

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Tapestry, Inc.,
a corporation,

and

Capri Holdings Limited,
a corporation.

Docket No. 9429

NON-PARTY EVERLANE, INC.'S MOTION FOR *IN CAMERA* TREATMENT

Pursuant to Rule 3.45 of the Federal Trade Commission's ("FTC") Rules of Practice, 16 C.F.R. § 3.45(b), non-party Everlane, Inc. ("Everlane") respectfully moves the Court for *in camera* treatment of two of Everlane's competitively sensitive and confidential business documents, labeled DX-0145 and DX-0242 in Respondents' exhibit list for the upcoming evidentiary hearing, for a period of at least five years. Everlane is a private start-up company that was founded in 2010. Everlane holds its sensitive information in confidence, including within Everlane itself. DX-0145 and DX-0242 are internal strategy decks that contain highly confidential and competitively sensitive information. If this information is disclosed to the public or Everlane's competitors and other industry participants—including Respondents Tapestry Inc. and Capri Holdings Limited, and the many other third-party subpoena respondents in this action or the related civil litigation—Everlane will suffer significant and irreparable harm. Indeed, the court in the related civil litigation agreed, granting Everlane's motion to seal the same exact documents in that case. Accordingly, the Court should grant non-party Everlane's Motion For *In Camera* Treatment.

In support of this Motion, Everlane relies on the Declaration of Lynne Emanuel, Chief Planning and Logistics Officer at Everlane (“Emanuel Decl.”) (attached as **Exhibit 1** to this Motion). Respondents do not oppose this Motion. The FTC has taken no position with respect to this Motion.

I. The Confidential Documents

Everlane seeks *in camera* treatment of the following documents, attached as **Exhibit 2** and **Exhibit 3** to this Motion (the “Confidential Documents”).

Respondents’ Exhibit	Description	BegBates	EndBates
DX-0145	April 24, 2023 F Bags Strategy	EVERLANE_00000138	EVERLANE_00000188
DX-0242	Bag Strategy	EVERLANE_00000101	EVERLANE_00000137

The Confidential Documents are internal strategy decks that contain competitively sensitive information. Emanuel Decl. ¶ 7. Specifically, these documents contain non-public information about Everlane’s handbag business in the last three years, including (1) pricing, sales, and marketing strategies; (2) financial information, including revenue and sales data; (3) product research, design, and development; (4) market research and competitive analyses; and (5) internal assessments regarding distribution and sales channels. *Id.*

II. Background

Everlane is a private clothing and accessory retailer that sells primarily online. Emanuel Decl. ¶ 2. It was founded in 2010 and today employs approximately 300 persons. *Id.* Everlane still sees itself as a start-up, having publicly announced its last round of fundraising on November 29, 2022. *Id.* It sells, among other things, sustainably made and affordable handbags, using innovative marketing strategies. *Id.* As a relatively new and growing market participant, particularly in the handbag industry, Everlane takes significant measures and precautions to

maintain the secrecy of its confidential information. *Id.* Disclosure of the Confidential Documents would threaten not only Everlane’s handbag business, but the company’s existence. *Id.* ¶¶ 2, 7-8.

Everlane produced the Confidential Documents, among others, in response to third-party subpoenas issued by Respondents and the FTC in a parallel civil litigation, *Federal Trade Commission v. Tapestry, Inc. et al.*, 1:24-cv-03109-JLR (S.D.N.Y. 2024) (the “Civil Litigation”). Emanuel Decl. ¶ 3. Everlane was reluctant in responding to the subpoenas, largely because it was concerned about having its confidential information exposed. *Id.* But Everlane understood its obligations as a corporate citizen and therefore produced certain documents to both parties. *Id.* In doing so, Everlane carefully designated the documents “Highly Confidential – Attorneys’ Eyes Only,” pursuant to the Stipulated Protective Order in the Civil Litigation (attached as **Exhibit 4** to this Motion). Emanuel Decl. ¶ 3.

On August 23, 2024, Respondents notified Everlane that they intend to rely on the Confidential Documents at the live evidentiary hearing in the Civil Litigation, beginning on September 9, 2024. Emanuel Decl. ¶ 4. Everlane timely moved to keep the documents under seal, and the court granted that motion on September 6, 2024. *See Order, Federal Trade Commission v. Tapestry, Inc. et al.*, 1:24-cv-03109-JLR (S.D.N.Y. 2024), Dkt. 321 (attached as **Exhibit 5** to this Motion).

On August 30, 2024, Respondents notified Everlane that they also intend to offer the Confidential Documents as evidence at the FTC’s Part 3 administrative evidentiary hearing, beginning on September 25, 2024. *See Respondents’ August 30, 2024 Email to Everlane’s Counsel* (attached as **Exhibit 6** to this Motion). Emanuel Decl. ¶ 5. This Motion followed.¹

¹ The Protective Order and Scheduling Order in this proceeding are attached as **Exhibit 8** and **Exhibit 9** to this Motion, respectively. Under the Scheduling Order, a third party who seeks *in camera* treatment for a document or transcript that a party intends to introduce into evidence

Respondents do not oppose this Motion. *See* Exhibit 6. When counsel for Everlane asked the FTC if it would oppose this Motion, the FTC stated that it takes no position with respect to this Motion. *See* FTC’s September 3, 2024 Email to Everlane’s Counsel (attached as **Exhibit 7** to this Motion). Emanuel Decl. ¶ 5.

