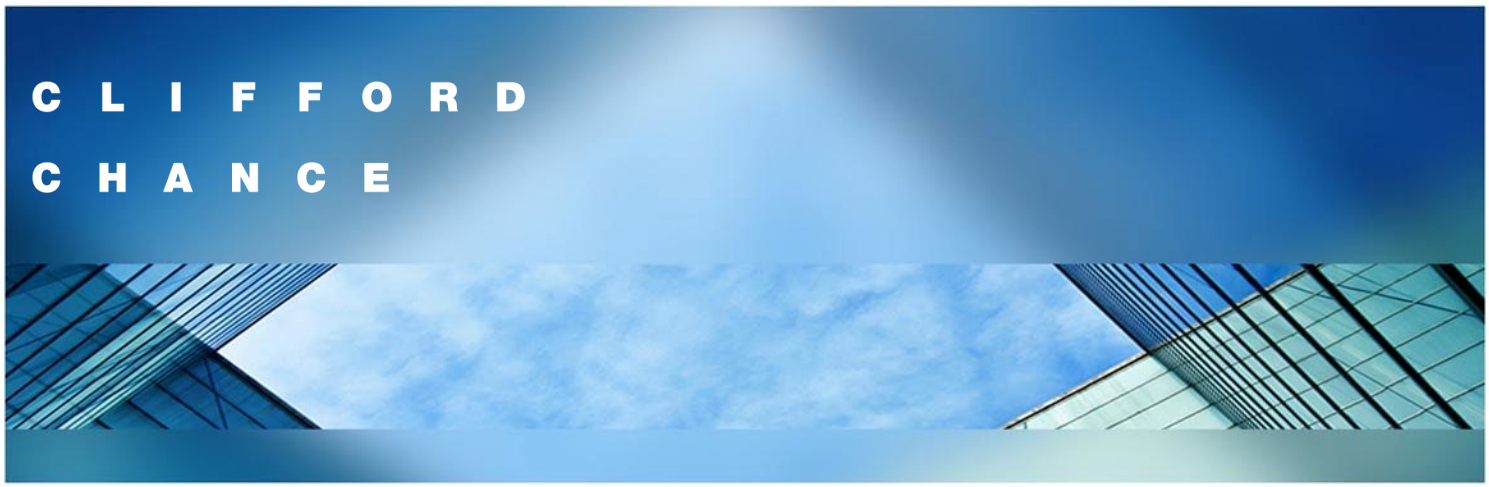

"ANTITRUST HAS COME INTO FASHION" – U.S. FEDERAL TRADE COMMISSION WINS PRELIMINARY INJUNCTION AGAINST TAPESTRY'S ACQUISITION OF CAPRI

On October 24, a U.S. federal district court judge granted the Federal Trade Commission's (the "**FTC**") motion to preliminarily enjoin the merger between fashion companies Tapestry, Inc. ("**Tapestry**") and Capri Holdings Limited (**"Capri"**), pending the completion of the FTC's administrative trial on the merits. Tapestry, the parent company for fashion brands Coach, Kate Spade, and Stuart Weitzman, announced in August 2023 that it was acquiring Capri, the owner of Versace, Michael Kors, and Jimmy Choo, for $8.5 billion.[1] The FTC sued to block the merger in the FTC's in-house administrative court in April 2024, and filed a motion for a preliminary injunction the next day in the Southern District of New York.[2]

Unlike some of the FTC's recent merger enforcement cases under Chair Lina Khan, *FTC v. Tapestry, Inc*. did not involve any novel theories of harm. The FTC simply argued that Tapestry and Capri were horizontal competitors, and the combination would increase market concentration to an unacceptable degree. However, the exact product market affected by the transaction was the central issue before Judge Jennifer Rochon of the Southern District of New York. Largely convinced by the defendants' own damaging internal documents, Judge Rochon accepted the FTC's narrow product market definition of a mid-tier "accessible luxury" handbag market, sitting in between "true luxury" and "mass market" handbags. Examining that product market, Judge Rochon found that the FTC was likely to succeed on the merits in demonstrating that a merger between Tapestry and Capri would likely lead to a lessening of competition based on the merging parties' combined market shares, which ranged from the high 50s to the low 80s.

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1 *Tapestry, Inc. Announces Definitive Agreement to Acquire Capri Holdings Limited, Establishing a Powerful Global House of Iconic Luxury and Fashion Brands*, BUSINESS WIRE (Aug. 10, 2023), at https://www.businesswire.com/news/home/20230809944810/en/.

2 U.S. Federal Trade Commission, Press Release, FTC Moves to Block Tapestry's Acquisition of Capri (Apr. 22, 2024), at https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-moves-block-tapestrys-acquisition-capri; Complaint, *FTC v. Tapestry, Inc.*, No. 1:24-cv-03109 (S.D.N.Y. Apr. 23, 2024), ECF No. 1.

