UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter & Commissioner Alvaro M. Bedoya
In the Matter of Tapestry, Inc. & Capri Holdings Limited
Commission File No. D09429

December 5, 2024

I join my colleagues in dismissing this matter in light of Tapestry and Capri's abandonment, which followed the Federal Trade Commission's success in obtaining a preliminary injunction.

I write separately to highlight how several aspects of the U.S. district court's detailed opinion reflect sound merger analysis and vindicate the FTC's efforts to anchor its work in modern commercial realities.

A key dispute in the litigation was the relevant market. The district court noted that markets can be defined either through qualitative evidence or quantitative evidence, drawing on precedent rejecting the view that any single methodology gets primacy.[1] Its analysis of the qualitative *Brown Shoe* factors is especially thorough and rigorous, wading through piles of evidence to understand the realities of how people perceive different types of handbags.[2] Looking to "industry or public recognition," for example, the district court found that the "reams of ordinary-course documents" that were "replate with references" to terms like "accessible luxury" rendered "not…credible" defendants' efforts at trial to downplay the term.[3] The court

[1] *See, e.g.*, *United States v. U.S. Sugar Corp.*, 73 F.4th 197, 206 (3d Cir. 2023) ("The District Court did not err by considering facts on the ground rather than relying upon HMT analysis."); *McWane, Inc. v. FTC*, 783 F.3d 814, 829 (11th Cir. 2015) (rejecting the contention that "the expert's analysis [of the product market] was insufficient because it did not involve an econometric analysis"; explaining that "there appears to be no support in the caselaw for [the] claim that such a technical analysis is always required," and that "courts routinely rely on qualitative economic evidence to define relevant markets" (original brackets and citation omitted)); *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 912 (N.D. Cal. 2023) ("There is no requirement to use any specific methodology in defining the relevant market," and "courts have determined relevant antitrust markets using, for example, only the *Brown Shoe* factors, or a combination of the *Brown Shoe* factors and the HMT." (quotation marks omitted)); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 118 (D.D.C. 2016) ("Courts routinely rely on the *Brown Shoe* factors to define the relevant product market.").

[2] For example, the court acknowledged that even if two products are functionally fungible, consumers still may not view them as reasonably interchangeable, explaining that "[o]ne can carry a wallet, a phone, or a personal item in a Trader Joe's tote bag just as effectively as in an Hermès Birkin," but the commercial reality is that consumers do not view those bags as substitutes for each other. *FTC v. Tapestry, Inc.*, 2024 WL 4647809, at *10 (S.D.N.Y. Nov. 1, 2024).

[3] *Id*. at *20 ("During the hearing, some of Defendants' executives and witnesses tried to downplay the significance of the term 'accessible luxury' by suggesting that is arcane and used mostly in speaking with investors. The Court did not find this testimony credible. Some witnesses employed and/or called by Defendants claimed that the term 'accessible luxury' has no commonly understood meaning at all, even within Tapestry and Capri. The Court found

similarly found "particularly compelling" ordinary-course documents showing that the parties "repeatedly identify each other as significant competitors" and "respond to each other's pricing and marketing strategies."[4] And throughout the opinion, the court credited documentary evidence that revealed the parties' intentions, weighing them more than "convenient litigation assertions" and finding them to be "more compelling evidence of commercial realities than the platitudes offered by Defendants' executives and experts."[5]

No doubt, quantitative evidence can play a critical role both in defining relevant markets and assessing the likely effects of a proposed deal[6]—and here, too, the district court engaged with the quantitative analysis presented by each side.[7] But given the exorbitant costs of retaining economic experts, preserving the ability for plaintiffs to show a Section 7 violation primarily through qualitative analysis will better ensure that market participants and state attorneys general can vindicate their rights under the statute.[8] Too often, litigating a single merger trial can cost millions of dollars in fees to outside experts and economic consultancies—costs that often only federal enforcers can muster.

The district court also recognized *Philadelphia National Bank*'s[9] rebuttable presumption that mergers resulting in a market share greater than 30% are unlawful.[10] While the Supreme Court's presumption remains binding precedent, defendants sometimes claim that it is no longer valid. The district court's opinion here builds on the *IQVIA* court's recent recognition of the same and should provide further clarity to market participants that the Supreme Court's presumption has not expired.[11]

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this testimony even less credible. The Court base[d] these credibility findings not only on its firsthand impressions of the witnesses' demeanors while testifying, but also on the substantial body of compelling evidence, including reams of ordinary-course documents, showing that terms like 'accessible luxury' are used frequently and consistently. The record is replete with references to 'accessible luxury,' 'affordable luxury,' and similar terms, not only by Tapestry and Capri, but also by other industry participants to describe good-quality handbags at affordable prices. This language appears in SEC filings, calls with investors, emails, internal analyses, internal presentations and slide decks (including many that were presented to companies' board of directors), and other materials.).") (citations omitted).

[4] *Id.* at *62.

[5] *Id.* at *35.