III. Legal Standard

Commission Rule 3.45(b) provides that the Administrative Law Judge may order that documents be afforded *in camera* treatment when their “public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting in camera treatment or after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b). A party seeking *in camera* protection must show that the documents at issue are “sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.” *In re Altria Group, Inc.*, Docket No. 9393, 2021 WL 2379509, at *1 (F.T.C. May 26, 2021) (quoting *In re General Foods Corp.*, Docket No. 9085, 1980 WL 338997, at *4 (F.T.C. Mar. 10, 1980)). Factors to consider include: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the movant and to its competitors; (5) the amount of effort or money expended by the movant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” *See In re Bristol-Myers Co.*, Docket Nos. 8917, 8918, 8919, 1977 WL 189054, at *2 (F.T.C. Nov. 11, 1977).

“[C]ourts have generally attempted to protect confidential business information from unnecessary airing.” *In re H.P. Hood & Sons, Inc.*, Docket No. 7709, 1961 WL 65882, at *4

must file an appropriate motion within 10 days of receiving notice. Exhibit 9 n. 1.

(F.T.C. Mar. 14, 1961). “[R]equests for in camera treatment by non-parties warrant ‘special solicitude.’” *Altria*, 2021 WL 2379509, at *4 (quoting *In re Crown Cork & Seal Co.*, Docket No. 8687, 1967 WL 94017, at *1 (F.T.C. June 26, 1967)); *see also In re Kaiser Aluminum & Chem. Corp.*, Docket No. 9080, 1984 WL 565325, at *1 (F.T.C. May 25, 1984) (“As a policy matter, extensions of confidential or in camera treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.”). Third-party materials that routinely meet the standard for *in camera* treatment include competitively sensitive business documents such as financial and sales data, development and marketing strategies, detailed information concerning business operations, distribution strategies, customer names and relationships, and information regarding the business relationship between the third-party and respondent(s). *See, e.g., Altria*, 2021 WL 2379509, at *4-11 (granting *in camera* treatment of these types of competitively sensitive third-party materials for a period of five years); *In re N. Texas Specialty Physicians*, Docket No. 9312, 2004 FTC LEXIS 109, at *5-21 (Apr. 23, 2004) (granting third-party requests for *in camera* treatment of competitively sensitive documents that discuss negotiating strategies, internal business analyses, and names and rankings of customers). When requests for *in camera* treatment of confidential business information are granted, they are “typically provided for two to five years.” *In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378, 2018 FTC LEXIS 123, at *7 (July 2, 2018).

IV. *In Camera* Treatment Of The Confidential Documents Is Warranted

The Confidential Documents are “secret” and “material.” As noted above, the Confidential Documents are internal strategy decks that contain competitively sensitive information about Everlane’s handbag business in the last three years, including (1) pricing, sales, and marketing strategies; (2) financial information, including revenue and sales data; (3) product research, design, and development; (4) market research and competitive analyses; and (5) internal assessments

regarding distribution and sales channels. Emanuel Decl. ¶ 7. As a start-up company, Everlane's ability to maintain its competitively sensitive information in confidence is critical to the company's survival. *Id.* ¶¶ 2, 7-8. Indeed, much of the information contained in the Confidential Documents are kept confidential, even within Everlane itself. *Id.* ¶¶ 2, 7. Everlane spent significant time, money, and effort putting the information in the Confidential Documents together. *Id.* ¶ 7. And because the Confidential Documents are based on internal assessments, designs, and data, the information is not known outside the business and cannot be easily replicated without Everlane's consent or participation. *Id.* Information of this type is routinely afforded *in camera* protection. *See, e.g., In re 1-800 Contacts, Inc.*, Docket No. 9372, 2017 FTC LEXIS 55, *9-35 (Apr. 4, 2017) (granting third-party requests for *in camera* treatment of competitively sensitive documents such as those containing competitive assessments, customer and supplier data, market data and indicators, and financial metrics for a period of five years).

In addition, disclosure of the Confidential Documents would cause non-party Everlane significant harm. The Confidential Documents would reveal Everlane's financial strength, competitive processes, design ideas, and market impressions. This information could be used by competitors to undermine Everlane's position in the market. Emanuel Decl. ¶¶ 2, 7-8. That is sufficient reason to order *in camera* treatment of the Confidential Documents. *See In re Dura Lube Corp.*, Docket No. 9292, 1999 FTC LEXIS 255, at *7 (Dec. 23, 1999) ("The likely loss of business advantages is a good example of a 'clearly defined, serious injury.'").

V. Conclusion

For the foregoing reasons and for the reasons set forth in the Emanuel Declaration, Everlane respectfully requests that the Court issue an order requiring *in camera* treatment of the Confidential Documents for a period of at least five years from the date of the order.

Dated: September 9, 2024

FENWICK & WEST LLP

By: /s/ Eric Ball

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**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Tapestry, Inc.,
a corporation,

and

Capri Holdings Limited,
a corporation.

Docket No. 9429

**[PROPOSED] ORDER GRANTING NON-PARTY EVERLANE, INC.’S MOTION FOR
IN CAMERA TREATMENT**

Upon consideration of Non-Party Everlane, Inc.’s Motion For *In Camera* Treatment, **IT IS HEREBY ORDERED** that the following documents shall be afforded *in camera* treatment for a period of five years from the date of this Order:

Respondents’ Exhibit	Description	BegBates	EndBates
DX-0145	April 24, 2023 F Bags Strategy	EVERLANE_00000138	EVERLANE_00000188
DX-0242	Bag Strategy	EVERLANE_00000101	EVERLANE_00000137

IT IS SO ORDERED.

Dated: _____, 2024

Hon. Dania L. Ayoubi
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2024, I filed the foregoing document electronically using the Federal Trade Commission's e-filing system, which will send notification of such filing to:

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Federal Trade Commission
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The Honorable Dania L. Ayoubi
Administrative Law Judge
Federal Trade Commission
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I also certify that I caused the foregoing document to be served via email to:

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Exhibit 1

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Tapestry, Inc.,
a corporation,

and

Capri Holdings Limited,
a corporation.

