattress Firm will reduce Tempur Sealy's need to respond to its most significant competitors by reducing prices or enhancing products, harming competition and consumers.

Mattress Firm has been a key battleground for Tempur Sealy's competition with SSB. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Tempur Sealy also has fixated on the threat of Purple within Mattress Firm. During negotiations to re-enter Mattress Firm in 2019, Tempur Sealy proposed that Mattress Firm eliminate Purple from its stores. PX2321-001; PX1619-003. And, in 2021, Tempur Sealy asked Mattress Firm to “Remove Purple from the floors” in exchange for money to upgrade the layout of Mattress Firm’s retail stores. PX1470-002; PX1460-002. Mattress Firm rejected these proposals. PX1619-003.

In the meantime, Tempur Sealy also initiated a [REDACTED]  
[REDACTED]  
[REDACTED] Those efforts continue to  
this day: [REDACTED]  
[REDACTED]  
[REDACTED]

*e. Mattress Firm Is the Most Competitively Significant Retail Channel for Premium Mattresses*

Tempur Sealy’s transaction documents highlight the extent of Mattress Firm’s competitive significance.

*i. Mattress Firm Deliberately Promotes Competition Between Its Suppliers*

Mattress Firm has a strategic interest in promoting competition between its suppliers. It believes it is in its [REDACTED]  
[REDACTED]  
[REDACTED] Mattress Firm actively monitors [REDACTED]  
[REDACTED]

[REDACTED] For example, in late  
2022, Mattress Firm noticed [REDACTED]

[REDACTED]

[REDACTED]

*PX2131-012*

In response, Mattress Firm developed a plan to [REDACTED]

[REDACTED] Mattress

Firm then [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

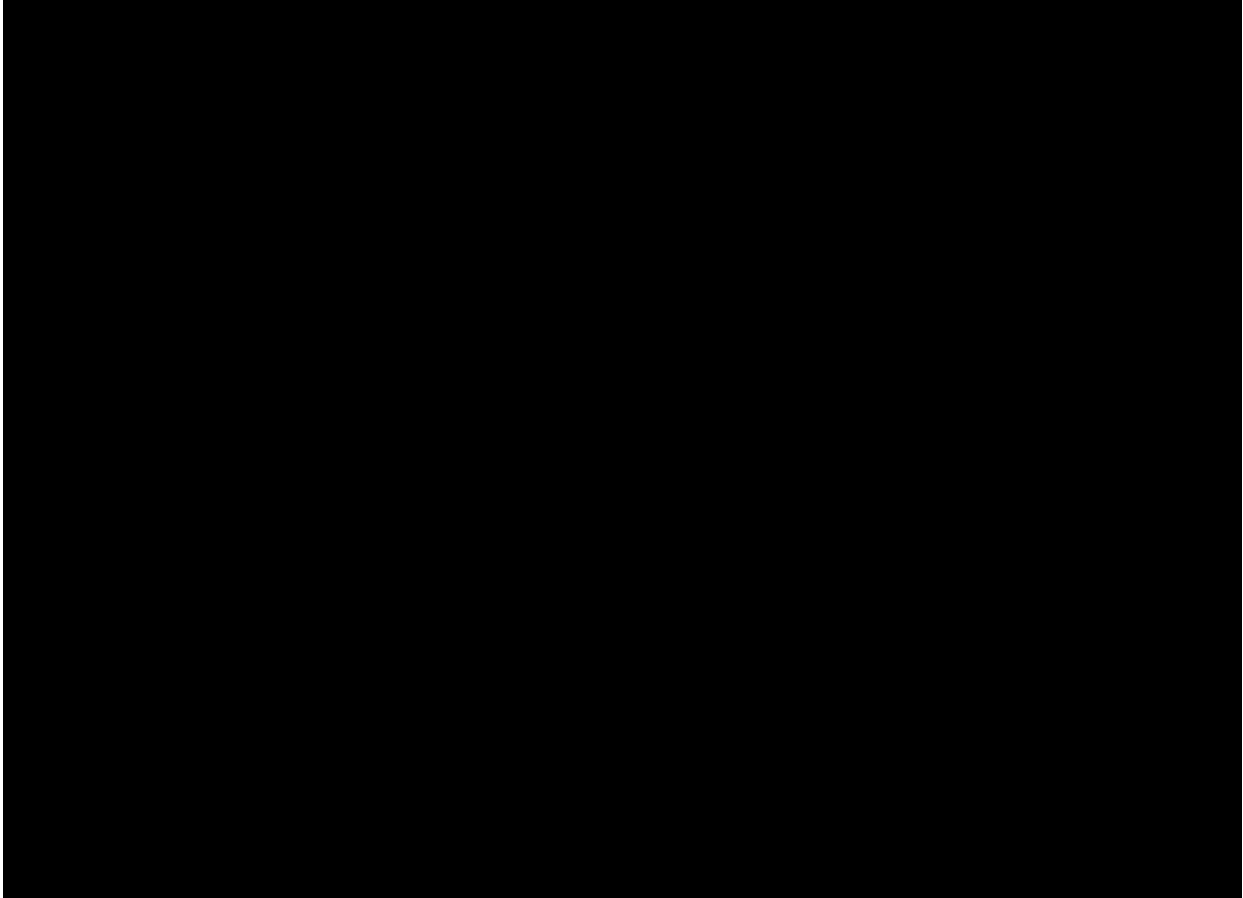
[REDACTED]

