UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Federal Trade Commission, Plaintiff, vs. Tempur Sealy International, Inc., *et al.*, Defendants.	Civil Action No. 4:24-cv-02508 Judge Charles Eskridge

Defendants' Response to Plaintiff's Motion for Preliminary Injunction

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Introduction

Vertical mergers are nearly always procompetitive. Tempur Sealy's vertical merger with Mattress Firm is no different. The objective evidence and economic analysis show that this merger will make Tempur Sealy a more efficient competitor, its rivals will respond by competing harder, and—most importantly—consumers will benefit. Nonetheless, the FTC asks this Court to block this merger based on a disfavored downstream-foreclosure theory that has not worked for the government in over 60 years.

The FTC does not claim any loss of horizontal competition—the primary concern of antitrust merger law. Nor does it claim that the merger will have any impact on the vast majority of mattress manufacturers, retailers, or sales. Instead, the FTC asserts that the merger will affect a triply narrow slice of the mattress industry: only "premium" mattress sales, only at Mattress Firm, and for only the few non-Tempur Sealy suppliers who sell there (really, Serta Simmons and Purple). This sliver of a sliver of a sliver of a case boils down to at the absolute most *de minimis* foreclosure even in the FTC's gerrymandered "premium" market. The FTC cannot show this miniscule foreclosure will harm competition. And, there won't be any foreclosure, because that would make no sense and is inconsistent with Tempur Sealy's actual post-merger plans. Instead, the merger will increase competition.

First, antitrust law only bars mergers that are likely to "substantially" lessen competition. *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1051 (5th Cir. 2023). But as the FTC concedes, many "premium" mattress manufacturers do not even use Mattress Firm, including Sleep Number (the [redacted] largest), Saatva, Avocado, Casper, and others. In fact, removing every competitor's "premium" mattresses from Mattress Firm would only foreclose [redacted] of retail distribution for the FTC's "premium" market as depicted below (and even less when Tempur Sealy's remedies are considered). That is too small to present a competitive concern. *See Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1245 (3d Cir. 1987).

Maximum Foreclosure Possible[1]

By contrast, in *Illumina*—the Fifth Circuit's recent opinion addressing a foreclosure theory—the merged firm had 100% market share of a gene-sequencing technology that was essential for rivals to produce a downstream clinical-testing product. 88 F.4th at 1051. So "even if other customers did learn about Illumina's foreclosing behavior and therefore wanted to take their business elsewhere, they would have nowhere else to turn." *Id.* at 1053. Other courts addressing both vertical mergers and identical issues under Section 3 of

[1] Calculated on a revenue basis. "TSI brands" refers to sales of Tempur Sealy products at Mattress Firm, which are excluded from any possible foreclosure. *See Alberta,* 826 F.2d at 1245 (market share of the acquiring company's supply to the acquired firm is not part of the foreclosure). "MFRM private label brands" refers to sales of Mattress Firm's own "premium" private label beds and are likewise excluded.

the Clayton Act—which is worded almost identically to Section 7 under which the FTC proceeds—have repeatedly rejected foreclosure claims with similar—and considerably higher—alleged foreclosure. *E.g.*, *Omega Env't, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162–63 (9th Cir. 1997).

Second, "the principal objective of antitrust policy is to maximize consumer welfare," *United States v. AT&T*, 310 F. Supp. 3d 161, 193 (D.D.C. 2018), "not [to protect] competitors," *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994). Yet the FTC does not get around to addressing consumers until page 40 of its 48-page preliminary-injunction motion, and even there it just waves its hand at the issue with a single paragraph reciting its expert (Dr. Das Varma), Dkt. 142 at 40–41, whose predications are unfounded and contradict the FTC's theory (he finds that rivals *benefit* from losing access to Mattress Firm).

Fundamentally, the FTC is trying to protect Serta Simmons and Purple, not consumers or competition. *See* Dkt. 142 at 41 (defining "[f]ull [f]oreclosure" as "SSB & Purple"). But antitrust law does not let federal agencies redistribute competitive advantages between rivals. In any event, these competitors will be just fine. Even just focusing on what the FTC calls "premium" mattresses, Serta Simmons sells only about [redacted]% of its premium mattresses, which are only [redacted]% of its overall sales, through Mattress Firm. Purple sells only [redacted]% of its premium mattresses through Mattress Firm ([redacted]

[redacted])—comprising only [redacted]% of its overall sales. Dr. Israel Rep. 27. It is thus not surprising that, *after* the merger was announced, Serta Simmons's CFO told a bankruptcy court under oath that it projected that its net sales would grow by 30% between 2023–2027, [redacted]. FTC-SSB-00001737.

Third, although ignored by the FTC, overwhelming documents and testimony show that Tempur Sealy plans to run Mattress Firm as a multi-brand retailer, modeled the transaction that way, and made that plan clear to Mattress Firm's Board and employees, Tempur Sealy's investment banker (JP Morgan), its Board of Directors, its lenders, and the entire investor community.

Indeed, Tempur Sealy has no reason to do otherwise. Mattress Firm's success is founded on its multi-brand strategy. Post-merger, roughly half of the merged entity's revenue would be from Mattress Firm's retail sales. Tempur Sealy would not jeopardize half of its post-merger revenue on an unplanned, long-shot foreclosure scheme. This contrasts sharply with *Illumina*, where the merged firm would have made *eight times* as much money from clinical testing as it would from gene sequencing and thus would be willing to withhold its monopoly gene-sequencing technology from clinical-testing rivals. 88 F.4th at 1053.

The FTC makes much of the fact that today, as a manufacturer, Tempur Sealy competes aggressively to displace its rivals at retailers. Of course it does. But, under *Illumina*, the Court should focus not on how Tempur Sealy behaved

pre-merger, when it made its money not as a major retailer, but at rival manufacturers' expense. Rather, the focus should be on what Tempur Sealy will do when half of its sales come from being a retailer whose success comes from being multi-brand. The answer is that Tempur Sealy will do what it did with its similar acquisitions of multi-brand retailers Dreams and SOVA—continue the successful multi-brand strategy (and make money by selling rivals' mattresses).

Moreover, Tempur Sealy has committed to divest nearly 200 stores to accelerate the already-rapid growth of Mattress Warehouse, and to preserve at minimum [redacted]% of Mattress Firm's slots for third-party mattresses priced at [redacted]. It also has entered post-closing supply agreements with several suppliers, guaranteeing access to the Mattress Firm floor. If Tempur Sealy had some plan to harm competition by kicking rivals off Mattress Firm's floor, those commitments would thwart that plan.

Instead of confronting these facts, the FTC falls back on soundbites—several of which the FTC manipulates. For example, the FTC includes a screenshot of a slide but crops out the part contradicting the FTC's argument, and cites *its own attorney's* deposition question as if it were evidence while omitting the witness' contrary answer. *See infra* at 32–33, 38–39. Manipulated or not, the FTC's snippets cannot meet its burden to overcome the

overwhelming evidence that Tempur Sealy's plan is to run Mattress Firm as a multi-brand retailer. *See AT&T*, 310 F. Supp. 3d at 208 (rejecting similar attempt by government to use "snippets" from defendants' documents in a "trial by slide deck").

Fourth, economics confirms this merger is procompetitive. Consistent with standard vertical merger analysis, Dr. Israel's report shows the merger: (1) reduces the merged firm's costs and makes it a more effective competitor, (2) does not create an incentive to foreclose rivals, (3) induces rivals to become more efficient, and (4) benefits consumers. Dr. Das Varma's contrary model not only contradicts the FTC's own arguments but is unmoored from the facts of the industry.

The Court should deny the FTC's requested preliminary injunction.

Background

The parties and industry

Mattresses, including "premium" mattresses, are sold through tens of thousands of retail stores across the United States, including mattress-specialty stores, furniture stores, department stores, and big-box retailers. *See* Compl. ¶ 76. Many suppliers also sell directly to consumers, including two of the three leading "premium" suppliers: Tempur Sealy and Sleep Number. Online mattress sales are rapidly growing, with one brick-and-mortar retailer calling them an "existential threat" and estimating that Amazon sells over 30%

of all mattresses in the US. [redacted] Dep. 26:22–25, 27:21–22. Tempur Sealy tries to be "wherever the consumer wants to shop," selling through its own stores and website, third-party websites, and in retailers of every kind. Tempur Sealy International, Inc., 2023 Annual Report at 6 (Form 10-K) (Feb. 16, 2024).[2] Mattress Firm competes in the crowded retail space largely by its multi-brand strategy. Dament Dep. 60:6–8.

