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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

In the matter of Tapestry Inc., a corporation, and Capri Holdings Limited, a corporation. Respondents.	**DOCKET NO. 9429**

COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF JEFF GENNETTE

Complaint Counsel moves to exclude the testimony, opinions, and report of Respondents' purported industry expert, Jeff Gennette, the former CEO of Macy's Inc. ("Macy's"). Mr. Gennette's opinions fall far outside the range of his experience at Macy's, covering competition from direct-to-consumer ("DTC") channels, discounting behaviors of various brands where Mr. Gennette has never been employed and the general behavior and practices of "multi-brand retailers" other than Macy's—with whom Mr. Gennette has no experience as well as the economic work of Complaint Counsel's expert, Dr. Loren Smith. Moreover, both Complaint Counsel and Respondents took [redacted]. Thus, providing an expert witness to opine on Macy's business is not just improper—it is unnecessary. For these reasons, the Court should exclude Mr. Gennette's testimony and opinions.

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LEGAL STANDARD

Rule 3.43(b) of the Commission Rules of Practice provides that "[i]rrelevant, immaterial, and unreliable evidence shall be excluded." 16 C.F.R. § 3.43(b). The Court may preclude the introduction of inadmissible evidence, including evidence proffered by a purported expert witness, by granting motions *in limine*, which "are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible." Order on Complaint Counsel's Motion *In Limine* at 2, *In re Basic Research, LLC*, FTC Dkt. No. 9318 (Jan. 10, 2006).[1] Under Federal Rule of Evidence 702, the party offering expert testimony has the burden of establishing that (1) "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," (2) "the testimony is based on sufficient facts or data," (3) "the testimony is the product of reliable principles and methods," and (4) "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

An expert opinion, even one drawing on experience rather than scientific technique, must be based on the application of reliable principles and methods to specific data, and the expert must show how their experience led to their conclusions. Fed. R. Evid. 702 (c)-(d); Order on Motions *in Limine* at 4, *In re Rambus Inc.*, FTC Dkt. No. 9302 (Apr. 21, 2003) (excluding expert report and precluding hearing testimony, in part, because the testimony "lacks a proper

[1] *Available at* https://www.ftc.gov/sites/default/files/documents/cases/2006/01/060110aljordonccmoinlim.pdf.

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foundation")[2]; *LinkCo, Inc. v. Fujitsu Ltd.*, No. 00 CIV. 7242 (SAS), 2002 WL 1585551, at *4 (S.D.N.Y. July 16, 2002).

ARGUMENT

I. Mr. Gennette's Opinions Regarding Consumer Behavior Are Not Based on His Expertise or on Reliable Principles or Methodologies.

Mr. Gennette, without conducting or reviewing any consumer surveys, offers opinions about consumer behavior, including what channels consumers shop in, how consumers categorize handbags, and how consumers choose between handbags. Ex. A, Gennette Rep. at ¶ 12(a). Mr. Gennette, also, posits that true luxury brands engage in discounting just as accessible luxury brands do and that entry is easy through direct-to-consumer channels, *id.*—despite having no experience at Macy's with direct-to-consumer channels and not being an employee of a true luxury brand. This is a mismatch between "the area in which the witness has superior knowledge, education, experience, or skill" and "the subject matter of the proffered testimony." *Washington v. Kellwood*, 105 F. Supp. 3d 293, 304 (S.D.N.Y. 2015) (internal quotations omitted).

Mr. Gennette, based on his expertise as a former CEO of one wholesaler, opines on the availability of many channels for customers' shopping experience. Gennette Rep. at ¶¶ 20-24. He states that customers may purchase handbags secondhand, on websites like the RealReal, *id.* at ¶ 23, where he has never worked; social media platforms, *id.* at ¶ 21, where he has also never worked, and in which he claims no expertise; and monobrand stores, *id.* at ¶ 24, in which he has no expertise. He concludes that [redacted] *id.* at ¶

[2] *Available at* https://www.ftc.gov/sites/default/files/documents/cases/2003/04/030421aljordonmoinlimine.pdf.

23, again, without having experience with channels other than the wholesale channel, or conducting any studies or surveys of pricing across channels, or consumer purchasing behavior. Ex. B, Gennette Dep. at 22:20-22, 24:7-9.

Mr. Gennette also attacks Dr. Smith's use of price-based brand classifications in NPD data, stating that "I never saw any research or had any firsthand experiences that suggested consumers think about shopping for handbags in this way." Gennette Rep. at ¶ 26. He relies not even on his limited experience, but rather, the lack of such experience during his time at one wholesaler. For his opinion that true luxury brands engage in discounting, Mr. Gennette largely falls back on analyses of internet searches, Gennette Rep. at ¶¶ 27-37, that do not require any particular expertise and are something counsel for Respondents themselves can do. *LinkCo*, 2002 WL 1585551, at *2. Finally, Mr. Gennette states that [redacted] Gennette Rep. at ¶ 38. This opinion is offered although Mr. Gennette has never worked in the direct-to-consumer channel, and it is not "the area in which the witness has superior knowledge, education, experience, or skill." *Kellwood*, 105 F. Supp. 3d at 304.

II. Mr. Gennette's Opinion That Multi-Brand Retailers Are Incentivized to Foster Handbag Competition Should Be Excluded.

Mr. Gennette also opines that multi-brand retailers are incentivized to foster handbag competition, but this opinion is based on unreliable anecdotes rather than a reliable methodology. Gennette Rep. § V. Mr. Gennette admits that he did not perform any economic analysis of incentives, nor would he be qualified to do so. Gennette Dep. at 259:14-16, 268:8-10; Gennette Rep. at ¶ 88.

Mr. Gennette's report offers that "[i]f current brands are not able to meet the full array of customer needs, multi-brand retailers can also respond with products from their own private

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brands (private label)." Gennette Rep. at ¶ 44. This claim lacks any citation. Mr. Gennette did not analyze sales of Macy's private label handbag business, or any wholesalers other than Macy's. Gennette Dep. at 266:1-4. His report also claims that the Michael Kors business "cooled" for an unspecified period at Macy's, but Mr. Gennette admitted that he did not perform any data analysis in support of this claim. Gennette Rep. at ¶ 51; Gennette Dep. at 266:21-267:16. He also admitted [redacted] which undercuts his own conclusion. *Id.* at 267:22-25.

Mr. Gennette's report relies on photographs showing handbag placement at two Macy's and one Bloomingdale's location to argue that private label brands compete with other brands. Gennette Rep. Figs. 13-15. But these photographs were not obtained through reliable or principled methods. Mr. Gennette does not know who took the photographs. Gennette Dep. at 32:6-21. Mr. Gennette testified that although he excluded other photographs taken at these department stores from his report, he does not know how many photographs were taken nor what percentage of the photos made the final report. *Id.* at 132:16-25. Finally, the photographs show small portions of the few stores' handbag offerings and there is no attempt to provide a full picture of the handbag department in certain stores, leaving the Court to guess at what lies just outside the frame. *Id*. at 213:7-17.

III. Mr. Gennette's Economic Opinions Regarding the Merged Firm's Pricing Power Should Be Excluded.

Mr. Gennette offers sweeping claims about the effects of the merger on consumer demand and the ability of the combined firm of Tapestry and Capri to increase prices. For example, Mr. Gennette's report rejects the calculated outputs of Dr. Smith's merger simulation model, based on the claim that "consumers exert authority over handbag prices." Gennette Rep. at ¶¶ 60-61, 72. However, Mr. Genette is not qualified to offer such opinions. Gennette Rep. at

¶88; *see* Fed. R. Evid. 702(a). It is notable that when evaluating a similar motion seeking exclusion of Mr. Gennette's testimony, the federal court concluded that "to the extent Mr. Gennette […] testif[ies] outside of [his] field of industry expertise, for example, as to economic analyses, that testimony would be outside of their scope of expertise and would not be afforded weight by this Court." Ex. C, Hr'g Tr. 65:20-24, *FTC v. Tapestry, Inc.*, No. 1:24-cv-3109 (S.D.N.Y. Sept. 6, 2024).

Mr. Gennette further fails to employ any reliable principles or methods. First, Mr. Gennette did not conduct any economic analysis or consumer surveys to come up with his opinion that consumer resistance would prevent the merged firm from increasing prices. Gennette Dep. at 22:20-23:3, 271:16-25; *see* Gennette Rep. § VI.

Second, Mr. Gennette relies on just [redacted]. Gennette Rep. at ¶¶ 65 n.132, 69 n.136, 82 n.152, 83 n.155. His report merely recites from the documents and claims that they support his opinion. *Longtop*, 32 F. Supp. 3d at 460, 462 (rejecting proffered expert testimony that simply "summariz[es] facts and documents in the record that the [trier of fact] is capable of understanding on its own").

Third, Mr. Gennette relies on his ambiguous personal "experience" working at Macy's but fails to disclose any underlying documents or data. Gennette Dep. at 22:9-19, 24:13-16. For example, in describing his opinion [redacted] Mr. Gennette repeatedly raised his recollection of discussions with unknown participants based on undisclosed data analyses. *Id.* at 71:12-21, 188:12-189:1 [redacted], 281:23-282:4 [redacted]

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[redacted] Gennette Dep. at 274:3-275:3. None of this data is cited, relied upon, or disclosed in Mr. Gennette's report and Mr. Gennette did not [redacted] Gennette Rep., Appendix B; Gennette Dep. at 29:18-25. "[B]asing an opinion on experience [does not] excuse an expert from the need to show how he reliably brought that experience to bear in reaching his opinion." *Castagna v. Newmar Corp.*, No. 3:15-CV-249 JD, 2020 WL 525936, at *3 (N.D. Ind. Feb. 3, 2020).

IV. Mr. Gennette's Opinions Regarding Dr. Smith's Use of NPD Data Should Be Excluded.

Mr. Gennette levels unfounded criticisms at Dr. Smith's use of NPD data. Gennette Rep. at ¶¶ 88-110. With no special training in working with data, he has neither the qualifications, nor any coherent methodology for his opinions. Mr. Gennette criticizes the completeness of the NPD data used by Dr. Smith, *id*. at ¶¶ 88-93, although he is not an economist and claims no expertise in data analysis. Gennette Dep. at 7:14-21, 16:22-25.

Mr. Gennette further claims that the NPD dataset is incomplete because [redacted] Gennette Rep. at ¶¶ 88-92. But as Mr. Gennette admitted during his deposition, he did not review the sales data produced by NPD; he reviewed only [redacted] Gennette Dep. at 30:4-9. Meaning, that Mr. Gennette employed no methodology to test the completeness of the data, and his challenge to Dr. Smith's use of the NPD data is based on [redacted] rather than sufficient facts or data. Fed. R. Evid. 702(b)-(c). Mr. Gennette also explained that he reviewed only [redacted] Gennette Dep. at 26:16-20, 119:2-5. Not only does Mr. Gennette lack

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the expertise to opine on Dr. Smith's use of NPD data, he also lacks a reliable foundation to do so. Order on Motions *in Limine* at 4, *In re Rambus Inc.*, FTC Dkt. No. 9302 (Apr. 21, 2003). Mr. Gennette additionally provides testimony about his personal experience using NPD data, Gennette Rep. ¶ 93, which, as described *infra*, is not appropriate expert testimony.

Similarly, Mr. Gennette attacks Dr. Smith's use of the Bridge and Contemporary categories in NPD and his determinations about which silhouettes to include in his market analysis—which largely boils down to a criticism of Dr. Smith's market definition, which Mr. Gennette has no economic or antitrust qualifications to make. Gennette Rep. at ¶¶ 94-110; Gennette Dep. at 7:14-21, 16:22-25, 120:6-8.

V. Mr. Gennette's Opinions Are Unduly Prejudicial Because They Are Based on His Inadmissible and Contradictory Personal Knowledge of Macy's.

Mr. Gennette's report repeatedly cites his personal recollection of Macy's for new facts that undergird his opinions even though [redacted] *See, e.g.*, Gennette Rep. at ¶¶ 51, 57 n.113, 75, 85, 93. [redacted]

[redacted]

Having failed to elicit the testimony from Macy's that they wanted in fact discovery, Respondents proffer ([redacted] Gennette Dep. at 8:25-9:2) Mr. Gennette to enter into evidence their wish list of facts and cast doubt on the testimony of his former subordinate. During his deposition, Mr. Gennette improperly opined on [redacted] *Id.* at 216:21-217:8; *United States v. Maxwell*, No. 20-CR-330 (AJN), 2021 WL 5283951, at *4 (S.D.N.Y. 2021).