"ACCESSIBLE LUXURY"

The FTC argued that Tapestry and Capri competed against one another in the "accessible luxury" handbag market, in which Coach, Kate Spade, and Michael Kors were the major players.[3] The FTC contended that this middle tier, sitting between "mass-market" and "true luxury" handbags, is defined by five main factors: (1) a distinct price range; (2) a distinct customer base ("middle- and lower-income consumers who seek out high-quality items at affordable prices"); (3) frequent discounts and promotions; (4) an "omnichannel approach and sales experience" (i.e., selling in branded, general retail, and outlet stores as well as online); and (5) offshore production while maintaining quality materials and craftsmanship.[4]

The companies fired back, arguing that the FTC's market definition was "revisionist" and overly narrow, arguing that their handbags competed against both what the FTC would consider "mass market" and "true luxury" handbags. They also criticized the FTC for ignoring the low barriers to entry in the handbag market, name-checking a stream of new, emerging brands.[5]

Judge Rochon clearly did not agree with the merging parties' arguments. In her highly technical 169-page opinion, Judge Rochon found that the specifics of the handbag market did justify a narrowly-defined product market for "accessible luxury" handbags, and that the FTC had sufficiently alleged a narrow market definition aligned with four factors from the Supreme Court's 1962 B*rown Shoe Co. v. United States* decision: (1) peculiar characteristics; (2) distinct prices; (3) industry or public recognition; and (4) sensitivity to price changes.

DAMAGING DOCUMENTS

Judge Rochon's opinion appears to have been strongly influenced by the defendants' own internal documents, including damaging texts, many of which were cited in the decision and confirmed the FTC's view of the case.

On pricing, the FTC alleged that "accessible" luxury handbags were generally priced around $100 and rarely, if ever, approached $1,000. Defendants countered that they sell their handbags both below $100 and above $1,000. But Judge Rochon pointed to a Tapestry board presentation stating that Coach's "product portfolio starts at $100 as [the] point of entry and does not exceed $1,000." Former Kate Spade CEO Liz Fraser also stated she "'never suggested a $1,000 or more MSRP for a Kate Spade bag' because she 'didn't believe that the Kate Spade customer would pay $1,000 for a Kate Spade bag.'" And top Capri executives testified that "at least 95 percent of Michael Kors handbags have an MSRP between $300 and $450" while Michael Kors "generally does not set prices over $1,000."[6]

On the industry recognition of the term "accessible luxury", the defendants argued that it was a description Tapestry and Capri had used "in the past" but largely "moved away from in recent years," now preferring the term "expressive luxury".

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3 Complaint at 14.
4 Complaint at 16-21.
5 Defendants Tapestry, Inc. & Capri Holdings Limited's Opposition to the Federal Trade Commission's Motion for Preliminary Injunction, *FTC v. Tapestry, Inc.*, No. 1:24-cv-03109 (S.D.N.Y. Aug. 20, 2024), ECF No. 161 ("Opp'n Motion").
6 Opinion and Order at 37-38, *FTC v. Tapestry, Inc.*, No. 1:24-cv-03109 (S.D.N.Y. Oct. 24, 2024), ECF. No. 339 ("Opinion").

However, Judge Rochon noted that the record showed that Tapestry and Capri had continued to extensively use the term "accessible luxury" – including in SEC filings and investor presentations – in the months before and after the acquisition, "only for the term to disappear from their lexicon" after the FTC filed suit to block the merger in April 2024.[7]

The court also likely found it difficult to accept the defendants' arguments that they genuinely competed with "true luxury" handbags when Tapestry executives texted one another "Bottom line, saying we're in the same market with true luxury is a joke. … Nobody says 'should I buy a LV bag or a Coach bag?'".[8]

In terms of market concentration, the internal documents painted a worse picture than even the FTC's estimates. The FTC's economic expert estimated from largely third-party data that the parties would have a post-merger share of 58.7% of the "accessible luxury" handbag market, well above the various thresholds for a presumption of anticompetitive effects based on antitrust precedents.[9] But Capri's internal documents calculated the parties' combined market shares to be 77%, and Tapestry's internal data was used to calculate a market share of 83%.[10]

Having already accepted the FTC's product market definition of an "affordable luxury" handbag market, the Court found that the FTC had a high likelihood of success on the merits based on these post-merger market shares to issue a preliminary injunction against the merger moving forward, pending the resolution of the FTC's administrative court proceedings. The trial in the administrative court is scheduled to begin on November 21, 2024. Tapestry has already said that it intends to appeal Judge Rochon's injunction to the Second Circuit, as required by the merger agreement.[11]

KEY TAKEAWAYS

- Merging parties and their counsel should continue to closely examine both transaction-related and ordinary course documents that may come to light during a merger investigation. It is clear from FTC v. Tapestry that the merging parties' internal documents negatively impacted their defense of the deal.
- Companies should monitor the progress of Tapestry and Capri's potential appeal to the more business-friendly 2nd Circuit. While the district court's opinion leaned heavily on the damaging internal documents, the FTC's narrow product market definition of a middle "accessible luxury" tier is still a relatively narrow approach. As the U.S. antitrust agencies continue to take an aggressive approach towards potentially anticompetitive mergers, it is clear that the agencies are willing to examine creative and narrow product markets, particularly if there is documentary support to their approach.

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7 Opinion at 61.
8 Opinion at 59-60.
9 *See United States v. Philadelphia National Bank*, 374 U.S. 321, 364 (1963) (establishing that a 30% post-merger market share presents the threat of undue concentration); *see also United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 37 (D.D.C. 2022) (acknowledging that while courts disagree on Philadelphia National Bank's 30% threshold, a 49% post-merger market share is "far above the levels deemed too high in other cases").
10 Opinion at 97.
11 *Tapestry, Inc. Issues Statement on District Court Ruling*, BUSINESS WIRE (Oct. 24, 2024), at https://www.businesswire.com/news/home/20241024326806/en.

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