The proposed transaction

In May 2023, Tempur Sealy agreed to purchase Mattress Firm for approximately $4 billion. That valuation—and the resulting Board of Directors' approval—was based on the assumption that Mattress Firm would continue to be a multi-brand retailer. Tempur Sealy has consistently communicated this to Mattress Firm, investors, lenders, and internally. For example, this investor presentation announcing the transaction touts Mattress Firm's multi-brand floor:

[2] https://investor.tempursealy.com/static-files/cc1ef308-3901-4bc7-8a2a-13a94b83bfab.

Tempur Sealy Investor Presentation[3]

The merger will bring Tempur Sealy closer to its customers, enhance innovation, eliminate double marginalization, and yield other procompetitive benefits, including saving ~$100 million over the next few years. Rao Dep. 20:13–14.

[3] TEMPUR-LIT-00301085 at -1091.

Argument

"A preliminary injunction is an extraordinary equitable remedy that is never awarded as of right." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024). This is especially true here, where the requested relief is "preliminary" in name only. *See Hester v. French*, 985 F.3d 165, 176 n. 39 (2d Cir. 2021) (applying a "higher standard"). As the FTC recently conceded, a federal court preliminary injunction "almost always obviates the need for further administrative proceedings." FTC's Response to Mot. to Continue, Tempur Sealy Int'l, Inc., FTC Docket No. 9433.

To obtain an injunction, the FTC must make a "clear showing" that (1) it is likely to succeed on the merits and (2) the public interest and equities favor an injunction. *See Starbucks*, 144 S. Ct. at 1575; 15 U.S.C. § 53(b) (removing irreparable-injury requirement for the FTC).

The FTC asks for a lighter burden because, it says, this Court merely plays an adjunct role to the administrative proceedings. *See* Dkt. 142 at 9–10. Not so. The FTC's administrative proceedings are unconstitutional, as Defendants will address in more detail in the pending action raising that issue. *See* Compl., *Tempur Sealy Int'l, Inc. v. FTC*, No. 4:24-cv-03764 (S.D. Tex. Oct. 4, 2024). Moreover, the FTC's administrative proceedings do not turn courts into rubber stamps; instead, courts conduct "a rigorous analysis," *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1084 (N.D. Cal. 2023), and often deny

the FTC's requests.[4] Further, the text of Section 13(b) (15 U.S.C. § 53(b)) confirms that the FTC must establish a likelihood of success on the merits; the provision that a court "may" grant a preliminary injunction incorporates traditional equitable rules for injunctions. *See United States v. Abbott*, 110 F.4th 700, 719–20 (5th Cir. 2024) (*en banc*).

To establish a likelihood of success, the FTC must show "that the proposed merger is likely to substantially lessen competition." *Illumina*, 88 F.4th at 1051. It is not enough to show *possible* harm; the FTC must establish that harm is *likely*. *AT&T*, 310 F. Supp. 3d at 189; *see Fruehauf Corp. v. FTC*, 603 F.2d 345, 352 (2d Cir. 1979). And it is not enough to show *any* harm; it must be *substantial*. *Illumina*, 88 F.4th at 1058. It also is not enough to show that *competitors* would be harmed; the FTC must show harm to *consumers*. *See AT&T*, 310 F. Supp. 3d at 193. In assessing whether the FTC has met its burden, this Court "must consider both the positive and negative impacts on consumers by balancing the pro-consumer, positive elements of the merger against the asserted anticompetitive harms." *Id.* at 193.

[4] *E.g.*, *Microsoft*, 681 F. Supp. 3d 1069; *FTC v. Cmty. Health Sys.*, No. 5:24-cv-00028, 2024 WL 2854690 (W.D.N.C. June 5, 2024); *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892 (N.D. Cal. 2023); *FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522 (E.D. Pa. 2020); *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278 (D.D.C. 2020).

The FTC attempts to meet its burden by arguing that the merged entity will have the "ability and incentive" to remove rival suppliers from Mattress Firm. *See Illumina*, 88 F.4th at 1051. This is necessary but not sufficient. Merely having the ability to foreclose "in the most technical sense" "does not establish that [the merged entity] would be able to impair the competitive process." *AT&T*, 310 F. Supp. 3d at 251, n.59. Merely establishing an "incentive to engage in anticompetitive conduct [] without any demonstration as to the probability of acting on that incentive" is not enough. *AT&T*, 310 F. Supp. 3d at 252, n.61; *United States v. Booz Allen Hamilton, Inc.*, No. 22-cv-1603, 2022 WL 9976035, at *7 (D. Md. Oct. 17, 2022) ("[A]n incentive is just the first step along the way to evaluating whether or not there's an effect."). The FTC must show that substantial competitive harm is likely. *See Illumina*, 88 F.4th at 1052–53.

Here, the FTC faces a heavy burden. "[V]ertical integration 'is ubiquitous in our economy and virtually never poses a threat to competition when undertaken unilaterally and in competitive markets.'" *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 990–91 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (quoting a leading antitrust treatise, 3B Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 755c). Indeed, courts have repeatedly recognized that vertical mergers are usually *procompetitive*. *E.g.*, *Fruehauf*, 603 F.2d at 351; *Alberta*, 826 F.2d at 1244; *AT&T*, 310 F. Supp. 3d at 197. For this reason,

there are no shortcuts in this vertical-merger challenge; the FTC "must make a fact-specific showing" that the merger is likely to substantially harm competition. *Illumina*, 88 F.4th at 1057.

To do so, the FTC must do more than show that a few mattress suppliers would be worse off if they lost access to Mattress Firm. *See Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 488 (1977). The FTC must show that *in general* mattress suppliers' competitive viability would be so undermined that *consumers* would suffer. *See Fruehauf*, 603 F.2d at 358–59.

I. Even accepting the FTC's theory, the merger will not harm competition.

As discussed in Section II, Mattress Firm will remain a multi-brand firm post-transaction. But even if Tempur Sealy removed third-party brands from Mattress Firm, it would not substantially harm competition.[5]

A. The FTC's contrived market should be rejected.

The FTC loses even under its proposed "premium" market, as discussed below. But its market definition is also contrived and implausible.

The FTC must define a relevant market that "correspond[s] to the commercial realties of the industry." *Illumina*, 88 F.4th at 1048–49. The FTC cannot "gerrymander its way to an antitrust victory without due regard for

[5] Although the FTC briefly mentions so-called "partial foreclosure," Dkt. 142 at 2, it never develops that argument and has thus waived it. Regardless, because complete foreclosure cannot harm competition, any partial-foreclosure claim would fail.

market realities." *See It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 683 (4th Cir. 2016).

Here, the FTC alleges that harm will occur only in a sliver ([redacted]%) of the mattress market: so-called "premium" mattresses, which the FTC defines as those priced at $2,000+. *See* Dr. Israel Rep. 17. But the evidence does not support that constricted definition.

Mattresses priced $2,000+ serve the same function, have similar features, and are made from the same materials as many mattresses priced below $2,000. [redacted] Dep. 60:9–17; [redacted] Dep. 141:20–25. Where, as here, the product at issue is priced along a "spectrum," pricing distinctions "are economically meaningless," and "[c]ourts have repeatedly rejected efforts to define markets by price variances." *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus.*, 889 F.2d 524, 528 (4th Cir. 1989).

Although mattress suppliers and manufacturers sometimes use "premium" as a shorthand, they are inconsistent about what that means, identifying the starting point for "premium" anywhere from $1,000 to $5,000.[6] Witnesses were consistent, however, that this is an arbitrary way of sorting mattresses. *See* [redacted] Dep. 60:2–17; [redacted] IH 20:14–22; [redacted] IH 70:7–8;

[6] [redacted] IH 96:3–4, [redacted] Dep. 37:17–38:4, and [redacted] Dep. 16:17–20 ($1,000); [redacted] at -3778 ($1,500); [redacted] Dep. 59:25–60:1, [redacted] Dep. 35:12–36:9 ($2,500); [redacted] Dep. 31:21–24 ($3,000); [redacted] at -1842, -1857 ($4,000); [redacted] Dep. 26:4–14 ($5,000).