[REDACTED]

ii. As Kingmaker, Mattress Firm Offers Benefits No  
Other Retailer Can Match

Among Mattress Firm's chief benefits is scale. Compared to other leading  
premium mattress retailers, Mattress Firm's sales are towering:

**Figure 2**  
**Wholesale Unit Sales of Top 3 Premium Mattress Vendors Through Mattress Firm**  
**and Other Prominent Multi-Vendor Retailers**  
 Mattresses with Estimated Retail Price at or above \$2,000+



*Das Varma Rep. Ex. 8*

Mattress Firm alone accounts for approximately [REDACTED] percent of all premium mattress sales, *Das Varma Rep.* ¶ 218, but this figure understates Mattress Firm's share as a distribution channel for premium mattress suppliers. The figure includes premium mattress sales by direct-to-consumer retailers—most notably Sleep Number—which do not distribute premium mattresses manufactured by third parties. Excluding those retailers, Mattress Firm accounts for [REDACTED] to [REDACTED] percent of premium mattress sales. *Id.* at

218 n.416. Even that figure significantly understates Mattress Firm’s true competitive significance.

Mattress Firm is a [REDACTED]

[REDACTED] PX0060-007, thus offering [REDACTED] PX0058-006.

According to Tempur Sealy, [REDACTED]

[REDACTED] PX6359-001. [REDACTED]

[REDACTED]

[REDACTED]

PX0010-006, -008. Accordingly, selling through Mattress Firm means access to an

[REDACTED] Dep. 234:17-235:9.

Tempur Sealy calculates that [REDACTED]

[REDACTED] PX6360-107.

Mattress Firm offers its suppliers exposure and validation that translates to additional sales outside of Mattress Firm. Selling through Mattress Firm in new markets can help to “clear the path to sell other retailers in those markets as well.” Binke (King Koil) Dep. 125:13-20; *see also* Megibow (Casper) Dep. 150:5-18 (a Mattress Firm partnership adds credibility to the supplier’s brand).

Mattress Firm offers its suppliers product innovation and launch support that are almost impossible to replicate. Mattress Firm touts it is [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] According to Mattress Firm, [REDACTED]

[REDACTED]

[REDACTED] Mattress Firm, for instance:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Mattress Firm also provides product feedback no other retailer can match. Purple, for example, [REDACTED]

[REDACTED]

iii. Mattress Firm Has and Will Provide a Springboard for Brands to Enter and Grow

Tempur Sealy is well aware of Mattress Firm’s power as “kingmaker,” having watched Purple successfully grow using Mattress Firm as a springboard. Purple started as a \$171,000 Kickstarter campaign in 2015. Following its initial deployment to 50 Mattress Firm stores in 2017, Purple’s business surged, and the company became publicly traded later that year. Purple is now the [REDACTED]-largest U.S. premium mattress supplier by revenue, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

One company that was unable to use Mattress Firm as a springboard was Casper, precisely because Tempur Sealy recognized Mattress Firm’s kingmaker power and successfully blocked Casper from Mattress Firm. Tempur Sealy’s CEO testified he

[REDACTED]

[REDACTED] And when Mattress Firm seemed poised to violate this agreement, Tempur Sealy threatened to roll out competitor retail stores to harm Mattress Firm’s business. PX1492-002 (“Our roll out will hurt there [sic] IPO and when their shareholders ask me why we rolled out stores I will tell them Casper issue they did not honor. . . . Someone will be fired.”).