Docket No. 9429

**DECLARATION OF LYNNE EMANUEL IN SUPPORT OF
NON-PARTY EVERLANE, INC.’S MOTION FOR *IN CAMERA* TREATMENT**

I, Lynne Emanuel, declare as follows:

1. I am the Chief Planning and Logistics Officer for Everlane, Inc. (“Everlane”). I submit this declaration in support of Non-Party Everlane Inc.’s Motion For *In Camera* Treatment of two of Everlane’s competitively sensitive and confidential business documents, labeled DX-0145 and DX-0242 in Respondents’ exhibit list for the upcoming evidentiary hearing (the “Confidential Documents”) (attached as **Exhibit 2** and **Exhibit 3** to the Motion). I have personal knowledge of the matters stated in this declaration, and if called upon to do so, could competently testify about them.

2. Everlane is a private clothing and accessory retailer that sells primarily online. It was founded in 2010. As of today, it employs approximately 300 employees. Everlane still sees itself as a start-up, having publicly announced its last round of fundraising on November 29, 2022. Everlane sells, among other things, sustainably made and affordable handbags, using innovative marketing strategies. As a relatively new and growing market participant, particularly in the

handbag industry, Everlane closely guards its market assessments, competitive strategies, product research, design and development, and other company and financial information, even within Everlane itself. Indeed, only a small group of Everlane employees have access to such information. Preventing dissemination of Everlane's strategic plans and competitive and financial information is essential to prevent Everlane's competitors from gaining an unfair market advantage.

3. In May 2024, Everlane received document subpoenas from Respondents and the Federal Trade Commission ("FTC") in a parallel civil litigation, *Federal Trade Commission v. Tapestry, Inc. et al.*, 1:24-cv-03109-JLR (S.D.N.Y. 2024) (the "Civil Litigation"). Everlane timely responded to the subpoenas and produced certain documents to both parties, despite its significant concerns about exposing its confidential information. Pursuant to the Stipulated Protective Order in the Civil Litigation (attached as **Exhibit 4** to the Motion), Everlane designated the documents "Highly Confidential – Attorneys' Eyes Only."

4. On August 23, 2024, Respondents notified Everlane that they intend to rely on the Confidential Documents at the live evidentiary hearing in the Civil Litigation, beginning on September 9, 2024. Everlane timely moved to keep the Confidential Documents under seal in the Civil Litigation, and the court granted that motion on September 6, 2024. *See Order, Federal Trade Commission v. Tapestry, Inc. et al.*, 1:24-cv-03109-JLR (S.D.N.Y. 2024), Dkt. 321 (attached as **Exhibit 5** to the Motion).

5. On August 30, 2024, Respondents notified Everlane that they also intend to offer the Confidential Documents as evidence at the FTC's Part 3 administrative evidentiary hearing, beginning on September 25, 2024. *See Respondents' August 30, 2024 Email to Everlane's Counsel* (attached as **Exhibit 6** to the Motion). Respondents do not oppose Everlane's Motion For *In Camera* Treatment. *Id.* When counsel for Everlane asked the FTC if it would oppose the

Motion, the FTC stated that it takes no position with respect to the Motion. *See* FTC's September 3, 2024 Email to Everlane's Counsel (attached as **Exhibit 7** to the Motion).

6. I have reviewed and am familiar with the documents Everlane has produced, including the Confidential Documents that Respondents notified Everlane that they intend to offer into evidence at the FTC's Part 3 evidentiary hearing, and for which Everlane seeks *in camera* protection.

7. The Confidential Documents are internal strategy decks that contain non-public information about Everlane's handbag business in the last three years, including (1) pricing, sales, and marketing strategies; (2) financial information, including revenue and sales data; (3) product research, design, and development; (4) market research and competitive analyses; and (5) internal assessments regarding distribution and sales channels. Everlane spent significant time, money, and effort to put the information in the Confidential Documents together, and only a small group of Everlane employees had access to the Confidential Documents. The confidential information is based on internal assessments, designs, and data. This information is crucial to Everlane's ability to compete and grow in the handbag space.

8. Based on my review of the Confidential Documents, my knowledge of Everlane's business, and my familiarity with how Everlane treats documents containing the types of information found in the Confidential Documents, I believe that public disclosure of the Confidential Documents would result in serious harm to Everlane and could constitute a threat to Everlane's existence as a company. Accordingly, the Confidential Documents should be afforded *in camera* protection for a period of at least five years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of September 2024.

Lynne Emanuel

Lynne Emanuel

Exhibit 2

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit 3

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit 4

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TAPESTRY, INC.,

and

CAPRI HOLDINGS LIMITED,

Defendants.

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

~~PROPOSED~~ **STIPULATED
PROTECTIVE ORDER**

Plaintiff Federal Trade Commission (“FTC” or “Commission”) and Defendants Tapestry, Inc. and Capri Holdings Limited, by and through their respective counsel, have stipulated, pursuant to Federal Rule of Civil Procedure 26(c), to the terms of this Stipulated Protective Order. Discovery in this action may yield documents and information of a sensitive and confidential nature, including business, commercial, financial, and trade secret information of Defendants or third parties. The Court finds that good cause exists for entry of a protective order in this action (the “Litigation”) to prevent unauthorized disclosure and use of such sensitive and confidential material during and after the course of the Litigation.

IT IS HEREBY ORDERED THAT this Stipulated Protective Order shall govern the handling of all Confidential Material, as hereafter defined.

1. As used in this Order:
 - a. “Confidential Material” means any trade secret or other confidential research, development, or commercial information, as such terms are used in Fed. R. Civ.

P. 26(c)(1)(G), or any Document, transcript, or other material containing such information that has not been published or otherwise made publicly available, including Sensitive Personal Information.