[redacted] IH 68:8–12; [redacted] Dep. 39:25–40:8. The other vague differences between "premium" and "non-premium" mattresses alluded to by the FTC, Dkt. 142 at 15, are irrelevant: "two products need not be identical to be in the same market; rather, the question is merely whether they are similar in character or use." *Illumina*, 88 F.4th at 1049–50.

Given the plethora of "premium" definitions, one might wonder why the FTC picked $2,000+. The answer is that it maximizes Mattress Firm's "premium" market share (albeit only at [redacted] thus allowing the FTC to maximize possible foreclosure (albeit only at [redacted] If "premium" means $1,000+, Mattress Firm has only [redacted] market share. If it means $1,500+, Mattress Firm has only [redacted] If "premium" means $3,000+, Mattress Firm has only [redacted] Dr. Israel Rep. 46.

This shows not only that the FTC's market definition is arbitrary but also that the alleged [redacted] market share and [redacted] foreclosure share for Mattress Firm, inadequate as they are, are the best the FTC can do. While the FTC's case flounders even using its arbitrary price cutoff, it tips further into irrelevance if that line inches either up or down.

Regardless, the FTC does not come close to showing that the merger is "likely" to "substantially" harm competition even within its market.

B. Mattress Firm is not critical to "premium" mattress competition.

Many successful mattress manufacturers—premium or otherwise—do not, and many *never have,* sold through Mattress Firm. *See AT&T*, 310 F. Supp. 3d at 202 (rejecting the government's argument that a product was necessary for competition in part because competitors "have successfully operated, and continue to operate" without that product); [redacted] Dep. 42:2–3 (there are [redacted]). Sleep Number, one of the largest "premium" mattress manufacturers, has not used Mattress Firm in many years and instead sells its mattresses itself. *See* Dkt. 142 at 5; SN00009113. Saatva, with $[redacted] million in mostly-premium annual mattress sales, sells directly to consumers and has never used Mattress Firm. [redacted] Dep. 13:25–14:9, 51:15–24, 71:10–20, 78:23–79:3. Avocado, a quickly growing premium mattress manufacturer with more than $[redacted] million annual sales, has never sold through Mattress Firm and rejected Mattress Firm's overtures. [redacted] Dep. 14:4–7, 85:21–23; [redacted] Dep. 42:12–23.

By even the FTC's calculation, only [redacted] of "premium" mattresses are sold through Mattress Firm. Dr. Israel Rep. 46. That number drops to [redacted] once Tempur Sealy's and Mattress Firm's own mattresses are excluded from the foreclosure analysis, as they must be. Dr. Israel Rep. 10; *see Alberta*, 826 F.2d at 1245 (market share represented by the acquiring company's existing

supply to the acquired firm is not part of foreclosure). That [redacted] is the *maximum* "foreclosure" effect of the merger.

Mattress Firm's Share of Premium Mattress Sales[7]

Mattress Firm's Share of Premium Mattress Sales Excluding Tempur Sealy and Mattress Firm's Own Brands[8]

[7] Dr. Israel Rep. 8.

[8] *See* Dr. Israel Rep. 10.

This case is thus the *opposite* of *Illumina*. The Fifth Circuit found possible competitive harm there because Illumina had *100%* of a gene-sequencing technology indispensable for a downstream clinical test; foreclosed rivals "would have nowhere else to turn." 88 F.4th at 1053. Far from having nowhere else to turn, most mattress manufacturers have *already* turned elsewhere—as have even suppliers that actually use Mattress Firm for any significant premium sales, namely Serta Simmons and Purple. Dr. Israel Rep. 34. In 2022, Serta Simmons sold [redacted] of its "premium" mattresses somewhere *other* than Mattress Firm. Dr. Israel Rep. 34. For Purple, as the below chart from Defendants' economic expert (Dr. Israel) shows, by 2023, [redacted] of its "premium" mattresses were sold somewhere other than Mattress Firm. Dr. Israel Rep. 28.

The Court need not guess about the impact to competition if a premium-mattress supplier at Mattress Firm were kicked out because it has already happened—to Tempur Sealy. In 2017, with little warning, Mattress Firm and Tempur Sealy abruptly ended their supply relationship. But as Dr. Israel's economic analysis shows, in less than two years Tempur Sealy [redacted] of its Mattress Firm revenues. Dr. Israel Rep. 54, 62. Tempur Sealy did this by shifting to other retailers, increasing advertising, helping retailers open new stores, and selling more itself, including opening its own Tempur-Pedic stores.

TEMPUR-FTC-32817606. Thus, when it lost Mattress Firm, Tempur Sealy competed harder. And whatever happened to Tempur Sealy, the FTC offers no evidence that the breakup had *any* effect on competition or consumers. *See* Dr. Israel Rep. 58–59.

If Serta Simmons or Purple were kicked out of Mattress Firm, they too would simply need to compete harder, and they too would be able to recapture any lost sales through other channels[9]—now armed with all the advertising and marketing dollars previously allocated to Mattress Firm. *See* Moore Dep. 82:9–20. That sort of sales realignment is not a competitive concern. *Fruehauf*, 603 F.2d at 353; *Alberta*, 826 F.2d at 1246. Indeed, they would probably do *better* than Tempur Sealy because they, unlike Tempur Sealy, have had advance warning—they've known about this merger since at least [redacted]. FTC's Second Suppl. Obj. and Resp. to Def.s' First Rogs at 4; [redacted] Dep. 23:8–13.

In fact, since the merger announcement, [redacted], opening up opportunities for competitors. Dr. Israel Rep. 29–30. For example, [redacted] stopped selling Tempur

[9] [redacted]

Sealy mattresses exclusively and added Serta Simmons. [redacted]. [redacted] which operates [redacted] US stores, recently did likewise. Dr. Israel Rep. 29–30. Ashley acquired Nectar mattresses to expand its own mattress offerings, and plans [redacted].[10] [redacted] sales have improved as other mattress retailers respond to the merger by boosting their offerings of non-Tempur Sealy brands. [redacted] Dep. 110:4–10.

Boxed in by its own low market-share calculation and the fact that the breakup did not harm competition, the FTC falls back on snippets, puffery, and speculation.

First, seizing on a handful of email comments, the FTC labels Mattress Firm a "kingmaker." *E.g.*, Dkt. 142 at 2. But Mattress Firm has made no kings. The only rival manufacturers who sell a material volume at Mattress Firm are Serta Simmons and Purple (though both sell only a small portion of their "premium" mattresses there). And Purple—which has only [redacted] of the FTC's "premium" mattress market (Dkt. 142 at 5)—was [redacted]. *See* MFRM-16499283. By the time Purple entered Mattress Firm's floor, it already had annualized net revenue of $187

[10] Howard Ruben, *Ashley Home acquires Nectar mattress owner Resident Home*, Retail Dive (Mar. 7, 2024), https://www.retaildive.com/news/ashley-home-acquires-resident-nectar-dreamcloud/709587/; [redacted] Dep. 32: 7–24. 171:16–22.

million. Purple Investor Presentation (July 27, 2017).[11] The FTC cites [redacted] email that Mattress Firm "made" Purple a "dynamic disruptor." Dkt. 142 at 7 (citing [redacted]). But [redacted] testified that he did *not* mean that Mattress Firm had done something for Purple that other retailers could not. [redacted] IH 37:2–5, 37:12–13, 39:11–15. And whatever [redacted] meant in his [redacted] email, the fact is that Purple's growth and profits are not remarkable, Purple doesn't credit Mattress Firm for its success, and its reliance on Mattress Firm has dwindled. DeMartini Dep. 166:1–8, 21–23; PURP-LIT003092.

Second, the FTC highlights that Mattress Firm sometimes assists in product development. Dkt. 142 at 30. But so do Macy's, Raymour & Flanigan, City Furniture, Rooms to Go, Sit 'N Sleep, Denver Mattress, and others.[12] Mattress Firm does not have [redacted]." [redacted] Dep. 20:5–7.

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[11] https://www.sec.gov/Archives/edgar/data/1643953/000121390017007952/f8k072717ex99-1_globalpartnr.htm.