*f. Suppliers Foreclosed from Mattress Firm Will Be Unable to Recoup Their Lost Sales Elsewhere*

Should Tempur Sealy limit rivals’ access to Mattress Firm, they will be unable to recapture the revenue lost because Mattress Firm’s volume of sales is nearly impossible to replicate. Moreover, Tempur Sealy has negotiated dozens, possibly hundreds, of incentive agreements with other retailers that exclude competitors from their floors.

*i. Mattress Firm’s Ubiquity and Importance Cannot Be Replaced*

Given the importance and ubiquity of Mattress Firm, premium mattress suppliers will be unable to replace lost sales at Mattress Firm. Losing Mattress Firm would [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Similarly, in 2022, [REDACTED] called its business with Mattress Firm [REDACTED] One year later, [REDACTED] told one of Tempur Sealy's top shareholders that if Tempur Sealy were [REDACTED]

No other retailer can provide premium mattress suppliers with anywhere near a comparable volume of sales. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

For foreclosed suppliers, there are no viable alternatives to the wholesale channel. The direct-to-consumer channel requires a network of vertically integrated retail stores, which are costly and time consuming to build, and challenging to run profitably. *Infra* Part I.C.1. The online and hospitality sales channels skew heavily toward lower-end products. [REDACTED] IH 19:14-21, 21:14-20; 63:25-64:19; 65:21-66:4; [REDACTED] [REDACTED] IH 28:21-29:13. And the volume of premium mattress exports is miniscule. [REDACTED] [REDACTED] IH 64:25-65:12; [REDACTED] IH 30:7-17.

The inability of a supplier to recapture lost Mattress Firm sales is best illustrated by Tempur Sealy's breakup with the retailer in 2017. For a two-year period between 2017 and 2019, Tempur Sealy sold zero mattresses through Mattress Firm. Although

Tempur Sealy pursued many potential sales opportunities, it was unable to recapture a majority of its lost sales revenue. The company reported to its lenders in 2019 that “i[n] 2 years, [Tempur Sealy] recaptured 34% of lost MFRM Revenue,” PX1608-003, including just 46 percent of lost mattress revenues. PX1643-011.

ii. Tempur Sealy Has Further Locked Up the Market Through a Web of Exclusive Agreements with Other Retailers, Preventing Recapture

Tempur Sealy’s incentive agreements with other retailers also prevent suppliers from replacing lost Mattress Firm sales. Tempur Sealy has agreements with dozens, if not hundreds, of retailers across the country, including many of the larger mattress retailers, that prevent or limit those retailers from carrying non-Tempur Sealy brands, including:

- “TSI-only” agreements that require retailers to sell exclusively Tempur Sealy mattresses, *e.g.*, PX6214-001;
- “TSI-dominant” agreements that require retailers to sell primarily Tempur Sealy mattresses—generally at least 75 percent, *e.g.*, PX6361-001  
[REDACTED]
- Agreements that prohibit retailers from selling specific rivals’ brands, primarily SSB and Purple, *e.g.*, PX6362-005 [REDACTED] PX1678-001 (prohibiting retailer from carrying Simmons, Serta, Purple, or Casper);
- “Kill Grandpa” agreements that require retailers to carry all Tempur Sealy brands. In 2022, Tempur Sealy launched the “Kill Grandpa” initiative to force Tempur-Pedic retailers to carry Sealy and Stearns & Foster, and in some cases, Sherwood, mattresses on their floors, thus requiring retailers to reserve additional slots for Tempur Sealy that cannot be used by rivals. PX1241-014.