- b. “Sensitive Personal Information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records.
- c. “Document” means any document or electronically stored information, as the term is used in Fed. R. Civ. P. 34(a).
- d. “Parties” shall refer to the Defendants and the Plaintiff.
- e. “Protected Person” shall refer to any party or nonparty that produces information designated as Confidential Material.
- f. “FTC Administrative Action” means *In the Matter of Tapestry, Inc. and Capri Holdings Limited.*, before the United States of America Federal Trade Commission Office of Administrative Law Judges, Docket No. 9429, and any related investigation by the Federal Trade Commission.

2. Any Document or portion thereof submitted by a Defendant or a nonparty during an FTC investigation, the FTC Administrative Action, or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any federal or state statute or regulation, or under any federal court or Commission precedent interpreting such statute or regulation, as well as any information taken from any portion of such Document, or

information that discloses the substance of the contents of any Confidential Materials derived from a Document subject to this Protective Order, shall be treated as Confidential Material for purposes of this Protective Order.

3. The Parties and any nonparties, in complying with informal discovery requests, disclosure requirements, discovery demands, or subpoenas in this proceeding, may designate any responsive Document or portion thereof as Confidential Material, including Documents obtained by them from nonparties pursuant to discovery or as otherwise obtained.

4. The Parties, in conducting discovery from nonparties, shall provide to each nonparty a copy of this Stipulated Protective Order so as to inform each such nonparty of their rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain that counsel believes the material so designated constitutes Confidential Material as defined in Paragraph 1 of this Order.

6. Material may be designated as Confidential Material by placing on or affixing to the Document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of Documents is confidential by placing on or affixing to that folder or box, the designation “CONFIDENTIAL,” “CONFIDENTIAL – FTC v. TAPESTRY/CAPRI,” “CONFIDENTIAL–FTC v. TAPESTRY, et al., Case No. 1:24-cv-03109”, or any other appropriate notice, together with an indication of the portion or portions of the Document considered to be Confidential Material. Confidential Material contained in electronic Documents may also be designated as confidential by placing the designation “CONFIDENTIAL,” “CONFIDENTIAL – FTC v. TAPESTRY/CAPRI”, “CONFIDENTIAL–

FTC v. TAPESTRY, et al., Case No. 1:24-cv-03109”, or any other appropriate notice, in the Document metadata, image file, or through another mechanism that clearly identifies the Document as confidential. Masked or otherwise redacted copies of Documents may be produced where the portions masked or redacted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been masked or redacted and the reasons therefor. The Party or nonparty desiring to designate any or all portions of oral testimony as Confidential Material shall do so by stating orally on the record on the day that the oral testimony is being given or by notifying the Parties in writing of the intention to designate any or all portions of oral testimony as Confidential Material after the oral testimony is given.

7. Confidential Material shall be disclosed only to: (a) the Court presiding over this proceeding and personnel assisting the Court, including its support staff; (b) the Administrative Law Judge presiding over the FTC Administrative Action, and staff and personnel assisting the Administrative Law Judge; (c) Plaintiff and their employees; (d) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter or the FTC Administrative Action; (e) outside counsel of record for any Defendant, their associated attorneys and other employees of their law firm(s), provided they are not employees of a Defendant; (f) anyone retained to assist outside counsel of record for any Defendant in the preparation or hearing of this proceeding or the FTC Administrative Action including experts, consultants, contract attorneys, litigation support services, and their staff, provided they are not employees of a Defendant and have signed Exhibit A; (g) anyone retained to assist the FTC in the preparation or hearing of this proceeding or the FTC Administrative Action including experts, consultants, contract attorneys, litigation support services, and their staff, provided they have signed Exhibit A, (h) any witness or deponent who may have authored or received the

information in question or who had access to the material in the ordinary course of their employment; and (i) any interpreter, court reporter, shorthand reporter, typist or videographer translating, recording, or transcribing Documents or testimony in connection with this Litigation or the FTC Administrative Action. Nothing in this Protective Order precludes a Party from using or disseminating its own Confidential Material, including for purposes other than litigating this Litigation, or from showing Confidential Material that it has produced to its own employee-witness or to anyone it deems proper.

8. Disclosure of Confidential Material to any person described in Paragraph 7 of this Protective Order shall be only for the purposes of the preparation and hearing of this proceeding and the FTC Administrative Action, or any appeal of either proceeding, and any legitimate law enforcement purpose, and for no other purpose whatsoever; provided, however, that Plaintiff may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose Confidential Material as provided by the FTC's Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any Confidential Material is contained in any pleading, motion, exhibit, or other paper filed or to be filed with the Court, the Court shall be so informed by the Party filing such papers, and such papers shall be filed under seal. Confidential Material contained in the papers shall remain under seal until further order of the Court; provided, however, that such papers may be furnished to persons or entities who may receive Confidential Material pursuant to Paragraph 7 or 9. Upon or after filing any paper containing Confidential Material, the filing Party shall file on the public record a copy of the paper containing redactions,

such that the public version does not reveal Confidential Material within two business days of the sealed filing.

10. Party Exhibits. If a Party includes exhibits on its exhibit list that contain or discuss information that has been designated as Confidential Material by a Party, at the time designated in Exhibit A to the Case Management Order, the Party must also provide redacted versions of those exhibits. At the time designated in Exhibit A to the Case Management Order, each Party must also (a) provide redacted versions of any exhibits on the opposing Party's exhibit list that contain information that the Party previously designated as Confidential Material and (b) exchange objections to the redacted evidentiary hearing exhibits that were provided with the exhibit lists. The Parties must exchange objections to those redactions in accordance with the Case Management Order. The Parties' joint proposal regarding this Confidential Material and any disputes will be raised to the Court in the Parties' joint submission in accordance with the Case Management Order.