[12] [redacted] Dep. 59:19–60:18 ([redacted] Saarie Dep. 47:11–49:7 ([redacted]); [redacted] Dep. 77:23–79:4; ([redacted]); [redacted] Dep. 196:16–197:3 ([redacted]); [redacted] Dep. 112:23–114:6 ([redacted]); [redacted] Dep. 256:6–257:1 ([redacted] receives feedback from Rooms to Go and Denver Mattress "similar" to Mattress Firm's feedback); [redacted] (detailing feedback [redacted] received from Ashley, Raymour & Flanigan, Rooms to Go, Denver Mattress, HOM Furniture, and Mor Furniture). [redacted] Dep. 31:10–32:13 ([redacted] obtains product feedback from retailers); [redacted] Dep. 52:8–25 (same for [redacted]

And clearly "premium" mattress suppliers do not need Mattress Firm's assistance, since many don't sell at Mattress Firm.

Moreover, Section 7 of the Clayton Act "is not about protecting [Tempur Sealy's] rivals from any and all competitive pressures they would experience should the merger go through." *AT&T*, 310 F. Supp. 3d at 211. The FTC's theory is premised on the idea that the merger must be blocked if rivals cannot find *one* mattress-specialty retailer that has the exact same supposed benefits as Mattress Firm. But those rivals can turn to many other retailers who collectively sell far more premium mattresses than Mattress Firm. The FTC's economic expert (Dr. Das Varma) complains that this "is like saying the only skyscraper in a city of low-rise buildings is not tall because the combined height of the other buildings exceeds the skyscraper's height." Dr. Das Varma Rebuttal Rep. ¶ 44. In fact, the FTC's theory is like saying a rival will have nowhere to live if it cannot get what the FTC apparently believes is the penthouse. Rivals "are free to sell directly, to develop alternative distributors, or to compete for the services of the existing distributors. Antitrust laws require no more." *Omega*, 127 F.3d at 1163.

[redacted] "have an incentive to oppose a merger that would allow [Tempur Sealy] to increase innovation while lowering cost." *AT&T*, 310 F. Supp. 3d at 214. [redacted]

[redacted] Shortly after this merger was announced, Serta Simmons' then-CFO submitted a sworn declaration to the court overseeing Serta Simmons' bankruptcy projecting that Serta Simmons' net sales would increase by 30% between 2023–2027. FTC-SSB-00001737 at -1759. Serta Simmons' 30(b)(6) witness testified that those projections "assumed that [Serta Simmons] would be able to grow market share at key customers, specifically Mattress Firm." Wyn Dep. 33:23–25. In other words, [redacted] it was assuring the bankruptcy court that it would *grow* [redacted]

Likewise, [redacted] Purple [redacted] told investors that "Mattress Firm stores are some of the least productive for [Purple]," and "the downside potential of losing [share at Mattress Firm] would be limited." TEMPUR-FTC-70061053. [redacted] its statements to investors are corroborated by the data, which reflect that Purple went from selling [redacted] of its "premium" mattresses at Mattress Firm in 2019 to [redacted] in 2023. Dr. Israel Rep. 27.

Fourth, the FTC also references guaranteed-slot-provisions in incentive agreements between Tempur Sealy and some retailers. But it offers no evidence of how many such provisions exist, what their terms are, or what percentage of the market they affect, if any. *See Dillon Materials Handling, Inc. v. Albion Indus.*, 567 F.2d 1299, 1305 n.19 (5th Cir. 1978) (existence of

exclusive arrangements with distributors and proof of the defendant's "market share and dollar volume" was "inadequate" "without any proof of the breadth of exclusive dealing" or "what portion … of the market had been pre-empted").

In any event, these provisions have little to no foreclosing effect. Where they exist, they are part of *incentive* agreements for cooperative advertising money, *see* Dkt. 142 at 36, not *supply* agreements for mattresses—which means that retailers need not fear losing access to Tempur Sealy mattresses if they terminate or renegotiate them. And in fact, they are easily terminable, short in duration, and often terminated or modified in the ordinary course. *See, e.g.*, TEMPUR-FTC-70061083. Further, Tempur Sealy has also [redacted] Tempur Sealy's Suppl. Resp. to Pls' Interrogatory No. 2.

C. The FTC makes no serious attempt to show consumer harm.

The FTC also fails by never meaningfully explaining how any foreclosure of mattress suppliers (let alone the tiny foreclosure at issue) would translate into consumer harm. The FTC does not meaningfully address consumer harm until page 40 of its 48-page brief, ultimately devoting only one paragraph to reciting Dr. Das Varma's view that requiring [redacted] of premium mattresses to be sold somewhere other than Mattress Firm would cause prices on *all* premium mattresses to increase *annually* by [redacted]. Dkt. 142 at 40-41. As explained in Section III, that conclusion is nonsense, and the FTC has nothing

else (including not even trying to show that the Tempur Sealy/Mattress Firm breakup harmed consumers).

D. The maximum potential foreclosure is far below enforcement thresholds.

In considering downstream-foreclosure vertical-merger challenges, courts ask: how much of the market will be foreclosed? *Brown Shoe Co. v. United States*, 370 U.S. 294, 328 (1962); *Alberta*, 826 F.2d at 1244–46; *Fruehauf*, 603 F.2d at 360; *Crouse-Hinds Co. v. InterNorth, Inc.*, 518 F. Supp. 416, 431 (N.D.N.Y. 1980). "[O]nly where foreclosures reach monopolistic proportions—or threaten to do so—does a vertical merger become troublesome." *Alberta*, 826 F.2d at 1244 (summarizing Areeda); *see Fruehauf*, 603 F.2d at 358–60.

Here, the maximum possible foreclosure of an all-mattress market is [redacted] Dr. Israel Rep. 11. That is *de minimis*. *Alberta*, 826 F.2d at 1245 (1.8% was *de minimis*). And *de minimis* foreclosure cannot violate Section 7. *Id.*; *Brown Shoe*, 370 U.S. at 329.

Even using the FTC's gerrymandered premium market yields only [redacted] foreclosure (even less considering Tempur Sealy's commitments). This fares no better. *See Alberta*, 826 F.2d at 1246 (collecting vertical-merger cases rejecting market foreclosures of 5.8% and 8.8%). Indeed, analogous caselaw requires a *minimum* foreclosure of 30-40% to challenge exclusive-dealing contracts under

Section 3 of the Clayton Act, 15 U.S.C. § 14, which is worded almost identically to Section 7 of the Clayton Act, addresses an identical theory of harm and should be interpreted similarly. *See* 4A Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1004 (5th ed. 2020); 11 Areeda, *supra.*, ¶ 1821c1; *Brown Shoe*, 370 U.S. at 321, n.36; *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 626 (5th Cir. 2002); ABA Section of Antitrust Law, *Antitrust Law Developments* 1 § D(2)(b) (9th ed. 2022). The FTC's [redacted] foreclosure claim comes nowhere close.

II. The FTC has not shown that the merged firm will foreclose rivals.

The FTC must show more than that Tempur Sealy "may" or "could" remove other brands from the floor. *See* Dkt. 142 at 2. It must show that foreclosure is "likely." *Illumina*, 88 F.4th at 1048. It fails.

A. Mattress Firm will continue to be a multi-brand retailer.

As the FTC says, "[t]he 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." Dkt. 142 at 11. From 2021 to today, those expectations have consistently been that Mattress Firm will be a multi-brand retailer post-transaction. *See Microsoft*, 681 F. Supp. 3d at 1091 (relying on the fact that the defendant's "witnesses consistently testified there are no plans to [engage in foreclosure]" in rejecting government vertical-merger challenge). The FTC never acknowledges, much less addresses,

this evidence in its motion; indeed, it was so intent on trying to build a counter-narrative based on soundbites that it barely inquired into much of this evidence during its investigation and discovery.