[6] FED. TRADE COMM'N & DEPT. OF JUSTICE, MERGER GUIDELINES (2023) at 2 [hereinafter "Guidelines"] ("The Merger Guidelines set forth several different analytical frameworks to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action. These frameworks account for industry-specific market realities and use a variety of indicators and tools, ranging from market structure to direct evidence of the effect on competition, to examine whether the proposed merger may harm competition.").

[7] *Tapestry*, 2024 WL 4647809, at *24-34.

[8] *See also* Public Comments of Attorneys General of 19 States and Territories in Response to the July 29, 2023 Request for Comments on the Draft Merger Guidelines (Sept. 18, 2023) at 32 ("While the use of empirical economic analysis can provide rigor, overreliance on this analysis comes at a real cost. Antitrust cases are inherently complicated, but their complexity can be unnecessarily inflated if too many fact questions (or even the whole case) come down to a question of proof through empirical economics (and the costly services required to produce these results.").

[9] *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963).

[10] *Tapestry*, 2024 WL 4647809, at *37 ("'Without attempting to specify the smallest market share which would still be considered to threaten undue concentration,' the Supreme Court has stated that '30% presents that threat.'" (citing *Phila. Nat'l Bank*, 374 U.S. at 364)).

[11] *FTC v. IQVIA Holdings, Inc.*, 710 F. Supp. 3d 329, 378-79 (rejecting the argument that "the 30% threshold is no longer valid" to trigger the *Philadelphia National Bank* presumption).

Lastly, the district court cited as persuasive authority the 2023 Merger Guidelines and rejected defendants' attempts to minimize their import.[12] The court corrected defendants' claim that no court had previously found the 2023 Merger Guidelines to be persuasive.[13] And it relied on the revised concentration thresholds in the updated guidelines, noting that the 2010 Merger Guidelines had been an outlier in lowering the thresholds below even what the 1982 Merger Guidelines had set out.[14] While some commentators had previously cast doubt on the likelihood that federal courts would treat the 2023 Merger Guidelines (and its revised thresholds) as persuasive authority, the district court's opinion here is just the latest in a string of cases where courts have used and cited the updated guidelines.[15]

I commend the parties for their thorough briefing in this matter and the district court for its careful opinion reflecting sound merger analysis.

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[12] *Tapestry*, 2024 WL 4647809, at *7 n.3.

[13] *Id*. ("Defendants assert that as of August 20, 2024 (when they filed their opposition brief), '[n]o court has cited' the 2023 Merger Guidelines 'as persuasive authority.' This claim is incorrect. Even if this claim were true, it would not surprise or trouble the Court. After all, the Department of Justice and the FTC did not finalize the 2023 Merger Guidelines until December 18, 2023, less than a year ago.") (internal citations omitted).

[14] *Id.* at *39 n.35. ("Since the introduction of the HHI to the Merger Guidelines in 1982, nearly every iteration has used these same figures as the relevant thresholds, *see* 2023 Merger Guidelines § 2.1 n.15 (citing 1982, 1992, and 1997 versions), and courts have routinely cited them in assessing the effects of a merger on market concentration. In this respect, the 2010 Horizontal Merger Guidelines were an outlier by adopting higher thresholds.") (internal citations omitted).

[15] *See id.* at *7 n.3 ("*See, e.g., FTC v. Cmty. Health Sys., Inc.*, --- F. Supp. 3d ----, 2024 WL 2854690, at *20, *22 (W.D.N.C. June 5, 2024), *vacated as moot sub nom. FTC v. Novant Health, Inc.*, No. 24-1526, 2024 WL 3561941 (4th Cir. July 24, 2024); *Tevra Brands LLC v. Bayer HealthCare LLC*, No. 19-cv-04312, 2024 WL 1909156, at *3, *5, *7 (N.D. Cal. May 1, 2024); *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, -- F. Supp. 3d ---, 2024 WL 1556931, at *13 & n.14 (E.D.N.Y. Apr. 10, 2024) (relying on Herfindahl-Hirschman Index thresholds from a U.S. Department of Justice webpage that, in turn, cites the 2023 Merger Guidelines); *cf.* Herfindahl-Hirschman Index, U.S. Dep't of Just. (Jan. 17, 2024), https://www.justice.gov/atr/herfindahl-hirschman-index [https://perma.cc/C5DM-76T8]; *see also IQVIA*, 710 F. Supp. 3d at 368 n.19 (focusing on the 2010 Merger Guidelines because the 2023 Merger Guidelines were not issued until "after briefing and argument in this case had concluded"); *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109, 151 n.51 (D. Mass. 2024) (similar), *appeal dismissed*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024)."); *Federal Trade Commission, v. Meta Platforms, Inc.*, No. CV 20-3590 (JEB), 2024 WL 4772423, at *9, 17-18, (D.D.C. Nov. 13, 2024) (discussing the hypothetical monopolist test ("HMT") under the 2023 Merger Guidelines). *Cf. Ambilu Tech. AS v. U.S. Composite Pipe S.*, No. CV 22-259-SDD-RLB, 2024 WL 993284, at *7 (M.D. La. Mar. 7, 2024) (stating with respect to the 2023 Merger Guidelines that although they did not affect the party's standing argument, "the Court agrees with USCPS that these guidelines can be 'highly persuasive' to a court.").