CONCLUSION

For the reasons set forth above, Complaint Counsel requests that the Court exclude the testimony of Mr. Jeff Gennette.

Dated: September 17, 2024

Respectfully Submitted

s/ Victoria Sims
Victoria Sims
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 538-0792
vsims@ftc.gov

Counsel Supporting the Complaint

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STATEMENT OF CONFERENCE PURSUANT TO PARAGRAPH 4 OF THE SCHEDULING ORDER

Complaint Counsel met-and-conferred with Respondents' counsel by videoconference on August 23, 2024 and September 9, 2024 in good faith seeking to resolve by agreement the issues raised by the motion and have been unable to reach such agreement.

Dated September 10, 2024

Respectfully Submitted,

By: s/ Victoria Sims
Victoria Sims
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
T: 202-326-0792
E: vsims@ftc.gov

Counsel Supporting the Complaint

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

In the matter of Tapestry Inc., a corporation, and Capri Holdings Limited, a corporation. Respondents.	**DOCKET NO. 9429**

[PROPOSED] ORDER

Upon Complaint Counsel's Motion *in Limine* to Exclude Testimony of Jeff Gennette, it is hereby:

ORDERED that Complaint Counsel's motion is GRANTED; and it is furthered

ORDERED that any statements in Jeff Gennette's August 27, 2024 report are hereby stricken and will not be received in evidence.

SO ORDERED THIS ___ DAY OF _____, 2024

_____
Dania L. Ayoubi
Administrative Law Judge

EXHIBIT A

REDACTED IN ENTIRETY

EXHIBIT B

REDACTED IN ENTIRETY

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EXHIBIT C

O962FTC1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TAPESTRY, INC., and CAPRI HOLDINGS LIMITED,

Defendants.

----------x

New York, N.Y.

24 Civ. 3109 (JLR)

Remote Hearing

September 6, 2024
10:05 a.m.

Before:

HON. JENNIFER L. ROCHON,

District Judge

APPEARANCES

FEDERAL TRADE COMMISSION
Attorneys for Plaintiff
BY: ABBY L. DENNIS
FRANCES ANNE JOHNSON
ANDREW LOWDON
VICTORIA SIMS

LATHAM & WATKINS, LLP
Attorneys for Defendant Tapestry, Inc.
BY: DAVID JOHNSON
ALFRED PFEIFFER
LAWRENCE BUTERMAN
JENNIFER GIORDANO

WACHTELL LIPTON ROSEN & KATZ
Attorneys for Defendant Capri Holdings Limited
BY: ELAINE GOLIN
ADAM GOODMAN
BRITTANY FISH

(Case called)

THE COURT: Good morning, everyone. Let me put a few things on the record first and then I will take appearances.

First, we are proceeding with this conference via Microsoft Teams through videoconference. Conferences are public proceedings even though we are holding it virtually and therefore a listen-only line was noticed on the docket for anyone who wishes to join. I understand we have many people on the line. Please presume that this is an open forum.

As a -- on this line we also have my deputy, my court clerk, as well as a court reporter who is transcribing these proceedings. Depending on how long the proceedings go, we may have to take a break for the court reporter to switch in and out, but I will ask the court reporter to let me know how we need to proceed at whatever point is necessary.

As a reminder, no one other than court personnel are permitted to record, rebroadcast, or disseminate these proceedings.

All right. Why don't we start with appearances. Who do we have here from the FTC?

MS. DENNIS: Good morning, your Honor. Abby Dennis for the Federal Trade Commission. With me in the room and on camera are my colleagues Frances Anne Johnson and Andrew Lowden. My colleague Victoria Sims is also joining remotely.

THE COURT: Terrific. Thank you.

And who do we have -- and, Ms. Dennis, will you be taking lead here today?

MS. DENNIS: I will. My colleagues will be arguing the *Daubert* motions, but I will handle everything else.

THE COURT: Okay. Thank you.

And then who do we have here for Tapestry.

ATTY 2: Good morning, your Honor.

MR. JOHNSON: Good morning, your Honor. This is David Johnson, of Latham & Watkins, representing Tapestry, and I'm joined today by my colleagues Al Pfeiffer, Jennifer Giordano, and Larry Buterman.

THE COURT: Good morning, everyone.

And who is here for Capri.

MS. GOLIN: Good morning, your Honor. This is Elaine Golin, from Wachtell Lipton, for Capri Holdings Limited. I am joined here by my partner Adam Goodman and our colleague Brittany Fish.

THE COURT: Terrific. Great. Thank you, everyone.

Let me just go over what we are going to cover here today. I have several things on my list.

So, first, I would like to go over some housekeeping issues and issues to deal with before we start the hearing on Monday.

Secondly, I would like to talk about sealing, which I think dovetails a little bit with some of the questions about

how we are going to proceed in the hearing.

Third, I would like to go over the *Daubert* motions. I will hear whatever the parties wish to add to the papers that they have given me. So I will hear argument and anything else you wish to present with respect to the *Daubert* motions.

Then we will talk about the joint September 4 submission. I think there is less to talk about there than I had anticipated, given the submission from the parties as to any prehearing determinations that they are requesting from me.

Then we will follow up a little bit on the August 28 letter that was sent to me and discuss that a bit.

So that is my agenda of items, and so I am going to start with the housekeeping ones first just to get those out of the way.

The hearing, as we all know, is going to take place in Courtroom 20B. If we run out of seats in 20B, there will be an overflow courtroom nextdoor in Courtroom 20C, where we will be live streaming the hearing. Each side will be given one jury room——one for Courtroom 20B and one for Courtroom 20C——where you can keep your files. You can treat it as a workroom so you don't have to cart things in and out. That will be yours for the duration of the injunction proceedings. It will be opened each day by 8:30 even though we are starting at 9:00 so that you will have time to get to your things should you need them and you can stay there until we lock it up the courtroom at

night.

As a reminder, nobody is permitted to record or rebroadcast or broadcast any of the proceedings that happen live. We have received a lot of calls to chambers as to whether there is going to be a live broadcast or dial-in to the hearing. There will not be. That is not consistent with court rules. Any member of the public who wishes to attend the hearing is most welcome to attend in person, and we should have enough space to accommodate everyone through the overflow courtroom as well.

The next topic I have is witness sequestration. I know the parties have an agreement about who can and cannot be in the courtroom during different portions of testimony. I am reiterating that it is the parties' obligation to make sure that that is being abided by. I will not know who the pertinent individuals are, so please do make sure that you are self-policing that agreement between the parties, especially since we have an overflow room, as well. So you will need to make sure that the people who are supposed to be in the room are in the room and the people who are not in the room.

If you have any witnesses that come and they are waiting to be heard, they can sit in the jury rooms. The jury rooms will not have the rebroadcast -- or the live stream of the proceedings going on, so that will essentially be a closed room where they can sit if they need to sit and await their

testimony.

The parties are responsible in terms of technology, for making sure their technology functions properly. I understand that there are several people here today to do run-throughs to make sure that everything is going to go smoothly. I appreciate that. Please make sure that what you are bringing works with our technology and that everyone is familiar with the technology so that we don't slow anything up. Our courtroom and I believe 20C, although I believe that will be less important, but our courtroom has been recently upgraded technology-wise, so we shouldn't have any glitches and it should be just fine.

The microphones in the courtroom, the microphones in the courtroom are going to be set to be off unless they are turned on. That's not always the case in various courtrooms and sometimes isn't even the case in my courtroom. But we are going to turn off the default function of having them on because if that's the case they may catch any whispers and things like that and there are an awful lot of people here, and it's being broadcast into another courtroom, so we just want to make sure that what's meant to be said out loud are the only things that are said out loud. But when they are on——and you just push them on and a little red light comes on——they will catch whatever is said. So if anyone is discussing anything, if you have a large team talking about anything and you don't

want it broadcasted on the microphone, please make sure that you are very careful and the microphone is either off, you are whispering very lightly or, even better, if you are staying well away from the microphones.

The timing of the proceedings, the parties have agreed and the Court has agreed the will have 45 minutes per side for opening arguments followed by an evidentiary hearing of 20 hours per side. We are going to -- the Court will keep track of time. I also expect that each side will track their time closely. I don't anticipate that I will be able to give either side additional time because I have a criminal trial that starts the day after this proceeding, and I did arrange my schedule based on the representations of the parties that they agreed to limit themselves to 20 hours each. As I said, my law clerk will keep track of each side's time daily. You should be keeping track as well and please have a representative from each side check in with my law clerk either during lunch or at the end of the day to reconcile any time issues, and I will provide the time at the end of each day so that we are all on the same page.

As a reminder, we will start the evidentiary hearing each day promptly at 9 a.m. We will have a 15-minute break at 11 a.m., an hour lunch from 1 to 2, during which I may have other proceedings to attend to, and a 15-minute break around 3:00, and then we will generally finish at 5:00. Because I may

have other proceedings at the lunchtime, I may ask you on certain days to remove your items from the tables so that I can have other parties come to the table during the lunch break and I can do a proceeding. If that's not necessary, you won't need to move your items, but on some days I can tell that you it will be necessary.

With respect to finishing at 5 p.m., if there is an issue and we need to run over just a little bit I will try to make accommodations for that just to make sure that we are on schedule. But I run a pretty tight schedule. So when I say we start at 9, we start at 9; when I say it's a 15-minute break, it's a 15-minute break, it's not an around-15-minute break. Now, something could happen, and certainly something could happen on my end, and often does, where I am delayed a little bit. But I'm going to try to make sure that that doesn't happen, I'm going to ask you to make sure that that doesn't happen, and we are going to use all of our time wisely.

And that goes for making sure that your witnesses are ready. We are going to use the entire time from 9 to 5 for this hearing. So if one witness ends at 4:45, that means another witness needs to be ready to go at 4:45, even if we only get a portion of that witness's testimony in. We are going to use the most of our 9-to-5 period. I am also happy to meet with the parties at 8:30 on any days if we find that there is an issue that we need to talk about before we start the

evidentiary portion of the preliminary injunction hearing.

I will put as many chairs around the table for plaintiff and defendants as we can, and there will be a row of chairs behind defense table because I anticipate we may have even more attorneys for defendants since we have two defendants there. But you can configure yourself when you arrive on Monday. The courtroom will be open by 8:30 on Monday, so you can get yourself ready before we start at 9:00.

Setting aside the question of sealing and those kinds of proceedings that we are going to talk about in a minute, any questions about logistics that we have just gone over? Let me start with Ms. Dennis. Any questions?

MS. DENNIS: No, your Honor. Thank you.

THE COURT: Okay. Mr. Johnson, any questions?

MR. JOHNSON: No, your Honor. Thank you.

THE COURT: And Ms. Golin?

MS. GOLIN: No, your Honor. Thank you very much.

All right. Now talking about sealing, there have been, I would say, an immense amount of sealing requests thus far in this case, and so what I am going to do is to grant those sealing motions regarding the items that have already been filed in an order that I am going to put out after this proceeding, but I do want to give the parties some guidance moving forward. As you know and as I am sure you understand, under cases like *Lugosch*, there is a heightened presumption of

public access for judicial documents under that case. So certain information that's currently filed under seal may end up being critical for the Court's determination in adjudicating this matter and that means, as the case progresses, some of what I am going to allow to be filed under seal now may need to become unsealed. I just don't know until I know exactly what's going to become the basis for my judicial determination here.

For example for plaintiff's brief in support of their motion for preliminary injunction, they have redacted purported total market shares held by Kate Spade, Coach, Michael Kors, and HHI held by these companies in the proposed market. I'm going to assume that those figures are going to be critical to the Court's analysis, so we need to determine how we are going to treat those in the future.

Another example, the defendants, in the defendants' opposition to plaintiff's motion for the PI, defendant's redacted their assertions about consumers viewpoints on particularities of manufacturing practice as well as generalized pricing information of handbags sold by defendants' own brands and, again, these may end up being central to the Court's analysis and may have to have some unsealing there. That all being said, I also recognize the privacy interests of third parties that weigh heavily in favor of sealing and even as to some party documents that have commercially sensitive confidential information that can merit seeing. But I am just

saying now that I will seal for now but that may be revisited as we move forward and determine what may need to be unsealed.

All right. So now I want to talk a little bit about how we are going to handle things in the hearing itself.