Timeline

May 2021	Scott Thompson tells Mattress Firm CEO John Eck that if the firms merged Tempur Sealy would not remove other brands, pointing to a then-soon-to-be-acquired multi-brand retailer (Dreams) that "would run as [an] independent company" with "[n]o pressure" to sell Tempur Sealy.[13]
February 2022	Even before JP Morgan (Tempur Sealy's banker) was retained, Scott Thompson instructed JP Morgan by email that Tempur Sealy was interested in Mattress Firm as a multi-brand retailer that would sell "all brands successfully," just like Dreams and SOVA.[14]
May 2022	Tempur Sealy's Board of Directors is presented with a valuation model assuming that Mattress Firm would remain a multi-brand retailer.[15]
June 2022	Tempur Sealy's "Strategic Rationale" evaluation of the deal explains that "Mattress Firm would be run on a stand-alone basis while utilizing Tempur Sealy's global reach."[16]
August 2022	Tempur Sealy sends Mattress Firm a formal Indication of Interest, in merging, making clear: "[w]e envisage that Mattress Firm would continue to operate with great autonomy as an independent, multi-brand retailer, much in the way that Dreams conducts its operations in the UK."[17]

[13] TEMPUR-FTC-34093643.
[14] TEMPUR-FTC-31536799 at -6800
[15] TEMPUR-FTC-70045041.
[16] TEMPUR-FTC-34067920 at -7921.
[17] TEMPUR-FTC-34610429.

January 2023	Tempur Sealy's Board of Directors is presented with a valuation model assuming that Mattress Firm would remain a multi-brand retailer.[18]
February 2023	Tempur Sealy's Board of Directors is presented with a valuation model assuming that Mattress Firm would remain a multi-brand retailer.[19]
April 2023	Tempur Sealy's Board of Directors is presented with a valuation model assuming that Mattress Firm would remain a multi-brand retailer.[20]
May 2023	Tempur Sealy's Board of Directors is presented with a valuation model assuming that Mattress Firm would remain a multi-brand retailer.[21]
	Tempur Sealy's Board of Directors votes to approve the merger based on the multi-brand model.[22]
	Shortly after the merger deal is announced, Tempur Sealy stresses Mattress Firm's multi-brand floor to investors.[23]
	Tempur Sealy prepares internal talking points explaining that "[a]fter closing, Mattress Firm will operate as a separate business unit … [s]imilar to prior acquisitions."[24]
August 2023	Scott Thompson tells then-Serta Simmons CEO: "We expect to run a multi branded floor and would be interested in retailing Serta Simmons products."[25]

[18] TEMPUR-FTC-35894197.
[19] TEMPUR-FTC-35894212.
[20] TEMPUR-FTC-35894267.
[21] TEMPUR-FTC-35894299.
[22] TEMPUR-FTC-31889184.
[23] TEMPUR-LIT-00301085 at -1091.
[24] TEMPUR-FTC-31365170 at -5175; TEMPUR-FTC-31554562 at -4565 ("Well-diversified platform generating sales through multiple key brands.").
[25] TEMPUR-FTC-34618567.

September 2023	Scott Thompson tells Purple: "After we close the Mfirm transaction, we plan on a multi branded floor. Same strategy we successfully run at Dreams in the UK."[26]
October 2023	Tempur Sealy tells its lenders that Mattress Firm "will be operated as a separate business unit with autonomy over their merchandising decisions and sales floor."[27]
November 2023	Scott Thompson touts to investors that "Tempur Sealy has signed numerous post-closing supply agreements with existing Mattress Firm suppliers …, [which] are consistent with our expectation for Mattress Firm to continue as a multibranded retailer post closing."[28]
June 2024	Tempur Sealy emphasizes Mattress Firm's "broad assortment of leading national brands" providing a "diverse range of innovative consumer solutions" in a rating-agency presentation.[29]

The FTC's theory is premised on the radical notion that Tempur Sealy has been, for years, lying to Mattress Firm, lenders, investors, and itself. The true explanation is that, as Tempur Sealy has said, Mattress Firm will remain a multi-brand retailer post-transaction.

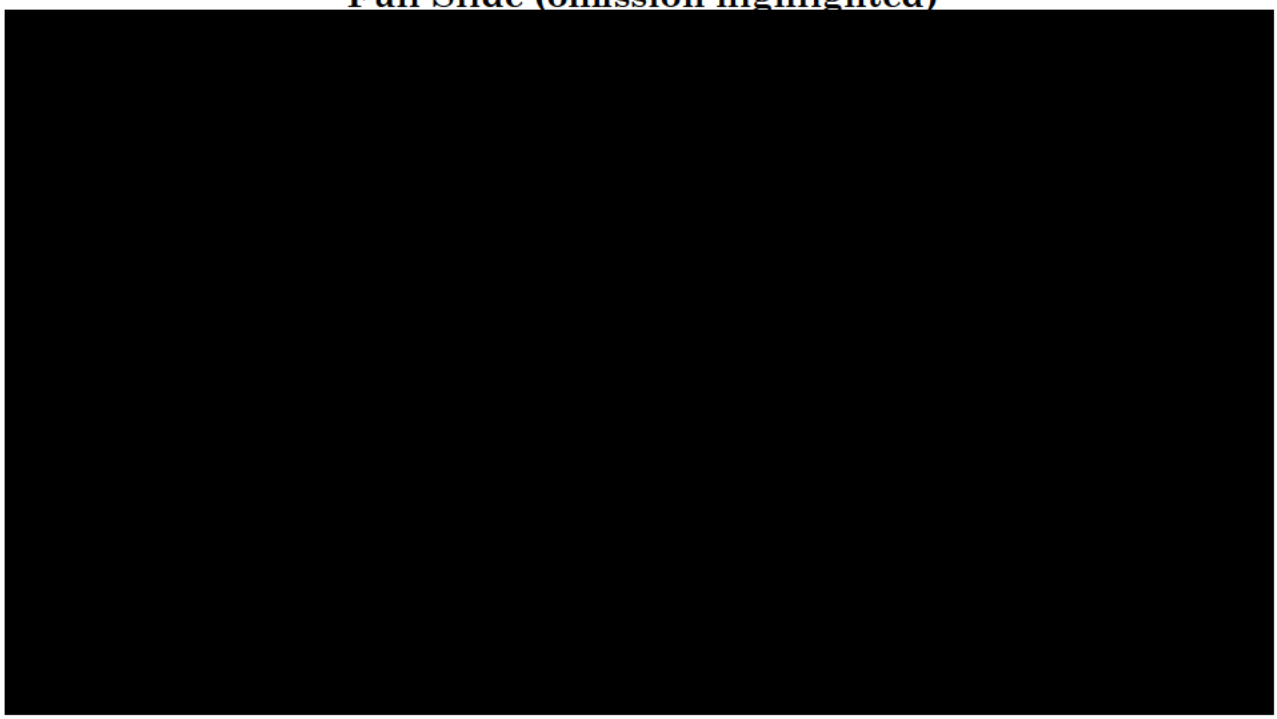
Instead of acknowledging the actual modeling presented to the Board for this transaction throughout 2022 and 2023, the FTC relies on a *2015* pitch deck prepared by outside investment bankers. *See* Dkt. 142 at 19-20. This near-decade-old deck was not relied upon in evaluating this merger. Rao Dep. 96:18.

[26] TEMPUR-FTC-34858517.
[27] TEMPUR-LIT-00050053 at -0054
[28] TEMPUR-LIT-00095408 at -5417-18; TEMPUR-LIT-00301085 at -1091-93.
[29] TEMPUR-LIT-00125294 at -5309.

And the FTC's screenshot crops out the part of the slide that notes that if Tempur Sealy replaced other brands at Mattress Firm, "[c]onsumers may respond negatively to limited brand selection." TEMPUR-FTC-31564317 at -4370.

FTC Screenshot (Dkt. 142 at 20)

Full Slide (omission highlighted)



The FTC also points to a 2021 "accretion model" prepared when Tempur Sealy first began considering an acquisition, which assumed a [redacted] balance of share at Mattress Firm and a [redacted] balance of share everywhere else. Dkt. 142 at 25. As Tempur Sealy's CFO (Rao) testified, this was simply a stress test or "what-if." Rao Dep. 55:1–4. *See AT&T*, 310 F. Supp. 3d at 210 (disregarding this sort of "what-if" as "a far cry" from evidence that anticompetitive effects are "likely"). In any event, even if it happened, this small "realignment of existing market sales"—which assumes that rivals displace Tempur Sealy at other retailers—does not show competitive harm. *Fruehauf*, 603 F.2d at 360.