11. Nonparty Confidential Material at Evidentiary Hearing. If counsel plans to introduce into evidence at the hearing any Document or transcript containing Confidential Material produced by a nonparty, they shall provide advance notice to the nonparty for purposes of allowing that Protected Person to seek an order that the Document or transcript be granted protection from public disclosure. If that Protected Person wishes to obtain protection from public disclosure for the Document or transcript, the Protected Person shall file an appropriate motion with the Court within seven (7) days after it receives such notice. Except where such an order is granted, Documents and transcripts shall be part of the public record. Where such protection is granted, a duplicate copy of such Document or transcript with the Confidential Material deleted therefrom may be placed on the public record.

12. If any Party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of Confidential Material submitted by another Party or nonparty, the recipient of the discovery request shall promptly notify the Protected Person of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and served to the Protected Person at least fifteen (15) business days before production, and shall include a copy of this Protective Order. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Protective Order to challenge or appeal any order requiring production of Confidential Material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Court. The recipient shall not oppose the Protected Person's efforts to challenge the disclosure of Confidential Material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 C.F.R. § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

13. At the time that any expert, consultant, or other person retained to assist counsel in the preparation of this Litigation concludes participation in the Litigation, such person shall return to counsel or destroy all copies of Documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential material. At the conclusion of this proceeding and the FTC Administrative Action, including the exhaustion of judicial review, the Parties shall return or destroy Documents obtained in this Litigation except as follows: (a) the Commission's obligation to return or destroy Documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 C.F.R. § 4.12; and (b) Counsel for the Parties will be entitled to retain court papers, deposition, hearing, and evidentiary hearing transcripts, evidentiary hearing exhibits, and work

product, as may be required by the Rules of Professional Conduct provided that the Parties and their counsel do not disclose the portions of those materials containing information designated as Confidential Material except pursuant to Court order or an agreement with the party that produced the Confidential Material or as otherwise permitted by this Order.

14. The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Material, shall, without written permission of the submitter or further order of the Court, continue to be binding after the conclusion of this proceeding.

STIPULATED AND AGREED:

S/ Abby L. Dennis
Counsel for Federal Trade Commission

May 1, 2024
Date

S/ Alfred C. Pfeiffer
Counsel for Tapestry, Inc.

May 1, 2024
Date

S/ Elaine P. Golin
Counsel for Capri Holdings Limited

May 1, 2024
Date

SO ORDERED:

Dated: May 1, 2024



UNITED STATES DISTRICT JUDGE
The Honorable Jennifer L. Rochon

EXHIBIT A ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Southern District of New York on [date] in the case of *Federal Trade Commission v. Tapestry, Inc., et al.*, Case No. 1:24-cv-03109. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order. I further agree to submit to the jurisdiction of the United States District Court for the Southern District of New York for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

Printed name: _____

Signature: _____

Exhibit 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,

Plaintiff,

-against-

TAPESTRY, INC. and CAPRI HOLDINGS
LIMITED,

Defendants.

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

ORDER

JENNIFER L. ROCHON, United States District Judge:

For the reasons stated on the record during the September 6, 2024 hearing, Plaintiff's motion to exclude the testimony of Karen Giberson is DENIED, Plaintiff's motion to exclude the testimony of the testimony of Jeff Gennette is DENIED, and Defendants' motion to exclude Dr. Loren Smith's opinions regarding and relying upon his diversion analysis is DENIED. The Clerk of Court is respectfully directed to close the motions pending at Dkts. 170, 175, and 184.

Additionally, for the reasons stated on the record during the September 6, 2024 hearing, the motions to seal filed in this case thus far are GRANTED. However, the Court reiterates that as the case continues to progress, some of what has been filed under seal may need to be unsealed. Specifically, the Court grants the following motions to seal and respectively directs the Court to close the motions pending at Dkts. 120, 131, 134, 135, 136, 141, 143, 147, 150, 155, 164, 165, 166, 167, 169, 174, 179, 183, 188, 193, 194, 196, 200, 202,

206, 209, 210, 211, 213, 214, 215, 216, 217, 219, 220, 221, 224, 227, 229, 231, 234, 238, 240,
245, 248, 249, 251, 254, 256, 262, 263, 267, 268, 270, 273, 274, 276, 278, 279, 284, 311, 315.

Dated: September 6, 2024
New York, New York

SO ORDERED.



JENNIFER L. ROCHON

United States District Judge

Exhibit 6

From: Emily.Viola@lw.com
Sent: Friday, August 30, 2024 2:37 PM
To: Kimberly Culp; Samuel Sahagian; Eric Ball
Cc: Lindsay.Martin@lw.com; David.Johnson@lw.com; Karen.Kim@lw.com
Subject: In the Matter of Tapestry Inc., and Capri Holdings Ltd., Dkt No. 9439 (Everlane)
Attachments: 2024.04.25 - Protective Order Governing Confidential Material.pdf; 2024.05.16 - Scheduling Order.pdf

**** EXTERNAL EMAIL ****

Counsel,

Pursuant to the Scheduling Order and Protective Order *In the Matter of Tapestry Inc., and Capri Holdings Ltd.*, Dkt No. 9439 (attached for reference) and 16 C.F.R. § 3.45(b), we are providing notice that we intend to offer materials or testimony provided by Everlane (the “third party”) as evidence at the FTC’s Part 3 administrative evidentiary hearing beginning on September 25, 2024 in Washington, DC. Accordingly, pursuant to the Scheduling Order in this matter, if a third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that third party shall file an appropriate motion with the Administrative Law Judge within ten (10) days after it receives notice of a party’s intent to introduce such material. Respondents will not oppose any proposed *in camera* treatment. The materials and/or testimony included are:

- DX-0145 - EVERLANE_00000138
- DX-0242 - EVERLANE_00000101

Best,

Emily J. Viola

Pronouns: *she/her/hers*

LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, NY 10020
Direct Dial: +1.332.240.1478
Email: emily.viola@lw.com
<https://www.lw.com>

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Exhibit 7

From: Saw, Edmund <esaw@ftc.gov>
Sent: Tuesday, September 3, 2024 5:43 PM
To: Samuel Sahagian; DiPietro, Cassandra
Cc: Eric Ball
Subject: RE: In The Matter Of Tapestry, Inc. / Capri Holdings Limited

**** EXTERNAL EMAIL ****

Hi Sam, same to you. The FTC takes no position on Everlane's motion for *in camera* treatment.