There may be some documents, especially in the context of third-party documents, that may need -- that perhaps should not be discussed in open court and need to be treated separately. So I would like to hear from the parties as to how you propose to move through the preliminary injunction hearing to take into account some of this confidential information. I know it's been done in different ways in different courts. I want to know what the parties are going to propose here and make we can talk about it a little bit. Let me start with you Ms. Dennis.

MS. DENNIS: Thank you, your Honor.

We defer to the Court's preferences, but we submit the courtroom should remain open as much as possible during this proceeding. We are prepared to work with defendants and nonparties to minimize the need to seal the courtroom, if at all, during live testimony. We think we can do that through redacting documents. We just got some redactions from defendants last night. We can use code names. We can just point to something in a document, say "you wrote that." We want to try to work with defendants and the parties who will be appearing live to make sure we don't seal the courtroom any

more than we have to.

There are a number of witnesses, however, nonparties who will be appearing via deposition video and for each one of those parties, I think with the exception of one, they have marked the entirety of their transcripts confidential. We believe and I believe defense agree with us——we talked about this yesterday——that those videos should be played in court. But the FTC at least does not oppose the third-party motions to seal that information and actually thinks that might be the most efficient way to get through those videos is to sealing the courtroom for the entirety of them. And I think there will be, for the Court's information, five or six in the FTC's case and we anticipate them all being under an hour.

THE COURT: Total under an hour?

MS. DENNIS: No, each witness.

THE COURT: Okay. Each witness is under an hour, so it would be six hours of testimony, five to six hours.

MS. DENNIS: Correct. That's what we are anticipating. We are in the process of winnowing down designations with the defendants. That's what they are all looking like at this point.

THE COURT: Okay. Thank you.

Let me hear, then, from defendants. But I will comment before I do that I do also agree with trying to keep the courtroom open absolutely as much as possible, and I think

there are ways in which testimony can be presented in a way that allows that especially obviously we don't have a jury, it's me sitting up there, so you can point me to something without having to say it out loud. I can see the documents in front of me. We can probably deal with a lot of things that may involve commercially sensitive information in a way that keeps things flowing and open. So I appreciate that.

Mr. Johnson, your thought, please.

MR. JOHNSON: Yes, your Honor.

From Tapestry's perspective we are in agreement with your Honor's approach and also with the approach that Ms. Dennis presented there. We share the sentiment of trying to keep the court open as much as possible for the live testimony while also working, I think, creatively and cooperatively on ways to protect some just narrow issues that are particularly competitively sensitive that we are still working through very cooperatively with the FTC and I'm confident we can reach resolution on those.

THE COURT: All right. That sounds fine. That's great.

Ms. Golin?

MS. GOLIN: I don't have anything to add, but I'm going to ask Ms. Fish if she did. She is handling these issues for us.

THE COURT: Thank you.

Ms. Fish?

MS. FISH: Nothing further from us. Mr. Johnson accurately described our position, as well.

THE COURT: I appreciate the parties working together. I think we all have the same approach in mind in terms of maximum transparency here, although I do recognize that there will be some items that we are going to need to be creative with and to make sure that we are not disclosing competitive information. Okay, so we will do that. I think that sounds like a good approach. And maybe that's a reason that we should all be here at 8:30 on Monday morning instead of 9:00 so we can talk about if there is anything else that we need to discuss in terms of logistics. So let's plan on 8:30. In fact, I'm going to do a standing, so that the parties are always ready for it, let's do a standing 8:30 so that everyone is ready for that because then we can talk about if there is anything that's going to happen that day with particular witnesses or testimony, we will know about how we are going to treat it in advance and don't need to take up the 9 to 5 time with that. Okay. So we will talk more about that as we go, and I appreciate everyone working together on that.

Okay. So then let's move to *Daubert* motions I have the papers. I have reviewed them very closely. They are very comprehensive, and I thank you for those.

I have three *Daubert* motions pending before me.

Plaintiff moves to exclude the testimony, opinions, and report of defendants' purported industry expert Karen Giberson. Plaintiff also moves -- and that's at docket 171. Plaintiff also moves to exclude the testimony, opinions, and report of defendants' other purported industry expert Jeff Gennette at Docket No. 176. And defendants move to exclude the opinions of Dr. Loren Smith regarding and relying upon his diversion analysis at Docket No. 185.

So I will hear first from -- let's hear first from plaintiff regarding the two *Daubert* motions that the FTC has filed. I will then hear from defendants in response to plaintiffs' presentation. And then if there is anything that plaintiff would like to add on reply, I am happy to hear that as well. Know, of course, that I have read these materials very closely, and as I am sure you also all know this is a preliminary injunction hearing, so feel free to add whatever you would like to add to these presentations.

Ms. Dennis.

MS. DENNIS: Your Honor, Ms. Johnson will be handling our *Daubert* motion with respect to Ms. Giberson and Ms. Sims will be handling it with respect to Mr. Gennette.

THE COURT: Okay. Why don't we do Ms. Giberson first.

MS. JOHNSON: Thank you, your Honor.

Frances Anne Johnson on behalf of the Federal Trade Commission.

I am happy to answer any questions the Court may have regarding our motion to exclude the opinions, testimony, and report of Karen Giberson.

As a threshold matter, Ms. Giberson testified during her deposition that she reached her opinion about this matter prior to reviewing any of the ordinary-course documents in this case. She also testified that she did not rely on any documents in reaching her opinion. They merely "fortified" the opinions she had already reached. This is improper, as the Court held in *EEOC v. Bloomberg.*

Defendants submit that Ms. Giberson is an industry expert, but even industry experts must meet the standard under Rule 702 and *Daubert*. Rule 702 requires that expert opinions must be the product of reliable principles and methods and that their opinions must reflect a reliable application of those principles and methods even where the witness is claiming expertise based on personal experience.

And an expert witness has to show their work. They have to show how their experience led to their opinions. They have to show how they reliably applied their methods and principles to the facts in the case. That is what's missing from Ms. Giberson's opinion and what distinguishes this case from the cases concerning industry experts that defendants cite in their opposition.

Under Rule 702 an expert witness must also help the

Court understand the evidence or determine a fact at issue. Defendants submit that Ms. Giberson will help the Court understand the real world, but that is what fact witnesses are for. Your Honor will hear from fact witnesses——both defendants' executives and nonparties——who will testify to the facts at issue and who have personal knowledge about the ordinary course documents in this case.

The FTC has noted our concerns with the timing and process of how Ms. Giberson reached her conclusions. The opinion is not based on a balanced and thorough review of the documentary record. We have also noticed -- noted our concerns with witness bias given the relationship between Ms. Giberson's organization and defendants. Tapestry and its brands are dues-paying members of the trade organization that Ms. Giberson heads.

In sum, Ms. Giberson's report is a recitation of the facts and the record as defendants would characterize them. Courts in this district have rejected similar attempts to use experts to present a summary of facts that the defendants wish to argue are relevant to the decisions the fact-finder must make at trial. As the Court said in *FTC v. Vyera Pharma*, this is not proper expert testimony.

For those reasons, we would respectfully ask the Court to exclude the testimony, opinions, and report of defendants' purported industry expert, Karen Giberson.

Thank you.

THE COURT: Thank you, Ms. Johnson.

Why wouldn't questions regarding any purported bias that exist go to the weight of her testimony and be ample fodder for cross-examination as opposed to excluding the testimony?

MS. JOHNSON: Yes, your Honor.

And the FTC certainly stands prepared to vigorously cross-examine Ms. Giberson and to present contrary evidence during our case in chief. We would submit that even in a bench proceeding the Court ultimately has to make a reliability determination about an expert witness under 702, and we would submit that proper time is now.

Thank you.

THE COURT: And why should I not hear this testimony and then make any determinations regarding reliability or whether there is an appropriate basis for her expertise in terms of the industry and then make that determination later since I'm not dealing with a jury here, it's just a preliminary injunction hearing with only the court present?

MS. JOHNSON: Your Honor, we certainly agree that it is within the Court's discretion to proceed that way should you desire.

THE COURT: Okay. Thank you. Thank you, Ms. Johnson. Excellent presentation.

Who will be responding from defense counsel?

MS. GIORDANO: I will, your Honor. Jennifer Giordano, from Latham & Watkins, on behalf of Tapestry.

I just wanted to start perhaps where Ms. Johnson left off which is understanding the nature of the opinions that Ms. Giberson has. She offers a number of different opinions, and I just want to level set the record a little bit about how the testimony that she gave at her deposition, how -- it's either being misunderstood or mischaracterized. I'm not sure which. But the reality of it is her role in this case is as a response to the case that the FTC is going to put in and in particular is a response to the testimony that's going to come in from the FTC's economist Dr. Smith.

And what her role in this case is is to explain -- she is not an economist and she is not going to offer any economic opinions, but her role in this case is to explain how the economic opinions that Dr. Smith offers don't match the commercial realities of the handbag industry that she knows from her nearly 30 years of working every single day in every facet of this industry. And this is important because whether that economic testimony matches commercial realities is a key issue in dispute in this case that the Court is going to have to resolve, and this type of testimony is clearly relevant, helpful, and important to the Court because Dr. Smith made the very same mistake in the only other time that he testified in a

merger trial. That was the *FTC v. Thomas Jefferson* case where what the Court held there was that Dr. Smith's economic results were unpersuasive because "they did not correspond with commercial realities." and Ms. Giberson is going to explain the commercial realities of the handbag industry because she is an expert in all things handbags and her role here is specifically to rebut the industry pieces of this case, not the economics.

So I will just run very quickly through what we would expect that to be.

She has a lengthy report. I'm sorry.

THE COURT: One question there. Why wouldn't the commercial realities be able to be addressed through fact witnesses who will presumably testify as to the commercial realities that they are experiencing?

MS. GIORDANO: That's a great question. It is because of the extraordinary breadth of this industry and the limitations on the number of witnesses we can feasibly present to the Court in 20 hours. Over 230 companies are indisputably competing in this marketplace even under the FTC's own theory. We and Ms. Giberson will explain it's actually far more than that, but we can't feasibly bring 200, 400 people into the Court in 20 hours with a limit of 20 witnesses to show you that breadth and the constant dynamic nature of this industry. People are coming into the handbag industry all the time. They

are expanding. They are growing. New businesses are popping up. Its dynamics happening in realtime, and that's just not feasible for us to do one fact witness at a time for the Court to really understand that scope and breadth, and that's what Ms. Giberson brings to this case with her extraordinary breadth of experience from 30 years.

THE COURT: Thank you. And I interrupted you. You can proceed with anything further you wanted to add.

MS. GIORDANO: I wanted to briefly explain, just so you understand the concepts of the things she would bring to rebut. She has a lengthy report, but obviously what of that she would be able to testify to depends on sort of how the case comes in from the FTC. So I didn't want you to think that she is necessarily going to say all of those things in her lengthy 97-page report. We just wanted to fairly disclose to the FTC all of which that might be.

But her primary role, what we expect her to say in this case is she is going to explain how plaintiff and specifically their expert ignore the competitive options for handbag consumers and specifically the incredible fast-growing resale channel that's happening in this industry. The resale of used handbags is incredibly important and a growing part, and plaintiff and her expert have really just ignored it so far in this case.

And she is going to explain from her experience how

plaintiffs and their expert are wrong about the attributes that they claim make accessible luxury handbags, quote, distinct from other handbags. She will be able to show with her experience and what she knows about the industry why the attributes actually aren't distinct or unique as the FTC claims. And she is going to be able to show that the FTC and their expert are unfairly ignoring or downplaying the significance of this constant dynamic nature of the industry, the growth, the expansion, the repositioning. And what that means in particular is what are the options going to be for consumers if Tapestry is allowed to acquire Capri. What is the nature of this expansion and dynamic industry? What does that mean for what consumer options are going to be and the many options that are always still going to be available if Tapestry is allowed to acquire Capri.

And lastly, one thing that is going to be important that I think the court has heard a lot about so far in the papers is this industry resource called MPD. This data is a fundamental underpinning tenet of Dr. Smith's entire economic analysis and the FTC did not depose, he did not speak to anyone at MPD about how the data works, how they create the data, but it turns out MPD is actually a number of Ms. Giberson's accessories council. She works with them daily. She knows how their data is put together. She speaks with people from MPD regularly. So she has insights into how their data actually

works, how it is put together, what those categories mean, and how Dr. Smith is completely misusing them, misunderstanding them, and that's an industry expertise that she brings to them, not an economic one.

If the Court has any other questions, I will stop there.

THE COURT: No, that's very good. Thank you, Ms. Giordano. Excellent presentation.