Tempur Sealy does not dispute the terms of such agreements. *Compare* Doc. 3

(Complaint) ¶ 92, *with* Doc. 52 (Answer) ¶ 92. [REDACTED]

[REDACTED]

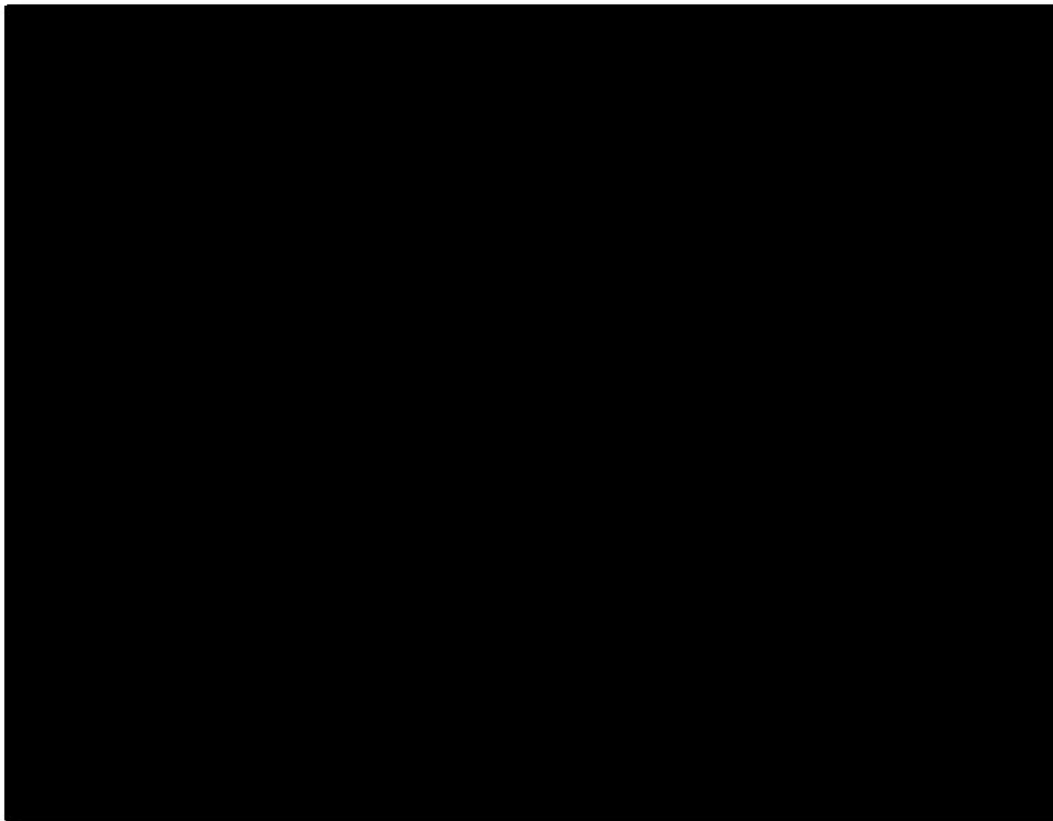
*E.g.*, PX6212-001 (TSI-Only); PX6213-001 (TSI-Only); PX6208-001 (TSI-Dominant);

PX6364-001 [REDACTED]

PX6365-001 (same); PX6366-001 (same).

*g. Tempur Sealy's Approach to Retailer Acquisitions Further Shows Its Ability and Incentive to Foreclose*

In evaluating past retailer acquisitions, Tempur Sealy typically analyzed the potential to grow sales of its own products [REDACTED] Indeed, Tempur Sealy's "Retail Acquisition Framework" calls for the company to "increase[] its share on the retailer's floor" following an acquisition. PX1436-050.



*PX1436-050*

Consistent with this framework, when evaluating the potential acquisition of a California-based retailer, Tempur Sealy's CEO asked "[i]f we owned them, I assume we would kick [SSB] off and pick up say \$12 million in sales?" PX1489-001; *see also* PX1752-002 ("[L]et's buy someone in a market where we are underserved. Kick SSB out.").