From: Samuel Sahagian <SSahagian@fenwick.com>
Sent: Tuesday, September 3, 2024 7:09 PM
To: Saw, Edmund <esaw@ftc.gov>; DiPietro, Cassandra <kdipietro@ftc.gov>
Cc: Eric Ball <eball@fenwick.com>
Subject: In The Matter Of Tapestry, Inc. / Capri Holdings Limited

Edmund & Cassandra,

Hope you're well. Pursuant to the Scheduling Order and Protective Order *In the Matter of Tapestry Inc., and Capri Holdings Ltd.*, Dkt No. 9429 and 16 C.F.R. § 3.45(b), Respondents have notified us that they intend to offer as evidence two of Everlane's confidential documents at the FTC's Part 3 administrative hearing beginning on September 25, 2024.

We intend to file a motion seeking *in camera* treatment of the documents. Respondents have stated that they would not oppose that motion. We understand that the FTC does not plan to use the documents, but out of an abundance of caution, we wanted to check in about whether the FTC would oppose a motion for *in camera* treatment.

Thanks,
Sam

Samuel Sahagian
Fenwick | Associate | +1 415-875-2265 | SSahagian@fenwick.com

Exhibit 8

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____)	
In the Matter of)	
)	
Tapestry Inc.,)	
a corporation, and)	Docket No. 9429
)	
Capri Holdings Limited,)	
a corporation,)	
)	
Respondents.)	
_____)	

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

Commission Rule 3.31(d) states: “In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section.” Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:

Dania L. Ayoubi
Dania L. Ayoubi
Administrative Law Judge

Date: April 25, 2024

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.
6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the

designation “CONFIDENTIAL – FTC Docket No. 9429” or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation “CONFIDENTIAL – FTC Docket No. 9429” or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an

order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Exhibit 9

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of)	
)	
)	
Tapestry Inc.,)	
a corporation, and)	Docket No. 9429
)	
Capri Holdings Limited,)	
a corporation,)	
)	
Respondents.)	
)	

SCHEDULING ORDER

- June 18, 2024 - Complaint Counsel serves preliminary proposed witness list (not including experts) with a brief summary of the proposed testimony.
- June 26, 2024 - Respondents serve preliminary proposed witness list (not including experts) with a brief summary of the proposed testimony.
- June 27, 2024 - Parties file Joint Status Report #1.
- July 9, 2024 - Deadline for parties to serve document requests, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.
- July 26, 2024 - Complaint Counsel serves proposed expert witness list.

Deadline for parties to serve requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of documents.
- August 6, 2024 - Close of fact discovery, except for discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- August 7, 2024 - Respondents serve proposed expert witness list.

- August 13, 2024 - Complaint Counsel serves expert witness reports.
- August 21, 2024 - Complaint Counsel serves final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel’s final proposed witness list shall include no more than twenty-five fact witnesses. Up to fifteen witnesses may appear on Complaint Counsel’s final proposed witness list regardless of whether that witness appeared on Complaint Counsel’s preliminary proposed witness list, subject to the restrictions described in Additional Provision 18.

Complaint Counsel provides the Administrative Law Judge (ALJ) with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
- August 27, 2024 - Respondents serve expert witness reports. Respondents’ expert reports shall include (without limitation) rebuttal, if any, to Complaint Counsel’s expert witness report(s).
- August 28, 2024 - Respondents serve final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents’ final proposed witness list shall include no more than twenty-five fact witnesses. Up to fifteen witnesses may appear on Respondents’ final proposed witness list regardless of whether that witness appeared on Respondents’ preliminary proposed witness list, subject to the restrictions described in Additional Provision 18.

Respondents provide the ALJ with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.
- August 29, 2024 - Parties file Joint Status Report #2.
- August 30, 2024 - Parties intending to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide

notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).¹

- September 6, 2024 - Complaint Counsel to identify rebuttal expert witness(es) and serve rebuttal expert witness report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert witness reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert witness report(s) or seeking leave to submit surrebuttal expert witness report(s) on behalf of Respondents).
- September 10, 2024 - Deadline to file motions for *in camera* treatment of proposed trial exhibits. *See* Additional Provision 16.
- Deadline for parties to file motions *in limine* to preclude admission of evidence. *See* Additional Provision 17.
- September 12, 2024 - Deadline for parties to depose expert witnesses (including rebuttal expert witnesses) and exchange expert-related proposed exhibits.
- Parties exchange objections to final proposed witness lists and exhibit lists, serving courtesy copies on the ALJ. Parties are to review the Commission's Rules on the admissibility of evidence before filing objections to exhibits and only raise objections that are necessary and valid.
- September 13, 2024 - Deadline for parties to file responses to motions *in limine* to preclude admission of evidence.
- Deadline for parties to file responses to motions for *in camera* treatment of proposed exhibits.
- September 16, 2024 - Complaint Counsel files pretrial brief supported by legal authority.
- September 20, 2024 - Parties exchange proposed stipulations as to law, facts, the admissibility of proposed exhibits, and the expertise of any expert witnesses.