Ms. Johnson, do you have anything that you would like to add?

MS. JOHNSON: Just briefly, your Honor.

We submit that the commercial realities that Ms. Giberson purports to opine on are appropriate for percipient fact witnesses to testify on, and we point to the *Longtop Fin Tech* case we cite in our papers which says an expert may not offer testimony but simply constructs a factual narrative based on record evidence or summarizes facts and documents in the record that the trier of fact is capable of understanding on their own.

That's all. Thank you, your Honor.

THE COURT: Thank you very much.

All right. I'm going to next move -- and I will give my -- I want to next move to the motion with respect to Gennette. It seems I was saying Giberson wrong, so perhaps I am saying Gennette wrong, but let's see. So who will be

arguing with respect to the report of Mr. Gennette?

MS. SIMS: Your Honor, I will be arguing the motion to exclude.

THE COURT: Okay. That is Ms. Sims?

MS. SIMS: Yes.

THE COURT: Okay. You may proceed, Ms. Sims.

MS. SIMS: Good morning, your Honor. Victoria Sims for the Federal Trade Commission.

The FTC respectfully asks the Court to exclude the testimony, opinions, and report of Jeff Gennette. Mr. Gennette is at best a fact witness who doesn't meet the requirements of Federal Rule of Evidence 702. Federal Rule of Evidence 702 requires that the party offering expert testimony must demonstrate that, number one, the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

Number two, the testimony is based on sufficient facts or data;

Number three, the testimony is the product of reliable principles and methods; and

Number four, the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Mr. Gennette meets none of these criteria. He has no

scientific, technical, or specialized knowledge. He is not an economist and has never performed a merger review. He has experience only with one channel of distribution and with one wholesale company, Macy's Inc., the same company that has already produced a corporate representative, who was deposed, and whom defendants intend to call as a fact witness. His testimony is not based on sufficient facts or data. He only reviewed the materials provided to him by counsel for defendants and the consulting firm they hired, Analysis Group, and failed to review the sales data underlying the economic analyses at issue.

Mr. Gennette did not employ any reliable methodology to come up with the opinions presented in his report. He did not conduct any statistical analyses or surveys, he performed no market definition work, and he did not test any of Dr. Smith's results. His only methodology was to review the materials provided to him by defense counsel and Analysis Group and to commission a set of photographs from a limited set of wholesalers. He failed to employ any reliable methodology that could be applied to the facts of the case.

Mr. Gennette offers opinions on the following topics: competition from direct-to-consumer channels in which he has never worked; entry into the market through direct-to-consumer channels with which he has no experience; discounting behaviors of luxury brands where he has never worked; behaviors,

practices, and incentives of multi-brand retailers other than Macy's with whom he has no experience. Mr. Gennette lacks the speaks to opine on these topics.

Mr. Gennette also offers opinions on the following economic analyses by Dr. Smith, the FTC's economist. Dr. Smith's merger simulation and the ability of the merged entity to raise prices --

(Technical issue)

MS. SIMS: Can you hear me?

THE COURT: I can still hear you. There was a little buzz, but now it stopped.

MS. SIMS: Fantastic.

-- the effects of the proposed merger, the data Dr. Smith used for his market share calculations, and Dr. Smith's market definition.

Mr. Gennette, who admits that he is not an economist and has no expertise in data analysis, market definition, or diversion analyses, has no training or expertise that would allow him to opine on these topics. There is no argument that Mr. Gennette has 40 years of experience with Macy's but, again, that's what makes him a fact witness rather than an expert.

Additionally problematic is the fact that Mr. Gennette often relies on undisclosed discussions and analyses from his time at Macy's conducted prior to being retained as an expert by defendants. These discussions and analyses were not

provided with his report and the FTC and its economist have had no opportunity to review or evaluate them. For instance, informing his opinion that Michael Kors faced a backlash when it tried to increase prices, Mr. Gennette relied on undisclosed analysis by Macy's that was not provided to the FTC. Similarly, Mr. Gennette cited undisclosed conversations he had while at Macy's as the basis for his conclusion on the effects of Michael Kors' price increase. Mr. Gennette had no recollection of the details of when and how these discussions occurred and the specific participants in all of the discussions.

Finally, Mr. Gennette's testimony confusingly comes into conflict with that of Macy's corporate representative. For instance, Mr. Gennette disagrees with Macy's corporate representative about the reasons why certain brands are placed near one another on the sales floor. He also disagrees with Macy's corporate representative about the uses of the data Macy's purchased from MPD.

This type of testimony is inappropriate for an expert witness and hinders, rather than helps, the Court's analysis. The FTC respectfully requests the Court to exclude the testimony, opinions, and report of Jeff Gennette.

Thank you, your Honor.

THE COURT: Thank you. I have a few questions.

First, you stressed that he has experience at Macy's

and that that would detract from his being an expert as opposed to a fact witness. But how do you address the defendants' reliance on cases like the *ROMAG* case that seem to say that you can be an expert in an industry even if you have only worked in one single company?

MS. SIMS: Sure. So in the *ROMAG* case the Court said the upshot of defendants' arguments seems to suggest that only an employee of Fossil could testify as an expert in Fossil's industry. But, your Honor, this is different than saying that Mr. Gennette can't opine on other channels of distribution than the channel of distribution with which he has familiarity as a source of his experience or, for instance, other wholesalers. He can't give an opinion saying this is what another wholesaler does because his experience is with Macy's. Similarly, he can't give an opinion on what a direct-to-consumer channel distribution is like because, again, his experience is in the wholesale channel distribution.

And I will just add that in *ROMAG* there were portions of both reports struck at the end and the Court also said the district court should not admit testimony that is directed solely to lay matters that a jury is capable of understanding and deciding without the expert's help, and that's essentially what we are saying here, your Honor.

THE COURT: Thank you.

You talk about various areas to which Mr. Gennette

allegedly does not have expertise, for example, direct-to-consumer. How do you respond to defendants pointing out that he developed Macy's marketplace and then with respect to luxury brands, while he didn't work at a luxury brand, defendants point out that Macy's sold some concededly luxury brands——Louis Vuitton, Gucci, Burberry, etc.——and similarly with respect to resale launching Macy's Backstage. So the different areas to which you point that he does not have expertise, they are pointing to aspects of his work at Macy's that does touch upon those areas. Can you respond to that?

MS. SIMS: Sure. So certainly Bloomingdale's sells some luxury brands and certainly Macy's Backstage exists, but our view here is that luxury brands themselves are in the best position to offer testimony about how luxury brands operate. And as your Honor will see during the hearing, we will have that kind of testimony from percipient witnesses available for your Honor to evaluate.

THE COURT: Thank you.

And then, finally, I hear your argument about disagreement between Mr. Gennette and the Macy's witness about placement or other aspects of the way Macy's sells things. Why wouldn't that disagreement then go to the weight? I assume there would be ample cross-examination of Mr. Gennette on his testimony if it is contradicted by those who work at Macy's now.

MS. SIMS: Your Honor, we think it would be most efficient -- a most efficient use of the Court's time and resources to make the determination now rather than to have a fight down the road about whose opinion is valid, the purported experts, or the fact witnesses and whether there was any bias or if there were any credibility issues. We just think that the issue can be resolved now and we can save some time if we do that.

THE COURT: Okay. Thank you, Ms. Sims. Excellent argument.

Who will be responding on behalf of defendants?

MS. GOLIN: I will, your Honor. This is Elaine Golin for Capri.

THE COURT: Hello, Ms. Golin.

MS. GOLIN: And by the way, it is Mr. Gennette. You did get that right. I was saying "Jennette" for the first couple of months I was working with him, but it's a hard G.

THE COURT: Okay, good.

MS. GOLIN: So as your Honor has said previously in the *MB Branding* case, there are basically three broad criteria for admitting expert testimony. There is qualifications, there is reliability, and there is relevance. I didn't hear Ms. Sims to be challenging relevance, and I would be surprised if she did, because Mr. Gennette's opinions go to the heart of the issues in this case, namely, competition and distribution

channels for handbags, commercial constraints on the ability of the merged companies to raise prices, how multi-brand retailers can and do support new entry by handbag brands, and whether the MPD categorizations that Dr. Smith relies on are good proxy for commercial realities in the industry. Spoiler alert: they are not. But I don't understand her to be challenging relevance, so we can talk about qualifications.

I think your hit the nail on the head in your questions to Ms. Sims when you noted that in Mr. Gennette's 40-year career at Macy's, during which he rose through the ranks on both the merchandising side——which is what should Macy's sell——and the store management side——how should they sell it——to eventually become chief merchandising officer, the person in charge of deciding all the products, including handbags that Macy's should buy and Macy's should sell both online and in their brick-and-mortar stores, and then he went from there to become president and eventually CEO of Macy's, Inc., which, as Ms. Sims noted, is not just Macy's but also Bloomingdale's and Blue Mercury. Admittedly, Blue Mercury sells makeup, not a lot to do with this case.

But as your Honor noted, along the way in those four decades he did a lot of things, and some of those things involved, for example, the sale of so-called luxury brands of handbags. Macy's sells handbags, luxury brands, both new and resale. Bloomingdale's is obviously a department store on the

higher end of the price spectrum, and I don't think Ms. Sims contends that they don't do a booming business in handbags at the higher end of the price speculum.

Resale, as your Honor noted, he built a resale business. He first partnered with a resale company and then he developed Macy's own business and certainly knows about the explosion of resale in this market. As your Honor noted, he started Macy's Marketplace, which is a business giving a platform to direct-to-consumer companies, so he got to see direct-to-consumer companies in action as he worked with them, placing them on Macy's Marketplace.

So all of this sort of nitpicking doesn't really go to the breadth and depth of Mr. Gennette's experience. But perhaps most importantly I think they are fundamentally misunderstanding what it takes to become CEO of the nation's largest department store company. You don't get there if you don't understand the industry that you are working in, in this case the fashion retail industry. You don't understand the vendors, you don't understand the suppliers, and you don't understand your own competition——other retail channels and avenues that are getting to consumers. If Mr. Gennette didn't understand all of that, he wouldn't have become chief merchandising officer and then president and then CEO. As Mr. Gennette testified and will testify in court, he observed closely the competition throughout his career. He participated

in industry events. He was chairman of the National Retail Federation. He talks about in his deposition about how he would talk to the consumer. He would go on shop-alongs. He would visit shops. He would visit competition's shops. So I think there is just a fundamental misunderstanding about the breadth and depth of his experience. If your Honor has questions about a specific experience, I would be happy to answer that, and of course, your Honor --

THE COURT: I -- go ahead, Ms. Golin.

MS. GOLIN: Your Honor correctly focused on I will call it *ROMAG*——but it may be *R-O-M-A-G*——*Fasteners* case where the challenge there was that the proffered expert had only worked at Coach, of all companies, and the Court rejected that and said that they could still testify more broadly as an expert to the handbag industry. And I noticed that Ms. Sims did not cite a case holding that a 40-year career as a prominent executive at a single company is disqualifying.

So that's qualifications. I don't know if you have questions on that before I move on to reliability.

THE COURT: You can move on. Thank you.

MS. GOLIN: Okay. So with respect to reliability, I understand Ms. Sims' primary attack to be that Ms. Giberson is not an economist. We can stipulate that he is not an economist. He said so himself. It's paragraph 88 of his report. He is an industry expert, unlike Dr. Smith, and the

law is clear that when you are an industry expert, you don't have to use economic tools. Your primary method can be, quote, "the application of his experience to the facts of this case." That's the *In re: Stand 'N Seal* case that we quote in our brief, and that's just what he did. He is not offering specialized economic opinion. He is offering a series of opinions, based on his 40 years of industry experience, that he does not believe Dr. Smith's opinions account for the commercial realities of the handbag market. That type of critique, saying, hey, your model is not grounded in the real world, is plainly permissible for an industry expert.

We cite Judge Scheindlin's *MTBE* case, where a logistics expert was challenged because they offered economic-related analysis, and the Court held there that the expert could testify to all matters within their experience even where those included economic considerations, and that an expert doing so need not employ a social science methodology.

Judge Brodie's opinion in *In re: Payment Card* is to the same effect. A marketing expert was allowed to respond to an economic expert using her marketing perspective to critique a economist's hypothetical analysis.

And there is the *Kamakahi v. American Society for Reproductive Medicine* case where, once again, a bioethicist was allowed to comment on the role ethics played in shaping a market, and that was deemed admissible to determine whether an

economist model was accurate.