The FTC also points to what it calls Tempur Sealy's "Retail Acquisition Framework." Dkt. 142 at 37 (citing TEMPUR-FTC-31048577). In fact, this

"Framework" slide was not from a Tempur Sealy document. It was from a draft presentation prepared by an [redacted]. And before Tempur Sealy actually used this slide with any investors, it removed the language ("[redacted]") on which the FTC relies. TEMPUR-FTC-31371375 at -1407; *see AT&T*, 310 F. Supp. 3d at 208 ("statements in a slide deck that were contained in a preliminary draft and were subsequently removed" had "minimal" "probative value").

B. Tempur Sealy's prior acquisitions corroborate its plan for Mattress Firm.

Merger cases are often challenging because they require the Court to predict the future. *See AT&T*, 310 F. Supp. 3d at 190. But that task is easier here because Tempur Sealy has previously acquired two multi-brand mattress retailers which, years later, remain multi-brand. *See id.* at 215 (relying on evidence of "prior, similar transactions").

In 2021, Tempur Sealy acquired Dreams—a U.K. multi-brand mattress retailer with a UK presence similar to Mattress Firm's US position. At his deposition, Dreams CEO Jonathan Hirst testified that Dreams has been "given almost total autonomy to run Dreams as we choose fit to do so" and described Tempur Sealy's relationship with Dreams as "management by arm's length." Hirst Dep. 22:12–13, 22:20–23:3. After the acquisition, Scott Thompson told Hirst that "[w]e want you to continue to run Dreams in the way that you have

for the previous 10, 11 years," and Hirst testified that "I'm pleased to say, nearly three years on from the acquisition, Tempur has been very true to their word, so this concept of arm's length management has really run true." Hirst Dep. 22:22–23:3.

The FTC complains that Dreams eventually added more Sealy mattresses, but omits that *after the acquisition* Dreams rejected Sealy until Tempur Sealy developed an innovative "[redacted]" technology enabling mattresses to [redacted]. Hirst Dep. 85:1–8, 85:19–86:11. That innovation—not any Tempur Sealy command—was why Dreams added more Sealy mattresses to the floor while reducing the slots for two low-volume, unpopular brands. Hirst Dep. 93:20–94:6, 99:21–25. Dreams remains multi-brand to this day.

Similarly, in 2018, Tempur Sealy acquired SOVA, a prominent multi-brand mattress retailer in Scandinavia. Six years later, SOVA continues to be a multi-brand retailer.

Mostly ignoring these transactions, the FTC focuses on Tempur Sealy's acquisition of bankrupt Sleep Outfitters' stores. But when acquired, Sleep Outfitters was already essentially a Tempur Sealy-only retailer, with 95% of sales from Tempur Sealy brands. Post-acquisition, Sleep Outfitters dropped one small brand based on "the price point, the quality, and the lack of

profitability," Buster IH 68:8–13, and the fact that upfront payments would have been required to continue retailing it.

Contrary to the FTC's suggestion, *see* Dkt. 142 at 38–39, the antitrust laws neither require a retailer to freeze the floor at the acquisition, nor to perpetually offer poor products. Sleep Outfitters' and Dreams' decisions to replace some less-popular with more-popular brands offers no support for the FTC's foreclosure theory. More telling is the fact that years after their acquisitions, Dreams and SOVA remain multi-brand.

C. Tempur Sealy has no reason to upend Mattress Firm's multi-brand model.

As *Illumina* explains, "the degree to which [the post-merger firm] has an incentive to foreclose . . . depends upon the balance of two competing interests"—the firm's "interest in maximizing its profits" at Mattress Firm as a retailer and the firm's "interest in maximizing its profits" as a manufacturer by selling more Tempur Sealy mattresses. 88 F.4th at 1052. In *Illumina*, the answer was easy: Illumina would make *eight times* as much money on the clinical tests as on the gene-sequencing platform over which it held a complete monopoly, so it was incentivized to stop making that platform available to clinical-testing rivals. *Id* at 1053. Here, the answer is also easy. After the merger, Tempur Sealy will derive about *half* of its revenue from *Mattress*

Firm's retail, and would not risk that by trashing the strategy that made Mattress Firm attractive in the first place.

Mattress Firm's multi-brand strategy and reputation is key to its success, as reflected in its testimony, strategy documents, and customer surveys. *See, e.g.*, Eck Dep. 203:5–8; Dament Dep. 60:6–8; TEMPUR-FTC-35949081 at -9145 ([redacted] of shoppers considered Mattress Firm because it "[o]ffer[ed] the mattress brand I wanted"); MFRM-05763577 at -3590; MFRM-06158496 at -8513-14; MFRM-07403085 at 6; MFRM-17528064 at -8065; MFRM-17595853 at -5860. As the FTC admits, buying a mattress is a big purchase, Dkt. 142 at 3, and so customers research mattresses online, shop multiple stores before purchasing, often come into Mattress Firm looking for a particular brand (or a wide assortment of brands), and can go elsewhere if Mattress Firm does not have what they want. *See* MFRM-07419407 at -9411, -9443; Dr. Israel Rep. 25–27, 84, n.153; [redacted] Dep. 155:15–16; [redacted] Dep. 52:14–16. Retailers lacking mattresses consumers seek will lose business to retailers carrying those products. *See* [redacted] Dep. 51:23–53:8; [redacted] Dep. 90:21–91:5; [redacted] Dep. 62:14–63:5.

Tempur Sealy has no reason, and has made no plans, to "uproot its entire business strategy." *See United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 141 (D.D.C. 2022); *AT&T*, 310 F. Supp. 3d at 251 ("The Government simply fails to explain why [the defendant] would jeopardize—much less

jettison—the … model on which [it] depends."). Nor does Tempur Sealy have a reason to ruin the multi-brand reputation that Mattress Firm has spent four decades cultivating. *Booz Allen*, 2022 WL 9976035, at *7 (defendants' reputational interests provided countervailing incentives); *UnitedHealth*, 630 F. Supp. 3d at 141 (same); *see Illumina*, 88 F.4th at 1052–53 (weighing the counterincentives of lost business and reputational harm against the incentive to foreclose).

Further, Tempur Sealy's brands benefit from having other traffic-driving brands on the floor. *See* [redacted] Dep. 93:10–12; [redacted] Dep. 182:15–16. In one of the FTC's exhibits, Mattress Firm CEO John Eck writes that "[redacted]." MFRM-05732467 (emphasis added). The same is true of [redacted]. *See* [redacted] Dep. 33:2–6; [redacted] Dep. 83:10–16. That Tempur Sealy would continue selling other brands at Mattress Firm is hardly unusual. Ashley, a multi-brand retailer that has its own Ashley Sleep mattresses and recently acquired Resident Home and its Nectar mattresses, [redacted] 92:14–93:10.

The FTC cites Aubrey Moore's (Tempur Sealy's Vice President, Investor Relations, Insights, & Analytics) deposition for the proposition that gains at Mattress Firm would outweigh losses elsewhere. Dkt. 142 at 25 (citing Moore Dep. 103:3–16). But the FTC cites only *its own attorney's* question, as if that

were evidence. Moore's *answer* to that question explained that "we are not assuming any change in balance of share revenues due to the acquisition of Mattress Firm. Mattress Firm was expected to operate as a separate business unit within the company." Moore Dep. 103:22–104:3. And Dr. Israel's report confirms that Tempur Sealy would lose money if it foreclosed other brands. Dr. Israel Rep. 80.

D. The FTC's snippets cannot counter objective evidence.

After a nearly two-year investigation involving millions of documents, the FTC has failed to identify a single document from either Tempur Sealy or Mattress Firm stating that the post-acquisition plan is to remove other brands from Mattress Firm and replace them with Tempur Sealy products, nor identified any evidence of the detailed planning necessary for the massive work any such scheme would require. *See Microsoft*, 681 F. Supp. 3d at 1091. Instead, the FTC resorts to a handful of soundbites and off-point evidence of robust horizontal competition.

For example, the FTC points to a handwritten note from Tempur Sealy CEO Scott Thompson on a copy of a JP Morgan deck for a May 2022 Board Meeting (over a year before the deal was signed) that, among other scribblings, stated "eliminate future competition" and "block new competition." *See* TEMPUR-FTC-34850587. But although the underlying *deck* was "presented to Tempur Sealy's Board of Directors," *see* Dkt. 142 at 8, the scribblings were not,

nor was there any discussion of these notes at the Board meeting. Thompson Dep. 59:4–12. The *AT&T* court, in rejecting a government vertical-merger challenge, rebuffed a similar maneuver. *AT&T*, 310 F. Supp. 3d at 209–10.