¹ Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within five days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten days' notice of the proposed use of such material. To resolve this apparent conflict, this Scheduling Order requires that the parties provide at least ten days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

September 23, 2024 - Respondents file pretrial brief supported by legal authority.

September 24, 2024 - Final prehearing conference begins at 10:00 a.m. Eastern Time.

The parties shall meet and confer prior to the final prehearing conference regarding trial logistics and proposed stipulations as to law, facts, admissibility of exhibits, and expertise of any expert witnesses. To the extent the parties have agreed to stipulate to any issues of law, facts, admissibility of exhibits, and/or expertise of any expert witnesses, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the final prehearing conference. At the final prehearing conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed to by the parties.

Also at the final prehearing conference, the parties may present any objections to the final proposed witness lists and proposed exhibits. All proposed exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admissibility of proposed exhibits, the parties shall prepare a list identifying each proposed exhibit to which admissibility is stipulated, which shall be offered into evidence as a joint exhibit marked as "JX2" and signed by each party. No signature by the ALJ is required.

September 25, 2024 - Evidentiary Hearing begins at 10:00 a.m. Eastern Time.

ADDITIONAL PROVISIONS

Filings

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Office of the Administrative Law Judges (OALJ) by email to: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to the OALJ directly and the FTC E-filing system shall not be used for this purpose. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110, Washington, DC, 20580 as the place of service. **The subject line of all electronic submissions to oalj@ftc.gov shall set forth the docket number, case name, and title of the submission.** The parties are not required to serve a courtesy copy on the OALJ in hard copy,

except upon request. Discovery requests and discovery responses are to be exchanged between the parties and shall not be submitted to the OALJ.

2. The parties shall serve each other by email and shall include “Docket 9429” in the subject line. All attached documents shall be in .pdf format. In the event that service by email is not possible, the parties may serve each other through any method authorized under the Commission’s Rules of Practice.

3. Each pleading that cites to an unpublished opinion(s) or opinion(s) not available on LEXIS or WESTLAW shall include a copy of such opinion(s) as an exhibit.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred in good faith with opposing counsel in an effort to resolve the issues raised by the motion, describing those efforts. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also recite the date, time, and place of each conference between counsel and the names of all parties participating in each such conference. Motions that fail to include such separate statement may be denied on that ground.

5. By signing and presenting a pleading, written motion, or other filing, an attorney or *pro se* litigant certifies that either: (1) no portion of the filing was drafted by generative artificial intelligence (“AI”) (such as ChatGPT, Microsoft Copilot, Harvey.AI, or Google Gemini), or (2) any language in the filing that was drafted by generative AI was checked for accuracy by human attorneys or paralegals using printed legal reporters and/or online legal databases. Any filing that fails to comply with these mandatory certification requirements may be stricken on that ground.

6. In relevant part, Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the ALJ, including those filed under Rule 3.38.

7. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission

with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

Discovery

8. Each party is limited to serving on each opposing party: fifty requests for production of documents, including all discrete subparts; twenty-five interrogatories, including all discrete subparts; and twenty requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

9. Any discovery obtained in this proceeding may be used in related federal court litigation, and vice versa. Any discovery taken in this administrative proceeding shall be non-duplicative of the discovery taken in the federal court preliminary injunction proceeding. No individual or entity deposed in one action may be re-deposed in the other, except that expert witnesses may be re-deposed in this proceeding to the extent their reports in this proceeding include opinions not set forth in their reports from the federal court proceeding. The parties preserve all rights to object to the admissibility of evidence.

10. The parties will serve any objections to document requests within ten business days of service of the request, and they will meet and confer to attempt to resolve any disputes and to discuss timing of production within three business days of the objections being served. The party responding to document requests will make a good-faith effort to produce responsive documents as expeditiously as possible, including by making productions on a rolling basis.

11. Compliance with the scheduled close of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off date and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion in this administrative proceeding to compel responses to discovery requests or to seek certification of a request for court enforcement of a non-party subpoena shall be filed within thirty days of service of the responses and/or objections to the discovery requests or within twenty days after the close of discovery, whichever first occurs; except that, where the parties have been engaging in negotiations over a discovery dispute, including negotiations with any non-party with regard to a subpoena, the deadline for the motion to compel shall be within five business days of reaching an impasse.

12. One Rule 3.33(c) deposition notice of each Respondent shall be permitted. Depositions of all individuals designated as representatives for purposes of a 3.33(c) deposition notice shall count as one deposition for purposes of this paragraph, even if the noticed entity designates multiple individuals to provide testimony. The parties shall consult and coordinate the time and place of the deposition prior to confirming any deposition. The parties shall use reasonable efforts to reduce the burden on witnesses noticed for depositions and to accommodate witness schedules. The deposition of any person may be recorded by video, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by video at least five days in advance of the deposition. Except as otherwise provided in this

paragraph, no deposition, whether recorded by video or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the ALJ. The parties will agree upon and submit to the ALJ a remote deposition protocol.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. Unless the parties otherwise agree, at the request of any party, the time and allocation for a non-party deposition that has been cross-noticed shall be divided evenly between each side. If both Complaint Counsel and Respondents notice any non-party fact deposition (including any Rule 3.33(c) deposition), the seven hours of record time will be divided equally between the sides. Unused time in any side's allocation of deposition time shall not transfer to the other side. To the extent a deposition involves a non-party and is not cross-noticed, the party who did not notice the deposition will have thirty minutes available to them and the party seeking the deposition will have six hours and thirty minutes.