So, in short, there is no particular analysis that Mr. Gennette had to perform to offer opinions in this case. He is applying his real world experience to the facts. And that's exactly what Judge Oetken said in *In re: Kirkland Lake Gold*, where he said that an expert's opinion, industry expert's opinion, should be, quote, "rounded in the facts." Mr. Gennette read depositions, he read documents, he applied his real world experience to opine on what was going on here, how this industry works in the real world. So that's reliability.

And I think finally the point that Ms. Sims made was this purported issue of conflict with Christopher Simon who is the Macy's 30(b)(6) witness. First of all, I think the FTC has magnified those conflicts in their brief, and I don't think your Honor will find those conflicts to be as troubling when she hears both of those witnesses testify. But as Mr. Gennette explained at his deposition when he was pressed by the FTC, he said that those differences could be down to perspective. I think it is your Honor's inherent role as the trier of fact here to assess those differences in perspective and, as you pointed out, they at most go to weight. They are not a basis to exclude Mr. Gennette.

I would add that, you know, perhaps proof the defendants don't see the conflict that Ms. Sims asserts is that

defendants, who have decided to call Mr. Simon as a live witness during this hearing, and you will see Mr. Simon a week after next along with Mr. Gennette and be in a position to assess them.

And the cases that they cited in their brief just aren't on point. Those were cases where one witness, like the *Ninely* (ph) case, an expert was hired to testify that police officers were telling the truth. We are not asking Mr. Gennette to comment on whether Mr. Simon is telling the truth. In fact, he did not criticize Mr. Simon of his own volition. He was pressed by the FTC on that point at his deposition and, as I said, he said it was a matter of perspective.

So that's all I have, your Honor, unless you have questions.

THE COURT: Can you respond to the FTC's argument that Mr. Gennette is relying on undisclosed analyses prior to him becoming an expert?

MS. GOLIN: He is relying on his experience, your Honor. I think what the FTC is referring to is in the course of his deposition when he said what -- how did you know this, what happened in the course of your experience that informed you, he mentioned that when he was at Macy's there were different studies done and that he had seen those when they would cross his desk, but he wasn't specifically relying on

those studies to form his opinions here. He is relying on his experience. And at deposition he was asked about the components of those experience, and he mentioned these other things, that in the past he had had conversations. But to be clear, he doesn't use those materials in his report, he won't be relying on them when he testifies, he won't be citing, for example, a study that the FTC doesn't have when he testifies at trial. He will be saying, I worked for years with the Michael Kors brand, and I saw what happened, and that informed my opinion as to what might happen in the future. But he won't be relying on it to study with respect to Michael Kors, for example.

THE COURT: Thank you, Ms. Giberson.

All right, Ms. Sims, anything you would like to add?

MS. SIMS: Just very quickly, your Honor.

Again, this case is not about Macy's. Perhaps if this case were just about Macy's, then Mr. Gennette would be a viable expert. But as I think Coach will tell you, the wholesale channel is at the bottom rung of the channels with which they are involved. This case is about various other channels with which Mr. Gennette has no experience that would qualify him as an expert.

Ms. Golin asserted that Mr. Gennette's opinions are reliable, but, again, that's also not so. Mr. Gennette repeatedly asserted, as your Honor pointed out to Ms. Golin,

that he was relying on conversations and studies that had never been provided. So the reliability prong is not satisfied here, and the differences between Mr. Gennette opinions and Macy's testimony further demonstrate the lack of reliability here.

(Continued on next page)

THE COURT: Thank you very much.

Let me now hear on the motion from defendants to exclude an opinion regarding Mr. Smith or Dr. Smith's diversion analysis.

Who will be arguing on behalf of defendant. Lawrence Buterman, your Honor.

THE COURT: You may proceed.

MR. BUTERMAN: Thank you good morning.

THE COURT: Good morning.

MR. BUTERMAN: Your Honor, diversion a very specific concept. It refers to a measured response by consumers to a measured increase in price, and here Dr. Smith is arguing that in response to a price increase in one of the brands, Kate Spade, Coach or Michael Kors, that customers would divert in large numbers to the other two brands. And that's a foundation of his entire analysis that we'll get to in a minute.

Now, how does he get there? He gets there by looking at survey questions, survey questions that were asked in 2021 and 2022. But survey questions had nothing to do with ascertaining whether there was a measured response to a measured price increase. The survey questions asked something very different. They asked consumers: In the past 12 months when you bought a handbag, what other brands did you consider? That was it. And Dr. Smith takes that survey question and the results, and he then uses that as the foundation for his

analysis.

So there are two problems in particular with the use of a survey question along the lines of the one that Dr. Smith relied on. The first is that consideration just does not in any way get out the concept of diversion. What I considered at one point in time doesn't inform what I would do in response to a price increase.

The second problem is a temporal one. What I did several years ago in 2021, what I considered in 2021 or 2022, there is no way that that can inform what I would do in 2025 in response to a price increase. So in thinking about the problems here, your Honor, I came up with this point. Several years ago I decided to get back into running, right around the end of Covid in 2021, and I went to a running store to buy a pair of sneakers. I looked at a number of brands, and one in particular were Nikes. They had some very funky kind of running shoes. I looked at them. I put them on, and they didn't fit my feet. They didn't fit well. And, frankly, the design, it didn't -- I didn't like it. I ended up buying a pair of Brooks in 2021.

Now if I have to buy a new pair of running sneakers tomorrow, the last brand that I'm going to consider is that Nike brand. I walked away from that process back in 2021 and 2022 with the idea that those sneakers, they're not good for me. But I did consider them. I absolutely did consider them.

And what Dr. Smith would say is that because I considered them in 2021, that means that in response to a price increase on my Brooks in 2024 or 2025, the brand that I am going to buy is that Nike. And that just doesn't make any sense. It doesn't work.

And we asked Dr. Smith about this. We asked him, don't you acknowledge the fact that there are certain customers who they considered a brand and left that experience saying they're never going to buy that brand that they considered. And he said it's a possibility, but it's a survey, and I used it. I used it for diversion.

Now, this is problematic because the government has said in other matters that a survey must ask the right question in order to have an evidentiary value. And, in fact, your Honor, what they actually said, and the reason we're here and making this motion is because the government has said that survey questions that do not reflect customer response to market changes at all cannot be used as evidence of diversion ratios. That was the position that the government took in *U.S. v. H&R Block* in a case where they actually said that because a survey question did not get at diversion, it should not be part of a bench trial looking at a -- on an injunction hearing in a Section 7 case.

THE COURT: But the court accepted it and rejected the motion in limine in *H&R Block*, right?

MR. BUTERMAN: Absolutely, your Honor. Ultimately, the court rejected the motion in limine. But at the conclusion of the case, the court agreed with the government in that matter that there were fundamental problems with that question that was posed in *H&R Block*. And the fundamental problem that they had, your Honor, is that the question did not get at diversion. And one thing that was actually -- that's really important about that question in *H&R Block*, that was a forward-looking survey question. So it asked consumers if you became dissatisfied with the *H&R Block* product, where would you go? That's very different than what we have here, because here we have not only the problem that you're not asking about how you would respond to a price increase, but you also have the problem of a temporal one. This is backwards looking.

And it's not just backwards looking 12 months ago; it's backwards looking several years ago. And I just wonder how many years, how many years back do we have to get before we realize that this has absolutely no value. If he did this based on a survey from 2015, would the FTC still be trying to claim it has relevance? If not, I think we would all assume it wouldn't. But then why is 2021 valid?

This industry changes so quickly. You're going to hear over the course of this hearing, your Honor, that in the fashion industry, a year is like a dog year. I mean, things just move from season to season, and so his reliance on this

is -- and I think the FTC to their credit correctly presented the issue. It's garbage in garbage out. This is not something that should be used for purposes of calculating diversion

THE COURT: Mr. Buterman, is it your position that Dr. Smith would have needed to conduct his own survey that would ask precisely a question that elicits a response to a price increase.

MR. BUTERMAN: So I won't say that he had to do it that way, your Honor. Economists have many, many tools in their arsenal to use. What we will say is that it is certainly possible, and it happens quite often, that experts and others conduct their own surveys when the results -- excuse me -- when what's available to them is not sufficient enough. And we make this point in our brief, your Honor. Daubert doesn't have a best efforts carveout. And Dr. Smith can't say, "Well, look, the reality is this survey, it was the best that was out there so that's what I used." No, that doesn't do it. If he wanted to use a survey, your Honor, and the survey was as ill-suited for the purposes as this one was, then it was incumbent upon him and the FTC to actually conduct a survey, and we do see it time and time again in other cases where entities do that.

Now, the other thing that Dr. Smith and the FTC seem to say in response to this is, "Well, you used the surveys." Okay, we did. We commissioned them. We absolutely did. In 2021 and 2022, we commissioned these surveys, but, again, the

case law makes clear that just because we do something, that doesn't give an expert a free pass to use it for any purpose regardless of how ill-suited it is. It absolutely doesn't work that way.

And the other part, your Honor, that I think is quite interesting is that while we did use the survey results, we stopped actually using that question in 2022. And the reason why -- and this is unrebutted testimony in this case, your Honor -- the reason that Tapestry stopped using the question "What brands did you consider when you made your last purchase?" is because they found that that question was not informative of consumer behavior for their purposes, and they replaced it.

And what did they replace it with? They replaced it with a forward-looking question, your Honor. "What brands will you consider?" They got rid of one of the issues. For them that was enough just to get rid of -- the consideration for them, they could use that for their purposes, but what they did is they moved away from something that was backwards looking that asked "What brands did you consider?" to "What would you do in the future?" That at least gets closer to the idea.

So going back to your question, your Honor, at a minimum, we would have expected that the survey question that Dr. Smith would have asked if he had conducted his own survey, hopefully, it would have been the right question: "In the

event of a price increase, what would you do?" That would be great. If he had done that, we wouldn't be having this problem. At a minimum, he could have gotten rid of the temporal issue by framing the question in one way or another

THE COURT: Mr. Buterman, you're representing that Tapestry changed the survey that it had commissioned to a more forward-looking survey. What year was that?

MR. BUTERMAN: That was 2023 and forward, your Honor.

THE COURT: Was that information available to Dr. Smith?

MR. BUTERMAN: I believe the answer is yes, your Honor. And I would also note, your Honor, that in the record, there are other surveys that have been conducted. There was work done by third parties in their productions, surveys that asked questions getting at the issue of cross consideration. And those surveys, your Honor, as we will see at the hearing, paint a very, very different picture. There are third parties talking about their customers considering if they're in what the FTC has referred to as accessible luxury, they have cross consideration with those true luxury brands, cross consideration along with brands that are more mass market. Dr. Smith didn't look at those surveys. He didn't use those. He just decided to focus on this one, and he said it's the party's survey so I can use it. And, again, that's just not the rule here, your Honor.

And I want to be clear: This isn't the only problem that we have with Dr. Smith's analysis. Your Honor is going to see a lot more when he gets on the stand. But this is one that really is fundamental to a significant portion of his quantitative analyses. It goes to his diversion ratios which feeds into his market definition, ultimately to the market concentration figures, his merger simulation. It is, as we will say, it is the virus that infects all of his quantitative analyses. And the FTC in response says, "Well, look, he also does some qualitative analyses." Okay, if he wants to testify about his qualitative analyses that aren't infected with this problem, that's fine.

Now, the FTC also says, by the way, he did another diversion analysis that was different that didn't rely on the survey, but Dr. Smith actually testified in his deposition that he does not rely on that diversion analysis for any of his opinions. And so consistent with the position that the government has taken in other cases, and in the interest of fairness, Dr. Smith should not be able to opine on diversion ratios that are based on something that has absolutely no relevance to the issue of diversion.

THE COURT: A question I have, there are cases out there and the Second Circuit has opined now, it's in a different context, say a false advertising context where they're evaluating surveys, and they talk about how if there is

an error in surveying methodology, that it goes to the weight of the evidence and not the admissibility of the evidence in cases like *Bustamante*. How do you address that in this case and whether your critiques as to the survey question that was utilized, that methodology goes to the weight as opposed to the admissibility?

MR. BUTERMAN: Your Honor, we are not suggesting that there is something inherently wrong with the survey methodology. And we used those surveys. We used them for whatever purpose and how useful they were. The companies did use them.

The critique here is something very, very different. It says that Dr. Smith was wrong to take those results and use them as an input into his diversion analysis because they have nothing to do with diversion. And so this fits very, very squarely within the position, again, that the government took in *H&R Block*, that this survey just doesn't have any value because it's not asking -- for this purpose because it's not asking the right survey question.

