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Antitrust Practice Group

FTC Wins Preliminary Injunction Against Tapestry/Capri Merger: "Accessible" Ordinary-Course Documents Carry the Day

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On October 24, 2024, Judge Jennifer Rochon of the United States District Court for the Southern District of New York issued an opinion and order preliminarily enjoining Tapestry, Inc. and Capri Holdings Limited from closing their proposed merger.[1] The decision is an important victory for the Federal Trade Commission ("FTC") with implications for future M&A activity.

Background

Tapestry owns handbag brands Coach and Kate Spade, while Capri owns Michael Kors. In August 2023, Tapestry inked a deal to acquire Capri for $8.5 billion. In April 2024, the FTC initiated administrative proceedings to block the deal and sued for a preliminary injunction in federal court.

Although the FTC's interest in handbags raised some eyebrows,[2] the FTC put forth a traditional theory of antitrust harm. Tapestry and Capri already had high shares in the FTC's alleged market for "accessible luxury" handbags. The combined entity would exercise significant market power in that market, according to the FTC, thereby harming competition. In response, Tapestry and Capri focused on disputing the FTC's definition of an "accessible luxury" market, describing it as "an exercise in gerrymandering."[3]

Importance of Ordinary-Course Documents

The FTC's case focused on ordinary-course Tapestry and Capri documents acknowledging a distinctive accessible luxury market. These documents, for example, included emails from key executives describing the distinctive features of accessible luxury handbags and reports that Tapestry and Capri had commissioned that differentiated "true luxury" products from "accessible luxury." The court relied extensively on these and other ordinary course documents and repeatedly found that defendants' executives' testimony was not credible:

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[1] *FTC v. Tapestry, Inc.*, No. 1:24-cv-03109 (JLR), 2024 WL 4647809 (S.D.N.Y. Nov. 1, 2024).

[2] The Wall Street Journal's editorial board wrote, for example, that: "[i]t's hard not to chuckle at the Federal Trade Commission's lawsuit last week seeking to block luxury fashion firms Tapestry and Capri from merging in the name of protecting America's working class." *Lina Khan Wears Prada*, WALL STREET JOURNAL, Apr. 28, 2024, https://www.wsj.com/articles/lina-khan-ftc-capri-tapestry-merger-antitrust-5a3627c1.

[3] *Tapestry, Inc.*, 2024 WL 4647809, at *10.

- "During the hearing, some of Defendants' executives and witnesses tried to downplay the significance of the term 'accessible luxury' by suggesting that it is arcane and used mostly in speaking with investors . . . The Court did not find this testimony credible. . . The Court bases 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."[4]
- "The ordinary-course documents in the record make clear that Coach, Kate Spade, and Michael Kors do not regard brands like Zara and Louis Vuitton as nearly as important to their bottom line as they regard one another, along with other usual suspects like Tory Burch and Marc Jacobs. The Court finds these documents to be more compelling evidence of commercial realities than the platitudes offered by Defendants' executives and experts."[5]

Pro-Enforcement Holdings

The *Tapestry/Capri* decision also is notable for its endorsement of many pro-enforcement theories of harm in connection with strategic mergers. These include:

- The court relied upon the *Philadelphia National Bank* presumption that a horizontal merger resulting in a 30% or greater market share is anticompetitive and unlawful (absent persuasive rebuttal evidence introduced by the merging parties).[6]
- The court cited the 2023 Merger Guidelines as persuasive legal authority and did so in ways that enforcers are likely to cite in future merger challenges.[7] For example:
    - The court adopted the restricted approach to efficiencies defenses found in the 2023 Merger Guidelines, requiring such a defense to: (1) offset the anticompetitive concerns posed by the merger, (2) be merger-specific, (3) be verifiable, and (4) not arise from anticompetitive reductions in output or service.[8]
    - The court applied *Brown Shoe*'s "practical indica" for determining the relevant market, analyzed those indicia extensively with reference to the ordinary course documents, and gave the result significant weight. [9] Indeed, the court discredited defendants' economics expert's calculations of the percentage of Michael Kors, Kate Spade, and Coach handbags sold for less than $100, because these calculations were "inconsistent with ordinary-course documents bearing strong indicia of reliability."[10] By contrast, the court credited the FTC economic expert's application of the "hypothetical monopolist test" as consistent with "the brands that Tapestry and Capri considered to be competitors."[11]
    - The court did not hold that lost head-to-head competition can suffice to make out the government's prima facie case (*see* 2023 Guideline 4.2). However, the intensity of the head-to-head competition between the merging parties was clearly persuasive to the court.[12] As the court explained, "compelling and significant ordinary-course evidence indicates that Defendants are particularly close competitors. Despite the efforts of Tapestry and Capri witnesses to minimize the significance of the evidence of head-to-head competition between them, the documents tell the story."[13]

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[4] *Id*. at *20.
[5] *Id*. at *35.
[6] *Id*. at *37 (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 364 (1963)).
[7] *See, e.g.*, *id*. at *9, *39, *57. The 2023 Merger Guidelines are available here.
[8] *Id.* at *57.
[9] *Id.* at *9–*24.
[10] *Id.* at *18.
[11] *Id*. at *30.
[12] *Id*. at *62–*67.
[13] *Id*. at *67.

- The court cited lack of access to relevant consumer data as a barrier to entry that may prevent new competitors from emerging and disciplining an entity with market power.[14] Data as a barrier to entry has naturally featured in some technology cases, *see, e.g.*, *United States v. Google, LLC*, No. 20-CV-3010 (APM), 2024 WL 3647498, at *78 (D.D.C. Aug. 5, 2024), but the analysis here is notable for focusing on data as a barrier to entry outside of the tech industry. Market participants outside of tech should take note that the FTC and the Department of Justice likely will continue to focus on collection and use of data as relevant to various elements of merger challenges.
- The court rejected executive testimony essentially "promising" to maintain competition post-merger.[15]

Implications for Future Merger Challenges

- The *Tapestry* decision confirms the truism that the antitrust agencies and factfinders place significant weight on ordinary course documents. Companies negotiating deals with significant competitive overlaps should undertake careful review of their own documents and push for robust antitrust due diligence during negotiations. Knowing the contents of the merging parties' ordinary course documents will inform negotiation of appropriate antitrust-related deal provisions, including requirements for remedies, litigation and reverse termination fees.
- Expert opinions that are at odds with the ordinary course documents and other evidence are less likely to be persuasive. Factfinders rely on experts to tie together the evidence into an analytical framework.
- In general, we expect enforcers to rely on this decision to urge courts to discount executive testimony about post-merger plans. The *Tapestry* court's discounting of "hollow promises from company executives"[16] to maintain competition post-merger stands in contrast to other cases in which courts credited executive testimony about post-merger behavior. There is a spectrum of evidence supporting "fixes" that merging parties can offer to rebut alleged anticompetitive effects.

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[14] *Id.* at *48–*49.
[15] *Id.* at *60.
[16] *Id.*

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