14. Every documentary subpoena to a non-party shall include a cover letter requesting that (1) the non-party Bates-stamp each document with a production number and any applicable confidentiality designation prior to producing it and (2) the non-party provide to the other parties copies of all productions at the same time as they are produced to the requesting party. If a non-party fails to provide copies of productions to both sides, within three business days of receiving the documents, the requesting party shall produce all materials received pursuant to the non-party subpoena, as well as all materials received voluntarily in lieu of a subpoena, including declarations or affidavits obtained from a non-party. If a party serves a non-party subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven calendar days after the original return date for the document subpoena, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

15. A party that obtains a declaration, note of support, or affidavit from a party or non-party witness will promptly produce it to the other party(ies), and in any event not later than (1) three business days before the party or non-party is scheduled to be deposed and (2) seven calendar days before the end of fact discovery. Declarations, notes of support, or affidavits produced after this date shall not be admitted into evidence or used in the administrative proceeding except upon a showing of good cause. The parties reserve all rights and objections with respect to the use and/or admissibility of any declaration, note of support, or affidavit. No declaration, note of support, or affidavit will be admitted unless a fair opportunity was available to depose the declarant.

Motions

16. If a party intends to offer confidential materials of an opposing party or non-party into evidence at the hearing, in providing notice to such non-party, the party is required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial. 16 C.F.R. § 3.45; *In re Otto Bock Healthcare North American*, 2018 WL 3491602 at *1 (July 2, 2018); *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr. 4, 2017).

Motions must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (Apr.4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the ALJ.

17. Motions *in limine* are strongly discouraged. Motion *in limine* refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (Apr. 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *SEC v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the ALJ is capable of assigning appropriate weight to evidence.

Witnesses

18. The final proposed witness lists shall represent counsel’s good faith designation of all potential witnesses who the parties reasonably expect may be called upon in their case-in-chief. A general designation that a party reserves the right to call anyone on the opposing party’s witness list is insufficient. A party shall promptly notify the opposing party of changes to witness lists to facilitate completion of discovery within the dates of this Scheduling Order. The final proposed witness lists may include up to fifteen witnesses not listed in the preliminary proposed witness lists, provided that any witness not appearing on a preliminary proposed witness list must have been deposed.

19. If any party wishes to offer a rebuttal witness other than a rebuttal expert witness, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and (d) shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

20. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

21. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

22. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other parties:

(i) Materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) Transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert witness report is produced, the producing party shall provide to the other parties all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of paragraph (g) below, except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the ALJ, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert witness report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the expert witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert witness who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who does not provide an expert report or will not act as a testifying expert.

(f) At the time of service of the expert witness reports, a party shall provide opposing counsel:

(i) A list of all commercially-available computer programs used by the expert witness in the preparation of the report;

(ii) A copy of all data sets used by the expert witness, in native file format and processed data file format; and

(iii) All customized computer programs used by the expert witness in the preparation of the report or necessary to replicate the findings on which the expert witness' report is based.

(g) Expert witnesses' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) Any form of communication or work product shared between any of the parties' counsel and their expert witness(es), or between any of the expert witnesses themselves;

(ii) Any form of communication or work product shared between an expert witness and persons assisting the expert witness;

- (iii) An expert witness' notes, unless they constitute the only record of a fact or an assumption relied upon by the expert witness in formulating an opinion in this case;
- (iv) Drafts of expert witness reports, analyses, or other work product; or
- (v) Data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert witness in the opinions contained in the expert witness' report.

23. If the expert witness reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert witness report(s) in accordance with Additional Provision 7 of this Scheduling Order and 16 C.F.R. § 3.45(e).

24. An expert witness's testimony is limited to opinions contained in that expert witness' report provided to the opposing party. No opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness shall provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

Proceedings

25. In the event that the evidentiary hearing in this matter is conducted remotely by video conference, in advance of the hearing, the parties may take expert depositions for the purpose of perpetuating trial testimony (i.e., a trial deposition) and submit such trial testimony as an exhibit in lieu of presenting the expert's live testimony at the hearing. This trial deposition may be conducted in addition to any deposition of an expert witness for purposes of discovery (discovery deposition). Although a party may submit trial depositions in lieu of live video testimony at trial for all expert witnesses in the case, a party may elect to conduct trial depositions for all or fewer than all experts.

26. The final exhibit lists shall represent counsel's good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final exhibit lists only by consent of all parties, or, if the parties do not consent, by an order of the ALJ upon a showing of good cause.

27. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the ALJ.

28. The parties shall provide to one another, the ALJ, and the court reporter at least forty-eight hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of the hearing, subject to possible delays or unforeseen circumstances.

Exhibits

29. The parties shall provide one another with copies of any demonstrative, illustrative

or summary exhibits (other than those prepared for cross-examination) twenty-four hours before they are used with a witness.

30. Complaint Counsel's exhibits shall bear the designation "PX," Respondents' exhibits shall bear the designation "RX," and joint exhibits shall bear the designation "JX," or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation "PXD" and Respondents' demonstrative exhibits shall bear the designation "RXD," or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number or some other consecutive page number.

31. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. The parties shall confer and eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. To that end, the parties shall agree in advance of the final prehearing conference to the identification of joint exhibits. Counsel shall contact the court reporter regarding submission of exhibits.

Page Limitations

32. Pretrial briefs shall not exceed fifty pages per side, post-trial initial briefs shall not exceed seventy-five pages per side, post-trial reply briefs shall not exceed fifty pages per side, and post-trial initial findings of fact and conclusions of law shall not exceed one hundred pages per side, unless otherwise agreed to by the parties or ordered by the ALJ.

Other

33. For the avoidance of doubt, any provision contained herein can be amended upon an order of the ALJ upon a showing of good cause. The parties may also modify discovery and expert disclosure deadlines by agreement.

ORDERED:

Dania L. Ayoubi

Dania L. Ayoubi
Administrative Law Judge

Date: May 16, 2024