THE COURT: Thank you.

Thank you very much. Is it Buterman or Buterman?

MR. BUTERMAN: It's Buterman. Everyone gets it wrong. They got it wrong in my college and law school graduation, so it's okay.

THE COURT: I'm trying to get things right.

Who is going to speak on behalf of the FTC?

Excellent argument, by the way, Mr. Buterman.

MR. LOWDON: Good morning, your Honor. Andrew Lowdon from the Federal Trade Commission.

THE COURT: Mr. Lowdon, you may proceed.

MR. LOWDON: Thank you, your Honor.

Defendants' motion to exclude the opinions of Dr. Loren Smith is based on statements of Dr. Smith's analysis and contrary to the factual evidence of the relevant law, and on those bases it should be denied.

Defendant's criticism of Dr. Smith's work don't meet the standard for exclusion. In this district, only serious flaws in reasoning or methodology will warrant exclusion of a proffered expert's opinions, especially in a bench proceeding such as this, and defendants have fallen far short of this high standard for exclusion.

First, defendants misstate Dr. Smith's analysis. Dr. Smith's opinions in this matter are based on his analysis of both qualitative and quantitative evidence. Each of Dr. Smith's analyses support his buyer market of accessible luxury handbags sold in the United States. And defendant's motion concerns just one of these analyses: His calculation of estimated diversion ratios based on Tapestry's ordinary course surveys.

Now, Dr. Smith's survey-based diversions are an

important part of his work, and they are integral to some of his other quantitative work, including his estimates of price harm and his merger simulation. But they are not his only analysis. Dr. Smith's analysis of the qualitative evidence also supports his market definition, and his calculation of market shares relies on sales data, not the diversion ratios, and shows high concentrations in this market well above the levels typically considered to be problematic in mergers.

Additionally, as Mr. Buterman noted, Dr. Smith estimates diversion ratios based on available sales data. Now, I do disagree with Mr. Buterman's characterization of Dr. Smith's testimony and his deposition on this point. These sales data have their own limitations. The diversions that they present are less precise, but they are directionally corroborative of the high-diversion ratios that are suggested by his analysis of the survey data, and in that sense support his survey analysis and the rest of his opinions.

This corroboration across the qualitative and quantitative analyses that Dr. Smith conducts is a feature of his analysis. Each of his analyses support his market of accessible luxury handbag brands, and they all point in the same direction that the proposed transaction presents -- threatens to significantly lessen competition in that market.

Moreover, Dr. Smith's survey-based diversions here, as he uses in his aggregate diversion analysis, are two to three

times the level that they would need to be to pass what we call the hypothetical monopolist test to show that there was a market here. The pricing results that defendants note in their motion, specifically that Michael Kors could raise prices following the deal by as much as 30 percent are six times the five percent SSNIP that we typically use in a hypothetical monopolist test to find a market. Defendants have identified no issue with Dr. Smith's survey analysis suggesting that his results are so inaccurate given how far above the line for market definition his results are.

Furthermore, the surveys Dr. Smith relies on are reliable. Defendants claim that they are not and cite to surveys that courts have rejected in cases like *FTC v. CCC Holdings* and the @dentist supply case, but those cases are readily distinguishable, and they involve methodological concerns with the surveys rendering them on non-reliable not present here, as I believe Mr. Buterman acknowledged.

For example, the survey in *CCC*, got only 31 respondents, and its internal use came as a caveat warning participants to -- warning employees to be cautious in how they use it because it is unreliable for that reason. Here, Dr. Smith's survey -- Dr. Smith relies on over 3,700 respondents across the Kantar and Bain surveys.

Additionally, ordinary course surveys, such as what Dr. Smith uses here, are considered more reliable than

specially commissioned surveys. but Particularly, rare, as here, they are in fact relied upon by the producing party. This is the *Schering Corp. v. Pfizer* case that we cite in our papers, your Honor. And here, Tapestry relied on the surveys. They used the survey results in the ordinary course in materials that went to its CEO, the brand level CEOs, its board directors, and in materials to prepare executives to speak with investors. In fact, Tapestry has used the specific question that Dr. Smith relies on to identify consideration sense, what customers view as alternatives to certain handbag brands, very similar in concept to the diversion ratio analysis that Dr. Smith does. As we say in our papers, it's certainly not surprising that Tapestry has not conducted their own diversion ratio analysis because that is not something you would expect a company to do. Market definition is litigation-specific exercise, but this use of the survey data shows that Tapestry believes that it is quite close in concept in showing what brands consumers who buy handbag A are considering.

And, indeed, earlier this year in Tapestry's advocacy to the Federal Trade Commission, they relied on these surveys for similar points. Now, these documents are under seal, your Honor, but we do discuss them in our memorandum in opposition at page 9.

Additionally, I would like to note that Mr. Buterman noted that the surveys are now a few years old, and that

Tapestry has since changed its survey question. I would like to note that, of course, Tapestry's advocacy to the FTC relying on these surveys was just earlier this year. There has been -- while the handbag industry may have been taking up a dynamic space, there has been no change in the industry, no entrants that defendants have pointed to that would suggest that consumer purchasing behavior has changed dramatically since 2022 when the last survey was conducted. And in response to your Honor's questions earlier, the new survey, the fiscal '23 survey and forward, asks respondents simply to list the brands that they are considering purchasing in the next 12 months. What's an important distinction between that survey and the surveys on which Dr. Smith relies is the 2021-2022 surveys asked the respondents to think about the specific actual recent purchase that they made and what brands they considered. a forward-looking question like the fiscal 2023 survey, a respondent could be considering making several purchases for several different reasons, and there is no way to tell -- as Tapestry executives testified, there is no way to tell from those survey results whether respondent actually viewed the brands they list as competing with each other for a particular purchase. Somebody could be thinking about their everyday bag and special occasion bag and have different brands in mind for those.

Furthermore, the case law that defendants cite do not

support their arguments. Defendants describe *H&R Block* as rejecting the survey at issue because it did not ask about price response. But, first, the surveys here are distinguishable. Surveys in *H&R Block* asked a hypothetical question about whether respondents would switch products in response to a hypothetical change in price, functionality, or quality. The surveys here asking actual handbag purchasers what other products they considered when making an actual specific purchase.

Additionally, in *H&R Block*, direct switching data was available, so the court relied on this data as a more direct indicator of switching rather than a survey that begs a hypothetical question about switching. Here, the survey data is the best evidence available regarding the diversion.

Now, while the survey does not directly measure diversion, as Mr. Buterman noted, that does not mean it is not indicative of diversion and can't be used by an expert to estimate diversion ratios. Indeed, that is what -- *H&R Block* supports that proposition. The switching data that was ultimately relied on in *H&R Block* is the very kind of non-price response data defendants argue cannot be used to estimate diversion ratios. That data did not show why consumers switched their tax preparation method. It only shows that they did. Nonetheless, the court there relied upon it in its market definition analysis. The opinion in *H&R Block* best supports

Dr. Smith's use of consideration data here.

And, third, when ruling on a motion to exclude, as your Honor noted, the *H&R Block* court denied the motion to the exclude and found that the survey is relevant because it is probative of the degree to which the merging parties are competitors. The same is true here.

Additionally, the *H&R Block* case is not in the help ladder. It is part of a long line of cases in which courts have used -- have accepted and relied upon the expert analyses that use non-price response data, such as bidding data or RFP data, and we collected some of these cases on pages 5 and 6 on our memoranda in opposition. Dr. Smith's use of the survey data here to estimate calculated diversions is consistent with the long line of case law using non-price response data for the same purpose.

And, finally, your Honor, I don't believe Mr. Buterman referenced this, but it came up earlier in the *Thomas Jefferson* case, and I would like to make a brief note about that. Defendants argue that the court in *Thomas Jefferson University* did not rely on Dr. Smith's diversion analysis there, and so that the court should exclude it here. But defendants misstate the issues in *Thomas Jefferson*. In that case, the court and even the defendants all agreed that Dr. Smith correctly calculated diversion ratios and correctly conducted a hypothetical analogous test analysis. The issue that -- in

that case is that the court concluded based on its evaluation of the qualitative evidence that Dr. Smith's analysis, which was a patient switching behavior, was not sufficiently indicative of insurer behavior. This is a question that comes up because of the peculiarities of the healthcare market which are not present here. Dr. Smith's qualitative analysis, as I mentioned earlier, is fully consistent with what his quantitative analyses show, which is that this merger would lead to a substantial lessening of competition in the market for accessible luxury handbags in the United States.

For these reasons, and as we discussed in our papers, your Honor, defendant's motion should be denied. I'm happy to address any questions you may have.

THE COURT: Thank you.

I think you addressed it in your remarks, but let me ask a specific question in case you have anything more to say on it.

I take defendant's central issue to be that the question regarding consideration of an alternative product could entail that somebody considered something that they would never have any intent to purchase in the future notwithstanding any price increase that may happen. How do you address how that question is therefore appropriate in this diversion analysis?

MR. LOWDON: Certainly, your Honor.

I think first the consideration question -- it's certainly possible that some number of respondents read consideration, the word "consider" in that way. However, it is clear from defendant's -- from Tapestry, excuse me, ordinary course of use of the survey that they did not seem to think that that is so -- the significant numbers of them did so such that these were not indicative of the brands that people are considering on a prospective basis.

Secondly, I would --

THE COURT: No, please, go secondly.

MR. LOWDON: I would just point again to how far above the critical aggregate diversion ratio or the five percent SSNIP level of Dr. Smith's aggregate diversion analysis and pricing analysis are. Even if one were to assume that some number of respondents understood the question in that way, it would have to be a substantial number of respondents, a number so large that I would posit it is inconsistent with Tapestry's ordinary course of use of the data for it to affect his ultimate conclusions here.

THE COURT: I think again you did address it, but if you could remind me why didn't Dr. Smith use the later surveys done by Tapestry that used forward-looking survey responses?

MR. LOWDON: Of course, your Honor. Tapestry revised its surveys in early 2023 to include this forward-looking question, which still uses the word "consider." That question

asks -- asked respondents what brands they were considering to purchase in the next 12 months. It does not ask them to consider a specific purchase event that they have in mind, such as in buying your next bag. It is simply what brands are you considering in the next 12 months. And as Tapestry's strategy executives testified, it is impossible to tell from that survey data whether the brands listed are brands that respondents thought were competitive, that they were considering for the same purchase.

So if a respondent is thinking in the next year, I would like to replace my every day bag and would like to get a new special occasion bag, and they list six brands - three that they're considering for one purchase and three that they're considering for another purchase - it is impossible to tell from that data which brands they're actually considering as alternatives for the same functional purpose. The 2021 to 2022 surveys don't have this problem because they ask the respondent to consider a specific purchase they actually made within the last year.

THE COURT: Thank you. Thank you, Mr. Lowdon. Excellent argument.

Mr. Buterman, anything you would like to add in reply?

MR. BUTERMAN: Yes, your Honor, a few points.

Your Honor, what I heard a couple of times from Mr. Lowdon is, your Honor, don't worry about the problem here

because Dr. Smith's results are so extreme that even if we reduce them by a significant portion, they're still going to trigger some presumptions. I don't understand how that's a defense here. That's the very problem that we're dealing with. Dr. Smith's results are so extreme, they do not comport with reality.

And I didn't bring it up, but Mr. Lowdon did bring up the *Thomas Jefferson* case. That's exactly what happened there. Dr. Smith was criticized by the Court in the only other case that he's testified in in a merger trial where the FTC had him come in and present a diversion analysis that did not comport with commercial realities.

And that's the fact here as well. His analyses just doesn't match up. And we know why it doesn't match up: Because consideration doesn't inform. And Mr. Lowdon at the end actually just said that. He actually just said that the questions going to consideration in some instances are not going to be able to tell you what are actual considerations versus something else. That's exactly the point that we are trying to make here.

And Mr. Lowdon also agreed that there are consumers out there who did consider a bag and come away with it thinking "I'll never buy it." The problem is we don't know how many that applies to. We don't know what percentages. And it's not enough to say, well, we don't know, so therefore we can use it.

That just shows fundamentally what the actual problem is here. You can't rely on this data because it doesn't inform the question at hand, and there is a lot of talk about consideration and switching, but let's be clear about this question. Consideration is not even switching. It's actually the opposite. The consideration question, "What brand did I consider when I made my last handbag purchase" actually asks the consumer to tell you which bag did you look at and implicitly reject. It's so far removed from what we should be looking at.