SR	Steve Rusing Received signed contract from Value City this morning—\$20m hit to SSB	3/5/2021, 11:32 AM
ST	Scott Thompson So who is next?	1:21 PM
SR	Steve Rusing Not anybody of significance	1:35 PM
ST	Scott Thompson Understand.....let's buy someone in a market where we are underserved. Kick SSB out.	1:37 PM
SR	Steve Rusing Have the list of candidates from my team. Let's discuss next week.	1:39 PM

PX1752-002

Tempur Sealy's two largest retailer acquisitions show that whatever it may say publicly, the company places little or no value in its retailers purchasing mattresses from rival suppliers. Following Tempur Sealy's acquisition of the U.S.-based Sleep Outfitters business, Tempur Sealy ousted the retailer's one third-party supplier and has not added a non-Tempur Sealy brand in the five years it has run the business. [REDACTED] (TSI) IH 72:22-73:6. And after Tempur Sealy acquired Dreams, a U.K. retailer with over 200 stores, Tempur Sealy added its Sealy brand to Dreams' stores while [REDACTED] [REDACTED] (TSI) Dep. 97:15–99:25. [REDACTED] percent of Dreams' sales are now either Tempur Sealy

mattresses or Dreams’ private label mattresses, leaving just [REDACTED] percent for third-party suppliers. PX6285-010.

**2. The *Brown Shoe* Factors Indicate the Proposed Acquisition May Substantially Lessen Competition in the Market for Premium Mattresses**

The FTC also is likely to prevail under the Supreme Court’s multifactor test established in *Brown Shoe* for determining whether a vertical merger may substantially lessen competition. 370 U.S. at 321-22. As the Fifth Circuit recently recognized, “[t]here is ‘no precise formula[]’ when it comes to applying these factors.” *Illumina*, 88 F.4th at 1055. A vertical merger may be unlawful based on “only three of the *Brown Shoe* factors.” *Id.* And at the preliminary injunction stage, a “likelihood of success” is established when “no merger between a manufacturer and an independent retailer could involve a larger potential market foreclosure” and the “trend toward concentration of the industry has been well-documented.” *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 695 (2d Cir. 1973). Here, several factors weigh against the Proposed Acquisition:

*Nature and Purpose of the Acquisition:* Numerous statements by Tempur Sealy’s executives and Board establish that the Proposed Acquisition is intended to “eliminate future competition,” “block new competition,” “further build[] a competitive moat,” and [REDACTED] *Supra* Part I.B.1.b.

*The Combined Firm’s Market Power:* Post-acquisition, Tempur Sealy would be the dominant premium mattress supplier *and* retailer, holding a much larger share in both markets than anyone else. Tempur Sealy would attain a [REDACTED]

\_\_\_\_\_ according to its prior deal analysis. PX1754-030.

*The Likelihood and Degree of Potential Foreclosure:* Tempur Sealy’s internal documents, its past efforts to exclude other suppliers from Mattress Firm, and the financial analyses performed by the company, its shareholders, Wall Street, and the FTC’s economic expert all make clear that the likelihood and degree of potential foreclosure is significant. A rival supplier fully or partially foreclosed from Mattress Firm would

██████████ *Heattransfer Corp. v. Volkswagenwerk, A. G.*, 553 F.2d 964, 985 (5th Cir. 1977).

*Barriers to Entry:* The Proposed Acquisition would raise the already high entry barriers in the premium mattress market by preventing others from growing through Mattress Firm, the mattress supplier kingmaker. *Supra* Part I.B.1. *See U.S. Steel Corp. v. FTC*, 426 F.2d 592, 605 (6th Cir. 1970).

### 3. The Proposed Acquisition Will Harm Consumers

Using empirical evidence, Dr. Das Varma employs an economic model of consumer demand frequently used in merger analysis to model multiple scenarios following the Proposed Acquisition. Dr. Das Varma's model shows that whether the combined firm fully forecloses rivals (by removing the rival from Mattress Firm stores) or partially forecloses rivals (by disadvantaging the rival at Mattress Firm stores), the Proposed Acquisition results in market-wide average price increases for premium mattresses ranging from 6.5 percent to 15.3 percent, which translates to \$308 million to

\$625 million in increased prices paid by American consumers *annually*. Das Varma Rep. Sec. VIII. In fact, given Mattress Firm’s competitive significance in the premium mattress market, the model shows that Tempur Sealy could drive significant price increases even if it chose not to act on its incentive to foreclose. *Id.*

**Figure 3**  
Consumer Harm Scenarios

Foreclosure Scenario	Avg Price Increase (%)	Avg Annual Price Increase (\$)
Full Foreclosure (SSB & Purple)	12.7 – 15.3%	\$534M – \$625M
Full Foreclosure (SSB)	9.3 – 10.7%	\$411M – \$481M
Partial Foreclosure (25%)	6.5 – 7.3%	\$308M – \$352M
No Foreclosure	5.7 – 6.3%	\$279M – \$314M

*Das Varma Rep. Sec. VIII*

**C. Defendants Cannot Rebut the Prima Facie Showing of Likely Competitive Harm**

Defendants bear the burden “to present evidence that the prima facie case inaccurately predicts the relevant transaction’s probable effect on future competition.”