The FTC's other fragments fare no better. For example, the FTC makes much of a handful of references to a "competitive moat," like one plucked from an October 2021 JP Morgan pitch deck (drafted almost 18 months before the deal signed). Dkt. 142 at 21–22. But this commonplace business-school lingo simply means something that makes a company a better competitor, not foreclosure.[30] *See AT&T*, 310 F. Supp. 3d at 203 (rejecting government reliance on a "marketing phrase"). There is no doubt this transaction will make Tempur Sealy a better competitor—for example, by lowering its costs and making it more innovative. Section 7 "is not about protecting … rivals from any and all competitive pressures they would experience should the merger go through." *See AT&T*, 310 F. Supp. 3d at 211.

In any event, no "moat" references or scribbles can overcome the unambiguous evidence that (1) Scott Thompson told both Mattress Firm (the target) and JP Morgan (Tempur Sealy's investment banker) that Tempur Sealy was interested in Mattress Firm as a multi-brand retailer; (2) the transaction

[30] Kristi Waterworth, *What Is a Competitive Moat?*, The Motley Fool (Jun. 17, 2024), https://www.fool.com/terms/c/competitive-moat/; Thompson Dep. 78:3–22.

was valued on that basis; (3) Tempur Sealy's Board was consistently presented with that valuation; (4) the Board voted to approve the merger based on this valuation; (5) Tempur Sealy rolled out the merger to investors as a multi-brand model; and (6) Tempur Sealy told its lenders, rating agencies, future suppliers, and everyone else that Mattress Firm would be multi-brand.

Phrases like "block competition," "world domination" and "dominate the US market" make for good soundbites in a government brief. *See* Dkt. 142 at 21–24. But none of those snippets were part of a *plan* to foreclose and none of them stand up against the weight of contrary evidence. In the end, "snippets" of documents are of little relevance and "a trial by slide deck leaves much to be desired!" *AT&T*, 310 F. Supp. 3d at 208.

The FTC's remaining arguments boil down to a claim that, as a mattress supplier prior to the merger, Tempur Sealy has aggressively competed with rival suppliers for floorspace at Mattress Firm and other retailers. *See* Dkt. 142 at 27 (price competition with Serta Simmons); *id.* at 28 (floorspace competition with Purple); *id.* at 34 (floorspace competition with Casper). All suppliers, when competing just as suppliers, fight for retail floor space.

This vigorous horizontal interbrand competition, though, is the very thing the antitrust laws are designed to protect. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007). And *Illumina* teaches it is *post*-merger incentives that matter. *See* 88 F.4th at 1053. After this merger,

Tempur Sealy will make billions of dollars—over half of its revenue in all—from Mattress Firm's retail. So, just like Mattress Firm does today, Tempur Sealy will be incentivized to maintain a retail floor including the various mattress brands, from multiple suppliers, that customers want.

E. Tempur Sealy's commitments make the FTC's theory even more implausible.

Competition-promoting commitments need only prevent "substantial," not "any," harm and need not recreate the premerger status quo. *Illumina*, 88 F.4th at 1058. To be clear, the merger poses no threat to competition. Regardless, Tempur Sealy has made various commitments that put the FTC's theory to bed.

First, Tempur Sealy has agreed to divest nearly 200 stores to Mattress Warehouse, almost doubling the reach of that fast-growing mattress-specialty retailer. In assessing a divestiture, courts consider (1) the likelihood of the divestiture, (2) the experience of the divestiture buyer, (3) the scope of the divestiture, (4) the independence of the buyer from the merging seller, and (5) the purchase price. *UnitedHealth*, 630 F. Supp. 3d at 135. Here, the FTC does not contest the first, second, or fourth factors. *See* Dkt. 142 at 44–45.

Instead, the FTC says the divestiture "doesn't create another competitor … comparable to Mattress Firm." Dkt. 142 at 44. But it does not need to. This is not a horizontal merger where a competitor is being eliminated

and must be replaced. As the Fifth Circuit held in *Illumina*, Defendants are not required to show that commitments "would negate [any] anticompetitive effects … entirely," only that they "*sufficiently mitigate[]* the merger's effects such that it was no longer likely to *substantially* lessen competition." 88 F.4th at 1059. Here, the divestiture will provide Serta Simmons, Purple, and other suppliers nearly 200 additional non-Mattress-Firm stores through which to sell mattresses, jump start Mattress Warehouse's growth into new regions by expanding its geographic footprint, and even further reduce the already *de minimis* total possible foreclosure by cutting the number of Mattress Firm stores.

Although the FTC complains about the low purchase price, Dkt. 142 at 45, this is common in merger divestitures. "[T]o state the obvious, a potential buyer of an asset sold to facilitate a merger under scrutiny … has enormous leverage over the seller because it knows the seller must divest the asset quickly to proceed with the merger." *RAG-Stiftung*, 436 F. Supp. 3d at 307. And the FTC offers no evidence to support its baseless claim that there is some doubt about "Mattress Warehouse's commitment to running the stores long-term." Dkt. 142 at 45. Rather, Mattress Warehouse's CEO has testified that the divestiture gives Mattress Warehouse "[redacted]." Papettas Dep. 103:12–19.

Second, Tempur Sealy has committed for the next five years to reserve at least [redacted] of Mattress Firm's floor—approximately [redacted] slots on average per store—for third-party mattresses priced $[redacted] Mattress Firm devotes an average of [redacted] slots per store for such mattresses now, but they are already mostly for Tempur Sealy. Serta Simmons today takes only [redacted] of those slots on average, and Purple takes [redacted] Thus, Serta Simmons and Purple currently have an average of [redacted] "premium" slots per Mattress Firm store and Tempur Sealy is committing to reserve [redacted] slots for third-party mattresses priced $[redacted] nearly [redacted] of what Serta Simmons and Purple already have.

Third, Tempur Sealy has executed post-closing supply agreements with Purple, [redacted], and [redacted].

Cumulatively, these commitments reduce the FTC's incredibly shrinking foreclosure case to near invisibility.

F. The FTC's passing reliance on *Brown Shoe* is misplaced.

The FTC also argues that it succeeds under the so-called *Brown Shoe* factors. Reflecting the weight this argument deserves, the FTC spends about a page on it. *See* Dkt. 142 at 39–40.

Supreme Court precedent regarding vertical restraints has evolved significantly since 1962, *see Leegin*, 551 U.S. 877, and "there is no *'Brown Shoe* standard' in modern antitrust analysis." Concurring Op. Comm'r Wilson 1–2,

In re Illumina, Inc, No. 9401 (FTC).[31] More bluntly: "It would be overhasty to say that the *Brown Shoe* opinion is the worst antitrust essay ever written …. Still, all things considered, *Brown Shoe* has considerable claim to the title." *United States v. Anthem, Inc.*, 855 F.3d 345, 376 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (quoting Judge Bork).

Even if *Brown Shoe* applies, as discussed above, the FTC would still *first* need to establish that a significant share of the market was foreclosed—which it cannot do. *See Crouse-Hinds*, 518 F. Supp. at 431. The FTC also loses under the remaining *Brown Shoe* factors.

First, the nature and purpose of the transaction is, as discussed, procompetitive. *Second,* as discussed, the likelihood and scope of foreclosure is tiny. *Third,* barriers to distribution entry are low, including because premium-mattress suppliers can and do sell directly to customers. *Fourth,* the FTC has not attempted to establish what market share is necessary for scale, much less that the merger is likely to prevent other suppliers from achieving it. *Fifth*, the FTC's motion does not attempt to establish that there is a trend toward vertical concentration or oligopoly. *Sixth*, the proposed transaction does not eliminate potential competition by one of the merging parties, nor does the FTC argue that it will. *Seventh*, as explained above, the merged entity will not have

[31] https://www.ftc.gov/system/files/ftc_gov/pdf/d09401wilsonconcurringopinion.pdf.

significant market power as a retailer in even the FTC's preferred "premium" market. *Eighth*, as discussed above, there are numerous other competing purchasers and methods of distribution.