And Mr. Lowdon, he criticized the *H&R Block* survey question and said that this one was better, and I tried to get down exactly what he wrote. But he said that the problem with this one, as opposed to the *H&R Block* one, is that this didn't ask about a hypothetical question about a hypothetical increase in price. Your Honor, the key reason we do this analysis is for the hypothetical monopolist test. That's what you're supposed to be asking. You're supposed to be trying to figure out what would the hypothetical monopolist do here in the event of a price increase. So asking the hypothetical question is precisely what makes a lot more sense than asking a year's old backwards question.

Now, there are two other points that I want to make here. Again, Mr. Lowdon brought up the reliance part. And if reliance is important, if the fact that Tapestry was right on

these surveys is somehow important to this analysis, then how do we deal with the fact that we don't rely on this question any more? And why is it that Dr. Smith can rely on it in 2024 looking at what's going to happen in 2025 when Tapestry doesn't rely on it at all?

One other point that I want to make here because Mr. Lowdon also said, you know, we have no reason to believe that the industry has changed so much since 2021 and 2022. And, your Honor will hear at the trial that that burying of heads in the sand, that might be what Dr. Smith did. In fact, that's what he testified, right? He says, "I have no reason to believe anything has changed," but the world has changed since 2021. And we all know that.

And even in the handbag industry, the world has changed. Mr. Lowdon said we're not aware of companies or big changes in the industry. In 2021, people weren't walking around in great numbers wearing Lululemon bags. Lululemon was one-fifth of the size that it is today. Lululemon as a company is poised in coming years to sell more handbags than Kate Spade. But because in 2021 a lot of people probably weren't considering Lululemon, Dr. Smith will say that in 2025 when that company's sales were five times what it was in 2021, that people wouldn't consider it. The industry changed, but Dr. Smith wants to freeze everything in 2021 and 2022 because that works better for the numbers that he's trying to get out.

Now, the last thing I will say, your Honor, is we have a fundamental disagreement about the rest of Dr. Smith's analysis. As I said, we plan to absolutely cross-examine him at trial on those issues. If Dr. Smith wants to testify about his qualitative analyses, we welcome that. And if he wants to testify about other analysis that he claims are unrelated to his diversion analysis, we welcome that as well. But consistent with the position that the government has taken in other matters, and given how poor this evidence is for the purpose that it's being presented, he should not be allowed to stand up in court and put us through the paces to have to defend against analyses that just do not have any basis at all, at all in proper techniques as the government -- excuse me -- as the FTC noted, garbage in, garbage out for this purpose

THE COURT: Thank you. Thank you, Mr. Buterman.

It strikes me we are now about an hour and 40 minutes. I need to give the court reporters a little bit of a break. So why don't we take a five-minute break so that they can switch hands, if need be. And so I will go off camera. Everyone is welcome to do that as well for five minutes, and we'll resume at 11:45. Thank you all.

(Recess)

THE COURT: I am going to first commend the parties on excellent papers, as well as argument on the Daubert motions. It was very helpful to the Court. I spent a great deal of time

looking through the papers, and I appreciated the time that the parties gave to the argument here today. I am going to give you my ruling now, and my ruling is that the Daubert motions are -- the three Daubert motions are denied. Let me give you my reasoning.

The strict rules of evidence do not apply to a hearing on a motion for preliminary injunction "*Zeneca Inc. v. Eli Lilly and Co.*, 1999 WL 509471 at *2 (S.D.N.Y. July 19, 1999). Nevertheless, both parties in this case have made motions to exclude testimony of the other side's respective experts invoking Federal Rule of Evidence 702, so the Court is analyze those motions accordingly, applying the principles of Rule 702.

"Rule 702 of the Federal Rules of Evidence governs the admissibility of expert witness testimony." *Bustamonte v. KIND, LLC*, 104 F.4th 419, 427, (2d Cir. 2024).

I considered and am applying Rule 702, although I won't recite the entire rule here today. Rule 702 assigns to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." That's *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

With respect to Dr. Smith, I will first turn to defendant's motion to exclude his opinions regarding and relying upon his diversion analysis at Docket No. 185.

As a threshold matter, the Court notes that defendants

do not dispute the that Dr. Smith is qualified to testify as an expert in economics. Dr. Smith is an experienced economist, holds a Ph.D. in economics from the University of Virginia, has taught undergraduate and graduate level courses in economics and econometrics at various institutions, published research in economics and antitrust journals, and has experience working at the FTC and now in private practice. He is qualified to testify as an expert on economics here, and as defendants acknowledge in their brief, has done so in the past.

The defendants' central critique of Dr. Smith's diversion analysis is that he relied upon surveys that Tapestry's commissioned in 2021 and 2022 which asked consumers to identify other brands they "considered" buying and uses the results of those surveys to calculate the percentage of consumers that would switch from buying a bag from one of the merging parties' brands to another if the price of one of those brands increased. Defendants assert that those surveys did not solicit the right input from which to calculate the diversion based on a hypothetical change in price in the present day.

These critiques may go to the weight that the Court ultimately affords Dr. Smith's analysis but do not necessitate exclusion of his entire analysis at this time. Although the Court does not now opine as to the conclusions that Dr. Smith has reached, the economic principles and methodology employed by Dr. Smith generally in conducting this type of analysis are

reliable and recognized in the fields of economics. *See, e.g.*, *United States v. Anthem*, 236 F.Supp.3d 171, 217, 220 (D.D.C. 2017). And the parenthetical reads (crediting diversion ratio analysis of government's expert which utilized internal company data of past bidding activity).

With respect to whether an input into his analysis; namely, the particular survey questions chosen are flawed will be assessed by this Court in deciding the weight to afford this opinion. Therefore, the Court will not exclude it at this point and will evaluate it in due course, just as was done in *H&R Block*.

With respect to am Jeff Gennette and Karen Giberson, the Court next analyzes plaintiff's motion to exclude the testimony of those individuals at Docket Nos. 171 and 176. Mr. Gennette is the former chief executive officer and chairman of Macy's, Inc., one of the largest retailers of handbags and has had more than 40 years of experience at Macy's, which includes Bloomingdale's in various roles. Docket No. 281 at 2-3. Ms. Giberson has more than 30 years of experience in the handbag industry and is presently the president and CEO of the Accessories Council and Editor-in-Chief of a magazine publication dedicated to fashion accessories. Dkt. 283 at 1.

Plaintiff argues that the Court should exclude the opinions and testimony of both Mr. Gennette and Ms. Giberson because they offer opinions that are not based on reliable

principles or methods, are testifying outside their areas of expertise, and are unhelpful to the Court. Dkt. Nos. 171 and 176.

Mr. Gennette and Ms. Giberson are offered by defendants as experts in the handbag industry and each of them have substantial expertise in that industry. "An expert may be qualified based on his experience." *SR International Business Insurance Co. Ltd. v. World Trade Center Properties, LLC*, 467 F.3d 107, 132 (2d Cir. 2006), and courts regularly find industry experts qualified to testify under Rule 702. *See e.g. Dover v. British Airways*, 254 F.Supp.3d 455, 459 (E.D.N.Y. 2017 (where an airline industry expert was qualified) and *ROMAG Fasteners, Inc. v. Fossil,* 2014 WL 1246554 (D.Conn. March 24, 2014) (where a handbag industry expert was qualified. Mr. Gennette and Ms. Giberson will be allowed to opine as experts as to matters within their expertise during the preliminary injunction hearing. Such expertise and testimony would be helpful to the trier of fact, the Court, to understand the evidence or a fact at issue here.

However, the Court notes that to the extent Mr. Gennette and Ms. Giberson testify outside of their field of industry expertise, for example, as to economic analyses, that testimony would be outside of their scope of expertise and would not be afforded weight by this Court. So the defendants would be well advised not to waste their limited time on those

areas. But the Court will hear the testimony, and the plaintiff's motions to exclude the testimony of both individuals at this time are denied.

I note that I am denying all three *Daubert* motions pending before me, and in doing so joining other courts who similarly routinely deny such motions ahead of preliminary injunction hearings. *See, e.g., FTC v. IQVIA Holdings*, 2024 WL 81232, at *6, *50 n. 32 (S.D.N.Y. 2024) where in that case the government moved to exclude some of defendant's expert's opinions and the court deferred consideration on the motion until after hearing all the experts' testimony and ultimately denied the motion as moot. In addition, the *FTC v. Novant Health, Inc. v. Community Health Systems, Inc.,* No. 24CV00028. In looking at the transcript from the final preliminary injunction hearing conference, the case is in the Western District North Carolina on April 24, 2024 at 24:22-25:8. The government moved to exclude testimony of defendant's expert and defendants moved to exclude testimony of government's expert, and the court denied both motions, noting that it has heard from both sides why the court should or should not give much weight to those expert opinions and why it chose to hear them.

Particularly, because this is a bench proceeding where there is no need for the Court to protect a jury who might be "bamboozled by technical evidence of dubious merit," *American Empire Surplus Lines Insurance Co. v. J.R. Contracting &*

Environmental Co., 2024 WL 3638329 at *3 (S.D.N.Y. Aug. 2, 2024) the Court will simply "take in the evidence freely and separate helpful conclusions from the ones that are not grounded in reliable methodology" or expertise. *Joseph S. v. Hogan*, 2011 WL 2848330 *3 (E.D.N.Y. July 15, 2011). And I will end there.

Again, the parties have presented very helpful arguments leading into the hearing, but at base, the Court will not exclude the testimony and analysis without even hearing it presented to it. The Court will then critically analyze it when I have all of the information before me.

All right. Thank you very much. That takes care of the Daubert motions.

(Court and court reporter confer)

(Continued on next page)

THE COURT: Now let's move to the joint September 4, 2024 submission. That is a submission that was provided by the parties regarding the confidentiality of hearing exhibits and some objections on the admissibility of certain exhibits, as well.

First, regarding admissibility, I understand that the parties have agreed that evidentiary objections are best raised, if at all, when the exhibit is introduced. I agree with that, and so I don't intend to rule on the objections at this time, noting only that this is a preliminary injunction hearing, which the parties all well know, and that things like hearsay are allowed under cases like *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010).

And then regarding confidentiality, I do appreciate that the parties are meeting and conferring and that a vast majority of disputes have already been resolved, so I do appreciate that and I understand that there is still some disagreement but that you are all still working through that, hoping to have things resolved before we get to the hearing and are not asking me for rulings on confidentiality either at this time. So that's my current understanding.

Let me now ask the parties if anything has changed in the, I think, 48 hours since I have received this submission.

So I will start with you, Ms. Dennis.

MS. DENNIS: Nothing has changed, your Honor.

I will note that in the pre-hearing order——I don't it in front of me; I think it is from August 26 or so——there is a process to raise with your Honor any disputes regarding confidentiality at 5 p.m. the day before and those were documents that were not on the potential examination list. The FTC thinks we should use that same process for documents that are on the potential examination list that we are not able to resolve over the weekend.

THE COURT: Okay. Seems fair.

Let me hear from Mr. Johnson.

MR. JOHNSON: Yes, your Honor.

Your understanding as to our position is exactly right. If anything has changed since we submitted our letter two days ago, it would just be that we have further reduced the number of disputes and come closer to resolution of the confidentiality issues, but we have no objection to the process that Ms. Dennis just proposed.

THE COURT: Thank you.

Ms. Golin?

MS. GOLIN: No objections.

THE COURT: Okay. Great. Well, then that was a quicker part of this proceeding than I had anticipated. Terrific.

Now let's move to the defendants put in a letter on August 28 asking for an immediate conference regarding certain

evidentiary materials. I gave some guidance immediately, didn't think that a conference was necessary. Hopefully I gave enough guidance to move us along but did tell the parties that since we are having this conversation here today, if there is anything further that needed to be discussed or clarified, etc., I would be happy to do that.

So is there anything further that we need to discuss with respect to the defendants' letter? And I guess that means I will hear from defendants first. Mr. Johnson, anything further we need to talk about there?

MR. JOHNSON: Thank you, your Honor.

We certainly appreciate the guidance that you did provide. It was very helpful for us as we were all working to prepare our findings of fact and briefing that went in on Friday. We understand your guidance, we appreciate it, as I said, and from our perspective there are no additional items that need to be raised regarding it at this time.

THE COURT: Okay.

Ms. Golin?

MS. GOLIN: Agree.

THE COURT: Okay.

And then just for good measure, Ms. Dennis, anything further to discuss?