*Illumina*, 88 F.4th at 1058. Defendants cannot rebut the FTC’s prima facie case here.

**1. Entry or Expansion Is Unlikely to Mitigate Anticompetitive Harm from the Proposed Acquisition**

Defendants cannot demonstrate that expansion of existing firms or entry by new firms will be “timely, likely, and sufficient in its magnitude, character, and scope” to deter or counteract the competitive effects of the Proposed Acquisition. *FTC v. Sanford*

*Health*, 926 F.3d 959, 965 (8th Cir. 2019). Premium mattress suppliers and multi-vendor mattress retailers alike face high barriers to entry and expansion.

For premium mattress suppliers, it is “very hard to build a new national brand” and “very expensive” to develop it. Koenig (City Furniture) Dep. 61:1-12. It also takes time. [REDACTED]

A premium mattress supplier also needs to build out distribution. As explained above, (a) the Proposed Acquisition would further raise the already high barriers to entry for premium mattress suppliers by blocking access to Mattress Firm, and (b) many third-party retailers have restrictive agreements with Tempur Sealy that preclude or limit access to them by other premium mattress suppliers.

For specialty and other mattress retailers, it is time consuming and expensive to establish or expand a brick-and-mortar retail store network. Opening a single retail store can take several years, Blumkin (Nebraska Furniture Mart) Dep. 136:1-19; Melville (Saatva) Dep. 118:14-119:11, and cost from one hundred thousand dollars into the millions. [REDACTED] Dep. 105:14-22; Blumkin (Nebraska Furniture Mart) Dep. 136:20-137:2. Once a location is established, opening a self-owned store can take from six to nine months or longer. Melville (Saatva) Dep. 67:17-20; Nguyen (Avocado) Dep. 117:24-118:10 (18-month process). It is not surprising, therefore, that retailers tend to open only a handful of stores per year. *E.g.*, Haverty’s Dep. 123:24-124:2 (targets 5 stores per year); Melville (Saatva) Dep. 119:12-23 (opens approximately 5 or 6 stores per year).

## 2. Respondents Have Not Alleged Any Cognizable Efficiencies

“To be cognizable as rebuttal evidence, an efficiency must be (1) merger specific, (2) verifiable in its existence and magnitude, and (3) likely to be passed through, at least in part, to consumers.” *Illumina*, 88 F.4th at 1059. As explained in Kevin Hearle’s expert report, Defendants have not demonstrated that any claimed efficiencies from the Proposed Acquisition are merger specific and verifiable. Hearle Rep. ¶¶ 55-59; *see also* PX1899-003 [REDACTED]

[REDACTED] In fact, Tempur Sealy has admitted its synergies-related work is [REDACTED] [REDACTED] (TSI) Dep. 186:5-187:17.

## 3. No Commitments or Agreements Made by Tempur Sealy Will Offset the Competitive Harm

In the Fifth Circuit, remedial commitments should be considered as part of Defendants’ rebuttal to the FTC’s prima facie case. *Illumina*, 88 F.4th at 1057. Defendants must demonstrate any remedial commitments would “sufficiently mitigate[] the merger’s effect such that it [i]s no longer likely” that the merger would “substantially lessen competition.” *Id.* at 1059. They cannot do so here.

### a. Post-Closing Agreements

Tempur Sealy has referred to the post-closing agreements it signed with certain suppliers as “supply agreements,” but that is a misnomer. First, while Tempur Sealy touts the number of agreements it signed, most are with companies that do not sell premium mattresses at Mattress Firm [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*b. Divestiture to Mattress Warehouse*

Defendants' proposed divestiture of [REDACTED]

[REDACTED] to Mattress Warehouse will not mitigate the Proposed Acquisition's competitive harm. First, Mattress Firm will retain over [REDACTED] stores and will remain the only nationwide mattress specialty retailer, while Mattress Warehouse would [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *see also* Binke (King Koil) Dep. 227:3-228:24 (locations of the divested stores are "not [in] major metropolitan markets" and "wouldn't make [Mattress Warehouse] any more of a rival" to Mattress Firm).