III. Economic analysis shows that the transaction will benefit competition.

Consistent with standard economic theory, Defendants' expert, Dr. Israel, concludes that this vertical merger, like most vertical mergers, will be procompetitive.

Standalone manufacturers and retailers "each apply their own markups (reflecting their own margins) in pricing their products," which "are incorporated into the final price that consumers have to pay." *AT&T*, 310 F. Supp. 3d at 197. Eliminating this "double marginalization," as this merger does, is a "procompetitive … standard benefit associated with vertical mergers." *Id.*

Applying this standard principle, Dr. Israel incorporates the specific facts of this industry and this merger into a quantitative model and finds that the transaction will increase consumer welfare. He concludes that under any plausible assumptions the vertically integrated firm will be incentivized to improve its products through innovation, improve retail experience, and increase the effort it puts into selling mattresses, and rivals will respond by competing harder. Dr. Israel Rep. 104; *see also, e.g.*, [redacted] Dep. 24:9–13 (the merger would make [redacted] compete harder). This is procompetitive.

By contrast, Dr. Das Varma's analysis teeters precariously on a set of implausible assumptions disconnected from the facts, and contradicts the FTC's theory of harm.

First, Dr. Das Varma claims that Tempur Sealy lost sales *shortly after* the Tempur Sealy/Mattress Firm breakup. But he ignores that Tempur Sealy then responded by competing harder for floor space at other retailers, so by the time Tempur Sealy and Mattress Firm reunited, Tempur Sealy had actually [redacted] and recaptured [redacted]. Dr. Israel Rep. 53-57. Moreover, there is no evidence that the breakup harmed consumers. Indeed, following the breakup, [redacted]—the opposite of what Dr. Das Varma's model predicts should happen. Dr. Israel Rep. 59-61.

Second, Dr. Das Varma's model relies on assumptions that rig the game. Dr. Das Varma assumes away the elimination of double marginalization—the "standard benefit associated with vertical mergers," *AT&T*, 310 F. Supp. 3d at 197—by pretending that mattress suppliers and retailers all act as if they are in permanent joint ventures, splitting a fixed and never-changing share of revenues. Dr. Israel Rep. 74. There is no support for this.

Similarly, Dr. Das Varma assumes that consumers—who in the real world extensively research purchases, visit multiple stores, and often have strong brand preferences—are so passively manipulated by retailers that they

behave irrationally. According to his model, a consumer who leaves a retailer because they did not find the non-Tempur Sealy brand they were looking for will forget their preferences by the time they get to the next retailer and buy whatever is on the floor—including the Tempur Sealy mattress that they could have bought at Mattress Firm. Dr. Israel Rep. 77-78. This assumption flies in the face of the facts. Dr. Das Varma relies so heavily on these counterfactual assumptions that relaxing any of them reverses his results and predicts that the merger would lead to lower prices and consumer benefits. Dr. Israel Rep. 76-80.

Finally, Dr. Das Varma's model contradicts the FTC's case. The FTC claims that the merger will so severely harm Tempur Sealy's rivals that they will no longer be able to effectively compete. But Dr. Das Varma's model predicts that every rival supplier will *increase* its profits post-merger. Dr. Israel Rep. 13. It can't be the case that every rival will do better, but somehow still be less able to compete.

IV. The public interest and the equities disfavor the requested injunction.

Separate from the FTC's failure to make a clear showing that it is likely to succeed on the merits, the FTC also has not established that the equities favor a preliminary injunction. To the contrary, an injunction would harm public equities by preventing this procompetitive merger.

Almost as an aside, citing testimony that [redacted] voluntarily stopped sharing information about its "[redacted]" with Mattress Firm, the FTC frets that without a preliminary injunction, Tempur Sealy will obtain access to rivals' "competitively sensitive" information. Dkt. 142 at 47; [redacted] Dep. 226:12–16; 249:21–23. But the FTC does not explain what this is, why it is sensitive, or how the merger would give Tempur Sealy access to something that [redacted] is no longer sharing. Nor does the FTC explain why, if this was important, a simple firewall of the type common in vertical mergers would not suffice. Dkt. 142 at 47-48.

The FTC's injunction will also harm private equities. *See FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981). The merging parties have spent millions of dollars and thousands of hours on the merger, the FTC's investigation, and the divestiture. The parties have already been in limbo for 17 months. Granting the FTC's preliminary injunction would destroy all of that.

Conclusion

The Court should deny the FTC's preliminary-injunction motion.

Dated: October 25, 2024

Respectfully submitted,

/s/ Ryan A. Shores
Attorney-In-Charge

Ryan A. Shores
D. Bruce Hoffman
Daniel P. Culley
Matthew I. Bachrack
Blair W. Matthews
Jacob M. Coate
Gabriel J. Lazarus
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2112 Pennsylvania Ave., NW
Washington, D.C. 20037
202-974-1500
bhoffman@cgsh.com
rshores@cgsh.com
dculley@cgsh.com
mbachrack@cgsh.com
bmatthews@cgsh.com
jcoate@cgsh.com
glazarus@cgsh.com

Heather S. Nyong'o
CLEARY GOTTLIEB STEEN & HAMILTON LLP
650 California St.
San Francisco, CA 94108
415-796-4400
hnyongo@cgsh.com

Lina Bensman
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, NY 10006
212-225-2000
lbensman@cgsh.com

Alex B. Roberts
Federal Bar No. 865757
Texas State Bar No. 24056216
aroberts@beckredden.com
Garrett S. Brawley
Federal Bar No. 3311277
Texas State Bar No. 24095812
gbrawley@beckredden.com
Lena Silva
Federal Bar No. 3608019
State Bar No. 24104993
lsilva@beckredden.com
Maryam Ghaffar
Federal Bar No. 3710605
Texas State Bar No. 24120847
mghaffar@beckredden.com

BECK REDDEN LLP
1221 McKinney Street
Suite 4500
Houston, TX 77010
Tel: (713) 951-3700
Fax: (713) 951-3720

Counsel for Tempur Sealy International, Inc.

/s/ *Sara Y. Razi*
Attorney-In-Charge

Sara Y Razi
N. Preston Miller
Lindsey C. Bohl
Avia Gridi
Geoffrey I. Schmelkin
SIMPSON THACHER & BARTLETT LLP
900 G. Street, N.W.
Washington, D.C. 20001
Tel: (202) 636-5500
Fax: (202) 636-5502
sara.razi@stblaw.com
preston.miller@stblaw.com
lindsey.bohl@stblaw.com
avia.gridi@stblaw.com
geoffrey.schmelkin@stblaw.com

Michelle E. Gray
State Bar No. 24078586
S.D. Tex. Bar No. 892270
mgray@foglerbrar.com
Deborah C. Milner
State Bar No. 24065761
S.D. Tex. Bar No. 971677
cmilner@foglerbrar.com

FOGLER, BRAR, O'NEIL & GRAY LLP
2 Houston Center
909 Fannin Street, Suite 1640
Houston, TX 77002
(713) 481-1010
(713) 574-3224 (Fax)

Counsel for Mattress Firm Group Inc.

CERTIFICATE OF WORD COUNT

Pursuant to this Court's Rule 18(c), I certify that the motion contains 9,360 words excluding the case caption, table of contents, table of authorities, signature block, and certificates.

/s/ Ryan A. Shores
Ryan A. Shores

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2024, I electronically filed a true and correct copy of the foregoing document using this Court's CM/ECF system, which will send a notice of electronic filing to all counsel of record.

I also certify that I caused an unredacted copy of the foregoing document to be served via email to:

apergament@ftc.gov; amaltas@ftc.gov; cwint@ftc.gov; dallen1@ftc.gov; ialbright@ftc.gov; kpasupula@ftc.gov; tmartin@ftc.gov; ytucker@ftc.gov; aritchie@ftc.gov; adurst@ftc.gov; chwang@ftc.gov; estevenson1@ftc.gov; jtabbaa@ftc.gov; jpascale@ftc.gov; lkrachman@ftc.gov; myellen@ftc.gov; mjoseph1@ftc.gov; nmiller2@ftc.gov; rmosier@ftc.gov; srodger@ftc.gov; wsohn@ftc.gov; xgong@ftc.gov

/s/ Ryan A. Shores
Ryan A. Shores