MS. DENNIS: No, your Honor. Thank you.

THE COURT: Okay. Which brings me a bit to the

question of depositions. I think I need a bit of clarity as to how they are going to be used. As I said, generally speaking, in even a bench trial, certainly in a preliminary injunction hearing, you may have deposition designations, you have cross-designations, there may be objections to certain testimony coming in because an objection was raised during the deposition that I need to deal with. I haven't seen any of that yet. What's the status and how are depositions going to be used in this case? Now, I'm not talking about depositions used for impeachment purposes. I know that has to be done in realtime. I'm talking about the affirmative admission of deposition testimony.

Let me start with you, Ms. Dennis.

MS. DENNIS: Yes, your Honor. Thank you.

We have two sets -- I guess the depositions will be used in two ways here beyond impeachment. One is the video designations that will be played in Court, unavailable witnesses or for third parties. And the second is the FTC intends to move for admission or at least for consideration in the record all the materials attached to the prehearing submissions for both sides. That includes findings of fact and conclusions of law in the PI briefing and all the evidence attached to them, including transcripts. That's consistent with what's happened in other section 13(b) proceedings. We think that going through a designation process on those, an

iterative process with no caps, won't be very efficient because parties will likely overdesignate anyway. We are also talking about defendants' witnesses here, so it is hearsay. So it comes in -- it's not hearsay. It's a statement of a party opponent. So that's what we traditionally do in these section 13(b) cases.

I would say, to the extent there have been designations done, it's what we have already designated actually in our briefing, in our PI brief, in our reply brief also in the findings of fact and conclusions of law. So there is plenty of opportunity for defense to do I will call it counters in their own briefing. So there is no need to go through the iterative process, formal process, especially if we are just submitting those to the Court for the Court's context and awareness.

THE COURT: And both parties will be able to cite to whatever portions of this information they wish to cite to in their post-hearing findings of fact and conclusions of law. So if there is something that one side takes issue with, either that context wasn't provided adequately at the hearing or this document doesn't say what the FTC says it says, that could be raised in the post-hearing briefing. Is that your position?

MS. DENNIS: Yes, your Honor. I think you hit the nail on the head there. Defendants have said that we are mischaracterizing documents. The best way for the Court to see

whether that is true or not is to have the entire testimony of these witnesses before the Court to the extent we can't present everything in the 20 hours per side that the Court has allotted for the evidentiary hearing.

THE COURT: Okay. Let me hear from you, Mr. Johnson. Do you intend -- Mr. Johnson, do the defendants intend to also present video deposition testimony during the hearing?

MR. JOHNSON: Yes, your Honor. The deposition designations that we intend to present we would present during the hearing, and we have engaged in a process that was set out in the Court's scheduling order of exchanging those designations, counterdesignations, objections, and so forth, and we have been working through that with the Federal Trade Commission in this case. And so as to those types of deposition, actual designations and counterdesignations, we agree and have no objection to those being played in court. That's certainly our preference.

I think Ms. Dennis raised the second category of materials, which it sounds like would be transcripts from witnesses that will not testify at the proceeding, if I understood what Ms. Dennis was saying, and to those transcripts, I think we do have a disagreement here. We understood the FTC's position throughout much of the hearing today to be that the best presentation of factual testimony would be through percipient witnesses for your Honor to

evaluate, and we certainly agree with than sentiment with respect to fact witnesses. Your Honor should have the opportunity to evaluate them, whether through in-court testimony, live, or through the deposition designations that would be performed or that would be played during the proceeding. The Court would not get the benefit of that from the written transcript, which your Honor knows, and that's your Honor's preference. But Ms. Dennis's suggestion that we could resolve any unfortunate -- you know, any mischaracterizations or attorney descriptions of what was said in a document or in testimony that maybe was inconsistent with what the witness or the document intends or says, that it could be resolved in posttrial briefing. I actually don't think it will be efficient and work in this proceeding because we have a simultaneous exchange of briefing of posttrial findings of fact very soon after the proceeding ends, seven days, so we will never know -- we will not be able to anticipate the ways in which the plaintiff will be characterizing testimony or documents that are never presented during the proceeding.

Our hope and vision for the proceeding would be that we could meet issue with the FTC on what are the critical points that your Honor will need to resolve, and by having those brought out in the hearing with an opportunity for your Honor to assess the witness's credibility, see the documents for yourself, that we would be able to resolve those disputes

through the hearing. But on a paper record, where we are arguing about how attorneys are characterizing various testimony or document, we don't think that is the preferred path in this proceeding, your Honor.

THE COURT: Okay. Let me break this up into two pieces.

So with respect to the deposition designations, I don't need to see nor do I normally see even in a bench trial where I am making final conclusions do I need to see the witnesses. I can do it from the transcripts. However, everyone knows that it is -- if you really want something highlighted, you are all experienced counsel, bring it out in the hearing, which I'm sure you all will. But if there are designations from depositions that need to come in and counter-designations for rules of completeness that need to come into evidence, I am willing to take those, as I suggested earlier in my guidance that was provided. I would say that I would like them to be designations and counterdesignations as opposed to entire transcripts of witnesses from which parties can just pick and choose whatever they would like. Because if I have designations and counter-designations, I will then be able to understand if there is an issue with a particular bit of testimony that I need to resolve before we get to posttrial briefing. So if I could have that with respect to deposition designations, that would be fine. So, at base, I am saying I

don't need every witness to be live as long as there is a basis for presenting the deposition testimony as you would in any bench trial with counter-designations that can be submitted, which is what I said earlier this week so that everyone could prepare their witnesses.

With respect to documents, I don't know that I really have the issue crystallized yet, and what I would suggest is that we wait and get through this hearing. Again, I'm going to assume that any documents that either party thinks are so important for me to look at that they will be highlighted during the trial, that that is just good practice. If we get to a point where there are some documents that have not been highlighted during the trial or presented during the trial that either party wants to get into evidence, we can then talk about that at some point. It may be that the piece of evidence is coming in because it's been authenticated and described in a deposition and therefore there is enough for it to come before me or there could be an affidavit that talks about it, either the affidavit or the affidavit talking about a particular document, again, a common means for information to come in in a preliminary injunction hearing through a sworn affidavit. So I just don't know with certainty all of the documents that you are talking about when we are talking about this in the hypothetical, so why don't we wait as we go through the trial and see what information we are bringing in and what remains

and then we can address that as we move along.

Ms. Dennis, does that work for you?

MS. DENNIS: It does, your Honor. I just have one question, when your Honor would like the depo designations that your Honor is referring to.

THE COURT: It sounds like you will need a little bit of time to do that, and so I don't need them prior to Monday, just get them to me -- why don't the two sides discuss when that can happen in a reasonable way so that the parties can get together and give me something joint which the designations and the counter-designations.

MS. DENNIS: Thank you.

THE COURT: Your welcome.

Mr. Johnson, any questions about this and will this work for you in terms of process?

MR. JOHNSON: That process works for us, your Honor. I just note that there might be one or two transcripts that are actually not from depositions in this proceeding but from the investigative phase. I'm not sure if the FTC intends to designate those. So maybe this isn't an issue for today, so I would just like to reserve the opportunity to potentially object to the admission of those exhibits if the FTC elects to attempt to designate them.

THE COURT: All right. So why don't you both discuss that in the first instance. My understanding of them is that

they are sworn testimony to which the defendants had an opportunity to ask questions, but that is a very surface understanding just based on brief letters that were given to me. But, again, it may not be even an issue, so why don't you discuss in the first instance and if there is an issue, you can bring it to my attention.

Ms. Golin, that process works for you?

MS. GOLIN: It does, your Honor. I am relying on David's deeper understanding of what we just agreed to. I guess I'm not clear if we are engaging in a designation process now for depositions that wouldn't be used in court because we have not done designations for those yet.

THE COURT: Right, you are.

MS. GOLIN: Okay.

THE COURT: All right.

MS. GOLIN: So what is the deadline for that, your Honor?

THE COURT: You are all going to talk about that as to what makes sense.

MS. GOLIN: All right.

THE COURT: It's not Monday.

MS. GOLIN: Okay, good.

THE COURT: That's fine. Okay. And because of that, the parties may decide that they don't need deposition designations. You will all decide what you want to do, but

deposition designations are things that come in certainly during bench trials and preliminary injunctions. You will decide whether you want to present that to me or not.

All right. I have one other thing that I have been instructed to advise the parties which is from our technology department. Apparently they are used to providing wifi on request to a limited number of people, but in this case we have 85 requests for wifi for this preliminary injunction hearing which they cannot accommodate. So I have been instructed to tell people to resubmit their electronic -- their technology forms, whatever you submit in order to get access to technology in the court, and do three things. Electronic device order, my clerk has corrected me. So resubmit your electronic device orders, and they are asking for three things.

Number one, please spell out things that you previously abbreviated. You said PEDs and there are there is some other acronym that is used that I think refers to your computers. They want to make sure they are clear as to what exactly you are going to need the wifi for.

Secondly, we can do up to ten per side for wifi, so ten for the FTC and ten for the defendants. So you can decide who needs wifi. Obviously the people who are presenting and doing those presentations and those devices are going to need wifi, but it's ten per side. People can still keep their devices to come into court. We can't accommodate the wifi for

more than ten per side.

Okay. Any questions -- I'm not going to be able to answer questions on that, so you can bring questions on that to our technology department, but I have given the message that I was asked to deliver.

Okay. That takes me to the end of my list of things that we need to cover here today.

Ms. Dennis, is there anything further that we should discuss before we all reconvene at 8:30 on Monday morning?

MS. DENNIS: Not for the FTC, your Honor. We look forward to seeing you next week.

THE COURT: Thank you.

Anything, Mr. Johnson, before we reconvene on Monday?

MR. JOHNSON: Your Honor, just one thing to note. Today is the deadline for the defendants to identify the corporate representative that would be attending the proceeding, so I just wanted to go ahead and identify for Tapestry that individual will be Joanne Crevoiserat, and we look forward to seeing you on Monday.

THE COURT: Good. Thank you for that. And I do -- I will ask you, Ms. Golin, in a moment, but I want to give my commendation to everyone for meeting all of these deadlines that I know you set for yourselves and made sure that things moved expeditiously, but it has been a very smooth process and, down to the deadline Mr. Johnson just articulated today,

everyone seems to be abiding by what they need to do, and so I thank you for that.

Ms. Golin, is there anything we need to talk about before 8:30 on Monday?

MS. GOLIN: Nothing that we need to talk about before 8:30 on Monday.

I would like to thank your Honor for recognizing the teams meeting the deadlines, because that's a lot of people who are not on this call, and they are working very hard and all night, and so I appreciate that recognition on their behalf.

Our corporate representative will be Krista McDonough, who is our general counsel, and she will be with us throughout the trial.

THE COURT: Great. And your corporate representatives can sit wherever you think is most appropriate. I have no problem with corporate representatives sitting up at counsel table if they need to or in the back is fine, as well. They usually choose to sit in the back so that they can come and go as they need to do. But I do appreciate them being here, as well.

Okay. Good. Well, thank you all very much. I know everyone has been working very hard. The materials that I have received thus far are excellent, and I know it takes more than the people on this call to produce those materials. So if you would please relay my appreciation to them for their hard work,

it's not lost on me that this is happening in September so people's summers have not been the most pleasant, I am sure. But the result has been excellent presentations, papers, very good argument here today, and I am sure will result in a very good preliminary injunction hearing starting on Monday.

Great. Thank you all very much. Enjoy the rest of your weekend, and court is adjourned. Take care.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2024, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable Dania L. Ayoubi
Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-117
Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

Al Pfeiffer
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111
Tel: (415) 395-8898
Email: al.pfeiffer@lw.com

Lawrence E. Buterman
Latham & Watkins LLP
1271 Avenue of the Americas
New York, NY 10020
Tel: (212) 906-1264
Email: lawrence.buterman@lw.com

Amanda P. Reeves
Latham & Watkins LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004
Tel: (202) 637-2183
Email: amanda.reeves@lw.com

Counsel for Tapestry, Inc.

Jonathan M. Moses
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
Tel: (212) 403-1388
Email: JMMoses@wlrk.com

Elaine P. Golin
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
Tel: (212) 403-1118
Email: EPGolin@wlrk.com

Damian G. Didden
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
Tel: (212) 403-1113
Email: DGDidden@wlrk.com

Counsel for Capri Holdings Limited

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By: s/ Victoria Sims
Victoria Sims

Counsel Supporting the Complaint