Second, the divestiture could actually leave current Mattress Firm suppliers worse off versus the status quo. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Tempur Sealy’s CEO even ran the numbers and concluded that [REDACTED]

[REDACTED] Tempur Sealy knew this fact for months before entering into the divestiture agreement but still pursued the divestiture “remedy.”

[REDACTED]

[REDACTED]

Finally, [REDACTED]

[REDACTED] casts serious doubt on both Mattress Warehouse’s commitment to running the stores long-term and the viability of those stores to serve competing suppliers. [REDACTED]

[REDACTED] *See* *United States v. Aetna Inc.*, 240 F.Supp.3d 1, 72 (D.D.C. 2017) (“low purchase price” is reason to reject the divestiture).

*c. Slot Commitment for Third-Party Brands*

Tempur Sealy’s proposed slot commitment does nothing to preserve competition from Tempur Sealy’s rival premium mattress suppliers and in fact *explicitly permits* a partial foreclosure scheme. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Even if Tempur Sealy allocates slots to its main rivals, this commitment would do nothing to prevent the myriad ways Tempur Sealy could harm rivals and steer sales to Tempur Sealy. Nor could rival suppliers monitor or enforce Tempur Sealy's compliance, because [REDACTED]

[REDACTED] *see also* Binke (King Koil)

Dep. 222:4-21. [REDACTED]

[REDACTED] PX0097-003.

*d.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

## II. The Equities Favor a Preliminary Injunction

“The second step in deciding whether to grant [preliminary relief] is to balance the equities.” *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). “The prevailing view is that, although private equities may be considered, they are not to be awarded great weight.” *Penn State Hershey*, 838 F.3d at 352. “[N]o court has denied a Section 13(b) motion for a preliminary injunction based on the weight of the equities where the FTC has demonstrated a likelihood of success on the merits.” *FTC v. Peabody Energy Corp.*, 492 F.Supp.3d 865, 918 (E.D. Mo. 2020).

Here, if Defendants consummate the Proposed Acquisition before the administrative proceeding is complete, they could impose immediate and enduring harm to competition. Several tactics would be nearly impossible to monitor, and Tempur Sealy could immediately and covertly begin its foreclosure strategy before the FTC obtains a ruling on its claims in the administrative proceeding.

Second, as soon as the Proposed Acquisition closes, Tempur Sealy will obtain immediate, unfettered access to competitively sensitive, confidential information about rival suppliers’ pricing, promotions, and products. *E.g.*, [REDACTED] Dep. 225:16-227:2, 249:13-250:6. [REDACTED]

[REDACTED] Tempur Sealy’s access to such sensitive information would likely lead to substantial harm to

competition that could not be undone even if the Proposed Acquisition is ultimately found to be unlawful and unwound.

By contrast, a preliminary injunction would not prejudice Defendants. [REDACTED]

[REDACTED] PX6363-

116. There is “no reason why, if the [Proposed Acquisition] makes economic sense now, it would not be equally sensible to consummate the [Proposed Acquisition] following an FTC adjudication on the merits that finds the [Proposed Acquisition] lawful.” *Penn State Hershey*, 838 F.3d at 353.

### **CONCLUSION**

For the reasons described above, the Court should grant the FTC’s motion for a preliminary injunction.

Dated: October 4, 2024

Respectfully submitted,

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### **CERTIFICATE OF WORD COUNT**

Pursuant to this Court's Rule 18(c), I certify that the motion contains 9,975 words excluding the case caption, table of contents, table of authorities, signature block, and certificates.

/s/ Allyson M. Maltas

Allyson M. Maltas  
Attorney-in-Charge

### **CERTIFICATE OF CONFERENCE**

Pursuant to this Court's Rule 17(a), I certify that on October 4<sup>th</sup>, 2024, the FTC communicated with Defendants to confirm whether they would oppose the Motion for Preliminary Injunction. Defendants represented that they oppose the filing of the Motion.

/s/ Allyson M. Maltas

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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing on all counsel of record who have appeared in this matter via the Court's CM/ECF system on October 4<sup>th</sup>, 2024.

/s/ Allyson M. Maltas

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